

1 **TRANSCRIBED FROM DIGITAL RECORDING**

2 IN THE UNITED STATES DISTRICT COURT  
3 NORTHERN DISTRICT OF ILLINOIS  
4 EASTERN DIVISION

4 MALIBU MEDIA LLC, )  
5 )  
6 Plaintiff, )  
7 )  
8 vs. ) No. 13 C 6312  
9 )  
10 JOHN DOE, subscriber assigned IP )  
11 address 24.14.81.195, ) Chicago, Illinois  
12 ) January 23, 2015  
13 Defendant. ) 9:44 A.M.

14 TRANSCRIPT OF PROCEEDINGS - Motion  
15 BEFORE THE HONORABLE GERALDINE SOAT BROWN, Magistrate Judge

16 APPEARANCES:

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32 **NOTE: Please notify of correct speaker identification.**  
33 **FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS**  
34 **UNINTELLIGIBLE.**

35

1 (Proceedings held in open court:)

2 THE CLERK: 13 C 6312, Malibu Media, LLC versus Doe.

3 THE COURT: Good morning, everyone.

4 MR. NICOLETTI: Good morning, your Honor.

5 MS. RUSSELL: Good morning, your Honor. Erin Russell  
6 for the defendant.

7 MR. NICOLETTI: Good morning, your Honor. Paul  
8 Nicoletti for the plaintiff Malibu Media.

9 THE COURT: Good morning, again. Happy New Year.

10 MR. NICOLETTI: You too.

11 MS. RUSSELL: You too.

12 THE COURT: We're here on the motion to compel and  
13 motion for leave to file under seal.

14 Now what aspects of the motion are deemed by the  
15 plaintiff to be confidential?

16 MS. RUSSELL: I believe the exhibits that we had  
17 referred to in our contempt motion were just things that  
18 originally when they were produced to us by the plaintiff they  
19 had designated as confidential. And in order to honor the  
20 protective order that's in place, we wanted to make sure that  
21 we were very careful about not filing publicly without, you  
22 know, leave of Court.

23 THE COURT: And what I can see here as a possibility  
24 is on page 3 of what is Exhibit A there is some names of people  
25 who had some role in these works. I assume that could

1 be -- but the motion itself, I don't see any reason why the  
2 motion itself on anything else but page 3 of Exhibit A are  
3 really confidential. You know, we have the presumption here,  
4 as you all know, of public filing.

5 So, Mr. Nicoletti, anything further on those --  
6 Exhibits A that you would think couldn't be on the public  
7 record?

8 MR. NICOLETTI: No, your Honor.

9 THE COURT: Okay. So the motion to seal is granted in  
10 part. The plaintiff -- excuse me -- defendant shall file a  
11 publicly filed version of exhibit -- of -- excuse me -- the  
12 motion for order Docket Number 123 redacting only the response  
13 to Interrogatory 22 on page -- Interrogatory 21 on page 3.

14 MS. RUSSELL: Okay. Thank you, your Honor.

15 THE COURT: Okay. So that takes care of that.

16 Now we're down to the heart of the controversy as we  
17 wrap up what we hope is final fact discovery here. I have read  
18 the defendant -- the plaintiff's response. Have you had a  
19 chance to read it, counsel?

20 MS. RUSSELL: Yes, I have last night, your Honor,  
21 briefly.

22 THE COURT: So what's left here?

23 MS. RUSSELL: Well, you know, obviously we haven't  
24 really had an opportunity to properly reply to it. You know,  
25 we're just looking for some odds and ends on discovery that

1 were not, you know, produced back when we issued the discovery  
2 and when the responses are due. We haven't been able to come  
3 to an agreement. And we had a couple of phone conferences and  
4 conversations by email, you know, with regard to, you know, the  
5 list of names. We addressed that list at an appearance before  
6 you in October or November, and that was the day that we talked  
7 about a couple of names on that list were merely initials.

8 We also still needed full responses. The request was  
9 for the names and the contact information for certain people.  
10 And when we got --

11 THE COURT: Let me interrupt you here to say, we're  
12 here, Mr. Nicoletti is here, let's get this done.

13 MS. RUSSELL: Yeah.

14 THE COURT: I don't want another written response and  
15 another motion hearing. Let's get it done.

16 So what is the number one thing on your list, the most  
17 important thing, you think has not been provided.

18 MS. RUSSELL: The number one thing that we're looking  
19 for is actually not related to the list of names. What we have  
20 asked for several times is in this case Malibu has claimed that  
21 they received from our client's IP address a piece of each of  
22 the copyrighted works at issue. In other words, a piece that  
23 came directly from this IP address.

24 We have asked for them to identify and produce to us  
25 what piece are you claiming you got from our guy, not other

1 pieces that you got from other people, what pieces are you  
2 claiming our guy distributed. And that's the information we  
3 can't seem to get.

4 THE COURT: Okay. Now where is that in Interrogatory  
5 or Document Request 4? Where is that -- that seems to me  
6 clear, what you are asking for is clear. But I would like to  
7 see where it appears in the interrogatories.

