Massachusetts Bay Transportation Authority v. Anderson et al Doc. 61

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

Plaintiff,

v.

ZACK ANDERSON, RJ RYAN, ALESSANDRO CHIESA, MASSACHUSETTS INSTITUTE OF TECHNOLOGY,

Defendants.

Civil Action
No. 08-11364-GAO

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
Tuesday, August 19, 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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Dockets.Justia.com

1 APPEARANCES:

2 HOLLAND & KNIGHT LLP
By: Ieuan-Gael Mahony, Esq.
3 Maximillian J. Bodoin, Esq.
10 St. James Avenue - Suite 12
4 Boston, Massachusetts 02116

5 ELECTRONIC FRONTIER FOUNDATION
By: Cindy Cohn, Esq.
6 Marcia Hofmann, Esq.
454 Shotwell Street
7 San Francisco, California 94110

8 - and -

9 AMERICAN CIVIL LIBERTIES UNION
By: John Reinstein, Esq.
10 211 Congress Street
Boston, Massachusetts 02110
11
- and -
12
FISH & RICHARDSON, PC
13 By: Thomas A. Brown, Esq.
Lawrence K. Kolodney, Esq.
14 Adam J. Kessel, Esq.
225 Franklin Street
15 Boston, Massachusetts 02110-2804
On Behalf of the Defendants Zack Anderson, RJ Ryan
16 and Alessandro Chiesa

17 EDWARDS ANGELL PALMER & DODGE, LLP
By: Jeffrey Swope, Esq.
18 111 Huntington Avenue
Boston, Massachusetts 02199
19 On Behalf of the Defendant MIT

20 Also in Attendance: Scott Darling III, Esq.
MBTA Legal Department
21
Jaren Wilcoxson, Esq.
22 Office of the General Counsel of MIT

23

24

25

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1 P R O C E E D I N G S
2 THE CLERK: All rise.
3 This is the United States District Court for the
4 District of Massachusetts. Court is now in session.
5 You may be seated.
6 Calling Civil Action 08-11364, Mass. Bay
7 Transportation Authority versus defendant Zack Anderson,
8 et al.
9 Counsel, please state your names for the record.
10 MR. MAHONY: Ieuan Mahony from Holland & Knight
11 for the MBTA.
12 MR. BODOIN: Max Bodoin from Holland & Knight
13 for plaintiff, MBTA.
14 MR. DARLING: Scott Darling from the MBTA.
15 MS. COHN: Good morning, your Honor. Cindy Cohn
16 from the Electronic Frontier Foundation for defendants
17 Anderson, Chiesa and Ryan.
18 MS. HOFMANN: Marcia Hofmann from the Electronic
19 Frontier Foundation for defendants Anderson, Chiesa and
20 Ryan.
21 MR. REINSTEIN: John Reinstein, ACLU of
22 Massachusetts, for the individual defendants.
23 MS. COHN: And, your Honor, co-counsel of the
24 Electronic Frontier Foundation are on the telephone,
25 including Jennifer Granick who could not be here today

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1 due to a conflict.
2 MR. SWOPE: Good morning, your Honor. Jeffrey
3 Swope, Edwards Angell Palmer & Dodge for MIT. With me
4 is Jaren Wilcoxson of the general counsel's office of
5 MIT.
6 MR. KOLODNEY: Good morning, your Honor.
7 Lawrence Kolodney, Fish & Richardson, for the MIT
8 students.
9 MR. BROWN: Good morning, your Honor, Thomas
10 Brown from Fish & Richardson on behalf of the MIT
11 students.
12 MR. KESSEL: Adam Kessel, also from
13 Fish & Richardson, on behalf of the MIT students.
14 THE COURT: Who is going to speak on behalf of
15 the MIT students?
16 MS. COHN: I am, your Honor.
17 THE COURT: All right. Well, there's been a lot
18 of filings in this case recently. And since I've been
19 on the bench for the last hour and a half or so I don't
20 know whether I've missed anything this morning that has
21 come in late. I've seen things that were filed last
22 night.
23 Is there anything that has been filed recently
24 that I haven't -- you don't know whether I've seen it or
25 not -- that I might not have seen?

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1 MS. COHN: Your Honor, we haven't filed anything
2 today.
3 THE COURT: Okay.
4 MR. MAHONY: Nothing, your Honor.
5 THE COURT: So the last thing I remember was the
6 memorandum from --
7 MR. MAHONY: The MBTA. That's correct.
8 THE COURT: -- plaintiffs that was filed last
9 night.
10 A VOICE: Your Honor, may I approach the bench
11 since I will file some evidence this morning?
12 THE COURT: Who are you?
13 A VOICE: I'm Dean Chen. I am just an
14 interested party. But I will be filing some evidence.
15 THE COURT: No. You have no standing here.
16 A VOICE: Okay. Thank you.
17 THE COURT: Well, then if we could refer to
18 yesterday's filings, the most recent, I think, are the
19 papers with respect to the plaintiff's motion for a
20 preliminary injunction which I understand to be
21 essentially a request to continue the temporary
22 restraining order, perhaps with some slight language
23 change, as a preliminary injunction.
24 Let me just address one matter, which I'm not
25 sure has much significance or not, before we proceed to

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1 that because I think the way to address the issue is
2 even though there may be other pending matters, is to go
3 directly to that issue. There seems to be some
4 understanding, I guess is the way to put it, or
5 "thought" may be better, that this being August 19th,
6 which is ten days after the entry of the TRO, that the
7 TRO would expire as of today. I'm not sure that's the
8 case.
9 Rule 6(a)(2) of the federal rules says that any
10 period less than 11 days excludes weekends, and so on in
11 the computation. And so under that computation the TRO
12 would continue, of its own force, for the full ten days,
13 I think till Friday. In other words, it would be -- it
14 was granted on a Saturday, which would be excluded, and
15 the counting would begin on last Monday, that would be
16 five days, and then pick up again yesterday, and it
17 would be another five days. So I think it would
18 probably expire on Friday. But I'm not sure that's of
19 any moment; it just may affect the timing of this.
20 But anyway, we have the motion now to convert,
21 or extend, the TRO as a preliminary injunction. So, Mr.
22 Mahony, if you want to address that motion.
23 MR. MAHONY: Yes, your Honor. Thank you, your
24 Honor.
25 Your Honor, I would like to make five points in

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1 the argument in support of this motion. Your Honor, the
2 discussion -- my points will be driven by the facts
3 here. As one of the commentaries in the articles the
4 EFF submitted said, "Talk is talk. Let's see the code.
5 The goal here is to show the facts to the Court."
6 Your Honor, the five points are as follows:
7 First, I'd like to examine, what is the information here
8 that is at issue? Keep in mind that the MIT students
9 provided last Wednesday night a 30-page security
10 analysis of substantially better quality and quantity
11 than the materials the MBTA had before. With that
12 security analysis, your Honor, the MBTA, with vendor
13 assistance, has determined that, in fact, the
14 CharlieTicket -- not the CharlieCard, but the
15 CharlieTicket -- system is compromised; that the MIT
16 students know how to clone and counterfeit
17 CharlieTickets. So, your Honor, I would like to examine
18 the information at issue here.
19 Second: Illegal conduct. Your Honor, illegal
20 conduct, in fact, took place here. This must inform the
21 Court's decision-making and all arguments by opposing
22 counsel here. Your Honor, whatever the end of the MIT
23 students, whether good or bad, it is unequivocally the
24 case that they used illegal means toward that end.
25 Third: I'd like to examine the presentation at

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1 issue here. I'd like to examine the face of the
2 presentation, but also, your Honor, the information
3 behind the presentation: the software code, the
4 demonstrations that have not been produced in this case
5 despite the Court's instruction to either produce or
6 respond.
7 Your Honor, I will show, I submit, that these
8 materials, from what we can glean, even though they've
9 been withheld presentation materials, are not -- they
10 are not abstract theoretical advocacy but rather
11 specific instructions and demonstrations on the methods
12 for committing crimes under the CFAA. Your Honor, these
13 are words likely to incite lawless action, and that's a
14 quote from the North American Man/Boy Love case from
15 this very Court.
16 Four: I'd like to address the balancing of
17 harms and what is responsible -- what is responsible --
18 disclosure in this case under these circumstances. Were
19 these MIT students responsible? Are they being
20 responsible now in withholding information about
21 security vulnerabilities potentially at the T?
22 And then finally, your Honor, I'd like to talk
23 briefly about the public interest. This is policy
24 issues concerning security through secrecy, security
25 through open disclosure. And I propose, your Honor,

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1 that these broad issues -- these broad policy points --
2 do not conflict in these circumstances.
3 The MBTA, with vendor assistance -- and again,
4 based on the security analysis that the students
5 provided last Wednesday -- has concluded that a
6 five-month period of time is needed to mitigate and
7 remedy the threats that the information poses and what
8 the students have discovered. Your Honor, it's a
9 five-month period of time. There is good public
10 interest in following through with that.
11 Now, let me turn, then, to the particular
12 points, your Honor. The information at issue: I'd like
13 to call the Court's attention to Docket No. 56, Exhibit
14 1, which is the third supplemental declaration that I
15 presented, your Honor, last night.
16 The Court has it?
17 THE COURT: No.
18 MR. MAHONY: Do we have some copies?
19 THE COURT: Well, actually, I can get it.
20 Gina, can you pull it up?
21 I'll turn to my assistant to do it.
22 MR. MAHONY: Your Honor, if I could just bring
23 this up.
24 MS. COHN: Counsel, do you have a copy for me?
25 MR. MAHONY: It's in the exhibit book; you have

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1 it.

