

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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MASSACHUSETTS BAY)	
TRANSPORTATION AUTHORITY,)	
)	
Plaintiff,)	
)	Civil Action
v.)	No. 08-11364-GAO
)	
ZACK ANDERSON, RJ RYAN,)	
ALESSANDRO CHIESA, MASSACHUSETTS)	
INSTITUTE OF TECHNOLOGY,)	
)	
Defendants.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

MOTION HEARING

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, August 14, 2008
11 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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7 On Behalf of the Defendants Zack Anderson, RJ Ryan
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On Behalf of the Defendant MIT

11 Also in Attendance: Scott Darling III, Esq.
12 MBTA Legal Department
13 Jaren Wilcoxson, Esq.
14 Office of the General Counsel of MIT

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P R O C E E D I N G S

1
2 THE CLERK: All rise for the United States
3 District Court for the District of Massachusetts. Court
4 is now in session.

5 You may be seated.

6 Calling Civil Action 08-11364, MBTA versus Zack
7 Anderson, et al.

8 Counsel, please state your names for the record.

9 MR. MAHONY: Ieuan Mahony from Holland & Knight
10 for the plaintiffs, Massachusetts Bay Transportation
11 Authority.

12 MR. DARLING: Scott Darling, in-house counsel
13 for MBTA.

14 MR. BODOIN: Max Bodoin for the MBTA.

15 MS. GRANICK: Good morning, your Honor. I'm
16 Jennifer Granick from the Electronic Frontier Foundation
17 for defendants Anderson, Ryan and Chiesa.

18 MR. SWOPE: Good morning, your Honor. Jeffrey
19 Swope, Edwards Angell Palmer & Dodge for MIT. With me
20 at counsel table is counsel Jaren Wilcoxson from the MIT
21 general counsel's office.

22 THE COURT: All right. Good morning, everyone.
23 I understand we have parties on the line as
24 well -- on the telephone line -- the defendant --

25 MS. GRANICK: That's correct, your Honor.

1 THE COURT: The student defendants.

2 MS. GRANICK: Yes. And I have my lawyers --
3 colleagues of mine -- from the Electronic Frontier
4 Foundation, and I believe that it's defendants Ryan and
5 Chiesa who are on the line. Mr. Anderson is out of the
6 country and is unable to join in the hearing this
7 morning.

8 THE COURT: Okay. Let me just make a couple of
9 preliminary comments before we get to any of the issues
10 between the parties.

11 First of all, because there is some -- I think
12 the lawyers know all of this, but for the benefit of the
13 people in the audience who may or may not, let me just
14 set the stage why we're here and what the proceedings
15 are.

16 We have a standard procedure in this court for
17 the handling of emergency or short-notice matters. All
18 our cases, both civil and criminal, are assigned to a
19 particular district judge by random assignment,
20 something we jealously protect. But we have a procedure
21 if a matter comes in on an emergency basis after hours,
22 or when the assigned judge is not available, that it can
23 be referred to an emergency-duty judge. And that's what
24 happened in this case. The case came in late Friday,
25 and although it was assigned to me I was not available

1 immediately, and Judge Woodlock, our emergency-duty
2 judge, happened to be present. And so that's why he
3 handled the first parts of the proceedings. But the
4 case had been assigned to me and all further proceedings
5 will be here in front of me. And that's entirely
6 regular under our processes.

7 But I just want to acknowledge Judge Woodlock's
8 prompt and attentive response to the matters, including
9 the extraordinary hearing on Saturday at which the
10 matters were resolved. And I told him privately that I
11 owe him one for having done that.

12 Let me just say also from my review of the
13 papers that I appreciate the professionalism displayed
14 by counsel in the case for all the parties. It is
15 apparent that they are, in their respective roles,
16 vigorously advocating for their clients' interests, but
17 I think so far, anyway, from what I see, adhering to the
18 high standards that we expect of counsel in these cases.

