

# **EXHIBIT D**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

BOURNE CO.,

Plaintiff,

-against-

TWENTIETH CENTURY FOX FILM CORPORATION,  
FOX BROADCASTING COMPANY, TWENTIETH  
CENTURY FOX TELEVISION, INC., TWENTIETH  
CENTURY FOX HOME ENTERTAINMENT, INC.,  
FUZZY DOOR PRODUCTIONS, INC., THE  
CARTOON NETWORK, INC., SETH MACPARLANE,  
and WALTER MURPHY,

Defendants.

Case No. 07 Civ. 8580 (DAB)

Deposition of JEREMIAH HORAN, pursuant  
to Rule 30(b)(6) Notice, held at the offices  
of Loeb & Loeb, 345 Park Avenue, New York, New  
York, on Friday, February 29, 2008, commencing  
at 9:57 a.m., before James W. Johnson,  
Registered Professional Reporter and a Notary  
Public of the State of New York.

1 Horan  
2 knowledge.  
3 MR. ZAVIN: And just again for  
4 clarification of the record, that letter is  
5 Bates stamped Bourne 0001 through 0002.  
6 Q. Mr. Horan, can you explain to me why,  
7 having discovered this in March of 2007, Bourne  
8 made no claim or didn't bring this to the attention  
9 of Fox until June 21st, 2007.  
10 A. As I said, we were researching to make  
11 sure that we in fact had not issued any licenses or  
12 had not received any kind of requests for licenses,  
13 and discussed possible actions to take directly,  
14 and we decided at that point that we would consult  
15 Mr. Levy.  
16 Q. Prior to March 2007 had anyone  
17 communicated any complaint to Bourne with respect  
18 to this use of "When You Wish Upon A Star?"  
19 A. No.  
20 Q. Had any licensee or potential licensee  
21 of "When You Wish Upon A Star" communicated any  
22 complaint or brought this use to the attention of  
23 Bourne?  
24 A. No.  
25 Q. Had any licensee prior to March 2007

1 Horan  
2 said they weren't going to license "When You Wish  
3 Upon A Star" because of the use in "Family Guy?"  
4 A. No.  
5 Q. Has Bourne ever granted a license to  
6 parody "When You Wish Upon A Star?"  
7 A. No.  
8 Q. Is that -- has anyone ever asked for a  
9 license to parody "When You Wish Upon A Star?"  
10 A. Not to my knowledge.  
11 Q. But it's fair to say you don't know  
12 whether the request that Fox made was to parody  
13 "When You Wish Upon A Star?"  
14 A. I'm sorry, but I don't, I don't know  
15 that, I never saw the original request from Fox, so  
16 I don't know what it says.  
17 Q. Right, and Bourne doesn't know what it  
18 says?  
19 A. Right, so we can't say that, I can't say  
20 that, if, that Fox was the first one. I cannot say  
21 that.  
22 Q. But you just don't know either way?  
23 A. Either way, correct.  
24 Q. Why was the decision made to make a  
25 claim against Fox with respect to this, the use by

1 Horan  
2 Fox in "Family Guy?"  
3 A. The decision was made because as a music  
4 publisher we have a right and an obligation to  
5 protect our copyrights, and we felt that this use  
6 was an invalid use, was an unlicensed use, and  
7 therefore we had a right and an obligation to make  
8 a claim.  
9 Q. Was that the sole reason?  
10 A. Yes.  
11 (Horan Exhibit 3, Complaint and Jury  
12 Demand, marked for identification.)  
13 Q. From 1999 to the present, when you were  
14 doing your second stint at Bourne --  
15 A. Yes?  
16 Q. -- do you know how many copyright suits  
17 Bourne commenced to protect its copyrights?  
18 MR. FAKLER: Object on the ground it's  
19 outside the scope of the 30(b)(6) notice.  
20 MR. ZAVIN: Objection is noted.  
21 A. I know specifically of two that did not  
22 go to trial, that complaints were made for invalid  
23 use of Bourne copyright songs.  
24 Q. Do you know what songs were involved?  
25 A. Yes.

