

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

-----x
DISNEY ENTERPRISES, INC., et al.,)
Plaintiffs,) Case No.
v.) 11-20427-
HOTFILE CORP., et al.,) WILLIAMS/
Defendants.) TURNOFF

-----x
HOTFILE CORP.,)
Counterclaimant,)
v.)
WARNER BROS. ENTERTAINMENT, INC.,)
Counterdefendant.)

-----x
VIDEOTAPED DEPOSITION OF SCOTT A. ZEBRAK, ESQUIRE
Washington, D.C.
Tuesday, December 20, 2011
9:43 a.m.

Job No.: 439702

Pages 1 - 370

Reported By: Joan V. Cain

1 Videotaped Deposition of SCOTT A. ZEBRAK,

2 ESQUIRE, held at the law offices of:

3

4 STRADLEY RONON STEVENS & YOUNG, LLP

5 Suite 500

6 1250 Connecticut Avenue, Northwest

7 Washington, D.C. 20036

8 (202) 822-9611

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10 Pursuant to Notice, before Joan V. Cain, Court

11 Reporter and Notary Public in and for the District of

12 Columbia.

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1 APPEARANCES

2

3 ON BEHALF OF PLAINTIFFS:

4 STEVEN B. FABRIZIO, ESQUIRE

5 JENNER & BLOCK, LLP

6 Suite 900

7 1099 New York Avenue, Northwest

8 Washington, D.C. 20001

9 Telephone: (202) 639-6000

10 E-mail: sfabrizio@jenner.com

11

12 ON BEHALF OF DEFENDANTS AND COUNTERCLAIMANT:

13 ANDREW LEIBNITZ, ESQUIRE

14 FARELLA BRAUN & MARTEL, LLP

15 Russ Building

16 235 Montgomery Street

17 San Francisco, California 94104

18 Telephone: (415) 954-4400

19 E-mail: aleibnitz@fbm.com

20

21 ALSO PRESENT:

22 Terry Michael King, Videographer

23

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1 pronouncing her first name. It's Nastachia, and --

2 how many names is that?

3 Q That's six.

4 A That's six. There's another woman whose

5 name is escaping me right now and another man by the

6 name, I believe it's Greg. This was some time ago,

7 including for some of them.

8 Q Have you now listed everyone you remembered

9 to the fullest detail you can?

10 A I think that's right.

11 Q You said some time ago. What do you mean by

12 that?

13 A It was some time ago. I mean, the project

14 began in mid November -- or I'm sorry -- mid October

15 and, you know, my -- my work with them stopped I guess

16 roughly at the time I did my report. So I mean I

17 worked with these folks from mid October through mid

18 November, roughly, and not all of them on a continuous

19 basis.

20 Q Okay. So you worked with them for about a

21 month, spending between 225 -- did you spend between

22 225 and 275 hours in that month period between mid

23 October and mid November?

24 A Give or take, maybe a little more than mid

25 November. Maybe, you know, some supplemental, you

1 know, thought and analysis and, you know, confirming
2 of my opinions after -- after mid November, but, you
3 know, give or take. If it's not 4 or 5 weeks, maybe
4 it's in a 6-week period.

5 Q What did you do after November 18th, when
6 your report was due?

7 MR. FABRIZIO: Objection, vague. Overbroad.

8 THE WITNESS: What did I do related to the
9 report?

10 BY MR. LEIBNITZ:

11 Q Yes, please.

12 A In the immediate days -- I don't recall the
13 exact timing, but, you know, some -- you know, some --
14 some further work to sort of further -- further
15 confirm what my conclusions were and, you know, just
16 some additional look at it. Probably not a
17 significant amount of time. Certainly not in the
18 overall scheme of that hour block I gave you.

19 Q Do you recall anything else about what you
20 did after your report was due on November 18th, 2011?

21 MR. FABRIZIO: Objection to form.
22 Overbroad.

23 THE WITNESS: Well, there may have been
24 other things. One -- one item I remember doing, I
25 know there -- there were some Hotfile records that I

1 fact that Hotfile or Anton Titov have taken active
2 steps to encourage infringement?

3 MR. FABRIZIO: Objection. Outside the scope
4 of the witness's testimony. Calls for speculation.
5 And, Counsel, the answer to your question is, no, he
6 will not.