19 And just a brief word about temporary
20 restraining orders and how they fit into the process of
21 a case. Our civil rules provide in emergency, or
22 exigent, circumstances for an application for and
23 perhaps even a grant of a motion for a temporary
24 restraining order. Under the rules that can even be
25 made -- to use the language that lawyers use -- ex

1 parte; that is, by one side without the other, although
2 it's usually -- an effort is made to involve both sides,
3 as happened here.

4 Temporary restraining orders usually reflect, at
5 least, the movant's view that there are emergent
6 circumstances which require shortening of
7 otherwise-applicable time periods and then expediting
8 address to the merits of the motion which can involve,
9 obviously, an assessment of the merits of the underlying
10 cause of action. Because of their rather extraordinary
11 nature, temporary restraining orders are limited in
12 duration to ten days, after which they expire of their
13 own force, unless extended -- they can be extended for
14 an additional period -- or during any of that time the
15 party -- if a restraining order is issued, the party may
16 move to extend that as a preliminary injunction, which
17 has more formal procedures attached to it sometimes, and
18 usually follows -- well, follows, perhaps, a
19 more-detailed presentation of the parties' views than is
20 practical on a short-notice temporary restraining order.

21 So in the history of this case, obviously, Judge
22 Woodlock had the hearing, granted the temporary
23 restraining order that is in the record that we're here
24 to consider. The rules also provide that if a temporary
25 restraining order is issued -- well, actually, I'm not

1 sure it applies here, ex parte -- a party may move to
2 dissolve it on short notice.

3 Here what we have is a motion by the plaintiff
4 to amend the terms of the order issued by Judge Woodlock
5 and a motion for reconsideration filed by the
6 defendants -- at least the student defendants -- which
7 may be equivalent to a motion to dissolve. I think the
8 objective of the reconsideration would be to withdraw
9 the restraining order.

10 There has been a late flurry of papers filed.
11 I'm not sure when -- there was a motion for a scheduling
12 conference and for some interim discovery that was
13 filed, I guess, late yesterday. I saw it the first
14 thing early this morning. And then there are also some
15 additional matters and formal opposition to the motion
16 to reconsider filed by the plaintiff, and accompanying
17 paper, and then a sealed document, Number 32 on the
18 docket.

19 MS. GRANICK: Would you like me to address that
20 briefly, your Honor?

21 THE COURT: Let me get to one other matter first
22 before we do that. I set this hearing in response to
23 the plaintiff's motion on Monday, I guess, to amend the
24 order. Shortly after that the hearing time was set. I
25 think that we had the motion for reconsideration and so

1 on. There's no -- the matter of when, within the
2 ten-day period, a hearing on such matters to amend or
3 perhaps extend or to reconsider or dissolve is something
4 that is really a scheduling matter and there's no
5 necessary particular time for it.

6 So let me raise a thought I had when I saw the
7 motion for discovery this morning, and that is whether,
8 depending on the defendants' views on this, it might be
9 appropriate to postpone the merits question in either
10 direction on the existence of the TRO to permit some
11 limited discovery such as that is moved for in the
12 plaintiff's motion. So I guess I'm looking to the
13 defendants for a reaction to that.

14 Let me just say that what appealed to me about
15 that possibility was it would perhaps enable me to make
16 a sounder decision if I knew a little bit more about the
17 facts of the case that might be developed during
18 discovery or not. Expedition is important on matters
19 such as this, but it is not the only value. And the
20 soundness and rationality and evidentiary foundation for
21 any ruling in either direction are also very important
22 considerations that I think I have an obligation to take
23 account of.

24 So simply as a scheduling matter, without
25 addressing the pros and cons of the underlying issues at

1 all, I wonder whether prudence might not dictate a
2 little further information development.

3 MS. GRANICK: Your Honor, the Court has before
4 it today all the information that it needs to decide the
5 validity of the temporary restraining order. The issue
6 in the temporary restraining order is different from the
7 issues underlying the merits of the case. The issue is
8 whether the restraining order is required in order to
9 prevent harm to the plaintiff.

