

Barbara Simons Deposition, in MPAA v. 2600

CA; July 8, 2000

1 IN THE UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3

4 UNIVERSAL CITY STUDIOS, INC., PARAMOUNT
5 PICTURES CORPORATION, METRO-GOLDWYN-MAYER
6 STUDIOS, INC., TRISTAR PICTURES, INC.,
7 COLUMBIA PICTURES INDUSTRIES, INC.,
8 TIME WARNER ENTERTAINMENT CO., L.P.,
9 DISNEY ENTERPRISES, INC., and TWENTIETH
10 CENTURY FOX FILM CORPORATION,

Plaintiffs,

vs.

NO. 00 Civ. 0277

(LAK)

8 SHAWN C. REIMERDES, ERIC CORLEY a/k/a
9 "EMMANUEL GOLDSTEIN" and ROMAN KAZAN,
10 Defendants.

11 _____/

12

DEPOSITION OF BARBARA SIMONS, Ph.D.

13

DATE: July 8, 2000

14

DAY: Saturday

15

TIME: 2:15 p.m.

16

PLACE: Weil, Gotshal & Manges LLP
2882 Sand Hill Road, Second Floor
Menlo Park, California

17

PURSUANT TO: Subpoena

18

REPORTED: KAREN L. BUCHANAN
CSR No. 10772

19

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22 _____
COMP-U-SCRIPTS

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	3 Two-page article entitled "To	42
	DVD or Not to DVD" by Barbara Simons	

19 Counsel, please state your name, your office
20 and whom you represent in this action.

21 MR. HERNSTADT: Edward Hernstadt, Frankfurt
22 Garbus Kurnit Klein & Selz, for the defendants in this
23 case.

24 MR. HART: Carla Miller, Proskauer Rose, for
25 plaintiffs in the case.

4

1 MR. HART: Is it my turn?

2 THE VIDEOGRAPHER: Yes.

3 MR. HART: Bill Hart, Proskauer Rose, for the
4 plaintiffs.

5 THE VIDEOGRAPHER: Are there any stipulations
6 you wish to put on the record at this time?

7 MR. HERNSTADT: Bill, any stipulations?

8 THE VIDEOGRAPHER: Please swear in the
9 witness.

10 BARBARA SIMONS, Ph.D.,
11 being first duly sworn by the
12 Certified Shorthand Reporter to tell
13 the truth, the whole truth, and nothing
14 but the truth, testified as follows:

15 EXAMINATION BY MR. HART (By Telephone):

16 Q. Good afternoon, Dr. Simons.

17 A. Hello.

18 Q. May I address you as "Doctor" throughout the
19 course of this deposition?

20 A. You're welcome to call me Barbara if you'd like
21 to.

22 Q. Thank you. Have you been deposed before?

23 A. Never.

24 Q. How many times?

25 A. Zero.

5

1 Q. Zero. Never, you said?

2 A. Yes.

3 Q. I'm going to ask the reporter to show you
4 Exhibits 1 and 2 that we've just marked.

5 A. They're right next to me here.

6 Q. Okay. And turning first to Exhibit 1, the
7 Notice of Deposition and Subpoena --

8 A. Right.

9 Q. -- my question is have you ever seen these
10 documents before?

11 A. I believe a copy of this was delivered to me at
12 my home. Is that right?

13 Q. Did you at any time pull together or cause
14 anyone else to collect any documents in response to this
15 Exhibit 1?

16 MR. HERNSTADT: Bill, let me just note for the
17 record that Exhibit 1 is a subpoena with an attachment,
18 a Schedule A.

19 MR. HART: Correct.

20 MR. HERNSTADT: It's not a Notice of
21 Deposition.

22 But go ahead, Barbara, you can answer the
23 question.

24 THE WITNESS: What was the question again,
25 please?

6

1 BY MR. HART:

2 Q. Did you at any time collect or cause anyone
3 else to collect any documents and things in response to
4 this Exhibit 1?

5 A. Yes.

6 Q. Yes?

7 A. Yes.

8 Q. And do you have those documents here with you
9 today?

10 A. I gave them -- I gave them to you, right?

11 MR. HERNSTADT: Yeah. Barbara turned them over
12 to me 10 minutes ago.

13 MR. HART: And are you going to turn those over

14 to us, Mr. Hernstadt?

15 MR. HERNSTADT: What I'm going to do is review
16 them to see if there is any documents that have to be
17 withheld based on any privilege and then turn them over.

18 MR. HART: What kind of privilege are you
19 talking about, Mr. Hernstadt?

20 MR. HERNSTADT: We represent Dr. Simons for the
21 purposes of today's deposition. If there is any e-mail
22 message about our representing her, that would be
23 attorney-client privileged. I don't think there are,
24 but I have to review.

25 MR. HART: I see.

7

1 MR. HERNSTADT: And the second basis would be
2 Dr. Simons is not only an expert witness for us but we
3 asked her apart from the expert's testimony that we've
4 asked her to present in this case, she's acted as a
5 consultant, as well. And those are two distinct
6 things. In other words, she's not testifying as to the
7 areas on which she's consulted with us.

8 If there is any attorney work product
9 materials, then I would have to also designate those as
10 privileged.

11 Again, I don't know that there are. I haven't
12 seen these. I just got them.

13 MR. HART: Just so I can be clear about your
14 position, Mr. Hernstadt, for the record, will you be
15 turning over to us documents which may have been
16 involved in the consulting capacity but also have a
17 bearing on Dr. Simons' testimony?

18 MR. HERNSTADT: Yes, I mean, properly
19 redacted. But if there is a mix of the two, I'm not
20 going to withhold the entire document. I'll only
21 redact that portion that is work product, to the extent
22 that exists. Again, I don't know. Not having reviewed
23 the e-mails, I don't know what's in them. I have a
24 vague recollection, but I don't know exactly.

25 MR. HART: And with due apologies to

8

1 Dr. Simons, that really wasn't exactly my question. It
2 was if you have, for instance, some document that has
3 subject matter in it that is both directed to the
4 consulting subject and the same words are also directed
5 to an area in which she is or may testify, are you going
6 to withhold that?

7 MR. HERNSTADT: Bill, until I take a look at
8 it, I can't tell you.

9 MR. HART: When do you plan to look at this and
10 turn it over to us?

11 MR. HERNSTADT: I plan to look over it tomorrow
12 on my way back.

13 MR. HART: So in other words, none of the
14 documents will be available for this deposition.

15 MR. HERNSTADT: What they are are e-mails.

16 MR. HART: None of the documents will be
17 available for this deposition, right?

18 MR. HERNSTADT: The documents we're talking
19 about are e-mails.

20 MR. HAT: None of these documents will be
21 available for this deposition, right?

22 MR. HERNSTADT: Are you done?

23 MR. HART: I'd like an answer to the question.

24 MR. HERNSTADT: What I'd like to do is put my
25 answer on the record, too. What you keep doing is

9

1 interrupting me in the middle of my answer and asking
2 the same question over again. I understand you're
3 indicating by doing that that you don't like my answer.
4 However, I am still going to put my answer on the
5 record. So if you're done with the question, I would
6 like to do that.

7 MR. HART: I am done with the question.

8 MR. HERNSTADT: The answer to the question is

9 that these, quote, documents as you refer to them are a
10 series of e-mails, okay. And these e-mails are not
11 going to be available to you, because you're in
12 New York, or to Ms. Miller, who is here, until after
13 I've had an opportunity to review them.

14 MR. HART: And you're not going to turn them
15 over to us while we're taking this deposition so that we
16 might be able to use them during the course of the
17 deposition, right?

18 MR. HERNSTADT: Given, Bill, that I can't
19 review them and defend a deposition at the same time,
20 the answer to that question is yes.

21 MR. HART: Thank you, Mr. Hernstadt.

22 BY MR. HART:

23 Q. Okay, Barbara, I'm sorry for the delay. Let
24 me try and get to the substance --

25 A. May I call you Bill?

10

1 Q. Sure.

2 A. All right.

3 Q. Can you give me in very brief form what areas
4 of expertise or specialized knowledge you bring to bear
5 in testifying in connection with this case?

6 A. Well, I have a Ph.D. in computer science which
7 I got from U.C. Berkeley almost 20 years ago. I've been

8 working in the field for many, many years as a
9 researcher.

10 And during the past couple of years, I've been
11 president of ACM, which is an 80,000-member educational
12 and scientific society of computer professionals. In
13 that capacity, I've had the opportunity to get a broad
14 view of a lot of things that are going on in the field.

15 Q. Going on in which field?

16 A. Computing.

17 Q. Computing generally?

18 A. Well, areas that pertain to computing. So for
19 example, technology policy is a broad area. A lot of it
20 uses computers or computing in some capacity, and that's
21 the aspect that I am most interested in.

22 Q. I'm sorry, can you --

23 A. Am I not speaking loudly enough?

24 Q. If you could keep your voice up, I'd really
25 appreciate it.

11

1 A. Sorry.

2 Q. That's okay. Did you participate in any way in
3 the legislative process that led to what we now know as
4 the Digital Millennium Copyright Act?

5 A. Can you please tell me what you mean by

6 "participate"?

7 Q. In any way, whether you lobbied, advocated,
8 submitted written views, testified, or in any other way
9 were involved directly or indirectly in that legislative
10 process.

11 A. Well, I don't lobby, and ACM doesn't lobby.
12 We're not a lobbying organization. We did submit a
13 couple of letters in which we expressed -- ACM -- my
14 recollection is we submitted at least one letter, and
15 I'd have to check on the web site to say if there are
16 more. This is all on our web site, by the way. So it's
17 all public -- at least one letter which I believe I
18 included -- do you have -- we have a copy of that,
19 right, somewhere?

20 MR. HERNSTADT: Probably.

21 THE WITNESS: I think I gave the URL for that
22 in my affidavit. So I referenced that in the affidavit,
23 and I actually printed it out so we can give a copy of
24 it here.

25 MR. HART: Okay.

12

1 BY MR. HART:

2 Q. Are we talking about Exhibit B to your
3 affidavit?

4 A. I'm not sure.

5 Q. Why don't we take a look.

6 A. You mean Exhibit B is -- is this what he's
7 referring to?

8 MR. HERNSTADT: Yes. That's what she's
9 referring to.

10 THE WITNESS: Sorry about that.

11 BY MR. HART:

12 Q. That's fine.

13 THE WITNESS: Exhibit B is --

14 MR. HERNSTADT: Letter to Orrin Hatch.

15 THE WITNESS: That one, the letter to Hatch,
16 is from presidents of eight societies -- I'm sorry,
17 yes. That's from the presidents of eight scientific
18 societies.

19 I believe the other letter, the one -- the ACM
20 letter may not -- there is only one letter here, right?

21 MR. HERNSTADT: Bill, I can actually turn this
22 over to you right now. What Dr. Simons is talking about
23 is a letter dated February 17th that's not part of the
24 DMCA legislation per se, but it was a letter to David
25 Carson of the Copyright Office with respect to the

13

1 rule-making procedures on 1201(a)1.

2 MR. HART: Is this the February 17th, 2000

3 letter?

4 MR. HERNSTADT: That's right.

5 BY MR. HART:

6 Q. Is that the one that's attached as Exhibit A to
7 your declaration?

8 A. Is that Exhibit A? All right. Looks like it
9 is.

10 MR. HERNSTADT: So then you have both of those
11 letters.

12 THE WITNESS: Yes.

13 BY MR. HART:

14 Q. So if we could go back to where we were.

15 Again, part of this exercise is simply to make
16 a clear record. To the extent I seem tedious, I
17 apologize in advance.

