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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SOFTWARE FREEDOM,

4 Plaintiff,

5 v.

09 CV 10155

6 BEST BUY,

7 Defendant.

8 -----x
9 New York, N.Y.
May 6, 2011
2:40 p.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 SOFTWARE FREEDOM LAW CENTER
15 Attorneys for Plaintiff Software Freedom Conservancy and
Erik Andersen

16 BY: DANIEL RAVICHER, ESQ.
AARON WILLIAMSON, ESQ.

17 ROBINS, KAPLAN, MILLER & CIRESI, LLP
18 Attorneys for Defendant Best Buy

19 BY: EMMETT J. McMAHON, ESQ.
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1 THE COURT: All right. Please be seated.

2 Mr. Ravicher?

3 MR. RAVICHER: Yes, your Honor.

4 THE COURT: Mr. Williamson.

5 MR. WILLIAMSON: Yes, your Honor.

6 THE COURT: Mr. McMahon.

7 MR. McMAHON: Yes, your Honor.

8 THE COURT: Are you the gentlemen that are usually
9 here for the defense side?

10 MR. McMAHON: Yes, I was here last time, your Honor.
11 I spoke a little bit. My partner spoke last time. I was here
12 last time.

13 THE COURT: Somebody I got used to seeing wasn't here,
14 okay.

15 So we have, I think, two issues to discuss this
16 afternoon.

17 One is the Best Buy would like to make a motion to
18 strike Bradley Kuhn as an expert witness. And that letter was
19 dated April 18th from Best Buy. And there was a responsive
20 letter from the plaintiff dated April 21st. And it said that
21 such a motion won't be successful.

22 And I, frankly, think there is enough in the letters
23 for me to discuss that issue and not have a motion. I don't
24 see why I need a motion, I'll give you my views on the issue.

25 And the other one is Best Buy, also defendant's letter

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1 requesting a premotion conference regarding, again, motion to
2 strike plaintiff's claim for actual damages. And to strike, I
3 guess, plaintiff's claim to obtain or cover Best Buy's profits.
4 And that letter is responded to on April 28th by the
5 plaintiff's, again objecting to the request to strike the claim
6 for Best Buy's profits, not objecting I think to the motion to
7 strike, so to speak, the claim for actual damages. And then
8 saying that plaintiff, in turn, intends to strike any expert
9 evidence should Best Buy offer any expert evidence as to
10 deductible expenses.

11 Once again, I think there was enough in the letters
12 for me to really take on all of those issues also.

13 So let's start with Bradley Kuhn.

14 The issue here is whether or not Mr. Kuhn is a witness
15 retained or specially employed to provide expert testimony in a
16 case. Or, one whose duties as the party's employee regularly
17 involved giving expert testimony. If he falls under either of
18 those categories, Rule 26(a)(2)(B) requires a written report
19 and the rule lays out what the report must contain.

20 If the witness is not specially retained or employed
21 to give expert testimony then no expert report is required. So
22 the only issue is which category does Kuhn fall in.

23 After reading these letters, I actually think Kuhn is
24 not retained or specially employed to provide expert testimony
25 and not one whose duties as the party's employee regularly

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1 involves giving expert testimony. So I don't think any expert
2 report is required and, therefore, his designation as an expert
3 witness is now stricken.

4 All that said, on the other hand, Best Buy has a lot
5 of information from this guy. He has already been deposed. As
6 I understand it, Kuhn has been deposed in this case. And we do
7 know the subject of the testimony. We do know his identity as
8 expert. We know the subject of his testimony. I'm
9 not entirely sure we know the summary of the facts and opinions
10 that he expects to give. But if you have done that, too,
11 that's fine. If you haven't done that, you ought to supplement
12 it, minimally, to do that. But then that will be satisfactory,
13 as I don't think a written report is required. So the long and
14 short of it is, I don't need a motion. And if you're not
15 satisfied with that, stand up and make your motion orally, I'll
16 listen to the plaintiff oppose it orally, and I'll rule orally
17 on the record. But that's pretty much going to be the ruling.
18 I think you're speaking now for the record and not really to
19 convince me, because I have already studied the issue.