2 MS. COHN: What book?

3 MR. MAHONY: The courtesy copy. What do you

4 have right there? Yes, it's 56.

5 So, your Honor, the docketed copy is at 56.

6 THE COURT: Fifty-six, Exhibit 1.

7 MR. MAHONY: And it's Exhibit 1, and it's a

8 document Bates-stamped at the bottom MBTA0001. And I'll

9 just call the Court's attention to the very top of that

10 page. It's an e-mail from Zack Anderson to DefCon, and

11 it states, "Attached is my submission for a talk at

12 DefCon 16 this year." And that's dated May 15, 2008.

13 Now, your Honor, if we look at the submission

14 itself, you can see that -- the title of the

15 presentation on the first page, "Anatomy of the Subway

16 Hack," and then if we take a look at the second page of

17 the document, it's MBTA0002, under "Presentation

18 Information" -- and again, your Honor, we're talking

19 about what is the information at issue; what are we

20 concerned about? This is the submission that goes to

21 DefCon that says the full presentation, and I'll point

22 that out to the Court.

23 Up at the top it says "Presentation

24 Information." And then if the Court looks down three or

25 four lines it says "Is there a demonstration?" And the

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1 answer is "Several." If we look at the next line: "Are
2 we releasing a new tool?" So that's a new software
3 tool. The answer is "Yes."
4 Now, if the Court takes a look a little further
5 down the page it says "Detailed Outline." And if the
6 Court looks at Item III(B) which says "MIFARE RFID card
7 attacks," under that in item one, line one, it says
8 "Code Release." If we look at Item 2 it says "Possible
9 demo and code release (possible because as of today the
10 Verilog is not finished)."
11 If we look on the next page, so page 3 of this
12 document, Item 4 says "Algebraic attacks." It says
13 "Code Release." Your Honor, this code is what the
14 Court -- is what we ask the Court to ask the
15 plaintiff -- I mean, I'm sorry, the defendants -- to
16 produce.
17 Four: "Algebraic code release." Item C refers
18 to cloning and forgery attacks on the CharlieTicket.
19 Item 1 refers to automated magstrip reverse-engineering
20 tool release. Item 2 says "Python script release and
21 demo." So there are a number of various software code
22 releases and other tool releases that are referenced in
23 this submission.
24 And also, your Honor, I'll note that when the
25 code was not completed, when Mr. Anderson had code that

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1 wasn't done, he informed DefCon, "Oh, the code isn't
2 ready yet," as in Item 2 about the Verilog isn't
3 finished. The reason the MIT students have said they're
4 unwilling -- or they refuse -- to produce the software
5 code that -- in connection with this presentation is,
6 they say, "Oh, it wasn't ready yet."
7 Now, your Honor, I also point out reference to a
8 white paper on page 4. Up at the very top of page 4 it
9 says "Sample slides about this talk." And then if the
10 Court looks to the next paragraph it says "White paper
11 about the material in the talk," and that is a web
12 address. And we believe, your Honor, that that's the
13 class paper that the students have also refused to
14 produce. There's no password referenced in connection
15 with this. That appears to be openly available to
16 anyone on the Internet. And, again, they refuse to
17 produce that paper.
18 Now, your Honor, if the Court were to take a
19 look at the page -- further down this page it says
20 "Legal Stuff," and then it says "Copyright Use Grant."
21 And in that last paragraph down there it says "If I am
22 selected for presentation, I hereby give DefCon
23 Communications, Inc., permission to duplicate, record
24 and distribute this presentation including, but not
25 limited to, the conference proceedings, conference CD,

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1 video, audio, handouts to the conference attendees for
2 educational, online, and all other purposes."
3 This is an unlimited grant; this is not a grant
4 for educational purposes only. But for non-commercial
5 *[sic]* purposes this is an ultimate grant device to
6 DefCon as well as the attendees.
7 Now, your Honor, let me call the Court's
8 attention to the next section which says -- on this same
9 page, page 5, which says "Terms of Speaking
10 Requirements." Your Honor, this is a contract. And
11 Mr. Anderson, on behalf of MIT students, agreed in
12 Paragraph 1 -- he said, "I will submit a completed and
13 possibly updated presentation, a copy of the tools
14 and/or codes, and a reference to all of the tools, laws,
15 websites and/or publications referenced to at the end of
16 my talk and as described in this CFP submission for
17 publication."
18 So, your Honor, all of the materials that I read
19 to the Court -- the code, the demonstration, all of
20 those tools -- Mr. Anderson agreed to submit to DefCon,
21 and signed this contract to do so.
22 Now, your Honor, where is -- where is this
23 information? Your Honor, during the hearing before
24 Judge Woodlock, EFF counsel stated that all of the
25 information that was relevant -- all of the

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1 information -- was just inside this presentation;
2 nothing outside the presentation, nothing outside the
3 four corners. And the Court asked three times -- the
4 Court said, "Just a moment." And this is from page 11
5 of our brief that gives the precise pinpoint cites of
6 that transcript, your Honor. And this is with EFF
7 counsel.
8 "THE COURT: Just a moment. Is there anything
9 of substance to the presentation, anticipated for the
10 presentation that is not on the slides?
11 "ANSWER: No, your Honor."
12 The Court again: "All right. These are the
13 entire materials that you intend for presentation?"
14 "MS. GRANICK: Those are the visual materials.
15 "THE COURT: Well, is there anything else that
16 is of substance for the presentation?
17 "MS. GRANICK: No, your Honor.
18 "THE COURT: There will be nothing beyond what's
19 shown on these several slides?
20 "MS. GRANICK: No, your Honor."
21 Your Honor, that's inaccurate. Later on after
22 the Court's pressing, Ms. Granick admitted, "Oh, yes,
23 there are," and counsel is pointing out the reference to
24 the software tools. Oh, there are software tools.
25 The Court asked: "What are these tools?" And

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1 the response was, well, these tools, they're tools that
2 allow you to carry out these attacks, but they're not
3 malicious.
4 How are we to judge that, your Honor? We don't
5 have the tools, and we're to take the word of counsel
6 because the tools have been withheld.
7 Now, your Honor, the Court asked at that
8 hearing: "Demonstrations. What are these? What do the
9 demonstrations do?" And the response was -- and again,
10 this is on page 12 of our brief -- the response was,
11 "The demonstrations by the MIT students at the DefCon
12 conference will be designed to show how to create a
13 forged card; in other words, one that is not issued by
14 the MBTA."
15 Now, your Honor, the students have asserted
16 their First Amendment right to withhold demonstration
17 materials and to withhold these software tools. We've
18 seen, your Honor, that the key information that has been
19 produced so far -- which is compiled in that 30-page
20 document under seal, which I believe is Docket 32 -- the
21 key information here, your Honor, is real; this is not a
22 prank. They've compromised the CharlieTicket, your
23 Honor.
24 So the information has value; it's of concern;
25 it has a real threat. And there is additional

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1 information that was designed for this conference that
2 they contractually agreed to present at this conference
3 that they refuse to withhold *[sic]* on First Amendment
4 grounds.
5 This is the second point: Your Honor, I would
6 like to call the Court's attention to the presentation.
7 And if I may just approach the bench? What we have here
8 are just a compilation of exhibits. We've given these
9 to opposing counsel. But the only exhibit -- this was
10 done for last Thursday's meeting. But the only exhibit
11 that is really of value for the present purpose is
12 Exhibit 17. And Exhibit 17, your Honor, which looks
13 like this, is the same as Docket No. 9-7. So Exhibit 7
14 in Docket 9. The difference, though, your Honor, is
15 that we've put Bates numbers at the bottom of the pages
16 to make it easier to refer to the specific pages.
17 Now, your Honor, if I could call the Court's
18 attention to Bates No. 140 in the presentation which
19 looks like this. And, your Honor, our surmise from this
20 document is that it is a way, visually, to indicate how
21 to take a dollar twenty-five CharlieTicket and turn it
22 into a $100 CharlieTicket so it's counterfeit.
23 What T officials did, your Honor, is in this
24 second $100 ticket, there's a serial number. Now, T
25 personnel took that serial number, linked the image of

