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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VIACOM INTERNATIONAL INC., <i>ET AL.</i> ,)	
)	CASE NO. C 08-80211-JF
PLAINTIFFS,)	
V.)	
YOUTUBE, INC., <i>ET AL.</i> ,)	SAN JOSE, CA
)	DECEMBER 9, 2008
DEFENDANTS.)	
_____		DEFENDANT'S MOTION TO
)	COMPEL PRODUCTION OF
THE FOOTFALL ASSOCIATION PREMIER)	DOCUMENTS OF THIRD
LEAGUE LIMITED, <i>ET AL.</i> ,)	PARTY BAYTSP.COM, INC.
)	
PLAINTIFFS,)	
V.)	
YOUTUBE, INC., <i>ET AL.</i> ,)	
)	
DEFENDANTS.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PATRICIA V. TRUMBULL
UNITED STATES DISTRICT MAGISTRATE JUDGE

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(APPEARANCES CONTINUED ON THE NEXT PAGE)

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1 SAN JOSE, CALIFORNIA

DECEMBER 9, 2008

2 P R O C E E D I N G S

3 THE COURT: GOOD MORNING. THIS IS VIACOM
4 INTERNATIONAL INC. VERSUS YOUTUBE, C 08-80211-JF.

5 SO ARE YOU SITTING AT THE RIGHT PLACES?

6 MR. MANCINI: WE BELIEVE WE ARE, YOUR HONOR.
7 WE ARE THE MOVANT.

8 THE COURT: PLAINTIFFS THERE? OKAY.

9 WHY DON'T YOU COME, THEN, AND IDENTIFY
10 YOURSELVES.

11 MR. MANCINI: YOUR HONOR, JOHN MANCINI FROM
12 MAYER BROWN ON BEHALF OF THE MOVANTS, GOOGLE AND YOUTUBE.
13 I HAVE WITH ME MY PARTNER, BRANDON BAUM -- AND
14 CO-COUNSEL, BRANDON BAUM, IS HERE; AND CO-COUNSEL, DAVID
15 KRAMER FROM WILSON SONSINI.

16 THE COURT: WELCOME.

17 MR. KRAMER: GOOD MORNING.

18 MR. HEMMINGER: GOOD MORNING, YOUR HONOR.
19 STEVE HEMMINGER FROM ALSTON & BIRD FOR THIRD PARTY
20 BAYTSP. AND I HAVE WITH ME OSAMA HUSSAIN, WHO IS THE
21 IN-HOUSE COUNSEL FOR BAYTSP.

22 MR. HIBBARD: GOOD MORNING, YOUR HONOR. I AM
23 STEPHEN HIBBARD OF SHEARMAN & STERLING, AND I AM COUNSEL
24 FOR VIACOM INTERNATIONAL, INC. AND I'M SPECIALLY
25 APPEARING FOR THE LIMITED PURPOSE TO FOCUS ON TIMING OF

1 PRODUCTION ISSUES, WHEN WE REACH THAT STAGE.

2 THE COURT: OKAY. THIS IS DEFENDANT'S MOTION
3 TO COMPEL PRODUCTION OF DOCUMENTS OF THE THIRD PARTY
4 BAYTSP.COM.

5 SO WHO IS ADDRESSING THIS?

6 MR. MANCINI: GOOD MORNING, YOUR HONOR.

7 I WILL BE ADDRESSING THE MOTION, AND I'M JOHN
8 MANCINI FROM MAYER BROWN ON BEHALF OF GOOGLE AND YOUTUBE.

9 IF I MAY, I WILL BE BRIEF ON THE BACKGROUND OF
10 THIS MOTION.

11 BAYTSP HAS BEEN ACTING AS AN AGENT FOR VIACOM
12 IN CANVASSING THE YOUTUBE WEB SITE AND ISSUING NOTICES TO
13 TAKE DOWN ALLEGEDLY INFRINGING CONTENT. IT'S UNDISPUTED
14 THAT VIACOM USED BAYTSP TO ACTUALLY COMMENCE THE LAWSUIT
15 IN THE CASE IN CHIEF IN THE SOUTHERN DISTRICT OF NEW
16 YORK. THE SUBPOENA WAS ISSUED IN SEPTEMBER 2007,
17 PURSUANT TO A DISCOVERY PLAN WHERE THE THIRD PARTY WOULD
18 ACTUALLY COMMENCE FIRST, THE THIRD PARTY DISCOVERY WOULD
19 ACTUALLY COMMENCE FIRST.

20 THEN AN EXTENSIVE MEET-AND-CONFER PROCESS
21 FOLLOWED, NO LESS THAN SIX TELEPHONE CONFERENCES, 33
22 LETTERS FOLLOWING THE FILING OF THE MOTION.

23 BAYTSP FAILED TO MEET MULTIPLE SELF-SET
24 DEADLINES TO PRODUCE THOSE DOCUMENTS, IN MAY OF 2008,
25 JULY AGAIN; AND THEN ON AUGUST 21ST THE FINAL DEADLINE

1 WAS SET WHERE WE WERE TO GET DOCUMENTS WITHIN SEVERAL
2 WEEKS, THEY FAILED TO MEET THAT TIME AGAIN. YOUTUBE HAD
3 NO OPTION BUT TO PROCEED WITH A MOTION TO COMPEL BECAUSE
4 WE HAVE BEEN PREJUDICED BY THIS.

5 THESE DOCUMENTS POSSESSED BY BAYTSP ARE AMONGST
6 THE MOST IMPORTANT IN THE ENTIRE CASE, NOT JUST BY THIRD
7 PARTIES, BUT ALSO BY THE PARTIES THEMSELVES.

8 INDEED, TWO DEPOSITIONS HAVE ALREADY OCCURRED
9 OF VIACOM WITNESSES, NAMELY MICHAEL HOUSLEY AND STANLEY
10 PIERRE LOUIS, WHERE EXTENSIVE REFERENCES WERE MADE TO THE
11 PROCESSES EMPLOYED BY BAYTSP AT VIACOM'S BEHEST TO LOCATE
12 ALLEGEDLY INFRINGING CONTENT ON THE SITE AND TO TAKE IT
13 DOWN. IN ADDITION, FOUR MORE DEPOSITIONS ARE YET TO
14 PROCEED WHICH CANNOT PROCEED WITHOUT THESE DOCUMENTS.
15 THEY ARE KEY VIACOM WITNESSES, NAMELY WARREN SOLOW,
16 MICHELENA HALLIE, ALLAN BELL, AND LEE D'ARCHEVESQUE.

17 THERE ARE SIX ISSUES BEFORE THE COURT. THE
18 FIRST IS THE SCOPE OF DOCUMENTS SOUGHT AND THERE ARE TWO
19 ISSUES THAT RELATE TO THAT, THE FIRST OF WHICH THERE MAY
20 NOT BE A DISPUTE, AND THAT IS DOCUMENTS RELATING TO
21 VIACOM ENTITIES. IT APPEARS THAT BAYTSP IS READY TO
22 PRODUCE THOSE, BUT THE CONCERN IS THE MODE IN WHICH THEY
23 SEEK TO PRODUCE THEM.

24 THE SECOND ISSUE, THOUGH, IS ONE THAT IS RIPE
25 FOR DETERMINATION. THEY SEEK TO -- THEY ARE REFUSING TO

1 PRODUCE DOCUMENTS RELATING TO NON-VIACOM ENTITIES. THEY
2 PURPORT TO CLAIM THAT THE SOLE BASIS FOR WITHHOLDING
3 THOSE DOCUMENTS IS BECAUSE OF SOME HARM, SOME HARM TO
4 THEIR REPUTATION IF THE INFORMATION ABOUT THEIR DEALINGS
5 WITH OTHER CLIENTS WERE TO GET INTO THE PUBLIC REALM.

6 WE HAVE ALREADY DISCUSSED ENTERING A PROTECTIVE
7 ORDER. THERE IS A PROTECTIVE ORDER IN THE CASE IN CHIEF
8 THAT HAS A PROVISION FOR THIRD PARTIES THAT SHOULD SOLVE
9 THAT ISSUE, BUT THAT IS AN ISSUE THAT THERE IS A DISPUTE
10 ON, AND WE NEED THIS COURT'S INTERVENTION.

11 BRIEFLY PUT, THOSE DOCUMENTS ARE CRITICALLY
12 IMPORTANT BECAUSE THEY WILL SHOW, AMONG OTHER THINGS,
13 THAT OTHER CLIENTS OF BAYTSP OTHER THAN VIACOM ENTITIES
14 HAVE GIVEN INSTRUCTIONS TO EITHER LEAVE CONTENT ON THE
15 YOUTUBE WEB SITE, PERHAPS FOR PROMOTIONAL REASONS OR FOR
16 STEALTH MARKETING REASONS, UNDERSTATING THE POWERFUL
17 VIRAL VALUE THAT YOUTUBE HAS TO MARKET THEIR CONTENT.
18 THE EXISTENCE OF THAT CONTENT WILL DISPUTE ONE OF
19 VIACOM'S CHIEF CLAIMS IN THE CASE IN CHIEF, NAMELY, THAT
20 YOUTUBE IS ABLE TO PERHAPS DISCERN THE AUTHORIZATION OF
21 CONTENT ON THE SITE MERELY BY ITS EXISTENCE. THOSE
22 DOCUMENTS WILL INDISPUTABLY REFUTE THAT POSITION. THEY
23 ARE CLEARLY WITHIN THE POSSESSION OF BAYTSP; THEY ARE
24 REFUSING AGAIN TO PROVIDE IT. THE ONLY BASIS ARTICULATED
25 IS THIS HARM, WHICH WE WOULD SUBMIT IS DEALT WITH BY A

1 PROTECTIVE ORDER.

2 THEY ARE ALSO IMPORTANT DOCUMENTS BECAUSE THEY
3 WILL SHOW MISTAKES; FOR EXAMPLE, BAYTSP WILL MAKE
4 MISTAKES, DESPITE BEING ARMED WITH THE BEST KNOWLEDGE BY
5 THE CONTENT HOLDER OF WHAT IS OR IS NOT ITS CONTENT, OF
6 WHAT IS OR IS NOT AUTHORIZED BY IT. BAYTSP ITSELF MAKES
7 MISTAKES WHEN IT SENDS A TAPE DOWN THE LINES TO YOUTUBE.
8 AGAIN, ONE OF THE CHIEF ISSUES IN DISPUTE IN THE CASE.
9 THEY ARE REFUSING TO PROVIDE THOSE DOCUMENTS.

10 THE SECOND ITEM FOR THIS COURT'S DETERMINATION
11 IS A DATE CERTAIN FOR THE EXCHANGE OF THESE DOCUMENTS.
12 WE HAVE HEARD AS RECENTLY AS YESTERDAY THAT -- IT'S
13 REALLY THE FIRST TIME WE HAVE ACTUALLY GOTTEN A DATE
14 CERTAIN -- THAT IT LOOKS LIKE THEY ANTICIPATE MAKING
15 THESE DOCUMENTS AVAILABLE BY MARCH 15TH.

16 AS YOUR HONOR HAS HEARD THIS MORNING, THERE ARE
17 FOUR UPCOMING DEPOSITIONS THAT SIMPLY CANNOT BE SCHEDULED
18 WITHOUT THESE DOCUMENTS. WE DON'T THINK THAT'S LONG
19 ENOUGH -- WE THINK THAT'S TOO LONG. WE THINK IT SHOULD
20 HAPPEN FAR EARLIER. THESE DOCUMENTS ARE NECESSARY TO
21 SCHEDULE DEPOSITIONS, AND WE HAVE ALREADY BEEN PREJUDICED
22 IN DEPOSITIONS.

23 THE THIRD ISSUE FOR YOUR HONOR'S DECISION IS
24 THE FORMAT OF THIS PRODUCTION. YOU HAVE SEEN FROM THE
25 PAPERS THAT BAYTSP HAS OFFERED TO PRODUCE THEM AT TWO

1 COMPUTER TERMINALS DURING REGULAR BUSINESS HOURS, BUT
2 WITH A TEMPORAL CUTOFF, NAMELY, TWO WEEKS AFTER THEY HAVE
3 FINALLY UPLOADED THE LAST FILES WERE DONE. PERHAPS
4 UNDERSTANDING THE UNREASONABLENESS IN DEPOSITION,
5 YESTERDAY FOR THE FIRST TIME WE RECEIVED A NEW PROPOSAL.
6 THAT NEW PROPOSAL WOULD PURPORT TO GIVE US ELECTRONIC
7 ACCESS TO A KROLL DATABASE, WE UNDERSTAND, WHICH VIACOM'S
8 APPARENTLY HAD ACCESS TO. THIS IS SOME TYPE OF
9 PASSWORD-PROTECTED ACCESS, BUT WE ARE NOT ALLOWED TO
10 PRINT. THE PRINTING WILL ONLY OCCUR AT THEIR OFFICES AT
11 OUR EXPENSE, AND THEY WOULD NOT EVEN AGREE TO BLOCK
12 VIEWING ACTIVITY OF OUR ACTIVITIES ON THE SITE, WHICH IS
13 CLEARLY WORK PRODUCT MATERIAL.

14 WE THINK THE SIMPLEST SOLUTION TO THIS --

15 THE COURT: IT'S ELECTRONIC, SO THAT'S WHY THE
16 PRINTING ISSUE IS IMPORTANT THERE, AS TO WHO PRINTS WHERE
17 AND WHEN THEY PRINT?

18 MR. MANCINI: WELL, IT'S ALSO IMPORTANT TO US,
19 YOUR HONOR, BECAUSE WITH DEPOSITIONS ONGOING, WE CAN'T BE
20 AT THEIR --

21 THE COURT: NO, I UNDERSTAND THE TIMING ISSUE.
22 BUT THE "WHERE" AND THE "WHEN" AND THE PRINTING ...

23 MR. MANCINI: IS AT THEIR OFFICES.

24 THE COURT: OKAY. I WAS JUST TRYING TO FIGURE
25 OUT WHETHER IT'S PAPER THAT THEY ARE COPYING OR WHETHER

1 IT'S THE ELECTRONIC THING THAT YOU PRINT OUT.

2 MR. MANCINI: THE ELECTRONIC VERSION WOULD BE
3 PRINTED OUT ON PAPER.

4 THE COURT: OKAY.

5 MR. MANCINI: SO WE THINK THE SIMPLEST SOLUTION
6 TO THIS IS THAT THE DOCUMENTS OUGHT TO BE PRODUCED
7 CONSISTENT WITH THE AMENDED ESI PLAN THAT IS IN EXISTENCE
8 IN THE CASE IN CHIEF. WE ALREADY HAVE A REVIEW DATABASE.
9 IF THOSE DOCUMENTS WERE PROVIDED TO US IN SOME ELECTRONIC
10 MEDIUM, DVDS OR OTHERWISE, WE WOULD UPLOAD THEM TO OUR
11 DATABASE. THE ONLY ARTICULATED CONCERN THERE IS COST.

12 NOW, WHEN PRESSED YESTERDAY, WE RECEIVED ONLY A
13 HALF ANSWER IN THIS. IT SEEMS RATHER CLEAR TO US THAT
14 VIACOM IS REIMBURSING THEM FOR ALL THEIR EXPENSES IN
15 RESPONDING TO THE SUBPOENA. THEY DID NOT ANSWER TO US
16 THE SIMPLE QUESTION: IF YOU WERE TO PUT IT ON DVDS FOR
17 US, WOULD YOU BE REIMBURSED BY VIACOM? BECAUSE IF THEY
18 ARE, THEN THE COST ISSUE IS OFF THE TABLE. PERHAPS THEY
19 WILL ANSWER IT FOR YOUR HONOR.

20 BUT LEAVING THAT ASIDE, WE CAN'T IMAGINE, GIVEN
21 THAT THEY HAVE ALREADY UPLOADED IT TO THIS KROLL
22 DATABASE, THAT THE COST COULD BE THAT SIGNIFICANT AT ALL.
23 IT'S A MATTER OF TAKING THOSE DATA FILES, PUTTING THEM
24 INTO SOME OTHER ELECTRONIC MEDIUM, WE WILL UPLOAD IT TO
25 OUR DATABASE. WE THINK THAT THAT OUGHT TO BE THE METHOD

1 IN WHICH THEY ARE ORDERED TO BE PRODUCED.

2 THERE ARE THREE OTHER ISSUES, PERHAPS ONLY ONE
3 OF WHICH IS OF EQUAL IMPORTANCE, AND THAT IS THE
4 PROVISION OF A PRIVILEGE LOG, CRITICALLY IMPORTANT,
5 BECAUSE WHAT WE NOW UNDERSTAND IS THAT VIACOM IS
6 REVIEWING EACH AND EVERY DOCUMENT THAT BAYTSP HAS
7 IDENTIFIED AS BEING RESPONSIVE, AND WE ARE NOT ALLOWED TO
8 SEE THOSE DOCUMENTS UNTIL VIACOM HAS MADE A DETERMINATION
9 ABOUT THEIR PRIVILEGE. FRANKLY, WE ARE BIT SURPRISED BY
10 THIS BECAUSE WE WONDER HOW VIACOM HAS STANDING IN THIS
11 COURT TO BE ABLE TO ASSERT THAT PRIVILEGE; IN FACT,
12 BELIEVE THAT THEY HAVE WAIVED IT BECAUSE THERE'S BEEN
13 NO APPEARANCE BY THEM IN THIS PROCESS UNTIL JUST VERY
14 RECENTLY.

15 LEAVING THAT ASIDE, ASSUMING THAT THIS COURT
16 WILL ALLOW THEM TO ASSERT THE PRIVILEGE, WE JUST NEED A
17 PROCESS IN PLACE FOR PROVISION OF A PRIVILEGE LOG. THAT
18 PRIVILEGE LOG OUGHT TO HAVE A REASONABLE CERTAINTY AS TO
19 IDENTIFICATION OF THE DOCUMENT AND THE BASIS FOR THE
20 PRIVILEGE, AND THERE OUGHT TO BE A PROCESS IN PLACE FOR
21 US TO CONTEST IT. BASED ON DEPOSITIONS THAT HAVE TAKEN
22 PLACE ALREADY IN THE CASE IN CHIEF, WE EXPECT THAT THAT
23 PRIVILEGE LOG IS GOING TO CONTAIN AN INORDINATE NUMBER OF
24 THESE DOCUMENTS.

25 JUST TO GIVE SOME PERSPECTIVE TO YOUR HONOR, WE

1 ARE UNDERSTAND THAT BAYTSP HAS IDENTIFIED APPARENTLY 1.35
2 MILLION DOCUMENTS AGAINST WHICH THEY HAVE APPLIED SEARCH
3 TERMS AND HAVE DEEMED 650,000 OF THEM TO BE RESPONSIVE TO
4 OUR SUBPOENA. THOSE DOCUMENTS ARE NOW BEING REVIEWED BY
5 VIACOM FOR PRIVILEGE AND AS OF, I GUESS, YESTERDAY
6 THERE'S ONLY A FEW THOUSAND OF THEM THAT ARE READY FOR US
7 TO VIEW ON THESE COMPUTER TERMINALS AT BAYTSP'S COUNSEL'S
8 OFFICES, WHICH TAKES ME TO THE NEXT ISSUE.

9 WE DO HAVE SOME CONCERN ABOUT THE METHODOLOGIES
10 THAT HAVE BEEN EMPLOYED BY BAYTSP TO RESPOND TO THE
11 SUBPOENA. WE HAVE HAD LONG DISCUSSIONS WITH THEM ABOUT
12 THE SEARCH TERMS THAT WERE EMPLOYED; AT ONE POINT
13 CRITICAL TERMS LIKE "GOOGLE" AND "YOUTUBE" WERE MISSING.
14 WE HAVE NOT GOTTEN ANY CLARITY ON THIS, BUT WE THINK
15 THERE IS A SOLUTION, AND THAT IS THAT BAYTSP BE REQUIRED
16 TO PROVIDE FOR US A SIMPLE AFFIDAVIT ABOUT THE
17 METHODOLOGIES THAT HAVE BEEN USED TO RESPOND TO THE
18 SUBPOENA AND THAT WE BE ENTITLED TO A BRIEF MAY TWO- TO
19 THREE-HOUR ESI DEPOSITION TO EXAMINE THOSE. AND
20 HOPEFULLY, AFTER THAT PROCESS, THERE WILL NOT BE ANY
21 REMAINING ISSUES ABOUT THE SUFFICIENCY OF THE SEARCH FOR
22 PURPOSES OF PRODUCTION.

23 FINALLY, THE SIXTH ISSUE IS THAT WE HAVE
24 REQUESTED DOCUMENTS RELATING TO THEIR SOURCE CODE BECAUSE
25 THEIR SOURCE CODE HAS EMBEDDED TECHNOLOGY THAT SEARCHES

1 THE YOUTUBE WEB SITE, AND WE UNDERSTAND THAT BAYTSP HAS
2 OFFERED TO GIVE US, INSTEAD OF THE CODE ITSELF, DOCUMENTS
3 SUFFICIENT TO SHOW THE OPERATION. THAT MAY BE AN ISSUE
4 THAT WE CAN AGREE UPON, PROVIDED WE GET THOSE DOCUMENTS
5 IN A REASONABLE TIME BASIS. BUT AGAIN, THEY WOULD BE
6 DOCUMENTS THAT WOULD BE SUFFICIENT TO SHOW THE OPERATION
7 OF THE CODE SO THAT WE CAN UNDERSTAND WHAT THE SERVICE IS
8 DOING ON THEIR SITE IN TERMS OF LOCATING POTENTIALLY
9 INFRINGING CONTENT, TAKING THEM DOWN OR LEAVING THEM UP.

10 THOSE ARE THE ISSUES FOR YOUR HONOR'S
11 DETERMINATION, AND AGAIN, WE REQUEST AN ORDER COMPELLING
12 THAT PRODUCTION UNDER THE CIRCUMSTANCES.

13 THE COURT: RESPONSE?

14 MR. HEMMINGER: GOOD MORNING, YOUR HONOR.
15 ONCE AGAIN, MY NAME IS STEVE HEMMINGER. I'M REPRESENTING
16 BAYTSP.

17 WITH REGARD TO THE ISSUES PRESENT, WHAT I WILL
18 DO FIRST IS GIVE A LITTLE BACKGROUND AS TO WHO BAYTSP IS
19 AND THE RELATIONSHIP THAT IT HAS BOTH WITH VIACOM AND
20 OTHER COPYRIGHT HOLDERS, THEN EXPLAIN AND ADDRESS SOME OF
21 THESE ISSUES RELATING TO RELEVANCE OF THE THIRD PARTIES
22 AND THE HARM IT WOULD IMPOSE. I'LL ALSO ADDRESS THE
23 ISSUE RELATING TO THE METHODOLOGY WHICH HAS BEEN
24 DISCUSSED *AD NAUSEAM* WITH YOUTUBE, AND THEN ADDRESS A
25 LITTLE BIT THIS ISSUE OF THE DELAY BECAUSE IT PERMEATED

1 SO MUCH OF THEIR PAPERS, WHICH IT REALLY IS KIND OF MOOT
2 BECAUSE THE DOCUMENTS HAVE BEEN AVAILABLE, AT LEAST A
3 PORTION OF THEM. AND QUITE FRANKLY, IT'S STRANGE TO ME
4 THAT IF THESE DOCUMENTS ARE ABSOLUTELY SO CRITICAL,
5 REGARDLESS OF THE METHODOLOGY TO BE ABLE TO REVIEW THEM,
6 IF I NEEDED DOCUMENTS, I CERTAINLY WOULD HAVE GONE IN AND
7 REVIEWED THEM WHEN I COULD HAVE IN THE PAST TWO OR THREE
8 WEEKS.

9 VIACOM'S COUNSEL WILL ADDRESS THE ISSUE WITH
10 REGARD TO THE DEPOSITIONS. FRANKLY, BAYTSP IS TOTALLY
11 REMOVED FROM THE LAWSUIT. IT HAS NO INVOLVEMENT --

12 THE COURT: IS IT CORRECT TO CHARACTERIZE YOU
13 AS A CONTRACTOR BASICALLY HELPING THEM WITH THE
14 NON-DEPOSITION DISCOVERY? I HATE IT CALL IT "PAPER";
15 IT'S NOT PAPER ANYMORE, IT'S ELECTRONIC MOSTLY. IS IT
16 THAT YOU ARE BASICALLY HIRED BY THEM TO HELP THEM WITH
17 THE RESPONSE OR WITH THE ORGANIZING OF THE ELECTRONIC AND
18 THE PAPER DISCOVERY?

19 MR. HEMMINGER: NO, THAT'S --

20 THE COURT: IS THAT TOO SIMPLE?

21 MR. HEMMINGER: WHETHER IT'S SIMPLE OR NOT,
22 THAT IS NOT AT ALL WHAT BAYTSP DOES. SO LET ME START, IF
23 I CAN GIVE YOU A BACKGROUND.

