

Court File No. T-292-04

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49

FEDERAL COURT

B E T W E E N:

BMG CANADA INC., EMI MUSIC CANADA, A DIVISION
OF EMI GROUP CANADA INC., SONY MUSIC ENTERTAINMENT
(CANADA) INC., UNIVERSAL MUSIC CANADA INC., WARNER
MUSIC CANADA LTD., BMG MUSIC, ARISTA RECORDS, INC.,
ZOMBA RECORDING CORPORATION, EMI MUSIC SWEDEN AB,
CAPITAL RECORDS, INC., CHRYSALIS RECORDS LIMITED,
VIRGIN RECORDS LIMITED, SONY MUSIC ENTERTAINMENT INC.
SONY MUSIC ENTERTAINMENT (UK) LIMITED,
UMG RECORDINGS, INC., MERCURY RECORDS LIMITED AND
WEA INTERNATIONAL INC.

Plaintiffs

- and -

JOHN DOE, JANE DOE AND ALL THOSE PERSONS WHO ARE
INFRINGING THE PLAINTIFFS' COPYRIGHT IN SOUND RECORDINGS

Defendants

--- This is the Cross-Examination of GARY MILLIN, the
Affiant herein, on an Affidavit sworn February 6, 2004,
taken at the offices of Dimock Stratton Clarizio, 20 Queen
Street West, Suite 3202, Toronto, Ontario, on the 4th day
of March, 2004.

APPEARANCES:

Ronald E. Dimock
For the Plaintiffs
Bruce Stratton
Wendy Matheson For the Non-Party Respondent
Charles Scott For the Non-Party Respondent
James A. Hodgson For the Non-Party Respondent

1 TABLE OF CONTENTS

2

3 INDEX OF EXAMINATIONS:

4 GARY MILLIN: Sworn.4

5 CROSS-EXAMINATION BY MR. SCOTT:4

6 RE-EXAMINATION BY MR. STRATTON:61

7 CROSS-EXAMINATION BY MS. MATHESON:66

8 CROSS-EXAMINATION BY MR. HODGSON:68

9

10

11 INDEX OF REFUSALS

12 Refusals are noted by R/F and are found on the following

13 pages: 24

14

15

TABLE OF CONTENTS (Continued)

INDEX OF EXHIBITS

Page No.

| | | |
|----|---|----|
| 1 | | |
| 2 | EXHIBIT NO. 1: Copy of Printout from Website | |
| 3 | for MediaSentry. | 29 |
| 4 | | |
| 5 | EXHIBIT NO. 2: Kazaa End User License | |
| 6 | Agreement. | 60 |
| 7 | | |
| 8 | EXHIBIT NO. A: Copy of Usability and Privacy, a | |
| 9 | Study of Kazaa P2P File Sharing. | 61 |
| 10 | | |

1 --- UPON COMMENCING AT 11:15 A.M.

2 GARY MILLIN: Sworn.

3 CROSS-EXAMINATION BY MR. SCOTT:

4 1. Q. Mr. Millin, would you be good enough to
5 give us your full name, please?

6 A. Gary Alan Millin.

7 2. Q. A-l-a-n?

8 A. A-l-a-n.

9 3. Q. And in which city do you reside, sir?

10 A. In New York City.

11 4. Q. How old are you?

12 A. 34.

13 5. Q. And I gather that you have a Bachelor
14 of Science degree from Wharton Business School?

15 A. Yes.

16 6. Q. And you have an MBA from Harvard?

17 A. That's right.

18 7. Q. Do you have any technical degrees or
19 recognitions?

20 A. No.

21 8. Q. Are you married?

22 A. No.

23 9. Q. Do you have any kids?

24 A. No.

25 10. Q. Okay. Do you have any computers at

1 home that are not used exclusively by you?

2 A. No.

3 11. Q. Okay. I gather from some stuff I got
4 off the web that you originally were a venture capitalist?

5 A. Yes.

6 12. Q. And you founded a company called
7 Mail.com?

8 A. Yes.

9 13. Q. What was that about?

10 A. We started off providing e-mail
11 services to consumers and then shifted to providing e-mail
12 services to corporations.

13 14. Q. I gather that company is now called
14 Easylink Services?

15 A. Yes.

16 15. Q. Are you still associated with that
17 company?

18 A. No.

19 16. Q. I gather that you are now president of
20 MediaSentry?

21 A. Yes.

22 17. Q. All one word. And that company was
23 founded in 1996?

24 A. MediaSentry or Easylink?

25 18. Q. MediaSentry.

1 A. No, MediaSentry was founded in early
2 2001.

3 19. Q. And you became the president in 2001?

4 A. Yes. End of 2001.

5 20. Q. You were not the president from
6 inception, I gather?

7 A. There wasn't a president. It was
8 founded by the CEO, Aaron Fessler, and I joined as
9 president in late 2001.

10 21. Q. Aaron is A-a-r-o-n?

11 A. Yes.

12 22. Q. And Fessler is spelled how?

13 A. F-e-s-s-l-e-r.

14 23. Q. How many employees does MediaSentry
15 have?

16 A. Between 25 and 30.

17 24. Q. For some reason I had a note that the
18 website said there were 600. Is that incorrect?

19 A. You're confusing Mail.com with
20 MediaSentry in your reading.

21 25. Q. I see. And in what jurisdictions does
22 MediaSentry do business?

23 MR. STRATTON: Are you asking for some kind
24 of legal conclusion here?

25 MR. SCOTT: No. No. No. Like Canada,

1 France, Hawaii, what geographical area do you do business
2 in?

3 MR. STRATTON: Where you have offices?

4 MR. SCOTT: Yes.

5 THE DEPONENT: We have offices in the
6 United States.

7 BY MR. SCOTT:

8 26. Q. And do you have one office or more than
9 one office?

10 A. More than one office.

11 27. Q. And are they all located in New York
12 City?

13 A. No.

14 28. Q. What places are they located in?

15 A. We have offices in New York, New Jersey
16 and Ohio. I travel frequently to California. And I would
17 differentiate offices to data centres.

18 29. Q. Where do you maintain data centres
19 other than those places you've mentioned to me already?

20 A. We have numerous data centres including
21 in those places, plus in the UK, plus we use data centres
22 in Asia from time to time depending on the needs of our
23 clients plus other locations in the U.S.

24 30. Q. And what happens at a data centre in
25 your business?

1 A. It's where we host computers.

2 31. Q. And what do those computers do, just in
3 general terms?

4 A. They access the Internet, search for
5 users offering infringing content as given to us by our
6 clients.

7 32. Q. And can you describe for me generally
8 the nature of the services that your company offers?

9 A. We help our clients understand and deal
10 with on-line piracy, which is the illegal distribution of
11 their content in an unauthorized fashion.

12 33. Q. You're using words like "illegal" and
13 "unauthorized" but do you have a law degree or any legal
14 training?

15 A. No.

16 34. Q. And what are your responsibilities as
17 president of the company; what do you do?

18 A. I have general oversight for the
19 business and particular strategy.

20 35. Q. And do you do that from an office and
21 have people that report to you?

22 A. Yes, I work from the New York office
23 primarily but travel frequently to the New Jersey office.

24 36. Q. Now, again maybe I misread this.

25 There's a good deal in your web biography about having a

1 capitalization of \$200 million and providing services to
2 20,000 enterprises and annual revenues of 100 million and
3 operations in 35 countries. Does all of that relate to
4 Mail.com or Easylink?

5 A. Yes, if you read the beginning of that
6 bio, it says before MediaSentry, Gary Millin worked at
7 Mail.com and then it goes on to describe my experience
8 there.

9 37. Q. I see. So all of this that's in the
10 media -- in the biography relates to --

11 MR. STRATTON: Sorry. You're pointing to
12 something that you're showing only to yourself, Mr. Scott.

13 MR. SCOTT: Oh, well.

14 THE DEPONENT: I was going to make the same
15 comment.

16 MR. SCOTT: I assumed Mr. Millin -- I'm
17 happy to show you a package of material I got off the
18 website. I'm looking at about the fifth page of material
19 down where you'll see there's page 102 called "Management
20 team."

21 THE DEPONENT: Yes, I have my bio from the
22 website in front of me.

23 BY MR. SCOTT:

24 38. Q. Right. So do I take it that all of
25 what's said in your bio relates, in fact, to things that

1 you did before MediaSentry? The only reference to things
2 about MediaSentry is the words before "MediaSentry," and
3 the balance of the bio relates to things you did before
4 MediaSentry?

5 A. Yes.

6 39. Q. I see. All right. So you have general
7 oversight for the business and the strategy, and you
8 travel frequently to New Jersey, working mostly out of the
9 New York office. How many customers -- now, I know this
10 all relates to some other company. How many customers
11 does MediaSentry have?

