

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF FLORIDA
 3 CASE NO. 11-20427-WILLIAMS
 4

5 DISNEY ENTERPRISES, INC.,)
 TWENTIETH CENTURY FOX FILM)
 6 CORPORATION, UNIVERSAL CITY)
 STUDIOS PRODUCTIONS LLLP,)
 7 COLUMBIA PICTURES)
 INDUSTRIES, INC., and)
 8 WARNER BROS. ENTERTAINMENT)
 INC.,)
 9)
)
 10 Plaintiffs,)
)
 11)
 v.)
 12)
 HOTFILE CORP., ANTON TITOV)
 13 and DOES 1-10,)
)
 14 Defendants.)

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 17 Deposition of JAMES BOYLE
 18 (Taken by the Plaintiffs)
 19 Raleigh, North Carolina
 20 December 21, 2011
 21
 22

23 Reported by: Marisa Munoz-Vourakis -
 RMR, CRR and Notary Public
 24 TSg Job # 44315
 25

1 APPEARANCE OF COUNSEL:

2 For the Plaintiffs:

3 DUANE POZZA, ESQ.

4 Jenner & Block

5 1099 New York Avenue, NW, Suite 900

6 Washington, DC 20001

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10 For the Defendants:

11 DEEPAK GUPTA, ESQ.

12 Farella Braun & Martel

13 Russ Building

14 235 Montgomery Street

15 San Francisco, CA 94104

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19 Deposition of JAMES BOYLE, taken by the

20 Plaintiffs, at Office Suites Plus, 3737 Glenwood

21 Avenue, Suite 100, Raleigh, North Carolina, on the 21st

22 day of December, 2011 at 11:04 a.m., before Marisa

23 Munoz-Vourakis, Registered Merit Reporter, Certified

24 Realtime Reporter and Notary Public.

25

█ [REDACTED]
█ [REDACTED]
█ [REDACTED]
█ [REDACTED]

5 Q. In the course of your research, do you have
6 any experience designing statistical studies?

7 MR. GUPTA: Objection, vague and
8 ambiguous.

9 A. No, I do not.

10 Q. Are you trained in statistics?

11 A. No, I am not.

12 Q. In the course of your research, do you have
13 any experience analyzing large data sets?

14 MR. GUPTA: Objection, vague and
15 ambiguous.

16 A. No, I would say that I do not have the
17 experience as a statistician analyzing large data sets.
18 As an academic, I have to consider large amounts of
19 data all of the time and try and draw conclusions from
20 it, so it depends exactly what you mean by large data
21 sets.

█ [REDACTED]
█ [REDACTED]
█ [REDACTED] [REDACTED]
█ [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

19 Q. Just going back again to the last sentence
20 of 9 sub-i, you say: Hotfile's proven suitability and
21 capability with such licensing models is of
22 significance.

23 Do you see that?

24 A. Yes, I do see it.

25 Q. What kind of significance?

1 MR. GUPTA: Objection, it's vague.

2 A. In Sony and the cases that followed Sony,
3 the courts have been very clear that it's not just the
4 current usage of a system but its potential for future
5 use that is important.

6 So, for example, in the Napster case the
7 court of appeals held that the district court had erred
8 in not considering the potential uses for Napster,
9 focusing only on its current uses. You asked what the
10 meaning is of the word significance. It's significant
11 first in that here we have a method that can be used
12 indirectly to compensate developers and distributors of
13 open source software, in this case these small
14 distributors, not the large scale commercial
15 distributors, but the independent programmer working
16 alone or in teams, who is being indirectly compensated
17 for his or her labor by distributing this copyrighted
18 work in accordance with the goals of the copyright act.

19 The significance there is first, that that
20 is an example of noninfringing use; and second, that
21 the potential that the system could be used even more
22 for this and other kinds of licitly, that is to say,
23 legally licensed distribution is something that shows
24 that under the Sony test, as reiterated in Napster, it
25 has potential future uses.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7 A. Certainly not as high as the 1.7 million
8 download figure for the open source programs. I
9 included this because, as I understand the test in
10 Sony, the court in Sony and subsequent courts are
11 interested both in magnitude, that is to say, the
12 number of uses, but also in types of uses, and this is
13 illustrative of a type of use.

14 When we think about the uses of a system in
15 order to spread cultural material, we, at least I, in
16 interpreting the Sony and Napster test, are not looking
17 only at the number, although that is clearly something
18 that we do look at, but also at what this represents.
19 In some cases, it may represent intensity of
20 preference. People who really like Hamlet or Othello
21 rather than many people who like JDownloader.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 common uses of the Hotfile system.

