

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE DAVID O. CARTER, JUDGE PRESIDING

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ECHOSTAR SATELLITE)	
CORPORATION, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	No. SACV 03-0950-DOC
)	
NDS GROUP PLC, et al.,)	
)	Day 17, Volume II
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Wednesday, May 7, 2008

Jane C.S. Rule, CSR 9316
Federal Official Court Reporter
United States District Court
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Santa Ana, California 92701
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08-05-07 EchoStarD17V2

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I N D E X

CLOSING ARGUMENT

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1 SANTA ANA, CALIFORNIA, WEDNESDAY, MAY 7, 2008

2 DAY 17 - VOLUME II

3 (10:14 a.m.)

4 (The following proceedings is taken in the
5 presence of the jury.)

6 THE COURT: Okay. The jury is present. All
7 counsel are present. The parties are present.

8 Thank you for your courtesy, Counsel.

9 If you'd be seated.

10 And this is Mr. Welch continuing on with his
11 closing argument on behalf of the plaintiffs.

12 MR. WELCH: Thank you, your Honor.

13 CLOSING ARGUMENT BY MR. WELCH (Continued.)

14 MR. WELCH: When we left off, we were talking
15 about Mr. Menard and Mr. Tarnovsky getting terminated at the
16 same time right before Mr. Tarnovsky's deposition. Now,
17 that was the very first time that we learned that Mr. Menard
18 was actually working for the defendants. And what's
19 important to know about Mr. Tarnovsky and Mr. Menard, in
20 addition to the Nipper, is that they put on a bunch of
21 experts to talk about -- they made broad opinions about who
22 was Nipper, who wasn't Nipper, but the proof would have been
23 in the pudding. We've got to look at who had the evidence.

24 They had access to Mr. Tarnovsky's hard drives.

25 They had access to Mr. Menard's hard drives, but those hard

1 drives came up missing. Some of Mr. Tarnovsky's were turned
2 over, but some of them weren't, and we know that
3 Mr. Menard's weren't, and that would have been the best
4 evidence that we could have had. So, unfortunately, we
5 don't have that. And you'll see an instruction that says
6 that if they got rid of material evidence, that you can hold
7 that against them, and we know that both these individuals
8 were employed by them while this lawsuit was pending. So
9 now we've addressed that. We'll go forward.

10 So what do you have to figure out? Did they do
11 it? So which brings us to the standard proof in this case.
12 It's called the preponderance of the evidence. Before, I
13 told you it was beyond a doubt that Mr. Tarnovsky is Nipper.
14 They are going to come up with a variety of people that --
15 they're going to have the shotgun approach, and it's all
16 misdirection. They want you to look up here (indicating)
17 when Mr. Tarnovsky is being Nipper down over here
18 (indicating).

19 But all we have to do is prove by a preponderance
20 of the evidence. And what does that mean? If you have the
21 scales of justice and they are both empty, they are equal,
22 they're fluctuating. All we have to do is have one feather
23 worth of evidence more than they do, credible evidence in
24 your mind. They could have a pile of evidence that you just
25 don't believe. But as long as the credible evidence we're

1 just a little bit more than them, you can find in our favor.
2 So that's the burden as you are going through the evidence.
3 Is it more likely than not? It's that simple. It's not
4 beyond a reasonable doubt.

5 So what's the answer to whether or not they did
6 it? They hired the satellite pirate, Chris Tarnovsky. We
7 know they hacked our system. They instructed him to create
8 accounts on pirate websites. He posted the hack on the
9 internet. We know that, because we have the evidence, we
10 have the documents, we have the testimony from the stand,
11 and we have, finally, Dr. Peled telling us that Christopher
12 Tarnovsky admitted it to Mr. Kommerling.

13 And you have John Norris, who is watching
14 Mr. Tarnovsky the whole time. Well, he was supposed to be
15 watching him, but what they did is they cut him loose by
16 himself, because they didn't want to know. They didn't want
17 to see what he was doing. They just wanted to turn a blind
18 eye to it and hope that it would all be okay. So what was
19 the result? We were forced to replace over 9 million Smart
20 Cards in the field between 2003 and 2005.

21 Now, remember, we have the post in 2000. We're
22 fighting it off with ECMs and the patch, but as you recall
23 the testimony from Mr. Kudelski and the engineers, like
24 Mr. Nicolas, Mr. Kummer, that you can't just go out and swap
25 all the cards. You have lead time, you have R and D, you

1 have manufacturing, and you still have the time period where
2 you're trying to fight the piracy, and that all takes time,
3 and that's why we don't start with the soft swap until 2003.
4 You don't want to interfere with your consumers. You don't
5 want to interfere with your other business relationships,
6 and you don't want to hurt your own business. You don't
7 want to raise costs needlessly.

8 So you heard Mr. Orban testify from the stand. He
9 was our controller. And you've got Exhibit 406 and 402, and
10 you have the purchase orders. And it shows you that we
11 replaced over 9 million Smart Cards, and we were forced to
12 switch the entire conditional access system from the
13 DNASP-II to the Aladdin card. And in addition to the money
14 we spent doing that, you'll see that in 406, it was
15 approximately \$90 million for EchoStar, and I'll walk you
16 through it. I've got a board. And you have \$3.5 million
17 dollars for NagraStar. Because remember, you've got
18 NagraStar buying the cards from Kudelski, and then NagraStar
19 turns around, and they sell them to us. And so we're
20 entitled to get all that money, because we had to spend it.

21 Now, why would we go out and spend \$90 million if
22 we didn't have to? It's not fun having to spend this money
23 and pass it on to consumers. And one of the things you're
24 going to be able to do is make all this right by putting the
25 burden of these costs and expenses where they rightfully

1 belong, which is on NDS.

2 So the other thing that we lost is revenues. You
3 heard Mr. Ergen testify from the stand. You even heard
4 Dr. Peled admit all the harm that comes to a satellite
5 operator when you have piracy, especially piracy that is as
6 rampant and pervasive based on the things that NDS did. So
7 we lost the revenues, and those are the lost profits, and
8 that's going to be one of the things that we're seeking from
9 you.

10 So how do we figure out our lost profits? We
11 could come up here and we could say, "Hey, there are
12 millions of customers." What we did is we took the most
13 conservative approach we could, and we said, "Let's use
14 their own number."

15 You have Exhibit 41, which is Mr. Tarnovsky's
16 e-mail. Now, remember, Mr. Tarnovsky is their man on the
17 ground. He's supposed to be doing the internet research,
18 and he comes up, they ask him -- this is February of 2001,
19 right after he releases the post, okay? And he says, "I'm
20 guessing at least a hundred thousand original cards,
21 professional E3Med or EchoStar 3M." So he's telling us
22 there is a hundred thousand cards, okay?

23 Now, I made a mistake earlier when I talked to you
24 about Exhibit 51. I said that Mr. Tarnovsky reprogrammed an
25 EchoStar access card, and actually, what he did is he

1 reprogrammed a DirecTV card, a period 1 card, to make it
2 able to get EchoStar programming, which is even worse,
3 because now you have all the EchoStar cards out in the
4 field. There's millions of these cards. Then you have all
5 the DirecTV period 1 cards, so you've got many more cards.
6 So it just gets worse for them.

7 So you've got Mr. Tarnovsky admitting that there's
8 at least a hundred thousand original cards, okay? Now,
9 what's interesting about this is it says "in use by the
10 U.S.A.," okay. Again, coming back to the U.S.A., because
11 what they are going to argue is "No, these cards are in
12 Canada," but they weren't. He's talking about the U.S.A.,
13 because that's the market they are trying to compete
14 against, Kudelski and Nagra in. And if you looked up at the
15 very top -- now, you've got to remember, EchoStar does not
16 sell programming in Canada. We sell it in the United
17 States. So if we're going to lose money, we're going to
18 lose it by not having customers in the United States.

19 And at the top of 41, you see where it says "I
20 spoke to Beth this morning. Tell us again how you're doing,
21 how high up in NDS" --

22 (Interruption in the proceedings.)

23 MR. WELCH: "High up in NDS."

24 You've got John Norris, you've got Chris
25 Tarnovsky. They are talking about the harm that they caused

1 to EchoStar, and you can look at the language. It says "To
2 show off with, for example, our guys" --

3 THE COURT: Just move the mike just a little bit
4 back.

5 MR. WELCH: Sure.

6 "Our guys want to go to Korea and say "Look, we
7 don't let our customer lose revenue." This tells you that
8 they are going out telling potential customers of theirs
9 "Don't use the Nagra system, we're better," and they are
10 flaunting this, okay?