24 BAYTSP STARTED A COMPANY AFTER THE DIGITAL
25 MILLENNIUM COPYRIGHT ACT CAME INTO PLACE. THE DIGITAL

1 MILLENNIUM COPYRIGHT ACT HAD SOME PROVISIONS CALLED SAFE
2 HARBORS FOR INTERNET SERVICE PROVIDERS, PROVIDED THEY MET
3 CERTAIN CRITERIA. THE DMCA ALSO ALLOWED COPYRIGHT
4 HOLDERS TO HIRE AN AGENT WHO WOULD BE AUTHORIZED TO ISSUE
5 TAKEDOWN NOTICES TO THE ISP WHEN THEY FOUND, OR IF THEY
6 FOUND, INFRINGING MATERIAL ON THE INTERNET. BAYTSP
7 CONTRACTS WITH COPYRIGHT HOLDERS, OBVIOUSLY SOME OF THE
8 VIACOM ENTITIES -- FOX, HBO, UNIVERSAL, AND EVEN MANY
9 SMALLER TYPE ENTITIES -- WHO CREATE COPYRIGHTED MATERIAL,
10 AND IS FEARFUL THAT ITS MATERIAL WILL END UP ON THE
11 INTERNET. YOUTUBE OBVIOUSLY ALLOWS PEOPLE TO POST
12 MATERIALS ONTO ITS WEB SITE. IT'S BECOME VERY, VERY
13 POPULAR. THERE ARE ALSO OTHER ISSUES DEALING WITH MOVIES
14 AND THE LIKE WHERE MOVIES WILL ALL OF A SUDDEN APPEAR ON
15 THE INTERNET A WEEK BEFORE THE RELEASE OF THE MOVIE.
16 THOSE ARE OTHER AREAS THAT BAYTSP WORKS ON.

17 SO BAYTSP'S INVOLVEMENT IS NOT WITH REGARD TO
18 LITIGATION. BAYTSP WAS HIRED BY VIACOM, AS IT IS WITH
19 OTHERS, TO LOOK AT THE INTERNET, FIND OUT IF EXCERPTS OF
20 SOUTH PARK ARE APPEARING ON --

21 THE COURT: BUT YOU ARE NOT A PARTY IN THIS
22 CASE; NO ONE IS COMING AFTER YOU FOR MONEY.

23 MR. HEMMINGER: WE ARE ABSOLUTELY NOT A PARTY.
24 WE GET NO MONEY. WE HAVE NO INTEREST WHATSOEVER IN THE
25 OUTCOME OF THIS SUIT. IT HAS NOTHING TO DO WITH US.

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EARLY ON --

THE COURT: SO YOUR ROLE -- CHARACTERIZE YOUR
ROLE FOR ME IN THIS CASE, BECAUSE YOU ARE REALLY THE ONE
WHO HAS MADE THE DECISIONS ABOUT WHAT TO PRODUCE AND NOT
PRODUCE, AS FAR AS I SEE IT, AND I AM NOT SURE THAT I
UNDERSTAND THAT SINCE I THINK THAT IT PROBABLY IS VIACOM
INTERNATIONAL WHO HAS SOME ISSUES HERE. AND IF YOU DON'T
DO WHAT THEY THINK SHOULD HAVE BEEN DONE -- AND I ASSUME
THAT'S NOT TRUE -- THEN THE MOTION TO COMPEL -- AM I
COMPELLING YOU? AM I COMPELLING THEM? AND IF I'M
COMPELLING THEM, ARE THEY MAKING YOU A -- I DON'T
UNDERSTAND THAT RELATIONSHIP.

MR. HEMMINGER: WELL, AND THAT'S BEEN LOST IN
THE MOTION PAPERS. QUITE FRANKLY, ALL OF THE DISCOVERY
THAT IS PRESENTED HERE WITH YOU, WITH THE EXCEPTION OF
BAYTSP'S CUSTOMERS -- OTHER THAN THE PLAINTIFFS IN THE
SUIT -- HAS BEEN DIRECTED AT VIACOM. THOSE DISCOVERIES
ARE OUT THERE. THE FACT -- AND AGAIN, I'M TELLING YOU
INFORMATION THAT HAS BEEN RELAYED TO ME BY VIACOM IN
PREPARING FOR THIS HEARING. THE DISCOVERY REQUESTS HAVE
BEEN DONE. VIACOM IS DOING THE EXACT SAME WORK PRODUCT
PRIVILEGE REVIEW OF THE DOCUMENTS IT HAS, NAMELY,
WHENEVER WE SEND SOMETHING TO VIACOM, OF COURSE, VIACOM
HAS A COPY OF IT, AND THEY ARE THE ONES THAT HAVE
ACTUALLY BEEN DECIDING WHAT THEY WANT TO DO WITH THE

1 INFORMATION BAYTSP SENDS.

2 SO THIS IS REALLY A LITTLE BIT OF AN END AROUND
3 OF WHAT THEY SHOULD BE DOING. THEY SHOULD BE GOING WITH
4 JUDGE STANTON IN NEW YORK, WHO IS FULLY VERSED WITH WHAT
5 IS RELEVANT AND NOT RELEVANT AND CAN MAKE THE DECISIONS.
6 BUT THESE DEPOSITIONS THEY HAVE BEEN GOING FORWARD WITH,
7 THEY HAVE BEEN GOING FORWARD WITH WITHOUT EVEN FILING A
8 MOTION TO COMPEL FOR THE EXACT SAME MATERIAL THAT IS
9 SITTING THERE IN VIACOM, WHICH IS THE MATERIAL THAT WE
10 HAVE BEEN COLLECTING AND ORGANIZING TO PRODUCE. SO IT'S
11 A BIT OF A MYSTERY TO US, AS IT IS TO YOUR HONOR.

12 BUT GETTING BACK TO THE ROLE THAT WE HAVE, IT
13 IS MERELY TO, FOR EXAMPLE, RECEIVE THE ACTUAL DIGITAL
14 VIDEO OF A SOUTH PARK EPISODE, HAVE THAT AND BE RETAINED
15 TO LOOK ON THE INTERNET, AND IN PARTICULAR, VIACOM ASKED
16 BAYTSP TO RESTRICT ITS SEARCHES ON THE INTERNET I BELIEVE
17 TO YOUTUBE. SO IT GETS THE INFORMATION SAYING "SOUTH
18 PARK IS OWNED BY US; NICKELODEON IS OWNED BY US. WE
19 WOULD LIKE YOU TO FIND OUT IF ANYONE HAS POSTED
20 INFRINGING MATERIAL ON YOUTUBE." ITS ENTIRE METHODOLOGY
21 IS TO DO JUST WHAT YOU WOULD WANT TO DO. IF YOU WANTED
22 TO TAKE A LOOK AT WHETHER A NICKELODEON EPISODE HAD BEEN
23 UP THERE, YOU WOULD TYPE IN A SEARCH TERM.

24 BAYTSP, WHICH IS A SMALL COMPANY -- I THINK IT
25 HAS ABOUT 100 EMPLOYEES, AND PROBABLY ABOUT HALF OF THOSE

1 ARE PART-TIME OR HOURLY PEOPLE THAT SIT IN FRONT OF A
2 MONITOR, PULL UP THE YOUTUBE WEB SITE AND ENTER SEARCHES.
3 THEY DOWNLOAD THE VIDEOS JUST LIKE YOU WOULD ON YOUR
4 COMPUTER. OF COURSE THEY DOWNLOAD LARGE NUMBERS OF THEM.
5 THEY SIT THERE. THEY LOOK AT IT. IS THIS A SOUTH PARK
6 EPISODE? IF IT IS, THEN THE FIRST REVIEWER SAYS, "I
7 THINK THIS MAY DESERVE A COPYRIGHT TAKEDOWN NOTICE." IT
8 GETS PUT OVER INTO A BAY. A SECOND, A SUPERVISOR, THEN
9 LOOKS AT THE MATERIAL AND SAYS, "YES, THIS LOOKS LIKE
10 VIACOM'S INFORMATION. WE WANT TO SEND A TAKEDOWN
11 NOTICE."

12 NOW, IF YOUTUBE REALLY IS MERELY JUST AN ISP,
13 ALL OF THIS ACTIVITY HAS NOTHING TO DO WITH YOUTUBE. IN
14 OTHER WORDS, YOU SEND A TAKEDOWN NOTICE TO YOUTUBE, AND
15 THEY ARE OBLIGATED UNDER THE SAFE HARBOR PROVISIONS TO
16 TAKE DOWN THAT POSTING. THEY THEN NOTIFY THE POSTER, THE
17 PERSON WHO PUT IT THERE, TO SAY, "WE HAVE RECEIVED A
18 NOTICE THAT THIS IS AN INFRINGEMENT OF VIACOM'S
19 COPYRIGHT." THE PERSON WHO POSTED IT THEN WITHIN 10 DAYS
20 CAN GO BACK AND, IF YOU WILL, DISPUTE IT, SAYING -- JUST
21 LIKE THIS ONE WHERE THE SONG "CRAZY" I THINK THAT YOU
22 HAVE BEEN HEARING ABOUT, ABOUT UNIVERSAL AND WHETHER
23 THERE'S AN INFRINGEMENT -- THEY CAN COME BACK AND SAY, "I
24 DISPUTE THAT." AND THEN IF THERE'S ANY LITIGATION, IT'S
25 VIACOM AGAINST THE PERSON WHO POSTED IT.

1 THE ISSUES THAT VIACOM HAS WITH YOUTUBE DOES
2 NOT HAVE TO DO WITH OUR PROCESSES. MY UNDERSTANDING IS
3 IT HAS TO DO WITH SOME OF THE LIMITATIONS WITH THE
4 YOUTUBE SITES. IT HAS FRIENDS AND FAMILIES WHICH MAKES
5 IT DIFFICULT TO SEARCH ALL OF THE CONTENT. THE VOLUME OF
6 INFORMATION THERE THAT YOU NEED TO REVIEW, THE MILLIONS
7 OF POSTINGS A DAY -- WE ARE NOT PARTY TO THIS; I'M JUST
8 SPECULATING AS THE BASIS OF THEIR CLAIMS AGAINST YOUTUBE.
9 BUT IT CERTAINLY DOESN'T INVOLVE BAYTSP, OTHER THAN THE
10 FACT THAT BAYTSP DID WHAT THE COPYRIGHT ACT SAID IT
11 SHOULD DO, WHICH IS IDENTIFY INFRINGING MATERIAL, GET IT
12 TAKEN DOWN. AND THE VOLUME OF THESE WAS HUGE. I THINK
13 INITIALLY THERE WERE 300,000 POSTINGS THAT WERE SET OUT.

14 THE ISSUE ABOUT THIS RELEVANCE AS TO THE
15 INSTRUCTIONS, FIRST OF ALL TO THE EXTENT WE GET
16 INSTRUCTIONS FROM VIACOM, VIACOM HAS ALL THAT INFORMATION
17 AND THEY ARE THE ONES THAT CAN EXPLAIN WHY AND WHERE IT
18 CAME FROM. HOWEVER, WHEN WE RECEIVED THE SUBPOENA A YEAR
19 AGO, WE BEGAN NEGOTIATING WITH THE PREVIOUS COUNSEL, AND
20 THIS MAY BE PART OF THE DELAY. FOR TWO OR THREE MONTHS,
21 WE TALKED TO HER ABOUT THE SCOPE OF THE SUBPOENA, AND WE
22 SAID, "LOOK, WE ARE WILLING TO PROVIDE YOU THE
23 INFORMATION ABOUT THE VIACOM COMMUNICATIONS AND COLLECT
24 ALL THAT INFORMATION. WE ARE WILLING TO PROVIDE YOU
25 INFORMATION OF OUR TRAINING MATERIALS, OF THE INFORMATION

1 THAT DESCRIBES THE CAPABILITIES OF OUR PROCEDURES AND ALL
2 OF THAT." AND, IN FACT, IT'S TAKEN QUITE A WHILE, BUT WE
3 HAVE THAT AND THAT'S BEEN MADE AVAILABLE -- SOME OF IT --
4 FIRST TO VIACOM BECAUSE IT'S ALL VIACOM'S MATERIAL TO DO
5 THEIR REVIEW. SO ALL OF THAT HAS BEEN DISCUSSED AND
6 EXPLAINED.

7 THE ISSUE WITH THE THIRD PARTIES AND THE
8 RELEVANCE IS DIFFICULT TO UNDERSTAND. THEIR ARGUMENT
9 APPARENTLY IS THAT -- WHICH VIACOM HAS SAID THAT IT IS
10 DIFFICULT FOR COPYRIGHT OWNERS TO BE ABLE TO PROTECT ITS
11 CONTENT. APPARENTLY, THEY WANT TO USE BAYTSP TO SAY,
12 "LOOK, BAYTSP IS SUCCESSFUL IN FINDING THESE MATERIALS."
13 CERTAINLY. AND YOUTUBE KNOWS EXACTLY HOW MANY TAKEDOWN
14 NOTICES HAVE BEEN SENT ON BEHALF OF VIACOM, KNOWS WHO
15 THEY WERE FROM, WHEN THEY HAPPENED, HAS THE VIDEOS, HAS
16 ALL OF THE INFORMATION ABOUT THAT BECAUSE IT'S REQUIRED
17 TO BE SENT TO THEM WITH THE TAKEDOWN NOTICE.

18 SOMEHOW NOW THEY ARE SAYING BECAUSE HBO HIRED
19 BAYTSP TO DO SOME WORK THAT IT IS ENTITLED THROUGH BAYTSP
20 TO APPARENTLY DO AN END AROUND THE REAL PARTY IN INTEREST
21 IN HBO AND FORCE US, FORCE BAYTSP TO DIVULGE WHATEVER
22 INFORMATION THAT THEY HAVE, WHICH FRANKLY, IF THEY WOULD
23 LOOK AT THE MATERIAL, THEY WOULD FIND OUT IT'S NOTHING
24 STARTLING, NOTHING EARTH SHATTERING; IT IS NEVER GOING TO
25 PROVE WHATEVER IT IS THEY ARE THINKING IT'S GOING TO.

1 BUT REALITY? IT'S THE COPYRIGHT OWNER. THEY KNOW HOW
2 MANY TAKEDOWN NOTICES BAYTSP HAS SENT TO YOUTUBE FOR THE
3 OTHER PARTIES. THEY ALSO KNOW HOW MANY OTHER DMCAS OR
4 HOW MANY UNIVERSALS AND OTHER PEOPLE HAVE SENT TAKEDOWN
5 NOTICES TO YOUTUBE, AND THEY HAVE THAT INFORMATION. THEY
6 DON'T NEED US FOR THAT.

7 SO WHAT WOULD HAPPEN IS, YOU NOW REQUIRE BAYTSP
8 TO CONTACT EVERY ONE OF ITS CUSTOMERS, TELL THEM THEY
9 HAVE RECEIVED A SUBPOENA FROM YOUTUBE, WHICH HAS ASKED
10 FOR EVERY SINGLE DOCUMENT THAT BAYTSP HAS WITH REGARD TO
11 THAT COMPANY. THEN THAT COMPANY, YOU KNOW -- WHAT? WE
12 ARE GOING TO HAVE TO THEN HAVE THEM COME IN AND MAKE
13 PROTECTIVE ORDERS AND DO ALL OF THAT? THAT'S NOT THE WAY
14 TO DO IT. IT'S NOT TO TAKE SOME THIRD PARTY AND TRY TO
15 DO AN END AROUND SOMEONE WHO ONLY HAS A VERY, VERY, VERY,
16 VERY LIMITED AGENCY ONLY TO SEND TAKEDOWN NOTICES. WE
17 ARE NOT THEIR AGENT FOR ANY OTHER PURPOSE AND HAVE NO
18 OTHER INVOLVEMENT.

19 SO GOING TO THESE THIRD PARTIES TO SUPPOSEDLY
20 UNDERSTAND THE INSTRUCTIONS AND THE DIFFICULTY, THOSE CAN
21 BE OBTAINED BY THE COPYRIGHT OWNERS. YOUTUBE FOR
22 WHATEVER REASON PROBABLY DOESN'T WANT TO GO AGAINST HBO
23 OR FOX BECAUSE THEY MAY HAVE LICENSE AGREEMENTS WITH
24 THEM. SO I'M NOT SURE WHY THEY ARE FORCING IT THROUGH US
25 TO GO THERE, BUT IT'S A HUGE BURDEN FOR THE THIRD PARTIES

1 AND THE RELEVANCE IS REMOTE.

2 IF IT'S ONLY THE INSTRUCTIONS THEY WANT, THEY
3 CAN TALK TO HBO.

4 BUT AGAIN, IF INDEED THEY ARE TRULY AN ISP,
5 THEY DON'T KNOW ABOUT THE CONTENT AND THEY DON'T CARE,
6 THEY JUST TAKE IT DOWN AND THEY ARE DONE. IF THEY HAVE
7 SOME OTHER INTERESTS, WELL, MAYBE THEY ARE NOT AN ISP AND
8 MAYBE VIACOM'S SUIT GETS MERIT. WE DON'T KNOW; WE DON'T
9 TAKE A POSITION.

10 THE OTHER THING THEY MENTIONED IS WE WANT TO
11 KNOW HOW SUCCESSFUL, HOW GOOD IT IS -- BAYTSP IS. BAYTSP
12 CERTAINLY SAYS, "WE'RE GOOD. WE GO OUT THERE AND FIND
13 THEM." BUT IT IS ABSOLUTELY IMPOSSIBLE FOR BAYTSP TO
14 HAVE STATISTICS ABOUT HOW MUCH INFRINGEMENT IS OUT THERE
15 THAT IT DIDN'T FIND. IF IT DIDN'T FIND IT, IT DOESN'T
16 KNOW IT EXISTS, AND THEREFORE THERE'S NO COMPARISON.

17 THE OTHER ISSUE IS ABOUT THESE QUOTE/UNQUOTE
18 "MISTAKES" BY BAYTSP IN THEIR PAPERS SENDING THE TAKEDOWN
19 NOTICE. IN THEIR PAPERS THEY REFER TO SOME PORNOGRAPHIC
20 SITE AND A FEW OTHER THINGS THAT WERE POSTED UP ON
21 YOUTUBE. I THINK THERE WERE MAYBE A HALF DOZEN. OUT OF
22 THE THREE- TO 400,000 TAKEDOWN NOTICES THAT HAVE BEEN
23 SENT, THAT'S A PRETTY SMALL PERCENTAGE. BUT AGAIN, THIS
24 IS ALL DONE UNDER THE TERMS OF THE COPYRIGHT ACT, WHICH
25 IT AUTHORIZES THEM TO DO THAT. AND THE FACT THAT THEY

1 WERE ABLE TO ATTACH THEM TO THEIR PAPERS INDICATES THEY
2 CERTAINLY KNOW, BECAUSE WHEN SOMEONE GETS A TAKEDOWN
3 NOTICE, APPARENTLY THEY GO BACK AND THEY CONTACT YOUTUBE.
4 YOUTUBE'S RESPONSE SHOULD BE, "SORRY. YOU HAVE TO TALK
5 TO VIACOM AND YOU WORK IT OUT." THEY DON'T NEED TO BE
6 INVOLVED. SO WE DON'T HAVE THE STATISTICS, WE DON'T HAVE
7 THE INFORMATION THEY WANT. PERHAPS THEY HAVE EXPERTS
8 THAT CAN DO IT, BUT IT'S NOT BAYTSP.

9 ALSO TALKED ABOUT IS THE SOURCE CODE. THE
10 DETERMINATION OF WHAT IS AND IS NOT AN INFRINGEMENT FOR
11 THE VIACOM/YOUTUBE ANALYSIS IS DONE BY A PERSON. THE
12 ONLY SOFTWARE THAT THEY HAVE IS SOFTWARE THAT ONCE YOU
13 HAVE DOWNLOADED IT, THEY WILL PUT IT INTO A DATABASE; IN
14 OTHER WORDS, THEY WILL PUT IT INTO A FILE LOCATION SO
15 THEY DON'T HAVE TO ACCESS THE INTERNET, WHICH IS
16 PERMITTED UNDER YOUTUBE. THIS IS NOT AN ISSUE OF A
17 VIOLATION OF THEIR TERMS. YOUTUBE WANTS PEOPLE TO
18 DOWNLOAD THE VIDEOS; THEY DO. THEY PUT IT IN A
19 PARTICULAR PLACE, THE PERSON REVIEWS IT, HE PUTS A LITTLE
20 CHECK MARK, SAYS, "GO TO THE SECOND REVIEW." IT IS JUST
21 A BIG DATABASE THAT HAS A FEW FIELDS. WHEN THE NEXT
22 PERSON SEES IT, LOOKS AT IT, SAYS, "I HAVE REVIEWED IT,
23 SEND OUT A TAKEDOWN NOTICE," THE SYSTEM AUTOMATICALLY
24 SENDS OUT AN E-MAIL.

25 AND THIS IS AGAIN SOMETHING -- THE WAY WE DO IT

1 IS VERY PROPRIETARY AND EFFICIENT, BUT IT HAS NOTHING TO
2 DO WITH THE SUCCESS OR ABILITY TO MONITOR THE SOFTWARE
3 AND WHAT'S ON THE INTERNET. AND IF THIS INFORMATION BORE
4 OUT, IT WOULD HAVE A VERY DELETERIOUS EFFECT ON BAYTSP'S
5 BUSINESS BECAUSE OTHER PEOPLE WOULD THEN BE ABLE TO COPY
6 THE SOFTWARE.

7 NOW, YOUTUBE'S COUNSEL ALLUDED TO THE
8 PROTECTIVE ORDER, AND THEY ATTACHED IT, AND I'M SURE YOU
9 HAVEN'T SPENT A LOT OF TIME REVIEWING; IT'S A PRETTY
10 STANDARD PROTECTIVE ORDER FOR THE PARTIES. THERE IS ONE
11 CLAUSE THAT DEALS WITH THIRD PARTIES AND, IN FACT, IT'S
12 PARAGRAPH 18; IT'S FOUR LINES LONG. IT SAYS, "ANY
13 NON-PARTY SUBPOENA" -- "ANY NON-PARTY SUBPOENA OR REQUEST
14 TO PRODUCE DOCUMENTS AND THINGS OR INFORMATION OR TO GIVE
15 DEPOSITION TESTIMONY SHALL HAVE THE FULL BENEFITS AND
16 PROTECTIONS OF THIS PROTECTIVE ORDER" -- SO IT'S
17 PERMISSIVE -- "AND MAY DESIGNATE DOCUMENTS OR DEPOSITION
18 TESTIMONY AS CONFIDENTIAL OR HIGHLY CONFIDENTIAL, SUBJECT
19 TO THE PROVISIONS HERE."

20 A COUPLE OF PROCEDURAL THINGS.

21 THIS PROTECTIVE ORDER IS ISSUED OUT OF NEW
22 YORK. THAT WOULD MEAN THAT ANYTIME THERE WOULD BE AN
23 ENFORCEMENT, BAYTSP WOULD HAVE TO GO ALL THE WAY ACROSS
24 THE COUNTRY TO JUDGE STANTON'S COURT AND THEN PURSUE.

25 SECOND OF ALL, THERE'S ONLY TWO LEVELS OF

1 CONFIDENTIALITY THAT THIS PROTECTIVE ORDER ALLOWS THIRD
2 PARTIES TO USE. THERE IS ANOTHER CATEGORY CALLED "HIGHLY
3 RESTRICTIVE SOURCE CODE" OR SOMETHING. THIS PROTECTIVE
4 ORDER DOESN'T ALLOW IT. SO THIS -- AT AN ABSOLUTE
5 MINIMUM, IF SOURCE CODE WERE TO BE PRODUCED, THERE WOULD
6 HAVE TO BE MODIFICATIONS UNKNOWN. WE OFFERED TO TALK TO
7 THEM ABOUT IT AT THE TIME, BUT QUITE FRANKLY, WE REACHED
8 AN AGREEMENT THAT THEY DIDN'T WANT THE SOURCE CODE. ALL
9 THEY WANTED TO KNOW IS WHAT IT DOES AND THE INFORMATION
10 AS TO HOW IT GOES. THAT WAS THE AGREEMENT REACHED;
11 THAT'S WHY WE DIDN'T PURSUE NEGOTIATIONS.

