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8 Attorneys for Defendant  
 ST. PAUL MERCURY INSURANCE COMPANY

9 **UNITED STATES DISTRICT COURT**  
 10 **NORTHERN DISTRICT COURT OF CALIFORNIA**  
 11 **SAN JOSE DIVISION**

Gordon & Rees LLP  
 275 Battery Street, Suite 2000  
 San Francisco, CA 94111

12	NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation;	)	CASE NO. 5:06-CV-00198 JW (PVT)
13	and	)	<b>DECLARATION OF SARA M. THORPE IN SUPPORT OF DEFENDANT ST. PAUL MERCURY INSURANCE COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY</b>
14	AMERICAN ONLINE, INC., a Delaware corporation,	)	
15	Plaintiffs,	)	
16	vs.	)	
17	FEDERAL INSURANCE COMPANY, an Indiana corporation; et al.,	)	Date: October 17, 2006
18	Defendants.	)	Time: 10:00 a.m.
19		)	Dept.: Courtroom 5
		)	Complaint Filed: 12/12/05
		)	Amended Complaint: 2/24/06

20 I, Sara Thorpe, declare as follows:

21 1. I am an attorney duly licensed to practice law in the State of California and  
 22 before the federal courts in this State and a partner in the law firm of Gordon & Rees  
 23 LLP. I am counsel of record for defendant St. Paul Mercury Insurance Company ("St.  
 24 Paul") in this matter. I have personal knowledge of the matters stated herein except as  
 25 to matters upon which I state they are based upon information and belief. If called as a  
 26 witness, I could and would competently testify to the same.

27 2. I took the depositions of witnesses involved in the issuance of the St. Paul  
 28 Policy. Nancy Perkins, formerly of Marsh (the broker involved with obtaining the St.

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1 Paul policy for plaintiffs) and now the risk manager at AOL testified that she, on behalf  
2 of Marsh and as the broker for AOL, was the person responsible for placing the general  
3 liability coverage for this account. She testified that she did not discuss or negotiate the  
4 personal injury coverage provisions of the St. Paul policy issued to AOL. Attached as  
5 Exhibit A to this declaration is a true and correct copy the transcript of the deposition of  
6 Nancy Perkins, pp. 29, 127-129.

7 3. I also took the deposition of George Bannell, the Marsh broker responsible  
8 for placing AOL's coverage with St. Paul. Mr. Bannell testified that they did not discuss  
9 or negotiate the personal injury coverage provisions of the St. Paul policy issued to  
10 AOL. Attached as Exhibit B to this declaration is a true and correct copy of the  
11 transcript of the deposition of George Bannell, pp. 40-41.

12 4. Plaintiffs have conducted extensive document discovery in this matter. St.  
13 Paul has produced to them the policy at issue, the underwriting file (both as it existed in  
14 2002 when it was produced in other litigation filed by AOL against St. Paul in Virginia  
15 [referred to here as the "Virginia Litigation"], and as it exists today), the claim file,  
16 electronic communications regarding this claim, eight other claim files and their  
17 electronic file notes, and documents that have been located regarding the changes to  
18 the Technology and standard commercial general liability form for the period 1985 to  
19 1991, and 1991 to 1996. St. Paul also has access to documents produced by Marsh  
20 (the broker) and documents St. Paul provided in response to requests AOL made in the  
21 Virginia Litigation. I know this last point is the case because plaintiffs have been using  
22 documents produced in the Virginia litigation in questioning witnesses in this case.

23 5. Plaintiffs have also requested and received the following documents,  
24 relating to changes in the policy language over the years: (1) "Side by Side comparisons  
25 of changes in the commercial general liability form (which includes reference to "making  
26 known" language and the "deliberately breaking the law" exclusion from 1985 to 1991);  
27 and (2) Side by Side comparisons of the 1991 to 1996 changes in the standard and  
28 Technology commercial general liability forms.

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1           6.       To date, plaintiffs have deposed for an entire day the underwriter  
2 responsible for issuance of the St. Paul policy to plaintiffs, and have taken the  
3 deposition of her supervisor and two others from the underwriting department. They  
4 have also asked questions and/or attended depositions of three other non-St. Paul  
5 witnesses relating to the underwriting of this policy.