11 So on Super Bowl Sunday night alone, EchoStar,
12 lost "XXXX" dollars, while DirecTV made a zillion dollars.
13 Okay. The only way we lose money is if these cards were
14 being used in the United States. So what do they do? They
15 have this document, and they turn it into something that
16 you'll see as Exhibit 1270.

17 Now, what's interesting about this is they can't
18 have it both ways. They say "This is one of the documents."
19 You'll remember, they had Mr. Guggenheim on the stand, and
20 this is one of the documents that they say is basis for
21 their counterclaim, okay? It's super top secret, okay? If
22 the information in this document was inaccurate or
23 incorrect, why would they be suing us over it? These
24 documents that they're suing us over hurt them in the
25 lawsuit. There's absolutely no evidence that they were used

1 in any improper way. But if you look at this document, it
2 talks about the hundred thousand cards, and in addition to
3 that, it talks about -- if you look up at the "poor
4 counterattack," it says "Nagra is not capable of
5 successfully launching an electronic countermeasure to fight
6 a hack. That goes against their "ROM hole open," "ROM hole
7 closed."

8 In the United States, pirates have found Nagra's
9 electronic Countermeasures easy to overcome. Hackers are
10 always aware of Nagra's attempts a day prior to a Nagra
11 counterattack due to the length of time it takes them to
12 actually broadcast the attack. This give the hackers a
13 chance to defend their illegal viewers. So it's kind of
14 disingenuous for them to go over here and be marketing their
15 services and downplaying the services of Kudelski and Nagra
16 and saying that it's a shoddy system, and it's subject to
17 piracy, piracy they created. They want to tout that, but
18 then in this litigation, they want to run from it. They
19 can't have it both ways.

20 THE COURT: Counsel, move that mike just down a
21 little bit.

22 MR. WELCH: Okay. Sorry about that, your Honor.

23 THE COURT: Thank you.

24 MR. WELCH: So what I did is I started with the
25 premise that there were a hundred thousand subscribers,

1 pirate subscribers, and we tried to figure out what was the
2 best case scenario for the defendants. We said, "Let's
3 assume that you've got these hundred thousand pirates
4 starting in January of 2001," because remember, Exhibit 1270
5 is dated May 16th of 2001, after the ECM, after the patch.
6 And they say in their own document that "The information
7 contained herein is correct as of the date it's written."
8 So we know they were still standing by that number,
9 marketing it to people in May of 2001.

10 So we start out with a hundred thousand pirate
11 devices, and the premise of this is that a pirate, if we
12 weren't secure, if we didn't have this piracy, they would
13 have been legitimate subscribers, okay? So it would be fair
14 what we did, is we took our 10-Ks, and you'll see those,
15 those are in evidence, Mr. Ergen testified about them, and
16 we have something called "churn." You have a legitimate
17 subscriber. That subscriber doesn't necessarily stay with
18 you the entire time. They may decide to go somewhere else.
19 You know, you could switch to DirecTV, go to cable, go to
20 over the air, so we call that "churn."

21 So it would be fair, we assumed a regular business
22 model. And so we churned out these subscribers on a yearly
23 basis. You see we start out with a hundred thousand at the
24 beginning of 2001. We churned out, to be fair,
25 approximately 19,000 subscribers to get through the end of

1 2001, and then we did the same thing all the way out to
2 where we went secure in September 30th, 2005. That's when
3 we switched the stream.

4 So -- and we get down to 34,000, and then we took
5 the ARPU, the average revenue per unit. And what that is,
6 is that's how much we make on a subscriber on a monthly
7 basis, and it's approximately \$50. That's your average
8 package, your average prescription price, and we multiplied
9 that number out. We multiplied it by 12, and we come up
10 with the numbers of the net projected revenues. That's the
11 gross revenues, the checks that we get in from the
12 subscriber. And that came down to, for the five years,
13 185 million. But to be fair, what we did is we said, "Hey,
14 this programming is not free. We have margin." So we took
15 out our costs on that to get our profit.

16 Another thing we did, to be fair, was we -- if you
17 buy a box, we have subscriber acquisition costs, so we are
18 actually losing money. So we took that out as well to have
19 an absolute drop-dead bare bones minimum number for them,
20 and we came up that there was \$90 million in lost profits.

21 Now, why is that number conservative? We took out
22 all the elements that you would have if you were trying to
23 figure out our actual business. In addition to that, what
24 you've got to remember is we took their hundred thousand
25 number, and we had it ramped down for churn. But what

1 Mr. Tarnovsky said is that number was conservative, because
2 as DirecTV went secure, especially when it went secure in
3 2004, where are all the pirates going to run? They are
4 going to run to the system that's not secure. So instead of
5 actually this hundred thousand number staying stagnant, it
6 would actually increase. But we don't know what that number
7 would be, all we know is that our number of a hundred
8 thousand is conservative, and so we think bare bones
9 minimum, that's a fair place to start.

10 So we have the 90 million for your card swap for
11 EchoStar. You'll see this in Exhibit 406. Mr. Orban
12 testified about it. And then NagraStar, also on
13 Exhibit 406, we've got \$3.8 million. So you have total
14 EchoStar, what we are out of pocket for the card swap and
15 what we lost in revenues, and that totals up to 181 million.
16 You add in the 3.8.

17 Now, when you actually get the special verdict
18 form, there will be a different spot for EchoStar and
19 NagraStar, and I'm going to walk you through the verdict
20 forms, how we suggest that you answer them. So I just
21 wanted to walk you through the math.

22 I am having technical difficulties.

23 So what are the damages? 90 million for the card
24 swap, 90 million for the lost profits. So the EchoStar is
25 181, and NagraStar is 3.8.

1 So we talked about the instructions. We talked
2 about the questions that you are going to see. The first
3 one will be our first claim, have the plaintiffs, EchoStar
4 and NagraStar, proven by a preponderance of the evidence
5 that NDS violated the Digital Millennium Copyright Act?

6 There is actually an instruction that will say
7 "Claim 1," so you'll be able to look at this as you are
8 going through it. The Judge is going to read you the
9 instructions when both myself and Mr. Snyder are done, and
10 you'll see the elements of these claims.

11 But once you find out that they hacked it and they
12 posted it, pretty much you end up answering all the
13 questions "yes." So we suggest that you answer the first
14 question, "Yes, they violated the DMCA." And you fill in
15 the actual damages for EchoStar of 181 million, NagraStar of
16 3.8.

17 Now, what you are going to see on the verdict form
18 is we get to make an election, and that election is we can
19 go with the actual damages that you find, or you are
20 entitled to award us statutory damages, and we make that
21 election later.

22 So if you are not sure about the 181, there is
23 another way that you can skim this. You can take the total
24 number of defendants' violations against plaintiffs, okay?
25 Take the conservative number of a hundred thousand in

1 Exhibit 41 and 1270.

2 And the amount per violation, that's within your
3 discretion. So you can go as low as 200, or you can get
4 2,500. If you believe they were harmed more, you could go
5 with 2,500, and so you've got a range of 181 to 250, and
6 that's up to you all.

7 So question 2 is the DMCA, number 2. Once again,
8 we suggest you answer that "Yes, the actual damage is the
9 same." This is not a double recovery, and you are going to
10 see that in the instructions. Answer each damage question
11 individually rather than answering -- figuring out that
12 there are five claims and dividing by five and then putting
13 in, you know, 30 million or something like that. Answer
14 them all individually. Once again, this ends up in the same
15 place.

16 The next one is "Have Plaintiffs EchoStar,
17 NagraStar, proven by a preponderance of the evidence that
18 NDS violated the communications act?" Once again, once you
19 find all those facts, the answer to that would be "Yes, with
20 the same damages," except in this one, depending on how you
21 feel, this statute allows you to award more in statutory
22 damages. You can go from a thousand to 10,000. Once again,
23 that's entirely in your discretion. It depends on how you
24 feel based on the evidence.