12 FURTHERMORE, "CONFIDENTIAL" AND "HIGHLY
13 CONFIDENTIAL" -- STICKING WITH THE "HIGHLY CONFIDENTIAL,"
14 IT ALLOWS ANYONE THAT EITHER VIACOM, YOUTUBE, OR THE
15 FOOTBALL LEAGUE -- AND IN THE PROTECTIVE ORDER -- IF YOU
16 EVER LOOKED AT THE FULL CITE, THERE'S LIKE A HUNDRED
17 PLAINTIFFS ALL INVOLVED HERE -- AND ANY ONE OF THEM, IF
18 THEY THINK THE INFORMATION IS USEFUL, CAN USE IT AT TRIAL
19 OR AT A DEPOSITION. BAYTSP AND/OR ANY OF ITS CUSTOMERS
20 THAT THEY PRODUCE DOCUMENTS FOR, EVEN IF IT'S DESIGNATED
21 "HIGHLY CONFIDENTIAL," WOULD HAVE NO IDEA OF WHAT IT'S
22 BEING USED FOR.

23 NOW, WE ARE WILLING TO DO THIS FOR VIACOM
24 BECAUSE WHEN THIS HAPPENED, WE SAID, "VIACOM, CAN WE
25 PRODUCE THIS MATERIAL? IT'S YOUR INFORMATION. IT'S

1 COMMUNICATIONS FROM YOU."

2 AND THEY SAID, "YES. WE ENTERED INTO THE
3 PROTECTIVE ORDER, WE ARE GOING TO BE AT THE HEARINGS, WE
4 ARE GOING TO BE AT THE DEPOSITIONS, WE ARE GOING TO BE AT
5 TRIAL, WE KNOW WHO HAS SEEN IT." SO IT'S OKAY TO THEM.
6 THE THIRD PARTIES HAVE NO WAY OF KNOWING WHO IS SEEING
7 IT.

8 THE COURT: BUT YOU ARE THE KEEPER OF THE
9 INFORMATION?

10 MR. HEMMINGER: OH, NO -- WELL, WE ARE THE
11 KEEPER --

12 THE COURT: I DON'T UNDERSTAND WHY YOU ARE HERE
13 AS OPPOSED TO VIACOM STANDING UP HERE. IT'S ADDRESSED TO
14 YOU, AND IT'S ADDRESSED TO YOU BECAUSE WHAT THEY WANT
15 FROM VIACOM THEY NEED AND -- MAYBE YOU CAN HELP THEM WITH
16 THIS -- YOU HAVE IT, YOU HAVE ACCESS TO IT, YOU ARE THE
17 ONE THAT'S STANDING HERE SAYING, "NO, THIS IS ONEROUS,
18 IT'S TOO MUCH, YOU ARE NOT GOING TO GET IT." AND THAT
19 CONFUSES ME AS TO WHICH PARTY I AM DEALING WITH OVER
20 HERE.

21 MR. HEMMINGER: FIRST OF ALL, WHY THEY
22 SUBPOENAED US -- NOT 100 PERCENT SURE. I DON'T THINK
23 SUBPOENAING BAYTSP FOR INFORMATION IT HAS ABOUT VIACOM
24 AND ITS COMMUNICATIONS IS -- IS IT RELEVANT? I DON'T
25 KNOW. BUT I WOULD NOT COME IN FRONT OF YOU, YOUR HONOR,

1 AND SAY, "NO, I DON'T HAVE TO PRODUCE THAT." WE AGREED
2 TO PRODUCE THAT. OKAY?

3 THE ONLY ISSUE AND THE REASON WE ARE HERE, I
4 THINK, IS WITH THESE THIRD PARTIES, THEIR ATTEMPT TO
5 CIRCUMVENT GOING TO HBO, UNIVERSAL, AND THE SMALLER
6 LITTLE ENTITIES WHO WE DO WORK FOR AND TRY TO GET THAT
7 INFORMATION FROM US. THEY AGREE THE ONLY ISSUE RELATED
8 TO THE VIACOM DOCUMENTS AND THE FOOTBALL LEAGUE DOCUMENTS
9 ISN'T IN FACT WITH REGARD TO HOW THEY GET COPIES OF THEM,
10 HOW THEY LOOK AT THEM AND HOW THEY REVIEW THEM WHICH,
11 QUITE FRANKLY, I THINK IS NOT NECESSARILY SOMETHING THAT
12 SHOULD BE HERE.

13 SO WHY ARE THEY GOING AFTER US? I DON'T SEE
14 THE RELEVANCE OF IT.

15 THE COURT: WELL, I GUESS WHAT I AM TRYING
16 TO -- I MEAN, IT'S NOT THE "WHY" AS MUCH AT THIS POINT AS
17 THE "PROCEDURAL," AS THIS IS A MOTION.

18 MR. HEMMINGER: YES.

19 THE COURT: AND IT'S A MOTION ABOUT GETTING
20 THINGS. AND IT'S FROM YOU AS OPPOSED TO -- WHAT ARE WE
21 DOING?

22 MR. HEMMINGER: THEY ARE LOOKING TO GET OUR
23 VIACOM-RELATED AND PLAINTIFF-RELATED MATERIAL WHICH WE
24 HAVE ALL ALONG BACK A YEAR AGO AGREED TO PRODUCE TO THEM.

25 AS I UNDERSTAND THE ISSUE NOW, THERE ARE TWO

1 CATEGORIES OF DOCUMENTS THEY WANT: ALL OF THE
2 INFORMATION THAT WE HAVE WITH ALL OF OUR THIRD PARTIES
3 WHICH, QUITE FRANKLY, WOULD BE EVERY DOCUMENT, AND
4 THERE'S OVER FOUR TERABYTES OF INFORMATION. IT'S A WHOLE
5 LOT OF INFORMATION, A THOUSAND OR WHATEVER GIGABYTES.

6 THE COURT: NO, I UNDERSTAND THAT.

7 MR. HEMMINGER: SO IT WOULD PROBABLY BE ABOUT A
8 YEAR OR MORE BEFORE THEY COULD GET THAT, EVEN IF THEY
9 WANTED IT, NOT TO MENTION THE OTHER THINGS.

10 SO THEY WANT THESE THIRD PARTIES: THE HBOS,
11 THE OTHERS. VIACOM DOESN'T HAVE THAT. I MEAN, BAYTSP'S
12 BUSINESS IS, "I WILL BE YOUR AGENT TO REVIEW THE
13 INTERNET." THAT'S ALL IT DOES. WE ARE GIVING THAT
14 MATERIAL TO THEM. WE DON'T WANT TO GIVE THE THIRD PARTY
15 INFORMATION; IT WOULD TOTALLY DESTROY OUR BUSINESS AND IT
16 WOULD CREATE A HUGE BURDEN -- FORGET THE MONEY ISSUE --
17 IT WOULD CREATE A HUGE BURDEN IN TRYING TO CONTACT AND
18 DEAL WITH ALL OF THESE PEOPLE. AND THEY WANT OUR SOURCE
19 CODE, WHICH THE SOURCE CODE EXACTLY HOW IT DOES IT,
20 DOESN'T MATTER. THE SOURCE CODE FOR THE SIMS, WHICH IS
21 USED FOR THE YOUTUBE, IS BACK-END DATABASE SOFTWARE. IF
22 DOESN'T HAVE TO DO WITH MONITORING THE CONTENT.

23 SO WHY ARE THEY WITH US? THOSE ARE THE ONLY
24 TWO REASONS I CAN THINK. THE WHOLE ISSUE OF DELAY AND
25 EVERYTHING THEY ARE TALKING ABOUT WITH THE VIACOM

1 DOCUMENTS, FRANKLY, I DON'T REALLY KNOW WHY THEY ARE HERE
2 COMPLAINING TO YOU. OKAY? WE HAVE AGREED TO GIVE IT TO
3 THEM. VIACOM, YOU KNOW, THEY COULD HAVE GONE IN FRONT OF
4 STANTON AND GOTTEN THIS PERHAPS SIX, NINE MONTHS AGO IF
5 THEY THOUGHT IT WAS IMPORTANT. MY UNDERSTANDING IS THE
6 AGREEMENT -- THEY ARE PRODUCING THE DOCUMENTS FOR THE
7 DEPOSITIONS BEFORE THE DEPOSITIONS OF THE PEOPLE.

8 AND MY OTHER UNDERSTANDING IS ALSO THAT JUDGE
9 STANTON HAS ADDRESSED THIS VERY ISSUE. AND HE SAID,
10 "VIACOM AND YOUTUBE, I'M SORRY. I'M NOT GOING TO SIT
11 HERE AND WAIT FOR ALL THE DOCUMENTS TO BE PRODUCED,
12 WHETHER IT'S THIRD PARTIES OR IN-HOUSE PEOPLE. YOU ARE
13 GOING TO START TAKING YOUR DEPOSITIONS, AND I UNDERSTAND
14 THERE MAY HAVE TO BE SOME DUPLICATE DEPOSITIONS. THAT'S
15 THE WAY IT IS."

16 SO THIS WHOLE CRITICAL NEED -- "WE ABSOLUTELY
17 NEED" -- THIS HAS BEEN ADDRESSED, AS I UNDERSTAND IT, BY
18 JUDGE STANTON, AND IT SHOULD NOT BE HERE THROWN ON YOU OR
19 BAYTSP. THAT'S AN ISSUE BETWEEN THEM.

20 THE COURT: WELL, THAT'S NOT QUITE HOW IT
21 HAPPENS; THAT'S WHY IT IS HERE. BUT --

22 MR. HEMMINGER: NO, I UNDERSTAND.

23 THE COURT: BUT IN THE PAPERS, I DIDN'T SORT OF
24 UNDERSTAND THE RELATIONSHIPS, AND THAT WAS CONFUSING TO
25 ME.

1 MR. HEMMINGER: RIGHT.

2 THE COURT: COUNSEL, COME UP NEXT TO HIM AND
3 HELP WITH THIS.

4 MR. HIBBARD: YOUR HONOR, MAY I SPEAK BEFORE WE
5 HEAR AGAIN FROM MR. MANCINI?

6 THE COURT: GO AHEAD.

7 MR. HIBBARD: YOUR HONOR, STEVE HIBBARD OF
8 SHEARMAN & STERLING FOR VIACOM INTERNATIONAL.

9 MR. MANCINI BEGAN BY SAYING THERE ARE SIX
10 ISSUES. AND THE FIRST ISSUE, I THINK, REALLY RELATES IN
11 PART WHY THIS COURT HAS THIS MOTION TO COMPEL IN FRONT OF
12 IT.

13 THE COURT: WELL, IT'S A DISCOVERY -- AN OUT OF
14 DISTRICT DISCOVERY MOTION, AND THAT USUALLY ENDS UP IN
15 THE DISTRICT THEY ARE SEEKING THE DISCOVERY. SO THAT'S
16 WHY YOU ARE HERE, RIGHT?

17 MR. HIBBARD: YES, YOUR HONOR. BUT WHAT I MEAN
18 SPECIFICALLY IS IF YOU THINK OF BAYTSP SERVICING DOZENS
19 AND DOZENS OF CLIENTS, THE SCOPE OF THE SUBPOENA REACHES
20 THE ENTIRE CLIENT BASE OF BAYTSP. A SMALL NUMBER OF
21 THOSE CLIENTS WOULD BE THE VIACOM ENTITIES, VIACOM
22 INTERNATIONAL.

23 NOW, AS TO THE VIACOM INTERNATIONAL DOCUMENTS,
24 THERE HAS BEEN AN AGREEMENT TO PRODUCE THOSE DOCUMENTS,
25 SUBJECT TO THE APPROPRIATE WORK PRODUCT REVIEW. SO THAT

1 ISSUE OF "SHOULD THOSE DOCUMENTS BE PRODUCED BY BAYTSP?"
2 IS NOT REALLY BEFORE THE COURT. WHAT I THINK THE COURT
3 WAS HEARING IS THE GREAT CONCERN OF BAYTSP AS TO THOSE
4 DOCUMENTS OF ALL OF ITS OTHER CUSTOMERS, AND AS TO WHICH,
5 OF COURSE, VIACOM HAS NO POSITION OR NO INTEREST AT ALL.
6 SO I THINK THAT IS PART OF WHAT MAY BE A LITTLE BIT OF
7 THE CONFUSION ABOUT WHAT IS ASKED OF THE COURT AND SO
8 FORTH.

9 LET ME SPEAK, THOUGH, TO THAT PART OF IT THAT
10 RELATES SPECIFICALLY TO THE DOCUMENTS RELATING TO VIACOM,
11 IF I MAY. THOSE DOCUMENTS HAVE BEEN SOUGHT BY DOCUMENT
12 REQUESTS BY THE DEFENDANTS FROM VIACOM DIRECTLY. THOSE
13 REQUESTS ARE SUBSTANTIALLY OVERLAPPING WITH THE SUBPOENA
14 DIRECTED TO BAYTSP. THOSE DOCUMENTS ARE IN THE PROCESS
15 OF BEING PRODUCED BY VIACOM, A PROCESS THAT'S BEEN GOING
16 ON FOR SOME TIME, AND WILL BE TURNED OVER. SO IN SOME
17 RESPECTS, TO THE EXTENT THE SUBPOENA DIRECTED TO BAYTSP
18 SEEKS THE DOCUMENTS RELATING TO VIACOM, ALTHOUGH IT'S NOT
19 TRUE FOR ALL CATEGORIES -- FOR EXAMPLE, SOURCE CODE AND
20 SO ON -- IT WOULD BE SUBSTANTIALLY OVERLAPPING AND WE
21 WOULD EXPECT THAT THE PRODUCTION WHEN MADE BY VIACOM WILL
22 BE --

23 THE COURT: AND SO WHEN IS THAT?

24 MR. HIBBARD: THAT IS -- IT IS HAPPENING ON A
25 ROLLING-BASIS.

1 THE COURT: WHEN IS THE ROLL OVER?

2 MR. HIBBARD: EXCUSE ME, YOUR HONOR?

3 THE COURT: WHEN IS THE ROLL OVER?

4 MR. HIBBARD: I DON'T KNOW THAT. I BELIEVE
5 IT'S MARCH 15, YOUR HONOR. I THINK THAT WE ARE TRYING TO
6 HAVE THESE THINGS MOVE ON A CALENDAR THAT IS THE SAME
7 TIME BECAUSE ESSENTIALLY IT'S THE SAME DOCUMENT REVIEW AT
8 THIS POINT.

9 WITH RESPECT TO THE TIMING, ONE OF THE
10 THINGS -- THIS IS A VERY, VERY LARGE LAWSUIT. BOTH
11 SIDES, I THINK, ARE BURDENED FOR THEIR OWN DOCUMENTS, LET
12 ALONE ISSUES INVOLVING THIRD PARTIES. AND THERE'S A
13 GREAT AMOUNT OF ENERGY BEING DEVOTED BY ALL SIDES TO MOVE
14 THIS CASE FORWARD AS RAPIDLY AS POSSIBLE.

15 ONE OF THE THINGS, FOR EXAMPLE, THAT YOUTUBE
16 HAS TOLD JUDGE STANTON IN NEW YORK IS THAT EVEN THOUGH IT
17 HAS 100 ATTORNEYS REVIEWING ITS OWN DOCUMENTS TO BE ABLE
18 TO PRODUCE THOSE DOCUMENTS TO VIACOM, IT TAKES YOUTUBE AT
19 LEAST A MONTH TO REVIEW HALF A MILLION DOCUMENTS. AND SO
20 WE HAVE A SET OF DOCUMENTS THAT ARE SUBJECT TO NOW A WORK
21 PRODUCT REVIEW; THAT'S ABOUT 650,000 DOCUMENTS. SO WE
22 HAVE TOLD YOUTUBE THAT WE WILL WORK EXTREMELY DILIGENTLY,
23 DEPLOY A LARGE NUMBER OF ATTORNEYS, AND WE WILL GET THAT
24 DONE BY MARCH 15, AND THAT'S WHAT WE ARE WORKING
25 EXTREMELY HARD TO DO AND TO ACCOMPLISH. AND, OF COURSE,

1 IT'S ON A ROLLING-BASIS.

2 THERE ARE ALREADY OVER 100,000 PAGES AVAILABLE
3 TO YOUTUBE FOR REVIEW, WHICH THEY HAVEN'T BEGUN TO REVIEW
4 FOR REASONS THAT RELATE TO, I THINK, A DISPUTE WITH
5 BAYTSP OVER ACCESS, BUT AN OFFER HAS BEEN MADE THAT THEY
6 SHOULD HAVE THE EXACT SAME ACCESS TO THIS DATABASE THAT
7 VIACOM HAS. AND INDEED, WE HAVE TOLD YOUTUBE THAT WE DO
8 NOT BELIEVE -- "WE," VIACOM -- WOULD BE ABLE TO SEE
9 TECHNICALLY ANYTHING THAT YOUTUBE IS LOOKING AT IN THE
10 SAME DATABASE BECAUSE WE BELIEVE WE ARE GOING TO BE IN A
11 DIFFERENT USER GROUP. SO WE WILL APPROACH IT FROM AN
12 ENTIRELY DIFFERENT POINT OF VIEW. WE, VIACOM, WOULD
13 NEVER SEE WHAT YOUTUBE DOES OR DOES NOT DO WITH THE
14 DATABASE. IF THAT WERE NOT TECHNOLOGICALLY THE CASE,
15 YOUR HONOR, WE HAVE SAID TO THEM, SPECIFICALLY, WE WILL
16 STIPULATE THAT WE WOULD NOT DO THAT AS A MATTER OF ETHICS
17 AND THE WAY ATTORNEYS SHOULD PRACTICE LAW; WE WILL NOT IN
18 ANY WAY, SHAPE OR FORM SEEK TO FIND OUT WHAT AND HOW THEY
19 DO WHEN THEY CHOOSE TO LOOK AT THE ELECTRONIC DOCUMENTS.
20 AND SO WE WILL NOT DO THAT.

21 THE COURT: BUT IT'S PHYSICALLY POSSIBLE? IN
22 OTHER WORDS --

23 MR. HIBBARD: NO, I BELIEVE IT'S NOT. I
24 BELIEVE THAT WE ARE IN A DIFFERENT ACCESS POINT TO A
25 DATABASE AND SO WE CAN'T SEE HOW THEY GO IN. FRANKLY, I

1 DON'T KNOW THAT THE TECHNICAL PEOPLE HAVE FULLY
2 INVESTIGATED THAT. WE BELIEVE THAT THERE WILL BE NO
3 ISSUE THERE. BUT WE HAVE SAID FORTHRIGHTLY THAT EVEN IF
4 IT WERE TECHNOLOGICALLY POSSIBLE, IT IS SOMETHING THAT WE
5 WILL NOT GO ANYWHERE NEAR.

6 I BELIEVE THERE IS AN ISSUE THAT THEY STILL
7 HAVE WITH REGARD TO --

8 THE COURT: THAT'S LIKE IN AN ORDINARY PAPER
9 CASE TELLING THEM, "GEE, GIVE ME EVERYTHING THAT YOU HAVE
10 EVER DONE IN THIS CASE, AND WE PROMISE NOT TO LOOK AT
11 THAT WHICH WE ARE NOT SUPPOSED TO SEE"?

12 MR. HEMMINGER: YOUR HONOR, MAY I ADDRESS THAT?
13 BECAUSE THIS CAME UP YESTERDAY.

14 THE COURT: COME ON.

15 MR. HEMMINGER: AND THE QUESTION WAS, YOU KNOW,
16 "WELL, WITH THIS DATABASE YOU HAVE, WE DON'T WANT BAYTSP
17 OR VIACOM SEEING WHAT WE ARE LOOKING AT." SETTING ASIDE
18 WHETHER THEY LOOK AT ONE DOCUMENT OR THE SEARCH TERMS
19 THEY USE, WHETHER OR NOT THAT IS WORK PRODUCT, FRANKLY,
20 BAYTSP DOESN'T CARE. VIACOM SAID IT DOESN'T CARE.

21 AND WE WERE ABLE TO EARLY THIS MORNING CONFIRM
22 WITH KROLL -- THIS IS ALL BEING HANDLED BY AN OUTSIDE
23 THIRD PARTY, KROLL. KROLL INTERNATIONAL IS A WELL KNOWN
24 ELECTRONIC DISCOVERY FIRM, HIGHLY REPUTABLE. WE WENT
25 WITH THEM BECAUSE OF THE SECURITY OF BAYTSP'S DOCUMENTS.

1 I HAVE BEEN INFORMED THAT IT CAN BE SET UP THAT THEY CAN
2 LOCK IT OUT AND WE CANNOT SEE THE SEARCH TERMS. OF
3 COURSE, WHEN THEY CHECK A DOCUMENT AND SAY, "WE WOULD
4 LIKE YOU TO PRODUCE A FORMAL COPY WITH A PRODUCTION
5 NUMBER AND CONFIDENTIALITY DESIGNATION," WE WOULD KNOW
6 THAT AND WE WOULD ONLY KNOW THAT.

7 MR. HIBBARD: YOUR HONOR, BOTH SIDES HAVE
8 ACCESS TO THE DATABASE SO WE CAN ALL LOOK AT WHATEVER WE
9 WANT TO LOOK AT. THE ISSUE IS WHETHER WE ARE LOOKING
10 OVER THEIR SHOULDER.

11 THE COURT: OKAY. THAT WAS MY QUESTION.

12 MR. HIBBARD: YEAH, AND WE WOULDN'T BE. AND
13 IT'S THE SAME AS IN A PAPER CASE.

14 THE COURT: IT JUST WOULDN'T BE THAT YOU CAN OR
15 WOULDN'T BE BECAUSE YOU CAN'T?

16 MR. HEMMINGER: BECAUSE YOU CAN'T.

17 MR. HIBBARD: IT WOULD BE BOTH; IT WOULD BE
18 BOTH. WE WOULD NOT DO IT BECAUSE WE HAD SAID WE WOULD
19 NOT DO IT, AND WE WOULD NOT DO IT BECAUSE WE CANNOT DO
20 IT. AND THE ANALOGY WOULD BE THIS: --

21 THE COURT: OH, I'M SURE THE COMFORT LEVEL IS
22 MORE IF YOU CANNOT DO IT.

23 MR. HIBBARD: CLEARLY. AND WE ARE IN FAVOR OF
24 THAT AND WE SUPPORT WE THAT AND WE WANT THAT.

25 THE COURT: EVEN IN THE PAPER WORLD, THAT IS A

1 PRETTY DICEY PROPOSITION.

2 MR. HIBBARD: WELL, YOU ARE RIGHT, YOUR HONOR.
3 I SUPPOSE IT WAS. BUT IF YOU PUT A BUNCH OF DOCUMENTS IN
4 A ROOM AND YOU PROMISE THAT YOU ARE NOT GOING TO GO IN
5 AND WATCH THEM WHILE THEY DO IT, THAT'S REALLY THE SAME
6 SORT OF THING WE ARE SAYING; WE ARE NOT GOING TO GO WATCH
7 IT.

8 THE COURT: EXCEPT THEY DON'T WON'T LET YOU IN
9 THE ROOM TO -- THEY HAVE THEIR COPY MACHINE IN THERE AND
10 THEY ARE DOING THAT.

11 MR. HIBBARD: MY POINT IS SIMPLY -- I DON'T
12 MEAN TO QUIBBLE OR ARGUE ABOUT THIS AT ALL, YOUR HONOR,
13 BUT --

14 THE COURT: I JUST WANT TO MAKE SURE I
15 UNDERSTAND IT, BECAUSE THE TECHNOLOGY IN THIS IS A LITTLE
16 BIT MORE COMPLICATED THAN USUAL, AND SO I'M TRYING TO
17 MAKE SURE I UNDERSTAND WHO IS ASKING FOR WHAT AND WHY AND
18 UNDER WHAT CONDITIONS.

19 MR. HIBBARD: WE ARE DELIGHTED AND HOPE THAT
20 THE TECHNOLOGY FULLY BLOCKS US OUT PERPETUALLY AND
21 PERMANENTLY AS TO ANYTHING THEY ARE LOOKING AT. WE HAVE
22 NO INTEREST IN SEEING WHAT THEY SEE AND HOW THEY SEE IT.

23 THE COURT: AND I DON'T DOUBT THAT. BUT IS IT
24 POSSIBLE, OR IS THERE --

25 MR. HIBBARD: I UNDERSTAND --

1 THE COURT: -- A REAL TECHNICAL DOUBT ABOUT
2 THAT?

3 MR. HIBBARD: I HAVE NOT DISCUSSED THIS WITH
4 KROLL ONTRACK. WE HAVE JUST HEARD THAT HE HAS HAD A
5 CONVERSATION, AND KROLL ONTRACK SAYS WE ARE LOCKED OUT.
6 SO I THINK THE ANSWER IS WE ARE LOCKED OUT.

7 THE COURT: IS THAT THE MAJOR PROBLEM?

8 MR. MANCINI: YOUR HONOR, THERE'S TWO PROBLEMS.
9 MAY I SPEAK?

10 THE COURT: WHY DON'T YOU JUST COME UP. MIGHT
11 AS WELL STAND UP HERE.

12 MR. MANCINI: SO THERE'S TWO PROBLEMS. THE
13 PROPOSAL THAT WE JUST GOT YESTERDAY IS THAT WE HAVE
14 ACCESS TO THEIR DATABASE. WE ASKED THEM SPECIFICALLY
15 YESTERDAY, "IF THE SYSTEM HAS A BLOCKING FUNCTION, WOULD
16 YOU AGREE TO ENABLE THE BLOCKING FUNCTION SO YOU COULD
17 NOT VIEW OUR ACTIVITY?" NEITHER OF THEM WOULD SAY THEY
18 WOULD AGREE.