8 MS. RUSSELL: We'll locate it, your Honor. One  
9 moment.

10 Forgive me, your Honor, Mr. Phillips was going to  
11 cover today's hearing, but he -- his mother is having surgery,  
12 and he could not be here so I'm covering for him at the last  
13 minute. But I do have the information here.

14 I believe that that would be in response to  
15 Interrogatory 25.

16 MR. NICOLETTI: Could I share with you?

17 MS. RUSSELL: I believe that's what Jonathan noted in  
18 the motion on page --

19 THE COURT: Okay. Would you please tell me where I  
20 can find that Interrogatory 25 in this motion here?

21 MS. RUSSELL: It should be, I believe, Exhibit B. And  
22 the reference to it is on page 3 of our motion for contempt.

23 THE COURT: Well, I want to see the actual  
24 interrogatory. Okay. Interrogatory B, okay, of plaintiff's  
25 supplemental responses are interrogatory B, but I don't see the

1 request.

2 Where is the interrogatory? Please refer --

3 (Discussion off the record.)

4 THE COURT: Is this it on page 2 going over to 3 on  
5 Exhibit B?

6 MS. RUSSELL: Yeah.

7 MR. NICOLETTI: Two going over to three. Right here.

8 MS. RUSSELL: Oh, yes, at the bottom of page 2.

9 THE COURT: Please identify each and every piece  
10 received from Doe's IP address by reference to: One, the date,  
11 hash value, and file name, which Malibu or its agents slash  
12 investigators actually used in the reassembly of the works so  
13 as to create copies of the works as listed in Complaint A --  
14 Exhibit A to the complaint.

15 MS. RUSSELL: That's correct, your Honor.

16 THE COURT: Okay. So the question is what  
17 pieces -- piece or pieces did you actually get from Doe?

18 MR. NICOLETTI: Your Honor, if you read -- if you have  
19 the exhibit in front of you, obviously you do, our response to  
20 Interrogatory Number 25 indicates we have got the -- an  
21 objection as the preamble. But plaintiff already produced the  
22 MySQL log file, which lists each hit date and file name for  
23 every transaction as of the filing of the complaint. I don't  
24 think there is any question about that.

25 Excipio is in possession and control of the hash value

1 for each piece received from defendant's IP address. And we  
2 bent over backwards. We contacted Excipio, and we actually had  
3 to pay to get this information. And we obtained this  
4 information from Excipio for the defendant, even though we had  
5 no obligation -- no obligation to do so because previously we  
6 had discussed that Excipio, if we don't have it, we don't have  
7 to get it. We got it from Excipio. We paid for it. And we  
8 gave it to them in the form of an Excel spreadsheet.

9 It is voluminous in nature. And there is no question,  
10 Ms. Russell isn't arguing that she doesn't -- that she didn't  
11 get this information in the form of a spreadsheet. That is  
12 everything that we rely on. That's the hit date. It is all in  
13 that report.

14 And I personally have not reviewed every page of the  
15 report because it is so voluminous. It is so much information.  
16 But that is the information that they wanted, and that is the  
17 only form that we are able to get the information in. And so  
18 we have given -- we have given them everything pertaining to  
19 that issue.

20 MS. RUSSELL: Here's what we don't have. In the  
21 original -- early in the case when they file a motion for leave  
22 to issue the subpoena, their motion for early discovery, they  
23 claim they got a piece of the movie from our client. They  
24 compared it to the original copyrighted work, and they  
25 determined that it matched and it reflected some portion of the

1 work.

2 We do have a MySQL, you know, spreadsheet that they  
3 sent to us. But what it doesn't reflect is what piece did you  
4 get from our client and then hold up next to your movie to say  
5 that matches, that's an infringing piece of the work. That's  
6 what we don't have.

7 THE COURT: How do you make that connection? What  
8 does the spreadsheet do for you to help you make that  
9 connection between Mr. Doe's IP address and the work?

10 MR. NICOLETTI: Your Honor, it details the IP address,  
11 the date and time that the information was exchanged. There  
12 are really three main components. There is a SQL log file. It  
13 is very complicated. And I'm not going to stand here and say  
14 that I understand the technical aspects of it because it is way  
15 over my head.

16 But there is a SQL log file. There are PCAPs that  
17 actually record the transaction between IPP's server and the  
18 defendant's IP address. And it is like taking a video camera  
19 and then recording the entire transaction. So, so she has  
20 that. And I think that that's really what she's asking for.

21 But over and above that, the spreadsheet is the whole  
22 enchilada. That's everything. This -- everything that she is  
23 looking for is on the spreadsheet, and in -- with the IP  
24 address, the hit dates, the movie, the times.

25 And this is not just a single download where there are



1 24 works. Every time there is a download, it is at a different  
2 point in time and it communicates back and forth. It is very  
3 technical, your Honor. And perhaps the remedy for the issue is  
4 for them to have an expert look at the PCAPs, the SQL files in  
5 the spreadsheets that we have given them, because that's all we  
6 have.