6           7.       On September 29, 2006, plaintiffs' counsel spent six hours deposing the  
7 person most knowledgeable at St. Paul (Eric Solberg) regarding the history and intent of  
8 the words "making known" for Technology and standard commercial general liability  
9 forms in use from 1985 to 2001. I defended Mr. Solberg at that deposition. During the  
10 deposition, Mr. Solberg was shown the 2001 Technology commercial general liability  
11 form and asked many questions about the changes to that form's personal injury  
12 coverage. A true and correct copy of the first three pages of that form, which include  
13 the personal injury offense of "making known," are attached here as Exhibit C.

14           8.       The "making known" part of the personal injury offense did not change in  
15 the 2001 form. Mr. Solberg testified about his involvement in a change in the 2001 form  
16 of the term "written or spoken material" to "covered material," a defined term.

17           9.       On October 5, 2006, plaintiffs spent approximately 7 hours deposing a  
18 Technology Claim employee (Dale Evensen) who handled the SmartDownload claims  
19 and who was designated as a person most knowledgeable about the application of the  
20 making known language to the claim. I defended Mr. Evensen's deposition. Plaintiffs  
21 questioned Mr. Evensen extensively on his application of the words "making known" to  
22 this claim and also asked him many hypotheticals, obviously testing out their theory that  
23 an insured sued for allegedly eavesdropping and collecting private information, without  
24 the insured disseminating that information to any third party, would fall within this  
25 coverage grant.

26           10.      Plaintiffs' counsel spent another 5 hours on October 5, 2006 deposing  
27 another former Technology Claim employee (Dan Weiss) who also worked on the claim  
28 and who also testified as a person most knowledgeable about the application of "making

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known" to the claim. I defended Mr. Weiss' deposition. Plaintiffs again spent a very large part of the deposition questioning Mr. Weiss about hypotheticals to test their theory.

11. I reviewed the deposition testimony provided by James Zacharski in the Melrose Hotel matter. The Zacharski transcript involves a different insured, different claim facts, and different policy provisions (albeit one of the provisions at issue in Melrose was the "making known" part of the advertising injury offense). The deposition transcript includes testimony without any bearing on this lawsuit and testimony about confidential settlement discussions.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of October 2006, in St. Paul, Minnesota.

  
SARA M. THORPE

# EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

-----X

NETSCAPE COMMUNICATIONS :

CORPORATION, ET AL., :

Plaintiffs, : Civil action Number

Vs. : C-06-00198 JW (PVI)

FEDERAL INSURANCE COMPANY, :

ET AL., :

Defendants. :

-----X

DEPOSITION OF NANCY PERKINS

AUGUST 3, 2006

227036



(310) 207.8000	Los Angeles	(916) 922.5777	Sacramento	(818) 702.0202	San Fernando Valley
(949) 955.0400	Orange County	(408) 885.0550	San Jose	(858) 455.5444	San Diego
(415) 433.5777	San Francisco	(951) 686.0606	Inland Empire	(760) 322.2	

Exhibit A

1 Q And you described already what your job  
2 was as the account advisor, I believe. Why don't  
3 you tell us what your responsibilities were as an  
4 account advisor in 1999 for the AOL team?

5 A I was responsible for day-to-day insurance  
6 issues brought to me by AOL. I was responsible for  
7 working with Global Broking to negotiate a renewal.  
8 I was responsible for checking the policies when  
9 they were issued, just providing consulting advice.

10 Q Were you responsible for reviewing the  
11 policies to see that they had the coverage that AOL  
12 wanted purchased?

13 A Yes.

14 Q Did you have contact directly with AOL?

15 A Yes.

16 Q Who were your contacts in 1999?

17 A Lori O'Connell and David Prince.

18 Q In connection with preparing for this  
19 deposition today, did you review the deposition you  
20 gave in April 2002?

21 MR. ABELSON: Asked and answered. Answer  
22 it again.

23 MS. THORPE: I haven't asked that  
24 question. Go ahead.

25 THE WITNESS: Did I review the deposition?

1 Q How about a demand for information? Have  
2 you seen any of those?

3 A No.

4 Q Demand for something to be stopped, like  
5 an injunction-type request?

6 A Not that I can think of.

7 Q Let me refer you to a different part of  
8 the policy. On page 2295, there's the coverage for  
9 personal injury liability. Do you see that on the  
10 right-hand column, and I'll quote. It indicates  
11 "will pay amounts any protected person is legally  
12 required to pay as damages for covered personal  
13 injury that results from your business activities"  
14 "and is caused by a personal injury offense  
15 committed while this agreement is in effect." Do  
16 you see that reference?