7 THE WITNESS: Yeah, I mean, I don't know
8 what questions you're going to ask me at a trial, if
9 I'm testifying at a trial. I do know that I was
10 retained for -- or what Jenner & Block might ask. But
11 I was retained for the purpose of the project that
12 I've described for you. That -- that's the work that
13 I've done and have considered and I believe is the
14 scope of my testimony being -- you know, reviewing
15 this sample of files and, if I could, make an
16 infringement determination or not.

17 BY MR. LEIBNITZ:

18 Q You studied approximately 1,750 files,
19 right?

20 A Approximately, that's right.

21 Q You charged \$45,000 for that review, right?

22 A Well, sort of right. My retainer letter has
23 a flat fee of that amount based on an estimate of the
24 number of hours the project would take, and so that
25 flat fee of \$45,000 relates to an estimate of the

1 amount of time I would have to incur on the project.
2 So that's how my compensation was structured. It's
3 laid out in a little more detail in the engagement
4 letter.

5 Q Are you entitled to the \$45,000 whether or
6 not you spend more or less than 128 hours at \$350,
7 your billing rate?

8 MR. FABRIZIO: Objection.

9 THE WITNESS: I'm sorry.

10 MR. FABRIZIO: Vague and ambiguous.

11 THE WITNESS: Well, let me clarify that as I
12 answer the question. First of all, I've -- I've spent
13 well more than 180 to 200 hours on the project. I
14 think there was no question I would spend that amount
15 of time on it. So I never considered whether I would
16 receive that money in the event that my hours didn't
17 exceed the 180 to 200 range. So that's not something
18 I considered.

19 And, actually, if you break my hourly rate
20 out, it comes to a discount off my hourly rate. It's
21 not \$350 an hour times 180 to 200 hours to get you to
22 \$45,000. It's, I believe, a number at least \$100
23 below that. \$350 an hour reference is with respect to
24 other components of my time that may be taken up in
25 connection with my retention, such as today's

1 CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

2 I, Joan V. Cain, Court Reporter, the officer
3 before whom the foregoing deposition was taken, do
4 hereby certify that the foregoing transcript is a true
5 and correct record of the testimony given; that said
6 testimony was taken by me stenographically and
7 thereafter reduced to typewriting under my direction
8 and that I am neither counsel for, related to, nor
9 employed by any of the parties to this case and have
10 no interest, financial or otherwise, in its outcome.

11 IN WITNESS WHEREOF, I have hereunto set my
12 hand and affixed my notarial seal this 29th day of
13 December 2011.

14

15 My commission expires:

16 June 14, 2014

17 _____

18 NOTARY PUBLIC IN AND FOR THE

19 DISTRICT OF COLUMBIA

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DISNEY ENTERPRISES, INC., TWENTIETH
CENTURY FOX FILM CORPORATION,
UNIVERSAL CITY STUDIOS PRODUCTIONS,
LLP, COLUMBIA PICTURES INDUSTRIES,
INC., and WARNER BROTHERS
ENTERTAINMENT, INC.,

Plaintiffs,

vs. Case No.

HOTFILE CORPORATION, ANTON TITOV 11-cv-20427-AJ
and DOES 1-20,

Defendants.

Videotaped Deposition of SCOTT A. ZEBRAK,
a witness herein, called for examination by counsel
for Defendants in the above-entitled matter, Washington,
D.C. pursuant to subpoena, the witness being duly sworn
by SUSAN L. CIMINELLI, CRR, RPR, a Notary Public in and
for the District of Columbia, taken at the offices of
Jenner & Block, LLP, 1099 New York Avenue, N.W.,

Washington, D.C., at 10:49 a.m. on Friday, January 20,

2012.

1 APPEARANCES:

2

3 On behalf of the Plaintiffs & Counterdefendants:

4 DUANE POZZA, ESQ.

5 STEVEN B. FABRIZIO, ESQ.

6 Jenner & Block, LLP

7 901 New York Avenue, N.W.