20 MR. McMAHON: I respect that you have gone as far as
21 you have already. I do have two comments to make.

22 One is that what we have right here is that if Mr.
23 Kuhn wants to testify -- and we apply the exception in rule 26
24 to him, then it should be limited to what Software Freedom
25 could say. But what we have here is the copyright holder has

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1 given some expert a proprietary interest in this case. He's
2 joined the case.

3 THE COURT: Some expert. You mean Mr. Kuhn. Use his
4 name or his company.

5 MR. McMAHON: I'm sorry.

6 And then he is providing opinions on behalf of Mr.
7 Anderson. So whether or not he has paid or not, he is still
8 retained. And I don't think retained should hinge on whether
9 or not the man is compensated and whether there is an expert
10 agreement. The only reason that --

11 THE COURT: He has to be retained as an expert. He
12 may be retained by the conservancy, but he has lots of other
13 duties, as I understand it. He manages the finances of the
14 company, he works on members' behalf to make arrangements for
15 third-party services, he counsels members. So he -- yes, he is
16 retained by the conservancy, but not for the purpose --
17 certainly not for the sole purpose of giving expert testimony,
18 which he has never given before.

19 MR. McMAHON: Well --

20 THE COURT: So he is an employee. He is --

21 MR. McMAHON: He is employee of a party --

22 THE COURT: -- retained.

23 MR. McMAHON: I'm sorry to interrupt.

24 THE COURT: No, go ahead.

25 MR. McMAHON: Employee of a party who should not be in

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1 this case because they lack standing.

2 THE COURT: But that's -- we disagree. You'll get to
3 appeal that someday. I have already ruled on the standing
4 issue.

5 MR. McMAHON: Okay. But my point is, then, let him
6 give opinions under 26(a) that apply to Software Freedom, but
7 not to what Mr. Anderson wrote.

8 THE COURT: Where does the rule say it has to be
9 limited to that?

10 MR. McMAHON: It doesn't. But who is he specially
11 employed by? He is specially employed -- or he is an employee
12 of Software Freedom.

13 THE COURT: He is an employee of Software Freedom, not
14 the --

15 MR. McMAHON: Not the copyright.

16 THE COURT: That may be true, too. But I don't see
17 the limitation you're talking about in the rule.

18 Are you really prejudiced here? You deposed him.

19 MR. McMAHON: That gets to my next point.

20 THE COURT: People write reports and then lawyers take
21 depositions anyway, which is beyond my comprehension. But you
22 deposed him. So what more do you want to know anyhow?

23 MR. McMAHON: If the Court's going to limit to what he
24 already gave in his declaration --

25 THE COURT: Declarations?

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1 MR. McMAHON: Well, he filed two declarations with
2 respect to preliminary injunction.

3 THE COURT: I know that. Before or after those
4 declarations.

5 MR. McMAHON: Before.

6 THE COURT: Do you want to depose him again?

7 MR. McMAHON: I don't want him to testify. But if
8 that's the Court's ruling, then I do want to depose him.

9 But, you know, the -- we have asked opinions. In
10 fact, we asked him at one time in his deposition and we was
11 just evasive.

12 This has been a moving target in this case. In fact,
13 we told the Court -- we used the words "moving target" when the
14 defendant's first scheduling order --

15 THE COURT: It is not a word that is uncommon in my
16 courtroom. Lawyers are always accusing each other of moving
17 targets. I hear it once a week.

18 MR. McMAHON: But I don't think my statement is less
19 appropriate because it's been -- I mean --

20 THE COURT: My point is that that's a fairly common
21 accusation, but go ahead. What is the point? I'm offering you
22 a further deposition. What is the point?

23 MR. McMAHON: All right. Well, okay, then I'll take
24 the deposition.

25 THE COURT: Yeah. I think that's right. I'm not

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1 going to grant your motion to strike, I'm gonna allow him to
2 testify. I don't think he falls under the part of the rule
3 that requires an expert report. But in the end you're going to
4 learn what he has to say.

5 MR. McMAHON: All right. I'll take his deposition.

6 THE COURT: Now, we turn --

7 MR. McMAHON: Your Honor, I have a rebuttal report.
8 Well, the rebuttal reports are due, I guess this is more
9 applicable to the damages issue.

