

SCOTT A. ZEBRAK, ESQUIRE - 12/20/2011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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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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A P P E A R A N C E S

ON BEHALF OF PLAINTIFFS:

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ALSO PRESENT:

Terry Michael King, Videographer

12:23:08 1 For purposes of my report, the content I'm
12:23:11 2 dealing with, you know, one thing I attempted to do
12:23:14 3 was determine was this some fan-based or user-based
12:23:19 4 material or the original work as created and
12:23:24 5 commercialized by the content provider. If I couldn't
12:23:27 6 determine that it was in that latter category of, you
12:23:30 7 know, the work created by the copyright owner and
12:23:33 8 being commercialized by the copyright owner, it would
12:23:36 9 have ended up being in an unknowable category, or if
12:23:40 10 it was noninfringing, in a noninfringing category.

[REDACTED]

[REDACTED]

14:19:02 12 THE WITNESS: So I would have the, you know,
14:19:02 13 Hotfile files. I would have the name of -- the file
14:19:04 14 of data about the name of the file or consisting of
14:19:07 15 the name of the file along with the Hotfile URL. So I
14:19:10 16 would have that information along with -- in certain
14:19:14 17 instances I would have information about takedown
14:19:16 18 notices or special right holder takedowns, and then we
14:19:26 19 actively went about viewing and doing searching and
14:19:29 20 investigation based on all this information which led
14:19:31 21 us to other information that we would -- I say we --
14:19:34 22 folks would help me gather this information, but then
14:19:37 23 I then considered this information as I attempted to
14:19:40 24 reach my determination.

14:19:40 25 BY MR. LEIBNITZ:

14:19:42 1 Q And that's the web search reflected in the
14:19:44 2 notes and elsewhere in Exhibit 101?

14:19:46 3 MR. FABRIZIO: Objection, mischaracterizes
14:19:48 4 his testimony.

14:19:51 5 THE WITNESS: It -- it -- it consists of a
14:19:52 6 variety of things. I'm happy to walk through. We
14:19:55 7 haven't -- we haven't really sort of completely walked
14:19:56 8 through the process yet today. But, you know, it
14:19:59 9 was -- it was an investigation. We started with the
14:20:00 10 information made available to us, being the content
14:20:06 11 files, the metadata about -- that included the name of
14:20:10 12 the file as long -- as well as the Hotfile URL. We
14:20:13 13 had information about takedown notices.

14:20:16 14 And then we actively review the files, do
14:20:22 15 searching of the link and of the file name and -- and
14:20:25 16 do other information to identify what the file is,
14:20:28 17 identify how the copyright owner or its agent were
14:20:30 18 commercializing the work, review associated terms of
14:20:33 19 use, licensing arrangements. It's a whole -- I used
14:20:37 20 the term "quilt" before, but there's a whole range,
14:20:40 21 whole spectrum of information that we attempted to
14:20:42 22 build and consider.

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

17:13:44 3 THE WITNESS: Again, you know, the process I
17:13:45 4 went through included reviewing the content file to
17:13:50 5 identify what was there, perhaps to identify the
17:13:55 6 artist to see what song or songs would have been there
17:13:58 7 if this is a music album including, you know, other
17:14:03 8 promotional material. I might have even seen an album
17:14:07 9 cover. You know, that's the type of thing I might
17:14:11 10 see. Especially in a .rar file, which is a -- a tool
17:14:16 11 used to compress a whole bunch of files often.

17:14:17 12 So I would look at the file, attempt to
17:14:19 13 figure out what the work was, and then I would do some
17:14:21 14 research to identify what -- you know, who the
17:14:24 15 copyright owner or its licensee was. Typically in the
17:14:28 16 record industry that would be the record label, and
17:14:35 17 then I would look to see how the work was being
17:14:37 18 commercialized, and if it was a professional artist
17:14:40 19 that was commercializing its work in a way that that
17:14:50 20 business model would be -- you know, really where the
17:14:53 21 antithesis of that is free and unrestricted
17:14:58 22 distribution of its music through the internet for --
17:15:01 23 for viral copy and distribution, that -- that would
17:15:03 24 form the basis of my highly likely infringing
17:15:06 25 designation and -- and the other legwork would have

17:15:08 1 included seeing, for example, that it was being -- it
17:15:11 2 was an assumption that it was being distributed, but
17:15:13 3 that was borne out here presumably by seeing the URL
17:15:16 4 in the Hotfile search -- I mean, reference in the
17:15:24 5 notes section along with looking at other web pages
17:15:26 6 about the artist and where the web -- you know, where
17:15:28 7 the URL may have been posted, and -- and of course the
17:15:31 8 label.