7 THE COURT: Okay. Let me ask this question. Did you  
8 designate any 30 -- Rule 26(a)(2) testimony --

9 MR. NICOLETTI: Yes, your Honor.

10 THE COURT: -- do you recall any --

11 MR. NICOLETTI: Yes, your Honor. That's -- I -- from  
12 IPP and Excipio. And they are the -- and we had it, this whole  
13 debacle with Excipio before, if you remember, where they wanted  
14 to test the Excipio software, and they wanted to make sure that  
15 the communications were accurate. And this kind of underlies  
16 that entire issue which they made a big fuss about, and then  
17 all of a sudden decided when the Court said, okay, you  
18 can -- you can have -- Excipio was here in court, and they  
19 said, okay, forget it, we're not going to test it.

20 So now they are going back and they are trying to get  
21 us to interpret the information in the three main components,  
22 the SQL file, the PCAPs, and in the spreadsheet. They are  
23 trying to get us to interpret that data for them when, first of  
24 all, I can't do it, my client can't do it. They -- they could  
25 have deposed IPP or Excipio, but they chose not to.

1 THE COURT: Let me ask this, did you issue your  
2 report? Did you issue your report from these people?

3 MR. NICOLETTI: Your Honor, everything has been  
4 served.

5 THE COURT: Did you get a report?

6 MS. RUSSELL: I don't have -- we have -- I think we  
7 received a report from one expert.

8 THE COURT: I mean, presumably -- sorry to interrupt.

9 But, presumably, you know, you're going to have to  
10 explain this to a trier of fact. And if you find it,  
11 Mr. Nicoletti, challenging to decipher this and need expert  
12 testimony to decipher it and make the link, I think it is very,  
13 very likely that myself or a jury, if the jury is the one  
14 deciding this, will also need that sort of testimony.

15 So, you know, I am thinking that this is a piece of  
16 what your expert should be explaining in his or her report.  
17 And that if Ms. Thom -- Ms. Wilson has that -- I got it right,  
18 Wilson?

19 MS. RUSSELL: Russell.

20 THE COURT: -- Russell has that report, then she has  
21 the key to interpreting the spreadsheet, I would assume.

22 MR. NICOLETTI: Your Honor, can I just add that Tobias  
23 Fieser and Michael Patzer are the two individuals associated  
24 with IPP and Excipio. They are identified in our disclosures,  
25 not as expert witnesses because we have got an expert witness,

1 Patrick Paige, who is going to testify as to the data, and  
2 the -- the final results of the interpretation.

3 So IPP and Excipio don't issue reports because they  
4 are not -- they are not considered -- they are not listed as  
5 expert.

6 THE COURT: Well, let me just point out that Rule  
7 26(a) (2) requires that every witness who is going to give  
8 testimony under Rule 703, 704 or 70- -- 702, 703 or 705 must  
9 make -- be the subject of a disclosure and, in many cases, a  
10 report, Rule 26(a) (2) .

11 In addition to the disclosures required by Rule  
12 26(a) (1), a party must disclose to the other parties the  
13 identity of any witness it may use at trial to present evidence  
14 under Federal Rules of Evidence 702, 703 or 705. And 702 is  
15 very broad as to what is the subject of expert testimony, a  
16 witness who is qualified as an expert by knowledge, skill,  
17 experience, training or education.

18 So, in other words, if your employee is going to get  
19 up here and give technical evidence, he has to be subject of a  
20 formal disclosure under Rule 26(a) (2) . If he is going to get  
21 up there and talk about anything that is beyond the common ken  
22 of a juror or trier of fact, he is going to have to be the  
23 subject of a Rule 26(a) (2) disclosure.

24 Now some witnesses who give that testimony are subject  
25 to a report. But even witnesses who do not provide a written

1 report must be disclosed by the attorney in a disclosure that  
2 states the subject matter on which the witness is expected to  
3 present evidence under Rule of Evidence 702, 703 or 705, and a  
4 summary of the facts and opinions to which the witness is  
5 expected to testify.

6 So unless those disclosures were made as to these  
7 gentlemen under Rule 26(a)(2), which I set the deadline for the  
8 plaintiff as the 9th, those people are not going to testify,  
9 period, end of story.

10 MR. NICOLETTI: I understand that, your Honor. And  
11 those disclosures were in fact made. A summary of their  
12 testimony and --

13 THE COURT: What they made under Rule -- as a separate  
14 Rule 26(a)(2) disclosure?

15 MS. RUSSELL: No. No.

16 THE COURT: The Seventh Circuit has said in -- Musser  
17 versus Gentiva Health Services, that disclosure under Rule  
18 26(a)(1) or interrogatories are not sufficient. A witness who  
19 presents evidence under Rule 702, 703 or 705 must, must have  
20 been disclosed in a formal Rule 26(a)(2) disclosure because  
21 there are steps and measures that are required of people who  
22 give technical, scientific or otherwise specialized testimony  
23 that do not apply generally across the board to witnesses.

24 And in that case, Musser versus Gentiva Health  
25 Services, which I'll give you the cite, 356 F.3d 751, a Seventh

1 Circuit decision of 2004, the Seventh Circuit affirmed summary  
2 judgment for defendant because the Court refused to allow in  
3 the testimony. The Court refused to allow in the -- any  
4 testimony by the treating doctor because, although he had been  
5 disclosed in Rule 26(a) (1) disclosures, initial disclosures,  
6 and interrogatories and everybody, quote, knew that he was the  
7 treating doctor, there had never been a formal Rule 26(a) (1) --  
8 (a) (2) disclosure served. The trial court refused to let it in  
9 and, accordingly, there was no proof of injury. Accordingly  
10 summary judgment for the defendant affirmed.