25 So the fourth claim talks about the California

1 Penal Code. On this one, there is not a statutory election,
2 so we suggest you answer that "Yes, the actual damages are
3 the same." In addition, on this one, you are going to ask
4 -- be asked an additional question. This one does not have
5 a damages component. This one's you answer it, and you get
6 to go to the next question. You don't have to concern
7 yourself with why there is not a damages line, but "Have
8 they acted with oppression, fraud or malice," we know they
9 acted with malice, because that was the only reason that
10 they would do this. Why didn't they just do the reverse
11 engineering and make their chip better? They didn't. They
12 set out on a course to harm. They flaunted it, as in
13 exhibit 41. They flaunted it in their marketing materials,
14 Exhibit 1270. The cat is out of the bag. They are happy
15 about this. They are not concerned about conditional access
16 marketplace. They are not concerned about the harm that
17 happens to consumers. So on this one, we suggest that you
18 answer "yes."

19 Now, question number 6 is the final California
20 Penal Code claim. We suggest that you answer that one
21 "Yes," once again, "the actual damages are the same."

22 And this one also has a statutory election. Once
23 again, we don't get to recover twice. This one also has the
24 oppression, fraud and malice question, but no damages, so we
25 suggest that you answer that one "yes," the same way you did

1 on question 5.

2 This question doesn't have a damage question -- or
3 damage section for it, but "Were they involved in a
4 conspiracy to violate the California Penal Code?" We
5 believe the answer to that one is "yes." You've got all the
6 various entities. You have the distribution network, you
7 have all the individual pirates. You have Mr. Menard, you
8 have Mr. Frost, Mr. Tarnovsky, you have NDS Americas, NDS
9 Israel, NDS Group, Mr. Dawson. All those individuals
10 conspired together to create this distribution ring to harm
11 EchoStar. We suggest you answer that one "yes."

12 The next question, "Find if they did this" --
13 "took these actions in a malicious, oppressive or reckless
14 disregard to Plaintiffs EchoStar, NagraStar's rights." How
15 can it not be in reckless disregard of our rights? They're
16 flaunting it. They know there is only one reason for this
17 report. They know there's only one reason to post it. It's
18 to harm EchoStar and gain a competitive advantage.

19 So when you answer that one "yes," you get to make
20 a decision. Should they be -- should we be awarded punitive
21 damages against them? We believe the answer to that is
22 "yes." Let the money go somewhere, to a company that
23 believes in better TV at a fair price. There is absolutely
24 no evidence that EchoStar, NagraStar or Mr. Kudelski's
25 company went out and engaged in the activities that they

1 make a business out of. So you can take that money and put
2 it in a good, safe place when Mr. Ergen and EchoStar -- so
3 that he could continue to give quality programming at a fair
4 price to subscribers. So that is entirely up to you.

5 So how do you determine what you are going to
6 award as punitive damages if you want to? What I put into
7 evidence was Exhibit 2010 and 2011. Those are their 10-Ks
8 and their Q. It is basically the latest current health of
9 their company. It shows you their net worth. It shows you
10 the amount of money they made, their profits, and that's
11 just where they are today.

12 Now, remember, Mr. Peled said that when they
13 entered into their IPO, they had a market cap of
14 approximately a billion dollars. Now, their market cap is
15 approximately \$3 billion, and they've been able to do that
16 through this course of conduct that they engaged in. They
17 built a business around these illegal activities. So we
18 believe that you can look at all of that evidence, and you
19 could come up with what you think is fair. So I'm not going
20 to give you a suggestion on that one. I am just going to
21 leave that up to you.

22 So that's all I have for now, so I'm going to turn
23 it over to Mr. Snyder, and then I'll be talking to you later
24 this afternoon. Thank you.

25 THE COURT: All right. Now, Counsel, you haven't

1 used your full two hours; is that acceptable to you?

2 MR. WELCH: That's fine.

3 THE COURT: All right.

4 Then, Mr. Snyder, I suggest we take a recess, and
5 would you like to start at 11:00 and get set up, or would
6 you like to start?

7 MR. SNYDER: Yeah, 11:00 would be fine.

8 THE COURT: 11:00?

9 All right. Ladies and gentlemen, I promised
10 counsel breaks in between. I think that would be wise. I
11 know you're going to take a little bit shorter and quicker
12 recess, but you're admonished not to discuss this matter
13 amongst yourselves, nor form or express any opinion
14 concerning the case.

15 Let everybody get set up. I'll see you at 11:00,
16 okay?

17 (Recess.)

18 (The following proceedings is taken outside
19 the presence of the jury.)

20 THE COURT: We are back on the record. Counsel
21 hadn't mentioned the RICO claim, but unless it's withdrawn,
22 I expect to hear more about the RICO claim, and I wouldn't
23 be lulled into complacency on either side about that, okay.

24 MR. WELCH: So we are not withdrawing it, your
25 Honor.

1 (Laughter.)

2 THE COURT: So I would suggest you -- you address
3 it, because you can be certain Mr. Welch is going to
4 readdress it again.

5 MR. WELCH: I talked about -- I talked about the
6 facts, your Honor.

7 THE COURT: You talked about the facts of the RICO
8 claim. It's -- obviously it's not withdrawn, and it's
9 obvious to the Court that you're entitled to argue that.

10 MR. WELCH: Yeah, I mentioned one of the claims
11 being a RICO claim, and I talked about the various
12 individuals --

13 THE COURT: I know that. You just didn't go
14 through the damages section of it, but you mentioned RICO,
15 and you mentioned the facts surrounding RICO. You didn't
16 mention the two criminal acts as predicates, yet, but that
17 doesn't preclude you from argument. And it's a proper
18 rebuttal, and so I suggest both of you address it. Now, you
19 can reopen if you'd like to when the jury comes back, but
20 you've mentioned it, and it's proper rebuttal.

21 MR. SNYDER: Final question, your Honor.
22 Mr. Welch, in talking about punitive damages, mentioned that
23 that money would go to consumers, which is neither accurate,
24 nor appropriate. The money would go to EchoStar, and I
25 think it would be improper for him to suggest that consumers

1 would be the beneficiaries of any punitive damage award.

2 THE COURT: Well, that -- that may be, and it may
3 not be. I am going to let your arguments give flight to the
4 wings of your imagination. I think that that's a great
5 case. I don't perceive that that's prejudicial, because
6 there is testimony inside this record that it -- the
7 competition between your two companies is really -- also
8 effects the subscriber, the consumer, that this is no longer
9 a lawsuit between both of you. It's approaching a duopoly,
10 quite frankly, in the United States, and as such,
11 subscribers and consumers are affected.

12 Now, the money, if it goes anyplace, though, is
13 clear, it is a corporate benefit, in a sense. By the same
14 token, it does affect subscribers, which are consumers.

15 Now, Mr. Hasak, I see you always standing there,
16 sir. Are you on worldwide security alert?

17 MR. HASAK: No, sir.

18 THE COURT: Why don't you have a seat back there,
19 then, on your side.

20 MR. HASAK: I just want to listen.

21 THE COURT: With you and JJ Gee around, the Court
22 feels entirely safe, but let me suggest --

23 (Laughter.)

24 THE COURT: Now, have a nice recess.

25 (Recess.)

1 (The following proceedings is taken in the
2 presence of the jury.)

3 THE COURT: All right. The jury is back in
4 session. All counsel and the parties are present.

5 Counsel, thank you for your courtesy.

6 If you'd please be seated.

7 This is Mr. Darin Snyder on behalf of the
8 defendants.

9 Counsel, your closing argument, please.

10 MR. SNYDER: Thank you, your Honor.

11 CLOSING ARGUMENT BY MR. SNYDER

12 MR. SNYDER: Good morning, ladies and gentlemen.

13 I know you've been sitting there for a long time,
14 but I want to start with one thing that may be familiar to
15 you. Winston Churchill said that a lie gets halfway around
16 the world before the truth has a chance to get its pants on.
17 Lies are easy. You say them, and you repeat them, and more
18 people repeat them. The truth is hard. The truth takes
19 evidence. The truth takes proof. I want to show you some
20 truth. I want to show you some evidence.

21 I hope you'll excuse me for standing over here by
22 the podium and occasionally looking at my notes, because
23 there are a lot of details, and I want to be very precise.
24 I think you'll find that the plaintiffs, in talking to you,
25 have not been precise, in fact, to the contrary. They've

1 ignored some very important things. They've confused some
2 very important things, and they have been simply wrong about
3 some very important things.

4 The first thing that the plaintiffs have been very
5 wrong about is their claim that piracy somehow destroyed
6 EchoStar. EchoStar has hardly been destroyed. As you heard
7 early on in this case, EchoStar is an extraordinarily
8 high-revenue company. Every year they've had dramatic
9 increases in their revenue, and if you look at in the center
10 box under the heading "2001," that is the year after the
11 postings about which they complain so much.

