

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)
Capitol Records, Inc., a) File No. CV-06-1497
Delaware corporation; Sony BMG) (MJD/RLE)
Music Entertainment, a)
Delaware general partnership;)
Arista Records, LLC, a) Duluth, Minnesota
Delaware limited liability) October 3, 2007
company; Interscope Records, a) 9:00 a.m.
California general)
partnership; Warner Bros.)
Records, Inc., a Delaware)
corporation; and UMG)
Recordings, Inc., a Delaware)
corporation,)
)
Plaintiffs,)
)
vs.)
)
Jammie Thomas,)
)
Defendant.)
)

BEFORE THE HONORABLE MICHAEL J. DAVIS and a Jury
UNITED STATES DISTRICT COURT JUDGE

(TRIAL - VOLUME II)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

(JURY PRESENT)

1
2
3
4 THE COURT: Let's continue.

5 MR. GABRIEL: Good morning, Your Honor. Doug
6 Jacobson is still on the stand. Your Honor, while he's
7 coming up, we had to redact a couple of things. We got one
8 of them done last night. I have a copy for the Court's
9 book. If I may approach?

10 THE COURT: Please.

11 MR. GABRIEL: This is just the first page of
12 Exhibit 13 where we redacted the header.

13 THE COURT: Good morning. Pull the microphone
14 down. You have a soft voice, like I do. Speak up.

15 You may continue.

16 MR. GABRIEL: Thank you, Your Honor. Good
17 morning, Your Honor. Good morning, Counsel, Ms. Thomas.
18 And good morning to you, Ladies and Gentlemen.

19 **(Doug Jacobson)**

20 **DIRECT EXAMINATION (Cont.)**

21 BY MR. GABRIEL:

22 Q. Good morning to you, Dr. Jacobson.

23 A. Good morning.

24 Q. I would like to just briefly kind of get us back to
25 where we were when we stopped yesterday. I believe that you

1 gave an opinion that the computer with IP address
2 24.179.199.117 on February 21, 2005 at about 11:00 p.m. was
3 used to distribute and download the sound recordings on the
4 share folder that we have seen. You gave that opinion
5 yesterday, correct?

6 A. That is correct.

7 Q. You also testified yesterday that the data that you
8 reviewed from Charter Communications connected that computer
9 to the defendant, Jammie Thomas, correct?

10 A. That's correct.

11 Q. And you testified that there was no wireless router in
12 use on this date and time, correct?

13 A. That's correct.

14 Q. And then I believe we turned to your forensics
15 examination. Does that pretty much bring us up to where we
16 were?

17 A. Yes.

18 Q. Let me do two things before we get back into the
19 forensic examination with you. Yesterday Judge Davis asked
20 I believe the gentleman from Charter Communications a
21 question and I think you were in the courtroom. He asked
22 about IP address spoofing. You were in the courtroom and
23 heard the question?

24 A. Yes, that's correct.

25 Q. And you're familiar with IP address spoofing?

1 A. Yes.

2 Q. I would like, if you would, to answer Judge Davis's
3 question about that. First, would you describe or tell us
4 what IP address spoofing is.

5 A. Basically it's pretending to be somebody else, taking
6 over their IP address on the Internet.

7 Q. Have you seen any evidence that that occurred in this
8 case?

9 A. No.

10 Q. Do you have an opinion as to whether that happened in
11 this case?

12 MR. TODER: Objection, foundation.

13 THE COURT: Overruled.

14 THE WITNESS: My opinion is it did not happen in
15 this case.

16 BY MR. GABRIEL:

17 Q. Why?

18 A. Making IP spoofing work is extremely complicated. To be
19 able to pretend to be somebody else at the same moment in
20 time they're on the Internet is almost impossible to carry
21 out.

22 Q. Dr. Jacobson, I have one more preliminary thing and we
23 will get to your forensics exam. Can you look at
24 Exhibit 17, please. It is in Book 3 of 3.

25 A. Okay.

1 Q. Do you have it?

2 A. Yes, I do.

3 Q. This document is in evidence. It was the set of
4 documents that Charter provided to Mr. Toder, correct?

5 A. That's correct.

6 Q. And you've seen this before, correct?

7 A. That's correct.

8 Q. And there's a long list of numbers, et cetera.

9 MR. GABRIEL: Tim, would you put that up, please.

10 BY MR. GABRIEL:

11 Q. Go a few pages in. You can see it on the screen too,
12 Dr. Jacobson.

13 A. Yes. There's several pages of that, yes.

14 Q. All right. Yesterday we at least heard some questions
15 about a supposed computer party. Do you recall that?

16 A. Yes.

17 Q. And questions directed towards people in Ms. Thomas's
18 house who maybe were plugging in and unplugging computers
19 and --

20 MR. TODER: Objection, misstates the evidence,
21 misstates the question. It was a hypothetical.

22 MR. GABRIEL: I'll withdraw it.

23 THE COURT: Withdraw the question.

24 BY MR. GABRIEL:

25 Q. Do you recall the hypothetical about the computer party?

1 A. Yes, I do.

2 Q. Dr. Jacobson, from this data, can you tell us whether a
3 computer party happened?

4 A. Yeah. From this evidence, the computer party would not
5 have happened.

6 Q. Why?

7 A. As was shown by or was testified by the person from
8 Charter, third column over, that is the address, that's the
9 physical address of the computer in the home. Notice that
10 that address is consistent throughout this document. If
11 somebody else would have plugged in a different computer
12 into that cable modem, there would have been a different
13 address that would have been noted by Charter
14 Communications.

15 Q. You're looking at the client MAC address?

16 A. Yes, I am.

17 Q. And what is a client MAC address?

18 A. That is the MAC address of the device plugged into
19 the -- on the user's side of the cable modem. So a cable
20 modem has two sides. It has the side that plugs into
21 Charter's network, which is the modem MAC and modem IP; and
22 then it has the side that the user plugs into, which is
23 indicated by the client MAC and the client IP.

24 Q. So the first column is the MAC address on the modem,
25 which we discussed yesterday?

1 A. Right, on the Charter side of the network.

2 Q. And then the client MAC is the user's --

3 A. Side of the network, yes.

4 Q. And so you're saying -- and you're noting here that all
5 these are the same?

6 A. That's correct.

7 Q. And could you look in this document -- we won't put up
8 all the pages. What date range were they all the same for?

9 A. As you notice at the top, it begins at the end of 2004.
10 It runs through --

11 Q. And there are a number of pages of these, right?

12 A. There's numerous pages. It runs into '06, May, June,
13 June of '06.

14 Q. So on the user's side that number was the same for
15 years, right?

16 A. Yes, until June of '06 and then that number -- there was
17 some changes in that number in June of '06.

18 Q. Thank you, sir. Now, coming back to the forensic
19 examination that you did, I think that you indicated -- you
20 described that you were able to inspect the mirror image or
21 the copy, forensic copy, of Ms. Thomas's hard drive, the one
22 she gave you, correct?

23 A. That's correct.

24 Q. And then you indicated, I think is where we were, is
25 that you had seen a bunch of sound recordings on there,

1 correct?

2 A. That's correct.

3 Q. Can I ask you to look at Exhibit 26.

4 MR. GABRIEL: Your Honor, while Dr. Jacobson is
5 looking at it, I believe counsel has stipulated to this one
6 in advance, so we would move its admission.

7 MR. TODER: No objection, Your Honor.

8 THE COURT: 26 will be admitted.

9 BY MR. GABRIEL:

10 Q. Dr. Jacobson, do you recognize Exhibit 26?

11 A. Yes.

12 MR. GABRIEL: Mr. Reynolds, would you put up just
13 the first page so the jury can see what we're looking at.

14 BY MR. GABRIEL:

15 Q. What is Exhibit 26, please?

16 A. Exhibit 26 is a listing of the files found in the hard
17 drive in the My Music directory of the hard drive.

18 Q. And did you note anything about what you found in this
19 set of files?

20 A. Several things. It was a very large number of music
21 files, several thousand. They were almost entirely in the
22 WMA format, which is the Windows Media Player format. There
23 were a couple that were in the MP3 format.

24 Q. But a great majority were in WMA?

25 A. Almost all of them were in the WMA format.

1 Q. And that's different from what was in the share folder,
2 the Kazaa share folder?

3 A. That's correct.

4 Q. Would you remind the ladies and gentlemen of the jury
5 how that was different.

6 A. In the Kazaa share folder all but two of them were in
7 the MP3 file format, which is a different file format than
8 the WMA.

9 Q. Please continue.

10 A. The other thing I noticed is the times at which these
11 files were placed on the directory, placed in the computer,
12 that there were two date ranges. There was a date range
13 that was in the June time frame, June '05 time frame, where
14 there were several hundred songs downloaded and placed on
15 the computer over a short period of time. And then in the
16 January '06 time frame there were several thousand songs
17 placed on the computer in a very short period of time.

18 Q. And, of course, both of those dates you just described
19 were after the capture date in this case of February 21,
20 2005?

21 A. That's correct.

22 The other thing that I noticed is that all of the
23 files except for the three at the beginning, which were
24 placed there by Windows when you install Windows, all those
25 files are after the date of capture.

1 Q. So the thousands of music files you saw, with the
2 exception of the ones that Windows put on, were after the
3 date of capture?

4 A. That's correct.

5 Q. Dr. Jacobson, do you have an opinion, based on what you
6 have reviewed, as to how these recordings got onto the hard
7 drive that you were given?

8 A. Yes, I do.

9 Q. What's your opinion?

10 A. That these recordings were placed on the hard drive from
11 another hard drive.

12 Q. Could you explain that. How does that work?

13 A. You connect another hard drive to the computer. You can
14 either do it internally or hard drives can connect the same
15 way that other peripheral devices can connect, through a USB
16 port or some other external mechanism.

17 Q. When you say "peripheral devices," you mean like a
18 printer or a fax machine?

19 A. Yeah. Like other devices that are connected to your
20 computer, you can connect hard drives that way.

21 Q. And so you believe that these were put onto this hard
22 drive by way of another modem -- excuse me -- another hard
23 drive?

24 A. Another high-speed digital device. Due to the time
25 between each of these files, this had to have been

1 transferred at a very high data rate, much higher than what
2 you would find over the network or much higher than what you
3 would find by ripping the songs from your own CD's.

4 Q. And you may have just answered this, Dr. Jacobson, but
5 what is the basis for your opinion that these were put on by
6 plugging in another hard drive as opposed to ripping your
7 own CD's?

8 A. The time between each song as it's placed on the -- you
9 can see the time there is much shorter than what it would
10 take to rip a song.

11 Q. You're looking on the right-hand column here?

12 A. Yes, I'm sorry, I'm looking at the right-hand column.

13 Q. And that shows the dates each file was created?

14 A. Dates and times, yes.

15 Q. So by way of example, I just happen to be looking at
16 line 16, "06 Love Gives Love Takes.wma" and then "07 I Could
17 Not Ask For More.wma." What's the time between those files?

18 A. The time is 15 seconds, and that's much shorter than
19 what it would take to rip from an audio CD.

20 Q. Now, Dr. Jacobson, yesterday when you first told us what
21 you found on the hard drive that you reviewed, I believe you
22 stated that you did not find any evidence of Kazaa on that
23 hard drive; is that correct?

24 A. That is correct.

25 Q. And you also stated that you did not find any of these

1 digital audio files that plaintiffs claim were being shared;
2 is that correct?

3 A. That's correct.

4 Q. Is there a reason for that?

5 A. Yeah. This is not the same hard drive that was in the
6 computer connected to the Internet on the date of capture.

7 Q. And that's February 21, 2005?

8 A. That's correct.

9 Q. And what's the basis for your saying that?

10 A. All of these songs were placed on this hard drive after
11 the date of capture. None of the songs are in the same
12 format as the share folder and the songs are not in the same
13 format.

14 Q. And have you seen evidence from Best Buy?

15 A. Yes, and there's evidence from Best Buy indicating that
16 the hard drive in the defendant's computer was replaced in
17 March, which is after the date of capture.

18 Q. March of 2005?

19 A. That's correct, March of 2005.

20 Q. So is it accurate, then, sir, that the hard drive that
21 Ms. Thomas provided to you was a drive other than the one
22 that was in the computer on the day of capture?

23 A. That's correct.

24 Q. Does this affect your opinion that the computer that was
25 connected to the Internet on February 21, 2005 at the IP

1 address we've been discussing was used to copy and
2 distribute the plaintiffs' recordings?

3 A. This does not change my opinion.

4 Q. Why not?

5 A. The evidence collected through MediaSentry and Charter
6 Communications clearly shows that the computer connected to
7 the Internet at that time was responsible for distributing
8 copyrighted material.

9 MR. GABRIEL: If the Court could give me one
10 moment, I think I'm finished.

11 (Pause.)

12 BY MR. GABRIEL:

13 Q. I'm sorry, Dr. Jacobson. In terms of -- with respect to
14 the last question, and the information you had also
15 connected that computer to Jammie Thomas, correct?

16 A. That's correct, the information provided by --

17 MR. GABRIEL: I have -- I'm sorry.

18 THE WITNESS: That's okay.

19 MR. GABRIEL: I have nothing further.

20 MR. TODER: Can he finish his -- finish your
21 answer, please.

22 THE WITNESS: The information provided made that
23 final connection between the computer to Jammie Thomas.

24 MR. GABRIEL: Thank you.

25

CROSS EXAMINATION

1
2 BY MR. TODER:

3 Q. What information connected the computer to Jammie
4 Thomas?

5 A. The information provided by Charter Communications.

6 Q. And specifically what information was that?

7 A. That Jammie Thomas is the owner of the account, of the
8 computer, and that she's a subscriber to that account with
9 the user name of tereastarr.

10 Q. Charter Communications told you that Jammie Thomas owned
11 the computer?

12 A. Charter Communications indicated that Jammie Thomas
13 owned the Internet account and basically owned the cable --
14 or leased the cable modem that Charter Communications
15 identified as the modem where the computer was connected.

16 Q. Okay. So really all Charter Communications told you,
17 the only information you can glean from Charter
18 Communications -- I understand you have other reasons for
19 your opinions, but Charter Communications, none of their
20 evidence showed that the particular computer, the physical
21 computer, used was Jammie Thomas's computer?

22 A. Charter Communications' evidence showed that the cable
23 modem was leased to Jammie Thomas and that the computer
24 connected to that cable modem, through other evidence, was
25 the computer that was responsible for distributing

1 copyrighted materials.

2 Q. What other evidence?

3 A. The evidence by MediaSentry shows which computer was
4 responsible for distributing.

5 Q. So you're no longer saying Charter -- you've gone from
6 Charter Arms [sic] and now included MediaSentry, but the
7 question was -- and I will ask it again -- what evidence
8 from Charter Arms [sic] did you look at that specifically
9 says that it was Jammie Thomas's computer as opposed to her
10 account or as opposed to her modem?

11 A. I guess I'm not quite sure what you're asking as far as
12 her computer what.

13 Q. Charter Arms [sic] didn't identify with their
14 information Jammie Thomas's computer. As a matter of fact,
15 Mr. Weaver -- I'm sorry -- Mr. Edgar was testifying that
16 what Charter Arms -- Charter Communications, what they
17 turned over was the IP account, the account number, and we
18 saw that in a letter here. They turned over the IP address
19 that was registered to Jammie Thomas, correct?

20 A. They turned over the IP address and the cable modem MAC
21 address.

22 Q. Let's talk about that for a second. How would Charter
23 Communications know which MAC address was being used?

24 A. On their cable modem?

25 Q. Yeah, the MAC address of the computer.

1 A. On the inside of the network?

2 Q. Yeah.

3 A. As I said, cable modems have two MAC addresses they deal
4 with.

5 Q. Right.

6 A. The way that cable modems are designed to work is they
7 keep track of the internal MAC address. Some cable
8 companies use that to -- I hate to use the word "strip," but
9 they use that to help control what devices are connected
10 through their network. My cable company in my city uses the
11 MAC address to ensure that you only connect one device to
12 their network.

13 Q. If somebody else -- let's take a look --

14 MR. TODER: Is this on? Oops, I had it on. I
15 can't remember the exhibit number. Do you remember the
16 exhibit number?

17 MR. GABRIEL: 17, I believe.

18 BY MR. TODER:

19 Q. Do you remember this exhibit we were just looking at?

20 A. Yeah.

21 Q. You have a modem MAC address and you have a client MAC
22 address, right?

23 A. That's correct.

24 Q. Now, if a different computer was used on this other than
25 Ms. Thomas's computer, would the client MAC address change?

1 A. Yes.

2 Q. Okay. And how would Charter Communications know that
3 there was -- would they get some sort of a signal from that
4 computer?

5 A. Yes.

6 Q. And where on that computer would the signal emanate
7 from?

8 A. From the network.

9 Q. From the network, not from the computer itself
10 physically?

11 A. Well, yes, from the computer as it's plugged into the
12 network. So it asks the computer what is its hardware
13 address.

14 Q. All right. And where does the computer store that
15 information?

16 A. The hardware address?

17 Q. Yeah.

18 A. The hardware address is stored in memory that is on the
19 network interface card.

20 Q. Okay. Well, this is -- please bear with me here. Well,
21 anyway, so if a different computer came on there, you say
22 the client MAC address would change?

23 A. Yes.

24 Q. What if the hard drive was replaced?

25 A. It wouldn't have any -- as long as the physical -- the

1 rest of the physical computer remained the same, that
2 wouldn't have any effect.

3 Q. Thank you. When were you first engaged by the record
4 companies?

5 A. I believe it was September of '05. I don't remember the
6 exact date.

7 Q. How many reports have you issued to them?

8 A. I have no idea.

9 Q. Would 200 be a fair --

10 A. That would be a fair number.

11 Q. At least 200, correct?

12 A. I think so.

13 Q. What is your hourly rate?

14 A. \$200.

15 Q. And how much have you been paid by the recording
16 companies so far to do this work for them?

17 A. I would estimate about 45,000.

18 Q. And you have a company called Palisade you founded?

19 A. Yes.

20 Q. Do they do any work for the recording companies?

21 A. No.

22 Q. How much time do you spend on each one of these reports?

23 A. For a standard report, about 45 minutes.

24 Q. Now, it's possible for more than one device to be
25 operating behind a single IP address, correct?

1 A. If they have a private IP address through a router, yes.

2 Q. That's assuming the question meant more than one at a
3 time. But you can switch devices behind the IP address,
4 correct?

5 A. Yes, but they can't both be running at the same time.

6 Q. So, in other words, if -- in your home if you have a
7 computer hooked up and you take a laptop and hook that up
8 because you want to get something on the Internet, that
9 certainly works, doesn't it?

10 A. Yes.

11 Q. It's also possible for a computer to have more than one
12 user; is that a fair statement?

13 A. Yeah.

14 Q. And when a person is engaged in peer-to-peer file
15 sharing, it's not a particular person that's identified by
16 the IP address, correct?

17 A. The IP address identifies the computer that's running
18 the peer-to-peer software.

19 Q. The computer or the account?

20 A. Well, the IP address is associated with a device that is
21 in communication. So the IP address is used by the computer
22 that is communicating to the peer-to-peer network.

23 Q. But the IP address, again, doesn't identify the
24 individual, the human being?

25 A. The IP address identifies a device on the Internet.

1 Q. So the answer to my question is "yes" or "no"?

2 A. The IP address does not identify an individual.

3 Q. That's right, it does not identify an individual.

4 Do you know what pollution is on Kazaa?

5 A. I'm familiar with the term.

6 Q. The term. Do you know how -- what kind of problems
7 Kazaa has with pollution?

8 A. I don't know what type of problems Kazaa has.

9 Q. Your expertise doesn't extend to the nature and extent
10 of how Kazaa deals with pollution?

11 A. No.

12 Q. Would you tell the jury what pollution is.

13 A. Pollution is, as the name implies, putting things into
14 the Kazaa network that are bad. Pollution is bad things
15 getting into something and pollution is the act of putting
16 bad things into the network.

17 Q. You heard some discussion earlier about metadata?

18 A. Yes.

19 Q. Metadata is text, correct?

20 A. Yes.

21 Q. And metadata can be changed, can it not?

22 A. Yes.

23 Q. And it can be changed easily through commonly available
24 software?

25 A. Yes.

1 Q. And it can be changed through Kazaa, correct?

2 A. Yes.

3 Q. What's meant by the term "computer hygiene precautions"?

4 A. In the forensic examination arena, what we mean by that
5 is -- it comes into play in several places. It's how we
6 handle the computer. It's how we, as I talked about, we
7 make the copy of that hard drive. We do it in such a way
8 that we can ensure that the copy is exactly like what we got
9 and that what we take the copy from didn't get corrupted in
10 the process of copying it.

11 So you don't want to corrupt what you're copying,
12 yet you want to be able to ensure that the copy you have
13 matches what you have copied. So that hygiene process is
14 making sure that everything is done in a clean fashion.

15 Q. Because you don't want contamination, among other
16 things, correct?

17 A. I'm sorry?

18 Q. You don't want contamination, among other things?

19 A. Yeah. You don't want to alter the drive that you are
20 making a copy of, so you actually use a physical piece of
21 hardware that disables the ability to write to the hard
22 drive. It's a little box that you plug the hard drive into.
23 And when you plug that box into the computer that is making
24 a copy of a hard drive, the actual write -- the actual
25 signals that write to the hard drive are physically disabled

1 and so you cannot alter the hard drive that you are making a
2 capture of.

3 Q. Let's talk about computer hygiene precautions in a
4 different context. Let's talk about it when you get data
5 from multiple locations. You've testified before, I think
6 in your deposition in February of this year, about getting
7 data from multiple locations for one file and you talked
8 about that in terms of computer hygiene precautions. Tell
9 the jury what you mean -- what computer hygiene precautions
10 are when you are getting data from multiple locations.

11 A. In that respect, if you're getting data coming in from
12 various places, you need to be aware that that's what's
13 happening. You've got to be careful when you make a request
14 and you're trying to make a request from a single individual
15 for a single item, that that request stays intact and that
16 you're not getting information from others.

17 So some of the peer-to-peer networks allow you to
18 get data from multiple places and so you've got to be
19 careful. Kazaa, when you use Kazaa you're getting it from a
20 single location, but there are other things, like
21 BitTorrent, where you get your file from a whole bunch of
22 places a piece at a time.

23 Q. What's multipeer downloading contamination? Is that
24 what we're talking about?

25 A. Yeah. Again, that would be BitTorrent type of

1 applications where you get a piece of the file from --
2 different pieces from a bunch of different people. And
3 contamination would be if one of the people that you're
4 getting a piece from gave you a bad piece and then when you
5 put that bad piece into the whole file, now the file is
6 corrupted.

7 Q. People can hack into other people's computers, right?

8 A. Yes.

9 Q. As a matter of fact, you teach a course on how to do
10 that, don't you?

11 A. Yes, I do.

12 Q. And you also teach students on how to crack passwords,
13 don't you?

14 A. Yes.

15 Q. So that can certainly be done?

16 A. Yes.

17 Q. And I think you testified that an IP address can be
18 spoofed, did you not?

19 A. It is technically possible.

20 Q. Can a MAC address be spoofed?

21 A. Yes.

22 Q. Are you familiar how MediaSentry got the IP address in
23 this case?

24 A. Yeah. MediaSentry got the IP address when they started
25 the downloads of the 1,700 songs. That's the metadata that

1 I talked about when I explained how Kazaa works. You go to
2 the supernode, but the supernode just contains the indexes
3 to where the files are stored. So in those indexes are the
4 IP addresses of where the files are stored. And so
5 MediaSentry, upon retrieving the indexes, gets the IP
6 address of where the file that you want is stored.

7 Q. You don't know the exact process and procedures that
8 MediaSentry used, do you?

9 A. I do not know, as I said yesterday, I do not know -- I
10 have not seen the code for the software that MediaSentry
11 uses. I know that they use the Kazaa application to do --
12 to search. They use the Kazaa application to do the
13 downloads. So they use the same application that every
14 other user in the Kazaa network uses to download those
15 files.

16 Q. You've never tested or verified their procedures, have
17 you?

18 A. No.

19 Q. Are you familiar with the procedures that Charter
20 Communications employed to link Ms. Thomas's name and
21 address to the IP address?

22 A. No.

23 Q. Do you know who conducted that research for Charter
24 Communications?

25 A. I don't know the individual, but I believe the testimony

1 yesterday was that they have two people that do that. One
2 does the initial mapping of the IP address back to the user
3 and then they have a second individual to verify those
4 results.

5 Q. Of those 200 reports, at least 200 reports that you've
6 done, in any of those cases did it turn out that it was some
7 family member other than the infringer that actually did the
8 infringing or did the transfers?

9 A. When I submit the reports, I don't follow what happens
10 as far as the continuing lawsuits or the prosecution
11 afterwards. The reports that I file identify the
12 individual. There have been some cases where in a
13 deposition there is already information tying the account to
14 a son or a daughter and there's deposition transcripts that
15 make that linkage.

16 Q. So you generally don't follow to see what happens after
17 you submit your reports; is that what your testimony is?

18 A. I don't follow the legal process that carries on after I
19 file my reports, that's correct.

20 Q. You were the expert in Atlantic Recording Corporation
21 vs. Tanya Andersen, were you not?

22 A. Yes.

23 Q. And you gave a sworn declaration in that case?

24 A. I believe I did.

25 Q. And in that case it turns out that the person who did

1 the infringing wasn't Tanya Andersen, it was someone who
2 lived over 200 miles away, was it not?

3 MR. GABRIEL: Objection, Your Honor, relevance.

4 THE COURT: Overruled.

5 THE WITNESS: I'm not aware of who -- that's the
6 first I've heard of 200 miles away.

7 BY MR. TODER:

8 Q. This is the first time that you've heard from your
9 declaration it wasn't Tanya Andersen, it wasn't the
10 defendant in that case?

11 MR. GABRIEL: Objection, Your Honor, relevance,
12 403, and foundation. Counsel is misstating the facts of
13 that case.

14 THE COURT: Cross examination.

15 You may continue.

16 THE WITNESS: Would you please say the question
17 again.

18 MR. TODER: Could you please read back the
19 question.

20 (Previous question read back.)

21 THE WITNESS: Yes.

22 BY MR. TODER:

23 Q. Did you do any work on a case involving Gertrude Walton?

24 A. That does not -- that name does not ring a bell.

25 Q. Sarah Seabury Ward?

1 A. That name is not familiar.

2 Q. Candy Chan?

3 A. No.

4 Q. Paul Wilke?

5 A. No.

6 Q. User names don't actually tell you the real name of the
7 person who is actually using the name, do they?

8 A. In what context?

9 Q. The legal name of the human being, the user name doesn't
10 do that?

11 A. In the Kazaa network, no.

12 Q. In the Kazaa network, that's what we're talking about
13 today, right?

14 A. Yes.

15 Q. And a person can use really any user name that they can
16 make up, correct?

17 A. That's correct.

18 Q. Any one of us could go on the computer and call
19 ourselves tereastarr@kazaa.com, correct?

20 A. That's correct.

21 Q. And if someone is logged on a particular computer and
22 that computer was kept on and someone else came down and
23 came over there and started typing away, the same user --
24 the user name wouldn't change because a different human
25 being was typing, would it?

1 A. Yeah, that's correct. If the Kazaa application was
2 running and somebody else came down, that's correct.

3 Q. And actually multiple users of Kazaa can have the same
4 user name, can they not?

5 A. Yes.

6 Q. What's a zombie?

7 A. There's several places where we see that, but the most
8 widely accepted use of the term "zombie" is in computer
9 security. Zombies are programs that an attacker manages to
10 place on individuals' computers. And as the name sort of
11 implies, they sort of sit in the back and are hidden and
12 somebody sends them a signal and they wake up and they do
13 something. They're most commonly used to send spam e-mail
14 is one of their big uses.

15 Q. Is it fair to say that, in reference to computer
16 security, that a zombie is a program that's under the
17 control of someone else?

18 A. Yes.

19 Q. And what's a cracker?

20 A. Again, in terms of computer security, that's a term we
21 use for somebody that breaks into things, like the term
22 "safe cracker." And so this is somebody that carries out
23 those same functions only in a computer.

24 Q. What's a drone?

25 A. A drone is a little bit like -- it's a little bit like a

1 zombie only it's something that, again, is controlled by
2 somebody else. There's a lot of these terms that we have
3 several terms for sort of the same things. So drones and
4 zombies are somewhat interchangeable.

5 Q. Does your company, Palisades, have anything to do with
6 zombies or crackers or drones or any of that sort of thing?
7 They do security work, right?

8 A. Yes, Palisades sells security plans.

9 Q. Can you tell the jury exactly what Palisades does,
10 please.

11 A. Yeah. We sell basically a box, a computer that fits in
12 the corporate environment. Our target market is mid-sized
13 corporations, banks, and hospitals and so on. The box will
14 sit on the company's network and it is designed to stop the
15 outflow of things like credit cards, Social Security
16 numbers, private documents. So it's designed to keep things
17 like identity theft from happening.

18 It also helps the company manage their various
19 what we call network protocols, which is a term we use for
20 how things talk over the network. So it's designed to
21 manage the network communication that leaves an
22 organization.

23 Q. Do you consider screen shots to be reliable in the sense
24 that they can't be manipulated or forged?

25 A. Any document could be possibly altered or forged, but

1 the screen shot is a -- the process that the computer goes
2 through is a reliable process. When you take that screen
3 shot, it takes a -- basically the screen of the computer is
4 really in memory. Even though it may not look like that,
5 it's a pretty picture, it's whatever you're seeing, all
6 those little dots that make up the screen -- if you look
7 real closely, you can see little colored dots. All those
8 little colored dots are actually stored in memory.

9 And so what a screen shot does is basically takes
10 all those little colored dots and puts them in a file. So
11 that process of screen shot into the file is an accurate
12 process. Once it's in a file, then it's digital data.

13 Q. But it can be altered with a graphics editing program,
14 can't it?

15 A. Once it's in the file, then it's digital data that can
16 be manipulated.

17 Q. Did you do anything at all to verify the authenticity of
18 the screen shots that we have here in this courtroom?

19 A. No.

20 Q. Do you know what MediaSentry did to verify whether or
21 not those screen shots are genuine?

22 A. No.

23 Q. Did you do anything to verify whether or not the IP
24 address had been hijacked or not?

25 A. Other than -- well, I looked at -- in this case we had

1 the cable modem address, the MAC address, and the
2 information from Charter, which ties those together.

3 Q. So, in other words, you relied on Charter Communications
4 to -- as to whether or not the IP address had been or had
5 not been hijacked, correct?

6 A. That's correct.

7 Q. And having looked at that, you, I imagine, concluded
8 that it was not, right?

9 A. That's correct.

10 Q. What's a log text file?

11 A. A log text file, it's a log file. Many programs will
12 keep information about what they're doing. Sometimes it's
13 used for if something goes wrong. Sometimes it's just used
14 so you know what's going on. And that log is kept in what
15 they call a text file.

16 A text file is basically what you type on a
17 keyboard. Yesterday you saw those little circles and
18 diamonds and so on and they talked about that being binary.
19 You can't read that. Well, text is the rest of it. That's
20 what you can read.

21 Q. They can be easily altered, right, if it's a text file?

22 A. Yeah, text files can be changed.

23 Q. Back to the MAC address. How do you see the MAC address
24 of a transmitting device? How does Charter Communications
25 see the MAC address of a transmitting device?

1 A. Of a device on the user's side of the network, is that
2 what you are talking about?

3 Q. Yeah.

4 A. Since that device is directly connected to the Charter
5 modem, the MAC address is carried in the data that is being
6 transmitted from that device to the cable modem. The MAC
7 address is used to let the device know that that message
8 belongs to it and so the cable modem would get the MAC
9 address of the device.

10 Q. And how would it -- physically how does it -- how would
11 Charter Communications get the MAC address of a specific
12 computer that was hooked onto the modem that was supplied by
13 Charter Communications?

14 A. The modem would send that information back to Charter
15 Communications.

16 Q. The modem would send which information?

17 A. The MAC address of what's on the inside, it would send
18 that back to Charter Communications.

19 Q. And how does the modem know -- I mean, does the modem
20 have software where it can physically look and see what's
21 there?

22 A. Okay. Let me explain a little bit how this works. What
23 happens when you -- let's say you walk up and plug your
24 computer into this cable modem. As was testified yesterday
25 by Charter, the IP address is dynamically assigned because

1 Charter has many times more users than they have IP
2 addresses. So they hand them out when you want them.

3 And so what probably happens when you plug your
4 device into -- plug it in or turn it on and it wants to
5 connect to the Internet, what it does is it goes out and
6 asks for an IP address. And that process of asking for an
7 IP address, in doing so its MAC address is, of course,
8 transmitted through that process when it communicates with
9 the cable modem.

10 So the cable modem picks that up and says, oh, I'm
11 getting a request from this MAC address and it wants an IP
12 address. So it gets one from the master pool of IP
13 addresses, hands that to the computer and says here's your
14 IP address.

15 And then it reports back to Charter the IP address
16 of the cable modem, the IP -- I'm sorry -- the MAC address
17 of the cable modem, the IP address of the device, which is
18 basically the IP address it just handed out, and the MAC
19 address of the device that requested that IP and that all
20 goes back to Charter.

21 And as Charter testified yesterday, they use that
22 cable modem's MAC address and the IP address for billing
23 purposes. So that information, it's in their best interest
24 that that information is accurate.

25 Q. You can change a MAC address on your computer, can't

1 you?

2 A. Yes.

3 Q. How do you do that?

4 A. The easiest way is to go to the Internet and find some
5 software and download that software.

6 Q. And then --

7 A. Then you can type in a new MAC address.

8 Q. And where is that stored?

9 A. That's stored in memory. So that's stored -- typically
10 stored in memory and, depending on the software, it may also
11 put that in what we call the registry, which is what -- if
12 you are talking about a Windows machine, then that's the
13 place where you can store things that you want to remember
14 over time.