11 So I take those disclosures very seriously. My  
12 website has a specific standing order about expert testimony  
13 that spells out these requirements. And I will not, not, go  
14 against the Seventh Circuit's mandate in Gentiva and other  
15 cases that have come down since then that a Rule 26(a) (2)  
16 disclosure must be served with respect to every witness who is  
17 going to give any technical, scientific or specialized  
18 knowledge testimony, employee or not employee. No matter what  
19 the relationship is, retained or not retained, that distinction  
20 has gone out the (unintelligible) in 2010.

21 There may be a difference as to whether it has to be a  
22 disclosure or whether it has to be an expert report. But there  
23 is no doubt anymore that you cannot have somebody get up and  
24 testify about expert, scientific, technical or specialized  
25 knowledge without a formal Rule 26(a) (2) disclosure, which is

1 why I set that date of the 9th.

2 MR. NICOLETTI: And, your Honor, I don't have the  
3 disclosure in front of me, and I apologize, I didn't -- I  
4 didn't see that coming up as an issue.

5 But I am -- I will stand by whatever our disclosure  
6 was. I know that we disclosed Tobias Fieser, we disclosed Mike  
7 Patzer, and we indicated that -- with a summary of their  
8 testimony, and we complied with all the federal and the local  
9 rules. And if I had a copy of it, I could read it, but I don't  
10 have it in front of me.

11 But what I am saying is that they don't -- in all the  
12 hundreds of cases we have had, we have never had this issue  
13 come up before where there was a report that was needed by IPP  
14 or Excipio because they are fact witnesses. They observed  
15 firsthand the transaction taking place.

16 THE COURT: Are they going to -- just like a treating  
17 doctor, a treating doctor observes the patient come in to the  
18 emergency room or wherever, but his testimony about that is  
19 based on his technical, scientific or specialized knowledge.  
20 He does not get to testify without a disclosure under Rule  
21 26(a)(2).

22 So, you know, you can stand by it all you want, and  
23 that's fine. And I'll take a look at it. And I'm not making  
24 any judgments. But I will tell you, I -- I, and every other  
25 judge in this building, to my knowledge, follows the Seventh

1 Circuit rules, and the Seventh Circuit has said those  
2 disclosures are required.

3 And now with the change in the Federal Rules of Civil  
4 Procedure in 2010, there is -- there is just no ambiguity left.  
5 I'm not going to permit people to testify under Rule 702 about  
6 anything based on their scientific, technical or other  
7 specialized knowledge, treating physician, employee. Anything  
8 that they looked at and interpreted that I could not look at  
9 and interpret myself because I don't have specialized  
10 knowledge, training or experience in this area is 702  
11 testimony.

12 Now if Mr. Whatever his name is, Mr. Witness was  
13 standing on a street corner and saw a car go through a red  
14 light and hit another car, he can certainly come and testify  
15 about that because that doesn't require specialized knowledge,  
16 training or experience. But if he is there interpreting  
17 something based on that, he is giving testimony under Rule 702.

18 MR. NICOLETTI: Your Honor, I think the best solution  
19 is that if we can look at the disclosures and -- I believe that  
20 we complied with the federal and --

21 THE COURT: I mean, not -- I don't do your case for  
22 you. All I'm telling you is what I understand the law to be.  
23 And, you know, I'll make a ruling. And if the ruling excludes  
24 your witness, you will be with Ms. Musser. So that's the way  
25 life falls. I mean, you make your judgments, you make your

1 evaluation of what the law requires, and that's it. What can I  
2 say? If they file a motion to exclude him as a witness, I will  
3 take a look at it and see whether the testimony is going to be  
4 permitted.

5 MR. NICOLETTI: That's fair enough, your Honor.

6 MS. RUSSELL: Your Honor, may I comment on this just  
7 very briefly? There were no disclosures filed and no review of  
8 the --

9 THE COURT: Well, no, filed isn't the word.

10 MS. RUSSELL: Sure.

11 THE COURT: Served is the word.

12 MS. RUSSELL: Well, sure. But -- and so what I was  
13 going to say is nothing was filed. And certainly all we  
14 received was an email with some things that we put  
15 Mr. Nicoletti on notice immediately we didn't feel were  
16 sufficient. And there have been a couple of conversations back  
17 and forth about that. So we'll address that, as you mentioned,  
18 with a motion or whatever when -- at the appropriate time. But  
19 it is our position that this -- that appropriate disclosures  
20 that comply with the rules have not been made.

21 THE COURT: I mean, in many ways this does have very  
22 strong parallels to a medical case in the sense that without  
23 expert testimony on these issues, I don't see how you could  
24 ever get to a trier of fact. I mean, I don't know off the top  
25 of my head how to link an ISP address with another number.



1 That's technical information. Just the same as a medical case  
2 relies on the testimony of a doctor to say that this injury  
3 occurred and this was the treatment for it. And that's what  
4 you can't get in without a Rule 26(a)(2) disclosure that is in  
5 an appropriate format.

