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Speaker 1 (00:03):

Case number 18-7188. Strike 3 Holdings, LLC, appellant versus John Doe, subscriber assigned IP address 73.180.154.14. Mr. Bandlow, the appellant. Mr. Lloyd, the amicus curia in support of the district court's order.

Lincoln Bandlow (00:23):

Good morning and may it please the court. My name is Lincoln Bandlow, and I represent the appellant, Strike 3 Holdings, LLC. I reserve three minutes for rebuttal. With me at counsel table are Emilie Kennedy, the general counsel of General Media Systems, the parent company of Strike 3, as well as Jessica Fernandez, senior counsel for General Media Systems. They were both on the briefs and are admitted here in D.C. I'd like to spend a brief moment talking about three things: the nature of my client's business, the nature of our lawsuits, and the errors that were made by the district court in denying us a fundamental step towards the process of enforcing our copyrights. First, my client is a motion picture production company that produces—it writes, produces, directs, edits, et cetera. It's in the business of licensing and selling its adult films that it produces.

Lincoln Bandlow (01:17):

These are very popular films of a large subscriber base, but unfortunately, that popularity is also evidenced by the fact there are a lot of people who'd rather steal the films than pay for them. So they use the BitTorrent protocol to do so. And they do so at an astronomical rate. Our investigators tell us that there are over 400,000 unique infringers of our content each month. And so we, like many other content creators, mainstream films, book publishers, record companies, et cetera, software creators, we have decided that it's important to protect our rights and do so through pursuing these online infringers with litigation. This litigation is different than most litigations. Most litigations, you know exactly who your defendant is. There may be a little dispute over liability, but your picture is posted to a website, you know who did it, and you can go right after them. But because of how the internet works, these people are anonymous at least temporarily. But Congress has specifically addressed the issue of whether they can always remain anonymous and has said very clearly under circumstances in which a party shows good cause you can obtain a court order requiring an ISP to provide you the name and address of who is that person behind that anonymous number.

Judge 1 (02:31):

You don't dispute the good causes of the test that you think should apply to get this that you all call it early discovery.

Lincoln Bandlow (02:39):

Absolutely. And we don't dispute. In fact, the district court did not dispute that the proper test is the Arista case. And so using that test, we need to seek court intervention to get the information to proceed further in our cases by giving us that order. But what we do before we bring any case is we do a substantial investigation that reveals three important things for this court. First, we don't go after everybody of those 400,000. We only go after the very serial significant infringers. So our investigators first uncover someone who is infringing a lot of our works, not one, one day, but in this case, 22—in this case actually relatively is a low one, 50, 100, 200 of our films. And we also uncover evidence that they're doing it over an extended period of time, three, five, six months, a long period of time. And the third thing we have before we file a lawsuit is we have that number, so we can tie it to a database that talks about their entire BitTorrent history. Every motion picture, videogame, book, song recording that they're using BitTorrent to infringe, we're aware of. So what we have is a massive serial infringer.

Judge 2 (03:52):

Counselor, do you agree that the standard here is abuse of discretion?

Lincoln Bandlow (03:56):

It is abuse of discretion, certainly but—

Judge 2 (03:52):

How do we get past that deferential standard of review?

Lincoln Bandlow:

There were three ways that discretion was abused. First of all, the court, although recognizing that the Arista test is the appropriate test, a very persuasive one as the court said—

Judge 2 (04:14):

That test hasn't been adopted by this circuit.

Lincoln Bandlow (04:17):

I'm sorry. Excuse me?

Judge 2 (04:18):

The Arista standard is a second circuit case, right?

Lincoln Bandlow (04:20):

That's correct. But every district court in this district that is looked at these motions has applied the Arista test or otherwise seen the factors in Arista to indicate the kind of good cause factors that you should look at. The court did three things that are abusive discretion. First, it substantially revised certain aspects of the Arista test to make it such that it would be impossible for us to obtain the very important, necessary information. Information the court deemed itself to be necessary to proceed with our cases. The second error in the abuse of its discretion was it didn't say everybody would have that impossibility. It said only us because we're producers of adult content. It said other producers of mainstream content or what have you would somehow be able to meet this test, even though we somehow could not meet the test.

Lincoln Bandlow (05:14):

And it did so on the basis, which is an abusive discretion of discriminating against us based on our content. It basically—pretty very clearly said "I'm not giving you this relief you request because of the content of your speech." The third error that's an abuse of discretion and a clear one I think under this court's precedent was conducting an extra judicial investigation. We put before the court very specific facts, things like our policy in these cases, specific declarations that we don't want to proceed against innocent people. We try very carefully to get all the evidence we can to make sure we're not doing that. And despite the fact that those were the undisputed facts before the record, the court went out and did its own investigation, looked at a highly disputed prejudicial law review article, looked at some old article about a lawsuit against a grandmother somewhere done years ago before we ever got into this litigation, and other bits of information to make several conclusions about what we supposedly do in these litigation that there was no evidence to support based on it. And it admitted—it said things like Google at your own risk, meaning he went out and Googled and looked at some things. We're not sure exactly what it was—

Judge 1 (06:24):

The actual legal rule in here—the legal basis given for his ruling didn't factor that information.

Lincolon Bandlaw (06:30):

I'm sorry. What?

