

Exhibit 16

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:

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20 ALSO PRESENT:

21 CONWAY BARKER, Videographer

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1 Court would rule. I do not believe a Court has, you
2 know, ruled on -- or that a case is pending with
3 respect to features such as these in the context of
4 tools such as these.

5 BY MR. GUPTA:

6 Q. So until such time as a Court does rule on
7 these types of software tools, do you believe it
8 would be appropriate for you to actually offer an
9 opinion that these tools are illegal?

10 MR. POZZA: Object as ambiguous. And
11 calling for a legal conclusion.

12 THE WITNESS: If I am reasonably certain
13 as to how I think the issue should come out, I think
14 it would be entirely appropriate for me to, you know,
15 offer my opinion on that.

16 BY MR. GUPTA:

17 Q. But at this time, is it fair to say that
18 your view of the law is that it doesn't provide a
19 clear answer on this question?

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

21 THE WITNESS: I would say it a little
22 differently than that. I would say that these
23 provisions are what they are, and there are some
24 limited exemptions to them. Where I'm finalizing my
25 analysis is fleshing out the application of these

1 provisions to these two tools, but I think there is a
2 very substantial argument that even if the use of
3 these tools by a user doesn't violate or constitute a
4 circumvention any longer if it's used for the
5 purposes of the Librarian of Congress's exemption
6 concerning adding a non-Apple approved app, for
7 example, you know, the question is whether these
8 tools are doing what those exemptions don't allow.
9 And that's why I mentioned the features of sn0wbreeze
10 that, for example, do not appear to be concerned with
11 software interoperability which is what this reverse
12 engineering and copyright office exemption concerned.

13 As well as the fact that iREB as stand
14 alone from sn0wbreeze sort of puts the phone, I
15 believe, in a jail breakable state, so to speak. I
16 think I just made up that word, in the sense that
17 it's not necessarily paired with adding a particular
18 application or not. But so, you know, these are
19 the -- these are sort of a factual --

20 BY MR. GUPTA:

21 Q. Yes.

22 A. Development relative to -- relative to
23 these exemptions.

24 Q. If you look at 1201, and I don't want to
25 spend too much time on this, but look at

1 1201(A)(2)(a) and it talks about the distribution
2 aspect that you've mentioned. But a predicate is
3 that the software be primarily designed for the
4 purpose of circumventing a technological measure that
5 effectively controls access to a work.

6 So in what sense would the functionalities
7 of sn0wbreeze that allow network unlocking and that
8 allow changing the images on your system constitute
9 technological measures that control access to a work,
10 if you so contend?

11 MR. POZZA: Same objections. Ambiguous.

12 THE WITNESS: First of all, it's clear
13 what these tools are marketed for. And with respect
14 to the work, I mean, you know, the -- you know, the
15 operating system, for example, that, you know, needs
16 to be put into a different state so you can upload
17 these applications, you know, I think that, you know,
18 these are the -- you know, that could be the work
19 that, you know, would be at play.

20 BY MR. GUPTA:

21 Q. Sorry. So you believe access to the
22 operating system is the access that's -- that's
23 potentially at issue here?

24 MR. POZZA: Objection. Ambiguous.
25 Misstates testimony.

1 has I think the wrong sort of presumption based in
2 it. You know, my analysis was whether distribution
3 of the work through Hotfile was an infringement. My
4 analysis did not extend to whether that copyright
5 owner could walk into Court the next day and bring a
6 lawsuit, prevail on the lawsuit and, you know, seek
7 remedy provided for in the Copyright Act and
8 whether -- if it wanted to do that, what -- an
9 equitable doctrine might otherwise stand in the
10 copyright owner's way. May -- that was not -- that
11 was not part of my analysis nor did it need to be.

12 BY MR. GUPTA:

13 Q. So you didn't consider, for example, the
14 equitable doctrine of waiver whereby a Defendant in a
15 copyright suit might be able to argue that the
16 copyright owner had waived their rights?