12 In that year, not only did EchoStar set a record
13 for revenue, it had the highest percentage increase in its
14 history. It had the highest numerical increase in its
15 history. If piracy were destroying EchoStar, could they
16 really have increased their revenue by \$1.2 billion in that
17 year following this disastrous posting that supposedly
18 destroyed their conditional access system? That's not what
19 happened, and I'm going to show you in the next couple of
20 hours, with a very convenient break for lunch, that that is
21 why that didn't happen, because the postings about which
22 they complain so much, the piracy about which they complain
23 so much, by their own words, was tolerable, and it was
24 minimal. It was something they kept under control with
25 their own ECMs. And this whole notion that they were

1 somehow destroyed by these postings or piracy connected to
2 NDS is a lie, and it's a lie that's gained a lot of
3 currency. It's a lie that's been repeated a lot. It's a
4 lie that's been repeated so many times that it landed us in
5 this courtroom, but let me show you some specifics about
6 that.

7 The first lie was who is responsible for those
8 postings. They told you originally that the post -- the
9 first posting was by xbr21, and that was connected to NDS.
10 You heard Mr. Gee say, "Didn't you testify that the xbr21
11 posting resulted in the explosion of piracy?"

12 What was his answer? "I did. Yes, I did."

13 That posting by xbr21 is the December 23rd posting
14 on the dr7 website that you've heard so much about. Before
15 we found Marco Pizzo, EchoStar and NagraStar actually swore
16 under oath that xbr21 was Chris Tarnovsky, the same way they
17 are telling you now that -- that Nipper is Chris Tarnovsky.
18 They had to sign a written document called an interrogatory.
19 And in there, they said that xbr21 was Chris Tarnovsky, and
20 Mr. Gee then signed that under penalty of perjury, the same
21 oath that he took here. And you will hear Judge Carter tell
22 you when he reads the instructions that these
23 interrogatories are just like testimony.

24 But when Mr. Gee was asked about his testimony,
25 about his interrogatory where he swore that xbr21 was Chris

1 Tarnovsky, he said it was just an assumption, and let's be
2 precise about that. Mr. Gee was asked, "These same people
3 who gave you this supposedly reliable evidence that
4 Mr. Tarnovsky was involved with Al Menard in some
5 distribution, network, right?"

6 "Yes, but they did not provide me any information
7 about xbr21."

8 "Who did?"

9 "That was based on our assumption with him."

10 "So you're saying you put under oath as a fact a
11 mere assumption?"

12 "Answer: "Yes."

13 Their whole theory that xbr21 was somehow Chris
14 Tarnovsky was based on an assumption, and it wasn't true.
15 We tracked xbr21 down. We found him in St. Louis, Missouri,
16 Marco Pizzo, and Mr. Pizzo came and testified for you.

17 And when they asked him, "What is the connection
18 between you and Chris Tarnovsky," his answer was indeed
19 memorable, "I don't know any Chris Tarnovsky."

20 That posting by xbr21 had nothing to do with Chris
21 Tarnovsky. It had nothing to do with NDS, even though for
22 most of this case, that's exactly what EchoStar was swearing
23 under oath.

24 Now, the other posting you've heard so much about
25 is the December 24th posting on a website called Pirates

1 Den. And what I want to show you over the next several
2 minutes is why that posting comes from Barrie, Ontario, and
3 why we know who, in fact, did that posting, and who is
4 Nipper. Someone named Mike Manieri, who also uses the
5 a.k.a. or the pseudonym "Jim Waters." And the amount of
6 evidence showing that Nipper is Mike Manieri or Jim Waters
7 is overwhelming, and it all traces back to Barrie, Ontario,
8 on the other side of North America from where Chris
9 Tarnovsky lived in southern California.

10 The first road to Barrie was actually by a
11 NagraStar investigator, Suzanne Guggenheim. In March of
12 1999, Suzanne Guggenheim bought a piracy device, and you saw
13 Ms. Guggenheim. She told you that part of her investigative
14 work was buying devices. She bought a device from Barrie,
15 Ontario, and we know that, because we have the FedEx airbill
16 when it was delivered to her. It came from Direct Marketing
17 in Barrie, Ontario. And the signature on that airbill, "JW"
18 something, is that Jim Waters? Maybe, maybe it's not. But
19 maybe it is, and you are going to see there is an enormous
20 amount of evidence indicating that Jim Waters was indeed the
21 person behind all these piracy devices in Barrie, Ontario.

22 Now, what was the next road leading to Barrie?
23 Anthony Maldonado purchased a black box from a group in
24 Barrie, Ontario. He told you that he twice traveled to
25 Barrie, and he met with Jim Waters in a field. We actually

1 showed him a picture of the black box, and he said, "Yep,
2 that's the one."

3 We also got from Mr. Maldonado, because he came
4 and testified, his wiring instructions. Mr. Maldonado put
5 those into evidence. It's Exhibit Number 2501-A, and those
6 wiring instructions show that they were sent to a bank in
7 Barrie, Ontario, to a numbered corporation, number 143-1916,
8 Ontario, Inc. And so we went and we got the records for
9 that numbered corporation, and those are also in evidence.
10 Those records show that that numbered corporation is
11 actually assigned to Mike Manieri. The name of the
12 corporation, 143-1916, Ontario, Inc. with an address in
13 Barrie, Ontario. The first director is Michael Manieri.

14 What's the next road to Barrie, Ontario? Their
15 own consultant, informant Ron Ereiser, and we are going to
16 spend some time talking about Mr. Ereiser. He also bought a
17 black box. He paid \$65,000 for it. He got his black box.
18 He sent it to NagraStar. NagraStar sent it to Switzerland
19 so they could study it. Then they did an ECM, and they sent
20 the box back to Mr. Ereiser. And where did he send it? He
21 said he originally bought it from somebody in Mexico, but
22 when he sent it back to see if it could be fixed to handle
23 the ECM, where did he send it? He sent it to Barrie,
24 Ontario. Then he got the box back, sent it back to
25 NagraStar. They sent it back to Switzerland. They did

1 another ECM, and they sent it back to Mr. Ereiser, and he
2 sent it back to Barrie.

3 Now, you heard Mr. Gee when he was asked, "Where
4 is the black box?"

5 "We don't have it anymore. I don't know where it
6 is." And he acknowledged that if there was one piece of
7 evidence in this case that might put everything to rest, it
8 would be what's inside that black box. Where is the code
9 inside that black box, where is it now? Nobody has it.
10 We'd all love to look at it, but it was sent to Barrie,
11 Ontario. It was not sent to Chris Tarnovsky.

12 There is still a lot more roads to Barrie to go.
13 What's the next one? On December 24th, there was a posting
14 on the website "Pirates Den." That website traced back to
15 an ISP, an internet service provider, in Sudbury, Ontario.
16 Now, you don't have to take my word for it. You don't even
17 have to take the word of any NDS witness for that. That is
18 what NagraStar's own investigators determined.

19 Renee Coltharp, who was an investigator for
20 NagraStar, checked the -- did a trace on that ISP address.
21 She got the ISP number, the UR -- the locator number for
22 NiPpEr2000. And she got this information in February of
23 2001, less than two months after the posting was made, and
24 the number that she used, 209.91.172.170. And then she
25 traced that number using a publicly available information

1 database, Whois. And where did it trace to? It traced to a
2 company called Vianet Internet Solutions in Sudbury,
3 Ontario.

4 Now, there is another posting that NagraStar
5 investigators found, and it also traced back to Barrie,
6 Ontario. Peter Kuykendall, another investigator, and you
7 heard his testimony by videotape, he found another posting
8 on Usenet. So it's not an actual website, but it's a -- a
9 forum. And on that Usenet posting, he traced it back as
10 well, and it had not quite identical, but a nearly identical
11 IP address, the same portions, first three of the four
12 portions match. And he said in this e-mail, which is
13 Exhibit 206, that he sent to Ms. Coltharp and to his boss,
14 Mr. Guggenheim -- I'm sorry, JJ Gee -- that that same Usenet
15 posting traced back to Ontario, Canada and to Vianet, the
16 same place that the December 24th posting on Pirates Den
17 traced back to.