17 A Yes, I see that.

18 Q Did you ever compare the personal injury  
19 liability coverage provided in the St. Paul policy  
20 with other general liability policies that AOL was  
21 considering for its April 1999 program?

22 A I didn't.

23 Q Did anybody else the Marsh team that you  
24 know of?

25 A They may have.



1 Q Who would have that responsibility fall  
2 into?

3 A Alex Evans, George Bannell.

4 Q Do you know if either one of them did  
5 compare the language to other general liability  
6 policies?

7 A Not with certainty.

8 Q Did you ever discuss with George or Alex  
9 whether the St. Paul policy provided any different  
10 personal injury coverage as far as the offenses that  
11 are included in the definition of personal injury  
12 than other general liability policies?

13 MR. ABELSON: The question lacks  
14 foundation, is vague. You can answer.

15 THE WITNESS: Again, going back to my  
16 earlier response, I don't recall.

17 BY MS. THORPE:

18 Q Personal injury offense is then defined  
19 and as is pertinent to this lawsuit, let me call  
20 your attention to the last bullet point there, and  
21 I'll quote. It says "personal injury offense means  
22 any of the following offenses," and the one I'm  
23 referring to is "making known to any person or  
24 organization written or spoken material that  
25 violates a person's right to privacy." Do you see

1 that reference?

2 A Yes.

3 Q Do you recall discussing this particular  
4 language with anyone on the Marsh team prior to the  
5 April '99 policy?

6 A I don't.

7 Q Have you ever talked to anyone on the  
8 Marsh team about this since the St. Paul policy was  
9 placed?

10 A Not that I recall.

11 Q Same question as to anyone at AOL?

12 A Not that I recall.

13 Q Have you talked to anyone at St. Paul  
14 about this language?

15 A I don't think so.

16 Q Do you recall any discussions with your  
17 Marsh team about whether there should be any change  
18 to the language in this personal injury offense, and  
19 particularly I'm talking about the words "written or  
20 spoken material" in light of the type of business  
21 that America Online conducts?

22 A No.

23 Q Do you remember a little earlier in the  
24 deposition we were talking about the executive risk  
25 policy and their definition of "matter." Do you

# EXHIBIT B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

-----)

NETSCAPE COMMUNICATIONS )

CORPORATION, ET AL., )

)

Plaintiffs, )

)

vs. ) Civil Action No.

) C-06-00198 JW(PVI)

FEDERAL INSURANCE )

COMPANY, ET AL., )

)

Defendants. )

)

DEPOSITION OF GEORGE BANNELL

AUGUST 18, 2006

227196



(310) 207.8000 Los Angeles	(916) 922.5777 Sacramento	(818) 702.0202 San Fernando Valley
(949) 955.0400 Orange County	(408) 885.0550 San Jose	(858) 4-----
(415) 433.5777 San Francisco	(951) 686.0606 Inland Empire	(760) 3

Exhibit B

BANNELL

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going to use in the placement?

A. In 1999?

Q. Yes,

A. Not always, no.

Q. Do you recall that with AOL's insurance placement that St. Paul did provide you with copies of the forms that they would use in the insurance placement?

A. I don't recall whether they did not. I trust that they did because of this fax, but I don't remember receiving it.

Q. Did you, assuming you did receive this, what is marked as Exhibit 16, which is St. Paul's technology commercial general liability protection specimen form, did you review this form?

A. I don't recall if I reviewed it or not.

Q. Would that be your normal procedure to do so?

A. It could be.

Q. Do you recall any discussions with St. Paul about any of the terms, provision or conditions in this generally liability form in connection with placing coverage for AOL in 1999?

MR. WOLFERT: Objection to form.

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BANNELL

THE WITNESS: I don't recall any discussions about that.

BY MS. THORPE:

Q. Do you recall having any negotiations over any of the wording in the form?

A. I don't recall that.

Q. Specifically do you recall discussing the scope of the personal injury and advertising injury as it appears in this generally liability form?