17 MR. POZZA: Object as ambiguous.

18 THE WITNESS: I think subsumed within the
19 authorization and fair use analyses would be some of
20 the arguments that somebody attempting to plead it
21 under lots of different umbrella terms might label it
22 as. And I, of course, have no reason to think that
23 waiver would apply to the sorts of infringements that
24 I was seeing in the instances where I declared a, you
25 know, work to be, you know, highly likely infringing

1 in terms of its distribution through Hotfile.

2 BY MR. GUPTA:

3 Q. Do, you know, what the legal standard is
4 for waiver?

5 MR. POZZA: Objection. Ambiguous.

6 THE WITNESS: I'm familiar with lots of
7 different legal and equitable doctrines. If you're
8 viewing an abandonment of rights or -- you know,
9 whether it's under, like, a promissory estoppel
10 theory or formal abandonment, loss of rights or
11 laches because you're moving to slow or, you know,
12 anything else you want to label these as, you know,
13 these are -- factually you're asking sort of
14 theoretical questions that were not presented by the
15 facts of the infringements that I was presented with.

16 BY MR. GUPTA:

17 Q. So my understanding of waiver is it is
18 similar to abandonment, and it's the intentional
19 relinquishment of a known right with knowledge of its
20 existence and the intent to relinquish it.

21 A. Uh-huh.

22 Q. Is that consistent with your understanding
23 of the doctrine?

24 MR. POZZA: I'm going to object as
25 ambiguous and to the extent it calls for legal

1 testimony on issues in the abstract that would be
2 outside the scope of the report.

3 THE WITNESS: You're talking about, yes,
4 waiver and abandonment issues, and, you know, often
5 when people raise arguments like these, they raise
6 them under lots of different names and titles as they
7 plead them, but, yes, I'm familiar with these
8 doctrines.

9 BY MR. GUPTA:

10 Q. Okay. And I understand that it's your
11 position that they're -- they're not relevant, but
12 assume for the sake of argument that -- that they are
13 relevant, that one should consider whether the
14 copyright owner waived their copyright before making
15 a conclusion that the file is highly likely
16 infringing because the, you know, usage would be
17 shielded under copyright, under waiver doctrine. So
18 in that case, do you agree that one needs to inquire
19 into the intent of the copyright owner to ascertain
20 the applicability of the defense?

21 MR. POZZA: Same objections and misstates
22 witness testimony and is ambiguous.

23 THE WITNESS: This is one of these
24 theoretical, isn't it possible questions of the type
25 that you were asking me earlier today where, you

1 know, I did my research and analysis and applied my
2 methodology according to the facts in my
3 investigation as I did it. I mean I wasn't doing
4 this in the abstract. I was, you know, reviewing
5 what these files were, identifying the copyright
6 owners, seeing how they were commercializing these
7 products which were entirely inconsistent in the
8 instances where I deemed it to be highly likely
9 infringing with notions of waiver. And therefore it
10 would be inapplicable.

11 BY MR. GUPTA:

12 Q. I understand. Did you consider the
13 doctrine of implied license?

14 A. Yes.

15 Q. And how did that play into your analysis
16 and methodology?

17 A. Sure. Well, I considered -- as I talked
18 about in my first deposition and perhaps mentioned
19 today, I considered whether copyright owners have in
20 a given instance -- if the activity was authorized by
21 the copyright owner. Of course, if the copyright
22 owner authorized it, it would be a noninfringing
23 distribution through Hotfile. And there are
24 different ways to authorize it. You can have of
25 course express authorizations, for example, in the

1 case of certain free kind of almost demo versions of
2 certain software products, it was freely
3 redistributable as long as the recipient agreed to
4 the installation terms of use, as opposed to the full
5 commercial version, which in that instance I'm
6 thinking of was not freely distributable. So in that
7 instance, though, the installation terms of use
8 explained that it was freely distributable, that
9 being an example of express authorization.

