

<p style="text-align: center;">1</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO</p> <p>Civil Action No. 09-cv-00528-PAB-BNB</p> <hr/> <p>DEPOSITION OF: DAVID A. WEINSTEIN - August 26, 2010</p> <hr/> <p>DATAWORKS, LLC, a Colorado limited liability company, Plaintiff, v. COMMLOG LLC, an Arizona limited liability company, Defendant.</p> <hr/> <p>PURSUANT TO NOTICE, the deposition of DAVID A. WEINSTEIN was taken on behalf of the Defendant at 1875 Lawrence Street, Suite 1000, Denver, Colorado 80202, on August 26, 2010, at 9:11 a.m., before Sharon L. Szotak, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public within Colorado.</p> <p style="text-align: center;">A P P E A R A N C E S</p> <p>For the Plaintiff: TRACY A. DAVIS, ESQ. Benjamin, Bain & Howard, LLC 7315 East Orchard Road Suite E400 Greenwood Village, Colorado 80111</p> <p>For the Defendant: J. MARK SMITH, ESQ. Pendleton, Friedberg, Wilson & Hennessey, P.C. 1875 Lawrence Street Suite 1000 Denver, Colorado 80202</p>	<p style="text-align: center;">3</p> <p>1 WHEREUPON, the following proceedings were 2 taken pursuant to the Federal Rules of Civil 3 Procedure. 4 * * * * * 5 (Deposition Exhibits 61 through 71 were 6 marked.) 7 DAVID A. WEINSTEIN, 8 having been first duly sworn to state the whole truth, 9 testified as follows: 10 EXAMINATION 11 BY MR. SMITH: 12 Q. Would you give us your name for the 13 record. 14 A. Sure. David A. Weinstein. 15 W-e-i-n-s-t-e-i-n. 16 Q. And your business address. 17 A. 695 South Colorado Boulevard, Suite 360, 18 Denver, Colorado 80246. 19 Q. And you have been designated as an expert 20 in the case of Dataworks versus Commlog; is that 21 correct? 22 A. Yes. 23 Q. Pursuant to that designation, you have 24 undertaken and rendered a report? 25 A. I did.</p>																																
<p style="text-align: center;">2</p> <p style="text-align: center;">I N D E X</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">EXAMINATION OF DAVID A. WEINSTEIN</td> <td style="width: 40%; text-align: right;">PAGE</td> </tr> <tr> <td>August 26, 2010</td> <td></td> </tr> <tr> <td>By Mr. Smith</td> <td style="text-align: right;">3</td> </tr> <tr> <td colspan="2" style="text-align: center;">I N I T I A L</td> </tr> <tr> <td>DEPOSITION EXHIBITS:</td> <td style="text-align: right;">REFERENCE</td> </tr> <tr> <td>Exhibit 61 Certificate of Registration, TX 6-932-189, 12/30/08</td> <td style="text-align: right;">5</td> </tr> <tr> <td>Exhibit 62 Certificate of Registration, TX 6-932-197, 12/30/08</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 63 Certificate of Registration, TX 6-894-605, 12/23/08</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 64 Certificate of Registration, TX 6-894-609, 12/29/08</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 65 Certificate of Registration, TX 6-894-609, 12/29/08</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 66 Certificate of Registration, TX 6-894-618, 12/23/08</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 67 Certificate of Registration, TX 6-894-618, 12/23/08</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 68 Letter to Register of Copyrights from Weinstein, 12/22/08, Re: Copyright Application/ Filing, with attachments</td> <td style="text-align: right;">8</td> </tr> <tr> <td>Exhibit 69 Information and Material to Prepare a Copyright Application</td> <td style="text-align: right;">16</td> </tr> <tr> <td>Exhibit 70 Invoice to Dataworks from Weinstein, 11/28/09, with attachments</td> <td style="text-align: right;">79</td> </tr> <tr> <td>Exhibit 71 Privilege Log</td> <td style="text-align: right;">80</td> </tr> </table>	EXAMINATION OF DAVID A. WEINSTEIN	PAGE	August 26, 2010		By Mr. Smith	3	I N I T I A L		DEPOSITION EXHIBITS:	REFERENCE	Exhibit 61 Certificate of Registration, TX 6-932-189, 12/30/08	5	Exhibit 62 Certificate of Registration, TX 6-932-197, 12/30/08	8	Exhibit 63 Certificate of Registration, TX 6-894-605, 12/23/08	8	Exhibit 64 Certificate of Registration, TX 6-894-609, 12/29/08	8	Exhibit 65 Certificate of Registration, TX 6-894-609, 12/29/08	8	Exhibit 66 Certificate of Registration, TX 6-894-618, 12/23/08	8	Exhibit 67 Certificate of Registration, TX 6-894-618, 12/23/08	8	Exhibit 68 Letter to Register of Copyrights from Weinstein, 12/22/08, Re: Copyright Application/ Filing, with attachments	8	Exhibit 69 Information and Material to Prepare a Copyright Application	16	Exhibit 70 Invoice to Dataworks from Weinstein, 11/28/09, with attachments	79	Exhibit 71 Privilege Log	80	<p style="text-align: center;">4</p> <p>1 Q. Okay. In addition to being endorsed and 2 retained as an expert to testify in this case, you 3 previously had done some work for Dataworks? 4 A. That's correct. 5 Q. Okay. Can you tell me when you first 6 started working for Dataworks? 7 A. Perhaps 10 years, or more, ago. 8 Q. Do you remember what the first item was 9 that you worked on? 10 A. A trademark registration. 11 Q. And what trademark, if you remember? 12 A. I don't remember. 13 Q. What other work did you do for Dataworks 14 over the years, up till 2008? 15 A. Mostly trademark applications, 16 registrations, maintenance of trademark. 17 Q. Did you counsel them on any other aspects 18 of law or business? 19 MS. DAVIS: Mark, I object to this. 20 Remember, stuff not at issue in this case is 21 privileged. So if it's not related to these marks, 22 even strategy related to these marks or copyrights, 23 I'm going to object to it as privileged. 24 MR. SMITH: Okay. I want to get a scope 25 of type. I don't have any problem. We won't be going</p>
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1 far afield. I just want to get the concept and the
 2 subject matter that we're talking about.
 3 A. Most of my counsel is with respect to
 4 trademark.
 5 **Q (BY MR. SMITH) When did you first**
 6 **undertake work on the copyrights that are the subject**
 7 **matter of this suit?**
 8 A. Probably within the last year or year and
 9 a half. I'm unsure of the specific date, but within
 10 that range.
 11 **Q. Okay. If we look at Exhibit 61, the**
 12 **first exhibit, it indicates a date of certification of**
 13 **December 5, 2008. Would that have been**
 14 **approximately -- that would have been when you filed**
 15 **for the application for that registration?**
 16 A. Correct. It may have been a month or so
 17 before that.
 18 **Q. Independently, do you remember when**
 19 **you -- either when or what you were specifically asked**
 20 **to do at the outset of the copyright registrations,**
 21 **application?**
 22 A. Seek registration of copyrights.
 23 **Q. Had you done any work for Dataworks on**
 24 **copyrights prior to that?**
 25 A. Not that I recall at this time.

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1 **Q. Who did you deal with at Dataworks?**
 2 A. Rochelle Paulet. R-o-c-h-e-l-l-e
 3 P-a-u-l-e-t.
 4 **Q. Anyone else?**
 5 A. Primarily with Rochelle.
 6 **Q. And would that have been for -- let me**
 7 **ask this question first: Did you undertake to do**
 8 **copyright counseling or application for registration**
 9 **on any other works other than the ones that are at**
 10 **issue in this case?**
 11 A. No. To my knowledge, no.
 12 **Q. So approximately a month or so, give or**
 13 **take, before December 5 of 2008 was when you started**
 14 **counseling with them?**
 15 A. That time period, yes.
 16 **Q. Okay. Is there anything specific that**
 17 **you can remember about the time that you first were**
 18 **involved with Dataworks on copyright registrations?**
 19 **Any specific incident or --**
 20 A. I think it was -- as best I can recall at
 21 this point, I think it was with respect to registering
 22 the copyrights. There may have been some other
 23 discussions, but I don't recall them at this point.
 24 **Q. And would those have been in person or**
 25 **phone?**

7

1 A. Almost all by phone.
 2 **Q. Was there e-mail correspondence?**
 3 A. I'm sorry. There was almost all oral
 4 conversations, by phone. There was conversation in
 5 writing through e-mail.
 6 **Q. Any what we would call snail mail?**
 7 A. Probably had some snail mail, but I don't
 8 recall it specifically.
 9 **Q. I hate to be so degrading to the Postal**
 10 **Service, but -- who did you work with at Dataworks**
 11 **with respect to the trademark registrations that you**
 12 **obtained?**
 13 A. There were a number of people. Initially
 14 it was Don Drennan, who I believe was a founder of
 15 Dataworks. That was 10 years or more ago. I do not
 16 recall the name of his partner, the co-owner, at this
 17 time. Those two individuals.
 18 **Q. And when did that change? That is,**
 19 **stopped being Mr. Drennan?**
 20 A. You know, I can't tell you specifically.
 21 I don't recall.
 22 **Q. But sometime, as you understand it, he**
 23 **left the firm or sold it?**
 24 A. He either left the firm or sold the
 25 firm -- he left the firm. I'm aware that he left the

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1 firm. I don't know when he left the firm. He may
 2 have sold it. I'm not sure what that transaction was.
 3 **Q. Okay. With respect to the copyrights**
 4 **that are at issue in this case, what copyrights are we**
 5 **talking about?**
 6 A. I'm going to have to look at the
 7 documents. I don't recall all of them. They were
 8 probably Guest Services Red Book.
 9 **Q. And that would be --**
 10 A. Do you want the exhibit number?
 11 **Q. Yes, please.**
 12 A. Exhibit 61.
 13 **Q. Okay.**
 14 A. Requested Days Off, Exhibit 62. Shift
 15 XChange, Exhibit 63. The Trainer's Log Book, third
 16 quarter 2008, Black-eyed Pea, Exhibit 65. The
 17 Trainer's Log Book, third quarter 2008, Black-eyed
 18 Pea, Exhibit 64.
 19 The Manager's Red Book, third quarter
 20 2008, Black-eyed Pea, Exhibit 66. The Manager's Red
 21 Book, third quarter 2008, Black-eyed Pea, Exhibit 67.
 22 Those are the works.
 23 There may have been another one called
 24 Regional Manager's Brown Book Period Thirteen 2008,
 25 Hooters. It's referred to in Exhibit 68. Pocket

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1 Rocket FS F2287, also referred to in Exhibit 68.
 2 **Q. Okay.**
 3 A. Did I say schedules? If I didn't say
 4 schedules, then Schedules Period Thirteen 2008,
 5 Hooters, referred to in Exhibit 68.
 6 **Q. Now, the ones with Hooters Pocket Rocket,**
 7 **you're referring to Exhibit 68 --**
 8 A. Correct.
 9 **Q. -- that included those. Are those in any**
 10 **way related to this case?**
 11 A. I'm not sure. I don't know.
 12 **Q. Okay. When you were contacted to seek**
 13 **registration of these copyrights that you've listed,**
 14 **were you given a reason why they were seeking**
 15 **registration?**
 16 MS. DAVIS: Objection. That's
 17 attorney-client privilege.
 18 MR. SMITH: What?
 19 MS. DAVIS: That's privileged. To the
 20 extent it could be something unrelated to this, it
 21 could be -- doesn't even matter if they were
 22 protecting them. For this case, it's still
 23 privileged.
 24 MR. SMITH: So you are instructing him
 25 not to answer?