12 A. We have customers in the music, movie,
13 software and publishing areas. We haven't given exact
14 numbers publicly of customers that we have. Customer
15 relationships are all confidential.

16 40. Q. Tell me how many customers you have,
17 approximately?

18 A. Between 20 and 40.

19 41. Q. And do you have any client-relationship
20 responsibilities for any of them or does somebody else
21 deal with that?

22 A. I interact with many of our customers,
23 but we have several people that interact with them on
24 different levels of the organization.

25 42. Q. Okay. And then the other 25 to 30

1 employees, aside from the executives, what kinds of people
2 work for your company? Are they technical people?

3 A. The two largest groups are technology
4 and operations.

5 43. Q. And generally speaking, what does the
6 technology group do?

7 A. They develop the programs that we use
8 to run our services.

9 44. Q. And generally speaking, what are the
10 operations people doing?

11 A. They procure the services, monitor the
12 equipment that the programs are run on, and interact with
13 the clients to provide aspects of the services that
14 require interaction from our operations team.

15 45. Q. Okay. And in terms of those people, do
16 they report to managers of some sort and then eventually
17 get up to you and to -- is it Mr. Fessler?

18 A. Yes.

19 46. Q. Okay. As I read the material on your
20 website -- and feel free to look at that -- I gather that
21 there are various services which your company offers, and
22 the ones that I've noted at any rate are something called
23 MediaScan, one word with a capital "S," MediaSentry with a
24 capital "S," MediaExchange with a capital "E," and
25 MediaDecoy, one word with a capital "D." Are you familiar

1 with those services?

2 A. Yes, other than MediaSentry is not
3 actually a service. You might have misread the website.

4 47. Q. MediaSentry is some sort of -- the
5 over-arching name you use for the other three, is that --

6 A. MediaSentry is our company name and the
7 name of our application and so is tied into services but
8 is not a service in itself.

9 48. Q. And are there people in the technology
10 group who develop those programs and are there people in
11 the operations group who do the hands-on stuff with those
12 programs; is that the way your company's organized?

13 A. Yes.

14 49. Q. If you turn to the page in that package
15 of material I showed to you, you will find a page --
16 you'll see there's a page headed up "Technology," and then
17 the next page is a "Solutions Overview," where there's a
18 reference to MediaSentry, MediaExchange and MediaDecoy.

19 See, the reason why perhaps I was mistaken,
20 you see in the Solutions Overview it says:

21 "MediaSentry offers a powerful suite of
22 three digital copyright protection services designed to
23 permit copyright holders to enforce their copyrights
24 across peer-to-peer networks," and then there's reference
25 to MediaSentry, MediaExchange and MediaDecoy; do you see

1 that?

2 A. I do, yes.

3 50. Q. Okay. But you say that MediaSentry is
4 not actually a program, so this --

5 A. You say not actually a program. What
6 do you mean?

7 51. Q. You distinguish between four programs
8 and three programs that you --

9 MR. STRATTON: I don't think he was talking
10 about programs; he was talking about services.

11 BY MR. SCOTT:

12 52. Q. Services. Okay. So MediaSentry is not
13 a digital copyright protection service that MediaExchange
14 and MediaDecoy, notwithstanding what's said on this page?

15 A. MediaSentry is the name of our company
16 and the name of our application and, therefore, it's tied
17 into all these different services. So when you say
18 MediaSentry provides a service, we are MediaSentry. So
19 every service we provide is effectively MediaSentry.

20 53. Q. What you're telling me is that
21 MediaSentry is not, despite what's said on this page, one
22 of the three digital copyright protection services that's
23 offered; it's something other than -- it's of a different
24 character than MediaExchange, MediaDecoy and MediaScan? I
25 just want to understand a little about how the business

1 works.

2 A. Yes, I would think it's different than
3 those other titles. But the website is not a selling
4 document and it's not a document we use when we're
5 interacting with our clients, and so your reading the
6 website as a way to try and understand the business, you
7 may get some level of confusion because this is not the
8 tool that we use to interact with our clients.

9 54. Q. Are you telling me that the web site is
10 inaccurate?

11 A. No, I'm not telling you it's
12 inaccurate. I'm telling you that if you're using it as a
13 way to understand the business, when I say "MediaSentry"
14 is providing the service, it -- we provide all the
15 services. So if you ask is MediaSentry a service, the way
16 the website's written is MediaSentry offers a powerful
17 suite of services, one of which is media sentry, and we
18 are the provider of the service. So it's accurate on the
19 website but is not a selling document as we relate to
20 clients.

21 55. Q. All right. So I gather from that and
22 your earlier answers that MediaSentry is not one of three
23 digital copyright protection services. It is not. And
24 something called MediaScan is?

25 A. One of the services we provide is

1 scanning services.

2 56. Q. And is it a digital copyright

3 protection service?

4 A. I'd consider it a digital copyright

5 protection service.

6 57. Q. Okay. All right. If you then turn to

7 the couple of pages that I've got that relate to

8 MediaScan, I think you'll find this three pages from the

9 end of this document. And this is material taken from

10 your current website. You recognize it as such, do you?

11 A. Yes.

12 58. Q. The second paragraph says this:

13 "Using a sophisticated network of Internet-

14 based software and data-mining techniques, MediaSentry

15 patrols the Internet for copyright infringements. A

16 continuously updated catalog of infringements is cross

17 referenced against a database of your copyrighted works."

18 First of all, who -- who is the reference

19 to "your copyrighted works"?

20 A. That would be our clients.

21 59. Q. I see. So this is a document then that

22 you would use to provide information to your clients?

23 A. I have not used -- I have not walked

24 into a client meeting with the website as a document as a

25 selling tool. You asked what the reference to the term

1 "your" there would be, and it's to our clients.

2 60. Q. You told me a moment ago you weren't
3 using this as a selling document to clients. I'm just
4 trying to figure out then who the phrase "your copyrighted
5 works" is directed to if not clients or potential clients
6 and in the selling process?

7 A. It's a description of the business.
8 It's not a document that we use for selling our business
9 to clients.

10 61. Q. And so the "your" in this case, you
11 tell me it doesn't refer to clients; it refers to just
12 people poking around on the web? It clearly refers to
13 clients, doesn't it, as you just said a moment ago?

14 A. The "your" refers to clients. I was
15 just telling you I do not use the website as a selling
16 tool when I go meet with the clients.

17 62. Q. That wasn't exactly the question. That
18 wasn't exactly the answer you gave me a moment ago.

19 MR. STRATTON: I think he's fairly
20 characterizing. If you want to have the reporter read
21 things back, you can.

22 MR. SCOTT: He said it this was not a
23 selling document; the website was not used as a selling
24 document he said.

25 MR. STRATTON: He said he had not taken

1 this document in with --

2 MR. SCOTT: That's not what he said.

3 MR. STRATTON: Yes, it is.

4 MR. SCOTT: He said it wasn't used as a
5 selling document.

6 THE DEPONENT: It says to my mind it's the
7 same thing.

8 BY MR. SCOTT:

9 63. Q. At any rate, let's move on to other
10 things. What's a data-mining technique?

11 A. Data-mining technique is a way to look
12 at data and make a determination as to what it is.

13 64. Q. Tell me how it works in this context.

14 MR. STRATTON: Mr. Scott, I've given you
15 quite a bit of leeway to go through different aspects of
16 the MediaSentry business and so on to try and get some
17 context, I suppose, for the evidence in this case. But to
18 go to the website and pick out phrases that may occur
19 there and ask what they mean when -- without establishing
20 it has any connection to what's at issue in the motion
21 next week I submit is not relevant.

22 MR. SCOTT: I won't be able to assist you
23 in that until I get an answer to the question.

24 MR. STRATTON: If you can establish how
25 these phrases you're picking out of the website are

1 relevant to what is at issue next week, fine, but we
2 haven't seen that.

3 MR. SCOTT: Okay. Well, let's go back to
4 the first paragraph of the MediaScan then: "The
5 unlicensed use of copyrighted works -- such as audio
6 files, software, textbooks, and movies -- is a major
7 concern to copyright owners."

8 Does that statement relate in any way to
9 the affidavit that you filed?

10 MR. STRATTON: Well, I -- Mr. Scott, I
11 think again --

12 MR. SCOTT: If you want to establish the
13 relevance, I'm going to do that. I'll do it piece by
14 piece, if you don't mind.

15 MR. STRATTON: Well --

16 MR. SCOTT: Is this --

17 MR. STRATTON: To take --

18 BY MR. SCOTT:

19 65. Q. Did you swear your affidavit because of
20 some concern of a copyright owner about the unlicensed use
21 of copyright works?

