

188ksofc

Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SOFTWARE FREEDOM CONSERVANCY &
4 ERIK ANDERSEN,

5 Plaintiffs,

6 v.

09 CV 10155 (SAS)

7 ZyXEL COMMUNICATIONS INC, and
8 PHOEBE MICRO, INC.,

9 Defendants.

10 New York, N.Y.
11 August 8, 2011
12 5:00 p.m.

13 Before:

14 HON. SHIRA A. SCHEINDLIN,

15 District Judge

16 APPEARANCES

17 LAW OFFICES OF DANIEL RAVICHER
18 Attorney for Software Freedom Conservancy and Erik
19 Andersen
20 DANIEL RAVICHER

21 ROBINS KAPLAN MILLER & CIRESI LLP
22 Attorneys for ZyXEL Communications, Inc.
23 DAVID LEICHTMAN
24 MATTHEW J. YANG

25 COHEN LAW GROUP, PC
Attorneys for Phoebe Micro, Inc.
BRIAN COHEN

ALSO PRESENT: TINA WONG, (By Speakerphone)

188ksofc

Conference

1 (In open court)

2 (Case called)

3 THE COURT: OK, so I guess today is a premotion
4 conference. Four letters have been received: The plaintiff's
5 July 15th letter describing his intention to move for summary
6 judgment; I don't know how to pronounce it -- ZyXEL?

7 MR. LEICHTMAN: ZyXEL.

8 THE COURT: -- ZyXEL's July 15th letter, also
9 requesting summary judgment; ZyXEL's July 18th letter claiming
10 there are inaccuracies in plaintiff's July 15th letter that
11 should be addressed now, before a briefing on summary judgment;
12 and then plaintiff's July 19th letter that was response to both
13 ZyXEL's letters.

14 So we do have a number of topics to discuss. One that
15 I think we should start with is sort of toward the back of my
16 agenda. That has to do with the expert evidence issue.

17 Plaintiffs say that ZyXEL has waived any right to
18 introduce expert evidence because it didn't produce any initial
19 expert report or rebuttal expert report; and also ZyXEL never
20 served any deposition notice on plaintiff's expert, Mr. Khun,
21 or any expert discovery requests on plaintiffs at all;
22 therefore, ZyXEL should be barred from producing any expert
23 evidence. ZyXEL says it hasn't had the opportunity to provide
24 a expert rebuttal report, expert rebuttal witness. It says
25 that during the 30(b)(6) deposition of Khun, Khun refused to

188ksofc

Conference

1 testify to any details of his expert opinion and was instructed
2 not to answer such questions.

3 Plaintiffs respond by asserting that those questions
4 related to Kuhn's rebuttal expert report regarding the now
5 dismissed codefendant, Best Buy, and were therefore improper
6 and untimely; and during the deposition plaintiffs told ZyXEL
7 that this deposition was a 30(b)(6) deposition limited to the
8 designated topics and was not an expert deposition of Khun. So
9 plaintiffs state that they're going to seek to exclude any
10 improper portions of that deposition, including any questions
11 related to Kuhn's rebuttal expert report, and that ZyXEL should
12 be barred.

13 Now, my clerk has just written me a note, that I
14 apparently forgot to put counsel for Phoebe Micro on the phone.
15 I'm not going to repeat all that, but I will ask the court
16 reporter to read back that whole language, introduction of
17 mine.

18 (Pause)

19 THE COURT: Hello? Hello.

20 MS. WONG: Yes this -- defendants -- Phoebe Micro.

21 THE COURT: What's your name?

22 MS. WONG: Tina Wong with --

23 THE COURT: You're breaking up. I don't know if
24 you're on a cell phone. All I caught is your first name. I
25 don't have your last name.

188ksofc

Conference

1 MS. WONG: Wong, W-O-N-G.

2 THE COURT: Ah, Ms. Wong, OK.

3 Are you on a cell phone?

4 MS. WONG: Yes, I'm sorry. I'm traveling, so I don't
5 have a phone landline. My apologies.

6 THE COURT: Well, you were not coming in clearly. We
7 really won't be able to hear what you say for the record, but
8 you'll be able to hear what we're saying. So I'm going to
9 begin by asking the court reporter to read back my statement
10 which introduced the first of the topics that I intend to
11 discuss at this conference. So hold on a second and he'll read
12 it to you.

13 (Record read)

14 THE COURT: OK, did you hear that, more or less,
15 Ms. Wong?

16 MS. WONG: Yes. Thank you.

17 THE COURT: OK, so now you're up to where we're up to.
18 My inclination on that one is absolutely to bar ZyXEL
19 from offering any expert evidence. Who here represents ZyXEL?
20 Mr. Leichtman, you want to say anything about that?

