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INDEX OF WITNESS EXAMINATION

DX CX R-DX R-CX

No witness testimony.

INDEX OF EXHIBITS

EXHIBIT DESCRIPTION Id'D Rcv'd

No exhibits identified or received.

MISCELLANEOUS INDEX

PAGE

No miscellaneous index entries.

1 *COURTROOM DEPUTY: Openmind Solutions, Inc. versus*
2 *Doe, Case No. 11-92-GPM, is called for a hearing on all pending*
3 *motions.*

4 Will the parties identify themselves for the record.

5 *MR. STEELE: John Steele, S-T-E-E-L-E, on behalf of*
6 *the plaintiff Openmind Solutions.*

7 *THE COURT: Mr. Steele, good afternoon.*

8 *MR. STEELE: Good afternoon, Judge.*

9 *MS. FAVRE: JoDee Favre for the plaintiff.*

10 *THE COURT: JoDee, good to see you again.*

11 *MS. SAMUELS: Julie Samuels, S-A-M-U-E-L-S, on behalf*
12 *of the Electronic Frontier Foundation, which has filed as*
13 *amicus curiae.*

14 *THE COURT: I think you're the amici I let in the*
15 *case.*

16 The reason I wanted to talk to everyone today about
17 this case is, as you know, the Seventh Circuit has taken a much
18 different approach to class litigation than most of the other
19 circuits have. And you have got your case, you have got your
20 case here. Ordinarily when you sue John Doe, we know there is
21 a John Doe but either we don't know what their name is -- it
22 appears often in the prisoner litigation and it goes something
23 like this: He was six, eight, he had on an orange jumpsuit, he
24 was a member of The Crush -- that's the SWAT team -- he and
25 some other fella, who had a black mustache, grabbed me and

1 swung me against the bars of the jail cell. That's all I can
2 tell you about them now. But I don't know their name.

3 Or we have a child who was assaulted or something like
4 that and we use John Doe.

5 Now, about all you know about your potential class is
6 that you know some IP addresses.

7 *MR. STEELE:* Well, we know the exact IP address that
8 was assigned to them at a certain segment in time by their ISP.

9 *THE COURT:* Right.

10 *MR. STEELE:* And of course, the ISP has the record of
11 exactly who that is at that time. So...

12 *THE COURT:* That tells you who the computer is or who
13 registered. Now, the problem you've got, of course, is -- you
14 have thought about it is the issue of commonality. And I was
15 telling someone, I can't recall precisely the demographics but
16 the largest subscribers to legal pornography are teenage boys
17 and diabetic men over 50.

18 *MS. FAVRE:* Is that a fact?

19 *THE COURT:* I think that's right. The last I read in
20 one of the blurbs.

21 Now, there is going to be a lot of mothers and fathers
22 who it's going to show up -- of course it's going to be their
23 kids on the computer, which is what happened in that regard to
24 the downloading of music, whatever the kids use to download
25 music, right, and not pay for it with these file sharing

1 things.

2 So I have a few questions for you and then I'm going
3 to let you address the issue. I'm not going to toss you out of
4 here yet. But in a class -- you have the class of defendants?

5 *MR. STEELE:* Yes.

6 *THE COURT:* How would you go about describing your
7 class?

8 *MR. STEELE:* Well, right now our initial description
9 of the class is the people that were observed downloading or
10 uploading this content at a particular time from our client's
11 content, people that had accounts in which they've -- when they
12 first signed up signed an agreement not to do that exact thing
13 with their ISPs and against any third parties.

14 And you know, as we have in our complaint, we list
15 out -- we're not alleging that they've violated any rule
16 because I think that's -- or violated the law just yet because
17 that is a matter of a fact for the courts to determine after
18 class certification. But as far as who the prospective, if any
19 classes, it would be people that have engaged in this conduct.
20 And then we're going to later on determine -- obviously after
21 class certification, when we get to the evidentiary phases, you
22 know, did they have a license for that content. Because if,
23 for instance, someone had taken using BitTorrent -- which is
24 almost exclusively used to steal content, I think that's pretty
25 common knowledge based on the studies we have. But they also

1 happen to have an account with our client and so I just felt
2 like downloading it this way. I'm just trying to come up with
3 a scenario. Then they would not obviously have committed
4 copyright infringement. So that's the question that would come
5 later.