19 MR. HIBBARD: THAT'S NOT CORRECT.

20 MR. MANCINI: LET ME FINISH.

21 THE COURT: DON'T STAND AT THE PODIUM AND TALK
22 TO EACH OTHER.

23 MR. HIBBARD: I APOLOGIZE, YOUR HONOR.

24 MR. MANCINI: WHAT VIACOM SAID IS THAT THEY
25 WILL AGREE AS A MATTER OF PROFESSIONAL RESPONSIBILITY TO

1 NOT DO THAT, BUT THEY WOULD NOT AGREE TO ENABLE THE BLOCK
2 FUNCTION. BAYTSP WOULD NOT MAKE EITHER REPRESENTATION;
3 THEY WERE GOING TO INVESTIGATE.

4 THAT'S THE FIRST PROBLEM.

5 THE SECOND PROBLEM IS THE CALL WE ARE TALKING
6 ABOUT. THEY --

7 THE REPORTER: COUNSEL, YOU NEED TO SLOW DOWN.

8 THE COURT: SLOW DOWN.

9 MR. MANCINI: SORRY.

10 THEY WILL PRINT THE DOCUMENTS FOR US. NO
11 BETTER WAY TO KNOW ABOUT OUR WORK PRODUCT ACTIVITY THAN
12 TO SEE EVERYTHING WE ARE LOOKING AT AND PRINT IT.

13 THE COURT: IF YOU AGREE TO THAT, THAT'S FINE.

14 MR. MANCINI: NO, THERE'S NO WAY WE WILL AGREE.
15 WE THINK --

16 THE COURT: YOU DO NOT ORDER THAT.

17 MR. MANCINI: I'M SORRY, YOUR HONOR, WITH ALL
18 DUE RESPECT -- I UNDERSTAND.

19 WE THINK THE SIMPLEST SOLUTION IS SIMPLY BURN
20 IT ONTO CDS, AND WE WILL UPLOAD IT TO OUR SYSTEM. WE CAN
21 AVOID ALL THESE THORNY WORK PRODUCT, WAIVER -- OR
22 POTENTIAL WAIVER PROBLEMS THAT THEY ARE SUGGESTING BY
23 THEIR SYSTEM. IT SHOULD NOT BE THAT BIG OF A BURDEN.
24 THEY HAVE ALREADY UPLOADED IT TO THE KROLL DATABASE; JUST
25 GIVE IT TO US IN THE NATIVE FORMAT AND WE WILL UPLOAD IT

1 TO OUR EPIC DATABASE. IT'S AS SIMPLE AS THAT.

2 MR. HIBBARD: YOUR HONOR, TO BE VERY CLEAR,
3 I MADE THE REPRESENTATION -- MY COLLEAGUE MADE THE
4 REPRESENTATION YESTERDAY THAT WE WOULD ABSOLUTELY,
5 ABSOLUTELY DEPLOY ANY TECHNICAL BLOCK THAT WE COULD.
6 SO MR. MANCINI IS INCORRECT IN THAT REGARD.

7 WITH REGARD TO THE FORM OF THE DATABASE AND
8 WHETHER IT'S DOWNLOADED, PROVIDED TO THEM, THAT IS NOT A
9 VIACOM ISSUE. THE POINT WE WERE SPEAKING TO WAS BAYTSP
10 HAS MADE IT AVAILABLE THE WAY IT HAS CHOSEN TO MAKE IT
11 AVAILABLE AND THAT THEY HAVE UNDERTAKEN TO GIVE
12 DEFENDANTS THE SAME ACCESS THAT VIACOM HAS. IF BAYTSP
13 CHOOSES TO GIVE IT IN ONE FORM VERSUS ANOTHER FORM,
14 THAT'S NOT A POSITION THAT VIACOM TAKES ONE WAY OR THE
15 OTHER.

16 I JUST WANT IT TO BE CLEAR FOR THE RECORD THAT
17 VIACOM HAS SAID YESTERDAY AND SAYS TODAY -- STANDS BEFORE
18 YOUR HONOR -- THAT IF IT WERE THROUGH THIS DATABASE,
19 VIACOM EMBRACES ANY TECHNOLOGICAL BLOCK THAT MAKES IT
20 BLIND AS TO ANYTHING THE DEFENDANTS ARE DOING, AND BEYOND
21 THAT MAKES ITS REPRESENTATION TO THE COURT THAT IT WOULD
22 NOT LOOK, EVEN IF IT COULD. THAT WAS REALLY THE POINT WE
23 WERE MAKING AND NOTHING MORE THAN THAT.

24 MR. MANCINI: YOUR HONOR, CAN I BE -- AT SOME
25 POINT I WANT TO RESPOND TO THE ARGUMENTS THAT HAVE BEEN

1 SAID IN OPPOSITION. SHOULD I SIT AND COME BACK?

2 THE COURT: NO, YOU MIGHT AS WELL ALL JUST
3 STAND THERE.

4 MR. HEMMINGER: EXCUSE ME, YOUR HONOR.

5 I KNOW HOW THE DOCUMENTS ARE KEPT. I KNOW -- I
6 CAN ADDRESS ALL OF THESE ISSUES, IF I MAY.

7 THE COURT: WELL, LET ME -- WHY DON'T I GIVE
8 YOU MY PROPOSED -- WHAT I WALKED OUT HERE WITH, AND THEN
9 WE WILL FIGURE OUT WHERE YOU WANT TO GO FROM THERE.

10 DOCUMENT REQUEST NO. 1, GRANT.

11 DOCUMENT REQUEST NO. 2, GRANT.

12 DOCUMENT REQUEST NO. 3, GRANT.

13 DOCUMENT REQUEST NO. 4, GRANT.

14 DOCUMENT NO. 5, GRANT, WITH SOME NARROWING.

15 NO. 6, TOO BROAD, MIGHT HAVE TO LIMIT THAT.

16 NO. 7, GRANT.

17 NO. 8, GRANT.

18 NO. 9, GRANT, WORRIED ABOUT ATTORNEY-CLIENT
19 PRIVILEGE ISSUES THERE.

20 NO. 10, BROAD, SEE IF YOU CAN NARROW THAT.

21 NO. 11, GRANT.

22 NO. 12, GRANT.

23 NO. 13, GRANT.

24 NOW, THOSE ARE SIMPLISTIC RESPONSES TO THE
25 REQUESTS. I DIDN'T EVEN ATTEMPT TO FIGURE OUT HOW TO DO

1 THE ELECTRONIC ISSUES AND SOME OF THOSE OTHER THINGS.

2 SO WHAT I AM GOING TO DO IS, I AM GOING TO
3 ADJOURN THIS FOR A HALF HOUR AND I AM GOING TO LET YOU
4 USE MY COURTROOM AND THE CONFERENCE ROOM OUT FRONT AND
5 SEE IF YOU CAN FIGURE OUT THE TECHNOLOGICAL PROBLEMS,
6 BECAUSE THIS IS PRETTY MUCH WHERE I AM GOING ON THE
7 SUBSTANTIVE ISSUES. BUT I DON'T FEEL LIKE I HAVE THE
8 TECHNOLOGICAL ABILITY TO GRASP WITH THE TECHNOLOGICAL
9 PROBLEMS, AND I WOULD BE HAPPY TO ORDER ANYTHING THAT THE
10 THREE OF YOU CAN AGREE ON.

11 BUT SUBSTANTIVELY, AS FAR AS REQUESTS FOR
12 DISCOVERY, THIS IS PRETTY MUCH WHERE MY POSITION IS. BUT
13 IT'S MORE COMPLICATED BECAUSE OF THESE OTHER ISSUES, AND
14 I DON'T KNOW THAT I CAN DO THAT WITHOUT YOUR HELP OR YOUR
15 AGREEMENT, AND I DON'T THINK I GOT THAT KIND OF HELP IN
16 YOUR PLAIN OLD ORDINARY DISCOVERY MOTION I HAD IN FRONT
17 OF ME WITH ALL OF ITS TECHNOLOGICAL NUANCES.

18 SO DOES THAT MAKE SENSE TO YOU TO DO IT THAT
19 WAY?

20 MR. MANCINI: YES.

21 MR. HIBBARD: YES.

22 THE COURT: OKAY.

23 MR. HEMMINGER: MAY I ASK A COUPLE QUESTIONS?

24 THE COURT: YOU MAY.

25 MR. HEMMINGER: BECAUSE, QUITE FRANKLY, THE

1 PRODUCTION AND TECHNOLOGICAL ISSUES ARE ABSOLUTELY MINOR.
2 WE HAD OFFERED TO PRODUCE THE DOCUMENTS, ALL OF THEM, IF
3 THEY PAID FOR IT, WHICH IS SIX CENTS A PAGE, WHICH IS
4 ABOUT SIX TIMES SEVERAL MILLION, WHICH IS SIX HUNDRED,
5 700,000.

6 THE COURT: I'LL PUT "COST" ON HERE, QUESTION
7 MARK. IS THAT WHAT YOU ARE WORRIED ABOUT?

8 MR. HEMMINGER: YES. THAT'S ONE ISSUE.

9 THE OTHER THING IS YOU ARE SAYING GOING THROUGH
10 AND GRANTING THESE -- ARE YOU SAYING THAT YOU ARE
11 REJECTING THE ARGUMENTS ABOUT THE THIRD PARTIES? BECAUSE
12 ALL OF THESE INCLUDE WITH THEM ANYBODY WHO HAS EVER DONE
13 ANY WORK -- WE HAVE DONE ANY WORK FOR AT BAYTSP.

14 THE COURT: CAN THAT BE RESOLVED BY PROTECTIVE
15 ORDER?

16 MR. HEMMINGER: NO. I EXPLAINED THE ISSUES.
17 AND WE ONLY HAVE LIMITED INFORMATION ABOUT THEM. AND THE
18 BURDEN OF REQUIRING US TO GO ON AND -- IT'S LIKE --

19 THE COURT: COUNSEL, THAT'S PRETTY MUCH WHERE I
20 AM AT, BASED ON THE PAPERS I HAVE. SO GO OUT AND TALK
21 AND COME BACK TO ME AND YOU CAN RAISE THAT AGAIN AFTER
22 THAT.

23 I DON'T KNOW, MAYBE THE THREE OF YOU CAN COME
24 UP WITH SOMETHING CREATIVE I CAN BUY INTO, BUT RIGHT NOW
25 THAT'S WHERE I AM AT. SO HALF HOUR -- COME BACK AT 20

1 MINUTES AFTER?

2 MR. MANCINI: THANK YOU, YOUR HONOR.

3 MR. HIBBARD: THANK YOU, YOUR HONOR.

4 MR. HEMMINGER: THANK YOU.

5 THE COURT: AND LIKE I SAID, YOU CAN HAVE THE
6 COURTROOM HERE -- THERE'S NOBODY ELSE HERE -- OR YOU CAN
7 USE THE CONFERENCE ROOM, WHICH IS RIGHT OUTSIDE THE FRONT
8 DOOR. I WILL MAKE SURE IT'S UNLOCKED.

9 (RECESS FROM 10:49 TO 11:28 A.M.)

10 THE CLERK: REMAIN SEATED. PLEASE COME TO
11 ORDER.

12 THE COURT: YOU CAN SIT DOWN. RETURNING TO
13 VIACOM INTERNATIONAL VERSUS YOUTUBE, C 08-80211.

14 SO, COUNSEL, WHERE ARE WE?

15 MR. MANCINI: YOUR HONOR, I THINK WE MADE SOME
16 PROGRESS.

17 THE COURT: GOOD.

18 MR. MANCINI: SO THERE WERE A FEW ITEMS LEFT
19 OPEN BY YOUR HONOR'S RULINGS. THE FIRST IS THE FORM OF
20 DISCOVERY.

21 IT SEEMS THAT THE PARTIES HAVE AGREED TO PERMIT
22 AN ELECTRONIC DOWNLOAD FROM THEIR SERVICE PROVIDER,
23 KROLL, TO OUR SERVICE PROVIDER. THE OPEN REMAINING
24 QUESTION IS REIMBURSEMENT OF COSTS. WE DO NOT BELIEVE WE
25 NEED TO INCUR THAT COST BECAUSE WE BELIEVE THIS IS

1 ALREADY VIACOM'S OBLIGATION. WE WOULD BE WILLING TO
2 CONSIDER, PROVIDED THERE WERE A REPRESENTATION THAT
3 VIACOM IS NOT ALREADY COMMITTED TO REIMBURSE BAYTSP FOR
4 THE COSTS OF COMPLIANCE WITH THE SUBPOENA, AND THAT THERE
5 BE SOME CLARITY ON -- SO THAT WE CAN UNDERSTAND WHAT
6 THESE COSTS ARE AND HAVE A FRAMEWORK OF THE OUTER
7 GOALPOST FOR THOSE COSTS.

8 THE SECOND --

9 THE COURT: GO AHEAD.

10 MR. MANCINI: THE SECOND --

11 THE COURT: OH, YOU WANT TO RESPOND ONE BY ONE?

12 MR. HEMMINGER: I THINK IT WOULD BE BETTER IF
13 WE RESPOND BY ONE BY ONE.

14 THE COURT: OKAY. SO WHY DON'T YOU DO THE COST
15 ISSUE.

16 MR. HEMMINGER: CERTAINLY. THERE IS NO
17 PROVISION IN THE FEDERAL RULES OF CIVIL PROCEDURE THAT
18 REQUIRES THE PRODUCING PARTY TO BEAR THE COST OF MAKING
19 THE COPY PRODUCED FOR INSPECTION.

20 IN THIS REGARD THE INFORMATION WAS COLLECTED
21 AND PUT ON A DATABASE. TO GET IT OFF THE DATABASE, THE
22 ELECTRONIC DISCOVERY PROVIDER IN THIS CASE, KROLL
23 ONTRACK, REQUIRES A FEE IN THE NEIGHBORHOOD OF SIX CENTS
24 A PAGE TO DOWNLOAD IT.

25 WE HAVE OFFERED TO THEM ALL ALONG THAT WE WOULD

1 BE HAPPY TO PUT IT IN WHATEVER FORMAT THEY WANT IF THEY
2 PAID KROLL, NOT TO PAY BAYTSP, NOT TO ANYBODY, THEY JUST
3 PAID FOR THE ACTUAL COST OF GETTING IT DOWNLOADED IN THE
4 FORMAT THEY WANT FOR THE DATABASE. AND I DON'T THINK
5 THIS IS A BURDEN THAT ANY PARTY PRODUCING DOCUMENTS --
6 WHETHER OR NOT THERE'S ANY INDEMNIFICATION AGREEMENT OR
7 NOT IN THIS CASE.

8 THE COURT: AND WHY SHOULDN'T IT BE THAT WAY?

9 MR. MANCINI: WELL, YOUR HONOR, THESE WOULD
10 OTHERWISE BE VIACOM COSTS, AND THERE'S A SIMPLE QUESTION
11 ON THE TABLE. IS THERE ALREADY AN AGREEMENT IN PLACE FOR
12 VIACOM TO REIMBURSE THIS EXPENSE? OTHERWISE, THERE WOULD
13 BE A CLEAR WINDFALL HERE. AND THEY ARE VIACOM'S COSTS
14 BECAUSE THEY JUST OUTSOURCED THIS FUNCTION TO BAYTSP.
15 VIACOM COULD HAVE ITSELF DECIDED TO SEND TAKEDOWN NOTICES
16 TO YOUTUBE. IT HIRED BAYTSP TO DO THAT; THEY ARE THEIR
17 AGENT. THESE ARE VIACOM'S DOCUMENTS THAT ARE PRODUCED AT
18 THEIR REQUEST BY BAYTSP, BUT APPARENTLY NOT ALL KEPT BY
19 VIACOM, WHICH IS WHY WE ARE HERE; WE NEED THEM FROM
20 BAYTSP. SO WE ARE SIMPLY SAYING IT IS A COST THAT VIACOM
21 ALREADY HAS AN OBLIGATION TO INCUR. THERE MAY ALREADY BE
22 AN AGREEMENT, AND IF THAT AGREEMENT EXISTS, THEY SHOULD
23 INCUR THEM.

24 MR. HIBBARD: YOUR HONOR, IF I MAY. STEVE
25 HIBBARD FROM SHEARMAN & STERLING.

1 I DON'T BELIEVE THE CHARACTERIZATION OF THESE
2 DOCUMENTS AS "VIACOM'S DOCUMENTS" IS CORRECT. BAYTSP IS
3 AN INDEPENDENT COMPANY CONTRACTED TO PROVIDE A SERVICE,
4 AND I DON'T BELIEVE THAT WE HAVE POSSESSION, CUSTODY OR
5 CONTROL OVER THESE DOCUMENTS, SO I DON'T BELIEVE IT'S
6 ACCURATE TO CALL THEM "VIACOM'S DOCUMENTS."

7 AS TO THE ISSUE OF WHETHER OR NOT THERE'S ANY
8 WRITTEN AGREEMENT --

9 THE COURT: ARE THEY ANYBODY'S DOCUMENTS?

10 MR. HIBBARD: ARE THEY BAYTSP'S DOCUMENTS, YOUR
11 HONOR? AND THAT'S EXACTLY THE POINT, I THINK, THAT
12 MR. HEMMINGER WAS MAKING WITH REGARDS TO BAYTSP HAVING
13 SATISFIED THE OBLIGATIONS OF MAKING THE DOCUMENTS
14 AVAILABLE FOR INSPECTION. I AM NOT AWARE OF ANY WRITTEN
15 UNDERTAKING BY VIACOM TO INDEMNIFY BAYTSP FOR THE COSTS
16 OF COMPLYING WITH THE SUBPOENA. AND IF THERE WERE ANY
17 UNDERSTANDINGS, I AM FAIRLY CONFIDENT THAT THOSE
18 UNDERSTANDINGS WOULD NOT REACH THE SCOPE OF THE KIND OF
19 PRODUCTION THAT'S BEEN SOUGHT FROM BAYTSP, WHICH IS FAR
20 BEYOND ANYTHING FOR WHICH VIACOM HAD RETAINED BAYTSP TO
21 PROVIDE SERVICES.

22 SO I THINK WE ARE LEFT WITH THE POINT THAT THIS
23 IS A FINANCIAL ISSUE BETWEEN BAYTSP AND THE DEFENDANTS IN
24 THIS ACTION. AND AS I UNDERSTAND IT, BAYTSP HAS MADE THE
25 DOCUMENTS AVAILABLE FOR INSPECTION AND THE ISSUE IS THAT

1 DEFENDANTS WISH TO HAVE THEM IN A DIFFERENT FORMAT MORE
2 CONVENIENT FOR THEM. IT'S JUST THAT TO OBTAIN THAT,
3 KROLL ONTRACK, WHICH NOW HAS CREATED ITS DATABASE,
4 CHARGES FOR THAT.

5 THE COURT: RESPOND.

6 MR. MANCINI: YOUR HONOR, GIVEN THAT
7 REPRESENTATION, WE SIMPLY ASK FOR CONFIRMATION OF THAT
8 FACT. AND AGAIN, WE DO BELIEVE THEY ARE ACTING AS THEIR
9 AGENT, SO IT IS THEIR OBLIGATION, AND UNDER THE CASE LAW
10 THAT MR. HEMMINGER HAS CITED.

11 BUT GIVEN THAT REPRESENTATION, THIS IS
12 SOMETHING THAT, FRANKLY, WE DON'T BELIEVE WE SHOULD PAY
13 FOR, BUT IF WE ARE OBLIGATED TO PAY FOR IT, WE JUST NEED
14 AN UNDERSTANDING HERE OF WHAT IT IS. KROLL, I'M SURE,
15 HAS A LISTING OF HOW MANY DOCUMENTS ARE IN THE DATABASE,
16 WHAT THE CHARGES ARE. IF WE CAN HAVE FULL DISCLOSURE OF
17 THESE CHARGES, WE BELIEVE WE ARE ENTITLED TO IT.

18 THE COURT: AND IS THAT POSSIBLE, FULL
19 DISCLOSURE OF THE CHARGES?

20 MR. HEMMINGER: OH, ABSOLUTELY.

21 THE COURT: IT'S POSSIBLE, BUT IT'S NOT BEEN
22 COMPUTED? I'M SORRY, I KEEP INTERRUPTING YOU.

23 MR. HEMMINGER: NO, NO, THAT'S OKAY.

24 WHAT KROLL'S CHARGES ARE ARE THE ONES I HAVE
25 BEEN TELLING YOU. IT DEPENDS ON THE FORMAT, BUT IT'S

1 ROUGHLY SIX TO EIGHT CENTS A PAGE FOR THEM TO DOWNLOAD
2 THAT.

3 THE COURT: THE MATH, ULTIMATELY --
4 APPROXIMATELY?

5 MR. HEMMINGER: WELL, IF YOU ARE GOING TO
6 CONTINUE WITH YOUR ORDER THAT IT REQUIRES EVERY DOCUMENT
7 IN BAYTSP WHICH, IF YOU DON'T CHANGE ANY OF YOUR
8 PRELIMINARIES -- I CAN'T TELL YOU. IT COULD BE -- LET'S
9 SEE, WE JUST PULLED OUT OF THIS ONE A MILLION -- COULD BE
10 THREE, FOUR MILLION DOCUMENTS AT 10 PAGES A DOCUMENT. IT
11 COULD BE 40 MILLION PAGES AT WHAT, 10 CENTS APIECE? WHAT
12 DOES THAT COME OUT TO?

13 THE COURT: A LOT OF MONEY.

14 MR. HEMMINGER: YEAH.

15 MR. MANCINI: AGAIN, WE NEED TO HAVE A BETTER
16 UNDERSTANDING OF WHAT'S IN THE DATABASE. I THINK WHAT
17 MR. HEMMINGER JUST ARTICULATED IS THAT'S WHAT HE THINKS
18 THE NEXT PRODUCTION IS, GIVEN YOUR HONOR'S RULINGS. BUT
19 WHAT WE UNDERSTAND THE CURRENT PRODUCTION IS, IS 650,000
20 DOCUMENTS. WE ARE HYPOTHECATING SOME MULTIPLIER, EITHER
21 FIVE OR 10 PAGES PER, SO ESTIMATING IN THE RANGE OF
22 SOMEWHERE BETWEEN THREE MILLION AND SIX MILLION PAGES.

23 AND IF I UNDERSTOOD HIM CORRECTLY, THE CHARGE
24 THAT KROLL WOULD TRANSFER TO US IS APPROXIMATELY SIX
25 CENTS PER PAGE TO UPLOAD THE FILES TO US. WE JUST WANT

1 GREATER CLARITY. FOR EXAMPLE, I WOULD IMAGINE KROLL
2 WOULD HAVE SOME BULK RATES; AFTER SEVERAL HUNDRED
3 THOUSAND DOCUMENTS, PERHAPS THAT COST PER PAGE GOES TO
4 SOME LOWER AMOUNT.

5 THE COURT: WE HAVE A SHAKING "NO" HEAD HERE.

6 MR. HEMMINGER: LOOK, WE ARE WASTING A LOT OF
7 TIME ON AN ISSUE WHICH I -- AS TO THE COST THAT KROLL IS
8 GOING TO CHARGE. I OFFERED, YOU KNOW, THAT WE WOULD BE
9 MORE THAN HAPPY TO SIT DOWN AND IF THEY WANT TO ENTER
10 INTO A SEPARATE AGREEMENT WITH KROLL TO TRY TO GET THE
11 INFORMATION AND TRY TO DO WHAT THEY WANT, THAT'S FINE;
12 HOWEVER, I DON'T THINK WE OUGHT TO BE COMING BACK AND
13 REVISITING THIS IF INDEED AND AFTER WE FIND OUT THAT
14 THERE ARE 40 MILLION PAGES OF DOCUMENTS THAT HAVE TO BE
15 PRODUCED, AND THEM COMING IN AND SAYING, "WELL, GEEZ, WE
16 DON'T WANT TO HAVE TO PAY FOR THAT."

17 SO FROM BAYTSP'S STANDPOINT, IT WOULD SIT THERE
18 AND WHATEVER -- IF THEY DON'T HAVE A SEPARATE AGREEMENT,
19 WHATEVER AGREEMENT THAT -- WHATEVER KROLL CHARGES, WE
20 WOULD PASS ON OFF TO YOUTUBE FOR THEM TO MAKE THE PAYMENT
21 TO KROLL FOR THE DOCUMENTS IN WHATEVER FORMAT THEY WANT.