22 A. I swore my affidavit because it was
23 truthful.

24 66. Q. Did you swear your affidavit because of
25 some alleged concern of a copyright owner about the

1 unlicensed use of copyright works?

2 A. Maybe I don't understand the legal
3 jargon of the term "swear," but I swore my affidavit
4 because it was truthful.

5 67. Q. And did you understand that one of the
6 issues as you were swearing your affidavit dealt with
7 issues of unlicensed copyright works?

8 A. Yes.

9 68. Q. And did MediaSentry use any of the
10 MediaScan programs in connection with the engagement you
11 had that gave rise to your affidavit?

12 A. Yes.

13 69. Q. And did you use -- did your company use
14 a sophisticated network of Internet-based software in
15 order to deal with the engagement that you understand you
16 had that gave rise to your affidavit?

17 A. Yes.

18 70. Q. Can you tell me, please, then what a
19 data-mining technique is?

20 MR. STRATTON: Well, again, I don't think
21 you've asked him directly about data mining.

22 MR. SCOTT: I want to know what it is.
23 Before I ask him, I'd like to know what it is. Let's
24 see. Tell me what data mining is. So he said it's a way
25 to look at data, and I'd like you to just tell me a little

1 bit about what data mining is.

2 MR. STRATTON: Mr. Scott, I think we're
3 getting into some technical areas, and I do want to be
4 precise. You've taken him up to the sophisticated network
5 of Internet-based software, and I still don't think you
6 have connected the data-mining techniques with what he's
7 done.

8 MR. SCOTT: Mr. Stratton, I must be getting
9 close to something good here because you're apparently
10 very nervous about this. Let me just make this very
11 plain.

12 MR. STRATTON: I don't think characterizing
13 my state is something that needs to be done here,
14 Mr. Scott. I'm not nervous in the least. I just want to
15 make sure that we all know what this connects to, if it
16 connects to anything.

17 MR. SCOTT: The witness has said that his
18 company, MediaSentry, used MediaScan in connection with
19 the engagement that gave rise to his affidavit. The
20 document from his website, with which he's familiar, says
21 that his company uses a sophisticated network of
22 Internet-based software and data-mining techniques to
23 patrol the Internet for copyright infringement. Surely
24 I'm entitled to ask him what data mining means in this
25 context.

1 MR. STRATTON: I think you're missing the
2 one piece, which is were data-mining techniques used in
3 the preparation of this affidavit.

4 MR. SCOTT: How can I understand the answer
5 unless I know what a data-mining technique is. I want the
6 witness to tell me what a data-mining technique is. This
7 isn't all that tough.

8 MR. STRATTON: It's not tough, and I think
9 if you've established it's something that was used, go
10 ahead, but we're not there yet. That's my point.

11 MR. SCOTT: I want to know what it is
12 before I ask whether he used it.

13 BY MR. SCOTT:

14 71. Q. What is it, sir?

15 A. I don't mind --

16 MR. STRATTON: Go ahead.

17 THE DEPONENT: I don't mind answering it.
18 Data-mining technique is a way to look at data and get
19 answers from that data.

20 BY MR. SCOTT:

21 72. Q. And where is the data located that is
22 being mined?

23 MR. STRATTON: Again, are we talking now
24 about something that was done in preparation of this
25 affidavit or --

1 MR. SCOTT: I don't know. Let's just --

2 MR. STRATTON: So far it's still an

3 academic inquiry, as far as I see.

4 MR. SCOTT: We'll bring it down to ground.

5 Just wait. It's a cross-examination. I'm entitled to do

6 this. If you want to impede this examination, then we'll

7 have to deal with it some other way. We have a deadline

8 to meet, and I want to get on with it, Mr. Stratton. So

9 let's get on with it.

10 MR. STRATTON: Yes, to ask generally what

11 data-mining technique is, he's given you the answer, and

12 then to say where is the data today without giving it a

13 context, is --

14 BY MR. SCOTT:

15 73. Q. Just generically, what data, what's the

16 location of the data that is mined by the data-mining

17 techniques that MediaSentry uses in general terms?

18 A. We find data on the Internet by

19 scanning the Internet on behalf of our clients looking for

20 works which they have not given authorization to be

21 distributed on the Internet through the channels that we

22 scan. We collect that information and then we run an

23 analysis on that information to make a determination on

24 whether or not it is what we were looking for, and that is

25 what we mean by data mining.

1 74. Q. Okay. And I gather that data mining
2 involves making an inquiry of information that is stored
3 on somebody else's computer?

4 A. No. The data mining would occur once
5 we receive the information. The inquiry is a separate
6 act.

7 75. Q. And how do you get the information in
8 respect of which this inquiry is made?

9 A. We scan various networks on the
10 Internet, and depending on the network that we scan, some
11 networks have built-in protocols that allow you to ask
12 users who are offering files publicly on the Internet for
13 the list of files that they're offering. And so that's
14 what we do, and the users respond with their list of
15 files.

16 76. Q. And does this technique involve leaving
17 a program or an applet or something on this other person's
18 computer from which you're looking to get this
19 information?

20 A. No.

21 77. Q. Never?

22 MR. STRATTON: You're asking in the context
23 of this affidavit what was done here?

24 MR. SCOTT: I'm just trying to understand
25 his business a little better.

1 MR. STRATTON: I think in a general way
2 it's irrelevant. If you're asking about what was done as
3 the -- to give rise to the exhibits in the affidavit --

4 MR. SCOTT: Well, how do I know that until
5 I ask him the questions?

6 MR. STRATTON: Well, how is it relevant
7 until you tie it in?

8 MR. SCOTT: I have tied this in.

9 THE DEPONENT: We don't do that in any
10 aspect of getting any evidence that related to this
11 affidavit.

12 BY MR. SCOTT:

13 78. Q. Do you do it in other circumstances?

14 R/F MR. STRATTON: I'm going to direct him not
15 to answer.

16 MR. SCOTT: How can I test the proposition
17 in cross-examination unless I know whether they use the
18 technique in other cases?

19 MR. STRATTON: He's telling you he's not
20 using it in these applications.

21 MR. SCOTT: You're telling me. He's not.
22 You're getting in the middle of this cross-examination. I
23 really do want you to let the witness answer the
24 questions.

25 MR. STRATTON: I'll let him answer

1 questions about what he's done to prepare the material
2 that's been filed in the court, not what he may have done
3 for other circumstances that don't relate to this motion.

4 BY MR. SCOTT:

5 79. Q. I put it to you, sir, that data mining
6 usually involves leaving a program or an applet on
7 somebody else's computer so it can send you information
8 unbeknownst to the owner of that computer; is that your
9 understanding of what data mining generally is?

10 A. No.

11 80. Q. Okay. Your MediaScan goes on to say:

12 "Our copyright management applications
13 allow you to monitor the status of your copyright searches
14 in real-time, add and remove works, and create extensive
15 management reports to track trends and the effectiveness
16 of enforcement activity taken on your behalf."

17 Is that a correct statement of your
18 company's operations in this regard?

19 A. It is. The point I would like to make
20 is that the service that we ran in order to provide the
21 information that we presented in my affidavit is
22 independent of these services. It's not described in
23 detail on the web site. It may use some functions from
24 the services, such as the scanning function, but the
25 service was not MediaScan.

1 81. Q. I thought you said you did use
2 MediaScan?

3 A. I said we use scanning.

4 82. Q. Well, I have to listen very carefully.
5 Did you use MediaScan in connection with this engagement?

6 A. We use scanning technology.

7 83. Q. Did you use MediaScan in connection
8 with this engagement?

9 A. As I said before, the website is not a
10 selling tool. In some cases we use --

11 84. Q. I'm not --

12 A. -- MediaScan as a way to describe --

13 85. Q. Trust me, you're not selling to me.
14 The question I asked is did you use -- and I'll ask it a
15 third time, maybe a fourth. Did you use MediaScan in
16 connection with the engagement that gave rise to your
17 affidavit?

18 A. MediaScan is a term that in some cases
19 we have used before to describe types of services that we
20 do, in some cases we don't use to describe types of
21 services that we do. The service that we did to get the
22 material that's in the affidavit did require us to use
23 part of our scanning technology, but it is not a media
24 scan service.

25 MediaScan is a term that we have used in

1 some situations in the past to describe and put a term
2 around some of the functions that we provide to some
3 clients.

4 86. Q. Is the answer to my question yes or no?

5 MR. STRATTON: I think he's given you the
6 answer to your question.

7 MR. SCOTT: No. I got a bunch of words.

8 BY MR. SCOTT:

9 87. Q. Did you or did you not use MediaScan in
10 connection with the engagement that gave rise to this
11 affidavit?