6 *THE COURT:* Aren't you really putting the cart before
7 the horse? Certainly if you can say this person on this time
8 did it -- but what would you do about Mrs. Jones' 51-year-old
9 diabetic husband, who when she is not around, gets on her
10 computer and watches pornography?

11 *MR. STEELE:* Well, we're not claiming that every
12 single person who happened to own that account is going to be
13 the person that's eventually part of the class. That's why we
14 do our discovery investigation. I mean if a person can show
15 that they, you know, were or not the ones, that they, for
16 instance, the husband, then that would be the person --

17 *THE COURT:* They don't have to show anything. You've
18 sued them. And therein lies the rub. What you described
19 really is a case where we are going to have to try every one of
20 these cases one at a time. And the class device really doesn't
21 help us in this case, in a case like this. Particularly where
22 you have a class of defendants, because what you have done is
23 really you have filed a case -- and certainly on an individual
24 case you could file a case against, say Mrs. Brown is licensed
25 and you could do a little investigation and see that she lives

1 by herself. And say, well, on information and belief I think
2 this for these reasons and she downloaded our software. She
3 may be able to say then -- raise the defense, well, that my
4 teenage kid was here and I certainly never authorized him to do
5 this, correct?

6 So how does the class device as you see it work in
7 this situation?

8 *MR. STEELE:* Well, first just to separate and briefly
9 respond to that question, I mean we're still saying that the
10 person who has an account that's promised, you know, in our
11 agreement with the ISPs and whatnot against third parties not
12 to do that, they're still vicariously liable. If you set up an
13 Internet --

14 *THE COURT:* Who says they're vicariously liable? In
15 other words --

16 *MR. STEELE:* Well, we are alleging that they're
17 liable.

18 *THE COURT:* You can't allege a legal theory. You have
19 to say is there some law that would say that? In other words,
20 is this a statutory claim that you are asserting or a contract
21 claim.

22 *MR. STEELE:* Well, no, we're asserting under a
23 copyright infringement and everybody in the process. So it's,
24 you know, just like the getaway driver drives a car, they're
25 just as responsible. So if someone opens up an account, they

1 can't say, hey, that's not my problem, it was my husband.
2 Well, no, it's your problem because you were part of the
3 infringing activity. Everyone, everything --

4 *THE COURT:* There is no such thing as negligent
5 infringement, though, under the copyright. If I have some
6 copyrighted material or whatever it may be and, without my
7 authority or without my knowledge, someone illegally makes a
8 copy of that and even sells it, I'm not strictly liable for
9 that.

10 *MR. STEELE:* No. But what we're saying is that you
11 are liable because you -- it's not about negligence, it is
12 about when you create an account, you have to click on a box
13 and you have to say certain things like I won't allow this to
14 happen. I'm taking a proactive guarantee, that's why you get
15 this account. And when you thus break it -- you can't, you
16 know, just leave a loaded handgun running around and say, well,
17 I knew what would happen in East St. Louis, I knew what would
18 happen, but you know what, I don't care, whatever.

19 I mean but to step back and answer your larger
20 question that I didn't get to and that is about the class
21 action, you know, framework. You know, this the --

22 *THE COURT:* Who would be the class rep in such a case
23 as this for the --

24 *MR. STEELE:* Well, in defendant class actions, the rep
25 is appointed, is chosen. You know, we suggest one, our rep.

1 The Judge has to, you know, obviously determine if that's
2 appropriate class representative based on various factors. And
3 in defendant class actions, although much less common than
4 plaintiff class actions, have certainly gone on for the last
5 150 years.

6 *THE COURT:* I understand that. I'm just saying what
7 would be looking for in an adequate class rep in a case like
8 this?