Judge 1 (06:30):

It's actual legal ruling here. The basis for its decision did not factor in the extracurricular research.

Lincoln Bandlow (06:37):

Well, I believe it did factor in that extracurricular research, because it said that, again, a quote unquote honest copyright holder, won't have to worry about this because an honest copyright holder doesn't do such things as engage in a high stakes shakedown and an extortionate plan and use the court as an ATM. Those were all statements that parallel what was said in that article. If you look at that article, you see those exact statements are made. There's no basis for those statements. [**inaudible**]

Judge 1 (07:10):

I just took it that the court is saying—I'm looking at page seven of its decision—that you lack required specificity because oftentimes the person that's identified is not the one doing the infringing. That was its rationale. And that you have a higher—in talking about the nature of the videos here—that was the basis for it—I don't think some of the language, but the nature of these videos—the district court found would trigger maybe a privacy interest that might be different from copyright cases that don't involve pornographic materials. And so you have the risk of miss identification and the heightened privacy rent interest. And that seemed to be with the district court was balancing, which I think is distinct from—I credit your point about some of the things that district court was saying, but we're here reviewing not opinions but holdings.

Lincoln Bandlow (08:09):

Sure. So I think there's three things there. I want to address all of them. First is look at the quote unquote specificity requirement. He turned that into something that it's not. The specificity requirement

is just simply have you been specific as to the exact thing you're asking for? And we, in this case, can't be more specific. We asked for the name of a person on a particular date, time, hour, minute, and second. So we're very specific about what we've asked for. He translated that into a requirement that we sort of prove our prima facie case right now as we asked for the discovery, which is, as other courts have said, is sort of circular. We have to get this discovery to proceed further, and he's saying no, you should know exactly who it is before you can proceed further. And we simply can't do that.

Lincoln Bandlow (08:53):

And every single BitTorrent case that you look at, every single party has always agreed. There's no other way you can get this information than using this process. And there's no otherwise way we can figure out who the exact person is. So that was the one area was turning that into that problem. Yes, Your Honor.

Judge 1 (09:09)

[**inaudible**]. Please go ahead.

Lincoln Bandlow (09:11):

And then the second thing that you said was the risk of misidentification. That's really not the standard and that's the standard that any court has applied. And there have been 17 district court judges here in D.C. that have not applied that standard. And there's been 325 judges across the country that have not applied that standard in these cases, because what that requires is that you prove that there's no possible other alternative to your theory of liability. And that just simply turns [**inaudible**] on its head. That's not what we're required to do. Yes, there's a possibility it is not the exact subscriber but that's not the test. The test is is it plausible that it's the subscriber?

Judge 1 (09:48):

What if point comes back from, here it was Comcast or Verizon or whomever, that the IP subscriber is the library. What happens then? Do you still claim to have a plausible inference that the library or the chief librarian is the one that did it?

Lincoln Bandlow (10:09):

So that very rarely happens since it does happen in our cases where it's a Starbucks or it's a library or things of that nature. At that point, we would not be able to proceed under Cobbler and say oh whoever administers that at the library must be responsible. We would have to then take that information and provide something more to the court to amend and proceed further. In that circumstance, we would realize probably going to be very difficult to figure out who the countless people walking through Starbucks or the library did this. We would immediately dismiss that case would be over. And it's one of the reasons why a lot of these cases—some of them—not a lot for this reason, but they winnow down from the process of getting the name to the process of resolution of the case. One of those reasons is that—

Judge 1 (10:55):

Would it be—the amicus found a quote from I don't remember his, you personally, but for your client in a district of New Jersey case, in which the quote was that is often that the subscriber to the IP address is not the one who's suspected of infringing because there's library, Starbucks, or parents or people at our

house that don't have a secure password and the whole neighborhood can be using it. And so what are you doing with that word "often" it's not the subscriber who is the one that you suspect it infringing?

Lincoln Bandlow (11:32):

I'd have to look back. I was at that hearing along with my clients here, testified at that hearing to see if we use that word, but now we know—

Judge 1 (11:40):

I can read it to you. There are often going to be circumstances in which mom is a subscriber on it, but it's dad or adult son or something of that nature that's actually doing the infringing. Obviously it's the word often.

Lincoln Bandlow (11:49):

It's a poor choice of words because what we have found in our litigations, because we have done a substantial number over these years, when we amend our complaints and proceed further after we've gotten the name, our data shows that approximately 75% of the time, we ended up proceeding against the subscriber and 20—the other 25%, it was somebody in the house. So it really actually isn't often in the extent of it's the majority of the time. It's settled over. 75% of the time we were right. It was the subscriber. And again, that's what I talked about at the beginning. What we have is someone that's infringing a lot of works over a long period of time. So it becomes more plausible. It's already plausible, but it comes more plausible than it is the subscriber. Cause it's someone with really consistent, repeated access to the account, which is more likely the subscriber, but we recognize that it may be somebody else, particularly somebody else in the house.

Lincoln Bandlow (12:40):

And that's why we need that information. We don't—maybe there's a misconception that we get that name and address, and we just immediately slap it onto amended complaint and off we're running. We don't. We take that information and conduct a substantial, further investigation to make sure that that information helps us tie it to either the subscriber or on occasion—get away from that often word—on occasion, we find out oh no, it's the 25 year old son that lives at home. It's pretty clear from the information we can glean from readily available public sources. We have cases where we had the name and address and we can look and we found somebody who's "tweeted love your content, do more works with these particular talent, et cetera." It's clearly that they are somebody that likes our works and there's reason to believe they're the ones that have infringed. So we do a substantial, further investigation. And we obviously can't. We can't serve the client and we can't do that investigation unless we at least get this very simple, basic information.