18 Now, both of those postings, it turns out,
19 actually trace to Barrie, Ontario. And you heard Jim
20 Emerson, the expert who came and -- and testified for you
21 and tried to explain how these traces work. He explained
22 that these numbers are both within the range that is
23 assigned to Vianet Solutions, and that's how we know that
24 they both trace back to Vianet. Vianet has a block of
25 numbers, and we know the beginning number, and we know the

1 last number. So if the number falls in between, then we
2 know it's a Vianet number, and he was able to confirm that.
3 The same information that Ms. Coltharp found, the same
4 information that Mr. Kuykendall found, but he was actually
5 able to take it one more step. Using a database available
6 to him, he was able to show that both of those addresses
7 actually trace further to Barrie, Ontario. So we knew where
8 the ISP was, in Sudbury, about 180 miles away from Barrie,
9 and then we knew even more based on the specific IP
10 addresses that they used, that they both traced to Barrie,
11 Ontario; not one of them, both of them.

12 Then we have the xbr21 posting from
13 December 23rd -- oh, no, I'm sorry, the -- the black box.
14 Mr. Nicolas, NagraCard's expert, who was actually here,
15 testified that he compared the code in the black box to the
16 code on the xbr21 posting, that December 23rd posting. And
17 Mr. Nicolas found that, in fact, they were the same, and he
18 was asked by Mr. Stone, "Am I correct, the black box does
19 the same thing as the internet posting in December of 2000?"

20 Mr. Nicolas was careful. "Which internet posting?
21 You are referring to the same one that I've" --

22 "Yes, the December 23rd, 2000 posting."

23 And what was Mr. Nicolas' response?

24 "Yeah, the Nipper Clauze used and described the
25 same recipe as the black box."

1 So now what do we have? We've got both postings
2 tracing back to Barrie, Ontario. We've got two black boxes
3 that have both come from Barrie, Ontario. We've got
4 Mr. Nicolas testifying that the black box and the posting
5 are connected.

6 And then you heard from Mr. Jones. He, too, did
7 an analysis of the black box code and the xbr21 posting, and
8 he showed you that they are almost, amazingly, similar.
9 Now, they are not identical, but in their architecture,
10 which he colored to show you the different portions of the
11 code and was very careful to explain, he showed you that
12 they are almost identical.

13 Now, there is still more evidence, though, that
14 leads to Barrie, Ontario. The card that was used for the
15 December 24th posting traces to Tonawanda, New York, and
16 ultimately, to the area near Barrie as well.

17 One of the things that plaintiffs spent no time
18 talking about at all was this secret password that they put
19 into each one of their cards. This 16-digit hexadecimal
20 number is unique for every card, and only Nagra in
21 Switzerland can translate that number into a specific card.
22 And you heard Mr. Nicolas admit that they took that number,
23 they ran it through their database, and they got a card
24 number. They then took that card number, and they put it
25 into the -- to the customer database that EchoStar uses, and

1 they got subscriber information that leads you to Tonawanda,
2 New York. Tonawanda is just across the border. You heard
3 Mr. Tom McGuire explain it's right on the border near
4 Niagara Falls across from Canada. And in fact, you also
5 heard that that trace to Tonawanda, New York actually goes
6 closer to Barrie, Ontario than any of us first imagined. It
7 actually goes right into Ontario, Canada, as well.

8 Mr. McGuire came and explained to you that the
9 account that was getting all these shipments was not, in
10 fact, Margaret Koops. It was a company called Tech
11 Electronic Services in Lindsay, Canada, which happens to be
12 very near Barrie.

13 We also asked him, "Well, who owns that account,"
14 and Mr. McGuire was able to provide those numbers as well,
15 that information, and so he provided the account
16 information, and this is also in evidence. The account was
17 owned by someone named Dawn Branton at Tech Electronic
18 Services. And you heard JJ Gee admit that Dawn Branton was
19 a very well-known pirate, a very well-known EchoStar pirate.
20 You also heard Mr. Maldonado say that he got his equipment,
21 his hardware, his systems from a woman. He didn't remember
22 her name, but Ms. Branton is the only woman pirate that
23 we've heard about during this entire case.

24 So was Mr. Maldonado getting his materials in the
25 same area of Barrie, Ontario that he got his box? Maybe.

1 And while we don't know that for sure, we do know one thing
2 for sure, he got his box from Barrie, Ontario.

3 And yet, there are still more connections to
4 Barrie. Mr. Gee got to interview Mr. Maldonado. In March
5 of 2001, Mr. Maldonado was raided, and all his material was
6 taken by law enforcement. Mr. Gee was there and interviewed
7 Mr. Maldonado and got all sorts of useful information from
8 him. Mr. Maldonado told him that he bought his box from Jim
9 in Barrie, Ontario, last name unknown, and that he paid
10 \$25,000 for it.

11 Mr. Gee actually asked Mr. Maldonado about Nipper.
12 Now, this was a little bit confusing, because Mr. Gee told
13 us that by this time, he already knew who Nipper was. They
14 already knew that Nipper was Chris Tarnovsky, but still
15 Mr. Gee asked Mr. Maldonado. And what did Mr. Maldonado
16 tell him? He told him that he knew the name "Nipper." He
17 said he also used the name "Nipper Clauze," and he told him
18 that it was Jim or Jim's engineer, the same Jim that sold
19 him his box, the same Jim that was in Barrie, Ontario.

20 And how do we know it was the same Jim that was in
21 Barrie, Ontario? Because Mr. Maldonado gave him an address
22 and a phone number, and that is also in Mr. Gee's notes, and
23 that is also in evidence. He told him that Mr. -- that Jim
24 Barrie -- or Jim Waters could be found at Discount
25 Distributors in Barrie, Ontario, and he even gave him a

1 phone number. "Here is his cell phone." Did Mr. Gee call
2 Mr. Maldonado? No. Did he go and visit -- or did he go
3 visit Jim Waters? No. Did he go call Jim Waters? No. He
4 had an address and a phone number, and he couldn't even make
5 that trip, because they already knew that it was Chris
6 Tarnovsky.

7 You heard Mr. Maldonado testify that he was
8 willing to wear a wire and to help lure Jim Waters across
9 the border so that they could catch him. Neither
10 Mr. Maldonado or his lawyer ever heard from EchoStar or
11 NagraStar again.

12 Now, Mr. Gee made another conclusion that was
13 important about Mr. Maldonado. Mr. Gee made the connection
14 between Ron Ereiser's box and the box that Mr. Maldonado
15 purchased from Jim in Barrie as well. In Mr. Gee's own
16 notes, he writes that Jim Waters is the Jim of the Barrie
17 group in Barrie, Ontario. He was the one who provided
18 Maldonado the unlooper, as well as Ron Ereiser.

19 So now, we've got all these things tied together.
20 Ron Ereiser's box comes from Barrie, Ontario.
21 Mr. Maldonado's box comes from Barrie, Ontario. The xbr21
22 posting traces to Barrie, Ontario. Mr. Nicolas, NagraCard's
23 head of Smart Card security, puts those two together and
24 says that the black box and the xbr21 posting are related.
25 It all traces back to Barrie, Ontario.

1 Now, really the only answer that plaintiffs have
2 been able to come up with for all of this evidence is that
3 these pirates wouldn't have a motive for posting this code.
4 All they'll tell you is, this doesn't make any sense. Why
5 would they post it, because then they wouldn't make any
6 money. But now that you've heard this testimony, and now
7 that you've seen these exhibits, the content of the
8 postings, which seems a little bit strange at first, all of
9 a sudden takes on new meaning.

10 We know that there were at least two boxes.
11 Mr. Ereiser had one, Mr. Maldonado had one. You also heard
12 from Mr. Maldonado that there were five or six different
13 boxes, and Mr. Maldonado said that some of the boxes went
14 down because of an ECM. Well, we know from looking at
15 NagraStar's and Nagra's records, that they did, in fact,
16 have two ECMs during that period.

17 ECM number 4, which is described in Exhibit 1260,
18 was in November of 2000, and it targeted all pirate
19 commercial DNASP-003 cards, which we know is another word
20 for the ROM cards. The next month, in December of 2000,
21 they had another ECM, ECM number 5. And ECM number 5
22 targeted all the pirate commercial DNASP-002, or ROM 2
23 cards. So between the two of them, what happened to those
24 boxes? Well, we know, actually from Mr. Ereiser's
25 testimony, that those ECMs were targeting the black box.