6 MR. NICOLETTI: Your Honor, that is -- Patrick Paige  
7 is the doctor in your example, and he has been disclosed as an  
8 expert, and he's been treated as an expert. And so he is -- he  
9 is going to give that testimony. I agree that expert testimony  
10 is necessary, and that's how we plan to introduce it.

11 THE COURT: Well, we'll see if the disclosure was  
12 sufficient.

13 Is he an employee?

14 MR. NICOLETTI: No, your Honor.

15 THE COURT: All right. He is not an employee, then  
16 he's retained.

17 MR. NICOLETTI: He is retained.

18 THE COURT: Did he do a report?

19 MR. NICOLETTI: I'm not sure when the reports are due,  
20 but --

21 THE COURT: The reports were due the 9th.

22 MS. RUSSELL: Yeah.

23 MR. NICOLETTI: The reports have been done.

24 MS. RUSSELL: We received a declaration with an  
25 electronic signature of Mr. Paige on it.

1 THE COURT: Well --

2 MS. RUSSELL: And a couple of attachments. Not  
3 everything that he has referenced in the -- the report is  
4 apparently this declaration. And the things that he relied on  
5 in support of the statements he makes in that declaration are  
6 not all attached. There are some things attached, but not  
7 everything that he purports to rely on in the declaration.

8 THE COURT: I see a fight coming down the road --

9 MS. RUSSELL: Yeah.

10 THE COURT: -- so I'm saying that this case seems to  
11 rely very strongly on technical information, technical  
12 testimony, and without -- if that's not sufficiently disclosed,  
13 it is not coming in.

14 MR. NICOLETTI: Understood, your Honor.

15 THE COURT: So --

16 MS. RUSSELL: Your Honor?

17 THE COURT: Yes.

18 MS. RUSSELL: And not to change the subject. But to  
19 respond, if I may, to what we were originally talking about  
20 with regard to trying to make them do some extra work to give  
21 us the thing that we're really looking for in discovery, the  
22 thing we're looking for is the thing they told you they had  
23 when they came in here and asked you if they can issue a  
24 subpoena. That's what we are -- they said they had a PCAP, a  
25 thing, that they compared to the original movie and made an

1 assessment that there had been copyright infringement.

2 All we want to know is we want to see that thing. And  
3 it was the -- we're not asking them to make something new or  
4 cost whatever money they are saying they have to spend. This  
5 is a thing that they came in and made representations regarding  
6 under Rule 11 when they filed their complaint and then when  
7 they came in here and asked you if they could issue the  
8 subpoena two years ago.

9 So all we have ever wanted is, okay, show us the  
10 piece, show us the PCAP that you took and you compared to the  
11 original work in order to make this assessment and file this  
12 case and get a subpoena. We don't want to -- we don't need  
13 anything new.

14 THE COURT: Well, they are saying that's on that.

15 MR. NICOLETTI: But it -- our expert has looked at it.  
16 It isn't. And I understand that Mr. Nicoletti may believe  
17 that. As he said, maybe he has some technical confusion or --  
18 I am not -- you know, whatever he's -- you know, he's made it  
19 pretty clear that it is very complicated.

20 But what our expert has said is this piece that we're  
21 looking at, what they claim later is, oh, well, we think we  
22 have some part of something or whatever. The thing that they  
23 said they had when they filed the complaint and the thing they  
24 said they had when they asked for the subpoena, we don't have  
25 it.

1 THE COURT: Okay. I don't know the answer to that --

2 MS. RUSSELL: So --

3 THE COURT: -- because, as you say, your expert told  
4 you that.

5 MS. RUSSELL: Yeah.

6 THE COURT: So I don't have any of that evidence  
7 before me. Mr. Nicoletti is saying, yes, the spreadsheet tells  
8 you. You're saying, no, it doesn't.

9 MS. RUSSELL: Yeah.

10 THE COURT: I have no way of knowing the answer to  
11 those -- that question.

12 MS. RUSSELL: Well --

13 THE COURT: So I cannot grant the motion or deny it.  
14 I can't -- you know, the problem is I don't know the answer to  
15 that question.

16 MS. RUSSELL: I'm sure -- I'm absolutely certain that  
17 you don't and I don't. But when my expert tells me that, and  
18 we have had many conversations --

19 THE COURT: Well, we have nothing from your expert in  
20 here.

21 MS. RUSSELL: Oh, no, I understand.

22 But what I am saying is, we have gone to Mr. Nicoletti  
23 a number of times. And even before my involvement, I think, in  
24 this case, Mr. Phillips had done so to say this is the  
25 PCAP -- this is the thing we're looking for, and we still don't

1 have that thing.

2 THE COURT: Well, see, that's the fact that is at  
3 contest, do you have it or do you not have it. Mr. Nicoletti  
4 says the spreadsheet says it. You say it doesn't. I don't  
5 have any facts on which I can base that decision.