21 MR. LEICHTMAN: Yes, your Honor. Your Honor may
22 recall --

23 THE COURT: I think you better come close so Ms. Wong
24 hears you too.

25 MR. LEICHTMAN: Sure.

188ksofc

Conference

1 Your Honor may recall that just in terms of the
2 sequence of timing of things here, our firm represented Best
3 Buy in this case, and Best Buy then settled. After that
4 settlement, we were asked by ZyXEL to come in and replace their
5 existing counsel and represent them in the case.

6 What happened with respect to ZyXEL, your Honor, is
7 they believed they were going down a road towards a settlement.
8 Neither side really engaged in any discovery. But all that
9 they had received from the plaintiff by way of expert
10 disclosures was two sentences on what Mr. Khun was going to
11 testify about.

12 THE COURT: You mean his report is a two-sentence
13 report?

14 MR. LEICHTMAN: Yes, your Honor.

15 THE COURT: Well, he'll be limited to the two
16 sentences.

17 MR. LEICHTMAN: Can I hand it up?

18 THE COURT: No, because it doesn't matter. That's all
19 he's going to be able to say -- experts are limited to the
20 opinions expressed in their report. That's why we have expert
21 reports in the Federal Rules of Civil Procedure, and nobody's
22 going around the rules here. If that's all he wrote,
23 Mr. Ravicher, then that's all he's testifying to, end of story.
24 Why don't you read the two sentences.

25 MR. LEICHTMAN: Sure. But if I may, you'll recall --

188ksofc

Conference

1 THE COURT: I don't want to recall anything. Read me
2 the two sentences, because that's what he's going to be allowed
3 to say, period.

4 MR. LEICHTMAN: Sure. "Bradley M. Khun to testify to
5 the facts and opinions contained in his declaration before the
6 Court in the abovereferenced matters."

7 THE COURT: Well, then there's a declaration.

8 MR. LEICHTMAN: That's right.

9 THE COURT: That's not two sentences, is it?

10 MR. LEICHTMAN: No, but the declaration doesn't relate
11 to my client.

12 THE COURT: Well, then he's not testifying about your
13 client, he's testifying so far to what he said in the
14 declaration. Go ahead.

15 MR. LEICHTMAN: OK. "The similarity between code
16 produced by defendants and contributions to the BusyBox
17 software program by Erik Andersen."

18 THE COURT: OK, and he can't testify to that.

19 MR. LEICHTMAN: OK, but there's a lot that would be
20 packed in there that I have not --

21 THE COURT: I can't help it. You had the opportunity,
22 while you busily thought you were settling, to ask for expert
23 discovery and didn't. We don't reopen the door. If that
24 discovery is closed -- and I believe it is -- that's it, you
25 waived.

188ksofc

Conference

1 MR. LEICHTMAN: Well, if I may, your Honor, there had
2 been an agreement to take Mr. Kuhn's deposition by ZyXEL. That
3 got pushed off until after those deadlines had expired because
4 the parties were talking about settling. When Mr. Khun then
5 came to be deposed, and your Honor had said in that context of
6 the Best Buy case these two sentences are not sufficient but
7 you can take his deposition --

8 THE COURT: Right.

9 MR. LEICHTMAN: -- so we assumed that the same would
10 apply for ZyXEL and would apply for Best Buy.

11 THE COURT: You can't assume anything. That was a
12 30(b)(6) deposition. It was done in response to a notice that
13 designated topics. That's why we have Rule 30(b)(6). And
14 apparently it was not converted, so to speak, into an expert
15 deposition because it was not noticed as an expert deposition.

16 MR. LEICHTMAN: Well, I clearly put Mr. Ravicher on
17 notice in advance of the deposition, we intended to find out
18 his expert opinion.

19 THE COURT: Really? How did you do that?

20 MR. LEICHTMAN: By email.

21 THE COURT: I guess you can produce that email?

22 MR. LEICHTMAN: I can.

23 THE COURT: Then if you gave you notice, Mr. Ravicher,
24 why did you instruct the witness not to give answers to
25 questions regarding his expert opinion?

188ksofc

Conference

1 MR. RAVICHER: I don't recall -- I don't know what
2 email he's talking about.

3 THE COURT: I don't either, but he says he can produce
4 it, so I can't do much more today. He says, I gave him notice
5 and I was going to explore the expert opinions. And despite
6 that notice, you wouldn't let him testify as to his expert
7 opinions.