15 Q. It can also be stored on the hard drive, can it not?

16 A. That's where the registry is, yes. I'm sorry.

17 Q. It's stored on the hard drive?

18 A. It could be stored -- yes, it could be stored on the
19 registry, which is on the hard drive.

20 Q. So if you change the MAC address on the hard drive, then
21 a different MAC address would ultimately be shown to the
22 modem, which would be shown to Charter Communications,
23 right?

24 A. Yes, if you -- yes.

25 Q. And who installs the MAC address on the computer?

1 A. The initial MAC address?

2 Q. Yeah.

3 A. MAC addresses are handled the same way as IP addresses.
4 You cannot have two MAC addresses the same at the same time
5 on the same physical network. And so to ensure that doesn't
6 take place, there is an authority that hands out blocks of
7 MAC addresses to the vendors that create the ethernet or
8 create the actual network interface cards.

9 So every network interface card that's produced
10 has a unique MAC address and, again, they do that by this
11 process of handing out a block and then the vendor, every
12 time they produce one, you know, here's MAC address 1 and
13 MAC address 2, 3, 4 and so on.

14 Q. Those MAC addresses are supplied not by -- to the
15 computer, they aren't supplied by Charter Communications,
16 are they?

17 A. No. The MAC addresses are placed there by the vendor.

18 Q. Going back to -- is it Exhibit 17? I apologize. But do
19 you see here on March 7th, this is when defendant, her
20 computer went on the blink and she took it to Best Buy, who
21 decided to replace her hard drive and they did. They
22 replaced her hard drive on March 7th and she didn't get it
23 back until March 20th. So now from here on she has a
24 completely different hard drive, yet the MAC address didn't
25 change.

1 A. That's correct.

2 Q. Why is that if there's a different hard drive in there
3 and it's stored in the hard drive and --

4 A. Okay. It is only stored in the hard drive if you go
5 through the process of changing the MAC address. If you
6 never -- if you don't run this software that changes the MAC
7 address, it's not stored, the MAC address is not stored in
8 the hard drive. That storing in the hard drive is an
9 override to override what the hardware has.

10 So by default when a computer boots up, the
11 operating -- Windows goes out and looks at the network
12 controller and says, oh, there's a MAC address in the
13 network controller. But if you were to go in and say I
14 don't like that MAC address, I want a different one, you put
15 that in the hard drive, Windows would go -- actually goes
16 there first and says, oh, this is the MAC address they want
17 to use, I won't go look at the hard drive.

18 Q. Back to this exhibit again. Anyway, an IP address can
19 be -- they're changed, so a person can have one IP address
20 one day and one IP address another day, correct?

21 A. That's correct, if it's the dynamic protocol.

22 Q. And that's what we have here in this case, don't we?

23 A. Yes, that's correct.

24 Q. And Jammie Thomas had more than one IP address, did she
25 not?

1 A. I believe it shows more than one IP address there.

2 Q. And are computers more easily hacked when they're on or
3 when they're off?

4 A. Well, obviously when they're on.

5 Q. When they're on. And so if her IP address -- she had an
6 IP address -- do you remember looking at this (indicating)?

7 Does this give you any indication how long her computer was
8 on? When you turn off your computer, you may or may not get
9 the same address again?

10 A. When you turn it back on, that's correct.

11 If you look in the last two columns -- I have a
12 hard time looking at that.

13 Q. That's not too bad, is it?

14 A. Those last two columns are what they call the lease
15 time, lease start and lease stop time. Again, imagine they
16 have a small pool of IP addresses, which is smaller than
17 they have subscribers, and so they need to manage that pool
18 and so they don't want you to take an IP address and keep it
19 forever and so they lease it to you, they give it to you for
20 a period of time.

21 And when that lease starts to expire, you can ask
22 to keep it and they can say, okay, you can keep it or they
23 can refuse to let you have it again. So you may lose your
24 IP address while your computer is on or obviously when you
25 turn your computer off, then you lose your lease.

1 When you turn it back on again your computer goes
2 through and says I need an IP address and Charter goes,
3 okay, here's one for you. You can have it for, you know, a
4 certain amount of time, which is the lease time.

5 Q. But does this tell you, then, this computer is on for --
6 these (indicating) are the lease starts and these
7 (indicating) are the lease stops, correct?

8 A. I'm sorry, I cannot -- are you on the first page?

9 Q. These (indicating) are when the leases start and these
10 (indicating) are when the leases stop, correct?

11 A. That's correct.

12 Q. Does this suggest to you that the computer is on during
13 this period of time?

14 A. Yeah, the lease start and stop times indicate -- now,
15 when you -- as I said, you can keep asking for a lease to be
16 updated. And so what typically ties the two together is if
17 you keep the same IP address over an extended lease start
18 and stop time, that typically indicates that it's been on
19 over that period of time. It's highly unlikely that if you
20 turn your computer off and turn it back on again you would
21 get the same IP address.

22 Q. Okay. The files that you saw in MediaSentry's screen
23 shots, do you have any evidence that any of those files were
24 distributed to anyone other than MediaSentry?

25 A. Due to the nature of the way Kazaa works, those files --

1 there was 2 million plus users on the network.

2 Q. Now could you answer my question, please?

3 MR. GABRIEL: Objection, Your Honor. He did.

4 THE COURT: Overruled.

5 BY MR. TODER:

6 Q. Do you know of any instances of any downloading or any
7 distribution of those files on MediaSentry's screen shots
8 that were distributed to anyone other than MediaSentry?

9 A. Other than by the nature of the way Kazaa works, no.

10 Q. Thank you. Look at your report here. This is page 6 of
11 your report, which is Exhibit --

12 MR. TODER: Is it 22?

13 MR. GABRIEL: Yes, it is.

14 BY MR. TODER:

15 Q. Do you have it in front of you, Doctor?

16 A. Which page? I'm sorry.

17 Q. Page 6.

18 A. I'm there.

19 Q. I would like to look at page 18 -- or item 18. Can you
20 read that okay?

21 A. Yeah.

22 Q. You said you'll testify that the information from
23 MediaSentry indicates that the computer with IP address
24 24.179.199.117 -- technically the computer itself doesn't
25 have an IP address, does it?

1 A. Yeah, the computer has an IP address. Otherwise it
2 can't talk on the Internet.

3 Q. The IP address isn't registered to the computer, is it?
4 The account is with the owner, correct?

5 A. The account is an artifact of Charter Communications
6 charging money for giving that IP address out to an
7 individual. In order for a device to communicate on the
8 Internet, it has to have an address.

9 Q. There was a computer that was using that IP address,
10 correct?

11 A. Yeah, a computer using that IP address.

12 Q. At number 22 you said that you will testify, based on
13 all the information provided, that the computer, again, that
14 had the IP address of 24.179.199, et cetera, was registered
15 to the defendant. Now, it wasn't -- it was the IP address
16 that was registered to the defendant, correct?

17 A. The IP address belonging to that computer.

18 Q. You'll also testify that, based on MediaSentry logs,
19 going to the next one here, 23, music found on the
20 defendant's computer -- now, music was found on a computer
21 that was identified by MediaSentry using the name tereastarr
22 and you're just saying it's defendant's computer because of
23 all the things that you've looked at here, correct?

24 A. That's correct.

25 Q. You also are going to testify about downloading, the

1 speed, the songs that were on defendant's computer, the one
2 that you actually did a forensics examination of, correct?

3 A. Yes.

4 Q. And you opine that another hard drive was used and that,
5 based on the times involved, defendant could not possibly
6 have stuck in one CD and then recorded it and then stuck in
7 another CD and recorded it, correct?

8 A. And placed those files in that directory, that's
9 correct.

10 Q. The highlighted areas, I again apologize for this thing
11 not being able to -- we have more time here and you'll see
12 where this goes to --

13 THE COURT: Counsel, if I could ask that
14 plaintiffs bring up this exhibit on their system so we can
15 see it.

16 MR. GABRIEL: I would be happy to.

17 MR. TODER: Page 4. Can I use your pointer?
18 Since we're all working together here.

19 MR. GABRIEL: That will cost you.

20 BY MR. TODER:

21 Q. 164, this is where one CD stops, right, and the next one
22 starts? Does that appear to be the case? We've got
23 track 1, track 2, track 3, track 4, but this is where we
24 have a change in CD's, do we not?

25 A. That appears to be -- yeah, that's a change in titles,

1 yes.

2 Q. So between 163 and 164 -- this (indicating) means 12:45
3 in the morning?

4 A. Yes.

5 Q. And then 15 seconds?

6 A. Yes.

7 Q. So it took roughly, what, about a minute -- or half a
8 minute to take out one CD and put it in?

9 A. It took half a minute between the time those two files
10 were placed in that directory, yes.

11 Q. So if she was actually taking CD's -- and you know she
12 owns a lot of CD's, do you not?

13 A. I have no recollection of how many CD's she owns.

14 Q. Did you read her deposition testimony?

15 A. Yes, but as I sit here I don't recall how many CD's she
16 owns.

17 Q. Do you realize that she actually brought in boxes of
18 CD's to her deposition and that was in the testimony?

19 A. I do not recall how many CD's were stated in the
20 deposition.

21 Q. It was hundreds, wasn't it?

22 A. Like I said, I don't recall.

23 Q. You don't recall. Okay. Well, she testified that she
24 stuck these in and recorded them, she ripped them. So we
25 have about a half a minute between this CD and the next one

1 and then between each -- as each track was recording, this
2 track here took about 15 seconds to go from 3 to 4 and this
3 track here, from 4 to 5, it took another 15 seconds. About
4 15 seconds, it seems like, you know, between each file that
5 got recorded. Is my time and my math right here? Here's
6 track number 8, 12:47:29, and then the next one here is, oh,
7 about 20 seconds to record that one.

8 You're saying that's not consistent with sticking
9 a CD in a hard drive and having it record it?

10 A. Those times are rather fast for ripping an audio CD into
11 a digital format.

12 Q. You're saying this could only be done by one hard drive
13 connected to another?

14 A. That's how it appears to me, yes.

15 Q. Have you ever taken any CD's and stuck them into a
16 computer and then ripped them?

17 A. Yes.

18 Q. And how long does it take you to do that per song
19 generally?

20 A. Fifteen tracks, three to four minutes --

21 Q. Isn't that we have here?

22 A. -- five minutes, somewhere in that ballpark.

23 Q. And that's what we have here, about three to four
24 minutes, right, maybe three minutes?

25 A. A little less than that.

1 Q. And if you had hooked one hard drive to another, how
2 fast would these take? What kind of seconds between songs
3 would you expect there to be?

4 A. Depending on the speed of the hard drives, again, I'd
5 expect about 15 seconds or so to copy across between two
6 hard drives through the computer.

7 Q. Which is the same as -- you're saying it's the same?
8 Your testimony is the hard drive is a lot faster. So is it
9 faster or is it the same?

10 A. No, the hard drive is going to be faster. Ripping a
11 song, it depends on the length of the song and so on, but
12 it's going to take, you know, upwards probably 30 seconds to
13 a minute to rip a song. It depends on the computer, you
14 know, the speed of the disk drive. There's so many
15 variables involved.

16 MR. TODER: Your Honor, we would ask for a brief
17 recess. We have Ms. Thomas's computer here. We have the
18 very CD's that we have here. And just for purposes of
19 demonstrating this and for purposes of cross examination, we
20 would like to have the doctor just put in the two CD's and
21 see how long it takes to download them and see how that
22 compares to this right here.

23 THE COURT: How much time do you need?

24 MR. TODER: Probably need 15 minutes at the most.

25 THE COURT: We'll take a 15-minute break.

1 MR. TODER: Thank you.

2 MR. GABRIEL: Your Honor, I'm sorry, I would like
3 the opportunity to inspect the --

4 THE COURT: Excuse me. We can argue this outside
5 the jury. All rise. We'll take a 15-minute break.

6 (Jury excused.)

7 **IN OPEN COURT**

8 **(JURY NOT PRESENT)**

9 THE COURT: Counsel, you wanted to say something.

10 MR. GABRIEL: Forgive me, Your Honor, I apologize.
11 Yes, Your Honor, we would like -- I have a relevance problem
12 with this. It depends -- how fast the CD rips, as
13 Dr. Jacobson I think testified, depends on the speed of all
14 kinds of things, the CD drive, the hard drive, all kinds of
15 things.

16 We have no idea if this is the same hard drive
17 that was used at any particular time or whether anything was
18 done to this computer. To show up in court now and say
19 we're going to surprise you with this -- we've never been
20 given this computer. We were given a copy of a hard drive.
21 -- is highly prejudicial. We object to it.

22 MR. TODER: Your Honor, Dr. Jacobson issued two
23 reports in this case.

24 Report number one did not suggest anything at all
25 about this computer and downloading songs and how -- one

1 hard drive to another. Then he did a supplemental -- that
2 was in January.

3 In May he did a supplemental report and that's
4 when we got wind of the fact that all of a sudden now he's
5 going to testify about -- he's going to attack her
6 credibility. He's going to testify that this had to have
7 been done hard drive to hard drive. His report doesn't even
8 talk about that. It just concludes it. It's an extra
9 opinion tacked onto the end of this report of his.

10 THE COURT: You can present your demonstration in
11 court.

12 MR. TODER: Thank you, Your Honor.

13 THE COURT: We'll take a 15-minute break.

14 (Recess taken at 10:10 a.m.)

15 * * * * *

16 (10:45 a.m.)

17 **IN OPEN COURT**

18 **(JURY NOT PRESENT)**

19 THE COURT: Counsel, do you wish to be heard?

20 MR. GABRIEL: Yes, Your Honor. Thank you. I'm
21 not sure whether Mr. Toder needs to lay any additional
22 foundation for the demonstration he wants to do. If he
23 does, he certainly can go first. We would like to voir dire
24 Dr. Jacobson on this issue outside the presence of the jury
25 before we go forward with the demonstration. We will make a

1 motion after that.

2 THE COURT: All right. Go ahead.

3 MR. GABRIEL: Thank you, Your Honor.

4 **VOIR DIRE EXAMINATION**

5 BY MR. GABRIEL:

6 Q. Dr. Jacobson, during the break you had an opportunity to
7 observe the defendant was setting up this demonstration that
8 they're doing, correct?

9 A. That's correct.

10 Q. And you understand that they want to do a demonstration
11 to show how quickly a CD rips using this, correct?

12 A. That's correct.

13 Q. Is there a live Internet connection here today?

14 A. No.

15 Q. Does that affect how fast a CD will rip?

16 A. Yes, because Windows wouldn't have -- Windows Media
17 Player normally wants to go out and get the basic metadata
18 for these songs, and so in this case it wouldn't have an
19 opportunity to do that.

20 Q. Which would make it faster, correct?

21 A. Yes.

22 Q. And in addition, these are -- you talked about this
23 concept of cached information, correct?

24 A. Yes.

25 Q. Remind the Court what that meant.

1 A. Cache is where you put copies of things you have gotten
2 on the Internet on an earlier date that stay on your
3 computer.

4 Q. And as far as you know, these same CD's are already
5 cached, right?

6 A. The metadata could very well be cached, yes.

7 Q. And that would make it much faster, correct?

8 A. That would make it much faster.

9 Q. Do you have any way of knowing whether all of the
10 hardware and software is the same today as it was in
11 February of 2005?

12 A. No.

13 Q. In fact, one thing you do know is the software is
14 different, do you not?

15 A. Yes.

16 Q. We asked in the break for the defendant to put up the
17 software of Windows Media Player that she's now going to
18 use, correct?

19 A. That's correct.

20 Q. What version is it?

21 A. This is Version 11.

22 Q. When was Version 11 released?

23 A. Version 11 was released in very late '06. For public
24 distribution it was early '07.

25 Q. And does that new version change how recordings rip from

1 February of 2005?

2 A. Yeah, they've added enhancements to the ripping process.

3 Q. Could you describe what those enhancements are.

4 A. They talk about enhancements to ripping in the WMA
5 format, basically adding some support for better ripping of
6 WMA.

7 Q. And so that would make it faster today, correct?

8 A. Yes.

9 Q. Are there hardware issues that affect the speed of a
10 rip?

11 A. The CD drive that you're ripping from and the hard drive
12 that you're ripping to would have an effect on the overall
13 speed.

14 Q. How so?

15 A. A faster hard drive. The primary one would be a faster
16 CD. A faster read rate on a CD drive is going to speed up
17 how fast that data is transferred into the Windows Media
18 Player software.

19 Q. Have those technologies changed from three years ago to
20 today?

21 A. Yes.

22 Q. Have they gotten a lot faster?

23 A. They've gotten faster, yes.

24 Q. Are there software issues that affect the speed of the
25 rip?

1 A. There would be potential enhancements to the Windows
2 operating system that may affect the overall performance of
3 the Windows operating system, which could affect the speed
4 of the rip.

5 Q. We know today -- again, you've already described it --
6 we're dealing with a current -- a more recent version of
7 Windows Media Player, correct?

8 A. Yes.

9 Q. In fact, late 2006 or 2007 version?

10 A. That's correct.

11 Q. That would be quite a bit faster than the one that
12 existed in February of 2005, right?

13 MR. TODER: Objection, leading.

14 THE COURT: Rephrase.

15 MR. GABRIEL: I'll withdraw the question.

16 BY MR. GABRIEL:

17 Q. Would that be faster than --

18 MR. TODER: Objection, leading.

19 THE COURT: Overruled.

20 THE WITNESS: The new version, they talk about the
21 fact that they made improvements to the ripping process and
22 therefore those improvements go to speed. That's the big
23 bottleneck in any ripping process.

24 BY MR. GABRIEL:

25 Q. Do you have a view, Dr. Jacobson, as to whether all

1 these various technologies today would affect the speed of
2 the rip?

3 A. Yes.

4 Q. Why?

5 A. I think the speed of the rip would be faster with these
6 technologies today than they would be a year or two ago.

7 MR. GABRIEL: Your Honor, based on all of that, we
8 object to this demonstration. It's not similar facts or
9 circumstances. We're dealing with, in particular, different
10 software that we know to exist today, that was put in in
11 2007, from 2005. The demonstration would be highly
12 prejudicial given those factors.

13 As I understand and recall the law, under Rule 403
14 a demonstration has to be under substantially similar
15 circumstances. For all the reasons Dr. Jacobson described,
16 these have not been.

17 And I will say again we haven't had the
18 opportunity to see this computer, so we're hamstrung and we
19 can't talk about all the hard drive changes that may exist,
20 but one we do know about is the software change that exists.
21 This is Windows Media Player Version 11. It's not the same
22 that existed in February of 2005. It would be much faster
23 today and the demonstration would be misleading and highly
24 prejudicial. We object to it.

25 THE COURT: Counsel.

VOIR DIRE EXAMINATION

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BY MR. TODER:

Q. Windows Media Player is the software that is being used, correct?

A. That's the software you have up there, that's correct.

Q. And it's the same software that was used in the exhibit here that we had, I think it was 26, Exhibit B to your report where you list all the songs, it was the same software then too, right, it was Windows Media Player?

A. The songs were produced by a version of Windows Media Player.

Q. So really the difference between what you have then and what you have now is a version or an upgrade of some sort, correct?

A. An upgrade to enhance the performance of the software, that's correct.

Q. And are you familiar with what that upgrade really entails, upgrade 11?

A. I have a cursory knowledge of what that -- it talks about the fact that it did improve the way that it handles the WMA formats and there's a bunch of cosmetic things that they added, but one of the things they talked about is their improvement to the ripping process.

Q. Ripping process, but you never used the word "faster" or "speedier." That was what your counsel used. You said

1 "enhancements" and you said "improvements."

2 Do you know what the difference in ripping speed
3 is between these two versions of the software?

4 Milliseconds?

5 A. I have not done a performance test between the two
6 versions.

7 Q. Could you estimate without speculating?

8 A. Not without knowing the exact code. It could be
9 anywhere from milliseconds to tens of seconds.

10 Q. Well, you don't know, you have never seen any data,
11 correct?

12 A. That's correct.

13 Q. You have never seen any data that says how much
14 faster -- if one is faster than the other, you have never
15 seen any data that compares the speed of ripping, have you?

16 A. Between versions of Windows Media Player?

17 Q. Correct, these two versions that we're talking about
18 today.

19 A. I don't know what the other version is. All I know is
20 that the songs were ripped with a version other than
21 Version 11. So I don't know what version that the defendant
22 was using.

23 Q. Well, in 2000 -- in June of 2005 what version was
24 extant?

25 A. 10 would have been the common version. That doesn't

1 mean that the defendant couldn't be using a different
2 version, an earlier version.

3 Q. So you couldn't tell actually when you looked at her
4 hard drive -- you examined her hard drive, did you not?

5 A. Yes, I did.

6 Q. You couldn't tell what version of software she was
7 using?

8 A. I did not look for the particular version of Windows
9 Media Player.

10 Q. But you still were able to conclude that it wasn't
11 ripped, it was done from a hard drive?

12 A. Yes.

13 Q. Well, you don't know how much faster Version 11 is than
14 Version 10 is, do you, ripping speed?

15 A. I don't know the exact number.

16 Q. You don't know a number at all, do you?

17 A. No.

18 Q. And you talk about not knowing this computer. Now, the
19 hard drive that you examined came from that computer, did it
20 not?

21 A. The hard drive I examined was reported to have come from
22 that computer. Whether that's the same hard drive that's in
23 that computer right now, I do not know.

24 Q. You never have seen this computer?

25 A. No, I have not.

1 Q. Did you look at the computer today?

2 A. I looked at the serial number of the computer.

3 Q. Is it the same hard drive you examined?

4 A. I did not have the physical hard drive from her computer
5 to examine.

6 Q. Did you have any information about the hard drive, any
7 kind of a serial number, any kind of identifier?

8 A. All I had was that it was a Western Digital drive and a
9 date.

10 Q. Is this (indicating) a Western Digital drive?

11 A. I did not look at the hard drive in here. I simply
12 verified the serial number of the --

13 Q. Would you like to look at it now?

14 A. I could.

15 Q. Will you take our word for it that it's a Western
16 Digital drive?

17 A. In all likelihood. There's a lot of Western Digital
18 drives.

19 Q. Do you have any information or evidence that -- strike
20 that.

21 MR. TODER: Your Honor, I would respectfully ask
22 that their motion to disqualify this, our presentation, be
23 denied. We have here expert testimony -- either that or the
24 expert testimony should be stricken regarding the speeds,
25 and I think we would make that motion right now that we made

1 earlier.

2 Because given that he didn't know the difference
3 between which versions, given the testimony about how he
4 said it was 15 seconds for one and then 15 seconds for the
5 other, the hard drive versus -- a hard drive to hard drive
6 connection versus ripping, I would ask that either we be
7 allowed to do this or alternatively the Court instruct the
8 jury that his testimony just respecting whether or not her
9 CD's were a hard drive to hard drive or a ripping to hard
10 drive connection be stricken.

11 THE COURT: Anything further?

12 MR. GABRIEL: I'll just respond to the motion,
13 Your Honor. The testimony about speed was based on data
14 that he had. So there was basis for the data that he had,
15 and Mr. Toder can cross on that. So there's no basis for
16 any motion to strike.

17 And the fact is it's admitted that we have a
18 different software. We have Version 11 versus Version 10 or
19 lower. I don't think he needs to know on the spur of the
20 moment today, not having been given any warning about this,
21 what the exact speed or difference is. We have an admission
22 that it's a different software. It's upgraded. It wasn't
23 the one at the time.

24 It is Mr. Toder's, the defendant's burden here to
25 support this demonstration, not ours, and I submit that he

1 has not done so. Quite to the contrary, he admits it's a
2 different version. These are not substantially similar.

3 THE COURT: Anything further?

4 MR. TODER: No, Your Honor.

5 THE COURT: Let's bring the jury out. The motion
6 is denied. You can cross-examine on the demonstration.

7 **IN OPEN COURT**

8 **(JURY PRESENT)**

9 MR. TODER: Your Honor, at this point we would
10 like to download through the Windows program, rip, so to
11 speak, two CD's to my client's hard drive. And I would ask
12 that my client actually do this, because I guess I can't
13 even run an ELMO here today, with the Court's permission.

14 THE COURT: You may.

15 MR. TODER: And if you could just tell the
16 jury what you are -- explain what you are doing, please.

17 MS. THOMAS: Okay. The first CD that I am going
18 to rip to my hard drive is AFI --

19 COURT REPORTER: Excuse me. If you could just --

20 MS. THOMAS: I apologize. I didn't speak very
21 loud.

22 The first CD I am going to rip to my hard drive is
23 AFI, *Single Sorrow*. This one, I believe, has approximately
24 12 songs on it, according to the insert. I will be timing
25 how long it takes to rip using the stopwatch on my phone.

1 MR. TODER: Excuse me. Which exhibit -- on this
2 exhibit, which song is that?

3 MS. THOMAS: We're starting at -- on this exhibit
4 we're starting at 164 and this goes through 183.

5 MR. TODER: May the record reflect we're looking
6 at Exhibit 26?

7 THE COURT: It may.

8 MR. TODER: And starting at song 164 and it goes
9 to, you said, Exhibit -- or 203, right?

10 MS. THOMAS: No. 183 is the last song on this CD.

11 MR. TODER: On this CD?

12 MS. THOMAS: That's correct.

13 MR. TODER: And then the next song is -- which CD
14 is that?

15 MS. THOMAS: The next CD that I'll be ripping is
16 Christina Aguilera, her initial CD, and this one here has
17 approximately 12 songs.

18 MR. TODER: Is it ripping now, as we speak?

19 MS. THOMAS: It's ripping right now, as we speak.

20 MR. TODER: You started your stopwatch?

21 MS. THOMAS: Yes, I started my stopwatch, sir.

22 (Pause.)

23 MR. TODER: And could you just tell us, how long
24 did that take?

25 MS. THOMAS: It took two minutes, 36.81 seconds.

1 MR. TODER: Two minutes, 36 seconds?

2 MS. THOMAS: .81 seconds, yes, sir.

3 MR. GABRIEL: Your Honor, we'll note -- we were
4 timing as well -- we got almost four minutes. We object.

5 MR. TODER: Perhaps we should do it again.

6 THE COURT: The jury was watching, so they can
7 determine how much time it was.

8 (Pause.)

9 MR. TODER: The time?

10 MS. THOMAS: Two minutes, 17.71 seconds.

11 MR. GABRIEL: Again, Your Honor for the record, we
12 were timing it. We got three minutes and 30 seconds.

13 MR. TODER: Thank you.

14 THE COURT: Continue.

15 MR. TODER: May I approach the witness, Your
16 Honor?

17 THE COURT: You may.

18 BY MR. TODER:

19 Q. Dr. Jacobson, I'm showing you page 4 of Exhibit 26. Do
20 you see beginning at 164, which is the first CD, and then
21 the second CD starts at 183? The first CD I believe --

22 MR. TODER: Your time was what?

23 MS. THOMAS: Two minutes, 36.81.

24 BY MR. TODER:

25 Q. Two minutes and 36 seconds. I think counsel here said

1 it was four minutes. But actually Exhibit 4 says, if you do
2 the math, it's three minutes and 55 seconds, is it not, for
3 the first CD?

4 A. Yeah, that --

5 THE COURT: Speak up, sir.

6 THE WITNESS: I'm sorry. I'm trying to do the
7 math in my head. Yeah, that appears to be right.

8 BY MR. TODER:

9 Q. The second CD --

10 MR. GABRIEL: We object to that. We added them up
11 and the witness --

12 THE COURT: Excuse me, Counsel. What's your
13 objection?

14 MR. GABRIEL: I'm sorry. Objection on relevance
15 and 403. It's a math issue. We can stipulate to the math.

16 THE COURT: Overruled. You may examine him.

17 MR. TODER: Thank you, Your Honor.

18 BY MR. TODER:

19 Q. Again, I did the math and it's three minutes and 55
20 seconds?

21 THE COURT: Excuse me, Counsel. I don't need you
22 testifying. Ask the question of the witness.

23 BY MR. TODER:

24 Q. Have you added up how long on Exhibit 26 the first song
25 [sic] took to download? That would be item 164 through 183.

1 A. I've not added up all the individual download times.

2 Q. You can subtract them, can't you, the bigger one from
3 the little one?

4 A. About two minutes and 40 seconds.

5 Q. Two minutes and 40 seconds?

6 A. Going from 164 to 183.

7 Q. Don't you have to go to 184 because aren't these the
8 times that these -- the downloading starts or is it the time
9 it concludes?

10 A. 184 would be putting a new one in.

11 Q. So that's the time you start, correct, these times you
12 see on the right-hand side?

13 A. That's the time that the file is -- yeah, that's the
14 time the file is put in there.

15 MR. TODER: If I may, Your Honor?

16 THE COURT: (Indicating.)

17 BY MR. TODER:

18 Q. 184 has a time of 12:49:44 on Exhibit 26 and the first
19 song on there began to be recorded at 12 -- that's item
20 number 164 at 12:45:49, correct?

21 A. Are you saying that song 184 is on the same album as
22 song 164?

23 Q. No. I'm saying that because these numbers on the
24 right-hand side say when the song starts, you couldn't end
25 this thing at the time that the last song started, you have

1 to allow some time from when the last song finished,
2 correct?

3 A. You also can't say that that other time was when that
4 song finished.

5 Q. So the difference, then, would be exactly 12 seconds,
6 whether you do it one way or the other; is that correct?

7 Somewhere during that 12-second period another CD was put
8 in; does that sound plausible?

9 A. I don't know where you are getting 12 seconds from.

10 Q. The difference between --

11 A. 183 and 184 is about 45 seconds.

12 Q. I'm sorry. It says 183 is 12:48:32 and that's when the
13 last song was put in, correct?

14 THE COURT: Excuse me. Counsel, if we could help
15 the jury. Let's put this exhibit up so the jury can see it
16 and follow along.

17 MR. REYNOLDS: I need one minute, Your Honor, to
18 get back online.

19 MR. TODER: You're not connected to the projector,
20 though. We need to go to page 4.

21 BY MR. TODER:

22 Q. Doctor, if you look at page 4, this is -- the start time
23 on Exhibit 26 is 12:45:49, is it not?

24 A. Yes.

25 Q. And that's what I have here is 12:45:49. And then these

1 songs are starting to download and they go all the way down
2 here. 183 is 12:48:32, but that's when the song started to
3 be downloaded, correct?

4 A. Right.

5 Q. So somewhere -- the next song started, the next CD then
6 was ripped, was inserted, and it started to copy itself at
7 12:49:44. And we know that there might be some difference
8 between 12:48 and 12:49, but just assuming for a sec that it
9 was 12:49, there would be three minutes and 55 seconds for
10 this to download, according to these figures here?

11 A. The difference in time between row 164 and row 184 is
12 your three minutes and 55 seconds, that's correct.

13 Q. And I think counsel said that they got four minutes and
14 we got 2.36.

15 MR. TODER: May we do the next CD, Your Honor?

16 THE COURT: You may.

17 MR. TODER: We have two CD's here.

18 MS. THOMAS: We already did the next one. We
19 already did it.

20 MR. TODER: I'm sorry.

21 BY MR. TODER:

22 Q. The next one begins at 01, 12:49:44, and it goes down to
23 203. So the last CD was started -- and the next album
24 started at 12:53:08. So that's roughly whatever time it
25 takes to put a CD in, but the number is somewhere between

1 here (indicating), correct?

2 A. The difference between those two, yes.

3 Q. And this whole distance -- this whole column here, have
4 you calculated how long that took? I have three minutes and
5 24 seconds.

6 A. The difference between those two columns appears to be
7 that. Yeah, that seems to be right, if it's through row --

8 Q. And of course that would be a shorter time actually
9 if -- before the next CD was ripped at 12:53:08. If this
10 song only went 20 seconds, that means this number here would
11 be 12:52:46. So the number is something less than probably
12 3.24. We know it's less than 3.24, do we not?

13 A. If these were indeed ripped and you had the time to
14 exchange the CD in and out.

15 Q. And this downloaded at two minutes and 17 seconds,
16 according to my client. Do you have any doubt that it took
17 two minutes and 17 seconds to do this?

18 A. In the courtroom?

19 Q. Yeah.

20 A. If that's what the time is.

21 Q. And she didn't use a hard drive to a hard drive
22 connection here today, she actually ripped something before
23 our very eyes, did she not?

24 A. Yes.

25 Q. And is it still your testimony that this -- that these

1 numbers here are so fast that they would have had to have
2 been done by a hard drive and couldn't have been done by
3 ripping from a CD? Are you certain?

4 A. Given new versions of software, it looks like you can
5 rip this fast.

6 Q. And this is a new version of software. Actually she
7 used Windows Media Player to rip these and we are using
8 Windows Media Player here today in the courtroom, are we
9 not?

10 A. Yes.

11 Q. The difference is that she probably used Version 10 as
12 opposed to Version 11?

13 A. That's correct.

14 Q. And you know this (indicating) is Version 11?

15 A. Yes.

16 Q. Do you know for a fact that Version 11 is faster than
17 Version 10?

18 A. I have no performance data that compares the two.

19 MR. TODER: We have no further questions.

20 MR. GABRIEL: May I, Your Honor?

21 THE COURT: (Indicating.)

22 MR. GABRIEL: Thank you.

23 **REDIRECT EXAMINATION**

24 BY MR. GABRIEL:

25 Q. Dr. Jacobson, I'll start with this demonstration. There

1 is no -- you had the opportunity to observe the defendant
2 setting this all up, correct?

