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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No. 11-Civ-20427-JORDAN/McALILEY

DISNEY ENTERPRISES, INC.,  
et al.,

Plaintiffs.

vs.

MIAMI, FLORIDA  
MARCH 7, 2011

HOTFILE CORPORATION, et al.,

Defendants.

TELEPHONIC STATUS CONFERENCE HEARING TRANSCRIPT ON  
PLAINTIFF'S MOTION PROHIBITING SPOILIATION & TO PRESERVE  
EVIDENCE BEFORE THE HONORABLE CHRIS M. McALILEY,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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REPORTED BY:

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(Call to order of the Court)

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THE CLERK: The United States District Court is now in session; The Honorable Magistrate Judge Chris McAliley presiding.

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Calling the case of Disney Enterprises, Incorporated, case number 11-20427-Civil-Judge Jordan.

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THE COURT: Okay. Good morning, counsel. If you would, give your appearances beginning with the plaintiff.

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MR. FABRIZIO: Good morning, Your Honor. My name is Steven Fabrizio for plaintiffs.

10

11

THE COURT: Okay. Welcome and for the defendant?

12

13

MR. THOMPSON: Good morning, Your Honor. This is Roderick Thompson with the firm of Farella Braun & Martel in San Francisco, and with me are my colleagues Andy Leibnitz and Deepak Guptak, and also on the line is Janet Munn, our colleague from Florida.

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THE COURT: Okay. Welcome everybody. All right. I thought it would be helpful if we just talked for a few minutes about plaintiff's emergency motion for order prohibiting spoliation.

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There has been a response and a reply. I was hopeful, after reading the reply, that possibly by having you all talk to each other some and share some information about the activity that the defendant has been engaging in regarding their Website, that you might reach some greater understanding

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25

1 of what the defendant is doing and possibly resolve the issue,  
2 or if not that, narrow it, and so I wanted to see what your  
3 thoughts were on that.

4 MR. FABRIZIO: Sure. Your Honor, this is Steve  
5 Fabrizio for the plaintiffs. Would you like me to address you?

6 THE COURT: Sure.

7 MR. FABRIZIO: We had a very good dialogue with  
8 Mr. Thompson and Ms. Munn beforehand, so I think we had a  
9 pretty good understanding of what defendants say they will do,  
10 and even to some degree of what the defendants have been doing  
11 over that holiday weekend, and we also see from the opposition  
12 papers that the defendants now say they are prepared to  
13 preserve even more categories of evidence that had been under  
14 discussion that previously they had not been willing to agree  
15 to preserve, but the biggest problem, from our perspective,  
16 Your Honor, is that defendants that are going to destroy  
17 volumes of data are not usually deterred by private agreement.

18 So there is no teeth to a private agreement. We had  
19 asked from the very outset, and it was sort of the essence of  
20 our effort to try and resolve this, that the defendants agree  
21 to a stipulation that we could present to the court, that if  
22 the court was so willing that the court would order, and that  
23 would give us at least all of the remedies that come with  
24 violations of court orders when it comes to spoliation of  
25 evidence, and to date nothing in our discussions with the

1 defendants and nothing in their papers have suggested to us  
2 that they were prepared to do that.

3 THE COURT: Okay. Is there something further you  
4 wanted to say?

5 MR. FABRIZIO: I am sorry, Your Honor. One thing we  
6 do know is that defendants are currently taking steps to  
7 manipulate the data, and let me explain what that means, Your  
8 Honor, in context here.

9 We referred to the events over the holiday weekend of  
10 defendants terminating, en masse it appears, some users that  
11 they have identified as their most egregious copyright  
12 violators.

13 Well, as they are doing that, they have advised us and  
14 the court that they are beginning to preserve a crucial  
15 category of data.

16 That data is the data that would show each download by  
17 each user of the records of the files that are being downloaded  
18 and by the users that are downloading them.

19 That server data, Your Honor, in past cases has proven  
20 to be invaluable. It is critical to many issues, not the least  
21 of which, and perhaps one of the most important of which it  
22 will show the overwhelming use of this service to engage in  
23 infringement.

24 In past cases similar types of statistical analyses  
25 have showed 85, 90, 95 percent of the uses of site are for

1 copyright infringement, and almost every court that has seen  
2 those sorts of statistics has said it is a very influential  
3 piece of evidence.

4           So, Your Honor, if you consider the juxtaposition of  
5 two acts, either of which independently defendants would say,  
6 "Well, those are good things and the plaintiff should be  
7 thanking us for doing them," if you consider them together, you  
8 can understand how we are not happy about this.

9           Defendants previously had not been preserving this  
10 server log data for downloads.

11           THE COURT: But are they doing it now?

12           MR. FABRIZIO: They are doing it now, but at the same  
13 that they are doing it they have terminated some of their, you  
14 know, thousands or hundreds or, you know, en masse their worst  
15 offenders.