18 There are three exhibits to your declaration.

19 A. Mm-hmm.

20 Q. One is a February 17, 2000 letter to the
21 Copyright Office --

22 A. Right.

23 Q. -- Exhibit A.

24 Exhibit B is a September 14, 1998 letter on
25 behalf of what appears to be quite a number of acronyms,

1 including the ACM --

2 A. Okay.

3 Q. -- addressed to Senator Hatch. That's
4 Exhibit B.

5 And then Exhibit C is your curriculum vitae.

6 A. Right. Actually, if you look at Exhibit B, on
7 the second page where it's signed, those societies are
8 all listed by their full names.

9 Q. Gotcha. My question is, apart from this
10 Exhibit B letter, were there any other letters that you
11 submitted either on behalf of the ACM or on behalf of
12 anyone else in connection with the legislative process
13 that led to the DMCA?

14 MR. HERNSTADT: Objection to form.

15 Go ahead. You can answer.

16 THE WITNESS: Oh, okay. Quite honestly, I
17 don't recall. If I had my computer with me, I could
18 check our web site and I could get that information for
19 you. It's all public. I just don't remember.

20 BY MR. HART:

21 Q. But sitting here today, you don't recall any
22 more than --

23 A. I don't remember. But there might be, and it
24 would be on our web site. You can verify that. We post
25 that on our web site.

1 Q. Were all of your communications that were
2 submitted to Congress or to legislative representatives
3 concerning the DMCA done on behalf of the ACM?

4 MR. HERNSTADT: Objection to form.

5 You can answer if you understand the question.

6 THE WITNESS: Well, part of the issue is that
7 ACM has a technology policy committee called USACM which
8 I created and chaired until I became president, and some
9 of our activities relating to policy were done through
10 USACM as opposed to ACM.

11 BY MR. HART:

12 Q. Gotcha. But apart from that separate
13 suborganization, if you will, for the ACM, you did not
14 submit, use or testimony on behalf of any other
15 organizations or people, did you?

16 A. Oh, good heavens, no.

17 Q. Okay.

18 A. And I didn't testify, by the way.

19 Q. In terms of giving live testimony?

20 A. Right.

21 Q. Uh-huh. Now, what was the general gist, if you
22 can tell me, of the ACM's position with respect to the
23 legislative proposals at the time the ACM expressed its
24 views to Congress?

25 MR. HERNSTADT: Bill, let me just point out

1 that this is not an area of expertise or an area for
2 which we're going to be asking or on which we're going
3 to ask Dr. Simons to testify.

4 That said, we have a short period of time. If
5 you want to use it on this, it's certainly your
6 prerogative.

7 You can answer the question.

8 MR. HART: Thank you.

9 THE WITNESS: We were concerned about some of
10 the implications of the legislation on technology and on
11 the ability to do research and development and even to
12 use products in areas such as, for example, computer
13 security and encryption.

14 BY MR. HART:

15 Q. Mm-hmm. Anything else?

16 A. We were also concerned about the efforts to
17 prohibit reverse engineering.

18 Q. Now, after you made the ACM's views known to
19 Congress in connection with the legislative process, are
20 you aware of any changes that were made in the
21 legislative proposals, whether or not they were causally
22 related to the ACM's comments?

23 A. I am aware of one change, which I don't know if
24 we had any impact on or not, and that is that there
25 was -- I believe there was a carve-out put into the --

1 what became the DMCA to allow computer security R&D in
2 certain specified instances.

3 Q. Okay. Are you also aware whether there exists
4 a reverse engineering exemption in the DMCA as enacted?

5 A. Yes. Reverse engineering, that was in fact --
6 I believe that that's -- the security carve-out was
7 related to reverse engineering, I believe.

8 I know that the reverse engineering exemption,
9 that there are certain exemptions for reverse
10 engineering, such as, for example, compatibility. I
11 believe that was in the legislation before we expressed
12 our concerns about computer security.

13 Q. Just briefly, can you tell me whether you're
14 satisfied in your role on behalf the ACM with the
15 circumvention provisions as enacted in the DMCA?

16 MR. HERNSTADT: Objection to the form of the
17 question.

18 If you understand that question, you can
19 answer, Dr. Simons.

20 THE WITNESS: I guess I'm not quite sure what
21 you mean by my role. Are you talking about as ACM
22 president? Or I don't understand.

23 BY MR. HART:

24 Q. Well, that's actually the easy part of the
25 question. I mean I'm assuming you submitted these

1 comments not in your own right but on behalf of the
2 organization of which you're president.

3 A. Let me see.

4 Q. I'm sorry, what's happening?

5 A. I'm just looking at the letters.

6 Yes.

7 Q. And my question is, are you as the president of
8 the ACM satisfied with the DMCA circumvention provisions
9 as enacted?

10 MR. HERNSTADT: Objection to the form of the
11 question.

12 You can answer it.

13 THE WITNESS: Well, let me just say that I
14 personally am not satisfied.

15 BY MR. HART:

16 Q. You personally are not?

17 A. Right.

18 Q. And what about you, Barbara Simons, acting as
19 the president of the ACM?

20 A. May I just make one correction? I'm no longer
21 president. My presidency ended at the end of June. So
22 I just wanted to be clear on that. I'm past president
23 now.

24 Q. Well, up until June of the year 2000 --

25 A. I just don't want this to be --

19

1 Q. -- when you were still president of the ACM.

2 A. A lot of people in the ACM, myself included,
3 people who would have following this issue, have been
4 very concerned about the Digital Millennium Copyright
5 Act.

6 Q. And you said that you personally also have
7 concerns about the DMCA circumvention provisions as
8 enacted?

9 A. Yes.

10 Q. I'm sorry?

11 A. Yes.

12 Q. Okay. And what are those concerns?

13 A. I think -- first of all, I think the whole
14 approach of the legislation is wrong. Rather than
15 penalizing technologies and technological devices, I
16 think what should have been done was to go after
17 behavior and, in fact, what I was hoping would pass was
18 the Candle-Boucher Bill.

19 I think it's a mistake to attempt to criminalize
20 technologies, and in particular it's a mistake to do that
21 when the people who are doing it don't understand
22 implications of what they are attempting to criminalize.

23 For example, I firmly believe that everybody in
24 Congress wants -- it's based on computer security.

25 (Interruption in the proceedings.)

20

1 MR. HERNSTADT: Bill, the phone is ringing.

2 I'm sorry.

3 MR. HART: I could hear that.

4 THE WITNESS: Should I go on?

5 MR. HART: I'd like you to, but I want to make
6 sure your lawyer is in attendance.

7 MR. HERNSTADT: Yeah. Yeah.

8 MR. HART: Okay. Go ahead.

9 THE WITNESS: We all are worried about computer
10 security. Some of the provisions, and in fact the
11 anti-circumvention provisions of the Digital Millennium
12 Copyright Act, appear to criminalize some standard
13 techniques that are used to try to determine if systems
14 are secure. I don't think this is a good idea.

15 They also could have the impact of forcing
16 researchers to consult with lawyers to determine if the
17 research that they are engaged in is legal or not. This
18 could be quite unhealthy, and it could result in a lot
19 of self-censorship unnecessarily.

20 BY MR. HART:

21 Q. Now, do you personally engage in computer
22 research?

23 A. Not at the moment, no.

24 Q. Have you within the last year?

25 A. No.

21

1 Q. What familiarity, if any, do you have with the
2 defendants in this case and/or their web site?

3 MR. HERNSTADT: Objection to the form of the
4 question.

5 THE WITNESS: Should I answer?

6 MR. HERNSTADT: I take it you're asking about
the
7 2600 web site and 2600, the magazine, and the publisher
of
8 the magazine.

9 MR. HART: Correct.

10 MR. HERNSTADT: Okay. Yes.

11 THE WITNESS: I've never met them, and I only
12 went to the web site -- oh, maybe a few weeks ago to see
13 what it looked like. This is, I think, after I
14 submitted the deposition (sic), I believe. I'm not
15 positive.

16 MR. HERNSTADT: I think she means
17 "declaration."

18 THE WITNESS: I'm sorry. I'm not a lawyer.

19 BY MR. HART:

20 Q. You're doing fine.

21 So apart from looking at the 2600 web site, you
22 have had no communications with Mr. Corley,
23 Mr. Goldstein or anybody at 2600?

24 A. To the best of my knowledge, I have never had
25 any communications with any of them.

22

1 Q. Do you know if Mr. Corley or Mr. Goldstein or
2 2600 are engaged in any form of security testing?

3 MR. HERNSTADT: Bill, I think we have to
clarify
4 that. The complaint identifies Mr. Corley as Eric
Corley,
5 a/k/a Emmanuel Goldstein. There is only one person.

6 That said, go ahead and answer the question.

7 THE WITNESS: I see. I don't know.

8 BY MR. HART:

9 Q. Are you aware, based on your review of the 2600
10 web site or based on anything else, what
11 Mr. Corley's claimed objective is in making DeCSS
12 available?

13 MR. HERNSTADT: Objection to the form.
14 Compound, assumes fact not in evidence.

15 THE WITNESS: What his objective is?

16 BY MR. HART:

17 Q. What's his stated objective?

18 A. Well, I haven't actually checked his web site
19 to find that out.

20 Q. Okay. And you don't know, based on anything
21 else that you know, what his stated objective is?

22 MR. HERNSTADT: Objection. Assumes facts not
23 in evidence.

24 THE WITNESS: Should I answer?

25 MR. HERNSTADT: Yeah, if you can.

23

1 THE WITNESS: I mean I've heard things about it.
2 I would just have to comment on hearsay, if that's all
3 right.

4 BY MR. HART:

5 Q. And what have you heard, and from whom have you
6 heard it?

7 A. I have heard that people have posted DeCSS on
8 the web site -- I mean, well, I'm not even sure. Did he
9 post DeCSS or did he post a URL for it? I'm not even
10 sure if he had DeCSS on his web site or not.

11 So I know that there are people who are
12 concerned about the efforts to restrict the publication
13 of software and/or URLs on the web, and some people have

14 made postings as a way to try to -- I guess as a form of
15 protest.

16 But I'm -- quite frankly, I'm not sure what he
17 has on his web site.

18 Q. Are you aware whether Mr. Corley or 2600 is
19 engaged in any sort of reverse engineering activities?

20 A. Again, I don't know of anything directly. All
21 I could tell you was hearsay.

22 Q. And what is your hearsay?

23 A. My impression is that the reverse engineering
24 was done by others.

25 Q. And do you know if at any time anybody at 2600

24

1 or Mr. Corley was engaged in any kind of reverse
2 engineering with respect to DeCSS or CSS?

3 MR. HERNSTADT: Objection to the form.

4 THE WITNESS: As I say, my understanding is that
5 DeCSS was posted, or the URLs to other places that have
6 were posted by various people, but that the reverse
7 engineering would basically -- the development of an
8 algorithm that could decrypt CSS was done elsewhere by
9 people who remained anonymous. That's my understanding.

10 BY MR. HART:

11 Q. What, to your understanding, is DeCSS?

it

12 A. It's a -- again, I'm not a cryptographer, but
13 my understanding is that DeCSS is a method for
14 decrypting something which is encrypted in CSS.