8 MR. RAVICHER: I'd just like to correct a couple
9 things:

10 First of all, Mr. Khun answered dozens of questions
11 about his expert report in the deposition. I made objections.
12 There were a couple of specific questions about Best Buy that I
13 said he wasn't prepared to answer, and Best Buy had nothing to
14 do with any deposition topics. But if we look at the
15 deposition transcript, he answered pages and pages, hours and
16 hours and hours, of questions. We went through almost every
17 paragraph of his expert report. So for them to say he didn't
18 answer questions about his expert report is not true.

19 Secondly --

20 THE COURT: All right, but then the objections are
21 overruled.

22 MR. RAVICHER: But the email I believe he sent me, I
23 haven't seen it, but I believe it was after discovery, after
24 expert discovery closed.

25 THE COURT: But before the Khun deposition?

188ksofc

Conference

1 MR. RAVICHER: But that was not a Kuhn deposition; it
2 was a 30(b)(6) --

3 THE COURT: But if he said to you before the
4 deposition, while we are at Mr. Kuhn's deposition, given that
5 he is the expert and has written a report of two lines, which
6 the judge said can be explored at deposition, I intend to
7 question him as to his expert opinions. That changes
8 everything.

9 MR. RAVICHER: But I responded by email, if I remember
10 correctly, almost instantly, saying that's not proper; if you
11 want to take it to the judge for a ruling, you can.

12 THE COURT: And I would have ruled in his favor,
13 because apparently I said on the record, that's the time to
14 explore his opinions; since this thing is so barebones, go
15 ahead and ask him whatever you want at deposition. But
16 basically you're saying people did ask about his expert
17 opinions. And while you preserved the objections for the
18 record, I can now overrule them; and whatever he said there is
19 part of his opinion, and you know what he's going to say.

20 MR. RAVICHER: I think there's confusion between his
21 report. First of all, he was an internal expert, so he had no
22 duty to provide an expert report. We went over that issue with
23 Best Buy. What he's talking about is our initial disclosures
24 of who our experts were, which was done in April.

25 Now, Mr. Khun did provide a rebuttal report in May to

188ksofc

Conference

1 Best Buy's expert, and so what he's talking about here, where
2 he asked him questions about his report, he's talking about the
3 Best Buy rebuttal report, not these two lines of our expert
4 disclosure. Again --

5 THE COURT: Were any of those questions answered about
6 the rebuttal report?

7 MR. RAVICHER: We were there seven hours, your Honor.

8 THE COURT: I know. Were questions answered about the
9 rebuttal report?

10 MR. RAVICHER: Yes.

11 THE COURT: All right, all those answers are there, on
12 the record and can be used.

13 MR. LEICHTMAN: I understand that. But what he
14 wouldn't answer was questions relating to an infringement by
15 ZyXEL. And so what I still don't have is any opinion from him
16 whatsoever about what manner in which ZyXEL --

17 THE COURT: Maybe he's never given an opinion on that.

18 MR. LEICHTMAN: Well, if he's not given an opinion on
19 it, then I don't need an expert.

20 THE COURT: That's right.

21 MR. LEICHTMAN: If he's going to be permitted to give
22 an opinion on it, then I need a rebuttal expert, and that's --

23 THE COURT: Hold on, hold on, hold on. The case is
24 getting out of control, and I won't allow that. I am not
25 starting expert discovery all over again. If he has given no

188ksofc

Conference

1 opinions about ZyXEL, that's the end of that story. Has he
2 given any opinions about ZyXEL, in writing or anything else?

3 MR. RAVICHER: He's given opinions in a deposition,
4 yes, about ZyXEL and his infringement analysis, yes.

5 THE COURT: In the deposition?

6 MR. RAVICHER: Yes.

7 MR. LEICHTMAN: I don't think he did, but --

8 THE COURT: What do you mean, you think? There's a
9 transcript, folks.

10 MR. LEICHTMAN: There is a transcript.

11 THE COURT: You don't have to think what he said.
12 It's in the transcript.

13 MR. LEICHTMAN: When I asked what his expert opinion
14 about ZyXEL's infringement, Mr. Ravicher instructed him not to
15 answer.

16 THE COURT: His testimony will be limited to that
17 which he did answer and not to which there was objection.

18 Mr. Ravicher, you can't have it both ways. If this
19 guy's going to testify, you couldn't do that, you couldn't say
20 he's not allowed to tell his opinion and then he's allowed at
21 trial. That's sandbagging, and it's wrong. So his opinion is
22 limited to whatever he answered at the deposition.