1 They made those ECMs, and then sent the box back to Ron
2 Ereiser just so they could see if the pirates could defeat
3 them. And we also know from the notes that Mr. Gee took
4 when he was interviewing Mr. Maldonado, that this apparently
5 was causing some problems among the pirates. What do his
6 notes say? This is of his conversation with Mr. Maldonado,
7 "Stole the code from developer in Canada, pissed system went
8 down."

9 So now we've got these multiple boxes out there,
10 all of them coming from Barrie, Ontario. We've got ECMs
11 that are taking place trying to defeat those boxes. We've
12 got pirates who are not very happy about it, and then you
13 look at the posting. And what does the posting by Nipper
14 say? "There will be no boxes anymore. There will be no
15 more fighting amongst us."

16 Now it makes sense. The multiple boxes were out
17 there. They were fighting each other over which box worked
18 and which box didn't, which boxes could recover from the
19 ECMs and which ones couldn't, and that's why Mike Manieri,
20 or Jim Waters, or whatever name he was using, posted that
21 code. The Usenet posting that Peter Kuykendall found tells
22 us the same thing. What did he say? "Charlie, please" --
23 "please fry these cards. We don't know how to unloop, yet."

24 And both of those postings trace back to Barrie,
25 Ontario, not to southern California, not to Chris Tarnovsky,

1 not to NDS. Both of them, not one, both of them trace to
2 Barrie, Ontario.

3 Now, there is an important aspect of all of this
4 that I'd like you to remember, and that is, that all of the
5 information that I just went through was in the hands of
6 EchoStar and NagraStar and Nagra the entire time. They had
7 the black box from Ron Ereiser. They -- it was their own
8 informant consultant who sent it back to Barrie. They
9 talked to Tony Maldonado, who gave them this information.
10 They were the ones who traced the IP addresses back to
11 Sudbury, Ontario. It was their investigator, Suzanne
12 Guggenheim, who made the purchase from Barrie, Ontario, and
13 yet, they didn't follow up on any of this. They didn't go
14 to Barrie and figure out who is Jim Waters, who is Mike
15 Manieri. Instead, they wanted to blame Chris Tarnovsky.
16 Instead, they wanted to blame NDS.

17 Ladies and gentlemen, this is not the only
18 evidence that they've ignored in the process of trying to
19 blame NDS for their piracy. They want to try and tell you,
20 and they told you in the opening, that the only company that
21 was capable of doing this kind of invasive attack was NDS,
22 but you've seen the evidence now to prove that that simply
23 is not true.

24 In his opening statement, Mr. Welch said, "NDS is
25 the only company in the world that had all the components

1 necessary to hack the EchoStar conditional access system
2 posted on the internet and do this harm." But we've brought
3 witnesses here, and we've shown you the documents to make
4 you understand that that, in fact, was not true. There were
5 several pirate organizations that we know had precisely that
6 capability. One of them was the DISH Plex Group in Thunder
7 Bay, Ontario. You heard Billy Joe Osborne testify about how
8 they had a scanning electron microscope, how it was financed
9 in the United States, then driven over the border so they
10 could set up their lab. One of the people who worked in
11 that group, Larry Pilon, is actually a consultant for
12 NagraStar, and you heard Mr. Gee testify to that fact. They
13 knew about this lab in Thunder Bay, Ontario, but they aren't
14 the ones who shut it down.

15 We also heard from StuntGuy. StuntGuy had put --
16 put together a bible of frequently asked questions, "How do
17 you hack EchoStar," a collection of EchoStar hacking
18 information that was available on the internet for well over
19 a year, and long before the December 2000 postings. And we
20 found StuntGuy, Chris Dalla, and brought him here so he
21 could talk to you. Did you hear what Mr. Gee said when he
22 found out that we had found StuntGuy? He said, "Yeah, you
23 found someone that I couldn't find." It's because we
24 looked. It's because we were looking for the truth.

25 There was another group, and we just finished

1 talking all about them. There is a lot of evidence in
2 NagraStar's hands that the Barrie group was able to do
3 attacks, was able to write pirate code, was able to create
4 pirate devices and boxes using that code, and all of that
5 information was in NagraStar's hands, and they didn't follow
6 up on it.

7 Now, we also know that EchoStar was actually aware
8 of StuntGuy. They may not have known who he was, but they
9 knew that he had information, and they knew that he was able
10 to get information about their cards. In June of 2000, six
11 months before the postings, Suzanne Guggenheim saw the --
12 this is the latest day. We don't know if it was sooner than
13 this, but Suzanne Guggenheim saw StuntGuy's FAQ and
14 forwarded it on. She forwarded on the postings from
15 December 13 -- I'm sorry, December 31st, 1999, which refers
16 to it, the contents, as a publicly available EchoStar ROM
17 dump and commented disassembly.

18 Now, you heard Mr. Nicolas testify, and you heard
19 Mr. Kummer testify that having that ROM code, that's the
20 thing that creates the real danger. That's the part that
21 creates pirate possibilities, because when they have that
22 information, then you know it can cause problems. But by
23 June of 2000, StuntGuy was already reporting that the code
24 was extracted and disassembled and available for anyone to
25 see on the internet.

1 StuntGuy further reported that by July of 2000,
2 the next month, he had done a complete analysis of all the
3 commands in the ROM 2 card, and this is a version of his
4 FAQ, which has been admitted as Exhibit 1352. And in his
5 change log, he notes an entry for July 15th, 2000,
6 "Completed analysis of all commands based on EROM 288-02 ROM
7 dump." And he told us that that number, 288-02, is actually
8 the ROM 3 card. For some reason, they start with number 2,
9 and then they go to number 3. So 288-02 is actually the
10 ROM 3 card, the very card they were complaining about with
11 the post by xbr21 and the post on Pirates Den.

12 StuntGuy also reported that pirates had been able
13 to get into a backdoor that was present on the card. In
14 that same exhibit, he thanks the EROM guys for providing a
15 good environment in which to work, good information and good
16 sounding boards, and then he gives you a specific date. "In
17 addition, as of 25 August 2000, the EROM group has managed
18 to gain full access, including backdoor commands to the
19 EchoStar 288-02 card."

20 And again, this is several months before the
21 December 2000 postings. And based on this information that
22 StuntGuy made available to anyone over the internet, someone
23 could use those backdoor commands to gain all the same
24 access that they complain about now. You'd be able to read
25 almost any memory in the system. You'd be able to write to

1 the RAM or the EEPROM, and you'd be able to download and
2 execute arbitrary code. The very kind of thing that they
3 complain about with the recipe that was posted on -- by
4 xbr21 on dr7, you could certainly do by August of 2000 with
5 the information provided by StuntGuy and the use of those
6 backdoor passwords.

7 Now, why didn't -- why couldn't Mr. Gee find
8 StuntGuy? It couldn't have been because it was particularly
9 hard to get in touch with him and at least tell him to stop.
10 StuntGuy actually posted his e-mail address in his
11 frequently asked questions. All you had to do was look. It
12 said "E-mail me at StuntGuy@dishplex.com." But we asked
13 StuntGuy, we asked Chris Dalla, "Were you ever contacted by
14 EchoStar or NagraStar?"

15 "No."

16 "Were you ever told to shut down your site?"

17 "No."

18 "Were you ever told that this is information that
19 you shouldn't be posting?"

20 "No."

21 So all throughout 2000, he's explaining to anyone
22 who wants to read it that the cards have been dumped, the
23 code has been extracted, it's been disassembled, the
24 backdoor password has been identified, and they have full
25 access to the card, and all of this was months before the

1 Nipper Clauze posting.

2 We also know that plaintiffs are simply wrong when
3 they say that the first time the Nipper phrase appeared on
4 the internet was a posting by Nipper in November of 2000,
5 and you heard plaintiffs' counsel tell you that right now,
6 that that was the first time they had heard that. But
7 actually, ladies and gentlemen, we know that that is not
8 true. Swiss Cheese Productions made that known at least a
9 month earlier in October of 2000, and I went through that
10 material with Mr. Kummer. We looked for that specific
11 phrase in the Swiss Cheese Production posting, and he
12 identified it. The phrase he designed, "Nipper is a
13 buttlicker" is the code phrase to identify when somebody had
14 that code.

15 Actually, I'm sorry, I misspoke. I said, "October
16 2000." I meant October 1998. So we are years before the
17 posting.