12 MR. STRATTON: He's given you the answer to
13 that.

14 MR. SCOTT: Please, let him answer that
15 very simple question. He answered it earlier and said --
16 told me, and I think the record will show, that he said he
17 did use MediaScan or the company used MediaScan. But now
18 there's some question about it, so I'm going to give him a
19 chance to change.

20 THE DEPONENT: You can read back the
21 record, but I don't believe I said we used MediaScan. I
22 said we used scanning technology. MediaScan is a term
23 that we have created for some clients to describe a
24 certain set of services that include our scanning
25 technology. When we entered into an agreement to provide

1 information that later went in our affidavit, we also used
2 scanning technology, but it is not -- the notion of a
3 MediaScan service varies across all the different clients
4 that we have in what it actually means.

5 If you can ask me about functions in our
6 company, one function that we provide is a scanning
7 service, and that scanning service was used to --

8 88. Q. I don't need all these words to answer
9 the question yes or no. I don't need all these words.

10 MR. STRATTON: He's given you an answer,
11 Mr. Scott. We're not really dealing with anything
12 relevant as far as I can see. I've let you continue. I
13 don't want to obstruct what you're trying to do, but
14 really we're here to talk about what is in his affidavit,
15 not what might be on his website or what he might offer
16 other customers.

17 MR. SCOTT: I'll be the judge of what I'm
18 going to put to the witness in cross-examination. It's
19 your witness. You filed the affidavit. Now it's my turn,
20 so I'll put to him whatever I want.

21 MR. STRATTON: Relevant questions are fine.

22 BY MR. SCOTT:

23 89. Q. Read through the material, sir, and
24 just so we have it on the record, would you look through
25 this and tell me whether these are copies of pages that

1 are taken, as I asked you earlier, currently from your
2 website? Would you tell me whether you can identify each
3 of these documents as such?

4 A. Yes, they are.

5 90. Q. Thank you. We'll mark that as Exhibit
6 1 on this examination.

7 EXHIBIT NO. 1: Copy of Printout from
8 Website for MediaSentry.

9 BY MR. SCOTT:

10 91. Q. Thank you. You can have it back now.

11 A. Most, if not all, of them were updated
12 before we entered into any contemplation of this agreement
13 that then later provided these services. So it is a
14 current example of what's on the website but does not give
15 an indication of when the web pages from that website were
16 updated.

17 92. Q. I'm sure if there's anything that's not
18 correct, you'll let me know or perhaps Mr. Stratton will
19 jump in and help you.

20 Let me take you, if I can, to the next page
21 from the one we were looking at, and you'll see there that
22 the website says that MediaSentry's approach to
23 anti-piracy delivers a fully automated --

24 MR. STRATTON: Sorry, he's not found the
25 page yet. What's the page?

1 BY MR. SCOTT:

2 93. Q. It's the second-last page of Exhibit 1?

3 A. Okay.

4 94. Q. "MediaSentry's approach to anti-piracy
5 delivers a fully-automated, comprehensive solution." And
6 you'll see "first" and then:

7 "Second, our Internet-based electronic
8 agents continuously patrol for violations. Infringements
9 are matched and cataloged 24x7x52, along with up to
10 fifteen identifying characteristics such as the
11 infringer's username, IP address, file path, bitrate and
12 file size."

13 Were all of those listed identifying
14 characteristics pulled up by your company in this case?

15 A. No.

16 95. Q. Were any of the balance of the 15
17 characteristics that aren't specifically referred to here
18 pulled up as part of this engagement?

19 A. Yes.

20 96. Q. What were they?

21 A. One example would be the network that
22 we found the user. Other examples might be other metadata
23 that was associated with the --

24 97. Q. Sorry, other what?

25 MR. STRATTON: He said metadata.

1 BY MR. SCOTT:

2 98. Q. And how do you spell that?

3 A. M-e-t-a.

4 99. Q. What's that?

5 MR. STRATTON: It's one word, I think.

6 Metadata.

7 BY MR. SCOTT:

8 100. Q. What is it?

9 A. Metadata is descriptions of data that
10 often travel along with that data, and on many of the
11 file-sharing networks where users distribute files, they
12 provide additional descriptions of those files that are
13 searchable by others who are looking for those files.
14 Bitrate is an example. Artist would be another example.

15 101. Q. Okay. One of the other functions
16 apparently offered by your company is something called
17 MediaExchange. And if I'm looking at the page we saw
18 earlier called "Solutions Overview," I see that
19 MediaExchange is described as -- do you have it there?

20 MR. STRATTON: Not yet.

21 THE DEPONENT: Okay.

22 BY MR. SCOTT:

23 102. Q. "Develop brand & artist loyalty by
24 permitting consumers to exchange bootlegged works for
25 legitimate copies."

1 And then if you go to the page that's
2 actually -- the section actually dealing with
3 MediaExchange, I'm looking then at the fourth paragraph
4 under MediaExchange -- well, the first paragraph says:

5 "The MediaExchange service permits
6 copyright holders to identify fans who are actively
7 engaged in pirating copies of copyrighted material, and
8 educate them on the illegal nature of piracy and offer
9 them the opportunity to exchange illegal versions for
10 licensed copies."

11 Is that a correct description of your
12 MediaExchange program?

13 A. The only incarnation or the only way
14 MediaExchange has been used to date has been copyright
15 owners sending notices, such as the notice that was in the
16 affidavit, telling users that they're offering illegal
17 content, and that notice is described in the affidavit.

18 103. Q. Was there any other aspect of the
19 MediaExchange services that was, so far as you know, was
20 used in respect of this engagement?

21 A. No.

22 104. Q. And then finally we come to one that
23 wasn't mentioned in that original list of three offered,
24 and I think -- yeah, the last page of Exhibit 1 refers to
25 MediaDecoy. And reading from the first paragraph,

1 starting the second sentence:

2 "The MediaDecoy service lets copyright
3 holders minimize the distribution of illegal copies of
4 their content on the Internet. Using innovative
5 technology designed to work within the confines of popular
6 piracy forums, MediaDecoy effectively combats the rampant
7 piracy of digital content."

8 And then if you look down to the third
9 paragraph, in the second sentence, it says:

10 "Geographically dispersed nodes
11 immediately begin the process of minimizing the download
12 availability of the advertised pirated work, and
13 overwhelming file trading communities with non-working
14 versions of your copyrighted material."

15 Do I understand that this technique puts
16 out non -- what appear to be copies of copyright work that
17 don't work?

18 A. Yes.

19 105. Q. Okay. And can you assist me as to why
20 when one of these -- I'm just going to call it a dummy
21 file or a fake file -- when one of these is put out, why
22 don't people just ignore it?

23 MR. STRATTON: Do you know the answer to
24 the question?

25 THE DEPONENT: Yes. They don't know what's

1 in the file until they listen to it.

2 BY MR. SCOTT:

3 106. Q. I see. So to the observer it looks as
4 if it's a real file. Until they try and play it they
5 don't know it doesn't have the right content?

6 A. Correct.

7 107. Q. And can the users not distinguish
8 what's a real file from a dummy file? Sorry, I gather
9 that -- I gather that what you do is you make a file that
10 looks like the real file, and that gets spread, but it
11 doesn't work; is that the intent of MediaDecoy?

12 A. The intent of MediaDecoy is to minimize
13 the harmful impact of unauthorized files being offered.
14 And so you make a file that looks like the real file, and
15 to the extent people are searching for the illegitimate
16 copies that other people are distributing, we make the
17 non-real file available so that when people get a screen
18 shot of results, they cannot differentiate from the people
19 illegally or distributing the illegitimate content and our
20 content, which appears in the same screen as the other
21 people distributing their files.

22 108. Q. And so the only way to tell them apart
23 is to listen to them?

24 A. That's right.

25 109. Q. All right. Now, you indicate in your

1 affidavit that MediaSentry has performed certain services
2 for CRIA, C-R-I-A. Do you know who CRIA is?

3 A. Yes.

4 110. Q. How long has that relationship existed?

5 A. About six to twelve months.

6 111. Q. And what -- is CRIA one of those
7 companies with which you have a personal involvement or is
8 it somebody else's? Who deals with CRIA?

9 A. I have a personal involvement.

10 112. Q. Are you the contact person for CRIA?

11 A. I am a contact person.

12 113. Q. Okay. In general terms, what have you
13 done for CRIA? You've had contact with them; you've
14 spoken to them?

15 A. I helped design how our services could
16 help meet some of what they were trying to achieve and
17 explain our services to them.

18 114. Q. Is there anything else that you've
19 done -- you personally have done for CRIA? You're the
20 contact. You've helped design. Whatever else you said.
21 Is there anything else you've done?