16           So the data that they are preserving is, in some  
17 senses, sanitized. The data that we will get today is not the  
18 same as the data we would have gotten on the day we filed this  
19 complaint because of defendant's actions.

20           THE COURT: But don't you want them to terminate the  
21 infringing users?

22           MR. FABRIZIO: Your Honor, absolutely, and that's why  
23 I said defendants would say that preserving this data is a good  
24 thing and terminating infringing users is a good thing, but  
25 when you do them at the exact same time, what you do is you

1 create data that is no longer reflective of the actual use of  
2 the site.

3 THE COURT: So what is it that you want? I am not  
4 clear on what it is that you want them to do.

5 MR. FABRIZIO: Well, what we would have wanted them to  
6 do, Your Honor, is to allow us to take a snapshot of the data  
7 so we have a fixed snapshot in time, and then they could have  
8 done whatever they wanted to address and terminate repeated  
9 infringers or blatant infringers.

10 We are not suggesting for a second that we don't want  
11 them to take action to clean up their copyright infringement.

12 We have wanted them to do that for years, but as a  
13 litigant, we are entitled to the data as it existed, not the  
14 data as it exists after they take these steps to fix some of  
15 the problems.

16 THE COURT: So when you say that you want to take a  
17 snapshot of the data, do you mean while the infringing is going  
18 on, right, before --

19 MR. FABRIZIO: Your Honor, what -- I am sorry.

20 THE COURT: Well, I am just trying to understand. I  
21 am not clear what you are asking them to do.

22 MR. FABRIZIO: Sure. Let me explain it. Every time a  
23 user requests a file to be downloaded, entries are made in a  
24 log on the server that would indicate the user that was  
25 requesting that download and the particular file that was

1 requested to be downloaded.

2 Now, other data, too, but you can just call that the  
3 core of the download data. That is kept in files; log files,  
4 and previously they had not or at least they told us they had  
5 not been preserving that data, as such, but that they started  
6 to recently.

7 So very quickly there are going to be millions and  
8 millions of entries showing downloads.

9 What we wanted and what we still want is to very  
10 quickly require defendant to produce for us those logs. That  
11 may create a snapshot in time, at least as to the period of  
12 time covered by those logs as to what was happening with the  
13 system.

14 Thereafter, changes that the defendants might make to  
15 the system will obviously affect the new log data coming in,  
16 but it will not affect the log data that we already have.

17 So we will effectively have a preserved snapshot of  
18 how the system was being used at a given point in time, and  
19 that is what we wanted and that is what we asked for starting  
20 from our very first conversation, but when defendants then  
21 changed the system before they gave us that log data, that log  
22 data now is biased in light of the changes that the defendants  
23 made.

24 Now, there may be nothing that we can do about the  
25 bias that has already been introduced into that data. What is



1 terminated is terminated, but it does serve to illustrate, Your  
2 Honor, the importance of getting a snapshot in time when we are  
3 talking about data that is so easily manipulated and changed,  
4 and that's whether it was done with all of the best intentions.

5           You know, this is not the place or the time to say why  
6 they are doing what they did. We are just simply saying the  
7 effect of it is now we get data that is different than the data  
8 that we would have gotten on the date of this complaint.

9           THE COURT: Well, obviously in a minute I am going to  
10 hear from defense counsel, but is it not possible for you all  
11 to talk about where you find yourselves today?

12           All right. What is done is done. I think it makes  
13 sense to me that you are not suggesting that this was done to  
14 try to destroy evidence.

15           I mean, the record seems to suggest otherwise. So  
16 assuming that they are trying to terminate infringing users for  
17 all of the right reasons, can you all talk to each other about  
18 what discovery you might get for prior events that led up to  
19 the termination of these infringers and how you might go  
20 forward?

21           Can you have a discussion about that and possibly  
22 reach an agreement?

23           MR. THOMPSON: Your Honor, this is Roderick Thompson  
24 for the defendants.

25           THE COURT: Yes. And I just wanted the plaintiff's

1 lawyer to tell me if he thinks that is possible, and then  
2 obviously I want to hear from the defendant.

3 MR. THOMPSON: Thank you, Your Honor.

4 MR. FABRIZIO: Yes, Your Honor. If defendants were  
5 prepared to allow us the immediate limited discovery we have  
6 requested which would give us the log data tables, there are  
7 tables and data bases that are on defendants servers.

8 They are organized. The defendants need to organize  
9 and collect them in one place. They are relatively small in  
10 volume, and they would be relatively easy to copy.

11 That's all according to our experts, and defendants  
12 have, frankly, not challenged, but if the defendants would give  
13 us the limited discovery that we have asked for right away,  
14 then we could have that snapshot in time.