2 Do you see that?

3 A. I do.

4 Q. I think we talked about the raw numbers.

5 In terms of the most common uses of the Hotfile system,
6 what do you mean there?

7 A. I mean the information about the fact that
8 files such as iREB and sn0wbreeze and to a less extent
9 JDownloader, were among the most commonly shared files
10 on Hotfile, that their number of downloads was high in
11 proportion to, excuse me, was high in rank if you
12 looked at the most downloaded.

13 Q. So are you making a statement about
14 different kinds of uses of the Hotfile system in
15 general?

16 MR. GUPTA: Objection, it's vague.

17 A. So I'm trying to give the court information
18 relevant to whether or not there are substantial,
19 noninfringing uses of Hotfile and also relevant to
20 whether or not Hotfile would be guilty of a Grokster
21 style inducement liability. To me, as a legal scholar,
22 it appears that if you find that the one and two most
23 downloaded files on the system are actually licitly
24 shared, that seems important, that seems significant.

25 The fact that those files are examples of

1 open source development, a kind of creativity, and the
2 fact that the developers of that open source software
3 are actively choosing to use Hotfile licitly to spread
4 it and appear to be gaining some compensation, I
5 believe that a court would see that as significant in
6 the determination of substantial noninfringing uses.

■ ■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ ■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

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■ ■ [REDACTED]

■ [REDACTED]

C E R T I F I C A T E

1
2 I, Marisa Munoz-Vourakis, RMR, CRR and Notary Public,
3 the officer before whom the foregoing proceeding was
4 conducted, do hereby certify that the witness(es) whose
5 testimony appears in the foregoing proceeding were duly
6 sworn by me; that the testimony of said witness(es) were
7 taken by me to the best of my ability and thereafter
8 transcribed under my supervision; and that the foregoing
9 pages, inclusive, constitute a true and accurate
10 transcription of the testimony of the witness(es).

11 I do further certify that I am neither counsel for,
12 related to, nor employed by any of the parties to this
13 action in which this proceeding was conducted, and
14 further, that I am not a relative or employee of any
15 attorney or counsel employed by the parties thereof, nor
16 financially or otherwise interested in the outcome of the
17 action.

18 IN WITNESS WHEREOF, I have hereunto subscribed my name
19 this 27th of December, 2011.

20 _____
MARISA MUNOZ-VOURAKIS

21 Notary #20032900127
22
23
24
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
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5 DISNEY ENTERPRISES, INC.,)
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HOTFILE CORP., ANTON TITOV)
13 and DOES 1-10,)
14 Defendants.)

15
16
17 Continued Deposition of JAMES BOYLE

18 Volume II

19 (Taken by the Plaintiffs)

20 Raleigh, North Carolina

21 January 19, 2012
22
23

24 Reported by: Marisa Munoz-Vourakis -
RMR, CRR and Notary Public

25 TSG Job # 45588

1 APPEARANCE OF COUNSEL:

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11 DEEPAK GUPTA, ESQ.

12 Farella Braun & Martel

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14 235 Montgomery Street, 17th Floor

15 San Francisco, CA 94104

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20 Continued Deposition of JAMES BOYLE,

21 taken by the Plaintiffs, at Office Suites Plus, 3737

22 Glenwood Avenue, Suite 100, Raleigh, North Carolina, on

23 the 19th day of January, 2012 at 9:38 a.m., before

24 Marisa Munoz-Vourakis, Registered Merit Reporter,

25 Certified Realtime Reporter and Notary Public.

[REDACTED]

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[REDACTED]

[REDACTED]

16 I am not a statistician, as I've said many
17 times in this report, and do not have the ability to go
18 and perform that study. What I was suggesting was that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13 So I don't think that anything in Sony or
14 the subsequent case law requires one to focus on
15 predominant use, as you have defined it, that is to
16 say, in terms of the number of infringing downloads as
17 a percentage of usages of the system. I certainly know
18 of no law to that effect, and in fact, I believe the
19 Supreme Court to have indicated strongly that the
20 opposite is the case.

[REDACTED]

1 report, but I don't know that.

2 Q. Did you ask Elysium Digital to give you a
3 report as to whether any of the 6,182,360 files with
4 only one registered downloads made it into the
5 statistical sample?

6 A. No, I didn't.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7 Q. And you're not aware of how many one
8 download files actually ended up in the sample?

9 MR. GUPTA: Objection, that's asked
10 and answered.

11 A. No, I'm not.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 Q. Have you examined the notes field in the
13 database that Mr. Zebrak produced?