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1 that CharlieTicket and that serial number to serial
2 numbers of multiple additional CharlieCards. These are
3 all clones of each other. The officials constructed an
4 auto trail showing payments, use and other activities.
5 The linked tickets, they all were used
6 illegally. Again, your Honor, whatever the end the MIT
7 students might have had in mind, or have in mind, it's
8 unequivocal in this case that they used illegal means.
9 And let's examine what MIT student -- the MIT
10 students and counsel say about this. Mr. Anderson says
11 in the press, and now, just as of last night in a
12 declaration, "We never rode the T for free," so it must
13 be okay. Counsel -- EFF counsel says -- and this,
14 again, is in our brief at page 13. We give the cite to
15 the transcript from the original hearing. Counsel
16 claims that the research the MIT students compiled was
17 not obtained through any kind of unauthorized access to
18 computers.
19 Now, your Honor, not riding the T for free is
20 very different than claiming no unauthorized access to
21 computers. So we have the clients saying one thing and
22 we have their counsel saying another. Which is it?
23 Your Honor, this is misinformation that the
24 requested deposition was designed to prevent. And I'd
25 note, your Honor, that while counsel said to this Court

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1 on Thursday Mr. Anderson is on holiday and he is too
2 busy to appear for a four-hour telephone deposition,
3 Mr. Anderson has been giving press statements, I
4 understand he was on WBZ radio this morning, and he's
5 had time to put together declarations. Your Honor, the
6 Court asked for a good, factual record before to make
7 this decision.
8 Now, your Honor, let me turn to my third point,
9 which is the presentation itself. And, again, that's
10 the material in Tab 17 in the handout that I just
11 provided the Court.
12 Your Honor, this document, plus what we believe
13 is the underlying software code and demonstration
14 materials, are not abstract theoretical advocacy, but
15 instead, they're specific instructions for violating the
16 CFAA.
17 If the Court were to take a look at page 105,
18 which is the first page, down at the bottom of that page
19 the Court can see it says "For updated slides and code"
20 see this website. That's the code we ask for, your
21 Honor. If the Court could take a look at page 107, the
22 slide says "What this talk is not: Evidence in court,
23 (hopefully)." It shows an anticipation and realization
24 that this talk was problematic.
25 Let me look at -- call your attention to the

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1 next page, which is 108. The slide says "You'll learn
2 how to..." Your Honor, this is instructional text.
3 "You'll learn how to generate stored-value fare
4 cards" -- those are counterfeits -- "reverse engineer
5 magstrips"; "hack RFID cards"; "use software radio to
6 sniff" -- that is to obtain information from computer
7 systems; "use FPGAs" -- so field-programmable gate
8 arrays -- "to brute force"; "tap into the fare vending
9 network"; "social engineer"; and "Warcart." So this is
10 instructional text.
11 Now, your Honor, if the Court would take a look
12 at the next page which states, "And this is very
13 illegal!" And, your Honor, just as a note, at the
14 bottom it says "So the following material is for
15 educational use only." Well, we've seen in the contract
16 that the MIT students have granted unlimited rights of
17 their material. And if the Court could take a look at
18 page 129. After working through a variety of methods on
19 cloning and counterfeiting cards the text says "You now
20 have free subway rides for life." It doesn't say "you
21 will have" or "you may have" or "if you follow these
22 instructions," et cetera, it says "You now have free
23 subway rides for life."
24 If I could call the Court's attention to page
25 142, this is a page that is showing a demonstration to

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1 the MagCard reverse engineering toolkit. And it refers
2 to Python libraries -- again, these are software
3 libraries, an open source for analyzing MagCards. And
4 at the bottom it says "Can now forge cards."
5 And then lastly, your Honor, I'd like to call
6 the Court's attention to page 176. And, your Honor,
7 this is a photo of network switches in the T's network
8 system. These are sensitive devices, and in order to
9 get here there would need to be some trespass committed.
10 But that's not the point right now. The point is that:
11 Take a look at -- these are network switches. All the
12 data is running through these network switches. It's
13 not just the CharlieCard and the CharlieTicket; it's all
14 ACF data are running through these switches.
15 And then if the Court could take a look at the
16 next page, you would see it's the same photo, but at the
17 bottom there's the addition of a blue rectangle that
18 says "Wireshark." Wireshark is sniffer technology that
19 allows one to sniff -- in other words, monitor, surveil,
20 intercept -- information over a computer network.
21 Your Honor, these are words -- and again, we
22 don't have the full presentation because they refuse to
23 give it, but these are words likely to incite imminent
24 lawless behavior. This is the DefCon conference. As
25 commentators have stated, there are the white hats at

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1 the conference who are out for the greater good, there
2 are the grey hats who are in between, and then there are
3 the black hats who are out to cause problems.
4 We have submitted an affidavit that has a
5 collection of articles about the DefCon conference to
6 give the Court a flavor of the type of audience that
7 this is being presented to.
8 Like the *Rice* case, which is the case about the
9 book called "Hit Man" -- and the book essentially
10 teaches you how to rough people up and kill them. But
11 it doesn't do it in an abstract, theoretical matter; it
12 has pictures, it has tools, it has everything -- your
13 Honor, these are instructions and step-by-step
14 directions on how to engage in conduct prohibited by the
15 CFAA; this is not protected speech.
16 Let me point now to balancing of the harms in
17 responsible disclosure. Your Honor, the MBTA does not
18 claim that the doctrine, or the principle or the concept
19 or whatever you might want to call it, of responsible
20 disclosure is written in the law. The Court on the
21 injunction motion is acting equity. Your Honor,
22 responsible disclosure should inform this Court, we
23 believe, deeply in terms of the equities. What is fair
24 between the parties here? What is responsible?
25 Your Honor, the students posted their

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1 presentation online -- this document we were just going
2 through, posted it online -- starting June 30. It was
3 available unpassword-protected. There was no meeting
4 with the T until August 4. At that meeting the MIT
5 students and Mr. Anderson told law enforcement that
6 nothing illegal went on. We've seen that's incorrect;
7 that was untrue.
8 They did not provide the presentation at that
9 time. After that there were numerous contacts between
10 MBTA officials and Professor Rivest who was acting, we
11 view, at least with apparent authority as their agent in
12 setting up the meetings and scheduling the
13 communications with the T. And finally, your Honor, on
14 Friday, the 8th, they agreed to give the presentation,
15 but then at roughly 6:45 EFF counsel instructed them not
16 to give the presentation to the T, even though the
17 presentation had been publicly available at the
18 conference as of Thursday. So we have a document that's
19 available publicly that counsel is instructing clients
20 not to provide, and I'm not sure why. And, your Honor,
21 that was their responsible disclosure.
22 Now, I want to temper that statement, your
23 Honor, with a clear statement that the security analysis
24 that the students provided to us last Wednesday, that is
25 a very useful document. As I said, from that document

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1 we came to the conclusion that the ticket has been
2 compromised. They're able to compromise the ticket.
3 So, your Honor, when I talk about responsible
4 disclosure, there are spots of great sunlight and then
5 there are spots of great darkness. So I don't want to
6 be too argumentative in talking about this as
7 unequivocal non-irresponsible disclosure. But, your
8 Honor, in terms of prior to that security analysis, yes.
9 And now, your Honor, the security analysis is
10 wonderful, but there are additional materials that cause
11 us great concern. Is this responsible disclosure now:
12 withholding the class paper, withholding the software
13 code, withholding the demonstration materials?
14 Balancing the harms, your Honor? We ask for a
15 five-month injunction. We've tailored the injunction so
16 it only covers nonpublic materials. We believe that
17 will preserve the status quo. Our hope, your Honor, is
18 that the parties will continue to talk in a constructive
19 manner along the lines of the security analysis to
20 resolve these issues, and at the end of that five-month
21 period they're free to discuss whatever they need to
22 discuss or whatever they feel like discussing.
23 Finally, your Honor, the last: the public
24 interest. On the one hand, your Honor, the MIT students
25 claim an unfettered right to disclose. Despite illegal

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1 conduct, despite incitement to others to copycat, they
2 say: We should be able to disclose. On the other hand,
3 your Honor, they claim essentially an unfettered right
4 to withhold. We're not disclosing the class paper,
5 we're not disclosing the demonstration papers, et
6 cetera.
7 In this vein, your Honor, I would like to point
8 briefly to the letter from the professors -- the 11
9 professors -- that was submitted to this Court. And I
10 think that letter is useful, one, in terms of
11 demonstrating that the MBTA's position and the
12 professors' position is not that different; and, two,
13 demonstrating that the professors are addressing a
14 question that does not bear on the facts here.
15 Your Honor, the professors state that they have
16 a firm belief that research and security vulnerabilities
17 and sensible publication of the results of the research
18 are critical for scientific advancement. That's on page
19 1 in the brief, your Honor. Your Honor, that term
20 "sensible publication" we agree with strongly.
21 The professors also state, "Generally speaking,
22 the norm in our field is that researchers take
23 reasonable steps to protect the individuals using the
24 systems studied." We agree as well, your Honor. Your
25 Honor, where we diverge is the professors say that using

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1 the law to silence researchers is improper.
2 Your Honor, we're not asking to silence these
3 researchers at all; we're asking for a time-limited
4 injunction with respect to nonpublic information that we
5 now know, based on further disclosures, is threatened
6 and poses a real threat to the system.
7 Your Honor, as the professors state on page 4,
8 "It is much better from everyone's perspective if
9 researchers discover the break and publish it than if
10 unscrupulous discoverers of the break exploit it without
11 public notice." Your Honor, we can agree with that
12 position, but we think better than that position is the
13 responsible disclosure doctrine from industry, not from
14 academia, that we propose, which is researcher finds the
15 flaw, brings it to the target, there's a resolution, and
16 then there's publication. That prevents the harm to the
17 target and serves the public interest in providing full
18 disclosure of the issue.
19 Now, your Honor, finally, the professors ask
20 that vendors should not be given complete control over
21 the publication of information as it appears that the
22 MBTA sought here. Your Honor, again, with the relief
23 that we requested, we have not sought complete control
24 over what the students are saying and the point is
25 inaccurate.