9 *MR. STEELE:* Well, first of all, it would be someone
10 who would wish to, you know, be aggressively fighting and
11 addressing this issues raised in court --

12 *THE COURT:* Someone who is in a situation, for
13 instance, where they would have a defense and say, well, my
14 husband did it without my consent, or knowledge or my teenage
15 son did it without my consent, or my teenage son's friends did
16 it without my consent or knowledge. And then they assert these
17 defendants uniformly across the class?

18 *MR. STEELE:* It's possible but we don't have that
19 occurring nearly as much as in -- I've personally dealt with a
20 lot of, you know, defendants in these kind of actions. For the
21 most part I hear, yeah, I did it, I want to settle or --
22 especially after the release is there, they are like, well, you
23 know, I had to make a decision whether to a hire an attorney,
24 you know, this or that. And they want to make sure that they
25 get releases for any other activity they may have done with our

1 other clients and so on.

2 But the issue with the class action process is, you
3 know, this is to designed for cases -- and I'm not preaching to
4 your Honor, I know you are aware of Rule 23 and how it works
5 and all. But this is a very perfect vessel for this type of
6 litigation because the infringer is not committing a massive
7 tort against a particular person. It's kind of like, you know,
8 asbestos litigation where, you know, asbestos, if they would
9 like to sue individually, sure, they may have no money and they
10 may not be able to, oh, well. The cost of litigation to our
11 client, who is getting their stuff ripped off is prohibitive if
12 they were to sue 3,000 people individually. Everyone in this
13 room -- well, every advocate in this room I think knows that.
14 And which is why and they're essentially not being allowed to
15 include in class action would essentially be a total victory
16 for the infringers. So the idea is that --

17 *THE COURT:* In this circuit that's routinely what
18 happens where someone -- we're told that, you know, you are
19 going to have to prove this as individual reliance. I'll bet
20 that JoDee could write us a quick law review article on that
21 very problem in these cases where they say, you know, it sounds
22 pretty actionable except how do you prove that each individual
23 plaintiff in this case relied upon the fraudulent statements --

24 *MR. STEELE:* Sure.

25 *THE COURT:* -- of the defendant. And they say, well,

1 you can't.

2 *MR. STEELE:* But we are almost putting the cart before
3 the horse a little bit because all we are doing now is getting
4 the discovery of these people. We're not dealing with class
5 certification. We're not dealing with how are we going to
6 prove our case. And to say, well, you don't know yet who these
7 people are specifically but yet you are expected to put on your
8 case. That's not where we are at.

9 I would respectfully suggest that all we're asking for
10 here is to get the information, which is very time sensitive.
11 Most of these ISPs they drop these people's names within months
12 or certainly within six months or eight months depending on how
13 big they are. So we need go and find who these people are now.
14 What we know is someone's name and address, that's all we know.
15 We are not asking for bank account records or anything truly
16 private. This is stuff they have already told to third
17 parties.

18 *THE COURT:* But when you do that, though, there's a
19 very powerful presumption in the federal system that if you
20 invoke the federal courts, if you are here, it's presumably
21 open. So unless you are talking about the -- someone's medical
22 records, or someone's recipe for Coca-Cola, or how to make a
23 bomb, all this becomes public information. So...

24 *MR. STEELE:* Well, the subpoena responses that we get
25 we take great effort -- for instance, our firm knows, for

1 instance, a name and address and so on. Our own clients don't
2 know who they are. We don't share this information with
3 anyone. We simply first reach out and say, look, would you --
4 you know, let's discuss this case.

5 But here's the important thing: We're just asking for
6 these people's basic, non-private information. Stuff that they
7 have told ISP, so they told third parties who they are. And we
8 know all this information about them. We say we know this
9 person at this ISP did this, this, this and this. We just need
10 to know from the ISP who that was. And we're not going on a
11 fishing expedition, we are not saying: Comcast, name all the
12 people that you think were doing this at this time. We are
13 saying this specific person we need information.