3 A. Yes.

4 Q. And you actually watched -- it was the defendant who did
5 it, correct?

6 A. Yes.

7 Q. There's no live Internet connection here; is that right?

8 A. That's correct.

9 Q. Does the absence of a live Internet connection make a
10 difference in terms of speed?

11 A. When you're ripping music, yes.

12 Q. Would you explain that to the ladies and gentlemen of
13 the jury.

14 A. The modern programs that do this ripping will go out to
15 the Internet to load some of that metadata we talked about,
16 artist, song title, genre, and it needs to go out to the
17 Internet to get that information and so that takes time, to
18 go out and connect to the server and figure out what the
19 album is and then download those metatags, the metadata.

20 Q. And how would that affect the speed?

21 A. Obviously it takes time to go out to the Internet and
22 retrieve that information. So it would make it -- take
23 longer to rip the music.

24 Q. If this was connected to a live Internet connection?

25 A. If it was connected and there was nothing in the caches.

1 I think the caches override even going to the Internet.

2 Q. Would you explain that.

3 A. Yesterday we talked about caches. When you get things
4 from the Internet, all the programs try to be helpful and
5 keep copies of it local so you don't have to go out and get
6 it again. The same thing happens here, so it will keep that
7 information local. If it has it, therefore you don't need
8 to go out to the Internet.

9 Q. And so the CD's here were already cached?

10 A. It came up with the metadata.

11 Q. And how would that affect the speed of this
12 demonstration that we did today?

13 A. It would make the demonstration go faster.

14 Q. Dr. Jacobson, do you have any way of knowing whether all
15 the hardware and software on this machine today is the same
16 that was in the machine in 2005?

17 A. No.

18 Q. In fact, you know one thing that's different is the
19 software, correct?

20 A. The Windows Media Player is different, yes.

21 Q. Did you have an opportunity to look at the software
22 version on the break?

23 A. Yes.

24 Q. What version is this playing?

25 A. This is playing Version 11.

1 Q. And when was that released?

2 A. It was released to the general public in '07. It was
3 released for OEM, which means put it into computers that
4 other people sell, very late '06.

5 Q. So this was two years after -- it was released two years
6 after the Windows software at issue in the case, allegedly?

7 A. Um-hmm.

8 Q. Right?

9 A. Yes.

10 Q. Does the new version change the ripping in any way?

11 A. The new version enhances the way that it rips the CD's.

12 Q. How so?

13 A. The documentation talks about the fact that they've
14 improved the method that they use to create the WMA formats
15 from the CD's.

16 Q. And you indicated in response to Mr. Toder's questions
17 that I guess you haven't seen the code to know exact speeds.
18 Do you have an opinion as to whether the software, the
19 Windows Media Player Version 11, would be faster or slower
20 or something else compared to Windows Media Player 10 or
21 lower?

22 A. Since the fact they talk about enhancements, that leads
23 me to believe that there's -- the only thing really you can
24 do to make ripping better is to make it faster.

25 MR. TODER: Objection, calls for speculation.

1 THE COURT: Overruled.

2 THE WITNESS: When they talk about it being
3 better, again, it's typically going to be an improvement in
4 speed. The WMA format doesn't change.

5 BY MR. GABRIEL:

6 Q. Are there hardware issues, Dr. Jacobson, that would
7 affect the speed?

8 A. Yeah. The speed of the CD-ROM drives would affect the
9 speed. To a lesser extent, the speed of the hard drive
10 itself would affect the speed.

11 Q. Have hard -- has hardware improved since 2005?

12 A. Yes.

13 Q. And has speed gotten faster, based on new hardware,
14 since 2005?

15 A. Yeah. Hard drives have gotten incrementally faster and
16 CD's have gotten faster.

17 Q. Do software issues affect the speed, besides the Windows
18 Media Player application you just described?

19 A. Yeah. As you might imagine, computers are very
20 complicated devices with lots of software that interacts.
21 You have the software that obviously ripped the music. You
22 have the operating system, Windows, that controls the hard
23 drive and controls the CD's; and Microsoft is constantly
24 updating and enhancing their software. So over time
25 Microsoft makes improvements to their software.

1 Q. And when you're dealing with Windows Media Player 10
2 versus 11, there are actually upgrades in between the two
3 that happened before the version changes, correct?

4 A. Yeah, there's what they call minor version changes. If
5 you need to update your software, you can go out and get a
6 minor -- what they call a minor version. They save the
7 major version changes for when something big happens,
8 especially if they charge for the software because then they
9 get to charge you again when they come out with a major
10 version change.

11 Q. And has technology happened such that the software today
12 is faster or slower than it was two years ago, almost three
13 years ago?

14 A. Generally speaking they continue to make improvements to
15 make the software easier to use, to make it perform better,
16 make it run faster if that's the performance issue.

17 Q. In connection with ripping, are you familiar with
18 something called a bit rate?

19 A. Yeah.

20 Q. What is that?

21 A. Bit rate is basically how good of quality you use when
22 you're ripping the music. The higher the bit rate, the
23 better the quality. So you can think about it as -- you
24 know, like in a picture, if you have more pixels in a
25 picture, the picture looks better, it's a finer resolution

1 picture. The same thing is true in audio. If you put more
2 data together, it sounds better.

3 But you can have a different bit rate on your
4 audio depending, typically, on where you -- what you listen
5 to and what you are going to listen to it on as the reason
6 why you have different -- you use different bit rates.

7 Q. The bit rate affects the speed, correct?

8 A. Yes. The higher the bit rate, the longer it takes to
9 rip the music.

10 Q. Do you have any idea what bit rate was running today?

11 A. No.

12 Q. Do you have any idea what bit rate was running today
13 compared to what was running in 2005?

14 A. No.

15 Q. Dr. Jacobson, you, I think, earlier testified that this
16 Exhibit 26 we were looking at showed that there were
17 thousands of recordings loaded in January of 2006, correct,
18 or ripped?

19 A. Yeah, January of -- yes.

20 Q. In fact, it was a two-day period in January of 2006, was
21 it not?

22 A. Yeah, 17th and 18th.

23 Q. Do you think it's likely that Ms. Thomas sat at her
24 computer for two days in January of 2006 and put in one CD
25 after another to get to 2,000 recordings?

1 MR. TODER: Objection, calls for speculation.

2 THE COURT: Sustained.

3 BY MR. GABRIEL:

4 Q. Dr. Jacobson, you gave -- does the number of recordings
5 that were loaded in a two-day period in January of 2006
6 affect your opinion that these were not loaded, ripped by
7 hand, they were ripped by a hard drive?

8 A. Yes.

9 Q. How so?

10 A. Given the very large number of songs, it's unlikely that
11 an individual would sit there that long without a break to
12 load that --

13 MR. TODER: Objection, calls for speculation,
14 beyond his area of expertise. This is about psychology and
15 human nature.

16 THE COURT: Sustained.

17 BY MR. GABRIEL:

18 Q. Dr. Jacobson, in the data that you saw, how much -- with
19 the 2,000 recordings that were loaded, do they happen
20 consistently with no break for two days?

21 A. Yeah, they -- since there's 2,000 of them, I haven't
22 analyzed every last one of them, but in my cursory look
23 through them, yes, there appears to be no break in that
24 period of time.

25 Q. And, Dr. Jacobson, does anything that we have seen today

1 change your opinion that this wasn't the hard drive that was
2 attached on February 21, 2005 to the Internet?

3 A. This does not change my opinion.

4 Q. This is not the computer that was connected, correct?

5 A. This is not the hard drive that was connected in
6 February 2005.

7 Q. Mr. Toder asked you questions about work you've done for
8 the recording industry over time. Do you recall that?

9 A. Yes.

10 Q. And I think you indicated you're estimating you maybe
11 have been paid about \$45,000?

12 A. Yeah.

13 Q. How long has that been over, what period of time?

14 A. Since September of '05.

15 Q. And that's for work in over 200 cases, I think you said?

16 A. Yes.

17 Q. Do you know how much time you spent in this case?

18 A. Well, let's see.

19 Q. Let's say before the trial.

20 A. Before the trial, probably five, six hours, maybe,
21 before the trial.

22 Q. And your billing rate is \$200?

23 A. \$200 an hour, yes.

24 Q. Dr. Jacobson, would you sacrifice your professional
25 integrity for anybody?

1 A. No.

2 Q. Now, you mentioned -- you were asked about the reports
3 that were done for the recording industry and you talked
4 about a standard report taking 45 minutes. What is your
5 standard report; what are you referring to?

6 A. That's a report where all -- what I had to look at is
7 the MediaSentry data, the ISP data, which is the data that
8 you've seen presented, prior to the forensics information.
9 Nonstandard is when I typically have a forensics examination
10 to carry out.

11 Q. So the standard report does not have the forensics
12 examination, right?

13 A. That's correct. Or sometimes there's cases with
14 extensive depositions, which take me much longer to go
15 through.

16 Q. And your standard report goes through the things you
17 talked about yesterday, the first phase of your work here,
18 how Kazaa works, how peer-to-peer works, correct?

19 A. Correct.

20 Q. And what you know about that is also based on all your
21 years of training and education up to your Ph.D., correct?

22 A. That's correct.

23 Q. Mr. Toder asked you a lot of questions relating to
24 pollution and various devices like that. I would like to
25 just briefly go through that. You described for the ladies

1 and gentlemen of the jury what pollution is before, correct?

2 A. Yes.

3 Q. Did you see any evidence of pollution in this case?

4 A. No.

5 Q. Mr. Toder asked you about multipeer contamination. Did
6 you see any evidence of multipeer contamination in this
7 case?

8 A. No.

9 Q. Mr. Toder asked you about people hacking into somebody
10 else's computer and cracking passwords. Did you see any
11 evidence of any such thing in this case?

12 A. No.

13 Q. Mr. Toder asked you about MAC addresses being spoofed.
14 Did you see any evidence of that in this case?

15 A. No.

16 Q. Mr. Toder asked you about whether multiple users of
17 Kazaa can have the same user name. Do you recall that?

18 A. Yes.

19 Q. And you said yes --

20 A. Yes.

21 Q. -- correct?

22 In all of your P2P, peer-to-peer, research and the
23 time you spent studying these issues, have you ever seen any
24 other user use the name tereastarr?

25 A. No.

1 Q. Mr. Toder asked you about zombies and you described
2 that. Did you see any evidence of any zombies in this case?

3 A. No.

4 Q. He asked you about crackers. Did you see any evidence
5 of crackers in this case?

6 A. No.

7 Q. He asked you about drones. Did you see any evidence of
8 drones in this case?

9 A. No.

10 Q. He asked you whether documents, metadata and the like,
11 could be forged. Do you recall that?

12 A. Yes.

13 Q. Did you see any evidence in this case that SafeNet or
14 MediaSentry data was forged?

15 A. No.

16 Q. Do you have any reason to think that MediaSentry forged
17 its data?

18 A. No.

19 Q. Did you have any evidence to suggest to you that Charter
20 Communications forged the data that it gave you?

21 A. No.

22 Q. Do you have any reason to doubt the data -- the accuracy
23 of the data provided to you by MediaSentry or Charter?

24 A. I have no reason to doubt the accuracy of the data.

25 Q. Based on that and your expertise, is it reasonable for

1 an expert in your field to rely on data of that sort?

2 A. Yes, it is.

3 Q. Mr. Toder asked you to point out on that exhibit -- it
4 was one of the exhibits where it shows -- it was a Charter
5 exhibit that showed different IP addresses over time. Do
6 you recall that?

7 A. Yes.

8 Q. And Ms. Thomas had different IP addresses at different
9 times, right?

10 A. Correct.

11 Q. That's consistent with the dynamic addressing you
12 discussed, correct?

13 A. Correct.

14 Q. Did Ms. Thomas have more than one IP address on
15 February 21, 2005?

16 A. No.

17 MR. GABRIEL: I think I'm finished, Your Honor, if
18 I can just have a moment.

19 (Pause.)

20 MR. GABRIEL: I have nothing further. Thank you.

21 **REXCROSS EXAMINATION**

22 BY MR. TODER:

23 Q. Dr. Jacobson, how many people at a given time around
24 2005 were using Kazaa?

25 A. At the time of the screen capture, it showed over

1 2 million users on the Kazaa network.

2 Q. And of those 2 million users, did most of them have
3 different names?

4 A. I don't have the name profile of those 2 million users.

5 Q. Well, you said you've never seen tereastarr before. How
6 many names did you look at?

7 A. In all of the names I've ever seen in Kazaa, I've never
8 seen tereastarr.

9 Q. And of the 2 million out there, about how many have you
10 seen, names?

11 A. Oh, over the years of studying Kazaa, I've maybe seen a
12 thousand names or so.

13 Q. So that's about half a percent of the --

14 A. Yeah.

15 Q. Okay. Now, you said that if this was connected to the
16 Internet when the ripping was done, it would be slower,
17 right?

18 A. It would want to go out and get the metadata, yes.

19 Q. In 2005 -- or subsequent to 2005, actually, when --
20 actually, it was Exhibit 26. On June 17, 2005, when all
21 these downloads -- when my client was ripping CD's, was she
22 connected to the Internet or not?

23 A. I don't have the Charter records to show that.

24 Q. You don't know whether she was, do you?

25 A. On that date, no.

1 Q. On all the dates that she ripped these songs from her CD
2 collection onto her computer, when all that was done you
3 don't know if her computer was turned on or off, do you -- I
4 mean whether her Internet was connected?

5 A. Those dates, as I sit here now, I do not know whether
6 her computer was connected to the Internet.

7 Q. Counsel was asking you about the differences between
8 Windows 10 and Windows 11 and you said a lot of things
9 probably changed, but you never said that it was actually
10 faster. You just said that typically in these kinds of
11 cases there's an improvement in speed?

12 A. That's correct.

13 Q. Earlier today when I asked you if you knew what the
14 difference in speed was, you don't have those figures, do
15 you?

16 A. That's correct.

17 Q. So you really don't know if there really was a
18 difference in speed, do you?

19 A. I don't have the performance numbers to show what
20 difference in speed there may be.

21 Q. You did a forensic examination of my client's hard
22 drive, did you not?

23 A. That's correct.

24 Q. Do you have any reason to doubt that the mirror image
25 hard drive that you examined is not a mirror image of the

1 one that's in that computer today?

2 A. What's sitting here, I have no data to prove one way or
3 the other whether the mirror image I have is of that hard
4 drive.

5 Q. If you look at that hard drive now, would you be able to
6 tell?

7 A. No.

8 Q. If you actually operate it and looked at its BIOS or
9 looked at something, could you tell if it was or not?

10 A. If I had some of my forensics tools, I could probably
11 tell.

12 Q. Well, do you have any evidence that my client changed
13 hard drives again after March of 2005?

14 A. I have no idea.

15 Q. You talked about bit rates when you were talking about
16 hardware. Do you know what the bit rate of this computer
17 was back in June of 2005 when she was ripping her CD's?

18 A. I do not know what bit rate those files were stored as.

19 Q. And bit rate actually talks about the rate that it was
20 moved from one spot to another, does it not?

21 A. In this case it talks about the -- basically how many
22 bits of information you store per unit time of the song. So
23 if you think about a song being played over time, the more
24 bits you capture per unit time, you get a higher bit rate.

25 Q. Now, you talked at some point -- you have a company

1 called Palisades, do you not?

2 A. Yes.

3 Q. Palisades doesn't directly work for the recording
4 companies you said, there's no contracts you have?

5 A. That's correct.

6 Q. Palisades does do things out in the United States for
7 security of computers and networks, does it not?

8 MR. GABRIEL: Objection, Your Honor, beyond the
9 scope of redirect.

10 THE COURT: Overruled.

11 THE WITNESS: Yes, Palisades produces products
12 that are used for network security that are used by
13 companies across the United States.

14 BY MR. TODER:

15 Q. You yourself, if you were to -- have you ever Googled
16 your own name on the Internet?

17 A. Yeah.

18 Q. And you come up in conjunction with Palisades?

19 A. I believe I do.

20 Q. And you come up in conjunction with all these suits,
21 too, regarding recording companies, right?

22 A. Yes.

23 Q. Does Palisades get any benefit by your notoriety?

24 A. I guess I don't have any evidence one way or another how
25 this -- I don't deal with the sales side of Palisades, so I

1 don't know how that changes particular sales.

2 Q. You did an expert report in this case, did you not?

3 A. Yes.

4 Q. You did two of them, didn't you?

5 A. Yes.

6 Q. The first one didn't have an opinion on there regarding

7 Ms. Thomas downloading or Ms. Thomas ripping the CD's, the

8 second one is where there was an opinion that she must have

9 done it hard drive to hard drive, right?

10 A. That's correct.

11 Q. It wasn't in your first one?

12 A. That's correct, because I did not have the hard drive

13 when I did the first report.

14 Q. And when you did these two reports, you considered

15 certain materials, did you not?

16 A. Yes.

17 Q. You looked at MediaSentry screen shots?

18 A. Yes.

19 Q. You looked at MediaSentry system logs?

20 A. Yes.

21 Q. You studied the MediaSentry user logs?

22 A. Yes.

23 Q. And you also studied the uncompressed MediaSentry user

24 logs, did you not?

25 A. Correct.

1 Q. You also, in the course of this work, looked at
2 MediaSentry download logs?

3 A. Yes.

4 Q. And their certificate of registration?

5 A. Yes.

6 Q. And you also studied MediaSentry's trace?

7 A. Trace route, yes.

8 Q. And you also studied the Charter Communications subpoena
9 response?

10 A. Yes.

11 Q. And you also did -- did you make the forensic copy of
12 defendant's hard drive or did you examine a copy that was
13 already made?

14 A. I examined a copy that was made.

15 Q. Carefully?

16 A. I examined it, yes, for the materials that I was looking
17 for, yes.

18 Q. And you read the deposition of Eric Stanley?

19 A. Yes.

20 Q. How many pages long was that, roughly?

21 A. I don't recall. I think it was 50 or so pages. I see
22 it in a 4-up format, so it's hard for me to translate pages
23 to pages because I see four little pages on one big page.

24 Q. You also read the deposition of Jammie Thomas?

25 A. Yes.

1 Q. Both volumes?

2 A. Both volumes? Again, I get it all as one PDF file.

3 Q. But you read that?

4 A. I read through that, yes.

5 Q. You looked at the exhibits that were attached to it?

6 A. I probably glanced through the exhibits.

7 Q. And you've read the various court filings in these
8 matters?

9 A. Yes.

10 Q. Is it still your testimony that you did all this in five
11 or six hours?

12 A. That I did -- I'm sorry?

13 Q. Is it still your testimony that you did all this work
14 before trial in five or six hours?

15 A. To prepare the report?

16 Q. You testified that the work that you did before trial
17 was five or six hours.

18 A. To prepare for this trial?

19 Q. Yes.

20 A. Yes.

21 Q. And all this took five or six hours, that I just -- all
22 these things that I just asked you that you looked at?

23 A. Those things I looked at were looked at in preparation
24 of the supplemental report.

25 MR. TODER: Thank you. No further questions.

1 THE COURT: Anything further?

2 MR. GABRIEL: Very briefly, Your Honor. Thank
3 you.

4 **FURTHER REDIRECT EXAMINATION**

5 BY MR. TODER:

6 Q. Dr. Jacobson, with respect to the sound recordings that
7 were on this later hard drive, the one after the fact, you
8 saw metadata in connection with those, correct?

9 A. Yes.

10 Q. If Ms. Thomas was not connected to the Internet at that
11 time, she would have personally had to type in the metadata,
12 isn't that right, or someone would have had to?

13 A. Somebody would have had to place it on the files, yes.

14 Q. We're talking about physically doing it if she was not
15 connected to the Internet?

16 A. Yes.

17 Q. And that would be all of those lines of metadata, album,
18 artist --

19 A. Genre, yes.

20 Q. -- title?

21 MR. GABRIEL: Nothing further. Thank you.

22 MR. TODER: May I approach the witness, Your
23 Honor?

24 THE COURT: You may.

25

FURTHER RECROSS EXAMINATION

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BY MR. TODER:

Q. Dr. Jacobson, this is one of the CD's that we just downloaded. Isn't all the metadata already on there?

A. It's on the paper label.

Q. Isn't it also on the disk?

A. There is just audio on the disk.

Q. Doesn't it print a data file as well?

A. There's --

Q. It gives you a data file when you rip the --

THE COURT: Counsel.

MR. TODER: Oh, I'm sorry.

BY MR. TODER:

Q. When you rip the CD, isn't the data, metadata, transferred from that CD onto your computer?

A. My understanding is that all that's on here is the audio music.

Q. Are you saying you don't know whether the metadata is in a file on that CD?

A. I can't -- I guess I can't see what is physically on this CD.

Q. Is there a way that we can put this CD in the machine and tell whether the metadata comes with it and is put on as a file?

A. Probably not with the software that exists here. We

1 would have to do a forensics exam of this CD to actually
2 analyze the data that is physically on this CD.

3 Q. So the best you can testify is that you don't know
4 whether or not there's metadata in the CD itself on there
5 and that comes to the computer as a separate file when you
6 download this, correct?

7 A. Again, without a forensics examination of this
8 particular CD, I cannot tell exactly what has been placed on
9 the tracks on the CD.

10 Q. But if it was placed on there, you wouldn't need the
11 Internet, would you?

12 A. If the metadata did exist in a Windows Media compatible
13 format that it could understand on this CD, then that's
14 correct.

15 MR. TODER: Thank you.

16 MR. GABRIEL: Sorry, Your Honor.

17 **FURTHER REDIRECT EXAMINATION**

18 BY MR. GABRIEL:

19 Q. Original legitimate CD's are in something called Red
20 Book audio format, are they not?

21 A. I believe so.

22 Q. And that does not contain metadata, correct?

23 A. Normal CD's do not contain metadata.

24 Q. In fact, that's what you testified to yesterday,
25 correct?

1 A. Yes.

2 Q. And your testimony here is without examining -- because
3 you're a scientist, without examining that one you're
4 unwilling to say for sure that there is not?

5 A. That's correct.

6 Q. But you know, as you testified yesterday, as a general
7 matter legitimate CD's have no metadata, correct?

8 A. That's right.

9 MR. GABRIEL: Thank you.

10 THE COURT: Sir, you may step down.

11 THE WITNESS: Thank you.

12 THE COURT: Call your next witness, please.

13 MR. GABRIEL: Thank you, Your Honor. Plaintiffs
14 calls Kevin Havemeier.

15 (Witness sworn.)

16 THE COURT: Good morning.

17 THE WITNESS: Good morning.

18 THE COURT: I need you to pull down the
19 microphone. Would you state your true and correct name for
20 the record, please.

21 THE WITNESS: Kevin Dale Havemeier.

22 THE COURT: And would you spell your name for the
23 record.

24 THE WITNESS: Last name?

25 THE COURT: Last name and middle name.

1 THE WITNESS: Kevin, K-e-v-i-n; Dale, D-a-l-e;
2 Havemeier, H-a-v-e-m-e-i-e-r.

3 THE COURT: You may inquire.

4 MR. GABRIEL: Thank you, Your Honor. Before I
5 start, would it be all right if I just move this down? It's
6 blocking my client's view.

7 THE COURT: You may.

8 (Kevin Havemeier)

9 DIRECT EXAMINATION

10 BY MR. GABRIEL:

11 Q. Good morning, sir.

12 A. Good morning.

13 Q. We met for the first time today; is that correct?

14 A. That's correct.

15 Q. My name is Richard Gabriel. I represent the plaintiffs
16 here.

17 Mr. Havemeier, do you know Jammie Thomas?

18 A. Yes, I do.

19 Q. How do you know her?

20 A. We used to be in a relationship together.

21 Q. And from what time frame did that fall within?

22 A. Fall of '04, around October, to beginning of '06, around
23 February of '06.

24 Q. And during your relationship you spent some time at
25 Ms. Thomas's home?

1 A. Yes, I did.

2 Q. Approximately how often?

3 A. Once every couple weeks during the weekend.

4 Q. Mr. Havemeier, do you recall at some -- strike that.

5 Do you recall that at some point you heard that
6 Ms. Thomas's hard drive had crashed?

7 A. Yes.

8 Q. And do you recall at some point you heard something
9 about a possible lawsuit against her?

10 A. That is correct.

11 Q. In relationship to the possible lawsuit, when did you
12 hear that the crash had occurred?

13 A. Before I had heard about the lawsuit.

14 Q. Were they relatively close in time?

15 A. Not that I remember.

16 Q. Would your memory have been -- you had your deposition
17 taken in this case?

18 A. Correct.

19 Q. Would your memory have been a little better when it was
20 taken --

21 A. Correct.

22 Q. -- some time ago?

23 MR. GABRIEL: I'm sorry, Your Honor. If you bear
24 with me just one moment. Your Honor, may I approach?

25 THE COURT: You may.

1 MR. GABRIEL: And for the record, Your Honor, I
2 have a sealed deposition transcript of Mr. Havemeier. I'm
3 going to open the seal now.

4 THE COURT: You may.

5 BY MR. GABRIEL:

6 Q. Mr. Havemeier, just for purposes of helping to refresh
7 your recollection, could I ask you just to read to yourself
8 pages 35 through 39. Just take a minute to do that.

9 (Pause.)

10 Q. Specifically, sir, page 38.

11 (Pause.)

12 A. All right.

13 Q. Does that help refresh your recollection to the time
14 referenced?

15 A. Right. Looking more towards beginning of '05, March,
16 April, May, somewhere in there.

17 Q. And you had indicated previously months or maybe a month
18 before you first heard about the lawsuit you heard about the
19 hard drive crashing?

20 A. Correct. I don't remember exact dates.

21 Q. Okay. Thank you, sir. And did Ms. Thomas take her
22 computer to be fixed?

23 A. From what I understand, yes.

24 Q. And you understand that it was taken to Best Buy?

25 A. Correct. That's what she had explained to me.

1 Q. And you understood the hard drive was replaced, correct?

2 A. Correct.

3 Q. Do you recall, then, that at some point Ms. Thomas
4 received a letter from Charter Communications indicating a
5 possible copyright infringement problem?

6 A. I don't remember who it was from, but I remember her
7 receiving a letter.

8 Q. Do you recall speaking with Ms. Thomas regarding what
9 anyone would find or not find in light of that crash?

10 A. Just a brief conversation. Once she had showed me the
11 letter, I remember saying that there was nothing there
12 because of the hard drive being wiped out or having replaced
13 the hard drive.

14 Q. And that was a conversation you had with Ms. Thomas?

15 A. Correct.

16 Q. And if I'm understanding, you said to her there's
17 nothing there because the hard drive --

18 A. Right. It was just a statement off of understanding
19 what the letter was about.

20 Q. After your relationship --

21 THE COURT: Excuse me. I'm confused. Who said
22 what?

23 MR. GABRIEL: I'm sorry, Your Honor.

24 BY MR. GABRIEL:

25 Q. Mr. Havemeier, did you make a statement to Ms. Thomas?

1 A. Yes, I did.

2 MR. GABRIEL: I apologize, Your Honor.

3 BY MR. GABRIEL:

4 Q. So you were the one who said to her -- let me make sure
5 we've got the chronology right. She either told you or
6 showed you this letter she received?

7 A. Correct.

8 Q. That indicated some problem about infringement?

9 A. Correct.

10 Q. And then you made a statement to her that there wouldn't
11 be anything there because the hard drive was replaced?

12 A. That is correct.

13 Q. After your relationship with Ms. Thomas ended, did you
14 remain generally friendly?

15 A. We tried to, but nothing happened.

16 Q. And did you communicate from time to time?

17 A. Yes.

18 Q. How did you communicate with her?

19 A. Mostly e-mails. Every once in a while a phone call.

20 Q. E-mails or instant messages?

21 A. I believe it was mostly e-mails. We had tried instant
22 messaging, but the instant messaging was just through the
23 cell phone. Just general conversations.

24 Q. And what was her e-mail address? Do you remember?

25 A. tereastarr@hotmail.

1 Q. And what was her instant message address?

2 A. I believe also the same, tereastarr. There was a Yahoo
3 and a Hotmail account, a couple of different things under
4 that tereastarr name.

5 MR. GABRIEL: That's all I have. Thank you.

6 THE COURT: You may inquire.

7 MR. TODER: Thank you.

8 **CROSS EXAMINATION**

9 BY MR. TODER:

10 Q. Mr. Havemeier --

11 A. Yes.

12 Q. -- when Ms. Thomas got a letter from Charter
13 Communications, which I believe is dated April 22 --

14 A. Okay.

15 Q. -- 2005, you were the one who made the statement that
16 there was nothing on her hard drive?

17 A. Correct.

18 Q. She didn't make that statement?

19 A. Correct.

20 Q. Did you think that there was something on her hard
21 drive?

22 A. No.

23 Q. Did you ever see her downloading songs off the Internet?

24 A. No, I did not.

25 Q. Did you ever use her computer?

1 A. Occasionally.

2 Q. Did you use it before -- one or two times before
3 February of 2005?

4 A. I believe so, yes.

5 Q. Did you ever use her computer after February of 2005?

6 A. No, I don't believe so.

7 Q. Well, you had a relationship until February 2006, right?

8 A. Correct. I honestly don't remember the dates.

9 Q. Well, let me put it this way. Before February of 2005
10 you said you used her computer.

11 A. Okay.

12 Q. Did you ever see any icons or anything on there to
13 suggest that Kazaa was installed on that computer?

14 A. I have not seen that, no.

15 Q. You also --

16 THE COURT: Excuse me. Let's back up. Do you
17 know what Kazaa is?

18 THE WITNESS: Yes.

19 BY MR. TODER:

20 Q. You would recognize the icon if you saw it?

21 A. I would now, yes.

22 Q. Okay. And what does the Kazaa icon look like?

23 A. I believe it has a "K," if I remember correctly.

24 Q. In your testimony, your deposition testimony, you talked
25 about the repair job at Best Buy?

1 A. Yes.

2 Q. Did she take it to Best Buy to have it repaired or did
3 she specifically take it there to have the hard drive
4 changed?

5 A. My understanding from conversation, I was at my house --

6 MR. GABRIEL: Your Honor, I will object now as
7 hearsay without further foundation.

8 MR. TODER: Your Honor, if it was hearsay, it
9 would be from the defendant.

10 THE COURT: Continue.

11 BY MR. TODER:

12 Q. Let me rephrase the question. Do you know what event
13 caused her to want to take the computer to Best Buy to be
14 repaired?

15 A. Not at all. The conversation that I recall was
16 something had happened to her computer and we just discussed
17 options and she decided to take it to Best Buy. That's the
18 extent of what I know.

19 Q. Do you know -- did she tell you Best Buy tried to repair
20 it?

21 MR. GABRIEL: Objection, Your Honor, it's hearsay.

22 THE COURT: Sustained.

23 BY MR. TODER:

24 Q. Well, do you have any -- other than what she told you,
25 do you have any kind of information about why the computer

1 had to be repaired in the first place?

2 A. I do not know.

3 Q. Well, did you ever see my client taking CD's and ripping
4 them onto her computer?

5 A. I believe briefly, yes. We had had discussions over the
6 phone when she was in the process of doing that. I've, if I
7 remember correctly, briefly seen her do that a couple of
8 times, but not -- my understanding was it was a long process
9 for her.

10 Q. How many -- did she have a lot of CD's?

11 A. Yes, she did.

12 Q. How many CD's do you think she had?

13 A. A few hundred.

14 Q. A few hundred?

15 A. Um-hmm.

16 Q. Could it have been more than two or three hundred?

17 A. She had a couple books of CD's that I believe held a
18 hundred each. So possibly more than 200. I don't know
19 exactly.

20 Q. Were these CD's that someone makes or were these CD's
21 that actually had a jacket on them and --

22 A. CD's purchased.

23 Q. CD's that she purchased?

24 A. Right.

25 Q. And where did she buy most of those CD's? Do you know?

1 A. I do not know.

2 MR. TODER: No further questions.

3 **REDIRECT EXAMINATION**

4 BY MR. GABRIEL:

5 Q. Mr. Havemeier, you indicated that you now would
6 recognize the Kazaa icon, correct?

7 A. Correct.

8 Q. As of the date of your deposition, which was May 1st of
9 2007, you did not know what it looked like, correct?

10 A. Correct, yeah.

11 Q. You've learned recently what it looks like?

12 A. Right.

13 MR. GABRIEL: No further questions.

14 THE COURT: Sir, you may step down.

15 Call your next witness, please.

16 MR. GABRIEL: Ryran Maki, Your Honor.

17 (Witness sworn.)

18 THE COURT: Good morning.

19 THE WITNESS: Good morning.

20 THE COURT: I need you to pull that microphone
21 down and speak directly into it. Would you state your true
22 and correct name for the record, please.

23 THE WITNESS: Ryran Chang Maki.

24 THE COURT: Spell your name for the record.

25 THE WITNESS: R-y-y-a-n, C-h-a-n-g, M-a-k-i.

1 THE COURT: You may inquire.

2 MR. GABRIEL: Thank you, Your Honor.

3 (Ryvan Maki)

4 DIRECT EXAMINATION

5 BY MR. GABRIEL:

6 Q. Mr. Maki, we met for the first time today; is that
7 correct?

8 A. True.

9 Q. Who do you work for?

10 A. I work for Best Buy.

11 Q. Where?

12 A. In the Geek Squad.

13 Q. And what location?

14 A. In Duluth.

15 Q. Since when have you been at Best Buy?

16 A. Since 2003.

17 Q. And what do you do for Best Buy?

18 A. I am the deputy of counterintelligence and supervisor of
19 the Geek Squad.

20 Q. And what does a supervisor of the Geek Squad do?

21 A. Maintaining as far as order with all the agents that
22 work on computers, promoting and selling Geek Squad
23 services.

24 Q. And could I -- there are a number of exhibit books
25 there, white books. Would you find Book 3 of 3 and look at

1 Exhibit 18, please. Have you found that, sir?

2 A. Yep.

3 MR. GABRIEL: Your Honor, I believe that this
4 exhibit -- there was no objection to these exhibits, so we
5 would move the admission of Exhibit 18.

