

EXHIBIT 4

1 Deposition of DAVID KAPLAN, taken on
2 behalf of Defendant, at 9:37 A.M., Wednesday,
3 October 12, 2011, at 633 West Fifth Street, Suite
4 3500, Los Angeles, California, before Jeanine
5 Curcione, C.S.R. No. 10223, RPR, pursuant to
6 notice.

7

8 APPEARANCES OF COUNSEL:

9 FOR THE PLAINTIFFS:

10 JENNER & BLOCK, LLP
11 BY: STEVEN FABRIZIO, ESQ.
12 633 West Fifth Street
13 Suite 3500
14 Los Angeles, California 90071

15 AND

16 MOTION PICTURE ASSOCIATION OF AMERICA, INC.
17 BY: KRISTA S. COONS, ESQ.
18 15301 Ventura Boulevard
19 Building E
20 Sherman Oaks, California 91403

21 FOR THE DEFENDANTS:

22 FARELLA BRAUN & MARTEL, LLP
23 BY: RODERICK M. THOMPSON, ESQ.
24 235 Montgomery Street
25 17th Floor Russ Building
26 San Francisco, California 94104

27 ALSO PRESENT:

28 EVAN M. ENGSTROM, ESQ.

29 DAN ACKLEY, VIDEOGRAPHER

30

31

[REDACTED] | 09:50:36 10

Q. Was there also a project within your

[REDACTED] | 09:50:39 11

department whereby Warner would load content onto

[REDACTED] | 09:50:46 12

Hotfile with the purpose of directing potential

[REDACTED] | 09:50:50 13

customers to iTunes?

[REDACTED] | 09:50:54 14

A. I'm not sure I'd call it a project.

[REDACTED] | 09:50:58 15

But there was a one time test done in I think

[REDACTED] | 09:51:05 16

May 2010 or around April, May 2010 in connection

[REDACTED] | 09:51:11 17

with an effort to put iTunes -- make Vampire

[REDACTED] | 09:51:20 18

Diaries' episodes available on iTunes in the UK in

[REDACTED] | 09:51:24 19

advance of their terrestrial broadcasts in the UK,

[REDACTED] | 09:51:34 20

free television broadcast in the UK.

[REDACTED] | 09:51:37 21

Q. And that included loading content from

[REDACTED] | 09:51:42 22

Vampire Diaries into Hotfile?

[REDACTED] | 09:51:45 23

MR. FABRIZIO: Objection. Vague.

[REDACTED] | 09:51:46 24

Q. BY MR. THOMPSON: Is that right?

[REDACTED] | 09:51:47 25

A. Not exactly. It included loading

09:51:49 1 portions of episodes of -- I think four episodes
09:51:52 2 of Vampire Diaries onto a couple of different
09:51:58 3 cyberlockers, Hotfile being one of them, for about
09:51:58 4 a three-week period of time.

[REDACTED]

10:24:10 1 A. On the subject of premium accounts?

10:24:12 2 Q. And verifying files more quickly with
10:24:15 3 premium accounts.

10:24:15 4 A. I think so.

10:24:21 5 Q. Now, it's true, is it not, that with
10:24:25 6 respect to the Hotfile takedown removal tool that
10:24:32 7 is referenced in Exhibit 1 that Warner, in fact,
10:24:36 8 did not verify content before using that tool?

10:24:41 9 MR. FABRIZIO: Objection. Lacks
10:24:42 10 foundation.

10:24:43 11 THE WITNESS: That's not correct.

10:24:46 12 Q. BY MR. THOMPSON: Did Warner ever view
10:24:49 13 the content on Hotfile, the actual content, not
10:24:56 14 the words in the URL, before utilizing the Hotfile
10:25:01 15 takedown tool?

10:25:04 16 A. I'm going to say no because I'm unaware
10:25:07 17 of any instance.

10:25:08 18 Q. Fair enough. And Warner's practice and
10:25:11 19 procedure is not to have any human being view the
10:25:14 20 content before using the tool?

10:25:16 21 A. I'm going to amend my answer a little
10:25:19 22 bit only because there were instances where we did
10:25:22 23 use these premium accounts for the reasons I just
10:25:25 24 described, so we would have seen in those
10:25:27 25 instances that there was a pirated version of

[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]

10:25:44 5 Q. It was Warner's practice and procedure
10:25:46 6 not to have any human review of the content on
10:25:49 7 Hotfile before utilizing the Hotfile takedown
10:25:53 8 removal tool?

10:25:54 9 A. By human review you mean downloading
10:25:57 10 the content before the tool was used to send a
10:25:59 11 notice?

10:26:02 12 Q. Downloading or otherwise viewing the
10:26:04 13 content?

10:26:04 14 A. That's correct.

[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
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[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]

10:28:26 1 THE WITNESS: Yes.

10:28:28 2 Q. BY MR. THOMPSON: And maybe I made that
10:28:30 3 more complicated than I needed to. It's possible
10:28:32 4 for Warner just to take a fingerprint from a file
10:28:35 5 in Hotfile and confirm by use of that fingerprint
10:28:40 6 that the content is Warner's property?

10:28:43 7 A. No.

10:28:43 8 MR. FABRIZIO: Objection. Lacks foundation
10:28:45 9 and been asked and answered. Just pause and let
10:28:47 10 me object.

10:28:48 11 THE WITNESS: No.