10 And what this case is about is an
11 unconstitutional gag order, prior restraint, on my
12 clients' ability to speak about a matter of great public
13 interest. Every day that goes by where this gag order
14 is in place is an irreparable harm to my clients and to
15 the First Amendment, yet the information -- on the other
16 side, the information that this Court has is enough to
17 know whether what my clients want to talk about will do
18 irreparable harm to the MBTA.

19 I filed this morning with the Court, and
20 provided to opposing counsel yesterday, a document which
21 is a confidential report which encompasses all the
22 findings -- all the reported findings, all the research
23 that my clients, the students, have done. And I
24 provided that report to counsel and to the Court because
25 it seemed to me from discussions with -- from what

1 counsel was saying in the press, and from discussions
2 with him and from what Judge Woodlock was concerned
3 about on Saturday, that there was a lot of uncertainty
4 and worry about what my clients might actually say, on
5 the one hand, and some dismissiveness about whether it
6 was a prank or whether it was serious on the other.

7 And in order to make both parties -- both the
8 MBTA and the Court more comfortable with what exactly
9 we're talking about here, I have provided the Court with
10 the entire universe of information that my clients would
11 like to talk about.

12 Now, it is much more than my clients ever
13 intended to talk about. They always intended to
14 withhold the details of their research when they were
15 going to give their talk at the conference and ongoing
16 into the future. But this document enables the Court
17 and counsel to know that there's not going to be another
18 shoe that's going to drop sometime later on. This is
19 what we're talking about, just the information that's in
20 this report.

21 Now, I filed it under seal also --

22 THE COURT: Yeah. I was just going to clarify.
23 You're talking about the sealed document that is
24 docketed as Number 32?

25 MS. GRANICK: Yes, your Honor. Docket No. 32.

1 And I filed it under seal because, as I said,
2 our clients never intended to reveal all of these
3 details; that was never their intention. It was a
4 document -- it is a document that we prepared for
5 settlement purposes. We offered to provide this
6 document since the MBTA's concern was what are these
7 students going to say.

8 But instead of engaging in this kind of
9 back-and-forth interchanging over settlement, we just
10 decided that it was important that all of the parties
11 and the Court be on the same page about what we're
12 talking about. And that is the core of the TRO
13 question. There needs to be no further discovery on
14 that matter; that's all there is that the Court needs to
15 be concerned about going forward.

16 And our contention, your Honor, is that looking
17 at that report -- first of all, everything in that
18 report is First-Amendment protected speech; and second
19 of all, discussing any information in that report is not
20 and cannot be a violation of the Computer Fraud and
21 Abuse Act. And I think the Court is eminently able to
22 make that determination today given the irreparable harm
23 and the prior restraint that's imposed upon my clients
24 and the consideration that the First Amendment -- of the
25 First Amendment in this area where we're talking about a

1 gag order.

2 THE COURT: Okay.

3 Mr. -- was that --

4 MS. GRANICK: Yes. I have some comments on the
5 proprietary of discovery at this point in time.

6 THE COURT: Well, yeah. Go ahead. Why don't
7 you address that as well.

8 MS. GRANICK: Okay. Thank you, your Honor.

9 First of all, the complaint has not been served
10 on my clients yet, and this lawsuit is less than a week
11 old. There has not been any meet-and-confer and there
12 have not been any initial disclosures. My understanding
13 from looking at my e-mail this morning -- I was on the
14 plane yesterday coming out here from California. It was
15 my understanding from looking at my e-mail this morning
16 that there were some disclosures made after the initial
17 discovery was propounded. That's not appropriate under
18 the rules.

19 And, you know, there is a reason why we have
20 meet-and-confer rules and timeframes for this and
21 initial disclosures, and it's in order to allow the
22 parties, you know, some time from the time that the
23 lawsuit is filed to, you know, do service, to look at
24 all the facts and to deal with everything.

25 So these discovery requests are too soon and

1 inappropriate at this stage of the case.