10 THE COURT: That is interesting. But what's -- you
11 have rebuttal report of the damages?

12 MR. McMAHON: I'm just thinking about the expert
13 report. I don't know, I -- I'll see what he says and make a
14 motion.

15 THE COURT: Not a motion, you'll write me a letter.

16 MR. McMAHON: Yeah, right.

17 THE COURT: Okay. Now, with respect to the damages
18 point, what rebuttal report do you have coming there?

19 MR. McMAHON: Oh. On the damages issue, we've
20 complied with all of the rules. And in April -- April 10th, I
21 believe it was, we had to give -- the parties had their opening
22 reports, we had to have rebuttal reports.

23 THE COURT: Right.

24 MR. McMAHON: I have an expert who is retained. I
25 don't know what to respond to, because the copyright law says

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1 that --

2 THE COURT: Oh, you're getting into the motion. I'm
3 about to tell you what I think on that one, too.

4 MR. McMAHON: Yes.

5 THE COURT: Let me tell you first, and you can be
6 heard on like you did on the other one.

7 Seems to me the plaintiff is not going to seek actual
8 damages. What they are seeking is defendant's profits.

9 Is that right? Mr. Ravicher, is that right?

10 MR. RAVICHER: Yes, your Honor.

11 THE COURT: So the part about actual damages you win
12 by default. But the part about the profits, your claim is they
13 didn't give you a computation under the rule, so they should be
14 barred. Well, that can't be right, because their burden going
15 forward on that theory is to show gross revenues. They can't
16 know the gross revenues, so they take it from you and give it
17 back to you. Whatever the gross revenues are, they are.

18 Then the burden shifts to you if you want to show
19 the -- the -- what do they call it, the costs, the -- the --
20 I'm not sure about the words --

21 MR. McMAHON: Costs and expenses.

22 THE COURT: Exactly. I thought there was one word
23 that covered that, and it won't come to me right now, but --

24 MR. McMAHON: Offsets.

25 THE COURT: That's the word I want, too, but it isn't

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1 the right word. But we're on the same page.

2 You get to them, the burden shifts to you, then, to
3 show any costs or offsets. And you're welcome to do that, but
4 all they're saying is you can't do that now through expert
5 testimony, because you didn't come up with an expert report.
6 And I don't think that's a problem because whoever is in the
7 company, is a fact issue. Somebody can come in and testify to
8 the fact that this was our cost of producing the goods or
9 whatever. These are our offsets, this is, who knows what,
10 shipping or packaging, whatever these things are, that we
11 subtract from gross revenues. That's not a matter of expert
12 testimony, it's fact testimony. So this is a fairly
13 straightforward one, too. They did tell you in the initial
14 disclosure that they intend to go after your lost profits, but
15 they are not required to compute it because it's -- their
16 burden is only gross revenues, then the burden shifts. And
17 there is plenty of case law. They obtain the gross revenues
18 from you, they give you the figure back, and then you're
19 allowed to prove the offsets.

20 What's so hard about this one?

21 MR. McMAHON: I still don't have even a statement from
22 them --

23 THE COURT: As to what your gross revenue is?

24 MR. McMAHON: As to what our gross revenue is.

25 THE COURT: Well, what is it? It comes from you.

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1 They can't know your gross revenue from the air.
2 They're allowed to seek in the course of discovery. They can
3 say: Dear Mr. McMahon, what are your company gross revenues
4 with this product. You tell them. And then they say that's
5 the number. But it has to come from a defendant. There is no
6 way a plaintiff who starts bringing a lawsuit knows your gross
7 revenues. As long as they disclose, which they did, that that
8 was going to be their theory of damages, that we're going to be
9 seeking defendant's profits.

10 MR. McMAHON: All right. First, your Honor --

11 THE COURT: They did tell you that.

12 MR. McMAHON: The rule says that we get more than a
13 theory of damages.

14 THE COURT: That's not true. You get a computation of
15 damages.

16 MR. McMAHON: Right.

17 THE COURT: But there is no way they can compute your
18 profits. Because the law says -- and there is case law that
19 says there is shifting burden. They come forth with gross
20 revenue, which they obtain from you. And you have the right to
21 prove the offsets.