Judge 1 (13:34):

Are you able when you—I just don't have any idea—to first ask the internet service provider if the account is a private sort of individual account or a business or some sort of large group Starbucks, something library, something like that? Is that like—is that possible for them to answer in the first instance or not?

Lincoln Bandlow (14:00):

Theoretically, they could.

Judge 1 (14:02):

Why wouldn't that be a better first cut? So then you're immediately going to knock out the Starbucks, the department wide provision of service, the libraries.

Lincoln Bandlow (14:13):

Cause we're going to immediately do that anyway. We are going to immediately do that. If we get back at Starbucks, it's a local BNB, it's a library we're already going to immediately do that. That case is going to get dismissed. And it doesn't, again, it doesn't mean there isn't an infringer somewhere. It means our infringement is going to just be unremedied. For example, if it's a Starbucks, again, that amount of infringement over a long period of time from the same number, it probably isn't someone wandering in and having a latte and some infringement. It's probably a barista in the back room using they're using the Wi-Fi, but that's okay. It's very difficult to prove, time consuming, burdensome on the courts that gets dismissed right away. But certainly, yeah, I guess you could have a court order that says tell us first if it's a business, and if not, we'll go from there.

Lincoln Bandlow (14:54):

But technically that's going to save a nanosecond of time. We see it's a business case has done. Now, I want to go back to your point about the privacy balancing that he did. He—his privacy analysis was based really on one case, this circuit's medical records case, and you really can't find a case that's more off point than that one, because it was a very different thing that was being balanced there. In that case, there was a subpoena to get a mentally retarded man's entire file in connection with a lawsuit for assault against him by other men—the retarded men at the hospital. They asked for his entire file and the court said wait a minute, that's going to include his notes and his conversations with his therapist. That's absolutely privileged. When you balance absolute privilege, that's it. That's the end of the balancing.

Lincoln Bandlow (15:41):

You don't get that information. That's the nature of absolute privilege. So you don't do balancing. You say that's attorney client, that's doctor patient. We're done. We don't have that here. First of all, we have a somewhat weaker privacy interest here. Although we acknowledge it. We always agree to protective orders. We want protective orders for ourselves to protect us so I can talk about, but in particular, we don't ever dispute it. We always ask for it. They're always granted. But more importantly than that, we don't know in every case somebody has a privacy interest. They may have no problem with the world knowing whatever content it is they enjoy. So we don't know in every case. Second of all, there is a lessened privacy interest in theft. I recognize that what you and I, when we go home and decide to watch, it should be something private and we get to keep to ourselves, but we don't get to go steal things and keep it private. And Congress has said so. That's why they've given us this right under the Communications Act to subpoena IPs. If we find that there's theft, there's a lessened expectation of privacy, because every single ISP gives you terms of use. And what does it say? If you use our service to steal stuff, we're going to have to reveal you maybe in a court process. So, you know, going into engaging in BitTorrent activity, that your activity may be revealed.

Judge Edwards (16:54):

But most contracts say that if someone else uses your ISP, we have to—we're going to reveal your name?

Lincoln Bandlow (17:01):

I think it just says—

Judge Edwards (17:02):

[**inaudible**] The privacy interests—well, the concern is that you may have found someone who has the address but is not an infringer.

Lincoln Bandlow:

I a hundred percent agree.

Judge Edwards:

Your argument now is not making any sense because you're avoiding that issue.

Lincoln Bandlow (17:20):

Well, that's assuming that we've got the wrong person, which is an assumption that, and assuming that's correct, that's why we're perfectly fine with protective orders in every single one of these cases. Before there's even a defendant involved, we suggest the protective order. We do it because we recognize that—

Judge Edwards (17:37):

What type of order? What are the details of the protective order?

Lincoln Bandlow (17:41):

The details typically of the protective orders that get entered around the country are (A) the defendant can remain anonymous throughout the litigation; (B) we can only use the information we obtained to further prosecuted our actions. We can't use it for any other purpose; (C) is to remain confidential with us, which we always agree to. And those are the basic provisions of the confidentiality order. So we don't release names. Names aren't out there. There's a statement in the opinion about how, oh, you'll Google someone and you'll immediately associate them with these lawsuits in this content. No, that you can't do that right now because no, that won't happen. So where that balancing—you've got on the one hand, the heaviest weight you can, without this we're done. Without this, we literally cannot enforce our copyrights. That's one end of the balance. The other balance is maybe this could be embarrassing to someone, but you can address it if I'm a protective order that problem's solved.

Judge 1 (18:35):

Again. I agree with Judge Edwards. I think you're watering down the whole reason even Arista developed its test is that there are First Amendment concerns here. And then you opened by describing your research that you do before you do this. And it shows you look over a period of time, not just to your images, but what else are they looking at? And so you've got a three 12-month record of what someone at ISP address has watched, and now we're going to use court processes to expose that. And so that seems to me a more, and you say theft, but as you said with her often or not, there's a, there's a material percentage here where the person's not going to be the one who's done anything wrong. And so we'll have full-throated First Amendment protection against analysis in a courtroom of the things they watched in the privacy of their home.