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1 Your Honor, a final point on the professors'
2 formulation: The professors' formulation did not
3 address the situation where the researcher has used
4 illegal means to capture the valuable research. Your
5 Honor, in that position Mr. Bodoin has hacked into my
6 system and he has committed illegal acts -- but he
7 hasn't hurt anyone -- to get that information. Now,
8 your Honor, from an interperspective, I want that
9 information so that I can fix my system.
10 Now, who owns the information, whether I should
11 be able to exploit it for someone else or whether
12 Mr. Bodoin should be able to, you know, reap the
13 commercial benefit of that, that's another issue. But,
14 your Honor, I am going to want that value to know where
15 my flaws are. Mr. Bodoin, however, if he's used illegal
16 activity to get into that system to discover this
17 valuable flaw, is going to be concerned that I'm going
18 to say to him, "Mr. Bodoin: CFAA. You'd better watch
19 out. You've got criminal exposure," or civil exposure.
20 The solution to that problem, your Honor, in
21 other words, in order to get the plum, the prize, the
22 value: I need to commit an illegal act. I need to hack
23 into someone's system. And the solution the professors
24 propose is: Narrow the CFAA. Don't make that
25 conduct -- or talking about that conduct -- don't make

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1 that illegal. So, in other words, if I've committed
2 illegal acts like the students here, and I get that
3 plum, that value, and I talk about it to the world at
4 large, that should not be a violation of the CFAA.
5 Your Honor, it proves too much. Narrowing the
6 CFAA, as is proposed here -- in other words, by reading
7 this term "transmission" to exclude written
8 transmissions like the presentation, code transmissions
9 like the code, verbal transmissions like the verbal
10 presentation -- to narrow the CFAA in that manner will
11 exclude -- sure, it will protect the good guys, but it
12 will exclude a vast range of potential bad guys.
13 If this were a terrorist conference and
14 terrorists were saying: This is the way -- you have
15 code here to hack the federal court system, or to
16 disrupt the financial institutions, it would be a much
17 easier issue. But it's still the same, your Honor. The
18 solution should not be to narrow the CFAA; the solution
19 should be to rely on established First Amendment
20 jurisprudence which prohibits words likely to incite
21 imminent unlawful activity and read the CFAA the way
22 it's intended to be written, which it picks up
23 transmissions of information.
24 Now, in sum, your Honor, these broad issues of
25 the public interest we think strongly support the

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1 requested relief here. It's time-limited relief. It
2 allows the parties to talk, solve the problem, and it
3 leaves the students free to publish research results and
4 continue on or have presentations as they see fit.
5 Thank you, your Honor.
6 THE COURT: Ms. Cohn?
7 MS. COHN: Good morning, your Honor.
8 I want to first clarify a couple of factual
9 things that I think have become clear as a result of the
10 preliminary injunction papers that were filed late last
11 night. And I do want to apologize in advance: I'm
12 ready to argue the preliminary injunction today but I
13 will note they were filed while I was on an airplane and
14 I had the two hours after my red eye landed today to
15 prepare. So I apologize if I'm not as polished as I
16 might be this morning.
17 THE COURT: They are quite similar to the other
18 filings, I noted.
19 MS. COHN: So the first thing is that the MBTA
20 has now been really clear that there was not a
21 compromise of the CharlieCard in the students'
22 presentation; there was a compromise of the
23 CharlieTicket. So any of the information or allegations
24 or anything about the CharlieCard are simply irrelevant
25 for purposes of the preliminary injunction because the

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1 students were not able to expose a vulnerability in that
2 card. They came up with theoretical information about
3 possible vulnerabilities but they were not able to
4 demonstrate one. So I think that the CharlieCard issue
5 should be off the table for purposes of the preliminary
6 injunction because the only information that could cause
7 harm to the MBTA, even under their own analysis, is the
8 information about the CharlieTicket.
9 So now moving to the actual merits of the
10 preliminary injunction hearing, I think that the
11 Court -- you know, the preliminary injunction standard
12 is the likely success on the merits, irreparable harm
13 and the balancing. I don't think your Honor needs to
14 reach the second two because there is no Computer Fraud
15 and Abuse Act claim here. There simply is not. And
16 that is the sole basis on which they have asked for this
17 injunction.
18 The Computer Fraud and Abuse Act is a statute
19 that is expressly and intentionally aimed at attackers
20 to computers. It's aimed at viruses and worms and
21 damage that can happen to computers. And it is
22 expressly limited to transmission of information to a
23 computer under 1030(a)(5)(A)(i).
24 This is clear and consistent throughout the case
25 law applying this statute. In fact, Judge Posner in the

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1 *International Airport Center* case expressly talked about
2 how you can't read "transmit" too broadly because if you
3 did, you know, hitting the delete key would be transmit,
4 and Congress didn't intend for it to reach that. So
5 while counsel cites the Webster dictionary definition
6 which includes both the definition that we think is
7 appropriate here, which is definition seven about
8 "transmission" meaning transmission to a device or a
9 computer, that's not really what Congress was talking
10 about here.
11 And it's very clear from the legislative history
12 and it's consistent throughout the case law. And they
13 can cite not a single case that supports the definition
14 of "transmission" as computer -- as communications to
15 people as opposed to communication to computers.
16 And you can see that even in the text of the
17 statute itself. 1030(a) is the provision involving
18 national security computers: computers that are owned
19 by the Justice Department, that are actually part of
20 Homeland Security. There Congress said communication of
21 information could be a violation of the Computer Fraud
22 and Abuse Act.
23 But in the provision of the statute that we're
24 talking about here, which is at (a)(5)(A)(i) which
25 involves the rest of the computers in the world, the

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1 ones that aren't involved in national security, which is
2 what we're talking about here with the transit
3 computers, communication is not included in the
4 definition. And I think that's intentional. I think in
5 the context of the national security situation and an
6 attack on a national security computer, I think the
7 First Amendment -- there's at least an argument there
8 that the First Amendment might countenance criminalizing
9 the communication.
10 But in the context of every computer that is
11 possibly connected to the Internet, which is what the
12 rest of the CFAA reaches, the definition of "protected
13 computer" under that law, there is no use of the word
14 "communication"; there's only use of the word
15 "transmit."
16 So if you look at the legislative history, if
17 you look at the statute itself, and if you look at
18 the -- all of the case law on the Computer Fraud and
19 Abuse Act, it's clear that "transmission" under the
20 statute means transmission to a computer, not speech to
21 a person.
22 There's also a second -- there are two other
23 problems with the Computer Fraud and Abuse Act claim
24 here that we haven't had a chance to develop more fully
25 but I think are fairly obvious from what we have so far.

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1 First, entirely -- it doesn't allege the $5,000
2 jurisdictional minimum for a Computer Fraud and Abuse
3 Act claim has been met here. That's because a computer
4 must be damaged in an amount; it must be actually
5 damaged by an attack. Again, we're thinking about
6 viruses and worms and other sorts of direct attacks on
7 computers.
8 And there's no allegation of any damage to any
9 computer through anything that the student did or the
10 presentation. The damage is, to the extent that there
11 is one, that the MBTA might not make as much money as it
12 might otherwise make. There's no allegation of damage
13 to any computer. And there's certainly no allegation of
14 loss in excess of $5,000 here. It's purely speculative.
15 Their argument turns on the idea that somebody
16 who hears this general information might turn around and
17 do something, and that something may cause damage and
18 that damage might be over $5,000. That is not
19 sufficient for a CFAA claim, and it's certainly not
20 sufficient for an injunction under the CFAA at this
21 particular point.
22 Secondly, it does appear to be unclear whether
23 this is actually -- the MBTA's claims actually affect
24 interstate commerce. It is not at all clear that there
25 are fare devices in Rhode Island. My understanding from