10

1 MS. DAVIS: I am.
 2 MR. SMITH: And that's based on
 3 attorney-client communication?
 4 MS. DAVIS: It is.
 5 MR. SMITH: And the scope of that
 6 privilege is?
 7 MS. DAVIS: As I said, it's the
 8 counseling that he did that's not related to the
 9 filing or the subject of the copyrights. The greater
 10 copyright strategy or discussions related to whether
 11 they should copyright or not copyright something,
 12 that's privileged.
 13 I understand that there's a line, since
 14 he's an expert, that there's going to be facts --
 15 things that go into his expert opinion that are
 16 probably the subject of some sort of communication,
 17 because the information had to come from Dataworks.
 18 But broader copyright strategy is not included in
 19 that.
 20 MR. SMITH: Just so we can lay the
 21 groundwork for ourselves, strategy as to why
 22 registration should be sought or the particular works
 23 that should be sought?
 24 MS. DAVIS: Yes.
 25 MR. SMITH: Or not sought?

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1 MS. DAVIS: Yes.
 2 MR. SMITH: Okay. But as to particular
 3 applications that are, in fact, within these exhibits
 4 that we've just listed, I'm going to be inquiring as
 5 to what he learned, who he learned that from,
 6 et cetera, and also why he made certain decisions.
 7 MS. DAVIS: I think there are facts with
 8 regard to the background for the books, that kind of
 9 information, which is not privileged. It's a fact,
 10 not advice. To the extent it's contained in
 11 communications, I think in this circumstance, it still
 12 seems to be something that's obviously part of the
 13 application.
 14 Why he made decisions regarding certain
 15 aspects, I think I'm not sure I can answer that yet
 16 until I hear what the question is. I guess I just am
 17 not quite sure what you're doing or where you're --
 18 what you're talking about, so --
 19 MR. SMITH: Okay. We'll get to that.
 20 I think we got off on this tangent based
 21 on I had asked about why they were seeking the
 22 copyright. And it's that particular question that
 23 you're objecting to?
 24 MS. DAVIS: It is.
 25 MR. SMITH: All right.

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1 **Q (BY MR. SMITH) With respect to when you**
 2 **started working on the applications for the trademarks**
 3 **that are -- or the copyrights that are -- the**
 4 **registrations that are Exhibits 61 and -- 61 through**
 5 **68, I guess, are referenced. Whether they are**
 6 **actually the registrations or not is a separate**
 7 **question.**
 8 **But you don't know, at this juncture,**
 9 **whether that was tied specifically to a particular**
 10 **third party, their actions?**
 11 MS. DAVIS: Objection. Privileged.
 12 MR. SMITH: Just so we do not have to
 13 restate it to the completion, but if you would just
 14 say -- and if it's satisfactory with you, objection as
 15 to privilege, that's fine. If we can agree that
 16 that's the scope of the privilege.
 17 MS. DAVIS: Yes. Objection as to
 18 privilege, for the reasons that I said before.
 19 MR. SMITH: That's fine. I won't ask you
 20 to repeat it.
 21 MS. DAVIS: Yeah. It's going to be a
 22 long transcript if I --
 23 MR. SMITH: It will.
 24 **Q (BY MR. SMITH) Did anyone explain any**
 25 **circumstances of any third-party actions that, in your**

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1 mind, were related to the application process?
 2 A. It's possible, but I don't recall
 3 specifically.
 4 Q. As you sit here today, do you remember
 5 any discussions about my client, Commlog?
 6 A. That name may have been mentioned. I
 7 don't recall specific discussions, no. That's the
 8 extent.
 9 Q. And again, were the entirety of your
 10 discussions with Ms. Paulet?
 11 A. Yes.
 12 Q. So you didn't talk with anyone else at
 13 Dataworks?
 14 A. Not that I recall.
 15 Q. Do you remember specifically what you
 16 were asked to do when you started the project of
 17 seeking registrations for the copyrights?
 18 A. To register the copyrights.
 19 Q. And did they come to you with specific
 20 works that they wanted registered?
 21 A. Yes.
 22 Q. Do you know -- were there works that they
 23 brought to you that you did not, in fact, seek a
 24 registration for?
 25 MS. DAVIS: Objection. It's privileged.

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1 Getting into bigger copyright strategy.
 2 Q (BY MR. SMITH) And how did you receive
 3 the works that were going to be registered?
 4 A. The physical works?
 5 Q. Yes.
 6 A. By delivery to my office.
 7 Q. Do you remember when that delivery was?
 8 A. Before I filed the applications.
 9 December, maybe, of 2009 possibly. I have to refresh
 10 my memory as to when the applications were filed.
 11 Either 2009 or 2008.
 12 Q. Why don't we just -- so we can keep --
 13 A. I'll tell you if it will be helpful to
 14 you. It's 2008.
 15 Q. So December of 2008 is when you at least
 16 submitted the specimens?
 17 A. It could have been November of 2008. In
 18 that two or three-month range. October, November,
 19 December.
 20 Q. And to the extent you're objecting as to
 21 privilege, I asked were there other works, other than
 22 the ones that we have listed or shown by Exhibit 61
 23 through 68, or referenced therein, that were delivered
 24 to you.
 25 MS. DAVIS: And I'm going to object to

15

1 that one for the same reason.
 2 Q (BY MR. SMITH) In the materials that were
 3 submitted to you in this time period of October to
 4 December of 2008, did they all come at one time?
 5 A. No.
 6 Q. Were there multiple --
 7 A. Yes.
 8 Q. -- deliveries? Were they all within
 9 that same time frame of October to December?
 10 A. Yes.
 11 Q. Do you remember which ones came first?
 12 A. No.
 13 Q. Do you remember how many deliveries there
 14 were?
 15 A. More than two.
 16 Q. More than five?
 17 A. Possibly.
 18 Q. More than 10?
 19 A. Unlikely.
 20 Q. Were there any accompanying
 21 communications, letters, informational attachments to
 22 any of those works?
 23 A. With the delivered items?
 24 Q. Yes.
 25 A. I don't recall anything other than the

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1 items themselves.
 2 Q. There was no cover letter?
 3 A. To my recollection, no.
 4 Q. Were there any labels on them? That is,
 5 other than the item themselves, as to what they may be
 6 labeled, were there any handwritten notes on them?
 7 A. To my knowledge or recollection, no.
 8 Q. When you received these, had you already
 9 communicated or talked with Ms. Paulet?
 10 A. Yes.
 11 Q. How many times?
 12 A. More than five.
 13 Q. Before you had any delivery of works?
 14 A. Yes.
 15 Q. What was the information that you were
 16 getting from Ms. Paulet, and what questions were you
 17 asking of her?
 18 MS. DAVIS: Object to the extent that
 19 that relates to advice, legal advice, regarding
 20 copyright strategy, protection, process. But to the
 21 extent it contains facts, you can answer.
 22 A. If I remember the question, it's what
 23 information did I request. It's reflected in one of
 24 the exhibits on a form. I can find it. Look at
 25 Exhibit 69.

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1 **Q (BY MR. SMITH) Okay. This is a series of**
 2 **forms with information placed in it?**
 3 A. Yes.
 4 **Q. Can you identify the form, when you**
 5 **received it, and its genesis? That is, before the**
 6 **information was placed in it.**
 7 A. I generated the form. I do not recall
 8 when I received it. I did not complete it with
 9 information in the column information.
 10 **Q. I'm sorry?**
 11 A. I did not complete -- in other words, it
 12 was a form that I used, and use now.
 13 **Q. Okay. So the form without the factual**
 14 **information contained in the column information is**
 15 **what you provide or what you start with?**
 16 A. Correct.
 17 **Q. And who submits the information that's**
 18 **added to that information column?**
 19 A. The person to whom I send the form.
 20 **Q. Okay. And in this case, you had sent a**
 21 **blank form to Ms. Paulet?**
 22 A. Correct.
 23 **Q. And what did you ask her to do?**
 24 A. I asked her to provide me with
 25 information in the form, so that I could prepare and

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1 file the copyright application.
 2 **Q. Okay. What else did you ask her for?**
 3 A. Probably asked her for copies of the
 4 works that were referred to in the form. When I use
 5 the word "works," I mean documents, tangible objects.
 6 **Q. And these documents, did they come before**
 7 **or after you received Exhibit 69?**
 8 A. I believe they came after the form.
 9 After I received the form.
 10 **Q. So as I understand, you had four or five**
 11 **telephone calls or communications with Ms. Paulet**
 12 **prior to receiving the documents, the works, or**
 13 **started receiving them. And then sometime during that**
 14 **four or five conversations, you sent her the form, and**
 15 **then she returned the form to you?**
 16 A. Yes.
 17 **Q. And then subsequent to receiving the**
 18 **form, you received the works.**
 19 A. In most cases, that was probably what
 20 happened. It's possible that I received works before
 21 I received forms, but I don't recall.
 22 **Q. Okay.**
 23 A. It's possible.
 24 **Q. All right. Do you remember receiving --**
 25 **how many forms do you remember receiving?**

19

1 A. I would have to refer to Exhibit 68,
 2 which lists the works that I filed with the copyright
 3 office. So that would be reflective of the number of
 4 forms that I received.
 5 **Q. You say Exhibit 68 would list the forms**
 6 **of --**
 7 A. Well, 68 does not list the forms. In the
 8 re of 68, there's an itemization of works that were
 9 filed with the copyright office. So for each one of
 10 those works, I would have received a form.
 11 **Q. Okay. But as I understand, the works**
 12 **that are listed on Exhibit 68 are the Trainer's Log**
 13 **Book, third quarter 2008, Black-eyed Pea, Schedules**
 14 **Period Thirteen 2008, Hooters, Regional Manager's**
 15 **Brown Book Period Thirteen 2008, Hooters, and Pocket**
 16 **Rocket.**
 17 A. Right. And I received forms for each of
 18 the works that are referred to in Exhibit 61, 62, 63,
 19 64, 65 --
 20 **Q. Now, 69 --**
 21 A. -- 66.
 22 **Q. -- these are the copies that you**
 23 **supplied us pursuant to our subpoena duces tecum; is**
 24 **that correct?**
 25 A. That's correct.

20

1 **Q. And if we look through the items, we have**
 2 **a Guest Services Book. That is, in fact, the same as**
 3 **Exhibit 61? The registration issued on that work?**
 4 A. Yeah, I believe it is.
 5 **Q. Okay. The next page -- or next form**
 6 **document, which starts with Bates number 22071, that**
 7 **has to be the Trainer's Log Book. Is that the same as**
 8 **Exhibit 64 and 65?**
 9 A. It's possible. 64 and 65 are the same
 10 work. It's the same copyright registration. It's a
 11 duplicate exhibit.
 12 **Q. Okay. These were as produced, so there**
 13 **may be some duplications.**
 14 A. Okay.
 15 **Q. But 64 and 65 were of the Black-eyed Pea**
 16 **Trainer's Log. Is that one and the same as the**
 17 **Trainer's Log that's in Exhibit 69 at page 22071?**
 18 A. It looks like it.
 19 **Q. And what were you basing that conclusion**
 20 **on?**
 21 A. The date of first publication in
 22 Exhibit 64, and the date of first publication in
 23 Exhibit -- the document marked CL 22071.
 24 **Q. Of Exhibit 69. Okay.**
 25 A. Of Exhibit 69, yeah.