10 In an implied case, it would be sort of,
11 you know, by its conduct, you know, someone would
12 make that argument. But -- so perhaps, for example,
13 of the download through the site where there
14 wasn't -- you know where you click download here and
15 you don't have to agree to licensing terms, but, you
16 know, by its -- well, that's actually not the best
17 example.

18 The -- you know, to the extent there would
19 be an implied issue, the -- to the extent I thought
20 it was -- if I was not comfortable if there was a
21 lack of authorization, it would be in the
22 noninfringing category. So where I saw indicia that
23 there was not this authorization, and there was no
24 reason to view implied license, it would not be put
25 into the noninfringing category.

1 Q. Okay. So if I'm getting you right, you
2 did attempt to look at the question of implied
3 authorization, implied license, whatever you want to
4 call it?

5 MR. POZZA: Objection. Ambiguous.

6 THE WITNESS: I looked at authorization
7 issues. Implied license -- as I'm sure, you know,
8 it's a narrowly construed doctrine and factually was
9 inapposite to those instances that I deemed something
10 to be highly likely infringing and, you know,
11 therefore it was not -- not a reason for me to hold
12 back from reaching that conclusion. If -- and I'm
13 not saying there was an instance, but if there was
14 some instance where I viewed it to be arguably within
15 that call, it likely would have been put in the --
16 wouldn't have put it in the infringing category, but
17 it was -- it was -- this is sort of -- again, it's a
18 theoretical question rather than one driven by the
19 facts.

20 BY MR. GUPTA:

21 Q. Right. But I do believe you said
22 something to the effect that you would look -- try to
23 look at the conduct of the copyright owner in order
24 to make a -- a judgment as to whether there was some
25 implied authorization or implied license, is that

1 right?

2 MR. POZZA: Objection. Misstates

3 testimony. Ambiguous.

4 THE WITNESS: There's -- potentially

5 that's something you could look at. Yes.

6 BY MR. GUPTA:

7 Q. Okay.

8 A. But this -- I'm sorry. Go ahead.

9 Q. Yes. And so my question to you is, isn't
10 it true that by virtue of the fact that you don't
11 have access to -- of the -- you don't have access to
12 the engines of discovery that are available in the
13 Court system, and by the fact that you were pressed
14 for time and the fact that large amounts of
15 information that would bear upon the question of
16 implied license were inaccessible to you and
17 inscrutable simply by the fact that it could involve
18 parties who reside far away, dealings between parties
19 whom you don't know, and ultimately the intent of the
20 parties and the intent of the copyright owner, that
21 you were essentially operating with a limited amount
22 of evidence as to whether or not there was any kind
23 of license or authorization.

24 MR. POZZA: Objection. Ambiguous.

25 Compound. Lacks foundation.

1 THE WITNESS: Your question had a lot of
2 what I think you're describing as facts and
3 circumstances of my review. I don't agree with some
4 of them. I'm not going to go through each one right
5 now unless you want me to, but the answer to your
6 question is absolutely not. In doing our review we
7 were very thorough. The question you pose is a very
8 abstract one. In my review, implied license was not
9 triggered, for example, when I would see the terms
10 under which the party was commercializing its work,
11 whether -- whether expressly when you read the
12 governing terms or you see how it's being
13 commercialized. The notion that a party who's
14 commercializing its work would -- in selling it,
15 would want to permit at the same time free and
16 unrestricted viral distribution of its product
17 through Hotfile and let anyone distribute it on an
18 unlimited basis, that was inconsistent with how I saw
19 parties commercializing their work, as well as how
20 their express terms read, and so, therefore, I was
21 comfortable making the determinations I made.