2 THE COURT: Okay. Mr. Swope?

3 MR. SWOPE: Thank you, your Honor.

4 The only discovery sought from MIT is the
5 deposition of Professor Rivest. The difficulty I have
6 is Professor Rivest has a prescheduled airplane flight
7 out to the West Coast tomorrow, and he won't be back in
8 Cambridge for -- I think there's maybe one day of the
9 week after next, and then he's out in Canada and won't
10 be back until after Labor Day.

11 So there would be no way to have his deposition
12 tomorrow, and we would have to wait a week to see if he
13 could fit it in at some point the following week.

14 MS. GRANICK: Your Honor, on a scheduling matter
15 also which I forgot to mention, it is also true that the
16 students are out for summer session, so none of them are
17 here in Boston now. One of them's out of the country;
18 another one is scheduled to leave the country; one's on
19 the West Coast. I mean, they're just not here now and
20 they will not be back in Boston until September.

21 THE COURT: Mr. Mahony?

22 MR. MAHONY: Hi, your Honor. If I may, I'll
23 address counsel for the individual defendants' arguments
24 first.

25 Your Honor, my sister said that the Court has

1 before it all that's needed. Your Honor -- and my
2 sister also made mention of what my clients want to talk
3 about. And my sister's papers are full of statements
4 about "my clients' good faith" and statements from the
5 clients.

6 Your Honor, there is no declaration, affidavit,
7 any statement by the individual defendants before the
8 Court at all. All of those statements that my sister
9 made about what her clients want, what they intend to do
10 are simply statements; they're not evidence. And
11 there's no evidence before the Court. So that's one
12 point.

13 The second point, your Honor: My sister
14 mentions a gag order. Your Honor, there's a conflict in
15 the position that the EFF is taking. First, I hear from
16 my sister that the individual defendants never intended,
17 and don't intend, to reveal the key information that
18 they have which we believe, at least in partial review,
19 because it's a complex document, is in that sealed
20 document. So there's a statement that the individual
21 defendants don't intend to reveal the key information,
22 and that means the other information they do intend to
23 reveal, but that other information is public domain, of
24 low sensitivity, that is not a concern.

25 Your Honor, that's precisely what the TRO says:

1 Do not reveal -- and our motion on Monday was intended
2 to make that crystal clear. In contrast to that, the
3 findings and rulings of Judge Woodlock, we understood
4 the TRO to say: You can talk about things in the public
5 domain, just don't reveal the key information, the key
6 details. The motion that the Court has before it is
7 intended to emphasize that again.

8 So, your Honor, there is no gag order. There's
9 no harm to the particular defendants here from the TRO
10 because they've already said, "We don't want to talk --
11 we don't intend to talk -- about the key information."
12 That's the only information we care about.

13 Your Honor, in terms of the document under
14 seal -- I'm sure we'll get to this in more detail --
15 it's a complex document. I received it last night. We
16 do think, your Honor, that the provision of that
17 information is a good step forward in this case. Our
18 papers are perhaps too detailed about the efforts that
19 we've gone through to try and pull the information from
20 the defendants.

21 There is still a good deal of information out
22 there, your Honor; for example, there's a source code
23 that's referenced in the presentation that we don't
24 have; there's the A paper that Professor Rivest -- that
25 they did for Professor Rivest, that we've been refused;

1 therefore, your Honor, there is a range of discovery, a
2 range of information, that we don't have that the Court
3 doesn't have the benefit of.

4 And when I say "range," your Honor, in our
5 discovery requests we've tried to be quite targeted.
6 The easiest way to look at that targeted intent, and
7 hopefully accomplishment, is the length of the
8 depositions. We stated for Mr. Anderson, who's the lead
9 defendant, the lead individual defendant, a four-hour
10 deposition, and for Professor Rivist a two-hour
11 deposition. So when Mr. Swope says he'll be unavailable
12 but maybe a week from now we could fit it in, that is
13 literally correct, your Honor, because we're only asking
14 for two hours. And we're happy to go to his office or
15 wherever it's convenient for him to be scheduled.