21	<p>1 Q. Going to the next page of Exhibit 69,</p> <p>2 document page 22072, is that a duplicate of the first</p> <p>3 page, 22069?</p> <p>4 A. It looks like it, yes.</p> <p>5 Q. Then the next form in Exhibit 69 is</p> <p>6 document 22074. Can you tell me which of the</p> <p>7 registrations in 61 through 68 relates to that?</p> <p>8 A. I'll try. I'm assuming, without looking</p> <p>9 through each of these exhibits, that the cover sheet</p> <p>10 on the exhibit -- that is, the one that has the</p> <p>11 exhibit number on it -- contains -- everything that's</p> <p>12 clipped together relates to that. So I can look</p> <p>13 through these page by page, but I won't unless you ask</p> <p>14 me to.</p> <p>15 Q. Which exhibit are you looking at?</p> <p>16 A. I'm looking at Exhibit 61. The reason I</p> <p>17 say that is because I'm trying to find the Manager's</p> <p>18 Red Book Quarterly. If all these things are grouped,</p> <p>19 then I won't need to look through to see if I can find</p> <p>20 anything for that.</p> <p>21 Q. Well, we tried to keep them in the same</p> <p>22 grouping as you produced them, so hopefully it's</p> <p>23 consistent.</p> <p>24 A. No, I don't find anything in that group</p> <p>25 of exhibits that corresponds to CL 22074.</p>	23
22	<p>1 Q. Do you have -- when you searched and</p> <p>2 produced the files from your office pursuant to the</p> <p>3 subpoena duces tecum, did you collect all you could</p> <p>4 and all that you could find?</p> <p>5 A. I believe I did. It's possible I missed</p> <p>6 something.</p> <p>7 Q. Do you keep your files separated by</p> <p>8 client or by -- how do you separate and file your</p> <p>9 relevant documents?</p> <p>10 A. I keep files by client and then subfiles</p> <p>11 or multiple files for clients if they have multiple</p> <p>12 matters. So there would be a separate file for each</p> <p>13 of these works for this client.</p> <p>14 Q. And when you file -- let's just take as</p> <p>15 general practice, not related to Dataworks. But your</p> <p>16 general practice of copyright filings. What do you</p> <p>17 normally do in the way of processing the information,</p> <p>18 the application, the registration? Do you keep them</p> <p>19 themselves as individual files, subfiles as to</p> <p>20 information you received from a client and your</p> <p>21 communication with the copyright office and the</p> <p>22 documents?</p> <p>23 A. For each work I have a separate file.</p> <p>24 Within that file would be correspondence from and to</p> <p>25 clients, to the copyright office, plus documents I</p>	24
21	<p>1 file with the copyright office.</p> <p>2 Q. You keep full copies of what you file?</p> <p>3 A. Yes.</p> <p>4 Q. Now, in the case of your production in</p> <p>5 this case, pursuant to the subpoena, we did not</p> <p>6 receive copies of any works. Do you have copies of</p> <p>7 the works that you filed?</p> <p>8 A. I would have to check my files to see if</p> <p>9 I have copies.</p> <p>10 Q. As a matter of practice, do you normally</p> <p>11 keep copies?</p> <p>12 A. Of?</p> <p>13 Q. Of the works that you file with the</p> <p>14 copyright office.</p> <p>15 A. I try to do that as a matter of practice.</p> <p>16 In some instances I don't.</p> <p>17 Q. What would be the circumstances that you</p> <p>18 would not?</p> <p>19 A. If I have insufficient copies from the</p> <p>20 client. That may be it. Or I use the copies to file</p> <p>21 with the copyright office, so that would mean I</p> <p>22 wouldn't have enough -- I wouldn't have an extra copy.</p> <p>23 Q. How many copies were supplied to you of</p> <p>24 each work from Ms. Paulet?</p> <p>25 A. At least two.</p>	24

25

1 Q. And I think we got on to this by page
 2 22074 out of Exhibit 69.
 3 A. Correct.
 4 Q. And the Manager's Red Book Quarterly. I
 5 think, if we look at DW 3 -- this is in Exhibit 61 --
 6 DW 31169. This appears to be deposit material for --
 7 and then there's a -- in Exhibit 61.
 8 A. All right.
 9 Q. And within that document, if we go to
 10 DW 31169, it appears that deposit material was
 11 received by the copyright office and included a
 12 Manager's Red Book for quarter 2009.
 13 A. Correct.
 14 Q. Is that what we're referring to here in
 15 Exhibit 69 at 22074?
 16 A. It may be.
 17 Q. Okay. But you can't tell?
 18 A. No, not with certainty.
 19 Q. Going on to the next form out of
 20 Exhibit 69, 22076, this is a Manager's Red Book, third
 21 quarter 2008. And can you find the registration or
 22 the subfile for that particular application?
 23 A. Yes. I believe I do.
 24 Q. Which documents relate to that?
 25 A. Exhibit 66 and Exhibit 67.

26

1 Q. And if we look at the very back page of
 2 Exhibit 67, DW 31316, is that a copy of the deposit
 3 work --
 4 A. Yes.
 5 Q. -- that was sent off to the copyright
 6 office?
 7 A. Yes, that would be the copy.
 8 Q. Then Exhibit 69, going to the next form,
 9 page 22077, Pocket Rocket FS.
 10 A. Uh-huh.
 11 Q. I think you indicated that that was noted
 12 in Exhibit 68?
 13 A. Yes, I did.
 14 Q. I don't see within that exhibit a sample
 15 of the work.
 16 A. Uh-huh.
 17 Q. I note that there was -- on page 1157 of
 18 Exhibit 68, that apparently Pocket Rocket work was
 19 received by, I assume, the copyright office.
 20 A. Yes, it was.
 21 Q. But I don't see any copy of the actual
 22 work itself.
 23 A. It's possible -- because it wasn't
 24 requested, it's possible that it wasn't the subject
 25 matter of this lawsuit.

27

1 Q. The next document, the form in
 2 Exhibit 69, is page 22078, Requested Days Off. Is
 3 that within Exhibits 1 through 68? Or 61 through 68?
 4 A. It would be Exhibit 62.
 5 Q. And the last page of Exhibit 62 is the --
 6 again, a copy of the -- apparently the front page of
 7 the Requested Days Off.
 8 A. Yes.
 9 Q. Okay. So going back to general practice
 10 that you had for copyright applications. You say you
 11 use the form that Exhibit 69 represents, less the
 12 information contained in it, and you send that to a
 13 client. Do you give them any specific instructions as
 14 to what information you're looking for on these
 15 categories 1 through 13?
 16 A. Unless there's a request for additional
 17 information, I believe that the descriptions in the 13
 18 listed items is sufficient. At least in my practice,
 19 my experience has been that clients understand what's
 20 necessary.
 21 Q. Do you remember, in the case of
 22 Ms. Paulet, whether she requested additional guidance?
 23 A. To my knowledge, she did not.
 24 Q. Did you ever have occasion to confer with
 25 her, before you received the forms or a particular

28

1 form that she wanted, to know something more or give
 2 you some broader picture of what the information was
 3 that she was going to have to put into this form?
 4 A. Not that I recall.
 5 Q. Do you remember, upon receiving the
 6 forms, ever calling Ms. Paulet or contacting anyone
 7 and asking for additional information?
 8 A. I may have called to ask for copies that
 9 I had not received. Documents or works that I hadn't
 10 received.
 11 Q. That is, the works referenced in the
 12 form?
 13 A. Yeah, exactly. It's possible that a form
 14 was received and there was no works, so I may have
 15 called and said, please send me or deliver to me a
 16 copy of the work corresponding to the form.
 17 Q. Do you remember requesting more than two
 18 copies of the works that were going to be applied for?
 19 A. I don't remember.
 20 Q. Now, in looking at the first page of
 21 Exhibit 69, 22069, it has to do with Guest Services
 22 Book.
 23 A. Yes.
 24 Q. Just walk me through what you understood
 25 from the client in the information they put in here.

29

1 A. Title of the work was Guest Services
 2 Book. The individuals who may have participated in
 3 creating the material were listed as the individuals
 4 whose names are given there. The person who employed
 5 those individuals at Dataworks -- I assume that
 6 Dataworks was Dataworks, LLC, the client. So each
 7 person was indicated. And the description of what was
 8 contributed to the material. Design layout and
 9 functionality. Year of creation would have been 2002.
 10 That would have been the year of completion -- I'm
 11 sorry -- not creation.

12 **Q. What's the difference, in your mind?**

13 A. You can start -- if you're writing a
 14 book, if you're writing a song, if you create artwork,
 15 you could start today but not complete it till
 16 sometimes a year or two from now, maybe tomorrow. So
 17 there would be different dates between -- there can be
 18 different dates of creation and completion.
 19 Something that takes a period of time to
 20 complete would be a different date than the date of
 21 creation.

22 **Q. Okay. And why did you specifically ask**
 23 **for date of completion rather than creation?**

24 A. Because that usually indicates when a
 25 work is possibly available for public distribution.

30

1 **Q. And what is the importance of that?**

2 A. Well, usually a client -- or I inform
 3 clients it's appropriate to register a copyright after
 4 a work has been completed versus during the initial
 5 stages, because there could be additional matter added
 6 to it.

7 **Q. Okay. Then the next category is, first**
 8 **made publicly available?**

9 A. Right. Yes, it is.

10 **Q. Okay. And number 8.**

11 A. It looks like it's a duplicate. I think
 12 I probably changed that form since. It looks like a
 13 duplicate request of the same information that was in
 14 7. It looks like it's the same thing.

15 **Q. 8 and 9 are duplicates of 7?**

16 A. Yeah, that's correct. It looks like
 17 that's what happened there.

18 10 would be a situation where the
 19 copyright owner is not necessarily the person who
 20 created the work or was the initial owner. So this
 21 indicates that the owner was the initial owner.

22 **Q. That was Dataworks?**

23 A. Yeah, Dataworks. Uh-huh. And 11 would
 24 be indicative of whether there's been another
 25 application -- any other registrations issued or any

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1 registration issued other than the one that's being
 2 sought.

3 12 indicates if there's been any
 4 inclusion in the work covered by the form, of other
 5 works or other material.

6 13 would indicate any differences that
 7 exist in the preexisting material that were added.

8 **Q. So looking at 11 -- and you -- for any of**
 9 **the works that you applied for registration, had there**
 10 **been prior registrations?**

11 A. To my knowledge, no.

12 **Q. To your knowledge, had Dataworks ever**
 13 **applied for any copyrights on their own or through**
 14 **anyone else?**

15 A. I don't have any information.

16 **Q. And with respect to item 12, if the**
 17 **material incorporates anything that preexisted at the**
 18 **time you created it. So again looking at this as an**
 19 **example, we have a completion date of 2002.**

20 A. Uh-huh.

21 **Q. And material incorporating anything that**
 22 **preexisted the time that you created it. So that's a**
 23 **time that's different than the completion. Do you**
 24 **discuss that with the client?**

25 A. Generally, no.

32

1 **Q. What do you mean by material that**
 2 **preexisted the time of creation?**

3 A. Anything that was in existence before a
 4 particular work was created. For example, a work of
 5 Shakespeare would preexist a work that I might be
 6 writing now, a Shakespeare treatise, or whatever.

7 **Q. Where you may have excerpts out of the**
 8 **play.**

9 A. Yeah. Uh-huh.

10 **Q. Does it also incorporate preexisting work**
 11 **that, in fact, the copyright owner --**

12 A. It could, yes. Preexisting does not
 13 necessarily mean it's what we call public domain,
 14 available for use by everyone, not protected. It
 15 could be material that's protected.