10:28:54 12 Q. BY MR. THOMPSON: Does Warner have to
10:28:55 13 download the file in order to check a fingerprint?

10:28:57 14 A. Yes.

10:29:02 15 Q. And, in fact, Warner's practice and
10:29:04 16 procedure was not to download any file before
10:29:09 17 using the Hotfile takedown tool to delete the
10:29:13 18 file?

10:29:13 19 MR. FABRIZIO: Objection. Asked and
10:29:14 20 answered.

10:29:14 21 THE WITNESS: That's correct.

10:29:22 22 MR. THOMPSON: I'm going to have another
10:29:24 23 document marked now, and I think this one may
10:29:26 24 be -- we'll hit a few other questions first and
10:29:37 25 come back to that.

[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]

11:21:44 5

[REDACTED] | [REDACTED]
[REDACTED] | [REDACTED]

[REDACTED] | [REDACTED]

[REDACTED] | [REDACTED]

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[REDACTED] | [REDACTED]

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[REDACTED] | [REDACTED]

[REDACTED] | [REDACTED]

12:02:13 1 this is a screen shot from the Hotfile website and
12:02:18 2 what I wanted you to focus on is the little check
12:02:23 3 box under -- there's a large blank box in the
12:02:26 4 middle, do you see that?

12:02:27 5 (Exhibit 6 was marked for
12:02:27 6 identification by the Reporter.)

12:02:28 7 THE WITNESS: Yes.

12:02:28 8 Q. BY MR. THOMPSON: And underneath
12:02:29 9 there's a check box and it states, "I certify
12:02:32 10 under penalty -- penalty of perjury that I am the
12:02:34 11 owner or authorized legal representative of the
12:02:37 12 owner of the copyrights to this material. I have
12:02:42 13 a good faith belief that use of this material is
12:02:46 14 not authorized by the copyright owner, the
12:02:51 15 copyright owners agent or by law. The foregoing
12:02:55 16 information is accurate as to this material."

12:02:58 17 Isn't it true that Warner made this
12:03:00 18 representation to Hotfile every time it used the
12:03:04 19 Hotfile SRA?

12:03:07 20 A. Well, I'm sorry. Are you asking
12:03:09 21 whether or not the -- the robot clicked the box as
12:03:12 22 part of getting access to the SRA tool?

12:03:18 23 Q. It would have to click the box to use
12:03:19 24 the SRA tool?

12:03:21 25 A. I think so, yes.

12:03:22 1 Q. And Warner knew that was the case;

12:03:23 2 correct?

12:03:24 3 A. Yes.

12:03:25 4 Q. So Warner knew that every time the
12:03:27 5 robot was using the SRA tool, that representation
12:03:31 6 was being made to Hotfile?

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

12:04:48 2

THE WITNESS: Well, I think I would put it

12:04:49 3

this way. The -- the statement is based on our

12:04:54 4

faith of the overall system that we developed.

12:04:58 5

Errors are made in any system that's being

12:05:00 6

developed. The fact that we took any errors that

12:05:03 7

we discovered and used them to improve the system

12:05:06 8

I think further gave us confidence that the system

12:05:08 9

was one that was the best one that we could

12:05:10 10

create.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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12:07:13 18 Q. BY MR. THOMPSON: Is it Warner's
12:07:14 19 position that the representation it made with
12:07:16 20 respect to the SRA tool that we've just read
12:07:20 21 cannot be evaluated on a link-by-link basis but
12:07:23 22 must be looked at in the overall picture that you
12:07:26 23 just described?
12:07:26 24 MR. FABRIZIO: Objection. Lacks
12:07:27 25 foundation.

12:07:28 1

Q. BY MR. THOMPSON: Is that right?

12:07:29 2

A. Yes.

[REDACTED]

[REDACTED]

12:29:12 14 Q. BY MR. THOMPSON: Okay. But there were
12:29:13 15 a lot more than four or five times where Warner
12:29:16 16 personnel had concluded that a particular file had
12:29:19 17 been taken down in error in all likelihood?

12:29:22 18 MR. FABRIZIO: Objection. Lacks
12:29:23 19 foundation.

12:29:24 20 THE WITNESS: Probably more than four or
12:29:25 21 five times, yes.

12:29:26 22 Q. BY MR. THOMPSON: In those times, did
12:29:27 23 Warner take any steps to notify the content owner
12:29:32 24 of Warner's mistake?

12:29:36 25 A. No.

[REDACTED]

[REDACTED]

14:57:34 2

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

16:58:37 19 A. The good faith belief as to any
16:58:41 20 particular file comes from our belief that the
16:58:44 21 system that we're using is one of the best ones
16:58:47 22 that's -- that's available. It's a robust system
16:58:51 23 that is capable of scaling. I've answered this
16:59:08 24 question a couple of different times. But I don't
16:59:09 25 know, I'm trying not to come up with different

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REPORTER'S CERTIFICATE

I, JEANINE CURCIONE, C.S.R. NO. 10223, RPR, in and for the State of California, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify the truth, the whole truth and nothing but the truth.

That said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction, and the same is a true, correct and complete transcript of said proceedings.

That the witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the witness reserved the right of signature;

I further certify that I am not interested in the event of the action.

Witness my hand this 26th day of October, 2011.



Jeanine Curcione

Certified Shorthand
Reporter for the
State of California