16 Now, your Honor, let me turn briefly to the
17 technical arguments that my sister makes about service.
18 Your Honor, back last weekend all of the individual
19 defendants were out in Las Vegas. We had retained local
20 counsel in Las Vegas who had a private investigator
21 ready to serve the defendants with the TRO. My sister,
22 on the record -- and Judge Woodlock confirmed with her
23 and with the individual defendants that they had notice,
24 that they understood that they were subject to the TRO.
25 I spoke with my sister on the phone, and I confirmed it

1 with an e-mail, that service was not required on her
2 clients. So if that's changed, that's something that
3 needs to be addressed, but I think it's wholly
4 inappropriate.

5 Second, in terms of meet-and-confer? Your
6 Honor, again, I view -- we view that document under seal
7 as a good step forward in terms of getting the parties
8 to talk. We have a huge interest in understanding what
9 the exposure is, what's going on. But, your Honor,
10 there is -- you know, for example, that A paper, there
11 are some things where talking just isn't working.

12 A meet-and-confer is a limited utility at this
13 point. A structure from the Court would be very
14 helpful. And the point that an evidentiary -- better
15 evidentiary record assists everyone, we strongly agree
16 with.

17 Thank you, your Honor.

18 THE COURT: Well, let me just press a little
19 further on that point. It may be, given the
20 practicalities, that oral depositions are not easily
21 accomplished on the time frame that I'm having in mind.
22 What I was contemplating is not something that would be
23 on the other side of a week from now, as Mr. Swope
24 refers to, but the oral depositions are only part of
25 what's requested. There is also a document request, and

1 there are at least a couple of things on that that would
2 seem to be available to be produced that might be
3 illuminating. And, of course, chief among those would
4 be the paper. I think just to flush it out,
5 maybe some -- and I'm looking at -- there's an exhibit
6 to the request that is a proposed service of document
7 request.

8 The other thing that occurs to me that might be
9 readily available and illuminating, potentially, would
10 be communications between the defendants, the
11 undergrads, and DefCon about the content of the
12 presentation.

13 So, now, let me just say with respect to the
14 argument that the Court's scheduling of events on the
15 hearing related to the TRO requires resolution of
16 whatever issues there are with respect to the First
17 Amendment I think is -- under the circumstances, anyway,
18 where there is no event on the horizon, as there was on
19 Friday and Saturday, is not particularly -- that is not
20 particularly germane to the scheduling question. In
21 other words, my suggestion is not to resolve any of the
22 substantive issues until -- strike the "until" -- but on
23 a sensible schedule within the scope of the force of the
24 TRO that permits an address to those issues which
25 include, perhaps, the First Amendment issue.

1 But I'm not inclined, at least on the facts as I
2 understand them, to first consider the merits of the
3 First Amendment claim in order to decide what our
4 schedule should be as long as we are operating within
5 the ten-day period under the rules.

6 That said, let me just ask about the feasibility
7 as a practical matter now, and any other substantive
8 objections there might be, to the production of those
9 limited items. Let me just look at the -- if you
10 have -- it is Exhibit 1 to Docket No. 28, which is the
11 plaintiff's request for an interim discovery order.
12 Those matters -- that would be under -- basically, very
13 limited -- under 1.1, 1.2 and 2.1. I don't know if you
14 have it with you. I can read it for you if you don't
15 have it in front of you.

16 MS. GRANICK: I know which documents you are
17 referring to, your Honor.

18 THE COURT: It is basically the communications
19 between the undergrads and DefCon and a copy of the
20 class paper.

21 MS. GRANICK: I understand, your Honor. Federal
22 Rule of Civil Procedure 34 says that a minimum of 30
23 days' notice is required for document requests. It's
24 simply untimely.

25 THE COURT: The discovery rules also say that

1 the Court can set any schedule for good reason. So I
2 mean, if it's a question of authority, there's no
3 question that I have the authority in a sort of
4 expedited emergency -- the rules also allow, indeed
5 permit, discovery before the action is brought, in some
6 circumstances. So there's wide latitude. So I don't
7 have any doubt of my ability to do that, so...