16 **Q. By someone, whether it be the same owner**
 17 **or someone else.**

18 A. Exactly.

19 **Q. And then item 13, if the material**
 20 **contains preexisting portions. Is that a duplicate of**
 21 **12, or is that different? So 12 is asking for what is**
 22 **the preexisting condition -- or preexisting material.**

23 A. I have to look at this. 12 says,
 24 describe what preexisted. And 13 says, what did you
 25 add to the preexisting material. What did you take

33

1 out of the preexisting material. What did you modify
 2 with respect to the preexisting material.
 3 **Q. Okay. So in this case, for the Guest**
 4 **Services Book, 69, first page, the preexisting**
 5 **material, they reference the Manager's Red Book layout**
 6 **and design.**
 7 A. Uh-huh.
 8 **Q. What did you understand that to mean?**
 9 A. My understanding was, it was not the
 10 entire Manager's Red Book, but it was elements of the
 11 Manager's Red Book that were preexisting and
 12 incorporated into the Guest Services Book.
 13 **Q. Okay. Do you know what portions?**
 14 A. I don't.
 15 **Q. In your general practice, do you inquire**
 16 **as to specifics of what preexisting works and the**
 17 **source?**
 18 A. It depends upon the type of work. For a
 19 compilation, I generally don't, because there's so
 20 much in, that I found the clients have a difficult
 21 time sorting out all of the elements. As to line 45
 22 is in an earlier work and 22 is in an earlier work,
 23 and we changed the fourth word in line 36.
 24 **Q. Do you ever ask the client to go**
 25 **determine those issues?**

34

1 A. I do all the time in -- as reflected by
 2 the form. That's the extent of what I do.
 3 **Q. So you don't inquire further if they say**
 4 **there is some -- there's going to be some preexisting**
 5 **material?**
 6 A. Generally, no.
 7 **Q. And with respect to additions to**
 8 **preexisting material, do you inquire in any more depth**
 9 **than what your question 13 --**
 10 A. Generally not.
 11 **Q. In the case of Dataworks and this Guest**
 12 **Services Book, do you remember discussing in any -- to**
 13 **any degree the existence of preexisting material?**
 14 A. No, I don't recall.
 15 **Q. Or what additions may have been made?**
 16 A. I don't recall.
 17 **Q. Do you remember any questioning or**
 18 **communication with anyone at Dataworks as to what**
 19 **elements or portions of the Manager's Red Book were**
 20 **incorporated into the Guest Services?**
 21 A. I don't recall.
 22 **Q. Do you remember any discussions**
 23 **discussing or describing the additions or changes that**
 24 **were made, as they've described it in response to 13?**
 25 A. I don't recall.

35

1 **Q. Going on to the second form in**
 2 **Exhibit 69, 22071. This is the Trainer's Log Book.**
 3 A. Yes.
 4 **Q. Again, this information was supplied by**
 5 **Ms. Paulet.**
 6 A. Correct.
 7 **Q. Do you know where she got this**
 8 **information?**
 9 A. No.
 10 **Q. Do you know what she did in the way of**
 11 **investigation to obtain this?**
 12 A. No.
 13 **Q. So the title is the Trainer's Log Book.**
 14 **The name of the person who participated in creating**
 15 **the material is Sarah Marshburn? It says, "Updated**
 16 **through 2008 by various Dataworks employees."**
 17 **Did you ever talk with Ms. Marshburn?**
 18 A. No.
 19 **Q. Have any communication with her?**
 20 A. No.
 21 **Q. Do you know what changes and updates were**
 22 **done through 2008?**
 23 A. No.
 24 **Q. And the year in which the material was**
 25 **completed is 2007. Do you know -- well, let's go down**

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1 **to -- the material was publicly available in February**
 2 **of 2007, and if it incorporates preexisting material,**
 3 **item 12, the Red Book Trainer's Log, second page.**
 4 **What is that reference?**
 5 A. The Red Book Trainer's Log, second daily
 6 page. That's what it refers to.
 7 **Q. Do you know what that is?**
 8 A. No, I don't.
 9 **Q. Did you inquire?**
 10 A. No, I did not.
 11 **Q. In looking at the sample of the work that**
 12 **you received from Dataworks, did you correlate that**
 13 **particular item with what you were given?**
 14 A. No.
 15 **Q. On the fourth form -- because the third**
 16 **form happens to be a duplicate of the Guest Services**
 17 **form. But on the fourth form, 22074, this is the**
 18 **Manager's Red Book Quarterly. And this, as you**
 19 **understand, was created by Mr. Drennan and**
 20 **Mr. Winckler. Is that the other owner that you were**
 21 **referring to?**
 22 A. That's the other owner. CJ. Yes.
 23 **Q. Did you ever have any discussions with**
 24 **Mr. Drennan or Mr. Winckler about their creation and**
 25 **the works that they did?**

37

1 A. Regarding trademarks, yes.
 2 **Q. How about copyrights?**
 3 A. No.
 4 **Q. Have you since had any communications**
 5 **with them?**
 6 A. No.
 7 **Q. In this case, it was completed in 1992,**
 8 **made publicly available in 1992, and it did not**
 9 **incorporate any preexisting material. Is that**
 10 **correct?**
 11 A. Yes, that's what the form says. Yes.
 12 **Q. And you didn't independently verify or --**
 13 A. No.
 14 **Q. -- do any type of investigation?**
 15 A. I did not.
 16 **Q. The next form is 22076. This is the**
 17 **Manager's Red Book, third quarter 2008. The person**
 18 **who participated in creating it is Laura Johnson. And**
 19 **then updated through 2008 by various Dataworks**
 20 **employees.**
 21 **So am I correct, then, that at least from**
 22 **the information you were given, that Laura Johnson was**
 23 **the original creator of this material?**
 24 A. My interpretation is, she participated in
 25 it. I'm not sure if, by looking at that, I could say

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1 she was the original creator.
 2 **Q. Okay. Is that something you would**
 3 **normally want in the way of information when you're**
 4 **collecting this information for an application?**
 5 A. What I would normally want from the
 6 client with respect to an entity that has employees
 7 create, to know that they were employees who created,
 8 because the entity would be the copyright owner.
 9 **Q. Under the Work Made for Hire Doctrine?**
 10 A. Correct.
 11 **Q. So again going back to the Manager's Red**
 12 **Book, third quarter 2008. Laura Johnson was listed as**
 13 **the only named employee, but there were others.**
 14 A. Correct. That's my assumption.
 15 **Q. And this was completed in 1996?**
 16 A. Yes, that's correct.
 17 **Q. And made publicly available in that same**
 18 **year.**
 19 A. That's what the form indicates, yes.
 20 **Q. And there was no preexisting material and**
 21 **no additions to the material.**
 22 A. The form indicates that that's the case.
 23 **Q. Going over to Pocket Rocket, you**
 24 **indicate you don't know if it's relevant here.**
 25 **Going over to the next form, it's 22078,**

39

1 **Requested Days Off. And Laura Johnson is listed as**
 2 **involved in the creation, as well as Al Wirtes and**
 3 **Greg Thiesen. And it was updated every year by**
 4 **Dataworks thereafter through 2008.**
 5 **Did you inquire as to what updates there**
 6 **were between its original creation in 2002, or**
 7 **completion in 2002 and the version that you had?**
 8 A. No.
 9 **Q. Did you ask for copies of the works as**
 10 **they were originally publicly available? That is, in**
 11 **the Guest Services Book, the one that would have been**
 12 **available in 2002.**
 13 A. In some cases, I may have asked for
 14 copies of books that were published in the original
 15 state, yes.
 16 **Q. Did you ask Ms. Paulet for those?**
 17 A. I believe I did.
 18 **Q. What would have caused you to ask for the**
 19 **originals?**
 20 A. During the prosecution of the
 21 applications, the copyright office, I believe,
 22 inquired about the originals. Deposit copies that
 23 were filed with the applications reflected dates later
 24 than the dates indicated for publication in the
 25 application.

40

1 **Q. Okay. Well, in the case of Guest**
 2 **Services, Exhibit 61, if we look at the last page,**
 3 **that is the document that was submitted with that**
 4 **application. It's the first quarter of 2009.**
 5 A. Correct.
 6 **Q. And the date of completion was 2002, and**
 7 **date of publication was 2002.**
 8 A. Correct.
 9 **Q. Is that a circumstance that would have**
 10 **triggered that inquiry from the copyright office?**
 11 A. That's the type of circumstance, yes.
 12 **Q. And what did you do in order to respond**
 13 **to -- what exactly did the copyright office tell you**
 14 **or ask you on this issue?**
 15 A. For this work?
 16 **Q. Well, let's just take this one as an**
 17 **example.**
 18 A. The copyright -- I believe I had a
 19 telephone conversation with the copyright office, and
 20 we discussed the difference between the date of
 21 publication claimed in the application and the date
 22 shown on the deposit copy.
 23 And there's a provision for special --
 24 not special handling, but with respect to deposit
 25 material, if it's not available, then you can use what

41	<p>1 is currently available with an explanation that what 2 is currently available doesn't vary by a specific 3 percentage from what was the content of the earlier 4 published version. And the copyright office will 5 accept the subsequent published deposit copy. The 6 later published deposit copy.</p> <p>7 Q. Okay. So in this case, I think, is it 8 the communication shown on Exhibit 61 at 1168 from the 9 copyright office to you of May 2nd, 2009?</p> <p>10 A. Correct.</p> <p>11 Q. And about midway through that body of 12 that e-mail, notes that the application gives dates of 13 creation and publication, 2002. The copy itself is 14 2000 -- has notices of 2006 and '7. And the actual 15 publication is 2009.</p> <p>16 A. That's what it --</p> <p>17 Q. So am I correct that -- is this the first 18 communication you had, or was it by telephone before 19 you received this e-mail?</p> <p>20 A. I may not have talked with this 21 registration specialist then. I believe that I made a 22 call to inquire about the status of the application, 23 simply because the process of filing applications has 24 changed to now an electronic format. And the 25 copyright office electronic filing format is a little</p>	43	<p>1 remember any specifics as to what you were told?</p> <p>2 A. I don't remember.</p> <p>3 Q. Whether it was on the Guest Services or 4 some other --</p> <p>5 A. I don't remember specifically.</p> <p>6 Q. In fact, that happened on two or three of 7 your applications.</p> <p>8 A. That's right. Not every application.</p> <p>9 Q. Okay. With respect to the -- and it was 10 only if they were -- they asked did you then go back 11 to Dataworks and ask for what do you have available in 12 the way of original work?</p> <p>13 A. If the copyright office inquired, yes.</p> <p>14 Q. And as I understand, you can obtain -- is 15 it a particular section of the regulations that 16 applies to being allowed to produce a published work 17 that is not, in fact, the original work?</p> <p>18 A. I do not recall. I do not -- I'm not 19 familiar with that.</p> <p>20 Q. But in this case, you did follow some 21 particular regulation?</p> <p>22 A. I followed the instructions of the 23 copyright office, which is the agency that determines 24 whether a registration should be issued and what is 25 sufficient in terms of allowing it to issue a</p>
42	<p>1 bit complex. It's not as easily followed as other 2 electronic filings, so -- vis-a-vis the patent and 3 trademark office, which is pretty clear-cut and 4 simple. So that was my -- probably my inquiry. 5 What's happened. I just --</p> <p>6 Q. For following up on your applications?</p> <p>7 A. Yeah. I filed applications. This is 8 just an aside. I think it's helpful. I filed 9 applications with the copyright office and haven't 10 heard back for a year and a half after they've been 11 filed, simply because the copyright office is 12 overloaded, overburdened, doesn't get all the work 13 done right away. So you kind of always want to know 14 what happened. I may have filed applications two 15 years ago and haven't heard back.</p> <p>16 Q. Okay. So you may have called to inquire. 17 At that time, did you learn during that telephone 18 conference that this might have been an issue?</p> <p>19 A. Yeah. I wanted some comfort level -- 20 when you file electronically, you file the application 21 electronically, then you deposit separately by mail. 22 So it's not all at once. So the question was, though 23 I had the postcards indicating that they received it, 24 did they really receive it.</p> <p>25 Q. And during that conversation, do you</p>	44	<p>1 registration.</p> <p>2 Q. Have you ever looked into the regs or the 3 regulations to gather what their guidelines are?</p> <p>4 A. Yeah, I have from time to time in the 5 past. Yes.</p> <p>6 Q. And what are those guidelines?</p> <p>7 A. Specifically, as an example would be 8 depositing computer software with respect to what 9 would be acceptable or referred to as alternative 10 deposit material. Rather than depositing the entire 11 program, the office will allow something alternative. 12 Similarly with respect to large-size 13 copyrightable works, there are provisions in the 14 regulations that allow the deposit of alternative 15 deposits, simply because the copyright office does not 16 want to store material. So if you can use photographs 17 of sculpture, that would be acceptable. Software, you 18 can deposit certain excerpts. So those would be the 19 types of things that I've looked at with respect to 20 deposits.</p> <p>21 Q. Previous to this circumstance arising in 22 the Dataworks filings, had you ever looked at this 23 issue of filing something other than the actual work 24 that's being registered?</p> <p>25 A. Yeah. That would be the alternative</p>