22 MR. MANCINI: AND AGAIN, WE ARE SIMPLY ASKING
23 FOR A FULL DISCLOSURE TO UNDERSTAND THIS PROCESS BETTER.
24 FOR EXAMPLE, YOUR HONOR, WHAT WE ARE NOT UNDERSTANDING IS
25 THIS DATA WAS UPLOADED TO KROLL AT SOME POINT. I CAN'T

1 IMAGINE THAT UPLOADING WAS AT SIX CENTS A PAGE. IF THERE
2 ARE DISKS AT BAYTSP -- IN OTHER WORDS, IF WE STARTED FROM
3 SCRATCH, THEY SHOULD JUST GIVE US COPIES OF THOSE DISKS;
4 THAT WOULD BE FAR LESS THAN SIX CENTS A PAGE.

5 MR. HEMMINGER: YOUR HONOR, THE PROCESS THAT
6 WAS PROCEEDED THROUGH TO OBTAIN THIS INFORMATION, WE
7 RETAINED KROLL. KROLL CAME IN, WENT TO EVERYBODY IN
8 BAYTSP, UPLOADED AN IMAGE OF THEIR COMPUTER AS WELL AS
9 OFF OUR SERVERS. THEY THEN PROCESSED THAT REMOVING
10 SYSTEM FILES AND THE LIKE. THERE ARE NO QUOTE/UNQUOTE
11 "DISKS." AND THEN TO TURN BACK AND SAY THAT IN RESPONSE
12 TO THE SUBPOENA WE WOULD NEED TO JUST GO IN AND TURN OVER
13 EVERYBODY'S COMPUTER REGARDLESS OF WHETHER THEY HAD ANY
14 RELEVANT INFORMATION IS JUST UNWORKABLE.

15 THE COURT: WELL, I'M NOT SURE HE SAID THAT. I
16 THOUGHT HE THOUGHT IT WAS MORE ISOLATED THAN WHAT YOU ARE
17 SAYING.

18 MR. HEMMINGER: NO, WE TRIED TO COMPLY AS BEST
19 WE COULD TO GET THEM ALL THE DOCUMENTS RELATED TO VIACOM
20 AND YOUTUBE AND THE PLAINTIFFS. SO THEY UPLOADED THE
21 INFORMATION AND IT'S ALL SITTING ON A KROLL DATABASE,
22 WHICH WE ARE PAYING A MONTHLY FEE TO MAINTAIN IT AND
23 STORE IT, AND THEN WE ARE PAYING A MONTHLY FEE ONCE WE
24 PROCESS THOSE THROUGH A FILTER. SO THERE'S NO DISK.

25 THE COURT: THAT'S AVAILABLE TO THE OTHER SIDE?

1 I'M SORRY, GO AHEAD.

2 MR. HEMMINGER: AFTER WE FILTERED IT, DID OUR
3 REVIEW, AND NOW IT'S UP TO VIACOM TO DO THEIR WORK
4 PRODUCT PRIVILEGE REVIEW. YES, THEY WILL BE ABLE TO USE
5 KROLL'S ONTRACK'S END-VIEW DATA PROCESSOR TO LOOK AT
6 THAT, IF THEY WANT. THEY ARE SAYING THEY DON'T WANT TO
7 DO THAT. WHAT THEY ARE SAYING IS, "WE WOULD MUCH RATHER
8 GET A HARD DISK, A CD OR DVD WITH THIS INFORMATION ON
9 IT."

10 TO DOWNLOAD THE INFORMATION THAT VIACOM SAYS IS
11 NOT PRIVILEGED AND "YOU CAN HAVE" IS GOING TO REQUIRE
12 THIS COST. I DON'T KNOW HOW MANY, YOU KNOW, PAGES OR HOW
13 MANY DOCUMENTS THAT'S GOING TO BE, BUT IT IS A FIXED FEE
14 THAT KROLL WILL CHARGE.

15 MR. MANCINI: YOUR HONOR, ALL I'M SAYING IS
16 THERE MUST HAVE BEEN SOME INTERMEDIATE COPIES BEFORE
17 KROLL UPLOADED IT TO THIS DATABASE.

18 MR. HEMMINGER: THERE IS NOT.

19 MR. MANCINI: WELL, ALL I'M ASKING FOR IS SOME
20 DISCLOSURE ON THIS BECAUSE THERE MAY BE A SOLUTION THAT'S
21 LESS THAN SIX CENTS A PAGE.

22 MR. HEMMINGER: YOUR HONOR, THERE IS NO
23 SOLUTION OTHER THAN TURNING OVER THE RAW COMPUTERS, WHICH
24 EXCEEDS THE SCOPE OF THE REQUEST. THERE'S INFORMATION ON
25 THERE THAT IS NOT AT ALL CALLED FOR. AND THEN WHAT WE

1 WOULD HAVE TO DO, WE WOULD HAVE TO GO THROUGH AND LOOK --
2 WE WOULD HAVE TO RE-DO EVEN THE WORK WE HAVE DONE BEFORE
3 TO FILTER IT. I MEAN, THIS IS -- I CANNOT BELIEVE THAT
4 THEY ARE REPRESENTING THAT WITH ALL THEIR EXPERIENCE THAT
5 THERE MUST BE SOME RAW DATA THAT COULD BE PROVIDED THAT
6 HASN'T BEEN REVIEWED. WHEN YOU ARE TALKING ABOUT FOUR
7 TERABYTES OF DATA, YOU ARE TALKING ABOUT MILLIONS AND
8 MILLIONS AND MILLIONS OF PAGES OF DOCUMENTS WHICH CAN
9 ONLY BE REVIEWED THROUGH ELECTRONIC SEARCHES.

10 MR. MANCINI: YOUR HONOR, I HAVE A SUGGESTION.

11 THE COURT: GO AHEAD.

12 MR. MANCINI: I BELIEVE WHAT IS THE ISSUE HERE
13 IS -- KNOWING A LITTLE BIT ABOUT DISCOVERY, I BELIEVE
14 WHAT MR. HEMMINGER IS TALKING ABOUT IS THIS COST PER PAGE
15 IS PROBABLY WHAT IS KNOWN IN THE INDUSTRY AS A
16 "BLOWBACK." KROLL HAS TO CREATE SOME DATA. ALL WE WOULD
17 SUGGEST -- AND I THINK MR. HEMMINGER IS OFFERING THIS --
18 IS WE, COUNSEL FOR GOOGLE AND YOUTUBE, OPEN UP A DIALOG
19 WITH KROLL AND THAT WE NEGOTIATE AN ARRANGEMENT TO FIGURE
20 OUT WHAT IS THE MOST EXPEDITIOUS AND INEXPENSIVE MEANS TO
21 GET THAT DATA TO OUR DATABASES. BECAUSE I WOULD SUSPECT
22 THAT IF WE HAVE THAT DIALOG, WE WOULD FIND A WAY TO DO
23 THIS FOR LESS THAN SIX CENTS A PAGE. AND I THINK HE IS
24 OFFERING THAT.

25 MR. HEMMINGER: I OFFERED THAT BEFORE. AND

1 IT'S NOT CALLED A "BLOWBACK"; IT'S CALLED "CREATING A
2 LOAD FILE."

3 MR. MANCINI: BUT I THINK THERE IS A SOLUTION
4 THAT WE CAN FIGURE OUT THAT'S LESS EXPENSIVE.

5 MR. HEMMINGER: WELL, ONCE AGAIN, THOUGH, WITH
6 THIS, PROVIDED THAT WE HAVE PRODUCTION NUMBERS TO CONTROL
7 THESE DOCUMENTS, AND ALSO PUTTING ON THEM THE
8 CONFIDENTIALITY DESIGNATION BECAUSE WE WILL NOT AND DO
9 NOT WANT TO PRODUCE DOCUMENTS WHICH ARE UNCONTROLLED.

10 MR. MANCINI: WE HAVE NO DISAGREEMENT WITH
11 THAT, YOUR HONOR.

12 THE COURT: OKAY. SO IT SOUNDS LIKE THIS IS
13 SOMETHING THAT I SHOULD SUBMIT, AND GIVE YOU AN
14 OPPORTUNITY TO WORK IT OUT.

15 MR. MANCINI: I WOULD AGREE, YOUR HONOR.

16 THE COURT: BECAUSE IT SOUNDS LIKE IF YOU
17 UNDERSTAND EACH OTHER, AND I'M NOT COMPLETELY SURE THAT
18 YOU DO, BUT I THINK YOU ARE CLOSER THAN YOU WERE BEFORE,
19 THAT THIS MIGHT BE SOMETHING THAT YOU CAN WORK OUT.

20 MR. MANCINI: I THINK THAT'S RIGHT, YOUR HONOR.

21 THE COURT: I CAN'T HELP BUT CONFUSE IT.

22 MR. MANCINI: WELL, YOU CAN HELP CERTAINLY IN
23 ONE RESPECT, WHICH, WITH ALL DUE RESPECT, WE THINK THAT
24 THIS COST SHOULD NOT BE BORNE BY US. BUT IF YOUR HONOR
25 IS INCLINED TO CAUSE US TO BEAR THAT -- AT LEAST WITH

1 RESPECT TO VIACOM'S DOCUMENTS -- WE BELIEVE THAT THIS IS
2 A SOLUTION THAT WE CAN WORK OUT WITH KROLL.

3 THE COURT: AND YOU ANTICIPATE THAT IT'S LESS
4 THAN SIX CENTS A PAGE THE WAY THAT YOU ARE --

5 MR. MANCINI: I WOULD THINK THAT WE CAN FIGURE
6 OUT A TECHNOLOGICAL FIX THAT WOULD BE LESS THAN THAT.

7 MR. HEMMINGER: I HOPE TO LEARN THAT
8 INFORMATION BECAUSE KROLL IS GENERALLY INFLEXIBLE, BUT
9 MORE POWER TO YOU.

10 MR. MANCINI: SO THE SECOND ISSUE, YOUR HONOR,
11 IS DEADLINES FOR PRODUCTION OF DOCUMENTS. THE FIRST
12 CATEGORY RELATES TO VIACOM ENTITIES. IT SEEMS THAT WE
13 HAVE AGREED WITH COUNSEL FOR VIACOM THAT THEY WILL
14 PRODUCE -- THAT THEY WILL COMPLETE THEIR REVIEW OF
15 DOCUMENTS THAT BAYTSP HAS IDENTIFIED AS BEING RESPONSIVE
16 FROM VIACOM-RELATED ENTITIES, AND PRODUCE TO US BY
17 FEBRUARY 15TH.

18 AS FOR NON-VIACOM-RELATED ENTITIES,
19 MR. HEMMINGER HAS REPRESENTED TO US, BUT WILL NOT COMMIT,
20 THAT HE BELIEVES IT WILL TAKE HIM SIX MONTHS. WE THINK
21 THAT THEY SHOULD BE ORDERED TO PRODUCE THOSE DOCUMENTS
22 WITHIN SIX MONTHS, OR ROUGHLY JUNE 15TH.

23 I BELIEVE THERE'S NO DISPUTE AS TO THE FEBRUARY
24 15TH DATE. I BELIEVE MR. HEMMINGER IS NOT WILLING TO
25 COMMIT TO JUNE 15TH, BUT WE THINK THAT THAT SHOULD BE

1 ORDERED BECAUSE THAT IS SUFFICIENT TIME; IT'S SIX MONTHS,
2 ESSENTIALLY.

3 MR. HEMMINGER: OF COURSE, IT WILL DEPEND ON
4 THE SCOPE OF WHAT WE END UP COMING OUT OF HERE. BUT WHAT
5 THIS INVOLVES IS NOTIFYING ALL OF THE THIRD PARTIES,
6 GETTING A RESPONSE BACK FROM THEM, ALLOWING THEM AT SOME
7 POINT TO INTERCEDE. I HAVE NO DOUBT THEY WILL WANT TO DO
8 THE SAME TYPE OF REVIEW THAT VIACOM IS DOING, AND VIACOM
9 RECEIVED ACCESS TO THIS EITHER -- SOMETIME IN OCTOBER, SO
10 WE ARE LOOKING AT FIVE MONTHS THERE. THAT DOESN'T EVEN
11 INCLUDE THE FIVE TO SIX MONTHS IT TOOK BAYTSP TO FILTER
12 AND PROCESS THE DATA TO GET IT THERE.

13 SO WHAT I TOLD COUNSEL WAS, I THINK INTERNALLY
14 THAT WE CAN HAVE THE BAYTSP REVIEW -- IN SEPARATING OUT
15 THE FEW NONRESPONSIVE DOCUMENTS THERE ARE AND PRIVILEGED
16 DOCUMENTS THAT MAY EXIST THAT AREN'T CALLED FOR -- WITHIN
17 ABOUT SIX MONTHS.

18 I DON'T KNOW ABOUT THE THIRD PARTIES BECAUSE,
19 FRANKLY, I HAVEN'T LOOKED AT THE SCOPE OF THAT AS TO
20 EXACTLY HOW MANY THERE ARE, HOW LONG IT'S GOING TO TAKE
21 THEM TO RESPOND AND SO FORTH.

22 AND THEN WE ALSO NEED TO WORK OUT A PROTECTIVE
23 ORDER IN THAT REGARD AS WELL. AND AGAIN, WE CAN
24 CERTAINLY WORK OUT A PROTECTIVE ORDER THAT IS -- TRY TO
25 ANTICIPATE THIRD PARTIES, BUT WE ARE NOT SURE WHAT THE

1 THIRD PARTIES WILL SAY ABOUT THE PROTECTIVE ORDER AND
2 WHETHER THEY THINK THE PROTECTIONS ARE SUFFICIENT.

3 MR. MANCINI: IF YOUR HONOR -- IF I MAY, I
4 WOULD LIKE TO SPEAK TO THE PROTECTIVE ORDER SECOND, AND
5 START WITH THE DEADLINE.

6 THE COURT: OKAY.

7 MR. MANCINI: SO WITH RESPECT TO THE DEADLINE,
8 IF HISTORY IS ANY GUIDANCE HERE, SOFT COMMITMENTS TO
9 PRODUCE BY A CERTAIN DATE HAVE NOT SERVED US WELL, WHICH
10 IS WHY WE ARE HERE. WE THINK THAT A COURT-ORDERED
11 DEADLINE FOR THE PRODUCTION OF THOSE DOCUMENTS BY JUNE
12 15TH IS MORE THAN FAIR, AND IT WILL GUIDE BAYTSP TOWARDS
13 COMPLIANCE. OTHERWISE, I FEAR IF WE HAVE -- JUST LIKE WE
14 HAVE HAD FOR THE LAST 13 MONTHS, SOFT DEADLINES, WE WILL
15 SIMPLY BE BACK BEFORE YOUR HONOR RATHER QUICKLY BECAUSE
16 WE HAVE NO ASSURANCE OF AN OUTSIDE DATE. AND WHAT AN
17 OUTSIDE DATE DOES IS CERTAINLY CRYSTALLIZE THE
18 OBLIGATIONS OF THE PARTIES TO PRODUCE IN A TIMELY
19 FASHION.

20 THE COURT: AND YOUR PROPOSED OUTSIDE DATE IS
21 JUNE 15TH?

22 MR. MANCINI: JUNE 15TH, YES.

23 THE COURT: CONCEPTUALLY, IS A FIRM DEADLINE
24 BETTER FOR YOU, WHETHER YOU AGREE WITH THE JUNE 15TH
25 DEADLINE OR NOT?

1 MR. HEMMINGER: WELL, WE CERTAINLY -- AND WHAT
2 WE CAN AGREE TO IS THAT WE WILL BE DONE WITH OUR REVIEW
3 BY JUNE 15TH. I'M NOT SURE WHAT OTHER THIRD PARTIES
4 WOULD SAY OR DO OR WHEN WE WOULD BE ABLE -- SO BY THAT
5 DATE WE COULD HAVE THE DOCUMENTS AVAILABLE FOR THIRD
6 PARTIES TO COME IN AND REVIEW. I DON'T KNOW HOW LONG
7 THEY WOULD TAKE. AND I JUST -- I'M WILLING TO COMMIT TO
8 THE HARD DEADLINE FOR THINGS THAT I CAN CONTROL, BUT NOT
9 THINGS I CAN'T.

10 MR. MANCINI: SO YOUR HONOR --

11 THE COURT: HOW MUCH DOES A THIRD PARTY KNOW
12 ABOUT -- I MEAN, OBVIOUSLY YOU CAN SAY TO THIRD PARTIES,
13 "WE ARE DOING THIS REVIEW AND WE HAVE A REVIEW THAT WE
14 HAVE TO DO BY COURT ORDER, AND WE HAVE COMMITTED THAT WE
15 CAN FINISH OUR REVIEW BY JUNE 15." WHEN CAN THEY START
16 THEIR REVIEW? IS THERE ANY WAY THAT THEY CAN START IT
17 EARLIER?

18 MR. HEMMINGER: AGAIN, I DON'T FULLY KNOW THE
19 SCOPE OF WHAT WE ARE TALKING ABOUT AND THE COMMITMENT
20 THAT BAYTSP WOULD HAVE TO HAVE TO REVIEW THE DOCUMENTS.
21 SO I DON'T KNOW IF I WOULD HAVE, YOU KNOW, EVERYBODY'S
22 DOCUMENTS AVAILABLE EARLIER. IF WE COULD, WE WOULD, BUT
23 MY GUESS IS IT'S GOING TO BE SOMETHING WE FIRST COLLECT
24 IT, DO A SEARCH, GO THROUGH, DO OUR PRIVILEGE AND
25 RESPONSIVENESS REVIEW TO THEM, AND WE WILL DO THAT ON THE

1 WHOLE THING. AND WE CAN DO THAT, AS I SAY -- IF WE LOOK
2 AT HISTORY, WHICH WAS IT TOOK US ABOUT SIX MONTHS TO GET
3 IT DONE BASED UPON THIS LIMITED SCOPE.

4 WE ARE A LITTLE BETTER AT IT. I THINK WE CAN
5 GET SOME EFFICIENCIES. AND INTERNALLY, WE CAN HAVE IT
6 READY FOR THIRD PARTIES TO REVIEW BY JUNE 15TH. WE
7 CERTAINLY WOULD TRY TO GET IT DONE EARLIER IF WE COULD.
8 BUT AS FAR AS A COMMITMENT, THAT'S ALL I CAN COMMIT TO.
9 I DON'T KNOW WHAT A THIRD PARTY IS GOING TO SAY.

10 THE COURT: CAN YOU DO IT PIECEMEAL? IN OTHER
11 WORDS, YOU CAN DO -- I DON'T KNOW HOW YOU WOULD ...

12 MR. HEMMINGER: PIECEMEAL ENDS UP BEING LESS
13 EFFECTIVE.

14 THE COURT: "PIECEMEAL" BEING THIS HUNK, AND
15 THEN IT'S DONE AND IT'S AVAILABLE TO THE PARTIES, AND
16 THEN THIS HUNK IS DONE AND AVAILABLE TO THE PARTIES. I
17 DON'T KNOW HOW YOU DEFINE THE "HUNK."

18 MR. HEMMINGER: THAT'S THE PROBLEM. WE WOULD
19 DO THE FILTERING ONCE, OKAY, AND WE WOULD DO ALL OF OUR
20 SEARCHES ON THE ONE THING. TO TRY TO DO IT IN PIECES,
21 YOU DON'T GET TO SEE THEN WHEN THERE ARE DUPLICATE
22 DOCUMENTS AND THINGS BECAUSE -- THE DATABASE IS PRETTY
23 GOOD, BUT YOU CAN SIT THERE AND, OKAY, HERE'S ALL THESE
24 DOCUMENTS THAT LOOK LIKE THEY ARE SIMILAR. OUR REVIEW IS
25 BETTER IF WE DO IT ONLY ONCE RATHER THAN COMING IN AND

1 LOOKING AT THEM MULTIPLE TIMES.

2 MR. MANCINI: SO I THINK YOUR HONOR'S
3 SUGGESTION IS A GOOD ONE. THERE OUGHT TO BE SOME ROLLING
4 OR PARALLEL-BASIS THAT THEY CAN MAKE THESE DOCUMENTS
5 AVAILABLE TO THESE VARIOUS THIRD PARTIES SO THAT WE CAN
6 HAVE PRODUCTION ON JUNE 15TH. OTHERWISE, I FEAR THAT IF
7 THEY ARE FIRST GOING TO MAKE THEM AVAILABLE ON JUNE 15TH,
8 THERE COULD BE ANOTHER SEVERAL-MONTH DELAY FOR THESE
9 THIRD PARTIES TO REVIEW. WHY NOT HAVE PARALLEL
10 PRODUCTION TO THESE THIRD PARTIES SO THEY CAN REVIEW IT
11 AT THE SAME TIME, AND WE CAN GO BE DONE BY JUNE 15TH.

12 MR. HEMMINGER: WE CAN'T HAVE PARALLEL
13 PRODUCTION BECAUSE I CAN'T GIVE -- JUST LIKE I CAN'T GIVE
14 VIACOM HBO'S INFORMATION TO LOOK AT, I CAN'T GIVE FOX
15 HBO'S INFORMATION. SO WE HAVE TO GO THROUGH, DO OUR
16 REVIEW, THEN SORT THEM OUT. AND IT JUST -- TO TAKE A
17 REVIEW AND, FOR EXAMPLE, SEARCH ON ENTITIES FOR ANY ONE
18 OF THESE PEOPLE, WE END UP LOOKING AT THEM TWICE. WHILE
19 IT WOULD BE NICE TO DO THAT, THAT IS NOT THE REALITIES OF
20 ELECTRONIC DISCOVERY.

21 ELECTRONIC DISCOVERY IS A MARVELOUS THING FOR
22 HANDLING LARGE GROUPS OF DOCUMENTS, LETS YOU LOOK AT
23 THEM, BUT IT DOESN'T NECESSARILY MAKE THE TASK THAT MUCH
24 QUICKER. IT ALLOWS YOU TO DO SOMETHING THAT YOU COULDN'T
25 DO, WHICH IS TO LOOK AT --

1 THE COURT: BUT TO SEARCH IT, YOU PUT A SEARCH
2 TERM INTO IT AND PULL THINGS OUT, RIGHT?

3 MR. HEMMINGER: WE COME UP WITH SEARCH TERMS;
4 WE FILTER IT ON THAT. AND THEN WHEN YOU HAVE A MILLION
5 DOCUMENTS, OKAY, THEN YOU HAVE TO START MANIPULATING
6 THOSE AND YOU LOOK AT ALL OF THOSE AND YOU DO YOUR
7 SEARCHES. AND IF WE BREAK IT UP INTO PIECES, WE ARE
8 GOING TO BE DOING THOSE SEARCHES MULTIPLE TIMES AND NOT
9 GETTING THE BENEFIT OF LOOKING AT IT IN ITS ENTIRETY
10 ONCE.

11 THE COURT: YOU COULDN'T TAKE ONE ENTITY AND
12 THEN PUT ALL OF THE CATEGORIES THAT YOU ARE LOOKING FOR
13 AND DO IT FOR THAT ONE ENTITY?

14 MR. HEMMINGER: THAT IS GROSSLY INEFFICIENT.
15 YOU COULD, BUT IT'S GROSSLY INEFFICIENT AND WILL END UP
16 COSTING A LOT MORE MONEY TO GO THROUGH IT. I MEAN,
17 THAT'S THE ISSUE. I MEAN -- AND IT'S JUST -- YOU COULD
18 DO ANYTHING, BUT IT TAKES TIME AND MONEY. AND THE MORE
19 YOU BREAK IT UP, THE MORE TIME IT'S GOING TO TAKE.

20 THE COURT: EXCEPT THEY WOULD HAVE ROLLINGS ON
21 THE END OF IT.

22 MR. MANCINI: SO YOUR HONOR, THERE MAY BE A
23 SOLUTION. THEY CAN CERTAINLY -- AND I THINK WE HAVE
24 HEARD THIS MORNING A FEW ENTITIES LIKE FOX AND
25 UNIVERSAL -- THEY CAN CERTAINLY PRIORITIZE A FEW SO THAT

1 WE CAN GET SOME ROLLING PRODUCTION EARLIER. OTHERWISE --

2 THE COURT: WELL, DO YOU HAVE PRIORITIES? I
3 MEAN, ARE THERE THINGS THAT YOU ARE MORE INTERESTED IN
4 HAVING FIRST?

5 MR. MANCINI: OTHER THAN THE LIST THAT WE HEARD
6 THIS MORNING, WE DON'T KNOW THE UNIVERSE THAT WE ARE
7 BIDDING AGAINST. BUT PERHAPS IF WE SAW THAT LIST, WE CAN
8 IDENTIFY THOSE THAT WE WOULD WANT TO PRIORITIZE SO THAT
9 WE CAN GET THEM EVEN EARLIER.