6 MR. TODER: No objection.

7 THE COURT: Be admitted.

8 BY MR. GABRIEL:

9 Q. Mr. Maki, do you recognize the documents that are in
10 Exhibit 18? And by all means look through them.

11 A. They are Star Service.

12 Q. And what does that mean?

13 A. It is a record of showing the computer or item that is
14 serviceable has been taken in for repair.

15 Q. There are a number of other records in there, correct?

16 A. Yes.

17 Q. These records all pertain to Ms. Thomas, do they not?

18 A. Correct.

19 Q. Can I ask you to look at the back of this document.

20 There's a color copy called Service Order 00522-796593952.

21 I believe it is the first colored copy. Let me know when
22 you have found that, Mr. Maki, if you would. Are you there?

23 A. Which page is that on again?

24 Q. You don't have page numbers, but it's the first color
25 copy you'll see. It's four from the back or approximately

1 four from the back.

2 A. All right.

3 Q. Have you found it?

4 A. Yep.

5 Q. Can you explain what this document is, Mr. Maki, please.

6 A. It looks like this is an archived service order, which
7 is something that hasn't been worked on within the past six
8 months. So it does put it in archive compared to a newer
9 service order or recent repair.

10 It's basically stating the customer's name,
11 contact information, like the phone number, and the product
12 that was being serviced. It also looks like it states as
13 far as the condition the unit was taken in.

14 Q. Let me ask about that. This service order applied to
15 the customer who was Jammie Thomas, correct?

16 A. Yes.

17 Q. There's a box, do you see at the bottom, called Reported
18 Problem?

19 A. Um-hmm.

20 MR. GABRIEL: Mr. Reynolds, could you pull that
21 up. It's actually above that, Tim. That's Repair Comment.
22 We're looking at Reported Problem.

23 BY MR. GABRIEL:

24 Q. Can you explain what this box shows, please.

25 A. Well, when you take in a computer or a service item,

1 serviceable item, the main thing is we have to get a
2 description of what's going on. So this is for the agent
3 that took in the computer in this case, what he was kind of
4 seeing what was going on with it; and it shows at the end
5 his initials.

6 Q. That would be the KJW we're looking at?

7 A. Right.

8 Q. Then there's a box in the upper right called Appearance
9 Comments. What's that?

10 A. The Appearance Comments basically, again, states if we
11 see a computer being brought in with physical damage or if
12 it's dirtier than normal, that type of thing.

13 Q. And this computer indicated normal wear and tear?

14 A. Normal wear and tear.

15 Q. Then there's a box right next to that called
16 Accessories. What does that mean?

17 A. Well, typically with a laptop we usually do take
18 accessories, like a battery and an AC adapter. For this
19 computer it looks like we didn't take anything in.

20 Q. Was this a laptop or a desktop?

21 A. Judging by the model number, it looks like it was a
22 desktop.

23 Q. And then at the bottom Mr. Reynolds had pulled up first
24 something called Repair Comments. Do you see that?

25 A. Yes.

1 Q. And what does that refer to?

2 A. Referring to the computer, as it states in the above
3 box, is under a PSP or a performance service plan through
4 Best Buy.

5 Q. Like a warranty?

6 A. Yes. It looks like the reason why it says COD for labor
7 and parts is because the agent that took this tag in --

8 THE COURT: Where is the COD?

9 MR. GABRIEL: Tim, if you would take that down.
10 Right above you'll see Labor and Parts Coverage, COD, above
11 it. The top screen, the higher screen. Keep going up.
12 Keep going up. There it is, Labor and Parts. Above that.
13 Right above where you are, Labor Coverage. Nope. Right
14 above it. There you go.

15 BY MR. GABRIEL:

16 Q. That's what you are referring to, Mr. Maki?

17 A. Because also to the top right of that it looks like it
18 was taken in as -- or actually on the bottom panel there,
19 the top right, so the bottom frame, right there, there are
20 different ways you can take a computer in. For example,
21 this was taken in as an upgrade. The agent should have
22 taken it in as a repair if we were doing diagnostic work on
23 it to figure out what the problem was.

24 Q. So there's just -- the agent that listed it, it should
25 have said "Repair," but it said "Upgrade"?

1 A. Yeah.

2 Q. Okay. And what was the date that this computer was
3 brought in?

4 A. It looks like March 7th of 2005.

5 Q. And does it show when this computer was purchased, on
6 this document you're looking at?

7 A. Well, it does on the top frame. If you get out of
8 there, it shows the warranty information in the top frame on
9 the bottom left portion.

10 Q. That shows the date the computer was purchased, correct,
11 March 6, 2004?

12 A. Um-hmm.

13 Q. Can I ask you now to go two pages further and look at
14 Service Order 00522-796752379. What is that document, sir?

15 A. It's referring to the previous tag. They actually
16 closed the tag out to make a new tag which would have the
17 performance service plan covering any type of parts or labor
18 involved with adding parts under the warranty.

19 Q. So if I'm understanding, the first tag was kind of
20 mislabeled and -- the tag is these forms, right?

21 A. Right.

22 Q. So you created a new form, but you corrected that the
23 work was not an upgrade, it was repair work going to be
24 done, correct?

25 A. Correct.

1 Q. And so this was the tag that was created, right?

2 A. Yep.

3 Q. And again there is a Reported Problem box on this one as
4 well, correct?

5 A. Yep.

6 Q. And what does that say?

7 A. It says, "Replace hard drive under the service plan and
8 the customer will restore at home" and then the agent's
9 initials.

10 Q. What does "customer will restore at home" mean?

11 A. When a computer is purchased, it comes with what's
12 called recovery disks or restore disks or it comes with the
13 software to make them. In today's cases most computers
14 actually require you to make your own set. The recovery
15 disks actually hold the operating system on them and the
16 drivers and programs that originally came with the computer.

17 Q. All right. And so what does "customer will restore at
18 home" mean?

19 A. It basically means that since we didn't take any
20 recovery disks in, the customer just will actually put in
21 the disks themselves at home.

22 Q. And the recovery disks are -- for example, when you buy
23 Microsoft Word, you get that extra disk from Microsoft Word?

24 A. Kind of, yeah. It has the programs on there.

25 Q. Whatever programs. So the customer here, Ms. Thomas,

1 was going to reload all those herself?

2 A. To an out of box factory condition.

3 Q. And there's a box here called Accessories as well,
4 correct?

5 A. Yep.

6 MR. GABRIEL: Upper right, Tim, the top box, the
7 two boxes at the bottom. Go down to -- there you go.

8 BY MR. GABRIEL:

9 Q. The Accessories here say, "None." Would that be where
10 you indicate the disks if the customer --

11 A. If they were taken in.

12 Q. And "taken in" would mean the customer could bring you
13 disks and you could reload them?

14 A. Absolutely.

15 Q. And then Appearance Comments you say, "Decent
16 condition," right?

17 A. Yep.

18 Q. Then there are -- at the bottom of this document there's
19 a box also called Repair Comments.

20 A. Yes.

21 Q. Do you see that?

22 And that indicates the hard drive was replaced,
23 does it not?

24 A. Correct.

25 Q. When was the hard drive replaced?

1 A. Well, the new tag, it looks like, was created on the
2 9th. So it was originally taken in on the 7th, from the
3 prior tag. So it looks like they actually started working
4 on it the 9th, and by working on it they actually closed out
5 the prior tag because you cannot have duplicate tags with
6 the same product and serial number open. And it looks like
7 it was replaced on -- between the 9th and the 13th because
8 the close date or the service complete date would be the
9 13th.

10 Q. Could I ask you to look at the next page in Exhibit 18.

11 MR. GABRIEL: Tim, could you go to the next page.

12 BY MR. GABRIEL:

13 Q. Does this page actually help you pinpoint the date when
14 the hard drive was replaced?

15 A. Okay. It looks like the hard drive was replaced
16 actually on the 9th. So the same day that they made the new
17 tag, they started working on it.

18 Q. Mr. Maki, would Best Buy ever replace a hard drive
19 without the customer's knowledge or consent?

20 A. Under a performance service plan or if a computer comes
21 in without a warranty, we do have to call the customer to
22 get approval, even if the parts are covered, just to let
23 them know as far as the process with that.

24 Q. And to the best of your knowledge, did Best Buy follow
25 that policy here?

1 A. It looks like they contacted on the 10th. It doesn't
2 log in Star as far as the agent calling to get the approval,
3 but as far as the checklist, there's also a manual checklist
4 that you have to fill out to see -- as far as if the
5 customer approved it.

6 Q. And sitting here now, you're certain that the customer
7 approved the replacement of this hard drive?

8 A. I don't see why not because it was under warranty, so
9 I --

10 Q. At the time the work here was done, did Best Buy have a
11 policy regarding what it would do with the old hard drive
12 that was being replaced?

13 A. Since the rollout of Geek Squad and Best Buy, which was
14 August 2004, the SOP or the standard operating platform is
15 to give the customer the option of taking the old hard drive
16 back. Because if a hard drive is technically bad, the
17 information is still on there. So we give the customer the
18 option to take that home. We usually just give it to them
19 in the box that we've replaced it with, the new hard drive.

20 Occasionally a customer will leave it at the
21 counter, forgetting it while they're picking up their
22 computer, but we do have an abandoned unit process where we
23 hold onto them for 90 days and the customer can come back
24 and pick it up.

25 Q. And in this case -- back up. The policy would be to

1 return the hard drive to the --

2 A. Return the hard drive to the customer.

3 Q. Do you have any reason to believe that the unit was
4 abandoned here?

5 A. I don't see any notes as far as why it would say it was
6 abandoned or left at the store.

7 Q. Do you have any reason to believe that the policy was
8 not followed here?

9 A. No notes, as far as what I can see, if it was left or
10 why it would be left there.

11 Q. Based on your knowledge of Best Buy's policy and your
12 being there at the time, is it probable that Best Buy
13 returned the hard drive to Ms. Thomas?

14 MR. TODER: Objection, calls for speculation.

15 THE COURT: Sustained.

16 BY MR. GABRIEL:

17 Q. I'd ask you lastly, sir, there's a document -- there's a
18 sales history document in this exhibit. Could I ask you to
19 look for that. It may be easier if you just look at the one
20 on the screen, sir.

21 A. Okay.

22 Q. On the date --

23 MR. GABRIEL: Tim, would you highlight the
24 March 12th entries.

25 BY MR. GABRIEL:

1 Q. On the March 12, 2005 entries there's just kind of a
2 bunch of X's and no numbers there, no other data. Just so
3 the jury understands what they're looking at, can you
4 explain what that is or why it's blank like that.

5 A. It looks like on March 12th of 2005, what the X's are
6 is when a computer has been repaired there's actually a
7 record by a Star Service order repair to actually purge it
8 from our system as it being picked up already. They
9 actually run it through our POS registers.

10 So this actually looks like a record of her
11 purchases in the past couple of years. The reason why it's
12 zeros is because that's just from us actually flushing it
13 out of our repair system. So it shows that it's been picked
14 up.

15 Q. And the issue, if I'm understanding, you indicated it
16 was originally tagged as a repair and then it was -- excuse
17 me -- originally indicated as an upgrade and then changed to
18 a repair?

19 A. To a repair, yep.

20 Q. And then what you would do when it was picked up is you
21 would clean it out of the system?

22 A. Yep.

23 Q. And so this actually reflects the repair work that
24 you've already described?

25 A. Yep.

1 Q. And that's reflected in all the service orders?

2 A. Yes.

3 MR. GABRIEL: Nothing further. Thank you.

4 **CROSS EXAMINATION**

5 BY MR. TODER:

6 Q. Good afternoon. The computer was repaired pursuant to
7 the warranty, right?

8 A. Yes, the manufacturer warranty and coverage by the Best
9 Buy performance plan.

10 Q. Best Buy wouldn't have replaced the hard drive if there
11 wasn't something wrong with the other one, correct?

12 A. Correct.

13 Q. Do you have Exhibit 18 in front of you?

14 A. Which page?

15 Q. How about the -- starting from the back, do you see
16 where there's a bunch of dates on the left side?

17 A. Yes.

18 MR. TODER: Actually, may I just approach the
19 witness briefly?

20 THE COURT: You may.

21 BY MR. TODER:

22 Q. The page that starts here (indicating), this document
23 shows purchases of my client, what she's been buying from
24 Best Buy, does it not?

25 A. Yes.

1 Q. And down at the bottom we get to -- it starts off with
2 2007 and it goes into 2006. So we go back in time, correct?

3 A. Correct.

4 Q. So let's just go onto the second page and we go down to
5 the bottom and we go to, let's say, March 12th where all
6 those X's were.

7 A. Yep.

8 Q. From that point back into time, December of 2004,
9 November of 2004, all the way through my client is buying a
10 lot of CD's from Best Buy, isn't she?

11 A. That's certainly what it looks like.

12 Q. She's buying hundreds of CD's from Best Buy before
13 February of 2005, is she not?

14 A. There's quite a few DVD's and CD's that I can see here
15 that have been purchased. I can't off the top of my head
16 count how many.

17 Q. Okay. But this document certainly speaks for itself,
18 doesn't it? She was a good customer, in other words, right?

19 A. That's what it would look like, yeah.

20 MR. TODER: Thank you. No further questions.

21 MR. GABRIEL: Nothing further, Your Honor.

22 THE COURT: Sir, you may step down.

23 Call your next witness.

24 MR. GABRIEL: We call Eric Stanley, Your Honor.

25 (Witness sworn.)

1 THE COURT: Good afternoon.

2 THE WITNESS: Good afternoon.

3 THE COURT: Would you state your true and correct
4 name for the record, please.

5 THE WITNESS: My name is Eric Stanley.

6 THE COURT: Spell your first and last name for the
7 record, please.

8 THE WITNESS: First name is E-r-i-c. Last name is
9 S-t-a-n-l-e-y.

10 THE COURT: You may inquire.

11 MR. GABRIEL: Thank you, Your Honor.

12 (Eric Stanley)

13 DIRECT EXAMINATION

14 BY MR. GABRIEL:

15 Q. Good afternoon, Mr. Stanley.

16 A. Good afternoon.

17 Q. We met for the first time today, correct?

18 A. That is correct.

19 Q. My name is Rich Gabriel. I represent the plaintiffs in
20 this case.

21 Mr. Stanley, what do you do for a living?

22 A. I am a project manager for a technology company.

23 Q. And could you describe what that means.

24 A. The company I work for makes control systems for the
25 electric utility industry and as project manager I am

1 responsible for the entire project once it's been
2 delivered -- once the contract has been signed until the
3 product is put into use. That includes making sure the
4 hardware is procured, staging the system and ensuring that
5 the system is configured correctly, testing the system both
6 within the company and with the customer, making sure that
7 it gets delivered and installed correctly and the system is
8 cut over and begin use by the customer.

9 Q. Sir, you have a bachelor's degree?

10 A. That is correct.

11 Q. In what?

12 A. Electrical engineering.

13 Q. And you've had -- besides your current position, you've
14 had various job experiences related to computers?

15 A. Yes, I have.

16 Q. Could you just give us a very high level of your job
17 experience related to computers.

18 A. I started out in the area of computer programming. I
19 got my first programming job in 1983, I believe it was, and
20 worked in the programming area for roughly 15 years. Then I
21 transitioned over to network administration type jobs, did
22 that for another five or so years. And since then I've been
23 doing various contracting jobs as well as the project
24 management position that I am currently in.

25 Q. Thank you, sir. You were retained as an expert in this

1 case by Ms. Thomas, correct?

2 A. Correct.

3 Q. How did you get connected or hooked up to Ms. Thomas?

4 A. I have a mutual acquaintance with Mr. Toder.

5 Q. In fact, it's Mr. Toder's brother, isn't it?

6 A. That is correct.

7 Q. So through Mr. Toder's brother you were hooked up to
8 Mr. Toder and his client here?

9 A. Correct.

10 Q. As part of the work that you did in this case for
11 Ms. Thomas, did you examine her computer's hard drive?

12 A. Yes.

13 Q. Do you recall when that was?

14 A. I picked up the system I believe it was late November of
15 2006.

16 Q. And you had the actual original hard drive, correct, it
17 was not a forensic copy of it?

18 A. That's what I was -- I was told it was the original when
19 I picked it up.

20 Q. Do you recall in connection with your work, Mr. Stanley,
21 did you ask Ms. -- you never -- strike that.

22 Did you ever personally talk to Ms. Thomas in
23 connection with your work in this case?

24 A. I never personally talked to her, no.

25 Q. You talked to her counsel, Mr. Toder, right?

1 A. Correct.

2 Q. Did you ever ask Mr. Toder anything about the hard
3 drive, for example, whether it had been replaced before?

4 A. I did ask whether it had been replaced.

5 Q. And did you ask that of Mr. Toder?

6 A. Through his office. I don't remember who I asked it of.

7 Q. And what did they tell you?

8 A. They didn't know. They asked Ms. Thomas and the answer
9 came back that it had been replaced.

10 Q. When?

11 A. I believe -- they didn't know for certain, but at the
12 time they told me early 2004 was I believe the answer that I
13 was given at that time.

14 Q. Specifically January or February of 2004, correct?

15 A. That sounds about right.

16 Q. Sitting here now, do you believe that's what they told
17 you?

18 A. I do.

19 Q. And in terms of your going forward with the analysis,
20 did you accept that as given?

21 A. Yes, I did.

22 Q. Did you ultimately learn, Mr. Stanley, whether that
23 January to February 2004 information was correct?

24 A. I did learn that it was not correct.

25 Q. And how did you learn that?

1 A. I examined the case of the hard drive and the
2 manufacturer date was printed on the case of the hard drive.
3 Q. The hard drive case has a date of manufacture on it?
4 A. Has a serial number, manufacture name, model number, and
5 the date of manufacture.
6 Q. A sticker of some sort?
7 A. Yes.
8 Q. Do you recall when that manufacture date was?
9 A. I believe the date was January 22, 2005.
10 Q. And did it also indicate where it was manufactured?
11 A. I believe it was manufactured in Malaysia.
12 Q. And do you recall, Mr. Stanley, previously stating a
13 view, based on that, as to whether it was more likely than
14 not that this hard drive was in Ms. Thomas's computer on
15 February 21, 2005?
16 A. I stated that I didn't believe so. I can't say that I
17 know the supply chain logistics well enough to say for
18 certain, but it seems to me that a month is a fairly short
19 time to get from a manufacturer to an end user.
20 Q. And, in fact, you now know -- you have information today
21 from Best Buy?
22 A. Correct.
23 Q. And you now know it was -- in fact, the hard drive was
24 put in a month later, in March 2005?
25 A. Yes.

1 MR. GABRIEL: Bear with me. I may be finished.

2 (Pause.)

3 MR. GABRIEL: No further questions. Thank you,
4 sir.

5 THE COURT: You may inquire.

6 MR. TODER: I have no questions.

7 THE COURT: You may step down.

8 Let's stop here and we'll start up at 1:30, 1:30.

9 All rise for the jury.

10 **IN OPEN COURT**

11 **(JURY NOT PRESENT)**

12 THE COURT: Anything that we need to discuss
13 before we start up again this afternoon?

14 MR. GABRIEL: Not from here. I wasn't sure when
15 the Court wanted to deal with jury instructions.

16 THE COURT: How are we doing with your case? Are
17 you close to finishing?

18 MR. GABRIEL: Yes, Your Honor. We have, I think,
19 four more witnesses, five more witnesses, most of whom
20 should be relatively short. I think we may get it in today.
21 I guess I won't promise that, but we'll get close, I
22 believe.

23 THE COURT: Well, let's -- I've given you copies
24 of the first draft of the jury instructions. Why don't you
25 take some time to look at them over lunch. And then if we

1 finish today, then we can talk about them at the end of the
2 day. And if we don't finish, we'll talk about them at the
3 end of the day anyway.

4 Have a good lunch.

5 MR. GABRIEL: Thank you, Your Honor.

6 MR. TODER: Thank you, Your Honor.

7 (Lunch recess taken at 12:25 p.m.)

8 * * * * *

9 (1:30 p.m.)

10 **IN OPEN COURT**

11 **(JURY NOT PRESENT)**

12 THE COURT: Counsel, you wanted to talk to me
13 before the jury comes out?

14 MR. GABRIEL: Yes, Your Honor, very briefly. As
15 the Court is aware -- good afternoon. I'm sorry.

16 As the Court is aware, we had for the trial taken
17 two of the recordings off because there were issues about
18 them and we're going to have our witnesses explain what
19 the issues were.

20 In preparing for one of the witnesses who was
21 going to appear today, we actually noticed that there's
22 another error and so we are actually going to withdraw from
23 the case one of the UMG Recordings, Godsmack's "Spiral."

24 So there are two Godsmack recordings that both
25 have certain issues. We will have a witness explain what

1 the issues are. This one happens to be the wrong copyright
2 registration number. It's a clerical error, lawyer error.
3 And so rather than having to fight about it, we are just
4 going to withdraw it from the case. There are a bunch of
5 other UMG Recordings, however.

6 MR. TODER: That won't affect -- that won't cause
7 any redaction of any of the exhibits, will it?

8 MR. GABRIEL: We discussed that before. We're
9 fine to leave it on, perfectly fine.

10 MR. TODER: Okay. What was the number of that?

11 MR. GABRIEL: It's Godsmack's "Spiral."

12 MR. TODER: No, the SR number.

13 MR. GABRIEL: 293-376.

14 MR. TODER: And the Bates number?

15 MR. GABRIEL: That I don't know.

16 MR. TODER: Okay.

17 THE COURT: Anything else, Counsel?

18 MR. GABRIEL: No. Thank you.

19 THE COURT: Anything else?

20 MR. TODER: Nothing from the defendant. Thank
21 you.

22 THE COURT: Let's get the jury out.

23 **IN OPEN COURT**

24 **(JURY PRESENT)**

25 THE COURT: Call your next witness, please.

1 MR. GABRIEL: The plaintiffs call Jammie Thomas,
2 Your Honor.

3 (Witness sworn.)

4 THE COURT: Good afternoon.

5 THE WITNESS: Good afternoon.

6 THE COURT: Would you state your true and correct
7 name for the record, please.

8 THE WITNESS: Jammie Lee Thomas.

9 THE COURT: Would you spell it for the record.

10 THE WITNESS: J-a-m-m-i-e, L-e-e, T-h-o-m-a-s.

11 THE COURT: You may inquire.

12 MR. GABRIEL: Thank you, Your Honor. Good
13 afternoon, Your Honor, Counsel, Ms. Thomas, and Ladies and
14 Gentlemen.

15 (Jammie Thomas)

16 CROSS EXAMINATION

17 BY MR. GABRIEL:

18 Q. Ms. Thomas, between the date range of August 2004 and
19 July 30, 2006 you lived at 618 8th Street in Brainerd,
20 correct?

21 A. Correct.

22 Q. Could you describe just briefly your educational
23 background.

24 A. I have an associate's degree from Fond du Lac Tribal
25 Community College and I graduated from there in 2000, and I

1 have my bachelor of science degree in business
2 administration with a major in marketing from St. Cloud
3 State University in 2002.

4 Q. And along the way you've taken several computer courses?

5 A. Yes.

6 Q. And you are proficient in the Microsoft suite of
7 products, Access, Word, Excel, Publisher, correct?

8 A. Yes.

9 Q. Where do you work?

10 A. I work for the Mille Lacs Band of Ojibwe in their
11 Department of Natural Resources and Environment.

12 Q. And what do you do?

13 A. I am the brownfield coordinator. I coordinate a grant
14 given to the tribe from the EPA to redevelop contaminated
15 property.

16 Q. And you use a computer at work, do you not?

17 A. Yes.

18 Q. And you use it for typical work things, like writing
19 e-mails, memos, letters, the like?

20 A. Yes.

21 Q. You also keep track of budgeting?

22 A. Yes.

23 Q. You write grants, grant updates, and grant reports?

24 A. Yes.

25 Q. You also use the Internet at work, correct?

1 A. Yes.

2 Q. You access the EPA website as part of your job duties to
3 conduct what's called Phase I environmental assessments,
4 correct?

5 A. Environmental site assessments, yes.

6 Q. And that involves basically researching environmental
7 databases, true?

8 A. That's correct.

9 Q. You also use the Internet to research the programs that
10 you're writing, right?

11 A. That's correct.

12 Q. And you use the Internet to keep track of what other
13 tribes are doing?

14 A. That's correct.

15 Q. And to update your own online website, correct?

16 A. It's not my website, it's actually the tribe's website,
17 and I only update one small part of it.

18 Q. So you update part of the tribe's website?

19 A. Part of it, yes.

20 Q. And you use the Internet at home as well, correct?

21 A. Yes.

22 Q. You have online accounts at various retailers, like
23 Best Buy and Wal-Mart?

24 A. Correct.

25 Q. You have posted on a website called match.com?

1 A. Correct.

2 Q. You play video games online?

3 A. Yes.

4 Q. You have a MySpace account too, correct?

5 A. Correct.

6 Q. Could you describe for the ladies and gentlemen of the
7 jury what a MySpace account is.

8 A. A MySpace account is basically a -- I guess you could
9 call it just information about yourself. It's kind of where
10 you can keep in touch with family, put pictures of yourself
11 on there, pictures of your family. It has a blog section
12 where you can keep them updated on what's going on in your
13 life. It has sections in there that list the things that
14 you like, the books that you like, the books you're reading,
15 the music you like. It has a list on there of all your
16 friends, and what your friends are are people who have other
17 MySpace pages. That's about it.

18 Q. And a MySpace page is basically a website, a personal
19 website, isn't it?

20 A. Yes.

21 Q. And it's something you design?

22 A. Under the parameters of the MySpace program, but yes.

23 Q. And in terms of the Internet, you have also posted
24 comments recently to an antirecording industry blog called
25 The Recording Industry vs. The People?

1 A. That's correct.

2 Q. I would like to turn to the issue of your computer, if
3 we can.

4 A. Certainly.

5 Q. Since 2003 you've had a Compaq computer, correct?

6 A. Yes.

7 Q. And specifically a Compaq Presario, Model S6300NX?

8 A. I couldn't tell you the model number.

9 Q. Does that sound right?

10 A. Yes.

11 Q. That was the only computer in your home on 8th Street in
12 Brainerd, true?

13 A. Correct.

14 Q. And, in fact, it specifically was the only computer in
15 the home on February 21st of 2005?

16 A. That I don't know. I don't know the specific date.

17 Q. Were there -- that was -- okay. At any time that you
18 lived at that 8th Street address from August '04 to July 30,
19 '06, did you have any other computer in that home?

20 A. I didn't, but others did.

21 MR. GABRIEL: Your Honor, I have the original
22 sealed deposition transcript for Ms. Thomas. May I open it?

23 THE COURT: You may.

24 MR. GABRIEL: And may I approach?

25 THE COURT: You may.

1 MR. GABRIEL: Page 87, Counsel.

2 MR. TODER: Are you on the first volume?

3 MR. GABRIEL: Yes, I am.

4 BY MR. GABRIEL:

5 Q. Ms. Thomas, do you recall that you had your deposition
6 taken in this case on -- at least the first time on
7 March 14th of 2007?

8 A. It was in March. I don't remember the day.

9 Q. Would you look on the cover of this deposition
10 transcript.

11 A. Sure.

12 Q. It will help you recall it was March 14, 2007.

13 A. Sure.

14 Q. Your deposition was taken by my partner, Mr. Reynolds?

15 A. Yes.

16 Q. And you understood that you were testifying under oath?

17 A. Yes.

18 Q. And you understood what that meant?

19 A. Yes.

20 Q. And you testified truthfully to the best of your
21 ability, did you not?

22 A. Yes.

23 Q. In fact, you had an opportunity to review and make any
24 changes to your deposition that you wanted to make after it
25 was taken, correct?

1 A. Yes.

2 Q. Could I ask you to look at page 87, please.

3 A. Okay.

4 Q. And you also understood, by the way, that you were
5 testifying under oath under the penalties of perjury, just
6 like you are today, correct?

7 A. Yes.

8 Q. And Mr. Reynolds, in fact, confirmed that with you?

9 A. Yes.

10 Q. Would you look at page 87 on line 2. Do you recall
11 being asked the following question and giving the following
12 answer?

13 "So from -- I think we've already covered this, but I
14 just want to be sure. From the time you purchased the
15 Compaq in spring of 2003 until you brought it to your
16 attorney's office last -- early last fall, the only computer
17 in your household was the Compaq computer?

18 "Answer: Yes."

19 That's the testimony you gave, correct?

20 A. Yes.

21 Q. While you were at the 8th Street address, ma'am, your
22 Internet service provider was Charter Communications,
23 correct?

24 A. Yes.

25 Q. And to access the Internet you rented a modem from

1 Charter Communications, correct?

2 A. Yes.

3 Q. There was a media access control or MAC address
4 associated with that modem, correct?

5 A. Yes.

6 Q. Do you remember that you provided responses to written
7 questions called interrogatories to us?

8 A. Yes.

9 Q. And do you recall that we asked you what the modem MAC
10 address was?

11 A. Yes.

12 Q. And do you recall that you told us what it was?

13 A. Yes.

14 Q. And you told us it was -- and you signed those
15 interrogatories under oath, there was a verification page?

16 A. That's correct.

17 Q. Do you recall that you told us that the modem MAC
18 address was 00028ACF5590?

19 A. If that's what was in my interrogatories, then, yes,
20 that's what I gave you.

21 MR. GABRIEL: Your Honor, may I approach again?

22 THE COURT: You may.

23 MR. GABRIEL: And for the record, I am going to
24 hand Ms. Thomas a copy of her responses to plaintiffs' first
25 set of interrogatories.

1 BY MR. GABRIEL:

2 Q. Ms. Thomas, I just don't -- didn't want you to have to
3 take my word. These are the interrogatory responses that
4 you provided to us, correct?

5 A. Yes.

6 Q. And your signature is on the back there somewhere?

7 A. Yes.

8 Q. And it's signed under oath, correct?

9 A. Yes.

10 Q. Would you look at your answer to Interrogatory No. 3.

11 A. Yes.

12 Q. And do you see that you provided us the model number --
13 make and model of your computer?

14 A. Yes.

15 Q. And, again, so you don't have to take my word, what
16 information did you provide?

17 A. The MAC address.

18 Q. Let me first ask about the computer make and model
19 number.

20 A. Oh. The computer make and model number is Compaq
21 Presario S6300NX, serial number MXK4081M7H.

22 Q. And then you also did provide a MAC -- modem MAC
23 address, did you not?

24 A. Yes.

25 Q. And what MAC address did you provide to us?

1 A. 00028ACF5590.

2 Q. Now, you're aware, ma'am, when you turn -- thank you for
3 that. You're aware that when you turn on your computer, it
4 comes up and there are kind of account names that show up?

5 A. Yes.

6 Q. Do you know what I'm talking about?

7 A. I know exactly what you're talking about.

8 Q. And what would you call that name? Do you call it a
9 user name or account name?

10 A. On my computer?

11 Q. Yes, ma'am.

12 A. Those are user names.

13 Q. All right. The user name on your computer was
14 tereastarr, correct?

15 A. Yes.

16 Q. And would you spell that for us.

17 A. t-e-r-e-a-s-t-a-r-r.

18 Q. And to the best of your knowledge, tereastarr was the
19 default profile, it was the one that came up first?

20 A. There was two of them that came up at the same time.

21 Q. Was tereastarr the default profile?

22 A. It was the administrative one.

23 Q. And that's kind of the one that controls all the other
24 ones, right?

25 A. Yes.

1 Q. You created the tereastarr name for this computer, did
2 you not?

3 A. Correct.

4 Q. And you created it on that computer in the spring of
5 2003?

6 A. We created it when I purchased the computer, after we
7 purchased the computer.

8 Q. And that's the only user name that you've used on that
9 computer, correct?

10 A. The only one I have used, yes.

11 Q. And, in fact, ma'am, you have used the tereastarr name
12 for pretty much everything relating to computers, correct?

13 A. Yes.

14 Q. In fact, you've done that for 13 or 14 years?

15 A. Yes.

16 Q. Your current e-mail address is tereastarr@yahoo.com?

17 A. Correct.

18 Q. Your prior e-mail address was tereastarr@charter.net?

19 A. Correct.

20 Q. You also had one at some point that was
21 tereastarr@msn.com?

22 A. Correct.

23 Q. You're familiar with an instant message address as well,
24 correct?

25 A. Yes.

1 Q. And you had instant messaging?

2 A. Yes. I used Yahoo messaging.

3 Q. And the instant message address you used was also
4 tereastarr?

5 A. Correct.

6 Q. We talked about your online accounts at places like
7 Wal-Mart and Best Buy you used the name tereastarr, correct?

8 A. Correct.

9 Q. You've used it on online video games that you have
10 played?

11 A. Correct.

12 Q. You also use it for your MySpace page?

13 A. Correct.

14 Q. And when you posted on this antirecording industry web
15 blog Recording Industry vs. The People, you used that name
16 as well?

17 A. Correct.

18 Q. Can I ask you, ma'am, to look at Exhibit 23 in -- I
19 think it's in the third volume. Have you found that, ma'am?

20 A. Yes.

21 Q. Do you recognize Exhibit 23?

22 A. Yes, I do.

23 Q. What is it, please?

24 A. This is screen shots that the plaintiffs asked me to
25 produce in my answers to interrogatories and production of

1 documents.

2 Q. And you have the -- do you remember responding to
3 interrogatories and requests for production of documents at
4 the same time?