15 Q. And how do you know that?

16 A. From having read articles and talked to people.

17 Q. I'd like to turn to your declaration --

18 A. Mm-hmm.

19 Q. -- which should be marked as Exhibit 2.

20 A. Should I pick it up?

21 Q. If you want to get that in front of you, we're
22 going to take a few minutes.

23 A. All right. I have it.

24 Q. You say in Paragraph 8 of your declaration --
25 give you a moment to turn to that page --

25

1 A. I'm there.

2 Q. -- in the second sentence that "The primary
3 commercially relevant purpose for DeCSS," and then it
4 goes on --

5 A. Mm-hmm.

6 Q. -- is "to use on the larger reverse engineering
7 project of building a universal DVD player."

8 A. Mm-hmm.

9 Q. What is the "commercially relevant purpose"
10 that you're referring to there?

11 A. Well, the idea of having universal DVD player
12 is that one could play a DVD using any system.

13 Q. And what role does DeCSS play in what you're
14 referring to as the larger reverse engineering effort?

15 A. Well, DeCSS would be a mechanism whereby the
16 DVDs could be played. It would be part of the
17 mechanism.

18 Q. And does that mean that DeCSS performs a
19 function for this proposed universal DVD player or that
20 it's being used as part of a research process to build
21 this proposed universal DVD player?

22 MR. HERNSTADT: Objection to the form of the
23 question.

24 THE WITNESS: Should I answer?

25 MR. HERNSTADT: Yeah. Compound and assumes

26

1 facts not in evidence.

2 But answer it if you can.

3 THE WITNESS: Well, before one could build such
4 a player, one would have to do the research in order to
5 figure out how to do it. So the research would have to
6 come first.

7 Whether or not there would be any commercially
8 relevant purpose, I couldn't say. I mean this is the

9 only thing I could think of. Doesn't mean that it would
10 happen.

11 BY MR. HART:

12 Q. Okay. But do you have any understanding of how
13 DeCSS is relevant to the reverse engineering process of
14 building a universal DVD player?

15 MR. HERNSTADT: Objection. Asked and answered.

16 You can answer it.

17 THE WITNESS: The reverse engineering process
18 of building? I'm sorry, I don't quite understand what
19 you mean.

20 MR. HART: Okay. Could we just have the
21 question read back?

22 (The record was read by the Reporter.)

23 THE WITNESS: I guess I'm still a little bit
24 confused what the reverse engineering process is.
25 Reverse engineering is a thing. It's a tool that is

27

1 used for doing all kinds of things.

2 BY MR. HART:

3 Q. DeCSS is?

4 A. Reverse engineering is a tool.

5 Q. Right, and I'm looking at Paragraph 8 of your
6 declaration.

7 A. I understand. I'm trying to figure out what

8 this question means. Reverse engineering is a tool;
9 DeCSS is basically a bunch of software.

10 Q. Mm-hmm.

11 A. If you wanted to build a universal DVD player
12 to play DVDs, you would need to have a method for
13 decrypting the encrypted DVDs. And DeCSS is such a
14 method. It doesn't have to be the only one. You could
15 have a different one. All you need is something that
16 can decrypt them, however that works. That's one
17 possibility.

18 Q. So is it your testimony as far as you
19 understand it that DeCSS performs the decryption
20 function in the context of building a universal DVD
21 player?

22 MR. HERNSTADT: Objection. Misstates the
23 testimony.

24 Go ahead.

25 THE WITNESS: It could perform a decryption.

28

1 BY MR. HART:

2 Q. Ma'am, I'm not trying to quarrel with you. I'm
3 just trying to get an understanding of this second
4 sentence in Paragraph 8 when you say commercially --

5 A. And I don't want to quarrel with you, either.

6 I'm just trying to figure out what the right thing to say
7 is here.

8 Q. Right. And my question is, what's the relevance
9 of DeCSS to use in what you say is the larger reverse
10 engineering project of building a universal DVD player?

11 MR. HERNSTADT: Objection. Asked and answered.
12 You can answer it again.

13 THE WITNESS: It would be used to decrypt the
14 encrypted DVD.

15 BY MR. HART:

16 Q. Okay. Are you aware of whether there currently
17 exists a so-called universal DVD player that's out in
18 the market and available for people to use?

19 A. Well, my understanding is that there doesn't
20 exist one.

21 Q. Is it your understanding that DeCSS itself
22 performs any kind of DVD playback function or is merely a
23 decryption device?

24 A. My understanding is that it's merely a
25 decryption scheme.

29

1 Q. Now, in Paragraph 10 --

2 A. Mm-hmm.

3 Q. -- of your declaration --

4 A. Mm-hmm.

5 Q. -- you talk about CSS as, and I quote,
6 "amazingly weak." Do you see that?

7 A. Yes, I do.

8 Q. Do you know how long CSS-encoded DVD products
9 have been in the marketplace?

10 A. Oh, I would guess a couple of years. I'm not
11 sure.

12 MR. HERNSTADT: Let me instruct the witness not
13 to guess. Don't speculate. If you don't know, you just
14 say you don't know.

15 THE WITNESS: Well, then, I don't know.

16 BY MR. HART:

17 Q. Do you have any understanding of how long
18 CSS-encrypted DVD has been in the marketplace?

19 A. It seems like that's the same question, isn't
20 it?

21 Q. I don't want you to guess either, ma'am, but to
22 the extent you could say that you know it's been longer
23 than the last two or three months --

24 A. It's been -- I could certainly say it's been
25 longer than the last two or three months.

30

1 MR. HERNSTADT: Bill, you're asking for a
2 general -- a couple of years or something like that?

could

3 MR. HART: That's what she said the first time,
4 and I was willing to accept that until you cautioned her
5 not to guess. I don't want guesswork either. If we
6 get a fair approximation of you understanding, that's all
7 I want.

8 MR. HERNSTADT: That's fine. I was just telling
9 the witness that, not with respect to just this question,
10 but also into the future. So if the answer is "I guess,"
11 that won't be the answer. If Barbara can say "I'm pretty
12 sure it's a couple of years," then that's her answer.

13 THE WITNESS: I was guessing.

14 BY MR. HART:

15 Q. I'm sorry, you said you were guessing?

16 A. Yeah, when I said a couple of years, I was
17 guessing.

18 Q. You say in Paragraph 10 --

19 A. Yes.

20 Q. -- that "with the carelessness of at least one
21 licensee, appears to have created additional
22 opportunities to break the system."

23 Do you see that?

24 A. Yes, I do.

25 Q. Okay.

1 A. Mm-hmm.

2 Q. My question is what are you referring to there?

3 A. Oh, damn it. I don't remember the name of a --
4 this is something -- I meant to get this before I came
5 here. I just don't remember the name of the company, but
6 apparently one of the -- one of the keys was left in

plain

7 text, is my understanding. And I forget the name of the
8 licensee who did that. I'm sorry. I have that
9 information at home. I just don't remember it.

10 Q. That's all right. And based on your
11 understanding that one of the keys was exposed, right --

12 A. Yes.

13 Q. -- is it your understanding that that's how CSS
14 was ultimately cracked?

15 A. My understanding is that CSS was cracked in a
16 number of ways. And in fact, I've heard of other people
17 who have cracked it too, independent of this -- of the
18 creation of DeCSS.

are

19 And cracking a -- an encryption scheme, there
20 many different ways one can crack an encryption scheme.
21 Having one of the keys in plain text is a very useful
22 technique for having to crack it. Whether or not that

was

23 a fundamental part of the whole process of cracking CSS,
I
24 can't say because I don't know who did it and I don't
know
25 exactly how they did it.

1 Q. Gotcha. Do you know whether it was cracked as
2 a result of a so-called "brute force attack"?

3 A. Well, anyone can do a brute force. You just
4 try all the possible keys. That doesn't take long on a
5 high-speed computer. That doesn't take much skill at
6 all.

7 Q When you say it doesn't take very long, what
8 kind of time interval --

9 A. A few minutes.

10 Q. Pardon?

11 A. A few minutes.

12 Q. A few minutes?

13 A. Mm-hmm. That's one of the problems with 40-bit
14 encryption is that it could be cracked by brute force.

15 Q. In Paragraph 11 of your declaration, you discuss
16 your knowledge about the anti-circumvention legislation,
17 right?

18 MR. HERNSTADT: Objection to the form of the
19 question. It says what it says.

20 BY MR. HART:

21 Q. Well, let me put it this way: You say that the
22 Film Industry, inish caps, "submitted strict
23 anti-circumvention legislation to Congress in hopes of
24 having Congress pass a law." Do you see that?

25 A. Uh-huh.

1 Q. Was the DMCA ultimately the law that was
2 enacted as you referred to such a law here in
3 Paragraph 11?

4 MR. HERNSTADT: Objection. Form.

5 Go ahead.

6 THE WITNESS: Yes.

7 BY MR. HART:

8 Q. Now, were you aware -- in Paragraph 12, you
9 refer to the DVD CCA having been created in December of
10 1999.

11 A. Yes.

12 Q. My question is, prior to December of 1999, were
13 you aware of whether any entity was issuing licenses for
14 the CSS technology?

15 A. No, I was not aware. In fact, I wasn't aware
16 of the DVD CCA in December of 1999, either. I learned
17 about that later.

18 Q. Okay. And who did you learn --

19 A. I learned it from doing some research for the
20 article I wrote. I don't remember. I went to a number
21 of web pages and talked to experts.

22 Q. So you have no knowledge about the licensing of
23 CSS technology prior to December of '99; is that

24 correct?

25 A. Absolutely right, yes.

34

1 Q. Now, you also say here that you've been
2 informed -- and I'm still in Paragraph 12, you've been
3 informed and it's your understanding that "to obtain a
4 license, one pays a fee and signs an agreement pledging
5 not to produce non-compliant machines or to reveal a copy
6 protection scheme," right?

7 A. Yes.

8 Q. In your experience, are such pledges, as you
9 call them, unusual in technology licensing?

10 MR. HERNSTADT: Objection to the form.

11 THE WITNESS: I'm not an expert in that area.

12 BY MR. HART:

13 Q. Okay. Well, you were at IBM, were you not?

14 A. Correct.

15 Q. For how long?

16 A. Oh, 18 years.

17 Q. Eighteen years?

18 A. Yeah. I started before I got my Ph.D. , yes.

19 Q. Had you ever seen any so-called technology
20 licenses in your 18 years at IBM?

21 A. I didn't see anything like this, no.

22 Q. What do you mean, "like this"?

23 A. I mean obviously -- I mean I wasn't involved
24 with licenses at IBM. I was a researcher.

25 Q. Okay. How many years have you been involved in

35

1 computers and technology?

2 A. Starting from -- when do you want me to start?
3 Graduate school? When I first started working?

4 Q. Whenever, I mean including schooling.

5 A. If you want to start from graduate school, I
6 would say roughly 25 years.

7 Q. And is it your testimony that you have no
8 knowledge about practices in licensing technology or
9 whether it's common or uncommon for an agreement to be
10 put into place requiring a party not to reveal certain
11 information or material that's provided to them in
12 connection with the license?

13 MR. HERNSTADT: Objection to form. Misstates
14 the testimony. Compound.

15 Answer it if you can.

16 THE WITNESS: Well, I'm familiar with
17 shrink-wrap licenses. Is that what you have in mind?

18 BY MR. HART:

19 Q. I'm just asking you generally what you know.

20 A. I know about shrink-wrap licenses.

21 Q. Now, you say in the next couple of sentences in
22 Paragraph 12 that "The Linux community was divided."

23 What do you mean by that?

24 A. What I mean is that there are -- basically the
25 open and free software movement has a philosophy that
they

36

1 should -- that everything is open and available to users.

2 Q. Right.

3 A. Having some kind of nondisclosure agreement,
4 which is, I gather, what was being required to obtain a
5 DVD license, is contrary to the philosophy of these
6 movements.

7 Q. Right.

8 A. Therefore, if people wanted to be able to play
9 legally-purchased DVDs on systems that used say, for
10 example, Linux, they would have to enter -- and if they
11 wanted to do it through the formal channels, they would
12 have to enter into an agreement which, was contrary to
13 the whole philosophy behind Linux.

14 So this created a problem. Some people wanted
to
15 compromise and sign the nondisclosure agreement, or
16 whatever the license is, because I haven't seen one; and
17 others felt that this was inappropriate, given the nature

to

18 of the movement of the open and free software movements
19 sign such an agreement.