A. I do not.

Q. Let me hand you what we've marked as Exhibit 17. This is a one-page document, the top is labeled America On Line, Inc., general liability insurance coverage review and comparison, N-A-T, slash, S-D-L-1-1-5-1-5 and 1-1-5-1-6. Sorry, it's a two-page document.

First of all, do you recall ever seeing this document before?

A. I don't.

Q. Is this the type of document that you would be involved in preparing, a comparison of different policies for coverage for AOL?

A. It's similar. I can't state that this is mine because I don't remember ever using a format

# EXHIBIT C

**TECHNOLOGY  
COMMERCIAL GENERAL LIABILITY PROTECTION**

**The STPAUL**

This insuring agreement provides general liability protection for your business. There are, of course, limitations and exclusions throughout this agreement that apply to that protection. As a result, this agreement should be read carefully to determine the extent of the coverage provided to you and other protected persons.

*Do not attach this form to a policy. It is for informational use only.*

<b>Table of Contents</b>	<b>Page</b>	<b>Each event limit. How the limits of coverage apply if a total limit is left blank.</b>	<b>12</b>
<b>What This Agreement Covers</b>	<b>2</b>		<b>13</b>
Bodily injury and property damage liability.	2	<b>Exclusions - What This Agreement Won't Cover</b>	<b>13</b>
Personal injury liability.	3	Aircraft.	13
Advertising injury liability.	4	Auto.	13
Medical expenses.	4	Breach of contract.	14
Right and duty to defend a protected person.	4	Contract liability.	14
Additional payments.	5	Control of property.	17
Right to appeal a judgment against a protected person.	6	Damage to your products or completed work.	17
<b>When This Agreement Covers</b>	<b>6</b>	Deliberately breaking the law.	18
Bodily injury and property damage liability.	6	Employers liability.	18
Personal injury liability.	6	Employment-related practices.	18
Advertising injury liability.	6	Expected or intended bodily injury or property damage.	19
Medical expenses.	6	False material.	19
<b>Where This Agreement Covers</b>	<b>6</b>	Impaired property.	19
<b>Who Is Protected Under This Agreement</b>	<b>7</b>	Intellectual property.	19
Individual.	7	Liquor liability.	20
Partnership or joint venture.	7	Material previously made known or used.	20
Limited liability company.	7	Medical expenses of certain persons.	20
Corporation or other organization.	7	Mobile equipment.	20
Employees and volunteer workers.	7	Nuclear energy liability.	21
Real estate managers.	8	Pollution injury or damage.	23
Landlords.	9	Pollution work loss, cost, or expense.	25
Equipment lessors.	9	Poor quality or performance.	26
Persons or organizations for your work as required by written contract.	9	Product recall.	26
Vendors of your products.	9	Unnamed partnership, joint venture, or limited liability company.	26
Operators of registered mobile equipment.	10	Watercraft.	26
Unnamed subsidiaries.	10	Workers compensation and other benefits laws.	26
Newly acquired or formed organizations.	10	Wrong price description.	27
Separation of protected persons.	10	<b>Other Insurance</b>	<b>27</b>
<b>Limits Of Coverage</b>	<b>10</b>	Primary or excess other insurance.	27
General total limit.	11	When this agreement is excess insurance.	27
Products and completed work total limit.	11	Methods of sharing.	27
Personal injury each person limit.	12		
Advertising injury each person limit.	12		



**St Paul**

**What This Agreement Covers**

**Bodily Injury and property damage liability.** We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:

- happens while this agreement is in effect; and
- is caused by an event.

*Protected person* means any person or organization that qualifies as a protected person under the Who Is Protected Under This Agreement section.

*Bodily injury* means any physical harm, including sickness or disease, to the physical health of other persons.

We'll consider any of the following that happens at any time to be part of such physical harm, sickness, or disease, if it results in or from such physical harm, sickness, or disease:

- Mental anguish, injury, or illness.
- Emotional distress.
- Care, loss of services, or death.

We'll consider any bodily injury that's a continuation, change, or resumption of previously known bodily injury to happen before this agreement begins if such continuation, change, or resumption would otherwise be covered by this agreement because of a continuous, multiple, or other coverage trigger required under the law that applies.