14 Now, if we don't have -- if we can't prove get our --
15 they're class certified or we can't prove the facts that we
16 allege -- and essentially this is, you know, what we are here
17 on, it's not worded as a motion to dismiss but essentially, for
18 all intents and purposes, what should be treated as such. I
19 mean we have to have some benefit of our complaint being
20 treated as our allegations are true. I mean we don't have to
21 prove, at least I would respectfully suggest --

22 *THE COURT:* You don't have to prove your case yet.
23 The problem you have got is in almost every other instance you
24 have a defendant and then you get to do discovery. Here you
25 are wanting to do discovery to find a defendant.

1 *MR. STEELE:* Well, we already know the defendant. And
2 like you were mentioning I think in the beginning about the
3 description of the John Doe cases where you had a 6'1" and so
4 on --

5 *THE COURT:* If you know defendant, why is it that you
6 wish to do discovery to find out who the defendant is?

7 *MR. STEELE:* Well, we know -- like the person that you
8 cited, he didn't know their name. But he knew all this
9 describing information about him; 6'1", orange whatever. Well,
10 we know a lot of description information too. And it only fits
11 one person and it's that person who has the account. And so
12 what we are asking for is this --

13 *THE COURT:* Why haven't you sued that person?

14 *MR. STEELE:* How could we -- we don't know where to
15 send the complaint to. We don't have their address.

16 *THE COURT:* But you know the person.

17 *MR. STEELE:* We know all the descriptive information
18 about them as far as, you know, their IP address at this exact
19 time that they were using. And that's an amazing piece of
20 information because they've given all their information,
21 personal information, like name, address, and e-mail address
22 to, you know, their ISP. The ISP -- and this is the same exact
23 type of technology that police officers use in going after
24 pedophiles. I mean this is not kind of crazy -- you know, this
25 isn't the first time this has ever been used where agents use

1 software and say, okay, we just watched this guy, this IP
2 address, send out and receive this bad information, let's find
3 out who that is because we have got to go punish them. And
4 that's essentially what we're doing here.

5 *THE COURT:* All right. Now, for the amici, I'll let
6 you intervene in this case because this is such -- ordinarily
7 the trial court would approve and we don't fool with amici but
8 if you can at least have a purported class of those persons who
9 you know not, I don't see how I could make things any worse by
10 letting an amici come and speak.

11 So who are you and what is your real point in all
12 this?

13 *MS. SAMUELS:* Sure. Well, your Honor, thank you for
14 letting us speak.

15 I am a staff attorney at the Electronic Frontier
16 Foundation, which is a nonprofit organization in San Francisco.
17 We do all kinds of digital civil liberties case work. And
18 we've been involved in many cases sort of like this but without
19 the class action piece, these mass copyright litigations that
20 have been taking place all over the country.

21 In fact, just in the past couple weeks a bunch of
22 defendants have been severed based on improper joinder in the
23 Northern District in a similar type --

24 *THE COURT:* Northern District of what?

25 *MS. SAMUELS:* Of Illinois. I'm sorry. In Illinois.

1 *THE COURT:* You had named defendants who had been
2 joined but allegedly --

3 *MS. SAMUELS:* No, it was styled as a similar complaint
4 against hundred or thousands of anonymous Doe defendants, but
5 without the class action vehicle, just as a joinder case.

6 And there's been a trend across the country -- and
7 we've gotten involved in many of these cases as amici at this
8 level or this point in the litigation.

9 *THE COURT:* What is your foundation's real concern?
10 What is the problem?

11 *MS. SAMUELS:* Our biggest concern is we're worried
12 about the due process implications to these individuals.
13 That's frankly the kind of stuff we worry about.

14 *THE COURT:* By the way, can either one of you -- is my
15 understanding of the demographics correct, have you studied
16 that?

17 *MR. STEELE:* No.

18 *MS. FAVRE:* No, but...

19 *THE COURT:* You have or haven't?

20 *MR. STEELE:* I haven't studied the demographics.