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1 my local counsel is that the fare devices are all in
2 Massachusetts. And I think there is a threshold-level
3 question about whether these are protected computers
4 under the CFAA that is worthy of further consideration.
5 So the CFAA just doesn't apply here. And
6 there's a good reason why it shouldn't apply here, why
7 it shouldn't be expanded in the way that plaintiffs
8 would like you to expand it. And that, of course, is
9 the First Amendment. If the CFAA was read to reach
10 speech, truthful speech, on a matter of public
11 importance, then the statute would be in tension with
12 the First Amendment. And of course your Honor is well
13 familiar with the idea that you should not read a
14 statute to create constitutional problems and that you
15 should avoid reading statutes in such a way, and yet the
16 MBTA urges on you an interpretation of the CFAA that --
17 again, supported by no case law, no legislative history
18 and no significant analysis, and would put the statute
19 in tension with the First Amendment. And I think you
20 should not consider going in that direction.
21 Now, in the preliminary injunction papers the
22 MBTA -- and in the oral presentation that counsel just
23 made MBTA makes -- brings in new information. We made
24 these arguments about transmission. And the parties
25 have gone back and forth on them. There's one new piece

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1 of information that's MBTA brings to this -- in the
2 preliminary injunction papers. And this is their
3 conclusory allegation that there may have been some
4 illegal activities by defendants in doing their
5 research.
6 Now, but that conclusory allegation -- first of
7 all, it's unsupported; they don't say what it is the
8 clients -- what it is that the students did, where they
9 did it, how they did it. They just assert that now it's
10 incontrovertible. Well, we would like to see that
11 evidence. Certainly their conclusory assertion
12 shouldn't be the basis upon which this Court makes a
13 finding.
14 But in any event, even if it is true that they
15 may have a small claims action for something against --
16 the clients did, or there was some minor infraction
17 along the way to doing their research, that is not a
18 Computer Fraud and Abuse Act claim. It doesn't meet the
19 jurisdictional minimum, it doesn't appear that there was
20 any transmission -- illegal transmission in this
21 particular incident, and it's simply below the statutory
22 threshold for the Computer Fraud and Abuse Act.
23 So the fact now that they have made a new
24 allegation that there may have been some illegal
25 activity by the students, which we hotly dispute,

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1 doesn't provide them a Computer Fraud and Abuse Act
2 claim in this case. So if they don't have it for the
3 speech and they don't have it for what the students may
4 have done in creating the speech, then they don't have a
5 Computer Fraud and Abuse Act claim and they do not have
6 a likelihood of success on the merits.
7 Even if you were to find that there was a
8 colorable Computer Fraud and Abuse Act claim, the law
9 would not countenance a prior restraint in these
10 instances. Remember that the prior restraint doctrine
11 is one of the strongest doctrines in constitutional law;
12 it protects truthful scientific speech, it protects
13 speech that was gained illegally, and it protects speech
14 when the publication of that speech would be illegal.
15 And we need look no further than the *Pentagon*
16 *Papers* case decided by the U.S. Supreme Court. When
17 Daniel Ellsberg took the Pentagon Papers out of the
18 Defense Department, he violated federal law clear and
19 unequivocally. And when he sought to publish that
20 information which was classified, that publication
21 violated public law. The Supreme Court said a prior
22 restraint shall not issue for this publication and the
23 information -- and the lower court's prior restraint was
24 overturned.
25 Now, in that instance we have both of the things

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1 that Mr. Mahony claims that my clients did here. They
2 claim that they got the information illegally, or that
3 they broke some law along the way, and they claim that
4 presenting this information to the public, while not
5 itself illegal -- it's one step further removed from the
6 *Pentagon Papers* case -- might incite other people to
7 lawless behavior.
8 Well, if that was the law, the *Pentagon Papers*
9 case would have gone the other way. And that's still
10 the controlling Supreme Court authority here. That's
11 because the First Amendment and the prior restraint
12 doctrine countenance strongly against prior restraints
13 on speech. There may be subsequent punishment after
14 speech. And indeed, all of the cases that they cite in
15 their argument that there's imminent lawless action and
16 aiding and abetting are not prior restraint cases; they
17 are all 201 subsequent punishment cases. The *Paladin*
18 *Press* case is a subsequent punishment, the *Rice* case
19 that we talked about earlier; *NAMBLA* -- the *NAMBLA*
20 case -- the *Curley* case is a subsequent punishment case;
21 the *Brandenburg* case is a subsequent punishment case;
22 the *Knapp* case is a subsequent punishment case.
23 All of the cases that they are using to support
24 their legal theory that a prior restraint is legal here
25 are not prior restraint cases. And there's a very good

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1 reason why they're not: because there aren't any prior
2 restraint cases that would countenance what they're
3 trying to do to the clients here. The clients are
4 engaged in academic research, the information they want
5 to publish is truthful and it's important to the public
6 debate. This -- if you issue this preliminary
7 injunction here you will be setting -- you will be
8 making an unprecedented ruling, and I think that it's
9 the wrong course to go on. I think that we've had a
10 prior restraint too far -- so far here for far too long.
11 The second -- the next thing I want to talk
12 about is the issue of irreparable harm. Now, they have
13 not met their burden to show that they will suffer
14 irreparable harm here, especially in the specific
15 context of this situation. While they like to say that
16 the students want to be free to say everything, the
17 students have never wanted to say everything. They have
18 always wanted to withhold what they call key
19 information, information that would allow someone to
20 replicate the attacks from what they speak about.
21 But let's be clear. There are three categories
22 of speech here that we're talking about -- and by the
23 way, they even went above and beyond, I think, what they
24 needed to do here and they wrote a paper called "A
25 Security Analysis" that we submitted to you under seal

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1 and gave to them last week to try to capture the
2 universe of what they want to say publicly.
3 They have been very clear, they have been very
4 consistent, and they have told anybody who wants to
5 listen that they never intended to give information
6 necessary to replicate the attack. And, in fact, they
7 didn't. They have never given the information necessary
8 to replicate the attack. And to the extent that anyone
9 in this courtroom gave information that was necessary to
10 replicate the attack on the CharlieTicket, it was the
11 plaintiffs, because they published the first
12 confidential report that the defendants wrote for them
13 even before the presentation on the court docket. And
14 that included the information that the clients -- that
15 the MIT students did not intend and were not going to
16 present at the DefCon conference. So to the extent that
17 anyone's been a little laissez-faire here about making
18 sure that nobody can replicate the vulnerabilities that
19 our clients found, I think you have to look at the MBTA.
20 But in any event, they have not met their burden
21 of proving irreparable harm here because the students
22 don't want to give that key information. As I said,
23 there are three pieces of information or three
24 categories of information: There's the public
25 information. Everybody agrees that that's outside the

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1 case -- outside the scope of the injunction. There is
2 the key information, the crown jewel that you would need
3 to replicate this attack. The clients do not want to
4 publish this, they never indicated they want to publish
5 it, and they certainly don't want to publish it now.
6 Then there is the universe of nonpublic
7 materials that is important to understanding what the
8 students did, without allowing replication, but to give
9 context and background to what -- to what it is the
10 students are saying. Remember, it was not until just
11 this morning that the MBTA admitted that what the
12 students did wasn't a prank. Until we pushed this to
13 this Court, they were trying to deny that this happened
14 and punish the whistle-blowers.
15 You know, if there's ever been a
16 shoot-the-messenger case, I guess this is it. Our
17 clients didn't create a vulnerability in the MBTA fare
18 security system; they just discovered one. The
19 vulnerability was there. Other people would have found
20 it, or may have found it already, but the -- you know,
21 to the extent, you know, that they are being punished
22 here, they're being punished because they want to speak
23 about a truthful thing that they discovered.
24 So the MBTA has not met their burden that there
25 will be irreparable harm here if the students are

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1 allowed to talk about not the key -- crown jewels,
2 because they don't want to talk about that, but the
3 second category of nonpublic information that is
4 contained in the security analysis.
5 Now, we gave this to your Honor very explicitly
6 because we wanted you to take a look at that security
7 analysis, and we felt that if you did, you would agree
8 with this: that there's nothing in that security
9 analysis but speech. It's pure protected speech. It's
10 research materials and it's the result of the research,
11 and that's all that's in there.
12 So we have given them the universe of what the
13 clients want to say. And effectively I think what the
14 MBTA is saying here today is: Well, we want an
15 injunction because we're scared that they might say
16 something else. But the First Amendment is very clear
17 on this: You don't get an injunction against speech
18 based on a speculative fear; you don't get an injunction
19 on speech based on the fact that, well, you don't want
20 to say it anyway so let's just enjoin you from saying
21 it. Those are the things that are off the table in the
22 context of prior restraints on speech.
23 And it does appear that that's kind of what they
24 want here. They want to enjoin the clients from not --
25 from saying things that the clients don't want to say,