23 MR. RAVICHER: Your Honor, just to defend myself, this
24 was -- they never served any -- if they served --

25 THE COURT: I can't help it. It's gamesmanship, and

188ksofc

Conference

1 it's wrong, and it's wrong for me to have to listen to it.
2 Everybody knew what was going on there. If he's going to be
3 the trial expert witness, then let him answer the questions and
4 be done with it. Let him give his opinions and expound on
5 them. If you say I instruct him not to answer, then there's no
6 opinion on the record, not in writing and not at deposition,
7 and it's over.

8 So whatever he said about ZyXEL comes in, and not
9 more. And you do not get a rebuttal expert. You've known
10 about this problem for a long time. Expert discovery is over.
11 It's too late for you to put in any expert witnesses. You were
12 busy settling. You could have worked on two tracks at once;
13 I'm not reopening expert discovery. The record is what it is.

14 MR. LEICHTMAN: Let me make an alternative proposal,
15 your Honor.

16 In the context of Best Buy, Best Buy had put an expert
17 report in. ZyXEL would be satisfied as an alternative to use
18 the same expert and to be limited to what that expert said in
19 his report at trial. There is no notice --

20 THE COURT: Did you ever depose that fellow?

21 MR. RAVICHER: We served deposition notices on Best
22 Buy's counsel, which was his firm.

23 THE COURT: Yes.

24 MR. RAVICHER: They said he had some health issues and
25 so they wanted to postpone the scheduling of the deposition.

188ksofc

Conference

1 Then we settled, so we never had --

2 THE COURT: I would accept that alternative if he's
3 deposed, if Mr. Ravicher has an opportunity to depose him, and
4 that ends the problem.

5 Now, let's talk about another discovery problem.
6 Plaintiffs say that ZyXEL is precluded from offering any
7 witnesses with regard to profits. On June 10th, plaintiffs
8 provided ZyXEL with a calculation of ZyXEL's gross revenues
9 attributable to the alleged infringement and the documents that
10 supported the calculation. On July 9th, plaintiffs asked ZyXEL
11 whether ZyXEL intended to use any fact witnesses to address the
12 issue of actual damages so that if there was such a person,
13 they could be deposed. Plaintiffs say that on July 10th, ZyXEL
14 responded that it did not plan on offering any further
15 discovery on this topic, and it has not yet decided who it will
16 call to testify at trial on that issue.

17 So plaintiffs now say we move to preclude the
18 production of any such evidence and the only evidence in the
19 record is going to be our calculation, and that sounds right
20 again, Mr. Leichtman. We asked you on July 9th, you responded
21 on July 10th, and that's the end of it.

22 MR. LEICHTMAN: Well, I don't know --

23 THE COURT: Didn't plan on offering any further
24 discovery on this topic, whatever that means.

25 MR. LEICHTMAN: Well, because here's what happened in

188ksofc

Conference

1 this instance, your Honor: Plaintiff served a 30(b)(6) notice
2 on our client. Our client provided a 30(b)(6) witness to
3 testify to both gross revenue and deductible expenses. We
4 provided that witness. They already took the testimony of that
5 witness --

6 THE COURT: Well, that comes in.

7 MR. LEICHTMAN: OK, so all I was saying in my email
8 was, I haven't decided who I'm going to call to testify at
9 trial but I've already given the discovery that's required to
10 prove our deductible expenses. It's in the very same
11 documents.

12 THE COURT: You're saying whether it's Mr. Jones or
13 Mr. Smith, the testimony is on the record?

14 MR. LEICHTMAN: Correct.

15 THE COURT: It will not change?

16 MR. LEICHTMAN: Correct.

17 THE COURT: It's just the person speaking; it might be
18 somebody else.

19 MR. LEICHTMAN: Correct. Now, he may ask different
20 questions, I don't know what questions he's --

21 THE COURT: "He," Mr. Ravicher?

22 MR. LEICHTMAN: Right, on cross-examination.

23 THE COURT: That's up to him. But that person is
24 limited to the testimony given at the 30(b)(6) deposition. He
25 cannot come up with all new figures, all new documents, no way.

188ksofc

Conference

1 He's limited to what was said at the 30(b)(6) deposition.

2 MR. LEICHTMAN: Correct. That's all I was saying. I
3 wasn't saying we're not going to prove deductible expenses at
4 trial. All I was saying is, you already have the discovery
5 you're asking for.

6 THE COURT: And you're limited to it, you can't change
7 that testimony. You can change the person who speaks, the
8 words, but the testimony is set in stone now.