21 *MS. FAVRE:* But I did want to interject something,
22 John's had a lot of these cases, a lot of these Doe defendants.
23 And I realize we had that problem immediately in this case
24 where the mother wrote the letter. But it hasn't been an
25 overall --

1 *THE COURT:* Right.

2 *MS. FAVRE:* -- issue. It hasn't. And I mean they
3 have had thousands of these Doe defendants. So I don't think
4 from experience, you know, if you look at his track record of
5 how this happens when he actually gets the subpoena out there,
6 he gets a very good response. He doesn't get a lot of people
7 saying it wasn't me.

8 *MS. SAMUELS:* If I may --

9 *MR. STEELE:* If I could address -- if you are worried
10 about due process, you can continue but I can address the
11 procedure.

12 *MS. SAMUELS:* Can I just --

13 *THE COURT:* Due process is something we are generalist
14 about here. Like tomorrow we will try a prisoner case. You
15 know, last week we'll try -- we'll have class questions. And
16 we don't even purport to be experts in all facets of life, but
17 we are generally familiar with the concept of due process
18 because that's, after all, we're an Article 3 court and the
19 Fourteenth Amendment and the Fifth Amendment is not new to us.
20 So I can understand all that.

21 *MS. SAMUELS:* If I can -- I'm sorry.

22 *THE COURT:* Here's what I'm going to give both of you
23 a chance to do: I want -- and you can weigh in on this, but
24 first of all read the Seventh Circuit precedent. I am a trial
25 judge. Okay. Our Seventh Circuit has written a lot on the

1 subject of class litigation. Commonality is a very, very big
2 thing.

3 You have both got two weeks to weigh in on how it's
4 feasible and helpful to proceed with this case under Rule 23.
5 I'll read it carefully. Now, nobody is doing anything until I
6 read that. But I want to read it first.

7 *MS. SAMUELS:* Your Honor, if I may ask just a quick
8 question about some logistics.

9 I do know that even after you stayed discovery, some
10 discovery had gone out and some names of --

11 *MR. STEELE:* Absolutely not true, your Honor -- and I
12 don't mean to interrupt.

13 *MS. SAMUELS:* I'm sorry, I don't mean inappropriately
14 but stuff had probably issued and maybe you had gotten those
15 names.

16 *THE COURT:* I just said nothing is going to happen for
17 14 days, until I get your briefs. And then I will tell you how
18 we are going to proceed.

19 Now, as you know, no one almost ever, ever goes behind
20 my orders. And it just never happens. And I don't ever expect
21 people will. It just doesn't happen around here.

22 *MS. SAMUELS:* I'm sorry, I didn't mean to interfere
23 that Mr. Steele was going behind your orders. I was simply
24 saying that I think there's, you know, in the day-to-day
25 business, subpoenas had gone out before that -- that order

1 because they were permitted. And you know, stuff has been
2 moved maybe before that order. So I just wanted to clarify the
3 record, but I didn't mean to infer --

4 *THE COURT:* If it happens we will take a look at it.
5 But he is not in a position to make his initial disclosures.

6 *MS. SAMUELS:* Sure.

7 *THE COURT:* There are a number of things here that
8 this type of litigation -- you might say it -- I don't want to
9 say it unnecessarily complicates things. Everything is just a
10 little out of joint. But I want to read everything and then I
11 make my ruling.

12 Now, the only thing I ask is both of you both, besides
13 you as an amici, you are here, read the Seventh Circuit
14 precedent. You, too, John. Read it and then place it in the
15 context of what you are asking the Court to do. And then I
16 will read it.

17 Now, if the Court were of a mind to certify this
18 class, it is going to Chicago immediately. So I'm not asking
19 you or ordering you to do anything that you wouldn't -- you are
20 not going to have to do anyway.

21 And the questions that their honors on the Court of
22 Appeal are going to ask you are going to be much more
23 challenging and difficult than questions I've put here today.

24 So I will read what you have in 14 days and we will
25 get back here.