Lincoln Bandlow (19:33):

Well, bear in mind if they were the person that didn't do it, we're not revealing anything that they watched or downloaded because they didn't do it. So, so the, the—

Judge 1 (19:43):

You take it face value? Every denial? You take it face value every denial? And said I'm not the one that did it.

Lincoln Bandlow (19:52):

We take, we take serious denials with an offer to provide information to support the denials very seriously at every single one. Right now, it is, there are some occasions in which it seems pretty clear. The defendant said to his lawyer, "Let's settle this, tell him I didn't do it, but let's work it out." And that's a denial. But when somebody is more serious and says, "I did not do this, in fact, I have evidence I can readily produce to you that would show it." Our first response is, "Give it to me." And in fact, our first response is I don't want to settle with you. I don't want a penny from you. If you didn't do this, give me the evidence. And we'll, we'll dismiss. We're very careful about these actions. And that's important to understand. There's bad actors in the past that have done all kinds of bad things in these litigations, but primarily those bad actors weren't companies. They were just people acquiring old works for the purposes of suing. We're a real company with a real reputation and a real brand. We don't want to be the company that sues innocent people, that hassles people, et cetera. That would be bad for our reputation as a company. We want to just simply enforce our rights and stop what is a massive problem for our company.

Judge 1 (20:56):

These remedies, are they usually monetary? Are the settlements usually monetary?

Lincoln Bandlow (21:01):

Not always monetary. There's two things we really want. We want some compensation for the harm to us, but we want the infringement to stop. And the one thing we found is once that ISP notice goes out, it stops. So there are a lot of times where we dismiss without any sort of payment, because we're happy that the fact that it stopped and it's important that it stops because these are not just downloads—they're distributors. They're helping us continue to be distributed on a daily basis. And we really want that to be stopped. I see I'm out of time. Thank you.

Seth Lloyd (21:41):

May it please the court, Seth Lloyd for court appointed amicus. The district court acted well within its broad discretion in denying discovery on the facts here. Strike 3's request creates a significant risk of misidentification because Strike 3 admits knowing only that someone allegedly used an internet address to commit copyright infringement without knowing who that someone is. That risk of misidentification threatens real harm to internet subscribers and Strike 3 has a pattern of pursuing discovery like this with little interest in seeking judicial resolution.

Judge Edwards (22:14):

The district court would have been similarly concerned that we were talking about infringing children's books?

Seth Lloyd (22:20):

I think that balance may well have been different in that context, Judge Edwards, because of what the district court identified that, that when the content is sensitive, adult content, the privacy interests are different. I don't think—

Judge Edwards (22:35):

Isn't that content discrimination?

Seth Lloyd (22:36):

No it's not.

Judge Edwards (22:37):

I don't get that. I mean, the district court seemed to weigh very heavily the fact that that this is a porn site, which she had little good taste for. And, you know, the first thing is I'm reading the cases will suppose it's children's books. That's what you're talking about because the risk of identifying someone who is not being infringer of the children's books is the same. And there may be an embarrassment caused to the person who was identified in the same way you're talking here. The only addition to the equation is this is porn site. The other is children's books. And if what the district court is wrestling with is that fact that they're porn sites, which you have no use for, that seems to be very iffy as a basis for, and if you're readily agreeing that it's going to be different, if it's children's books, then I'm not sure that discretion was not abused.

Seth Lloyd (23:32):

It, it it's different, but it's not different because of the content, it's different because of the effects that that content has on people's privacy interests. And that that's, that's consistent with Supreme Court precedent.

Judge Edwards (23:42):

Lots of people, if they're stealing children's books, would be mortified if someone was accusing them of having done it, and they would not want that known. And I don't know how to weigh that against those who would be mortified if someone found out that they were looking at or using whatever these movies are.

Seth Lloyd (23:57):

So it's fair for courts to consider the privacy effects, including the secondary effects of the content. So if, if, if there may be concerns like that for children's books, then that would be something the district court could balance just as the district court here could balance the fact that the adult content is sensitive.

Judge 1 (24:16):

Wouldn't it be a troubling line to have us have courts factor into whether you get this type of upfront early discovery subpoena, social judgments about the worth of the content that's being infringed?

Seth Lloyd (24:35):

That would be a troubling line, but that's not what happened here.

Judge 1:

How's that not exactly what happened here?

Seth Lloyd:

The district court didn't do anything different ultimately I don't think from what Strike 3 itself said. Strike 3's filings recognize that the sensitive nature of this litigation has the potential to embarrass and humiliate people and to force innocent individuals to settle. That's what Strike 3 said in its filings. And that's what I think is the privacy interest—

Judge 1 (24:58):

Well it may just be overreacting to exactly this problem—the courts. I mean, it's one thing if the person on the receiving end or the ISP or the person the ISP is identifying wants a protective order, for whatever reason they articulate, courts can deal with that. But for that's a different thing, right? There happens all the time. People can explain why they need a protective order, and that's really coming out of their mouths. It's not a content-based upfront judgment like we have here, which is before I know whether one even wants a protective order or anyone's embarrassed. I'm going to look at the content of your material and decide that it's harder for you to get this discovery against infringement than say Disney for, I have to say, I'm guessing that there's probably a theft of *Frozen*.