8 Washington, D.C. 20001

9 (202) 639-6000

10 dpozza@jenner.com

11

12 On behalf of the Defendants:

13 DEEPAK GUPTA, ESQ.

14 Farella Braun + Martel, LLP

15 235 Montgomery Street

16 San Francisco, CA 94104

17 (415) 954-4400

18 dgupta@fbm.com

19

20 ALSO PRESENT:

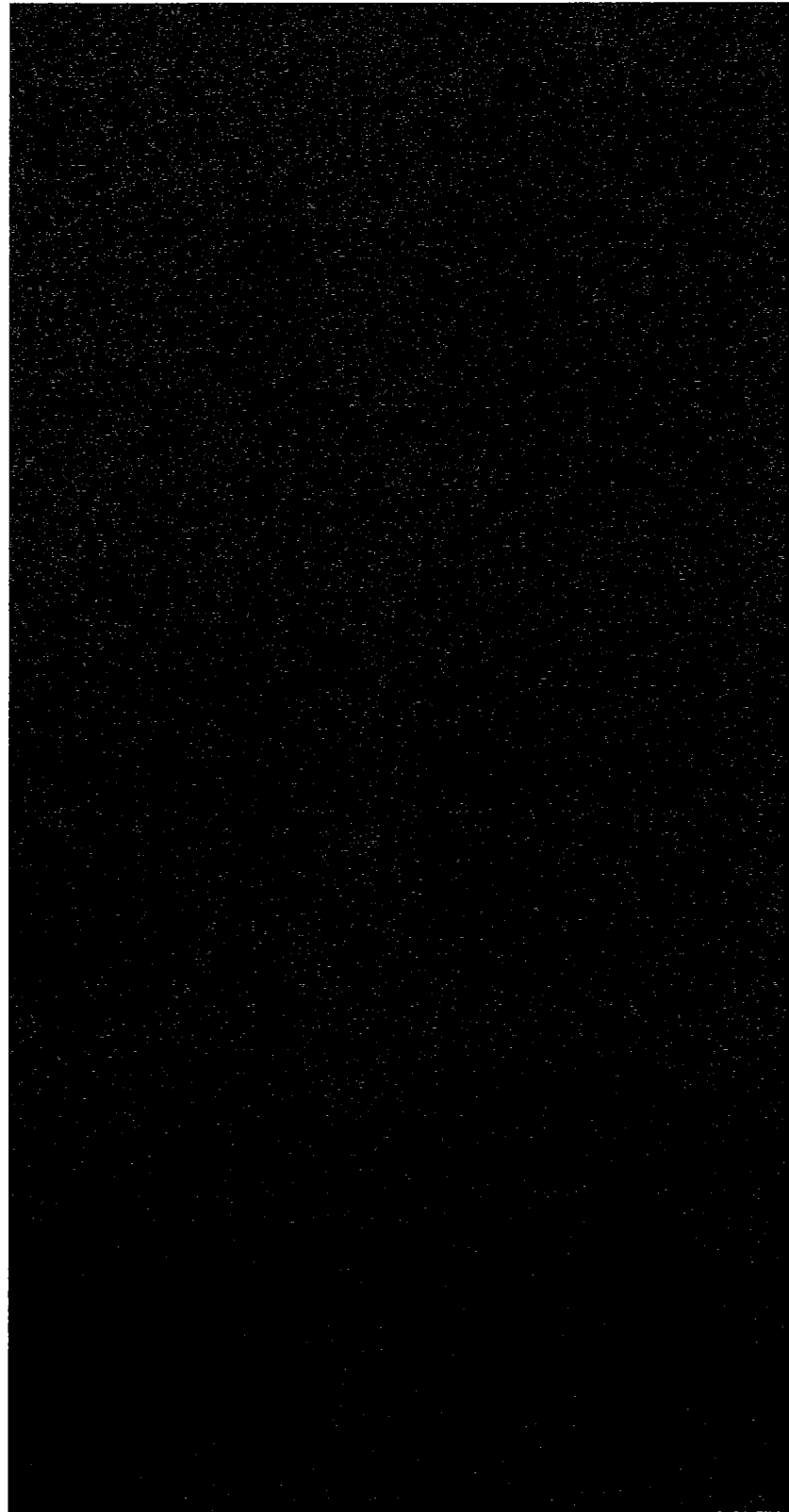
21 CONWAY BARKER, Videographer

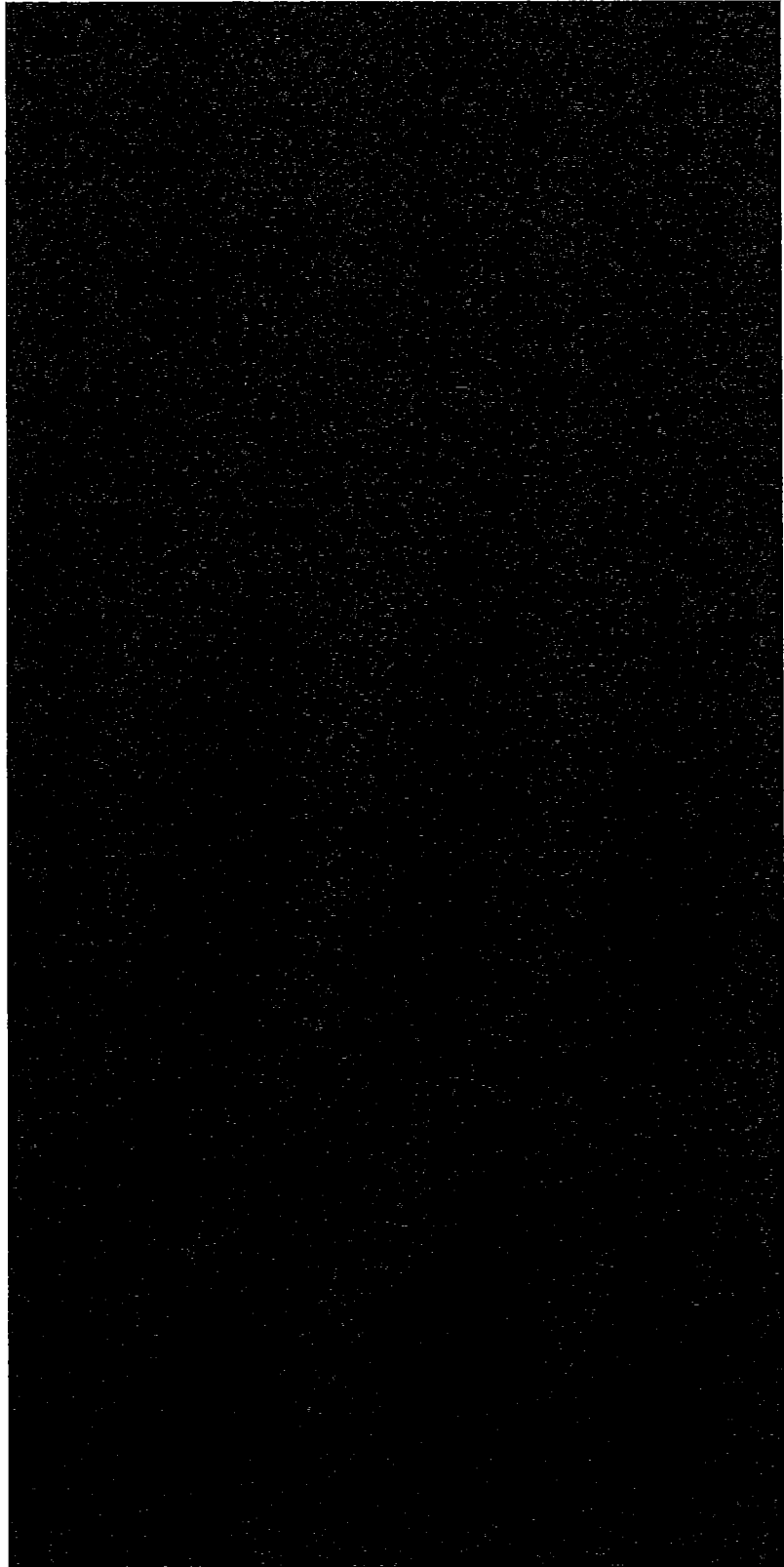
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1 And when I say hadn't yet reached, what I
2 was asked to do here wasn't to assign a
3 classification to all these files like was done where
4 possible in the stats study work. Here I was merely
5 asked to identify those files that I thought were
6 highly likely infringing for them to be distributed
7 through Hotfile.

8 Q. So for example, on page 16 of the original
9 exhibit.

10 A. I have that one now. Yes.

11 Q. There are a bunch of categorizations such
12 as noninfringing, unknowable.

13 A. Right.

14 Q. Do you believe that those categorizations
15 are accurate or not?

16 A. Let me -- without answering as to those
17 two, let me ask -- answer as to the unknowable and
18 noninfringing designations across the exhibit. These
19 were, except in instances, you know, let me -- if I
20 could, let me just look through this quickly. Okay.
21 Here is an example. So on page 24, there is an
22 example of a work that I saw as a J downloader work.
23 That was the title of the work. That as I recall was
24 a work that in my stats study, I declared to be
25 noninfringing. So here that would be an example of

1 something that I had a firmer conclusion about than
2 many of the other works that you would see as
3 noninfringing -- noninfringing or unknowable, where
4 those, you know, as I began my work, if that was, you
5 know, it was sort of a tentative designation whether
6 it was from me or someone from my team which would
7 often be the case.