6 MS. RUSSELL: Well --

7 THE COURT: I can't -- I can't make the decision.  
8 You're making a representation, he's making a representation.  
9 Yours is based on your expert. I don't have that expert. I  
10 have no affidavit. I have no testimony. I have nothing before  
11 me that would say -- I have nothing but argument of counsel  
12 before me so I cannot make a judgment based on your  
13 representation of what the expert said that it is more likely  
14 than not than what Mr. Nicoletti said.

15 Do you see what I am saying? Your argument here,  
16 we're kind of wasting time because I don't have that insight  
17 into that. That is a technical piece of information that I  
18 don't have.

19 MS. RUSSELL: I understand, your Honor. But I don't  
20 know how I resolve it if Mr. Nicoletti doesn't go back to his  
21 people and say -- well, you know, if he is saying we gave  
22 you -- there is a universe of stuff. That's like saying, we  
23 gave you a truckload of boxes, but we won't tell you which  
24 thing in there we rely on.

25 THE COURT: I don't know that that is the case.

1 MS. RUSSELL: Well --

2 THE COURT: Mr. Nicoletti --

3 MS. RUSSELL: -- I understand.

4 THE COURT: -- is telling me that it is like a  
5 Whitler's -- what do you call those? -- Whitman Sampler where  
6 the name of the chocolate is on the bottom of the box.

7 MS. RUSSELL: Right.

8 THE COURT: So I don't know whether it is a Whitman  
9 Sampler box or just a Forrest Gump box --

10 MS. RUSSELL: Well, we're --

11 THE COURT: -- where the piece of chocolate, you don't  
12 know what you are going to get.

13 MS. RUSSELL: Right. But we just don't understand why  
14 they can't point to it and say, it is that piece we compare.

15 THE COURT: Okay. We're not getting anywhere here.

16 MS. RUSSELL: Okay.

17 THE COURT: We're not getting anywhere. I want to  
18 move the ball down the field.

19 MS. RUSSELL: Okay.

20 THE COURT: All right? Then what I -- now you have  
21 got whatever disclosures they're going to make. They're  
22 adequate, they are not adequate. You know, to some extent if  
23 they aren't adequate, then that will redound the problem of the  
24 plaintiff.

25 You know what, the defendant's expert disclosures are

1 coming up on the 9th.

2 MS. RUSSELL: Yes, we'll be making them. We'll be  
3 disclosing at least an expert.

4 THE COURT: Okay. And then you have depositions of  
5 experts, and we'll see what it is. You know, I just -- I just  
6 don't have enough information to grant this motion at this  
7 time.

8 So what I will do is I'm going to deny the  
9 motion -- well, that was point number one.

10 What was the next one? I just don't have the  
11 technical information. So let's -- as to Interrogatory Number  
12 25 it's denied without prejudice.

13 Okay. What else have we got?

14 MS. RUSSELL: The other --

15 THE COURT: Anything else?

16 MS. RUSSELL: The other issue was -- if we're  
17 prioritizing, the second issue was the -- getting the full  
18 disclosure of the contact information for the list of names  
19 that were identified.

20 THE COURT: Why do you need that? I never quite  
21 understood why you need that.

22 MS. RUSSELL: Well, we had asked for it  
23 because -- because these are just names. If we're going to do  
24 any sort of investigation into whether these are  
25 people -- these are people who allegedly contributed to the

1 creative process, and we can't even do like a background check  
2 to make sure that that's true or that these people are those  
3 kind of people that do that kind of work or --

4 THE COURT: Well --

5 MS. RUSSELL: -- to see if there is anything.

6 THE COURT: -- but why do you need that?

7 MS. RUSSELL: Because there are questions as to  
8 whether or not any of those people may have property rights in  
9 these copyrights. And I understand that the plaintiff has  
10 contended that they do not. But what we have wanted to do is  
11 to at least figure out who these people are and, you know, do  
12 they work in this industry and get some information about  
13 what -- that they are --

14 THE COURT: I just don't -- I really don't see why  
15 that is relevant. I mean, I don't see --

16 MS. RUSSELL: It is relevant.

17 THE COURT: Plaintiff has assert -- has registered a  
18 copyright (unintelligible).

19 MS. RUSSELL: Oh --

20 THE COURT: Right?

21 MS. RUSSELL: They have registered the copyright. But  
22 if -- even if you register the copyright, if it turns out that  
23 you didn't have the right to register that copyright, if in  
24 fact you didn't hold sufficient rights to do that, then that is  
25 a problem.



1 THE COURT: Well --

2 MS. RUSSELL: So we can have all these people who are  
3 allegedly involved in the creative process. They can have  
4 rights in that copyright. That's the reason that we ask --

5 THE COURT: I think this is very far afield. I  
6 really -- we have got to wrap this up. I mean, this is a  
7 registered copyright. You are going to go behind the copyright  
8 now and claim that they don't have the proper registration in  
9 this copyright? I mean, this seems to me to be far afield.

10 Is there some kind of affirmative defense that's  
11 alleged that they don't have copyrights and -- copyright  
12 interest in this case?