Seth Lloyd (25:50):

That I think the district court rightly looked at the effects that this could have on subscribers, just as this court did in AF Holdings. The court in AF Holdings recognized that the adult nature of this content combined with the high-risk of statutory damages and the cost of litigation place burdens on the absent individuals and that courts could properly consider those. And the Supreme Court has. So just on the First Amendment point, the Supreme Court has repeatedly said, it's content neutral when you have a regulation, for example, that says an adult film theater cannot be located near residential areas, but non-adult film theaters can. And the reason the court said that that's a content neutral regulation that can survive First Amendment scrutiny because what you're concerned about is the secondary effects of the content on those around them.

Judge 2 (26:39):

Under a regulation or a statute is something very different from a single district court judge exercising their discretion, right? I mean, if you have a law or regulation that's been implemented through some process, that's very different from exercising your discretion over the type of content that determines a privacy interest.

Seth Lloyd (26:58):

I think that's different, but at the end of the day, I don't think, I don't think the law requires district courts to blind themselves to the privacy interests that are at stake. This court referred to the same thing in AF Holdings and that's all the district court did here. But again, the privacy interests, sorry, I didn't. The privacy interest is just one part of the balancing that the district court applied here. I don't

think the district court committed an error of law in considering that, and the other factors the district court considered—

Judge 2 (27:23):

What if it was violent conduct? Could they do the same thing if it was videos of violent conduct?

Seth Lloyd (27:29):

If they're—if the district court is concerned and there's evidence as there is, as I think AF Holdings suggests there is, that parties are using that type of content to put pressure on unnamed subscribers to settle cases, regardless of the merits of them. Then that, that may be a factor that district courts can consider.

Judge Edwards (27:50):

Is there some evidence to indicate that that's what's going on, they're using this to put pressure on people who don't want to settle? Where's that coming from?

Seth Lloyd (27:57):

That's, that's the concern that this court identified in AF holdings, where it faces a similar pattern of conduct.

Judge Edwards (28:03):

This is a particular case. Is there some evidence to support that—they allowed to address the concerns that the district court raised having looked at these newspaper articles, et cetera, that they got a shot at that?

Seth Lloyd (28:19):

I, I think, I—

Judge Edwards (28:21):

I mean, it's not your fault. I'm just asking kind to get a sense of what your argument is. Abuse of discretion doesn't allow or doesn't embrace wasteful decision-making, and I'm not entirely sure what lines are being drawn by the district court. I'm unhappy because why, why be unhappy happen because of the nature of the site? And I don't get that quite honestly. And, and now you're suggesting it's because maybe these people use this to just go out and leverage innocent people? Is there something to support that other than the newspaper articles that the judge read and that were not the subject of the hearing?

Seth Lloyd (29:03):

Yes, I think there is. If at first I think it's important to be clear—the district court didn't adopt any bright line rules. It didn't draw any lines in the sand. It, it did a multifactor balancing test, which is what courts are supposed to do when they balance—when they exercise discretion in this context. And if you read the decision as a whole, I think what the district court was concerned about, the, for one, the district court started by calling Strike 3's content award-winning and critically acclaimed. I think the district court had a balanced view of what was happening here and, but found concerns. Those concerns aren't just the nature of the content. It's the, it's the pattern and practice of filing thousands of these suits,

1,849 suits in a 13-month span and not being able to point to a single one that proceeded, not even just to a trial, but to judicial resolution.

Seth Lloyd (29:49):

And in this court, when Strike 3 had the opportunity to show that it is, it is seeking discovery here to pursue cases in court. What did it point to? It pointed to the case we submitted a couple of weeks ago from the Western district of Washington, where, when a John Doe defendant filed a counterclaim, Strike 3 promptly dismissed its own claims and tried to prevent the district court from deciding that the case. I think that shows a pattern, and the district court who has 30 years of experience overseeing litigation, could reason, at least reasonably infer that there's a pattern here of filing these cases to get the discovery and pursue settlements, but preventing courts—actively preventing courts from reaching—

Judge 1 (30:27):

How does the legal test that the district court adopted here, which focuses on the salacious, makes a, an express factor of the salacious nature of the material? How does it, how does it protect against the concerns you were raising about filing lots of lawsuits and dismissing them?

Seth Lloyd (30:45):

I think the district court simply considered a variety of factors into time in determining whether to exercise its discretion, the privacy interests of the absent subscriber was one of those factors. I think that pattern and practice of litigation conduct is another, because it shows that the, the question that this court asked and looked in AF Holdings, is the party seeking discovery to pursue litigation in court? It, are they exercising or asking for the help of the court to actually do what discovery is for, or are they doing it for another reason?

Judge 1 (31:18):

So this is sort of a strange position procedurally we're at the complaint stage, but it's almost like the half-complaint, because it hasn't even been served yet. And we don't even know the defendant on the receiving end of that complaint. And normally we would expect district courts to construe the complaint in favor of the plaintiff and make all reasonable inferences in their favor before doing what the district court recognized here, which is denying them, the discovery, which means dismissing your case. The two go hand in hand here. On the other hand, it is an unusual time, you know, that you're, you're authorizing a form of discovery, almost ex parte. There's no defendant here. And so there's genuine concerns, but it seems to me how far can district courts go in finding their own facts about what's going on and not taking confined themselves to the complaint in this context? Can you identify that in the decision?