15 Again, it would include whatever data exists at this  
16 time which would include some older data and also some data  
17 post the change they made to their policy determining repeat  
18 infringers, but at least we would be assured of having data  
19 that is not subject to constant change as we go forward as we  
20 wait for regular discovery to begin.

21 THE COURT: Well, here is my question, though:  
22 Assuming this server log data can be preserved, why is it that  
23 you need it now as opposed to during the discovery process,  
24 assuming it can be preserved?

25 MR. FABRIZIO: Well, it cannot be. The way the

1 defendants have it set up, absent physically making the copy  
2 that we want, it cannot be preserved because it is constantly  
3 being added and changed, and that's one of the reasons we  
4 wanted, you know, immediate discovery of it.

5 It is also the case, Your Honor, that it is very  
6 easily subject to manipulation, and we want to get it in our  
7 hands as quickly as we can so that we can be assured that as  
8 much as possible it has not been subject to manipulation.

9 THE COURT: Okay. I understand. All right. So go  
10 ahead, Mr. Thompson.

11 MR. THOMPSON: Thank you, Your Honor. Let me just say  
12 I am very encouraged that we are having this dialogue. This  
13 should have happened before this motion was filed.

14 The motion was filed without any further dialogue with  
15 us. It was based on an assumption that the heightened  
16 termination policy was destroying data. That was false.

17 It showed in our declaration through Mr. Keytak. In  
18 fact, all evidence was preserved from those accounts which were  
19 terminated over the holiday weekend.

20 So we are very encouraged in having this dialogue  
21 clarifying what evidence is being preserved, and this should  
22 have happened a while ago. I won't react in detail to this,  
23 but the --

24 THE COURT: Right. Now is not the time to get into  
25 the whole debate. I would like to focus it more, you know,

1 about how you might resolve it at this point.

2 MR. THOMPSON: Certainly, Your Honor. And what I hear  
3 from Mr. Fabrizio is the argument that the user data logs are  
4 not being preserved. Well, that's just simply not the case.  
5 They are being preserved.

6 They have been preserved from the first time we got  
7 notice of this lawsuit.

8 What he is complaining about is their dynamic. They  
9 are being added to a lot. That's the nature of our client's  
10 business. I think the plaintiffs understand that well.

11 What I heard him say just now was the real reason he  
12 wants immediate discovery is he is suspicious of manipulation.  
13 So we come back down to the innuendo that our clients are bad  
14 people and, therefore, they cannot be trusted.

15 Frankly, we resent that, Your Honor. There is no  
16 evidence to support that, and we have preserved the data, and I  
17 am very willing to speak with Mr. Fabrizio and his team to try  
18 to work out whatever assurances they may need, but we should  
19 not proceed with this motion based on an assumption of our  
20 people are bad people because of other cases involving other  
21 parties and other technology. That simply is not fair, and it  
22 is not accurate.

23 THE COURT: Okay. And I understand that, and I  
24 understand why you feel the need to respond to that now.  
25 That's the nature of these kind of, you know, complaints.

1           Two different thoughts occur to me, and I don't have  
2 an opinion yet on whether early discovery makes sense or not.  
3 I just don't know enough, but I have two thoughts on either  
4 side.

5           One is, and this would probably be more appealing to  
6 the defendant, to have the defendant in some way show the  
7 plaintiff that you are preserving the data in a way that is  
8 meaningful, and I don't know if that requires or if that can be  
9 done in some sort of written statement or if that can be done  
10 by a declaration by an IT person who knows your system and if  
11 that requires the plaintiff's IT person to come over to your  
12 office and sit with your IT person and see that you really,  
13 really are preserving it, but maybe there is some process that  
14 allows a little more transparency, from the plaintiffs point of  
15 view, to reassure them as to what you are saying.

16           So that's one thought on one end, and the other  
17 thought, and I am sure I am not telling you anything that you  
18 all haven't thought of yourselves, but another thought on the  
19 other end is for the defendant to give a snapshot, you know, an  
20 example of the data that you preserved and produce it to the  
21 plaintiff so they see what you have and the plaintiff knows  
22 what is being preserved and what will be available in the  
23 discovery process.

24           So those are two thoughts that I have being from the  
25 top of a tall building and you are down close.

1           So are there any thoughts about that or any better  
2 ideas of how you all might have a conversation about this?  
3 Because what I wanted to do was talk to you today and see if we  
4 could set up some sort of process by which you try to resolve  
5 the issues rather than spending, frankly, a lot of your  
6 clients' money and time, and some of you are out of state, so I  
7 don't know if the out of state counsel will come in for an  
8 evidentiary hearing, and these evidentiary hearings, you know,  
9 because of the nature of the accusations, people feel the  
10 stakes are very high and want to turn it into sometimes my  
11 experience a bit of a mini trial, which is not what I am going  
12 to do, but it is a little challenging to keep it focused on  
13 what the issues are.