22 MR. McMAHON: Your Honor, I have here -- first, they
23 had the discovery. They have had a deposition, in fact, about
24 one document they produced. So they had discovery on a
25 document on a spreadsheet. We have, at that time, six

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1 different products. Yeah. Most of them, even the same
2 document --

3 THE COURT: Let me interrupt you. But it seems to me
4 so elementary compared to what --

5 MR. McMAHON: I don't know which product --

6 THE COURT: Hold on. Hold on. That's what I was
7 going to say. Give me a minute to get my thought out. This is
8 very easy, compared to the rest of my day. I have a whole
9 bunch of hard cases today.

10 If they have not told you which product they are
11 talking about in terms of gross revenues, they have to do that.
12 But they are not out of time to do that. But I think, Mr.
13 Ravicher, you have had discovery as to revenues, right?

14 MR. RAVICHER: Yes, your Honor.

15 THE COURT: All right. So what gross revenues are you
16 seeking?

17 MR. RAVICHER: We have identified for them the exact
18 document and the exact witness that we deposed that are the
19 factual bases. It's a spreadsheet. It has the products. It
20 has the exact name, product number, gross revenues.

21 THE COURT: Oh, so you told them which products.

22 MR. RAVICHER: Absolutely.

23 THE COURT: All right. And where did you tell them
24 that?

25 MR. RAVICHER: In the letter that was attached to our

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1 responsive letter to you about this.

2 THE COURT: Oh.

3 MR. RAVICHER: So we sent it -- and just -- we didn't
4 think we had a burden to do that at that time, but out of
5 courtesy and out of caution --

6 THE COURT: I don't think it is courtesy, I think you
7 did have that burden, but you met it.

8 Do you know which page he is talking about, Mr.
9 McMahon?

10 MR. McMAHON: Well, I think so.

11 THE COURT: Well, show it to him. You're standing
12 right there, Mr. Ravicher. Just show him what you are
13 referring to.

14 MR. McMAHON: Which document. Is this the one?

15 MR. RAVICHER: It's got the Bates numbers right there.

16 MR. McMAHON: Well, that's 400 pages. Is this the
17 page you are referring to, because there is one document that
18 is --

19 THE COURT: Wait, wait. Talk to each other off line
20 for a minute. Talk to each other, please.

21 (Pause)

22 MR. McMAHON: Your Honor, if he is going to clarify
23 it, then that's fine and I get some relief. Because we have
24 called, and didn't get our phone calls returned, so we filed
25 our motion.

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1 But what we have, and what I need to know, for one
2 thing, there is one spreadsheet that has been produced. He
3 still won't commit to it today --

4 THE COURT: You still won't commit to it today?

5 MR. McMAHON: He won't tell me this is the one that he
6 is relying upon. Some of the documents have gross margins that
7 are slightly profitable. Most of them have gross margins that
8 are not profitable. And if you took the aggregate of them all,
9 there is going to be a loss in these documents.

10 THE COURT: Okay. Well, I at least found the rule I
11 was speaking about, trying to cite before. It's section 504(b)
12 of the copyright act, which says the copyright owner is
13 required to present proof only of infringer's gross revenue.
14 And once that is accomplished, the burden shifts to the
15 defendant to prove deductible expenses. That was the phrase I
16 was looking for. But that's right out of the copyright act.

17 The point is, you do have to tell Mr. Ravicher which
18 gross revenue you're referring to. Can't be the whole company,
19 has to be some products, which products. I agree you get that
20 information from the defendant. Then you give it back to him
21 and say, with respect to these products, according to your own
22 documents, the gross revenue was X. That's all.

23 MR. RAVICHER: I mean the spreadsheet which we
24 identified, which we didn't get into native format until
25 not very long ago.

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1 THE COURT: Okay.

2 MR. RAVICHER: We identified that spreadsheet. And
3 there is a page which says -- and I'm sorry I can't remember
4 the exact precise page. But there is a page that says SKU
5 number, gross revenues.