Seth Lloyd (32:25):

So I don't read the decision here as finding any facts that weren't either already, or that, that weren't part of the allegations in the complaint, part of the motion, or aren't sort of readily discoverable facts from Pacer filings, right? So the district court's looking at Strike 3's pattern of litigation conduct. I think those are the only facts that influence the district court's decision. And I think that those are properly considered.

Judge 1 (32:45):

As I read it, the district court did more than simply say you filed lots of cases, because there's lots of infringement. That would be the reasonable inference from that. And then saying the cases ended. But I thought the district court was going further, particularly with the copyright troll labels saying that they ended because, and here's the facts. They don't want to litigate. They cut and run. They are sort of abusing the process. Those seem to me like additional fact-findings that are anything but judicially noticeable from Pacer.

Seth Lloyd (33:20):

I think those are inferences that the district court from the undisputed facts about Strike 3's pattern of litigation conduct across 1,849 cases. I think the district court—

Judge 1 (33:30):

That's my question. Normally we take reasonable inferences at the stage in favor of the plaintiff, not against the plaintiff. Are you telling me the only inference that can be drawn from lots of filings and then cases that settle or some that are dropped, the only inference can be drawn is that it's abusive litigation? The only reasonable inference that can be drawn?

Seth Lloyd (33:51):

I don't think the court has to conclude that that's the only reasonable inference.

Judge 1 (33:56):

I think we have to credit it, don't we? Because otherwise we have to take, there's a reasonable inference that goes another direction then do we not have to take that at this stage?

Seth Lloyd (34:07):

No, I don't think so. And I think AF Holdings shows that that's, that's not the case. And in AF Holdings, again, there was a similar pattern of litigation practice–filing hundreds of suits, getting discovery, getting the name and then probably dismissing the suits. And this court drew the inference that, that the pattern and practice there was that you're seeking this discovery for reasons unrelated to pursuing your claims in court and courts don't—are not compelled to lend their imprimatur to that type of practice. And I think it's important to realize, or remember, you know, what Strike 3 is seeking here is the bright line rule, that any time a copyright owner files this form complaint with this form motion district courts have to grant this discovery and not granting it would be an abuse of discretion. That's not the type of discretionary practice that the rules contemplate. And that's contrary to what Congress expected, right? The reason, Strike 3 suggests there's like a technological problem that prevents it from getting the subscriber's name. It's not. The internet provider knows who this person is, but Congress wanted that information protected and wanted courts to act as a check against abuses. And that's what the district court did. It, it weighed the factors if it applied a multifactor, balancing and exercise—

Judge 1 (35:23):

Just to show, I mean, so under this theory district court's approach, I don't know how any of these actions will ever go forward. So it seems, although it had more words and factors it seems like at the end of the day, it's also, it's another bright line test going the other direction. What more could they show without first identifying the plaintiff that would, that would meet the, I mean the Copper test was not at

this stage. They'd actually had given them the subpoena. It was at the 1286 stage, but what, what more would they be able to show or should they show to get the subpoena?

Seth Lloyd (36:01):

I think they should show that they're seeking the discovery because they actually intend to pursue claims on the merits, including if defendants fight back.

Judge 1 (36:10):

Well, wouldn't it be a little troubling, if based on the content of their movies, we said, you have to commit to litigating further in court than we require of other parties?

Seth Lloyd (36:22):

No, but, but I, I think the inference, when there are 1,849 cases, and you can't point to a single one, I think it's—it may in fact be sort of unreasonable to infer. I think that every single one of those parties either settled—

Judge 1 (36:37):

Except, if you accept the district court's view about privacy concerns, then people might very well be willing to settle. And they've got, you know, they do once they find the name that goes with the IP address, unless that person can say, I didn't do it. Then they've got the evidence already of the infringement. And so they will be, there's not much of a defense on the other side. I mean, that's the thing where I have no idea why these things are ending. It could be for a whole variety of reasons. It could be Starbucks, libraries. It could be, you've got me. And I don't want—how do we know from this record without the district court surmise that it was their decision to stop as opposed to the defendants?

Seth Lloyd (37:21):

Well, I, I think we're, we're not in complete darkness here. I think that the case we submitted a couple of weeks ago from the Western district of Washington shows, in fact that when people fight back Strike 3 does cut and—

Judge 1 (37:30):

Well, it shows us in one case, that's what happened—

Seth Lloyd (37:34):

But Strike 3, out of thousands of cases, can't point to a contrary thing. So—

Judge 1 (37:39):

But you can't tell me, I'm sorry, have we looked at the 1,848 cases and found that in every one of those, someone pushed back and they cut and ran, where do we know that? I assume you're not going to represent, we're grateful to your work for the court is Amicus, but I assume you haven't looked at 1,849 cases to figure out whether maybe, you know, defendants wanted to settle to extent. You can tell any of that from Pacer anyhow.

Seth Lloyd (38:04):

No, I haven't looked at the 1,000 cases, but Strike 3 was involved in those 1,000 cases. And when it had the opportunity in this court to point to cases where defendants have fought back and it continued, instead it pointed to footnote seven, the case, it points to it as showing a different pattern is the case where it cut and run.