14           In the end I just think we could counsel on both sides  
15 and I would like to think that maybe with a little help on my  
16 end that you all can reach a better conclusion than you are  
17 going to get from me after I hold an expensive and lengthy  
18 evidentiary hearing.

19           MR. FABRIZIO: Your Honor, this is Steven Fabrizio for  
20 plaintiffs again.

21           THE COURT: Yes.

22           MR. FABRIZIO: We appreciate the suggestions coming  
23 from the court, and they may very well provide a road map to  
24 some solution, but one of our fundamental concerns would remain  
25 and has from the outset, and let me first make one thing clear.

1           We have leveled some accusations about defendants, but  
2 if it is not already abundantly clear, let me make it clear  
3 that we are not leveling any accusations against counsel.

4           We have had an opportunity to get to know Mr. Thompson  
5 and Ms. Munn and we know them by reputation, and we have  
6 nothing but the highest regard for them.

7           THE COURT: Right. That is understood, at least  
8 certainly by me, but you have got the burden of proof here, and  
9 I think it is rather steep, and the remedy of a preservation  
10 order can be rather kind of onerous, and so you have got a  
11 pretty big burden, and we are going to have to go next in this  
12 conversation with what witnesses do you all want to call, the  
13 scope of this hearing, and I am just questioning if we have to  
14 get there.

15           MR. FABRIZIO: Well, Your Honor, one, I am not sure  
16 that an evidentiary hearing itself is required.

17           The standard and the material part is whether there is  
18 a legitimate concern, and we think on this record that there is  
19 plainly a legitimate concern.

20           You know, Mr. Thompson might take issue with it. We  
21 are talking about a set of defendants that don't operate as a  
22 legitimate business, Your Honor.

23           They do operate in the shadows. They have no presence  
24 anywhere as far as we can tell.

25           Every address that they list, whether it is in Panama,

1 Bulgaria or Florida, it is either a fictitious address or it is  
2 a mail drop box.

3 They operate through shell companies, and they admit  
4 they have 700 servers in Texas, but yet they are not registered  
5 to do business in Texas, in violation of Texas law.

6 So, clearly, in terms of the nature of the defendant,  
7 we are not dealing with a major company that, you know, can be  
8 expected to be respectful of the judicial process.

9 I mean, I know Mr. Thompson does not like it when we  
10 refer to past cases, but the law allows the court to consider  
11 the conduct of comparably situated defendants in past cases,  
12 and it has become motus operandi of defendants like this to  
13 engage in the sort of evidence spoliation.

14 I mean, just in cases that we have handled over the  
15 past, you know, half of a decade it has been almost in every  
16 case.

17 THE COURT: But, Mr. Fabrizio, I understand why you  
18 get kind of passionate about this subject, but what about what  
19 would you like now?

20 What information, if you could sit down with Ms. Munn  
21 and Mr. Thompson and get some information to assure you that  
22 evidence is being preserved, what would you like?

23 MR. FABRIZIO: I would like them to agree with a  
24 stipulation that could then be presented to the court. I had  
25 been in a situation not too long ago --



1 THE COURT: Okay. You said that before. That makes  
2 sense.

3 Mr. Thompson, what about that? I mean, that is a  
4 pretty standard procedure.

5 All of the time I get proposed confidentiality orders,  
6 for example, that the parties draft and I sign them and turn  
7 them into a court order, and all of the time, you know, well,  
8 not all of the time, but quite often I have the parties come up  
9 with a discovery plan, and when they are really having trouble,  
10 a whole schedule and they give it to me and it becomes a court  
11 order and it becomes enforceable. So why not do that?

12 MR. THOMPSON: Your Honor, I think we would be  
13 interested in a reciprocal preservation order. These are 5  
14 plaintiffs, very large companies with ESI around the world who  
15 have been investigating our client for well over a year.

16 I think if we have a reciprocal order requiring both  
17 sides to preserve relevant information, I am sure we can work  
18 it out with Mr. Fabrizio.

19 What we object to is the assumption that the  
20 defendants are somehow wrongdoers, and I should just correct  
21 Mr. Fabrizio's statement.

22 His version of proof is to show significant imminent  
23 harm to get a preservation order. He has not done that.

24 MR. FABRIZIO: I would disagree, Your Honor, that that  
25 is the standard. That I believe is the standard if you are

1 moving ex-parte, which obviously we are not.

2 THE COURT: Okay. Well, put that aside. Okay. So  
3 this is coming down to a very human dynamic from my  
4 perspective.

5 Disney, the plaintiff, by making these accusations  
6 against the defendant, however well-founded they are,  
7 Mr. Fabrizio, I have no opinion on it, is insulting.

8 Hotfile, the defendant, who doesn't like the words  
9 they are hearing, okay, this happens all of the time in  
10 disputes. So, you know, that is not helping the conversation  
11 move forward.