45	<p>1 deposit. And that's -- this would be an alternative 2 deposit.</p> <p>3 Q. Had you had prior circumstances where 4 you've done that?</p> <p>5 A. No.</p> <p>6 Q. Have you had any circumstances since then 7 where you've done that?</p> <p>8 A. No.</p> <p>9 Q. And this was upon the recommendation of 10 the examiner or whoever you had this telephone call 11 with?</p> <p>12 A. Yes.</p> <p>13 Q. And do you have a record of that 14 telephone call and what you were actually told?</p> <p>15 A. It would be reflected in my notes.</p> <p>16 Q. And do you have those notes that you 17 could reference?</p> <p>18 A. They could be in correspondence to the 19 client.</p> <p>20 Q. That is, you say that the notes could 21 have been --</p> <p>22 A. They could have been -- rather than 23 taking notes, I could have -- it's possible that I 24 corresponded with the client recalling what I had 25 talked about with the copyright office.</p>	47	<p>1 Q. So your first telephone call with the 2 copyright office was really just to make sure that the 3 deposit connected with your electronic application?</p> <p>4 A. Uh-huh. If you look at --</p> <p>5 Q. And did something -- was there some 6 conversation during that first call that the 7 discussion as to the date discrepancy came up?</p> <p>8 A. I don't recall. I'm just looking to 9 refresh my memory as to what happened.</p> <p>10 Q. Okay.</p> <p>11 A. I'm looking at --</p> <p>12 Q. Why don't we take a break, and you can 13 look through that.</p> <p>14 A. That's fine. Or if you want to go on, I 15 can do it now.</p> <p>16 Q. No. Let's --</p> <p>17 A. Take a break. Okay. (Recess taken, 10:28 a.m. to 10:38 a.m.)</p> <p>19 Q (BY MR. SMITH) Have you had a chance to 20 review your file that we've --</p> <p>21 A. I did.</p> <p>22 Q. -- provided you? Does that refresh your 23 recollection as to the sequence of telephone calls, 24 who you talked with?</p> <p>25 A. I think there's enough here that allows</p>
46	<p>1 Q. Do you remember sending any 2 correspondence to the client -- that is, Dataworks -- 3 explaining that issue?</p> <p>4 A. I may have sent correspondence, yes. 5 Apparently with this -- I don't see anything here.</p> <p>6 Q. Why don't we take a few moments and look 7 through the other exhibits.</p> <p>8 A. I have handwritten notes. Look at 9 Exhibit 65. Document DW 301151.</p> <p>10 Q. Okay. Those are -- are these the notes 11 you took during that telephone conversation?</p> <p>12 A. Yes. On February 4 with Ann Tetreault at 13 the copyright office.</p> <p>14 Q. Do you remember if you called her or if 15 she called you?</p> <p>16 A. I probably called her, because I had some 17 communications -- I think it's shown in one of these 18 other exhibits -- with someone else at the copyright 19 office, where I wasn't satisfied with the responses I 20 had received. And I think I ultimately was given her 21 name to talk with.</p> <p>22 My concern was, there was a coordination 23 of the electronically filed application with the 24 deposit material that was mailed. And I think they go 25 to two different places.</p>	48	<p>1 me to do that.</p> <p>2 Q. Is there more that may be in your file 3 somewhere?</p> <p>4 A. In terms of communications with the 5 copyright office, no. This is it. You have 6 everything that was in my file.</p> <p>7 Q. All right. Do you remember sending 8 either a letter or e-mail to your client, Dataworks, 9 Ms. Paulet, as to what you learned either in the 10 telephone call or the e-mails?</p> <p>11 A. Yes, I did.</p> <p>12 Q. And would those e-mails or -- was it by 13 e-mail or letter, if you remember?</p> <p>14 A. E-mails.</p> <p>15 Q. And did those e-mails -- were they done 16 contemporaneously with the correspondence you had with 17 the copyright office?</p> <p>18 A. If it wasn't contemporaneous, it was 19 pretty close to the same day or very soon after. The 20 next day.</p> <p>21 Q. Would it have been a complete recitation 22 of those facts as you learned from the copyright 23 office?</p> <p>24 A. It would have been -- I'm not sure if it 25 would have been complete. It would have been a good</p>

49	<p>1 indication of what those conversations were with the 2 copyright office.</p> <p>3 Q. Did it include recommendations or advice?</p> <p>4 A. I believe it did.</p> <p>5 MR. SMITH: We're probably going to ask 6 for copies of those.</p> <p>7 MS. DAVIS: We'll probably object to at 8 least part of it as being privileged. But I'll see 9 what the e-mails look like, and see what's on them.</p> <p>10 MR. SMITH: Okay.</p> <p>11 Q (BY MR. SMITH) Going back to -- you 12 initially called the copyright office to find out if 13 the deposit had been connected with the electronic 14 application. And you indicated that you thought you 15 were not satisfied with the response you were getting 16 from that particular contact?</p> <p>17 A. I think I had left a number of telephone 18 messages. I had probably called the copyright office 19 to locate a responsible person. And just on past 20 experience dealing with them, probably what happened 21 is, I was given a number and left messages and they 22 weren't returned, and followed up a couple times and 23 finally did reach someone that was able to talk.</p> <p>24 Whether that was either through a return 25 call that was made to me or one that I made to the</p>	51	<p>1 we had previously identified -- where were those?</p> <p>2 A. I'm sorry?</p> <p>3 Q. What exhibit are you referring to --</p> <p>4 A. DW 31305. And actually, the words would 5 be, "should be completed next week."</p> <p>6 Q. Okay. I note that in your e-mail of 7 January 16, you said that -- when did you actually 8 file the applications that are listed here? Do you 9 have the date of that?</p> <p>10 A. It looks like on December 23, 2008.</p> <p>11 Q. And what are you referring to? What 12 page?</p> <p>13 A. The first sheet on Exhibit 67.</p> <p>14 Q. 1297?</p> <p>15 A. That's correct.</p> <p>16 Q. Okay.</p> <p>17 A. And I see a date at the top under the 18 phrase "effective date of registration." And that's 19 December 23, 2008.</p> <p>20 Q. What is the difference between the 21 effective date of registration, December 23rd, and the 22 certificate date of December 19? It occurs at the 23 bottom.</p> <p>24 A. I'm sorry. Okay. It's quite possible 25 they were filed on December 19, and the copyright</p>
50	<p>1 copyright office, I -- so I did talk to someone 2 ultimately.</p> <p>3 Q. That is this Ms. Ann Tetreault?</p> <p>4 A. Let me look on the -- if you look at 5 document DW 31305, this document is probably going to 6 be representative of documents that would be in other 7 files where the same facts were involved.</p> <p>8 On January 30th, I sent an e-mail to a 9 Mr. Pearson. Apparently I had left a number of 10 messages for him, as early as January 16, and hadn't 11 heard anything. So I had contacted him on January 16 12 by e-mail. I contacted him on January 30 by e-mail. 13 And finally on February 3, I was able to talk with 14 him.</p> <p>15 Q. And you're referring to your note?</p> <p>16 A. That's how I recall that, yes. That 17 indicates on February 3rd, I talked with Pearson. He 18 said the files were located, and the exam should be 19 completed -- I can't read my writing. But that's what 20 it says.</p> <p>21 Q. Okay. Now, this correspondence -- 22 telephone correspondence was on February of '04 -- 23 or --</p> <p>24 A. '09.</p> <p>25 Q. -- '09. Right. And the other notes that</p>	52	<p>1 office did not receive the deposit material until the 2 23rd, where the copyright office would then determine 3 if the application was complete.</p> <p>4 So on December 19th -- let's go back. 5 The applications were filed on December 19th. The 6 deposit material was received -- the applications were 7 filed electronically December 19. The deposit 8 material was mailed December 19. So I think that 9 answers your question.</p> <p>10 Q. Yes, I think so.</p> <p>11 So we were talking about 1305. How did 12 you learn of Mr. Pearson and the individual you should 13 be contacting?</p> <p>14 A. It's likely that I called the copyright 15 office and asked for someone in the group at the 16 copyright office that handles the receipt of 17 applications, a particular section. But I don't 18 recall the name of the section. And I believe his 19 name was given to me as either the head of the section 20 or someone who works in that section.</p> <p>21 Q. Okay.</p> <p>22 A. And I may have received it from an 23 operator -- general information operator at the 24 copyright office or someone else at the copyright 25 office.</p>

53	<p>1 Q. I note in your e-mail it's cc'd to two 2 other copyright office mail drops, anyway. Do you 3 know who they are? 4 A. No. At least this set of documents 5 doesn't tell me who they were. 6 Q. Going on to the next page, 1306, and 7 actually 1307, in 1307 there's a letter to -- 8 A. This is going to explain it. 9 Q. Is that still the same Mr. Pearson? 10 A. Yeah, I think. 11 Q. Or Denise -- Dennis or Denise? 12 A. Dennis. 13 Q. Dennis. Okay. And you're writing to him 14 asking for special handling. What is special 15 handling? 16 A. Let's maybe make it easier for you. 17 Let's go to 1307. I spoke with him on January 5, 18 which is indicated in the -- in that message. So that 19 was my first contact. And I apparently got his name 20 from someone at the copyright office. So that was 21 the -- probably the first telephone contact I had with 22 him on that date. 23 Q. All right. 24 A. And then the January 5 message from him 25 to me identifies the recipients of the cc's. And my</p>	55	<p>1 Q. Okay. So do you remember discussing with 2 Dataworks whether to ask for special handling? 3 A. I believe I was asked to expedite the 4 examination process. And probably explained that 5 there is a way to do that by requesting special 6 handling and paying a large, large fee. 7 Q. Did you do special handling on any other 8 applications other than these three? 9 A. It's possible. I'm unsure. But for 10 these three, yes. 11 Q. And the applicant intended to initiate 12 litigation. Do you know what litigation they were 13 referring to? 14 A. I'm unsure of which litigation they were 15 referring to. 16 Q. You had not been consulted with respect 17 to whether there would be litigation? 18 A. You know, I don't recall. 19 Q. So then after your e-mail requesting 20 special handling, they responded on the 20 -- on 21 January 5, and Mr. Pearson indicated you had these 22 alternative contacts. 23 And then your follow-up on January 16, 24 you just wanted to inquire as to the status that's on 25 1305. And it was during his -- you did another</p>
54	<p>1 January 16 message to him, which would be Brenda 2 Roseboro and Renoldo Spivey or Spivey. Roseboro is 3 R-o-s-e-b-o-r-o. And Renoldo is R-e-n-o-l-d-o, 4 initial L, Spivey I would say. S-p-i-v-e-y. 5 Q. And apparently Mr. Pearson is the head of 6 the out-processing section. 7 A. That's apparently what he is. 8 Q. What is out-processing section? 9 A. Someone who out-processes documents at 10 the copyright office. I don't know. 11 Q. All right. But as you discussed in the 12 telephone call on January 5, and with your e-mail to 13 him of that date, you were requesting "special 14 handling for the following applications in light of 15 litigation applicant intends to initiate promptly." 16 A. All right. 17 Q. And you were informing the copyright 18 office that you were requesting special handling. 19 What does that entail? 20 A. Paying a significant fee in addition to 21 the normal application fee. And examination of filed 22 applications within a significantly shorter time 23 period than a year and a half; ideally within possibly 24 two weeks to 30 days. Taken out of the normal course 25 of examining.</p>	56	<p>1 follow-up to him on January 30. 2 A. Uh-huh. 3 Q. And then you had the telephone conference 4 on February 3rd. Did you call him or did he call you? 5 A. He may have called me. I can't tell by 6 this note. 7 Q. Okay. While we're in this section, if we 8 look at 1304 of Exhibit 67, this is an e-mail from you 9 to ALET at the copyright office. Do you know who that 10 is? 11 A. I think it's ATET. And that would be 12 Mrs. Tetreault. 13 Q. That's the individual that we had the 14 handwritten notes about? 15 A. Yes. 16 Q. Okay. And that's on page 1301? 17 A. Correct. 18 Q. So at the time of your conference with 19 Mr. Pearson on February 3rd, had you been given 20 Ms. Tetreault's name and number? 21 A. I believe I was given her name and 22 number. 23 Q. And so you called her on February 4? 24 A. Yes. 25 Q. And these notes are a recitation of your</p>

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1 conversation with --

2 A. Summary of what I recall her saying or

3 what we said.