22 A. Well, I consider part of the reason I'm
23 here is because of an affiliation with CRIA.

24 115. Q. Right. That's why you swore the
25 affidavit?

1 A. That's right.

2 116. Q. And then got invited to come to

3 Toronto. That will teach you.

4 All right. So that's -- all right. Thank

5 you very much. Now, I just want to try and deal with some

6 technical issues and I don't know whether this is in your

7 province or not. I gather that -- would you agree with

8 the general statement that knowing an IP address of

9 someone on the Internet does not identify the person on

10 the other end of that IP address that's using that IP

11 address?

12 To put it another way, merely by knowing an

13 IP address I gather one cannot identify who the user is?

14 A. Yes.

15 117. Q. And I gather you've had a chance or

16 have you looked at the affidavit of Greg Pfohl that was

17 filed by the Shaw people earlier? Have you read his

18 affidavit?

19 A. No.

20 118. Q. You haven't. Okay. You've not seen

21 the affidavit that was filed by my client, Shaw?

22 A. Not that I know of. Not that I can

23 remember.

24 119. Q. I guess my next question is you don't

25 have any dispute with the technical information that

1 Mr. Pfohl has? I gather the answer to that question is
2 no, you have no dispute?

3 A. I have no knowledge to answer your
4 question.

5 120. Q. All right. So you're not here today to
6 dispute anything about technical information?

7 MR. STRATTON: I think you've got your
8 answer about Mr. Pfohl and his affidavit.

9 BY MR. SCOTT:

10 121. Q. Do you know enough of the technology
11 involved to distinguish between a static and a dynamic
12 allocation of an IP address?

13 A. I know what the difference between a
14 static and a dynamic IP address is.

15 122. Q. What is that differences?

16 A. In some cases an Internet provider will
17 allocate an IP address and not change it, which will be
18 considered a static IP address. And in some cases, an
19 Internet provider would change an IP address that they
20 offer their customers from time to time, and that would be
21 a dynamic IP address.

22 123. Q. And you understand that in the case of
23 a dynamic IP address, it may or may not be the case that
24 the same IP address is assigned to that account when that
25 account logs on and then logs back on to an ISP system?

1 A. That's right.

2 124. Q. Do you understand that IP addresses are
3 allocated to devices on the Internet that have a mac
4 address or does that go beyond your technological
5 understanding?

6 A. I know a mac address identifies a
7 computer, but I don't know specifically how an ISP
8 allocates an IP address that is then tied to a specific
9 mac address.

10 125. Q. Do you understand that a mac address
11 can also be tied to some other device, like a router?

12 A. Yes, a computer or a router.

13 126. Q. Okay. And does your understanding go
14 so far as to agree with me that a -- when an IP address is
15 assigned to a router that has that mac address, that
16 behind that router there may be other devices having other
17 mac addresses that are not seen or utilized by that IP
18 address? That's the sort of concept of a router, isn't
19 it?

20 A. Say the question one more time?

21 127. Q. That in the case where an IP address is
22 associated with a router, the IP address doesn't know
23 anything about the devices that are behind the router,
24 such as other computers or other routers that may have
25 their own mac addresses, that the IP addresses is

1 associated with the router that it gets to?

2 A. I'm confused by your question because
3 an IP address is -- I just don't understand your question.
4 Maybe you can repeat it. I'm very familiar with how
5 routers work.

6 128. Q. That's helpful. When an IP address is
7 assigned to a router, that's the connection that's made
8 between the mac address on the router and the IP address?

9 A. Correct.

10 129. Q. And the Internet addresses using the IP
11 address, addresses the router?

12 A. That's correct.

13 130. Q. And then behind that router there may
14 be a few or many other devices?

15 A. Correct, one or more devices.

16 131. Q. But the IP address that's being used by
17 the Internet only addresses the router, and the router's
18 job is to direct the traffic to the other devices that are
19 on the other side of the router?

20 A. Yes, that's correct.

21 132. Q. And in the case of somebody using a
22 home router, there may be two or three computers, but in
23 the case of a larger enterprise, there may be many more
24 than that behind a router?

25 A. That's correct.

1 133. Q. All of which to the Internet would have
2 the same IP address?

3 A. That's correct.

4 134. Q. And in the case of a home address, you
5 might have two or three computers on a home network, and
6 in the case of a business, you could have what; hundreds?

7 A. Sorry. Just to go back, it depends on
8 if network address translation is being used. And if
9 network address translation is not being used, then you
10 may have a router and people behind the router, and it
11 would each be assigned their own IP address. So I'd like
12 to clarify the last comment because it does depend on if
13 you're using network translation or not.

14 135. Q. Okay. You can't tell that from the IP
15 address?

16 A. That's correct.

17 136. Q. Okay. And if it is the case that the
18 IP address is talking, communicating with the router, then
19 there might be in the case of a home system two or three
20 computers, but in the case of a business, there could be a
21 hundred or more computers behind it?

22 A. Yes, if a router is using network
23 address translation, that router could then be used by one
24 or many users, in the case of a corporation, several users
25 who would all have the same external IP address --

1 external meaning that that's how people outside of that
2 infrastructure routes to that computer.

3 137. Q. Right. And the same would apply to a
4 cyber cafe? It could apply. You can't tell from looking
5 at the IP address. It could well apply to a cyber cafe?

6 A. It could apply to any setup using
7 network translation.

8 138. Q. Right. Or a university with a bunch of
9 students using the university network to communicate?

10 A. Correct.

11 139. Q. Okay. Are you aware that mac addresses
12 can be cloned? Does that phrase or concept have meaning
13 to you?

14 A. I don't have specific knowledge on
15 that.

16 140. Q. But you're familiar with the phrase?

17 A. I'm familiar with the phrase of a mac
18 address.

19 141. Q. Of being cloned?

20 A. No, I'm not familiar.

21 142. Q. Okay. I'm just going to ask you about
22 cable modems. And I preface this by saying I think that I
23 don't know whether in your U.S. experience whether the
24 penetration of cable modems is as strong in the U.S. as it
25 is in Canada. I rather have the impression that there's

1 more cable modems in Canada, more penetration than the
2 U.S.

3 But with that little preface, do you have
4 an understanding of what a cable modem is?

5 MR. STRATTON: So you are just asking him
6 the second part? The first part is just --

7 MR. SCOTT: I'm just trying to give him an
8 out, if he wants it.

9 THE DEPONENT: I know what a cable modem
10 is.

11 BY MR. SCOTT:

12 143. Q. Okay. And do you have an understanding
13 as to how in Canada people use cable modems and how they
14 might use a network, a home network, behind a cable modem?

15 A. I don't have specific knowledge on how
16 Canadians use cable modems versus a U.S. resident. I have
17 knowledge of cable modems and routers and people setting
18 up routers.

19 144. Q. Okay. Is the usual -- is the case that
20 you're familiar with that an Internet service provider
21 runs a cable into a cable modem that might then be
22 connected either to a computer or to a router in a
23 residential circumstance?

24 A. Yes.

25 145. Q. And then what we said about the routers

1 and the IP addresses would apply in that circumstance as
2 we discussed earlier?

3 A. That's right.

4 146. Q. And so that would allow one or more
5 people in a particular house to use a cable connection
6 behind the router?

7 A. Yes.

8 147. Q. Okay. Have you had experience with
9 wireless routers; do you know what they are?

10 A. Yes.

11 148. Q. And do you have a sense of what the
12 range of a wireless router is?

13 A. I would imagine it depends on the
14 router.

15 149. Q. Have you heard of cases and do you know
16 of cases where routers are used in a residential
17 circumstance to enable the family to use computers
18 throughout the house?

19 A. They could be used in a home or
20 business to enable users to use that Internet connection.

21 150. Q. And in your -- in the operation of your
22 business, have you come across instances where wireless
23 routers are being used by people who actually don't work
24 in the business or live in the house; in other words, by a
25 next-door neighbour or somebody in the business next door

1 or somebody passing by on the street?

2 MR. STRATTON: You're asking him in his

3 business in Canada or the U.S. or --

4 BY MR. SCOTT:

5 151. Q. It doesn't matter where. Have you

6 heard about that sort of thing going on?

7 MR. STRATTON: Let's start with Canada.

8 THE DEPONENT: Repeat the question.

9 BY MR. SCOTT:

10 152. Q. Have you heard of instances where

11 signals from a wireless router are being used by people

12 who aren't actually members of the family that owns the

13 router or by employees of businesses using the router?

14 A. I know wireless routers can be set up

15 in one of two ways. They can either be set up to make it

16 accessible only to people who have authorization to use

17 that router, or they can be set up to provide access to

18 anyone who has a wireless adapter or a computer that's

19 wirelessly enabled. So I would imagine it depends on how

20 the person sets up a wireless router.