Of course, if there's a continuation, change, or resumption, after this agreement ends, of bodily injury that:

- Isn't previously known bodily injury; and
- happens while this agreement is in effect; we'll consider such continuation, change, or resumption to also happen while this agreement is in effect if that would be the result because of a continuous, multiple, or other coverage trigger required under the law that applies.

*Previously known bodily injury* means bodily injury that happened before this agreement begins and was known by you or any described individual protected person

before this agreement begins as a result of any of the following at that time:

- You or any described individual protected person reporting all or part of that bodily injury to us or any other insurer.
- You or any described individual protected person receiving a claim or suit for all or part of that bodily injury.
- Any described individual protected person witnessing, or being told of, the beginning, or any change, continuation, or resumption, of all or part of that bodily injury.

*Described individual protected person* means any of the following:

- You or your spouse if you are an individual.
- Any of your partners or co-venturers that are individuals, or their spouses, if you are a partnership or joint venture.
- Any of your members or managers if you are a limited liability company.
- Any of your directors or executive officers if you are a corporation or other organization.
- Any of your employees who is or acts as your insurance or risk manager or holds a position in your insurance, risk management, or legal department.

*Property damage* means:

- physical damage to tangible property of others, including all resulting loss of use of that property; or
- loss of use of tangible property of others that isn't physically damaged. For example:

*One of your employees accidentally causes a fire in your premises. The fire department responds and orders nearby businesses to close for safety reasons while it fights the fire. Your premises is heavily damaged by the fire. But none of the nearby businesses are physically damaged. As a result, we'll consider the period of time those businesses are closed due to your fire to be loss of use of tangible property of others that isn't physically damaged.*

We'll consider all physical damage to tangible property of others that's a continuation, change, or resumption of previously known physical damage to

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The St Paul

Do not attach this form to a policy. It is for informational use only.

tangible property of others to happen before this agreement begins if such continuation, change, or resumption would otherwise be covered by this agreement because of a continuous, multiple, or other coverage trigger required under the law that applies.

Of course, if there's a continuation, change, or resumption, after this agreement ends, of physical damage to tangible property of others that:

- Isn't previously known physical damage to tangible property of others; and
- happens while this agreement is in effect; we'll consider such continuation, change, or resumption to also happen while this agreement is in effect if that would be the result because of a continuous, multiple, or other coverage trigger required under the law that applies.

We'll consider all loss of use of:

- damaged tangible property to happen at the time of the physical damage that caused it; and
- undamaged tangible property to happen at the time of the event that caused it.

*Tangible property* does not include data.

*Previously known physical damage to tangible property of others* means physical damage to tangible property of others that happened before this agreement begins and was known by you or any described individual protected person before this agreement begins as a result of any of the following at that time:

- You or any described individual protected person reporting all or part of that property damage to us or any other insurer.
- You or any described individual protected person receiving a claim or suit for all or part of that property damage.
- Any described individual protected person witnessing, or being told of, the beginning, or any change, continuation, or resumption, of all or part of that property damage.

*Event* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

We explain the terms:

- claim and suit in the Right and duty, to defend a protected person section;
- executive officer and other organization in the Corporation or other organization section; and
- employee in the Employees and volunteer workers section.

*Personal injury liability.* We'll pay amounts any protected person is legally required to pay as damages for covered personal injury that:

- results from your business activities; and
- is caused by a personal injury offense committed while this agreement is in effect.

*Personal injury* means injury, other than bodily injury or advertising injury, that's caused by a personal injury offense.

*Personal injury offense* means any of the following offenses:

- False arrest, detention, or imprisonment.
- Malicious prosecution.
- Wrongful entry into, or wrongful eviction from, a room, dwelling, or premises that a person occupies, if such entry or eviction is committed by or for the landlord, lessor, or owner of that room, dwelling, or premises.
- Invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies, if such invasion is committed by or for the landlord, lessor, or owner of that room, dwelling, or premises.
- Libel, or slander, in or with covered material.
- Making known to any person or organization covered material that disparages the business, premises, products, services, work, or completed work of others.
- Making known to any person or organization covered material that violates a person's right of privacy.

*Covered material* means any material in any form of expression, including material made known in or with any electronic means of communication, such as the Internet.