9 MR. LEICHTMAN: I understand.

10 THE COURT: All right, Mr. Ravicher.

11 MR. RAVICHER: Well, the 30(b)(6) witness is their
12 chief technology officer. He does nothing with financial
13 accounting --

14 THE COURT: But if he gave you figures, those figures
15 come in, that's it, OK, done.

16 Now, another preclusion: Plaintiffs want to preclude
17 introduction of evidence pertaining to ZyXEL's use of fact
18 witnesses to address the issue of actual damages. I guess --

19 MR. LEICHTMAN: I think that's the same issue, your
20 Honor.

21 THE COURT: I was going to say, it sounds the same,
22 but for the remedy down the road, they ask that the Court
23 eventually order ZyXEL to deliver all articles containing
24 BusyBox to plaintiffs. That's down the road. We don't have to
25 reach the remedy now, do we?

188ksofc

Conference

1 MR. RAVICHER: No, your Honor.

2 THE COURT: OK, so that's done.

3 So there's two issues left really, the substantive
4 ones. The first is, the extent of plaintiff's copyright.

5 What has Andersen really copyrighted? And I gather
6 it's limited, it has only a copyright to a portion of version
7 .60.3 that did not exist at the time of .60.1, and whatever new
8 portions Andersen himself authored, and that's the extent of
9 his copyright. And plaintiffs apparently think that the
10 registration covers the new code he wrote as well as the
11 version as a whole, since he was the project manager and is,
12 therefore, responsible for the collection and assembly of the
13 whole. ZyXEL says that plaintiff's unregistered copyright, so
14 to speak, can't be asserted, and it cites to a Southern
15 District case from 2009, SimplexGrinnell, which held that
16 plaintiffs cannot assert any remedy for claims of infringement
17 in an unregistered work because registration is a precondition
18 to filing suit, and ZyXEL says that Andersen or plaintiffs
19 haven't met this precondition and so they can't recover for any
20 of the unregistered versions.

21 Then plaintiffs say, well, the Supreme Court, in Reed
22 Elsevier, 2010, in some way overruled SimplexGrinnell because
23 that case said it doesn't go -- it's not a jurisdictional bar
24 but it's still a precondition to suit.

25 So I'm really confused by the argument, Mr. Ravicher.

188ksofc

Conference

1 Maybe the Court still has jurisdiction over the action, but the
2 registration is still a precondition to suit, and I don't know
3 that Reed Elsevier changed that at all. Did it?

4 MR. RAVICHER: In Reed Elsevier, you had some
5 copyrights that were registered, some that were not, exactly
6 the same situation we have here.

7 THE COURT: Right.

8 MR. RAVICHER: Mr. Andersen has a registered copyright
9 in 60.3 and has registered copyrights in later versions as
10 well. So in Reed Elsevier, both the registered and unregistered
11 copyrights were asserted and remedied by the Court, and we seek
12 the same thing here, both the registered and unregistered
13 copyrights being asserted and remedied.

14 THE COURT: What do you say the outcome was in Reed
15 Elsevier, they heard the unregistered copyright portion of the
16 infringement case?

17 MR. RAVICHER: So the case in Reed Elsevier was
18 basically a class action, and they were trying to settle claims
19 by both registered copyrightholders and unregistered.

20 THE COURT: Right.

21 MR. RAVICHER: And the Court was asked the question,
22 can we resolve claims of unregistered copyrights since you
23 can't file a suit and the Supreme Court said yes, you can.

24 THE COURT: Well, you can resolve suits, I think is
25 somewhat different than litigating suits.

188ksofc

Conference

1 MR. RAVICHER: Well, I'll --

2 THE COURT: In other words, there's -- can we resolve
3 them even though we can't actually bring them as a claim? The
4 Court said, essentially, go ahead and resolve them, which
5 sounds logical to me. But here it's not being resolved now.
6 Now we're talking about full-blown litigation, a trial, an
7 outcome, a remedy and enforcement, all of that stuff, when for
8 the unregistered copyright portion of this, there's a
9 precondition of being able to file that suit, which has not
10 been met.

11 MR. RAVICHER: Well, I would argue that what Reed
12 Elsevier means is that a precondition for filing suit is either
13 registration of the copyright --

14 THE COURT: Right.

15 MR. RAVICHER: -- or bringing the unregistered
16 copyright in conjunction with a copyright --

17 THE COURT: You think that's what it means,
18 Mr. Leichtman?

19 MR. LEICHTMAN: No, absolutely not.

20 THE COURT: I doubt it. But if you think this is an
21 issue to be briefed, that's it, you can go ahead and brief it,
22 but I can tell you where I think I'm going to go with it.

23 All right, then we get what products are involved
24 here. ZyXEL says that the summary judgment proceeding should
25 be limited to only one product, the P663H router, because it's

188ksofc

Conference

1 the only product mentioned in the complaint. And apparently
2 Khun in his deposition couldn't even describe, with respect to
3 even that product, what version of BusyBox or what features of
4 BusyBox that router actually used.

5 But related to that, ZyXEL says that plaintiff's
6 knowledge of any other ZyXEL products that may contain BusyBox
7 were revealed to the plaintiffs during settlement discussions
8 and, therefore, can't be used. And plaintiffs said, in
9 response, that the complaint uses that router only as an
10 example but not as a limitation, and that they were aware of
11 other products apart from the settlement effort.

12 I would like the plaintiff to try to be more specific
13 if we can't do this today. Do you have evidence of what
14 specific portions or versions of .60.3 that Andersen does have
15 a registered copyright for and what products are the totality
16 of the list of products that you want to use and how you
17 learned about them outside of settlement? Because I think you
18 are barred if the only way you learned about them is through
19 settlement discussions, where there's a presumption that you're
20 not going to be able to use it for any purpose.

21 MR. RAVICHER: So with respect to what Mr. Andersen
22 contributed -- putting aside the editorial anthology
23 compilation copyright he has, because he put together all these
24 pieces, but just looking at specific code that he added, either
25 by himself or as a co-author with other persons, that is

188ksofc

Conference

1 detailed in Mr. Kuhn's rebuttal expert report to Best Buy, and
2 Mr. Leichtman asked Mr. Khun dozens of questions exactly about
3 this. The analysis is not capable of precise -- like comparing
4 two books to see where the same words are, because software is
5 written in one language and then gets compiled in just binary
6 digits and completely differently, so you can't eyeball it to
7 see the identicalness.

8 So what Mr. Khun described in his report is he
9 compares the previous version of BusyBox to .60.3, he finds all
10 the differences. Then in those differences, he looks in the
11 author field to find who was the attributed author and where
12 there was -- I think you may recall we had a phone call about
13 this during the Best Buy preliminary injunction. And there are
14 certain fields where Mr. Andersen attributes the authorship to
15 himself and some where he attributes it to other people certain
16 instances where he left it blank, which was his way of saying
17 I'm not going to waste my time putting my own name in when I
18 wrote it. So Mr. Khun goes into detail about this. So that's
19 Mr. Anderson's copyrights that he wrote in the version.

20 With respect to the versions in the products, we do
21 know -- and we have a detailed spreadsheet with each product
22 that we believe has BusyBox in it -- which version is in there.

23 THE COURT: So you know which products he wants to
24 talk about, you just think it should be limited to one in the
25 complaint?

188ksofc

Conference

1 MR. LEICHTMAN: I have not seen that spreadsheet; it
2 hasn't been produced.

3 THE COURT: Are you planning to show your adversary
4 the spreadsheet so he knows which products you think were in
5 dispute?

6 MR. LEICHTMAN: I think it's too late for that, your
7 Honor.

8 THE COURT: No, I don't think it's too late. I'm not
9 saying I'm going to let him. It's not too late to show you.
10 We'll all see what the list is. Weren't you planning to show
11 it to him?

12 MR. RAVICHER: We can provide this information to him.
13 I was waiting for us to get this expert discovery issue
14 resolved.

15 THE COURT: We need to get it resolved.

16 MR. RAVICHER: I can tell you that we know that the
17 one product that's mentioned in the complaint, which is just an
18 example of the number of products that they had, has a version,
19 which if I recall correctly -- I don't have it right in front
20 of me -- is the same exact version that was in the Best Buy
21 products that we alleged infringed. So the analysis of
22 Mr. Kuhn's -- what's left over from .60.3 into version 1.0 --

23 THE COURT: No, I understand that in terms of which
24 portions of the code might be registered or not, might be new
25 or not, compared to an older version, but I think he's entitled

188ksofc

Conference

1 to this spreadsheet that tells him what products you think are
2 infringing and, therefore, at issue. So will you turn over
3 that spreadsheet?

4 MR. RAVICHER: Yes, your Honor.

5 THE COURT: So that's coming. And then we can revisit
6 whether it's fair to do that, but I don't think the fact that
7 they're not listed one by one in the complaint is a problem
8 because I think he's saying any product that uses the
9 infringing software we believe we have a right to pursue.

10 MR. LEICHTMAN: Just so I understand, because then I
11 think what flows from that is a whole host of additional
12 issues, because, one, we have no opinions on those versions
13 from Mr. Khun and, therefore, we have had no opportunity to put
14 in any rebuttal expert evidence on the infringement issues.

15 THE COURT: I don't know that -- wait a minute.
16 You're telling me two different things. You're talking about
17 versions of the software and I'm talking about additional
18 products to the router.

19 MR. LEICHTMAN: That's exactly what I'm talking about
20 as well because each product uses a different version.

21 THE COURT: Every product is a different version?
22 There can't be that many different versions. If you have 50
23 products, you have 50 versions of the code.

24 MR. LEICHTMAN: Your Honor, there are at least 15
25 versions that just start with 1.00 and then they go up from

188ksofc

Conference

1 there, and I think they're already up to 1.18 now, and within
2 each of those gradations -- so if you have 1.2, you might also
3 have 1.2.1, 1.2.2. I don't know how many version there are,
4 but there are many, so there are many different versions of the
5 software that have been used.

6 THE COURT: When you produce the spreadsheet with the
7 many products, when you say here's a spreadsheet of 50
8 products, will it also disclose whether those 50 products each
9 have a different code or whether the following ten have the
10 same code, the following five have the same code, we can see
11 how many different codes we're talking about?

12 MR. RAVICHER: We can produce a spreadsheet with every
13 product identified and which version of BusyBox we believe is
14 in it, and you can sort it by version --

15 THE COURT: How many different versions are there
16 going to be in that spreadsheet?

17 MR. RAVICHER: I would think Mr. Leichtman's about
18 right -- somewhere around 15.

19 THE COURT: How many different products are going to
20 be in that list?

21 MR. RAVICHER: About 50.

22 THE COURT: I think there too --

23 MR. LEICHTMAN: Your Honor, again, there's been no
24 request for discovery about sales, profits, about any of those
25 products. There's been no request for a discovery about

188ksofc

Conference

1 infringement on any of those products.

2 THE COURT: How are you going to prove any damages if
3 you didn't make any request for discovery with regard to those
4 products?

5 MR. RAVICHER: Your Honor, we did make requests for
6 discovery on all products which include BusyBox. They only
7 gave us what they gave us.

8 THE COURT: And what were you complaining about that?

9 MR. RAVICHER: I didn't complain about that, so we'll
10 still seek a remedy of an injunction for any of the products
11 that we didn't get --

12 THE COURT: But not damages?

13 MR. RAVICHER: Well, statutory damages, but that's by
14 work, not by product.

15 THE COURT: And you wouldn't need to know profits and
16 expenses, deductions and things like that?

17 MR. RAVICHER: Right.

18 THE COURT: That's helpful.

19 MR. LEICHTMAN: It is, except they still have no
20 infringement evidence with respect to --

21 THE COURT: Then they'll fail. If they don't have
22 infringement evidence, they'll fail.

23 MR. LEICHTMAN: Because none of the versions use --
24 none of the products use version .60.3.

25 THE COURT: But they may use portions of the

188ksofc

Conference

1 registered copyright in the codes; is that your point? I'm
2 asking Mr. Ravicher. Some portion of those codes may contain
3 the information that Andersen was able to register; is that
4 right or wrong?

5 MR. RAVICHER: That's true. And I also don't know how
6 he can say none of the 50 products use 60.3 if he doesn't know
7 what versions are in his products.

8 MR. LEICHTMAN: I know it's not 60.3.

9 THE COURT: Why don't we reconvene after we get the
10 spreadsheet?

11 MR. LEICHTMAN: That's fine, your Honor.

12 THE COURT: OK.

13 MR. RAVICHER: I'd like to --

14 THE COURT: We need a schedule for this brief. We're
15 very close. But when are you going to turn over this
16 spreadsheet?

17 MR. RAVICHER: I can turn it over by tomorrow.

18 THE COURT: So should we reconvene toward the end of
19 this week, Thursday or Friday?

20 MR. RAVICHER: I actually am traveling. I can do
21 Monday or Tuesday.

22 THE COURT: OK. I'm not here Tuesday so Monday. Let
23 me look. I want to get it done.

24 Well, we can try 5:30. You may end up waiting. I'll
25 do my best. So 5:30 on Monday the 15th, and then we'll finish

188ksofc

Conference

1 up and do a briefing schedule.

2 MR. RAVICHER: There's just one issue you mentioned
3 there, your Honor, about how we became aware of all these
4 products.