10 THE COURT: IS THERE ANY REASON YOU CAN'T SIT
11 DOWN AND TALK ABOUT THE LIST SO HE CAN --

12 MR. HEMMINGER: THE CLIENTS ARE CONFIDENTIAL.
13 I HAVE TO TALK TO THE CLIENTS BEFORE I CAN EVEN TELL
14 YOUTUBE POTENTIAL -- AND WE HAVE HUGE -- I KNOW YOU SAY
15 SIX MONTHS. BY GOLLY, THAT'S A LONG TIME. THAT REQUIRES
16 A WHOLE LOT OF WORK AND PROCESSING. SO I MEAN, EVEN IF
17 WE WERE ABLE TO DO IT IN PIECES, AT MOST WE ARE MAYBE
18 TALKING ABOUT A MONTH EARLIER TO GET THESE BROKEN UP INTO
19 PIECES, WHICH IS IN MY VIEW NOT WORTH JUSTIFYING THE
20 BREAKING UP INTO PIECES.

21 THE COURT: AND THE CASE MEETS A SCHEDULE IN
22 NEW YORK?

23 MR. HEMMINGER: I DON'T KNOW.

24 MR. MANCINI: WELL, THAT'S EXACTLY WHAT I WAS
25 ABOUT TO SAY, YOUR HONOR. ALTHOUGH THERE IS NO

1 DEFINITIVE SCHEDULE, THE PARTIES ARE SCHEDULING
2 DEPOSITIONS FOR THE FIRST QUARTER OF '09 NOW. AND AS YOU
3 HAVE HEARD THIS MORNING, THESE DOCUMENTS ARE A GATING
4 ISSUE TO SCHEDULING THESE DEPOSITIONS. SO NOW WE ARE
5 HEARING POSSIBLY BY JUNE 15TH. IT WILL HAVE A
6 DETRIMENTAL IMPACT ON THAT SCHEDULE IF WE MAY NOT BE
7 GETTING DOCUMENTS UNTIL PERHAPS EVEN THREE MONTHS LATER,
8 IF I UNDERSTAND MR. HEMMINGER'S PROPOSAL. YOU ARE
9 TALKING ABOUT SCHEDULING DEPOSITIONS OUT TO THE FALL OF
10 '09, BECAUSE THESE DOCUMENTS ARE ESSENTIAL FOR SOME OF
11 THESE DEPOSITIONS.

12 THE COURT: AND I TAKE IT THAT THE JUDGE IN NEW
13 YORK DOESN'T YET KNOW ABOUT HOW COMPLEX THIS IS.

14 MR. MANCINI: I DON'T BELIEVE -- CORRECT.

15 THE COURT: SO YOU HAVE FURTHER STATUS
16 CONFERENCES IN FRONT OF HIM?

17 MR. MANCINI: INDEED. WE HAVE THEM QUITE
18 REGULARLY ABOUT THE DISCOVERY. THERE IS NO SCHEDULE, BUT
19 THERE IS A COMMITMENT BY BOTH PARTIES TO SCHEDULE
20 DEPOSITIONS AS QUICKLY AS POSSIBLE, AND THEY ARE ONGOING.
21 BUT THIS WILL BE A GATING ISSUE FOR SEVERAL DEPOSITIONS.

22 THE COURT: SO YOU NEED SIX MONTHS IS WHAT YOU
23 ARE SAYING?

24 MR. HEMMINGER: IF YOU ARE GOING TO MAINTAIN --
25 AND I STILL WOULD LIKE TO GO THROUGH THESE BECAUSE I

1 DON'T THINK YOUR COMMENTS, SUCH AS NO. 5 "SHOULD BE
2 NARROWED," MAKES ANY SENSE WHEN YOU HAVE ONES THAT ARE
3 BROADER THAN THAT WHICH SWEEP WITHIN THE SCOPE.

4 THE COURT: SO LET'S GO THROUGH THEM.

5 MR. MANCINI: WELL, YOUR HONOR, THERE ARE A
6 COUPLE OF THESE THAT I THINK ARE EASY, AND THEN WE CAN
7 GET DO THAT ARGUMENT.

8 THE COURT: OKAY.

9 MR. MANCINI: SO THE NEXT IS THE PRIVILEGE LOG.
10 AGAIN, RELATING NOW JUST TO VIACOM, IT SEEMS THAT WE HAVE
11 AN AGREEMENT THAT VIACOM WILL PRODUCE ITS FIRST PRIVILEGE
12 LOG ON OR ABOUT JANUARY 15TH -- ASSUMING THAT'S NOT A
13 WEEKEND -- AND THEN A ROLLING PRODUCTION OF PRIVILEGE
14 LOGS TWO WEEKS THEREAFTER. TWO WEEKS AFTER THE
15 COMPLETION OF --

16 THE COURT: JANUARY 15TH IS A THURSDAY.

17 MR. MANCINI: FINE. SO THE FIRST PRIVILEGE LOG
18 BY JANUARY 15TH, ROLLING PRIVILEGE LOGS TWO WEEKS AFTER
19 PRODUCTIONS, WITH THE FINAL ONE TWO WEEKS AFTER THE
20 COMPLETION DATE OF FEBRUARY 15TH. I THINK WE ARE IN
21 AGREEMENT ON THAT.

22 MR. HIBBARD: WE ARE, YOUR HONOR.

23 THE COURT: OKAY.

24 MR. MANCINI: SO THE NEXT ITEM IS SEARCH TERMS,
25 YOUR HONOR. IT SEEMS THAT WE HAVE AGREED WITH

1 MR. HEMMINGER THAT WE WOULD MEET AND CONFER ON A PROCESS
2 WHERE WE WILL BOTH EXCHANGE TOPICS FOR SEARCH TERMS --
3 NOW THESE ARE AS THEY APPLY TO THIRD PARTIES -- AND THAT
4 WE WILL RESOLVE BY MONTH END TO AGREE ON A DEFINITIVE
5 LIST OF SEARCH TERMS SO IT DOES NOT DELAY THE COLLECTION
6 OF DOCUMENTS FROM THIRD PARTIES.

7 MR. HEMMINGER: PROVIDED I GET APPROVAL FROM
8 THE THIRD PARTIES TO EVEN REVEAL WHO THEY ARE TO PUT
9 THEIR NAMES IN THE SEARCH.

10 THE COURT: HOW FAST ARE YOU GOING TO BE ABLE
11 TO DO THAT?

12 MR. HEMMINGER: YOUR HONOR, I DON'T KNOW.
13 I DON'T KNOW THE FULL SCOPE OF THE LIST, BUT I WOULD
14 THINK THAT WITHIN THE NEXT -- BY A WEEK FROM FRIDAY
15 I COULD GET LETTERS OUT TO EVERYBODY TELLING THEM ABOUT
16 THE SUBPOENA AND ASKING IF WE COULD REVEAL THEIR NAME TO
17 YOUTUBE UNDER THE TERMS OF THE EXISTING PROTECTIVE ORDER.
18 IF THEY WON'T DO IT ON THAT, WE WILL TRY TO FIGURE OUT
19 WHAT OTHER TERMS WE COULD REVEAL THE INFORMATION FROM.

20 THE COURT: IF THEY DON'T DO THAT, THEN WHAT?

21 MR. MANCINI: SO WITH RESPECT TO THAT -- THAT
22 ACTUALLY TAILS TO THE NEXT ISSUE, WHICH IS A PROTECTIVE
23 ORDER. WE HAVE SAID TO MR. HEMMINGER THAT WE ARE HAPPY
24 TO SIT WITH HIM AND CONSIDER SUGGESTIONS THAT HE HAS TO
25 THE PROTECTIVE ORDER, PERHAPS CHANGE THE VENUE IF HE

1 WANTS, OR PERHAPS HAVE A THIRD-PARTY-SPECIFIC PROTECTIVE
2 ORDER. WE THINK THAT THAT SOLVES ALL OF THESE THIRD
3 PARTY CONFIDENTIALITY CONCERNS. IF HE WANTS TO VENUE IT
4 HERE, WE ARE AMENABLE TO THAT, BUT WE SHOULD DO THAT
5 QUICKLY SO THAT TOO IS NOT A GATING ISSUE.

6 THE COURT: THEN YOU WOULD HAVE A PROTECTIVE
7 ORDER TO TAKE TO THE INDIVIDUALS TO SAY "THIS IS THE
8 PROTECTION ORDER." THAT WOULD MAKE IT EASIER FOR YOU,
9 PROBABLY.

10 MR. HEMMINGER: WELL, WHAT I WOULD DO INITIALLY
11 IS SEE IF THEY WOULD AGREE TO THE EXISTING PROTECTIVE
12 ORDER -- AT LEAST REVEALING THEIR NAMES, WE COULD GET THE
13 SEARCH TERMS. AND WE WOULD WORK QUICKLY TRYING TO COME
14 UP WITH NEW TERMS AND SO FORTH FOR THE PROTECTIVE ORDER
15 THAT WE HOPE WOULD SATISFY OUR CUSTOMERS.

16 THE COURT: SO LET'S SET A SCHEDULE FOR WORKING
17 ON A PROTECTIVE ORDER BECAUSE THAT SEEMS THAT THAT'S KIND
18 OF IMPORTANT TO DO.

19 MR. MANCINI: WE WOULD ACTUALLY SUBMIT, YOUR
20 HONOR -- BECAUSE WE HAVE DONE THIS MANY TIMES -- THAT WE
21 WOULD ACTUALLY SUBMIT SOMETHING TO YOUR HONOR BY MONTH
22 END, WHICH SHOULD NOT BE A DIFFICULT THING TO DO.

23 THE COURT: WELL, YOU NEED TO DO A LOT OF MEET
24 AND CONFER ABOUT IT TO MAKE SURE THAT ALL OF THE ISSUES
25 ARE RESOLVED.

1 MR. HEMMINGER: I THINK MONTH END IS REASONABLE
2 TO SUBMIT A PROTECTIVE ORDER OR COME TO YOU WITH ANY
3 ISSUES WE HAVE.

4 THE COURT: "MONTH END" BEING THE DECEMBER
5 MONTH?

6 MR. HEMMINGER: YES.

7 THE COURT: WELL, IT'S A COMPLICATED MONTH, AND
8 I WANTED TO MAKE SURE THAT'S WHAT YOU MEANT.

9 MR. MANCINI: YES.

10 MR. HEMMINGER: YES, I DID MEAN DECEMBER.

11 THE COURT: SO DECEMBER 31ST?

12 MR. MANCINI: YES. PERHAPS WE SHOULD JUST SAY
13 THE 30TH, YOUR HONOR, FOR THE HOLIDAY.

14 THE COURT: RIGHT. SINCE YOU WOULD PROBABLY
15 LIKE TO GO PARTY, PERHAPS.

16 MR. MANCINI: AT LEAST MY KIDS WOULD.

17 MR. HEMMINGER: DEPENDING ON YOUR RULING, I
18 WON'T BE PARTYING MUCH.

19 THE COURT: YOUR LIFE IS FILLED WITH THIS, SO
20 YOU HAVE ALWAYS GOT TO TAKE OCCASIONS IN THE MIDDLE OF IT
21 TO PARTY.

22 MR. MANCINI: SO YOUR HONOR, I BELIEVE WE HAVE
23 WORKED OUT THE ITEMS THAT WE ARE ABLE TO.

24 I THINK MR. HEMMINGER WANTS TO SPEAK TO THIRD
25 PARTY DISCOVERY.

1 THANK YOU, YOUR HONOR.

2 THE COURT: THANK YOU.

3 MR. HEMMINGER: YOU INDICATED IN YOUR TENTATIVE
4 THAT YOU THOUGHT NO. 5 WOULD HAVE TO BE NARROWED. AND
5 NO. 5 TALKS ABOUT ALL DOCUMENTS AND COMMUNICATIONS
6 CONCERNING BAYTSP'S RELATIONSHIP WITH ANY THIRD PARTY
7 CONCERNING THE MONITORING, SEARCHING OR SCREENING OF THE
8 YOUTUBE WEB SITE FOR ALLEGED VIOLATIONS, INCLUDING BUT
9 NOT LIMITED TO, SERVICE CONTRACTS, INVOICES OR
10 AGREEMENTS. MAYBE GETTING SOME INFORMATION TO YOU AS FAR
11 AS NARROWING WILL HELP ME IN EXPLAINING WHAT THESE ARE.
12 WHAT WERE YOUR THOUGHTS THAT THIS NEEDED TO BE NARROWED?

13 THE COURT: WELL, TO LIMIT THE PRODUCTION TO
14 VIACOM AND VIACOM-RELATED ENTITIES. IS THAT ONE WAY OF
15 LIMITING IT? I MEAN, I'M KIND OF SHOOTING IN THE DARK
16 WHEN I COME UP WITH LIMITING, SINCE I DON'T KNOW AS MUCH
17 ABOUT THIS AS YOU DO.

18 MR. HEMMINGER: AND IN FACT, WE HAVE NO PROBLEM
19 AND WE HAVE COLLECTED UP THE DOCUMENTS RESPONSIVE TO THE
20 REQUEST, NOTWITHSTANDING OUR OBJECTIONS FOR THE VIACOM
21 AND VIACOM-RELATED ENTITIES AND THE FOOTBALL LEAGUE
22 THINGS. WE HAVE ALREADY DONE THAT NARROWING.

23 THE COURT: OKAY.

24 MR. HEMMINGER: AND IF THAT, IN FACT, IS A
25 NARROWING, CAN WE LOOK AT NO. 1? IT SAYS, "ALL DOCUMENTS

1 AND COMMUNICATIONS CONCERNING BAYTSP'S MONITORING,
2 SEARCHING OR SCREENING OF YOUTUBE." THAT THEN JUST
3 BRINGS BACK EVERYTHING THAT WE WERE TALKING ABOUT IN
4 NO. 5 AND EVERYTHING. IT RELATES TO ALL COMMUNICATIONS
5 WITH THIRD PARTIES AND, YOU KNOW, A HUGE PIECE OF OUR
6 BUSINESS. SO THIS IS WHERE WE GET INTO ALL OF THESE
7 ISSUES WITH THESE THIRD PARTIES AND THEN THEIR LACK OF
8 RELEVANCE.

9 THE COURT: "ALL DOCUMENTS AND COMMUNICATIONS
10 CONCERNING MONITORING, SEARCHING AND SCREENING OF
11 YOUTUBE." SO WHAT DOES THAT MEAN TO YOU? BECAUSE IT'S
12 HARD FOR ME TO TELL WITH THESE AS TO WHAT THAT MEANS FROM
13 YOUR POINT OF VIEW.

14 MR. HEMMINGER: THAT MEANS EVERY CLIENT, EVERY
15 CUSTOMER WE HAVE THAT HAS WITHIN IT ANYTHING RELATING TO
16 "PLEASE GO OUT AND MONITOR OUR CONTENT" BECAUSE YOUTUBE
17 OBVIOUSLY IS A SITE THAT'S MONITORED. SO THAT THEN JUST
18 BRINGS IN ALL OF THE EFFORT -- PROBABLY EVERYTHING AT
19 BAYTSP.

20 THE COURT: IS THERE ANY WAY THAT THAT CAN BE
21 MORE SPECIFIC?

22 MR. KRAMER: YOUR HONOR, DAVID KRAMER FROM
23 WILSON SONSINI. MAY I SPEAK TO THESE ISSUES?

24 THE COURT: SURE.

25 MR. KRAMER: THANK YOU, YOUR HONOR.

1 YOUR HONOR, THAT REALLY IS THE WHOLE BALL OF
2 WAX HERE. THE QUESTION IS, THIS IS A COMPANY WHOSE
3 EXISTENCE IS MONITORING THE ONLINE WORLD FOR ALLEGED
4 INSTANCES OF COPYRIGHT INFRINGEMENT. VIACOM'S
5 ALLEGATIONS IN THIS CASE, COUPLED WITH THE PLAINTIFF
6 PUTATIVE CLASS ACTION ALLEGATIONS IN THIS CASE, ARE THAT
7 YOUTUBE IS A PIRATE SITE, THAT YOUTUBE IS RIFE WITH
8 INFRINGING CONTENT, THAT YOUTUBE KNOWS SIMPLY BY VIRTUE
9 OF SEEING THE CONTENT THAT IT IS UNAUTHORIZED INFRINGING
10 CONTENT -- NOT JUST FOR VIACOM, BUT YOUTUBE SHOULD KNOW
11 SIMPLY BY SEEING A PARTICULAR PIECE OF PROFESSIONAL
12 CONTENT THAT THAT CONTENT IS UNAUTHORIZED. AND BECAUSE
13 OF THAT, YOUTUBE SHOULD BE HELD LIABLE FOR COPYRIGHT
14 INFRINGEMENT FOR ALL VIACOM CONTENT THAT'S ON THE SERVICE
15 AND FOR ALL OF THE PUTATIVE CLASS PLAINTIFFS' CONTENT
16 THAT'S ON THE SERVICE.

17 AND I SHOULD POINT OUT THE PUTATIVE CLASS
18 ACTION HERE IS ON BEHALF OF EVERY COPYRIGHT HOLDER IN THE
19 WORLD CLAIMING THAT THEIR CONTENT HAS BEEN UPLOADED TO
20 YOUTUBE WITHOUT AUTHORIZATION. NO CLASS VERIFICATION
21 YET, BUT THAT'S THE SCOPE OF THE CASE THAT WE ARE DEALING
22 WITH.

23 BAYTSP SPENDS ITS DAYS REVIEWING YOUTUBE
24 LOOKING FOR CONTENT -- BAYTSP -- ON BEHALF OF NOT JUST
25 VIACOM, BUT ALL SORTS OF THIRD PARTIES. AND WHAT IS

1 CRITICAL IN THIS CASE IS THAT THIRD PARTIES AND VIACOM
2 USE YOUTUBE FOR ITS PROMOTIONAL VALUE. THEY FLOOD THE
3 SERVICE WITH CONTENT THEY PUT THERE THEMSELVES; THEY WANT
4 IT TO BE THERE. AND THEN THEY HAVE TO TELL BAYTSP,
5 "WELL, HERE'S THE CONTENT WE WANT ON YOUTUBE. DON'T TAKE
6 THIS CONTENT DOWN. HERE'S THE CONTENT WE DON'T WANT. GO
7 GET THIS CONTENT OFF."

8 IN ORDER TO DEMONSTRATE THE SCALE OF THAT
9 ISSUE, WHAT WE CALL STEALTH OR VIRAL MARKETING, IT'S
10 CRITICAL THAT WE NOT JUST BE LIMITED TO WHAT VIACOM IS
11 DOING. ALTHOUGH WE ARE QUITE SURE THAT THERE IS A
12 SIGNIFICANT AMOUNT OF STEALTH AND VIRAL MARKETING BY
13 VIACOM, WE NEED TO BE ABLE TO PRESENT THE PICTURE TO THE
14 JURY THAT REFUTES THE SUGGESTION THAT YOUTUBE SHOULD KNOW
15 IT WHEN IT SEES IT. BECAUSE THERE IS THIS UNIVERSE OF
16 CONTENT OWNERS IN THE WORLD FILLING YOUTUBE WITH CONTENT
17 THAT IS AUTHORIZED, THAT THEY WANT TO BE THERE. THERE IS
18 A HOST OF OTHER CONTENT THAT THE WORLD OF CONTENT OWNERS
19 IS AWARE OF ON YOUTUBE AND INSTRUCTS BAYTSP NOT TO
20 REMOVE.

21 SO THAT'S WHY THESE REQUESTS SWEEP NOT JUST TO
22 VIACOM, BUT TO THE ACTIVITIES OF OTHER PARTIES WHOM
23 BAYTSP REPRESENTS. BAYTSP WILL HAVE THE INSTRUCTIONS
24 THAT THESE PARTIES PROVIDE SAYING, "THIS IS AUTHORIZED
25 CONTENT. ALL OF THIS CONTENT IS AUTHORIZED. THIS

1 CONTENT WE WANT YOU TO TAKE DOWN."

2 THERE'S MORE, AND WE DISCUSSED THIS IN OUR
3 SEPARATE STATEMENT AT SOME LENGTH -- IT'S ON PAGE 3 AND 4
4 OF OUR REPLY BRIEF IN SOME DETAIL -- AND IT WAS NOT
5 RESPONDED TO BY BAY.

6 ANOTHER CRITICAL ISSUE IS, AND MR. MANCINI
7 REFERENCED IT IN HIS REMARKS, BUT WHEN BAYTSP TAKES STUFF
8 DOWN, THEY ROUTINELY MAKE MISTAKES. IT'S NOT A HANDFUL
9 OF EXAMPLES THAT WE PUT INTO THE COURT AS EXAMPLES; IT'S
10 ON A REGULAR BASIS. POSSESSED OF ALL OF THE INFORMATION
11 THAT BAYTSP HAS ABOUT WHO OWNS WHAT AND WHETHER CONTENT
12 IS AUTHORIZED, BAYTSP ROUTINELY SENDS NOTICES TO YOUTUBE
13 ASKING IT TO REMOVE STUFF THAT THE USER HAD EVERY RIGHT
14 TO POST, THAT'S THERE WITH AUTHORIZATION. AND THAT
15 DEMONSTRATES AGAIN THAT YOUTUBE CAN'T POSSIBLY KNOW WHEN
16 IT'S LOOKING AT CONTENT ON THE SERVICE WHETHER OR NOT
17 IT'S AUTHORIZED.

18 IF BAYTSP CAN'T KNOW -- ACTING AS THE AGENT FOR
19 THESE COPYRIGHT HOLDERS -- WHETHER CONTENT IS OR IS NOT
20 AUTHORIZED, THEN IT ROUTINELY IS MAKING MISTAKES. SURELY
21 YOUTUBE, WHICH IS MERELY A PASSIVE REPOSITORY FOR CONTENT
22 THAT USERS ARE UPLOADING TO THE SERVICE -- HOW IS YOUTUBE
23 SUPPOSED TO KNOW?

24 THAT KNOWLEDGE ISSUE, "YOU KNOW IT WHEN YOU SEE
25 IT," IS CRITICAL TO VIACOM'S CLAIMS; IT'S CRITICAL TO

1 YOUTUBE'S DEFENSES.

2 THE COURT: IT'S LIKE YOU DON'T EVEN KNOW IT
3 WHEN YOU SEE IT.

4 MR. KRAMER: OH, CERTAINLY NOT, YOUR HONOR.
5 CERTAINLY, YOUTUBE CAN'T KNOW IT WHEN IT SEES IT BECAUSE
6 VIACOM IS ROUTINELY UPLOADING THIS CONTENT ITSELF TO THE
7 YOUTUBE SERVICE, OR WHEN IT'S AWARE OF THAT CONTENT ON
8 THE SERVICE, CHOOSING TO LEAVE IT THERE AND INSTRUCTING
9 ITS AGENT NOT TO TAKE IT DOWN, EVEN IF VIACOM DIDN'T PUT
10 IT THERE ITSELF.

11 SO THAT'S WHAT'S AT ISSUE WITH BAYTSP, AND THAT
12 KNOWLEDGE ISSUE IS ONE OF THE MOST IMPORTANT PARTS OF THE
13 CASE. MR. MANCINI STARTED HIS REMARKS BY SAYING THE
14 DOCUMENTS SOUGHT FROM BAYTSP ARE AMONG THE MOST IMPORTANT
15 IN THE CASE. HE IS NOT OVERSTATING THE ISSUE.

16 THERE IS ONE OTHER POINT TO MAKE HERE, AND THAT
17 IS WITH RESPECT TO THE WAY THAT YOUTUBE COMPARES TO OTHER
18 ONLINE SERVICES. AS I SAID, VIACOM IN THE PUTATIVE CLASS
19 WANTS TO PAINT YOUTUBE AS A PIRATE SITE, AS A SITE THAT
20 WANTS TO BENEFIT FROM COPYRIGHT INFRINGEMENT. IN FACT,
21 YOUTUBE DOES FAR MORE THAN ANY OTHER SITE ON THE
22 INTERNET, AS FAR AS WE CAN TELL, TO PROTECT THE RIGHTS OF
23 COPYRIGHT OWNERS. THEY ARE FAR MORE RESPONSIVE THAN ANY
24 OTHER SITE, AS FAR AS WE KNOW, TO REQUESTS TO REMOVE
25 CONTENT. THEY HAVE FAR BETTER TOOLS.

1 AND BAYTSP'S INTERNAL DOCUMENTS -- BECAUSE THEY
2 ARE CHARGED NOT WITH JUST POLICING YOUTUBE, BUT POLICING
3 THE ENTIRE WEB -- BAYTSP'S INTERNAL DOCUMENTS WILL SHOW
4 HOW MUCH BETTER YOUTUBE IS THAN ALL OF THESE OTHER SITES
5 AND -- WE THINK -- UNDERMINE VIACOM'S POSITION THAT
6 YOUTUBE IS A SLACKER, THAT YOUTUBE WANTS THIS STUFF ON
7 THE WEB. YOUTUBE IS IN FACT AN INDUSTRY LEADER.