6 THE COURT: Okay.

7 MR. RAVICHER: Now, I know there are other pages that
8 talk about margins and costs --

9 THE COURT: No, no, that's not your burden. You just
10 show him the page that says -- he is handing you the page.

11 MR. McMAHON: No, the one with the SKU numbers --

12 THE COURT: Maybe that's the one.

13 MR. RAVICHER: No, this is margins, this is not --

14 THE COURT: Then you're not prepared, you don't have
15 it with you in court today.

16 When you get back to the office, find that page, fax
17 it over and say that's the number I'm claiming is gross
18 revenues. The rest is up to him. The copyright act says that
19 you prove deductible expenses. And if it comes up a loss, then
20 I don't know what the lawsuit is about. But he'll tell you the
21 gross revenue figure, and he'll have to prove deductible
22 expenses. Not through an expert, through a fact witness.

23 MR. RAVICHER: Right. The only problem is, your
24 Honor, if I want an expert to rebut whether or not the expenses
25 they are trying to deduct are reasonable or not, I don't know

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1 what they want to deduct, because they didn't provide --

2 THE COURT: Correct. Fair enough. So just like I
3 said, he can still depose Kuhn. When he tells you who the fact
4 witness is in the company who is going to make their case on
5 deductible expenses, then you can depose that person.

6 MR. RAVICHER: What about providing my own expert?

7 THE COURT: Right. After you depose that person and
8 you have a quarrel with certain expenses that this person
9 claims should be deducted and you think they shouldn't be as a
10 matter of industry practice or whatever, I will allow you an
11 expert. There is no way you could have done that earlier
12 because you don't know what this fellow is going to say.

13 MR. RAVICHER: Thank you, your Honor.

14 THE COURT: Yeah, I understand where we have to go
15 here.

16 MR. McMAHON: Your Honor --

17 THE COURT: You have to go step by step.

18 MR. McMAHON: I need to be able to submit an expert to
19 lay down the expenses. No, you don't, because you didn't and
20 it's too late. I'm sorry, you are barred. There was a date by
21 which you were to produce affirmative expert reports. That
22 date has come and gone. You're barred. But, I don't think
23 you're out of luck, because I think it is a fact. Somebody
24 sits down in the company and says we are claiming this is a
25 deduction; this, this, this. Her is the dollar amount. We

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1 spent X dollars on postage -- make it up, whatever it is. We
2 spent X, X, X, X. And that's why, when you look at the margin
3 of gross revenue versus deductible, we took a loss. Fine,
4 that's what you get to do.

5 Then he proposes an expert, theoretically, to rebut
6 that. The expert can only say as a matter of industry practice
7 or something, postage isn't deductible. You can try that. I
8 mean I don't know what else his expert is going to say. And
9 then your guy comes back and says, you're just wrong, we do it
10 all the time. But you can't do an expert now, because you
11 didn't. You had a chance to do experts, you didn't do experts.
12 But you're not out of luck.

13 MR. McMAHON: May I -- I understand, your Honor.

14 May I just speak to that, I want to make sure my
15 record is clear on this.

16 I understand the ruling. The Court had just referred
17 to section 504B.

18 THE COURT: I did.

19 MR. McMAHON: Which says, first, the plaintiff's
20 submit the profits --

21 THE COURT: No. It does not say that. It says gross
22 revenue.

23 MR. McMAHON: All right. Gross revenue. He still has
24 not done that.

25 THE COURT: He says he has. He doesn't have the

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1 page with him in Court today. He said he sent it to you. He
2 referred you to the page with the SKU number that says this was
3 the gross revenue for that number. You then tried to hand him
4 a piece of paper. He said, no, it's not that page, because
5 that page talks about the margin. He has got one page, and I
6 don't know what it is. It is not here in the courtroom for
7 some reason. But when he gets back to office, he'll find the
8 page, fax it to you, that's your gross number. That's the
9 products we are talking about. Then you have your people look
10 at it, talk about deductible expenses all you want. Then he
11 deposes that person. Then if he thinks he can pick it apart
12 with an expert, he tries. But if you challenge that expert
13 under Daubert, I may just -- that's not the way -- the field
14 for expert testimony. We'll see what he comes up with.