5 THE COURT: Yes, I did ask that, when you raised the
6 point about settlement.

7 MR. RAVICHER: In these products, the firmwares for
8 those products are all available on ZyXEL's website. So any
9 member of the public can go there and look at the firmware and
10 it's easy to inspect and determine if BusyBox is in there.
11 They also have an admission on their website saying: Dear
12 customer, our products, including the following model numbers,
13 have BusyBox in them. And so there's plenty of public
14 information about these products that include BusyBox in them.

15 THE COURT: That would seem to make an end to the
16 argument about the settlement talks, do you think,
17 Mr. Leichtman?

18 MR. LEICHTMAN: Your Honor, I don't think that's quite
19 accurate. I think what's on the website shows updates in the
20 software, to the extent that members of the public can make
21 updates to the products. And if the BusyBox hasn't been
22 updated, there's no BusyBox software code on ZyXEL's website.

23 THE COURT: No, no, he didn't say the code was. He
24 said it's disclosed, all the products that are using the
25 BusyBox software. Isn't that what you said?

188ksofc

Conference

1 MR. RAVICHER: Two things: First of all, there's --
2 you can go and download new firmware for your device. And it's
3 not componentized from where it's a complete new firmware that
4 you just flash on your device to replace everything else. They
5 have whole host of files and folders you can download that for
6 their products, so that's (a).

7 (B) is the statement on the website says: Dear
8 customer, some of our products have included software written
9 by third parties, including BusyBox. These are the product
10 model numbers that include --

11 THE COURT: Well, I think maybe what you ought to
12 do -- can you do can a snapshot and bring in what you're saying
13 supports your ability to have found this out other than through
14 settlement?

15 MR. RAVICHER: Yes.

16 THE COURT: Can you go to that website and show me
17 what you're talking about?

18 MR. RAVICHER: Assuming they have not taken it down
19 since our letter, yes.

20 THE COURT: Assuming they have not taken it down since
21 your letter. Best I can do. As you say, it shows one thing
22 and he denies it. That's again silly. The record is what it
23 is, just like a transcript.

24 Whatever is up there, is up there, unless you took it
25 down. So why don't you try to do that this afternoon so I can

188ksofc

Conference

1 see it on Monday.

2 MR. RAVICHER: Yes, your Honor.

3 THE COURT: All right.

4 MR. LEICHTMAN: Will I be allowed to see that in
5 advance as well, your Honor?

6 THE COURT: Well, it's there if it's there.

7 MR. LEICHTMAN: Because I don't know what he's talking
8 about.

9 THE COURT: OK.

10 MR. LEICHTMAN: He says it can be found. I haven't
11 been able to find it.

12 THE COURT: OK.

13 MR. LEICHTMAN: Your Honor, when is he going to turn
14 over the list?

15 THE COURT: He said he would turn over the spreadsheet
16 tomorrow, close of business tomorrow. That's the 9th. And the
17 snapshots, I would think the same thing; you go back, you go on
18 the site, either they're there or they're not.

19 MR. RAVICHER: Our letter has the URLs. All he has to
20 do is type it into his web browser.

21 THE COURT: Why don't you do it. Then there won't be
22 any confusion that you're talking about the same spot so to
23 speak.

24 MR. RAVICHER: Yes, your Honor.

25 THE COURT: There's probably a lot of things on there.

188ksofc

Conference

1 You know what you're saying. Otherwise I get this: It's up
2 there; no, it's not -- two people saying the opposite about
3 what's right there. OK, so by the close of business tomorrow
4 you can get both of these things to him?

5 MR. RAVICHER: Yes, your Honor.

6 THE COURT: Then we'll be ready to talk again on
7 Monday. OK, thank you.

8 MR. RAVICHER: Thank you.

9 MS. WONG: Your Honor?

10 THE COURT: Yes, Ms. Wong?

11 MS. WONG: Yes, Phoebe Micro is hoping to settle --

12 THE COURT: Wait, wait. Phoebe Micro is helping to
13 settle, you said?

14 MS. WONG: Yes.

15 -- with plaintiffs shortly, and we're trying to reduce
16 the costs for my client. Can we be excused from the reconvened
17 hearing?

18 THE COURT: Yes. That's your choice. If you wish to
19 be excused from the reconvened hearing next Monday, you can.
20 That's up to you. I have no problem.

21 MS. WONG: Thank you, your Honor.

22 THE COURT: OK, thank you. Bye-bye.

23 MS. WONG: Bye-bye.

24 THE COURT: OK. I guess we're done. Thank you.

25 * * *