18 And what does Mr. Kummer say? He looks at the --
19 the Swiss Cheese Production posting and says, "Yep, there it
20 is." The disassembled code that was posted on the internet
21 in October of 1998 had the one-code phrase that meant that
22 the pirates had access to the card.

23 We also heard from Mr. Nicolas that they were
24 aware of emulation devices, and you heard him describe the
25 significance of an emulation device. If pirates have an

1 emulation device, it means that they can make an external
2 device behave like a Smart Card, and that means they must
3 have sufficient access to the contents of that card, that
4 they can create something that behaves just like it. And
5 they knew by late 1998 that there were emulation devices
6 available.

7 Mr. Nicolas testified, "When did it first come to
8 your attention that there were pirate devices for ROM 3?"

9 "So right" -- "a few months after the publication
10 of October 1998, the so-called battery card was the first
11 pirate devices implementing an emulation of the system, but
12 that emulation of the system is linked to an emulation of
13 the DNASP-002 family of cards. So no matter what the
14 information is extracted from a ROM 2 or a ROM 3, it is
15 usable on the system. And all of that existed, and all of
16 that was in the hands of the plaintiffs by 1998, two" --
17 "more than two years before the December 2000 postings."

18 NagraStar and EchoStar also knew from publicly
19 available information that pirates had been able to get into
20 their own system and gain access to source code that was
21 kept on a corporate FTP site. StuntGuy's FAQ, Exhibit 1311,
22 includes that information. And he says, "Well, it seems
23 that the EchoStar guys are so sure that their corporate FTP
24 site is secure that they're willing to put the source code
25 to their receivers up there in nothing more than" --

1 "nothing more secure than encrypted zip files."

2 The pirates were able to get onto that FTP site.
3 They were able to get that code, and they were able to use
4 it. And so now the StuntGuy FAQ includes this enormous
5 compilation of information, all existing long before
6 December 2000, all providing pirates, if they want it, a
7 road map, and more importantly, demonstrating to EchoStar
8 and NagraStar that pirates had been able to get into their
9 card. And none of this, ladies and gentlemen, none of this
10 is linked in any way whatsoever to NDS. Indeed, you have
11 not even heard the accusation that the EROM guys or DISH
12 Plex or Swiss Cheese Productions or StuntGuy were somehow
13 connected or controlled or influenced or affected in any way
14 whatsoever by NDS.

15 Now, what did Mr. Gee say when he was asked about
16 some of this information? As I told you before, Mr. Gee
17 admitted that he wasn't interested, because all he wanted to
18 do was find a connection to Chris Tarnovsky. By March 2001,
19 when he talked to Anthony Maldonado, he already had the
20 information that he thought was sufficient to connect Chris
21 Tarnovsky. He was asked, "Why were you asking Mr. Maldonado
22 if he knew who Nipper was?"

23 "I was getting" -- "trying to find as much
24 information as I could to identify who he was."

25 "Well, had you been told before this raid that

1 this black box that Ereiser got and that Maldonado had been"
2 -- "that Maldonado had were connected to the postings?"

3 "No. The information that I had before was that
4 Chris Tarnovsky was associated with Nipper, and the more
5 people I could find to confirm that, the more believable it
6 is."

7 But you know what they left out? They forgot to
8 show you a feather of evidence that they had in February of
9 2001 connecting Chris Tarnovsky to being Nipper. We are
10 going to talk about the evidence that they have, and what
11 I'm going to show you is that all of that evidence shows up
12 long, long after the postings, long after February 2001. In
13 fact, most of it shows up long after this lawsuit.

14 In fact, let's take a moment and compare, what
15 kind of evidence did they have linking Chris Tarnovsky to
16 Nipper versus the Barrie group? From the Barrie group,
17 Ms. Guggenheim had purchased pirate devices. There was no
18 purchase of a pirate device from Chris Tarnovsky. They've
19 never brought you one, and they haven't had anybody come
20 testify about one.

21 Mr. Maldonado, Tony Maldonado, told you that he
22 bought a black box from the Barrie group. Nobody has
23 testified to buying a black box from Chris Tarnovsky.

24 Mr. Maldonado told Mr. Gee that Nipper was an
25 engineer for the Barrie pirate group. You have not heard a

1 single person come into this courtroom, sit in that witness
2 stand and give you any firsthand knowledge whatsoever that
3 Nipper was connected to Chris Tarnovsky. The best that you
4 have heard is that someone claims that they were told by
5 somebody else, and the people who are telling you that are,
6 in every case, somebody being paid by the plaintiffs.

7 You heard their own consultant, Ron Ereiser, say
8 that he sent a black box back to Barrie, Ontario so it could
9 be reprogrammed. You have not heard any testimony that
10 somebody sent a device back to Chris Tarnovsky so that it
11 could be fixed. The xbr21 posting itself references the
12 disappearance of the black boxes, and the fact that they
13 don't want to have any more fighting. The postings
14 themselves trace back to Barrie, Ontario and Vianet, and
15 Nagra's own expert, Christophe Nicolas, testified that the
16 postings and the black box use the same recipe.

17 Now, what is the evidence that they want you to
18 rely on? They want you to believe that those postings came
19 from Chris Tarnovsky, because whoever did the posting
20 supposedly registered them with the name
21 ChrisVon@s4.interpass.com.

22 Now, Mr. Welch asked you this morning to think
23 about things that don't make any sense, and I'd like you to
24 think for a moment about something that doesn't make any
25 sense. You heard the expert Jim Emerson explain, "What do

1 you do if you want to hide your identity?" And he admitted
2 and I think most of us know, that you can use things like
3 proxies and anonymizers and spoofing to hide your location.
4 So if you go to the trouble to hide your location on the
5 internet and to use an IP address that doesn't really belong
6 to you, do you register for that using your real first name
7 and the alias that you're most known by around the world and
8 put them together into one? "I think I'll call myself Chris
9 Von." I don't think so. It doesn't make any sense at all,
10 and what doesn't make any more sense is that if you were
11 going to try and do that and hide your identity, why would
12 you do it twice so that it traced to exactly the same
13 location? Because both of those postings, the December 24th
14 posting, and the Usenet posting, both of them trace to the
15 same ISP in Sudbury, Ontario, and both of those specific
16 numbers trace to Barrie. You should be very suspicious of
17 any suggestion that those postings were done by anybody
18 other than Jim or Jim's engineer in Barrie, Ontario.

19 The other thing you should be very suspicious of,
20 ladies and gentlemen, is this notion that the kinds of
21 evidence that you've seen and that you've heard that
22 connects to Barrie is the same kind of evidence that
23 connects to Chris Tarnovsky and to NDS. Ask yourself, if
24 this distribution network was so widespread, and you saw
25 plaintiffs' graphic that has Al Menard and his distribution

1 network and cards going out and money coming back, if this
2 was so pervasive, can they bring you a card, one card? Did
3 one of their investigators go and buy a single card from
4 this so-called distribution network, bring it in here and
5 analyze it and show it to you? There is not one, not one.

6 This programming device that they claim was being
7 used to program all these cards, we've seen pictures of
8 programming devices from Barrie, Ontario, two different
9 witnesses, one who's being paid by nobody, one who's being
10 paid by Nagra, Ron Ereiser, both got black boxes. Have you
11 seen a black box that's connected in any way to NDS or Chris
12 Tarnovsky that reprograms EchoStar cards? No, because it's
13 not true.

14 Have you seen any IP traces for postings done by
15 Chris Tarnovsky involved in piracy of EchoStar that trace
16 back to him or anything connected with NDS? No. All of
17 them trace back to Barrie, Ontario.

18 Have you had any pirates who participated in this
19 so-called distribution network come in and say, "Yep, I was
20 involved. I got some cards, I got some devices. I sold
21 some cards, and I" -- "I was part of the scheme"? No.

22 You heard Marco Pizzo come in. He testified that he
23 was xbr21. You heard Chris Dalla come in. He testified
24 that he was StuntGuy. You heard Tony Maldonado come in. He
25 testified and said, "Yeah, I got one of the black boxes. It

1 came from Barrie."

2 You heard Ron Ereiser come in and testify. He got
3 a black box, too, and it came from Barrie.

4 Did you hear anybody come in and say "I
5 participated in this distribution network?" No. There are
6 no cards, there are no devices. There are no IP addresses
7 in postings. There are no people. There is no proof,
8 because it didn't happen.