12 Now, what about that, Mr. Fabrizio? What about if you  
13 all came up with an agreed order from me on preservation of  
14 evidence for both sides and how you will manage your ESI in  
15 discovery?

16 MR. FABRIZIO: Well, Your Honor, we will obviously  
17 deal with the managing ESI discovery when we get into sort of  
18 the case management and the discovery plan, but there is no  
19 basis, none whatsoever, except a tit-for-tat for suggesting  
20 that there needs to be an order against the plaintiffs. The  
21 plaintiffs are some of the most prominent companies in America.

22 THE COURT: I agree with you. No. Mr. Fabrizio, I  
23 completely agree with you.

24 It did sound tit-for-tat for me, but sometimes, you  
25 know, we have to do things. You know, you do things to get

1 things done.

2 Is there any reason why your client would not want to  
3 commit to some basic preservation of evidence procedures that  
4 both sides would be held accountable to?

5 MR. FABRIZIO: Well, Your Honor, we have worked with  
6 our clients about fairly extensive evidence preservation and  
7 litigation hold, and we have received information from  
8 Mr. Thompson about his best use as to what that should be.

9 The issue here is, and the issuance of an order of  
10 preservation requires more, and it comes with greater  
11 consequences and greater burdens.

12 We don't ask defendants to do it willy-nilly. We ask  
13 defendants to do it because we believe that the record shows  
14 that there is a very legitimate concern about evidence  
15 spoliation; a concern that Mr. Thompson has not even pretended  
16 to show to our clients.

17 They have never been accused as far as I know of  
18 destroying evidence in cases like this.

19 MR. THOMPSON: Your Honor, this is Rod Thompson. If I  
20 may, one concern we have is our clients allows copyright  
21 holders, such as Warner Brothers, one of Mr. Fabrizio's  
22 clients, one of the plaintiffs here, to have special rights  
23 holder accounts which gives them extraordinary powers to take  
24 down content from our Website.

25 This is not the typical BMCA notice. This gives the

1 special rights holder the ability to say, "That file is  
2 infringing. Take it down." Just willy-nilly.

3 They have to attest that it is, in fact, a copyrighted  
4 work of theirs. Warner Brothers, one of the plaintiffs here,  
5 has a special rights holder account and has been using that  
6 extensively in the months leading up to this lawsuit.

7 That is very relevant information that we think is  
8 very helpful to our case. And as I told Mr. Fabrizio, he is  
9 right, we have exchanged letters.

10 I have asked him to make sure that that evidence is  
11 preserved.

12 Now, I am not accusing anyone of spoliation. There is  
13 no basis to say that.

14 Frankly, there is no basis to say that of plaintiffs,  
15 either. So we come back to if we want to talk about an agreed  
16 order, I think Your Honor is on the right track here.

17 Let the lawyers work it out, but it should be a  
18 two-way street.

19 MR. FABRIZIO: Well, again, Your Honor, I would  
20 suggest that the defendants are proposing a tit-for-tat simply  
21 because they realize that major corporations are going to be  
22 reluctant to enter into orders on preservation because of the  
23 burden and consequences, and that is the reason that there is a  
24 standard to get such an order.

25 I believe we can make it or have made it. I believe

1 that when you look at the defendant's do not operate  
2 legitimately, that as I explained to Your Honor, whether  
3 intentional or not, and I am not prepared to say it has not  
4 been intentional, but intentional or not, defendants have  
5 already taken steps to manipulate key data.

6 I think that they have already demonstrated that they  
7 have not complied with litigation obligations, litigation hold  
8 obligations in other cases. And, frankly, Your Honor, I think  
9 we can demonstrate that Mr. Ketak has not been completely  
10 forthright with this court.

11 I think these are the factors. These sorts of factors  
12 clearly differentiate this set of defendants from plaintiffs  
13 who are major U.S. corporations that have physical addresses,  
14 that have boards of directors.

15 Many of them are publicly traded and there have never  
16 been any accusations by any defendants in any case that I have  
17 been involved with about evidence spoliation.

18 I think turning this into a tit-for-tat is really  
19 defendants way of trying to take attention off of themselves  
20 and shift the dialogue.

21 THE COURT: Well, I will tell you how it looks to me,  
22 okay, and I say this often to folks. A couple of things I say  
23 often.

24 First of all, I think it is very hard for any of us to  
25 be in the other person's shoes anywhere in life. So, standing

1 in my shoes, things look a little differently then they do  
2 maybe in each of your shoes, and it doesn't make me right, but  
3 it is just the way it looks, and you are kind of stuck with me  
4 because I am managing your discovery.

5 So here you go. You two sound extremely entrenched,  
6 and you are caught up with a broader battle where it strikes me  
7 that you don't need to be.

8 Mr. Fabrizio, I am hearing you say, "My client is  
9 superior and I am not going to be held to be in the same club  
10 as the defendant," and you are offended at the thought that  
11 your client would be subject to the same order that the  
12 defendant would.