14 A. If the notes field is the field at the end
15 where he lists, generally without comment, some URLs,
16 which I presume were the places that he went for
17 research, yes, in a few of the cases that I talk about
18 here, I have looked at them.

19 Q. Have you looked at all of them?

20 A. No, I have not.

21 Q. Approximately -- for approximately what
22 percentage of the 1750 files have you looked at the
23 URLs that were listed in the notes field?

24 MR. GUPTA: Objection, it's vague and
25 it calls for speculation.

1 A. I'm genuinely unsure. I would say I looked
2 through to try and get a sense of his methods, and so
3 if we're merely talking, looking through to get a sense
4 of his methods, the kinds of things that are in there,
5 then in that case, I looked at a fairly large number of
6 them, 150, 200, simply looking at what URLs were there,
7 not going to the URL and checking it out.

8 Q. That was my next question.

9 A. In terms of the ones where I actually went
10 and looked at the specific URL, certainly for the ones,
11 all of the examples that I mentioned here, and for a
12 number of others, I would say perhaps there are also
13 some of the files that were looked at in my first
14 study, so JDownloader, iREB, sn0wbreeze. If one adds
15 all of those together, I would guess perhaps somewhere
16 between 25 and 40, but I couldn't be sure. Not all of
17 them being specifically referred to in both reports
18 that is.

19 Q. Those are ones where you clicked on a
20 specific URL?

21 A. Where I clicked on a URL or attempted to
22 look at what the URL was. I might have clicked on the
23 URL and also attempted to look for that material as
24 well.

[REDACTED]

22 Q. And I believe you testified earlier that,
23 correct me if I'm wrong, that you looked at the -- you
24 had actually clicked on the links in the note section
25 for approximately 30 to 40 of the files in the sample?

[REDACTED]

[REDACTED]

16 Q. Did you take a sample, a subsample of the
17 1750 sample files that was random and look at those to
18 see if you had any opinion as to whether or not
19 Mr. Zebrak's opinions as to the infringement status was
20 correct?

21 A. No, I did not.

[REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

5 Q. But sitting here today, you would not add
6 any -- if I'm understanding you correctly, you would
7 not add any files to the list of those that you believe
8 Mr. Zebrak classified erroneously in terms of its
9 infringement status, other than the ones that are
10 listed in your rebuttal report?

11 A. As I sit here today, I don't have knowledge
12 of other files where I am satisfied enough, specific
13 files where I'm satisfied enough with my analysis to
14 come to a definite conclusion on that. There are some
15 classes of files where I have concerns, but because of
16 the limitations of time and because, you know, I was
17 largely working on this, you know, under those
18 limitations of time, I simply wasn't able to
19 investigate all of them, and so I don't have specific
20 examples sitting here today, no.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[REDACTED]

18 Q. Have you reviewed any of these files that
19 appear to be pornographic?

20 A. No.

21 Q. Have you reviewed any of the links for
22 these files that Mr. Zebrak provided for any of the
23 files that appear to be pornographic?

24 A. When you say reviewed the links?

25 Q. Have you clicked on the links?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7 Q. Do you have any knowledge of what -- how
8 many of the files that were actually in the study you
9 would classify as being teasers?

10 A. No. As I said, I didn't examine any of the
11 files in the study.

12 Q. And do you have any knowledge of any files
13 that appear to be -- to you to be orphan works of any
14 sort?

15 A. As I said, I didn't examine any of the
16 files in the study. What I tried to do was to point

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]

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█ [REDACTED] [REDACTED]

█ [REDACTED]

█ [REDACTED] [REDACTED]

█ [REDACTED]

█ [REDACTED]

10 Q. Do you have any reason to believe that

11 Mr. Zebrak did not look closely at files to make an

12 assessment of whether he thought the pornographic files

13 distribution of the pornographic tiles would be a fair

14 use?

15 A. I don't know whether he did or not. I note

16 that in other portions of this study, I was concerned

17 that he had not carried out a full fair use analysis.

18 So to the extent that concern carries over, it would be

19 replicated here.

20 Q. There's nothing specific about the

21 pornographic files for which you think Mr. Zebrak did

22 not engage in a full, fair use analysis?

23 A. I simply don't know. My point was that in

24 this class, it was going to be harder to classify, and,

25 thus, the confidence interval will have highly likely

1 infringing was going to be harder to reach.