8 SO THAT'S A BRIEF SUMMARY. AS I SAY, IT'S IN
9 OUR PAPERS, AND IT WAS NOT RESPOND TO DO, BUT I THOUGHT I
10 WOULD PROVIDE THAT CLARIFICATION.

11 MR. HEMMINGER: WELL, WE DISAGREE IT WAS NOT
12 RESPONDED TO -- PERHAPS NOT IN GREAT DETAIL.

13 HOWEVER, A COUPLE OF POINTS HAVE COME UP. HE
14 HAS INDICATED HE WANTED INSTRUCTIONS -- WELL, PERHAPS IF
15 WE WERE LIMITED TO THE INSTRUCTIONS. ALSO, HE IS TALKING
16 ABOUT WHEN THERE WERE COMMUNICATIONS BACK FROM THE
17 COPYRIGHT HOLDER AS TO A COMPLAINT THAT, I'M SORRY, I
18 THINK IT WAS IMPROPERLY -- I THINK IT WAS PROPERLY POSTED
19 AND WE THINK IT IS NOT SOMEBODY'S COPYRIGHT, LIMITED TO
20 THE COMMENTS BACK. IF THOSE ARE THE TYPES OF THINGS THEY
21 ARE TALKING ABOUT, IT IS MUCH EASIER TO GO THROUGH ON A
22 MUCH SMALLER SCOPE TO GO FIND THOSE TYPES OF DOCUMENTS.

23 THERE'S ANOTHER ISSUE THAT COMES UP, WHICH WE
24 REALLY HAVEN'T TALKED ABOUT, BECAUSE PREVIOUSLY THE
25 AGREEMENT WAS THE SCOPE WOULD BE LIMITED TO YOUTUBE.

1 THERE ARE OTHER CLIENTS THAT BAYTSP HAS, MOVIE
2 MANUFACTURERS -- OR PRODUCERS THAT MAKE THE FILMS. AND I
3 MENTIONED EARLIER THAT WE HAVE CLIENTS WHO WANT TO KNOW
4 WHEN AND WHERE A DIGITAL COPY OF A MOVIE SHOWED UP ON THE
5 INTERNET. NOW, THAT HAS ABSOLUTELY NOTHING TO DO WITH
6 THE YOUTUBE-TYPE SITE FOR THE POSTING. THIS IS ACTUALLY
7 INFORMATION ABOUT WHERE, IN FACT, PEOPLE ARE -- IT'S A
8 SERVICE CALLED FIRST SOURCE WHERE BAYTSP SAYS, "WHICH WEB
9 SITE WAS THE FIRST SOURCE FOR THE DOWNLOAD OF -- FOR THE
10 LAST RELEASE OF THE JAMES BOND MOVIE," SO THAT THEN THE
11 COPYRIGHT OWNER COULD FIGURE OUT IF THEY WANT TO PROCEED
12 OR WHAT PROTECTION. THAT HAS NOTHING TO DO WITH THE
13 ISSUES IN THIS LAWSUIT.

14 SO THE THING IS THEN TO LIMIT THAT AND
15 ELIMINATE THE WORK THAT BAYTSP IS DOING FOR MOVIE
16 PRODUCERS AND/OR DISTRIBUTORS IN THAT REGARD, BECAUSE
17 IT'S COMPARING APPLES AND ORANGES.

18 AND I THINK, IF I HEARD COUNSEL RIGHT, IT'S THE
19 INSTRUCTIONS AND THE COMMENTS BACK THAT THEY THINK ARE
20 THE MOST RELEVANT. I'M GOING TO WITHHOLD MY COMMENTS
21 WITH REGARD TO WHETHER I THINK THEY ARE RELEVANT, BUT AT
22 LEAST THAT WOULD PUT A LIMIT ON THE INFORMATION THAT THEY
23 ARE GOING -- AND STREAMLINE THE ABILITY TO, ONE, GET
24 APPROVAL FROM THE CLIENTS, AND TWO, PRODUCE THEM AND GET
25 THE DOCUMENTS TO THEM SOONER.

1 MR. KRAMER: SORRY, YOUR HONOR, DOING THIS ON
2 THE FLY AND NARROWING IT IS VERY DIFFICULT. AS I SAID,
3 THIS WASN'T IN OUR -- THIS WASN'T IN THEIR PAPERS AND IT
4 WAS IN OURS, AND THESE REQUESTS HAVE BEEN OUTSTANDING FOR
5 MORE THAN A YEAR.

6 THE COURT: NO, AND THIS ENDED UP BEING A MUCH
7 BIGGER MONSTER THAN IT LOOKED LIKE ON PAPER WHEN I WALKED
8 OUT HERE.

9 MR. KRAMER: I UNDERSTAND, YOUR HONOR. I
10 UNDERSTAND, AND I APOLOGIZE FOR IT BEING THE MONSTER THAT
11 IT IS, BUT WE ARE DEALING WITH IT IN THE DAY-TO-DAY OF
12 THE LITIGATION.

13 THE COURT: BUT ABSOLUTELY. I MEAN, THERE ARE
14 A LOT OF ISSUES HERE WE ARE GOING TO HAVE TO ADDRESS AND
15 THEN PARSE THEM OUT.

16 MR. KRAMER: SO WITH RESPECT TO THE FIRST
17 SOURCE SERVICE, YOU KNOW, THINKING ABOUT IT, AS I SAY,
18 "ON THE FLY," I CAN THINK OF REASONS WHY THAT ACTUALLY
19 WOULD BE RELEVANT, BECAUSE PARAMOUNT IS ONE OF THE
20 PLAINTIFFS IN THIS ACTION. PARAMOUNT WANTS TO KNOW WHEN
21 AND WHERE ITS MOVIES APPEARED ONLINE. IF A PORTION OF
22 THAT MOVIE APPEARED ON YOUTUBE AND PARAMOUNT IS CHOOSING
23 TO SUE YOUTUBE OVER THAT ALLEGED INFRINGEMENT, THEN WHEN
24 AND WHERE THAT CONTENT APPEARED FIRST ONLINE WILL THEN
25 FORM THE QUESTION OF HOW LONG IT'S BEEN THERE, WHETHER

1 VIACOM TOOK STEPS TO MITIGATE DAMAGES, WHETHER IT
2 ACTUALLY REQUESTED THE REMOVAL OF THE CONTENT FROM THE
3 ORIGINAL SOURCE.

4 IF VIACOM, KNOWING THROUGH FIRST SOURCE THAT
5 ITS CONTENT WAS ON THE WEB JANUARY OF 2004, DID NOTHING
6 ABOUT IT AND CHOSE TO LEAVE IT THERE FOR FOUR YEARS, IT'S
7 HARDLY IN A POSITION TO CLAIM THAT IT WAS DAMAGED TO THE
8 TUNE OF HUNDREDS OF THOUSANDS OF DOLLARS BY HAVING A
9 SHORT CLIP OF THAT FILM ACCESSIBLE THROUGH YOUTUBE.

10 SO I CAN MAKE RELEVANCE ARGUMENTS TO THE STUFF
11 THAT I'M HEARING FOR THE FIRST TIME, BUT THESE ARE THE
12 KINDS OF THINGS THAT SHOULD HAVE BEEN RAISED DURING THE
13 MEET-AND-CONFER PROCESS, AND WEREN'T.

14 THESE ARE ISSUES THAT AT THIS POINT WE HAVE NO
15 CHOICE BUT TO COME TO THE COURT AND REQUEST. I'M NOT
16 ASKING THAT THE COURT LIMIT THIS. IN FACT, I'M ASKING
17 THAT THE COURT NOT LIMIT THIS TO INSTRUCTIONS AND
18 COMMENTS.

19 I HAVE NO IDEA HOW BAYTSP KEEPS ITS DOCUMENTS.
20 THEY MAY HAVE HOARDS OF E-MAIL IN BETWEEN PEOPLE THAT
21 WORK FOR THE COMPANY TALKING ABOUT HOW GREAT YOUTUBE IS.
22 THAT'S NOT AN INSTRUCTION. THAT'S NOT A COMMENT. I
23 WON'T KNOW ABOUT THAT, AND I WANT THAT DOCUMENT. SO WE
24 CRAFTED THE REQUESTS THE WAY THAT WE DID IN AN EFFORT TO
25 GET AT DOCUMENTS THAT ARE REASONABLY CALCULATED -- THE

1 REQUESTS ARE REASONABLY CALCULATED TO LEAD TO THE
2 DISCOVERY OF ADMISSIBLE EVIDENCE.

3 WITH RESPECT TO REQUEST NO. 5, WHICH I THINK
4 YOUR HONOR ALLUDED TO AS ONE THAT SHOULD BE NARROWED, I
5 BELIEVE THAT THAT REQUEST REALLY IS WHAT WE NEED. I
6 REALLY BELIEVE THAT WE NEED TO KNOW HOW THESE THIRD
7 PARTIES ARE MONITORING THE YOUTUBE SERVICE. I DON'T KNOW
8 THAT WE NEED -- NO, I'M SORRY. I BELIEVE THAT THAT'S
9 EXACTLY WHAT I'M TALKING ABOUT. HOW THESE THIRD PARTIES
10 ARE USING BAYTSP TO MONITOR THE YOUTUBE SERVICE IS AS
11 RELEVANT AS ANY DOCUMENT -- AS RELEVANT AS ANY DOCUMENT
12 THERE IS IN THIS CASE.

13 THE COURT: SO THIS ONE IS "ALL DOCUMENTS AND
14 COMMUNICATIONS CONCERNING YOUR RELATIONSHIP WITH ANY
15 THIRD PARTY CONCERNING THE MONITORING, SEARCHING,
16 SCREENING OF WWW.YOUTUBE.COM FOR ALLEGED COPYRIGHT
17 VIOLATIONS INCLUDING, BUT NOT LIMITED TO, ANY SERVICE
18 CONTRACTS INVOICES AND AGREEMENTS." I GOT THE IMPRESSION
19 THAT IN A MEET AND CONFER, THERE WAS SOME NARROWING OF
20 THIS. IS THAT --

21 MR. HEMMINGER: YOUR HONOR, THERE WAS. AND HE
22 WASN'T INVOLVED IN ANY OF THE MEET AND CONFERS. AND IN
23 THE FIRST MEET AND CONFER, QUITE FRANKLY, WE TALKED ABOUT
24 THESE ISSUES ABOUT FIRST ALERT WITH SHANE & COOK AT THE
25 TIME. SO I UNDERSTAND HE WASN'T INVOLVED AND WASN'T

1 AWARE, BUT THESE ARE NOT BEING RAISED FOR THE FIRST TIME.
2 WE HAVE HAD LENGTHY --

3 THE COURT: MY UNDERSTANDING IS THERE WAS SOME
4 NARROWING CONCERNING THE PRODUCTION OF VIACOM AND
5 VIACOM-RELATED ENTITIES.

6 MR. HEMMINGER: THAT WAS WHAT THE AGREEMENT
7 WAS, AND THAT IS WHAT WE HAVE COLLECTED UP TO PRODUCE.

8 THE COURT: BUT THAT WASN'T IN THE AGREEMENT?

9 MR. KRAMER: NO. CERTAINLY NOT, YOUR HONOR.
10 ABSOLUTELY, POSITIVELY NOT. WE COULD NOT POSSIBLY HAVE
11 ENTERED INTO THAT AGREEMENT. THE OTHER INFORMATION IS
12 FAR TOO IMPORTANT TO US TO HAVE ENTERED INTO THAT
13 AGREEMENT.

14 I WOULD SAY THAT THE DISCUSSIONS THE PARTIES
15 HAD DURING THIS MEET-AND-CONFERENCE PROCESS WERE INTENDED TO
16 SEGMENT PRODUCTIONS SO THAT THE STUFF THAT WAS MOST
17 IMPORTANT WOULD BE PRODUCED FASTEST AND WOULD BE
18 AVAILABLE TO US FOR USE IN DEPOSITIONS. THEY WERE ALL
19 CONDITIONED ON THE IDEA THAT, "OKAY, YOU GOT THE SUBPOENA
20 IN SEPTEMBER OF '07. IF YOU GIVE US THESE DOCUMENTS BY
21 FEBRUARY OF '07, GREAT, WE CAN WAIT ON SOME OTHER
22 DOCUMENTS. BUT THESE ARE THE ONES YOU SHOULD PRIORITIZE.
23 THESE ARE THE ONES WE CAN WAIT ON." WE DIDN'T GET ANY.
24 THIS WAS THE BACK AND FORTH OF THE MEET-AND-CONFERENCE
25 PROCESS. IT WAS ALL CONDITIONED ON TIMELY COMPLIANCE

1 WITH THE SUBPOENA, AND OBVIOUSLY WE HAVEN'T GOTTEN THAT.

2 MR. HEMMINGER: WELL, AGAIN, HE WASN'T INVOLVED
3 IN THE MEET AND CONFERS, AND THERE WAS NEVER A DISCUSSION
4 ABOUT THE DATE, "WE'LL AGREE TO THIS IF YOU GET IT BY
5 SUCH AND SUCH." I THINK THE RECORD -- YOU HAVE GOT ALL
6 THE COMMUNICATIONS. YOU CAN SEE ALL THE EFFORTS AND
7 DISCUSSIONS THAT WENT BACK AND FORTH WITH REGARD TO
8 NARROWING AND HOW WE GOT TO THE POINT WHERE WE ARE AT.
9 I DON'T REALLY WANT TO BELABOR IT.

10 WHAT I AM TRYING TO DO NOW IS TO PUT THIS TO A
11 REASONABLE SCOPE OF TRULY DOCUMENTS THAT THEY KNOW THAT
12 THEY WANT. THE COMMENT ABOUT THIS FIRST SOURCE AND
13 PARAMOUNT, QUITE FRANKLY, BECAUSE PARAMOUNT IS IN FACT A
14 VIACOM ENTITY, AS PART OF OUR AGREEMENT, THOSE TYPES OF
15 DOCUMENTS WERE MADE AVAILABLE. I, HOWEVER, THINK THAT
16 THOSE DOCUMENTS MAY BE BEING WITHHELD ON WORK PRODUCT
17 BECAUSE A DECISION AS TO WHAT A CLIENT DOES WITH THE
18 INFORMATION WITH REGARD TO SOMETHING TOTALLY DIFFERENT
19 THAN, YOU KNOW, THE ISP IS -- WHERE UNDER THE SAFE HARBOR
20 ACT, "WHAT DO I DO WITH THE UNDERLYING INDIVIDUAL?" THAT
21 IS A LITIGATION QUESTION AND DEALS WITH MENTAL
22 IMPRESSIONS OF THE CLIENTS AS TO WHAT THEY DO.

23 SO THIS OPENS UP A HUGE CAN OF WORMS, WHICH WE
24 HAVE NO TROUBLE WITH BECAUSE VIACOM IS A PLAINTIFF; THEY
25 CAN GO IN AND PROTECT THEMSELVES. OUR OTHER CLIENTS AND

1 CUSTOMERS ARE NOT IN THAT SITUATION, AND THE BURDEN THAT
2 THIS IS GOING TO PUT ON THEM IS HUGE.

3 AND AGAIN, THIS -- IN THESE TIMES WITH THIS
4 ECONOMIC SITUATION WHERE EVERYBODY IS LAYING OFF -- AND
5 BAYTSP HAS HAD TO LAY OFF -- TO REQUIRE US TO GO IN AND
6 SAY, "I'M SORRY. NOW IF YOU USE US, YOU ARE GOING TO
7 HAVE TO GIVE UP ALL YOUR DOCUMENTS AND GET INVOLVED IN
8 THIS VIACOM/GOOGLE HUGE LAWSUIT" WHEN THEY REALLY HAVE NO
9 SAY IN IT, IT IS JUST OUTRAGEOUSLY BROAD.

10 AND THE COMMENT THAT, "WELL, IT MAY NOT BE
11 WORTH \$100,000," THAT'S A MISREPRESENTATION, YOUR HONOR,
12 OF WHAT THE CASE IS ABOUT. AND I'VE READ THE COMPLAINTS
13 AND I HAVE GOT SOME SENSE OF THE ANSWERS AND SO FORTH
14 ABOUT WHAT'S GOING ON, MORE THAN YOU HAVE HAD THE
15 OPPORTUNITY TO DO. SO I UNDERSTAND.

16 BUT WHAT YOU HEAR, THE CRITICALITY IN THESE
17 THINGS, QUITE FRANKLY, I CAN'T ADDRESS, BUT KNOWING WHAT
18 I KNOW ABOUT READING THE COMPLAINT, THESE ARE GROSS
19 OVERSTATEMENTS OF THE NEED FOR THESE TYPES OF DOCUMENTS.
20 AND, IN FACT, IF THEY NEEDED THEM, THE WAY TO GO IS NOT
21 BACK TOWARD -- THROUGH SMALL LITTLE BAYTSP AND DESTROY
22 ITS BUSINESS.

23 IF ONE WERE TO STEP BACK AND LOOK AT IT -- I
24 MEAN, THIS IS YOUTUBE SAYING, "GOD, YOU KNOW, BAYTSP,
25 THEY ARE ONE OF THE PEOPLE THAT SEND US A HUGE NUMBER OF

1 TAKEDOWN NOTICES. IF WE CAN GET RID OF THEIR BUSINESS,
2 IT'S GOING TO MAKE OUR LIFE EASIER." SO IF YOU WANT TO
3 CAST ASPERSIONS, WHICH I HAVE BEEN TRYING TO AVOID DOING,
4 THE TACTIC OF NOT GOING TO THE PEOPLE WHO ACTUALLY ARE
5 DOING COPYRIGHT PROTECTION, THE ACTUAL COPYRIGHT OWNERS,
6 INSTEAD GOING TO SOME THIRD PARTY WHO HAPPENS TO ONLY BE
7 AN AGENT UNDER THE COPYRIGHT ACT TO DO THE THINGS FOR
8 THEM, IS CIRCUMVENTING, AND IN OUR VIEW IS JUST BAD
9 FAITH, QUITE FRANKLY.

10 GO TO THE CONTENT PROVIDERS, ASK FOR ALL OF
11 THEIR DOCUMENTS RELATING TO COPYRIGHT PROTECTION AND THE
12 INSTRUCTIONS AND THE THINGS THEY DO, AND THEN THEY DON'T
13 HAVE TO WORRY ABOUT WHAT GOES IN BETWEEN AND PIECEMEAL
14 EFFORTS AND SO FORTH.

15 AN ORDER ORDERING US FOR THE NEXT SIX MONTHS TO
16 SPEND TIME GOING THROUGH ALL OF THIS, CONTACTING ALL OF
17 OUR CUSTOMERS, IS GOING TO HAVE A DEVASTATING EFFECT ON
18 BAYTSP'S BUSINESS. AND IT'S JUST NOT JUSTIFIED BY THE
19 RELEVANCE HERE. YOU ARE HEARING, YOU KNOW, VERY GREAT
20 RHETORIC. HE IS DOING A GOOD JOB EXPLAINING HOW HORRIBLE
21 AND HOW CRITICAL THESE ARE. QUITE FRANKLY, AS I SAID, WE
22 DON'T HAVE STATISTICS AS TO WHEN THERE IS OR IS NOT AN
23 INFRINGEMENT. THEY HAVE ALL OF THE TAKEDOWN NOTICES FROM
24 EVERYBODY. THEY ARE IN THE BEST POSITION TO KNOW WHETHER
25 OR NOT THERE'S BEEN A TAKEDOWN.

1 AND AS FAR AS PUTTING IT BACK UP, TO THE EXTENT
2 THE COPYRIGHT OWNER OBJECTS, THEY ARE OBLIGATED -- THEN
3 THEY CAN PUT IT BACK UP; THEY KNOW THAT. THEY HAVE
4 VIACOM; THEY CAN DO ALL OF THOSE THINGS THROUGH VIACOM.
5 SO THIS IS NOT SOMETHING THAT NEEDS TO TAKE AND REQUIRE A
6 SMALL COMPANY IN THE BAY AREA HERE -- WHO IS HAVING ITS
7 OWN TROUBLES, LIKE EVERYBODY IS -- TO SPEND THE NEXT SIX
8 MONTHS TELLING ITS CUSTOMERS THAT, YOU KNOW, "BECAUSE YOU
9 USE ME, YOU ARE GOING TO END UP HAVING TO GET EMBROILED
10 IN THIS LAWSUIT."

11 FOOTBALL LEAGUE WENT OUT AND SAID, "ANYBODY WHO
12 WANTS TO PARTICIPATE, IT'S A CLASS ACTION SUIT," OR AT
13 LEAST -- I DON'T KNOW IF IT'S BEEN CERTIFIED, BUT "IT'S A
14 CLASS ACTION SUIT." THEY WENT OUT LOOKING FOR PEOPLE.
15 ANY OF THE COPYRIGHT OWNERS THAT WANTED TO GET INVOLVED,
16 THEY COULD GET INVOLVED; OTHERS DON'T. THEY SHOULD NOT
17 BE DRAGGED IN, AT LEAST THROUGH THIS BACK DOOR. THEY
18 SHOULD GO -- IF THEY WANT THEM, THEY KNOW WHO HAVE BEEN
19 USING YOUTUBE. THEY SHOULD GO OUT AND GO AFTER THEM
20 DIRECTLY AND HAVE THE REAL PARTIES OF INTEREST RATHER
21 THAN TAKING THESE INTERMEDIARIES.

22 AND THESE ARGUMENTS ABOUT RELEVANCE ARE VERY,
23 VERY REMOTE. THE ISSUE IS NOT WHETHER OR NOT THE
24 TAKEDOWN NOTICES WERE PROPER. EVEN IF IT IS, THEY HAVE
25 THAT INFORMATION -- OKAY? -- OR THEY COULD GO AFTER THEIR

1 COMPETITOR ISPS IF THEY WANT TO GET THE INFORMATION ABOUT
2 OTHER PEOPLE THAT ARE DOING THOSE THINGS. BUT THAT IS
3 NOT THE ISSUE.

4 THE ISSUE HERE IN THE CASE IS REALLY WHETHER OR
5 NOT VIACOM -- I'M SORRY, WHETHER YOUTUBE BY ALL OF ITS
6 OTHER ACTIVITIES, OF ITS DRESSING UP AND PRESENTING AND
7 THE WAY THAT IT ENDS UP SHOWING THE VIDEOS, WHETHER THAT
8 BRINGS IT OUTSIDE THE SCOPE OF THE SAFE HARBOR ACT AND
9 THE COPYRIGHT ACT. IT IS NOT WHETHER OR NOT THE PUBLIC
10 POLICY OF ALLOWING A COPYRIGHT OWNER TO HIRE BAYTSP OR
11 ANY OTHER THIRD PARTY TO SEND A TAKEDOWN NOTICE IS
12 PROPER. THE QUESTION IS "THEIR" ACTIVITY. AND THEY ARE
13 TRYING TO GO OUT AND, FRANKLY, CREATE ISSUES THAT WILL
14 NOT FURTHER THE CORE OF THE ISSUE BEFORE THE COURT.

15 NOW, I'M NOT INVOLVED IN THAT. THIS IS MY
16 READING OF THE COMPLAINTS AND THE ANSWER, AND I'M
17 ADDRESSING IT BECAUSE THE SCOPE OF THE SUBPOENA
18 DRAMATICALLY IMPACTS THE BUSINESS, REGARDLESS OF ANY
19 AGREEMENT BY VIACOM TO REIMBURSE BAYTSP -- OKAY? -- AND I
20 KNOW THEY HAVE MADE A BIG DEAL ABOUT THAT SAYING IT'S NOT
21 THE BURDEN. AND YES, I DON'T KNOW OF ANY WRITTEN
22 AGREEMENT, BUT THERE HAVE BEEN SOME EFFORTS BY VIACOM --
23 HAS BEEN TRYING TO HELP OUT. WHETHER THEY WILL PAY ALL
24 OF IT, WHO KNOWS? BUT THIS WILL HAVE A DRAMATIC BURDEN;
25 EVEN IF VIACOM WERE TO PAY ALL OF THE EXPENSES IN DOING

1 ALL OF THIS, IT WILL HAVE A DRAMATIC IMPACT ON THE
2 CUSTOMER SERVICE PEOPLE WHO NOW HAVE TO DEAL WITH THESE
3 CLIENTS TO TELL THEM, "I HAVE THIS BROAD ORDER ASKING FOR
4 EVERY DOCUMENT I HAVE ABOUT YOU." IT'S JUST NOT FAIR AND
5 NOT AT ALL RELEVANT.

6 MR. KRAMER: VERY BRIEFLY, YOUR HONOR. THE
7 TIME TO MAKE A BURDEN SHOWING WAS IN RESPONSE TO OUR
8 MOTION TO COMPEL. THERE IS NOT ONE SCINTILLA OF EVIDENCE
9 OF ANY BURDEN SHOWN BY BAYTSP IN RESPONSE TO THE
10 SUBPOENA. THERE IS NO BURDEN SHOWING AT ALL.