4 Q. Okay. Maybe you can read them for us.

5 A. Sure. The heading at the top of the page

6 says, "Ann Tetreault.

7 Q. Could you spell that for us?

8 A. Yes. T-e-t-r-e-a-u-l-t. Then it says,

9 2/4/09. The next line is a telephone number,

10 202-707-8318. And then on the next line it says,

11 "Remove from." And right below it says, "All SMS,"

12 meaning applications. That's my code for

13 applications. And then next to that in quotes it

14 says, "Design and layout," end quote.

15 A couple of lines -- blank lines down, it

16 says, "Text." A couple of lines that are blank.

17 Below that, it says, "Date of publication. Completion

18 for submitted work." Below that it says, "If new

19 version of previously published work, hyphen,

20 register."

21 A few lines below that it says, "Pub

22 Managers" -- that's abbreviated -- "Red Book." Then

23 on the same line to the right would read, "Trainers

24 Pub Date Okay." Below Manager's Red Book on the next

25 line would read, "Shift XChange." That's

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1 S-h-i-f-t-X-C-h-a-n-g-e.

2 A few blank lines below that it reads,

3 "If original pub, hyphen, reg, period, special relief

4 from deposit, req, period" -- meaning requirement.

5 Blank line below that is numbered 1, "Request."

6 Next line, number 2, "Indicate percentage of work

7 stayed" -- I can't read it. "1992, hyphen, 2007."

8 Next line below that, number 3, "Why unable to submit

9 original, hyphen, out of print." Two lines below that

10 is her e-mail address, atet@loc.gov.

11 Q. Okay. Let's take them item by item,

12 then. "Remove from all applications." What were you

13 to remove, and why?

14 A. I was to remove design and layout. And I

15 believe I was told by Ms. Tetreault that design and

16 layout is repetitive, and it's unnecessary; that in a

17 compilation, whatever was left would be sufficient.

18 Which would probably be text. Compilation. Possibly

19 editing. I'm not sure for which work. But those

20 would be examples of what would be left.

21 In other words, design and layout from

22 the copyright office standpoint is not meaningful.

23 And they feel that that description is covered by one

24 of their other descriptions: compilation.

25 Q. So the compilation is what in a copyright

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1 sense?

2 A. There's a definition for compilation in

3 the statute. That's what a compilation is. It's a

4 collection of preexisting material -- maybe not even

5 preexisting material. I can't quote it literally,

6 because I can't recall it. But the general idea is,

7 material and data that you compile together. In terms

8 of what you select and how you arrange it is subject

9 and eligible for copyright protection, regardless of

10 whether it's public domain protected.

11 Q. And then the next line is text. Was that

12 also to be removed?

13 A. Text was probably okay.

14 Q. And anything other than text?

15 A. My note indicates nothing else, so

16 apparently either I understood at the time or that

17 there was nothing else or -- I don't know. That's

18 what it says, "Text."

19 Q. Okay. The next lines of entry are, "Date

20 of publication, slash, completion"?

21 A. Yes.

22 Q. Completion for?

23 A. The submitted work.

24 Q. Submitted work. Okay.

25 And what does that mean? What was the

60

1 substance --

2 A. The publication would be the date the

3 work is made available publicly by selling it, giving

4 it away, offering to sell, loaning, leasing, or

5 renting. And completion would be the year -- usually

6 the year in which you complete the work.

7 Q. Okay. And what was it that she was

8 asking you to do, or what was the issue that was being

9 addressed?

10 A. You know, I don't recall from these

11 notes.

12 Q. Okay. Then the next entry, "If" --

13 A. If it was a new version of a previously

14 published work. And on its face, I don't -- I can't

15 say specifically what it meant. Maybe she was saying,

16 if it's a new version of a previously published work,

17 then -- I don't know.

18 Q. Then you said -- the next grouping was

19 published on the left, and then Manager's Red Book and

20 Shift XChange.

21 A. Yes.

22 Q. And "Trainers" -- I don't know. I can't

23 remember what you said there.

24 A. "Trainers pub date is okay."

25 Q. Okay. What is the import of that --

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1 those entries?

2 A. Based upon an e-mail to her on

3 February 10, I would think that it relates to the

4 publication dates of those two works may have required

5 an explanation with respect to the difference between

6 the deposit copy and the published copies on the

7 publication date.

8 Q. Okay. And then -- so those two -- the

9 ones on the left were ones that had a -- well, I guess

10 the question is, on the trainers book, you submitted a

11 version that was not the 2007 version, was it? If we

12 look at Exhibits 64 and 65.

13 A. Well, I don't know.

14 Q. If we look at -- in 65, Exhibit -- or

15 document number 1155, it indicates that the trainer

16 log that's being submitted is for third quarter 2008.

17 And the date of first publication for that work, in

18 looking at the registration, is February 11th of 2007.

19 A. Uh-huh.

20 Q. So is there a span of time that she was

21 telling you was okay, but beyond that it was something

22 you had to do this special handling for?

23 A. From my notes, I'm unable to tell you.

24 Q. Okay. And the next entry.

25 A. "If original pub require" -- "if the

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1 original publication requires special relief from

2 deposit requirement."

3 So my interpretation there is, if the

4 original publication was not deposited, that I could

5 make a special relief -- or request for special relief

6 from the deposit requirement explaining why the

7 original was not available or any differences between

8 the original and what was deposited.

9 And then the following three points are

10 approaches to follow that were given to me by

11 Ms. Tetreault.

12 Q. And what were those?

13 A. To make a request for special relief, to

14 indicate the percentage of work that stayed the same,

15 and why I was unable to submit original copies, if

16 they were out of print.

17 Q. Okay. And on page -- in Exhibit 67, page

18 1299 and 1300, is this your request by e-mail to

19 Ms. Tetreault?

20 A. I'm sorry. Document 1299 or -- I see a

21 DW 1304. So 1299? I'll find it if it's here.

22 Okay. This -- well, actually, it's not a

23 request. 1299 is a response from Ms. Tetreault to me.

24 Q. And your request starts below that?

25 A. That's right. And that would be in

63

1 document 1304.

2 Q. Okay. So 1304 is your specific request

3 of February 10 for special handling.

4 A. My February 10 letter to Ms. Tetreault

5 was responding to her with respect to completing the

6 application process. And for each of the three works

7 referred to in that message, there's an indication of

8 what the applicant, Datworks, would be doing or did.

9 Q. All right. So after your telephone

10 conference with Ms. Tetreault on the 4th of February,

11 you communicated with Datworks to inquire as to

12 whether they had copies, the original copies?

13 A. Yes.

14 Q. Okay. And who did you talk to?

15 A. Rochelle Paulet.

16 Q. Did you talk to her or e-mail?

17 A. I may have talked with her, but probably

18 e-mailed.

19 Q. And what was discussed?

20 A. Probably the conversation with the

21 copyright office.

22 Q. And what were you told?

23 A. By Rochelle?

24 Q. Yes.

25 A. I don't recall specifically what I was

64

1 told, but I do know what I was -- what I did after I

2 was told whatever I was told. And that's reflected in

3 the February 10 message to Mrs. Tetreault.

4 Q. On page 1304.

5 A. Correct.

6 Q. Do you remember if you got an e-mail

7 information from --

8 A. I don't remember.

9 Q. -- Ms. Paulet?

10 A. It's possible. I don't remember.

11 Q. Okay. And you don't remember what you

12 were specifically told?

13 A. I don't remember specifically what I was

14 told. But from this, it -- this reflects generally

15 what I was told, because I was responding based upon

16 information I had received from the client.

17 Q. Okay. 1304.

18 A. Correct.

19 Q. And this was the information that was

20 going to satisfy these items 1, 2, and 3 --

21 A. Right.

22 Q. -- on page 1301.

23 A. To my knowledge, it was information and

24 action by the applicant that would be adequate and

25 acceptable to the office for purposes of registering

65

1 the works.

2 **Q. Do you remember if Ms. Tetreault gave you**

3 **a form to follow?**

4 A. She gave me no form.

5 **Q. With respect to the percentage change,**

6 **did she give you a range that was going to be**

7 **acceptable?**

8 A. I believe she did.

9 **Q. And what did she say?**

10 A. By virtue of looking at the February 10

11 message to her, it looks like a change of less than 20

12 percent.

13 **Q. How did she explain that to you?**

14 A. I don't remember exactly what she said,

15 but it's likely she said that we would qualify for

16 special relief from the deposit requirement if there

17 were less than a 20 percent change in the deposit

18 material from that that was from the version

19 originally published.

20 **Q. Okay.**

21 A. And I believe that's a copyright office

22 practice, but I do not know if it's in the

23 regulations, and I do not know of anything in writing

24 where the copyright office has that documented.

25 **Q. Okay. So to your knowledge, was it that**

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1 **you came away from that conversation with her that 20**

2 **percent was your target that you needed to be under,**

3 **or was that something that you came to after talking**

4 **with Ms. Paulet?**

5 A. I believe that she said specifically 20

6 percent.

7 **Q. That is, Ms. Tetreault?**

8 A. Ms. Tetreault, right. The copyright

9 office representative.

10 **Q. Right. And the issue -- when you made**

11 **your request under document 1304 for the Manager's Red**

12 **Book and the Shift XChange, you asked for that relief**

13 **and specifically outlined that the deposited copy, as**

14 **you say, reflects less than a 20 percent change in**

15 **content from the initial work that was being**

16 **registered.**

17 A. Correct.

18 **Q. So in the case of the Manager's Red Book,**

19 **the work that was being registered is the 1996 work.**

20 A. Correct.

21 **Q. And what you have is this third quarter**

22 **2008 Black-eyed Pea version, and it has no more than**

23 **20 percent change from that 1996 work.**

24 A. That's what that says, I believe.

25 **Q. And do you know how you were able to**

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1 **confirm that fact with Ms. Paulet?**

2 A. Probably asked her if there had been a

3 change. And whatever response was given is reflected

4 in this correspondence to the copyright office.

5 **Q. Do you remember if you asked her what the**

6 **percentage was, or did you tell her that if we have**

7 **less than 20 percent --**

8 A. I don't recall specifically. It's

9 possible I gave her the parameters of the copyright

10 office.

11 **Q. And asked her if it would be compliant**

12 **with those?**

13 A. I probably said, these are the parameters

14 of the copyright office for purposes of a change.

15 **Q. Do you know what she did in the way of**

16 **conducting any type of investigation?**

17 A. No, I don't.

18 **Q. Do you know if she compared the**

19 **Black-eyed Pea third quarter managers log to a 1996**

20 **version?**

21 A. I don't know what she did, no.

22 **Q. And similarly for the Shift XChange, you**

23 **also request special relief, because it's 20 percent**

24 **less change than the 1992 version in that case.**

25 A. Correct.

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1 **Q. I'm referring to 1304.**

2 A. Yes.

3 **Q. And then on the Trainer's Log Book of**

4 **2008, this goes back to your handwritten note that the**

5 **Trainer's Log publication date appeared to be okay?**

6 A. Yes.

7 **Q. So you didn't have to ask for the 20**

8 **percent change in that circumstance?**

9 A. To my knowledge, no.

10 **Q. Now, for Manager's Red Book, third**

11 **quarter 2008, and the others within Exhibit 61 through**

12 **68, which ones of those were similarly situated that**

13 **it required special relief in order to submit the**

14 **specimen or the work with the deposit that was not the**

15 **original work?**

16 A. If there is nothing in each of these

17 exhibits reflecting special relief, then others would

18 not have required it within this group.