8 So the answer is I don't -- unlike the
9 stat study where works were -- I reached a conclusion
10 and called a work noninfringing or unknowable, here I
11 don't have that same level of certainty for these
12 works. I don't necessarily agree that these works
13 are noninfringing or unknowable. I would have to go
14 work by work and do further investigation and
15 analysis to answer your question directly.

16 Q. So when you say in paragraph 3, you
17 followed the same methodology, would you say it's
18 something to be taken with a grain of salt. It's a
19 little different?

20 A. I wouldn't say with a grain of --

21 MR. POZZA: Object. Argumentative and
22 ambiguous.

23 THE WITNESS: I wouldn't say with a grain
24 of salt. No. I applied the same methodology, but to
25 a different project. But when I say the methodology,

1 Q. And did you find it curious that you
2 weren't asked to look at the infringement status of
3 the top 100 downloads on the site?

4 MR. POZZA: Objection. Ambiguous.
5 Argumentative.

6 THE WITNESS: No, I really didn't think
7 about it one way or the other. That was, you know,
8 the issue that counsel thought was -- needed looking
9 into.

10 BY MR. GUPTA:

11 Q. I remind you, you are under oath.

12 MR. POZZA: I don't think the witness
13 needs to be reminded.

14 MR. GUPTA: Can you please mark this as
15 Exhibit, I believe we are up to 125.

16 (Zebrak Exhibit 125 was
17 marked for identification.)

18 BY MR. GUPTA:

19 Q. Have you seen this before?

20 A. I may have. I certainly know of it. This
21 is what I believe you were asking me about a moment
22 ago where, you know, Hotfile, you know, was asked to
23 identify certain top downloaded works.

24 Q. Right. So I'll represent to you this is
25 Hotfile Corporation's fourth set of interrogatories

1 to plaintiffs, where Exhibit A attached to this
2 interrogatory is the top 100 ever downloaded files on
3 Hotfile. And I wanted you to take a look at that
4 Exhibit A for a moment.

5 A. Okay. Okay, and you said a moment ago
6 that these are the top downloaded works over time?

7 Q. Correct.

8 A. Okay. Okay. I'm with you.

9 Q. And I wanted you to look at that first
10 page just to start.

11 A. Yes.

12 Q. And tell me if, based on these file names,
13 you see anything here that looks like it would be
14 likely to be studio content.

15 MR. POZZA: I'm going to object to this
16 line of questioning as lacking foundation to the
17 extent that there is no evidence in the record that
18 these are the top 100 most downloaded files, or what
19 that would mean. And further object to this is
20 outside the scope of the expert report and the
21 witness has not seen this list of files before. Or
22 at least has testified he has not considered this
23 list of files before.

24 BY MR. GUPTA:

25 Q. Please go ahead.

1 A. Please go ahead, and just flip through
2 this report and --

3 Q. I was going to ask you, just focus on the
4 first page so we don't take too much time.

5 A. Sure. And the question is to identify
6 what works appear to be studio content?

7 Q. If any of these file names are suggestive
8 to you that this might be a studio file.

9 MR. POZZA: Same objections.

10 THE WITNESS: Okay. I've flipped through
11 it.

12 BY MR. GUPTA:

13 Q. And what's your answer?

14 MR. POZZA: Also object this lacks
15 foundation to the extent you're asking the witness
16 about his knowledge of studio works, is not something
17 he has been qualified as an expert in.

18 THE WITNESS: I mean -- I mean, when I
19 look at the file names, none of these file names, you
20 know, in my mind make me think of a studio movie, for
21 example, if that's the question.

22 BY MR. GUPTA:

23 Q. And when you look at the file names, do
24 you see file names that are suggestive to you that
25 these files -- that some of these files are in fact

1 not infringing?

2 MR. POZZA: Same objections. Ambiguous.

3 THE WITNESS: Yes.

4 BY MR. GUPTA:

5 Q. And can you tell me which file names you

6 believe are suggestive of a file that is likely not

7 to be infringing?

8 MR. POZZA: Same objections. Outside the

9 scope of the expert testimony. Ambiguous.