11 WITH RESPECT TO WHAT YOU SAY TO THIRD PARTIES,
12 GOOGLE GETS MORE SUBPOENAS THAN ANYBODY COULD POSSIBLY
13 RECEIVE; IT GETS MORE SUBPOENAS THAN ANYBODY. PEOPLE
14 UNDERSTAND THAT WHEN THEY USE THIRD PARTIES TO FULFILL
15 FUNCTIONS THAT THEY THEMSELVES COULD FULFILL, THAT THOSE
16 THIRD PARTIES POSSESS INFORMATION THAT IS SUBJECT TO
17 SUBPOENA.

18 NOW, I HEARD MR. HEMMINGER SUGGEST THAT WE
19 SHOULD JUST GO AFTER THESE THIRD PARTIES AND GET
20 INFORMATION FROM HUNDREDS OF THEM OR DOZENS OF THEM BY
21 SEPARATE SUBPOENAS. A NUMBER OF PROBLEMS WITH THAT.
22 ONE, IS THE JUDICIAL EFFICIENCY PROBLEM.

23 MORE IMPORTANTLY, THOUGH, THERE IS NO
24 INDICATION THAT THOSE PARTIES ACTUALLY HAVE THESE
25 DOCUMENTS. YOU HEARD VIACOM SAY, "OH, NOT OURS. WE

1 DON'T HAVE POSSESSION, CUSTODY OR CONTROL OF THESE
2 DOCUMENTS. THESE ARE BAYTSP'S DOCUMENTS." WHY WOULDN'T
3 A THIRD PARTY SAY THE SAME THING? OF COURSE THEY WOULD.

4 THERE IS NO RESPONSE THAT I HEARD TO OUR
5 RELEVANCE ARGUMENTS. THEY ARE NOT MAKEWEIGHT RELEVANCE
6 ARGUMENTS. THEY GO TO THE CORE OF THE CASE.

7 THE LANGUAGE THAT COUNSEL IS PUTTING OUT THERE
8 ABOUT TAKEDOWN NOTICES AND RESPONSES TO TAKEDOWN NOTICES,
9 THAT'S NOT THE ISSUE. I DESCRIBED THE ISSUE WHEN I GOT
10 UP FOR THE FIRST TIME. THERE ISN'T A RESPONSE TO THAT
11 BECAUSE IT IS CRITICALLY RELEVANT INFORMATION, AND BAYTSP
12 HAS HAD PLENTY OF OPPORTUNITY TO PROVIDE A RESPONSE ON
13 THAT ISSUE AND STILL HASN'T DONE SO.

14 FINALLY, WITH RESPECT TO BAYTSP ITSELF, IT WENT
15 INTO A BUSINESS THAT CONSISTS OF AIDING PARTIES IN
16 BRINGING LITIGATION. VIACOM HAS IDENTIFIED BAYTSP AND
17 PRAISED IT FOR HELPING TO BRING THIS VERY ACTION.
18 BAYTSP, AT VIACOM'S DIRECTION, TROLLED THE YOUTUBE SITE,
19 COLLECTED UP INSTANCES OF ALLEGED INFRINGEMENT FOR MONTH
20 AFTER MONTH AFTER MONTH, AND THEN BLASTED IT TO YOUTUBE
21 IN ONE DAY, AND THEN ANNOUNCED IT IN THE PRESS.

22 WHEN YOU DO THAT, WHEN YOU ARE A BUSINESS THAT
23 SETS OUT TO AID IN A BILLION-DOLLAR LAWSUIT, IT SHOULD
24 NOT COME AS A SURPRISE TO YOU THAT THE DEFENDANT IN THAT
25 LAWSUIT WANTS TO KNOW WHAT YOU KNOW. AND THAT'S WHY WE

1 SENT THE SUBPOENA. IT WAS THE VERY FIRST SUBPOENA THAT
2 WAS SERVED IN THIS CASE, I BELIEVE, SEPTEMBER OF 2007.
3 WE HAVE BE WAITING A VERY LONG TIME FOR THIS INFORMATION.
4 AND AS MR. MANCINI HAS REPEATEDLY REFERRED TO, WE NEED IT
5 TO CONDUCT DEPOSITIONS.

6 I THINK WITH THAT, I'LL SUBMIT THE MATTER.

7 MR. HEMMINGER: BAYTSP IS NOT IN THE BUSINESS
8 OF LITIGATION. THE WHOLE PURPOSE OF THE DMCA WAS TO
9 PROVIDE A WAY TO AVOID LITIGATION.

10 WHAT YOUTUBE IS TALKING ABOUT IS WHAT BAYTSP'S
11 CLIENTS AND CUSTOMERS DO WITH THE INFORMATION. THEY ARE
12 AN AGENT THAT SENDS TAKEDOWN NOTICES BASED UPON
13 INSTRUCTIONS. HE SAID, "TAKEDOWN NOTICES AREN'T THE
14 ISSUE." WELL, THAT'S COMPLETELY CONTRARY TO WHAT
15 MR. MANCINI SAID. ARE THEY OR AREN'T THEY? THEY ARE
16 TRYING TO COME UP WITH EVERY ARGUMENT THEY CAN TO GET THE
17 BROADEST, MOST SWEEPING PRODUCTION OF DOCUMENTS, HOPING
18 THEY CAN FIND SOMETHING. IT'S A FISHING EXPEDITION OF A
19 THIRD PARTY.

20 BAYTSP HAS NO INTEREST IN THE OUTCOME OF THIS
21 LITIGATION -- AT ALL. WHETHER OR NOT YOUTUBE IS AN ISP
22 PROVIDER OR NOT MAKES NO DIFFERENCE TO BAYTSP.

23 EVEN STILL, EVEN IF YOU WANT TO PAINT THAT
24 PICTURE WITH REGARD TO VIACOM SAYING, "OH, THEY GOT INTO
25 THIS BUSINESS, THEY SHOULD ACCEPT THEIR BURDEN AND

1 PRODUCE THE DOCUMENTS," BAYTSP HAS. IT HAS SPENT A YEAR
2 AND OVER \$1 MILLION. I THINK WELL OVER \$1 MILLION HAS
3 BEEN EXPENDED IN COLLECTING AND GETTING THESE DOCUMENTS
4 READY TO PRODUCE.

5 SO TO THE EXTENT THERE'S AN ISSUE WITH VIACOM
6 OR ANY OF ITS ENTITIES, THAT'S BEEN TAKEN CARE OF. IT IS
7 NOT IN THE BUSINESS OF LITIGATION, AND I THINK IF YOU
8 WENT AND DID A SEARCH OF ANY OF THE RECORDS, I DON'T
9 THINK YOU WILL SEE BAYTSP INVOLVED IN ANY LITIGATION.
10 THAT IS NOT ITS BUSINESS; ITS BUSINESS IS ENFORCING THE
11 DIGITAL MILLENNIUM COPYRIGHT ACT PROVISIONS ON BEHALF OF
12 ITS CLIENTS.

13 SO IT WOULD JUST BE IMPROPER TO GO FORWARD AND
14 ASK FOR EVERY DOCUMENT RELATING TO EVERY ONE OF ITS
15 CLIENTS. THERE SHOULD BE A RESTRICTION WITH -- AT LEAST
16 WITH REGARD TO THE INSTRUCTIONS, IF THAT'S WHAT THEY ARE
17 LOOKING FOR. ALTHOUGH IF THEY ARE LOOKING FOR THE
18 INSTRUCTIONS FROM THE CLIENT, THE COPYRIGHT OWNER WOULD
19 HAVE THAT. IF THEY ARE LOOKING FOR ERRONEOUS TAKEDOWN
20 NOTICES, YOUTUBE HAS THAT.

21 BUT EVEN STILL, IF YOU LIMIT IT TO THOSE
22 THINGS, THOSE ARE MUCH MORE REASONABLE AND THINGS THAT I
23 THINK CAN BE DONE MUCH MORE QUICKLY AND WOULD SERVE THEIR
24 PURPOSES. THOSE ARE THE ONLY TWO BONA FIDE ARGUMENTS
25 THAT I SAW WITH REGARD TO RELEVANCE IN THIS WHOLE MIX

1 THAT WE HAVE SEEN TODAY.

2 SO I WOULD ASK YOUR HONOR TO RECONSIDER A
3 TENTATIVE AND LIMIT IT TO THE EXTENT IT GOES TO THIRD
4 PARTIES, TO BE LIMITED TO THE INSTRUCTIONS AND, IF YOU
5 WILL, ERRONEOUS TAKEDOWN NOTICES. I THINK THAT SATISFIES
6 ALL OF THEIR RELEVANCE CLAIMS. TO THE EXTENT THEY WANT
7 ANYTHING ELSE, THEY SHOULD GO AHEAD AND TALK TO MAYBE THE
8 OTHER ISP SITES, MAYBE THE OTHER COPYRIGHT OWNERS, BUT
9 NOT THROUGH BAYTSP.

10 THANK YOU.

11 THE COURT: RESPONSE TO HIS CONCLUSION?

12 MR. KRAMER: YOUR HONOR, THERE IS A HOST OF
13 INFORMATION AT BAYTSP THAT WE CAN'T IDENTIFY THAT BEARS
14 ON THE ISSUES THAT I MENTIONED IN MY REMARKS. THERE ARE
15 E-MAILS, THERE ARE ACCOUNT NAMES, YOUTUBE ACCOUNT NAMES
16 SHOWING HOW BAYTSP ITSELF ACCESSES THE YOUTUBE SERVICE
17 USING ACCOUNT NAMES THAT WE DON'T EVEN KNOW.

18 COUNSEL MENTIONED THAT WE WOULD KNOW ABOUT
19 ERRONEOUS TAKEDOWN NOTICES. WE HAVE NO IDEA WHETHER A
20 TAKEDOWN NOTICE WAS ERRONEOUS. WE GOT A TAKEDOWN NOTICE
21 FROM BAYTSP AND A USER COMPLAINED OR A CONTENT OWNER
22 COMPLAINED TO BAYTSP THAT THIS CONTENT SHOULDN'T BE TAKEN
23 DOWN. WE DON'T KNOW THAT; BAYTSP KNOWS THAT. YOUTUBE
24 HAS NO IDEA THAT THE TAKEDOWN NOTICE WAS ERRONEOUS OR
25 NOT. WE MAY NEVER KNOW. WE HAVE NO IDEA WHAT'S GOING ON

1 AT BAYTSP, HOW THEY ARE MONITORING THE YOUTUBE SITE, HOW
2 THEY ARE ACCESSING VIDEOS. THE ENTIRE PROCESS, WHAT THEY
3 ARE DOING, IS A MATTER OF EXTREME SIGNIFICANCE IN THIS
4 CASE.

5 I WISH I COULD IDENTIFY FOR YOU EVERY SINGLE
6 CATEGORY OF DOCUMENTS, BUT THAT'S WHY WE ASKED THE
7 REQUESTS THAT WE DID.

8 THE COURT: HOW ARE YOU GOING TO LEARN WHAT
9 THEY DO? YOU HAVE NO IDEA WHAT THEY DO IN THESE
10 INSTANCES. IS THAT ULTIMATELY WHAT YOU WILL FIND OUT IN
11 SOME SORT OF A DEPOSITION?

12 MR. KRAMER: WE BELIEVE THAT ONCE WE GET
13 THESE -- WE BELIEVE THAT IT WOULD HAVE ALREADY TAKEN
14 PLACE, BUT WE BELIEVE THAT ONCE WE GET THESE DOCUMENTS,
15 WE ARE GOING TO TAKE A DEPOSITION OF BAYTSP AND ASK
16 QUESTIONS THAT ARE SUGGESTED BY THE DOCUMENTS WE RECEIVE,
17 BUT DOCUMENTS SUGGESTING THE PROCESS BY WHICH THEY
18 MONITOR THE YOUTUBE SITE.

19 THEY HAVE 20 PEOPLE TRAINED TO LOOK FOR CERTAIN
20 THINGS. WHAT THINGS? WHAT ARE THEY LOOKING FOR? WHY
21 ARE THEY LOOKING FOR THAT? THERE ARE ALL SORTS OF
22 OPERATIONAL ISSUES WITH WHAT THEY DO THAT -- AND AGAIN, I
23 THINK WE DISCUSSED THEM AT SOME LENGTH IN OUR SEPARATE
24 STATEMENT, SO I'M NOT GOING TO GO BACK AND REHASH THEM,
25 BUT I BELIEVE THAT IT WOULD BE EXTREMELY PREJUDICIAL TO

1 YOUTUBE TO NARROWLY CONSTRUE REQUESTS TO SPECIFIC TYPES
2 OF DOCUMENTS. WE DON'T KNOW WHAT DOCUMENTS THEY HAVE;
3 THAT'S WHY WE ASKED THE REQUESTS THAT WE DID.

4 THAT'S ALL.

5 MR. HEMMINGER: I'M SORRY, YOUR HONOR, BUT ONE
6 LAST COMMENT. HE RAISED NEW ISSUES.

7 THE COURT: I'M GOING TO LISTEN UNTIL NONE OF
8 YOU CAN TALK ANYMORE.

9 MR. HEMMINGER: THANK YOU, YOUR HONOR, I
10 APPRECIATE IT. IT'S A VERY IMPORTANT ISSUE, AS YOU
11 RECOGNIZE.

12 THE COMMENT ABOUT WE NEED TO KNOW HOW BAYTSP
13 DOES WHAT IT DOES, TO THE EXTENT THEY TAKE THE TIME TO
14 LOOK AT THE VIACOM-RELATED DOCUMENTS, THEY ARE GOING TO
15 GET ALL OF THAT INFORMATION. THEY DO NOT HAVE TO SEE
16 THAT IT'S THE SAME PROCESS FOR EVERYBODY ELSE. AND TO
17 THE EXTENT THEY WANT TO KNOW THAT, THIS IS THE FIRST I
18 HAVE HEARD THAT THEY ARE GOING TO WANT TO TAKE A
19 DEPOSITION.

20 THE COURT: SO MUCH FOR MEET AND CONFER.

21 MR. HEMMINGER: OVER A YEAR, TOO. YOU WOULD
22 THINK. BUT ANYWAY, THEY CAN ASK THAT QUESTION AT THE
23 MEET AND CONFER, THAT IT IS THE SAME. TO FORCE AND SAY
24 "GIVE US EVERY DOCUMENT" IS JUST NOT WITHIN THE SCOPE OF
25 RELEVANCE BECAUSE THEY ARE FISHING. HE SAID, "I DON'T

1 KNOW WHAT THEY HAVE." AND QUITE FRANKLY, HOW BAYTSP
2 OPERATES, ITS INTERNAL BUSINESS ACTIVITIES IS WHOLLY
3 IRRELEVANT TO WHETHER OR NOT YOUTUBE IS A PIRATE SITE.

4 WHAT DOES HOW BAYTSP HAS ITS EMPLOYEES -- WHAT
5 DOES IT MATTER IF THEY ARE THERE FOUR HOURS, HAS AN HOUR
6 OFF? DOES THAT IMPACT WHETHER OR NOT VIACOM --

7 THE COURT: I WOULD BE SURPRISED IF THOSE WERE
8 THE QUESTIONS.

9 MR. HEMMINGER: WELL, HE IS TALKING ABOUT THE
10 OPERATIONAL ASPECTS. I DON'T KNOW WHAT THAT MEANS. AND
11 THEIR SUBPOENA IS SO BROAD; ARGUABLY, IT COVERS
12 EVERYTHING. AND AGAIN, WHAT THEY HAVE SAID THEY WANT TO
13 KNOW, WHAT THEY THINK IS RELEVANT IS HOW THE DECISION IS
14 MADE OR WHAT INSTRUCTIONS BAYTSP HAS FROM ITS CLIENTS TO
15 TAKE DOWN -- TO SEND A TAKEDOWN NOTICE. OKAY? FRANKLY,
16 THOSE TYPES OF INSTRUCTIONS I DON'T THINK ARE RELEVANT AS
17 TO WHAT THEY DO. IT MAY BE RELEVANT AS TO WHETHER OR NOT
18 THE PERSON WHO POSTED IT IS VIOLATING A COPYRIGHT OR
19 WHETHER OR NOT THE INSTRUCTIONS WERE SUFFICIENT TO
20 CAPTURE EVERYTHING. BUT THOSE THINGS, ALL OF THAT
21 INFORMATION IS GOING TO BE OBTAINED -- IF IT EXISTS --
22 THROUGH THE VIACOM DOCUMENTS, TO THE EXTENT THAT THEY ARE
23 PRODUCED THAT ARE NOT WORK-PRODUCT RELATED.

24 INSTEAD, THEY ARE COMING IN HERE AND SAYING,
25 "I DON'T KNOW WHAT ALL THEY ARE GOING TO SAY ABOUT ALL OF

1 THEIR CLIENTS, BUT WE WANT TO LOOK AT IT AND SEE IF WE
2 CAN FIND ANYTHING RELEVANT," OTHER THAN THE TWO THINGS
3 THAT THEY HAVE INDICATED. HOW WE SIT THERE AND MAINTAIN
4 A SERVER THAT HAS A COPY OF A VIDEO, THAT -- TO THE
5 EXTENT IT COMES OUT, THAT'S GOING TO COME OUT THERE. AND
6 THEY ALREADY KNOW THAT, I'M SURE. THAT'S NOT AN ISSUE.
7 THEY DON'T NEED DOCUMENTS TO SEE THAT.

8 SO ALL OF THE QUOTE/UNQUOTE "RELEVANCE" IS JUST
9 SUPERFICIAL. IT DOES NOT GET INTO THE HEART OF THE REAL
10 ISSUE, WHICH IS WHAT YOUTUBE DOES IN COMPLIANCE WITH THE
11 COPYRIGHT ACT, AND THAT IS WHAT THE LAWSUIT IS IN FACT
12 ABOUT. AND EXACTLY HOW BAYTSP, A THIRD PARTY WHO DOES
13 NOT GET INVOLVED IN LITIGATION AND HAS ONLY DONE ONE
14 THING, WHICH IS SEND TAKEDOWN NOTICES -- OKAY? -- SHOULD
15 NOT BE FORCED TO DISGORGE THE ENTIRETY OF ITS DOCUMENTS.

16 SO I THINK YOU SAW AN ADMISSION THAT THEY ARE
17 JUST FISHING. AND I JUST THINK THAT THERE ARE OTHER MORE
18 EFFICIENT WAYS TO GET IT, EITHER THROUGH THE COPYRIGHT
19 OWNERS -- PERHAPS THE DEPOSITION WOULD RESOLVE THEIR
20 ISSUE. PERHAPS THAT IS A WAY TO GO INSTEAD OF REQUIRING
21 THE PRODUCTION OF MILLIONS AND MILLIONS OF PAGES OF
22 DOCUMENTS. BUT IT IS CERTAINLY NOT SOMEONE WHO IS A
23 THIRD PARTY. AND MERELY BECAUSE THE THIRD PARTY USED THE
24 INFORMATION THAT WAS PROVIDED BY BAYTSP BECAUSE IT FOUND
25 OVER 300,000 INSTANCES OF INFRINGEMENT, THAT SOMEHOW NOW

1 IT IS SUBJECT TO BEING DRAGGED INTO THIS HUGE LAWSUIT,
2 THAT CONNECTION IS NOT THERE.

3 THERE ARE OTHER MORE MEANINGFUL AND EFFICIENT
4 WAYS TO GET THIS THAN THROUGH THE BURDENING OF A THIRD
5 PARTY.

6 THANK YOU.

7 THE COURT: QUICK RESPONSE, AND THEN I'LL ASK
8 ANYBODY ELSE IF YOU HAVE ANYTHING TO SAY, AND THEN I'M
9 SUBMITTING IT.

10 MR. KRAMER: THANK YOU, YOUR HONOR.

11 THERE ISN'T A RELEVANCE ARGUMENT -- A RESPONSE
12 TO THE RELEVANT ARGUMENTS WE ARTICULATED. THERE ISN'T A
13 SHOWING OF BURDEN. AND EVEN IF THERE HAD BEEN A SHOWING
14 OF BURDEN, WE STILL HAVEN'T GOTTEN TO THE BOTTOM OF THE
15 QUESTION OF HOW MUCH VIACOM IS PAYING OF THIS. THE
16 PARTIES IN THIS LITIGATION ARE EACH BEARING MILLIONS OF
17 DOLLARS IN COST. THERE'S NO QUESTION ABOUT THAT.

18 BAYTSP SHOULD NOT BE HEARD TO CLAIM BURDEN FOR
19 DOING THAT WHICH VIACOM COULD HAVE DONE ITSELF AND FOR
20 WHICH VIACOM WOULD HAVE HAD TO BEAR THE COST OF PRODUCING
21 THIS INFORMATION, PARTICULARLY IF VIACOM IS NOW PAYING
22 FOR BAYTSP TO COMPLY WITH THE SUBPOENA, AS WE THINK IT
23 IS, AND WE HAVE HEARD NO SUGGESTION TO THE CONTRARY
24 TODAY.

25 THAT'S ALL I HAVE, YOUR HONOR.

1 MR. HEMMINGER: LAST COMMENT, YOUR HONOR, THIS
2 ISSUE ABOUT VIACOM REIMBURSING.

3 AS I SAID, THERE'S NO WRITTEN AGREEMENT.
4 VIACOM HAS BEEN PAYING AND REIMBURSING BAYTSP FOR ITS
5 LEGAL COSTS AND SO FORTH FOR RESPONDING. BAYTSP HOPES
6 THAT IT WILL CONTINUE TO DO SO. WITH THE SCOPE OF YOUR
7 ORDER, I DON'T KNOW.

8 THAT ASIDE, EVEN ASSUMING -- EVEN ASSUMING THAT
9 VIACOM WOULD CONTINUE TO REIMBURSE BAYTSP, AND THE BURDEN
10 AND THE IMPACT ON ITS BUSINESS -- WHICH IS IN FACT IN OUR
11 OPPOSITION, CONTRARY TO THE REPEATED STATEMENTS BY
12 COUNSEL -- COULD BE DEVASTATING TO ITS BUSINESS BECAUSE
13 IT'S GOING TO THIRD PARTIES REQUIRING THEM TO NOW GET
14 EMBROILED IN A LAWSUIT WHERE IT HADN'T BEFORE.

15 THE FACT THAT GOOGLE, A MULTI-BILLION-DOLLAR
16 COMPANY, I ASSUME -- I DON'T KNOW HOW MUCH IT MAKES --
17 WHICH IS HUNDREDS OF THOUSANDS OF TIMES BIGGER THAN
18 BAYTSP -- OKAY, THAT'S IN THEIR BUSINESS; THAT IS NOT
19 BAYTSP'S BUSINESS. BAYTSP IS SIMPLY "I'M GOING TO LOOK
20 AT THE WEB, I'M GOING TO FIND INFRINGEMENT, I'M GOING TO
21 SEND A TAKEDOWN NOTICE." AND IF THE ISP WANTS TO COMPLY
22 WITH THE DMCA, IT TAKES IT DOWN. AND THAT SHOULD BE THE
23 END OF IT.

24 THE OTHER ARGUMENTS BY VIACOM RELATE TO "YOU
25 ARE OUTSIDE THE SCOPE OF THE SAFE HARBOR ACT AND THE

1 DMCA, SECTION 512; YOU ARE OUTSIDE OF THAT." THAT
2 DOESN'T HAVE ANYTHING TO DO WITH THIS, THE ACTIVITIES OF
3 BAYTSP.

4 THANK YOU.

5 THE COURT: THANK YOU, GENTLEMEN. IT'S
6 SUBMITTED.

7 MR. KRAMER: THANK YOU, YOUR HONOR.

8 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

9 ---OOO---

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CERTIFICATE OF REPORTER

I, JANA L. RIDENOUR, OFFICIAL REPORTER PRO TEM
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE,
CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE AND
CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN CASE NO.
C 08-80211-JF-PVT, VIACOM INTERNATIONAL, INC., ET AL., V.
YOUTUBE, INC., ET AL., AND THE FOOTBALL ASSOCIATION PREMIER
LEAGUE LIMITED, ET AL., V. YOUTUBE, INC., ET AL., DATED
DECEMBER 9, 2008; THAT I REPORTED THE SAME IN STENOTYPE
AND TRANSCRIBED THE SAME BY COMPUTER-AIDED TRANSCRIPTION
TO THE BEST OF MY ABILITY AS HEREIN APPEARS.

DATED THIS 16th DAY OF DECEMBER, 2008.

Jana L. Ridenour #9302
JANA L. RIDENOUR, CSR
OFFICIAL REPORTER PRO TEM
LICENSE NUMBER 9302

ORIGINAL