19 **Q. And looking at Exhibit 61, and going over**

20 **to page 1168, it does note that the application gives**

21 **a date of creation and publication of 2002, that the**

22 **copy bears copyright notices of 2006 and '7, and the**

23 **publication of the work that was filed was 2009.**

24 A. Uh-huh.

25 **Q. Does that indicate that that same issue**

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1 was being raised for this application, the Guest
 2 Services?
 3 A. It looks like that may have been the
 4 case.
 5 Q. I don't find the request similar to what
 6 we just discussed on the Manager's Red Book. I wonder
 7 if you could find that.
 8 A. Well, it's quite possible it was made. I
 9 don't see anything here. What I do see is a document,
 10 DW 301167, from the copyright office, indicating they
 11 had received e-mails from me and requests for special
 12 relief.
 13 Q. What document were you referring to, and
 14 the page?
 15 A. Document 61, sub document DW 301167.
 16 Q. Okay. So 1167 indicates that you must
 17 have made a similar request.
 18 A. That's correct.
 19 Q. Okay.
 20 A. Maybe there's something among these other
 21 documents.
 22 Q. Just going over to Exhibit 62, and
 23 drawing your attention to document 1200, this would
 24 indicate that it similarly had that issue and would
 25 have necessarily required special relief?

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1 A. Yes.
 2 Q. I don't find in this stack any request or
 3 acknowledgment on them.
 4 A. No.
 5 Q. Could I ask you to again go through your
 6 file when you get back to your office on each of these
 7 to make sure we have complete copies?
 8 A. Sure. So we're talking about Guest
 9 Services Book and --
 10 Q. Guest Services, Request Off, and the --
 11 well, if we look at just the ones that we have here,
 12 61 to 68. Shift XChange, we have that, I think.
 13 Isn't that the one that was part of the -- yeah, it
 14 was requested with your e-mail to Ms. Tetreault in
 15 February. So that's there.
 16 I guess the simplest way is, those that
 17 you had to have special handling or special --
 18 A. Special relief.
 19 Q. -- relief that are involved in this
 20 case, that's what I want to make sure we have.
 21 A. Okay.
 22 Q. We have Manager's Red Book and the Shift
 23 XChange, but I don't think we have anything else in
 24 the way of a request.
 25 A. All right.

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1 Q. And it may be the ones that are -- we had
 2 the forms in Exhibit 69, but there may not be all of
 3 them, such as the Manager's Red Book Quarterly that
 4 was produced back in 1992.
 5 A. I'm sorry.
 6 Q. In 69, it would have been page 22074.
 7 A. Uh-huh. And what about that? I'm sorry.
 8 Q. I don't find even the application or
 9 registration file for that, much less the request for
 10 special relief. So I would ask you to provide a copy
 11 of that, if you could.
 12 MS. DAVIS: It's possible you wouldn't
 13 have it if Dataworks did it instead of --
 14 THE DEPONENT: That's true.
 15 MR. SMITH: I'm sorry?
 16 MS. DAVIS: It's possible, if Dataworks
 17 did its own registration, that he wouldn't have a
 18 copy. Because they did do that. And I think you have
 19 their files regarding registration.
 20 THE DEPONENT: I'll look.
 21 MR. SMITH: I don't think so.
 22 MS. DAVIS: The registration's in
 23 those -- the stuff you do have. They wouldn't have
 24 correspondence like this, but -- we've produced that.
 25 I've got another set of stuff to go through, but I'll

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1 double-check and make sure it's not in there. But I'm
 2 pretty sure we produced it some time ago. I'll try to
 3 get you the Bates range.
 4 MR. SMITH: Yes. It's hard to keep
 5 track.
 6 MS. DAVIS: And it would look like a
 7 duplicate of this. In fact, it may have been mostly
 8 duplicates, because it would have been what you have
 9 from David, so --
 10 MR. SMITH: I know you did supply
 11 registrations. I thought that was a copy of his file.
 12 MS. DAVIS: Oh, there was -- there was --
 13 we did produce a copy of his file, but there also
 14 would have been produced separate files from Dataworks
 15 that would have been registrations and stuff that they
 16 did when they did their registration.
 17 So let me see if I can't track down the
 18 numbers for you.
 19 MR. SMITH: Okay. Good. I'll look from
 20 our side, too.
 21 Q (BY MR. SMITH) After you got the
 22 information from Ms. Rochelle -- what's her last name?
 23 A. Paulet.
 24 Q. -- Paulet, that is, to enable you to
 25 make the request for special relief, and then you

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1 **communicated that to the copyright office, did you**
2 **have further conversations or communication with**
3 **Ms. Paulet about what was going on?**
4 A. I believe, the next communication would
5 have been a copy of the registration certificate that
6 the copyright office issued.
7 **Q. Do you remember having any other**
8 **telephone conversations with anyone at the copyright**
9 **office, other than the ones we've discussed so far?**
10 **Mr. Pearson, Ms. Tetreault.**
11 A. It's possible I had conversations trying
12 to locate people or following up on people. It's
13 possible that I called Mrs. Roseboro or Renoldo. It's
14 possible that I called those people, because I had
15 their names. And Mr. Pearson had indicated that he
16 was going to be away and gave me their numbers, so --
17 **Q. Do you remember, for any other**
18 **application, talking with the examiner as to what was**
19 **going to be required to get special relief?**
20 A. No. Only those conversations that would
21 be reflected in the documents that we looked at.
22 **Q. But you don't remember there being**
23 **another circumstance or another conversation?**
24 A. No, I don't. It's possible, but I don't
25 recall.

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1 **Q. Subsequent to February when you had the**
2 **registration, did you have any communication with**
3 **anyone at Dataworks as to the effect of that**
4 **registration or those registrations?**
5 A. Subsequent to sending them copies of the
6 certificates?
7 **Q. Yes.**
8 A. It's possible I did, but I don't recall.
9 **Q. Do you remember working with Ms. Johnson**
10 **at any time? That is, communicating with her or**
11 **meeting with her? Laura Johnson.**
12 A. Laura Johnson? No, I don't.
13 **Q. How about Mr. Thiesen?**
14 A. Regarding --
15 **Q. Copyrights.**
16 A. I don't recall.
17 **Q. Do you remember doing any comparison of**
18 **Dataworks' works that you were registering, and any**
19 **third party's works?**
20 MS. DAVIS: In the course of his
21 representation, then, separately from working as an
22 expert witness, or --
23 MR. SMITH: Right.
24 THE DEPONENT: Which?
25 MS. DAVIS: Which?

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1 **Q (BY MR. SMITH) What I'm asking is during**
2 **this period 2007, 2008, 2009. You were designated as**
3 **an expert in 2010. So what I'm asking is your**
4 **activities with respect to representing or aiding**
5 **Dataworks.**
6 MS. DAVIS: And I object to that. That
7 could even be work product privilege, but it certainly
8 would be attorney-client and copyright enforcement
9 with regard to Commlog or anybody else that he might
10 have looked at.
11 So at least, as phrased, I'm going to
12 instruct him not to answer.
13 **Q (BY MR. SMITH) With respect to your**
14 **expert work, when did you first start as an expert in**
15 **this case?**
16 A. I think that would be shortly before my
17 report was provided.
18 **Q. And that would have been?**
19 A. I don't recall specifically.
20 **Q. June of 2010?**
21 A. If that was the date of the report. We
22 could probably look back.
23 **Q. I think it was July 19th or --**
24 A. Within that time period.
25 **Q. Okay. How long before that had you been**

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1 **retained for the purposes of being an expert?**
2 A. In this case, I don't recall. Not
3 significant -- not for a significant -- not a year,
4 not six months, not five months.
5 **Q. Within a few months?**
6 A. Could have been, yes.
7 **Q. Before that time, did you review any**
8 **materials as potential infringement materials for**
9 **Dataworks?**
10 A. In this case? No.
11 **Q. Or in any case.**
12 A. I don't recall reviewing any. It's
13 possible I did, but I don't recall. Nothing stands
14 out in my mind that says, yeah, I did.
15 **Q. You don't remember giving any opinions to**
16 **anyone at Dataworks that this was infringement or not**
17 **infringement?**
18 A. When you say this infringement, in this
19 case?
20 **Q. This case specifically, but --**
21 A. No, I don't recall.
22 **Q. Have you rendered any reports in any**
23 **other litigation involving Dataworks? That is,**
24 **disclosed expert reports.**
25 A. Yes.

77	<p>1 Q. In what case?</p> <p>2 A. It was a rebuttal expert report in a case</p> <p>3 that I believe is captioned Dataworks versus Planet,</p> <p>4 but I'm not sure.</p> <p>5 MR. SMITH: We'd like to get a copy of</p> <p>6 that report.</p> <p>7 MS. DAVIS: All right.</p> <p>8 MR. SMITH: I'd like to get a copy of the</p> <p>9 other report, what it's rebutting.</p> <p>10 THE DEPONENT: You should.</p> <p>11 Q (BY MR. SMITH) When was that report</p> <p>12 rendered?</p> <p>13 A. I don't remember.</p> <p>14 Q. With respect to the Manager's Red Book</p> <p>15 plus design application for trademark --</p> <p>16 A. Uh-huh.</p> <p>17 Q. -- when did you handle that?</p> <p>18 A. I'd have to refresh my memory by looking</p> <p>19 at the file. It could have been 10 years ago. I'm</p> <p>20 unsure. I don't remember. I think it's -- the</p> <p>21 Section 8 has been filed. It may have been renewed,</p> <p>22 so --</p> <p>23 Q. With respect to the descriptive terms</p> <p>24 within that mark, what do you remember about that?</p> <p>25 A. Well, I think you'll have to help me in</p>	79	<p>1 distinctiveness?</p> <p>2 A. Under section 2(f), the basis was five</p> <p>3 years use prior to the date the claim was made.</p> <p>4 Q. And what was the evidence that you relied</p> <p>5 upon?</p> <p>6 A. Without seeing the file, I'm going to say</p> <p>7 the evidence was five years use, and possibly</p> <p>8 ownership of a registration for a similar mark issued</p> <p>9 earlier by the office, which can be a basis for a</p> <p>10 possible distinctiveness claim.</p> <p>11 Q. You don't -- right now, without your</p> <p>12 file, you don't know the specifics of the claim that</p> <p>13 you made in this case?</p> <p>14 A. I think it was five years use. And I</p> <p>15 think it was -- I think I also based the registration</p> <p>16 on an earlier registration issued to the client. I</p> <p>17 think that's what it was.</p> <p>18 Q. You have before you Exhibit 70. These</p> <p>19 are your bills, I think, on --</p> <p>20 A. Got them.</p> <p>21 Q. At least some of the bills. And I want</p> <p>22 to draw your attention to January 5, 2009. And that</p> <p>23 is marked as CL 22057 and 22058.</p> <p>24 My question is, the entry for the work</p> <p>25 done includes telephone conference with and</p>
78	<p>1 terms of what you're calling descriptive terms.</p> <p>2 Q. Manager's Red Book.</p> <p>3 MS. DAVIS: Do you mean the whole --</p> <p>4 Q (BY MR. SMITH) Those words, the Manager's</p> <p>5 Red Book.</p> <p>6 A. You're saying that Manager's Red Book</p> <p>7 were descriptive terms, or are descriptive terms?</p> <p>8 Q. Right.</p> <p>9 A. I think the only term that was</p> <p>10 descriptive was book. I think that was disclaimed in</p> <p>11 the registration and the application.</p> <p>12 Q. But isn't it true that you had to have a</p> <p>13 2(f) or acquired distinctiveness?</p> <p>14 A. Yes. There was a 2(f) claim.</p> <p>15 Q. And what does that mean?</p> <p>16 A. It means that a -- the subject matter of</p> <p>17 a trademark application has acquired distinctiveness</p> <p>18 as recognized as identifying and distinguishing the</p> <p>19 products or services it's used in connection with from</p> <p>20 similar products or services offered by other people.</p> <p>21 Q. And in the case of the Manager's Red</p> <p>22 Book, what was the 2(f)?</p> <p>23 A. It was a clean distinctiveness under</p> <p>24 section 2(f) of the Trademark Act of 1946.</p> <p>25 Q. And what was the basis for that acquired</p>	80	<p>1 correspondence to the United States copyright office</p> <p>2 re request for special handling, filed application.</p> <p>3 Is this the correspondence you had with Ms. Tetreault?</p> <p>4 A. Probably not. No.</p> <p>5 Q. Okay. And after that, there's</p> <p>6 correspondence re request to Ms. Paulet, or R. Paulet.</p> <p>7 A. Uh-huh.</p> <p>8 Q. What was the request to Ms. Paulet at</p> <p>9 that time?</p> <p>10 A. It must have related to the conference I</p> <p>11 had with the copyright office regarding special</p> <p>12 handling.</p> <p>13 Q. On January 5?</p> <p>14 A. Uh-huh.</p> <p>15 Q. Then on the February 24th bills, for the</p> <p>16 third quarter Black-eyed Pea Trainer's Log and</p> <p>17 managers log, you indicate that correspondence with</p> <p>18 the copyright office and contact to R Paulet.</p> <p>19 Would this encompass the correspondence</p> <p>20 you had with the copyright office on special relief?</p> <p>21 A. Yeah, it sounds like it's possible.</p> <p>22 Though, you know -- it could be.</p> <p>23 Q. If you'd look at Exhibit 71.</p> <p>24 A. Uh-huh.</p> <p>25 Q. This is a privilege log that you created</p>