15 MR. McMAHON: All right. He didn't submit this letter
16 that he is referring to until April 27th --

17 THE COURT: I realize that, and he says --

18 MR. McMAHON: -- after they were done with their
19 expert reports.

20 THE COURT: Sorry, I know you are trying to win the
21 point, you're not going to get there.

22 He didn't get that information in native usable
23 format, he says, until quite recently. He is giving you back
24 information you had all along. It's your gross revenues. You
25 knew 504B better than I did. You knew after gross revenues

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1 come deductible expenses. Prove them up.

2 MR. McMAHON: Your Honor --

3 THE COURT: I'm not foreclosing you. Everything is
4 going to work out okay. But I'm not taking an expert report.
5 I don't even think it is really an expert area. I think it's a
6 fact area. Company comes in and proves its deductions. And,
7 usually, for cross-examination, the deductions are challenged
8 and the jury decides. I mean I have done this before. Without
9 experts, by the way. It's a fact issue, I think. So that's
10 why I'm curious as to what he's going to do when he says we
11 want an expert. Anyway, he is not sure. First he's going to
12 take the guy's deposition. If he has enough there, he won't
13 bother with an expert. I hope.

14 MR. McMAHON: Something the Court needs to understand
15 the full fact. I just want it in the record.

16 What we did, before April 27th, we gave them a
17 document that -- this is not -- he didn't get it for the first
18 time in April. He is misleading the Court in that respect.

19 They got an earlier chart that they deposed the
20 witness on February 11. He could have told us which products
21 he was asserting -- he could have done what is doing, now, back
22 in February. All we did was we supplemented as was required by
23 rule 26, and gave him some new. That's all we did. And then
24 he focuses on that and says, well, that then my disclosure was
25 timely. It wasn't untimely. We made the disclosure, we just

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1 updated as we were required to do.

2 THE COURT: Sorry, no prejudice. You know your gross
3 revenues as well as he does. I agree with you, he has to be
4 specific and tell you what products. Maybe he should have done
5 it earlier. To me, no harm no foul. You are not going to
6 suffer. He is going to tell you which ones. Somebody at the
7 company is going to look at deductions. You can depose that
8 person. That may be the end of the matter. He attempts
9 experts, you may challenge it. If you don't challenge it, your
10 guy may be able to rebut it easily. Let's take this step by
11 step.

12 MR. McMAHON: Our experts will also attribute indirect
13 costs to the sales --

14 THE COURT: What experts?

15 MR. McMAHON: Whenever experts testify about -- this
16 is what you're cutting me off on, your Honor.

17 THE COURT: What -- you know you are presuming,
18 without ever seeing it, that he is going to be able to come up
19 with an expert that is acceptable on this. I think it's a fact
20 question. I have said that three times on this record. I
21 don't even think it's an area for expert testimony.

22 MR. McMAHON: Right.

23 THE COURT: But if he tries, and you look at it, and
24 you challenge it, the first step is do I agree with you that
25 the expert should be stricken. If I don't agree with you, the

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1 rebuttal may be easy for you. You may be in the same hands as
2 the person who figured out the deductible expenses. Why don't
3 we go step by step. He may not ever propose an expert. He may
4 be satisfied just challenging your fact person. I don't know
5 yet. You don't know yet.

6 MR. McMAHON: All right. I made my point.

7 THE COURT: Yes. And after you get that expert
8 report, and if you lose a challenge to it, maybe I would relent
9 then and say, well, I see so much new here, you should really
10 be able to rebut his expert, I don't know. Because you were
11 not barred from rebuttal experts, you are only barred from
12 affirmative experts. So we need to go step by step.

13 MR. McMAHON: May I address one more unrelated issue.

14 THE COURT: Unrelated, okay.

15 MR. McMAHON: With the concession that they're not
16 seeking damages to themselves.

17 THE COURT: Actual damages.

18 MR. McMAHON: Right -- well, right.

19 THE COURT: It's called actual damages.

20 MR. McMAHON: I believe that that puts the death nail
21 on the pending motion for preliminary injunction. I mean
22 they -- we've argued -- this is just something new that I want
23 the tell the Court.