20 So that was how the community was divided.

21 Q. I see. You say one group, LSDVD, has, you
22 said, quote, "has been working on a licensed DVD
23 player."

24 A. Mm-hmm.

25 Q. Do you see that?

37

1 A. Mm-hmm.

2 Q. Was that work on a licensed DVD player for the
3 Linux platform?

4 A. That's my understanding.

5 Q. What do you base that understanding on?

6 A. From talking to people.

7 Q. People in the Linux community?

8 A. Yes, I expect so. I mean basically, I talked to
9 a number of people prior to writing an article on the
10 whole DVD controversy. I mean I spoke to many people, I
11 exchanged e-mail with a lot of people, and I don't
12 remember who said exactly what. But I tried very hard to
13 verify the things that I was told as much as I could.

14 Q. When you say you wrote an article on the DVD
15 controversy --

16 A. Yes, I did.

17 Q. -- what controversy are you talking about, this
18 lawsuit?

19 A. Well, that was one of the things I mentioned,
20 yes.

21 Q. Is this article listed in your curriculum
22 vitae?

23 A. I expect it is, but in any case, we have a copy
24 here don't we?

25 MR. HERNSTADT: Probably do.

38

1 THE WITNESS: We can give you a copy.

2 MR. HERNSTADT: Bill, just so you know, on the
3 second page, it's the top publication. It's the first
4 publication listed under the heading "Publications."

5 THE WITNESS: So it is. That is the most
6 recent article I had written when I sent this CV.

7 MR. HART: That's the second article or the
8 first one?

9 MR. HERNSTADT: First one.

10 BY MR. HART:

11 Q. "To DVD or Not to DVD"?

12 A. That's it.

13 Q. Got it.

14 A. Some people objected to the title.

15 Q. Pardon?

16 A. Someone objected to the title. Said it didn't
17 capture what was in the article.

18 Q. Oh. Why not?

19 A. He was just being cute.

20 Q. And what was the thesis of the article?

21 A. The thesis of the article was that there are
22 some -- may I look at the article and I can tell you
23 what it says? Is that allowed?

24 Q. If it helps you, and I guess I'll ask
25 Ms. Miller to mark it.

39

1 A. We can give it to you.

2 MR. HERNSTADT: If I can find it.

3 THE WITNESS: There it is. Okay. Good.

4 Actually, so it's -- let me just scan the article while
5 he does that.

6 It's basically talking about the law cases that
7 have been brought, so I mentioned the New York and
8 Connecticut cases, and I mentioned the case in
California.

9 I talk about the whole issue of Linux. I mentioned
10 Johansen. I start off by talking about him a little bit,
11 I talk about the DVD CCA and about the problems of
12 reverse engineering, the issues surrounding reverse

13 engineering. And I also mentioned the Digital
14 Millennium Copyright Act slightly.

15 And it's sort of a plea to try to -- I end by
16 saying, "We need to declare a truce in the intellectual
17 property war and start a discussion about how
18 intellectual property owners can receive fair
19 compensation without resorting to restrictions on
20 technology and speech."

21 That, I think, captures the main idea of the
22 article. Shall I hold onto it?

23 MR. HART: Pardon?

24 THE WITNESS: I'm sorry. I'm just asking if I
25 should hold onto this 'til we're finished with the

40

1 questioning.

2 MR. HERNSTADT: I'm going to give it to
3 Ms. Miller so she can mark it as, I guess, Simons
4 Exhibit 3, Bill. Is that what you want?

5 MR. HART: That would be great.

6 MS. MILLER: And I would like to state for the
7 record that Mr. HERNSTADT has just turned over a two-page
8 article entitled "To DVD or Not to DVD." It indicates
9 that the author is Barbara Simons, and the legend "From
10 the President" is across the top. It appears to come

from

11 the May, 1999 --

12 THE WITNESS: It's 2000, isn't it?

13 MS. MILLER: At the bottom, it says May, 1999.

14 THE WITNESS: It should be 2000.

15 MR. HERNSTADT: It's 2000. If you look in

16 the --

17 THE WITNESS: It should be 2000.

18 MS. MILLER: So that's a typographical error.

19 THE WITNESS: That's a mistake in our digital
20 library. Thank you. I'll have to let them know.

21 MR. HERNSTADT: If you look at the CV, it's
22 identified as a 2000 article.

23 THE WITNESS: I couldn't have written that
24 article in 1999.

25 MS. MILLER: Certainly not. So it's the May,

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1 2000 edition of the Communications of the ACM.

2 president,

3 THE WITNESS: Just to let you know, as

4 I wrote a column which occurred roughly quarterly in the

5 the

6 journal. So this was just one of my columns; in fact,

7 last one.

MR. HART: Great.

MS. MILLER: We'll mark this as Exhibit 3.

8 (Plaintiffs' Exhibit 3 was marked for
9 identification.)

10 BY MR. HART:

11 Q. Thank you. Did you have any need to consult a
12 lawyer in connection with the preparation of that
13 article?

14 A. I talked with some lawyers, but not as -- I
15 just talked with them because they were lawyers involved
16 in the legal cases. That's all.

17 Q. Right. Did you review the provisions of the
18 DMCA yourself without having input from a lawyer to the
19 extent you commented on the provisions?

20 A. The comments on the provisions in that article
21 are pretty negligible. I think I mentioned in passing
22 I referenced another article that I wrote on it earlier.
23 You can check. I don't believe I really go into it very
24 much.

25 Do you want me to look and see?

and

1 Q. No. Just to the best of your knowledge sitting
2 here today.

3 A. Yeah.

4 Q. You say in Paragraph 14 of your declaration
5 that you're informed that many of those involved with

6 the CSS break or "with breaking CSS say they did so to
7 make it possible to play DVDs on Linux," et cetera.

8 How were you informed of that?

9 A. Again, this is something which I learned when I
10 was researching that particular article.

11 Q. And you learned that by talking to other
12 people?

13 A. Yes. And when I say "talking," I use that in
the
14 generic sense. A lot of talking I do is by e-mail.

15 Q. Are some of those e-mail within the group of
16 things that you turned over to Mr. Hernstadt today?

17 A. No.

18 Q. I'm sorry, yes?

19 A. No.

20 Q. Do you have those e-mails?

21 A. I have no idea.

22 Q. Are you saying you did not include those among
23 the documents that you collected?

24 A. Yes, that's correct.

25 Q. Is there a reason why?

1 A. I just didn't think they had anything to do
2 with this. Any communications I had were relevant for
3 writing this article, not for preparing for this

4 testimony.

5 Q. I see, but you say in Paragraph 14 of your
6 declaration, "I am informed" --

7 A. Mm-hmm.

8 Q. -- "that many of those involved with breaking
9 CSS" and so on, and you just told me that those
10 communications included communications you have had with
11 people by e-mail.

12 A. I said they may have.

13 Q. May have.

14 A. I mean I talk with people in many ways, on the
15 phone, by e-mail, at meetings. I was going to web
16 sites, I was doing all of those things and trying to get
17 the material to write this article, because it was a
18 rather difficult article to write, quite frankly.

19 Q. But sitting here today, you don't recall who and
20 how you were informed that "many of those involved in
21 breaking CSS" and so on?

22 A. I don't recall, but I did very much have the
23 sense that this was common knowledge.

24 Q. Now, you say in the next sentence of
25 Paragraph 14 that "The plaintiffs in this case appear to

1 believe that section 1201 prohibits almost all reverse

2 engineering of copy-protection systems," but "that is
3 not the case."

4 A. Yes.

5 Q. What do you base that statement on?

6 A. I believe the next sentence, which talks about
7 interoperability.

8 Q. Taking those two sentences together, what's the
9 basis for your statement that plaintiffs appear to
believe
10 that section 1201 prohibits almost all reverse
11 engineering?

12 A. Well, my sense is that if you want to be able
13 to play a DVD on a computer which has Linux, then my
14 interpretation, and I'm not a lawyer, is you should be
15 allowed to reverse engineer in order to develop a
16 technology such that you can do that, and that would be
17 covered by the interoperability exclusion of the DMCA.

18 Q. But you said earlier in your testimony today
19 you're not aware of whether Mr. Corley/Goldstein or 2600
20 is in any way involved in reverse engineering; is that
21 correct?

22 MR. HERNSTADT: Object to the form. Asked and
23 answered.

24 THE WITNESS: That is what I said I believe,
25 yes.

1 BY MR. HART:

2 Q. That is what you said?

3 A. That's my -- yes, I think so.

4 Q. I'm not trying to give you a hard time. It's
5 the phone connection. I apologize for it.

6 When you say in the next sentence of
7 Paragraph 14, "I believe this exemption would directly
8 apply to the use (or publication) of DeCSS," what do you
9 mean by that?

10 A. "Publication" to me means publishing something
11 in a book, in a newspaper, on the web, in fliers.

12 Is that your question?

13 Q. I want to know how publication of DeCSS is
14 covered by the exemption as you said in this sentence.

15 A. Because DeCSS would be a tool that would allow
16 for the development of interoperability so that you can
17 play legally-purchased DVDs on a system that uses Linux,
18 on a computer with a Linux system.

19 Q. So is that because the end user would then be
20 enabled to get DeCSS to use it for a Linux-related
21 purpose?

22 MR. HERNSTADT: Objection to the form.

23 If you understand that, you can answer it.

24 THE WITNESS: Well, my sense is that the end
25 user might actually not be bothered with DeCSS if

1 somebody developed the technology to allow a DVD to be
2 played on a Linux machine.

3 BY MR. HART:

4 Q. Right.

5 A. It might have DeCSS embedded in it, but there
6 is no reason why the end user would have to be bothered
7 by that. Ideally, the end user wouldn't be.

8 Q. But your statement that the exemption would
9 directly apply to the publication of DeCSS, is that
10 based on your reading of the exemption or something
11 else?

12 A. Oh, clearly my reading.

13 Q. And let me ask you this: If someone just put
14 out DeCSS and made it available to anybody and everybody
15 for whatever use they wanted to make of it, would you
16 still regard that as something that you believe should
17 be covered by the exemption?

18 A. Well, certainly it could be used by people who
19 wanted to play a DVD on Linux and who had the skills to
20 complete the whole process. So I believe in that case,
21 the exemption would also be included. So yes.

22 Q. Are you aware of any potential to use DeCSS as
23 a device to so-called "rip" DVDs?

24 A. What do you mean by "rip"?

25 Q. Do you have any knowledge of what the word

1 "rip" means?

2 A. I'm not sure how you're using it here. I'm not
3 trying to be difficult.

4 Q. That's fine. I understand. Let me rephrase
5 the question, then.

6 DeCSS decrypts CSS-encoded DVD. Right so far?

7 A. Yes.

8 Q. And to your knowledge, does it direct the
9 unencrypted copy to the hard drive of the computer?

10 A. That's my understanding, again.

11 Q. Now at that point, can't the plain text, if you
12 will, of the DVD movie, unencrypted DVD movie content
13 that's on the hard drive be copied and/or compressed
14 and/or transmitted further?

15 A. Sure.

16 MR. HERNSTADT: Objection to the form.

17 THE WITNESS: Sure.

18 BY MR. HART:

19 Q. Sure?

20 A. Any unencrypted thing can be copied. Any
21 encrypted thing can be copied. Anything can be copied.

22 Q. Right. But in order to take advantage of an
23 encrypted copy, at some point you've got to decrypt it,
24 correct?

25 A. At some point, but you could certainly copy it

1 without decrypting it.