8 MS. GRANICK: I understand. But my point is,
9 your Honor, that the discovery that's sought goes to the
10 underlying merits of the case and not to the issues that
11 are before the Court for either a TRO or a preliminary
12 injunction. So there's no reason to change the Rule
13 34 --

14 THE COURT: Well, but the underlying merits of
15 the case are a key consideration in whether the
16 plaintiffs have met the burden required for obtaining a
17 TRO, or continuing it, once obtained, and that is the
18 likelihood of success on the merits. So it's necessary
19 to consider the merits of the case.

20 MS. GRANICK: That's correct, your Honor. Only
21 if the plaintiffs have come here and presented the Court
22 with a valid legal theory on which relief may be based.
23 And there is a manifest legal error that underlies Judge
24 Woodlock's TRO which needs to be addressed by this Court
25 and can be addressed without any reference to other

1 documents. And that underlying fallacy is the idea that
2 the Computer Fraud and Abuse Act prevents the
3 distribution of information.

4 What plaintiff is claiming is that there is a
5 notion of responsible disclosure, which they define as
6 you disclose everything to MBTA and wait until they've
7 had a chance to fix it, and that that notion is
8 enshrined in law in the CFAA and that it's consistent
9 with the First Amendment. That is wrong.

10 First of all, responsible disclosure is --
11 responsible disclosure is what the students engaged in
12 here. They never intended and -- at the talk at DefCon
13 to reveal the information that they believed was the
14 important piece of information that would allow or teach
15 a bad guy to circumvent the system and to get free
16 subway rides from the MBTA.

17 That withholding was responsible. And there's a
18 letter in the -- from 11 renowned computer science
19 professors and computer scientists which says that this
20 is how computer science security research is done. It's
21 how it's done every day. There are hundreds of
22 conferences --

23 THE COURT: Let me just interrupt because I
24 understand that that's your argument on the merits of
25 the questions that are going to be presented, and you

1 may well be right, but my discovery-related comments are
2 made without getting to -- in other words, what I'm
3 talking about is a way of getting to a reliable, from my
4 point of view, information base on which to address the
5 merits questions. And so to address the merits
6 questions to decide whether I need discovery I think has
7 it backwards.

8 What I'm talking about is being sure that I can
9 have a sufficient understanding of both parties'
10 positions so that I can, as I say, reliably resolve the
11 merits questions which include: Is this a lawful TRO?
12 That's your question. And your position is it's not.
13 You may be right. My question is setting a schedule and
14 developing the information that will help me make a good
15 call on that point.

16 MS. GRANICK: Whether it's a lawful TRO, your
17 Honor, is a question of law, not of fact. It's a
18 question that discovery will not help us answer. And
19 forcing the defendants to go through a bunch of
20 discovery when the underlying legal theory of the
21 case -- the claim that is the only claim that gives this
22 Court jurisdiction over the case -- is flawed, is
23 putting the cart before the horse.

24 And they have to show this Court before they can
25 continue the TRO, before they can seek discovery, that

1 the CFAA claim is valid. And the CFAA claim is not
2 valid. Because if you look at the plain language of the
3 statute, the legislative history and all of that, it
4 very clearly shows that the transmission of information
5 can't be to the public in a conference; it has to be a
6 human-protected computer.

7 And it's a provision that Congress added not to
8 enshrine some notion of responsible disclosure in the
9 law. CFAA, this provision of it, well predates all the
10 debates in the security community about responsible
11 disclosure. It was a provision that was added in order
12 to protect computers from viruses and worms. And the
13 plaintiff is misreading that provision to squelch speech
14 at a conference.

15 That is not something on which this Court needs
16 to take discovery. Those are legal matters that this
17 Court can decide -- and indeed has to decide -- right
18 now because of the First Amendment harm that's ongoing.