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1 and they want to enjoin the clients because they're
2 afraid that the clients might say something else other
3 than what the clients have very consistently, both
4 privately and publicly, told the MBTA they want to say.
5 So finally, the balancing, the third prong of
6 the preliminary injunction test: Again, MBTA has not
7 met its burden -- its very high burden -- to counteract
8 the public interest in the free flow of information
9 here. The status quo under the First Amendment is the
10 free flow of information. And the computer science
11 professors and computer scientists agree that the free
12 flow of science could be chilled here.
13 If your Honor issues an injunction preventing
14 the students from presenting their research, you're
15 going to have a ripple effect across the computer
16 research community. You're going to have people afraid
17 to do research; you're going to have people afraid to
18 talk about their research; you're going to have people
19 afraid to engage in peer review of their research,
20 which, by the way, is what the DefCon conference is
21 about, it's about peer review of scientific research by
22 researchers; and they -- you're going to set an example
23 that's going to cause ultimately all of us to be less
24 secure. Because what security researchers do, while it
25 may not be popular with vendors and transit authorities,

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1 ought to be popular for all the rest of us, because it's
2 what keeps us safe from the hackers, from the worms,
3 from the viruses, from the evil people. And I guess
4 it's what keeps the MBTA safe from people who want to
5 not pay for transit fees.
6 Ultimately -- this is the main point made by the
7 11 eminent computer security researchers, and I believe
8 that given more time I could have easily gotten triple
9 this number to sign -- is that the dialogue that happens
10 in computer security research is important to the public
11 interest. It's exactly why the First Amendment protects
12 research and scientific speech to the same level as it
13 protects journalists and their speech and speech on
14 public affairs and speeches on political events.
15 Scientific speech and the ongoing dialogue that
16 scientists widely have, that computer revolution that we
17 have today, as the scientists say, and chilling that, by
18 forcing researchers to come into court and to present to
19 the other side in the court their research, the entire
20 sum body of their research authorities, will endanger us
21 all.
22 Now, I want to talk a little about the TRO
23 language and the specific preliminary injunction
24 language because one of the problems in the language
25 that is most troubling to us -- as I said, there are

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1 three categories: There's the stuff they don't want to
2 say, there's the nonpublic stuff that they do want to
3 say and there's the public stuff. But the way that the
4 TRO is drafted, it says that anything that gives
5 material assistance to anyone in not paying their fare
6 on the T could -- is a violation of the injunction.
7 Well, this is an extremely vague term and I
8 think could easily reach a tremendous amount of ordinary
9 speaking that the clients want to do in order to explain
10 why it is they did what they did and the vulnerabilities
11 that they found. So the injunction language that
12 they're proposing is actually quite vague and creates a
13 lot of uncertainty for the students even if it were to
14 be adopted by the Court, which we don't think it should
15 be.
16 Now, I want to address a couple of things that
17 counsel said in his presentation. I'm happy to answer
18 questions, however, that the Court may have. The first
19 thing I guess I want to talk about a little bit is that,
20 you know, counsel spent a lot of -- well, I guess the
21 first thing -- I'll go in order from the five points. I
22 think that's probably the easiest way to do it.
23 The first issue is that -- the idea that the
24 information that's at issue here is that the MBTA still
25 doesn't know what the students know. I think that

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1 there's a serious First Amendment problem in ordering
2 the students as a condition of this lawsuit to divulge
3 everything that they may know as part of a preliminary
4 injunction.
5 What -- and there are several cases about this.
6 And I think the *Bextra* case and the *Cusumano* case are
7 cases that lay out exactly why such a requirement on the
8 students for providing their research materials and
9 their non-published information about their work would
10 create a chill on First Amendment speech, and that's why
11 *Cusumano* has to exist, to avoid this kind of free-form
12 inquiry into the research process.
13 I guess the second thing that I want to talk
14 about is the allegation that illegal conduct took place
15 here now. I mentioned it briefly before, but I do want
16 to point out that that allegation is merely an
17 allegation and they have not provided anyone with any
18 information supporting that allegation. And, indeed,
19 the allegation is somewhat vague about what it is they
20 think the students did and how it is they think they can
21 prove it.
22 But that is a mere allegation and it is not a
23 basis for a preliminary injunction. And, indeed, even
24 if it was the basis for a preliminary injunction -- even
25 if it was the case that the clients engaged in illegal

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1 behavior, which we firmly deny, that doesn't have
2 anything to do with the preliminary injunction they're
3 seeking here. The preliminary injunction doesn't ask
4 that the students not engage in whatever illegal
5 behavior it is under whatever statute they think it is
6 they violated; the preliminary injunction prevents the
7 clients from speaking.
8 And so there's a disconnect between the harm
9 that they said that they found, the illegal behavior,
10 and the relief that they're seeking here with this
11 preliminary injunction. And the First Amendment is very
12 clear that you should not punish someone for behavior
13 unrelated to speech by stopping their speech.
14 Next, counsel spent a lot of time talking about
15 the presentation materials, but I guess the thing that I
16 think is most important to observe from this is that the
17 DefCon presentation passed. They did not give the
18 presentation. And they have not stated, nor is there
19 any indication, that they're going to ramp up and give
20 this presentation any time again. Instead, what they
21 did was, they provided you with a security analysis that
22 gives the four corners of what they want to say
23 publicly, and that's the analysis that has to be had
24 here, not whether some presentation that didn't happen
25 in the past or some random thing that, you know, was

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1 part of that presentation that was clearly puffery by
2 20-year-old students should be the basis for a
3 preliminary injunction.
4 The students have now told you and the MBTA
5 exactly what they would like to say, and the only
6 question here is: Is it speech and is it protected? It
7 plainly is. So a lot of time was spent on the
8 presentation and the other materials, but that's not
9 what the students want to do right now, and there's no
10 indication that they do want to do, and an injunction to
11 prohibit them from doing something that they don't want
12 to otherwise do is improper under the case law.
13 Counsel also spent a lot of time talking about
14 the communications between the students and DefCon, and
15 trying to make some intimation that because the students
16 were willing to tell the conference what it is they
17 wanted to say -- and they didn't get to finish it
18 because they didn't provide a lot of things to DefCon
19 because of the perfunkle that happened -- the
20 students --
21 What MBTA is asking here is exactly what the
22 Court rejected in the *Bextra* case, the case involving
23 New England Journal of Medicine. In submitting articles
24 to the New England Journal of Medicine, I would bet that
25 a full copyright assignment is given to the New England

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1 Journal of Medicine. I believe that in submitting a
2 paper to the New England Journal of Medicine, an author
3 provides more information than just the paper itself,
4 but some of the supporting information.
5 And in the *Bextra* case they talk about the
6 dialogue between the New England Journal of Medicine and
7 the researchers who are submitting their information to
8 be presented, in this particular instance in the journal
9 rather than a conference. But the situation is directly
10 analogous. The fact that the students were willing to
11 tell the publisher, or the vehicle for publishing their
12 information -- the information -- doesn't change the
13 research privilege. It didn't change it in *Bextra*, it
14 certainly didn't change it in the *Cusumano* case where
15 clearly a lot of that information was given to the
16 publisher, and it shouldn't make a difference here.
17 The presentation at DefCon was part of the
18 research; it was part of the publication of the
19 research. And the research privilege is not waived by
20 giving the information to the publisher on your way to
21 publishing the information. So I think that the New
22 England Journal of Medicine case, the *Bextra* case, is
23 actually on all fours with the students 'relationship
24 with DefCon here. And just as the research privilege
25 should have prevented them from having to provide the

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1 confidential materials there, the same should be the
2 case here.
3 Finally, counsel gave a characterization of the
4 facts that led us to today that I think I don't really
5 want to belabor and go through, but I think there is one
6 important piece of evidence that was presented by the
7 defendants last Thursday without comment, the
8 supplemental Sullivan declaration, that I think is
9 tremendously important because it demonstrates that the
10 MBTA wasn't really straight with Professor Goodlaw --
11 excuse me -- Judge Goodlaw about --
12 THE COURT: Woodlock.
13 MS. COHN: Woodlock. Excuse me. Jet lag is
14 starting to hit.
15 -- about what had happened.
16 What Sergeant Sullivan says in the second
17 declaration, which was omitted from the first
18 declaration that they presented to the judge last week,
19 is two things of tremendous importance. First, he says,
20 "I told the students that they didn't have to give us
21 anything except for a confidential report which was due
22 in two weeks." The students actually got that report to
23 them much sooner because they heard through their
24 professor that MBTA wanted the report much sooner than
25 the two weeks.