21 153. Q. But from your understanding of the

22 technology, it's quite feasible that somebody next door or

23 in the next office can use a router and not have to worry

24 about the passwords?

25 A. If the person had set up the wireless

1 router to allow anyone to access it, then anybody who has
2 a wireless computer or wireless adaptor could access it.

3 It depends on how it's set up.

4 154. Q. And in the circumstances we discussed
5 earlier, those people would -- could to the Internet all
6 have the same IP address?

7 A. We would see the IP address that's
8 associated with the wireless router, yes.

9 155. Q. Right. So the computer that's actually
10 using the router at the time could be somebody next door
11 or somebody through the wall of an office building?

12 A. If that individual that set up the
13 wireless router had set it up such that they allowed
14 anyone to access it, then anyone could access it as long
15 as they were within range.

16 156. Q. Right. And have you seen the other day
17 that I think it's Dell that's offering a \$33 device where
18 you can walk down the street and ascertain whether there's
19 a wireless router that you can tap into? Have you seen
20 that on the Dell ads?

21 A. No.

22 157. Q. But you're familiar with people walking
23 down the street and looking for what are called hot
24 points?

25 MR. STRATTON: You're asking whether he

1 himself is familiar with this?

2 MR. SCOTT: Yes.

3 BY MR. SCOTT:

4 158. Q. You've heard of this being a situation

5 in the industry?

6 MR. STRATTON: Where he himself has heard

7 that?

8 BY MR. SCOTT:

9 159. Q. Yes. What are they called? They are

10 called hot point; is that what they are called?

11 A. To my understanding, a hot point is

12 some establishments that offer Internet access, such as a

13 Starbucks in the U.S. advertises the fact that they offer

14 Internet access, and it's called a hot point, but I don't

15 know of anyone who walks up and down a street with their

16 computer in hand waiting for it to get connected.

17 160. Q. That's why Dell offers \$33. You can

18 get the little device; you don't have to get your

19 computer.

20 MR. STRATTON: He says he hasn't seen that

21 ad.

22 --- Off-the-record discussion.

23 BY MR. SCOTT:

24 161. Q. You say in paragraph 93 of your

25 affidavit:

1 "Once an ISP is given an IP address within
2 the range of IP addresses it manages, and the date and
3 time it was used, it should be a relatively
4 straightforward task for the ISP to determine the identity
5 and contact information of the Infringers,"

6 Are you using "Infringers" as being the
7 person who is operating the computer that has this IP
8 address associated with it; is that what you mean by
9 "infringers"?

10 A. We don't have the identity of the
11 person operating the computer, so we -- we have the IP
12 address that we could see where that piece of content was
13 being offered from.

14 162. Q. This statement in 93 doesn't take
15 account of the problems of static or dynamic IP addresses;
16 it doesn't take account of wireless routers; it doesn't
17 take account of people using a router being behind a
18 router; it doesn't take account of any of those things
19 we've been discussing for the last few minutes, does it?

20 A. It takes account of it in the fact that
21 we know the IP address that we saw that content coming
22 from, but we can't tell you the user that was at that IP
23 address. And to the extent that someone is using a
24 wireless router and they chose --

25 163. Q. Or as in a university, a cyber cafe or

1 in the next building, next office; your statement here
2 doesn't take account of any of those circumstances?

3 A. All we can see is the IP address that
4 that content is coming from, and it -- it would depend on
5 how a person set up a router or a wireless device to give
6 it public access or not. If they had multiple people
7 using that IP address is something that we can't tell. We
8 see just the IP address that the content is coming from.

9 164. Q. Right. And when you say it should be
10 relatively straightforward for an ISP to be able to do so,
11 you're not dealing with the circumstances that we've been
12 discussing in the last few minutes when the ISP doesn't
13 know any more than you do about who is using the computer
14 behind the router or who is next door or who is at the
15 cyber cafe or any of that stuff?

16 A. When I say it should be relatively
17 easy, I would be referring to for the ISP to determine
18 whose account was being used to deliver the content.

19 165. Q. I see. Assuming that it had a record
20 of the ISP that was assigned to a particular account at
21 that time, but it would be more difficult in the case of a
22 dynamic allocation for ISP, wouldn't it?

23 A. I made the statement because I would
24 assume that ISPs keep track of, in some kind of log, users
25 that are connected and the date and the time and the IP

1 addresses for a variety of reasons.

2 166. Q. When you say "users," do you mean the
3 account holders?

4 A. The account holders.

5 167. Q. You don't mean the person actually
6 operating the computer?

7 A. Correct. The account holder.

8 168. Q. You're assuming that there are logs
9 kept; you don't know that that's the case?

10 A. Correct.

11 169. Q. Okay. I see that from your
12 affidavit -- your affidavit says in respect of -- I'll
13 take you to paragraph 17. It says:

14 "MediaSentry discovered that as of
15 approximately 4:03 AM Eastern Standard Time ("EST") on
16 December 13, 2003, an individual using the alias
17 Geekboy@KaZaA," et cetera, et cetera.

18 I gather you were not in the office at 4:03
19 a.m. Eastern Standard Time on December the 13th?

20 A. No.

21 170. Q. And if I take you to paragraph 26,
22 dealing with Amanda@KaZaA, there's some reference there to
23 something going on at 3:01 a.m. Eastern Standard Time
24 November 24. I assume you were tucked in your bed or some
25 other comfortable spot at 3:01 a.m. Eastern Standard Time

1 on November the 24th?

2 A. It's unlikely I was in the office.

3 171. Q. Unlikely. You weren't there, were you,

4 at 3:01?

5 A. No.

6 172. Q. Okay. You refer to Geekboy as "he" and

7 "him," and you refer to Amanda as "her" and "she." How do

8 you know that?

9 A. I would have to clarify that there's

10 no -- that I would not know that. That's a --

11 173. Q. That's an assumption?

12 A. That's an assumption. If I clarified

13 it, it should be his/her for both of them.

14 174. Q. If I take you to paragraph 13, you say

15 there: "Since August 13, 2003, MediaSentry, on behalf of

16 CRIA, has sent more than 694,000 'instant messages.'"

17 What's the significance of August the 13th,

18 2003; what's that about?

19 A. Just when that program started.

20 175. Q. Okay. Did you -- you didn't send out

21 any of these messages, did you?

22 A. Me personally?

23 176. Q. Yes.

24 A. No.

25 177. Q. Do you know what geographic areas they

1 were sent to; do you have a belief about that?

2 A. No. These would just be identified as

3 Canada.

4 178. Q. Do you know what software was used to

5 send these messages?

6 A. Yes.

7 179. Q. What was it?

8 A. The Kazaa application.

9 180. Q. Do you know what version of Kazaa?

10 A. Not off the top of my head, no.

11 181. Q. Do you know whether it was version

12 2.5.1 or later?

13 A. Not off the top of my head.

14 182. Q. Do you know that in version 2.5.1 of

15 Kazaa and thereafter that the instant-messaging function

16 was disabled by default?

17 A. I know that at some version of Kazaa
18 they disabled the receipt of incoming messages by default.

19 183. Q. What was the name of the sender? Do

20 you know the name of the sender that was used on these

21 messages?

22 A. No.

23 184. Q. I gather you can't tell from the

24 information about Geekboy that's set out in the affidavit,

25 you can't tell how hold Geekboy is?

1 A. No.

2 185. Q. You can't tell whether Geekboy speaks

3 English or not?

4 A. No.

5 186. Q. Can't tell what Geekboy's education is?

6 A. No.

7 187. Q. Couldn't can't tell whether Geekboy is

8 a careful or a sloppy person?

9 A. No.

10 188. Q. Can't tell whether Geekboy pays

11 attention to what's on his computer screen or not?

12 A. No.

13 189. Q. Have you listened to any of the files

14 that were downloaded from Geekboy or that you believe were

15 downloaded from Geekboy?

16 A. It's unlikely.

17 190. Q. You don't now recall having listened to

18 any of the files that you believe were downloaded from

19 Geekboy?

20 A. That was not what we were contracted to

21 do. I had listened to some files as part of the service,

22 but it was not one of our tasks in the process to listen

23 to the songs.

24 191. Q. You don't know -- because you didn't

25 listen to these personally, you don't know whether from

1 your own knowledge whether any of these files are
2 MediaDecoy files or the real thing?

3 A. We set the process up where we would --

4 192. Q. Sorry. If you would just answer the
5 question. Do you know from your personal knowledge
6 whether any of these files are MediaDecoy files or whether
7 they are the real thing?

8 A. Can I answer the question?

9 193. Q. If you can answer the question without
10 deviating from the question, yes, from your own personal
11 knowledge?