5 A. Yes.

6 Q. What's the date that you responded? I think you have
7 those answers up there with you.

8 A. The date that I signed this was September 22nd of '06.

9 Q. Thank you. And so you would have printed this out
10 around that time?

11 A. This was done before I went into my attorney's office,
12 but yes.

13 Q. Somewhere close in that September --

14 A. Very close, yes.

15 MR. GABRIEL: Your Honor, move Exhibit 23.

16 MR. TODER: No objection.

17 THE COURT: 23 will be admitted.

18 BY MR. GABRIEL:

19 Q. Just so the jury can see what you're looking at, ma'am,
20 this is the first page of Exhibit 23, correct?

21 A. Yes.

22 Q. And this is what -- when you open up your computer, this
23 is kind of the screen shot of what it looks like?

24 A. Yes.

25 MR. GABRIEL: Tim, would you turn to the second

1 page.

2 BY MR. GABRIEL:

3 Q. And then if you kind of open up the Start, you look at
4 the programs, this is what comes up, correct?

5 A. Correct.

6 Q. And it does show the tereastarr name, consistent with
7 what you told us?

8 A. Correct.

9 Q. Can I ask you to look at Exhibit 24, please.

10 A. Okay.

11 Q. And there's been some testimony about these already,
12 ma'am. Do you recognize what Exhibit 24 is?

13 A. Yes.

14 Q. What are these, please?

15 A. These are pictures of accounts that I have online.

16 Q. And the first one is an account from where?

17 A. This is pogo.com.

18 Q. And it does show tereastarr, correct?

19 A. Correct.

20 Q. And then if you turn the page, there's match.com.

21 MR. GABRIEL: Tim, would you turn to the next
22 page.

23 BY MR. GABRIEL:

24 Q. This is also yours?

25 A. Correct.

1 Q. And you used the tereastarr name, correct?

2 A. Correct.

3 Q. In fact, that's you?

4 A. Yes, that's me.

5 Q. I won't show you the next one because we're going to
6 redact out your private e-mails, but we do have the Yahoo
7 e-mail in here?

8 A. Yes.

9 Q. And it does show also the tereastarr name?

10 A. Correct.

11 Q. Does it indicate there's tereastarr e-mail going from
12 tereastarr@charter to tereastarr@yahoo?

13 A. Yes.

14 Q. And was this you e-mailing yourself, or can you explain
15 that?

16 A. That was I wanted to keep a copy of it and on my
17 tereastarr@charter I couldn't do folders to keep copies of
18 it, but on Yahoo I can.

19 Q. Okay. And so you basically e-mailed yourself so you
20 could keep a copy, right?

21 A. Yes.

22 Q. There's no other tereastarr, the two tereastarrs we're
23 looking at here --

24 A. Yes.

25 Q. -- are both you?

1 A. Yes.

2 Q. I neglected to ask you, ma'am, what is match.com?

3 A. match.com is an online dating website.

4 Q. The Compaq computer that you described, ma'am, was kept
5 in your bedroom, correct?

6 A. Yes.

7 Q. We're talking about the 8th Street address, right?

8 A. Yes.

9 Q. In fact, do you recall in your deposition you were kind
10 enough to draw kind of a picture of your -- that home and
11 where the computer was kept?

12 A. Yes.

13 Q. Could I ask you to look at Exhibit 20, please. Have you
14 found that?

15 A. Yes.

16 Q. Is this the picture that you drew for us?

17 A. Yes.

18 Q. And it shows that the computer is in your bedroom and
19 where it is?

20 A. Yes.

21 Q. And this picture is an accurate depiction of your -- not
22 to scale, but an accurate hand drawing of --

23 A. As accurate as I could get it, yes.

24 MR. GABRIEL: Move Exhibit 20.

25 MR. TODER: No objection.

1 THE COURT: 20 will be admitted.

2 BY MR. GABRIEL:

3 Q. Just so -- the jurors can see it now. This is a picture
4 of the home on 8th Street that you described?

5 A. Yes.

6 Q. And it shows that the computer was in your bedroom, kind
7 of in the corner near the bathroom, correct?

8 A. Correct.

9 Q. Do you recall, ma'am, that since about the summer of
10 2004 -- and if it helps you, that's a time when you ended a
11 relationship with a Mr. Gervais.

12 A. Mr. Gervais.

13 Q. Gervais. Excuse me. That's G-e-r-v-a-i-s.

14 Do you recall that about that time you had put
15 password protection on your computers?

16 A. It was after that time.

17 Q. Was it close in time to that?

18 A. I want to say it was after I moved to Brainerd.

19 Q. The summer of 2004, roughly?

20 A. Around August 2004.

21 Q. So the summer of 2004, we can agree on that?

22 A. Yeah.

23 Q. And so once that was password protected, you would need
24 a password to get online, correct?

25 A. To get into my user, yes.

1 Q. And no one had access to your password except you,
2 correct?

3 A. Correct.

4 Q. And so the only person with access to the tereastarr
5 portion of your computer was you?

6 A. Correct.

7 Q. I promise you we won't get into personal details here.
8 Just in terms of time, you ended the relationship with
9 Mr. Gervais in about the spring or summer of 2004?

10 A. It was June 2004.

11 Q. Prior to that time you never saw any music on the
12 computer, correct?

13 A. I never noticed any music on my computer, no.

14 Q. And then we heard from Mr. Havemeier today. You had a
15 relationship with him as well, correct?

16 A. Correct.

17 Q. And that was from October 2004 through roughly February
18 2006?

19 A. Correct.

20 Q. Throughout the entire time of your relationship with
21 Mr. Havemeier your computer was password protected, right?

22 A. Correct.

23 Q. He did not have access to your password either, correct?

24 A. No.

25 Q. Is that correct?

1 A. That's correct.

2 Q. Sorry. Double negative. My fault.

3 And, in fact, you actually recall that
4 Mr. Havemeier used your computer twice in the course of your
5 relationship to check his e-mail?

6 A. That's what I remember, yes.

7 Q. And you had to help him get on it and you typed the
8 password?

9 A. Yes, I had to type in the password for him.

10 Q. And you never heard Mr. Havemeier listening to music on
11 the computer, correct?

12 A. No.

13 Q. That's true?

14 A. That's true.

15 Q. Now, ma'am, you are someone who is very interested in
16 music, are you not?

17 A. Yes.

18 Q. And you've been interested in music for a very long
19 time?

20 A. Yes.

21 Q. You have a fairly large collection of CD's, do you not?

22 A. Yes, about 240 CD's.

23 Q. In fact, at one point you had over 400?

24 A. Yes.

25 Q. Can I ask you to look at Exhibit 25, please.

1 A. I have it.

2 Q. This is actually a list that you provided to us in the
3 course of the case of all of the recordings that you own,
4 correct?

5 A. Correct.

6 MR. GABRIEL: I think the exhibit is not objected
7 to, Your Honor. We would move its admission.

8 MR. TODER: No objection, Your Honor.

9 THE COURT: Be admitted.

10 BY MR. GABRIEL:

11 Q. Ma'am, sitting here today, you're now aware that on the
12 backs of your CD's there's a little "C" in a circle and a
13 little "P" in a circle, correct?

14 A. Yes.

15 Q. And you understand that those are warnings regarding
16 unauthorized use of those CD's, correct?

17 A. Correct.

18 Q. And you understood that the CD's in your collection
19 contained copyrighted sound recordings, correct?

20 A. Correct.

21 Q. And you, in fact, understood that when you bought them,
22 correct?

23 A. I wouldn't say when I bought them, but I understand it
24 now, yes.

25 Q. Can I ask you to look at page 126 of your deposition,

1 please, ma'am.

2 A. Yes.

3 Q. Do you have that, ma'am?

4 A. Yes.

5 Q. Again, we're looking at your deposition, again under
6 oath, in March of this year, right?

7 A. Um-hmm.

8 Q. Yes?

9 A. Yes.

10 Q. Do you recall being asked -- and, again, you testified
11 under oath, under the penalty of perjury, and you understood
12 that when you were testifying, correct?

13 A. Yes.

14 Q. And, again, you had a chance to make changes to your
15 deposition if you chose to do that, correct?

16 A. Yes.

17 Q. Do you recall being asked the following questions and
18 giving the following answers on that date? This is
19 page 126, line 2.

20 "Question: And, in fact, without looking through the
21 entire box, most of the CD's in those boxes are copyrighted
22 sound recordings, right?

23 "Answer: Yes.

24 "Question: You understood that?

25 "Answer: Yes.

1 "Question: And you understood that when you bought
2 them, right?

3 "Answer: Yes."

4 That's the testimony you gave under oath, correct?

5 A. Yes.

6 Q. Now, Ms. Thomas, you have what you, I think, have
7 described as a fairly eclectic taste in music, right?

8 A. Yes.

9 Q. You listen to everything, from heavy metal, to hip hop,
10 to country, to classical, to jazz, to blues; you have a wide
11 range of interest, correct?

12 A. Yes.

13 Q. And you have indicated, ma'am, that you copy the CD's
14 that you own into your computer, correct?

15 A. I ripped them to my computer, yes.

16 Q. And I was going to ask: The phrase that people would
17 use is ripping them, correct?

18 A. Yes.

19 Q. And you've indicated that you always listen to music
20 through your home computer, correct?

21 A. I listen -- that's one of the mediums I listen to it
22 through.

23 Q. And you do that frequently, correct?

24 A. Yes.

25 Q. And do you recall, ma'am, testifying previously that you

1 began ripping your CD's onto your computer after your
2 relationship with Mr. Gervais ended?

3 A. Yes.

4 Q. And you've told us that was June of 2004?

5 A. Yes.

6 Q. And I believe you have previously testified that you did
7 that using Windows Media Player, correct?

8 A. Yes.

9 Q. And that would load the CD's in WMA format, correct?

10 A. I believe so, yes.

11 Q. You would spend two or three hours once a week ripping
12 your CD's to your computer; isn't that true?

13 A. I actually said I did it one to two times a week,
14 sometimes three, based off of my schedule as I was a single
15 mom.

16 Q. Would you look at page 66 of your deposition, please.

17 Let me know when you've found it.

18 A. Um-hmm.

19 Q. Are you there?

20 A. Okay.

21 Q. And, again, this was your deposition under oath in March
22 of this year, right?

23 A. Yes.

24 Q. And testifying under the pains and penalties of perjury?

25 A. Yes.

1 Q. Do you recall being asked the following question and
2 giving the following answer? This is page 66, line 20.

3 "Question: So once a week or so you would spend two,
4 three hours at the computer uploading CD's to the computer,
5 correct?

6 "Answer: That's correct."

7 That was your testimony, right?

8 A. Yes, but on the next page it explains more, on page 67,
9 question 8.

10 Q. You say that there could have been days where you would
11 do it two days in a row, three days in a row, it depends how
12 busy you were?

13 A. Yes, that is what I testified to.

14 Q. And you testified, ma'am, that you -- the most you can
15 ever recall uploading in a single day is six or seven?

16 A. I did, yes.

17 Q. You never recall uploading 2,000 songs in a two-day
18 span, right?

19 A. I could have.

20 Q. You told us under oath before the most you could recall
21 was six or seven in a day.

22 A. I said it was an approximation, yes.

23 MR. GABRIEL: Your Honor, I have Volume II of
24 Ms. Thomas's deposition under seal or sealed. May I open
25 the envelope and approach?

1 THE COURT: You may.

2 MR. TODER: Counsel, do you have an extra copy of
3 that?

4 MR. GABRIEL: I don't.

5 BY MR. GABRIEL:

6 Q. Ma'am, do you recall that your deposition was taken a
7 second time in this case on May 1st of this year?

8 A. Yes.

9 Q. And that was taken by my partner, Mr. Reynolds?

10 A. Yes, over the phone.

11 Q. Right. And you again were -- you were sworn to testify
12 under oath?

13 A. Correct.

14 Q. And you understood what that meant?

15 A. Yes.

16 Q. Same as before, right?

17 A. Yes.

18 Q. Can I ask you to turn to page 206, please. Have you
19 found it, ma'am?

20 A. Yes.

21 Q. Do you recall being asked -- and we're at line 19 --
22 being asked the following question and giving the following
23 answers?

24 "Question: What's the most CD's you can recall
25 uploading to your computer in a single day?

1 "Answer: Six or seven.

2 "Question: And when was that?

3 "Answer: I don't have a specific incidence.

4 "Question: Do you remember whether it was in 2004 when
5 you first started doing it or whether it was in 2005?

6 "Answer: I don't know.

7 "Question: But in any event, the most you can recall
8 ever uploading in a single day is six or seven CD's?

9 "Answer: The most I can remember, yes."

10 That was the testimony you gave, correct?

11 A. Yes.

12 Q. And, ma'am, with respect to the depositions you gave, do
13 you recall that Mr. -- after your depositions Mr. Stanley
14 discovered the sticker on the hard drive?

15 A. After my deposition?

16 Q. Yeah. You learned that the hard drive that Mr. --
17 excuse me. Let me try again. The testimony you gave was
18 before your expert, Mr. Stanley, discovered the sticker on
19 the hard drive?

20 A. That's correct. I believe so.

21 Q. Can I ask you, ma'am, to look at Exhibit 6 now. I
22 believe it's in Volume 2.

23 A. Your book is falling apart up here.

24 Q. I apologize.

25 A. I have Exhibit 6, but I can't turn any of the pages.

1 MR. GABRIEL: Can I assist, Your Honor, or
2 Mr. Reynolds can assist and we can keep going?

3 THE COURT: I'm sorry?

4 MR. GABRIEL: May we approach and assist the
5 witness?

6 THE WITNESS: I've got it.

7 BY MR. GABRIEL:

8 Q. Thank you, Ms. Thomas. I apologize.

9 You understand now, ma'am, that the record
10 companies in this case say that these are screen shots of
11 the Kazaa share folder that SafeNet saw on a certain
12 computer that the plaintiffs say ultimately was traced to
13 you; do you understand that?

14 A. Yes.

15 Q. You recognize, of course, that the name tereastarr@kazaa
16 is next to virtually every single file name in the share
17 folder, right?

18 A. Yes.

19 Q. And, of course, that's the same user name you've
20 described that you use for everything?

21 A. Yes.

22 Q. And the spelling is the same?

23 A. Yes.

24 Q. And it's your position in this case that this share
25 folder was not yours, right?

1 A. It's not mine.

2 Q. You have heard of a group called Lacuna Coil, have you
3 not?

4 A. Yes.

5 Q. You listen to Lacuna Coil?

6 A. Yes.

7 Q. And you've been to a Lacuna Coil concert?

8 A. Yes.

9 Q. Lacuna Coil is a band from Italy, right?

10 A. Yes.

11 Q. And I think you've described them as eclectic in their
12 sound?

13 A. Yes.

14 Q. There are Lacuna Coil recordings in this share folder,
15 correct?

16 A. I haven't looked at the entire share folder. If you
17 could direct me to a page.

18 Q. I just picked one randomly. There's Bates numbers at
19 the bottom, ma'am. Do you see them?

20 A. Yes.

21 Q. If you could look at page 469 -- or 486 may be a better
22 example. I apologize.

23 A. 486?

24 Q. Yes, ma'am. Do you see there's some Lacuna Coil
25 recordings in here?

1 A. Yes.

2 Q. You are familiar with a band called Cold?

3 A. Cold?

4 Q. C-o-l-d.

5 A. Yes.

6 Q. I think you described them as a mixture between rock and
7 heavy metal, correct?

8 A. Yes.

9 Q. I think you indicated they're not as heavy metal as
10 some, but in the middle, right?

11 A. Yes.

12 Q. Could I ask you to look at Bates pages 475 to 476.

13 A. Okay.

14 Q. And do you see recordings by Cold on there?

15 A. Yes.

16 Q. Are you also familiar with a group called Evanescence?

17 A. Yes.

18 Q. In fact, you have been to one of their concerts as well?

19 A. No, not Evanescence.

20 Q. Maybe this will refresh your recollection. Did you have
21 plans to go to an Evanescence concert and then not get
22 there?

23 A. At one time, yeah, but I never made it.

24 Q. But it's a band that you listen to?

25 A. Yes.

1 Q. Could you look at page 490.

2 A. Okay.

3 Q. Do you see a bunch of Evanescence recordings there?

4 A. Yes.

5 Q. You've heard of Howard Shore?

6 A. Howard Shore, yes.

7 Q. You're aware that he did the music for *Lord of the*

8 *Rings*, right?

9 A. Yes.

10 Q. And you actually listen to his music as well, you have

11 some of his music?

12 A. Yes.

13 Q. Could you look at Bates page 504.

14 A. Okay.

15 Q. And you see there's a number of recordings by Howard

16 Shore in the share folder, correct?

17 A. Yes.

18 Q. You've heard of the group Green Day?

19 A. Yes.

20 Q. You listen to Green Day as well?

21 A. Yes.

22 Q. Would you look at Bates label 493, please.

23 A. Okay.

24 Q. And there are recordings by Green Day here, right?

25 A. Yes.

1 Q. You've heard of a group called Chevelle?
2 A. Chevelle?
3 Q. C-h-e-v, as in Victor, e-l-l-e.
4 A. Yes.
5 Q. You listen to them as well?
6 A. Yes, I have one of their CD's.
7 Q. And would you look at Bates label 474.
8 A. Okay.
9 Q. And do you see a bunch of recordings by Chevelle there?
10 A. There's five, yes.
11 Q. You've heard of the group Creed?
12 A. Yes.
13 Q. You listen to their music as well?
14 A. Yes.
15 Q. Would you look at Bates page 477. Are you with me?
16 A. Yes.
17 Q. Do you see recordings by Creed there?
18 A. Yes.
19 Q. And also on the very next page?
20 A. Yes.
21 Q. You've heard of Enya --
22 A. Yes.
23 Q. -- E-n-y-a?
24 A. Yes.
25 Q. You listen to Enya?

1 A. Yes.

2 Q. Would you look at Bates 487. This page is all Enya,
3 correct?

4 A. Yes.

5 Q. Are you familiar with a group called Dream Theater?

6 A. Yes.

7 Q. You listen to them as well?

8 A. Yes.

9 Q. Would you look at page 476. Sorry to make you bounce
10 back and forth. Do you see recordings -- I'm sorry.

11 A. Okay.

12 Q. Do you see recordings by Dream Theater?

13 A. Yes.

14 Q. You've heard of A.F.I.?

15 A. Yes.

16 Q. You have some of their music as well?

17 A. Yes.

18 Q. Would you look at Bates label 470, please. Are you
19 there?

20 A. Yes.

21 Q. Do you see a bunch of recordings by A.F.I. here?

22 A. Yes.

23 Q. You listen -- or you've heard of Belinda Carlisle?

24 A. Yes.

25 Q. You have heard some of her music, you listen to her?

1 A. Yes.

2 Q. Would you look at page 473.

3 A. Okay.

4 Q. And you have Belinda -- there are Belinda Carlisle
5 recordings here?

6 A. Yes.

7 Q. And, in fact, on 472 as well?

8 A. Yes.

9 Q. You, of course, have heard of Black Sabbath?

10 A. Yes.

11 Q. You listen to their music?

12 A. Yes.

13 Q. On the same page, 473 I think we were, you see a bunch
14 of Black Sabbath here?

15 A. Yes.

16 Q. You have heard of the Black Eyed Peas?

17 A. Yes.

18 Q. And you listen to their music?

19 A. Yes.

20 Q. And on this same page there's a bunch of Black Eyed
21 Peas, correct?

22 A. Yes.

23 Q. You've heard and listen to Sheryl Crow?

24 A. Yes.

25 Q. Would you look at page 479. Do you see some recordings

1 by Sheryl Crow there?

2 A. I see four.

3 Q. And do you listen to a group called Days of the New?

4 A. Yes.

5 Q. Could you look on the same page. Do you see recordings
6 from Days of the New at the bottom?

7 A. Yes.

8 Q. You listen to a group called Danzig, D-a-n-z-i-g?

9 A. I have heard of them, yes.

10 Q. And you listen to them?

11 A. No.

12 Q. Would you look at your deposition, the first volume,
13 look at page 166. Have you found it?

14 A. Yes.

15 Q. Again, you were testifying under oath here, correct?

16 A. Yes.

17 Q. And you understood that, correct?

18 A. Yes.

19 Q. Mr. Reynolds was going through a list of recordings,
20 sort of like I'm doing, and at line 5 he said:

21 "Question: And Danzig?" And he spells it.

22 "Answer: Yes, I do have them."

23 A. Yes, I have one of their CD's.

24 Q. And they are in this share folder too, correct?

25 A. Yes.

1 Q. Do you listen to a group called Breaking Benjamin?

2 A. Yes.

3 Q. Would you look at page 482.

4 A. Okay.

5 Q. Do you see Breaking Benjamin recordings here?

6 A. Yes.

7 Q. You listen to a group called Disturbed, correct?

8 A. Yes.

9 Q. Would you look at 484, please. There are a bunch of
10 recordings by Disturbed, correct?

11 A. Yes.

12 Q. Last one I'll ask you about. You're familiar with a
13 group called Drowning Pool?

14 A. Yes.

15 Q. Would you look at the next page, page 485. Do you see a
16 number of recordings by Drowning Pool?

17 A. Yes.

18 Q. Ma'am, would it surprise you to learn that there are
19 more than 60 artists that you've told us you listen to in
20 this share folder, Exhibit 6?

21 A. No.

22 Q. I'm going to ask you to look at Exhibit 1.

23 A. Which book?

24 Q. It's the very first one.

25 A. Okay.

1 Q. This document is in evidence. It indicates the
2 recordings at issue in this case with a couple of extras.
3 You listen to every artist on here, do you not?

4 A. Yes.

5 Q. And every one of those is in the share folder,
6 Exhibit 6, that we just looked at?

7 A. Some of them we didn't look at, but, yes, I guess I'll
8 take your word for that.

9 Q. Would you look at Exhibit 2, please.

10 A. Okay.

11 Q. And these are other recordings --

12 MR. GABRIEL: Can we pull up Exhibit 2.

13 BY MR. GABRIEL:

14 Q. These are other recordings at issue in the case,
15 correct?

16 A. Yes.

17 Q. And you listen to every one of these artists?

18 A. Yes.

19 Q. And every one of these was also in the share folder,
20 Exhibit 6, correct?

21 A. Yes.

22 Q. Ms. Thomas, in the process by which you had responded to
23 those interrogatories we looked at, the written questions,
24 do you remember that you also signed responses to requests
25 for admissions?

1 A. Yes.

2 Q. We asked you to admit certain facts?

3 A. Yes.

4 Q. And do you recall, ma'am, you admitted that you had no
5 evidence to dispute that each plaintiff owns or controls the
6 exclusive rights to all of the recordings in Exhibit 1?

7 A. At that time I didn't, no.

8 Q. And you likewise admitted that the plaintiff -- each
9 plaintiff owns or controls the exclusive rights to every one
10 of the recordings in Exhibit 2?

11 A. At that time I didn't, no.

12 Q. And you never amended your responses, correct?

13 A. No.

14 Q. That's correct?

15 A. That's correct.

16 Q. You also told us that you have no evidence to dispute
17 that each plaintiff properly registered each of the
18 recordings on Exhibit 1 with the Copyright Office more than
19 three years before you were sued, you admitted that,
20 correct?

21 A. At that time I didn't have any information on that, yes.

22 Q. And you likewise stated on your requests for admissions
23 that you had no evidence to dispute that each plaintiff
24 properly registered each of the recordings on Exhibit 1 with
25 the Copyright Office more than three years before you were

1 sued in this case? I'm sorry. I said Exhibit 1. I meant
2 Exhibit 2. You gave the same admission with respect to
3 Exhibit 2?

4 A. At that time I didn't, no.

5 Q. And, again, you never amended your response --

6 A. No.

7 Q. -- to change it, correct?

8 A. Correct.

9 Q. You also admitted previously that you have no evidence
10 to dispute that each copyright registration for each sound
11 recording listed in Exhibits 1 and 2 were valid, right?

12 A. At that time I had nothing.

13 Q. And, again, you never amended your responses, right?

14 A. No, I did not.

15 Q. You admitted that none of the plaintiffs ever authorized
16 you to copy or distribute any of the sound recordings on
17 Exhibits 1 or 2, correct?

18 A. Yes.

19 Q. You admitted also that you have no evidence to dispute
20 that each sound recording identified in Exhibits 1 and 2 are
21 identical to the sound recordings registered with the United
22 States Copyright Office?

23 A. Correct.

24 Q. And talking about your requests for admissions, do you
25 recall you also gave -- you testified to those in your

1 deposition as well?

2 A. That's correct.

3 Q. And you testified the same as your requests for
4 admissions, right?

5 A. Correct.

6 Q. And you did not correct your deposition either, correct?

7 A. Correct.

8 Q. And you had the opportunity to do that, correct?

9 A. Correct.

10 Q. Ma'am, you have heard of a service called Napster,
11 correct?

12 A. Yes.

13 Q. You heard about that when you were in college?

14 A. Yes.

15 Q. Approximately 1999?

16 A. '98, '99. It was the first or second trimester in
17 college, yes.

18 Q. In fact, ma'am, you did a case study on Napster, right?

19 A. Yes.

20 Q. You used Napster to download music at that time?

21 A. Yes.

22 Q. And you did this by setting up an account, searching
23 their database, and clicking on a recording to download the
24 recording, correct?

25 A. Yes.

1 Q. And when you did this, you understood the recording was
2 then stored on your computer?

3 A. On the college's computer, yes.

4 Q. The computer you were using?

5 A. Yes.

6 Q. And you understood that there was then a digital copy of
7 that recording on that computer?

8 A. Yes.

9 Q. At the end of the study that you were doing, you
10 concluded that Napster was legal?

11 A. Yes.

12 Q. You later learned that Napster was shut down because it
13 was illegal?

14 A. Yes.

15 Q. You have, ma'am, burned CD's for people, correct?

16 A. Yes.

17 Q. You understand what burning a CD is, right?

18 A. Yes.

19 Q. For those on the jury who may not be familiar with that,
20 could you explain what that is.

21 A. Okay. Burning a CD, you take music that you have stored
22 on your computer and you put it into a burn file under
23 Windows Media Player. Then you put in either a CD-R or a
24 CD-RW and then you click "burn" and then your CD-R actually
25 burns the music onto that CD.

1 Q. Thank you. You created two CD's for Mr. Havemeier?

2 A. Yes.

3 Q. You created a CD for another friend, Mr. Rasset?

4 A. He's my fiancé. Yes.

5 Q. Congratulations.

6 A. Thank you.

7 Q. You have -- and you have burned CD's for yourself?

8 A. Yes.

9 Q. And if I understand the way it works, you create a

10 playlist on your computer and then burn the CD, right?

11 A. Not a playlist. A burn list.

12 Q. A burn list?

13 A. Yes.

14 Q. You make a listing of the recordings you want on that

15 CD?

16 A. Yes.

17 Q. And then you can put whatever you want on the CD?

18 A. Yes.

19 Q. And if I understand it, the ones that you made for

20 Mr. Havemeier were from CD's that were in your -- or

21 recordings that were in your home computer, correct?

22 A. Yes.

23 Q. And the one you did for Mr. Rasset was from CD's

24 purchased from walmart.com?

25 A. No. It was from songs purchased from walmart.com.

1 Q. Thank you. You purchased recordings from walmart.com?

2 A. Correct.

3 Q. And so when you made these CD's for others, you were
4 making copies of CD's that you owned and giving them as
5 gifts?

6 A. I wasn't making copies of CD's. I was compiling songs.

7 Q. You made copies of songs that you owned?

8 A. Yes.

9 Q. And gave them to somebody else?

10 A. Yes. As a gift, yes.

11 Q. Did you get permission from the copyright owners to do
12 that?

13 A. No.

14 Q. Could I ask you to look at Exhibit 27, please.

15 A. Okay.

16 Q. Do you recognize, ma'am, what Exhibit 27 is? You can,
17 by all means, flip through it.

18 A. Yes.

19 Q. And what are contained in Exhibit 27?

20 A. These are playlists on my computer.

21 MR. GABRIEL: And I think these were not objected
22 to, Your Honor. We would move Exhibit 27.

23 MR. TODER: No objection.

24 THE COURT: Be admitted.

25 BY MR. GABRIEL:

1 Q. And if I understand this correctly, ma'am, you compiled
2 these playlists from recordings on your computer and then
3 burned copies for other people, correct?

4 A. Not all of them.

5 Q. You burned some of them for yourself?

6 A. Some of these playlists are just playlists I play at
7 home when I'm -- depending on what I'm doing.

8 Q. Okay. But some of the playlists you used to burn CD's?

9 A. Just a second.

10 Q. Sure.

11 A. One of these is a playlist that I used to burn a CD.

12 I'm looking at page 4.

13 Q. What's the title of that, please?

14 A. The title of the playlist?

15 Q. Yes, ma'am.

16 A. "From Me to You."

17 Q. And was that a CD you then burned for Mr. Havemeier?

18 A. Yes. It was a Valentine's present.

19 Q. Ma'am, you've told us before that you had, in relation
20 to your college work, downloaded music on Napster, right?

21 A. Yes.

22 Q. And when you made that CD for Mr. Rasset, you had
23 downloaded from walmart.com, correct?

24 A. Yes.

25 Q. With respect to -- you have actually purchased music

1 over the Internet from some other places too, correct?

2 A. Yes.

3 Q. You've downloaded music on your MySpace page?

4 A. I've downloaded some songs from artists off of MySpace,
5 yes.

6 Q. In fact, when you open your MySpace page, it plays music
7 by Evanescence, does it not?

8 A. I have what's called a jukebox on my MySpace page and
9 what it is is it's just collections of songs off of other
10 MySpace pages and other places and it just randomly plays.

11 Q. So do you download those from other MySpace pages?

12 A. No. That's just a function of MySpace. It's a MySpace
13 jukebox. It basically takes music from other MySpace pages,
14 the ones that they're playing, and then it puts it in that
15 jukebox function and it plays it on MySpace.

16 Q. And you've also bought CD's online from artists from
17 places like Best Buy and Wal-Mart, correct?

18 A. Yes.

19 Q. And you've purchased ring tones online, correct?

20 A. Yes.

21 Q. You've had at least that experience we just described
22 with respect to music and the Net, true?

23 A. Yes.

24 Q. And given all that experience, is it your testimony that
25 you never heard of the online file sharing service of Kazaa

1 before this case?

2 A. That's true.

3 Q. In fact, ma'am, it's your testimony, notwithstanding all
4 of that, that you never heard of online file sharing
5 programs at all before this case?

6 A. I had heard of Napster and that was it.

7 Q. Ma'am, do you recall that in April of 2005 you got a
8 letter from Charter Communications?

9 A. Yes.

10 Q. It indicated they were going to be releasing certain
11 information about you?

12 A. Yes.

13 Q. And they indicate -- refer to potential claims of
14 infringement, correct?

15 A. That's not the wording they used, but --

16 Q. Could you look at Exhibit 15, please. Have you found
17 that ma'am?

18 A. Yes.

19 Q. Is this the letter from Charter that you recall?

20 A. Yes.

21 Q. Charter did advise you, did it not, that Elektra
22 Entertainment alleges that your Charter high-speed Internet
23 account was used for file sharing of copyrighted works,
24 music files, without permission of the authors of the works?

25 A. Yes.

1 Q. And it tells you that it's part of the record company's
2 campaign against this type of alleged file sharing, which
3 has received extensive media coverage?

4 A. Yes.

5 Q. The letter says at the top, does it not, "Important
6 Legal Notice: Please Read Carefully"?

7 A. Yes.

8 Q. You did not read it when you got it, carefully?

9 A. No.

10 Q. That's true?

11 A. That's true.

12 Q. I think you may have told us earlier you threw it on a
13 pile of junk mail like a bill or something else?

14 A. No. I said I left it on my computer desk.

15 Q. Did you not tell us previously that you figured it was
16 junk mail or a bill?

17 A. That's what I assumed it was, yes.

18 Q. And you thought that -- and there was a subpoena
19 attached when you received this, true?

20 A. There could have been.

21 Q. Do you remember?

22 A. No.

23 Q. You now understand, ma'am, do you not, that Charter has
24 something called an Acceptable Use Policy that prohibits the
25 use of Charter's account to send or receive information that

1 infringes copyright?

2 A. I understand that now, yes.

3 Q. The letter that you received here, Exhibit 15, asks you
4 to call with any questions, correct?

5 A. Yes.

6 Q. And you did not call at that time, correct?

7 A. Correct.

8 Q. Do you recall, ma'am, that after you received that
9 letter from Charter, at some point you received a letter
10 from a law firm for the plaintiffs or record companies --
11 excuse me. I am getting a little tongue-tied myself.

12 Do you recall that after you received the Charter
13 letter you received a letter from a law firm that then
14 represented the record companies?

15 A. Yes.

16 Q. Would you look at Exhibit 19, please.

17 A. I have it.

18 Q. You did receive this letter, correct?

19 A. Yes.

20 Q. And you read this letter, correct?

21 A. Yes.

22 Q. And it did indicate that the record companies intended
23 to file suit if the matter was to be resolved [sic]?

24 A. Yes.

25 Q. If the matter would not be resolved. Excuse me.

1 A. Yes.

2 Q. The letter also specifically mentions a duty to preserve
3 evidence, does it not?

4 A. Yes.

5 Q. And you understood that, right?

6 A. Yes.

7 Q. You also understood that the evidence that this letter
8 was referring to had to deal with online file sharing or
9 file trading?

10 A. That's correct.

11 Q. The letter also gave you a number that you could call to
12 discuss the matter, right?

13 A. That's correct.

14 Q. You, in fact, called that number?

15 A. Yes.

16 Q. And that was after August of 2005, right?

17 A. Yes.

18 Q. You told the representatives of my client that my
19 clients were free to look at your computer, correct?

20 A. Yes.

21 Q. You told them that they would find -- they wouldn't find
22 Kazaa or anything like it there, correct?

23 A. Correct.

24 Q. And this was five months after your hard drive was
25 replaced by Best Buy, correct?

1 A. Approximately.

2 Q. Ma'am, do you recall that this lawsuit was filed -- that
3 ultimately we didn't work it out and this lawsuit was filed
4 in April of 2006?