1 Horan  
2 Q. Which songs were they?  
3 A. One was "Whistle While You Work," and  
4 one was "Hi Ho." The other was "Hi Ho."  
5 Q. Who were these claims made against?  
6 A. "Whistle While You Work" was made  
7 against the Ying Yang Twins and their record  
8 company, the name of which I cannot remember, and  
9 the other was, the other suit was against Alfred  
10 Publishing.  
11 Q. Were uses made of either of these songs  
12 claimed to be parodies?  
13 A. No.  
14 Q. Do you know what market substitution is?  
15 A. Yes.  
16 Q. In your view, what is market  
17 substitution?  
18 A. In the case of in the music industry,  
19 the use of one song for another song or a similar  
20 song, substituting one song for another, for  
21 whatever use is being made.  
22 Q. So that is it fair to say a potential  
23 licensee, you know, wants song A, but instead of  
24 using song A it uses song B?  
25 A. That's correct.

1 Horan

2 Q. Does Bourne have evidence of "I Needed  
3 You" substituting in the market for "When You Wish  
4 Upon A Star?"

5 A. Well, we have the immediate evidence  
6 that we don't have a synchronization license or fee  
7 for the use on "Family Guy." Nor do we have  
8 performance income from that use, but then also, as  
9 stated in Ms. Siroka's report, we don't always,  
10 people don't tell us why they don't use a song, but  
11 these things do affect a potential user's decision  
12 to use the song.

13 Q. Let me clarify the question.

14 Does Bourne have any evidence that any  
15 potential licensor, putting Fox aside for the  
16 moment, that "Family Guy" any other potential user  
17 or licensor or purchaser of songs has chosen to  
18 purchase "I Needed You" instead of purchasing or  
19 licensing "When You Wish Upon A Star?"

20 A. No, we do not.

21 (Horan Exhibit 4, Responses to  
22 Defendant's First Request for Admissions,  
23 marked for identification.)

24 Q. I'm showing you a document that's been  
25 marked as Exhibit 4, which I will represent to you

1 Horan

2 is the responses to requests for admissions that we  
3 received from Bourne, and the first question is, do  
4 you recognize it?

5 A. Yes.

6 Q. You've seen it before?

7 A. Yes, I have.

8 Q. Did you participate in its preparation?

9 A. Yes, I did.

10 Q. Okay, could you tell me the basis of the  
11 denial for request for admission number 10 on  
12 page 5, and just so the record is clear, the  
13 request for admission reads, "Admit that," quote,  
14 "I Needed You," end quote, "has not served as a  
15 substitute in the market for the song," the song  
16 being "When You Wish Upon A Star," and what is the  
17 basis for the denial of that request for admission?

18 A. Because we were not aware of any use  
19 does not necessarily mean to us that it has not  
20 been used.

21 Q. In your opinion, would any licensor who  
22 wants to use "When You Wish Upon A Star" think that  
23 "I Needed You" is an acceptable substitute?

24 MR. FAKLER: Objection to the request  
25 for an opinion, a lay opinion.

1 Horan

2 A. In my opinion, no.

3 Q. So could you explain to me the basis for  
4 the denial of request for admission number 11,  
5 which states, "Admit that," quote, "I Needed  
6 You," end quote, "cannot serve as a substitute in  
7 the market for the song."

8 A. Again, I, I don't know that -- we don't,  
9 Bourne Company doesn't know that somebody, what  
10 somebody could do, so therefore we deny it. We  
11 can't say specifically that it cannot serve as a  
12 substitute in the marketplace for the song.

13 Q. But it's your opinion that it cannot? I  
14 think you just testified to that.

15 MR. FAKLER: Objection, asking for a lay  
16 opinion.

17 A. Again, my personal opinion is that it  
18 cannot.

19 Q. And then let's go to request for  
20 admission number 12, which says, "Admit that  
21 plaintiff," or Bourne, "is not aware of any  
22 instances where a consumer or other potential user  
23 or licensee of this song has purchased, used or  
24 licensed 'I Needed You' instead of the song."

25 What is the basis of the denial of that

1 Horan

2 request for admission?

3 A. Again, we are not aware of any, but we  
4 don't know, so we can't admit that, we cannot say  
5 that there is an instance or not.

6 Q. Mr. Horan, I suggest that you read that  
7 request for admission carefully, because I believe  
8 that it asks, admit that you are not aware of any  
9 instances of substitution, and yet you denied that,  
10 which is denying -- it implies to me that you are  
11 aware of instances of market substitution.

12 Can you explain to me what the basis of  
13 the denial for that request for admission was.

14 A. No, I cannot in that case.

15 Q. Do you agree with me that Bourne does,  
16 is not aware of any instance where a consumer or  
17 other potential user or licensee of the song has  
18 purchased, used or licensed "I Needed You" instead  
19 of the song?