█ [REDACTED]

█ [REDACTED]

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█ [REDACTED] [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

2 Q. Are you purporting to claim that this
3 allowed you to draw any opinions or conclusions about
4 Hotfile?

5 A. I would say that these numbers indicate
6 that the category that Mr. Zebrak identified as
7 noninfringing had a much higher conversion rate, that
8 is to say, a rate of converting people to premium than
9 the confirmed infringing.

10 I'd say in addition, that Mr. Zebrak's
11 confirmed infringing category was the lowest of all of
12 the types of content, lower even than unknowable, and
13 so I think I can from that draw the conclusion that
14 Hotfile was gaining economic success from noninfringing
15 material, number one, I can conclude that; and number
16 two, that they were actually gaining more economic
17 success proportionately from noninfringing material
18 than from confirmed infringing or highly likely
19 infringing material.

20 Q. Can you extrapolate these results from the
21 1750 files to the broader population of files on
22 Hotfile?

23 A. I believe it is the assertion of
24 Dr. Waterman and Mr. Zebrak that the study can be
25 extrapolated. I, for the reasons in this report, I

1 have problems with extrapolating the study, but this,
2 for the purposes of argument, I took their
3 classifications and accepted them.

4 Q. Well, no, these numbers themselves you're
5 taking a different variable, the paid for variable,
6 right? They didn't analyze that?

7 A. That is correct.

8 Q. And you're saying that you can take that
9 variable, calculate this conversion rate, which is
10 based on this other variable daily download total that
11 they did not consider?

12 A. I believe they did consider.

13 Q. Daily download total?

14 A. Well, they looked at daily downloads,
15 excuse me.

16 MR. GUPTA: Objection, this line of
17 questioning is obviously somewhat confusing
18 and complicated.

19 BY MR. POZZA:

20 Q. I'm trying to figure out if these
21 conversion rates that you claim for different
22 categories of infringing and noninfringing content, are
23 you claiming that those conversion rates would
24 extrapolate to the entire population of files or
25 downloads on Hotfile?

1 MR. GUPTA: Objection, to the extent
2 it seeks a statistical analysis.

3 A. What I'm claiming is that if Dr. Waterman
4 and Mr. Zebrak were correct about, first of all, the
5 statistical representativeness of their study, about
6 which I raise questions, and also the accuracy of it,
7 about which I raise questions, but if we assume that
8 for the sake of argument they are claiming that it
9 provides a generalizable representative picture of
10 Hotfile, if they take their assumption, the assumption
11 they make in their report, then I would expect that the
12 paid for could be extrapolated to the rest of Hotfile.

13 Q. Would it be extrapolated in the way that
14 you have done here?

15 A. I think a court might extrapolate it in any
16 number of ways. I think if their argument is correct,
17 and they are presenting estoppel from which conclusions
18 can be extrapolated, then their sample and their
19 classifications with this one extra piece of
20 information, namely, the sample paid for is a
21 percentage of daily download totals.

22 Q. Is that based on your understanding of the
23 statistical methods that Dr. Waterman employed?

24 A. It's based on my understanding that
25 Dr. Waterman claims that his study is a statistically

SIGNATURE PAGE

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you.

(Whereupon the deposition was
concluded at 5:43 p.m.)

(Signature reserved.)



Digitally signed by James Boyle
DN: cn=James Boyle, o, ou,
email=boyle@law.duke.edu, c=US
Date: 2012.01.31 15:55:27 -05'00'

JAMES BOYLE

SUBSCRIBED AND SWORN to before me this _____
day of _____, 2012

NOTARY PUBLIC

My Commission expires: _____

C E R T I F I C A T E

1
2 I, Marisa Munoz-Vourakis, RMR, CRR and Notary Public,
3 the officer before whom the foregoing proceeding was
4 conducted, do hereby certify that the witness(es) whose
5 testimony appears in the foregoing proceeding were duly
6 sworn by me; that the testimony of said witness(es) were
7 taken by me to the best of my ability and thereafter
8 transcribed under my supervision; and that the foregoing
9 pages, inclusive, constitute a true and accurate
10 transcription of the testimony of the witness(es).

11 I do further certify that I am neither counsel for,
12 related to, nor employed by any of the parties to this
13 action in which this proceeding was conducted, and
14 further, that I am not a relative or employee of any
15 attorney or counsel employed by the parties thereof, nor
16 financially or otherwise interested in the outcome of the
17 action.

18 IN WITNESS WHEREOF, I have hereunto subscribed my name
19 this 23rd of January, 2012.

20
21
22 _____
MARISA MUNOZ-VOURAKIS

23 Notary #20032900127
24
25