19 THE COURT: Okay. Before I go back to Mr.
20 Mahony, Mr. Swope, anything on that question?

21 MR. SWOPE: No, your Honor. The document
22 request is not to MIT.

23 MR. MAHONY: Your Honor, if I could simply add
24 the two more document requests at 5.4 and 5.5? The 1.1
25 and 1.2 and 2.1 the Court suggested is fine for the

1 MBTA's purpose on an interim basis; the 5.4 -- and
2 5.5 -- which asks for the code that's referenced in the
3 materials; and the 5.5 is just a catch-all to say: If
4 there's anything else you're planning on providing at
5 that conference, let us take a look at it.

6 And, your Honor, I would like go back to the
7 deposition question to see if there's a way maybe we
8 could do a telephonic deposition, if folks are
9 unavailable. In other words, the goal here is if we
10 can't have face-to-face -- we've already went down to
11 four hours and two hours, if we can't have face-to-face,
12 your Honor, we're willing to work to get something, you
13 know, second best, again, for this interim -- you know,
14 for this in-between or beginning phase.

15 THE COURT: Okay.

16 MS. GRANICK: Your Honor, I just -- if -- before
17 the Court does a serious consideration of this, if this
18 is what the Court is considering, which is to continue
19 the TRO --

20 THE COURT: No, I would not continue the TRO.
21 I'd do nothing to the TRO. The TRO continues on its
22 own. That's my whole point. I am not reaching the
23 question under this plan. There's no implicit approval
24 of the TRO; it is simply deferring to permit development
25 of information at which that question will be

1 considered.

2 And maybe to reduce anxiety, I should tell you
3 the schedule I am thinking of is to continue this only
4 until next Tuesday, so a very short period of time, well
5 within the ten days of the duration of the TRO.

6 MR. MAHONY: And what would -- would the thought
7 on Tuesday be that we'd have this same hearing and maybe
8 we could supplement, because we certainly want to move
9 to convert this to a protective order.

10 THE COURT: I guess to flush out more details.
11 I'm talking about very limited document discovery which
12 I -- is as forthwith as can be -- I don't know what the
13 practicalities are in that -- and then the parties to
14 submit anything that they want to say about that, I
15 mean, by, I guess, the close of business on Monday, and
16 then we'll take it up on Tuesday morning. That would be
17 my thought. We can pick one day or the other, I guess,
18 to do it.

19 MR. MAHONY: So that the papers for the Tuesday
20 hearing would be due Monday, and the discovery would be
21 Friday --

22 THE COURT: Not later than the end of business
23 tomorrow.

24 MR. MAHONY: That's wonderful.

25 THE COURT: That's my thought.

1 MS. GRANICK: Your Honor, it just -- as a
2 practical matter it is highly impractical. One of our
3 clients is out of the country; another of our clients is
4 neither in Boston nor in San Francisco, where our
5 offices are; we are losing one of our clients to another
6 overseas trip, since they're on their summer break, I
7 think on Monday of next week; I am going to be flying
8 back to San Francisco all day today and then we have the
9 weekend which intervenes. So this is -- it's going to
10 be extremely difficult for us to pull this information
11 together before Monday.

12 I also think that, you know, as I said, it does
13 not weigh upon the issues that are before this Court.
14 And then one of the lawyers from our office -- it
15 actually can't be me because I am going to be flying on
16 this weekend -- will have to come back here to Boston in
17 order to appear before the Court and argue these issues.

18 So I don't -- I mean, I don't understand how the
19 documents that are the subject of plaintiff's request
20 weigh upon the issues of whether this TRO is, A -- has
21 legal basis under the CFAA; and, B, is in accordance
22 with the First Amendment, because those are factual
23 issues, and what the plaintiff needs to show is that
24 it's legally appropriate.

25 THE COURT: Well, I've already addressed the --

1 whether this would involve -- the scheduling decision
2 would involve consideration of the First Amendment.

3 Let me just say I don't think you're right about
4 the fact that it's a pure legal question. The question
5 in any case is whether -- unless it's a -- you know, you
6 might have an objection that the statute is invalid or
7 on its face it can't cover the range of possibilities on
8 the facts, but usually the question on a case is whether
9 on the facts as pled does the plaintiff have a cause of
10 actions as alleged under the cited authority. And so
11 there's always a mixed question of fact and law.