9 Now, let me take a few minutes to talk about some
10 of the other evidence they're relying on, because this is
11 some -- this is some evidence that I think once you analyze
12 it, is extremely unsettling, and I call this the plaintiffs'
13 circle of evidence. And what I want to show you is how
14 plaintiffs essentially manufactured information that they
15 now want you to rely on as somehow concluding or proving
16 that Chris Tarnovsky was connected with these postings.

17 What plaintiffs did was hire a company, ICG. They
18 told ICG to go out and look for postings. They then had
19 their informants make postings. ICG reports the postings,
20 and then they cite to the ICG report as evidence.

21 Now, what they are going to come up and tell you
22 is, "Well, gee, we didn't" -- "we didn't actually hire ICG,
23 DirecTV did." But you heard Jeff Bedser testify that at the
24 time that DirecTV hired ICG in late 2002, EchoStar and
25 DirecTV already had an agreement to merge.

1 Mr. Bedser testified, "Could you remind the jury
2 when you did this investigation for DirecTV?"

3 "We are engaged September 2002, and we completed
4 by November of 2002."

5 "And after November 2002, did you do any further
6 work on this investigation?"

7 "Clarification, company or personally?"

8 "The company or you personally."

9 "Neither."

10 And then he was asked, "And I believe you
11 testified earlier that when the investigation was going on,
12 you were actually aware that EchoStar and DirecTV had an
13 agreement to merge."

14 "Answer: Yes."

15 And in fact, Mr. Guggenheim provided a further
16 connection between all of these companies when he pointed
17 out that at this -- about this same time, Canal+ was
18 actually providing a billion dollars to EchoStar to help
19 facilitate the DirecTV merger.

20 So now what do you have? You have EchoStar and
21 DirecTV and Canal+, and they are all working together. You
22 don't have to take my word for it. You can take Mr. Gee's
23 word for it -- or Mr. Guggenheim's word for it, I'm sorry.

24 Mr. Guggenheim went to France, and he met with
25 Giles Kaehlin to get some of the stolen documents we're

1 going to discuss. And what did Mr. Guggenheim say?

2 "Can you tell us the first time you received
3 documents from Canal+?"

4 "Sir, we had a meeting with Canal+'s lawyers and
5 EchoStar lawyers, and I was invited at that meeting and
6 decided to do whatever shared defense agreement with them."

7 And if you look at the ICG report, you can
8 immediately see the influence of the plaintiffs. Look at
9 the list of the aliases that they wanted them to track down.
10 Geo, Geo 11, Chris Geo, Arthur Von Neumann, BG, Big Gun,
11 Chris Berny, Chris Geo, Mike George, NiPpEr2000 and shrimp.

12 Now, have you seen anything whatsoever that
13 connects NiPpEr2000 to DirectTV piracy? Nothing. The reason
14 ICG was given the NiPpEr2000 alias was to see if they could
15 find something to help them in their lawsuit, and let's not
16 make any mistake at all. Mr. Bedser and Mr. Lebson were
17 both very clear that these names did not -- were not names
18 they come up with. They were names that were given to them
19 by their clients. Mr. Bedser was quite explicit.

20 "So is this a list of the internet aliases and
21 e-mails that you had identified as somehow being connected
22 to Mr. Tarnovsky?"

23 "No, no, they're not."

24 "Question: This is a list of the aliases and
25 e-mail addresses that had been provided to you from

1 Mr. Tarnovsky?"

2 "Answer: Yes."

3 And Mr. Bedser then testified that their
4 instructions were to go out and try to find connections
5 between Chris Tarnovsky and those e-mail aliases or e-mail
6 addresses and aliases. TDI, essentially, did the same
7 thing, but they didn't come up with any. They want to tell
8 you that they found a link, and they want you to rely on the
9 ICG reports as somehow definitive proof. But if you look at
10 their own internal e-mail, it is clear that they did not
11 have that. In an e-mail from Eric Lebson to Eric Timek, who
12 did much of the work at ICG, Mr. Lebson says, "Can we prove
13 that Tarnovsky used the internet alias Nipper?"

14 He responds, "So far, it is hearsay. I have not
15 located direct evidence pointing Nipper to Tarnovsky."

16 And in fact, in ICG's final report in November,
17 they said exactly the same thing, "No relevant postings were
18 found to prove a conclusive evidentiary link to Tarnovsky."
19 And when I asked Mr. Bedser about that, he said the very
20 same thing. But they did find some evidence. What evidence
21 did they find? They found internet postings. They found
22 postings by someone using the alias "Gunsmoke2," "GS2,"
23 "Charles Perlman."

24 Then they found another posting by GS2 on October
25 2002, another posting by GS2 that same day, a posting the

1 next day in October by Dean Love, another posting by GS2, a
2 posting by someone using the alias "To the real king,"
3 a.k.a., "TTRK," "V Cipher," "Reggie," Reginald Scullion, and
4 then finally another post by GS2, Charles Perlman.

5 You know what's interesting about all those posts?
6 All three of those people, Charles Perlman, Dean Love,
7 Reggie Scullion, all three of those are people that
8 plaintiffs have admitted they have paid.

9 There is another thing that's very interesting
10 about those posts. Look at the dates. All of those dates
11 are in 2001 by Charles Perlman, and then every other one of
12 them is actually after this project started in October of
13 2002. So what happened? ICG gets retained to look for some
14 connection between NiPpEr2000 and Chris Tarnovsky. Then
15 informants for NagraStar, Charles Perlman, Reggie Scullion,
16 Dean Love, make posts during the period that the project is
17 going on. ICG finds them -- I assume they are pretty good
18 at their job of looking for things on the internet --
19 reports them, puts them in the report, and now EchoStar
20 wants you to rely on those as somehow proof that Chris
21 Tarnovsky is NiPpEr2000. That's not proof. That's not
22 evidence. That's their own informants saying what helps
23 them, saying what they want you to believe. That is not the
24 kind of evidence that creates an evidentiary link between
25 Chris Tarnovsky and any of these postings or the alias

1 "NiPpEr2000."

2 I asked Mr. Bedser if he was aware that these
3 people were informants, and he said, "No."

4 I also asked him, "Would that affect your
5 conclusion?"

6 And he said, "It would taint the information to
7 know that those people were being paid as informants."

8 Now, there is another reason why I think you
9 should be suspicious about this information that ICG found.
10 You find all sorts of nonsense on the internet. In fact, in
11 addition to the conclusion linking Chris Tarnovsky to
12 NiPpEr2000, they found information linking Alan Guggenheim
13 to EchoStar piracy. Alan Guggenheim is NagraStar's CEO. So
14 if you think that the information was adequate to connect
15 Chris Tarnovsky to NiPpEr2000, then the same quality of
16 information connects Mr. Guggenheim to the piracy of his own
17 system. And you find that description in Exhibit 29 where
18 ICG concludes that Sean Quinn has stated online that an
19 individual named Guggenheim, who allegedly worked at Nagra,
20 provided information to specified members of the hacker
21 community on hacking Nagra cards, the ROM 10 dump. It is
22 possible that Guggenheim is actually Alan A. Guggenheim, who
23 at the time the ROM 10 dump was provided to the hacker
24 community, was CEO of NagraStar. That is the only objective
25 evidence that they want you to rely on, and it is not

1 objective at all. It is actually the result of postings
2 made by their own informants and consultants and then
3 paraded around in front of you as something that you ought
4 to rely on, and I know you won't be fooled by that.

5 Your Honor, this would be a good time to take a
6 break.

7 THE COURT: All right. You are admonished not to
8 discuss this -- well, first of all, how long, Counsel, would
9 each of you like, just so I'm sure that you're moving at a
10 comfortable pace, hour and 15, hour, hour and a half?

11 MR. SNYDER: An hour would be fine, your Honor.

12 THE COURT: Well, why don't we just reconvene at
13 1:00. Would that be acceptable?

14 You're admonished not to discuss this matter
15 amongst yourself, nor form or express any opinion concerning
16 the case.

17 Thank you very much.

18 Counsel, 1:00.

19 MR. SNYDER: Thank you.

20 (Recess.)

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2 CERTIFICATE

3
4 I hereby certify that pursuant to Section 753,
5 Title 28, United States Code, the foregoing is a true and
6 correct transcript of the stenographically reported
7 proceedings held in the above-entitled matter and that the
8 transcript page format is in conformance with the
9 regulations of the Judicial Conference of the United States.

10
11 Date: May 8, 2008

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14 _____
15 JANE C.S. RULE, U.S. COURT REPORTER

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