5 A. I don't remember the date it was filed, but somewhere
6 around there, yeah.

7 Q. Does that sound about right to you?

8 A. It sounds about right.

9 Q. April 19, 2006?

10 A. Somewhere around there, yes.

11 Q. Ma'am, you now understand, once we started the lawsuit,
12 that the date on which the plaintiffs say they found
13 infringement happened through your Internet account under
14 the user name tereastarr@kazaa was February 21, 2005; isn't
15 that right?

16 A. Yes.

17 Q. You previously gave testimony under oath in this case
18 that the hard drive was replaced in January or February of
19 2004, right?

20 A. Yes.

21 Q. And that's a year before my clients say they found
22 infringement on your hard drive?

23 A. Yes.

24 Q. In fact, as I recall it, you indicated that one of your
25 children smacked the side of the computer and broke it?

1 A. That's what they told me had happened, yes.

2 Q. And then you brought the computer to Best Buy?

3 A. Yes.

4 Q. And according to you, they told you there was a hole in
5 the hard drive?

6 A. That's what they said, yes.

7 Q. And then they replaced it?

8 A. Yes.

9 Q. And the only time you took the computer to Best Buy was
10 on one occasion?

11 A. That's correct.

12 Q. You also recall, ma'am, that you previously testified
13 under oath that there were no changes made to the hard drive
14 of your computer after January or February of 2004?

15 A. That's correct.

16 Q. You specifically testified under oath that the hard
17 drive was not replaced after January or February of 2004?

18 A. That's correct.

19 Q. And you also testified under oath that the hard drive
20 had not been reformatted after January or February of 2004?

21 A. That's correct.

22 Q. You then -- you did produce the hard drive to our
23 expert, or a copy of it, correct?

24 A. I gave it to my attorney, yes.

25 Q. And you understand that your attorney provided to people

1 that we hired -- to make what you heard was a forensic copy
2 and then we looked at it?

3 A. Yes.

4 Q. And you also provided the hard drive to your own expert,
5 Mr. Stanley?

6 A. My attorney did, yes.

7 Q. I'm sorry. Mr. Toder provided your hard drive to your
8 expert, Mr. Stanley?

9 A. Yes.

10 Q. And this was consistent with what you had told the
11 record companies, that they should come look at your hard
12 drive?

13 A. Yes.

14 Q. You now know, ma'am, that what you told us about the
15 date the hard drive was replaced was not correct?

16 A. Correct.

17 Q. Both your expert, our expert, and the people from Best
18 Buy have now showed us that the hard drive was installed in
19 March of 2005?

20 A. Correct.

21 Q. It's one month after the date that the plaintiffs found
22 the infringement?

23 A. Two weeks after the date.

24 Q. It was after, correct?

25 A. Yes.

1 Q. And, in fact, we now know the hard drive wasn't even
2 manufactured until January 22nd of 2005?

3 A. I didn't know that until Eric Stanley's deposition, but
4 yes.

5 Q. So the hard drive that you gave us to inspect was not
6 the hard drive connected to the Internet on February 21,
7 2005, right?

8 A. No.

9 Q. That's right?

10 A. That's correct.

11 Q. And you did tell everyone in this case under oath that
12 it was the hard drive connected to the Internet on
13 February 21, 2005?

14 A. It is what I thought was the hard drive at the time,
15 yes.

16 Q. The answer to my question is "yes," right?

17 A. Yes.

18 Q. You heard Mr. Havemeier say in this courtroom just a bit
19 ago that after you received the first letter about these
20 lawsuits, you and he had a conversation in which he told you
21 that the record companies would find nothing since you just
22 replaced your hard drive, correct?

23 A. It wasn't the first letter, it was the second letter,
24 but yes.

25 Q. You heard his testimony today, right?

1 A. Yes.

2 Q. And your view of that is that he was not being truthful
3 when he testified?

4 A. He wasn't being very -- remembering, I guess. I
5 wouldn't say he was lying, but he doesn't have a very good
6 memory.

7 Q. You testified that he wasn't being truthful, did you
8 not?

9 A. About specific parts of that conversation.

10 Q. Would you look at the second volume of your deposition
11 at page 245.

12 A. Okay.

13 Q. Are you there, ma'am?

14 A. Yes.

15 Q. Again, you testified under oath on this occasion on
16 May 1st of 2007?

17 A. I'm sorry. What?

18 Q. You testified under oath when you gave this deposition,
19 correct?

20 A. Yes.

21 Q. And you understood what that meant?

22 A. Yes.

23 Q. And you had a chance to correct your deposition if you
24 wanted to, correct?

25 A. Yes.

1 Q. Do you remember being asked this question and being --
2 and giving this answer? This is page 245, line 19.

3 "Question: And you also -- I'm sorry. Go ahead. You
4 also heard Kevin's testimony that he told you that because
5 the hard drive had crashed, there wouldn't be any
6 information on the hard drive regarding this lawsuit. Do
7 you remember that conversation?

8 "Answer: We never had that conversation.

9 "Question: Are you saying that Kevin is not being
10 truthful when he said that?

11 "Answer: That's correct."

12 A. Yes.

13 Q. That was your testimony?

14 A. Yes.

15 Q. Ma'am, do you recall also telling us -- and you maybe
16 even said this earlier today -- that you began uploading
17 your own music or ripping your own recordings in about June
18 of 2004?

19 A. It was actually the fall of 2004, not in June.

20 Q. After you broke up with Mr. Gervais?

21 A. Yes.

22 Q. And you, I think, went through this before. You
23 indicated that you did it once a week about two to three
24 hours each time, sometimes maybe two days in a row, three
25 days in a row, right?

1 A. Yeah, approximately, yes.

2 Q. And I think you told us earlier that the most you can
3 recall loading in one day was six or seven CD's?

4 A. The most I could remember, yes.

5 Q. Do you remember also telling us, ma'am, that you loaded
6 less than two dozen recordings in all of 2006?

7 A. Yes.

8 Q. You're now aware, ma'am, that the hard drive that you
9 provided to us that our expert looked at and your own expert
10 looked at showed no recordings uploaded until June of 2005?

11 A. Yes.

12 Q. The drive also showed hundreds of recordings uploaded in
13 a four-day span between June 17 and June 20, 2005?

14 A. That's correct.

15 Q. And that's, of course, after the date the plaintiffs say
16 they found the infringement, right?

17 A. Yes.

18 Q. And that's also after the date that the letter -- you
19 received a letter from Charter in April of 2005?

20 A. That's correct.

21 Q. The hard drive that you gave us also shows that over
22 2,000 recordings were uploaded -- I'll say thousands of
23 recordings were uploaded on January 17th and 18th of 2006?

24 A. That's correct.

25 Q. And that's after the date that the plaintiffs say they

1 detected the infringement?

2 A. Yes.

3 Q. It's after the date you got the letter from Charter?

4 A. Yes.

5 Q. And it's after the date that you got the letter from the
6 law firm that sent you the letter about the possible
7 infringement?

8 A. That's correct.

9 Q. You cannot explain this, can you?

10 A. Yes, I can.

11 Q. Did you not tell us previously that you could not
12 explain it?

13 A. You were asking me to testify against evidence that I
14 had never seen. So I told you it was a moot point because I
15 hadn't seen your forensic evidence at that time.

16 Q. Ma'am, in your deposition you told us that you could not
17 explain that, correct?

18 A. I told you I couldn't explain something I didn't have.
19 I couldn't explain your forensic evidence because it hadn't
20 been provided to me yet.

21 Q. All right. And you never amended your deposition to
22 tell us what apparently you are going to tell us today,
23 correct?

24 A. No.

25 MR. GABRIEL: I have no further questions. Thank

1 you, Ms. Thomas.

2 THE WITNESS: Thank you.

3 **DIRECT EXAMINATION**

4 BY MR. TODER:

5 Q. When you had your deposition taken, you were told that
6 if you want to make an amendment it had to be done in 30
7 days, correct?

8 A. Correct.

9 Q. Was any more information provided to you in 30 days?

10 A. After my first or my second deposition?

11 Q. Either one. Both of them.

12 A. I received my first deposition within the 30 days. The
13 second one I couldn't afford, so I never received it until a
14 week before trial.

15 Q. You were asked whether you could explain why there were
16 a large number of songs that you had ripped from your CD's
17 onto your computer in a short period of time.

18 A. Um-hmm.

19 Q. Go ahead and do it.

20 A. I will. That month actually Tyler, my oldest child, had
21 been removed from hockey for failing his English class. So
22 I actually had time to sit down and put my CD's on my
23 computer, so that's what I did.

24 Q. And do you recall the time that you did this?

25 A. I was under the assumption it was maybe in December. I

1 remember he was kicked out of hockey the end of November,
2 around Thanksgiving, maybe a little after Thanksgiving, so I
3 assumed it was in December I had done this.

4 Q. How long does it take you to rip a CD?

5 A. Well, we just showed it takes about two and a half to
6 three minutes for one CD.

7 Q. So have you ever figured out how many CD's you could do
8 in an afternoon or the middle of the night or over --

9 A. I've never actually sat down and -- I never sat there
10 with a stopwatch and said, okay, you know, I'm going to do
11 15 CD's to see how much time it takes, no.

12 Q. That's something that the jury can figure out, correct?

13 A. Yes.

14 Q. Just by doing the math?

15 A. Yes.

16 Q. Now, you testified that you did not -- you said that the
17 repair to your hard drive, replacement of your hard drive
18 did not occur after January 2004?

19 A. That's correct.

20 Q. Can you explain why you said that.

21 A. I was a year off on everything in my deposition. I had
22 said that I purchased the computer in the spring of 2003. I
23 found out it wasn't purchased until the spring of 2004. I
24 had said that the hard drive wasn't replaced until January
25 or February of 2004. It was January or February of 2005.

1 And then I had said that it was up until the fall of 2005
2 that I replaced all my music on the computer when even
3 plaintiffs' attorney pointed out that it was up until the
4 fall of 2006 during my deposition.

5 Q. And all that testimony was under oath?

6 A. Yes.

7 Q. It was all memorialized in your deposition?

8 A. Yes.

9 Q. Did you ever have Kazaa on your computer?

10 A. No.

11 Q. Did you ever do a download on -- you didn't have Kazaa
12 on your computer, so you didn't do a download on Kazaa,
13 right?

14 A. Correct.

15 MR. TODER: I have no further questions.

16 **REXCROSS EXAMINATION**

17 BY MR. GABRIEL:

18 Q. Ms. Thomas, just a couple more. You indicated -- well,
19 strike that.

20 Do you recall at the beginning of your second
21 deposition Mr. Reynolds actually asked you if you had
22 reviewed your first deposition?

23 A. Yes.

24 Q. And he asked you if you wanted to make any changes?

25 A. I don't know that he specifically asked me if I needed

1 to make changes.

2 MR. TODER: Objection, Your Honor. There's a
3 specific question involved with the questions that he's
4 asking right now in the deposition. It refers to something
5 special.

6 MR. GABRIEL: I'll show her. That's fine.

7 BY MR. GABRIEL:

8 Q. Would you look at Volume II of your deposition.

9 A. Yes.

10 Q. Turn to page 200, please.

11 A. Okay.

12 Q. And look at line 5.

13 A. Okay.

14 Q. Mr. Reynolds did ask you since your first deposition if
15 you had the opportunity to review that transcript. You
16 said, "Yes."

17 A. Yes.

18 Q. He asked you whether you wanted to make any changes or
19 correct anything. And you said, "There were a few
20 typographical errors, but other than that, no."

21 A. Correct.

22 Q. And he went on and asked you, "Aside from typographical
23 errors, you have no changes to your testimony that you gave
24 in the first part of your deposition?" And you said,
25 "That's correct."

1 A. That's correct.

2 Q. And so today you're now changing your testimony so you
3 are off a year on the dates, correct?

4 A. Yes.

5 Q. And your testimony has changed after your own expert
6 discovered the sticker on that hard drive?

7 A. No. I even said in my first deposition that my years
8 were off. I told -- Mr. Reynolds? I apologize. I don't
9 remember. I told plaintiffs' attorney my years were off.

10 Q. You said repeatedly January and February 2004, did you
11 not?

12 A. I said I would have to check with Best Buy, but, yes, as
13 best as I could remember, yes.

14 Q. And then -- in fact, you heard Mr. Stanley today. You
15 told him January or February 2004, correct?

16 A. Yes, as best as I could remember.

17 Q. And even if it was a year off, it's actually March of
18 2005, not January of 2005, correct?

19 A. Roughly a year, yes.

20 MR. GABRIEL: Nothing further.

21 MR. TODER: Nothing further, Your Honor.

22 THE COURT: You may step down.

23 Call your next witness, please.

24 MR. GABRIEL: We call Chris Bavitz, if he's here.

25 Your Honor, we want to make sure he's here. I apologize.

1 (Pause.)

2 MR. GABRIEL: Your Honor, Mr. Bavitz is on his way
3 from the hotel, so we will call JoAn Cho, who is here.

4 (Witness sworn.)

5 THE COURT: Good afternoon.

6 THE WITNESS: Good afternoon, Your Honor.

7 THE COURT: I need you to state your true and
8 correct name for the record, please.

9 THE WITNESS: My name is JoAn Cho, C-h-o.

10 THE COURT: You may inquire.

11 MR. GABRIEL: Thank you, Your Honor.

12 (JoAn Cho)

13 **DIRECT EXAMINATION**

14 BY MR. GABRIEL:

15 Q. Good afternoon, ma'am.

16 A. Good afternoon.

17 Q. Would you tell the ladies and gentlemen of the jury what
18 you do for a living.

19 A. I'm an attorney with the Universal Music Group.

20 Q. And do you have a title?

21 A. It's senior director, litigation counsel, business and
22 legal affairs.

23 Q. And what are your responsibilities for Universal Music
24 Group?

25 A. I manage litigation for and against the company, the

1 various companies of the Universal Music Group, and provide
2 various legal counsel to the business units.

3 Q. And what -- can you describe, what is the Universal
4 Music Group?

5 A. The Universal Music Group is a group of affiliated music
6 companies, which includes UMG Recordings, Inc., and
7 [inaudible] --

8 COURT REPORTER: I'm sorry. I didn't hear after
9 "UMG Recordings, Inc."

10 THE COURT: You are going to have to speak up so
11 we can hear you.

12 THE WITNESS: -- UMG Recordings, Inc., and
13 Interscope Records, among others.

14 BY MR. GABRIEL:

15 Q. And are UMG Recordings, Inc., and Interscope Records
16 plaintiffs in this case?

17 A. They are.

18 Q. Ma'am, have you seen documents listing the sound
19 recordings that are at issue in this case?

20 A. Yes, I have.

21 Q. Would you look at Exhibit 1, please. Have you found
22 that?

23 A. Yes, I have it.

24 Q. With the exception of the -- strike that.

25 Do you recognize Exhibit 1?

1 A. I do.

2 Q. What is Exhibit 1?

3 A. Yes, I do.

4 Q. What is Exhibit 1?

5 A. I'm sorry. It is a listing of some of the recordings on
6 which the plaintiffs are proceeding.

7 Q. With the exception of the last recording on here, the
8 Godsmack recording, and the first one on here, the Janet
9 Jackson recording, which we'll talk about in a moment, do
10 you see recordings for which UMG or Interscope owns the
11 copyrights or exclusive rights?

12 A. The recording entitled "Different People" by the artist
13 No Doubt.

14 Q. Do you understand, ma'am, that Interscope Records is
15 suing on that recording in this case?

16 A. Yes, I do.

17 Q. With respect to that No Doubt sound recording,
18 "Different People," did Interscope Records do anything to
19 confirm that this recording was indeed its copyrighted
20 recording?

21 A. Yes. I reviewed the MP3 file which I understand -- of
22 "Different People" which I understand was obtained from the
23 defendant's computer and I compared it against the recording
24 from a legitimate album, a No Doubt album, and they were the
25 same.

1 Q. And, in fact, keep your finger on Exhibit 1. Would you
2 look at Exhibit 12.

3 A. My Exhibit 12 is a sheet of green paper.

4 Q. You are probably missing the CD.

5 MR. GABRIEL: May I approach, Your Honor?

6 THE COURT: You may.

7 BY MR. GABRIEL:

8 Q. Ma'am, do you recognize Exhibit 12 as a CD-R?

9 A. Yes, I do.

10 Q. And does it contain the MP3 file you just described?

11 A. Yes, it does.

12 Q. In fact, that's what you listened to to confirm,
13 correct?

14 A. That's correct.

15 Q. Now, ma'am, on this Exhibit 1, in preparing for your
16 testimony today, did you recognize an issue with respect to
17 the UMG Godsmack recording "Spiral"?

18 A. I did. While this is a recording that is owned by UMG
19 Recordings, Inc., the incorrect SR number was listed on this
20 form.

21 Q. The SR is the copyright registration?

22 A. The copyright registration number, yes.

23 Q. There's no question UMG owns that recording, correct?

24 A. UMG definitely owns that recording.

25 MR. TODER: Objection, foundation.

1 THE COURT: She may testify.

2 BY MR. GABRIEL:

3 Q. And what you noticed is when this document was prepared
4 there was a mistake on the SR number, correct?

5 A. That's correct.

6 Q. And based on that, have you decided to withdraw that --
7 originally UMG was suing on that recording in this case?

8 A. That's correct.

9 Q. Based on that clerical error, you have decided to
10 withdraw that from the case, correct?

11 A. UMG has decided to withdraw that, yes.

12 Q. Can I ask you to look at Exhibit 6, please.

13 A. I have it.

14 Q. And there are Bates numbers on here. Can I ask you to
15 turn to page 499, please.

16 A. Yes, I have it.

17 Q. Do you, ma'am, see a recording on here by Janet Jackson
18 called "Come Back to Me"?

19 A. Yes, I do.

20 Q. Do you know whether UMG owns that recording?

21 A. UMG does own that recording, yes.

22 Q. Did UMG register the copyright on that recording?

23 A. Yes, it did.

24 Q. And, in fact, in that Exhibit 12, those CD-R's with the
25 MP3's, is the recording of Janet Jackson's "Come Back to Me"

1 on that CD-R?

2 A. Yes, it is.

3 Q. Did you listen to that?

4 A. I did.

5 Q. And did you confirm that it is, in fact, UMG's
6 copyrighted recording of Janet Jackson's "Come Back to Me"?

7 A. Yes, it is.

8 Q. Now could I ask you to look at Exhibit 1 again.

9 A. Okay.

10 Q. Again, ma'am, in preparing for your testimony in this
11 case did you become aware that there was an issue with
12 Exhibit 1 that relates to Janet Jackson's "Come Back to Me"?

13 A. I did. Apparently someone listed Janet Jackson's track
14 "Back" rather than "Come Back to Me."

15 Q. And it's listed here -- to your knowledge, does Virgin
16 Records actually own the Janet Jackson track "Back"?

17 MR. TODER: Objection, foundation.

18 THE WITNESS: That's my understanding.

19 MR. GABRIEL: I will withdraw the question and
20 we'll deal with it with a Virgin witness. I withdraw the
21 question.

22 BY MR. GABRIEL:

23 Q. You notice, ma'am, that there's a track here called
24 Janet Jackson's "Back," correct?

25 A. That's correct.

1 Q. And it's your -- what's not here is Janet Jackson's
2 "Come Back to Me" that was on that Exhibit 12, correct?

3 A. That's correct.

4 Q. And having now -- in preparation for your testimony do
5 you understand that that was an error and it should have
6 been Janet Jackson's "Come Back to Me"?

7 A. That's my understanding.

8 Q. And, again, based -- strike that.

9 Could I ask you to look at Exhibit 2, please. Do
10 you recognize Exhibit 2?

11 A. I do.

12 Q. And what is Exhibit 2?

13 A. It's a listing of additional sound recordings on which
14 the plaintiffs are proceeding.

15 Q. With the exception of the recording by Godsmack called
16 "Moon Baby," do you recognize or see recordings for which
17 UMG or Interscope owns the copyrights or exclusive rights?

18 A. Yes, I do.

19 Q. Which ones, please?

20 A. "Welcome to the Jungle" by Guns N' Roses, "Save the Best
21 for Last" by Vanessa Williams, "Let's Wait Awhile" by Janet
22 Jackson, "Cryin'" by Aerosmith, "Pour Some Sugar on Me" by
23 Def Leppard, "One Honest Heart" by Reba McEntire, "Somebody"
24 by Bryan Adams, "Bathwater" and "Hella Good" by No Doubt,
25 "Run, Baby, Run" by Sheryl Crow, and "November Rain" by

1 Guns N' Roses.

2 Q. Do you understand, ma'am, that UMG and Interscope are
3 suing on those recordings in this case?

4 A. Yes, I do.

5 Q. And were all of these UMG and Interscope recordings
6 copyrighted works?

7 A. Yes, they are.

8 Q. Now, ma'am, I asked you to skip over that Godsmack
9 recording "Moon Baby."

10 A. That's right.

11 Q. Does UMG own the copyright recording for that -- the
12 copyright registration -- sorry. Does UMG own the copyright
13 on that recording?

14 A. Yes, UMG owns the copyright on that recording.

15 Q. Have you decided -- has UMG decided not to pursue that
16 recording in this case?

17 A. Yes, it has decided not to pursue that recording because
18 unfortunately an incorrect SR was listed on this one.

19 Q. Are you mixing up the recordings? Was the registration
20 filed on this one, "Moon Baby"?

21 A. On this one an application for the registration was sent
22 to the Copyright Office, but the certificate hasn't been
23 received yet.

24 Q. So UMG does own the copyright on that recording?

25 A. Yes, it does.

1 Q. And the registration has been filed with the Copyright
2 Office, correct?

3 A. Yeah, the application has been filed and we are waiting
4 for the registration to come back.

5 Q. And you haven't received the registration come back?

6 A. That's correct. There is a backlog at the U.S.
7 Copyright Office.

8 Q. Is it your understanding, ma'am, that having filed the
9 registration, UMG could pursue that recording in this case?

10 THE COURT: Counsel, why don't you ask nonleading
11 questions. This is your witness.

12 MR. GABRIEL: I'll do that.

13 BY MR. GABRIEL:

14 Q. Why have you chosen not to pursue that copyright
15 recording in this case, Godsmack's -- I'm sorry --
16 Godsmack's "Moon Baby" in this case?

17 A. Although UMG does own that recording, for simplicity's
18 sake, because the certificate hasn't been issued yet, we
19 opted to withdraw that from the case.

20 Q. Ma'am, you've identified a number of UMG and Interscope
21 recordings that are at issue, right?

22 A. Yes, I have.

23 Q. Do you know whether UMG and Interscope Records have
24 registered the copyrights in those recordings?

25 A. Yes, they have.

1 Q. Could I ask you to look at Exhibit 3, please.

2 A. I have it in front of me.

3 Q. And, ma'am, I would like to ask you if you would flip
4 through Exhibit 3 and tell us when you come to a UMG or
5 Interscope copyright registration form; and when you get
6 there, identify it by the SR number and the Bates number for
7 counsel.

8 A. The first one is SR number 206-724, Bates number
9 Thomas, J (MN)0022 and 23.

10 Q. Which song is that for?

11 A. It relates to all the tracks on the No Doubt album
12 *Tragic Kingdom*. So it relates specifically to the recording
13 "Different People."

14 Q. Please continue.

15 A. The next one is SR 85-358, Bates number 0579 to 80.
16 This is for the album *Appetite For Destruction* by Guns N'
17 Roses and the recordings thereon. So it relates
18 specifically to the Guns N' Roses recording "Welcome to the
19 Jungle."

20 The next one is SR 111-365, Bates number 0587
21 through 88, which relates to the Vanessa Williams album *The*
22 *Comfort Zone* and the recordings thereon. So it applies to
23 recording "Let's Wait Awhile" [sic].

24 Q. I'm sorry. Ma'am, what SR number was that?

25 A. I apologize. It's SR 141-365.

1 Q. And which recording is that?

2 A. Vanessa Williams, "Save the Best For Last." It applies
3 to the album *The Comfort Zone*.

4 Q. Thank you. And then if you can go back to Guns N'
5 Roses. I may have misheard you. Which particular Guns N'
6 Roses' track are you talking about that relates to this
7 case?

8 A. That is -- the track that's at issue in this case is
9 "Welcome to the Jungle," which was on the album *Appetite For*
10 *Destruction*.

11 Q. And what SR number is that?

12 A. 85-358.

13 Q. Thank you. Please continue.

14 A. The next one is SR 69-529, Bates number 0575 through 76.

15 Q. I'm sorry. Again, which SR number?

16 A. SR 69-529.

17 Q. And what recording does that relate to?

18 A. It relates to the Janet Jackson recording "Let's Wait
19 Awhile."

20 The next one is SR 153-061, Bates number 0589
21 through 90, and this relates to the recording "Cryin'" by
22 Aerosmith.

23 The next one is SR 90-420, Bates number 0581
24 through 82, and this relates to Def Leppard's "Pour Some
25 Sugar on Me."

1 The next one is SR 256-807, Bates number 0601 to
2 0602, which relates to Reba McIntyre's "One Honest Heart."

3 The next one is SR 58-024, Bates number 0573
4 through 74. This relates to "Somebody" by Bryan Adams.

5 The next one is SR 279-727, Bates number 0603
6 through 0604. This relates to the track "Bathwater" by
7 No Doubt.

8 The next one is SR 305-872, Bates number 0607
9 through 0608, and this relates to "Hella Good" by the artist
10 No Doubt.

11 The next one is SR 209-823, Bates number 0595
12 through 0596, and this relates to "Run, Baby, Run" by Sheryl
13 Crow.

14 And then SR 134-647, Bates number 0585 through
15 0586, and that relates to the track "November Rain" by
16 Guns N' Roses.

17 Q. Have you now found all of them, ma'am?

18 A. That's the end of the exhibit, yes.

19 Q. Ma'am, each of these has a date on it?

20 A. Yes, they do.

21 Q. Were each of these documents prepared on or about the
22 dates that they bear?

23 A. Yes.

24 Q. Were they prepared in the ordinary course of UMG's
25 business?

1 A. Yes, they were.

2 Q. Were they maintained in the ordinary course of UMG's
3 business?

4 A. Yes, they are.

5 MR. GABRIEL: Your Honor, I'll move those
6 exhibits -- or those documents within Exhibit 3.

7 MR. TODER: May I voir dire the witness on those,
8 Your Honor?

9 THE COURT: You may.

10 **VOIR DIRE EXAMINATION**

11 BY MR. TODER:

12 Q. You were just asked, Ms. Cho, about how these documents
13 were prepared and who prepared them.

14 A. I did not, no.

15 Q. Do you know who prepared these documents?

16 A. There's a signatory on each of these documents. They
17 were prepared by the copyright departments of the various
18 record labels.

19 Q. They weren't necessarily prepared by your company,
20 correct?

21 A. I guess I'm not sure what you mean by my company. They
22 were -- all the companies listed on these are either
23 Interscope Records or predecessors of the UMG Recordings
24 group.

25 Q. So the David Geffen Company is related to Interscope or

1 UMG?

2 A. Yes, it is.

3 Q. How is it related?

4 A. The David Geffen Company, which later changed its name
5 to Geffen Records, Inc., was merged into UMG Recordings,
6 Inc., in 1999.

7 Q. What about Polygram?

8 A. Polygram Records, Inc., is a former name of UMG
9 Recordings, Inc. It's the same company.

10 Q. A&M Records?

11 A. A&M Records, Inc., was merged into UMG Recordings, Inc.,
12 also in 1999.

13 Q. And we just mentioned Geffen. I guess there's two,
14 there's a David Geffen Company and there's Geffen Records,
15 Inc.

16 A. The David Geffen Company is a former name of Geffen
17 Records, Inc. After it changed its name, it was merged into
18 UMG Recordings, Inc.

19 Q. Mercury Records?

20 A. Mercury Records was a label name of Polygram Records,
21 Inc., which subsequently changed its name to UMG Recordings,
22 Inc.

23 Q. MCA Records Nashville?

24 A. MCA Records Nashville is a division. I believe on this
25 SR it's listed as a division of MCA Records, Inc. It is

1 still a division, but MCA Records, Inc., was merged into UMG
2 Recordings, Inc., again in 1999.

3 Q. And these certificates of copyrights that we have just
4 been talking about, these were certificates of copyrights
5 that you produced to defendant when we asked for requests
6 for production of documents?

7 A. I wasn't involved in producing documents.

8 Q. Did you sign a verification?

9 A. For the production of documents?

10 Q. Yes, for interrogatories.

11 A. I did.

12 Q. And didn't the interrogatories refer to certain
13 documents that were going to be produced?

14 A. I believe it did. I don't recall what specific
15 documents those were.

16 Q. Well, we'll get to that on cross.

17 MR. TODER: In the meantime, no objection, Your
18 Honor.

19 THE COURT: Be admitted.

20 MR. GABRIEL: Thank you, Your Honor.

21 THE COURT: Let's stop here and take a 15-minute
22 break, take a 15-minute break. All rise for the jury.

23 (Recess taken at 3:10 p.m.)

24 * * * * *

25 (3:25 p.m.)

IN OPEN COURT**(JURY NOT PRESENT)**

1
2
3 THE COURT: Counsel, you wanted to talk to me
4 before the jury came out?

5 MR. TODER: Yes, Your Honor. Thank you.
6 Plaintiffs intend to call a Mr. Sherman, who is a
7 spokesperson, I guess, for the RIAA and I'm advised that he
8 is going to talk about the nature of these lawsuits in
9 general.

10 We had one motion in limine that was sort of
11 glossed over. It had to do with bringing in evidence of
12 other people's suits and I don't -- I believe that what's
13 happening with other people's suits generally, as a general
14 proposition, the way this whole system works is irrelevant
15 and I would ask that they not be allowed to put that kind of
16 evidence in in the form of Mr. Sherman.

17 THE COURT: All right. Counsel.

18 MR. GABRIEL: Yes, Your Honor. First let me
19 correct something Mr. Toder said. Mr. Sherman is not a
20 spokesperson. He is the president of the Recording Industry
21 Association of America.

22 He will -- he's not going to testify about -- get
23 into specific cases, talk about other cases. And it's
24 ironic because Mr. Toder keeps raising other cases and we
25 objected to that. He is going to testify about harm caused

1 by piracy over the Internet in this and other cases. And we
2 have evidence in the record that when someone is on Kazaa
3 and connected to millions of other people, the harm is sort
4 of exponential.

5 So he will talk about the harm caused in this and
6 other cases, which I believe is directly relevant in this
7 case, and I think the jury instructions that the Court gave
8 us, at least as a draft, show that.

9 MR. TODER: Your Honor, if we would have known
10 that, we would have had someone talk about all the harm
11 that's caused by individuals who are being sued, you know,
12 who aren't -- I mean, we would have got more information or
13 maybe even had a witness.

14 But this isn't relevant to the issue of whether or
15 not Jammie Thomas on February 21st downloaded some songs.
16 The fact that there's -- the idea of piracy out there and
17 what the whole industry suffers as a whole, it's just
18 something that's not relevant.

19 MR. GABRIEL: And just briefly, Your Honor, I
20 would say -- I respectfully submit that the defendant opened
21 the door on these issues. They've asked people, Don't you
22 sue dead people? And all this other stuff.

23 I think, you know, the harm is an issue in this
24 case and I think it does relate to how you calculate
25 statutory damages. That's one of the factors you look at.

1 I think the harm is interrelated. It does relate to this
2 particular case.

3 MR. TODER: Your Honor, whether or not they sue
4 dead people or not goes to the accuracy of what people are
5 doing here. That's all it goes to.

6 As far as the harm done and how much statutory
7 damages should be awarded, it's almost like a penalty.
8 We've seen in Supreme Court cases, recently the Campbell
9 case, where you can't consider the harm that is done to
10 people who are not parties to this action.

11 THE COURT: It sounds like there's been no
12 documentation that's been turned over to defense regarding
13 his testimony and the harm factor that this is alleged to
14 have caused.

15 MR. GABRIEL: I don't believe that -- he is not
16 going to rely on documents, Your Honor, and I believe we've
17 had someone disclosed from day one as a representative of
18 the recording industry to talk about harm. I don't have it
19 with me, but I believe it's been disclosed for a year.

20 MR. TODER: The Court has gotten to see what we
21 received by way of discovery because they were the subject
22 and they were attached as declarations to my other motions.
23 Again, we said in our motion in limine that we don't want to
24 turn this into a soapbox for the recording industry and
25 that's exactly what's happening here.

1 MR. GABRIEL: I am pulling the disclosure, Your
2 Honor. I'm quite certain we disclosed a representative to
3 speak to the harm in our 26(a)(1) disclosures. Mr. Sherman
4 was disclosed on a witness list, as required by the Court.
5 The harm is directly relevant in this case. It's relevant
6 to statutory damages.

7 MR. TODER: Your Honor, the only notice we got on
8 this was on the witness list.

9 MR. GABRIEL: We're looking for the 26(a)(1)
10 disclosure, Your Honor.

11 THE COURT: I would ask you to turn to Draft 1,
12 Jury Instruction 21, which certainly would show that this
13 testimony would not be relevant.

14 MR. GABRIEL: I'm sorry. I didn't hear you, Your
15 Honor.

16 THE COURT: If you would turn to Draft
17 Instruction 21 dealing with the statutory damages.

18 MR. GABRIEL: Yes, sir.

19 THE COURT: Reading that proposed instruction, it
20 would seem to me that the testimony that you are about to
21 elicit from Mr. Sherman would not be relevant to this case.

22 MR. GABRIEL: I submit, Your Honor, that it would
23 be. It relates to the effect of the defendant's prior or
24 concurrent copyright infringement activity. Again, the
25 defendant is part of a network of millions of people who are

1 infringing and so it directly goes to that issue. This is
2 the effect of the defendant's participation in a worldwide
3 network of infringement.