12 A. I did not personally listen to the
13 files.

14 194. Q. So that you cannot then tell me
15 whether, from your own personal knowledge, whether any of
16 those files are MediaDecoy files or whether they're the
17 real thing?

18 A. Depends how you define "personal"
19 knowledge. We set up the task --

20 195. Q. I want to know whether -- if you didn't
21 listen to them, I suggest to you you don't have any
22 personal knowledge. I don't want to know from what people
23 told you or from what you have read. I want to know from
24 your own personal experience, eyes and ears, whether you
25 know whether any of those files are MediaDecoy files or

1 whether they are the real thing?

2 A. I did not listen to those files, so.

3 196. Q. Thank you.

4 A. That was not part of the process that

5 we set up with CRIA.

6 197. Q. Do you have any personal knowledge as

7 to whether any files that you think Geekboy had were

8 downloaded by anybody other than your organization?

9 A. I have no knowledge of that one way or

10 another.

11 198. Q. Okay. I gathered that -- do you have

12 Kazaa installed on one of your computers?

13 A. Yes.

14 199. Q. One of your personal computers you have

15 it?

16 A. Yes.

17 200. Q. And I'm told then that when a file is

18 being uploaded from someone's computer, that that

19 person -- Kazaa doesn't tell that person that a file is

20 being uploaded from that person's computer. Can you

21 confirm that to me? There's no screen message that

22 flashes?

23 A. The front screen of Kazaa tells you how

24 many files you are making available for others to copy.

25 201. Q. No. No. My question to you was not

1 what the screen says is available. My question to you is
2 when a file is being uploaded from Kazaa from a user's
3 computer, there is no message on the screen that Kazaa
4 displays that that activity is taking place?

5 A. I believe in some of the screens within
6 the Kazaa application, you can see that transfer taking
7 place.

8 202. Q. Not on the main screen?

9 A. Not on the first screen.

10 203. Q. I'm told that there is a switch, of
11 some sort of software switch within Kazaa that you can
12 turn off the uploading capability, but that that switch is
13 by default turned off so that when you install Kazaa, by
14 default it makes files available. Is that your
15 understanding of Kazaa from your own experience?

16 A. Kazaa has made changes to their
17 defaults from time to time.

18 204. Q. And is the statement that I put to you
19 earlier, is that correct for some or many, if not all, of
20 the Kazaa software packages, that you have to specifically
21 turn off the uploading ability?

22 A. I believe that's correct for many of
23 the Kazaa packages.

24 205. Q. I gather then that if a user has
25 installed Kazaa and has not turned off the uploading

1 capability, I gather there's no physical action that
2 person has to do in order to send a computer file to
3 somebody else, whether it's a data file or a music file or
4 any other kind of file; there's nothing that the person
5 who owns the computer has to do; it's something that's
6 entirely within the capability of somebody else on the
7 Internet?

8 A. They have to copy a file into a shared
9 directory in order for it to be available to others on the
10 Internet.

11 206. Q. And that file could come from a CD or
12 from the Internet or from MediaDecoy or wherever; you
13 don't know where that file comes from?

14 MR. STRATTON: Who is "you" in this case?

15 BY MR. SCOTT:

16 207. Q. "You" is the person -- we're talking
17 about the person who has installed Kazaa and apparently
18 has files available for uploading?

19 A. Sorry. Say the question again?

20 208. Q. You said that you have to have -- I
21 forget the word you used?

22 A. You have to copy a file into a
23 directory which is being shared in order for it to be
24 available for others -- for distribution.

25 209. Q. And by looking at the file list, you

1 can't tell whether that file came from a CD that the
2 person owns or from the Internet or is something that came
3 from MediaDecoy?

4 A. Who is "you"?

5 210. Q. The person who owns the computer who
6 has made these files available, as you would think. You
7 can't tell it from looking at the file list?

8 A. Unless it's identified in the file
9 name, which often it is, as to where the file came from,
10 would be one indication; other than that, looking at the
11 file name, you don't know where it originally came from
12 unless you were the person that copied it there.

13 211. Q. It could have come from the user's CD?

14 A. Yes.

15 212. Q. Okay. And I guess whatever -- aside
16 from whatever speculation you might have about these file
17 names, there's nothing magical. Anybody can name any
18 file, give it any name they want, give it any user name?

19 A. Yes.

20 213. Q. So I can name a file Beethoven's Fifth
21 but it might not, in fact, be Beethoven's Fifth?

22 A. Yes.

23 214. Q. You can't tell that from looking at the
24 file list, I gather?

25 A. Can't tell what?

1 215. Q. Whether it's actually Beethoven's Fifth
2 or whether it's something else?

3 A. Correct.

4 216. Q. Help me out here. I'm also told that
5 with Kazaa, even though you think you closed Kazaa down,
6 it may still be running in your system tray even though
7 you've clicked on the "X" in the upper right-hand corner
8 and shut it. You might think you have shut it down, but,
9 in fact, it's still running; is that your understanding of
10 how it works?

11 A. You can close it from a window and have
12 it still running in the system tray, yes.

13 217. Q. So someone could think that they closed
14 it down, but, in fact, it was still running and making
15 files available.

16 A. I know if it's in my system tray that
17 it's still running. It would depend on the knowledge of
18 that person.

19 218. Q. You've got a Harvard MBA. Not
20 everybody has that advantage. But you will agree with me
21 that there are people out there who --

22 A. Don't have Harvard MBAs.

23 219. Q. Harvard MBAs and might think they shut
24 it down but it's still running?

25 MR. STRATTON: I think he's given you the

1 answer as to his knowledge, and now you're asking --

2 THE DEPONENT: If you don't know that
3 something in your system tray could still be running, then
4 you could close Kazaa and have it in your system tray and
5 not know that it's still running.

6 MR. SCOTT: Thank you. Why don't we just
7 take five minutes. We may be finished. I'll see what I
8 have.

9 --- Recess taken at 12:40 p.m.

10 --- Upon resuming at 12:53 p.m.

11 MR. SCOTT: All right, Mr. Millin. We've
12 both got planes to catch. I'm going to try and close off
13 quickly here.

14 BY MR. SCOTT.

15 220. Q. You told me you installed Kazaa on one
16 of your own computers. Have you printed off and have you
17 read the user agreement for Kazaa?

18 A. Yes.

19 221. Q. Okay. Can you identify this document
20 as a Kazaa user agreement, end-user license agreement?

21 A. In general but I haven't read every
22 page of this or of the application.

23 222. Q. Well, if you come across any errors or
24 omissions, if it's different from the one you've got,
25 you'll let me know -- or your counsel know?

1 MR. STRATTON: You've got the
2 identification of it to the best that he can.

3 MR. SCOTT: Okay. Let's call that Exhibit
4 2?

5 EXHIBIT NO. 2: Kazaa End User License
6 Agreement.

7 BY MR. SCOTT:

8 223. Q. And are you familiar with a study
9 that's been published by HP about people's knowledge and
10 understanding of how Kazaa works?

11 A. No.

12 224. Q. Okay. Just -- I'll just show this to
13 you. I don't know whether that assists you by looking at
14 it. I'm told this is a -- well, it says on its face a
15 study by two people from the Office of Information
16 Technology, University of Minnesota, called "Usability and
17 Privacy, a study of Kazaa P2P file sharing."

18 What's "P2P"?

19 A. Peer to peer.

20 225. Q. Are you familiar with this study? Have
21 you heard about it? Have you read it?

22 A. None of the above.

23 226. Q. Just drawing a blank on this?

24 A. Not familiar with it, haven't heard
25 about it, haven't read it.

1 227. Q. Okay. Let's just mark it as Exhibit A
2 for Identification, if you don't mind.

3 EXHIBIT NO. A: Copy of Usability and
4 Privacy, a Study of Kazaa P2P File Sharing.

5 MR. SCOTT: Thank you, sir. Those are
6 all my questions.

7 MR. STRATTON: All right. I do have
8 something by way of re-examination, Mr. Millin.

9 RE-EXAMINATION BY MR. STRATTON:

10 228. Q. You recall being asked questions
11 relating to the files obtained from the Geekboy user and
12 being asked whether or not you had personal knowledge as
13 to whether the different files listed were, as I think
14 Mr. Scott put it, the real thing or a MediaDecoy. Do you
15 remember those questions?

16 A. Yes.

17 229. Q. And you indicated that it was not part
18 of the process set up with CRIA for you to actually listen
19 to those files?

20 A. That's correct.

21 230. Q. What was the process set up with CRIA
22 that you refer to?

23 MR. SCOTT: Well, that's been gone into in
24 his affidavit, and that is not, with all due respect,
25 particularly in light of the kinds of limitations you

1 tried to put me under in cross-examination -- in my
2 respectful submission, that is not proper re-examination.
3 If you want to talk about the process that's been done in
4 the affidavit, it's been cross-examined on and that's it.