81	<p>1 for us --</p> <p>2 A. Yes.</p> <p>3 Q. -- pursuant to the subpoena duces tecum?</p> <p>4 A. Yes.</p> <p>5 Q. How did you go about finding the items</p> <p>6 that are listed here? Did you go through your e-mail</p> <p>7 accounts or --</p> <p>8 A. I went through each file.</p> <p>9 Q. And in looking at the first page,</p> <p>10 document number 22064, I note that you've broken it</p> <p>11 down by basically the works that you --</p> <p>12 A. Yes.</p> <p>13 Q. -- were doing. So the Guest Services</p> <p>14 Red Book indicates that you sent a form; is that</p> <p>15 correct? Or you had a form that you sent to</p> <p>16 Ms. Paulet on --</p> <p>17 A. Correct.</p> <p>18 Q. -- the 1st of December?</p> <p>19 A. Correct. No. It's a -- I didn't send</p> <p>20 it. I received it.</p> <p>21 Q. You received it. Okay.</p> <p>22 A. I believe I received it. Yes. It says,</p> <p>23 "Recipient," and my name is under the column. So</p> <p>24 recipient identifies who received the form. Author</p> <p>25 identifies who originated the form.</p>	83	<p>1 without having the file, I can't tell. But what it's</p> <p>2 suggesting to me, after looking at that, is that that</p> <p>3 may have accompanied the form.</p> <p>4 Q. That is the e-mail?</p> <p>5 A. Uh-huh.</p> <p>6 Q. Item 2 in that list under Guest Services?</p> <p>7 A. So it's quite possible what I did was</p> <p>8 list each document in the file.</p> <p>9 Q. It appears that you wrote no e-mails</p> <p>10 until the 10th of December. Does that indicate you</p> <p>11 had more telephone conferences with Ms. Paulet prior</p> <p>12 to that?</p> <p>13 A. The 10th of December?</p> <p>14 Q. At least, that's how I -- there's a</p> <p>15 letter that you sent on the 10th of December.</p> <p>16 A. I see correspondence on the 5th of</p> <p>17 December. E-mail.</p> <p>18 Q. Oh, all right. Okay. Sorry.</p> <p>19 There's an earlier correspondence on the</p> <p>20 3rd of December, and the nature of the discussion is</p> <p>21 the correspondence re copy of the work.</p> <p>22 A. Uh-huh.</p> <p>23 Q. Can you tell me what that correspondence</p> <p>24 from Ms. Paulet was with respect to the work?</p> <p>25 A. Only that it related to a copy of the</p>
82	<p>1 Q. All right.</p> <p>2 A. Or the document that's referred to in the</p> <p>3 documents column.</p> <p>4 Q. Okay. So item 1 is the form, information</p> <p>5 to prepare application. Is that the same form that</p> <p>6 we've discussed as part of Exhibit 69?</p> <p>7 A. It looks like it corresponds to 22069.</p> <p>8 Q. That is Exhibit 69, first page.</p> <p>9 A. Yes.</p> <p>10 Q. I guess I'm wondering, what are you</p> <p>11 claiming privilege out of that form? We have the</p> <p>12 form. Are you claiming that it's privileged and that</p> <p>13 you redacted things?</p> <p>14 A. No. You have the entire form. There may</p> <p>15 have been correspondence with the form. But I don't</p> <p>16 have the file in front of me, so I can't tell you.</p> <p>17 But I believe that's possibly the case, though there</p> <p>18 is no reference to correspondence in that column</p> <p>19 nature of document.</p> <p>20 Q. The next entry, also received on December</p> <p>21 1st from Ms. Paulet, is correspondence re information</p> <p>22 to prepare application.</p> <p>23 A. So it's quite possible that the first</p> <p>24 line in that referred only to the form, and maybe</p> <p>25 there wasn't anything else. Maybe the second --</p>	84	<p>1 work, either that I had received or had not yet</p> <p>2 received.</p> <p>3 Q. Can you give me any more detail as to</p> <p>4 correspondence -- there are a lot of correspondence re</p> <p>5 copy of work. And that's the only description that</p> <p>6 you provided us.</p> <p>7 A. Yes.</p> <p>8 Q. What was this correspondence relative to</p> <p>9 the copy of the work?</p> <p>10 A. It could have been I received copies. It</p> <p>11 may have been I need more copies. I'm unsure without</p> <p>12 looking at the correspondence. But there may have</p> <p>13 been comments included.</p> <p>14 Q. I guess, certainly these things through</p> <p>15 December of 2008 on Guest Services and --</p> <p>16 MS. DAVIS: Mark, are you -- let me</p> <p>17 interject real fast. Maybe we can do this on paper</p> <p>18 somehow.</p> <p>19 Are you trying to get enough information</p> <p>20 so you can determine if you want to challenge whether</p> <p>21 something is really privileged? And if so, we could</p> <p>22 probably provide you a more detailed description of</p> <p>23 the nature of the document.</p> <p>24 MR. SMITH: Or redact, if there's any</p> <p>25 opinion or advice. Then that might simplify a lot.</p>

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1 Because just correspondence re copy of the work, I
 2 have no idea what it means.
 3 MS. DAVIS: We can review that. That's
 4 no problem.
 5 MR. SMITH: All right. That will -- why
 6 don't I go through and note what I think I need, and
 7 we can just flag those.
 8 MS. DAVIS: Sure.
 9 **Q (BY MR. SMITH) But you don't have any**
 10 **independent recollection of any of the details of**
 11 **these correspondences?**
 12 A. No, I don't.
 13 **Q. Okay. And am I correct that you do not**
 14 **have any recollection of any meetings at Dataworks?**
 15 A. No, I have had no meetings at Dataworks.
 16 **Q. Have you ever met personally with**
 17 **Ms. Paulet?**
 18 A. I have.
 19 **Q. When?**
 20 A. I can't remember specifically. We had
 21 lunch together. That I know. I could tell you where.
 22 Ted's out on Santa Fe Drive. I don't know the name of
 23 the shopping center. Does that help?
 24 **Q. What time of year was it? What did you**
 25 **have?**

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1 A. I think I had a cobb salad. I think
 2 Rochelle had the same. It's funny, the things you can
 3 remember and things you don't.
 4 **Q. Did you discuss the applications?**
 5 A. No, we didn't.
 6 **Q. Did you discuss copyrights?**
 7 A. No. We just had a discussion of who we
 8 are; just about ourselves. To meet a client.
 9 **Q. Not about this case at all?**
 10 A. Not about this case, no.
 11 MR. SMITH: I think I have no further
 12 questions.
 13 THE DEPONENT: I don't have any.
 14 MS. DAVIS: I don't, either.
 15 WHEREUPON, the within proceedings were
 16 concluded at the approximate hour of 11:52 a.m. on the
 17 26th day of August, 2010.
 18 * * * * *
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 21
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1 I, DAVID A. WEINSTEIN, do hereby certify
 2 that I have read the above and foregoing deposition
 3 and that the same is a true and accurate transcription
 4 of my testimony, except for attached amendments, if
 5 any.
 6 Amendments attached () Yes () No
 7
 8
 9 _____
 10 DAVID A. WEINSTEIN
 11
 12 The signature above of DAVID A. WEINSTEIN
 13 was subscribed and sworn to before me in the county of
 14 _____, state of Colorado, this _____ day of
 15 _____, 2010.
 16
 17 _____
 18 Notary Public
 19 My commission expires
 20
 21
 22
 23
 24 Dataworks, LLC 8/26/10 (sz)
 25

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REPORTER'S CERTIFICATE
 STATE OF COLORADO)
)ss.
 CITY AND COUNTY OF DENVER)
 I, SHARON L. SZOTAK, Registered
 Professional Reporter, Certified Realtime Reporter,
 and Notary Public, State of Colorado, do hereby
 certify that previous to the commencement of the
 examination, the said DAVID A. WEINSTEIN was duly
 sworn by me to testify to the truth in relation to the
 matters in controversy between the parties hereto;
 that the said deposition was taken in machine
 shorthand by me at the time and place aforesaid and
 was thereafter reduced to typewritten form; that the
 foregoing is a true transcript of the questions asked,
 testimony given, and proceedings had.
 I further certify that I am not employed
 by, related to, nor counsel for any of the parties
 herein, nor otherwise interested in the outcome of
 this litigation.
 IN WITNESS WHEREOF, I have affixed my
 signature this 31st day of August, 2010.
 My commission expires June 10, 2012.
 ___X___ Reading and Signing was requested.
 ___ Reading and Signing was waived.
 ___ Reading and Signing is not required.

August 31, 2010

Tracy A. Davis, Esq.
Benjamin, Bain, Howard & Cohen LLC
7315 East Orchard Road, Suite E-400
Greenwood Village, Colorado 80111

Re: Dataworks, LLC v. Commlog LLC
Depositions of: David A. Weinstein
Laura Johnson
Rochelle Paulet
Liane Talley

Dear Ms. Davis:

Enclosed are the original signature pages(s) of the above-named deposition(s). It was agreed that you would arrange for signature of same by means of your copy transcript(s) and the enclosed signature page(s). Also enclosed are amendment sheets for changes if necessary. Please return the signed and notarized signature page(s) and amendment sheet(s), if any, to our office within 30 days from the date of this letter to comply with the statute.

We will mail the original pages to the appropriate attorney to be placed with the original sealed transcript and copies to all other counsel.

If circumstances change and a copy transcript is not available from your office for the witness to review, then please notify the witness that he/she should contact our office to make an appointment to read, sign, and make corrections to a copy that we will make available at our office. Thank you for your attention to this matter.

Sincerely,

Kathy Azcuenaga, Filing Assistant
HUNTER + GEIST, INC.
Court Reporting, Legal Videography, and Videoconferencing

c: J. Mark Smith, Esq.