[REDACTED]

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

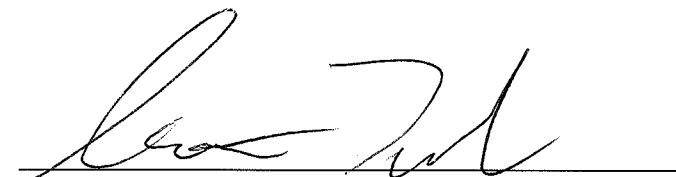
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_____ Subject to the above changes, I certify that the transcript is true and correct.

No changes have been made. I certify that the transcript is true and correct.


(signature)

2/1/2012
(date)

Print Name Scott Zebrak

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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
and DOES 1-20,

11-cv-20427-AJ

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.

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APPEARANCES:

On behalf of the Plaintiffs & Counterdefendants:

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ALSO PRESENT:

CONWAY BARKER, Videographer

█ [REDACTED]

█ [REDACTED]

3 A. See, Professor Boyle -- and this is a flaw
4 across his report, and I believe it's a very serious
5 one. He -- he approached this, as he put it, as a
6 legal scholar. He largely wanted to discuss issues
7 in theory, rather than focus on those issues
8 implicated by the facts and actually review the
9 facts. And, in this instance, I did review the
10 facts, including for the pornographic works that I
11 examined in the course of the study, and I reviewed
12 the terms of use and the conditions under which these
13 companies allowed for use of their works. And I also
14 had my own background knowledge on that industry, as
15 well as further spoke with a representative from that
16 industry to test my background and understanding on
17 how their works are created and distributed. And
18 they all supported my -- my conclusions.

19 As I mentioned earlier, of course a
20 company is free to authorize distribution of its own
21 works and how it sees fit but the works I -- I ran
22 across and concluded were highly likely infringing
23 were commercial works that were taken from sites that
24 charged for access to that material and were of a
25 length inconsistent with any sort of promotional

1 distribution of the type that you hypothesized over a
2 moment ago as inspired by Professor Boyle.

3 BY MR. GUPTA:

4 Q. So what do you consider to be a length
5 inconsistent with promotional distribution?

6 MR. POZZA: Objection. Incomplete
7 hypothetical and ambiguous.

8 THE WITNESS: Well, I looked at a variety
9 of factors. As with regard to my classification of
10 works, for the most part, the works I examined were
11 all full-length long commercial works. To the extent
12 works were short such as 30 seconds, a minute, two
13 minutes, something of that ilk, those tended not to
14 be works, especially within the pornographic content
15 we're talking about now, that were included in my
16 highly likely infringing assessment.

17 The hypothetical example you gave and
18 Professor Boyle's -- to my knowledge, I'm not sure if
19 Professor Boyle reviewed any of the files that I
20 reviewed in this category of pornography. He -- he
21 expresses some sweeping conclusions about the adult
22 entertainment industry based on from what I can tell
23 is a review of three articles. But I would -- so in
24 terms of the length of the works, those were the
25 works of that period or shorter that I tended not to

1 have in the infringing category.

2 BY MR. GUPTA:

3 Q. Okay. Mr. -- Professor Boyle also
4 criticized your analysis as to fair use. What's your
5 reaction to that?

6 MR. POZZA: Same standing objection. Lack
7 of --

8 THE WITNESS: Yeah, I mean, again, if you
9 show me his report, I can go example by example, but
10 Professor Boyle, again, throughout his report wants
11 to talk about theoretical issues rather than a review
12 of given files and whether those -- the distribution
13 of those files is an infringement or not. He, in his
14 report, talks about fair use. He talks about
15 personal storage. He likes talking about zero and
16 one downloads. Yet, a review of the actual files and
17 facts show that those considerations for the files
18 that I've examined are -- are just largely not
19 present.

20 Professor Boyle, were he inclined to do
21 so, could have reviewed these files to see that they
22 were full length commercial works being distributed,
23 and when I say distributed, as opposed to personal
24 storage, these were -- these were works where he
25 could merely take the Hotfile URL, paste it into his

1 Google search bar, and find those links online, as I
2 did and as my data includes, along with my deposition
3 testimony. So, you know, he discusses the Sony case
4 and home taping and fair use and personal use, but
5 the download data and the distribution data and the
6 actual files I reviewed really undermine the way he
7 attempts to raise these issues and attempts to sort
8 of cast them across a great number of files. I just
9 think factually he's -- he's off base about its
10 relevance.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

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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

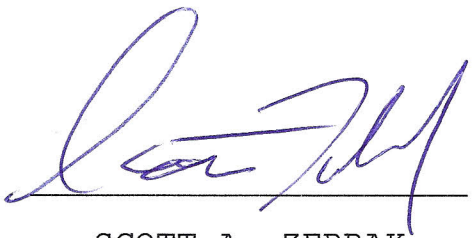
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I have read the foregoing transcript of my deposition
and find it to be true and accurate to the best of my
knowledge and belief.



SCOTT A. ZEBRAK

Deposition of Scott Zebrak – Day 2 (rebuttal)
January 20, 2012
Errata

Location	Correction
163:2	change "highly unlikely infringing category" to "highly likely infringing category"