5 MR. STRATTON: Well, he was answering your
6 question, Mr. Scott, and made reference to the process set
7 up with CRIA, and I'd like to have in the context of those
8 questions an explanation of what he --

9 MR. SCOTT: He personally.

10 MR. STRATTON: He referred to.

11 MR. SCOTT: If you want to have an
12 explanation of what he personally did, that's fine. But
13 going beyond that --

14 THE DEPONENT: I'm very confused when you
15 say "personal knowledge" how people define "personal
16 knowledge." Because I didn't listen, but I had personal
17 knowledge that they were being listened to as part of the
18 process. So it really comes down to what your definition
19 of personal knowledge is.

20 MR. SCOTT: I asked you what you know from
21 your own ears and your own eyes and your own senses, not
22 what you were told, and that's -- we're not getting into
23 hearsay evidence on this point, with all due respect,
24 Mr. Stratton.

25 MR. STRATTON: Well, I think he has made

1 reference to the process that was part of what took place
2 in this material being produced, and that was part of his
3 answer to your question and it's completely within the
4 ambit of re-examination.

5 MR. SCOTT: My question to him was about
6 his personal knowledge, and you can't now go and ask him
7 what somebody -- what he's been told somebody else did. I
8 asked about his personal knowledge. Got the answer.

9 MR. STRATTON: All right.

10 MR. SCOTT: I object to anything further on
11 this.

12 MR. STRATTON: Let's have the answer and we
13 can have the objection dealt with at the motion.

14 MR. SCOTT: Let's go back and do that then
15 with the questions that I asked and you refused to let him
16 answer. Let's go back and answer those questions, and
17 then we'll let the judge rule on those, too.

18 MR. STRATTON: I don't think there was any
19 area that we didn't go through in a complete and full way
20 in your cross-examination.

21 MR. SCOTT: Do you want to go back and I'll
22 ask those questions and get the answers this time?

23 MR. STRATTON: Well, as I say, I think this
24 is something where it came out in the re-examination.
25 It's a completely appropriate question.

1 MR. SCOTT: I object to this.

2 BY MR. STRATTON:

3 231. Q. Go ahead, Mr. Millin, and -- what is
4 the process?

5 A. Well, again, the reason why there was
6 some confusion before was counsel there asking questions,
7 definition of personal knowledge and mine may be somewhat
8 different. I did not personally hear or listen to the
9 songs, but that was never the process that was set up.

10 MediaSentry's role was to capture the
11 songs. It was the CRIA's responsibility to listen to the
12 songs to make sure they were purported to what they were
13 supposed to be, and I had an understanding, personal
14 knowledge, that they were doing that.

15 MR. SCOTT: Well, look. If this witness is
16 going to tell us what he's been told, that is simply not
17 on the cards. It's not evidence.

18 MR. STRATTON: Well, in terms of evidence
19 on a motion, there is evidence that can come in by way of
20 personal knowledge or information and belief.

21 MR. SCOTT: And this is a final application
22 as far as we're concerned, not interim.

23 MR. STRATTON: This is a motion and we're
24 filing evidence by way of an affidavit, which allows
25 information and belief, and I don't believe that we're

1 going anywhere beyond that and --

2 MR. SCOTT: He wants to tell you what
3 somebody else told him, and that's simply not on,
4 Mr. Stratton. You're a much better lawyer than this. You
5 know this.

6 MR. STRATTON: Well, the Shaw affidavit
7 indicated that it's either personal knowledge or knowledge
8 that's on information and belief, and that's evidence that
9 you filed in this matter and that was on the very front of
10 your own affidavit material. And I think to now start to
11 draw lines that you yourself didn't draw initially, is
12 trying to tilt the playing field.

13 MR. SCOTT: I'm going to object to any of
14 that.

15 MR. STRATTON: And let's -- let's get the
16 complete answer, and we'll go from there. As I say, it's
17 a motion and I don't think we're going anywhere beyond
18 what the rules provide for this.

19 Mr. Millin, can you complete your answer,
20 please?

21 THE DEPONENT: Our responsibility was to
22 capture and archive the songs from the target user, which
23 in this case was Geekboy. We did that. It was someone
24 else's responsibility that's affiliated with CRIA to
25 listen to those songs and make a determination as to

1 whether or not it was, in fact, what it purported to be by
2 the title or file name of the song.

3 That was my understanding of the process,
4 and it's my understanding that these songs that are in my
5 affidavit had been listened to and someone had made a
6 determination that they were what the file name purported
7 to be.

8 MR. STRATTON: Thank you. And with that, I
9 believe we're done.

10 --- Off-the-record discussion.

11 CROSS-EXAMINATION BY MS. MATHESON:

12 232. Q. Mr. Millin, you sworn an affidavit in
13 connection with a motion brought against Rogers Cable
14 Communications Inc. Frankly, I can't read the date. If
15 you could tell me what it is?

16 MR. STRATTON: I'm just getting him the
17 right copy here.

18 THE DEPONENT: February 6, 2004.

19 BY MS. MATHESON:

20 233. Q. And just so we don't get into the same
21 debate about personal knowledge, sir, I am only asking you
22 about the sort of thing that Mr. Scott describes,
23 something you are a personal witness to, you did yourself,
24 you saw yourself, you heard yourself. You understand what
25 I mean by that? That's what I mean. Do you understand?

1 A. Yes, I understand. It would be helpful
2 if you used those words as opposed to "knowledge" because
3 I personally may have knowledge of something. I don't
4 understand the legal jargon. I apologize, but if you
5 clarify and use the terms as to whether I heard, so.

6 234. Q. Would it clarify if I used the term
7 that you were personally a witness to; is that something
8 you do understand? Something you saw yourself, heard
9 yourself. Does that make sense to you?

10 A. I'm fine if we want to define personal
11 knowledge as I heard it myself, saw it myself, witnessed
12 it myself, and that's the definition and we both agree on
13 that, and then I'm fine using that as a definition.

14 235. Q. Thank you, sir. You agree with me that
15 you have no personal knowledge regarding the data that
16 Rogers does or doesn't have in respect of the nine IP
17 addresses that the motion is being brought in respect to?

18 A. Can you ask the question again?

19 236. Q. You have no person knowledge of the
20 data that Rogers does or doesn't have with respect to
21 those nine IP addresses?

22 A. Correct.

23 237. Q. And you agree that you have no personal
24 knowledge of the amount of time required by Rogers
25 employees to determine what information it does or doesn't

1 have with respect to those nine IP addresses in connection
2 with the motion?

3 A. Can you ask the question again?

4 238. Q. That you have no personal knowledge of
5 the amount of time required by the Rogers employees to
6 determine what information Rogers has in response to the
7 CRIA motion?

8 A. Yes, it would depend on the actual data
9 that they have, which I have no personal knowledge of.

10 239. Q. So you have no personal knowledge of
11 the amount of time either; is that correct?

12 A. Correct.

13 MS. MATHESON: Thank you. Those are my
14 questions.

15 MR. HODGSON: I have a couple of questions
16 from Bell. Very simple.

17 Actually, it would probably help if you
18 would put Schedule A to the motion in front of the
19 witness.

20 MR. STRATTON: Yes, we have that.

21 CROSS-EXAMINATION BY MR. HODGSON:

22 240. Q. Mr. Millin, that's a list of the seven
23 peer-to-peer network pseudo names about which information
24 is being sought in this motion; do you see that?

25 A. Yes.

1 241. Q. And if we take the first one, Jordanna,
2 J-o-r-d-a-n-n-a, Jordanna@KaZaA, and you come to paragraph
3 17 of your affidavit --

4 A. Yes.

5 242. Q. Paragraph 17 and following deals with
6 Jordanna@KaZaA, and paragraph 17 refers to a discovery
7 that's made on November 27th of 2003 at 10:58 p.m. And I
8 take it whoever made a discovery, it's not you personally?

9 A. Correct.

10 243. Q. All right. And that would, just to
11 save time, I assume rather than having to take you to each
12 part of the affidavit dealing with the other six
13 peer-to-peer network pseudo names, if I asked you the same
14 question, I'd get the same answer?

15 A. Correct.

16 MR. HODGSON: Thank you. That's it.

17 Thanks.

18 --- WHEREUPON THE EXAMINATION ADJOURNED AT 1:08 P.M.

19

20 I HEREBY CERTIFY THE FOREGOING
21 to be a true and accurate
22 transcription of my shorthand notes
23 to the best of my skill and ability.

24

25

26

27

28

KATHRINE MCMENEMY, CSR
Computer-Aided Transcription