4 THE COURT: Anything further?

5 MR. TODER: Your Honor, only that as it relates to
6 her prior conduct, I believe that the very first witness,
7 Ms. Pariser, said that they could have sued for all 1,700,
8 but they wanted to be nice and pick 25 of these things.

9 That's it.

10 THE COURT: The Court will grant the defendant's
11 motion. This witness, Mr. Sherman, will not be able to
12 testify.

13 Anything further?

14 MR. GABRIEL: Yes, Your Honor. I think we need to
15 make an offer of proof on this.

16 THE COURT: Go ahead and make the offer.

17 MR. GABRIEL: Your Honor, I'm sorry. There's one
18 issue that I -- I will make an offer of proof, but another
19 issue that it's relevant to is Mr. Sherman would testify to
20 the education campaign that occurred before the infringement
21 at issue happened, nationally, that the word was out all
22 over; and that goes directly to the issue of willfulness in
23 this case. In other words, that the campaign was so
24 widespread, the publicity was so widespread about it, that
25 the defendant would had to have known or a reasonable jury

1 could conclude would have known about this national problem
2 and then ignored it would be the argument that we would make
3 on willfulness.

4 MR. TODER: That would call for speculation. I
5 don't even know if I heard about this. Whether or not this
6 defendant heard about this -- and she was never asked
7 whether she heard about that.

8 MR. GABRIEL: Actually, I did and she denied it.

9 MR. TODER: Well, then there you are. She didn't
10 hear about it.

11 MR. GABRIEL: It will be a question, I think, Your
12 Honor, for the jury on credibility.

13 THE COURT: My ruling stands. Make your record.

14 MR. GABRIEL: Your Honor, Mr. Sherman would have
15 testified as to what the Recording Industry Association is,
16 that it is a trade association made up of all of the record
17 companies -- or many of the major record companies in the
18 United States, including all of the record companies at
19 issue in this case.

20 He would have testified that the percentage of
21 sound recordings -- the vast majority of sound recordings in
22 the marketplace are sold by the Recording Industry
23 Association's members, which would tend to show that the
24 share folder here was made up mostly of my clients'
25 copyrighted works.

1 He would testify that as part of his
2 responsibilities for the Recording Industry Association of
3 America he is involved with the record companies in
4 connection with this lawsuit and others like it and
5 manages -- or would gather data and see if the program was
6 moving forward and the success of particular lawsuits.

7 He would have described that the recording
8 industry's involvement in this lawsuit and others like it
9 are to oversee these cases and the impact of these cases on
10 the record company members and that the Recording Industry
11 Association helps strategize with other record companies as
12 to what the record companies can do to combat online piracy
13 in this and other cases.

14 He would have talked about the background that led
15 to cases like this one and others like it. He would talk
16 about the massive problem of peer-to-peer file sharing that
17 has occurred for many years now; that there were efforts to
18 shut down the services themselves, like Kazaa and Rockster
19 and others like it. He would indicate that we have had some
20 success in shutting down these services, but that there are
21 other services that keep popping up as well and that is what
22 led to bringing cases against individual users, because we
23 have not had success in suing -- not fully successful in
24 shutting down this problem.

25 He would have testified that in this case and

1 others like it the recording industry is trying to achieve
2 the goals of education and deterrence.

3 He would have testified that it's not the
4 preference of record companies to take cases like this one
5 to trial, that the preference here is to try to resolve
6 cases early based on the -- because of that goal we sue on
7 far fewer recordings than were actually infringed, that we
8 resolve cases for amounts well below statutory damages. In
9 other words, we're not trying to get million dollar
10 verdicts, but we're trying to essentially prove a point and
11 get deterrence by damages that are reasonable.

12 He would have testified regarding the educational
13 efforts by the -- substantial educational efforts by the
14 recording industry to get the word out about the problem of
15 piracy that happened before the infringements at issue in
16 this case.

17 He would have discussed the many news articles
18 that were put out on college campuses, college press
19 articles that were put out, videos made for MTV, instant
20 messages that were sent around the country, something called
21 the EdVenture program on college campuses to get the word
22 out, education videos at all different -- and programs -- at
23 all different age levels, from young age groups right
24 through college, and speeches on college campuses and
25 elsewhere to get the word out.

1 He would have testified to the harm to the record
2 companies that this case and others like it have caused. He
3 would have laid the foundation by indicating the recording
4 industry does track industry trends and economics. He
5 personally oversees that.

6 He would have testified that the problem of P2P
7 file sharing in this and other cases like it has resulted in
8 substantial lost revenues to the industry, to the plaintiffs
9 in this case, lost jobs, inability to sign new artists,
10 damage to the market for new legal Internet download sites,
11 the fact that retailers have gone out of business.

12 He would have testified that lawsuits about this
13 one are not about making money. There is -- as the Court
14 knows, there was a motion in limine accusing us of suing
15 poor people. He would have responded to that kind of
16 negative press that we hear in this and other cases. He
17 would say the goal really is to recover costs in these cases
18 and it is not about making money.

19 He would have specifically testified that lawsuits
20 like this one do make a difference because it gets the word
21 out that although we like to try and resolve cases early and
22 are not seeking huge damages awards, we need people around
23 the country to know that we're very serious about these,
24 even if the damages are small, and that we are willing to
25 take these cases to trial if need be.

1 He would have testified that the lawsuits have
2 been effective, lawsuits like this one and this one have
3 been effective in getting the word out. He would have
4 talked about that what happens in this lawsuit does, in
5 fact, matter and for reasons such as I described.

6 He also would have been able to testify, if
7 called, regarding -- Mr. Toder has thrown out a bunch of
8 names of cases, suggesting all kinds of nefarious conduct.
9 He would have been able to testify in response to those, if
10 asked.

11 I think I've probably covered it, Your Honor. My
12 client is nodding. I think that would conclude the offer of
13 proof.

14 And I will note on the record that Mr. Sherman was
15 disclosed as a witness. He has traveled here from
16 Washington, D.C., and is here and prepared to testify if the
17 Court would allow.

18 Thank you, sir.

19 THE COURT: Let's get the jury out.

20 **IN OPEN COURT**

21 **(JURY PRESENT)**

22 THE COURT: Call your next witness.

23 MR. GABRIEL: Ms. Cho was still on the stand, Your
24 Honor.

25 THE COURT: Oh, I'm sorry. Come forward and

1 continue.

2 MR. GABRIEL: May I proceed, Your Honor?

3 THE COURT: You may.

4 MR. GABRIEL: Thank you, sir.

5 BY MR. GABRIEL:

6 Q. Ms. Cho, I will remind you also to speak up when you
7 talk.

8 Prior to the issues that bring us here today, did
9 UMG and Interscope Records sell the recordings that it's
10 suing on, sell legitimate copies of those?

11 A. Yes, they did.

12 Q. And you're familiar with what copyright notices are?

13 A. I am.

14 Q. Would you just generally describe what that is.

15 A. With respect to the sound recordings, it's the little
16 "P" in the circle that is on the back of the CD and on the
17 CD itself.

18 Q. "P" stands for phonorecord?

19 A. Yes. It's a notice that the phonorecord is copyrighted
20 and it's usually followed by the date of the copyright and
21 the owner.

22 Q. And you have seen within what we've marked as Exhibit 5
23 actual CD's at issue in this case?

24 A. I have seen actual CD's at issue in this case, yes.

25 MR. GABRIEL: Your Honor, may I approach?

1 THE COURT: You may.

2 BY MR. GABRIEL:

3 Q. Ms. Cho, do you recognize the set of CD's that I've
4 handed to you?

5 A. Yes, I do.

6 Q. And what are those, please?

7 A. These are CD's containing the recordings at issue in
8 this case, the UMG and Interscope recordings in this case,
9 and these are the CD's that actually were sold by UMG and
10 Interscope.

11 MR. GABRIEL: We would move those recordings, Your
12 Honor, within Exhibit 5.

13 MR. TODER: No objection.

14 THE COURT: Be admitted.

15 BY MR. GABRIEL:

16 Q. Now, ma'am, I won't make -- have you reviewed those
17 before right now?

18 A. I have.

19 Q. And to speed it up, do all of them have the copyright
20 notices you've described?

21 A. They do.

22 Q. And just show us one, just pick one and show us where
23 those notices are.

24 A. Sure. Here's the one on top, No Doubt, *Tragic Kingdom*.
25 The "P" notice is on the bottom of the back of the CD in

1 small type. The "P" and "C" indicates a copyright on the
2 sound recording and the artwork, "1995, Interscope Records."
3 That's on the back of the CD. Also inside the CD, also in
4 smaller print, it has "P, 1995, Interscope Records," which
5 is the copyright notice for the phonorecords.

6 Q. Ms. Cho, have you in preparing for your testimony and
7 before listened to the MP3 version of No Doubt's "Different
8 People" that you understand came from the defendant's share
9 folder?

10 A. Yes, I did.

11 Q. And have you also listened to the legitimate CD version
12 of that recording?

13 A. Yes, from this album.

14 MR. GABRIEL: With the Court's permission, I would
15 like to play a few seconds of each one.

16 THE COURT: (Indicating.)

17 BY MR. GABRIEL:

18 Q. If you can go to Exhibit -- I think it was 12, the CD-R.
19 It takes a moment to load.

20 A. It's thinking. This should be it if I did this right.

21 (Audio recording played.)

22 Q. I think that's good enough. You can shut that off. And
23 would you tell us what we were just listening to.

24 A. That was the recording "Different People" by No Doubt.

25 Q. And where did that one come from?

1 A. This was -- I think this was Exhibit 12. It's the CD-R
2 of MP3 files taken from the defendant's computer.

3 Q. Now would you play the legitimate CD version of that
4 same recording, please.

5 A. Sure.

6 (Audio recording played.)

7 Q. Thank you, Ms. Cho.

8 Ms. Cho, did either UMG Records or Interscope
9 Records -- UMG Recordings or Interscope Records ever give
10 the defendant, Jammie Thomas, a license or authorization to
11 copy any of their sound recordings?

12 A. No, they did not.

13 Q. Did UMG Recordings or Interscope Records ever give
14 Ms. Thomas a license or authorization to distribute any of
15 their recordings?

16 A. No.

17 Q. Can I ask you to look at Exhibit 6, please.

18 A. I have it.

19 Q. Ms. Cho, do you see other recordings on Exhibit 6 that
20 are owned or controlled by UMG Recordings, Interscope, or
21 related entities? Just point a couple out for us.

22 A. There are 14 tracks by Bryan Adams. There are also a
23 dozen or so tracks by Aerosmith. Actually additional ones
24 on the next page. The Black Eyed Peas, there are about a
25 dozen recordings by the Black Eyed Peas. Boyz II Men, ten

1 recordings. Some more No Doubt mixed in. A number of
2 additional Sheryl Crow recordings.

3 Q. Bottom line, Ms. Cho, there are many recordings owned by
4 UMG or its related entities that are in that document?

5 A. There are, yes.

6 MR. GABRIEL: Nothing further, Your Honor.

7 THE COURT: You may inquire.

8 **CROSS EXAMINATION**

9 BY MR. TODER:

10 Q. Good afternoon, Ms. Cho.

11 A. Good afternoon.

12 Q. When we were playing these songs just now, you said the
13 MP3 files were taken from defendant's computer?

14 A. That's my understanding.

15 Q. You have no personal knowledge of that, though, do you?

16 A. No. I was not the one who did that.

17 Q. Those are the allegations in these proceedings, correct?

18 A. I understand that is alleged in this proceeding, yes.

19 Q. Do you remember signing a declaration in this lawsuit on
20 August 23, 2007 in Santa Monica, California?

21 A. I do recall signing a declaration.

22 Q. Do you recall saying in the declaration -- referring to
23 the fact that plaintiffs observed defendant infringing them?

24 MR. GABRIEL: May I see it, Your Honor?

25 THE COURT: (Indicating.)

1 BY MR. TODER:

2 Q. Do you recall that?

3 A. Not specifically. I would be happy to take a look at
4 it.

5 MR. TODER: May I approach, Your Honor?

6 THE COURT: You may.

7 BY MR. TODER:

8 Q. I have underlined the part I'm talking about. There
9 were no plaintiffs that observed defendant infringing
10 anything, was there?

11 A. It's my understanding that MediaSentry, who was working
12 on behalf of the plaintiffs, was able to observe the
13 activity on her computer.

14 Q. You're saying in your declaration that plaintiffs
15 actually observed defendant infringing, that's what you're
16 saying?

17 A. That's the text here, but I guess what I've just
18 explained is how they observed it.

19 Q. So you're saying that because you have heard that
20 MediaSentry observed someone that they think may have been
21 defendant's computer because of all the things we've talked
22 about in this case, the fact that an IP address was used
23 that was the same as defendant's and because tereastarr was
24 used; is that where you came to that conclusion?

25 A. I wasn't here for most of the trial, so I can't be sure

1 what was testified to, but, yes, my understanding is the IP
2 address was connected to the defendant's computer, that the
3 name tereastarr is a name that she admits to using for
4 online uses, including things like match.com.

5 Q. May I have that back, please?

6 A. Sure.

7 Q. As I understand it, you're withdrawing a claim to the
8 "Moon Baby" title?

9 A. That is correct.

10 Q. And why, again, are you withdrawing your claim to the
11 "Moon Baby" title?

12 A. With respect to that title, the copyright registration,
13 the certificate we have not received back yet. An incorrect
14 SR was listed.

15 Q. When was it filed?

16 A. By "filed" you mean submitted to the Copyright Office?

17 Q. Yes.

18 A. Fairly recently.

19 Q. So it wasn't filed as of February 21, 2005?

20 A. It was not.

21 Q. Can you -- who owned the exclusive rights to "Moon Baby"
22 on February 21, 2005?

23 A. UMG Recordings, Inc.

24 Q. And how do you know that?

25 A. Because I reviewed the chain of title documents,

1 including the agreement by which UMG Recordings, Inc.,
2 purchased that recording.

3 Q. Okay. And I believe there's one other title in issue
4 and that is *Awake* by Godsmack?

5 A. That album, yes.

6 Q. And actually it's Exhibit 3. Do you have the exhibit
7 book there?

8 A. I do. Exhibit 3?

9 Q. Yes. It's Bates stamped 0030.

10 A. 0030?

11 Q. Yes.

12 A. Sorry, these aren't in Bates stamp order, so it will
13 just take me a minute.

14 Q. It took me a while too.

15 A. Yes, I found it.

16 Q. And why are you withdrawing this now from the lawsuit?

17 A. With respect to this, there were two tracks of the
18 same -- two different versions. One was acoustic. One was
19 nonacoustic. This registered one version. We determined
20 that it should have been the acoustic version. That was on
21 an album called *The Other Side* and that one had been
22 registered as well.

23 Q. Well, the one that -- the title that actually appeared
24 on whoever used tereastarr@kazaa and then it was downloaded
25 by the people that work for -- the MediaSentry people, was

1 that actually Exhibit -- the 293-376?

2 A. Can you restate this? This is a registration
3 certificate that covers an album and a number of recordings,
4 so I want to make sure I'm not misunderstanding your
5 question.

6 Q. Fair enough. I'll do it maybe a little slower.

7 A. Sure.

8 Q. 293-376, the title is *Awake* and the artist is Godsmack?

9 A. That's correct.

10 Q. And this was on -- was it on your Schedule 1?

11 A. This album and SR was listed on --

12 Q. Exhibit A. One of the two.

13 A. -- Exhibit A/Exhibit 1.

14 Q. Okay. And that was a song that was on the screen shot
15 that said "tereastarr" on it?

16 A. I haven't reviewed the screen shot, but my understanding
17 is this was -- this title was captured along with a number
18 of Godsmack files.

19 MR. TODER: I have no further questions.

20 MR. GABRIEL: Nothing further from here, Your
21 Honor.

22 THE COURT: You may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Call your next witness, please.

25 MR. GABRIEL: The plaintiffs call Betsy Brown,

1 Your Honor.

2 (Witness sworn.)

3 THE COURT: Good afternoon.

4 THE WITNESS: Hi.

5 THE COURT: Would you state your true and correct
6 name for the record, please.

7 THE WITNESS: It's Betsy Brown.

8 THE COURT: Would you spell it for the record.

9 THE WITNESS: B-e-t-s-y, B-r-o-w-n.

10 THE COURT: You may inquire.

11 MR. GABRIEL: Thank you, Your Honor.

12 (Betsy Brown)

13 DIRECT EXAMINATION

14 BY MR. GABRIEL:

15 Q. Good afternoon, Ms. Brown. Who do you work for, please?

16 A. Warner Bros. Records.

17 Q. And what do you do for a living?

18 A. I am the contract administrator.

19 Q. And what does that mean?

20 A. I oversee the copyright registration of all of the
21 product that we release and I also notify people within
22 Warner Bros. Records what our rights, restrictions,
23 exploitation restrictions and obligations are under all of
24 our agreements.

25 Q. Are you an attorney, ma'am?

1 A. No, I'm not.

2 Q. And is Warner Bros. Records a plaintiff in this case?

3 A. Yes, it is.

4 Q. Have you seen documents listing the sound recordings
5 that are at issue in this case?

6 A. Yes, I have.

7 Q. Could I ask you to look at Exhibit 1, please.

8 A. Which is?

9 Q. Oh, I'm sorry. There are books in front of you and
10 there should be one called 1 of 3.

11 A. Yes. Okay.

12 Q. Do you recognize what Exhibit 1 is?

13 A. Yes, I do.

14 Q. What is it?

15 A. It is a list of the recordings that were downloaded from
16 Jammie Thomas's computer.

17 Q. And do you see any recordings on here that Warner Bros.
18 Records owns the copyrights or exclusive rights for?

19 A. Yes, there is one.

20 Q. Which, please?

21 A. Green Day, the recording "Basket Case."

22 Q. And do you understand Warner Bros. is suing on that
23 recording here?

24 A. Yes, I do.

25 Q. Did Warner Bros. do anything to confirm that this

1 recording was its own?

2 A. Yes. I have listened to the downloaded recording and it
3 is indeed the recording of the album.

4 Q. And was that -- there's another book. If you'd look for
5 Exhibit 12, please. Oh, it may be laying on the table
6 there. It's a CD-R, if you'll look for it.

7 A. This (indicating)?

8 Q. Yes, ma'am.

9 A. Yes.

10 Q. Does that contain the recording you just referred to?

11 A. Yes, it does.

12 Q. And you listened to that?

13 A. Yes, I did.

14 Q. And you were able to confirm that that was the Warner
15 Bros. recording you just described?

16 A. That is correct.

17 Q. Would you look at Exhibit 2, please.

18 A. Okay.

19 Q. Do you recognize Exhibit 2?

20 A. Yes, I do.

21 Q. And what is Exhibit 2, please?

22 A. These are recordings from Warner Bros. Records' albums.

23 Q. And there are some other recordings on there as well,
24 correct?

25 A. Yes. I'm sorry. There are two that are Warners Bros.

1 Records' albums.

2 Q. Are these also recordings that Warner Bros. and others
3 are suing on in this case?

4 A. That is correct.

5 Q. Do you see any recordings on this Exhibit 2 for which
6 Warner Bros. Records owns the copyrights or exclusive
7 rights?

8 A. Yes, there are two, Goo Goo Dolls, "Iris," and Linkin
9 Park, "One Step Closer."

10 Q. And did you all do anything to confirm that these
11 recordings were your copyrighted work?

12 A. Yes. I have looked and noted that all the information
13 is correct and these are the recordings that we own.

14 Q. And you're familiar at a high level with something
15 called spoofs?

16 A. I am aware of that.

17 Q. Do you have a general understanding of what a spoof is?

18 A. Yes.

19 Q. What's your --

20 A. Instead of putting -- Warner Bros. Records would put out
21 fake versions of these songs on the Internet.

22 Q. That's what a spoof is?

23 A. Yes.

24 Q. Did you actually yourself do anything to check whether
25 these were spoofs?

1 A. Yes, I did.

2 Q. And what did you find?

3 A. We did not spoof these songs.

4 Q. Ma'am, of the three Warner Bros. Records that you just
5 identified, do you know whether Warner Bros. Records has
6 registered the copyrights in any or all three of those?

7 A. All three, yes.

8 Q. And that's part of your job, correct?

9 A. Yes, it is.

10 Q. Can I ask you to look at Exhibit 3, please. Ma'am, when
11 you get there, I will ask you to flip through that exhibit
12 and when you get to one that -- a recording that's one of
13 yours, would you let us know, tell us the SR number and
14 there's something called a Bates number at the bottom.

15 A. Okay. First one is SR 185-457. It is for the recording
16 "Basket Case" by Green Day and it's Thomas J, (MN)0020.

17 Q. All right.

18 A. The next one is SR 246-538. It's for "Iris" by the
19 Goo Goo Dolls and it's Thomas J, (MN)0599.

20 The last one is SR 288-402. That's for "One Step
21 Closer" by Linkin Park, Thomas J, (MN)0605.

22 Q. Thank you, ma'am. Did you notice that there are dates
23 on all these SR's?

24 A. Yes.

25 Q. Were these prepared on or about the date that they bear?

1 A. Yes.

2 Q. And are these documents prepared in the ordinary course
3 of Warner Bros. Records' business?

4 A. Yes, they are.

5 Q. Are they kept in the ordinary course of Warner Bros.
6 Records' business?

7 A. Yes, they are.

8 MR. GABRIEL: Move those three SR's, Your Honor.

9 MR. TODER: No objection.

10 THE COURT: Be admitted.

11 BY MR. GABRIEL:

12 Q. Ms. Brown, prior to the issues that bring us here, did
13 Warner Bros. sell legitimate versions of these three
14 recordings?

15 A. Yes, we did.

16 Q. Are you familiar with something called a copyright
17 notice?

18 A. Yes.

19 Q. What do you understand that to be?

20 A. A little "C" circle.

21 Q. And were those notices placed on these recordings?

22 A. Yes.

23 MR. GABRIEL: Your Honor, may I approach?

24 THE COURT: You may.

25 BY MR. GABRIEL:

1 Q. For the record, I've handed the witness three actual
2 CD's that are within Plaintiffs' Exhibit 5. Ms. Brown, do
3 you recognize those CD's?

4 A. Yes, I do.

5 Q. And what are they?

6 A. First one is Green Day, Linkin Park, and Goo Goo Dolls.

7 Q. Do these contain the recordings you've just described?

8 A. Yes, they do.

9 Q. And do they have the notices you've indicated on them?

10 A. Yes, I see them on the back. There's Green Day. Also
11 on the label.

12 Q. All three of them have that?

13 A. Yes.

14 Q. Ma'am, did Warner Bros. Records ever give the defendant,
15 Jammie Thomas, a license or authorization to copy any of
16 Warners Bros. Records' sound recordings?

17 A. No, we do not.

18 Q. Did it ever give Jammie Thomas a license or
19 authorization to distribute any of Warners Bros. Records'
20 sound recordings?

21 A. No, we did not.

22 Q. I neglected to ask you, ma'am, when you went through the
23 copyright registrations, two of them were in the name of
24 Warner Bros. Records, correct?

25 A. That's correct.

1 Q. And one was in the name of Reprise Records, a division
2 of Warner Bros. Records; is that correct?

3 A. That is correct.

4 Q. Could you tell the ladies and gentlemen of the jury what
5 Reprise Records is.

6 A. Yes, Reprise is a division of Warner Bros. Records and
7 it's one and the same.

8 Q. Ma'am, could you look at Exhibit 6, please.

9 A. Okay.

10 Q. Are you there?

11 A. Yes.

12 Q. Ma'am, do you see in Exhibit 6 recordings that are owned
13 by Warner Bros. Records or its related entities other than
14 the three that you've described?

15 A. Yes. I see some other Green Day recordings. I see some
16 Enya recordings. More Enya. More Green Day.

17 Q. There are a number of other recordings?

18 A. Yeah. I can see that they are interspersed within this.

19 MR. GABRIEL: Nothing further, Your Honor.

20 MR. TODER: I have no questions.

21 THE COURT: You may step down, ma'am.

22 Call your next witness, please.

23 MR. GABRIEL: Plaintiffs call Chris Bavitz, Your
24 Honor.

25 (Witness sworn.)

1 THE COURT: Good afternoon.

2 THE WITNESS: Good afternoon.

3 THE COURT: Would you state your true and correct
4 name for the record, please.

5 THE WITNESS: Sure. My name is Christopher
6 Bavitz, B-a-v-i-t-z.

7 THE COURT: You may inquire.

8 MR. GABRIEL: Thank you, Your Honor.

9 (Christopher Bavitz)

10 DIRECT EXAMINATION

11 BY MR. GABRIEL:

12 Q. Good afternoon, sir.

13 A. Good afternoon.

14 Q. What do you do for a living?

15 A. I am senior director of legal affairs for EMI Music
16 North America.

17 Q. And what is EMI Music North America?

18 A. EMI Music North America is a business name for Capitol
19 Records, Inc. There are several record companies under the
20 EMI umbrella, including Capitol and Virgin Records.

21 Q. Capitol Records, Inc., is one of the plaintiffs in this
22 case, correct?

23 A. That's correct.

24 Q. Have you, Mr. Bavitz, seen any documents listing the
25 sound recordings that are at issue in this case?

1 A. I have.

2 Q. Could I ask you to look at Exhibit 1, please.

3 A. Sure. Okay.

4 Q. Do you recognize Exhibit 1?

5 A. I do.

6 Q. And do you see -- well, what is Exhibit 1?

7 A. My understanding of Exhibit 1 is a partial list of the
8 recordings about which the plaintiffs are suing the
9 defendant in this case.

10 Q. Do you see any recordings for which Capitol owns the
11 copyrights or exclusive rights?

12 A. I do, the second recording on the list there by the
13 artist Richard Marx. The recording is entitled "Now and
14 Forever."

15 Q. Do you understand that Capitol Records is suing on that
16 recording in this case?

17 A. I do.

18 Q. Did Capitol Records do anything -- did you specifically
19 do anything to confirm that this recording was indeed its
20 copyrighted work?

21 A. I did. Given the artist Richard Marx and the track
22 title, I confirmed that this track appears on an album
23 entitled *Paid Vacation*. I checked the track listing of
24 *Paid Vacation* and confirmed that the recording is on that
25 album. I then pulled the copyright registration for the

1 album *Paid Vacation*, confirmed that we do have a
2 registration for that album, and then listened to a version
3 of this recording that had been downloaded from the
4 defendant's share folder and compared that with a version of
5 the recording on our actual *Paid Vacation* CD and confirmed
6 its identity.

7 Q. Do you see Exhibit 12 up there? It's a CD-R.

8 A. Yes, I do.

9 Q. And is the MP3 recording you listened to on that --

10 A. Yes.

11 Q. -- Exhibit 12?

12 A. That's correct.

13 Q. Mr. Bavitz, on Exhibit 1, if you can go back to that --

14 A. Yes.

15 Q. -- do you see on the very first line there's a recording
16 listed as Virgin Records America, Inc., Janet Jackson,
17 "Back"; do you see that?

18 A. I do.

19 Q. In fact, does Virgin Records own that recording?

20 A. Yes, it does.

21 Q. Are you, sir, aware of an issue regarding that recording
22 in this case?

23 A. I am. It's my understanding that in preparing for the
24 trial and reviewing the contents of the share folder and
25 listening to the recordings again, we determined that the

1 defendant had distributed a recording by Janet Jackson by
2 the title of -- I think it's called "Come Back to Me." It's
3 a title similar to "Back," but it wasn't exactly "Back."

4 And that recording is actually owned by Universal,
5 one of the co-plaintiffs in this case. It's not the
6 version -- I'm sorry. It's not the recording "Back" by
7 Janet Jackson that Virgin owns and therefore Virgin has
8 dropped its claim with respect to the recording "Back."

9 Q. Do you understand how "Back" got on this list?

10 A. You know, I don't specifically. Again, they have
11 similar titles and I think it was -- I assume it was just an
12 error in transcription. When creating this Exhibit A, "Come
13 Back to Me" was written down as "Back." Instead of
14 Universal, Virgin was listed as the owner. I think that's
15 how it happened.

16 Q. And once that clerical error came to your attention,
17 Virgin Records decided not to pursue that recording?

18 A. That's correct.

19 Q. Sir, you identified the one Capitol recording, Capitol
20 Records recording at issue in the case, the Richard Marx
21 song, correct?

22 A. Yes.

23 Q. Do you know whether Capitol has registered a copyright
24 in that recording?

25 A. I do, yes.

1 Q. Could I ask you to look at Exhibit 3.

2 A. Sure. Okay.

3 Q. And if I could ask you to look through that and see if
4 you can find the SR for that recording.

5 A. Yes, I have it here. I think it's the second SR in this
6 packet. It's SR number 210-246.

7 Q. The Bates number too, please?

8 A. I'm sorry. The Bates number is Thomas, J 0024 and 0025.

9 Q. Did Capitol Records prepare -- there's a date on there,
10 correct?

11 A. Correct.

12 Q. And did Capitol Records prepare this document on or
13 about the date it bears?

14 A. Yes. As far as I know, yes.

15 Q. And was it created in the ordinary course of Capitol's
16 business?

17 A. Yes.

18 Q. Was it kept in the order course of Capitol's business?

19 A. Yes, it was.

20 MR. GABRIEL: Move Exhibit 5, Your Honor.

21 MR. TODER: No objection.

22 THE COURT: Be admitted.

23 BY MR. GABRIEL:

24 Q. Mr. Bavitz, did Capitol Records ever give the defendant,
25 Jammie Thomas, a license or authorization to copy any of its

1 sound recordings?

2 A. No, we did not.

3 Q. Did Capitol Records ever give the defendant, Jammie
4 Thomas, a license or authorization to distribute any of its
5 sound recordings?

6 A. Not to my knowledge, we did not.

7 Q. Can I ask you to look at Exhibit 6, please.

8 A. Sure. Okay.

9 Q. Do you see other recordings that are owned by Capitol
10 Records or related entities?

11 A. Just sort of leafing through this, this is obviously a
12 large list of recordings, but just based on artists and
13 titles, I see a handful here that correspond with recordings
14 that are owned by Capitol Records. I see a Lenny Kravitz
15 recording here on page Thomas, J 494. It says, "Miles
16 Away." I think it's a recording called "A Million Miles
17 Away." I see a recording on that same page by the artist
18 Hammer or MC Hammer, "Too Legit to Quit." That would be
19 owned by a Capitol Records label. On page 499 I see there's
20 a Janet Jackson recording that Virgin does own, "That's the
21 Way Love Goes." That's another example. I think there are
22 others on here as well.

23 Q. Thank you. And I neglected to ask you, sir, prior to
24 the issues that bring us here did Capitol Records sell
25 legitimate versions of the Richard Marx recording that it's

1 suing on here?

2 A. Yes, we did.

3 MR. GABRIEL: May I approach, Your Honor?

4 THE COURT: You may.

5 MR. GABRIEL: The record should reflect I have
6 handed Mr. Bavitz an actual CD that's part of Plaintiffs'
7 Exhibit 5.

8 BY MR. GABRIEL:

9 Q. Mr. Bavitz, do you recognize that?

10 A. I do. This is the commercially released *Paid Vacation*
11 album by the artist Richard Marx released under Capitol.

12 Q. And are you familiar with something called copyright
13 notices?

14 A. Yes.

15 Q. Do you see -- strike that.

16 MR. GABRIEL: I should first move Exhibit -- this
17 CD in Exhibit 5, Your Honor.

18 MR. TODER: No objection.

19 THE COURT: Be admitted.

20 BY MR. GABRIEL:

21 Q. Does Capitol Records put copyright notices on the CD?

22 A. We generally do, yes.

23 Q. Can you just indicate where they are.

24 A. I see a "P" and a "C" notice here. It indicates "P and
25 C, 1993, Capitol Records, Inc.," on the booklet that

1 accompanies the CD.

2 Q. Thank you, sir.

3 MR. GABRIEL: Your Honor, just as housekeeping, I
4 cannot remember if I offered the Capitol certificate of
5 registration that was in Exhibit 3. If I haven't, I'll move
6 that. I think I did.

7 MR. TODER: I'm sorry?

8 MR. GABRIEL: The Capitol SR in Exhibit 3, I can't
9 remember if I moved it in. I think I did.

10 MR. TODER: If you did not -- well, we don't
11 object anyway.

12 THE COURT: Be admitted.

13 MR. GABRIEL: I think I neglected, Your Honor,
14 when I showed the last witness, Ms. Brown, the CD's, the
15 actual CD's that Warner owns, I think I neglected to move
16 those into evidence. I would move those.

17 MR. TODER: No objection.

18 THE COURT: Be admitted.

19 MR. GABRIEL: If I can just have a moment, Your
20 Honor?

21 THE COURT: (Indicating.)

22 (Pause.)

23 MR. GABRIEL: No further questions, Your Honor.

24 MR. TODER: Thank you, Your Honor.

25

CROSS EXAMINATION

1
2 BY MR. TODER:

3 Q. Good afternoon, Mr. Bavitz.

4 A. Good afternoon.

5 Q. You're saying that EMI Group owns Virgin Records?

6 A. EMI Music North America is, again, just a business name
7 for Capitol Records, Inc. Virgin Records America, Inc., is
8 an indirect subsidiary, but a subsidiary of Capitol Records,
9 Inc., yes.

10 Q. I will represent to you that in these proceedings
11 plaintiffs filed a certificate of interested persons stating
12 that Plaintiff Virgin Records America, Inc.'s parent is EMI
13 Group PLC. Is that true?

14 A. I think the ultimate parent of both Virgin Records
15 America, Inc., and Capitol Records, Inc., is a company
16 called EMI Group PLC. That's a UK company. I'm not sure
17 what you're referring to, but I'm sure that just designates
18 the ultimate parent of all the EMI companies is a UK company
19 called EMI Group PLC.