22 Q. Okay. Let's talk a little bit more on the
23 specific because I appreciate that you feel it's
24 getting too abstract. I do think the abstract
25 question is very important, but in order to move it

1 THE VIDEOGRAPHER: This is the end of tape
2 three. Off the record at 6:40.

3 (Discussion off the record.)

4 THE VIDEOGRAPHER: This is the beginning
5 of tape four in the -- in the deposition of
6 Mr. Zebrak. On the record at 6:46.

7 MR. POZZA: I just want to make a standing
8 objection to this line of questioning to the extent
9 that it could have been asked in the first deposition
10 and thus is a way of exceeding the seven hours
11 allotted to the first deposition, which was about the
12 documents studied in the first place.

13 MR. GUPTA: And I'll note this is being
14 linked to Professor Boyle's rebuttal report. I'll
15 note that this is questioning that is pursuant to
16 Professor Boyle's rebuttal report where he made an
17 analysis of the use of adult content in -- in
18 Dr. Waterman's study.

19 BY MR. GUPTA:

20 Q. So I was asking about factor four of the
21 fair use analysis, which is the harm to the market
22 for the copyright owner, and I wanted to get your
23 perspective on, you know, really and genuinely, you
24 know, if you believe that this is appreciably going
25 to harm the market.

1 MR. POZZA: Object as ambiguous and to the
2 extent it calls for speculation.

3 THE WITNESS: Well, I actually do think in
4 this instance -- and first of all, again, this is --
5 you know, this type of example is more of an outlier.
6 In most cases, the files that I was reviewing were
7 full-length copies of the entire episode, not what in
8 this case is apparently a two-minute portion but
9 apparently a portion that a segment of the population
10 finds very, very much of interest being in this case
11 a strip-tease scene from the Californication episode.
12 And, you know, the notion that someone would instead
13 of purchasing a copy of that Showtime episode to, you
14 know, watch what they really cared about for that
15 segment of the population being the strip-tease
16 scene, which apparently is of interest to this
17 blogger and those people that he thinks are reading
18 -- or she thinks are reading the blog, you know, this
19 could -- could certainly displace sales.

20 BY MR. GUPTA:

21 Q. Isn't -- isn't that form of reasoning
22 essentially going to eviscerate the fourth prong of
23 the fair use analysis, because basically what you're
24 say something that as long as a work has -- is
25 generating some -- is generating some interest that

1 there is a potential market for it, and so there's
2 inherently a deprivation of the copyright owner
3 insofar as they are being deprived of the ability to
4 access that market?

5 MR. POZZA: Object as ambiguous, and to
6 the extent it's talking about abstract legal ideas,
7 it's outside the scope of the testimony.

8 THE WITNESS: Again, you know, I
9 understand the fair use doctrine. I routinely need
10 to look at and apply the fair use doctrine, and do
11 not believe that my analysis here eviscerates the
12 fair use doctrine. Your question was sort of a vague
13 abstract one. You know, the notion that a whole
14 group of people interested in -- in seeing a
15 beautiful woman dance and do a strip-tease might be
16 happy to view this two-minute clip rather than seeing
17 the whole episode if this is the only thing that
18 person cares about -- that certainly could -- could
19 have harm to the market as opposed to going to
20 purchase the episode. You know, this is very
21 different than, you know, the more classic type of
22 instances of fair use. And certainly had this person
23 merely done a screen shot or included a list of
24 the -- in this person's view, the best most sensual
25 scenes from movie and TV series, I think that would

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.

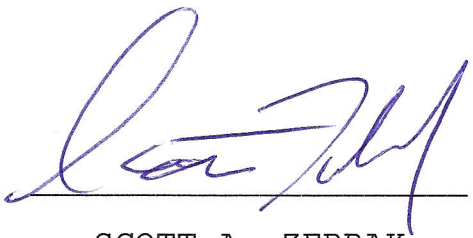
11 BY MR. GUPTA:

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

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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"

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.

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SUSAN L. CIMINELLI

21

22 My commission expires: 11/30/2016

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