Judge 1 (38:22):

So, so does that mean that just defendants aren't fighting back or does that mean that they cut and run? Which does that mean?

Seth Lloyd (38:28):

I think the district court, again, this is, I think exactly the type of thing that district courts are well qualified to weigh because—

Judge 1:
At this stage?

Seth Lloyd:

Yes, in terms of a pattern or practice of litigation and why parties are seeking discovery.

Judge 2:

I mean, just the nature of this, you know, there's widespread infringement, but each individual claim may not be that important to the plaintiffs. Right? So they pursue what they can and they let go of the others. Why isn't that a plausible explanation of the many lawsuits?

Seth Lloyd (38:58):

Because we, we don't invoke the machinery of courts, unless your purpose is to use that machinery to pursue—

Judge 2 (39:07):

But lots of private parties start lawsuits and then go to settlement. Right? I mean, I don't know what percentage of cases settle, but I assume it's a large percentage in all cases?

Seth Lloyd (39:16):

That's right. But we typically require private parties to have a plausible claim before, before they get into court and Strike 3—

Judge 1 (39:25):

That's a different argument, that they don't have a plausible claim?

Seth Lloyd (39:27):

I think it's simply one of the factors is that they have a very weak case at this point, the most they can say is that somebody used an internet address. They want to get into court and they want to get discovery to get the name. And then the name may not be well known.

Judge 2 (39:41):

They know somebody is infringing because they know that people are illegally downloading. So they know there's been an infringement of their, of their copyright. They don't know who did it, but they know that such an infringement has occurred. So that's not speculative. They know somebody is misusing the copyright.

Seth Lloyd (39:59):

That's right. But, but that under [**inaudible**] [**inaudible**], that doesn't usually open the court doors to discovery, right? Under [**inaudible**], you have to, you have to have a plausible claim against the defendant that you're suing in court, right? And, and we understand, and the district court understood that they can't get the name and they can't kind of get further along without going to court and getting a subpoena.

Judge 1 (40:20):

Why isn't it plausible, if, let's assume it's not a library or a multi-unit IP address or Starbucks or anything like that. So it's a house. Why isn't it plausible that the subscriber that owns this account did it? Say there's four people in the house, is 25% not plausible? That's 25% evenly.

Seth Lloyd (40:49):

I think that that probably wouldn't be plausible under the Supreme Court. The Supreme Court has said, when there's alternative obvious explanations, then—

Judge 1 (40:59):

The alternative explanation has to negate the other one. And this one, this is like, you know, four people shot the gun at once and we don't, we don't know which one's bullet hit, hit the person, right? And, but I think they're all, it's plausible to say they're all.

Seth Lloyd (41:12):

I, I think I would disagree. I don't, I don't think it's plausible to say that all four of them could be sued in court simultaneously because the allegation is that only one of them did it. And so if, if it's more likely that it's one of the other three, there's—

Judge 1 (41:27):

If there's a computer in a house that four people have access to. It's undisputed all four of them have access to using it. Maybe even use it sometimes. And child pornography is found on that computer. Is it true that a court would say you don't have probable cause to arrest the owner of the computer?

Seth Lloyd (41:47):

I think most likely in that case, you would have probable cause to get a warrant to search the hard drives and then you could arrest the—

Judge 1 (41:53):

No. I'm telling you I already know what's on the hard drives somehow. Okay. And so is there not probable cause to arrest the owner or maybe arrest all four people? Is that, would that not be probable cause? I'm just going to go with the owner because we're doing this—

Seth Lloyd (42:03):

I think that probably would be probable cause to arrest the owner—

Judge 1 (42:06):

Possibility is higher than probable cause?

Seth Lloyd (42:08):

No, no possibility is not. But we, again here, you don't even know how many devices there are. And, and even in your hypothetical, if you have a situation where the, you know, 10 different people share the computer, that may be that, that would be a factor I think you would want to weigh in the analysis.

Judge 1 (42:27):

If the district court's rule were adopted and none of us can think of what more they could show at this stage because we're not going to make people take a blood oath to litigate to the very end. Then isn't there another consequence of course, sort of adopt a rule that says nothing you can do to stop this infringement with the infringement, go through the roof. We have to worry about that.

Seth Lloyd (42:51):

Two responses. I don't think the district court adopted a rule. And the court in affirming here wouldn't be endorsing a rule that says you can never get discovery.

Judge 1 (43:00):

So in cases that involve whatever the district court thinks is apparently salacious. There's a rule that at least you're going to have to come back with more. Do you, do you say you don't think that they could come back on another day and get a subpoena from the same judge to you without having shown something more?

Seth Lloyd (43:16):

I don't think the privacy interests, the district court identified were the only factor. I think the pattern of—

Judge 1 (43:21):

What more could they show it to get this district court to issue a subpoena under the test that is—

Seth Lloyd (43:27):

At this point, it may be well too late, but that's because, I'm saying because of Strike 3's pattern of conduct over thousands of cases, if the court's doors are not close to it for discovery, it only has itself to blame because it never has shown that it's seeking this discovery to pursue claims in court. So, but that's not that wouldn't be an issue.

Judge Edwards (43:47):

In [**inaudible**], they pursued the claim in court. In [**inaudible**] they pursued the claim in court.

Seth Lloyd (43:53):

That wasn't Strike 3.