13 The defense lawyer strikes me, it does feel  
14 tit-for-tat. As you say, you have no suggestion that the  
15 plaintiff is, you know, preserving their evidence.

16 So it sounds to me like you are kind of shifting the  
17 discussion, also, and neither one of you, and I don't mean to  
18 offend anybody.

19 You are very good lawyers, but the way it sounds,  
20 sitting in the middle, neither one of you really want to talk  
21 about solving the problem in a way that you kind of let go of  
22 your positions.

23 So I am kind of wondering if it makes sense, it will  
24 be a lot cheaper than having a hearing in front of me, I wonder  
25 if we should get you a mediator to sit down and talk to you

1 about this and come up with just to kind of broker an  
2 agreement. What about that?

3 MR. THOMPSON: Your Honor, this is Rod Thompson. If I  
4 may, first of all, I think a mediator is necessary.

5 We have no objection, but I do think Mr. Fabrizio and  
6 I have had a good dialogue in the recent past, and I am just  
7 conferring with the client that if a sample of the server log  
8 is something he wants to see, we can certainly get him that. I  
9 think that was one of your suggestions.

10 THE COURT: That sounds like a great idea to me. I  
11 mean, again, I am at the top of a tall building. I don't  
12 understand, you know, the systems that you all are dealing  
13 with, but it sounds like a good idea to me.

14 MR. THOMPSON: Okay.

15 MR. FABRIZIO: What we had proposed, Your Honor, is a  
16 method where we could actually get some samples, some limited  
17 discovery of these logs, and then we can actually do a sampling  
18 of other data, and after we finish that sampling of other data  
19 which would or can happen relatively quickly, we could actually  
20 relieve defendants of their obligations to put litigation holds  
21 on all of this data that they say is, you know, difficult for  
22 them to simply preserve.

23 So maybe this is a solution that has some merit. If  
24 we were to get some of the limited log type data which would be  
25 pretty easy to produce, we can, in very short order with the

1 help of our expert statistician, give them a sample list of,  
2 you know, a few thousand or probably less content files that we  
3 would be prepared to say we will live with that as our  
4 discovery of content files, and that is a few thousand out of  
5 many millions, Your Honor.

6 THE COURT: Have you each retained yet experts who are  
7 going to be, you know, your computer experts?

8 MR. THOMPSON: Your Honor, this is Roderick Thompson.  
9 We have just been engaged. We have not yet had a chance to  
10 retain an expert.

11 I do want to clarify something. Mr. Fabrizio has  
12 shifted to a different subject. He was talking about discovery  
13 of content files.

14 What I suggested was as a way of showing we are  
15 preserving evidence, we can provide a sample of a server log  
16 file which is what his stated concern was before.

17 They are really very different animals. Content files  
18 are very much larger, and that is a different issue, plus he  
19 was talking about actual discovery.

20 THE COURT: Right. Mr. Fabrizio, I did make a note  
21 that you are talking about server log data that you wanted.

22 MR. FABRIZIO: Oh, that is absolutely right. The  
23 reason or one of the reasons we want server log data is also  
24 linked to draw a sample of content files, but Mr. Thompson is  
25 right.



1           This motion concerns the server log data, but I want  
2 to make sure we don't get confused between what I just heard  
3 Mr. Thompson say they would give us a log file just so we could  
4 basically see the parameters of the log file and what is being  
5 preserved.

6           That, in our mind, is meaningless. Your Honor, if I  
7 can convey a story that will inform the court as to why we are  
8 somewhat entrenched on this.

9           A couple of years ago in a case that I was handling  
10 for different copyright clients against a similarly situated  
11 defendant, we engaged or we had counsel, by the way, Your  
12 Honor, that I knew very well.

13           I had known this lawyer probably close to a decade,  
14 and we had a personal friendship as well as knowing each other  
15 professionally for years.

16           Counsel spent weeks negotiating the terms and  
17 conditions of the production of this very type of data, and on  
18 the day that we had reached agreement that defendant was  
19 supposed to start preserving and producing this data to  
20 plaintiffs, on that very day defendants took steps to make sure  
21 all of the data would disappear and was erased.

22           That was not anything counsel did, obviously, but in  
23 situations like this, counsel are powerless to stop their  
24 clients from pushing a button and deleting data.

25           That gives us such great concern, given all of the

1 telltale signs from these defendants that we are going to end  
2 up in a situation where we spend years fighting about what data  
3 was destroyed rather than the merits of this case.

4 THE COURT: So what about if you each engage an expert  
5 and you have your experts sit down and let them guide you, help  
6 guide you towards some sort of agreement? Does that make  
7 sense?

8 MR. THOMPSON: This is Roderick Thompson, Your Honor.  
9 I think we need some time to find the expert, but certainly  
10 that sounds like a promising prospect.