20 MR. FAKLER: Objection, misstates his  
21 prior testimony.

22 MR. ZAVIN: I, I was asking him whether  
23 he agreed with that statement.

24 Q. You can answer the question.

25 A. Would you repeat the question.

1 Horan  
 2 Q. That Bourne is not aware of any  
 3 instances where a consumer or any other potential  
 4 user or licensee for the song has purchased, used  
 5 or licensed "I Needed You" instead of the song.  
 6 A. Correct, we are not aware.  
 7 Q. Now, other than Ms. Siroka's opinion --  
 8 put that aside for the moment -- does Bourne have  
 9 any evidence that the song "I Needed You" as it  
 10 appears in "Family Guy" has harmed the market for  
 11 "When You Wish Upon A Star?"  
 12 A. As I said, the, the fact that it was  
 13 used without a license in "Family Guy" is, is -- no  
 14 synch license, no performance license, has harmed  
 15 our market.  
 16 Q. Putting aside any royalty you were  
 17 deprived of by Fox, Fox's use, putting aside  
 18 Ms. Siroka's report, do you have any evidence  
 19 whatsoever that the song "I Needed You" as it  
 20 appears in "Family Guy" has harmed the market for  
 21 "When You Wish Upon A Star?"  
 22 A. No.  
 23 Q. When did you first contact -- and when I  
 24 say "you" I mean Bourne -- first contact  
 25 Ms. Siroka?

1 Horan  
 2 A. We contacted -- we didn't have direct  
 3 contact with her. She was contacted by our  
 4 attorneys.  
 5 Q. Do you know when?  
 6 A. I don't know the exact date. It was  
 7 within the last month.  
 8 Q. Okay, that is actually what I wanted to  
 9 know, so I'm going to show you a document that's  
 10 been marked as Exhibit 3 in this proceeding, which  
 11 I will represent to you is the complaint that was  
 12 served against the defendants.  
 13 Do you recognize that document?  
 14 A. Yes, I do.  
 15 Q. Did you see it at the time it was  
 16 drafted?  
 17 A. Yes.  
 18 Q. So is it fair to say that you saw it  
 19 before it was served?  
 20 A. Yes.  
 21 Q. And the complaint is dated October 3rd,  
 22 2007; is that correct?  
 23 A. October 3rd?  
 24 Q. If you'll look at the page 11 --  
 25 A. Yes.

1 Horan  
 2 Q. -- does that conform with your personal  
 3 knowledge that the complaint was prepared and/or  
 4 served approximately on October 3rd?  
 5 A. Yes.  
 6 Q. And is that, and is -- am I correct that  
 7 that is well before there was any contact made with  
 8 Ms. Siroka or any report received from Ms. Siroka?  
 9 A. Yes.  
 10 Q. In that case, sir, could you tell me the  
 11 basis in paragraph five for the statement that  
 12 defendants -- and I'm quoting now -- quote,  
 13 "Defendants' infringing activities have also caused  
 14 substantial and irreparable harm to Bourne."  
 15 A. Would you repeat the question, please.  
 16 Q. Could you tell me the basis of the  
 17 statement in the complaint in paragraph five where  
 18 it is asserted that, quote, "Defendants' infringing  
 19 activities have also caused substantial and  
 20 irreparable harm to Bourne."  
 21 A. We feel that this use without a license,  
 22 and with the nature of the lyrics that were used,  
 23 will be harmful to Bourne for two reasons; first,  
 24 that it would appear that Bourne did not protect  
 25 its copyrights, in that it was, a use such as this

1 Horan  
 2 was made without our consent; and secondly, that,  
 3 with the nature of the use of a classic like "When  
 4 You Wish Upon A Star," we felt that it could harm  
 5 the potential market for the use in commercials and  
 6 in other films.  
 7 Q. But isn't it fair to say, I think as you  
 8 previously testified, you didn't have any evidence  
 9 that any such harm had occurred?  
 10 MR. FAKLER: Objection, vague as to what  
 11 you mean by "evidence." You mean admissible  
 12 evidence?  
 13 MR. ZAVIN: No. In the common layman's  
 14 terms.  
 15 Q. Did you have any evidence in October  
 16 2007 that there has been any actual harm to the  
 17 composition?  
 18 A. The evidence we have is that we have,  
 19 I've got 25 years' experience in the business, the  
 20 owner of the company's been in business for a long  
 21 time, and if a song is used, although we cannot  
 22 give you dollars-and-cents figures, how a song is  
 23 used in one instance can and has affected how the  
 24 song is used in future instances, and we feel that  
 25 this is a case, exactly this kind of a case now.

**FILED UNDER SEAL**

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**FILED UNDER SEAL**



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1 Horan  
 2 this on the grounds that it's outside the  
 3 scope of the 30(b)(6) notice.  
 4 MR. ZAVIN: Well, it isn't.  
 5 MR. FAKLER: How is it within, how is  
 6 the public association of Walt Disney on this  
 7 notice? Can you show it to me.  
 8 DI Q. Mr. Horan, did you ever watch in the  
 9 1950s the television program "The Wonderful World  
 10 Of Disney?"  
 11 MR. FAKLER: I'm going to instruct the  
 12 witness not to answer. This is way outside of  
 13 anything on this list.  
 14 Q. Mr. Horan, are you following the  
 15 instruction of your counsel?  
 16 A. Yes, I am.  
 17 MR. ZAVIN: I have no further questions.  
 18 MR. FAKLER: Can we take 10.  
 19 MR. ZAVIN: Sure.  
 20 MR. FAKLER: Thanks.  
 21 (Recess taken.)  
 22 MR. FAKLER: First I'd just on the  
 23 record like to request that Mr. Horan have the  
 24 opportunity to review and correct any final  
 25 transcript of the deposition.

Page 59

1 Horan  
 2 MR. ZAVIN: Agreed.  
 3 MR. FAKLER: And so -- thanks, and I  
 4 have just a little bit of cross here, so to  
 5 speak.  
 6 EXAMINATION BY MR. FAKLER:  
 7 Q. Mr. Horan, having answered a series of  
 8 questions, is there anything in your testimony that  
 9 you feel the need, looking back on it, to amplify  
 10 or clarify?  
 11 A. Yeah, there were a couple of questions  
 12 regarding market substitution and harm to the  
 13 market. In a couple of instances I gave an answer  
 14 of, if asked if there was any harm I said -- and I  
 15 guess just an answer -- no, but in those instances  
 16 I should, should have said that, brought up the  
 17 loss of revenue from the "Family Guy" use that does  
 18 affect Bourne Company.  
 19 And then there was also a question about  
 20 the, whether or not I was aware of whether or not  
 21 the, a request from Fox had come in for the use,  
 22 and I said I was not aware whether or not it came  
 23 in or what was, whether it was denied or how it was  
 24 denied.  
 25 That should be clarified to state that

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1 Horan  
 2 in 1998, until 2005 in fact, the only person who  
 3 would have denied or handled a telephone call  
 4 requesting a use would have been Beebe Bourne, who  
 5 has since passed away, B-E-E-B-E Bourne, who died  
 6 in 2005.  
 7 MR. FAKLER: That's all I have.  
 8 MR. ZAVIN: Okay, just very simple.  
 9 EXAMINATION BY MR. ZAVIN:  
 10 Q. I just -- I understand that Beebe Bourne  
 11 died, but your answer remains correct that Bourne  
 12 as a company does not have any record of the  
 13 request, a request coming in or what the nature of  
 14 the request was or why it was denied if it was  
 15 denied; is that correct?  
 16 A. That is correct.  
 17 Q. Okay. And just with respect to your  
 18 first clarification, is it, does the rest of your  
 19 answer remain the same, that you, other than the  
 20 loss of whatever revenue that they might have  
 21 expected to receive by Fox from the use, Bourne has  
 22 no evidence of market harm or market substitution?  
 23 A. That is correct.  
 24 MR. ZAVIN: Okay, I have no further  
 25 questions, except I reserve the right to

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1 Horan  
 2 reopen this should the court move favorably,  
 3 that the witness was improperly instructed not  
 4 to answer certain questions or certain lines  
 5 of questions.  
 6 (Time noted: 11:45 a.m.)  
 7  
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 10 JEREMIAH HORAN  
 11 Sworn and subscribed to  
 12 before me this \_\_\_\_ day  
 13 of \_\_\_\_\_ 2008.  
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 16 NOTARY PUBLIC  
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 10 JEREMIAH HORAN  
 11 Sworn and subscribed to  
 12 before me this \_\_\_\_ day  
 13 of \_\_\_\_\_ 2008.  
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 17 NOTARY PUBLIC  
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