10 BY MR. GUPTA:

11 Q. Or in fact, you can mark it with a pen and

12 then -- you know, if that's faster and easier.

13 A. No. I can go through and tell you. But

14 when you say suggestive, I'm of course answering this

15 for purposes of just answering your question now.

16 This is not suggestive of infringement or

17 noninfringement as I would have done my different

18 analyses. I just want to be clear about that.

19 Q. Right. Because this is just based on file

20 name, right, so it's not going to be conclusive.

21 A. Well, all I meant to say is that I'm

22 answering your question and doing as you asked. My

23 -- if just based on this file name that this is of

24 course not the methodology I did as I did my

25 different analyses. I'm just distinguishing the two.

1 BY MR. GUPTA:

2 Q. Agreed.

3 A. Okay.

4 Q. Agreed. But you did look at file name in
5 your methodology as one of the factors, right?

6 A. Of course. I looked at file name among
7 many other considerations. Well, of course, without
8 listing each one, you know, the tools labelled iREB
9 and sn0wbreeze are the tools we have just been
10 talking about, which I know I mentioned to you that I
11 have in the unknowable category, but it's either
12 going to be -- if it's moved out of unknowable, it
13 would be to highly unlikely -- it would be moved to
14 noninfringing or illegal, but not infringing.

15 Q. Got it.

16 A. And I believe that in my analyses, I had
17 the J downloader tool also as -- which appears
18 several times here as noninfringing for purposes of
19 that work. And as I quickly look through it now,
20 those are the tools that, you know, those three items
21 I mentioned are really the only ones that jump out at
22 me, I think.

23 Q. Okay. I appreciate that. Do you
24 recognize this file that recurs a few time, this DOTA
25 utilities file?

1 be more closely in line with the fair use doctrine.

2 But, you know, again, we're now focusing
3 on what, you know, I really think is, you know,
4 probably one of a handful of outliers that are closer
5 calls in my analysis than what are really the much
6 more prevalent and easier calls, which are
7 full-length distribution of these works that are
8 being commercialized such as full-length copy of this
9 episode. But I grant you this is one of the more --
10 you know, one of the closer calls within my analysis.

11 BY MR. GUPTA:

12 Q. Okay. And so would you consider
13 redesignating this as unknowable?

14 A. What I -- look, with regard to any of the
15 closer calls that you raise with me today, whether
16 it's just this one or if this is one of X number, I
17 would be happy to go back and look more closely at
18 these. I actually, you know, take great pride in the
19 fact that I think that if you were to review the 1750
20 files and focus on the ones that I deemed to be
21 infringing, I think you'll find that you won't
22 dispute the overwhelming -- overwhelming majority of
23 them and that while you may be able to isolate and
24 present to me a few that are closer calls, that I had
25 sound reasoning both for the ones where I opted to

1 MR. POZZA: Objection. Misstates witness
2 testimony.

3 THE WITNESS: It -- as I hear that term, I
4 think of, you know, some -- some software that can be
5 distributed without it violating rights, as a result
6 of, for example, it being open-source software or,
7 you know, software where perhaps even the copyright
8 owner says it's a free copy and can be freely
9 distributed but still require some other terms to be
10 agreed to, and that's one of the terms in the
11 installation terms of use. But that's -- you know,
12 that's what I think of when I hear -- hear that term.

13 BY MR. GUPTA:

14 Q. Okay. So it would be, for example, if
15 you, Mr. Zebrak, created a piece of software and put
16 it on your website as shareware, I could download
17 that software and that I could email it to counsel,
18 right? And even though I'm not a copyright owner and
19 don't have any copyrights, I would not be in
20 violation of your copyrights in that process, right?

21 MR. POZZA: Objection. Incomplete
22 hypothetical.

23 THE WITNESS: You know, again when I
24 applied my methodology and went through this process,
25 I did this within the context of particular sites and

1 particular files. This is an abstract question. But
2 I certainly ran across instances of redistributable
3 software, where the owner of that software
4 contemplates and has permitted that a recipient of
5 the software would be allowed to further distribute
6 it to others.

7 BY MR. GUPTA:

8 Q. Okay. Well, let me ask you a question.
9 Do you have a sense of the business model that
10 users -- or that people who create shareware use to
11 monetize their -- their software?