11 Unfortunately, Mr. Fabrizio keeps going back to other  
12 cases, and he is not talking about this case.

13 THE COURT: Right.

14 MR. THOMPSON: I will be happy to try to work on it.

15 THE COURT: Right.

16 MR. FABRIZIO: I will be happy to talk about this  
17 case, Your Honor. I mean, again, whether it was deliberate or  
18 not, an issue we will save for later, defendants have already  
19 engaged in spoliation of data or at least a manipulation of  
20 data.

21 THE COURT: All right. I think we are repeating  
22 ourselves now. The question is what can I set up with an order  
23 for you all that will be a path for you to, with some time  
24 limits that works for all of us, there is nothing like a  
25 deadline for me to get something done, so we have some

1 deadlines and maybe something else in there for you to try to  
2 reach some agreement that you could present to me that would  
3 resolve this motion.

4 MR. THOMPSON: Your Honor, this is Rod Thompson. If I  
5 may, I think that we could provide Mr. Fabrizio informally some  
6 examples of a server log data that he is talking about and try  
7 to work with him to try to satisfy him that proper preservation  
8 measures have been taken.

9 Hopefully that will work. If it does not, then we can  
10 get experts involved on both sides, and I think that whole  
11 process could be concluded in two weeks.

12 If we are not able to resolve things, we can come back  
13 to Your Honor, but I am hopeful we can. I agree with  
14 Mr. Fabrizio, despite the offensive harsh words, I think we get  
15 along well, and I trust his professionalism.

16 So I would say just please give us two weeks, and I  
17 think we can work something out.

18 THE COURT: All right. Well, that time frame makes  
19 sense for me because next week I am not here. So it is not  
20 like you can be in front of me next week.

21 MR. FABRIZIO: Your Honor, this is Steven Fabrizio.  
22 Look, I appreciate the sort of seemingly reasonableness to try  
23 to take more time to resolve this, but I do want to mention  
24 that we did take a lot of time to try and resolve this.

25 I mean, I know Mr. Thompson said that we rushed to

1 court after their weekend of activity, but we had been in touch  
2 with defendant's counsel almost from the day the complaint was  
3 filed and have been in discussions for periods of weeks.

4 So we are not coming to this as lawyers who have not  
5 spoken to each other, nor as lawyers who don't get along.

6 THE COURT: Well, what is that you want, Mr. Fabrizio?  
7 What do you want me to do at this point?

8 MR. FABRIZIO: If Mr. Thompson is saying that he is  
9 prepared to discuss an agreement that will then be presented to  
10 the court and so ordered, that is something that I think may be  
11 meaningful, but if we are talking about plaintiffs getting  
12 comfort based on what defendants tell us they are doing, given  
13 our history of these cases and what we see of these defendants  
14 already, that's not something that is likely to lead to an  
15 agreement, which is why we have asked the court for an order.

16 THE COURT: Right. Well, Mr. Thompson, let me say  
17 this to you:

18 Regardless of the plaintiff's accusations that the  
19 defendants are not the most honorable companies, putting that  
20 aside, if that were not even here, what I would expect to do if  
21 you could resolve this is you would present me with an order  
22 that would resolve the issue, and so that's not a remarkable  
23 concept.

24 So, in the broadest sense, again, without having heard  
25 the details of this dispute, but in the broadest sense that

1 makes a lot of sense to me, and the only question is whether it  
2 should be bilateral, and I don't have an opinion on that one at  
3 this point.

4 MR. FABRIZIO: Well, Your Honor, can I offer one input  
5 into that issue? We have actually made a motion where we have  
6 put forward evidence and what we believe is something  
7 sufficient to be a standard. Defendants have made a motion.  
8 They don't have --

9 THE COURT: I know that, Mr. Fabrizio, but  
10 understandably you are very focused on your motion.

11 I am focused on the bigger picture, and that is how  
12 you are going to move forward with your discovery in this case,  
13 and obviously your client is going to have to produce  
14 electronically stored information.

15 So, to the extent that you all could have a really  
16 bona fide conversation about how that is going to go forward  
17 and reach maybe some basic agreements, that would be progress  
18 in the case.

19 So that's not dependent upon your motion. And just so  
20 you know, because I forget, but you are not from Florida,  
21 right?

22 MR. FABRIZIO: No. We are in Washington, D.C., Your  
23 Honor.

24 THE COURT: Right. Okay. Okay. So you don't have a  
25 scheduling order yet, but what will happen with Judge Jordan --

1 well, actually pretty soon it won't.

2 Well, Judge Jordan's piece will happen when he issues  
3 a scheduling order. He will be referring all discovery to his  
4 paired magistrate judge. As of April 1st, that's not me.

5 We are all shifting, but I believe the magistrate  
6 judge who will be paired with Judge Jordan as of April 1st does  
7 something similar to me, and that is somewhat of an abbreviated  
8 discovery process.