2 Q. Have you ever done that with a DVD?

3 A. No. I've never played a DVD.

4 Q. Do you have a DVD player at home?

5 A. No. The person I live with does, but it's his,
6 not mine. And I've never played anything on it.

7 Q. Have you ever watched anything on it?

8 A. I think I may have seen a movie at IBM research
9 back when people were doing research in this area that
10 was using DVD technology.

11 Q. No entertainment, though?

12 A. No. I haven't. I heard it's very nice, but I
13 haven't seen it.

14 Q. Now, you say in Paragraph 15 of your
15 declaration, and I'm going down several sentences to a
16 sentence beginning "In this regard, I will note that
17 DeCSS is not a prerequisite for making illegal
18 copies" --

19 A. Yes, I see that.

20 Q. -- "since other descramblers exist and are
21 available," what's your basis for that statement?

22 A. Well, the idea -- basically what's called a
23 descrambler is a software or program for decrypting

24 something that's encrypted. And there is no single way
25 of doing that. This is -- you know, there are many

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1 different ways one can write software to solve the same
2 problem, and in fact, there is a web site, I think it's
3 CMU, which has several different versions, for example.

4 Q. Are we talking about Dr. Touretsky's web site?

5 A. Yes.

6 Q. Are you saying that Dr. Touretsky's web site
7 provides CSS descramblers that can be operated as an
8 executable piece of software?

9 A. That's my understanding.

10 Q. That is your understanding?

11 A. Yes, or you can modify what he has there to
12 make it executable in some cases.

13 Q. Apart from what's on Dr. Touretsky's site, do
14 you have any other information that forms the basis for
15 your statement that "other CSS descramblers exist"?

16 A. Well, I've heard of somebody who broke CSS in
17 two either hours or days, and I don't remember what the
18 figure is, but one or the other, someone who is a
19 cryptographer who just did this, I think, as an
20 exercise.

21 Q. And when was that?

22 A. Oh, when was that? I believe it was within the

23 past year.

24 Q. Within the past year. Do you know if it was
25 after DeCSS was released?

50

1 A. I don't know.

2 Q. You don't know?

3 A. I don't know.

4 I don't believe he posted it, by the way, but he
5 did it. He broke it.

6 Q. I see. And how did you find out about this?

7 A. From a colleague.

8 Q. And can you give me the name of that colleague?

9 A. She asked me not to. What do I do?

10 MR. HERNSTADT: Bill, what Barbara said is that
11 she asked her not her to.

12 MR. HART: Excuse me?

13 MR. HERNSTADT: She asked her not to.

14 Is this the colleague that broke it, or is this
15 the colleague that told you about it?

16 THE WITNESS: No. This is the one who told me
17 about it.

18 MR. HART: I'm sorry, I'm just trying to get an
19 understanding what's happening on that end of the phone.

20 MS. MILLER: Well, if I can just state, there

21 has been a concern expressed by Dr. Simons that the
22 person who told her about this cracking of CSS has asked
23 that her name not be identified.

24 MR. HART: I see.

25 MS. MILLER: I don't know whether

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1 Mr. HERNSTADT feels that it might be appropriate to
2 designate a portion of the transcript confidential or
3 highly confidential within the meaning of our protective
4 order or whether Dr. Simons feels she can't reveal the
5 name.

6 MR. HERNSTADT: I'm going to go along with
7 Barbara on that.

8 If you feel like you can't reveal the name --

9 MR. HART: Just so the record is clear, I'm not
10 trying to berate you about this, Barbara.

11 THE WITNESS: I set myself up.

12 BY MR. HART:

13 Q. You decline to identify the person who told you
14 about this?

15 THE WITNESS: What happens if I do mention the
16 names?

17 MR. HERNSTADT: Then, for example --

18 THE WITNESS: The person could be subpoenaed?

19 MR. HERNSTADT: Yeah, if Bill wants to, yeah.

20 MR. HART: Again, I'm not trying to abuse you
21 over this. I just want a clear statement.

22 Are you declining to give me the identification
23 of that person?

24 THE WITNESS: Is it okay if I do that?

25 MR. HERNSTADT: Yes.

52

1 THE WITNESS: Okay, then yes, I would like to
2 decline.

3 BY MR. HART:

4 Q. When you say in Paragraph 15 at the end that
5 "given the weaknesses of the DVD copy protection system,
6 it was, as the DVD CCA was aware, only a matter of time
7 before CSS would be broken," right --

8 A. Yes.

9 Q. -- is it your testimony that you do not know how
10 long, in fact, it took before CSS was broken?

11 MR. HERNSTADT: Objection to the form of the
12 question. I think that misstates Dr. Simons' testimony.

13 But go ahead.

14 THE WITNESS: Well, I'm certainly not aware of
15 when CSS was first broken, and I suspect nobody is
16 because this is the kind of thing --

17 BY MR. HART:

18 Q. And you also said earlier you were only
19 guessing as to when CSS was first released.

20 A. Yes, that's correct.

21 Q. So you cannot tell me as a matter of fact based
22 on your knowledge how much time it actually took from the
23 time that CSS was available on a commercially-released
24 product until it was, in fact, broken; is that right?

25 A. That's certainly correct. And what I was saying

53

1 is that in addition, I doubt anybody could tell that
2 because you could have situations where someone would
3 break it and not publicize that.

4 Q. Why would someone break it and not publicize
5 it?

6 A. As a test.

7 Q. As a test?

8 A. Yes, to see how clever you are as a
9 cryptographer.

10 Q. Is it also possible that someone that did so
11 could share that information with others in a more
12 private fashion?

13 MR. HERNSTADT: Objection to form.

14 THE WITNESS: Sure.

15 BY MR. HART:

16 Q. Like by e-mail?

17 A. Possible.

18 Q. Just bear with me here. The reason for the
19 silence here is I'm actually trying to make my questions
20 shorter rather than longer.

21 A. I appreciate that. Thank you.

22 MR. HERNSTADT: The reason for the silence on
23 this end is because we were all hoping that's what you
24 were doing.

25 THE WITNESS: I think everyone is starving.

They

54

1 haven't had lunch. If you look at the videotape, you'll
2 see that I took the liberty of having a yogurt in the
3 beginning.

4 MR. HART: Oh.

5 THE WITNESS: You're going to move it. Thank
6 you.

7 BY MR. HART:

8 Q. Now, you say in Paragraph 10 of your
declaration,

9 I know we're going backwards now but it's actually
10 progress, that there was a reaction to the arrest of the
11 Norwegian teenager who originally posted DeCSS and "led
to
12 thousands more people downloading DeCSS and/or creating
13 mirror sites of the program."

14 A. Right.

15 Q. Do you see that?

16 Is that consistent with what you said earlier
17 about the posting of DeCSS being a form of protest?

18 A. Yes, I believe so.

19 Q. Are you aware of what role Mr. Corley or 2600
20 played in that regard?

21 A. In regard of the downloading?

22 Q. And/or the mirroring of DeCSS on the internet.

23 A. No, I'm not.

24 Q. Are you aware whether Mr. Corley encourages
25 people to mirror his site containing DeCSS and/or links

55

1 to DeCSS?

2 A. I think I've heard something to that effect.

3 Q. Okay.

4 A. I'm not intimately familiar with his web site.

5 Q. Gotcha. But when you looked at his web site,
6 do you recall seeing a list of mirrors or the list of
7 hot links?

8 A. I saw a whole bunch of URLs.

9 Q. Did you see the box at the bottom of the URLs
10 that said "Please submit your URL or a mirror here"?

11 A. I don't remember. I may have. I haven't looked

12 at it for a while, so it's not fresh in my memory.

13 Q. Fair enough. You haven't posted DeCSS, have
14 you?

15 A. Nope, although I do give a URL for it in my
16 article.

17 Q. Okay. And is your article on line?

18 A. It is.

19 Q. Pardon?

20 A. It is.

21 Q. Okay. And is that URL set up as a link?

22 A. I believe so. It goes to the deposition -- to
23 the --

24 MR. HERNSTADT: Do you want to look?

25 MR. HART: I'm sorry.

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1 THE WITNESS: Could I see the article for a
2 minute? I'll tell you.

3 BY MR. HART:

4 Q. You're referring to Exhibit 4? Or where are we,
5 3?

6 MS. MILLER: Exhibit 3.

7 THE WITNESS: This is the "DVD or Not to DVD"
8 report, 3.

9 MS. MILLER: That's 3.

10 THE WITNESS: I think I give a URL. Yeah. I

11 give a URL to the Hoy -- to the Hoy testimony or the
12 Hoy -- it's -- should I read the URL to you that I have
13 included?

14 BY MR. HART:

15 Q. I'm sorry, you give a URL to --

16 A. Let me read you these two sentences, okay?

17 Q. And you're reading from Exhibit 3?

18 A. Yes.

19 Q. Okay. Go ahead.

20 A. "If you wish to obtain a copy of the DeCSS
21 source code, the DVD CCA thoughtfully provided it in the
22 California case." And then I give the URL for the
23 Hoy -- it's cryptome.org/dvd-hoy-reply.htm#Exhibit B.

24 Q. And why did you do that?

25 MR. HERNSTADT: Hang on. She's not done.

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1 THE WITNESS: There is another sentence: "Or
2 you can wear it on a T-shirt (to order, go to
3 copyleft.net/cgi-bin/copyleft/t039.pl?l&back."
4 If you can remember that.

5 BY MR. HART:

6 Q. And why did you do that?

7 A. To point out that it's widely available.

8 Q. And that's source code as it was contained in

9 what you refer to in Paragraph 13 of your declaration as
10 the "notorious Hoy declaration"?

11 A. Yeah, I guess so.

12 Q. I'm just --

13 A. Yeah.

14 MR. HERNSTADT: The now notorious.

15 THE WITNESS: Now notorious. Slightly
16 colorful, isn't it?

17 BY MR. HART:

18 Q. And it's also source code as it is embodied on
19 a T-shirt, which is a piece of wearing apparel?

20 A. Right. It is. It's there. Yes. Mm-hmm.
21 That's exactly what I just read.

22 Q. Okay. And is that also part of a protest on
23 your part?

24 A. My sense is that if something can be published
25 in a newspaper or in a book, it should be legal to post

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1 it on the net.

2 Q. I'm sorry, your voice dropped.

3 A. My sense is that First Amendment rights should
4 apply to the net as well as to books and newspapers --

5 Q. Okay.

6 A. -- and T-shirts.

7 Q. Okay. In Paragraph 17, you talk about certain

8 "fair use" rights of copyrighted materials.

9 A. Yes.

10 Q. Now, do you regard it as fair use, using the
11 term as you've used it in your declaration, to copy
12 decrypted DVD movies and transmit them over the internet
13 to others?

14 MR. HERNSTADT: Objection to the question
15 insofar as it calls for a legal conclusion.

16 And I would simply direct the witness to answer
17 only as to her understanding but not to give any kind of
18 a legal opinion, because I don't think she's qualified
19 to do so.

20 THE WITNESS: I'm definitely not qualified to
21 do so. My amateur opinion is that it is illegal to
22 completely copy a movie and send it to somebody else
23 like that, the way you've described it, if you're
24 talking about the full movie, that that is not fair use.

25 BY MR. HART:

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1 Q. Okay. And if the decrypted DVD movie content
2 is resident on the hard drive of a computer as a result
3 of using DeCSS, right --

4 A. Mm-hmm.

5 Q. Are you with me so far?

6 A. I'm with you.

7 Q. -- and you say that that may help enable Linux
8 playback in some way which you regard as permissible,
9 right --

10 A. Yes.

11 Q. -- but may also have the potential for doing
12 other things like copying and transmission on the
13 internet --

14 A. Yes.

15 Q. -- how do you, Barbara Simons, come out in
16 terms of drawing a line between what you regard as
17 permissible on the one hand and the risk of what may be
18 impermissible on the other hand?