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1 But the students were asked to do one thing in
2 person by a representative of the MBTA, and they did
3 that one thing. They met with the FBI. They
4 communicated with the FBI and the MBTA. They were asked
5 to do one thing and they did it.
6 The other thing that is important is that nobody
7 else from MBTA ever talked to the students. As far as
8 they knew, after they did this, they heard from their
9 professor that they wanted the paper sooner, they got
10 the paper sooner, and they were good to go. And without
11 any notice to them, and while clearly on notice that
12 they were out of state, the MBTA came to Judge Woodlock
13 and presented a version of the story that omitted that
14 they got -- that omitted this fact: that nobody talked
15 to the students requesting anything else from Monday
16 until Friday, and that the Friday conversation that they
17 referenced was in the context of the MBTA telling the
18 students, after they learned through counsel from MIT
19 that they were being sued, that they should now turn
20 over the slides.
21 And I think it was completely legitimate and
22 appropriate for the students to wait and see what the
23 causes of action were against them before continuing to
24 try to cooperate with the MBTA because it was clear that
25 cooperating with the MBTA wasn't helping them. And, you

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1 know, in any event, the slides were withheld for less
2 than 12 hours, and they were ultimately presented.
3 So I think that the Sullivan declaration is
4 tremendously important because I think it changes -- it
5 very clearly supports the students' version of what
6 happened and it very clearly, I think, undermines the
7 MBTA's story that they repeatedly asked the students --
8 they asked the students many, many times for
9 information; the students refused to give it to them.
10 That's not what happened here.
11 Now, the MBTA tries to bolster this by saying,
12 "Well, maybe we didn't talk to the students, but we
13 talked to their professor. We talked to Professor
14 Rivest." But Professor Rivest isn't the agent for the
15 students. They knew how to reach the students. They
16 could have called them directly if they wanted more from
17 them. And, you know, while Professor Rivest did ask
18 them to present their paper more quickly, they were not
19 told that they needed the slides; they were not told
20 that the MBTA wanted all of their presentation
21 materials. The only person who talked to the students
22 before they rushed to court and filed suit and got an
23 injunction while the students were in Las Vegas is
24 Sergeant Sullivan. And the last thing they heard from
25 him, "Everything's fine. I believe you. You guys

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1 aren't going to be a problem. I've seen all the DefCon
2 materials."
3 All these materials that counsel just walked you
4 through with great drama were all seen by the MBTA
5 before that Monday meeting -- actually, that's not true.
6 Those came later. But they had seen the ad -- the
7 conference ad saying "This is what we're going to do at
8 the conference." So they knew that the students -- what
9 the students were saying they were going to do when they
10 met with the students.
11 And I think the MBTA is trying to present the
12 students as somehow dragging their feet in terms of
13 trying to help the MBTA. And that's not the case. The
14 students are standing on their privileges and their
15 First Amendment rights. That's appropriate. You should
16 not waive those in this country. But the students have
17 been trying, within the bounds of their own rights, to
18 help the MBTA. And what they've gotten in response is a
19 litigation flurry the likes of which I think I've never
20 seen and a tremendous amount of pressure on them. And I
21 think it's completely inappropriate and it's really time
22 for this to stop. And the MBTA really ultimately is
23 trying to silence some uncomfortable truths that these
24 students uncovered. They're trying to -- they want to
25 hide the fact -- they've wanted to hide all along the

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1 fact that their fare system is broken, and rather than
2 respond the way that the transit authorities in London
3 and in Amsterdam did when similar security flaws were
4 brought to their attention, by taking the time and
5 addressing the problem, they're trying to sue the
6 messengers and they brought an action against three
7 college kids rather than addressing the problems in
8 their own house.
9 I'm going to conclude now. I'm happy to answer
10 some questions. But ultimately, your Honor, we believe
11 that the temporary restraining order should not be
12 converted to a preliminary injunction, it should be
13 dissolved immediately, and the case should go forward.
14 THE COURT: Mr. Swope?
15 MR. SWOPE: Thank you, your Honor. Good
16 afternoon.
17 The temporary restraining order doesn't run to
18 MIT, nor does the request for the preliminary
19 injunction; therefore, I only have 30 seconds of points
20 that I'd like to make to the Court, simply to correct
21 what might be the impression left by the plaintiffs'
22 briefs and comments today.
23 It was MIT who first contacted the T regarding
24 this matter. When the students contacted the Professor
25 Rivest, they asked him to call the MBTA. And it was

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1 that call that generated the meeting on Monday which
2 you've heard so much about.
3 Professor Rivest is not the agent or authorized
4 spokesperson for the students. These were kids who took
5 one class of his. He's not their advisor; they're
6 simply students in his class. He agreed to set up the
7 meeting. When the T then called him afterward to say
8 that they wanted to reach the students who were at this
9 point dispersed around the country, he relayed the
10 message to those students, but he is not their agent nor
11 acting as their attorney in that regard.
12 THE COURT: Mr. Mahony, I'll give you an
13 opportunity to respond.
14 MR. MAHONY: Your Honor, just briefly.
15 A number of the MIT students' arguments that
16 turn on information provided, your Honor, for example,
17 the argument that the CharlieCard should be released
18 from any injunction. Your Honor, based on the security
19 analysis, it's correct that the CharlieCard has not been
20 compromised. But, your Honor, we still don't know --
21 again, it's the same old concern: We don't know that
22 additional information that the students declined to
23 share.
24 Your Honor, with respect to that additional
25 information, it's difficult to envision the purpose

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1 served by advertising, as they did in the initial
2 announcement. "We present several attacks to completely
3 break the CharlieCard." That's what they've advertised.
4 And that remained in the second announcement:
5 "Completely break the CharlieCard." To make those
6 statements, and then when they say "We've given you
7 everything we want to talk about publicly. There's
8 other stuff that we could talk about but we don't want
9 to talk about but we're not going to tell you what that
10 is," and for us to have that concern of "completely
11 break the CharlieCard" as they've claimed, when they
12 won't provide even in a confidential structure -- we
13 have a protective order that we've provided to opposing
14 counsel to try to work this out -- it's hard to fathom
15 what the reasons are.
16 Your Honor, in terms of the claims that the
17 illegal activity is conclusory, your Honor, we are happy
18 to provide discovery on that point, attorneys' eyes
19 only, and after we've had a chance to depose the
20 students so we're clear about who said what to whom.
21 But, your Honor, that information is solid information.
22 We've provided a thinner version for public consumption
23 because the more that's discussed about the audit trails
24 and the protections, the more unfriendly hackers know
25 about the system. But, your Honor, understand that that

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1 is solid information and my sister is incorrect.
2 Finally -- actually, two points, your Honor. My
3 sister has said, "Court, be careful. If you continue
4 the injunctive relief, researchers will be afraid. They
5 won't research here anymore."
6 Your Honor, I submit well-tailored relief here
7 will set the rules, will settle expectations, will
8 remove the fear on both sides -- perhaps researchers are
9 afraid. But I can tell you, your Honor, entities that
10 rely on computer networks are pretty afraid as well.
11 Your Honor, we need some civil, responsible structures
12 here in place.
13 The students had their presentation and knew
14 they were going to present it for two and a half months
15 before they went to the T. Is that responsible? Do we
16 want to say to researchers who know flaws in computer
17 networks: It's okay to take two and a half months
18 before you go, and then give less than ten days, and
19 then want to disclose everything all over the world?
20 Your Honor, that's not rational structure at all.
21 We need to balance the interests. We need to
22 protect the fears of the researchers, absolutely. They
23 perform an incredibly valuable function. Your Honor,
24 I'm not underestimating when I say the students in their
25 security analysis perform valuable function. That's

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1 value, your Honor. But we don't want to discount the
2 fear that the network owners also have of researchers
3 acting irresponsibly.
4 Your Honor, the last point was, my sister said
5 it's time to stop. Your Honor, we have offered to
6 mediate on many occasions. We have offered to discuss
7 settlement on several occasions. Even yesterday we
8 presented two offers. So the statement to the Court
9 that it's time to stop coming from the MIT students
10 seems out of place.
11 Thank you, your Honor.
12 THE COURT: Okay. Well, it hardly needs
13 repeating here, I guess since it's been repeated
14 already, repeatedly, what the test is for a preliminary
15 injunction: the familiar four steps that the party
16 seeking a preliminary injunction, as with a TRO, must
17 show a likelihood of success on the merits of the
18 underlying claim, the prospect that in the absence of
19 that relief there would be, if not immediate, at least
20 imminent harm that would be irreparable, it is a term of
21 art which the law classifies certain inadequacy of other
22 remedies.
23 The test recognizes that there are, as in any
24 lawsuit, competing interests that can be affected by the
25 judgments, and that the balance shouldn't weigh in favor

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1 of the party seeking the restraint. And finally, public
2 interest is to be taken account of in light, I think, of
3 disposition of the other factors. So let me try to
4 address those in summary fashion.
5 First is the likelihood of success on the
6 merits. In many cases I've noted from the circuit and
7 elsewhere, this is the most fundamental criterion for
8 establishing a case for a preliminary injunction, and as
9 the First Circuit has said, it's the sine qua non
10 element of preliminary injunction.
11 Plaintiff's claim here, as I understand it, is
12 that the Computer Fraud and Abuse Act, as codified at 18
13 U.S. Code Section 1030, was violated, or was threatened
14 to be violated. And the section of that statute that
15 the plaintiffs rely on is Subsection (a)(5)(A)(i). Let
16 me note that that claim of a past, present or future
17 violation of the federal statute is the basis for
18 federal jurisdiction on this case. The federal
19 courts -- of course courts have limited jurisdiction.
20 And as I understand the papers, the plaintiff relies on
21 its claim arising under the CFAA to be the basis for
22 this Court's jurisdiction.
23 There are some state law claims that are
24 included in the complaint and, if anchored to a federal
25 basis for jurisdiction, might also be heard, but I don't