13 MS. RUSSELL: Well, if indeed any of these people do  
14 have rights, then that is an affirmative defense, and that's  
15 something we need to look into --

16 THE COURT: I --

17 MS. RUSSELL: -- to see if these are --

18 THE COURT: This is very far afield. If you get  
19 enough information -- no, this is too far afield. The real  
20 question -- we need to wrap this up. This is now a two-year-  
21 old case. It has cost your client a lot of money, and -- which  
22 you have mentioned from -- numerous times, and we need to move  
23 on with this thing. They have a registered copyright. I'm not  
24 going to go beyond that. We are not going to have a trial on  
25 whether that copyright is properly registered.

1           So let's move on. Next.

2           MS. RUSSELL: I believe those are the issues that were  
3 raised in order. We did -- you know, the -- I mean, you have  
4 just ruled on it. So, I mean, they -- we asked for names and  
5 addresses for those people, and they gave us a list of names,  
6 and that's not a complete answer to the interrogatory, but --

7           THE COURT: Well, I just think it is well beyond the  
8 scope of what is relevant to claims and defenses in this case  
9 as they are pled. I just think it is sort of fishing for a  
10 possibility, and it is way past the time for fishing at this  
11 point in the game, so let's move on.

12           Anything else?

13           MS. RUSSELL: The other issue that was raised was when  
14 we are talking about IPP and how they are listed in the -- in  
15 the discovery responses. We did have -- there have been --  
16 this has been a point of contention for some time.

17           And then after I became involved in the case, we  
18 recently had a telephone conference about it. And I believe in  
19 Malibu's response they contended that we are, you know, making  
20 a big deal about it doesn't matter which corporate entity, what  
21 you call it. And it does matter. It is not just one thing.  
22 If it is IPP, is it IPP Limited? Is it IPP something else?

23           All we wanted to know is, what are you claiming is the  
24 corporate name that you are relying on? So when we talked --  
25 and that's not picking nits, that's a very specific thing.

1           We don't want to hear later on in this case that, oh,  
2 well, you know, IPP Limited did this, but IPP UG Pancake did  
3 something else. We just want to know what corporation are you  
4 taking about because it appears to us that your --

5           THE COURT: Amend your answers to supplement -- serve  
6 supplementary answer to interrogatories identifying that entity  
7 by its proper legal name. And referring back to previous  
8 answers, verify that that proper legal name was the entity that  
9 was referred to in those other ones so we're not having any  
10 ambiguity about whether it is -- there are multiple different  
11 IPP entities working around.

12           MR. NICOLETTI: Judge, if I can just comment. It is  
13 not that simple. I understood what you just said. However,  
14 the online copyright infringement agreement that forms the  
15 basis for IPP doing work for Malibu Media was entered into by a  
16 company by the name of IPP International UG. So we can't just  
17 change -- when they claim that there is confusion, it is like,  
18 what kind of car do you drive? I drive a GM. Well, I don't  
19 know what a GM is. It is General Motors. It is an  
20 abbreviation.

21           So when the German registry identifies the company, it  
22 abbreviates. It says, IPP INT UG. That's the -- that's what  
23 they are talking about. So if we amend the answers to say that  
24 we're referring to IPP INT UG, then all of a sudden they're  
25 going to argue that, well, we don't have an agreement with IPP

1 INT UG, it is a different company. They are all -- it is the  
2 same entity. There is only one IPP entity. There is no  
3 confusion over it.

4 THE COURT: Then please serve a supplemental answer  
5 that says, there is only one entity that we have entered into a  
6 contract with, whatever the answers to interrogatories apply  
7 to, that has performed work for us. Its full name is whatever  
8 it is, period. And that is the entity to which we are  
9 referring in all of our previous answers to interrogatories.

10 MR. NICOLETTI: And, your Honor, that's what our  
11 answer was to the interrogatory.

12 MS. RUSSELL: And, your Honor --

13 THE COURT: Well, I don't see it. Where is the answer  
14 to -- you mean your email that you include as an exhibit,  
15 Exhibit A, says -- oh, Mr. Phillips says, I forgot to include  
16 that PN agreed to amend any answers that refer to IPP INT UG as  
17 any other name, including IPP (unintelligible) or IPP  
18 International UG?

19 MR. NICOLETTI: I --

20 THE COURT: Let's just clarify this and put this issue  
21 to bed.

22 MR. NICOLETTI: But --

23 MS. RUSSELL: It is not as simple as an abbreviation,  
24 your Honor. And as we mentioned in our motion, Mr. Fieser's  
25 declaration, which was filed as -- it is you ECF Document

1 Number 2 in this case, says his employer is IPP Limited. That  
2 is not just an obvious abbreviation of IPP International UG,  
3 whatever. It is -- all we wanted to make sure is we don't get,  
4 you know, spun around later with someone saying, oh, well,  
5 that's different. And since they filed the declaration and  
6 this man says he works for IPP Limited, we just want to make  
7 sure. So all we asked him to do was, even once he figured out  
8 what the answer was, I'm going to do a word search, you know,  
9 do a find and replace something. We're not asking him to  
10 reinvent the wheel. But, you know, the corporate name, it is  
11 an important thing.

12 THE COURT: If you think you need to amend your  
13 answers, file a supplemental answer to clarify this. Just  
14 clarify it with a verified supplemental answer.