9 When I manage discovery and I see a case like this,  
10 often I will just kind of get more involved than just the  
11 motion.

12 I mean, if people are having a hard time, I will  
13 engage the parties in a discussion about how are you going to  
14 get your discovery done and what are the issues and maybe get  
15 me a discovery plan, you know.

16 So I understand you filed one motion, but clearly it  
17 seems to me that you all have some or may need some court  
18 involvement in your discovery process.

19 MR. FABRIZIO: And we may, Your Honor, but on the  
20 issue of preservation from plaintiffs, we have not yet even  
21 have a had a discussion.

22 We got a letter. First of all, even without a letter,  
23 we, of course, spent some great deal of time with our clients  
24 organizing their preservation, and then we got a letter from  
25 Mr. Thompson, and we expect to have a discussion with him where

1 I think, in large part, we are prepared to tell him that  
2 everything, you know, but for a few keep exceptions everything  
3 in his letter, I mean his letter is not a problem.

4 MR. THOMPSON: Your Honor, this is Rod Thompson again.  
5 Maybe I am the optimist, but I hope that if Mr. Fabrizio and  
6 his team and our team can sit down and talk, we can explain to  
7 him and show him the evidence we are preserving, as we should  
8 be on our server logs.

9 And if that doesn't convince him, if he wants an  
10 order, then we can talk a suitable order. I do think going in  
11 that our mind set should be reciprocal since there is no reason  
12 to think that our clients have done anything wrong, but let's  
13 put that aside.

14 If he does not prejudge things, if he comes in with an  
15 open mind, we can try to persuade him that, "Look, here is  
16 proof we are preserving things, maybe that will satisfy him.

17 If it doesn't, then we can present an order to the  
18 court and, if necessary, we can present competing forms of  
19 orders. We can present one and he can present one.

20 THE COURT: That's right. That's an option. Okay.

21 So what I am going to do then is I am going to issue  
22 an order that is going to say that we held a status conference  
23 today, and based on that, I am going to give the parties two  
24 weeks to meet and confer in an effort to reach an agreement  
25 that resolves the plaintiffs motion.

1 I understand that at minimum the defendant will be  
2 providing plaintiff with some server log data that the  
3 defendant says should demonstrate that the defendant is  
4 preserving the necessary evidence, but I am going to encourage  
5 the parties to have a more expansive exchange of information to  
6 attempt to reach agreement on a proposed order that will  
7 resolve this dispute and possibly address broader preservation  
8 of evidence issues that the parties foresee, you know, being  
9 important in the case.

10 So that will be by the 18th, a week from Friday will  
11 be the deadline, and I will be back in the district after the  
12 18th. And if I need to do something more, then I will figure  
13 out what to do. Okay?

14 MR. LEIBNITZ: Your Honor, this is Andy Leibnitz. I  
15 work with Rod Thompson for Hotfile.

16 THE COURT: Yes.

17 MR. LEIBNITZ: Can we make clear that any document  
18 production by Hotfile be for attorneys eyes only until we get a  
19 protective order in place?

20 THE COURT: I don't see a problem with that. Do you,  
21 Mr. Fabrizio?

22 MR. FABRIZIO: I don't see a problem with that as long  
23 as counsel for MCCA, who are counsel of record in this case,  
24 are included in the attorneys eyes only.

25 That is as long as it is without prejudice in the



1 ultimate protective order.

2 THE COURT: Right. Right. Okay. Well, so the  
3 parties I think also need to be considering preparing a  
4 proposed confidentiality order for the court, too.

5 MR. FABRIZIO: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. FABRIZIO: And, Your Honor, what is the mechanism  
8 for us to address the court again in the event we are not able  
9 to reach resolution?

10 THE COURT: Well, I need to get by the 18th a joint  
11 report from the parties as to the outcome of your conferral  
12 process.

13 Either you are going to submit a proposed order for me  
14 that is going to resolve everything, that would be the best  
15 case circumstance and you will tell me, you know, you have  
16 resolved the motion.

17 The motion is being withdrawn or can be denied as moot  
18 because you have resolved it. Either way works, or you are not  
19 going to be successful, and then by the 18th file with me a  
20 joint report that tells me the nature of your discussions and  
21 what if any agreements were reached and what the disagreements  
22 are and how you each propose to go forward. Okay?

23 MR. FABRIZIO: Thank you, Your Honor. Yes.

24 MR. THOMPSON: Thank you, Your Honor.

25 THE COURT: All right. Thank you. Good luck.

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MR. FABRIZIO: Thank you, Your Honor.

MR. THOMPSON: Thank you.

MS. MUNN: Goodbye, Your Honor

(Whereupon the proceedings were concluded)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

MARCH 13, 2011

S/JERALD M. MEYERS

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DATE

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JERALD M. MEYERS, RPR-CM