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1 understand that any of the claims that we've been -- or
2 issues that we've been addressing rest on any of those
3 state claims; it's federal claims exclusively. And
4 that's the same now as it was at the outset. It's the
5 pleading; the complaint frames the pleading. And I
6 guess the issue that was -- it was the way that the
7 issues were addressed initially before Judge Woodlock in
8 the motion for a TRO, and as I understand it continues
9 to be the case.
10 And I think to keep the focus -- I mean, many
11 people have different interests in the broad issues at
12 stake here. My interest is rather limited in that I
13 have a federal statute that is claimed to be violated
14 and a particular legal remedy is sought. So I
15 appreciate the breadth of views of others, but my view
16 is considerably more focused on the issues that are
17 presented by the lawsuit.
18 Now, let me also say that there had been a
19 number of motions and other papers filed in the course
20 of the last ten days or so, and there is an outstanding
21 issue concerning the discovery order that was made last
22 week. I think it's not necessary on this occasion to
23 resolve that because I think it can be, for present
24 purposes, sufficient to infer or assume, either way,
25 that information in the possession of defendants might

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1 in some ways -- if publicized, might in some ways
2 facilitate, in ways that I can't be specific about, the
3 cloning or forging of CharlieTickets. I'll assume that
4 the information that it might do that has not been
5 disclosed. I don't think it matters for present
6 purposes because I think that for other reasons based on
7 the claim that is made the MBTA has not shown the
8 likelihood of success to the merits of the CFAA claim,
9 which is, as I say, based on 1030l(a)(5)(A)(i).
10 And specifically, I think I'm actually in
11 agreement with the argument made this morning by the
12 defendants, and that is that the -- it is likely -- this
13 is not a definitive resolution of the construction of
14 the statute -- but let me just even back up to that
15 statement.
16 The issue presented first, it seems to me, is a
17 question of statutory construction rather than a
18 question of the constitutional conventions. Counsel
19 pointed out the statutes are to be construed consistent
20 with the Constitution, if possible, and construction
21 that would raise constitutional issues are generally
22 avoided, if possible. That's true. I think it is also
23 true that if there is a statutory answer to a question
24 that we need not reach, that we can prescind from
25 reaching constitutional questions if the issues

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1 presented can be resolved on constitutional grounds.
2 And I think that's the case here that's central.
3 So I agree with the argument by the defendants
4 that the construction of the statute argued for by the
5 plaintiff that the "transmission" information, according
6 to the section under the statute, by publication to an
7 audience is not likely the correct construction of that
8 provision of the statute.
9 First of all, I agree simply as a matter of
10 examination of the language and syntax. I think there's
11 a point maybe not made this morning with quite the same
12 precision but it was in one of the briefs that the
13 placement of the comma before the phrase "to a protected
14 computer" at the end of the phrase suggests that not
15 only the nearest clause, but a more remote clause, is
16 associated with that qualification to a protected
17 computer; and in particular, that is the offense
18 described here, is that a person commits the offense if
19 the person knowingly causes the transmission of a
20 program to a protected computer -- programmed
21 information -- to a protected computer. I think that is
22 a completely orthodox syntactical reading of the
23 section. And if that's the case, it's unusual for us to
24 try to find otherwise.
25 I note also that the word "information" relied

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1 on by the plaintiff is used in association with the
2 words "program code" and "command" which tend to be more
3 technical terms, suggesting that information is an
4 entity of the same order of information as codes,
5 commands and programs. And I'm not suggesting that this
6 is, in fact, a transmission of information to a computer
7 that is being addressed rather than, obviously, to an
8 audience. And I think these interpretations of the
9 statutory language are consistent with what relatively
10 minor guidance we can get from the legislative history
11 which suggests that this particular provision was aimed
12 primarily, at least, at things such as viruses and worms
13 that could be introduced by transmission to a protected
14 computer.
15 So I think that the match between the giving of
16 a public lecture or publishing in written form
17 information, that behavior, the language of the statute,
18 isn't sufficiently present for me to conclude there's a
19 likelihood of success on the merits of that claim.
20 I would also say that -- although this hasn't
21 been a primary focus here, that I think there is a
22 substantial question about whether the $5,000 loss
23 figure in (5)(B)(i) would be satisfied under these
24 circumstances. I think there's speculation about how
25 high loss could be if the loss were to be characterized

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1 as loss of revenue from people using unauthorized,
2 forged, cloned, whatever, manipulated cards. The extent
3 to which the teaching of the defendants' project would,
4 in the real world, produce forgery of the kind necessary
5 to get to $5,000 I think is a matter of possibility but
6 I don't think it has been sufficiently established to
7 support the injunction requested.
8 I think -- that's the key, obviously. I think
9 there are other problems with other steps. There's a
10 question whether there's a sufficient reason to believe
11 that there is likely imminent or irreparable harm.
12 There's some issue as to what information will be
13 produced and how harmful it will be, whether the
14 defendants will release certain key information or
15 nonpublic key information or not.
16 I think -- particularly in light of changed
17 circumstances, I think the very publicity that's been
18 attendant upon the case may change that likelihood from
19 what it was when there was a scheduled conference
20 appearance. And so I think that's less clear in the
21 plaintiff's favor than perhaps it was even at the time
22 of the original filing. And there remains also in the
23 area of speculation, I think, whether any damaged remedy
24 could be deemed adequate or not.
25 As I said earlier, in any case there's competing

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1 interests and there are winners and losers and there are
2 harms that occur and don't occur. And so the balance --
3 there are things to be said on both sides about what
4 might happen in either event, either the granting or
5 denial. Essentially for the reasons I've already
6 described with respect to the information bearing on
7 whether there's likelihood of immediate irreparable
8 harm, I think the balance is hard to assess as well, and
9 it falls to the party seeking the matter to more than
10 show it's an issue, to show it's an issue that cuts in
11 their favor.
12 So there's obviously interest in protecting the
13 integrity of the fare system, in avoiding major loss to
14 the MBTA. That's certainly legitimate harm to be
15 concerned about. There's an interest and a potential
16 harm to persons in the position of the defendants
17 regarding their ability to engage in public discussions
18 about these matters. And I make that point in the first
19 instance without reference to the First Amendment, what
20 it may or may not guarantee under these circumstances;
21 that is, I think the harm exists as a practical matter
22 without consideration of whether it's something that
23 also implicates the person. In other words, I think
24 this matter can be resolved without resort to
25 constitutional principles at this stage.

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1 And finally, public interest. Again, there's an
2 ambiguity. Obviously, the public has some interest in
3 the integrity of public institutions and systems such as
4 the MBTA in avoiding losses that will -- if they occur,
5 will likely be borne by innocent third parties such as
6 other properly paying MBTA riders and perhaps even the
7 general taxpayers. That's not an inconsiderable
8 interest. On the other hand, there's a public interest
9 in frank debate and truth-telling about weaknesses in
10 public systems so they can be improved. So I think that
11 factor comes out to be a wash. But the overriding one,
12 I think, is that here in a federal court there must be a
13 federal claim that is sufficiently viable to justify
14 orders supposed -- where they are needed.
15 Now, let me just note that a lot of reference
16 has been made to illegal behavior. And sort of a
17 general term, for purposes of establishing what needs to
18 be established here, the illegal behavior has to mean
19 illegal in the sense that it is a violation of federal
20 law, particularly, the CFAA. And for the reasons I've
21 said, I don't think that's been shown.
22 So the fact that there might be other illegal
23 behavior in violation of state law -- for example,
24 theft, damage to property, things that arise under the
25 common law -- I don't think that's significant under

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1 this kind of a claim, and so any -- I don't say that the
2 facts might not show that there was some illegal
3 behavior in terms of getting free rides or whatever, but
4 the key is whether that was a violation of federal law
5 to support a federal court's jurisdiction and order.
6 So in summary, then, those are the, I think,
7 significant reasons. And as is obvious, I conclude the
8 plaintiff has not satisfied the prerequisites for a
9 preliminary injunction, so the motion for a preliminary
10 injunction is denied.
11 I referred earlier to what the life of the TRO
12 is. I think that it apparently has life beyond this,
13 but obviously for the same reasons that I would deny the
14 motion for the preliminary injunction, I will dissolve
15 the existing TRO at this point.
16 I think it was Miss Cohn who said the case goes
17 on, it does, and we'll see what happens next, all right?
18 We'll be in recess.
19 THE CLERK: All rise.
20 (The proceedings adjourned at 12:49 p.m.)
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1 C E R T I F I C A T E

2

3 I, Marcia G. Patrisso, RMR, CRR, Official

4 Reporter of the United States District Court, do hereby

5 certify that the foregoing transcript constitutes, to

6 the best of my skill and ability, a true and accurate

7 transcription of my stenotype notes taken in the matter

8 of Civil Action No. 08-11364-GAO, MBTA v. Zack Anderson,

9 et al.

10

11 /s/ Marcia G. Patrisso

MARCIA G. PATRISSO, RMR, CRR

12 Official Court Reporter

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