15 MR. NICOLETTI: Just one -- just one supplemental  
16 answer, your Honor, as opposed to going back and changing --

17 THE COURT: I don't think -- I think at this point  
18 going back and changing and re-serving and re-filing 20  
19 different things would be really -- let's simplify it.

20 MR. NICOLETTI: And, your Honor, that's what I  
21 offered, and counsel rejected that. I would --

22 MS. RUSSELL: No.

23 MR. NICOLETTI: I would file a notice saying that when  
24 we're talking about IPP --

25 THE COURT: Not a notice, an amended verified

1 supplemental answer --

2 MR. NICOLETTI: Okay.

3 THE COURT: -- to an interrogatory.

4 MS. RUSSELL: That's what we wanted.

5 THE COURT: Amended verified supplemental answers to  
6 interrogatory in which you simply, at the Court's direction,  
7 identify this one entity, whether it is referred to as X, Y, Z,  
8 T, it is the same entity.

9 MS. RUSSELL: And, your Honor --

10 MR. NICOLETTI: In one paragraph, your Honor, not a --

11 THE COURT: Ms. -- counsel?

12 MS. RUSSELL: That's what we asked for. And what we  
13 were offered was, let's do a stipulation. And my concern  
14 was --

15 THE COURT: No, not a stipulation.

16 MS. RUSSELL: -- if it is not a verified response --

17 THE COURT: Because you don't know. You don't have  
18 any basis for a stipulation.

19 MS. RUSSELL: Right, since I don't know. And so --  
20 and that's all I wanted was a verified response.

21 THE COURT: One answer, one supplemental answer, in  
22 which you set this fact out verified by an appropriate person,  
23 and then it is done.

24 MS. RUSSELL: Yes.

25 THE COURT: So it is granted as to -- where would that

1 be? What's that interrogatory, by any chance?

2 Grant as to -- granted --

3 MS. RUSSELL: Okay.

4 THE COURT: -- as to the issue of the corporate name  
5 of IPP. The defendant will serve a verified supplemental  
6 interrogatory answer setting out the fact that there is one  
7 entity with whom the plaintiff has contracted. And identify  
8 the full corporate name and the other names that have been used  
9 by that entity in this lawsuit.

10 MR. NICOLETTI: Fair enough, your Honor.

11 THE COURT: Get that done.

12 MS. RUSSELL: Perfect.

13 THE COURT: Okay.

14 MS. RUSSELL: Perfect, your Honor.

15 THE COURT: Okay. Next?

16 MS. RUSSELL: I believe -- I can review, but I think  
17 that's the end of the issues that were raised in our motion.  
18 I'll verify that, but I think we have covered everything.

19 THE COURT: Okay. Good.

20 MS. RUSSELL: I believe so.

21 THE COURT: So grant -- that motion is granted in  
22 part, denied in part, and denied without prejudice so -- as  
23 stated on the record.

24 MS. RUSSELL: Thank you, your Honor.

25 MR. NICOLETTI: Thank you.

1 THE COURT: Then we have the status hearing on the  
2 12th of February. I think we better keep that because I think  
3 that -- I want to see how things are developing on the expert  
4 witness front.

5 MS. RUSSELL: I agree, your Honor.

6 THE COURT: That is at 10:30. That still work for  
7 everybody?

8 Mr. Nicoletti, you're going to be on the line. Unless  
9 you want to be here in person, then that's --

10 MR. NICOLETTI: No, I would prefer the telephone, your  
11 Honor.

12 THE COURT: Okay.

13 MS. RUSSELL: Your Honor --

14 THE COURT: Well, we'll see.

15 MS. RUSSELL: -- I hate to --

16 THE COURT: Yes, ma'am.

17 MS. RUSSELL: -- be the -- I hate to be the local  
18 person asking to move it. I have a matter in front of Judge  
19 Darrah at 9:30, and so we -- 10:30 is great, but just -- I  
20 would like to put the Court on notice that there is a chance I  
21 will be running in right at the --

22 THE COURT: Well, if Mr. Nicoletti is not here, he's  
23 on the phone --

24 MS. RUSSELL: Okay.

25 THE COURT: -- then he can stand by for a few



1 minutes --

2 MS. RUSSELL: Okay.

3 THE COURT: -- while we wait for you to get --

4 MR. NICOLETTI: That's fine.

5 MS. RUSSELL: Judge Darrah usually moves pretty  
6 efficiently. But just that's where I will be if I am running  
7 late.

8 MR. NICOLETTI: I'm flexible, your Honor.

9 THE COURT: Okay. All right. Well, always  
10 interesting.

11 Anything else then?

12 MR. NICOLETTI: Nothing else.

13 THE COURT: Status remains set for the 12th.

14 MS. RUSSELL: Thank you, your Honor.

15 THE COURT: See you then.

16 MR. NICOLETTI: Thank you.

17 (Which concluded the proceedings.)

18 CERTIFICATE

19 I certify that the foregoing is a correct transcript  
20 from the digital recording of proceedings in the above-entitled  
21 matter to the best of my ability, given the limitation of using  
22 a digital-recording system.

23 /s/ **Pamela S. Warren**  
24 Official Court Reporter  
25 United States District Court  
Northern District of Illinois  
Eastern Division

January 27, 2016  
Date