24 THE COURT: Okay.

25 MR. McMAHON: We have argued that there was no

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1 evidence, whatsoever, in their affidavits about any actual harm
2 that was sustained by either of the plaintiffs in this case.
3 And the only comments that were made were lawyers' arguments.
4 And now it is -- it is out of the case based on this
5 concession. So I think that just eliminates any allegation of
6 harm. And the Court should --

7 THE COURT: Of irreparable harm?

8 MR. McMAHON: Yes, irreparable harm. Well, first you
9 have to have harm. And then it has to be irreparable.

10 THE COURT: That's true. Let's see what mer. Ravicher
11 has to say.

12 MR. RAVICHER: The reason why we need preliminary
13 injunction is because the harm being caused by their failure to
14 comply with the license is not causing economic harm. It can't
15 be compensable for with money later on. That's why we had to
16 move for preliminary injunction. The harm is irreparable
17 because of the other effects --

18 THE COURT: Noneconomic effects.

19 MR. RAVICHER: Right.

20 THE COURT: What are the noneconomic effects?

21 MR. RAVICHER: It destroys the ecosystem under which
22 the open source exists. This was the whole federal circuit
23 opinion, where the district court there had denied a
24 preliminary injunction because they felt there was no
25 irreparable harm. The federal circuit said, no, allowing

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1 copyright holders even to license their copyrights for free, in
2 order to encourage collaboration, and future development, and
3 return --

4 THE COURT: Okay. So he is conceding on this
5 record -- that's helping you Mr. McMahon -- that he is -- that
6 he is talking about noneconomic harm.

7 MR. McMAHON: Right. And there is no evidence that
8 was submitted to the Court for noneconomic harm.

9 THE COURT: All right. But that's already briefed, I
10 assume. I assume that is already briefed?

11 MR. McMAHON: Yes, it is.

12 THE COURT: All right. So that's not new.

13 But what you have got is a very simple and pure
14 concession it's not economic, and it's not compensable to
15 damages, which is exactly why he says he needs a PI.

16 MR. RAVICHER: While we are talking about preliminary
17 injunction, I wasn't going to mention this today, because I
18 know Mr. McMahon has gone through some personal difficult
19 circumstances. But in their motion papers opposing our
20 preliminary injunction, they said certain things about when
21 they would stop making products with Busy Box in them. They
22 said, quote: Products manufactured after March no longer
23 contain Busy Box.

24 So a couple -- about a week and a half ago, I sent
25 them privately a message saying, hey, can you just confirm --

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1 now it's mid April -- can you confirm that what you said in
2 your opposition --

3 Because that's very important whether or not they are
4 still making products. They concede they are still selling the
5 products that they made in Busy Box.

6 THE COURT: I understand.

7 MR. RAVICHER: -- and I understand that there are
8 still circumstances.

9 I have gotten, well, our clients are travelling. It
10 seems to me a very simple question, yes or no, are products
11 still being made --

12 THE COURT: Yes or no, are products still being made?

13 MR. McMAHON: No product has been made and shipped
14 into the United States since March 31st, so -- so the answer is
15 that the statement was correct. We told you that any products
16 manufactured after the date would have would have Busy Box
17 removed. Well, they are going through QC, from what I
18 understand.

19 Well, they are going through QC, from what I
20 understand. I had a -- I had a personal emergency this week, I
21 couldn't get all of the facts; we don't need to get into that.
22 And I told Mr. Ravicher this. But I tried to make the calls
23 that I could. But I have confirmed that no products -- the
24 statement is correct, I mean nothing has been manufactured and
25 shipped into the United States with Busy Box on it.

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1 MR. RAVICHER: So --

2 THE COURT: Since March 31?

3 MR. McMAHON: Right. The affidavit says -- the plan
4 was as of --

5 THE COURT: I don't need more. Since March 31?

6 MR. McMAHON: Yes.

7 THE COURT: Does that answer your question?

8 MR. RAVICHER: Well, that's one of the two questions.

9 THE COURT: What is the other one?

10 MR. RAVICHER: The other one is products that people
11 purchased long ago, when they were at home, but they are
12 connected to the internet. So then Best Buy shoves down the
13 internet the new firmware updates, new software updates to
14 these players all the time. And they also said in their
15 opposition to our preliminary injunction, that none of those
16 new firmware updates would contain Busy Box after March 31.

17 THE COURT: Okay. Do any of the firmware updates
18 after March 31 contain --

19 MR. McMAHON: I don't know, your Honor.

20 I would anticipate that since the new product has not
21 been launched yet, that it is probably that they --

22 THE COURT: When can you get an answer. You already
23 said you don't know, that's all you needed to say.

24 MR. McMAHON: Within a week, within a week.

25 THE COURT: Within another week from today?

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1 MR. McMAHON: Well -- all right, Tuesday. Your Honor,
2 I won't be back to the office until --

3 THE COURT: Wednesday?

4 MR. McMAHON: -- Wednesday.

5 THE COURT: Yes. You're not back until Wednesday?

6 MR. McMAHON: Yes, your Honor. I to have stay here
7 this weekend. I have another matter in New Jersey.

8 THE COURT: All right, can you wait until next Friday?

9 MR. RAVICHER: I just want an answer --

10 THE COURT: I know what you want. Can you wait until
11 next Friday to get an answer to the second question.

12 You have the answer to first question on the record.
13 Can you wait until next Friday to get an answer to the second?

14 MR. RAVICHER: I just want to know when I can expect
15 an answer.

16 THE COURT: Friday. Next Friday is May 13.

17 MR. McMAHON: No -- your Honor --

18 THE COURT: Please give him the answer on the firmware
19 updates.

20 MR. McMAHON: But I can add this to it. And what we
21 also said -- so I'm complete here. We also said that with --
22 we will be making -- the license requires that anybody using
23 Busy Box must offer to make it available and -- since that
24 time, since March 31, Best Buy has on its website, the same
25 place where they would go to get the downloads, has made the

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1 offer. And, in fact, someone, probably someone at their
2 instance, has actually requested it. And it has been
3 delivered. So we have the CD. So we are -- regardless of
4 whether or not it is in the software, we are making the offer
5 that's required by this general purpose license, and we have
6 been since the --

7 THE COURT: Do you understand --

8 MR. RAVICHER: Yeah, so what he is saying, is they are
9 complying with the license today --

10 THE COURT: Right.

11 MR. RAVICHER: -- so he is no longer infringing our
12 copyrights.

13 We addressed this in our papers. That directly
14 conflicts the license itself, says once you breach this
15 license, your rights are gone forever until they are
16 reinstated.

17 So it's kind of like if a police officer pulled me
18 over for speeding, and I say, well, I'll abide by the speed
19 limit now. I was speeding, right? And if I was recklessly
20 driving, you can take away my license, it doesn't matter if I'm
21 now going to drive according to the law, I've lost my license
22 exactly the same by breaking the license, they have lost their
23 license, they have no permission even if they do now comply
24 with the license.

25 THE COURT: All right. You have made that argument,

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1 I'll see it.

2 MR. McMAHON: It has been briefed. I obviously
3 disagree with them.

4 THE COURT: But it's been briefed.

5 MR. McMAHON: Yes.

6 THE COURT: Okay. All right, I think that's what the
7 conference was about. It's done. You made a promise, Mr.
8 Ravicher, when you get back to the office you are going to send
9 this document that gives that gross revenue figure.

10 MR. RAVICHER: Yes, your Honor.

11 MR. McMAHON: And he has made a promise that he is
12 going to kind of me a deposition of Mr. Kuhn.

13 THE COURT: No, I have ordered it.

14 MR. McMAHON: All right, thank you.

15 THE COURT: And I have also ordered that whoever is
16 going to testify about deductible expenses, he can depose. As
17 soon as gets arranged, that person should calculate it. Once
18 you get this piece of paper that you already have, he points
19 you to it, then designate the person in the company, do those
20 calculations, you take that person's deposition. Then he'll
21 decide about experts, then he'll see if you challenge it, then
22 I'll rule, and then I'll see what I can do for you, Mr.
23 McMahan.

24 Got the sequence?

25 MR. McMAHON: Yes, your Honor.

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1 THE COURT: Okay, good.

2 MR. McMAHON: I -- please don't -- I just want to make
3 sure my record is clear that I'm objecting to foreclosure of
4 the expert.

5 THE COURT: Right. Got it. Okay. Thank you.

6 MR. RAVICHER: Thank you, your Honor.

7 (Adjourned)

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