Judge Edwards (43:55):

Your claim is pursued. I mean, I don't even understand, what kind of requirement would that be? That they're going to file the complaint and sign an affidavit that they attached to the complaint saying, "We want you to know no matter what we're going to fully litigate." You gotta be saying that [**inaudible**]. We appreciate your efforts, but that's got to be [**inaudible**].

Seth Lloyd (44:16):

I think I'm saying something different from what you're saying, Judge Edwards. I'm not saying that somebody has to swear they're going to pursue it at all costs. What I'm saying is when there's, when there's a pattern of filing thousands of cases, and you're unable to point to any case where you fought back against a defendant who, who is resisting your charges, then I think a district court could reasonably infer that you're not seeking this discovery to pursue the claims in court

Judge 2 (44:46):

I was just going to ask, I mean, how much of, of all of this argument exists against the background of what the district court suggested, which is maybe pornography is not subject to copyright production? I mean, how much of, of that sort of suggestion, I mean, do you agree with that suggestion? Do you think pornography is protected by copyright?

Seth Lloyd (45:07):

No. Or I do think pornography is protected by copyright in general. I think there, of course, there can be obscenity restrictions. I don't even know that that's a copyright issue. I think the district court was just simply noting that until 20 years ago or 30 years ago, it was actually still an open question. I don't think that had any influence on the district court's decision. I think just noting the history that, that yeah. I would point the court on the First Amendment issue and whether this, this type of looking at secondary effects I think the court, the one case worth noting is the city of Renton. That's 475 U.S. 41. That's the zoning case about where, whether it's okay to restrict the location of adult content films and not other content. But if the court has no further questions, we ask that you refrain.

Judge 1:

Thank you very much. Thank you. Does Mr. Bandlow have time left?

Speaker:

No.

Judge 1:

Okay. We'll give you, we'll give you two minutes.

Lincoln Bandlow (46:24):

There's two points. One is this notion of Judge Edwards noted this allegation of shame settlements. That's exactly what I said earlier about why we asked for protective orders. We want them in place so that no one can ever accuse us of that. We want it clear. We're never going to shame you by threatening to out you or reveal your content. We want a protective order in place so that no one can ever do that. And there's no evidence whatsoever that we've ever done that. In fact, the evidence presented to the court was to the contrary, that we only pursue cases that we think are very strong, good evidence, and that we have good faith basis to believe we're going after someone who's guilty. So the evidence, if you could look at appendix page 14 and see the evidence that was presented on that issue.

Lincoln Bandlow (47:03):

Second on the Zilly case that we cut and run. In the Zilly case, we litigated it for a year by the way. We fought off numerous motions. They resisted us with all kinds of motions. We fought every single one of them. We won most of those motions. What happened in that case is the judge refused to give us the name for some time. When we finally got it, we did a further investigation. We determined it was likely the adult 50-year-old son who had lived in the house his whole life, who we later deposed and admitted he used BitTorrent to download adult content, but we determined fairly impecunious defendants and we'd gotten our purpose. The infringement stopped. So it made some sense to dismiss. There's no, at this fact that we don't have any trials than 99% of the civil system needs to look out because every case gets resolved before trial. In fact, courts encourage you to resolve cases without trial. We're in this weird, weird world where it says use file a lot of actions that might overwhelm the courts, but also you should try them all. You can't have both. We're trying to be as reasonable as we can. So the ones that need to be tried, we'll try. The ones that don't, we resolve. Thank you.

Judge 1 (48:07):

Is it accurate that once someone is identified as a defendant in your case, even if you don't pursue it further, they don't continue to download?

Lincoln Bandlow (48:17):

We have found the infringement stops. There are, there are some rare occasions where they started up again. We've, we've found that same address doing it, but most of the time, and particularly when they get the ISP notice, we find it stops.

Judge 1 (48:28):

Is that what this is really what this is about?

Lincoln Bandlow:

Stopping the infringement?

Judge 1:

Just getting them identified in court and then they're going to stop.

Lincoln Bandlow:

Well, it's certainly about stopping them. It's certainly about—

Judge 1:

I can't imagine your litigation strategy is producing a lot of wealthy people who are going to pay damages?

Lincoln Bandlow (48:43):

It's, it's not, but it doesn't need to. That's one of the other aspects of our case, our settlement demands are extremely low. We asked for a very, we asked for the literally the least amount you can ask for under statutory damages. So we're very reasonable. We do want some compensation for the significant harm that's caused to us by infringement, but we do of course want it to stop. We want to send a message, go look at other content that you want to steal. Don't steal ours. So we're trying to, we have a number of objectives here.

Judge 1 (49:08):

Do you know if other content creators sue with this frequency? I mean, BitTorrent isn't limited to this content.

Lincoln Bandlow (49:17):

I have a couple of mainstream cases myself. So the mainstream filmmakers are still bringing these cases on a significant level. My understanding is they're about to ramp up another round of it. The recording industry has done it. Software industry, Microsoft, et cetera, has done it. So a lot of content creators do these kinds of actions. Sometimes they have single work. We have, we have a compounded problem with people stealing 50, a hundred, 200 works.

Judge 1 (49:40):

Okay. Mr. Lloyd, you were appointed by the court to represent the judgment of the district court. And the court is very grateful to you for your able assistance in this matter. The case is submitted.