19 MR. HERNSTADT: Objection to the form.

20 Go ahead, Barbara.

21 THE WITNESS: I mean I feel there are some
22 things that are okay to do and some things that are not
23 okay. Again, I'm not a lawyer, but my understanding is
24 it's okay to use a VCR to make copies, for example as we
25 just did of the Wimbledon tournament to play back later.

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1 On the or hand, if that happened to be
2 copyrighted material, and I don't know if it is or not
3 but certainly a movie would be, it would not be legal to
4 do that and then try to sell it, for example, to other

5 people.

6 (Interruption in the proceedings.)

7 MR. HERNSTADT: Hold on here, Bill.

8 MS. MILLER: Let's go off the record for a
9 second.

10 THE VIDEOGRAPHER: Off the record, the time is
11 3:33 p.m.

12 (Discussion had off the record.)

13 THE VIDEOGRAPHER: On the record, the time is
14 3:34 p.m.

15 MR. HART: Are we back?

16 MR. HERNSTADT: Yes.

17 BY MR. HART:

18 Q. Did you get to complete your answer?

19 A. I don't recall.

20 THE WITNESS: Maybe would it make sense for you
21 to read it back?

22 MR. HART: Let's see what the reporter has.

23 MR. HERNSTADT: I'd like to ask the reporter to
24 read the last question and answer as far as we got.

25 (The record was read by the Reporter.)

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1 MR. HERNSTADT: Do you have anything more to

2 add?

3 THE WITNESS: I was going to say something
4 else, but now I don't remember what I was going to say.
5 I can't remember. Sorry.

6 BY MR. HART:

7 Q. I was trying to give you a chance to make sure
8 you completed your answer.

9 A. Yeah.

10 Q. And apart from selling a copy of the movie to
11 other people, would you still regard it as
12 impermissible to make the copy of the movie available
13 through internet transmission?

14 MR. HERNSTADT: Objection, assumes facts not
15 in evidence.

16 Go ahead.

17 THE WITNESS: First of all, I think it would be
18 almost impossible to do internet transmission. Let me
19 just state that. These files are much too large. But --

20 BY MR. HART:

21 Q. How do you know that?

22 A. Because I know these are very, very large
23 files. Movies are very large files, and my
24 understanding is we currently don't have the bandwidth
25 to ship them over the net.

1 But in terms of shipping them over the net, I

2 don't want to sound picky, but it seems to me it would
3 depend -- if I were shipping it to myself over the net,
4 and if it was my movie, if I was shipping it to another
5 computer, for example, it's not clear to me that that
6 would be illegal.

7 If I was posting it on a web site, if this could
8 be done, and I don't believe it could be done at this
9 point, if I posted it on a web site for people to
download
10 as they chose, that clearly would be illegal.

11 Q. Just assume with me for the moment that that
12 was feasible, okay?

13 A. Mm-hmm.

14 Q. And based on that assumption, I come back to
this
15 long line-drawing question of a moment ago, which is,
16 given your testimony that you believe there are some
17 permissible uses of DeCSS --

18 A. Mm-hmm.

19 Q. -- right --

20 A. Right.

21 Q. -- which justify its proliferation, and on the
22 other hand, given the risk that I just described, if you
23 assume with me for a moment that it's feasible --

24 A. Right.

25 Q. -- to make an internet transmission, I'm asking

1 you how you draw the line, you, Barbara Simons.

2 MR. HERNSTADT: Objection. The question calls
3 for speculation.

4 Go ahead.

5 THE WITNESS: Yeah, I mean my sense is, and I'm
6 not a lawyer, that copyright law is a bit vague in
7 certain areas like fair use and first sale.

8 I mean for example, if I shipped it over the net
9 and destroyed my own copy, if I shipped it to somebody
10 else, would that be a first sale? Would that be a first
11 sale, right, where I'm giving my copy to somebody else?

I

12 can do that with a book. I can do that with a videotape
13 that I buy. I can give it to somebody else. I can do it
14 with a DVD.

15 So if the net is simply the mechanism whereby I
16 make that transfer, then I don't think it should be
17 illegal. I think it depends on what copyright law would
18 say is legal and not legal.

19 BY MR. HART:

20 Q. But I'm actually asking an easier question. And
21 that is, just envision a situation where the internet
22 transmission of DVD movies is plainly inappropriate,
23 according to your likes, okay, and I'm asking you if you
24 envision that one situation on the one hand and you take
25 what you regard as permissible uses of DeCSS on the

other,

1 I'm asking you as a technologist and policy person in the
2 technology area where you, Barbara Simons, draw the line.

3 MR. HERNSTADT: Objection to the form of the
4 question. I think it's asking for a different kind of
5 opinion.

6 But if you can answer it, go ahead.

7 THE WITNESS: I don't understand about drawing
8 a line. It seems to me the issue is violation of
9 copyright. And copyright can be violated in many
10 different ways using many different tools, like using
11 Xerox machines. I don't understand where DeCSS comes
12 into play here.

13 I'm sorry. I'm not trying to be difficult. I
14 truly don't know.

15 BY MR. HART:

16 Q. No, I understand. Now, apart from what we've
17 covered so far in your deposition and what you've said
18 in your declaration, are there any other areas that you
19 are prepared to testify on in connection with this case?

20 MR. HERNSTADT: Bill, it might be easier for me
21 to answer that question. I intend to ask her a couple of
22 questions, and what you may want to do is if you're done
23 with your questions now, I'll reserve time at the end now
24 so you can cross her on the questions that I'm going to

25 ask her about.

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1 Dr. Simons, as I've told you, is leaving the
2 country I think in two days, or actually going to Utah
3 and then leaving the country for the remainder of the
4 month. She'll not be testifying at trial. So this
5 testimony is her testimony.

6 MR. HART: Uh-huh. Let me just ask a couple
7 more questions before we do that --

8 MR. HERNSTADT: Certainly.

9 MR. HART: -- of the witness, not of you.

10 THE WITNESS: I thought you were going to say
11 that.

12 BY MR. HART:

13 Q. Dr. Simons, when did you first get involved in
14 this case?

15 A. When I realized I had to write my last
16 president's column, and I was trying to decide what to
17 write it on, and I finally decided to write it on the DVD
18 controversy. Since this was published in May, the
19 deadline was probably sometime in March, so I would say
20 somewhere around February, March, something like that.

21 Q. Okay. And how did you come to file a
22 declaration in this case?

23 A. Oh, I was approached.

24 Q. By?

25 A. Moglus is his name, Moglus?

66

1 MR. HERNSTADT: Edwin Moglen.

2 THE WITNESS: Edwin Moglen, excuse me. Edwin
3 Moglen, who is one of the people -- he happens to be a
4 lawyer, but I'm sure you'll agree lawyers are people,
5 too. I'm getting some laughs here anyway. He was one of
6 the people I had spoken to, in quotation marks --

7 MR. HART: Right.

8 THE WITNESS: -- about DVD, the whole DVD
9 situation, trying to understand it. And he contacted me
10 and said that there would be some interest in having me
11 file an affidavit in this case.

12 BY MR. HART:

13 Q. Did Mr. Moglen tell you he had taken a position
14 in this case?

15 A. No, I don't believe he did. I have his
16 e-mails. I don't believe he did, actually I printed out
17 his e-mails, and I have them.

18 MR. HERNSTADT: Gave them to me?

19 THE WITNESS: Yeah.

20 MR. HERNSTADT: Bill, apparently Barbara gave
21 them to me, so I'll take a peek at them and send them on

22 to you, probably.

23 THE WITNESS: I don't think he did.

24 BY MR. HART:

25 Q. Did there come a time when you were in

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1 communications with any of the attorneys of the

2 Frankfurt Garbus firm?

3 A That's your firm? Right.

4 Then Edward contacted me.

5 Q. Then when was that?

6 A. We've got the e-mail there, do you know?

7 I have the first e-mail. If you wait a second,

8 I can tell you.

9 MR. HERNSTADT: Bill, do you want me to look?

10 BY MR. HART:

11 Q. Other than looking at the e-mails, do you have

12 a recollection?

13 THE WITNESS: It's right there. They're in

14 chronological order. I can do it.

15 MR. HART: Are we going to be able to get these

16 e-mails? I'm a little concerned that the witness is

17 referring to e-mails you have in your possession and

18 you've given your statement earlier, Ed, that you may

19 not be turning over all of these.

20 THE WITNESS: It was maybe a month ago, a month

21 and a half ago, two months.

just

22 MS. MILLER: If I could state for the record
23 so it's absolutely clear, Dr. Simons has not at this
24 point, Bill, just so you know, actually looked at the
25 stack of e-mails she gave to Mr. Hernstadt today. If she

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1 had, we certainly would have asked for Dr. Simons that it
2 be marked as an exhibit, as she would have been referring
3 to it.

4 But at this point, Mr. Hernstadt still has the
5 stack of e-mails. He's already noted his prior
6 objection and request to be able to review the documents
7 that Dr. Simons has turned over at this point to be able
8 to determine if there is any privileged material.

9 But at this point in time, the witness has not
10 referred to the e-mails to determine the answer to the
11 question you've asked.

12 BY MR. HART:

13 Q. If we could get your unvarnished answer,
14 Barbara, without referring to e-mails about
15 approximately when you were contacted by somebody at the
16 Frankfurt Garbus firm.

17 A. I do have a date for you here. It's on the
18 affidavit that I filed. And the date on that is April

19 27th. Now, obviously, I was contacted before then.

20 Q. Right.

21 A. So I would guess, given the fact that I think
22 this whole process didn't last too terribly long, that
23 it was early April. That's my guess. But we can verify
24 that.

25 Q. And was this declaration that's been marked as

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1 Exhibit 2 typed onto Frankfurt Garbus' word processing
2 system?

3 A. Was it typed onto their word processing system?
4 Well you sent it to me, right, so I guess it must have
5 been, yes.

6 Q. And were you sent some kind of draft that was
7 prepared by one of the lawyers at Frankfurt Garbus, or

did

8 you draft something first and send it to them, or how did
9 that work?

10 A. There were drafts.

11 Q. Sorry?

12 A. There were drafts.

13 Q. And who sent the first one?

14 A. Edward did.

15 Q. I see. And how long did that take from the

16 time you first talked to someone at Frankfurt Garbus and

17 the time Edward, as you referred to him, sent you the
18 first draft?

19 THE WITNESS: Shall I refer to you in some
20 other way?

21 MR. HERNSTADT: I appreciate that. You're one
22 of the two other people in the world that does. I like
23 it.

24 THE WITNESS: I believe the first draft came
25 shortly after I was contacted. Basically, my

70

1 recollection is that it more or less is the article
2 entitled "To DVD or Not to DVD" broken up with my C.V.
3 sort of stuck on top.

4 BY MR. HART:

5 Q. Gotcha. So Ed took first cut at doing that, and
6 you reviewed it?

7 A. Yes.

8 Q. And how significantly did you change that draft
9 after you reviewed it?

10 A. There were a number of changes made.

11 Q. There were?

12 A. Mm-hmm.

13 Q. Okay. And do you have copies of the earlier
14 drafts?

15 A. Edward does.

16 MR. HART: I see. Have those been produced to
17 us?

18 MR. HERNSTADT: Bill, that's part of the
19 e-mails. Everything was done by e-mail, and so that's
20 in there.

21 MR. HART: So that's what you're holding in your
22 hand, too?

23 MR. HERNSTADT: Well, actually it's on the
24 table next to me, but I don't really know. When Barbara
25 came, she handed me a stacks of e-mails and said "This

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1 is what I have." And I have not had an opportunity to
2 look at them.