12 MR. POZZA: Objection. It's ambiguous.

13 THE WITNESS: You know, there's so many
14 different fact patterns that can be applied to answer
15 that question. As I talked about in my first
16 deposition, you know, I don't -- my expertise here is
17 in having been in this copyright field as a lawyer
18 doing these types of analyses. I don't consider
19 myself necessarily an expert at, you know, a
20 particular industry within the copyright field, but I
21 have, in the course of this work and through my prior
22 work, acquired a pretty extensive background.

23 In terms of the business model to support
24 redistributable software, there can be many examples
25 of that. For example, there can be, you know,

1 any, changed hands. And I also don't know what, you
2 know, what this speaks to in terms of what -- you
3 know, this speaks to -- if it's accurate by this
4 person, what the person minds now, not whether one of
5 the exclusive copyright rights was exercised without
6 authorization at the time it was done. So those are
7 all things I can and will look further into.

8 Q. Just for the record, so this is an
9 affidavit that we procured from Mr. Mackay who is an
10 Australian who is the author of this video and I
11 think you probably heard he had the Australian
12 accent. He claims he is the owner and creator of the
13 website and he says that in paragraph 4, I've been
14 informed that some or all of my videos have been
15 posted at Hotfile.com, a cyber locker site that
16 allows users to store and/or share large files over
17 the Internet. Paragraph 5 says, I have no objection
18 to my videos being stored and/or shared in this
19 manner and do not consider such storing and/or
20 sharing to infringe my intellectual property rights.

21 A. Right.

22 Q. So would you say that this affidavit would
23 at least cause you to change your categorization from
24 highly likely infringing for these several files to
25 at least unknowable?

1 MR. POZZA: I object. Lacks foundation
2 and to the extent the witness has never seen this
3 document before and that counsel is providing
4 testimony.

5 THE WITNESS: A few things. As I've
6 mentioned several times, you apparently challenging
7 my designation here makes me want to look further
8 into it, along with, of course, you know, this
9 affidavit, I would want to speak with this person,
10 but, you know, I don't know if Mr. Mackay is a lawyer
11 or not, but a nonlawyer opining on what the nonlawyer
12 considers to be an infringement, that requires legal
13 judgment.

14 He, of course, knows what at the time he
15 authorized or didn't authorize, but the point is
16 whether one of his exclusive copyright rights was
17 exercised through the unauthorized distribution of
18 the file through Hotfile, you know, him looking back
19 on it now saying what he does or doesn't have an
20 objection to, I'm not sure speaks to what was
21 authorized in the first instance. And, you know,
22 again, you know, I would want to speak further with
23 him and will presumably do so.

24 BY MR. GUPTA:

25 Q. But don't you think that even if he hadn't

1 and take a short break, and I think we are close to
2 finished.

3 THE VIDEOGRAPHER: Off the record at 8:01.

4 (Recess.)

5 (Zembrak Exhibit 133 and Exhibit 134

6 was marked for identification.)

7 THE VIDEOGRAPHER: Back on the record at

8 8:09.

9 BY MR. GUPTA:

10 Q. Mr. Zembrak, are there any opinions other
11 than those you've expressed today, those you've
12 expressed in your first day of deposition and those
13 that are expressed in your reports, that you intend
14 to provide at trial?

15 A. No. These are the areas that I'm
16 testifying about.

17 MR. POZZA: Object as ambiguous and
18 calling for speculation.

19 THE WITNESS: Yes.

20 BY MR. GUPTA:

21 Q. Do you anticipate engaging in any further
22 factual inquiries before trial?

23 MR. POZZA: Object as ambiguous and
24 calling for speculation.

25 THE WITNESS: You know, I intend to

1 UNITED STATES OF AMERICA)

2 SS:

3 DISTRICT OF COLUMBIA)

4

5 I, SUSAN L. CIMINELLI, the officer before whom

6 the foregoing deposition was taken, do hereby

7 certify that the witness whose testimony appears in

8 the foregoing deposition was duly sworn by me; that

9 the testimony of said witness was taken by me to the

10 best of my ability and thereafter reduced to

11 typewriting under my direction; that I am neither

12 counsel for, related to, nor employed by any of the

13 parties to the action in which this deposition was

14 taken, and further that I am not a relative or

15 employee of any attorney or counsel employed by the

16 parties thereto, nor financially or otherwise

17 interested in the outcome of the action.

18

19

20 _____
SUSAN L. CIMINELLI

21

22 My commission expires: 11/30/2016

23

24

25