20 Q. So really there are some entities between Virgin Records
21 America, Inc., and EMI Group PLC?

22 A. Yes, that's correct.

23 Q. What entities would those be?

24 A. I don't know the corporate chart off the top of my head.
25 I just don't know.

1 Q. Well, the plaintiff in this is Virgin Records America,
2 Inc., correct?

3 A. That's one of the EMI plaintiffs, yes. I think Capitol
4 Records, Inc., is the other.

5 Q. But Virgin Records Ltd. is the copyright holder for the
6 Janet Jackson song whose serial number is 174-392, correct?

7 A. I don't know. I think we've dropped the claim as to
8 that Janet Jackson recording, so I don't even -- I haven't
9 even seen the registration on that.

10 MR. TODER: May I approach, Your Honor?

11 THE COURT: You may.

12 MR. GABRIEL: At this point, Your Honor, I will
13 object on the grounds of relevance. We dropped the claim.

14 MR. TODER: I'm testing whether this witness knows
15 anything about his company and the songs. Credibility.

16 THE COURT: Continue.

17 BY MR. TODER:

18 Q. This is marked -- actually I have taken -- this was
19 marked Defendant's Exhibit 13, but we will mark it as
20 Defendant's Exhibit 1 for purposes of identification. Do
21 you see who the copyright claimant there is?

22 A. Yes.

23 Q. And who is the copyright claimant for SR 174-392, the
24 recording that got dropped?

25 A. It says, "Virgin Records Ltd. in care of Virgin Records

1 America, Inc."

2 Q. "In care of Virgin Records America, Inc.," is just the
3 mailing address, correct?

4 A. I don't know.

5 Q. Well, who is Virgin Records Ltd.?

6 A. Virgin Records Ltd. is a UK affiliate of Capitol and
7 Virgin here in the U.S.

8 Q. What do you mean by "affiliate"?

9 A. It's another corporate entity under the umbrella of EMI
10 Group PLC, the UK company.

11 Q. When you say "under the umbrella," is it owned by EMI
12 Group PLC?

13 A. Is Virgin Records Ltd. owned by EMI Group PLC, is that
14 the question?

15 Q. Yes.

16 A. Yes.

17 Q. Wholly owned?

18 A. I don't know.

19 Q. You don't know. Do you know whether Virgin Records
20 America, Inc., owns any of Virgin Records Ltd.?

21 A. No, I think it would be the other way around. The
22 ultimate parent of all these companies is EMI Group PLC. I
23 think Virgin Records America, Inc., and Virgin Records Ltd.
24 and Capitol Records, Inc., are all various subsidiaries of
25 EMI Group PLC.

1 Q. This copyright certificate, you've seen it before,
2 correct?

3 A. I have not seen this before, no.

4 Q. Well, you have seen copyright certificates before?

5 A. I have seen copyright certificates.

6 Q. You're a lawyer, correct?

7 A. I am a lawyer.

8 Q. And so you know how to read these and you know what they
9 say --

10 A. Sure.

11 Q. -- generally?

12 Are you familiar with these in your work from day
13 to day with your business?

14 A. I am.

15 Q. So this form you're looking at marked as Defendant's
16 Exhibit 1 identifies Virgin Records Ltd. as the owner of the
17 first song on Exhibit A of the Complaint, correct?

18 MR. GABRIEL: Again, Your Honor, I'm going to
19 object on the grounds of relevance. It's not in the case
20 anymore.

21 THE COURT: Sidebar.

22 **(At sidebar.)**

23 MR. TODER: Your Honor, this inquiry is about
24 credibility. It has to do with he's here to testify that
25 his company owns this, this, and this. And so I'm testing

1 his knowledge of just what he knows about the companies and
2 who they are and whether they know what they own or not.

3 THE COURT: I am going to sustain the objection.

4 MR. TODER: Okay.

5 **(In open court.)**

6 MR. TODER: No further questions.

7 THE COURT: You may step down, sir.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Excuse me. Any further questions?

10 MR. GABRIEL: We don't have any further questions,
11 Your Honor.

12 THE COURT: Sir, you may step down.

13 THE WITNESS: Thank you.

14 THE COURT: Call your next witness.

15 MR. GABRIEL: Your Honor, I think that we may
16 rest. May I ask the Court for a brief recess just so we can
17 convene and make sure that we're done?

18 THE COURT: Oh, most definitely. Let's take a
19 ten-minute break. All rise for the jury.

20 (Recess taken at 4:25 p.m.)

21 * * * * *

22 (4:35 p.m.)

23 **IN OPEN COURT**

24 **(JURY PRESENT)**

25 THE COURT: Mr. Gabriel.

1 MR. GABRIEL: Yes, Your Honor. Thank you for the
2 opportunity for that. The plaintiffs rest.

3 THE COURT: Mr. Toder.

4 MR. TODER: I suppose we would like to make our
5 typical motions after they rest, but other than that, we
6 will be resting.

7 THE COURT: All right. Members of the Jury, we
8 have concluded all the testimony in this case and we will
9 have the final arguments tomorrow morning at -- we'll start
10 up at 9:30, 9:30. That gives us -- so we have a little time
11 to make sure I have all the jury instructions ready for you.

12 You will get this case tomorrow and you will be
13 deliberating on this case tomorrow. My understanding is one
14 of you is receiving an award at 4:30. If you have not
15 reached a verdict by 4:15, you will adjourn for the day so
16 you can go get your award. I don't know which -- I'm happy
17 for you, whoever it is.

18 All right. Have a good evening. Enjoy this
19 beautiful Duluth day and we'll see you tomorrow at 9:30.
20 All rise for the jury.

21 (Jury excused.)

22 **IN OPEN COURT**

23 **(JURY NOT PRESENT)**

24 THE COURT: Counsel.

25 MR. TODER: I was going to move for a directed

1 verdict only out of an abundance of caution. I believe that
2 Virgin Records America, Inc., has dismissed their claim with
3 prejudice. So I guess I would move for a directed verdict
4 against Virgin Records of America, Inc. I don't know
5 whether that's necessary by virtue of the fact that they
6 have dismissed their claim with prejudice, but out of an
7 abundance of caution, I'll just make that record.

8 MR. GABRIEL: And, Your Honor, I appreciate
9 Mr. Toder. I don't believe that there's any directed
10 verdict or motion for judgment as a matter of law. We
11 dismissed it with prejudice before the trial.

12 THE COURT: That plaintiff has been dismissed with
13 prejudice, so the motion is moot.

14 MR. TODER: Thank you, Your Honor.

15 THE COURT: Is there anything else before we get
16 to the jury instructions?

17 MR. GABRIEL: No, Your Honor. Thank you.

18 THE COURT: All right. Let's move to the jury.
19 instructions, if you would pull out the packet, Working
20 Copy No. 1. Do you have your working set?

21 MR. TODER: Yes, Your Honor.

22 MR. GABRIEL: Yes, Your Honor.

23 THE COURT: What I would like to do is go through
24 each instruction and for the record give the Court whether
25 or not you accept it, object to it, or ask for modifications

1 to it.

2 Jury Instruction No. 1, any additions,
3 corrections, or objections to it?

4 MR. GABRIEL: Your Honor, we would just ask for a
5 minor addition. As the Court knows, there's been press on
6 this case. We'd ask for a sentence along the lines of that
7 the jurors must apply the law as the Court instructs,
8 whether they agree with the law or not, and craft
9 language -- I know there's a stock instruction like that in
10 some places.

11 THE COURT: I'll put a sentence in. Any
12 objection?

13 MR. TODER: No, Your Honor.

14 THE COURT: All right. Jury Instruction No. 2,
15 any objections, modifications?

16 MR. GABRIEL: No, Your Honor.

17 MR. TODER: No, Your Honor.

18 THE COURT: Jury Instruction No. 3.

19 MR. GABRIEL: On this one, Your Honor, we would
20 ask that the very last paragraph be stricken from here. As
21 the Court knows, the plaintiffs called all of the witnesses
22 and the defendant didn't call any. So the normal
23 instruction that the weight not being determined by the
24 number of witnesses I think tends to work against the
25 plaintiffs in this particular case. We would just ask that

1 that language be stricken.

2 MR. TODER: Your Honor, that's a standard
3 instruction. We would like it to stay there because the
4 jurors might think because all this evidence is here that
5 it's -- by the fact there's so much of it, it means
6 something; and this paragraph cures that.

7 THE COURT: That paragraph will stay in.

8 MR. GABRIEL: Your Honor, just a point of
9 procedure. I assume having made the objection, it's
10 preserved and I don't need to make an exception or ask for
11 an exception?

12 THE COURT: It's preserved.

13 MR. GABRIEL: Thank you, sir.

14 THE COURT: Jury Instruction No. 4.

15 MR. GABRIEL: Two comments, Your Honor, that are
16 along similar lines.

17 The second paragraph, for the same reasons I would
18 ask that it be stricken, dealing with the greater number of
19 witnesses. It's also duplicative of the language the Court
20 will be giving in Instruction No. 3.

21 Also, as the Court -- the very last sentence of
22 the instruction in the first paragraph deals about the
23 evidence being equally balanced. We would ask the Court to
24 add a sentence there that says, "If, however, you find that
25 the evidence even slightly favors one side on an issue, then

1 that side has met its burden of proof."

2 MR. TODER: Your Honor, we would object and want
3 to keep the instruction the way it's written.

4 THE COURT: All right. I will use Eighth Circuit
5 Instruction 3.04, Burden of Proof. It reads as follows:

6 "In these instructions you are told that your
7 verdict depends on whether you find certain facts have been
8 proved. The burden of proving a fact is upon the party
9 whose claim or defense depends upon that fact. The party
10 who has the burden of proving a fact must prove it by the
11 greater weight of the evidence.

12 "To prove something by the greater weight of the
13 evidence is to prove that it is more likely true than not
14 true. It is determined by considering all of the evidence
15 and deciding which evidence is more believable. If on any
16 issue in this case the evidence is equally balanced, you
17 cannot find that the issue has been proved. The greater
18 weight of the evidence is not necessarily determined by the
19 greater number of witnesses or the exhibits a party has
20 presented.

21 "You may have heard of the term 'proof beyond a
22 reasonable doubt.' That is a stricter standard which
23 applies in criminal cases. It does not apply in civil cases
24 such as this. You should therefore put it out of your
25 minds."

1 That's Eighth Circuit Jury Instruction 3.04.
2 Counsel.

3 MR. GABRIEL: I think I've made my record. I
4 understand the Court's position. We would still like that
5 one sentence added that I asked to be added and ask that one
6 paragraph be stricken about the greater number as
7 duplicative. I have made the record. Thank you, sir.

8 THE COURT: Counsel.

9 MR. TODER: I have nothing to say.

10 THE COURT: The Court will give 3.04 on burden of
11 proof instead of Instruction No. 4.

12 MR. GABRIEL: And perhaps, Your Honor, I should
13 have been somewhat more clear. We would ask for -- to the
14 Eighth Circuit instruction we would ask for the same
15 additions and changes made, but -- that's our position.
16 Other than that, using "the greater weight" is fine.

17 THE COURT: Once you get the written copy of 3.04,
18 you will see that what you've asked for is included.

19 MR. GABRIEL: I appreciate that, Your Honor.

20 THE COURT: Jury Instruction No. 5.

21 MR. GABRIEL: Your Honor, this is generally okay.
22 We would ask for an addition or perhaps an additional
23 instruction. The Court is aware there's been substantial
24 media coverage and in voir dire some of the jurors indicated
25 they have read issues about these kind of cases.

1 Again, I didn't have enough time to actually craft
2 an instruction, but we would ask either to add to this
3 instruction or a separate instruction advising the jurors
4 that they are not permitted to rely on anything that they
5 have seen or read outside of the courtroom or that they've
6 read in the paper. I think you actually gave that
7 instruction at the beginning of the case --

8 THE COURT: I did.

9 MR. GABRIEL: -- but we would ask that be done
10 here.

11 THE COURT: Counsel.

12 MR. TODER: We don't have any objection to that,
13 but as we go along here, our position is always going to be
14 that the default that we would always want is the model
15 instructions from the Eighth Circuit.

16 THE COURT: We will add an instruction dealing
17 with the publicity of this case and they are not to draw any
18 inferences from that.

19 Jury Instruction No. 6, any objections,
20 corrections, or additions to it?

21 MR. GABRIEL: Not from plaintiffs, Your Honor.

22 MR. TODER: Not from defendant.

23 THE COURT: Jury Instruction No. 7.

24 MR. GABRIEL: Also fine with the plaintiffs, Your
25 Honor.

1 MR. TODER: Fine with defendant.

2 THE COURT: Jury Instruction No. 8.

3 MR. GABRIEL: Fine with the plaintiffs, Your
4 Honor.

5 MR. TODER: Fine with defendant.

6 THE COURT: Jury Instruction No. 9.

7 MR. GABRIEL: Acceptable to the plaintiffs, Your
8 Honor.

9 MR. TODER: It's okay with the defendant.

10 THE COURT: Jury Instruction No. 10.

11 MR. GABRIEL: Acceptable to the plaintiffs, Your
12 Honor.

13 MR. TODER: Acceptable to defendant.

14 THE COURT: Jury Instruction No. 11.

15 MR. GABRIEL: Acceptable to the plaintiffs, Your
16 Honor.

17 MR. TODER: Acceptable to defendant.

18 THE COURT: Jury Instruction No. 12.

19 MR. GABRIEL: Here, Your Honor, the plaintiffs
20 would ask for, I think, the addition of a sentence. As it
21 reads I think the instruction suggests that to prove our
22 case we have to prove both reproduction and distribution.
23 It also suggests, I think, that unless we have proven all 24
24 acts of distribution or reproduction, we haven't proven our
25 case.

1 So we would ask that the instruction -- a sentence
2 be added to indicate that plaintiffs need not -- or each
3 plaintiff need not prove both reproduction and distribution
4 and also that any single act of distribution or single act
5 of downloading constitutes an act of infringement.

6 MR. TODER: This is cured, Your Honor, by the fact
7 that you say each plaintiff claims that the defendant has to
8 do something and you say, "violated its exclusive rights to
9 reproduce and distribute." And they do have exclusive
10 rights to reproduce and distribute. But the next line you
11 say, "One who reproduces or distributes...the copyright
12 infringes." And so therefore I would leave this the way it
13 is.

14 THE COURT: The Court will leave 12 as is. It's
15 clear.

16 MR. GABRIEL: Your Honor, I just wanted to add one
17 thing. I understand the Court's ruling. For purposes of
18 the record, again, we would ask -- the statement of law I
19 believe is accurate is that we only need -- this instruction
20 goes to liability and I believe we only need to prove one
21 act of infringement to prove liability in this case, which
22 is why I was asking for that second sentence to be added.

23 THE COURT: The Court's ruling stands.

24 13.

25 MR. GABRIEL: No problem from the plaintiffs, Your

1 Honor.

2 MR. TODER: No problem for defendant.

3 THE COURT: 14.

4 MR. GABRIEL: Your Honor, with respect to the
5 plaintiffs, we submit 14 is actually an incorrect statement
6 of the law. The law in this case -- the law is, I submit,
7 fairly well settled that, in fact, the mere act of making
8 copyrighted sound recordings available for electronic
9 distribution is, in fact, by itself a violation of the
10 exclusive right of distribution and actual transfer need not
11 take place. I can cite to you a whole bunch of law, Your
12 Honor.

13 In the Seventh Circuit, BMG Music vs. Gonzalez
14 says "...people who post or download music files are primary
15 infringers."

16 In In re Aimster Copyright Litigation, Seventh
17 Circuit, transmitting a digital copy of copyrighted music
18 infringes copyright.

19 The Ninth Circuit, A&M Records vs. Napster,
20 "Napster users who upload file names to the search index for
21 others to copy violate plaintiffs' distribution rights."

22 Sony Pictures Home Entertainment vs. Lott,
23 Northern District of Texas, 2007, grants summary judgment to
24 the plaintiff motion picture companies based on evidence
25 that their copyrighted motion pictures were being

1 distributed from the defendant's computer without an actual
2 receipt.

3 Motown Records vs. DePietro, Eastern District of
4 Pennsylvania, February 16, '07, holds making copyrighted
5 works available to other online file sharers violates the
6 copyright holder's distribution right.

7 United States vs. Shaffer, 472 F.3d 1219, Tenth
8 Circuit, 2007, We have little difficulty in concluding that
9 the defendant distributed child pornography by placing the
10 pornography in his computer's Kazaa share folder.

11 Hotaling vs. Church of Jesus Christ of Latter-Day
12 Saints, 118 F.3d 199, Fourth Circuit, 1997, Placing an
13 unauthorized copy of copyrighted work in a library's
14 collection, listing the work in the library's index, and
15 making the work available to the borrowing or browsing
16 public was distribution within the meaning of the Copyright
17 Act.

18 Your Honor, I will also note -- I am trying to
19 find it here really quickly -- the United States Copyright
20 Office has taken the position that making available is a
21 distribution.

22 The Register of Copyrights from the United States
23 Copyright Office, Marybeth Peters, wrote a letter to
24 Congress dated September 25, 2002. I do have a copy for
25 counsel. I will find the exact quote. It states -- I'm

1 sorry, Your Honor. I didn't hand you a copy. I apologize.
2 May I approach?

3 THE COURT: You may.

4 MR. GABRIEL: In this letter the Register of
5 Copyrights, Ms. Peters, states, Your Honor, in the second
6 paragraph, "While Section 106 of the U.S. Copyright Act does
7 not specifically include anything called a 'making
8 available' right, the activities involved in making a work
9 available are covered under the exclusive rights of
10 reproduction, distribution, public display and/or public
11 performance set out in Section 106," and there are a bunch
12 of cases cited.

13 She is specifically talking about peer-to-peer
14 networks in these cases. She says in the next paragraph,
15 "In the case of a peer-to-peer network user uploading a
16 copyrighted work onto his or her computer, making it
17 available for other users of the peer-to-peer network to
18 download, it is simply incorrect to suggest that the person
19 performing the download is the only person legally
20 responsible for the infringement. Making the work available
21 in this context constitutes an infringement of the exclusive
22 distribution right as well as the reproduction right." She
23 goes on to cite the Napster case that I referred to.

24 She also, Your Honor, talks about in this letter
25 various international treaties that the United States

1 signed, the WIPO treaties that are referred to here. Those
2 treaties have specifically a making available right, if you
3 will.

4 The United States when it signed those treaties
5 had to verify that its U.S. law was in compliance with the
6 same making available right. The executive branch and
7 Congress all concluded that U.S. law did not need to be
8 amended because the making available right was already part
9 of the right of distribution.

10 I could probably go on for a longer period of
11 time, Your Honor, but I respectfully submit that, in fact,
12 in the P2P world Congress, the legislature, and the courts
13 have stated that making recordings available on a P2P
14 network like this is, in fact, a distribution. They are
15 handing them out just like the guy on the street, here, take
16 these. That person is distributing.

17 That's what's happening here, whether or not you
18 can prove that someone at the other end actually took it.
19 It makes sense because in a case like this, with millions
20 and millions of people, it's virtually impossible to track
21 where that went.

22 THE COURT: Counsel.

23 MR. TODER: Your Honor, we don't have with us our
24 file, but I recall from the Napster case and from the
25 Hernandez case that there must be an actual sharing. And

1 this instruction actually talks about that, an actual
2 transfer, an actual sharing, and therefore we would
3 respectfully ask the Court to leave the instruction the way
4 it is.

5 MR. GABRIEL: And I know what counsel is referring
6 to, Your Honor. In the Napster case the district court
7 said -- and I will explain this. The issue in the Napster
8 district court case and also a case called Venegas-Hernandez
9 out of the First Circuit, what those cases hold is that it
10 is not enough when you just have an index. In other words,
11 if there was just a set of words up there, that that would
12 not be enough to be a distribution.

13 Those cases have nothing to do with this case
14 where there was a file behind the index, is what we would
15 say. In other words, as you heard from witnesses, there
16 is -- the supernode has the index uploaded, but there is a
17 work behind the index.

18 This Hotaling case that I mentioned to you is an
19 easier example in the hard world, hard copy world, a case of
20 a library book. If there was just a card catalog, that
21 alone would not be a distribution. But if there's a card
22 catalog and the book lies behind it to take it out, that is
23 distribution whether or not there is evidence that someone
24 took it. And that's what the Hotaling case holds.

25 So I submit the Napster case and the

1 Venegas-Hernandez case that Mr. Toder refers to are
2 distinguishable because the issue in both was that there
3 wasn't anything behind an index.

4 THE COURT: I'll take this matter under
5 advisement. I'll look at the cases again tonight. And if
6 you wish to have anything to say to the Court about this
7 matter, we can take it up at 8:30 tomorrow morning. I'll
8 have my ruling by then and then -- well, I'll listen to what
9 you have to say, if there's anything additional that you
10 have to say, and then I'll rule by 8:30 tomorrow morning.
11 We'll just go over the instructions again. You'll have a
12 clean packet by at least 8:15 so you can take a look at what
13 the Court is going to do.

14 MR. GABRIEL: That would be great. Just really as
15 an offer to assist the Court, I am certainly willing -- the
16 last thing I want to do is write a brief, but I'm certainly
17 willing to provide any law to the Court.

18 THE COURT: I think in your pretrial materials
19 that you've cited those cases. We'll review them again.
20 Unless there's a new case that -- I didn't hear any Eighth
21 Circuit cases that were cited.

22 MR. GABRIEL: I don't believe the Eighth Circuit
23 has spoken on the issue, Your Honor. I think we looked for
24 that.

25 One case we didn't cite -- and I don't have the

1 exact cite -- is called Perfect 10 vs. Amazon in the Ninth
2 Circuit, Your Honor. I apologize I don't have the cite.

3 THE COURT: Do you have the cite?

4 MR. GABRIEL: We can get the cite and provide it
5 to you very quickly.

6 THE COURT: Perfect 10?

7 MR. GABRIEL: vs. Amazon.

8 THE COURT: We'll be able to find it.

9 MR. GABRIEL: And, Your Honor, if I may, since we
10 submitted our jury instructions we actually have the same
11 instruction we submitted to you with some additional cites
12 in it, the ones I just read to you. If I may approach, I
13 will provide that to you.

14 THE COURT: You may. Make sure counsel has a
15 copy.

16 Let's move on to Jury Instruction 15.

17 MR. GABRIEL: I could probably make this go a
18 little faster. I recognize that the Court did just separate
19 them out into individual plaintiffs and we're fine with all
20 of them. That would be 15 through 20.

21 THE COURT: 15, 16, 17, 18, 19, 20.

22 MR. GABRIEL: Those are the ones, Your Honor.

23 MR. TODER: And we have no objection.

24 THE COURT: All right. 21, any objections to 21
25 or additions?

1 MR. GABRIEL: I am trying to read my own notes
2 here, scribbling over lunch. Oh, yes, Your Honor. I
3 recognize that the language of this instruction is -- I
4 think the pattern may be from O'Malley. I can't remember
5 for sure. The Copyright Act talks in terms, I think, of
6 works as opposed to acts of infringement.

7 We submitted -- we basically submitted this
8 instruction to you and after it says "per act of
9 infringement," we had put in parens "(i.e., per sound
10 recording distributed or downloaded)." I believe that the
11 O'Malley instruction is not 100 percent consistent with the
12 copyright statute, which is why we made that addition.

13 So we would ask that those additions be placed in
14 here, in other words, adding, where it says "per active
15 infringement," "that is, per sound recording distributed or
16 downloaded."

17 MR. TODER: We would object to that because
18 earlier in the instructions you define what an act of
19 infringement is.

20 Your Honor, may I make one more comment on
21 Instruction 21?

22 THE COURT: Yes.

23 MR. TODER: You say under the Copyright Act each
24 plaintiff is entitled to some such and such. Then you say,
25 "If, however, you find that the defendant's conduct was

1 willful." I would respectfully ask the Court to say, "If,
2 however, you find that a defendant's conduct was willful,"
3 then each plaintiff is entitled to a sum.

4 Because there it almost -- it could be read to
5 suggest that it's almost a foregone conclusion that the
6 plaintiff [sic] has done something and now is it willful.
7 But if you keep it neutral as a defendant's conduct, you
8 would be doing the same thing for each plaintiff. The same
9 thing in the second paragraph.

10 THE COURT: I see. You're saying, "If, however,
11 you find that a defendant's conduct was willful," is that
12 what you are asking?

13 MR. TODER: Yes, Your Honor.

14 THE COURT: There's only one defendant.

15 MR. TODER: I thought that you were just trying to
16 set this up as a general proposition of law as opposed to
17 this specific defendant. But if that was your intention, we
18 can keep "the."

19 THE COURT: Counsel.

20 MR. GABRIEL: I think we're talking about this
21 case, which is why you changed it to "each plaintiff," and
22 so I think the -- it is one defendant, as you said.

23 MR. TODER: You know, I'm going to withdraw my
24 objection. The more I read this, I think that it is right.

25 THE COURT: It is withdrawn. We're back to -- I

1 will review 21 again and I'll take that objection under
2 advisement -- or addition under advisement and review that
3 this evening.

4 22.

5 MR. GABRIEL: No objection to 22, Your Honor.

6 MR. TODER: No objection to 22.

7 THE COURT: 23.

8 MR. GABRIEL: No objection to 23, Your Honor.

9 MR. TODER: No objection to 23, Your Honor.

10 THE COURT: We are going to hand out the verdict
11 form in a few minutes so you can review that.

12 MR. GABRIEL: Your Honor, in terms of making a
13 record -- I didn't mean to interrupt you.

14 THE COURT: Go ahead.

15 MR. GABRIEL: There are some other instructions
16 that the parties submitted that the Court has chosen not to
17 give and I'm not sure if we need to make a record of that.

18 THE COURT: Yes, let's make a record.

19 MR. GABRIEL: Your Honor, the plaintiffs had
20 submitted two instructions that you have chosen not to give
21 in addition to the one that we talked about on distribution,
22 so we would, of course, respectfully request that the Court
23 give the form that we submitted. I am trying to find the
24 number of it. It would be, Your Honor, plaintiffs' proposed
25 Instruction No. 8. So just for the record --

1 THE COURT: How does that read?

2 MR. GABRIEL: It reads -- I guess I gave you a
3 slightly different version. The one we submitted prior
4 reads as follows: "The act of distributing and/or making
5 copyrighted sound recordings available for electronic
6 distribution on a peer-to-peer network without license from
7 the copyright owners violates the copyright owners'
8 exclusive right of distribution, regardless of whether
9 actual distribution has been shown." So we would ask for
10 that one, Your Honor.

11 We also asked for plaintiffs' proposed Instruction
12 No. 11, which is basically a definition of "knowledge," Your
13 Honor, and this we asked for because it goes -- the
14 definition of "willfulness" that you gave uses the term
15 "knowledge," but it doesn't define the term.

16 And so plaintiffs' Instruction No. 11 is a
17 definition of "knowledge" that comes from various cases and
18 it reads, "Knowledge may be either actual or inferred from
19 the evidence. Moreover, knowledge can be established by
20 intentional concealment of copyright infringement."

21 As the Court knows, certainly a theory in this
22 case is that there was concealment of infringement going on.
23 So we would ask for that instruction.

24 MR. TODER: And we would object to that. That's
25 far too suggestive.

1 THE COURT: All right. I will take those two
2 additional instructions under advisement and I'll review
3 them tonight.

4 MR. GABRIEL: That would be fine.

5 THE COURT: I think we can find the O'Malley
6 instruction dealing with knowledge.

7 MR. GABRIEL: We may have looked. I'm not sure if
8 we found one, but forgive me, I just can't remember. It
9 seemed like there was an issue about it and I don't remember
10 what it was.

11 THE COURT: All right. We'll take a look at it.
12 That was 8 and 11 of your requested instructions?

13 MR. GABRIEL: Yes, Your Honor. And the other one,
14 just for purposes of making a record here, was our No. 12,
15 which was -- reads, "You are instructed that documents and
16 information that defendant intentionally failed to preserve,
17 including but not limited to files contained in her computer
18 hard drive, would have been advantageous to plaintiffs and
19 disadvantageous to defendant."

20 I believe there is evidence here to support such
21 an instruction. Our evidence intended to show that these
22 instant messages were sent on the day of capture and then
23 after that the hard drive got changed and files were then
24 gone from that hard drive. So that was the basis for our
25 request for Instruction No. 12.

1 MR. TODER: And we object to that because, for one
2 thing, the evidence suggests that -- well, the two notices
3 that she got of these proceedings, she got a letter from
4 Charter Communications, she got an August 19th letter from
5 plaintiffs, that occurred after she brought her hard drive
6 in for repair.

7 The evidence is that she brought it in for repair,
8 not for replacement, and adding that on would be very
9 suggestive that she was trying to pull a fast one and so
10 therefore I would ask that not be included among the
11 instructions.

12 THE COURT: As to plaintiffs' suggested
13 Instruction No. 12, the Court will not give that
14 instruction.

15 As to 8 and 11, we will review those two tonight
16 and make a ruling tomorrow morning.

17 MR. GABRIEL: Thank you, Your Honor. Those are
18 the additional ones that we had.

19 THE COURT: Any additional ones for the defendant?

20 MR. TODER: No, Your Honor.

21 THE COURT: Let's pass out the verdict forms.

22 (Pause.)

23 THE COURT: Counsel, have you had an opportunity
24 to review the verdict form?

25 MR. GABRIEL: Yes, Your Honor. I just want to

1 make sure we've got -- if I can double-check to make sure we
2 have all the plaintiffs here, which I think we do, I think
3 we will be ready to talk about it in just a second.

4 (Pause.)

5 MR. GABRIEL: We're ready when Your Honor is and
6 when Mr. Toder is.

7 (Pause.)

8 MR. TODER: I'm ready.

9 THE COURT: All right. Counsel.

10 MR. GABRIEL: Thank you, Your Honor. We really
11 have just a minor kind of editing. Throughout the draft it
12 refers to "song titles" and it is actually -- song titles
13 versus sound recordings is a term of art. Song titles
14 generally refers to what a publisher of music would
15 basically own and that's very different than the sound
16 recordings. So we would just ask that "song titles" be
17 replaced with "sound recordings" to be technically accurate.

18 And then Question No. 2 it says, "to one or more
19 copyrights of song titles." We would ask that that says
20 "one or more copyrighted sound recordings" and then we would
21 ask for that change throughout. I think those were -- and I
22 do see that in a lot of places.

23 So we would ask that "song titles" be called
24 "sound recordings" and that where it says -- those questions
25 that talk about copyrights of song titles, we are really

1 saying it's not that the defendant infringed with respect to
2 one or more copyrights of song titles, it's infringe with
3 respect to one or more copyrighted sound recordings.

4 Other than that, we're okay with this, Your Honor.

5 THE COURT: Any objection to that?

6 MR. TODER: I don't have an objection to the first
7 suggestion at all, but you can't really infringe anything
8 other than a copyright. So you're suggesting that we
9 have -- I'm sorry. What is your suggestion for the edit,
10 again, for No. 2?

11 MR. GABRIEL: It would just say "copyrighted sound
12 recordings." And you do infringe the copyrighted recording.

13 MR. TODER: That's what I don't understand, how
14 you infringe a copyrighted recording. You infringe
15 someone's right, someone's copyright.

16 MR. GABRIEL: And I think we can -- with all due
17 respect, I think it is more correct to say "copyrighted
18 sound recordings." I suppose we can live with "copyrights
19 of sound recordings" instead of "song titles," but I do
20 think "copyrighted sound recordings" is accurate.

21 THE COURT: Counsel, anything further on that?

22 MR. TODER: No, Your Honor.

23 THE COURT: We'll change it to "one or more
24 copyrighted sound recordings."

25 If you would turn to 4(b), the Court has to tell

1 the jury the statutory amounts. Right after "What statutory
2 damages do you award Capitol Records for each copyrighted
3 work," the copyrighted -- the statutory amount for
4 nonwillful is \$750 to \$30,000 and that will follow for each
5 one of those questions that deal with nonwillfulness.

6 And then on 5(d), D as in dog, if it's a willful
7 violation, then the amount is up to \$150,000 and that will
8 follow with each appropriate question.

9 MR. GABRIEL: Maybe I'm confused. You're
10 suggesting, Your Honor, you're going to go ahead and add
11 those in?

12 THE COURT: Right.

13 MR. GABRIEL: We struggled with whether you do or
14 not. I know you are instructing the jury on it. We're fine
15 to not have it in. The form is fairly long and complicated
16 as it is.

17 THE COURT: Well, I think it's best that we have
18 the amount that they can use in calculations.

19 MR. TODER: The defendant concurs.

20 THE COURT: Any other additions, corrections?

21 MR. GABRIEL: One moment, Your Honor, if we may?

22 THE COURT: (Indicating.)

23 (Pause.)

24 MR. GABRIEL: Thank you, Your Honor. We don't
25 have anything more to add.

1 MR. TODER: Nothing more from defendant.

2 THE COURT: All right. Anything else with this
3 trial? Have you thought about your final arguments and how
4 much time you need? You asked for up to 45 minutes
5 yesterday.

6 MR. GABRIEL: That will be fine, Your Honor. I
7 will try to, of course, keep it much shorter than that; do
8 my best.

9 MR. TODER: Ours will be certainly in the
10 neighborhood of probably 20 minutes.

11 THE COURT: All right. If there's nothing else
12 that we need to discuss tonight, I will see you at 8:15
13 tomorrow morning.

14 MR. GABRIEL: That's fine, Your Honor.

15 (Court adjourned at 5:20 p.m.)

16 * * *

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19

20 I, Lori A. Simpson, certify that the foregoing is a
21 correct transcript from the record of proceedings in the
22 above-entitled matter.

23

24 Certified by: s/ Lori A. Simpson

25 Lori A. Simpson, RMR-CRR