3 BY MR. HART:

4 Q. So in other words, the answer to the question
5 whether they've been produced to me was at first they're
6 in the e-mails, but now you're saying you don't know if
7 the drafts are in the e-mails.

8 THE WITNESS: Oh, no. The drafts are in the
9 e-mails.

10 MR. HERNSTADT: I know they're in there,
11 because I flipped through and I saw that there were
12 drafts in there.

13 THE WITNESS: And I can tell you they're there,

14 because I just printed them out this morning. So I know
15 they're there.

16 BY MR. HART:

17 Q. Now, when was this trip that you're taking
18 scheduled, Dr. Simons?

19 A. Oh, I get tired thinking about it. Tomorrow I'm
20 going to Utah, coming back two days later; the next day
21 I'm going to Japan, coming back -- I go on the 12th, come
22 back on the 16th, go to Helsinki on the 17th and come

back

23 on the 30th. And I am not a young kid.

24 Q. My, oh my.

25 A. This is an endurance trip.

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1 Q. And when was this trip scheduled?

2 A. Oh, some time ago.

3 Q. Prior to your ever --

4 A. Prior to my being -- is this a subpoena that I
5 got? Whatever. Prior to my receiving a subpoena to
6 testify, to give a deposition.

7 Q. Was it prior to the time you prepared your
8 declaration?

9 A. Umm -- no. Well, I think the -- I mean I
10 certainly knew that I was going to be making the Utah
11 trip prior to then. I was thinking about the Japan

12 trip, and the Helsinki trip had probably not yet been
13 scheduled.

14 Q. When did you first inform Mr. Hernstadt or
15 anybody at the Frankfurt Garbus firm that you might be
16 unavailable for the trial in this action due to your
17 travel plans?

18 A. Again, I don't recall, but it was some time ago.

19 Q. Some time ago?

20 A. Yeah. In fact they told me I probably wouldn't
21 be giving a deposition as a result.

22 Q. That you would not be giving a deposition?

23 A. At one point I was told I would not be, because
24 it wasn't possible given my schedule.

25 Q. When did you learn otherwise?

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1 A. Well, first I got the subpoena saying I would,
2 and then I was told that I wouldn't, and then I was told
3 that I would again only in the past week, I think.

4 Q. Were you told why on again, off again, now back
5 on again?

6 A. I'm don't remember exactly. I know a lot of
7 the issues had to do with other people's schedules and
8 the ability for people to get to places and my being so
9 constrained.

10 Q. I'm sorry, your being so what?
11 A. Constrained because of my travels.
12 Q. Right, but were you told in words or substance
13 why it was decided just recently to put you back into
14 the case?
15 A. No, except that it could be done today and I
16 could make it today. That's all I knew.
17 Q. And when was that communication made to you?
18 A. Within the past week, I think.
19 Q. Was that by Mr. Hernstadt?
20 A. Yes.
21 Q. Have you ever talked to Mr. Garbus?
22 A. No. I've never talked to him. I've tried.
23 Q. You tried?
24 A. I called him, but he wasn't in.
25 Q. Didn't return your call?

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1 A. Well, I called him -- the time that I called
2 him, it was -- no, didn't.
3 Q. Yeah, I have that problem sometimes, too.
4 A. That was recently.
5 MR. HERNSTADT: Objection.
6 MR. HART: Just give me a moment here. I'd like
7 to confer with my colleague, Ms. Miller, on the other
8 line. And if you'd just bear with me because of the sort

9 of logistics of my being on the phone.

10 THE WITNESS: Does that mean I leave?

11 MR. HART: No, no, you don't have to leave.

12 MR. HERNSTADT: I'd like to go off the record
for
13 about three minutes. We'll step out, and you can have a
14 private conversation.

15 MR. HART: That sounds great. We're going to
16 take a little break right now and go off the record.

17 THE VIDEOGRAPHER: Off the record, the time is
18 time 3:50 p.m.

19 (Break taken from 3:50 to 4:01 p.m.)

20 THE VIDEOGRAPHER: On the record, the time is
21 4:01 p.m. Please continue.

22 EXAMINATION BY MS. MILLER:

23 Q. Okay. We're back on the record.

24 Dr. Simons, I just have a couple of very quick
25 questions for you because I know that you're pressed for

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1 time. But since Mr. Hart, who is not in this city at the
2 moment, hasn't had the opportunity to look at what's been
3 marked in your deposition as Exhibit 3, I have, quickly,
4 and I have -- excuse me, a couple of questions for you on
5 this document.

6 A. Sure.

7 Q. If you could, flip to Page 2 of Exhibit 3. And
8 in Paragraph 2, that is the second full paragraph on
9 Page 2, there is a sentence that states, "The main
10 function for CSS appears to be to protect a monopoly on
11 licensing the player market and to inhibit the
12 widespread production of illegal DVDs and noncompliant
13 machines."

14 Do you see that statement?

15 A. Yes, I do.

16 Q. Have I read it accurately?

17 A. Yes, you have.

18 Q. I would like to, first of all, ask you what's
19 the basis for that conclusion that the main function for
20 CSS is to protect a monopoly on licensing the player
21 market.

22 A. That was my opinion after having talked with a
23 number of people. The fact is, it is a monopoly, right,
24 because the licensing is done by only one organization.
25 So I felt that that was a pretty obvious statement.

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1 I know that the movie industry is concerned
2 about widespread illegal copying, and my sense is that
3 they had -- that they felt that this might be one way to
4 try to prevent that.

5 Q. And in your view and based on the opinion that
6 you expressed in that statement, do you think that's a
7 valid concern that the movie industry has to inhibit the
8 widespread production of illegal DVDs?

9 MR. HERNSTADT: Objection to the form of the
10 question.

11 THE WITNESS: I understand their concern, and I
12 have some sympathy for them for having that concern. I
13 don't see how they can protect, prevent that from
14 happening, because one can make -- one can establish a
15 factory, as I have heard, and I don't have any firsthand
16 knowledge of this, but I've heard has been done in some
17 Asian countries or one Asian country to just make mass,
18 mass market duplicates, make large number of duplicates
19 of the encrypted DVDs, which would be widespread
20 copying. And I don't see how this approach could
21 protect against that.

22 BY MS. MILLER:

23 Q. But that's certainly one form of illegal
24 copying that you've just described there.

25 A. Right.

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1 Q. It's not your opinion that CSS was intended to
2 protect against that form of copying of DVDs; is that
3 correct?

4 MR. HERNSTADT: Objection to the form. I think
5 that's exactly what she just said.

6 MS. MILLER: That's what I was asking her to
7 confirm.

8 THE WITNESS: I don't think that CSS can
9 prevent it.

10 BY MS. MILLER:

11 Q. But CSS can prevent other forms of illegal
12 copying; is that correct?

13 A. CSS can't prevent much of anything, as I can
14 see. I think it's awfully weak. That may have been the
15 intent, but I don't see that it does much. It's too
16 weak.

17 Q. But apart from the members of the Linux
18 community or people that you've just testified about
19 that you've heard that have cracked CSS --

20 A. Mm-hmm.

21 Q. -- would you agree that CSS protects against
22 illegal copying by the average consumer that might not
23 be technically proficient?

24 MR. HERNSTADT: Objection to the form. I think
25 that's extremely vague.

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1 THE WITNESS: Yeah. I think it's vague, too,

2 in the sense that there are many ways of making
3 copying. I mean the average consumer knows how to copy
4 records onto tapes.

5 I don't know how difficult it might be in the
6 future to copy the output, the analog output, for
7 example, make copies of that off of a computer by an
8 average person.

9 BY MS. MILLER:

10 Q. So you just don't know how difficult that is?

11 A. No. I don't know.

12 Q. In Paragraph 3 still on Page 2 of Exhibit 2
13 (sic), there is a statement where you say, "What would
14 have happened had the DVD CCA licensed all Linux and
15 free/open-source operating systems, or eliminated the
16 licensing requirement altogether?"

other

17 Do you see that statement?

18 A. Oh, yes. Right.

19 Q. Now, in that statement, you seem to imply that
20 the DVD CCA hasn't licensed any Linux development
21 efforts for DVD players.

22 A. Mm-hmm.

23 Q. What's the basis for that assumption?

24 A. That was my understanding at the time I wrote
25 the article.

1 Q. And that would have been in April of this year?

2 A. March, something like that.

3 Q. March of this year?

4 A. February, March, because there is a long window
5 between when it gets written and when it gets
6 published. Probably February. Again, I could get that
7 information for you. I just don't recall.

8 Q. But you wrote your declaration in --

9 A. April.

10 Q. -- April of this year?

11 A. Mm-hmm.

12 Q. And in your declaration, you indicated that you
13 were aware that LSDVD or that development project for a
14 Linux-based DVD player was pursuing a license with the
15 DVD CCA?

16 A. Yes.

17 Q. So in making this statement in Exhibit 2,
18 you're not indicating any knowledge one way or the other
19 whether or not the DVD CCA has refused to issue licenses
20 to Linux developers, correct?

21 MR. HERNSTADT: I think that is a misleading
22 question.

23 But if you can answer it, go ahead.

24 I object to it on that ground.

25 THE WITNESS: Has refused to license, is your

1 question?

2 BY MS. MILLER:

3 Q. Correct.

4 A. My understanding is that they would refuse to
5 license if the other party refused to sign a
6 nondisclosure agreement or refused to sign the type of
7 secrecy or nondisclosure agreement that they required
8 and that obviously, the Linux group that was working
9 with them must have agreed to sign it. That's all I
10 know.

11 Q. And what's that understanding based on?

12 A. Talking to people. As I say, I mentioned
13 earlier, there is this dichotomy in the Linux
14 community. Some people felt they shouldn't compromise
15 and sign an agreement which was contrary to the whole
16 philosophy of the Linux open-source, free-source,
17 open-software, free-software movement and then others
18 who felt that they were willing to make such a
19 compromise.

20 But I don't refer to that in this article, I
21 don't believe.

22 Q. Fair enough.

23 A. Basically -- let me just expand on this. What I
24 was saying, I believe, is that the DVD CCA was unwilling
25 to license Linux on the terms -- on the standard terms

1 that the Linux community understands. So therefore, some
2 people were willing to compromise and try to go with the
3 DVD CCA rules, and others were not.

4 Q. Okay, and for those that were willing to, as
5 you put it, go along with the DVD CCA rules --

6 A. Yes.

7 Q. -- as you understand it --

8 A. Yes.

9 Q. -- they were issued licenses?

10 A. I don't know.

11 Q. But you certainly don't mean to imply that the
12 DVD CCA will not issue a license to anyone that's
13 developing a Linux-based DVD player.

14 MR. HERNSTADT: Objection to form.

15 Go ahead.

16 THE WITNESS: I mean to imply that they would
17 not issue a license to anyone developing a Linux DVD
18 player who adhered to the rules of Linux, which is open
19 sources.

20 BY MS. MILLER:

21 Q. So in other words, who refused to sign a
22 nondisclosure agreement?

23 A. Because it would not allow them to do open
24 source.

25 Q. Okay. Thank you.

1 The last question I have in this document in
2 that same paragraph, Paragraph 3, that is, there is a
3 statement, quote -- I believe it's the next sentence,
4 "Surely the risk of illegal copying DVDs would not be
5 any greater than it is now with DeCSS widely available."

6 A. Correct. Mm-hmm.

7 Q. By that statement, do you mean to imply that
8 the wide availability of DeCSS increases the risk of
9 illegal copying of DVDs?

10 A. It might.

11 Q. Does it present a risk of illegal copying of
12 DVDs?

13 A. I think it's relatively minor compared to the
14 risks that are presented by the whole technology.

15 Q. A relatively minor risk is still a risk, is it
16 not?

17 A. Sure.

18 MS. MILLER: Thank you very much. That's all I
19 have, Dr. Simons.

20 MR. HERNSTADT: Bill, are you still with us?

21 MR. HART: Yep.

22 MR. HERNSTADT: I'm going ask a couple
23 questions now. Are you -- I just want to make sure

24 you're done too, for now.

25 MR. HART: Subject to all the usual caveats,

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1 objections, reservations.

2 MR. HERNSTADT: Not to mention stamping of feet
3 and pulling of hair.

4 MR. HART: I'm sorry, what?

5 MR. HERNSTADT: It was a joke, Bill.

6 EXAMINATION BY MR. HERNSTADT:

7 Q. Dr. Simons, I just want to -- following up
8 on the last questions that were asked of you, you've
9 been asked a couple of questions as to -- about
10 balancing risk. Could you tell me what you think the
11 risk is posed by the CSS system or scheme?

12 MS. MILLER: Objection. Vague.

13 MR. HERNSTADT: If you understand the question.

14 THE WITNESS: I don't.

15 BY MR. HERNSTADT:

16 Q. Okay. You were asked -- the last question, I
17 think that Ms. Miller asked you is that there is a risk
of
18 illegal copying, and you said that you thought that that
19 was -- you compared it to some other risk. Could you
20 explain what that other risk is?

21 A. Well, my sense is that the major risk for the

22 movie industry is mass-produced illegal copies that can
23 be made by simply copying the entire DVD, encrypted
24 version of the DVD in mass, en masse and selling them
25 for less than what the movie industry sells them for. I

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1 think that's the major risk.

2 I think that the level of risk created by
3 people decrypting and then sending or doing something
4 with these decrypted copies is relatively minor by
5 comparison.

6 Q. Do you see a risk to the public or to
7 scientists if the DMCA is understood to mean that
8 something like DeCSS cannot be posted at all?

9 A. I see it --

10 MS. MILLER: Objection to form.

11 THE WITNESS: Sorry.

12 MR. HERNSTADT: You can answer.

13 THE WITNESS: I see a risk -- I see a risk to
14 prohibiting the publication of software, and I also see
15 a risk to -- and I'm not sure if this is actually your
16 question, but I also see a risk to making it difficult
17 for the normal person, for most people to exercise their
18 fair use rights. Those are the two risks I see.

19 BY MR. HERNSTADT:

20 Q. Can you explain that second risk?

21 A. The fair use?

22 Q. Yes.

23 A. One problem -- a problem with having some sort
24 of technological control of intellectual property, such
25 as CSS or any kind of encryption, is that one can't get

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1 in and make a copy of the piece of it, typically.

2 Certainly, you can't do that with DVDs unless you've
3 somehow encrypted them first.

4 Now, if the technological community has access
5 to something like DeCSS because it's all over the place,
6 I mean you really can get it trivially, and know how to
7 do this, then we can, we the technology community, I
8 haven't done this so I'm saying "we" in the generic
9 sense, can decrypt a DVD and take out a piece to use, for
10 example, in a presentation, a digital version as opposed
11 to analog.

12 This is a right that the nontechnical community
13 will not have, because they don't have the expertise to
14 do it and because the technical community is prevented,
15 if this effort succeeds, from making that knowledge
16 commonly available.

17 Q. Taking a large step to the side, could you --
18 and I am fortunately going to ask you to be brief about

19 this, although that's going to be difficult --

20 MR. HART: Ed, could you speak up? I'm sorry.

21 BY MR. HERNSTADT:

22 Q. Could you tell me how long you have been a
23 computer scientist?

24 A. Um --

25 Q. And start with getting into it and going through

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1 your career.

2 A. I went back to school in 1971 at the age of 30,
3 so that will tell you how old I am, and started taking --
4 took one CS and one math course a semester for a couple
of
5 years, because I had small children, and then eventually
6 started taking graduate courses and eventually applied to
7 graduate school and eventually transferred to Berkeley
8 and this and that and ended up getting a Ph.D. in 1981,
9 although I started working at IBM in 1980. And I've been
10 sort of at it ever since.

11 Q. Over the course of your career, what have been
12 your areas of focus or expertise?

13 A. My background really is theory, which is more
the
14 mathematical end of things, working on algorithms in
15 particular. So I started off, my dissertation was in
16 scheduling theory. I've also worked on compiler

17 optimization, fault tolerant distributed computing, and
18 communicating sequential processes. Those are the main
19 areas I've worked in, technical.

20 Q. Okay. Are you familiar with programming
21 languages as a result of your work in computing
22 sciences --

23 A. Yes.

24 Q. -- computer sciences?

25 Could you tell us what source code is?

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1 A. Source code typically refers to the language in
2 which a program is written, the actual program written
3 in some high-level language.

4 Q. For example, what?

5 A. C, Fortran, ALGOL, List, PL/1.

6 Q. And what is object code?

7 A. Object code is -- object code tends to be what
8 the source code is translated into.

9 This is a little bit tricky, because you can,
for
10 example -- I'm not speaking what my compiler optimization
11 had on it -- you can translate the source code in
12 something which you might refer to as object code or
13 intermediate code, there are many different names for it,
14 which is not aimed at a particular machine. So it's sort

finite
15 of a generic machine. For example, you might assume an
16 unbounded number of registers. Every machine has a
17 number of registers. There are other assumptions you
18 might make.

19 You might do various things to this, and then
20 at some point you might translate it again such that it
21 actually maps onto a specific machine.

22 One of the projects I worked on when I was
23 doing compiler optimization was developing what's called
24 a back end for a compiler which would produce relative
25 generic code and then mapping that generic code onto

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1 various specific processors.

The
2 I don't know if I've answered your question.
3 point is that object code -- you tend to think of object
4 code as being the final output with the thing that --
that
5 the computer actually runs, but it's not a hard-and-fast
6 definition. It's not like we have a mathematical
7 definition of object code like we might have of some
8 precise notion. It a little bit depends on what you're
9 doing with it and what your model is.

10 Q. Do you believe that source code is expressive?

11 A. Well, of course.

12 MS. MILLER: Object to form.
13 BY MR. HERNSTADT:
14 Q. Do you think that object code is expressive?
15 A. Certainly.
16 MS. MILLER: Object to form.
17 THE WITNESS: Did you get my answers?
18 THE REPORTER: No.
19 THE WITNESS: I think the first one was "yes,"
20 and the second one was "certainly."
21 MR. HERNSTADT: I'm going to stop right there.
22 THE WITNESS: You are?
23 MR. HERNSTADT: Yes. I'm going to stop right
24 there. I think that's good.
25 Bill, do you have any questions? Carla?

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1 MR. HART: Yeah, we have a couple, I think.
2 But I need to speak to Carla privately for just five
3 minutes to prepare notes and wrap it up.
4 MS. MILLER: Off the record.
5 THE VIDEOGRAPHER: Off the record, the time is
6 4:19 p.m.
7 (Break taken from 4:19 to 4:22 p.m.)
8 THE VIDEOGRAPHER: On the record, the time is
9 4:22 p.m . Please continue.

10 MR. HERNSTADT: Okay.

11 BY MR. HERNSTADT:

12 Q. Dr. Simons, a final question. You, I think,
13 testified that you've just completed your term as
14 president of the ACM. Could you tell us in a little more
15 detail what the ACM is?

16 A. Well, ACM is the oldest and largest scientific
17 and educational society of computer professionals in the
18 world. We're over 50 years old. And it's the premier
19 society for computer scientists. We have a large
20 library of technical journals. We run conferences,
21 meetings.

22 It's actually been quite an honor to be ACM
23 president. It's been terrific.

24 Q. And you've just concluded your two-year term.

25 A. Yes.

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1 Q. What are you doing now?

2 A. What am I doing now?

3 Q. Yeah.

4 A. I'm at this deposition.

5 Well, I'm past president for the next two
6 years, and I'll continue, for example, being on the
7 president's export council subcommittee on encryption.
8 It's a catchy name. This is a committee that advises --

9 well, it advises the president's export council on the
10 subject of encryption, and the president's export
11 council advises president. And we have meetings once
12 every couple months in the Department of Commerce
13 building. And Undersecretary Reich is usually there.

14 I'm also going to be continuing my technology
15 policy work. I'll be teaching a course on policy at
16 Stanford in the spring.

17 What else am I doing. I don't know. I seem
18 awfully busy.

19 Q. And a final question: Do you, for the purposes
20 of testifying, adopt everything in your declaration as
21 being true?

22 A. Yes.

23 MR. HERNSTADT: I have no further questions.
24 thank you very much, Dr. Simons.

25 MR. HART: I just have a few more, Dr. Simons,

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1 in light of what Mr. Hernstadt just did.

2 FURTHER EXAMINATION BY MR. HART:

3 Q. You mentioned in response to one of
4 Mr. Hernstadt's questions that there were certain things
5 that circumvention technology effectively prevented.

6 A. Uh-huh. Yes.

7 Q. Right?

8 A. Yes.

9 Q. And my question is, where does that leave you in
10 terms of the existence of laws against circumvention?

11 A. I think that they're a bad idea. They can
12 prevent people from reverse engineering software to
13 eliminate bugs and viruses. They can prevent people
14 from posting problems about software on the net so that
15 others can correct those problems. They can prevent
16 people doing computer security R&D from using a lot of
17 their tools which frequently involve trying to break
18 into systems.

19 The fact is that we can't prove the correctness
20 of computer systems. All we can do -- I mean what
21 people do is they try to break them. When they succeed,
22 then they've found a vulnerability which then gets
23 patched.

24 I'm not talking about people who have tried to
25 break them for criminal reasons. I'm talking about

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1 people who break them because they want them to be
2 secure. And this frequently involves circumvention.

3 Many of these tools, which are standard tools,
4 they need to be taught to students who will continue to
5 do computer security work in the future.

6 And again, I'm not a lawyer, but it seems to me
7 that one danger is you could read the DMCA as preventing
8 some of this kind of activity, which I think would be a
9 disaster.

10 Q. Are you being paid in any way for your time or
11 testimony?

12 A. I got a check for \$62 from you.

13 Q. Other than that check from me, are you being
14 paid for your time or testimony by the defendant?

15 A. I am not being paid.

16 Q. Okay. Is it a fair statement to say that one
17 of your motivations for taking a position in this case
18 is your views generally about circumvention law and the
19 DMCA in particular?

20 A. Yes, I think that's a fair statement.

21 Q. Now, Mr. Hernstadt had asked you a couple of
22 questions about source code and object code, and I don't
23 want to go back over all of that. I just want to ask
24 you I think one simple question, and that is, is it fair
25 to say that source code can be easily converted into an

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1 executable utility through the use of a compiler?

2 A. That's the purpose of the compiler, yes.

3 MR. HART: I don't have anything further for

4 you. I thank you both for your patience with us and for
5 your time and your -- actually for three things, and
6 your candor.

7 THE WITNESS: Thank you. This has not been
8 nearly as bad as I thought it would be.

9 MR. HART: See you on the tape. Thanks again.

10 MR. HERNSTADT: Let's go off the record.

11 THE VIDEOGRAPHER: Off the record, the time is
12 4:28 p.m.

13 (Discussion had off the record.)

14 THE VIDEOGRAPHER: This concludes today's
15 deposition of Barbara Simons on July 8th, 2000. The
16 total number of tapes used is two (sic). The master
17 videotapes of today's deposition will remain in the
18 custody of McMahon & Associates. Off the record, the
19 time is 4:29 p.m.

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21 (Time noted 4:29 p.m.)

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BARBARA SIMONS, Ph.D.

Subscribed and sworn to before me
this _____ day of _____, 2000

Notary Public in and for the State of
California, County of Santa Clara