12 The legal meaning of the -- or the legal scope
13 of the statute, properly understood, obviously has
14 something to do with deciding whether the facts that the
15 plaintiff pleads fit within the proper scope so that
16 there's relief, but it can't be a pure legal question.

17 MS. GRANICK: Your Honor, assuming all the facts
18 that plaintiff has alleged are true -- assuming for the
19 sake of argument they are all true -- there is no claim.
20 There's a pure legal question. And this Court can
21 address that. It has absolutely nothing to do with the
22 factual allegations. If everything in the plaintiff's
23 complaint and everything that they've argued is true,
24 the CFAA doesn't cover it because the CFAA, by its very
25 terms as a legal -- pure legal matter -- does not cover

1 the transmission of information to people; it only
2 covers the transmission of information to a protected
3 computer. So there is no factual dispute here for the
4 purposes of this TRO.

5 We're assuming, for the sake of argument, that
6 everything they say is true. It's a pure legal question
7 as it's a First Amendment question.

8 THE COURT: Okay. I understand your point but
9 I'm not in agreement with it because, even as you say
10 it, what you're saying is that, on the facts they pled,
11 there's not a legal remedy, which is, of course, a fact
12 and legal question.

13 But anyway, let me --

14 MS. GRANICK: Your Honor, if you -- I would --
15 I'm sorry.

16 THE COURT: Let me consider your practical
17 considerations. I mean, the class paper I would assume
18 is easily available. I mean, if not from you, then they
19 can serve Mr. Swope, and he has a copy, I assume.

20 MR. SWOPE: We do have a copy, your Honor. The
21 federal educational -- the Family Education Rights and
22 Privacy Act say the students have to be given notice,
23 which I guess they're getting now, and have a right to
24 object, which I guess they can do now, and your Honor
25 can rule on it. We do have a copy, obviously, but I

1 assume your Honor will go through the appropriate dance
2 for us to provide it.

3 THE COURT: Okay. If it can't be produced by
4 the students, and I don't know what the practicalities
5 are, and nor --

6 MS. GRANICK: Your Honor, everything that's in
7 that paper and more is contained in the document that I
8 provided to the Court and to --

9 THE COURT: Well, that's one thing I'm
10 interested in, is how they compare, frankly. If they're
11 the same, that's one thing; if they're not the same, I
12 might be interested in the differences. They might be,
13 too, but I am.

14 MS. GRANICK: How could those differences weigh
15 upon the question of the validity of the claim?

16 THE COURT: I don't know. I don't know what
17 they are.

18 Anyway, let's do this: I will grant the request
19 for discovery as outlined in 1.1, 1.2, 2.1, 5.4 and 5.5
20 understanding that the defendants have to use reasonable
21 efforts to comply. If they're unable, for practical
22 reasons, reasonably to comply, then they may state those
23 circumstances which make it difficult to comply. But at
24 least we'll get that answer. So I would say by, say --
25 why don't we say by four o'clock Eastern time tomorrow,

1 either production or otherwise a response. And then
2 we'll permit the parties to evaluate that.

3 And we'll continue this hearing on Tuesday, the
4 19th. Why don't we say --

5 I think I have something at ten, Gina?

6 THE CLERK: Yes.

7 THE COURT: Why don't we say 10:30 on Tuesday
8 morning.

9 MS. GRANICK: Your Honor, we are intending to
10 seek a writ to the First Appellate -- the First Circuit
11 Court of Appeals. Can I ask the Court to stay this
12 discovery order to give us an opportunity to seek that
13 writ?

14 THE COURT: You can ask, but the request is
15 denied.

16 MS. GRANICK: Thank you, your Honor.

17 THE COURT: Okay. I'll see you Tuesday morning.

18 THE CLERK: All rise.

19 Court is now in recess.

20 (The proceedings adjourned at 11:46 a.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Civil Action No. 08-11364-GAO, MBTA v. Zack Anderson, et al.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter