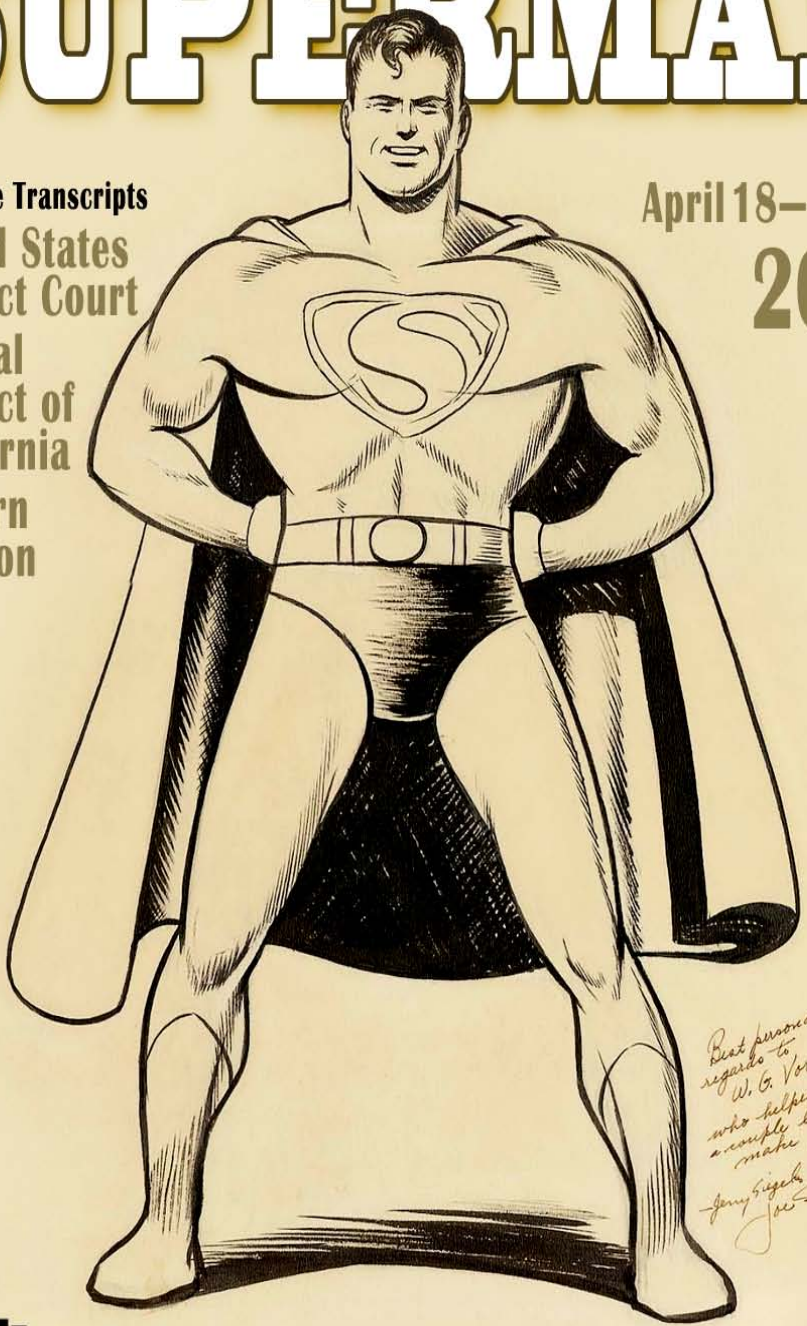
THE TRIALS OF SUPERMAN

Complete Transcripts

United States District Court
Central District of California
Eastern Division

April 18—May 19
2009



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Compiled and edited by DANIEL BEST

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

No. CV 04-08400-SGL

HONORABLE STEPHEN G. LARSON, JUDGE PRESIDING

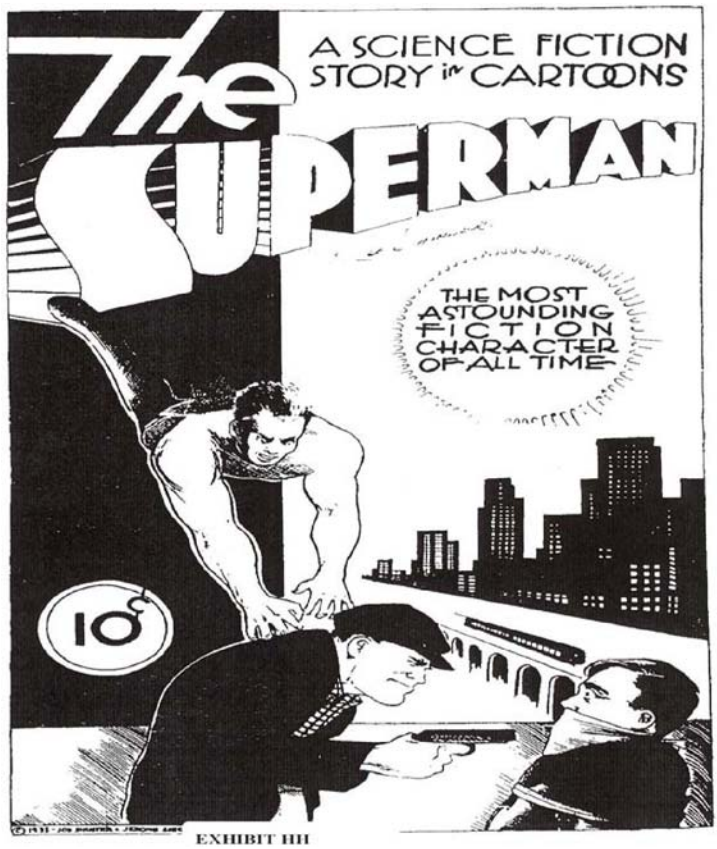

EXHIBIT HH

JOANNE SIEGEL and LAURA SIEGEL LARSON,

Plaintiffs,

vs.

WARNER BROTHERS ENTERTAINMENT INC.; TIME WARNER, INC.; DC COMICS; and DOES 1-10,

Defendants

The Trials of Superman

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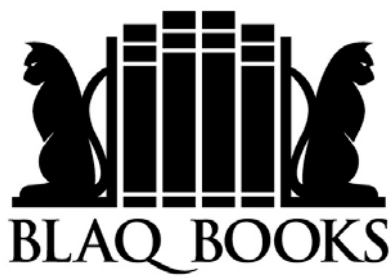

For…

Steven Bove

- who likes the secrets to be told-

Michael Nezter

- for endless support, encouragement and advice and an amazing cover-

Trevor Von Eeden, Alan Kupperberg, Norm Breyfogle and Rich Buckler

- for endless support, encouragement and advice-

Dr Brendan Carson, Dr Catherine Gunson, Chad Eglinton, Michelle Baylis, Stevie Harris, Anastasia Marsden and Tobias Finch

- For countless late nights drinking, fighting and discussing everything under and above the sun-

My darling long suffering partner Lyndal and the Three Cattens: Merlin, DeKlerq and Puddin'

Kathleen and Geoffrey

- Who'll get a kick out of seeing their names in print-

Without all of you, and many more, I'd have given up long, long time ago…

Introduction

The never-ending battle for Superman hasn't really been about ownership since the late 1990s when Joanne Siegel, the widow of Superman co-creator Jerry Siegel, filed termination notices against DC Comics to claim the character for herself and her family. The court, in April 1999, found that the character, Superman, was not created as work for hire, that it had been created prior to being bought and published by DC Comics. As such the court then awarded 50% of the copyright to Actions Comics #1 to Joanne Siegel; Joe Shuster, who passed away in 1992, had assigned his rights to his brother and sister, who then negotiated a handsome life-time pension deal with DC in return for the rights. The 50% Siegel copyright was split between Joanne and her daughter, Laura, and Jerry Sigel's son by his first marriage, Michael Siegel. DC Comics were thus obliged to enter into a partnership with the Siegel's, which they did, in order to continue publication of the character and to exploit it for maximum profit. Since then the battle has been about control and money; who has the money (DC Comics) and who wants the money (the Siegels and their lawyers).

Depending on who you believe, in 2001 DC Comics had reached an agreement to license and control the Siegel's 50% stake – they already control co-creator Joe Shuster's 50% share, until 2013 when the Shuster heirs are expected to file suit – when talks fell apart and the Siegel's walked. The other side of the story is that DC changed the terms of the deal at the last minute leaving the Siegel's with no choice but to terminate the negotiations. DC have since counterclaimed that the Siegel's were led into withdrawing from signing the contract in 2001 at the eleventh hour by their current lawyer, Marc Toberoff. As it stood the Siegel's then filed suit, in 2004, against DC Comics, seeking to validate their ownership, in addition to seeking further rights and to also demand that DC Comics give a full accounting of the money that had been realized since 1999 by the Superman franchise. DC have since filed suit against Toberoff personally, claiming that he had interfered with their negotiations in order to control the copyrights. As of the time of writing, this suit is ongoing.

In relation to the current Siegel vs. DC suit a variety of issues were put before the court, relating to both Superman and Superboy, and in August 12, 2009 Judge Larson found that the Siegel's, "…have successfully recaptured (and

are co-owners of) the rights to the following works: (1) Action Comics No. 1 (subject to the limitations set forth in the Court's previous Order); (2) Action Comics No. 4; (3) Superman No. 1, pages three through six and (4) the initial two weeks worth of Superman daily newspaper strips. Ownership in the remainder of the Superman material at issue that was published from 1938 to 1943 remains solely with the defendants (DC Comics)." That is what they won, despite the reports of the time they did not win total control over the character as it is published today. Indeed DC Comics can simply change the name of the current Superman and continue publishing it as the character, in it's current form, bears little resembelance to the original Siegel and Shuster creation, other than the name and a variation of the logo and costume.

This was still a major win, both for the Siegel heirs and Toberoff, but also for creators everywhere – indeed such was the impact of the victory that the heirs of Jack Kirby would file suit against Marvel Comics, using Marc Toberoff, to reclaim copyrights to iconic Marvel characters. Sadly that case would fail as it could not be proven by evidence that Kirby had created any of the Marvel characters separate from instructions from Marvel. The strongest evidence that the Kirby heirs could provide was in the form hearsay, mostly from people who were not there. Marvel had a trump card in Stan Lee, a man who was there. Back to Superman…

Once the judge had ratified the court order all that remained was the issue of accounting. The argument was that DC Comics had undervalued Superman and licensed the rights to exploit the character in movies and television by dealing with their parent company, Warner Brothers. DC argued that it had always done the right thing, that the deals negotiated and that the payments received, going back to the Salkind era (the 1970/1980s Superman movies with Christopher Reeve) and extending through to the current deals, including the television series Lois and Clark and the highly successful Smallville, along with the most recent movies, were more than fair and indeed over market value. The argument to resolve this was taken to a ten day bench trial, at which time DC Comics would have to prove that it had not undersold Superman, and the Siegel's would have to prove otherwise. The trial gave a great insight into the machinations of comic books and motion pictures along with the true value of Superman, as a multi-media concept.

A NOTE ON THE TRANSCRIPTS.

As people are aware, court transcripts reflect what is said in court and are recorded verbatim. This creates a real time look into the workings of the court and it's participants, and, as with any conversation, sometimes what is said doesn't make much sense. When editing these transcripts I have elected only to clean up general grammar and spelling and have left ansers intact – what people said and how they said it are all here on display. There is a few gaps in the transcripts, these were deliberate as the witness in question elected to discuss the details of another case currently in session. The information was subject to a protection order and as such the testimony was stricken from the record. These gaps are identified in the transcripts. Other than those gaps everything that was said, in court, during the trial is intact.

TRIAL DAY 1

A.M. Session

Tuesday, April 28, 2009

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Opening Statement - Plaintiff

Opening Statement - Defense

WITNESS: Mark Evanier

THE CLERK: Calling item No. 1 on calendar, case No. CV 04-08400-SGL, Joanne Siegel, etc., versus Warner Bros. Entertainment, Inc., etc.

Counsel, please state your appearances for the record.

MR. TOBEROFF: Good morning, Your Honor, Marc Toberoff, attorney for plaintiffs.

THE COURT: Mr. Toberoff. Counsel?

MR. BERGMAN: Good morning, Your Honor, Michael Bergman for the defendants. My colleagues will introduce themselves, but if Your Honor pleases, I'd like to introduce Mr. Paul Levitz, who is the president and publisher of DC and who will be DC's designated representative at the trial.

THE COURT: Good morning.

MR. PERKINS: Patrick Perkins for the defendants, Your Honor. Good morning, Your Honor.

MS. MANDAVIA: Anjani Mandavia for defendants.

THE COURT: Good morning. And Counsel, go ahead just for the record, if you would.

MR. WILLIAMSON: Nicholas Williamson for plaintiffs, Your Honor. Good morning.

MR. ADAMS: Keith Adams for plaintiffs, Your Honor. Good morning.

THE COURT: Good morning to you all.

The Court wants to proceed with the trial momentarily, but I first want to take up this plaintiffs' ex-parte application concerning the authentication of documents pursuant to 90211.

Plaintiffs are certainly correct that pursuant to 90211, the formal procedure is that the documents are self-authenticating. Of course, if there's an objection, the defense has an opportunity to bring in and cross-examine the declarant; which is why I said before, it's easier if we just have a stipulation, if not a stipulation, bring the witness in because I assume there's not a stipulation if there's an objection.

But procedurally, you are correct. They do technically come in, and then it's up to the defense to cross-examine the declarant if they wish. I think the better practice is simply just to have this worked out in advance. If there is a stipulation, let me know. If there's going to be an objection and a request to cross-examine the declarant, have the declarant available. It does save you the time, of course, though, of actually examining on direct examination the declarant. You can simply submit the declaration. Understood?

MR. BERGMAN: Yes, Your Honor.

MR. TOBEROFF: Yes, your Honor.

THE COURT: So the ex-parte application is granted. The Court is prepared to listen to opening statements. Counsel?

OPENING STATEMENTS - PLAINTIFFS

MR. TOBEROFF: Plaintiffs, as co-owners of the early Superman copyrights, are entitled to a pro rata share of all profits derived from those copyrights.

Defendants entered into a number of internal Superman agreements after they had clear notice of plaintiffs' termination and clear knowledge that plaintiffs would be entitled to a very significant share of Superman proceeds as of April, 1999.

It would not be equitable for plaintiffs' revenue share to be diluted by defendants' internal dealings. And that is why we're here today to take a closer look at those arrangements.

Our focus will be on whether or not the Superman agreements constitute fair market value for an extremely valuable intellectual property. We will see whether the terms of those Superman agreements measure up to agreements

for other high-level properties negotiated at arm's length in the competitive open market.

However, we cannot view these contractual terms in a vacuum without taking into consideration the value of the properties to which those terms apply.

First, we need to understand the market value of Superman in 2001, 2002 when the Superman agreements in question were entered into.

Plaintiffs will therefore call their expert comic book historian, Mark Evanier, to briefly take us through Superman's commercial track record of over 70 years of exploitations from comic books to radio to television to film and ubiquitous merchandising throughout.

We will better understand through Mr. Evanier's testimony what we already sense; that everybody knows who Superman is. They not only know who he is, but everyone on the planet even knows his story; his alter ego, Clark Kent; his love interest, Lois Lane; his arrival from a doomed planet.

The evidence will show that in 2001 through 2002, when defendants entered into the Superman film agreement, that they essentially copied the economic terms of an old 1974 film agreement entered into three decades earlier.

Through Mr. Evanier and other evidence, we will show that in 1974, as opposed to 2002, Superman was at its virtual low point in terms of popularity due to the counterculture. By contrast, plaintiffs will show that Superman, as a branded franchise property, was of particular value in 2002 when defendants entered into the Superman film agreement.

Comic books and super heroes, in particular, had become hot properties for big-budget, special-effects-driven franchise films with plenty of action.

By this time in 2002, as opposed to 1974, Superman and Batman had already proven themselves as major film franchises.

Recent hits starting in 1997; like, Men in Black, X-Men and Spider-Man that came out shortly before the Superman film agreement created a situation where every studio in town was scrambling to develop superhero films. It is in this heightened market that defendants' internal deals were made and should be judged.

In making this analysis, we need to understand the contours of fair market value; and in so doing, understanding that these literary properties are essentially unique by definition.

Of these, Superman is particularly unique. Few, if any, properties have reached the iconic status of Superman and have its long-term continuous commercial track record spanning 70 years.

The only real way to determine the fair market value of a particular property at a particular time is to test that value in the open market, in the competitive open market, through arm's length negotiations.

We will show that DC failed to ever test the market before assigning away valuable Superman assets to Warner Bros.

At this point, therefore, the only thing we can do in testing the fair market value of their agreements is to simulate fair market value by analyzing rights' agreements for high-level properties, that unlike Superman, the Superman agreements were negotiated at arm's length for fair market value.

Plaintiffs have developed what we believe is a simple and logical methodology for looking at comparable agreements. Deals for better terms that concern properties of equal or lesser value would demonstrate that the Superman film agreements do not constitute fair market value, and plaintiffs will show you today, and in this coming week, a number of such agreements.

Conversely, deals with lessor or equal terms to the Superman agreements concerning properties of equal or greater value to Superman would tend to prove that the Superman agreements are for fair market value. And I submit that defendants will be unable to show you agreements for properties of equal or greater value to Superman that have lesser or equal terms to their Superman film agreements.

Instead, defendants will show you agreements with lesser terms for properties that are less valuable to Superman. And we submit that such agreements are irrelevant and do not aid in the analysis because, of course, the terms would be less than the terms in the Superman agreements because they deal with lesser property.

In locating comparable agreements, plaintiffs are somewhat at a disadvantage to defendants who have decades of archived rights' agreements at their disposal. Despite this handicap, plaintiffs were still able in a short time to find numerous rights' agreements with terms far superior to the Superman agreements, even though they concern properties not quite as valuable to Superman, or obviously less valuable to Superman.

For instance, the Superman film agreement contains a guaranteed payment of a million-five upon signing. This payment is deemed applicable to what we call a back-end participation of 5 percent of Warner Bros. Worldwide gross.

Plaintiffs will show you agreements that were negotiated at arm's length in the open market with guaranteed payments of 5 million, 7 million, 10 million, even $20 million compared to the million-five in the Superman film agreement, and back-end gross participation, instead of 5 percent, which equals 10 percent to 20 percent of gross.

These agreements were negotiated at arm's length in the open market. They demonstrate the tremendous leverage of prominent intellectual property in the entertainment marketplace, and they lie in sharp contrast to defendants' casual perfunctory agreements.

As another example, the scope of the rights' grant in defendants' Superman agreements is far broader than defendants' obligation to pay DC. The agreements are written in such a way that defendants need only pay for a feature-length motion picture or for an episodic television series while obtaining all audiovisual rights.

This means that defendants could exploit movies of the week, television specials, documentaries, all sorts of new media types of exploitation on the Internet without having to pay DC a penny.

The term of the agreements extends -- the option term of the agreements extends for 34 years. Plaintiffs will show that it is customary for options to be for 18 months with a single renewal term of 18 months, as opposed to the renewals in the Superman film agreement, which go on for 34 years and essentially tie up film and TV rights for that lengthy time period.

It is customary in agreements for franchise properties, since a franchise property generates a consistent cash flow and since a good portion of the compensation, these agreements, is contingent compensation, the form of participation in the revenues from the exploitation of the property, it is, therefore, customary for the licensee to have to exploit the property on a continuous basis; otherwise, the licensor will be cutoff from receiving a lucrative cash flow.

Most agreements for franchise properties have reversion terms stating that if a new film is not released every three or four years, the rights will revert to the licensor. And we found this even in agreements that defendants have

produced in this case, Warner Bros.' agreements. No such perversion takes place in the Superman film agreement. This is particularly onerous when you understand that DC's compensation is primarily weighted to its gross participation in revenues from a produced film.

Essentially, Warner Bros. could not make another TV series or film for 34 years, and DC and plaintiffs would not be able to do anything about that and would be cutoff from receiving revenues for a very valuable asset.

Ever since this Court recently uttered the adjective, 'non-exclusivity,' defendants have glommed onto this word, where previously, in four years of litigation, they never so much as came close to making any arguments about how retroactive non-exclusivity affected the value of their agreements. They now attempt to retroactively transform what we belief are sweetheart deals into fair market deals by harping on exclusivity.

It's apparent that the vast majority of DC's Superman copyrights are unaffected by plaintiffs' termination. Only those recaptured copyrights that are co-owned by DC and plaintiffs would bring into effect non-exclusivity.

DC assigned rights in numerous Superman copyrights on an exclusive basis undisturbed by the termination. In addition to that, DC assigned rights in exclusive trademarks, Warner Bros. has its own exclusive trademarks based on Superman works it's been involved in over the years.

And in addition to that, and most importantly, DC retained exclusive foreign rights to even the recaptured copyrights. Given this exclusivity and its hold on all these rights and the nature of the entertainment industry, Warner Bros. has de facto exclusivity with respect to film and television rights. And we will show that it has an insignificant bearing on the value of the agreements in question.

In addition to that fact, Warner Bros. received the contractual equivalent of exclusivity through a very specific warranty and indemnification in the agreements in which DC, after both Warner Bros. -- excuse me, after both DC and Warner Bros. had received notice of the terminations and entered into the agreements, they had DC warrant and represent that it had exclusive rights to everything being transferred to Warner Bros. And it agreed to indemnify Warner Bros. for any loss, damage, costs, including this lawsuit, resulting from anything less than non-exclusivity.

It is undisputed that at the time the Superman agreements were entered into, and they were entered into with the predecessor called Time Warner

Entertainment, LP, we'll call it TWEC, that DC was negotiating with its owner. TWEC owned 50 percent of DC, and the other 50 -- and owned 100 percent of EC Publications, which owned the other 50 percent of DC. Thus, TWEC sat on both sides of the negotiating table when entering into these agreements.

In addition, this Court has ruled on summary judgment, and it was noted in Paul Levitz's declaration, that DC must report to and obtain approvals from Warner Bros. on key decisions. And we would submit that the transfer of film and television rights to one of its core properties is a key decision.

It is counterintuitive and improbable that such a vertically-integrated, non-arm's length transaction would result in fair market terms, though it remains a mathematical possibility.

MR. BERGMAN: Your Honor, if I may, this is becoming a closing statement.

THE COURT: Just so we get this straight from the beginning, if you're going to make an objection, you need to stand.

MR. BERGMAN: Yes, Your Honor. I'm sorry.

THE COURT: That's all right.

MR. TOBEROFF: Nonetheless --

THE COURT: I'll hear you both out, and the Court is mindful of its rulings.

MR. TOBEROFF: We will show -- even though it remains a mathematical possibility for these terms to be fair market terms, and we will engage in an objective analysis, of course.

Strong inferences can still be drawn from this relationship that are relevant to this case. We will show that DC functions as Warner Bros.' IP division, as an IP stable, as a source of franchise properties for the exploitation in multiple media and multiple divisions of Warner Bros.

We will show that DC's most valuable comic book properties, Superman and Batman, are captive assets of Warner Bros. And what is missing from the negotiations of the relevant Superman agreements is the most important thing: The ability to walk -- which defines every negotiation, any real negotiation -- the ability to walk and transact with the competitor.

It is not surprising that given this relationship and the arm's length negotiations that resulted from this relationship, that the terms of the agreement were not for fair market value.

We will show, in fact, that under this integrated structure, no meaningful negotiations of the agreements took place. As I said earlier, the Superman film agreement merely copied the economic terms of a 1974 Superman film agreement when Superman was at its lowest point, rather than reflect the value of Superman in 2002.

In 1974, we will show that even Warner Bros., which at the time Warner Communications owned DC, had little interest in developing Superman and left Superman to an outsider to develop and produce as a motion picture. Yet defendants used the same 1974 terms in 2002 when superheroes were going through the roof in Hollywood.

We will show that for the Smallville television agreement, defendants followed the same pattern of simply Xeroxing a 1991 television agreement with another Warner company called Lorimar Productions, and that there was virtually no negotiation of this agreement.

Plaintiffs will submit that defendants' casual and perfunctory negotiation comport with the fact that the terms of these agreements were well below market value.

Thank you, Your Honor.

THE COURT: Counsel.

MR. BERGMAN: Thank you, Your Honor.

OPENING STATEMENTS - DEFENSE

MR. BERGMAN: Your Honor, we will, of course, during the course address Mr. Toberoff's statements concerning the relationship of the parties and the effect of that. And, of affiliates; they have a close working relationship that they've had for 30 years; yes, no one's stormed out of any negotiations; no one banged their shoe on a table; no one walked. And they didn't walk because this was a relationship that had been extremely beneficial to DC for 30 years.

But the relationship, and the point Mr. Toberoff is attempting to emphasize, is of little probative value within the context of this proceeding. It doesn't matter how close or friendly these parties may have been; it does not matter if the agreements were Xeroxed, which they were not; it doesn't matter if they were negotiated in two days or in two weeks.

All that matters is whether the agreements were for fair market value. And whatever the relationship may be, Your Honor, the Court has defined the

precise question to be answered: Has DC received fair market value for the nonexclusive Superman rights it transferred to Warner Bros.?

And in response to Mr. Toberoff's statement, Your Honor, of course, it was only relatively recently that Your Honor ruled that the agreements were, in fact, nonexclusive. And before that, we did not argue that.

But the whole notion of non-exclusivity assumes that there was a market for nonexclusive rights in 2002.

Defendants' experts question whether such a market exists in either film or television. They can state only that if there was such a market, the value of nonexclusive rights would be significantly lower than the value of the corresponding exclusive rights; and that is because studios invest a great deal of money in producing and marketing a movie. And the uncertainty and potential for competition from another rights' holders, such as the Siegels, who have the right to grant nonexclusive film rights in Action Comics No. 1, is not a risk that the studios are willing to bear.

And plaintiffs' expert, Mr. Halloran, can't answer Your Honor's question as to the value of nonexclusive rights either. When I asked him at deposition that precise question: "What was the fair market value of the nonexclusive rights?"

He responded: "I have not formulated that opinion." That was with respect to the film.

I then asked him with respect to the television series: "What was the fair market value of nonexclusive rights in 2002?"

And he responded: "I have not formulated that opinion." This was at his deposition a few weeks ago.

As a result, the experts can't offer any credible evidence as to the fair market value of those nonexclusive rights. None of the other agreements being offered in evidence, regardless of who offered them or regardless of whether they are comparable or not, all involve exclusive rights.

So they failed to provide any evidentiary basis of the Court's perception as to what is the pertinent question. And plaintiffs have no other documentary evidence as to market value among their listed exhibits. Nor do they have any other witness who can competently testify on the question that

Your Honor has posed as to the value of the nonexclusive rights.

The failure of such evidence should, as we state in our trial brief, be dispositive. Plaintiffs have the burden of showing the fair market value of these nonexclusive rights, and they simply have no evidence with which to do so.

Now, while we view this failure of proof as unavoidable, the defendants have, of course, prepared for the eventuality that the plaintiffs are permitted to introduce evidence which show what the rights would be worth had they been exclusive.

As we'll demonstrate, Your Honor, permitting plaintiffs to do so, as inappropriate as it may be, doesn't change the result. The agreements in question are clearly at or above market, even if viewed as granting exclusive rights.

There are basically only two agreements that are in question: The film agreement, pursuant to which Superman Returns was produced, and the television agreement, pursuant to which Smallville is being produced. The Warner Bros. consumer products merchandising agreement doesn't appear to be contested by the plaintiffs, and the animation agreements are clearly at or above market and they involve very little money.

As for the television agreement, Your Honor, the evidence will show that DC has earned over $23 million from the Smallville series. That's with no investment whatsoever.

The evidence will also show that the TV agreement is far more economically beneficial to DC than any agreement that is going to be offered in evidence to Your Honor to indicate fair market value of television agreements. It is at the very top of the market, even perceiving it as granting exclusive rights.

And the same is true of the film agreement. That agreement, which was finally executed in 2002, is simply the most advantageous rights' acquisition agreement of any agreement, with the exception of the half-century-old My Fair Lady agreement which the plaintiffs are offering, the most beneficial agreement to the licensor of any other agreement that will be introduced in evidence.

And the proof is in the pudding, Your Honor. The evidence will demonstrate that DC Comics has made $42 million from the release of Superman Returns, again, without any investment whatsoever.

In fact, Your Honor, again with the single exception of My Fair Lady, defendants will prove that DC Comics made more money from the release of

Superman Returns under the terms of the film agreement, than DC Comics would have made from Superman Returns under the terms of any other agreement to be introduced in evidence. The evidence, the actual agreements, will demonstrate that they are not only at fair market value; they're above fair market value.

And I don't mean to imply by that, Your Honor, that that's defendants' obligation. We don't have to prove that the agreements are at the very highest level. Fair market value is necessarily a range. All defendants have to do, assuming that defendants have to do anything, is show that the agreements in question fall within the fair market range.

It just so happens, Your Honor, based on my calculations that the amounts paid for the rights in question turned out to be the very highest on the leader list.

Mr. Toberoff's opening continues what he had done in his contentions of fact and law and what his expert, Mr. Halloran, has done in his report. Rather than looking at the agreements in their entirety, what they do is they look through all the agreements and they find the highest option price paid by any agreement. And then they compare that to an option price in one of the agreements in question. Then they look through all of the agreements, and they find the highest purchase price, usually, almost invariably, in a different agreement. And they compare that to one of the agreements in question.

Obviously, that is inappropriate. You must look at the agreement in its total.

Mr. Toberoff, in his trial brief and in his contentions, keeps working at these little provisions in comparing one to another, and referring to terms in a contract, any contract, as being fair market terms. There are no fair market terms. There are fair market agreements. Because one thing we're going find out about how studios, all studios, operate, Your Honor, is that they operate within parameters. They run various analyses before they acquire properties, all designed to find out 'are we going to make money out of this movie?'

And if a participant negotiates something more than usual in one provision, like an option, like a purchase price, the participant pays for it in another provision, such as a contingent compensation.

You cannot look at one isolated term of an agreement and then compare it to another and assert one as fair market value. The test, as Mr. Halloran, their

expert, testified at deposition, is how much sticks to the ribs? What does the licensor walk away with?

And as we'll demonstrate, through Mr. Levitz' testimony; through the testimony of Brett Paul, the executive vice president of business affairs at Warner Bros. and through the experts, is that the deal that DC was able to achieve; in particular, getting a piece of what is called first-dollar gross, has set it aside from any other television agreement ever entered into by Warner Bros.

We'll be explaining to Your Honor that there are forms of contingent participation which range all over the map.

At the very height of the pyramid is something called first-dollar gross, where virtually nothing is deducted from the monies that the distributor receives from the exhibitors and then puts into the gross pot to share with participants.

We will see, the evidence will show, that Warner Bros. has never given a first-dollar gross participation to any television participant, whether it be a TV star, a director, producer or a rights' grantor, other than DC Comics. They are the only one who ever before and ever since has received a gross participation.

And it was at gross participation, Your Honor, as you'll see, that earned DC Comics $23 million from the TV show, an amount which is greater than any expert will testify he is aware of. And as I noted, Your Honor, the film itself brought in $42 million to DC.

And we submit to Your Honor that, while Mr. Toberoff argues -- and while we certainly agree, that Superman is a terrific iconic character, is he more iconic than Batman or Tarzan or Iron Man or Watchmen? I don't know. Seems to me that once you become an icon, you're an icon.

In any event, Superman, as much as it means to the defendants, as well as the plaintiffs, has to be viewed in an objective way, because fair market value is indeed objective.

The evidence will show that Mr. Toberoff is 180 degrees off, Your Honor. The evidence will show that in 1974, Superman sat at the top of the comic book sales; that Superman was a virgin territory; there had never been a feature film made of Superman, and he stood at the very height of his value.

And DC made a deal with an independent producer by the name of Salkind, who had very bad bargaining power. They made a phenomenal agreement

with him. And pursuant to that agreement, Mr. Salkind made four Superman movies starring Christopher Reeves and one Supergirl movie.

The problem, Your Honor, in 2002, when the deal was consummated, the film agreement, was that Superman had fallen from his perch. The first Superman movie and the second Superman movie did rather well. The first one did very well. The second one fell off about 20 percent. The third one dropped precipitously by about 50 percent. And Superman IV stands out in cinematic history as one of the biggest bombs ever made. It is a film, again starring Christopher Reeves, the last one made, that had a domestic box office gross of $17 million, which the evidence will show was an absolute disaster.

And that 1987 Superman film marked the end of Superman as a film star for 20 years. Nobody touched him. Warner Bros. didn't. No third party did. From the very time that the last Superman movie was shown until this very date, no one else has come to DC and said, "Gee, we'd like to license Superman."

We'll see, Your Honor, that in that context, the Superman film agreement was negotiated. And Mr. Toberoff makes much of the fact and he keeps saying that notwithstanding the termination, notwithstanding our knowledge that they were terminating their interests, we went ahead and made this grant.

Well, Your Honor will find, and the evidence will show, that at the time we made the grant and executed the agreement, the dispute had ended. I understand that Your Honor has ruled that there was no settlement agreement. But the fact of the matter is, Your Honor, from October 19th, 2001, until the middle of May of 2002, during which period the Superman agreement was finalized and executed, DC and Warner Bros. believed that they had reached an agreement.

We'll also see, Your Honor, that the film was financed -- not nearly by Warner Bros., but by a financing partner called Legendary Pictures and that the producers spared no expense in making the movie. You'll see, Your Honor, that the production cost of the film -- often referred to as negative costs because it's the cost of getting the film's negative into the can -- that cost alone was $242 million.

As of last year, the interest on that negative cost was $39 million. And the cost of marketing the film, what they refer to in the business as prints and advertising, P and A, was $143 million.

The bottom line is that the film, Superman Returns, cost $424 million to make and to market. And you'll hear from the defendants' witnesses that spending a lot of money on a movie doesn't necessarily mean the movie will break even.

But it does mean one thing: It means that anybody who is fortunate enough to have a first-dollar gross participation in the film will walk away with a great deal of money. Because when you spend that much money, $140 million, promoting a movie, it invariably brings in large grosses. The film may lose money, but the people who participate in the first-dollar gross, the very finical of participants; they're going to make a lot of money. And in terms of contingent compensation, even though the film didn't break even, DC made from its contingent compensation alone, $12 million. And that's only a portion of what DC received under the film agreement.

As Your Honor will see, under the film agreement, DC reserved all to itself all the merchandising rights for Superman. DC makes a great deal of money from merchandising. And it purposely negotiated a deal where it retained all of the merchandising revenue under the film agreement and then merely paid 25 percent to Warner Consumer Products under a separate agreement for actually doing the merchandising.

And the result, Your Honor, will be that the evidence will show that DC retains 75 percent of every merchandising dollar earned by Superman Returns.

The evidence will also show that that amount that Superman Returns generated was in excess of $40 million; that DC, therefore, received $30 million simply as its merchandising share under the agreement. Hence, $42 million profit from the film.

As far as the other agreements go, Your Honor, we will show that none of the agreements, which are truly comparable to Superman's film agreement, come even close to the value that DC received. Not Conan; not Tarzan; not Watchmen; 300; Robotech; not even Iron Man. And our expert, Mr. Gumpert, who will be shown to be a true expert, will refer to other agreements for iconic characters, like The Lone Ranger, The Green Lantern, and Flash Gordon, all of which agreements pale by comparison.

The plaintiffs have introduced other agreements. They haven't introduced a single comic book character agreement. What they have done is they have produced an agreement for the extremely successful trilogy, and even more successful film, Lord of the Rings, which is, indeed, a very rich agreement. It's

a very rich agreement. But it's not quite as rich as the Superman Returns' agreement.

They've submitted these agreements, which Mr. Toberoff referred to where one of what is called a marquee author -- a Michael Crichton, a John Grisham, a Tom Clancy -- receives an enormous amount of money upfront; 5 million, 7 million, $10 million, all of which is an advance against a contingent compensation and which agreements contain very low unappealing merchandising provisions.

We will, once again, show, Your Honor, with respect to all of the novels which have been written by these marquee authors that DC Comics made more money from Superman Returns under the terms of the film agreement than it would have made from Superman Returns under the terms of any of these best-selling novels. The facts, the mathematics, speaks for itself.

Again, Your Honor, I've made some very far-reaching and absolute statements. I'm just excluding My Fair Lady, which, as the evidence will show, was made under a financial structure, which is of historical value only. Like The Great Train Robbery, it just doesn't apply to today's film world. With that exception, you will find, as I say, that no one would have made more money from Superman Returns than DC did under the settlement agreement.

And as I indicated to Your Honor, we don't have to show that it's the highest agreement, it just worked out that way.

Thank you, Your Honor.

THE COURT: Thank you, Counsel. Plaintiff may call their first witness.

THE CLERK: Do you solemnly swear that the testimony you are about to give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: My name is Mark Evanier. Evanier is spelled E-v-a-n-i-e-r.

MR. PERKINS: Your Honor, the defendants interpose an objection to Mr. Evanier. As Your Honor will recall, we moved to exclude Mr. Evanier because the description of his testimony that was given was not within the parameters

of his actual expert report. Your Honor ruled that he would take that up at the trial.

THE COURT: Why don't we do this. Why don't we go ahead and begin with laying the foundation. I'll give you an opportunity to voir dire, and I'll take up the objection after I've had a chance to hear this play out.

That's kind of what I meant by that ruling, was let's -- let me hear some of the testimony. I'll give you both a chance to conduct voir dire, and we'll see where we're at.

MR. PERKINS: If he makes statements that are not within the parameters of his --

THE COURT: Don't worry, Counsel. We don't have a jury. I appreciate that.

MR. PERKINS: Okay.

MR. TOBEROFF: And Your Honor, just to note, we have a pocket brief on this subject, anticipating defendants' objection.

THE COURT: Let's go ahead and start with some examination on both sides, and we'll go from there.

DIRECT EXAMINATION

BY MR. TOBEROFF:

Q: Mr. Evanier, could you please tell us what you do for a living.

A: I'm a writer. I also sometimes produce TV shows. I also voice direct cartoon shows.

Q: And how long have you been involved in the comic book industry?

A: Since 1969.

Q: Have you worked for any notable comic book creators?

A: For creators? In 1969, I was hired by a man named Jack Kirby, who is considered one of the preeminent comic book creators of all time. I was his assistant for awhile.

Q: What comics, if any, did Mr. Kirby help create?

A: Mr. Kirby was the creator or co-creator of Captain America, The Fantastic Four, The Hulk, Iron Man, The Avengers, Thor, Challengers of the Unknown, The New Gods, Kamandi; it's quite a long list.

Q: Have you worked for any companies in the comic book industry?

A: I've worked for most companies in the comic book industry. I've worked for DC Comics; I've worked for Marvel Comics; I've worked for Dark Horse Comics; Pacific Comics; Western Publishing; Ed Rice Burroughs Company; Hanna-Barbera; Archie; Eclipse. There's probably others. Image.

Q: That's fine. When did you first work for DC Comics?

A: 1970.

Q: What work did you do for DC Comics?

A: I was assisting Mr. Kirby. He was doing a series of books with them; Jimmy Olson, The New Gods, The Forever People, Mister Miracle.

THE COURT: Excuse me. Will you slow down? She is trying to write down everything.

THE WITNESS: I'm sorry. Jimmy Olson, The New Gods, The Forever People, Mister Miracle.

BY MR. TOBEROFF:

Q: And how long did you work for DC?

A: Well, I had worked for DC intermittently since that time. I still do work for them occasionally.

Q: What was your position at Hanna-Barbera?

A: I started as a writer there; then I was made the editor of the comic book department.

Q: Any other comic book experience that you can think of?

A: Lots of it. Actually, the same time I was working for Mr. Kirby -- in 1969, I began working for Marvel running part of their fan operation, editing their official fan magazine. Subsequently, I worked for just about every company off and on. I don't know what else to tell you.

Q: Did you work for the Edgar Rice Burroughs estate?

A: I was the editor of the Edgar Rice Burroughs' comic book department in the 1970s.

Q: Have you ever worked in animation?

A: I've worked extensively in animation, yes.

Q: What animated shows have you worked on?

A: Well, I was the producer and writer of the show, Garfield and Friends for eight years on CBS. I'm currently producing and writing a new Garfield series. For Hanna-Barbera, I wrote Scooby-Doo. I wrote Richie Rich. I wrote Yogi Bear. I wrote a lot of the ABC Weekend Specials. I wrote Plastic Man, Thundarr the Barbarian that was first called Ruby-Spears. I did the show Dungeons & Dragons for Marvel Productions. I did the show, The Wuzzles for Disney. I did a show called Mother Goose and Grimm for CBS.

Q: Have you ever worked on any animated shows for DC Comics?

A: Well, Plastic Man was based on a DC property. And then I also wrote Superman: The Animated Series for Warner Animation.

Q: Did you participate in writing the pilot for any animated shows?

A: I wrote the pilot for Dungeons & Dragons; I wrote the pilot for The Wuzzles; I wrote the pilot for The Littles on ABC; I wrote the pilot for Garfield on CBS; I wrote the pilot for Mother Goose and Grimm. I've written a few pilots. Those are all shows that have sold. I've written a dozen pilots that haven't sold.

Q: Have you ever worked in live-action television?

A: Yes, I have.

Q: In what capacity?

A: Writer, story editor, head writer. I was the -- I wrote for Welcome Back, Kotter; I wrote Love Boat; I wrote That's Incredible!; I wrote one episode of Cheers; I wrote a lot of variety specials. I wrote one of the unsuccessful Bob Newhart Show, the one where he played a comic book artist. I wrote an episode of the Superboy show, the one they did in 1988.

Q: Have you ever been nominated for any awards for your work in television?

A: I've been nominated three times for Emmy awards, yes.

Q: For which shows?

A: Two for Garfield and Friends, and one for Pryor's Place, which was a -- and that was another live-action show; that was a show starting Richard Pryor on Saturday morning.

Q: Have you ever received any awards for your work in animation?

A: Yes. The Writers Guild of America Animation Writers Caucus gave me the Lifetime Achievement Award a few years ago.

Q: Do you teach any courses based on your experience?

A: I teach comedy writing at USC from time to time, yes.

Q: Do you participate in any conventions related to the comic book industry?

A: Many of them. I've been attending the comic convention in San Diego for 40 years now. Actually, this year will be the 40th year. It will be the 40th convention and the 40th that I've attended. I appear at other conventions. I was a frequent guest of honor at WonderCon in San Francisco. Other conventions -- I just, last weekend, was a guest of honor at a convention in Calgary.

Q: What was the name of the first comic convention you mentioned?

A: Well, the San Diego convention is now called the Comic-Con International.

Q: Please describe to me what goes on at Comic-Con.

A: Well, the Comic-Con in San Diego is an annual event in a convention center that holds 125,000 people, so it contains -- it's filled to capacity. In fact, they're almost sold out for this year's convention, which is in July. There are -- it's a giant hall full of comic books and exhibit books for sale, animation, video games, science fiction, promotion of current motion pictures. There are panel discussions; there are award shows; there are previews of forthcoming motion pictures.

Q: And what do you do at Comic-Con?

A: Mostly I moderate panels that are there.

Q: How many panels do you moderate?

A: It's crept up on me. I think I'm up to an average of 14 a year now. I'll probably do -- I did 14 last year.

Q: And what do you at these panels? You say "you moderate them." What do the panels concern?

A: Well, in some cases, the panels are one-on-one interviews with me interviewing one or two people who are notable in the field of comics; usually, for historical purposes, people who have had great experience in comics. There are other panels. We do an annual thing called the Golden Age Panel where we get six-or-so veteran comic book writers or artists, and I interview

them and then take questions from the audience. Sometimes I do one-on-one interviews; sometimes we do -- I also do -- some of these panels are about animation, also.

Q: What year did you first begin hosting panels at Comic-Con?

A: I hosted one, I think, in 1972, and I hosted two in 1973, and it kind of crept up on me to doing all of these.

Q: And since 1973, have you been hosting panels at Comic-Con on an annual basis?

A: I probably missed a few years in there, but for the last 10 or 15 years, I haven't. I haven't missed in the last 10 or 15 years.

Q: Have you ever moderated any events at comic book conventions at the request of DC Comics?

A: Well, a lot of the panels we do are about DC Comics. One year they asked me to moderate a panel on Mad Magazine, the history of Mad Magazine, which is a DC publication.

Q: Have you ever received any awards for your work at Comic-Con?

A: Well, I've received awards -- for my work at Comic-Con, one year, they gave me what's called the Bob Clampett Humanitarian Award, which is an award for service to the industry. And then they also have -- the convention gives an award called the Inkpot Award, which is for being a -- it's kind of a lifetime achievement award. I received that. They have an award called Friend of Fandom Award, which I think they've now discontinued, I received that. Then they have a thing called the Eisner Awards, which are a comic book equivalent of the Oscars or Emmy's, and I received several of those.

Q: Are you involved in choosing the recipient of any awards at Comic-Con?

A: Yes. There's an award that's presented each year called the Bill Finger Award, which is named in honor of a man named Bill Finger, who was instrumental in the creation of Batman. It is a lifetime achievement award for writing, and I am presently the administrator. I put together a blue ribbon committee each year to select the recipient of that award.

Q: Have you ever written any books on comic books?

A: Yes. My most recent was a book called Kirby: King of Comics, which was an illustrated biography of Jack Kirby, the man I mentioned earlier. I did a book

called Mad Art on the history of Mad Magazine, which was done at the behest of DC Comics. And then I've done several books -- we've done several collections publishing -- collecting columns and articles I've written over the years about comic books.

Q: Have you ever written any introductions or prologues for books on comic books?

A: Dozens of them, yes.

Q: Have you ever written any such introductions for DC Comics -- or DC Comics' publications?

A: Yes. Quite a few, yes.

Q: Have you appeared on television to discuss comics ever?

A: Yes. I was on the TV show, Biography when they did a portrait of Stan Lee, the head of Marvel Comics; I was interviewed on that.

Q: Have you ever appeared on DVD's to discuss comic books?

A: Yes. I'm on about a dozen DVD's. Do you want me to go into the list?

Q: You can mention a few.

A: I'm on The Flinstones' DVD, discussing the history of The Flinstones. I'm on a lot of Yogi Bear DVD's. I'm on a Huckleberry Hound DVD. I'm on one of the seasons of the Superman TV show. I'm on a couple of the Looney Tunes, Bugs Bunny DVD's. I'm on the DVD for Turok: Son of Stone discussing the history of the Turok comic book. I'm on a couple of Scooby-Doo DVD's.

Q: Were any of these Warner Bros.' DVD's?

A: All of the ones I just mentioned, except for Turok, were Warner Bros., Warner Home Video. I'm on the Dungeons & Dragons DVD, but that's not Warners.

Q: Have you ever provided consulting services to museums regarding comic books or pop culture?

A: Yes. There's an exhibit currently at the Skirball Cultural Center in Los Angeles on the history of superheroes and comics. And I was employed as a consultant to that exhibit.

Q: Are you currently working on any projects for DC Comics?

A: I just finished a run on a comic book for DC. I'm not working on anything right this minute for them.

MR. TOBEROFF: Your Honor, Mr. Evanier's report has been marked for identification as Exhibit 215.

THE COURT: Could I see that?

MR. TOBEROFF: It contains an even more-detailed list of his qualifications. Rather than take up more valuable time going through all of Mr. Evanier's qualifications, I would like to offer Exhibit 215 into evidence at this time.

THE COURT: Any objection?

MR. PERKINS: Yes, Your Honor.

THE COURT: State your objection, Counsel.

MR. PERKINS: It's irrelevant. Mr. Evanier is not -- none of the areas in his testimony on his report have anything to do with the issues in this phase of the trial. There is no discussion of fair market value.

THE COURT: Well, Counsel, are you seeking to introduce the qualifications or the conclusions of the report?

MR. TOBEROFF: The qualifications, Your Honor.

THE COURT: It's qualifications, Counsel.

MR. PERKINS: Well, it's not clear to me what the qualifications have to do with --

THE COURT: We're getting ahead of ourselves. Do you have any objections -- is there any question that these are or are not his qualifications?

MR. PERKINS: I have no objection to the qualification.

THE COURT: Very well. The qualifications come in, Counsel. Move along.

MR. TOBEROFF: Your Honor, we tender Mr. Evanier at this time as an expert in the field of comic books and their history.

THE COURT: Comic books and what?

MR. TOBEROFF: Their history as it bears on the history of Superman in this case, which is relevant to valuing Superman, which is relevant to determining whether agreements were for fair market value.

THE COURT: Very well. Is there any objection to this witness's qualifications as an expert on comic books and their history?

MR. PERKINS: If he's admitted for that, no objection, Your Honor.

THE COURT: Very well. You may proceed, Counsel.

DIRECT EXAMINATION (continued)

BY MR. TOBEROFF: Q: Mr. Evanier, could you please tell the Court how much you have charged plaintiffs to provide your expert opinion in this matter.

A: Nothing.

Q: Were you offered a fee for your services in this case?

A: I was told one could be arranged; I declined.

Q: Why did you refuse to be paid for your expert opinion?

A: I felt uncomfortable about taking money directly or indirectly from the Siegel family.

THE COURT: That is a first in my courtroom. Carry on.

BY MR. TOBEROFF: Q: Why is that?

A: Because of how much Jerry Siegel gave to the industry and how little he received from it. I've built my life around this industry, and I think most people in this industry owe him an enormous debt of gratitude.

Q: Let's talk about the comic book character Superman. Who created Superman?

A: Jerome Siegel and Joseph Shuster.

Q: When was the character first published?

A: It was first published in Action Comics No. 1, which was published on April 18, 1938, I believe.

Q: In what form was it published?

A: I'm not sure I follow the question.

Q: The first story was...

A: Superman was on the cover, and he was the lead story in Action Comics No. 1.

Q: Thank you. Who published Action Comics No. 1?

A: The company which we now refer to as DC Comics. At the time, it was called Detective Comics, Incorporated; and also there were a couple of other shell companies or other corporate names. The publisher was a man named Harry Donenfeld.

Q: When Action Comics No. 1 hit the stand, was it well received?

A: It was phenomenally well received. It is still the greatest success story in the history of comics.

Q: Did this become apparent to DC immediately or later on?

A: Well, some people at DC claim that they knew it from the start. It is said that Mr. Donenfeld, the publisher, was the last one to pick up on this. When he saw the first cover, he thought it was outrageous and that the book wouldn't sell. He had ordered subsequent issues to not feature Superman so prominently; so Superman was on the cover of Action Comics No. 1, but he was not on the cover of Action No. 2 or 3 or 4 or I think 6. There's a lead time in doing comics. By the time No. 1 hits the stands -- actually, by the time you get some distributor or retailer reaction to a comic, you've already got the next three or four issues well under way or off to the printer.

Q: How popular did Superman comics become?

A: Superman was the best selling comic book of its time, of the earlier 1940s. Superman immediately was featured in other media. They immediately spun off a solo comic book called Superman, completely comprised of his adventures. He was the first character really honored that way.

Q: When was that?

A: That was 1939.

MR. PERKINS: Your Honor, I need to interpose an objection. This is well beyond what was in his report. We did not have an opportunity to depose him with respect to his expertise in comics. He was not presented as an expert in the history of comics. It's simply not within the four corners of his report.

THE COURT: Counsel, a few minutes ago, you told me you didn't object to him being designated as an expert in the history of comics.

MR. PERKINS: I was discouraged because -- he is an expert in comics, but he --

THE COURT: No, no. The specific question was, 'Do you object to him being designated as an expert in comic books and their history'; and you said, 'No objection.'

MR. PERKINS: I have no objection, but, Your Honor, I have an objection to the testimony. He is undoubtedly an expert, but at the prior hearing, when we talked about these motions, Your Honor made it clear that if it's not in their report, they will not be permitted to testify.

THE COURT: Counsel, is this in the report?

MR. TOBEROFF: Your Honor, Yes, it is.

I'd like to read you a quote from defendants' reply in support of their motion in limine number two.

THE COURT: Not the reply, the report. Where in the report is it?

MR. TOBEROFF: I'll get that in a moment, but if I can -- defendants have acknowledged that it cannot be disputed that Mr. Evanier's report deals largely with the "history of the Superman character," quote, end quote. They have acknowledged this to the Court. Page 8 of his report --

THE COURT: I'm looking at the report. Here, Counsel, he does seem to go in great detail into the history in the report.

MR. PERKINS: Well, he goes into detail about how the comics were created. There's nothing in his report other than some general comments about popularity, but he gives no opinion with respect to where Mr. Toberoff is going, for example, which is that it was at its nadir in 1974. There's no analysis; they're not permitted to examine him about that. His report outlines on the first page the three areas of analysis or opinion that he was going to give, and those three areas are, the manner in which the earlier Superman comics were created by Jerry Siegel --

THE COURT: That's what we're hearing about right now.

MR. PERKINS: The last answers that he gave talked about how popular Superman was when it was released, that it was phenomenally popular, that there was a new title that was created as a result, that there were people within DC who thought that it would and it wouldn't be. None of that is in this report. The report was very focused, Your Honor. It was focused on work-for-hire issues, and it was focused on the Smallville issues that were in the case

when there was a copyright infringement claim. The first page outlines the three areas of testimony that he was to give.

THE COURT: Counsel?

MR. TOBEROFF: Your Honor, his testimony is clearly within the scope of the report. It's been admitted by defendants in their earlier statements, and, as I mentioned, in the reply. I could quote you paragraphs of the report that goes to the value, the effect of Superman's history and popularity on the value. Mr. Evanier says on Page 9 of his report, quote, "Any new entertainment venture, a movie, a TV series, a video game, based on Superman is instantly considered a major hot endeavor in the same way that the excitement and potential success of a new motion picture is enhanced by the signing of an established star with proven box-office success."

THE COURT: Let's move along. The objection is overruled.

BY MR. TOBEROFF: Q: Did Superman remain popular in the 1940s?

A: Very popular, yes.

Q: Throughout what period did he remain very popular?

A: Superman was popular in the 1940s. He was popular in the 1950s. He was popular throughout the '60s. There was a decline in the late '60s and so on.

Q: How many comic books was Superman selling per month by the late 1950s?

A: By the late 1950s, Superman was in comics each month, totaling sales of approximately 4 million copies.

Q: That's 4 million copies per month?

A: 4 million copies per month.

Q: Is Superman still published today?

A: Yes, it is.

Q: How many different comic book lines is Superman published in?

A: I don't know if I can even keep track. There's a Superman comic. There's an Action Comics. There's a book called All Star Superman. There's a book called Superman & Batman. There are many miniseries. They have an ongoing series of reprinting old Superman comics. They keep the old ones in print, which is unprecedented. That was not done in the old days.

Q: What did Detective do once they realized what they had in Superman?

A: They began exploiting him in other fields.

Q: What other fields?

A: Within the first couple of years of Superman's existence, he was quickly spun off into a syndicated newspaper strip; a very popular radio program; and a series of theatrical cartoons, distributed by Paramount Pictures.

Q: In what other media, other than what you've just mentioned, has Superman been exploited?

A: Well, the radio show went on for a long time. When the cartoon -- around the time -- the next notable appearance of Superman in other media would be in 1949. Columbia Pictures produced the first of two motion picture serials. It was so popular -- Superman was so popular as a serial, they did another one the following year.

Q: And these are animated shows featuring Superman?

A: The two Columbia serials were live action.

Q: And prior to that, there were animated shows?

A: Yes. As I mentioned, Paramount purchased a license to turn Superman into an animated character; and they produced 17, I believe, theatrical shorts, one of which was nominated for an Oscar. They were very popular. They're still very popular. They just came out on DVD again.

Q: Has Superman continued to be exploited in animation throughout the years?

A: Yes. There have been a half dozen different Superman cartoon shows over the years. If you'd like, I can go through them individually.

Q: You can go through some of them briefly.

A: There was a Superman-animated series done in 1966, I believe, or '67, produced by Filmation; that was on for a couple of years. Then, in 1973, Hanna-Barbera produced a show called Super Friends, which featured Superman, Batman, Wonder Woman, and a core of other DC characters; but Superman was the lead character in that.

Then the next Superman-animated appearance -- Super Friends went off and on for a number of years. The next animated Superman show would have been 1988. That was a show produced by a studio called Ruby-Spears. Then

there would have been the show that I worked on, Superman: The Animated Series, which was done in the '90s. And that was followed by a series that Warner Animation also produced, the Justice League of America, with Superman prominent in that. I think that's all of them, but I may have missed one.

Q: Has Superman appeared in any live-action television shows?

A: Well, in 1951 -- the Columbia serials were done in 1949 and 1950. In 1951, DC Comics themselves produced a theatrical film that was also intended as a pilot for a television series. The theatrical film was called Superman and the Mole Men; that was used a vehicle to set up a Superman live-action TV show. Sorry. I'm giving this lady so much trouble. I apologize.

Superman and the Mole Men was produced in 1951. That was a pilot for a TV series. And then they started in '51 the Superman series that starred George Reeves as Superman. And that was done for 104 episodes throughout the 1950s, ending in 1957. It would have gone on longer except for the untimely death of Mr. Reeves.

Q: Any other live-action Superman television series or Superman-derived television series?

A: The next time Superman was in live action on television, apart from little cameos and guest appearances would have been 1975. On ABC, there was a special, based on an earlier-failed Broadway musical of Superman; that was in '75. It was run late night once, in the middle of the night. Almost no one saw it. And then I don't think there was another Superman, a live action -- the next time Superman was in live action, if you counted it, it would be the Superboy 1988 series.

Q: And after that?

A: After that, the next one would be Lois & Clark, which was in '93, I believe, which was on ABC.

Q: And after Lois & Clark?

A: After Lois & Clark, I think the next one would be the Smallville show in 2001.

Q: Has Superman appeared in -- I think you interspersed in your testimony, you mentioned, I believe, theatrical short films. I'd like you to take us through Superman's history in live-action theatrical films.

A: Live-action theatrical films -- well, there were the two serials. There was the Superman and the Mole Men pilot. And then the next time Superman was done theatrical in live action would have been in the 1978 movie starring Christopher Reeve.

Q: That was just called Superman?

A: That was just called Superman. It was followed by three sequels.

Q: What were the sequels called, and when were they released?

A: Superman II was released in 1980; Superman III was 1984, I believe; and Superman IV was released in 1986.

Q: You mention Superman's exploitation early on in merchandising. Has that merchandising continued to this day?

A: Definitely.

Q: For 70 years, he's been continuously exploited in merchandising?

A: Yes.

Q: Was Superman ever adapted for the stage?

A: Yes. As I mentioned a moment ago, there was a musical comedy version of Superman, called It's a Bird, It's a Plane, It's Superman, which was done in -- it opened in March of 1966. I believe most of the history books say '65, but it was '66. And it was not a success.

Q: You testified earlier that in the 1940s and 1950s, Superman was extremely popular. Did that popularity remain, or did it wane?

A: There have been periods when the sales on Superman were down, when the merchandising was down, and Superman was not quite the superstar that we generally think of him as.

Q: When did Superman's popularity decline?

A: There was a diminution on the sales of the comic and a drop in the merchandising in the late '60s, which continued through the early '70s; and didn't, by my reckoning, really reverse itself until the Christopher Reeve movie in '78.

MR. PERKINS: Move to strike, Your Honor. That's not in his report at all. Those conclusions are not in his report.

THE COURT: Counsel?

MR. TOBEROFF: Your Honor --

THE COURT: Where in the report?

MR. TOBEROFF: Every single thing that he says on the stand is not going to be in his report, but the scope – the idea of having these matters in the report is to give the other side fair notice.

THE COURT: Yes, Counsel. But a particular question, like a "why," goes to the heart of an opinion; that is the type of thing that needs to be disclosed. You're absolutely right; a report does not have to include every single thing that is being said on the stand. But a question -- you're asking why, now; you're asking for his opinion. Has that opinion been disclosed? Has he disclosed the answer that he's about to give?

MR. TOBEROFF: He hasn't disclosed specifically the --

THE COURT: If he hasn't, then it's not coming out now.

MR. TOBEROFF: I don't know the precise answer.

THE COURT: You answered the question. I sustain the objection.

Opinions need to be disclosed. The filler, I certainly will give you leeway on that, and your notice is correct; but an actual 'why' question, or 'do you have an opinion as to why' or 'how' or 'who' or 'what,' those types of things need to be disclosed.

BY MR. TOBEROFF: Q: How was Superman viewed in the late 1960s?

MR. PERKINS: Again, objection. That opinion was not elicited in this report.

THE COURT: This is more of that historical. I'll allow you to continue. Overruled.

THE WITNESS: Could I have the question again.

BY MR. TOBEROFF: Q: The question was, how was Superman viewed in the late 1960s?

A: In the late 1960s, Superman was kind of out of sync with his times. The readership did not really like the comic book that DC was producing. The long-time editor of it was terminated. He was allowed to quit, but it was clear that he was ousted.

The character got the first of many makeovers, to try and bring it back into favor. The character was kind of stodgy; he had become kind of a self-parody,

I think. And the late '60s was a time when authority figures had a little trouble in this country, and Superman had gone too far in the wrong direction. He had become kind of pompous and lecturing. I felt the character was not speaking to the audience at the time. His sales were significantly eclipsed by Marvel Comics of the day, which did reach out to the audience, reached them on a more basic level.

BY MR. TOBEROFF: Q: Any other reasons for the sharp decline in Superman's popularity in the 1970s?

A: I think that there was a consensus that the comic book was not very good. They were demeaning the character a lot, for gimmicks. They were trying very hard to find something that would sell, and I think they went in the wrong direction. They kept doing covers to show him weak and frail and humiliated; and people don't want to see a weak, frail, humiliated Superman.

Q: How else was Superman portrayed in this time period?

A: Well, there were things that I thought were wrong in the fundamental way they were approaching the comics. There was a period in the early '70s when they took Clark Kent out of being a news reporter. He was no longer a mild-mannered reporter. They essentially turned him into Walter Cronkite. He was a star anchorman on TV. And it was illogical. Readers didn't like it. It didn't make sense to them for Superman -- Clark Kent is supposed to be -- in every appearance that's been successful, the template has been that Clark Kent is this shy, bumbling person, who -- first of all, it makes sense for Superman to hide himself that way. He doesn't have to be heroic in both of his identities. Otherwise, he doesn't need a super identity if he's heroic in both. And it didn't make sense for him to be so visible.

If you look at the Christopher Reeve movie, for example, the first time in 1978 -- the first time you see Clark Kent, he's bumbling, he's bumping into doors, he's inept. That's the way Clark Kent has traditionally been. DC, for some reason in the early '70s, thought, 'Let's turn him into a TV superstar reporter'; and I think that contributed to the decline of the comics.

Q: What role, if any, did DC's management have in this decline in the late '60s, early '70s?

A: DC's management was calling the shots on this. They were the ones making the decisions, that I happen to think were bad ones. And I think the company ultimately felt that. They got rid of that management; they fired them.

Q: When was that?

A: '75.

Q: Given this decline you just testified to, what was the lowest point in Superman's popularity historically?

MR. PERKINS: I object to the question. That opinion is not rendered in the report.

THE COURT: Overruled. I think all of this -- I mean, clearly this witness is qualified to describe the history, and he indicated that he would be covering the history. This is not opinion as much as it is --- I'll overrule the objection.

You may answer.

THE WITNESS: Could I have the question, please, one more time.

BY MR. TOBEROFF: Q: Historically, what was the lowest point in Superman's popularity?

A: The early '70s, '73 through '75, in there.

THE COURT: What is that based on?

THE WITNESS: Sales. Books weren't selling very well. The character was kind of -- comic fans get very possessive about the characters they love. Readers were starting to protest the way Superman was being depicted. They were not getting a Superman that they felt good about. There was one issue that had a cover of Superman bowing down and kissing the foot of an Amazon alien invader; and everybody protested it. They said, 'You guys don't understand Superman; you're ruining this character.' Superman is not subservient. Superman is -- hey, I can do that. I don't need Superman to be humiliated. And sales were down. I was working on and off for DC Comics at the time. We had meetings. We had to reinvent Superman. They didn't know what to do with it.

The man I mentioned earlier, Jack Kirby, who was a superstar of -- probably the most successful comic creator who ever lived, they brought him into meetings, and I went with him as his assistant; and the publisher of the company sat there and said, 'Help us figure out what to do with Superman; we don't know.' Some of their other books were thriving. The company was not completely incompetent at the time. They had some very good comics. They were actually doing a good job with Batman. And Batman was becoming more popular than Superman.

THE COURT: Again, based on sales?

THE WITNESS: Yes, based on sales. And on industry reaction, awards. I mean, Superman never stopped selling.

THE COURT: When you say "industry reaction," that's what you observed when you attended these conventions?

THE WITNESS: Yeah. Conventions and awards. And there were all of these magazines, people who do reviews. I was writing for a lot of them at the time.

I'm giving you a consensus of what I perceived as the readership from the only measures we have, which is the buzz, the panel discussions, what we know of sales. You can also track the popularity of these characters frequently with what the company does. When they start putting Superman on the cover of lots of comics, it's because they perceive that he is a saleable commodity; that his presence on the cover helps the comics sell. When they start hiding him, then you say, well -- cutting back the comics, featuring him less often.

In the 1960s --

THE COURT: Let me stop you there. Your next question.

BY MR. TOBEROFF: Q: Does DC agree with this conclusion that Superman was at the lowest point in his popularity in the early '70s?

MR. PERKINS: Objection. Hearsay. And, also, it's well beyond the --

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Did Superman appear in any live-action films or television shows during the early '70s?

A: Live-action films in the early '70s? No. The first one I know of would have been the 1975 adaptation of the Broadway show I mentioned.

Q: The 1975 late-night special on ABC?

A: Correct.

Q: Could you tell me about that late-night special again, please.

A: ABC was at that time doing a series called ABC's Wide World of Entertainment, which was on opposite Johnny Carson; and it was a series of different shows in different forms. And they took the Superman Broadway show from '66, and they did a very cheap, shoddy adaptation of it, very campy,

low budget. It was a horrifying show. It is generally mocked by those -- not that many people saw it, but those who did still jest about how bad it was.

Q: After Superman's popularity hit rock bottom in the early 1970s, did his popularity ever rebound?

MR. PERKINS: Objection, Your Honor. Mischaracterizes Mr. --

THE COURT: As to the form of the question, sustained.

BY MR. TOBEROFF: Q: Did Superman's popularity rebound after it had declined in the early 1970s?

A: Yes, it did.

Q: Can you describe to me how it rebounded.

A: Well, in 1978, there was a Superman movie starring Christopher Reeve which was phenomenally successful. It reinvigorated the character. It certainly reinvigorated the merchandising. There were hundreds and hundreds of Superman toys and games and T-shirts. There was Superman -- I started eating Superman peanut butter about the time they started bringing it out. The character suddenly had a new life at that point, because that movie was so successful.

Q: Did that movie influence other forms of Superman programming?

A: Yes. Well, there were the sequels, as I mentioned. The Super Friends animated show, which had kind of been on its last leg, was reborn. It ended up changing formats a few times, but it began featuring Superman more prominently; and it stuck around for quite a few years after that. I think it ended in '86, or thereabouts, which is a very long run. It's a very long run for a show that was cancelled when it was originally put on the air, to come back like that and be successful. I don't think there were any other adaptations in motion pictures or television until after the fourth – the Superman features with Christopher Reeve.

Q: Were the sequels, Superman II and Superman III, you mentioned released in 1980, and the other was 1983 -- I believe you said --

A: I said '84.

Q: Superman II and Superman III, were they successful as well?

A: Two was a little less successful than one, and three was a little less successful than two.

Q: And how would you describe the last sequel, Superman IV?

A: I think it was viewed by about as many people who are in this courtroom at the moment. It was not successful at all.

Q: Did that have any effect on the popularity of Superman?

MR. PERKINS: Objection, Your Honor. That is an opinion that's not provided in his report.

THE COURT: Now we're getting into causality again, Counsel. I'm permitting the witness to testify as to his understanding of what was happening as opposed to why it was happening.

BY MR. TOBEROFF: Q: In terms of Superman's historic popularity, did Superman IV have any effect on his historic popularity?

MR. PERKINS: Same objection, Your Honor.

THE COURT: Sustained. That's the same question in a different form.

BY MR. TOBEROFF: Q: Did Superman IV have any historic effect on Superman's popularity?

THE COURT: Counsel, every time you're using the word "effect," you're asking for him to assess causality; and unless that's set forth in the expert report, I'm going to keep sustaining the objection.

MR. TOBEROFF: I have it.

BY MR. TOBEROFF: Q: How popular was Superman after Superman IV?

A: I think Superman was still very popular. I just think people didn't like that movie.

Q: Are you saying they blamed the movie rather than Superman?

A: No.

MR. PERKINS: Objection, Your Honor.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Returning to Superman, how was Superman exploited in the late 1980s through the 1990s?

A: Exploited in other media besides comics, you mean?

Q: Exploited in any media.

A: The comic books were very successful at the time. DC added new titles. They did a couple of reboots in there, where they reinvented the character, cleaned out some of the dead wood; and the comic book sales went up considerably. It became a much more prominent, successful comic than it had been at certain times in the past.

In '88, you had both the new Saturday morning show and the Superboy show going on the air. Next thing after that, I don't know -- did I answer your question?

Q: Yes. Can you tell me about Superman No. 75.

A: Well, Superman No. 75 -- in 1993, DC did a story arc called The Death of Superman, which stunned everyone by how much attention it got. It was a phenomenon in the industry. It was unprecedented. And it was not just a matter of --

Superman No. 75, which was the issue in which Superman actually died in the story line, sold 3 million copies. This is at a time when a good-selling comic book might be selling 30,000. So 3 million was astronomical. It was not just that one issue; it was all of the issues leading up to it. And the death of Superman story line was interwoven in all of the DC comics for several months; so readers were picking up all of the different DC titles in record numbers. And then when the issue 75 came out with the actual death of Superman, it hit the mainstream press like some beloved real person had died. It was covered on the evening news; it was covered in headline stories. And then the subsequent issues, which featured Superman's funeral, and then later, his return, were also selling well, well above any expectations of the time.

Q: Thank you.

Can you describe to me the differences in comic book sales in different periods and how that was viewed by the comic industry as either being successful or unsuccessful. Do you understand my question?

A: I think so.

THE COURT: I'm not sure if I do, Counsel. Why don't you rephrase it.

MR. PERKINS: To the extent I understand it, I object.

THE COURT: He's rephrasing it, Counsel.

MR. PERKINS: Thank you.

BY MR. TOBEROFF: Q: You mentioned, when you were talking of the death of Superman, that that sales figure was phenomenal for that particular time period.

Did the amount of comics an issue had to sell to be considered successful differ from one period to another in the comic book industry, and why?

A: I think I've got that.

Yes. Yes. The answer is, the standards changed over the years. Prior to about 1980, comic books were distributed by a term that is frequently called the "independent distribution method." This is the way most magazines were and most still are distributed, which is that they are sold on a returnable basis to wholesalers and then on to retailers throughout the country.

Around 1980, that method of distribution atrophied, for reasons that will probably get us 23 objections here; so I won't go into them. But the business changed over to a direct -- a thing where the comics were sold direct, primarily to comic book shops which bought them for higher prices on a nonreturnable basis.

Prior to about 1980, this cutoff point I'm mentioning, if a comic book sold under 150,000, it was considered a failure. I did comics at that time that were sold under -- when you fell under 150,000, you were probably going to get cancelled. A good sale would be 200,000 and up. A great sale would be 300,000 to 500,000. There were occasional exceptions selling into the millions.

Since 1980, it is profitable now to do a comic that sells 30,000 copies. Last month, there was no comic book published in America that sold over 100,000. The number one selling comic last month sold 97,000 copies.

THE COURT: How did the distribution change?

THE WITNESS: Well, what happened was, you used to go to your corner newsstand, buy a comic book for a dime, 15 cents. The newsstand would get 25 copies. If they sold ten, the other 15 would go back to be pulped, the copies would be destroyed, or they would be returned; so the publisher would rebate the distributor. So to sell ten copies when you're destroying 15 is not profitable. To sell 25 when you're destroying five could be profitable. It was a measure of copies sold versus copies returned.

In the current method, we have comic book shops all over the country. They're the primary means of distribution. Your local comic shop orders 100 copies of

the new issue of Superman. They pay for them in full. They're $2.95 to $3.95. They get them for a reduced price, but once they buy them, they're not returnable; so there's no spoilage. And they're sold; so you can make money selling a comic book that sells 20,000 copies these days.

THE COURT: Let's take our lunch break at this time. We'll resume at 1:00.

Court is in recess.

(A.M. session concludes.)

COURT TRIAL - DAY 1

TUESDAY, APRIL 28, 2009

P.M. SESSION

WITNESSES: Mark Evanier; Alan Frederic Horn

THE COURT: Counsel, you may proceed.

DIRECT EXAMINATION (CONTINUED)

BY MR. TOBEROFF: Q: Mr. Evanier, you testified earlier that in the late 1950's, Superman was selling 4 million copies per month. Was that one Superman magazine or all Superman comics combined?

A: That was the amalgam of all the comics Superman was featured in at the time. He was in Action Comics. He was in Adventure Comics. He was in Superboy, the Lois Lane comic book. There was the Jimmie Olson -- I'm not quite sure which ones they were counting, but collectively, that's the number.

When you hear them say 4 million, they are referring to the group of all the titles that featured the character.

Q: Now, in the early 1970's, what was the status of these collective Superman comics in terms of sales?

A: I don't know the exact number. They were selling substantially less. There were fewer of them at the time. Quite a few of those books had been discontinued or substantially altered. When I was assisting the editor of Jimmie Olson in 1970 or '71 that had become a very low selling title for DC. A few years later it was canceled. The Lois Lane comic, which at one point had been DC's best selling in the 50's or 60's, it had been canceled.

THE COURT: That was a separate?

THE WITNESS: Yes, it was called Superman Lois Lane, with a character like Superman, and this is true of something like Archie, the character is in a group of comics. They are timed to come out every week. One week Action Comics comes out featuring Superman. So that every week the kids can go to the rack and buy one or two comics that feature Superman. Superman was always prominent on the cover of Jimmie Olson and prominent on the cover of Lois

Lane. It's the same with the Archie line of comics. It's Archie and the Betty and Veronica and the Jughead and the Reggie comics. There are all these ancillary titles. Archie's friends and Archie's enemies and Archie's toothbrush and such. So when --

THE COURT: Very well.

THE WITNESS: So when they talk about Archie sales, they mean all the Archie titles.

BY MR. TOBEROFF: Q: What was the reason why these Superman comic books were being canceled?

A: The only reason that you have for canceling comics is that people aren't buying them.

Q: And how did the Superman comic itself, the comic called Superman, how did that fare in the early 1970's?

A: It had declined in sales from the 60's, if that's what you're asking.

Q: That's just looking at the Superman comic itself?

A: Yes, that's right.

Q: In the comic industry, when you are judging the success of a comic, you just look at the Superman comic itself?

A: No. That would be misleading about the strength of the property. You would -- it would not tell you, you know, is this character capable of -- you're looking at the franchise.

The value of the Superman, the value of an Archie is that you can do a lot of comics of them. You're not limited to one every month. The Bugs Bunny comic book, and the Yosemite Sam and Porky Pig comic books, we find different ways to put out a comic book that had Bugs Bunny's face on the cover.

Q: You mentioned that DC Comics financed the 1951 feature film Superman Versus the Moleman. Did DC also finance the TV series starring George Reeves?

A: Yes, they did.

Q: Did DC finance the Superman film starring Christopher Reeves that appeared in 1978?

A: No, they did not.

Q: Did they participate financially in any way in that?

A: I assume they received some fee for that.

Q: But did they invest in the film in any way?

A: To the best of my knowledge, they did not.

Q: Did DC finance Super Friends that appeared in the 70's as you testified or any other TV or film derivatives in the 70's?

A: I know of no project in the 70's that DC put their own money into.

Q: Now, you previously mentioned that there was continuous merchandising in the 1980's through the 1990's. Focusing now on the 1990's, was Superman exploited in other media in addition to publishing and merchandising?

A: In the 1990's?

Q: In addition to merchandising in the 1990's, merchandising and publishing, how was Superman exploited?

A: Well, the biggest would have been the Lois and Clark television show on ABC, which was on, I believe, in '93 through '97 or thereabouts. That was very successful, a prime time show. There was the Superman animated series that was done during that time period. I'm blanking on something else. There was another one.

Q: I believe earlier you testified to Superboy. Was that in this period?

A: The Superboy show went on in 1988, and it was on into the 90's. Yes, that was successful for a while.

Q: Now, in the 1990's --

A: I forgot the show I worked on. I'm sorry.

Q: In the 1990's, was a new Superman theatrical film being developed?

A: We heard there was. That was the word around conventions. There were articles in the fan press and various magazines that a Superman movie was coming.

Q: And what did you hear?

A: I heard a lot of different things. We heard various stars. At one point Nicholas Cage was allegedly going to star in a Superman movie. At one point Tim Burton, who had very successfully directed the Batman franchise. He was going to direct it. There were outlines and scripts bootlegged around the

convention market, and people were alternately horrified or encouraged. There were fans very worried. They assumed a Superman film was coming and they were worried that the character would not do him justice.

Q: What was the reaction at Comicon to this anticipated film starting in the mid-1990's?

A: Well, the entirety of the Comicon, the character of Comicon shifted in the 1990's. Previously it had been basically a convention about comic books and publishing. In the 1990's, the Comicon evolved into a place where the major stars would appear to promote their films. One of those panels that I got kicked out of the room one time was around Schwarzenegger wanted to promote another Terminator movie. He was going to make a sudden appearance.

So there were all these panels suddenly showing clips of previews of upcoming films or panels discussing -- studios would fly in their directors and their executives and their stars to promote. There was an awful lot of merchandise handed out at the convention. When you got to the convention, you got your badge and a goodie bag full of merchandise and promotional items. And sometimes you'd get T-shirts and fliers and pins saying, you know, these movies are coming. So -- the Superman -- the Superman movie was one of the main ones that people were excited about. Because it was Superman.

Q: And this started in the mid 90's and continued until what time?

A: It's continuing today. The fervor about the upcoming movies. There's a convention in July, the Comicon for this year. A lot of that convention is going to be about what movies are coming out. What movies are in development now. What movies had just come out. What movies are coming on DVD now. It's -- there are people who actually complain that the convention is too much about the next big superhero movie that's coming out.

Q: So Hollywood's participation in Comicon, would you say, commenced in the mid-1990's?

A: Again, it was a slow process. It -- I can find isolated incidents before then, but it was an avalanche in the 90's of all of a sudden these big stars are there.

Q: And what was the status of superhero films starting in the late 90's?

A: Superhero films, there were some very successful ones. I can't think of the first one right off. Men in Black came out in, I think, '97. Blade in '98. Those are

both very successful films about relatively minor properties, characters that had very little track record and weren't known characters.

Then you suddenly started seeing movies like -- there was a big explosion of excitement in 2000 when the first X-Men movie came out. That was huge. And they started talking about the sequel and the upcoming Spiderman movie, which I think came out in 2002.

Q: The Spiderman movie that I came out in 2002, when at Comicon did you start hearing about that movie?

A: Well, we'd been hearing about Spiderman movies for some time before that. There were scripts circulated. There were talks of different directors and stars attached to it.

Q: But specifically, the movie that came around --

A: Excuse me. The specific movie that came out, I think we started hearing about it around 1999. It's like a two- or three-year lag on all these things before they come out. One year you hear the movie is in heavy development and names are being attached to it. The next year you hear that it's got a start date, when they start promoting it, putting out kind of generic advertising, key art that they are showing you.

Possible poster, a possible logo type. They try to get some advance merchandise out, and then you have, you know, the next year the movie is out. Or it is about to come out, and they come and show the trailer, and people cheer it or shrink away in disgust, whichever is applicable. Then usually a year or so later, they are promoting the DVD's coming out.

Q: And how did this focus on comic books and superheroes in particular in the movies occur?

A: I'm sorry?

Q: I'm sorry. I phrased that poorly. What was the cause of this sudden focus on comic books and superheroes part starting in the mid-1990's?

MR. PERKINS: Objection, your Honor. It goes beyond the --

THE COURT: Sustained. Rephrase, Counsel.

BY MR. TOBEROFF: Q: What connection do you see between comic books and films?

THE COURT: Overruled.

THE WITNESS: Well, they are merging together as forms, if that's what you're asking me. The comic books are increasingly becoming a template for movies, not only in terms of content but in terms of trying to replicate the excitement that was established in the comic book to replicate it on the screen. It's a kick start for a movie. You have a successful comic book.

People love the comic book, and now that generates heat for the project before it turns into a multimillion dollar movie. And at the moment, practically every comic book is a potential movie. There are people creating comic books, hoping they will become movies.

Q: Is there anything about comic books in particular that lends itself to exploitation in the film?

THE COURT: Counsel, now we're getting into an area where -- is this covered in the disclosure?

MR. TOBEROFF: The cover.

THE COURT: Now you're going beyond that. Again, I -- I have no doubt that this witness is more than qualified to answer these questions. It is all about the disclosure that was given to the other side.

MR. TOBEROFF: I understand.

THE COURT: So don't take this -- you are consummately qualified on this. It's beyond the scope of the expert disclosure. So I'll sustain the objection.

BY MR. TOBEROFF: Q: In the comic book industry, what are the -- what are DC's core comic book properties?

A: Superman and Batman are the top tier.

Q: And where in your opinion does Superman rank in the hierarchy of comic book superheroes in terms of sustained popularity?

A: I think Superman is number one.

MR. PERKINS: Objection. That opinion was not in his disclosure.

MR. TOBEROFF: Actually, I think he goes on and on about the attributes, the key attributes and popularity of Superman. On page 9 he speaks about Superman being an established star with a proven box office success. For a studio to establish the same kind of fame and recognition of a newly created character would require an investment of countless millions of dollars with, of course, no guarantee of success.

MR. PERKINS: The objection was to the specific question, which was how does it rank, and the answer being it's number one, which was not opined upon, and I didn't have a chance to --

THE COURT: It's a closer call, but I'll overrule the objection. You have answered. Next question, Counsel.

BY MR. TOBEROFF: Q: Now, switching gears. Mr. Bergman in his opening mentioned a character by the name of the Lone Ranger.

Are you familiar with the character?

A: Yes, I am.

Q: Did this character appear in comic books?

A: It has appeared in comic books intermittently.

Q: When?

A: I'm not prepared to tell you the exact dates. A company called Western published the Lone Ranger comic under the Dell imprint from around 1942. I'm guessing at this, but it was throughout much of the 40's, much of the 50's and became more spotty. They were canceling it in the 60's. And I think it was published briefly in the 70's, and there have been a few intermittent. It has not been a continuously published comic.

Q: How popular was the Lone Ranger in comic books compared to Superman?

A: It was much less popular.

Q: What other media did that -- did the Lone Ranger appear?

A: The Lone Ranger was a radio show, very popular radio show in the 30's and 40's. There were a series of monthly serials made in the 40's. There was a television show in the 50's. There have been a couple of movies that have not done well. There was a -- a chain of Lone Ranger restaurants. There was one near my house in the 70's. It hasn't been around a lot.

Q: Has the Lone Ranger remained popular?

A: I don't see it being published as a successful comic book or -- it was an animated show very briefly at one point. I have not seen any sustained indicator or popularity of the character.

Q: Does the Lone Ranger have the sustained success of Superman since the 1930's?

A: Not even close.

Q: Another character I believe was mentioned was the Green Case Hornet. In what media format did this character first appear?

A: It was a radio show.

Q: Do you know when it first appeared?

A: In the mid-30's.

Q: Was the Green Hornet popular?

A: The radio show was popular for an extended time, yes.

Q: And in the 1930's and 40's?

A: 30's and 40's, yes.

Q: After that?

A: It lost popularity. There was a brief revival in the 60's on a TV show that I think only lasted a short time.

Q: Did the Green Hornet appear in comic books?

A: Western Publishing published, I think, three issues before it was canceled.

Q: Has the Green Hornet remained popular?

A: No, I don't think so.

Q: Has the Green Hornet had the sustained success of Superman since the 1930's?

A: Even less than Lone Ranger.

MR. PERKINS: Your Honor, I'm going to object to this line of questioning. There was nothing in his report regarding any character other than Superman. There was no discussion of Green Hornet, Lone Ranger.

THE COURT: Is there, Counsel?

MR. TOBEROFF: Not specifically, your Honor. I'm responding to characters mentioned by Mr. Bergman in his opening statement.

THE COURT: Well, I know what you're doing. The question is whether or not there was any grounds for the disclosure of this.

MR. TOBEROFF: To a certain extent, this is also anticipatory rebuttal.

THE COURT: And as rebuttal, it would probably be proper. Counsel, is there any -- quite frankly, some of this, as interesting as it is, is not exactly earth-shaking. I mean, I -- the Lone Ranger, it's been a while since we've seen the Lone Ranger.

MR. PERKINS: Your Honor, as long as it's going on Mr. Toberoff's clock, I think I shouldn't complain.

THE COURT: I think out of judicial efficiency, some of the stuff could be addressed now. Let's move along.

MR. TOBEROFF: It would be so he didn't have to come back in rebuttal. All the characters that I'm mentioning are the subject of contracts that have been produced and will be used by defense at trial, I believe.

THE COURT: Very well.

MR. TOBEROFF: That's the relevance.

THE COURT: I understand the relevance. Again, the issue is not relevance. It's disclosure. But I view it as essentially rebuttal, given the statements that were made by counsel in his opening. Let's just do this now.

BY MR. TOBEROFF: Q: Tell me about the character Flash Gordon.

A: Flash Gordon was a syndicated newspaper strip, very popular syndicated newspaper strip. There were a series of serials starring a character called Buster Crabbe. There was a radio show for a time that was very popular, mostly in the 1940's.

Q: And when did the comic strip first appear?

A: The comic strip first appeared in the late 30's.

Q: And over what period was the comic strip exploited?

A: Well, the comic strip is still going today. It's in about four newspapers. It used to be in about 600.

Q: Has Flash Gordon been exploited outside of comic strips?

A: I mentioned the radio show. There was a Flash Gordon serial. There was a Flash Gordon TV show briefly in the 50's. There have been some -- there was a Flash Gordon animated series done by Filmation in the 8 -- in the mid-70's, I would say.

Q: So has the exploitation --

A: There was a feature film in the 70's.

Q: Would you characterize the exploitation as intermittent or continuous?

A: It's certainly tapered off the last 20 years. I would say it's intermittent.

Q: Is Flash Gordon popular?

A: It's a known character. I wouldn't say it's very popular these days.

Q: Has Flash Gordon had the sustained success of Superman since the 1930's?

A: Not at all.

Q: Tell me about the character Ghost Rider?

A: Ghost Rider, if you're referring -- there have been a number of characters named Ghost Rider. If you're referring to the one that was a motion picture that was a Marvel comic that was introduced in the early 70's. The comic book has been published intermittently. It had a successful run for a few years. They stopped it and brought it back. There was a successful motion picture a few years ago.

Q: Was Ghost Rider popular?

A: Briefly here and there at times.

Q: Has Ghost Rider been exploited -- excuse me. Has Ghost Rider had the sustained success of Superman since the 1930's?

A: Not even close.

Q: Are you familiar with the character Iron Man?

A: Yes, I am.

Q: Tell me about Iron Man's exploitation.

A: The exploitation -- well, Iron Man was first in comics in 1963. He was in a comic called Tales of Suspense. He was a minor Marvel hero in the 60's. There was a bad, low budgeted cartoon show, and they stuck Iron Man in that. His comic book did not do very well for a time. He was cancelled a couple of times and brought back, I believe. More recently, there was an Iron Man animated series and a very successful Iron Man motion picture a few years ago.

Q: You're referring to the Iron Man film that came out in 2008?

A: Yes, I am.

Q: Prior to the release of the Iron Man film, would you describe Iron Man as successful?

A: No. I would describe it as a lower tier Marvel character.

Q: Has Iron Man had the sustained success of Superman?

A: No.

Q: Have you heard of the graphic novel entitled 300?

A: Yes, I have.

Q: Could you describe for me what this consists of?

A: It was a series of comic books done -- published by Dark Horse around '98. I'm not sure of the year. And then they collected it into a graphic novel, published it as a collected work. And the motion picture was made out of it that I'm told was very successful.

Q: Was it what they call a miniseries?

A: Yes, that's right.

Q: Do you know how many issues were released by Dark Horse in the 1990's?

A: It's either four or six. I'm sorry. I don't know the exact number.

Q: And outside of those four or six issues and then being bound together in a graphic novel, has 300 been exploited outside of publicly?

A: Just that movie.

Q: What you say that movie, you're referring to the 2007 movie entitled 300?

A: Yes.

Q: Other than the publishing you mentioned on 300 and the movie released in 2007, are there any other exploitations?

A: Not that I know of.

Q: Has Iron Man had anywhere near the sustained success of Superman?

A: Are you asking me about Iron Man or --

Q: Excuse me. 300?

A: No, not at all.

Q: Are you familiar with the character Swamp Thing?

A: Yes, I am.

Q: In what media did it first appear?

A: It first appeared in House of Secrets No. 92 in 1971.

Q: And after that?

A: Shortly after that, it got its own comic. And it was very successful for a short time period, and then they cancelled the book.

Q: Has Swamp Thing had the sustained success of Superman?

A: No, it hasn't.

Q: Have you heard of the character Human Target?

A: Yes, I have.

Q: When did this character first appear?

A: I think 1971 as a backup feature in Action Comics.

Q: And after that?

A: I think DC brought it back intermittently here and there. It was only in Action Comics for a short period of time. It was not considered a successful character. And then at some point, I'm sorry, I can't tell you the year. There was a short-lived television series. I think it lasted like seven episodes.

Q: Has the Human Target appeared in any other medium?

A: I don't know of any.

Q: Has the Human Target in any way, shape, or form – strike that.

Has the Human Target -- is it comparable to Superman?

A: I can't think of too many characters less known these days than the Human Target.

Q: Are you familiar with a character Doc Savage?

A: Yes, I am.

Q: When did he first appear?

A: I think 1933, I believe, as a pulp character.

Q: And from its first appearance in 1933, when did it appear thereafter?

A: There was a radio show. I don't think there was ever -- there was a very short-lived newspaper strip. I think it lasted less than a year. There was a -- boy, I can't tell you too many appearances. There was a motion picture made in 1975 of Doc Savage that was not very successful.

Q: And the radio show?

A: And there was a comic book -- there was a comic book in the 40's briefly, and then there was a comic book in '75 to tie in with the motion picture, and there have been – been occasional comic book appearance.

Q: When did the radio show --

A: The radio show was in the 40's sometime.

Q: Has Doc Savage had anywhere near the sustained success of Superman?

A: Not at all.

Q: Are you familiar with G.I. Joe?

A: Yes, I am.

Q: When did G.I. Joe first appear?

A: G.I. Joe was a -- debuted as a toy from the Hasbro company in the early 60's. It was produced for a while as strictly a toy. In the early 80's, Hasbro resurrected the toy and also promoted an animated series and a comic book to expand the franchise to add ancillary characters and promote the name of G.I. Joe.

Q: When did the animated series G.I. show appear?

A: Mid-80's. I can't tell you the exact year.

Q: And this was like a Saturday morning cartoon?

A: It was a syndicated series. Hasbro, the toy company themselves, produced it. They financed it, promoted it. They were the advertiser. It was on many stations in the syndicated marketplace.

Q: Has G.I. Joe ever been exploited as a theatrical film to date?

A: I don't think so.

Q: Has G.I. Joe had the sustained success of Superman?

A: No.

Q: Have you heard of the comic book Watchmen?

A: Yes, I have.

Q: When was it first released?

A: Oh, I think '86. There was a 12 issue -- they call it a maxi series if they go over 4 or 6 issues. It was 12 issues. It was a comic book published by DC, and then they collected those 12 issues into a trade paperback and a hard cover and a trade paperback and -- and other formats.

Q: Other than the printing and reprinting of these 12 issues in different formats, was it -- were there other issues that were published?

A: Other issues of Watchmen? I don't believe so. There were some distant spin-offs, I believe.

Q: Did Watchmen appear in any other media?

A: There was a motion picture released recently. A very big budget movie after the graphic novel.

Q: Other than the motion picture you just mentioned, has Watchmen been exploited in any other media?

A: There's been a few merchandise items promoted in conjunction with the motion picture.

Q: Was the film successful, the recent Watchmen film?

A: The word is not successful.

Q: Has Watchmen had the sustained success of Superman?

A: Not at all.

THE COURT: What do you mean by "sustained success"?

THE WITNESS: Well, Superman --

THE COURT: No, what do you mean by the phrase?

THE WITNESS: There's no track record. When they say sustained success, more than a couple of months in the spotlight. More than six months of heat. Sustained success means more than one success.

THE COURT: Very good.

BY MR. TOBEROFF: Q: You are familiar with Tarzan?

A: Yes, I am.

Q: When did Tarzan first appear?

A: Tarzan first appeared in 1912 in pulp magazines.

Q: Was this pulp magazine publication a serialized magazine of the Edgar Rice Burroughs books?

A: Yes.

Q: How many books did Edgar Rice Burroughs write?

A: I'm sorry. I don't know the answer to that.

Q: Do you have an approximation?

A: I think 30 or something like that. I don't know. I used to work for the company, and I don't know the answer to that. I'm sorry.

Q: Do you know -- I finally found a question you didn't know the answer to. Do you know how many Tarzan stories were published prior to January 1, 1922?

A: Around 20, I believe.

Q: Has Tarzan been consistently exploited since its publication in serialized form in 1912?

A: Relatively consistently. It always seems to be around in some form.

Q: Are you familiar with Tarzan's exploitation in film?

A: Reasonably so, yes.

Q: How many films were produced based on Tarzan?

A: I'm sorry. I can't give you the -- about 20 or 25.

Q: How would you characterize those films in terms of their success?

A: Well, they were low budget films. They were successful as low budget films. You know, shooting stuff in the jungle is real cheap.

Q: During what period?

A: Mostly in the 50's, early 60's. They did – the franchise declined in the 60's.

Q: And in publishing, how did -- how would Tarzan compare to Superman?

A: Superman -- Tarzan was very popular -- you're talking about in publishing comic books. Tarzan was very popular in -- let me start over.

In terms of publishing, if you're talking about publishing anything, the Tarzan novels were very popular for many years. If you're talking about the comic book, the comic book was very successful throughout the 50's and 60's, and it declined rapidly in the 70's.

Q: How would you compare the success of Tarzan in publishing to that of Superman?

A: In terms of comic books or in terms of all publishing?

Q: All publishing.

A: I -- I don't know what the sales of the Tarzan books have been like for the last couple years. I'm so doing a Tarzan comic book project right now, and they are warning me it's not going to sell very well. But I don't -- I don't have any information on the current sales of the books.

Q: How do you believe Tarzan stacks up against Superman in terms of a sustained commercial track record?

A: I don't think he's as popular as Superman. I don't think he has the same track record as Superman.

Q: Are you aware of the character Conan the Barbarian?

A: Yes. I'm doing a Conan project for the same publisher.

Q: When did Conan first appear?

A: In the 30's in a comic called -- in a magazine called Weird Tales, and it was serializing pulp novels written by a man named Robert E. Howard.

Q: Has Conan had the sustained success of Superman?

A: No.

Q: Are you familiar with Marvel comics?

A: Yes, I am.

Q: How would you compare Marvel comics to DC Comics in terms of their -- the success of their characters in the comic book industry?

MR. PERKINS: Objection. Relevance, and again, not in the report.

THE COURT: Where are you going with this in comparison to Marvel and DC Comics, Counsel?

MR. TOBEROFF: I don't want to testify for the witness, but we believe that Superman at DC had two core characters. Superman and Batman, and that Marvel, which really dominated the comic book industry for quite some time, and Marvel had an assortment of characters, some of which were popular, but essentially DC for a very long time dominated the industry with Superman and Batman. This is relevant to valuing Superman as the basis for film and television --

THE COURT: Okay. Overruled.

THE WITNESS: May I have the question again? (Record read.)

THE WITNESS: Both characters have had some tremendous successes. Marvel seems to have its successes over a greater range of characters. DC has very valuable properties in Superman and Batman. And then they have another tier of characters that are not quite as successful. There have been times when each company dominated the industry. I'm not sure what else to say.

BY MR. TOBEROFF: Q: Can you tell me about Marvel's business going back to the 1970's up to the present?

A: How successful the company was?

Q: Yes.

A: Well, Marvel throughout the 60's, 1960's in comics was kind of a case of how long will it take Marvel to overtake DC. DC was the number one company in the 60's, and at one point by a very wide margin, and over the years, Marvel chipped away at their success to the point where -- it's arguable at what point they actually passed them because there's different measures, but certainly by the early 70's, Marvel had eclipsed DC and was the dominant company in the marketplace.

Q: Did Marvel go bankrupt at one period of time?

A: Marvel at one point had a bankruptcy, yes.

Q: When was that?

A: Late 80's, early 90's. I'm not sure.

Q: What is the stature of Marvel in the industry – the entertainment industry today?

A: It's a very healthy company as far as I can determine. Very successful. They are dominating a lot of the publishing. They are dominating much of the media. They are producing their own motion pictures, and they have quite a few of them coming out based on their properties. Seems to be a very successful company now.

MR. PERKINS: Objection, your Honor. Foundation.

MR. TOBEROFF: I have no further questions.

THE COURT: Very well. Counsel, cross-examination. And I will sustain your objection on foundation on the health of the company.

MR. PERKINS: Thank you.

CROSS-EXAMINATION

BY MR. PERKINS: Q: Good afternoon, Mr. Evanier. This morning when you went through the list of your credits and the characters that you worked on, you omitted a character, didn't you?

A: I omitted lots of characters.

Q: You omitted the character Groo, G-R-O-O, the Wanderer; is that correct?

A: Yes.

Q: And that's a character that you co-created; isn't that right?

A: No, I did not.

Q: You did some writing on that character?

A: I write on -- I contribute to the character, yes.

Q: And as a result of your involvement with Groo the Wanderer, you also have a business relationship with Mr. Toberoff and his film company; isn't that correct?

A: Not with -- I don't think Mr. Toberoff has a film company.

Q: Do you have a relationship, a business relationship with the company called IPW?

A: I don't think so. I don't think you'd call it a business relationship.

Q: Mr. Evanier, you recall having your deposition taken on March 30, 2007?

A: Yes, I did.

Q: When you were having your deposition taken, did you testify under oath?

A: Yes, I did.

Q: And when you were testifying, did you testify truthfully?

A: I believe I did.

Q: At page 37, beginning at line 3 of your deposition, do you recall making the following statement and then answering the following questions?

THE COURT: Wait. You said page 37 --

MR. PERKINS: Line 4:

"And then, as you know, Mr. Toberoff and I had a relationship relating to the comic book character Groo the Wanderer that I'm involved with.

"QUESTION: What was that relationship?

"ANSWER: Well, at the moment we are developing a screenplay with a company that Mr. Toberoff is affiliated with."

Do you recall that testimony?

A: I believe I do, yes.

Q: Was it truthful?

A: Yes.

Q: There is in fact an agreement between a company affiliated with Mr. Toberoff and the rights relating to Groo the Wanderer for exploitation of motion pictures; isn't that correct?

A: Yes, there is.

Q: And you stand to benefit financially if the motion picture is exploited; isn't that correct?

A: If the motion picture is made, yes.

Q: And you know the financial terms under which the Groo the Wanderer comic book character is to be exploited; isn't that correct?

A: I actually don't remember the exact terms.

Q: Well, is there an option payment?

A: Yes.

Q: What is it?

A: I don't know. I don't remember.

Q: Is there a purchase payment in the event a motion picture goes forward?

A: I don't know.

Q: In the event a motion picture is made, is there a gross first dollar participation in that agreement?

A: I don't know the answer to that.

Q: Now, Mr. Evanier, you consider yourself an advocate for comic creators' rights; isn't that correct?

A: I would say so, yes.

Q: And on occasion, you've taken it upon yourself to right perceived wrongs that have taken place in the comic book community; is that right?

MR. WILLIAMSON: I'm going to object, your Honor. Vague and ambiguous.

THE COURT: Do you understand the question?

THE WITNESS: I'm not a hundred percent sure I do.

THE COURT: Why don't you rephrase, Counsel.

BY MR. PERKINS: Q: Mr. Evanier, do you recall at page 70 of your deposition being asked the following question and giving the following answer? Page 70, line 5:

"QUESTION: Have you in the past taken it upon yourself to right wrongs that you perceive to have taken place in the comic book community?

"ANSWER: Occasionally, yes."

Do you recall that testimony?

A: Yes, and phrased that way, the answer to the question is yes.

Q: Were you testifying truthfully?

A: Yes.

Q: You've given some testimony today, Mr. Evanier, concerning what I think you termed the decline of popularity of the Superman character in the 1970's.

Do you recall that testimony?

A: Yes.

Q: And your testimony with respect to the popularity of Superman has been limited to his popularity in comic book sales; isn't that correct?

A: Yes. Well, no. I take that back. I mentioned the – I talked about the decline of the motion pictures. Are you talking about a specific time period?

Q: I'm talking about the 1970's.

A: Well, okay. In the 70's, I did talk about the additional failure of the Super Friends cartoon show. And I talked about the bad reception for the 1975 Superman television special.

Q: Now, in 1972, do you know how many Superman titles were being published by DC Comics?

A: I can figure it out if you give me a minute. They were publishing Superman. They were publishing Action Comics. They were publishing ad -- '72. Superman -- Supergirl was in adventure comics in '72. Jimmie Olson was still being published. Lois Lane was still being published. There was a -- World's Finest comics was being published, and that was featuring Superman every month.

I can't -- I can't swear that's a complete list.

Q: What about Superboy?

A: Superboy was being published in '72, yes.

Q: How about Justice League?

A: Justice League was being published in '72, yes, I believe.

Q: Do you know, as you sit here today, what the average monthly sales combined of these Superman titles were in 1972?

A: I can't give you a number.

Q: How about 1971?

A: I can't give you a specific number, no.

Q: How about 1973?

A: No. I don't have a specific number.

Q: 1970?

A: No.

Q: You are aware, aren't you, that notwithstanding your testimony of decline, in 1972, the Superman titles were still outselling the Batman titles; is that right?

A: There were a lot fewer Batman titles.

Q: Were the Superman titles outselling the Batman titles?

A: The seven or eight Superman titles were outselling the three or so Batman titles, yes.

Q: Right. So the market was able to sustain seven or eight Superman titles; correct?

A: In '73, they were still publishing, yes.

Q: And in 1972, the Superman titles were outselling the X-Men titles; isn't that correct?

A: In '72, yes. Well, X-Men was in one comic, but yes.

Q: And it was also outselling Iron Man; is that correct?

A: Could I have the whole question?

Q: The Superman titles were outselling the Iron Man titles?

A: The Iron Man was in one comic, and Superman was in multiple comics.

Q: What comic titles were outselling Superman in 1972?

A: I believe the Richey Rich line was outselling --

THE COURT: I'm sorry. What?

THE WITNESS: Richey Rich. I believe the Archie line was outselling Superman in 1972. Casper the Friendly Ghost may have been also.

BY MR. PERKINS: Q: Caspar the Friendly Ghost -- was that a popular comic book character?

A: For many years it was, yes.

Q: And Mr. Toberoff didn't ask you about that. Well, let me ask you.

Do you compare that favorably in terms of sustained success to Superman?

A: I don't think it's anywhere in Superman's league. It's had its moments of success. It hasn't been published as a comic book in a long time.

Q: Now, are you familiar with the expression or the phrase Q rating?

A: Yes.

Q: Can you explain to the Court what that is?

A: Well, I know it mostly in conjunction with television networks. They will do surveys to determine the popularity of characters, how familiar people are.

They also do this with celebrities. There are Q stores for various actors, franchises, shows, products. They -- it's a survey that attempts to determine two things. It determines how well-known something is and how favorably disposed the general public is towards it.

Q: Now, in opining on the declining popularity of Superman in 1972 -- in the early 1970's, did you take into consideration Superman's Q rating?

A: I consider Q ratings to be bogus, snake oil.

Q: Is that a "no"?

A: I did not take it into account, no.

Q: Regardless of what you think of Q ratings, media exploiters, companies that exploit characters in television and motion pictures look at Q ratings, do they not?

A: I guess some do. I think most of them do not these days.

Q: How about in 1972?

A: I wasn't in the industry -- in the television industry in '72. So I'd have no experience for that.

Q: In 1973, are you familiar with how many weekly viewers were tuning in to the Super Friends animated series?

A: I can't give you a number. I know that ABC was very unhappy with the show.

Q: What's the basis for that statement?

A: People at ABC telling me that years later.

Q: But as you sit here today, you don't know what the percentage share of televisions tuning in on Saturday morning when Super Friends was showing, was being -- was tuned in to Super Friends?

A: No. I'm assuming it was low because they canceled the show.

Q: When did they cancel the show?

A: Well, they canceled it almost -- well, they canceled it almost immediately. They ran the entirety of the first 12 that were made. Or there may have been 18 at the time. They ran it for one season, and they stopped production on it.

Q: So in 1973, do you know how many homes were tuning in?

A: No, I don't know the number.

Q: Mr. Toberoff took you through a list of comic book characters or comic book properties that he asked you to compare to Superman. And I wanted to ask you a couple questions about a couple of them.

You testified, I believe, that Men in Black was not a very popular comic book title; is that correct?

A: I believe I testified that it was not well-known at that time. It was a relatively new property at the time.

Q: And are you familiar with whether or not it was a successful motion picture?

A: I believe it was a successful motion picture.

Q: And you testified that Iron Man in your opinion was not well-known when the Iron Man motion picture came out recently; is that correct?

A: Could I have that one more time, please?

Q: Is it your opinion that the Iron Man property was not well-known when the most recent motion picture came out?

A: It was not that well-known compared to the other properties -- some of the other properties we've been talking about like Superman and Batman.

Q: Are you familiar with how Iron Man did at the box office?

A: I can't give you the numbers, but I heard it did very well.

Q: With respect to Lois and Clark, do you know how many episodes of Lois and Clark were produced?

A: There were four seasons, I believe. So you're talking about roughly 20 episodes per season.

Q: Do you have any knowledge based on your experience as to how in 1997 television producers gauged the success of their programs?

A: Yes.

Q: And how did they gauge its success?

A: They look at ratings and the demographics of the audience and the ratings. They look at the profitability of the show.

Q: Do you know what the Lois and Clark ratings were in the first season?

A: No, but it was renewed. So they can't have been too bad.

Q: How about the second season?

A: I don't know the specific ratings.

Q: Do you know the ratings in any season of Lois and Clark?

A: No, I don't.

Q: So your assessment that Lois and Clark was successful was based upon information that does not include the ratings; correct?

A: It's based on the assumption that the ratings had to be good enough to get it renewed year after year.

Q: Now, you have not, in connection with formulating opinions in this case, performed any formal audience surveys to determine what creates interest in a Superman motion picture; correct?

A: None.

Q: And your opinion in this regard is based solely on your anecdotal interactions with people in the comic book community; isn't that right?

A: Could I have the whole question again? Let me have the first part and the second part which referenced the first part. (Record read.)

THE WITNESS: The answer to your question is I formulate my opinions based on observation of the industry, what they are publishing, what they publish more of. Yes, there is anecdotal information involved, but it's also reading articles about the success of things. I don't have to -- I don't have to conduct a survey to know that a very successful movie was very successful.

BY MR. PERKINS: Q: When you are referring to the industry, you mean the comic book industry; correct?

A: Not necessarily. I'm talking about the -- depends on the question. In some questions I'm talking about the entertainment industry. When I'm talking about the success of a motion picture, I'm not talking about the comic book industry exclusively.

Q: Well, what about with respect to your opinion as to the recognition amongst the public of Superman's popularity?

A: That's observation from appearances. That's seeing how the character appears in various media. That's anecdotal as well. I think it's kind of well-known that people know who Superman is.

Q: Now, in your experience has popularity of a given title or character in the comic book industry automatically translated into popularity outside of the comic book community?

MR. WILLIAMSON: I'm going to object, your Honor. Vague and ambiguous, time and place.

THE COURT: Overruled.

THE WITNESS: Could I have the question again, then. (Record read.)

THE WITNESS: Automatically, no.

BY MR. PERKINS: Q: Sometimes it does, and sometimes it doesn't; is that right?

A: Yeah, it's like, you know, you could have, say, a big movie star. People love him. They want to see his movie. That doesn't mean they will see every single movie he's in.

Q: Now, you have not reviewed the terms, the financial terms of any Superman motion picture agreement that's at issue in this case; correct?

A: That's correct.

Q: So with respect to, for example, the 1974 motion picture agreement between DC Comics and the Salkind folks, you have no idea how much value DC comic was able to obtain for its license of Superman motion pictures; correct?

A: That's correct.

Q: And similarly, you have no idea how much the DC Comics was able to obtain in value from Warner Brothers in connection with the more recent motion picture agreement?

A: I have not seen those contracts, correct.

Q: And your opinion, therefore, as to the alleged declining value of Superman in the early 1970's does not purport to opine as to whether that decline in value in any way affected the financial terms in the 1974 motion picture agreement; correct?

A: I don't believe I said anything to that effect.

Q: This morning, before the lunch break, I believe you testified that in your view, one of the reasons for the alleged decline of the Superman franchise in comic books in the early 1970's was that some of the actual issues were not very good; isn't that correct?

A: That's my opinion, yes.

Q: And isn't it fair to say that if a bad motion picture starring Superman were produced, that that also would have a deleterious affect on the value of Superman?

A: No, I don't think that follows logically at all.

Q: Now, do you know what the grosses were --

A: Excuse me. May I amend something I just said a minute ago? Is that all right? Am I allowed to go back? I said that I felt that the comic books were not very good. I also said that I think -- I emphasize I felt that the comic books were missing the point of the character for a time there. They were -- they were not being true to the soul and core of the character. And they were demeaning the character in many ways.

THE COURT: You've testified that there have been comic books that have not done well in terms of popularity that have translated well to the screen as movies.

THE WITNESS: Yes, there's no automatic formula here.

THE COURT: And now you've just testified that a use of a bad movie, but a poorly received movie does not necessarily affect the followship of the comic strip? Am I understanding you correctly?

THE WITNESS: I'm sorry. If you could ask that one more time?

THE COURT: I guess what I'm gathering from your testimony is that you are suggesting that there is not necessarily a correlation between the success or popularity of the comic strip and the success and popularity of the movie and vice versa.

THE WITNESS: No, I'm not testifying to that. I believe that if you base a movie on a very popular comic book, you'll have a greater chance of success. That doesn't mean it's guaranteed to be a success. You can take a best-selling

novel and turn it into an unsuccessful movie. But to start with a best-selling novel gives the motion picture a better chance of success.

THE COURT: And is there any formula or calculus that you are aware of using empirical data that can measure this, or is this kind of anyone's guess?

THE WITNESS: If I could figure out a formula, I'd be running a studio right now.

THE COURT: Fair enough. You and me both. So I guess the bottom line is there is no such formula.

THE WITNESS: One of the interesting things about -- well, comic books and movies, is that there's a certain amount of crap shoot involved in this. You're putting out your best efforts. You put in the best elements and get the best script you can. You get the best stars you can, and you get the best underlying property, and you hope to succeed with it. And if you do a bad job, people don't go see it. I've done shows that people didn't watch because we didn't do as good as possible a job on it. And I've done shows that people have liked and enjoyed because somehow we locked into the right elements, or somebody was skillful.

THE COURT: Or you got lucky.

THE WITNESS: Yeah, we got lucky.

THE COURT: All right.

BY MR. PERKINS: Q: Mr. Evanier, going back to your comment about some of the comic book titles in the early 70's having missed the point of the character, is it your opinion that Superman 4 missed the point of the character?

A: I think Superman 4 was just a bad movie. And I have to honestly tell you that when it first came out, everybody told me not to go see it. I didn't watch it until a year or two later. I saw it at a screening at a convention a few years later, and it's kind of let's all go laugh at that movie. They all thought it was corny. And it probably missed the point of the character in the sense of being preachy and making Superman kind of an unpleasant character.

So I guess yes, in that context it did miss the point of the character.

MR. PERKINS: I have nothing further, your Honor.

THE COURT: Very well.

REDIRECT

BY MR. TOBEROFF: Q: You mentioned that having a famous comic book character in a movie did not necessarily guarantee success in the movie. Does it, in your opinion, dramatically improve your chances of success?

A: Certainly.

MR. TOBEROFF: I have no further questions on redirect.

MR. PERKINS: I have just one cross on that, your honor.

BY MR. PERKINS: Q: Mr. Evanier, in your years as a comic book expert, have you ever done any formal study of what comic book characters have and have not been successful in a motion picture?

A: A formal study? I don't know what that means. Can you ask a more specific question? Can you -- I don't know what that means exactly. A formal study? I don't know if there have been any formal studies.

MR. PERKINS: I have nothing further.

THE COURT: Very well. You are excused.

Plaintiff's next witness.

MR. TOBEROFF: Plaintiffs call Alan Horn.

THE CLERK: Please come forward and stop next to the court reporter. Please raise your right hand.

ALAN FREDERIC HORN, SWORN.

THE CLERK: Please take the stand. Please state your full name for the record and spell your last name.

THE WITNESS: Alan Frederic Horn, H-O-R-N.

THE COURT: Counsel.

DIRECT EXAMINATION

BY MR. TOBEROFF: Q: Good afternoon, Mr. Horn. You serve as the president and chief operating officer of Warner Brothers Entertainment?

A: Yes.

Q: And you have held that position since October of 1999 when you began that position?

A: Yes.

Q: Did you recently renew your contract with Warner Brothers?

A: It's not signed yet, but yes.

Q: Now, you oversee all of the studio's theatrical film operations?

A: I do.

Q: Do you oversee Warner Brothers Pictures Group, which includes worldwide motion picture production, distribution, and marketing?

A: Yes.

Q: Your oversight also includes New Line Cinema?

A: Yes.

Q: You also oversee all the studios home entertainment operations?

A: Yes.

Q: In terms of motion pictures, you oversaw Warner Brothers' successful Harry Potter films; is that correct?

A: Yes.

Q: And you also oversaw the 2005 Warner Brothers movie Batman Begins and the 2008 movie The Dark Knight?

A: Yes.

Q: You also oversaw the 2006 Warner Brothers film Superman Returns?

A: Yes.

Q: And you are hands on with respect to these movies?

A: I am.

Q: You are involved with the development of these movies?

A: At a certain stage, yes.

Q: And you are involved with the choice of talent or leading talent to direct and act in such movies?

A: Yes.

Q: Now, when you joined Warner Brothers in 1999, one of your key objectives was to reboot the Batman and Superman film franchises. Isn't that so?

A: Yes. One of them.

Q: You viewed Batman and Superman as two of Warner Brothers' key properties?

A: Yes.

Q: I'd like to show you what has previously been admitted as Plaintiff's Exhibit 279.

MR. WILLIAMSON: I've got copies.

BY MR. TOBEROFF: Q: I'd like to draw your attention to Bates marked DCC 52118.

A: I have it.

Q: If you see the third bullet point, it says, quote, Batman and Superman are the most famous and valuable superhero brands in the world, unquote. Do you see that, Mr. Horn?

A: I do see it, yes.

Q: What does Warner Brothers mean in calling Superman a valuable brand? What's meant by that?

A: Well, I didn't write this and have not seen it, but Superman is one of the iconic brands that belonged to DC Comics along with Batman and a number of others.

Q: What does it mean when you refer to a literary property as brands?

A: It means there's a public awareness of it. An awareness out there that means that if we were to exploit the property, that there would be some understanding of it, knowledge of it, perhaps anticipation of it.

Q: And how does that preawareness help you when you exploit a property as a film or TV show?

A: Well, when we introduce a film or TV show into the marketplace, we have to first get awareness that it exists in the first place, and then interest in seeing it if it were to be property to the screen or to television, and then, you know, hopefully it would be a first choice or second choice among those who would go and see such a movie or television show.

So if a property is already known, it helps us in gaining the first objective, which is awareness.

Q: I'd like to turn your attention to another page in this document, Bates No. DCC 52089.

Do you see the heading, it says classic brands, Superman?

A: I'm not there yet. Yes.

Q: I'm giving you a copy of the document as a whole so you have it in paper form. But then when we turn to a page, we're putting it up on your screen automatically to make it easy for you.

A: I see. Thank you.

Q: Underneath the title Theatrical Brands, Superman, it says theatrical, dash, brands. Now, when it says theatrical-brands, does this mean a brand for film exploitation?

A: Well, I assume so.

MR. PERKINS: Your Honor, objection. The witness's answer indicates that he may not have read this document. And that should be established.

THE WITNESS: I have never seen this document.

THE COURT: Let's lay a foundation.

BY MR. TOBEROFF: Q: The foundation is that –

THE COURT: Not with me, with the witness.

BY MR. TOBEROFF: Q: Excuse me. I thought you asked me what the foundation was.

THE COURT: Right.

BY MR. TOBEROFF: Q: This is a Warner Brothers document. Correct?

A: Well, it has the Warner Brothers logo on it. I have never seen it.

Q: Do you have any reason do believe that it is not a Warner Brothers document?

A: No.

Q: Do you have any reason to believe that this document was not prepared by Warner Brothers employees?

A: No.

Q: Looking at this document, you might at this point want to look at the document as a whole. What division of Warner Brothers do you believe prepared this document?

A: I don't know. It could be prepared by someone in the theatrical group. It could be prepared by someone at – in our public relations group or communications group. Corporate communications.

Q: The chances are either the theatrical film department or the promotions department?

MR. BERGMAN: Objection. Leading.

THE COURT: I wouldn't describe this exactly as a friendly witness, Counsel. Overruled. No offense. But from a legal perspective.

THE WITNESS: May I have some water, please?

THE COURT: Of course.

BY MR. TOBEROFF: Q: So my question is that this would likely either have been prepared by, based on your testimony, the theatrical film department or a marketing arm of Warner Brothers?

A: Or the corporate communications group.

Q: Thank you. I'd like to show you what has been previously admitted as Exhibit 293. It's a document entitled Warner Brothers Superman Cross-Divisional Meeting, September 19, 2005. What would be meant by the title Warner Brothers Superman Cross-Divisional Meeting?

MR. BERGMAN: Objection. Foundation.

THE COURT: Sustained. Let's make sure the witness is familiar with the document that you're showing him.

BY MR. TOBEROFF: Q: Are you familiar with the document that I'm showing you?

A: No, I'm not.

MR. TOBEROFF: Your Honor, I'd like to ask the witness questions about information contained in this document as the head of the studio. He may not see every document at the studio, but it's a Warner Brothers document produced by defendants in this case.

THE COURT: You can ask him about the document. But in terms of the meaning of it, if he doesn't have a foundation, he doesn't know.

MR. TOBEROFF: I'm not asking what was intended by the author of the document as opposed to what these various statements mean in terms of Warner Brothers's business.

THE COURT: That, you have to have a foundation for, Counsel. You can ask him if these statements are true, if he would adopt them as his own. You can use anything to do that.

But without a foundation, without establishing that he understands what this document is, even, I can't have you question him on the document itself.

If you want to use it as a guide to go through and ask him some other questions, that's fine.

MR. BERGMAN: Also, if your Honor please, the document is dated September 2005. Which is three years after the agreement.

THE COURT: I'm mindful of that as well. Although that would go to the weight of the evidence of whether it's still a true statement, et cetera.

Go ahead, Counsel.

BY MR. TOBEROFF: Q: Now, I'd like you to turn to the page Bates No. DCC 52118, entitled DC Comics History and Worldwide Reach.

THE COURT: Counsel, this must be a new document that you're looking at. This document only goes up to 51711.

MR. TOBEROFF: Pardon me. Page 2 of the document, Bates No. DCC 51692.

THE WITNESS: Okay.

THE COURT: And just for the record, we're referring to Exhibit 293 here; is that correct?

BY MR. TOBEROFF: Q: It states --

THE COURT: Counsel, is that correct? 293?

MR. TOBEROFF: Yes.

Q: DCC 51692 contains a statement: "Superman has been and continues to be a staple for many businesses across the studio."

As of 2005, would you agree with this statement?

A: No.

Q: So in 2005, when this was written by Warner Brothers, it was incorrect?

A: I'm just saying I wouldn't agree with it. I don't know who wrote it, and I have never seen this.

Q: Okay. Now, if you'd turn to the next page, which we'll bring to your attention on the screen. It's DCC 51693. It states at the top of the page: "With the release of the new film next year, Superman is poised to become the broadest reaching tent-pole property for the company, its partners, and consumers."

Do you see that?

A: I do.

Q: What is meant by a tent-pole property?

A: A tent-pole property is one that is -- it's one of four or five a year that the studio hopes will be large enough and significant enough and profitable enough that it will be a, you know, of very, very significant importance to the company. It usually refers to a film. A tent-pole film. And that's a film that would resonate globally and would be what we call a four quadrant film, which would be young, old, male, and female so that it would resonate across different quadrants and appeal to an audience on a worldwide basis.

Q: And an anticipated film in 2005 was Superman Returns?

A: Yes.

Q: And the tent-pole property was Superman?

A: Yes.

Q: And why, again, do they call it a tent-pole picture?

A: Well, again, this was written before the picture was released, but the anticipation evidently, and I've never seen this, was that Superman would qualify as a tent-pole property, which would mean it would have -- it would command a global audience and appeal to a very, very broad and diverse audience, including, as we say, young, old, male, and female.

Q: You are familiar with the trade paper Variety?

A: Yes.

Q: And you've been interviewed by Variety's long time but now former editor, Peter Bart?

A: From time to time, yes.

Q: Why are you referred to as the Titan of Tent Poles by Mr. Bart?

MR. BERGMAN: Objection. Hearsay.

THE COURT: I don't know if it's going to the truth of the matter asserted, but we'll see.

THE WITNESS: Well, Peter, who I think was trying to be amusing and alliterative at the same time, called me that because when I came to Warner Brothers in 1999, the company had not done many tent-pole movies as I've just loosely sort of defined them. So in 2000, for example, we had one tent-pole movie, The Perfect Storm. And in 2001 we had two, Harry Potter and Skooby Doo. In 2003, we had three. Matrix, Terminator, Matrix.

So I've been trying for my part of it to build the studio to a place where we would have four or five such movies a year.

BY MR. TOBEROFF: Q: It's your objective, when you joined the studio, to focus more on tent-pole pictures; correct?

A: No, my intention was to come up with a balanced release slate that would include four or five tent poles a year. We have 27 releases this year, for example. So we have a lot of movies. But I wanted to, if I could, provide for a slate that would include four -- three, four, five a year of tent poles.

Q: Is Warner Brothers making fewer and bigger movies? Would that be a fair characterization?

A: No, sir. As I said, we have 27 releases this year. So I wouldn't say -- there has been an objective to make fewer movies and perhaps bigger movies. It does feel like that's a direction in which to go, given the competitive environment.

But when New Line was merged into Warner Brothers, we found ourselves with another sort of mini studio merged into us. So we found that it's a little hard to get below roundly 25 a year.

Q: And you had an independent film division, I believe it's called Warner Independent?

A: Warner Independent Pictures, yes, sir.

Q: And that was recently closed?

A: Yes.

Q: And you had another independent film company?

A: Picture House.

Q: Picture House Entertainment? Was that closed also?

A: Yes.

Q: When was Warner Independent and Picture House closed?

A: In early 2008, I believe.

Q: And was that part of a strategy to make fewer and bigger pictures?

A: Not really. If those pictures had been incrementally profitable to our overall objectives or our overall movie slate, we would not have closed them down. But we found that the business of being an independent film, that is, small film, pictures with budgets of 10 million or less, let's say, was proving to be not profitable for us. We just couldn't justify it.

Q: Now, prior to its -- the release of Superman Returns in 2006, going in, you viewed Superman Returns as a major tent-pole picture; is that correct?

A: I had hoped it would be, yes.

Q: And you had authority -- you have authority to green light Warner Brothers' tent-pole pictures?

A: I do.

Q: And to green light a picture, means to decide to actually make the movie?

A: It does.

Q: And you decided to make Superman Returns for a 2006 release?

A: Yes.

Q: What was the approximate budget of Superman Returns when you green lit the picture?

A: Approximately $200 million.

Q: Are you aware that defendants hired a financial expert in this case by the name of Franklin Johnson?

A: No.

Q: Are you aware that Mr. Johnson served a rebuttal report in which he concluded, based on your financials, that the budget of the actual amount of money invested in the Superman Returns negative was $225 million?

A: No.

Q: Do you have any reason to believe that that – your expert's finding is incorrect?

A: I don't recall the exact number, but my recollection is it was roundly $200 million.

Q: And what was the approximate expenditure on prints and advertising in connection with Superman Returns?

A: I don't recall the exact number, but my guess, given the -- given the magnitude of the negative cost, would be roundly a hundred million to 110- worldwide.

Q: Again, Mr. Johnson pegged the total print and advertising cost of the figure at 147 million. Do you have any reason to believe that that -- his assessment is incorrect?

A: It sounds a little high to me, but it's possible.

Q: For a tent-pole picture, what is the average budget?

A: I would say $150 million or more.

Q: And what would be an average print and advertising expenditure for such a picture?

A: Roundly a hundred million dollars.

Q: Now, you oversaw the development of a new Superman movie from 1999, when you joined Warner Brothers, to 2006, when Superman Returns was released; is that correct?

A: There were a number of drafts of -- a number of approaches to reintroducing the Superman character. I oversaw them, yes.

Q: And you oversaw them during the period you arrived at the studio to the release of Superman Returns?

A: Yes.

Q: In green lighting Superman Returns and spending the money that was spent on both development, production, and in marketing, you viewed Superman as a prime candidate for a new film franchise; is that correct?

A: So I had hoped, yes.

Q: In fact, Superman is what you would call a – Superman Returns going in was what you would call a big franchise event movie; is that correct?

A: I would call it a tent-pole movie.

Q: What is meant by franchise event movie?

A: Well, an event movie and a tent-pole movie in my view are synonymous. A franchise movie would be one that would be potentially sequelable. For example, Troy was a tent-pole movie, but we don't see it as being -- as having sequel potential. But The Dark Knight and Batman, you know, Batman Begins are part of a franchise that may be replicated or have different incarnations of them.

Q: So a tent-pole movie -- tent-pole movies are often franchises, but not necessarily?

A: Yes.

Q: And a franchise is a movie that can also hopefully be exploited by Warner Brothers on multiple additional platforms by its various other divisions, including new media, merchandising, and other forms of exploitation in addition to the film itself?

A: Along with other tent poles, yes.

Q: Now, comic book franchises like Batman and Superman already enjoy significant brand awareness?

A: Yes.

Q: 1978 to 1986, four Superman films were released; correct?

A: I know there were four prior to Superman Returns, yes.

Q: And the first Superman movie, starring Dick Donner -- excuse me. Directed by Dick Donner and starring Christopher Reeves is considered a huge hit; correct?

A: I wasn't at the studio then. I don't -- I don't recall the numbers. It was certainly -- it's certainly thought to be a successful movie, sure.

Q: And before you invested the money in Superman Returns, did you look at the success of the prior Superman movies?

A: I looked at the last one, Superman 4, and was frankly daunted by the fact that it had done something like $15 million in the entire U.S. and Canadian box office, and I thought that was frightening.

Q: And Superman 4 is widely considered one of the worst movies ever made; correct?

A: Well, again, you have to ask people, but I know that the box office results were a little scary for me.

Q: Did you see the movie?

A: Yes, I did.

Q: What's your opinion about the caliber of that movie?

A: It's been a while since I've seen it. I think it was over 20 years ago. But I don't recall thinking it was going to make the time capsule or anything.

Q: And based on your review, green lighting Superman Returns, your understanding was that Superman 1 was extremely successful. Superman 2 was also successful but a little less than the first Superman movie. And that Superman 3 was less successful than Superman 2; is that correct?

A: I think that's a fair relative ranking of the movies. I just felt that the franchise had gone downhill, and I thought that it was a little scary.

Q: Between 1989 and 1997, Warner released four Batman films; is that correct?

A: Well, now, I'm not sure. But if that's the fact, it's the fact. I don't recall. I know there were a number of Batman films, yes.

Q: But you are aware that the first Batman movie in 1989 was extremely successful.

A: I'd have to see the numbers, but I don't have any reason to doubt that.

Q: And that the second two Batman films after that were less successful than the first but also profitable?

A: I don't recall the Batman movies as well in terms of their relative ranking, and I can't address their profitability because I don't know. I wasn't there and didn't know the cost structure at all. I don't know what they cost or any of that.

Q: And what was the fourth Batman movie in that franchise in the late 80's?

A: I don't recall. But I know there was -- there was a Batman movie also, and I will say that in green lighting a new Batman movie and a new Superman movie, I had similar concerns with each, that the franchises had been played out, and I considered each to be challenging for that reason.

Q: And to refresh your -- in an attempt to refresh your memory, the title of the fourth Batman movie was Batman and Robin, which was released in 1997?

A: Was that the George Clooney one?

Q: Yes.

A: Yes.

Q: Now, the George Clooney one was also widely considered a flop like the fourth Superman movie; is that correct?

A: Well, I was just trying to identify it. I know that the results for the last Batman or two were like Superman, disappointing, but I was not at the studio. I haven't seen the numbers or any of that.

Q: Are you aware that Batman and Robin was panned by the critics?

A: I don't recall.

Q: Are you aware that it was financially unsuccessful?

A: I have not seen the numbers. It would not surprise me.

Q: Now, Sony released a picture called Men in Black in 1997.

Are you familiar with that picture?

A: I saw that move.

Q: And you are aware that was based on the comic book; correct?

A: I'm not even aware of that. I'm sorry.

Q: You are aware that it was a very big hit; is that correct?

A: Yes.

Q: And then in 2000, Fox released X-Men, and that's also -- you're aware that's based on a comic book?

A: Yes.

Q: And that was extremely successful as well?

A: Yes. I can't address profitability, but I think it justified sequels. They have one coming out this Friday.

Q: And in May of 2002, Sony released Spiderman, and that was a huge hit; correct?

A: Yes.

Q: Now, do studios track each other's development of films?

A: Yes.

Q: So at what point was Warner Brothers aware that Sony was developing a Spiderman movie to be released in 2002?

A: I can't address when Warner Brothers became aware of it. I wasn't aware of it until it appeared on -- maybe it was brought up at a development meeting or something, but I really became aware, I'm sorry to say, when I saw it on a release schedule. I'm -- we sort of operate, you know, independently.

Sony's decision would not really influence -- would not have influenced our decision about whether or not to make any movie.

Q: And when you said you saw it on a release schedule, how much in advance -- how long in advance of the film's release does a release schedule come out?

A: It depends. With a tent-pole movie, a studio might try to stake out the date and announce in advance that they were going to take, you know, July of 2011, for example, and hopefully, because it would be the kind of movie that would have a broad and diverse appeal and global appeal, that it might scare away the other studios from trying to have another tent-pole or one of their tent poles on the same date.

So I'm sorry to not answer this directly. So it could be as brief a period of time as six months or as long a period of time as two years.

Q: You track these release schedules so you can better decide when to release competitive movies?

A: People who report to the person who now reports to me do that. They have what they call daily meetings, and I attend many of them. They go through competitive release schedules and try to figure out a way to put a movie out on a date where there's either the, you know, the least competition possible or

counter programming, a movie that might appeal to an older female audience as opposed to one that might appeal to a young male audience.

Q: So we have Men in Black coming out in '97 and then there's another one I didn't mention, Blade came out in – it was a new line film, which was part of the Time Warner Company at the time and now absorbed in Warner, released Blade successfully and X-Men in 2000 and Spiderman in 2002.

Why do you think the studios were so keen on comic book characters at the time?

MR. BERGMAN: Objection. Calls for speculation, your Honor.

THE COURT: Let's lay a foundation.

BY MR. TOBEROFF: Q: Well, when you develop movies, you are developing movies to appeal to the public; correct?

A: Yes.

Q: And you do certain demographic studies as to what people are interested in?

A: Yes. Sometimes.

Q: And you formulate strategies for developing what you believe will be successful movies at one particular time as compared to another particular time?

A: That's fair.

Q: So given that, why do you think the studios at this period were so keen, including Warner Brothers, on developing movies based on comic books?

A: Well, I can only speak for Warner Brothers. And I will say that we are keen to develop tent-pole movies in the number that I have already mentioned, four or five a year.

By the way, the reason it's not more than five a year is that it's not like you can just do ten. It's because to spend that kind of money on a negative cost and on the releasing cost, it's helpful to have an audience available to see them. And the time to do that is usually May, June, July, November, and Christmas.

So it's hard to find a time when there's a big enough audience available to go and see any movie. But speaking for ourselves, we, in the quest to find tent-pole movies as I've defined them, we look at all resources, including properties that have potential for a tent-pole acceptance.

For example, we're developing a Tarzan movie now, which would satisfy the criteria we've been discussing, and likewise, a comic book character that has a built-in awareness, like Batman carries with it an appeal because that initial threshold of getting an audience to even be aware that it exists would be largely satisfied. So comic books are one of those things. I mean, Harry Potter has nothing to do with a comic book, but it was widely known and qualified as a property that contained built-in awareness because the books had exploded in the public consciousness.

THE COURT: What did you mean by negative costs?

THE WITNESS: I'm sorry?

THE COURT: Did you say "negative costs"?

THE WITNESS: Negative costs is the cost of making the movie. And releasing costs is the print and advertising costs associated with that.

THE COURT: Very good. Counsel.

BY MR. TOBEROFF: Q: Do you believe that starting in the mid to late 90's and moving into 2000, 2001, there was an increase in focus on producing and releasing what you would call franchise films?

A: I don't know from my memory what the other studios strategies or philosophies have been. But I think it's fair to say that with the emergence of the international component of the marketplace as being more important with the – the emerging of it as being more important, and with the number of movies made and released each year, having a movie that strongly resonates in the marketplace, like one of these tent-pole movies, is a desirable objective if it works.

I mean, you could also do Speed Racer, which we thought would be one of those and lost a fortune.

Q: And again, to focus on franchise films, why during this period were studios focusing more on franchise films or franchisable properties? Was it because of the preawareness in the foreign market?

A: I wouldn't say because of preawareness in the foreign market. I would just say that the foreign market is a component of the potential audience that became increasingly important as time went on. I mean, it just -- we're looking to do as well as we can. And again, I can't speak for other studios. I can only speak for ourselves.

Q: When I'm asking about other studios, I'm asking about your perception as to other studios, not the fact of what's going on –

A: My perception is that every studio has recognized the importance of so-called tent-pole properties and as part of a release schedule. As I say, we're talking about four or so a year.

Q: And as part of this focus is a -- there is a focus on properties as source material for tent-pole firms that have built in preawareness; is that correct?

A: It's helpful to have that, yes.

Q: Are you familiar with the term promotional tie-in?

A: Yes.

Q: What does that term mean?

A: Well, it means that in connection with the release of a motion picture, we can have different kinds of promotional tie-ins. Perhaps an advertiser like -- I'll use an example. For example, Coca-Cola might say look, we'll do a promotional tie-in and do ads that will promote your movie and at the same time sell our Coca-Cola. This was a big thing with Cadillac in the Matrix. The Matrix movies used Cadillac as a vehicle. And most of the vehicles were Cadillacs and/or General Motors cars, and then General Motors would do a promotional tie-in with that to have an advertisement, a 30-second spot or something. They said if you -- we'll give you some free cars, and we'll do some spots that will advertise your movie, and at the same time showcase our car.

So that's what I think of as a promotional tie-in. And sometimes there will be a product placement where – on Speed Racer, for example, we had hoped this would be the case. It wasn't as big as we'd like, but there were manufacturers,

Mattel would make cars, and they would say okay, maybe we can sell some of these cool-looking cars which will be showcased in your movie.

Q: Now, on Superman Returns, Warner Brothers arranged for numerous promotional tie-ins; is that correct?

A: I know we had promotional tie-ins. I don't know how many.

Q: Who were Warner Brothers' major promotional partners for Superman Returns?

A: Who what?

Q: Who were the major promotional partners of Warner's Superman Returns --

A: I'm sorry. I don't recall.

THE COURT: Counsel, why don't we go ahead and take our afternoon break here. About 10 minutes.

(Recess taken.)

THE COURT: Counsel.

BY MR. TOBEROFF: Q: Mr. Horn, I'd like to show you what has previously been admitted as Plaintiff's Exhibit 233. It's a document entitled Superman Property Overview, dated April 7, 2007. I draw your attention to the first page, which is on the screen, DCC 121077, and to the section entitled Theatrical Promotions, Domestic and International.

Do you see that?

A: I do.

Q: And underneath it says national promotions.

A: Yes.

Q: And then underneath that it says confirmed partners.

These would appear from a document to be Warner's confirmed promotional partners in Superman Returns; correct?

A: Yes, they seem to be, yes. Uh-huh.

Q: Now, on this page, it lists Pepsi, Quaker, and Frito-Lay as Warner Brothers' promotional partners on Superman Returns.

A: Yes.

Q: We turn to the next page, DCC 001210778, it lists Burger King, Samsung, Duracell, Quaker State, Perfectmatch.com, People Magazine, and Pepsico.

Do you see that?

A: Yes.

Q: And then if we go to the next page, DCC 00121079,

Wal-Mart, Albertsons, Kroger, and Heb are all listed as domestic promotional partners in Superman?

A: Yes.

Q: I'd like to draw your attention to the heading on the bottom of this page that says international promotions. Do you see that?

A: Yes.

Q: Now, these would appear to be Warner Brothers' international promotional partners on Superman Returns?

A: Yes.

Q: These pages, as we go through them, list such major partners as Pepsi, Frito-Lay, Kellogg's, Burger King, KFC, Engergizer, Hershey's, Coca-Cola, Woolworths, Proctor and Gamble, Colgate Palmolive, FedEx, L'Oreal, Matsushita, and a number of other foreign entities.

Do you see that?

A: Yes, I do.

Q: Does that refresh your recollection -- unfortunately, my question came right before the break, but I'd asked you who were Warner's promotional partners on Superman Returns. Does this refresh your recollection as to Warner's promotional partners --

A: Yes, it's helpful, sure.

Q: Warner Brothers is reported in fact to have secured over $280 million in promotional tie-ins for Superman Returns.

Does that figure sound correct to you?

A: Well, I don't know if that figure is correct or not. I'm also not sure what it means. They value these things sometimes oddly. So I don't know what that means, but it doesn't sound long. I don't know.

Q: How do they value promotional tie-ins when they put a dollar figure on --

A: Well, my understanding is that they will say well, we have a billboard up, or we have an image on a package, and we have -- there's so much foot traffic in a store, this is how many people see that. And therefore, that translates to an advertisement that you'd have to buy that would get you the same kind of exposure. I mean, it's that kind of thing.

There are people at the company that really understand this better than I, I'm sorry to say.

Q: I see. Now, switching to a different subject. You green lit Warner Brothers film Batman Begins in 2005?

A: Yes.

Q: And in green lighting this film, you viewed the Batman character as a prime candidate for a multiple film franchise; right?

A: Hopefully, yes.

Q: And Batman Begins was quite successful?

A: It was moderately successful.

Q: And it served to revive the Batman film franchise?

A: Yes, it did.

Q: Now, to your credit, you also green lit the Batman movie The Dark Knight released in 2008; correct?

A: Yes.

Q: And that was phenomenally successful?

A: Yes.

Q: And the defendants are hoping to do another Batman movie?

A: We'd like to, yes.

Q: Now, Superman Returns, looking at what they call the distributor's gross, the gross revenues received by Warner Brothers, grossed a bit more money at the worldwide box office than Batman Begins; is that correct?

A: My recollection is that they were about the same, but it may have grossed a bit more. They were both under 400 million worldwide box office, I think.

MR. TOBEROFF: I'd like to mark for identification as Plaintiff's Exhibit 333, marking this for identification purposes only, pages from the website Box Office Mojo that tracks the performance at the box office of films.

Q: Are you familiar with the website Box Office Mojo?

A: No.

MR. BERGMAN: Objection, your Honor. This was not on the witness list -- on the exhibit list, rather.

THE COURT: Counsel?

MR. TOBEROFF: Refreshing recollection, your Honor.

THE COURT: Well, let's establish that he's forgotten something first.

MR. TOBEROFF: Well, he had a --

THE COURT: Lay a foundation, Counsel. Establish that he's forgotten something.

BY MR. TOBEROFF: Q: Do you know what the box office return was for Superman Returns, the worldwide box office?

A: I don't know exactly. My recollection is that it was something in the neighborhood -- a little under $400 million worldwide box, I think. I think that's roundly correct.

MR. TOBEROFF: This has an exact figure.

THE COURT: It may or may not, Counsel. But you'd have to lay a foundation that this document would help refresh his recollection of exactly what it is. That's up to you, not me.

BY MR. TOBEROFF: Q: If I showed you the Box Office Mojo figure for Superman Returns, both the domestic and abroad, would that serve to refresh your recollection as to what the figure is?

A: I don't know what Box Office Mojo is, but my source is usually Variety. But I have no reason to doubt you, Counsel.

I'm just -- unless -- if Mojo is accurate, and it's a truthful depiction of what the box office was, it sort of was what it was.

Q: Well, Box Office Mojo reports that for the film Superman Returns, it did $200 million at the domestic box office and $391 million worldwide.

A: That sounds about like my recollection, yes, sir.

Q: And Box Office Mojo also reports that for the film Batman Begins, that film generated 205 million domestically and 167 million worldwide -- excuse me. 167 foreign for a total of 372 million.

A: That also sounds correct, yes.

Q: So Box Office Mojo did a total for Superman Returns, 391-, and for Batman Begins was approximately 20 million less.

A: Okay.

THE COURT: Counsel, I'm confused. In your statement there you referred to worldwide the first time 391-. Is that including domestic?

MR. TOBEROFF: Yes.

THE COURT: Okay. So you didn't specify out what the foreign was for Superman Returns.

MR. TOBEROFF: Yes, in my notes I hadn't broken it down.

THE COURT: So 391- total for Superman Returns and –

MR. TOBEROFF: Versus Batman Begins would be 372 million worldwide.

THE COURT: You believe that's accurate?

THE WITNESS: Yes, sir.

BY MR. TOBEROFF: Q: I'd like to talk to you about Warner's attempts to develop a new Superman movie prior to the release of Superman Returns in 2006.

Warner Brothers began developing a Superman film called Superman lives commencing in approximately 1994. Does that comport with your understanding?

MR. BERGMAN: Objection, your Honor. Lack of foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: In working on Superman Returns starting in 1999, when you came to Warner Brothers, did you familiarize yourself with past attempts to develop the Superman film?

A: Yes. I was given different drafts of screenplays that tried to reintroduce the character, yes.

Q: Now, do you recall when approximately the development from the dates of those screenplays started at Warner Brothers?

A: I have no idea. Sorry.

Q: Do you have the ability to approximate whether it was a year before you arrived in 1999 or a few years before?

A: I don't know.

Q: Now, from the time Warners started developing a new Superman movie to the production of Superman Returns, I'd like you to confirm that Warner Brothers hired the following top directors.

Tim Burton.

A: Well, I don't believe Tim Burton was hired subsequent to my joining Warner Brothers, no. And when you say hired, you don't mean committed to. I think you mean entered into a development deal with. They are different because you can attach a director to a project, pay a nominal fee, which, for example, $25,000, and have the director develop the piece. As opposed to committing to that director with a real belief that that screenplay is going to be made, which means you might lock up that director, and that might mean a bigger commitment.

So I'm not aware of -- I'm not aware of any commitment to Tim Burton on Superman.

Q: When you lock up a director, is that what's called a pay or play deal?

A: Ultimately, yes.

Q: And how does a pay or play deal work?

A: It means we say to the director we are so sure we're going to make this that we want you to reserve this time in your life to make this movie, and in return for that, we'll guarantee you that whether, even if we don't make the movie, we'll pay you your fee, which means pay or play.

Q: And is that the full fee that the director would receive?

A: Well, the director's fee can include two components. A fee for making it as against a percentage of the gross receipts. It would not include gross receipts should the movie be subsequently made by another director or something like that. But it would include that director's fee. But the cash up front fee. But these are negotiable things.

So they say may still pay you half of your fee or something like that.

Q: And for a top director, how high can that percentage of gross be?

A: The percentage of the gross? Well, Spielberg gets 20 percent of the gross. But an established first rate director, especially in this economic climate, might get 5 percent of the gross. So I would say 5 to -- Peter Jackson's quote is 20 percent, for example. We don't normally pay that kind of money.

Q: Peter Jackson's quote is 20 percent of gross?

A: That's what we hear.

Q: And before this economic climate hit earlier on in 2000, 2002, at that time period, what would a top director receive?

A: The same numbers I've quoted, but Warner Brothers, I can't remember paying a director more than 10 percent of the gross, if that's helpful.

Q: Okay. So going back to my list, I used the word hired. When I go through these list of directors, I'll replace my word hired with attached. And I'd like you to tell me whether they were attached in the more casual sense that you mentioned or put on a pay or play basis.

Tim Burton.

A: Not to my knowledge.

Q: Was he attached?

A: I understand what you're saying, Counselor. Not to my knowledge.

Q: Brent Ratner.

A: Yes.

Q: Pay or play?

A: No.

Q: J.J. Abrams?

A: I don't think so.

Q: He was attached, but not pay or play?

A: No, no, I understand. I don't think he was either attached or pay or play. In the sense that I don't believe anyone paid J.J. to enter into any any development work on Superman. But I may be wrong because we have other levels at the company that normally do this kind of stuff. And I would get more involved when it comes to the bigger commitment, which is when we want to lock in this person or we'd like you to green light the movie or this is who we'd like to play Superman. You know, I would --

Q: I understand. McG?

A: Yes.

Q: And was he pay or play on the film?

A: No. But he was -- well, he may have been pay or play, but he himself withdrew, which obviated our need to pay him. He was unable to continue.

Q: So the circumstances of his withdrawal did not trigger the pay or play provision?

A: No.

Q: Brian Singer?

A: Yes.

Q: And he was made pay or play as well?

A: Yes.

Q: And at one point the actor Nicholas Cage was attached to star in Superman; is that correct?

A: Not under my regime, but -- I'm sorry I said regime. In my tenure. But I know that Nick was attached to play Superman and very much wanted to.

Q: Was he attached on a pay or play basis?

A: I think he was prior to my coming to Warner Brothers, yes.

Q: Do you have an awareness of how much money was spent on developing Superman Returns prior to the start of principal photography?

A: I don't know the exact number, but I know it was a lot of money, more than $10 million. More than $15 million. But not -- I think that's the ballpark.

Q: Does $30,000,000 sound correct to you based on your knowledge?

A: I can't confirm that.

Q: During the same period when you were continuing to develop a new Superman film, Warner Brothers was also developing a Superman versus Batman film; is that correct?

A: That is correct.

Q: How many different Superman films were being developed at the same time?

A: The way it works is we have a president of production who is responsible for development, and that person reports to the president of the motion picture group, who then -- I don't even like the word reports, but he hierarchly reports to me.

So they could have a number of screenplays in development on Superman that I would not even be aware of. But I know -- I don't wish to be unhelpful. I just say that I know that there's a Batman versus Superman screenplay being developed and a Superman lives screenplay that was still floating around.

Q: And Wolfgang Peterson was hired to direct the Superman versus Batman picture?

A: He wasn't hired.

Q: Attached?

A: He was attached, yes.

Q: Do you know whether that was on a pay or play basis?

A: I'm sure it was not. Well, I'm sorry. But I know that Wolfgang then segued into Troy, and because he did Troy, he and we agreed that any work he was doing with respect to Superman would be discarded.

So I don't know if he was pay or play and then that was switched over to Troy or whether we hadn't gotten to pay or play with him yet, and we just stopped his work on Superman and then went to Troy. I just don't recall.

Q: Ultimately, it was decided in 2002 not to make Superman versus Batman and to focus instead on the Superman film; correct?

A: That's correct.

Q: Now, switching gears a little bit, is it fair to say that you viewed Superman -- you viewed Superman -- strike that.

Is it fair to say that you view Superman even today as an evergreen source of income for Warner Brothers?

A: For different components of the character. I can't speak for the television people or for the merchandising people, for kids that want to dress up on Halloween. But I can say that my view of Superman as an evergreen theatrical motion picture property is that it is viable but not -- but challenged.

Q: I'd like to show you what's been marked as – strike that.

I'd like to show you what's been marked for identification purposes only as Exhibit 276. We have it on the screen. Exhibit 276 is a Wall Street Journal article dated August 22nd, 2008, entitled Warners bets on fewer bigger movies. The article contains quotes from interviews with Warner Brothers

Picture Group President Jeff Robinov and DC Comics President Paul Levitz. I'd like to focus on a statement in the article --

MR. BERGMAN: Your Honor, before Mr. Toberoff does that, the document is hearsay, and it's irrelevant.

THE COURT: Well, I'm not really sure -- it may very 1 well be, I just don't know what statement he's identifying and for what purpose he wants to introduce.

MR. BERGMAN: You don't know whether there's an admission against interest?

THE COURT: Okay. Let's see where it is, Counsel.

What are you referring to?

MR. BERGMAN: Thank you, sir.

BY MR. TOBEROFF: Q: I'm referring to -- it's highlighted on the screen. If you could zoom in.

On the second page of the article, in the middle of the page, it says it, meaning Warner Brothers, is focused on releasing four comic book films in the next three years, including a third Batman film, a new time reintroducing Superman, and two more films focusing on other DC Comics characters.

THE COURT: What paragraph, Counsel?

MR. TOBEROFF: Second to last paragraph – third page. I'm sorry.

THE COURT: I see it.

BY MR. TOBEROFF: Q: Is this statement true or false?

MR. BERGMAN: Same objection, your Honor.

THE COURT: Well, the statement is not being offered. He's just being asked whether or not the statement is true or false. So we could do it without the document if he wants.

THE WITNESS: Sure, that's fair. It is true that we are planning to utilize the DC library as a resource to develop new movies that hopefully will be franchising tent-pole movies as we are with other things also, may I say, but it is not true that the -- that the timing to movies focusing on other DC Comics.

For example, it says Green Lantern -- Green Arrow, Wonder Woman are all in active development. For a movie that would qualify as a tent pole, since I have the ultimate authority to green light it, any screenplay for a movie like that

would be given to me, and I would -- you know, I would involve myself earlier than I might on other kinds of movies that would be less expensive.

So, for example, I have seen a screenplay on Green Lantern, and we are getting close to going ahead with the Green Lantern movie. But I haven't seen anything on Flash. I saw something on Green Arrow that I threw out. And I haven't seen anything on Wonder Woman. So I'm not -- the timing isn't right.

BY MR. TOBEROFF: Q: I was actually focusing within that paragraph, they speak about Green Lantern and other characters. I wasn't really focusing on those characters. I was focusing on the statement that Warners is focused on releasing four comic book films in the next three years, including a third Batman. That's correct?

A: Well, a third Batman -- let's see. This is 2008. So 9, 10, 11. We might have a third Batman sometime in 2011, or it might be in the summer of 2012.

Q: And the next one, a new film reintroducing Superman?

A: Well, we had hopes to keep the character alive and to once again reinvent Superman. We are -- our hope is to develop a Superman property and to try again. What hurt us is that the reviews and so on for the Superman movie, which did outperform Batman by, as you point out, something like $20 million worldwide box office, did not get the kind of critical acclaim that Batman got, and we have other issues with Superman that concern us. So we are -- but we will try again.

I'd love to see a great screenplay.

Q: Are you anxious to bring Superman back?

A: I'm anxious to have tent-pole movies. Anxious, may I say respectfully, however you characterize it, we have a number of properties that qualify as these tent poles as we've been discussing. Superman is certainly among them. And I happen to, because of my particular vintage, I grew up with Superman, and so I happen to love the Superman character myself. So I have kind of a bias in favor of Superman. I like Superman.

Q: You'd like to bring him back?

A: I would, yes.

Q: I'd like to show you what's been previously admitted as Plaintiff's Exhibit 313. Exhibit 313 is entitled 2008 Business Review. 2009 budget, and it's dated

December 10, 2008. I'd like to turn your attention to page 17 of the exhibit entitled -- excuse me -- 13, entitled Media.

MR. BERGMAN: Objection, your Honor. Lack of foundation.

THE WITNESS: Okay.

BY MR. TOBEROFF: Q: Right-hand column is entitled Theatrical Development. Excuse me. Under the heading Theatrical, the second bullet point states Warner Brothers Pictures states --

MR. BERGMAN: What page are we on?

MR. TOBEROFF: It's page 13, it's on your screen.

THE WITNESS: I have it.

BY MR. TOBEROFF: Q: Second bullet point reads Warner Brothers Pictures looking to reshape process of development of DC projects to accelerate and take advantage of our rich source material.

Is that statement accurate?

A: I think is, yes.

Q: Are you overseeing this reshaping process?

A: I'm not overseeing the development of it, but I'm overseeing the green lighting of the movies.

Q: Now, the third bullet point states major projects include 2010 Green Lantern, and close behind, the Flash, the Losers, Lobo, and Superman.

Do you see that?

A: Yes.

Q: When it says close behind, does this mean that the next Superman film, if it is indeed released, would take place in about 2011?

A: I don't see that happening in 2011. By the way, and to be fair, I think it is true for Green Lantern where we are planning a 2010 movie, if we can get it together in time. These movies because of the special effects complexity, have generally longer lead times than a smaller movie that has no special effects component.

But this -- I've seen nothing on the Flash, nothing on the Losers. There was a screenplay on that which I hated. I've seen nothing on Lobo. So I don't know what close behind means here.

Q: What would be the target year to launch a new Superman film if you launched one?

A: I would say 2012.

Q: I'd like to draw your attention to page 17 of this exhibit.

The right-hand column is entitled, quote, Theatrical Development, paren, WB, close paren, close quote. I take it WB stands for Warner Brothers?

A: Yes.

Q: And listed in a long list is Superman with an asterisk.

Do you see that?

A: Yes.

Q: And then it says at the bottom the asterisk indicates active development work in 2008.

A: Well, Counsel, I didn't -- are you asking me a question?

Q: The question is was there any development in 2008 of a new Superman movie?

A: Not that I'm aware of. I'm very screenplay driven when it comes to any of these properties, and I have not seen a screenplay in 2008 or in 2009 for Superman.

Q: Earlier you testified that the -- when I asked you about your oversight of development, you testified that as you oversee the development process, there are many things that are developed that you don't have specific knowledge of; is that correct?

A: That's correct. But for a tent-pole movie, a movie that would cost, as we've discussed, around $150 million or even more, they would not, if they were in active development, I'd be aware of it. I'd be very surprised if there's a Superman screenplay floating around that I'm not aware of.

Q: Now, it's been reported that Warner Brothers in 2008 were hearing various pitches for a new Superman movie; is that correct?

A: I wouldn't know. But that may be true. I don't hear pitches myself.

Q: I'd like to turn to the subject of DC Comics for a moment. DC Comics provides Warner Brothers with a large library of characters for potential tent-pole pictures; correct?

A: Yes.

Q: And DC Comics also provides Warner Brothers with a stable of characters for potential franchise motion pictures?

A: Hopefully, yes.

Q: Warner Brothers can exploit DC's stable of characters in television?

A: Yes.

Q: Home entertainment?

A: Yes.

Q: Animation?

A: Yes.

Q: Consumer products?

A: Yes.

Q: Video games?

A: I would think.

Q: And news media?

A: Yes.

Q: I'd like to talk to you briefly about the Siegels' Superman termination notices. When you joined the company in 1999, you were made aware that the widow and daughter of Jerry Siegel, the creator of Superman, had filed notice of termination in 1997, claiming co-ownership in Superman under the Copyright Act; is that correct?

A: It is correct that I get a litigation summary from our general counsel that tells me what litigation --

MR. BERGMAN: Objection. I don't think he should be speaking about what you've heard from counsel.

BY MR. TOBEROFF: Q: You were made -- without giving me the substance --

THE COURT: Very well. Rephrase the question, Counsel.

BY MR. TOBEROFF: Q: I simply asked whether he was aware -- was made aware, when he joined the company in 1999, not the substance of the communication, whether -- that the Siegels had filed notices of termination under the Copyright Act in 1997 claiming co-ownership rights in Superman?

A: I do not recall being made aware of it when I joined the company in 1999, but that was such a blur of --

THE COURT: I'm going to stop you. There was a question.

Next question, Counsel.

BY MR. TOBEROFF: Q: When were you first made aware of that?

A: I don't recall when. But I was -- at some point I became aware of the fact that there was a -- an effort to disengage or whatever the legal terms are.

Q: Do you believe it was -- that you were made aware before 2002?

A: I don't recall when, Counselor.

Q: You were made aware before green lighting Superman Returns in 2006?

A: Well, express it differently, if I may, and that is that no one told me when I green lit the movie in 2005 -- nor the 2006 release, and the green light would have been a year earlier, or eight months earlier. Something like that. At least a year earlier actually before the release. No one said you may not do that.

I mean, I rely on other people, business affairs and so on to advise me if there's something I'm planning to do. The head of business affairs is in our production meetings, and if there was some reason that I didn't have the right or the company didn't have the right to do something, he would say well, wait a minute, you can't do that.

So I always assumed that we had the right to make the movies and someone has to advise me if that's not the case.

Q: Just to put you at ease, no one is claiming that you didn't have the right to release that movie. I'm just – I just would like to establish that you were aware that they had filed termination notices prior to green lighting the picture.

Not as to the --

A: I don't remember when I was made aware.

Q: In 2005, do you believe you green lit Superman Returns in 2005?

A: Or even earlier, but yes, 2005 sounds okay.

Q: And you're unable to tell me whether you had heard anything about -- not the substance, just the fact that whether you've heard about it, the Siegels' termination prior to that?

A: The only thing I can say is that I was aware that -- or I was told that the company had clear right to make the movie that I was green lighting.

Q: And when you were told that, without giving me the substance of the conversation, was the subject of the Siegel termination ever discussed with you, or were you begin notice of the Siegels' termination?

MR. BERGMAN: Objection. Privileged.

THE COURT: Sustained. I assume you're asking in terms of discussion with counsel?

MR. TOBEROFF: I'm just asking whether he was aware -- made aware of the termination notices themselves.

THE COURT: You're going to have to exclude counsel from that question if you want me to overrule the objection, Counsel. Otherwise, it's sustained.

BY MR. TOBEROFF: Q: Were you made aware that the Siegels filed the present lawsuit in October of 2004?

A: Not that I recall.

Q: When is the first time you learned about this lawsuit as best you can recollect?

A: The claim or the lawsuit?

Q: The lawsuit.

A: I really don't recall, but I'm sure it's months and months ago.

Q: Do you believe it was as far back as 2004?

A: I don't recall. I'm sorry.

Q: Do you recall hearing anything about the lawsuit in 2005?

A: I don't recall when I heard about it. But I was advised that there was a lawsuit filed. I just don't recall when.

Q: Do you recall reading about this lawsuit in Variety?

A: Well, no. But Variety prints a lot of things. No. I just don't want to appear to be evasive. I get this information from counsel. From my head of business affairs or our general counsel. And I honestly operate on an exception basis. I -- we have a lot of movies, as we've discussed. a year or so. And it's just a lot of movies. And I rely on them to tell me when I may not do something or if

there's a problem that would prohibit me from doing something. And I was not so advised with respect to the green lighting of this movie we're talking about.

Q: Do you read what they call the trades?

A: Yes.

Q: And do you read those on a regular basis?

A: Yes, I do.

Q: And those are Variety and Hollywood Reporter?

A: Yes.

Q: And is there a particular time of day that you like to read the trades?

A: Seven o'clock in the morning with coffee.

Q: So at breakfast you read Variety and you read the Hollywood Reporter?

A: I read them. I skim them.

Q: On a daily basis?

A: Yes, I do.

Q: Do you also have people that break down for you articles that appear in the press?

A: Yes.

Q: Regarding Warner Brothers' pictures or projects?

A: Yes. Regarding the whole company.

Q: And Warner Brothers characters?

A: Well, it's a clipping service that clips out information that pertains to the company. This is really Time Warner, not just Warner Brothers. So there will be a sheaf of articles relating to the overall activities of the company. So that comes in daily.

Q: Do you receive that on a daily basis?

A: Yes, sir.

MR. TOBEROFF: I have no further questions.

THE COURT: Very well. Cross-examination?

MR. BERGMAN: Just a few, your Honor.

CROSS-EXAMINATION

BY MR. BERGMAN: **Q:** Mr. Horn, have you ever given instructions to any executive at Warner Brothers or Warner Brothers Television to attempt to obtain any DC property at below fair market value?

A: No.

Q: To your knowledge, has Warner Brothers acquired any DC property at below fair market value?

A: No.

Q: Was Superman Returns a successful film?

A: I would call it a modestly successful film for us and an unsuccessful film for our partner, as best I can tell. In other words, if we had owned 100 percent of Superman and were not able to charge a distribution fee to the entity Legendary that put up half the money enabling us to get more money off the top before the split, I think the picture would have been roughly a break even.

THE COURT: Who was your partner in that?

THE WITNESS: Legendary Pictures.

BY MR. BERGMAN: Q: And were they an equal financing partner?

A: Yes.

Q: And did they in fact supply not only half of the negative costs but half of the prints and advertising?

A: Yes.

Q: And have you done business with financing partners on that basis for some time?

A: Yes.

Q: And is that time of sharing of responsibility and budget something that is customarily done by Warner Brothers with respect to what we've been calling tent-pole pictures?

A: Yes.

Q: And can you briefly state the reason for that?

A: Well, I will exclude Harry Potter. In deciding to make a tent-pole picture, we know that we are committing very substantial resources of the company

towards the cost of the negative and the prints and ads. That cost cumulatively or totally aggregates to really a very substantial amount of money. And by bringing in a partner, we understand that if the picture is a blow-out success, e.g., The Dark Knight, we would in retrospect acknowledge that we would have made more money had we not had a partner.

On the other hand, if the picture is a disaster, e.g., Speed Racer, we're happy we had a partner. So in an environment when -- in an environment where there's inherent volatility in our business practice, especially as it relates to these extremely expensive movies, we know that by bringing in a partner, we can compress the high points but also protect ourselves from the low points and have a narrower band, if you will, in which to operate, which gives us a little more comfort when we sleep at night.

Now, we charge a fee. The partner might say why do you charge a fee? And my answer would be we have offices in every country. If you want to pay the overhead for marketing and distribution and for offices around the world, it would cost you a lot more than that 10 percent or 11 percent or 12 or whatever it is that we take off the top before splitting with you.

So that is our argument for having a partner. And that's, by the way, why we rarely try to find a studio partner. Because then nobody gets a distribution fee and you just divide the world in terms of distribution, and everything goes in the pot. We did that with Benjamin Button, for example.

Q: I see. And am I correct that a distribution fee that is charged with a participating partner like Legendary Pictures is just a fraction of the normal distribution fee that would be charged by the studio on a studio finance and distributed picture?

A: Yes. Yes.

Q: Would you in fact say that the financing partner gets as best a deal on the distribution fee as anyone would get?

A: There's no question.

Q: Does Warner Brothers presently, at this point in time, have any Superman film that it is developing as a tent-pole picture?

A: Not to my knowledge.

Q: Does Warner Brothers, on the other hand, have other properties that it is presently developing or considering as tent-pole pictures?

A: Yes.

Q: Could you identify some of those, please?

A: Well, we have Scooby Doo. We've had two movies. We'd like to bring Scooby Doo back. We have Looney Tunes. We have Tarzan. I've looked at four drafts of a Tarzan screenplay.

We have The Jetsons. We have the Hobbit. We have a very exciting property called Guardians of Gahool (phonetic), which is being directed by Jack Snyder. It's a family movie, very exciting picture.

We have Happy Feet. We're working on Happy Feet 2. We have Looney Tunes, but there's no screenplay written yet. So there's a number of them.

MR. BERGMAN: Very good. Thank you, sir.

Appreciate your being here.

THE COURT: Any redirect?

MR. TOBEROFF: Just a couple questions.

REDIRECT EXAMINATION

BY MR. TOBEROFF: Q: What division at the studio negotiates the deals for the acquisitions of underlying literary rights?

A: The business affairs. If it's for literary rights and the acquisition for purposes of having the theatrical motion picture, it would be the business affairs division of our motion picture group.

Q: So the business affairs division essentially negotiates the deal, and the legal affairs division papers the deal; is that correct?

A: Yes.

Q: Now, are you involved in setting the fixed and contingent compensation of pay in a literary rights acquisition agreement?

A: No.

Q: Were you involved in the underlying rights agreement, film agreement between DC and Warner Brothers that was executed in 2002 underlying the Superman film?

A: No.

MR. BERGMAN: Your Honor, objection. That goes well beyond my cross.

THE COURT: Seems to, Counsel.

MR. TOBEROFF: He asked questions whether you have ever -- he asked a question whether you have ever paid less than fair market value.

THE COURT: Okay. Briefly.

BY MR. TOBEROFF: Q: Your answer was no?

A: No.

Q: You heard my last question, and your answer was no; correct?

A: Yes, but would you repeat it, please, just to be sure.

Q: My question was whether you were involved in negotiation of the underlying literary rights agreement in 2002 for Superman rights?

A: No, I was not.

Q: Now, just moving for a moment to Legendary Pictures. You testified that a co-financier like Legendary Pictures receives a sharply reduced distribution fee; is that correct?

A: Yes.

Q: What is the distribution fee charged to Legendary Pictures on the Superman films?

A: I think it's 11 percent or 10 percent. They renegotiated their deal a few times. So I'm not sure.

Q: What would you say would be the range for a partner that either finances the entire film or co-finances half the film?

What would be the range of the distribution fee?

MR. BERGMAN: Objection. Compound.

THE COURT: Break it up, Counsel.

BY MR. TOBEROFF: Q: What would be the range for a financing partner that co-finances a film, the range of the distribution fees charged?

A: I would -- I'm sure this is -- I'm sure there are exemptions, but I would put the bulk of the bell curve, if you permit that, from 10 to 15 percent.

Q: And what would be the range for a financier that financed the entire negative cost and the marketing costs of the picture?

A: It could be as low as, I'd say, 8 percent, but we don't go below 10 percent. I can't recall one below 10 percent.

Q: And a co-financier would receive a hundred percent of -- in calculating the revenues received by a co-financier in connection with a co-financed film, a hundred percent of video revenues would be included minus certain expenses; is that correct?

A: Yes.

MR. TOBEROFF: Thank you.

THE COURT: Anything further?

MR. BERGMAN: Nothing further, your Honor.

THE COURT: Very well. You are excused. Thank you, Mr. Horn.

THE WITNESS: Thank you, your Honor.

MR. TOBEROFF: Thank you.

THE COURT: Counsel, we're going to conclude for the day. We'll resume tomorrow morning at 9:00 sharply. See you in the morning.

(Proceedings concluded at 4:05 P.M.)

TRIAL DAY 2

A.M. Session

Wednesday, April 29, 2009

WITNESSES: Gregory Noveck, Paul Levitz

THE CLERK: Calling item number one on calendar, Case Number CV 04-08400-SGL, Joanne Siegel, etc., versus Warner Bros. Entertainment, Inc., etc.

Counsel, please state your appearances for the record.

MR. BERGMAN: Good morning, Your Honor. Michael Bergman for the defendants.

MR. PERKINS: Patrick Perkins for the defendants, Your Honor.

MS. MANDAVIA: Anjani Mandavia for defendants.

THE COURT: Good morning.

MR. TOBEROFF: Good morning, Your Honor. Marc Toberoff for plaintiffs.

MR. ADAMS: Good morning, Your Honor. Keith Adams for plaintiffs.

MR. WILLIAMSON: Good morning, Your Honor, Nicholas Williamson for plaintiffs.

THE COURT: Good morning to you all. The plaintiffs may call their next witness.

MR. TOBEROFF: Plaintiffs call Gregory Noveck.

THE CLERK: Do you solemnly state that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please state your full name for the record and spell your last name.

THE WITNESS: Gregory Noveck, N o v e c k.

THE COURT: Counsel?

DIRECT EXAMINATION

BY MR. TOBEROFF: Q: Good morning, Mr. Noveck.

A: Good morning.

Q: You're currently employed by DC Comics?

A: That's correct.

Q: And your position is senior vice president in creative affairs?

A: Yes.

Q: Your offices are on the Warner Bros. Studio lot?

A: Correct, primarily.

Q: In your position as senior vice president in creative affairs, you act as a liaison between DC and Warner Bros.; is that right?

A: And the outside community as well.

Q: You help Warner Bros. find and develop DC properties to adapt as motion pictures and television shows?

A: Correct.

Q: Who did you report to at DC Comics?

A: Paul Levitz.

Q: Who do you report to at Warner Bros.?

A: I don't report to anyone at Warner Bros.

Q: Who do you deal with primarily at Warner Bros., if anyone?

A: I mean, virtually everybody, you know, I mean, within my rank and file; but, as well, you know, the creative community, et cetera, as well.

Q: I'd like to show you what has previously been admitted as Exhibit 187. It's a document entitled "Media Development Creative Affairs Department First Annual Status Report." I'd like you to turn for a moment to the last page of the document, Bates No. DCC-134329, which closes with, "Thanks as always for your time and attention, Gregory Noveck."

Do you see that?

A: Yep.

Q: This document was, I assume, presented by you?

A: Yes.

Q: Or drafted by you?

A: Yes.

Q: And it was drafted for an oral presentation?

A: No.

Q: This was the presentation?

A: Correct.

Q: Now, on the last page of the document -- excuse me, I'll direct you to the page. It's DCC-134329. It states towards the top of the page "Goals for 2005."

Does this mean this document was likely written in late 2004?

A: I believe that's correct.

MR. BERGMAN: Your Honor, in light of the fact that the document was written two years after the last document was executed, I don't see the relevance of this document.

THE COURT: I'll give you some latitude, Counsel. I'm not really sure what it is either, but let's see.

BY MR. TOBEROFF: Q: To whom was this presentation directed?

A: To my direct report, Paul Levitz, my boss.

Q: On Page 1 of the presentation, DCC-134324, second paragraph, you write as follows: "The media department at DC officially launched November 1, 2003, almost exactly one year ago."

Do you see that?

A: Yes.

Q: Does this refresh your recollection that this presentation was written in late October of 2002 or November 1, 2002?

MR. BERGMAN: Objection, Your Honor. It's clear it was written in late 2004.

THE COURT: Counsel?

If November 1, 2003 was a year ago, it looks like it was written in November 2004.

MR. TOBEROFF: Excuse me. I'm thinking backwards instead of forwards. I apologize.

THE COURT: Very good.

BY MR. TOBEROFF: Q: Does this refresh your recollection that this presentation was written in late October or early November 2004?

A: Yeah. That's about right.

Q: I'd like to draw your attention to Page 1 of Exhibit 187, where you state before Paragraph 1, towards the bottom of the page, "Now, the areas targeted for development..."

Do you see that?

A: Yes.

Q: And then it follows from Page 1 to the next page, "These are your goals..."

Correct?

A: Yeah. I mean, these were areas that I had identified as things to focus on.

Q: Turning to Page 2 of the document, Bates No. 134325, one of your targeted areas is set forth in Paragraph 7, entitled "Outside the box."

Do you see that?

A: Yes.

Q: And in Paragraph 7, you state the following: "To successfully set up properties outside the Warner Bros. family, once they have been fully considered internally, this includes trying to expand our horizons and set up feature projects with other studios."

Now, by "other studios," you mean studios other than Warner Bros.; correct?

A: Yeah, correct.

Q: Part of your job duties at DC was to address this issue; correct?

A: Yes.

Q: Moving to Page 4 of the document, which is Bates-stamped 134327; if you'd turn to Paragraph 5, starting with the second sentence, you state the following: "A year ago, both studio executives and the creative community were generally at a loss when considering how to approach DC with questions. Studio executives would often just call the president of the company, since that is DC's most public face, though they would often proceed without informing anyone. Outside entities often contacted the studio directly or walked in with comic books they bought off the shelf, assuming the rights were available. In

all cases, there was very little thought given to any concerns DC may have regarding the properties under consideration."

Did I read that correctly?

A: Yes.

Q: When you say "Studio executives would often just call the president, though they would often proceed without informing anyone," you're referring to Warner Bros. executives?

A: No, actually. I'm referring to all studios and all studio executives.

Q: So executives at other studios would proceed with DC's properties without ever informing DC they had developed projects based upon DC comic books without ever informing DC?

A: Well, they wouldn't be developing them. What would happen, and happens often, is that producers or other creative entities will find a comic book, whether it's ours or another publisher's, and go to a studio and say, 'I found this great comic; I want to develop it,' and then they'll get all excited; and at some point, someone will start looking at the rights and realize that it actually belongs to someone and that they have to get into it.

Q: The first sentence says "studio executives," and then you describe how they act; and then the second sentence begins with "outside entities," and you describe how they act.

I know this document was written a few years ago, but wouldn't you say that in the first sentence, you're differentiating the behavior of the studio executives at Warner Bros. from the second sentence, where you're talking about executives at outside entities?

A: No. I mean, I don't think it's exclusive to Warner Bros.

Q: On Page 5, Bates No. 134328, Paragraph 7 is entitled "Selling elsewhere." You state the following in Paragraph 7: "This has been the hardest area to crack. While this has been a primary goal, a number of different factors have conspired to prevent true success in this area. Uncontrollable aspects include matching the right properties with the right talent and getting a pitch together that is exciting enough to be bought, yet is passed on by the various arms of Warner Entertainment. The most important part of the process, however, is the ability to extract properties from the studio in a timely manner."

Did I read that correctly?

A: I think it actually says "hardest arena to crack."

Q: Okay.

When you say "the ability to extract properties from the studio in a timely manner, you're referring to DC's properties; correct?

A: Yeah.

Q: I'd like you turn to the last page of Exhibit 187, entitled "Goals for 2005." The second paragraph, third sentence under that section, begins as follows: "First, I would suggest that we extend the mandate of selling outside the studio to television entities as well. This is a two-prong suggestion. The initial part concerns the ability to pitch to other television studios projects that have been passed on by Warner Bros. Television (reserving for them the same right as the feature division to buy into the project at a later date). The second initiative would be to allow us to pitch directly to the cable networks without having to go through the studio first."

The reference in this paragraph to the feature division means that even when Warner Bros. passes on a DC project, they would still retain the rights to co-finance, and therefore have distribution rights, even if the project was thereafter set up and developed by another studio; is that correct?

A: It's more reserving the right to negotiate for that.

Q: Reserving the right to --

A: To negotiate. They can choose not to.

Q: Warner Bros. can choose not to?

A: Uh-huh.

Q: But the question is, can the other studio developing a DC product choose not to?

A: It's negotiation.

Q: I understand that, but when you say reserving for Warner Bros. Television the same right as Warner Bros. feature division to buy into the project at a later date, you expressed that as a right which they could choose to exercise or not exercise; is that correct?

A: Yeah. I mean, we have --

Q: Speaking of Warner Bros.?

A: Yes, speaking of Warner Bros. We have a first-look deal.

Q: So if you went to another studio, Warner would have the right, if it so chooses, to co-finance a project and then negotiate with the other studio how distribution rights to the film and television project would be divided between them; is that correct?

A: Yes.

Q: You write on the last page -- if we could turn to the last page --

THE COURT: Before we go on, that second initiative that you referred to there, "The second initiative would be to allow us to pitch directly to the cable networks without having to go through the studio first." If you recall, what do you mean by "the studio"?

THE WITNESS: I'm referring to Warner Bros. television in that instance.

BY MR. TOBEROFF: Q: Now, still on the last page of this document, 134329, if you could go, please, to the second line of the third full paragraph, excluding your 'thank you' at the end, the second line begins with the word "tangentially." It reads as follows: "Tangentially, I would use the anticipated success of Batman Returns and Constantine, along with the unique situation of DC properties being the top revenue creators for virtually all Warner Bros. Entertainment divisions this year, as a rallying cry that DC is indeed Time Warner's crown jewel, and thus should drive the train on its own success." "TW" refers to Time Warner; is that correct?

A: Correct.

Q: Now, I'd like to show you what has previously been admitted as Plaintiffs' Exhibit 191. Exhibit 191 is a memorandum from you to Courtney Armstrong, dated May 2, 2006.

MR. BERGMAN: Objection; same objection. This document post dates any contract by four years.

THE COURT: It does, Counsel. I think that goes to the weight of its relevance. You can certainly examine that on cross-examination, whether or not -- the Court will consider that in assessing its weight.

MR. BERGMAN: Very well, Your Honor.

MR. TOBEROFF: Your Honor, I would like to point out that --

THE COURT: Counsel, the objection was overruled. You may ask your next question.

MR. TOBEROFF: I understand.

BY MR. TOBEROFF: Q: Courtney Armstrong, to whom this memo is directed, was a Warner Bros. employee at the time you wrote this memorandum; correct?

A: I believe so.

Q: If you turn to the first paragraph of the memo, you write, "Courtney, per your discussion with Paula Lowitt, please find short descriptions of the properties we with {sic} to formerly shop outside Warner Bros." I take it that was a typo and you meant "which"?

A: Correct.

Q: Who is Paula Lowitt?

A: At the time, she was our SVP of legal and business affairs at DC Comics.

Q: If you leaf through the document, you'll see that after each character, you'll have the words "pitch to" or "submitted to." Do you see that?

A: Correct. On most of them, yes.

Q: Now, that means film projects based on that particular DC character was pitched to Warner Bros. as of that date, and that in response, Warner Bros. rejected the project or failed to license it for development; is that correct?

A: They either passed or failed, yeah; or failed to respond; or we hadn't gotten anywhere, really.

Q: So, for instance, let's turn to Page 2 of the document, Bates No. DCC-134334, of this Exhibit 191. So this would mean that a movie project based on -- what is Adam Strange? Is it a comic book character?

A: Correct.

Q: So this would mean that a movie project based on Adam Strange was pitched to Warner Bros. executives on 25 January 16, 2005; and then it was pitched again ten months later on October 27, 2005; is that correct?

A: Correct.

Q: So by May 2, 2006, when you wrote this memo, looking at the date on the first page of the memo, DC had still not approached any other studios with the

Adam Strange project, even though Warner Bros. had passed on the project back on January 16, 2005; is that correct?

A: Well, the first part of your question is accurate, in that we had not approached other studios. But they hadn't passed. The reason that we had pitched twice officially, and multiple times unofficially, to the studios was because they actually were interested in the property and wanted -- we were just creatively trying to figure out how to crack it.

Q: So you pitched it the first time on January 16th, and they didn't like the pitch.

A: Correct.

Q: They rejected the pitch.

A: Parts of it, if I remember. It's been awhile. But, yeah, it was, like, 'We like this; we don't like that; keep working on it.'

Q: And then nine or nine and a half months went by, and you pitched it again.

A: Uh-huh.

Q: Correct?

A: Correct.

Q: But by May 2nd, when you wrote this memo, you still had not pitched the product to a competing studio; is that right?

A: Yeah, that's correct, to the best of my recollection.

Q: Let's turn to Page 3 of the document, Bates No. 134335. Look at the comic book Metal Men.

This shows that DC pitched a Metal Men movie to Warner Bros. back on September 21, 2004; is that correct?

A: Correct.

Q: And then you subsequently pitched it a second time; correct?

A: Correct.

Q: But like with the other project, Adam Strange, that we had previously spoken about, by May 2, 2006, DC had still not approached a competing studio with the project.

A: That would be correct.

Q: And you were asking permission from Warner Bros., on May 2, 2006, nearly two years after the original pitch, for permission to pitch Metal Men to another studio.

A: Correct.

Q: Now, I realize you would have enthusiasm for the comic Metal Men because you were pitching it as a motion picture, but in the scale of things, would you regard Metal Men as a major DC comic character or a less major DC comic book character?

A: Well, it's not, you know, on the level with the Batmans and characters like that, but it's not at the bottom of the heap either; it's somewhere in the middle.

Q: Is it on the level of a Green Hornet?

A: I'd say it's definitely on the level of a Green Hornet. Green Hornet is not our character, so...

Q: I understand.

On the level of a Green Arrow?

A: Probably not; probably a little less than that, a little smaller. But, I mean, they've been around just as long. With comic books, you have people -- you can find people that will tell you that Metal Men is the greatest comic known to man.

Q: But you'd agree that most people who would be familiar with that -- if you went to a cocktail party with a hundred people at it, probably nobody would know the name Metal Men.

A: They were a comic book --

MR. BERGMAN: Objection, Your Honor. That's totally irrelevant and speculative.

THE COURT: Rephrase, Counsel. Lay a foundation for the question.

BY MR. TOBEROFF: Q: You would agree that outside of people who are comic book fans, most people would not know the comic titled Metal Men?

A: Yeah, I would agree with that.

Q: Now, this delay on Metal Men, from 9-21-04, when it was originally pitched, to May 2, 2006, when you were asking permission to take it to another studio, is this the type of delay you were referring to when you wrote in your first

annual status report we previously reviewed, Plaintiffs' Exhibit 187, where you wrote in November 2004 that the most important part of the process is the ability to extract properties from the studio in a timely manner?

A: No. I mean, you know, with Metal Men, Adam Strange, it was really -- the length of time had to do with getting the pitch right, finding the right writers, finding the right creative auspices. That's why you have that kind of length of time. I'm trying -- when I wrote the memo, we are trying to figure out, you know, what a formal process would be that would be efficient, in terms of informing the studio, 'Okay, we feel we've run our course on this one; let's move on.' That was -- you know, when I started my job, it was one of these evolving kinds of things that I had to figure out.

Q: We spoke about Metal Men. Regarding the other properties in Exhibit 191, Kid Eternity, Adam Strange, Doctor Thirteen, Ghost Breaker, et cetera, these properties are nowhere near in the league of a Superman, a Batman, a Wonder Woman; correct?

A: Yeah, that's correct.

Q: And do you agree that with respect to the other properties here, outside the cadre of a comic book fan, these titles are not well known?

A: That's generally correct, yes.

Q: I'd like to now show you what has been previously admitted as Plaintiffs' Exhibit 92. If you would turn to the last page of this document, Bates No. DCC-88439, the document closes by saying, "Thank you for your time and consideration. Gregory Noveck." Do you see that?

A: Yes, I did.

Q: You drafted this document as well?

A: That's correct.

Q: This document also reads like a presentation. Was this simply a written presentation in the form of this document, or was it an oral presentation?

A: This was a written presentation.

Q: And it was a presentation to Paul Levitz as well?

A: That is correct.

Q: In the first paragraph, third sentence, on Page 1, Bates No. 88435, you describe Superman as a core DC property; correct?

A: I'm looking for the sentence here. Third sentence?

Q: Third sentence, first paragraph. It reads, "Another argument is that they are continually updating and judiciously exploiting our core properties, i.e. Batman, Superman, et cetera."

A: Correct.

Q: Now, DC's two most important properties are Batman and Superman; correct?

A: It depends on what you mean by "important." It's certainly up there. I would add Wonder Woman to that triumvirate.

Q: Okay.

Now, if you move to Paragraph 2 on Page 1, you describe Superman as a "big brand."

Do you see that?

A: On the same page, where it says, "We are now only in preproduction"?

THE COURT: It's blocked off a little bit, unfortunately.

BY MR. TOBEROFF: Q: I'm sorry. It's the second paragraph. It says, "First, let us deal with the big brands"; and then it says Batman and then Superman.

A: Oh, I see where you're saying. Okay.

THE COURT: I'm sorry, Counsel. I'm not there yet. What page?

MR. TOBEROFF: Bates No. 88435, the first page of the document, second paragraph, "First, let us deal with the big brands."

THE COURT: Okay. Yes. That intro line.

BY MR. TOBEROFF: Q: By "big brand," I assume that you mean that due to the long-term commercial success of Superman, it's name alone evokes a great deal of preawareness in the public.

A: Yeah. I also had Constantine on this list, I think, at that time.

Q: Now, also in the first paragraph, on Page 1, the sixth sentence from the bottom of the paragraph begins with, "The below is with...".

You state, "The below is with the understanding that we would distribute through WHV, but that we would be in charge of controlling content. In fact, for this to work at all, I would suggest that DC have control over its own pipeline."

Do you see that?

A: Yes.

Q: "WHV" refers to Warner Home Video?

A: That is correct.

Q: And Warner Home Video, the correct name for the company is Warner Home Entertainment?

A: Good question.

Q: This proposal refers to made-for-DVD programming?

A: Yes. Correct.

Q: As opposed to a theatrical feature film?

A: That's correct.

Q: Why is it in DC's economic interest to control its own content?

A: Well, you can make an argument either way whether it's in our economic interest. I firmly always believed it's in our creative interest, you know; someone who's passionate about the properties and wants to see them done right. I will, to my detriment, often argue that we should be, you know, as in-charge of the process as humanly possible.

Q: You refer to Superman and Batman and other top DC comics as "big brands."

A: Uh-huh.

Q: Isn't it also in the economic interest of DC to protect those brands?

A: Yeah, absolutely.

Q: And to help protect those brands by exercising some creative control to make sure that Superman, Batman, and some of the other characters are being portrayed consistent with a DC comic?

A: Yeah, absolutely. To have input, yes.

Q: I'd like to talk to you for a moment about DC's comic Justice League of America.

In addition to Superman, what other DC characters are in the Justice League?

A: Well, I mean, a lot. But if you look at the core seven, you're talking about Superman, Batman, Wonder Woman, Aquaman, Hawkman, Green Lantern, and The Flash.

Q: I'd like to mark for identification, as Plaintiffs' Exhibit 334, an oversized DC comic book entitled JLA: Secret Origin.

MR. BERGMAN: Objection, Your Honor. This was not on the exhibit list.

MR. TOBEROFF: Your Honor --

THE COURT: Was it, Counsel?

MR. TOBEROFF: No, it's not on the exhibit list. I'm just using it as a visual aid so I can ask him questions about who these characters are, so we get a sense of what they look like.

THE COURT: Have you had a chance to look at it, Counsel?

MR. BERGMAN: No, I haven't, Your Honor.

THE COURT: Why don't you look at it.

MR. TOBEROFF: I'm really just focusing on the first page of the document, the cover.

MR. BERGMAN: I have no objection to the cover, Your Honor.

THE COURT: Very good. It's kind of a cool cover. Fair enough.

BY MR. TOBEROFF: Q: Mr. Noveck, have you seen this DC comic before?

A: Yes.

Q: "JLA" stands for Justice League of America?

A: That's correct.

Q: In order to date this, we would just need to turn to the last page. It's dated November 2002. Actually, it must be the third to the last page. Excuse me.

It says, "JLA: Secret Origin, November 2002." Do you see that?

A: Yes.

Q: That's approximately when this was published?

A: I wasn't there at the time.

Q: Do you believe, by that date and your experience in comic books, that this was approximately when this was published?

A: Yeah. But I don't know if the book was a collection or not. But that's probably right.

Q: I'd like to go through these characters with you.

The big guy front and center is obviously Superman. On either side of him is Batman and Wonder Woman; correct?

A: That's correct.

Q: As we descend, on the right is the character Flash.

A: Correct.

Q: And on the left is the character Aquaman.

A: That's correct.

Q: And then further down the line on the right is the Green Arrow.

A: Uh-huh.

Q: And on the left is the character Black Canary.

A: That's correct.

Q: Now, behind Batman, in the background, is that the Green Lantern?

A: Yeah, just above Batman's head.

Q: Who are the smaller characters in the background, if you can identify them for me?

A: Above Flash's head is Plastic Man. Above him is Martian Manhunter. Standing on Superman's shoulder is The Atom. Flying above Wonder Woman is Hawkman. Hawkgirl is kind of above Aquaman's head. And to the extreme left, you have Captain Marvel/Shazam.

Q: Together, do these characters comprise DC's better-known characters?

A: Yes. I mean, there are others as well; but, yeah, it's a good selection.

Q: Now, none of these characters are the basis for film or TV projects and development at any studio other than Warner Bros.; is that correct?

A: Well, Captain Marvel had been at New Line for a long time. Other than that, that's correct.

Q: When was Captain Marvel at New Line?

A: I don't know the exact date under which it started being an option, but it continued up until New Line was folded into Warner Bros. recently.

Q: New Line was a Time Warner entity that has since been folded into Warner Bros.; correct?

A: I believe that's correct.

MR. TOBEROFF: Your Honor, I'd just like to offer this into evidence, just for the cover, as a visual aid, to track his testimony.

MR. BERGMAN: No objection to the cover, Your Honor.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'd now like to show you what's been previously admitted as Plaintiffs' Exhibit 189. Exhibit 189 is a memo dated August 12, 2005, from DC Comics to a number of different executives.

Do you see that in the two column, third line down, you are listed as one of the recipients of this document?

A: Yes, I do.

Q: Do you have any reason to believe you did not receive this document?

A: No.

Q: Do you receive these media status reports periodically?

A: Yes.

Q: I'd also like to show you a second media status report, which has been admitted as Plaintiffs' Exhibit 190.

Do you help produce these media status reports?

A: I do, generally.

Q: I'm sorry?

A: Yes, generally, I do.

Q: I'd like to go through with you some of the Warner Bros. executives that appear in the two column, and ask for you to identify, as best you can, who they are, and what their position is at Warner Bros.

Barry Meyer?

A: I think he's a co-CEO or COO of Warner Bros.

Q: Alan Horn.

A: The other co-CEO or COO of Warner Bros.

Q: Jeff Robinov?

A: I forget the official title, but essentially, president of production of the theatrical group.

Q: Peter Roth?

A: Head of Warner Bros. Television.

Q: Kevin Tsuj ihara?

A: Head of Warner -- I guess that would be Warner Home Entertainment. But certainly, all home video and games and things like that.

Q: And he used to be in charge of new media?

A: I believe that's correct.

Q: Bruce Rosenbloom?

A: Head of television, above Peter Roth, I believe.

Q: Patty Conley?

A: Warner Bros. legal.

Q: Now, on Page 2 of the document, New Line Cinema is referenced.

At the time this was written, New Line Cinema had not yet been absorbed into Warner Bros., but was a company owned by Time Warner; is that correct?

A: I believe that's correct.

Q: I'd like to show you what's been previously admitted as Plaintiffs' Exhibit 278. It's a document entitled "Warner Bros. Brand Council, Introduction to the DC Brands"; and it's dated May 2003. I'd like to draw your attention to Page 16 of the document; it's Bates No. DCC-88490.

Do you see the DC logo in the center, and that it's surrounded by various Warner Bros. companies?

These are all of the entities in Warner Bros. that DC works with to exploit DC's properties; correct?

MR. BERGMAN: Objection. Lack of foundation. No indication of when --

THE COURT: Sustained. Lay a foundation.

BY MR. TOBEROFF: Q: You work as a liaison between DC and Warner Bros.; correct?

A: And the rest of the town; correct.

Q: And in that capacity, you work with various different divisions at Warner Bros.; correct?

A: Correct.

Q: And this document shows the number of different divisions of Warner Bros. that you work with in your capacity as VP creative affairs for DC.

A: Yes. Though I would point out that New Line Cinemas was not at the time a Warner Bros. Entertainment company. It was a Time Warner company.

THE COURT: At what time?

THE WITNESS: I think whenever this was generated, in 2003.

MR. TOBEROFF: May of 2003.

THE COURT: When did New Line become part of Warner Bros.?

THE WITNESS: Within the last nine, ten months.

BY MR. TOBEROFF: Q: But at this time, it was a part of Time Warner; correct?

A: That's correct.

Q: Do you know how long New Line was a part of Time Warner?

A: No. I want to -- I can't say specifically. Sometime in the '90s, but I could be wrong.

THE COURT: So it's no longer part of Time Warner?

THE WITNESS: I think it's been folded into Warner Bros. Entertainment. New Line is still a distinct company.

THE COURT: I'm sorry. I'm confused.

Was it or was it not part of Time Warner -- Warner Bros. back in 2003?

THE WITNESS: It was part of Time Warner in 2003.

THE COURT: Okay.

BY MR. TOBEROFF: Q: Finally, I'd like to show you what has been previously admitted as Plaintiffs' Exhibit 306.

This document, which was produced by DC, reflects all film and television deals based on DC properties as of December 8, 2008, the date in the lower left-hand corner of the document.

Do you see that?

A: Yes.

Q: Do you recognize this document?

A: Yes. I mean, I don't know if it's this specific one that I recognize, but I've seen documents like this.

Q: And do you participate in providing some of the information that goes into a document like this?

A: Yeah. I mean, not on the deal stuff, but on the creative aspect, yes.

Q: Now, if you go through this document, it shows that the vast majority of DC's projects, based on its properties, are set up at Warner Bros., or their contracts at Warner Bros. covering those properties.

Does that comport with your experience?

A: Yes, generally.

MR. TOBEROFF: Thank you. I have no further questions.

THE COURT: Cross examination?

MR. BERGMAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BERGMAN: **Q:** First of all, we see that you started at DC sometime in 2003.

A: Correct; late 2003.

Q: Could you describe to the Court what you were doing in the entertainment industry before you came to DC.

A: My background has been as a creative executive and a producer since I came to L.A. in '91. I started off as an assistant many years ago and worked my way up, and worked with various production companies.

Q: Could you identify the companies that you worked with.

A: Sure.

I started off at CBS in 1992. I was then at a company called Reeves Entertainment. '93ish, I worked at a company called Gaumont, a French company, production company. I was at a company called Rysher and a company called Platinum Studios for a while. And then just prior to being at DC Comics, I was with Silver Pictures.

Q: What were your duties at CBS?

A: I was an assistant in business affairs at the time.

Q: Business affairs with respect to television?

A: Correct. That's correct.

Q: While you were at CBS in business affairs, did you encounter any television series where CBS paid a portion of gross to the licensor?

MR. TOBEROFF: Objection, Your Honor. This is outside of the scope of direct testimony.

THE COURT: Counsel?

MR. BERGMAN: I believe it's related, Your Honor, to what the witness testified to in direct. I'm just trying to establish his background and the parameters of the projects that he dealt with.

THE COURT: I'll give you some leeway.

THE WITNESS: It was a long time ago, but I don't -- if we're talking licensor in terms of underlying rights, I don't remember any deals like that.

BY MR. BERGMAN: **Q:** Okay. And what did you do at Gaumont?

A: At Gaumont, I ran television for Gaumont in the U.S.

Q: And when you say you ran television, did you make pitches to different studios?

A: Yes, studios; and television producers and networks.

Q: When you came over to DC, was the position that you were given a new position for DC?

A: Yes. That's my understanding.

Q: Okay. Had anyone at DC been doing the activities that you were charged with doing before you arrived?

A: My understanding was that prior to my arrival, Paul Levitz was doing the majority of what I was doing, in that capacity.

Q: Okay.

And how would you characterize the objective of what you were assigned to do when you came to DC?

A: You know, the objective was really to expose the vast majority of our properties to the creative community, and to create an efficiency of communication between the creative community, DC, and the buyer.

Q: And by the "creative community," are you including entities and producers outside of the Time Warner family?

A: Sure. Absolutely.

Q: Mr. Toberoff kept referring to you and asking you whether you were acting as a liaison between DC and Warner Bros.

What was your particular function? What was it that you were supposed to do when it came down to Warner Bros.?

A: Well, I work for DC, so my job is to develop, package, and sell DC Comics' properties, in film, television, animation, what have you; so, you know, my job is to pitch Warner Bros. executives and other executives and producers and writers and directors and try to get them as excited about the properties as I am.

Q: So would it be accurate to say that your job for DC is to

pitch projects to Warner Bros. and to other production entities?

A: Yeah, that's accurate.

Q: How many properties would you estimate DC has available for production as either a television show or a motion picture?

A: Available for development? My guess is thousands.

Q: And without going into details, because I'm not sure if we have a closed courtroom, are you presently involved in any activities in which you are pitching television shows or motions pictures to studios and producers other than Warner Bros.?

A: Yes.

THE COURT: Counsel, don't be too concerned. Besides your people from Warner Bros., that's my parents in the background.

MR. BERGMAN: Very well, Your Honor.

THE COURT: Not to worry.

BY MR. BERGMAN: **Q:** If you could, could you identify some of those projects.

A: Sure.

We have a project called Red that's set up at Summit Entertainment.

Q: And is that a feature motion picture?

A: That would be for a future motion picture, hoping to go into production this summer.

Q: And that company has -- does it have any relationship with Warner?

A: Not to my knowledge. Not any more than any other studio would.

Q: Any others?

A: We have a project called Uncle Sam and the Freedom Fighters that we're trying to get set up at Disney. We have a project called Welcome to Tranquility that we're working on with a couple of outside producers. We have a project called The Demon, which we're working on.

There's a couple of dozen, probably, that we're in the process of either developing with outside producers or trying to talk to other studios about, predominantly on the feature film side.

Q: In terms of delay, when you pitch a project -- and am I correct that pitching means trying to sell?

A: Correct.

Q: Okay.

In terms of delay, do you find that there is frequently, at any studio, with any producer, a significant delay from the time of your pitch until the time you get a final answer one way or the other?

A: Absolutely. I mean, yeah.

Q: Can that length of time at studios and producers, other than Warner Bros., exceed a year?

A: Yeah. I think so.

Q: Has it, in fact, in the past?

A: Yes. What happens is that a studio exec will say, 'I like it, but I don't know if I can sell it internally,' or 'I don't like this aspect,' or 'Can you find a different writer?' So you're basically kind of unofficially working with that executive to get the project to a point where they feel they can buy it.

And that's the same at every studio, because it's one of those things where you feel like you kind of have a fish on the hook, so you're hoping to reel it in; so you kind of focus your energies in that direction. Sometimes it takes a really long time.

Q: Has the first-look relationship between DC and Warner Bros. helped or hindered you in the performance of your responsibilities?

A: I think it's helped. We have a massive amount in development. We have a lot that's, you know -- it's helped, in every aspect.

MR. BERGMAN: Thank you.

I have nothing further, Your Honor.

THE COURT: Plaintiff, redirect?

REDIRECT EXAMINATION

BY MR. TOBEROFF: Q: Previously, we spoke about a statement you had made, that one of your goals is to have the ability to extract projects from Warner Bros. in a timely manner. Do you recall that?

A: Yes.

Q: Has your ability to do that improved since the time you wrote that memo?

A: Yes.

Q: And as a result of that, when you were speaking about current projects you have in development, you've been able to set more projects up at other studios.

A: Yes.

Q: But previously, when you wrote the memo in 2004, it was a greater problem than it is today, since you just said that the problem improved.

A: It wasn't a problem. It was just a process that needed to be launched. When I wrote that memo, I was in the first year of my job, so I spent a lot of it

just learning the parameters of DC Comics and what our properties were and what was available that we had; so I wouldn't categorize it as a problem so much as let's understand what -- let's create a process whereby we can do this.

Q: One of the reasons you want to extract a property in a timely manner from Warner Bros. is because you have a writer or a director attached to that project; correct?

A: Not necessarily, no. I mean, it's really about whether the property -- whether we think that the studio will buy the property, whether or not they've indicated that they really have interest in it or not. Sometimes we may have an element with which we've developed a pitch, and sometimes it's just a clean property.

Q: But on some of the projects, you do have attachments of writers or directors.

A: When we're pitching to -- under our first-look deal, we don't officially attach creative elements. We may be working with people, but it's not like an official attachment. If we extract the property, if we get a pass from the studio and we choose to go elsewhere, then we may at that time decide to officially attach a producer or a director or what have you.

Q: Now, you've worked at producing or setting up film projects or TV projects prior to your work at Warner Bros.; correct?

A: That's correct.

Q: And have you worked in situations where you didn't have an obligation for a studio to first pass on the project before you could take it elsewhere?

A: Yes.

Q: In that situation, when you incur a delay of a year or two years, when a studio is still making up its mind, you would go to other studios to see if they're interested; correct?

A: You would generally do it right at the beginning, and then you'd sort of -- you'd end up at one place and you would keep working with that person.

Q: But you wouldn't wait two years for one studio to make up its mind before you would approach another studio with a project; correct?

MR. BERGMAN: Objection, Your Honor. Incomplete hypothetical.

THE COURT: Sustained. Rephrase.

BY MR. TOBEROFF: Q: In a situation when you were pitching projects in the open market, and one studio was waiting two years to pass on a project, you would go to other studios to see if they were interested; correct?

MR. BERGMAN: Same objection, Your Honor.

THE COURT: What elements are missing, Counsel?

MR. BERGMAN: We're missing who are the actors, what is the property, what is the interest of the studio, if the studio --

THE COURT: I guess what it is, it's too broad a question, Counsel.

MR. TOBEROFF: He spoke broadly about his experience at five different companies, pitching projects, developing projects; and I'm talking about his general experience when he is not subject to a first-look deal or an obligation for one studio to pass on a project before he can take it to another studio. I'm asking, in that instance, when he's not subject to that obligation, would he or would he not wait two years before offering it to other studios in the open marketplace.

THE COURT: It's too broad a question, Counsel.

BY MR. TOBEROFF: Q: On the project Red that you mentioned that is set up in another studio, Warner passed on that project.

A: Yes, they did.

Q: You were obligated to pitch it to Warner Bros. before you could set it up at another studio.

A: Under the terms of the first look, yes.

MR. TOBEROFF: No further questions.

THE COURT: Anything further?

MR. BERGMAN: Nothing further, Your Honor.

THE COURT: You're excused, sir. Thank you. Plaintiffs' next witness?

MR. TOBEROFF: Plaintiffs call Paul Levitz.

THE CLERK: Do you solemnly state that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Paul Levitz, L-e-v-i-t-z.

DIRECT EXAMINATION

BY MR. TOBEROFF: Q: Good morning, Mr. Levitz. You currently serve as the president and publisher of DC Comics.

A: I do.

Q: And how long have you worked at DC Comics?

A: Depending on how you measure it, about 36 years.

Q: You were deposed in this action on November 6th and November 7th, 2006; correct?

A: I don't remember the dates, but I remember the deposition.

Q: In my offices.

A: Correct.

Q: At that time you testified under oath, just as you're testifying under oath here today; correct?

A: Yes, sir.

Q: As president of DC Comics, you report to Alan Horn at Warner Bros.

A: That's correct.

Q: I'd like to now show you what's been admitted as Plaintiffs' Exhibit 254.

Exhibit 254 is a document produced by your company, DC Comics, in this case. It's untitled. The document states, "Since his debut in 1938, DC has made Superman the star of more original media exposure than any other cartoon character." Did I read that correctly, Mr. Levitz?

A: No. Actually it says "original major media exposure"; but, yes, the rest is the same.

Q: Thank you.

I'd like to now show you what's been previously admitted as Plaintiffs' Exhibit 278.

THE COURT: How long have you been president of DC Comics?

THE WITNESS: I've had this title since 2002.

THE COURT: What were you before that?

THE WITNESS: I started at the company on the editorial side as a freelance writer; I was an assistant editor; editorial coordinator, which was basically sort of the administrative side of the creative publishing; manager of business affairs; vice president of operations; executive vice president; and then executive vice president and publisher for about 16 years prior --

THE COURT: To becoming president.

THE WITNESS: Yes.

BY MR. TOBEROFF: Q: Mr. Levitz, I neglected to ask you. When did you start working at DC Comics?

A: Unfortunately, it kind of depends on your definition of work. I began freelancing for them in December 1972; I began doing some part-time per diem work before that in July of 1973; and I became a regular employee of the company in March of 1976.

Q: Turning to Plaintiffs' Exhibit 278, it's the document entitled "Warner Bros. Brand Council Introduction to the DC Brand, May 2003."

Have you ever seen this document before?

A: I'd have to look at it to familiarize myself to see if I remember. If you would like me to, I will.

Yes. I believe I remember this document when we produced it.

Q: On Page 11, Bates No. DCC-88485, it states, "Superman is the most successful comics character ever." Do you see that?

A: Yes.

Q: If you could turn to Page 11 of the document.

A: That is Page 11.

Q: Excuse me. In the middle of the same page, Page 11, it states "From the 1939 radio show to the current Smallville TV series, a virtually uninterrupted six decades as a major media and licensing property." Do you see that?

A: Yes.

Q: Is Warner Bros. statement accurate -- or DC's statement?

A: I believe it was DC's statement, and I believe that to be accurate. It depends on how you define an interruption; there obviously are some small gaps in those decades.

Q: I'd like to show you what's been previously admitted as Plaintiffs' Exhibit 150.

A: Yes.

Q: This document is entitled "Superman Returns Press Junket, dated June 9, 2006, round table interview with Paul Levitz." Do you recall giving this interview, Mr. Levitz?

MR. BERGMAN: Objection, Your Honor. The document is hearsay and irrelevant.

THE COURT: Let's lay a foundation first of all, and then I'll look at what it's being introduced for.

MR. TOBEROFF: Your Honor, defendants have stipulated to the admission of this document; in the objection column, they write "none."

THE COURT: Let's make sure this witness has some understanding about what this document is, counsel.

BY MR. TOBEROFF: Q: You recall giving this interview; correct?

A: I'm not familiar with the document, I'm afraid, offhand; but I participated in the press junket for Superman Returns and in the course of that junket, there was what was called a round table interview with a group of press.

MR. BERGMAN: Excuse me --

MR. TOBEROFF: And that occurred on about June 9, 2006.

THE COURT: Counsel, this is a statement of a party opponent. This is his statement. There's not a hearsay objection to it.

MR. BERGMAN: I just wanted to correct something, Your Honor. I just looked at Exhibit 22 in the right-hand corner, and that was something we had objected to. I didn't notice that we were up to 150.

My apologies to the Court and to counsel.

THE COURT: No worries. You may proceed, counsel.

MR. TOBEROFF: No problem. Thank you.

BY MR. TOBEROFF: Q: On page Bates No. 1898, if you would turn to that page, please.

A: Yes.

Q: The press asked you the question: "I realize you are prejudiced, but you're also a guy who can answer this question. Why is the character worth six films, cartoon series, TV series, comic books, everything else, enduring?"

Now, the press is referring to Superman; correct?

A: I would assume so. We're in the middle of a Superman Returns junket. I'm rereading it now.

Q: And your answer is "I think there's a prejudice and an objective answer. If you look back over the last 65 years or so, I guess Superman has now been out 67 years. Out of those 67 years, there have only been about 15 where there has not been a new Superman creative work in whatever the dominant media of the time was. He was a radio show for 11 or 12 years; he was a television series for about 9; the serials; the theatrical cartoons. Objectively speaking, you have at least three generations that love Superman when he had done well, and starting on the fourth."

You gave this statement on or about June 9th; correct?

A: If it's dated that, that's a plausible date. I don't remember the date.

Q: But you have no reason to believe you did not make this statement.

A: It sounds like me; it sounds like something I would say; I would assume it's mine.

Q: Now I'd like to show you what has been admitted as Plaintiffs' Exhibit -- pardon me. Do you agree, Mr. Levitz, without equivocation that Superman is an enduring cultural icon of extraordinary value; is that correct?

A: Absolutely.

Q: Now I'd like to show you Plaintiffs' Exhibit 228; it's been admitted.

Exhibit 228 is a document produced by DC Comics entitled "Superman Brand Merchandising." If you could turn to the page marked DCC-89115, it says, "1968 DC Joins the Family." Do you see that?

A: Yes.

Q: By the family, it's referring to the Warner Bros. family; correct?

A: Yes.

Q: Now if you would turn to Page 89116, it states, "DC today is a pivotal part of Time Warner and Warner Bros." Do you see that?

A: I do.

Q: Now please turn to Page 89142. It reads "Combined power! Brands That Drive a Billion Dollars of Time Warner Sales in 2005 alone."

Now, this is referring to DC's brands; correct?

A: I believe so. I've not reread the document, but if I'm recognizing it correctly.

Q: Or DC's characters or properties; is that right?

A: Yes.

Q: Mr. Levitz, are you aware of the Internet site Newsarama?

A: Yes.

Q: Do you recall being interviewed by Newsarama?

A: I've been interviewed by Newsarama several times over the years.

Q: I'd like to show you what's been previously marked for identification only as Plaintiffs' Exhibit 8.

Plaintiffs' Exhibit 8 is a Newsarama interview with you, dated January 1st, 2003, entitled "Looking Back and Forward With Levitz."

Turn, please, to page Bates No. 1909.

MR. BERGMAN: Objection, Your Honor.

Once again, this agreement post-dates any of the agreements in question, and it's also hearsay.

THE COURT: Well, if it's Mr. Levitz, it's an admission of a party opponent; so it's not hearsay.

MR. BERGMAN: Well, there's been no indication that it's an admission against interests, Your Honor.

THE COURT: The Court overrules the hearsay objection.

As far as the relevancy objection, let me take a look at what it is.

MR. BERGMAN: Very well.

BY MR. TOBEROFF: Q: Look at Bates No. 1909. At the bottom of the page, you're quoted by Newsarama as saying the following: "We're coming to a point where the interest in comics by other media is probably higher than it has ever been.

Last year, comic book properties did about twice the box office that they have ever done, between the success of Spiderman, Road to Perdition, and Men in Black II." Do you see that?

A: Yes, sir.

Q: So by last year, since this was an interview dated January 1st, 2003, you're referring to 2002; correct?

A: I believe that's correct.

Q: Do you have any reason to believe you did not make this statement in Newsarama?

A: No.

MR. TOBEROFF: Your Honor, I'd offer Plaintiffs' Exhibit 8 into evidence as admission of a party opponent. It is an admission to the extent that plaintiffs are alleging here that at the time the Superman agreements were entered into in 2002, comic book properties were considered extremely "hot" in the entertainment industry, particularly by the movie business.

MR. BERGMAN: Objection, Your Honor. That is not inconsistent with anything that Mr. Levitz has stated, and we have not placed the dates --

THE COURT: Counsel, this is going to be a real long trial if you make these speaking objections. Just state your objection.

MR. BERGMAN: Yes, sir. My objection is that it's hearsay; it's not an admission against him.

THE COURT: Overruled on those grounds.

MR. TOBEROFF: Switching subjects now –

THE COURT: And just for the record, that's the only portion of Exhibit 8 that comes in is the statement that was identified.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. TOBEROFF: Q: I'd like to talk to you briefly about the Superman film option purchase agreement that was entered into by DC Comics in 1974.

In 1974, DC Comics licensed its Superman film and television rights to an independent producer named Iylia Salkind; correct?

A: No; That was Alexander Salkind's father who was running the entity at the time. Elia was a young man working with his father.

Q: Thank you for that correction. I'd like to show you what's been previously admitted as Exhibit 203.

THE COURT: Counsel, we're going to take a brief break for the court reporter at this time. We'll resume at 11:00.

(Whereupon a brief recess was held.)

THE COURT: Counsel?

THE CLERK: Mr. Levitz, please be advised you're still under oath.

THE WITNESS: Thank you.

BY MR. TOBEROFF: Q: I'd like to refer back to what we were just speaking about, Exhibit 203, which is the agreement between DC Comics' predecessor, National Periodicals Publications and Film Export AG, dated November 6, 1974. Mr. Levitz, have you seen this agreement before?

A: Yes. This appears to be the original Salkind contract.

Q: And Film Export AG is Mr. Salkind's company; correct?

A: I would refer to it as that; he operated through a wide variety of business entities and peculiar self-dealing structures; so at different times, it's film export or Cantharus or other entities. But from a practical standpoint, I would think of it as our deal with Alex Salkind.

Q: How would you characterize Mr. Salkind?

A: An entrepreneurial movie producer.

Q: He's what you would call an independent movie producer.

A: He certainly -- he was not a part of any larger corporate entity. Independent producer, I think, is a term of art in the movie business, and I'm not enough of a movie guy to necessarily know if he would fully qualify. But he was certainly not affiliated with any larger corporate entity.

Q: Do you know whether at the time he entered into this agreement he was affiliated with any particular studio?

A: I believe he was not.

Q: Now, before DC licensed Superman film and television rights to Salkind, DC had offered these rights to Warner Bros.; correct?

A: I was not involved in that, but I believe that would be the case.

Q: In 1974 when this agreement was entered into, DC was owned by Warner Communications?

A: Correct.

Q: I'd like to refer you back to the exhibit we previously discussed, Plaintiffs' Exhibit 150, the Superman Returns press junket, dated June 9, 2006, in which you participated.

A: Yes, sir.

Q: If you go to the third paragraph from the bottom --

A: Which page, please.

Q: Bates number 1895 on the first page.

A: Yes.

Q: Could you read your response where it begins 'oh, absolutely.'

A: Yeah. 'Oh, absolutely. I have a lovely note in my file somewhere from --

THE COURT: Slow down, please; she has to take down every word.

THE WITNESS: 'Oh absolutely. I have a lovely note in my file somewhere from Warner Bros. turning down producing Superman in the early 1970s and saying, "go license it out to Alex Salkind; we don't think anyone will care," (laughter.)

BY MR. TOBEROFF: Q: Do you recall making this statement?

A: I'm sure I did. I don't recall it.

Q: Mr. Levitz, are you familiar with a recent Warner Bros. documentary that bears the DC logo regarding Superman which is entitled, "Look, Up in the Sky; The Amazing Story of Superman?

A: I'm reasonably familiar with it.

Q: And you were interviewed for this documentary; correct?

A: Yes.

Q: I'd like to show you what's been marked for identification only as Exhibit 303. This documentary traces the history of Superman from its origins in the 1930's up through 2006, with the Superman Returns movie; correct?

A: I believe so.

Q: And DC provided information regarding Superman and also provided Superman materials to the film makers who made this documentary; correct?

A: Yes.

Q: And DC's and Warner Bros.' logo appears on the DVD of this documentary; correct?

A: I would assume so. Yep.

Q: And DC was provided with rough cuts of this documentary to review it for accuracy before it was finalized; correct?

A: We would be reviewing it for our brand management process which would address how we wanted the material to be portrayed.

Q: The documentary was financed by Warner Bros.?

A: Technically, I believe it might have been financed by Warner Home Video with one of its corporate entities, rather than Warner Bros. pictures or Warner Bros. corporately. But I'm not sure.

Q: But Warner Bros. Home Video is a division of Warner Bros.; correct?

A: I'm not sure how it is structured legally; functionally, it is.

Q: And this Superman documentary was also distributed by Warner Bros.

A: I believe the principal distribution of it was the home video distribution. It may have been distributed in some other form by some other Warner Bros. entity.

THE COURT: May I see that Exhibit?

THE WITNESS: Sure.

THE COURT: Thank you.

THE WITNESS: We would probably have attempted to get it distributed as widely as possible; so there may be many other companies that contributed to the process.

MR. TOBEROFF: Thank you.

Your Honor, I would just point out that we have provided you with a copy in your bench book.

THE COURT: Thank you. I just wanted to take a look.

BY MR. TOBEROFF: Q: I'd like to show you now some clips from this Warner Bros. DVD.

MR. BERGMAN: Objection, Your Honor. This document was produced beyond the court-mandated timeline.

MR. TOBEROFF: Your Honor --

THE COURT: In terms of -- you disclosed it as an Exhibit?

MR. BERGMAN: Yes, Your Honor.

MR. TOBEROFF: That's incorrect, Your Honor.

THE COURT: When was it produced?

MR. TOBEROFF: We produced the document on January 7, 2009, and you had set a cutoff date of January 14, 2009; you said after that, no other exhibits will be admitted.

THE COURT: I recall that. And you have a letter indicating that it was produced on January 7th?

MR. TOBEROFF: Yes, Your Honor, we do.

THE COURT: Counsel, I'll certainly accept Mr. Toberoff's proffer, unless there's a reason not to.

Are you suggesting it was produced some time after that date?

MR. BERGMAN: I believe so, Your Honor.

I believe that the 14th was the deadline for Warner Bros. to produce; I don't believe it applied to Mr. Toberoff.

MR. TOBEROFF: Your Honor, I believe it was dated with regard to both parties. I don't see the --

THE COURT: Let's produce it. I'll allow later the parties an opportunity later today to present the Court with the orders and the letters, and we can resolve this at that time.

MR. BERGMAN: Very well, Your Honor. Thank you.

THE COURT: Counsel, proceed.

Why don't you meet and confer among yourselves, because I'm hearing, 'I think,' or 'we think.' Let's pin this down.

Counsel, proceed.

MR. TOBEROFF: We're playing clips from the video, Your Honor.

(Video clip plays.)

THE WITNESS: I can't understand the audio.

(Video clip plays again.)

MR. TOBEROFF: Now, we couldn't hear the sound at some points. At the 45-minute mark, the DVD states, "by the 1970's, the future looked bleak for the Man of Steel." Also at the 45-minute mark, the DVD states that Superman had become, "by the 1970's, Superman had become 'a figure of fun.'" Finally, at the 48-minute mark, it states that "during the 1970's, one could not dispel the notion that Superman's best years were behind him."

BY MR. TOBEROFF: Q: Now, do you have any idea why the old note in your file from Warner Bros. that you had previously referred to, turning down Superman in the 1970's said, "go license it out to Alex Salkind. We don't think anyone will care"?

MR. BERGMAN: Objection. All of those statements, there's no indication who made them, when they were made. There's no indication on the outside of the book and certainly none in anything we've seen. Who made those statements?

THE COURT: I understand, Counsel. The statement that is being asked about is the statement that was made that he's already testified that he believes that he may have made or did make. That's the statement in evidence.

That's what he's being questioned about.

MR. BERGMAN: And those are statements by Mr. Levitz?

THE COURT: No, Counsel. I'm not going to make the argument for you. I'll let you respond, Mr. Toberoff.

MR. BERGMAN: Thank you.

THE COURT: Clarify for the record and for counsel what statement you're referring to. There's only one statement in there that's being attributed to this witness.

MR. TOBEROFF: I'm referring to the statement in your interview during the press junket where you mention you have an old note in your file from Warner Bros. turning down producing Superman in the early 1970s which says, "go license it out to Alex Salkind. We don't think anyone will care."

Do you have any idea now why Warner Bros. said this at this time?

THE COURT: That's the statement that's being attributed to him. Not the other statement.

MR. BERGMAN: I thought it was an earlier statement, Your Honor. I apologize.

THE COURT: No worries.

You may answer the question, if you can.

THE WITNESS: Thank you.

Because they were foolish creative executives. Most creative executives in film at some point or another in their careers turn down properties that turn out to be terrifically successful. We have similar notes in the file for Batman, and I suspect there would be an army of such notes available for pretty much any property that's been around a long time.

MR. TOBEROFF: I'd just like to show you a second brief clip from the same Warner documentary regarding a 1975 late-night television special on ABC that Mr. Evanier referred to in his testimony as having been financed or partly financed by DC. It's entitled, "It's a Bird, It's a Plane, It's Superman."

(Video clip plays.)

BY MR. TOBEROFF: Q: When did you first learn about this documentary?

A: I believe I watched it when it first aired.

MR. TOBEROFF: Your Honor, plaintiffs would like to -- actually before I do so -- when we took the deposition of Bryan Singer two years ago, we discussed at length this documentary; he was the director of the documentary and he was also the director of Superman Returns, and this documentary was financed and distributed by Warner Bros. in conjunction with its marketing of Superman Returns. I'd like to offer this documentary into evidence at this time.

MR. BERGMAN: Objection. Mr. Toberoff is purporting to state what Mr. Singer stated.

THE COURT: Counsel, if you're objecting there's no foundation, just say that. The Court understands what a foundational objection is.

Sustained.

MR. BERGMAN: Thank you.

MR. TOBEROFF: My purpose was just to explain something to address the prior objection regarding this documentary in that --

THE COURT: Counsel, the objection is sustained.

You can bring in Mr. Singer; you can lay the foundation; we'll bring it into evidence if that foundation is laid. Preferably we work these things out or we do not bring in needless witnesses. But based on the record before me, there's no foundation. And you cannot lay that by all of the explaining in the world.

MR. TOBEROFF: Your Honor, I'm not trying to introduce any evidence. I was actually just trying to point something out to the Court about --

THE COURT: I thought you were trying to move this into evidence.

MR. TOBEROFF: No. I'm trying to move the documentary into evidence, and in so doing, I just want to point out, we had taken the deposition of Bryan Singer, and in that deposition we thoroughly discussed the documentary to point out that defendants have had notice that this documentary was an issue in this case two years ago; that was the sole reason I was pointing it out.

THE COURT: I just gave an instruction about five minutes ago for you to meet and confer during lunch to discuss this and then come back if there was another issue.

We're not going to have this throughout the trial, little interspersions like this.

MR. TOBEROFF: I understand. I apologize.

THE COURT: Very well. Move along.

Your next question.

BY MR. TOBEROFF: Q: I now turn to DC's Superman option purchase agreement with Time Warner Entertainment, dated as of November 6, 1999. And for simplification, I'll refer to this as the Superman film agreement.

The Superman film agreement was previously admitted as Plaintiffs' Exhibit 232.

Please turn to Bates number WB-4215.

A: Yes, sir.

Q: Is that your signature on this page?

A: Yep.

Q: This Superman film agreement between DC and Time Warner Entertainment company essentially copied the basic financial terms of the 1974 Salkind agreement, Exhibit 203, we discussed previously.

A: The most critical terms, the contingent compensation, were driven by the Salkind agreement. The option structure financially is somewhat different; and, of course, many of the other elements were significantly different based on the changes in the parties and the changes in the times.

Q: But the economic terms were substantially the same; correct?

A: The most critical economic terms were the same.

Q: Now, Warner Bros. succeeded to the 1974 Salkind agreement in approximately 1993; correct?

A: I'm not sure of the exact date, but that sounds like the right time.

Q: The Salkind agreement, the 1974 Salkind agreement, was set to expire on November 5, 1999; correct?

A: Yes, I believe so.

Q: That's why this Superman film agreement is dated as of November 6, 1999; correct?

A: Yes.

Q: In November 1999, the Superman rights that had been granted to Salkind were going to revert to DC at the end of the Salkind agreement; is that correct?

A: Can you restate the question.

Q: If this option purchase agreement, dated as of November 6, 1999, had not been entered into, the Superman film and television rights that had been licensed to Salkind would have reverted to DC; correct?

A: Yes.

Q: At the time on or around the time that these rights were going to revert, did you ask Warner Bros. for permission to shop Superman outside Warner Bros. to another studio?

A: I did not ask Warner Bros. for permission, nor would I have had to.

Q: Did you shop Warner Bros. at this time to another studio?

THE COURT: You mean Superman.

MR. TOBEROFF: Superman, excuse me.

THE WITNESS: No.

BY MR. TOBEROFF: Q: Did you retain a top entertainment agency like Creative Artist Agency or the William Morris Agency to represent DC with respect to the licensing of Superman film and television rights?

A: We never have; we do not think that's a useful strategy.

Q: Did you retain any agency at that time, any talent agency?

A: I think that's the same question.

We never have; we don't believe it's a useful strategy.

Q: Did you retain any one of the entertainment law firms that specialize in the negotiation of transactions with the studios to assist you in your negotiations with Warner Bros.?

A: No.

Q: I'd like to talk to you briefly about the DC/Warner Bros. relationship.

You're both part of one large corporation; correct?

A: Correct.

Q: And whether DC makes money or Warner Bros. makes money, there's a beneficial effect to Time Warner; correct?

A: Correct.

Q: In such a relationship, cash does not transfer in the same way as it does in the competitive open market, does it?

A: I'm not sure what you mean by 'cash does not transfer.'

Q: In your deposition, you made this statement. I'd like to read to you a portion of your deposition.

A: I'm just asking for clarification.

Q: In the deposition, my question -- actually, I'd just like to provide the witness with a copy.

THE COURT: Very well. You may.

Where are you reading from?

MR. TOBEROFF: Page 300, line 19.

BY MR. TOBEROFF: Q: In my question on line 19, I refer to a question I asked you by the press in an interview as follows: Press: "Are these economic windfalls for DC in the same way as Marvel has generated a lot of revenue for itself, or does it kind of fall under just Time Warner?"

Do you see that?

A: Yes.

Q: And by 'economic windfall' they are referring to money received for films like Superman Returns, Batman Begins.

Do you understand that?

A: Yes.

Q: And if you turn to your answer --

THE COURT: Counsel, if you're going to read from the deposition, read the entire question that is set forth in the deposition; read the entire answer. Don't just take excerpts out of it, just for the record.

MR. TOBEROFF: Thank you, Your Honor. I'll reread it.

THE COURT: Indicate the page you're starting at, the line you're starting at, to the line that you're ending at and the line that you're ending at, and then read it.

MR. TOBEROFF: Okay.

BY MR. TOBEROFF: Q: On Page 300, line 15.

QUESTION: "Coming out or have come out based on DC characters, Superman Returns, Batman Begins, V For Vendetta, Constantine; and then on Page 1897, do you see where it says "Press: Are these economic windfalls for DC in the same way as Marvel that's generated a lot of revenue for itself? Or does it kind of fall under just Time Warner?"

Do you see where it says that?

A: Yes, sir.

Q: ANSWER: "I do."

QUESTION: "Your answer. Well we're owned by Time Warner, so it's all a piece of the same thing."

"What do you mean by that statement?"

A: If a corporation --

Q: Excuse me. I'm just reading from this.

ANSWER: "I mean that as distinct from the Marvel situation where they have separate stockholders and there's cash accruing directly to the individual stockholders, and in many cases in the Marvel situation, individual directors for their particular participation, we're part of a large corporation, so it's a transaction between the units. And whether DC makes money on something or Warner Bros. makes money on something, there's a beneficial effect for Time Warner that balances out. Cash doesn't transfer in the same way."

THE COURT: What did you mean by 'cash doesn't transfer in the same way'?

THE WITNESS: What I meant was that if you're dealing with a transaction between unrelated parties, then if the money doesn't get paid to Marvel, the owners of Marvel don't benefit at all. If you're dealing with two related entities, regardless of whether DC is successful or Warner Bros. is successful, the owner benefits, obviously.

BY MR. TOBEROFF: Q: I'll now show you Plaintiffs' Exhibit 223, previously admitted. Turn, please, to Page 5 of the document that is Bates stamped WB-135035.

A: Yes, sir.

Q: As well as Page 9, Bates stamp WB-135039 of the agreement.

A: Yes.

Q: Is that your signature?

A: Yes.

Q: I'd like to show you what's been previously admitted as Plaintiffs' Exhibit 174. Exhibit 174 is a letter dated December 5, 2000, from Brett Paul to you.

Who's Brett Paul?

A: Brett Paul is a business executive with Warner Bros. television.

Q: He writes to you, "DC Comics and Warner Bros. television has agreed that in connection with the caption project in development as a prime time

television series for the WB Network, the same financial conditions contained in that certain letter dated as of September 30, 1991 from Lorimar Productions to DC, relating to, 'Lois & Clark' shall apply to the captioned project, mutatis mutandis."

Did you receive this document?

A: I don't remember it offhand, but I would believe I did. It looks real.

Q: You have no reason to believe you did not receive it; correct?

A: No.

Q: The caption project is Smallville; correct?

A: Correct.

Q: It's your understanding that the Superman television agreement, Plaintiffs' Exhibit 223, contains the same financial terms as DC's 1991 Lorimar agreement regarding the television series Lois and Clark; correct?

A: I believe that the significant financial terms were the same.

Q: By 1991, Lorimar productions had been purchased by Warner Communications and folded into Warner Bros. television; correct?

A: I believe Lorimar was in 1989, and I don't know at what point it was functionally folded into Warner Bros. television. They ran as a separate divisions within Warner Bros. for some period of time.

Q: It was purchased by Warner Bros. communications by that time; correct? By 1991?

A: By Warner Bros., yes, I believe so.

Q: And it sometime thereafter folded into Warner Bros. television; you're just not sure when.

A: I'm not sure of the dates.

Q: If you would turn to Page 6 of this Exhibit, WB-134.

Excuse me. It's the first page of the Exhibit, WB-134867.

A: Yes.

Q: Pardon me. I have the wrong Bates number.

THE COURT: Which Exhibit are you referring to? 223 or 174?

MR. TOBEROFF: I'm referring to 174.

BY MR. TOBEROFF: Q: If you would turn to Page 6, Bates number 134875.

Is that your signature?

A: Yes.

Q: Now, this is the 1991 Lorimar agreement referred to in Mr. Paul's letter; correct?

A: It appears to be, yes.

Q: I'd like to show you what's been previously admitted as Plaintiffs' Exhibit 175.

A: Okay.

Q: Exhibit 175 is a letter agreement dated November 1, 2006, between Warner Bros. television and DC Comics.

Is that your signature on the agreement?

A: Yes.

Q: It's your understanding this agreement gives Warner Bros. television the right to use the DC character Martian Manhunter in the television show Smallville; correct?

A: Yes, as provided herein for, I guess, one episode or one episode and a cameo.

Q: And according to this agreement, DC receives no compensation for the inclusion of Martian Manhunter in Smallville; correct?

A: No compensation in addition to what we're already receiving for Smallville.

Q: I'm referring to compensation for the use of the character Martian Manhunter; there's no additional compensation; correct?

A: There's no additional compensation.

Q: Thank you.

Showing you what's been previously admitted as Plaintiffs' Exhibit 176. Exhibit 176 is a letter agreement dated September 22, 2006, between Warner Bros. television and DC Comics. Mr. Levitz, is that your signature on the Exhibit?

A: Yes.

Q: It's your understanding that like the prior Exhibit, this agreement gives Warner Bros. the right to use a DC character in the television show Smallville; correct?

A: Correct.

Q: This is a different character by the name of the Green Arrow; correct?

A: Correct.

Q: Is the Green Arrow one of DC's more important characters?

A: Second or third tier, I would say.

Q: This gives Warner Bros. the right to use the Green Arrow in Smallville, as indicated in the agreement.

A: Correct.

Q: And DC received no additional compensation for licensing the use of that character to Warner Bros. television for inclusion in Smallville; correct?

A: Correct.

Q: Showing you what's been previously admitted as Plaintiffs' Exhibit 177. Exhibit 177 is a letter agreement dated 2006 between Warner Bros. television and DC Comics.

Is that your signature on the Exhibit?

A: Yes, sir.

Q: And it's your understanding that this agreement gives Warner Bros. television the right to use the DC characters Flash, Aquaman, and Cyborg in the television show Smallville; correct?

A: Correct.

Q: There appears in this agreement to be no additional compensation for the licensing of those characters to Warner Bros. television for use in the television show Smallville; correct?

A: Correct.

MR. TOBEROFF: No further questions.

THE COURT: Cross-examination?

MR. BERGMAN: Your Honor, I will be calling Mr. Levitz during our own examination, but I just want to touch on this last point that Mr. Toberoff made, if I may.

THE COURT: You may.

CROSS-EXAMINATION

BY MR. BERGMAN: **Q:** Mr. Levitz, is it in DC's interest to have Smallville stay on the air, continuing to attract audiences?

A: It's tremendously in our interest, because we receive very substantial fees for that show and have a very significant participation in it.

Q: And is it your opinion or was it your belief at the time you gave these rights for one-segment appearances that the characters who would be appearing as guests might increase the popularity of the show?

A: You face two sets of positive opportunities here. One is that, as I just said, you have a tremendous incentive to keep a show like Smallville alive, and any program over a period of time essentially becomes boring because you've now had everybody fall in love with everybody and everybody hate everybody and move around. If you think of the show ER, which just ended and there's been a lot of coverage, by the time it had finished, some of the women in the show had slept with every man of an appropriate age, almost in rotation. You run out of Peyton Place. So one of the ways you deal with that is you provide fresh material to enhance it and continue it and keep it fresh. That's one of our motivations for doing these deals with no additional consideration.

The second motivation is that for most of these properties, giving them an opportunity to be exposed in this fashion enhances their value. In the case of Aquaman specifically, we were discussing with the producers of Smallville the possibility of developing an Aquaman television show as a spin-off program from Smallville as a companion show.

We did, in fact, shortly after this, option them and they produced a pilot for an Aquaman show to be a companion show based on what they had developed here. It was not successful; it was not picked up by the network. But that's part of what you're trying to do also; you're trying to create future value.

THE COURT: A movement of placements, of sorts.

THE WITNESS: Absolutely.

And the weaker the character, the more the promotional value. If you take Cyborg, who is one of the members of the Teen Titans, again, sort of a third-tier character in our world, you're able to build the value of the character by his having been there.

BY MR. BERGMAN: **Q:** So that one of the possibilities that may exist is that Warner, or some other studio, might say, Gee, Flash was great in that Smallville episode. Why don't we give them a pilot?

MR. TOBEROFF: Objection. Since he is the president of DC comics, I don't believe he should be allowed to ask him leading questions.

THE COURT: Fair enough. Sustained.

Rephrase.

BY MR. BERGMAN: **Q:** Does the appearance in a cameo appearance, such as the one being made by Cyborg or Green Arrow, does that enhance the possibility that another show starring that particular character might be made?

A: In the case of Aquaman, it very specifically worked that way. And in most of the cases, we feel that at the very least, it enhances public awareness of the character. And if you're lucky, maybe that leads somewhere.

MR. BERGMAN: Thank you, sir. I'll continue during our case.

THE COURT: Anything further?

MR. BERGMAN: Nothing further, Your Honor.

REDIRECT EXAMINATION

BY MR. TOBEROFF: Q: Mr. Levitz, have you ever licensed the right to exploit Flash, Aquaman, Cyborg, Green Arrow, or Martian Manhunter in film or television to a company other than Warner Bros. for zero compensation?

A: We probably have for some minor use somewhere along the way. Not for any major project. Certainly not to make a film or a television show around the character, but to appear in it. I think there was a Flash appearance in a motion picture -- God, what was the name of it -- about a guy who continually assumed other people's identities and pretended -- it was a live-action motion picture -- he pretended to be other people. And at one point, the screenwriter had him give Barry Alan, Flash, his real identity as the name he was operating under. 'Stop me if you can,' or something like that. And they had approached

us and said 'can we do this,' and we either charged them nothing or an absolutely trivial fee to get some exposure at the time, after some debate.

There have been instances over the years where we have licensed characters -- definitely including the Flash; I think including Aquaman -- to television programs for appearances where someone was going dressed to a Halloween party as the character. I know there were several Flash instances like that, and we either charged them nothing or a nominal fee.

Q: Other than these nominal uses or references to the character, have you ever permitted these characters to appear as the characters themselves in a television program or movie produced by another studio other than Warner Bros.?

A: I believe we have.

Q: Can you tell me what that belief is based on?

A: Virtually all of our characters at some point in their history have done some form of cameo appearance in something by somebody else. We used a number of the characters, for example, many years ago in Sesame Street, where we allowed them to incorporate them as guest stars because we felt it was good publicity in that situation.

They are not frequent situations. In most situations, you're looking at what the consideration is for what you're doing. The best case consideration you've got is what we had here with Smallville where DC is already receiving a significant income stream, has a significant incentive for the program's success and continued health. And then on top of that, like the cherry on the sunday, you're getting a little added exposure and excitement for the character. But there are occasions where you settle for the cherry, and you just do that. But you'll be much less incentivized to do that; so you'll only do that if that's a Sesame Street or something that you feel has the auspices that will add significant value to your character, even if they are not paying you what you think you would ideally like to get.

Q: My question, Mr. Levitz, was not whether you've licensed the appearance of these characters as cameos in other television shows. My question was whether you've licensed the actual appearance of these characters, whether as cameos or otherwise, for zero compensation to a non Warner Bros. company?

MR. BERGMAN: Objection. Asked and answered.

THE COURT: I think it has been.

I am not seeing the fine point that you are alluding to, Counsel. I think he has answered the question.

MR. TOBEROFF: In his answer, Your Honor --

THE COURT: As I understand it -- and maybe I'm mistaken -- these were essentially cameo appearances; The Green Arrow, Flash, Aquaman; these were single --

THE WITNESS: Single episodes or short arts; basically, supporting characters.

THE COURT: That's what you're asking about; has that happened with anyone outside of Warner Bros.

MR. TOBEROFF: I'm asking whether it's happened where DC has not been compensated for that license, even if it's a minimal license.

THE COURT: I think he's answered that question.

THE WITNESS: I believe -- if you read back my previous answer -- I believe there have been cases where we have charged no fee, as well as cases where we've charged a nominal fee.

BY MR. TOBEROFF: Q: What are the cases where you have charged no fee?

A: Sesame Street is the one I remember offhand. Because they are not economic projects, they don't have significant bottom line or no bottom line implications; and because cameos are intrinsically a transient thing, I don't remember across the many many years which of them we've done. But it would be our practice to have done things like that.

Q: Isn't it a fact that Green Arrow, one of the characters licensed in one of the exhibits I just pointed to, is now a regular on the Smallville TV series?

A: We have since added Green Arrow to more episodes. I don't know if he's a full regular or not. Frankly, I don't follow the show that closely at this point; but it worked creatively and it added value to the show, so we're thrilled to have him there if it has helped us get to our eighth season now.

Q: And he has appeared on multiple episodes; correct?

A: Correct, yes.

Q: And DC is not receiving compensation for that appearance; correct?

A: We're receiving considerable compensation for it in the form of our share of the revenues from Smallville.

Q: But DC is not receiving separate compensation for the use of the Green Arrow in multiple Smallville episodes; correct?

A: I don't remember, but I don't think so.

MR. TOBEROFF: Thank you.

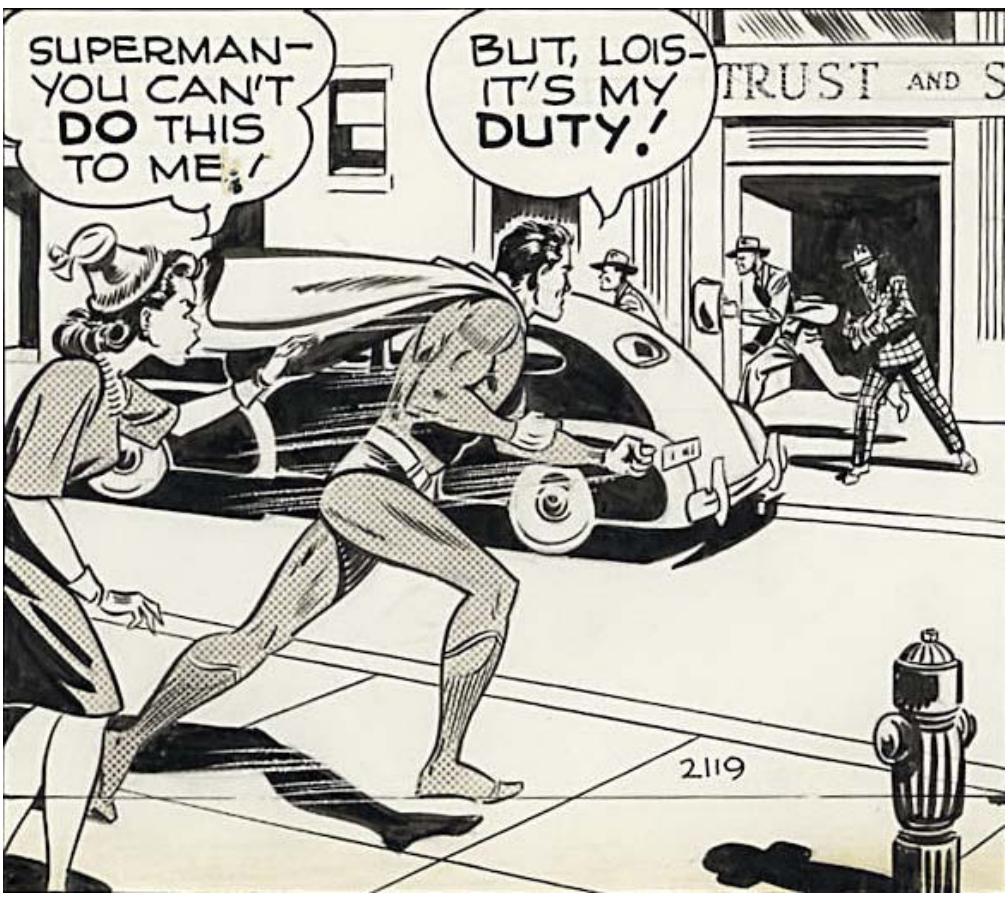
THE COURT: Anything further?

MR. BERGMAN: Nothing further, Your Honor.

THE COURT: Thank you.

All right. It's about five minutes before the noon hour. Let's break for lunch at this time.

(A.M. session concludes.)



P.M. Session

Wednesday, April 29, 2009; 1:35 P.M.

WITNESSES: Mark Edward Halloran

THE COURT: Good afternoon, Counsel. Plaintiffs may call their next witness.

MR. TOBEROFF: Good afternoon. Plaintiffs call their expert, Mark Halloran.

THE CLERK: Please come forward and stop next to the court reporter. Please raise your right hand.

MARK EDWARD HALLORAN, SWORN.

THE CLERK: Please take the stand. Please state your full name for the record, and spell your last name.

THE WITNESS: Mark Edward Halloran, H-A-L-L-O-R-A-N.

DIRECT EXAMINATION

BY MR. TOBEROFF: Q: Good afternoon, Mr. Halloran.

A: Good afternoon.

Q: Can you please tell us what you do for a living.

A: I'm a transactional entertainment lawyer, author, and teacher.

Q: How long have you been working in the entertainment industry?

A: Approximately 28 years.

Q: And in those 28 years, have you ever worked for a major studio?

A: Yes.

Q: Which studio?

A: I worked for Orion Pictures and for Universal Pictures.

Q: What is the time period during which you worked for Orion Pictures?

A: 1982 to 1985.

Q: And what was your position at Orion?

A: I was business affairs counsel.

Q: And in that position, what was the scope of your duties?

A: I did a whole host of things. I -- the basic two categories were that I was counsel with respect to projects that were developed, produced, and distributed by Orion, and I was also music counsel.

Q: And what was the other studio that you worked at? Universal?

A: Yeah, MCA Universal.

Q: What was your title there?

A: It was initially business affairs executive, and then in 1986 I got promoted to vice-president of business affairs.

Q: And you were at MCA Universal for what time period?

A: From 1985 to 1990.

Q: And what were the scope of your duties in business affairs at MCA?

A: Well, initially, when I was business affairs executive, I was predominantly a -- the primary duty would be to document deals on a project basis, including deals for rights, acquisition, writers, actors, producers, and the like, and then when I was promoted to vice-president, assumed a more -- my predominant job was to negotiate the deal points, the up-front deal points, specially money for deals involving rights acquisition, writers, directors, actors, producers, and also negotiating deals for the acquisition of the distribution rights to motion pictures.

I also spent a fair amount of time actually both at Orion and at Universal working at financing transactions with banks whereby both -- the studios would be able to raise financing from a bank in order to finance the production of their pictures.

Q: What films did you work on at Orion?

A: At Orion I worked on --

Q: Just some examples?

A: Okay. I worked on the Richard Gere movie Breathless. I worked on Cotton Club, which was directed by Francis Coppola and starring Richard Gere.

I worked on a picture called Falcon and the Snowman, which started Sean Penn and was directed by John Schlesinger.

I worked on the Hotel New Hampshire, based on a John Irving book. I worked on Amadeus. I worked on the Woman In Red, which had a Stevie Wonder sound track.

Q: That's fine. At MCA Universal, what pictures were you involved with?

A: I worked on Out of Africa, which won the Academy Award for Best Picture in 1985 and starred Robert Redford and Meryl Streep. I worked on the Back to the Future 2 and 3, starring Michael J. Fox. I worked on Twins, which starred Arnold Schwarzenegger and Danny DeVito. I worked on Kindergarten Cop, which again starred Arnold Schwarzenegger. Both are illustrative. I also worked on Dark Man.

Q: Please describe your television experience, if any, at Orion.

A: At Orion, when I -- I documented and negotiated rights acquisition and writer deals. As part of the agreements, I would negotiate royalties, grant of rights, and also royalties for television MOW's and -- excuse me. Movies of the Week, miniseries, and television series. Both network and non-network.

Q: Could you please describe your television experience at MCA Universal?

A: It was essentially the same. I would negotiate the acquisition of television rights and rights acquisition and writer agreements and specifically negotiate the royalties that would be payable to the -- the rights on it or the writer for movies of the week, miniseries, and episodic television, including for network and cable and the like.

Q: After working at the studios, what have you done since 1991?

A: I have been in private practice as a transactional entertainment lawyer.

Q: And in private practice, can you please describe to me your work?

A: My work in private practice has been a little more broad based than at the studio. I've worked in the film business on both studio deals and independent deals. I've represented television companies and television content creators. I've represented stage authors, companies that -- more lately companies that are producing so-called webisodes, which is essentially television series that are intended to be initially broadcast on the Internet rather than through traditional broadcast.

I've also acted as an expert witness in approximately 30 cases.

Q: Were you involved -- at the studios, you were involved with respect to intellectual property on the buy side; is that correct?

A: Correct.

Q: And in private practice, you are more involved in representing the seller in dealing with intellectual property?

A: Well, vis-a-vis the studios, I'm on the selling side from the -- when I represent intellectual rights holders. When I represent independent producers, I'm on the buying side.

Because I am involved in the optioning of books, plays, and other types of intellectual property to be used as the basis for theatrical motion pictures and television motion pictures.

Q: Could you provide some examples of work you've done in private practice regarding entertainment projects that are based on pre-established intellectual properties?

A: Yes. In the 90's, I was counsel to a company called Require Cinema. And that was a joint venture between Random Productions and Amblin, Stephen Spielberg. And the company developed and produced for initial broadcast on Turner Network television a series of movies of the week that were based on writings of well-known authors.

I believe there were about six. Three were based on plays, and three were original screenplays written by famous authors. And three of the plays were -- one was written by Arthur Miller. One by David Manet, M-A-N-E-T, and one by Horton Foot.

Q: And you worked on all six of these television MOW's?

A: Yes. I also at that time represented a company called Handmade Pictures, and I licensed the television motion picture rights to part of their library, a picture called Time Bandits. Also during that time I represented a company called Neopets, and I negotiated a possible animation joint venture with Hasbro.

Q: Now, getting back to my focus on working on entertainment projects regarding pre-established properties. You mentioned representing Cinema, Inc.

A: Writers Cinema.

Q: Writers Cinema, Inc. Can you give me other examples of work you've done in private practice regarding entertainment products based on pre-established properties?

A: Well, I have represented producers of studio films that were based on existing properties. I represented and continue to represent Bob Doucet, who did Mummy, Mummy 1, 2, and 3 for Universal. He's just finishing G.I. Joe for Paramount right now. I also represented -- I think that's it.

Q: Did you represent a gentleman by the name of Cavandra?

A: It was actually Jonathan Cavandish. He's the producer for Bridget Jones.

Q: Both the original and sequel?

A: Yes. I believe that was based on a book.

Q: And what other entertainment projects have you represented Handmade Films on?

A: I represented Handmade Films in the acquisitions to the television and merchandising rights to a children's comic -- excuse me -- a well-known children's series of books called Eloise, and what we did was we purchased the Simon and Shuster and the estate of the writer owned the rights, and we purchased everything but the publishing rights, and then we arranged with ABC to produce a series of Eloise movies of the week.

So I negotiated -- after acquiring the television rights, I negotiated a deal with ABC on behalf of the Handmade -- excuse me -- whereby they received a license fee from ABC to enable them to produce the MOW's for ABC. And also there was a merchandising component in that deal and also a separate home video component in that deal with ABC.

Most recently, I have been in negotiations with Lionsgate to possibly license the Handmade television rights to Lionsgate for the Handmade library.

Q: So although your practice includes a great deal of film work, you also have television experience; correct?

MR. BERGMAN: Objection. Leading, your Honor.

THE COURT: It's foundational. Overruled.

BY MR. TOBEROFF: Q: Can you give me some more examples of your experience in television and private practice?

A: Yes, I've acted as an expert witness in the television area.

Q: I'll get to that in a moment.

Other than expert witness, focusing on your transactional work, could you give me some more examples of -- you mentioned representing Cinema, Inc.

A: Right. I also have represented a company called Trademark Properties, the principals of which are Richard Davis and Ginger Alexander. And I negotiated – they developed a real estate format which was originally exploited on A and E. And then subsequently I made a deal with Fox, which didn't go through, and then ultimately went to the Discovery Channel, and they are currently shooting a show called The Real Estate Pros.

Q: When you say real estate format, you're referring to a format for a reality television series?

A: Yes.

In addition, I represent two companies that, as I mentioned before, were involved in the webisode business, which is a conjunction of the web and episode. One of them is called Ms. Sheila. They have a very prominent website, and they option content and create consent for that site.

I also represent a company called Ten Thousand Days, LLC. The two people who own that are Erica Lockridge and Eric Small. And they are doing a series of webisodes called Ten Thousand Days, which stars John Schneider from Smallville.

So I also negotiated the deal with John Schneider to star in that webisode series.

Q: When you refer to webisodes, is this essentially programming that is like television programming except that rather than being broadcast on a network, it's distributed over the Internet.

A: Yes.

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained. Why don't you describe what webisode is. You're the expert.

THE WITNESS: Okay. I'll be happy to tell you. Webisode is very much like -- the companies that are in the webisode business essentially have adopted the television way of doing business except instead of the episode being broadcast initially over television, it's broadcast through a computer. One of the

features, though, the so-called webisodes, are typically only three to six minutes long. They are very short. I guess it's because the attention span of those who use computers is very short.

These are sometimes -- oftentimes designed to be the launching pad, hopefully, for a network television series. So those are webisodes.

Is that clear?

BY MR. TOBEROFF: Q: Did you represent a company by the name of Citadel Entertainment?

A: Yes. I represented them in the 90's, and their principal was David Ginsberg. And I had represented a woman by the name of Lee Ann Moore, who was their producer. Lee Ann and I met at Universal when we worked on Back To The Future together.

So -- for Citadel, I worked on the development and production of a series of, I think, four to six television movies of the week as well. And they were licensed to various cable companies for initial release. Initial broadcast, rather.

Q: And are you familiar with a TV producer by the name of John Leboff?

A: Yes. I currently represent John Leboff. He is developing a television series called The Spirit of Man. The basic notion is that he will be going around the world and interviewing famous sports figures and showing the good deeds that they do in their countries, for example, a famous Brazilian soccer player and the like.

I recently negotiated an agreement with a company called Fremantle -- that only has one E, but it's pronounced free -- and they produce Person Idol, and Fremantle is going to handle the foreign distribution of the program. And my clients essentially partnered with Fremantle in terms of doing a deal with them at U.S. network.

Q: Mr. Halloran, have you ever been retained as an expert witness in a case involving the television industry?

A: Yes.

Q: Can you run me through the cases very briefly?

A: Yes, very briefly. Actually, my first engagement, after I left Universal, was a case called Max Baer versus ABC, as most people know, who starred in the

Beverly Hillbillies, involving a dispute over the option to make a television movie out of the Madonna song Like a Virgin.

I was subsequently engaged in a case on behalf of George Wendt and John Ratzenberger, who were two of the stars of Cheers. There was a dispute over the unauthorized use of their likeness as the basis for some animated robots. Pretty famous case.

Q: The animated robots appeared in?

A: Animatronic Robots. They appeared in bars at airports.

Q: On television?

A: No. The dispute arose out of the license by Paramount, which was producing Cheers to Host International to merchandise and depict robots that looked like George Wendt and John Ratzenberger. And the contracts I was dealing with were the contracts for Cheers.

More recently, I worked on a case called Smitt versus Gurney, which involved a dispute over fees payable for footage and producing services on a reality television program. And I also was engaged in a case called Fraser, F-R-A-S-E-R, versus NBC, which involved a dispute over the alleged appropriation of a format idea by NBC and a company called Reveille.

Q: Other than your work at the studios and in private practice, what other positions have you held relevant to the entertainment industry?

A: Since 1987 or so, I have worked on the USC Beverly Hills Bar Association Institute on Entertainment Law and Business.

That's probably the premiere entertainment law seminar in the world. I initially was on the syllabus committee that we put together the materials, and then I graduated to the planning committee, which puts together the programs. Since 1994. So I've been co-chair of the institute. And we put on an annual program. Last year, for example, it was called Your Television Is Ringing. It was about the migration of television into mobile devices and the like.

Q: Have you received any awards or -- excuse me. Have you received any awards in connection with your work with the Beverly Hills Bar Association Institute on Entertainment Law?

A: I received the Lewis B. Fox distinguished award a few years ago for my work with the Beverly Hills Bar Association and specifically, the book that I co-wrote for the Bar Association called Musicians, Business, and Legal Guide.

MR. BERGMAN: Excuse me, your Honor. May I ask that the witness speak a little bit louder, please?

THE WITNESS: Sure.

MR. BERGMAN: Thank you.

BY MR. TOBEROFF: Q: Have you written any other books related to the entertainment industry?

A: Yes, I've written two other books. One is called Musicians Guide to Copyright, which I co-wrote while I was at Hastings Law School and which was published by Charles Scribner & Sons and was on the U.S. Copyright Office recommended reading list.

My latest book is called The Independent Film Producers Survival Guide. And it's published by Schirmer Books.

Q: Have you written any articles related to the entertainment industry?

A: Yes, I've written numerous articles.

Q: Have you given any talks or lectures relating to the entertainment industry?

A: Yes. I've given two within the last month. I speak frequently.

Q: Have you given any lectures regarding intellectual property rights?

A: Yes.

Q: Can you please describe those for me.

A: Yeah. For two years a lawyer -- a trademark lawyer who I work with by the name of Ken Feinsloff (phonetic) asked me to talk about protection of intellectual property at his class at UCLA Extension.

Q: Have you taught any courses related to the entertainment industry?

A: Yes. I taught a course on motion picture finance in the mid-80's at UCLA Extension. And since 2004 I've been teaching a class at Southwestern Law School called Financing and Distributing Independent Films.

Q: I'd like to mark for identification as Plaintiff's Exhibit 332 Mr. Halloran's expert report in this case.

(Exhibit 332 for identification.)

BY MR. TOBEROFF: Q: Your resume is attached as Exhibit A.

Strike that.

I'd like you to turn to Exhibit A. Is that your resume?

A: It is.

MR. TOBEROFF: Your Honor, I'd like to offer Plaintiff's Exhibit 332 into evidence solely for the purposes of Mr. Halloran's resume.

THE COURT: Let me take a real quick look at it, Counsel. I haven't received a copy yet.

Where is the resume within this, Counsel?

MR. TOBEROFF: It's Exhibit A.

THE COURT: And that's all you're seeking to introduce at this time?

MR. TOBEROFF: That's correct.

THE COURT: Any objection?

MR. BERGMAN: No objection for that limited purpose.

THE COURT: Very well. It's admitted.

(Exhibit A received.)

MR. TOBEROFF: Your Honor, at this time I'd like to tender Mr. Halloran as plaintiff's expert witness in this case.

THE COURT: For what purpose?

MR. TOBEROFF: For the purpose of reviewing a number of agreements relevant to an analysis of the fair market value of the Superman film and television agreements between DC and Warner Brothers and for the purpose of speaking of the value of Superman to the entertainment industry as a branded franchise.

THE COURT: Any objection?

MR. BERGMAN: Yes, your Honor. I do object at least insofar as the witness would testify as to the question your Honor posed, namely, were the rights that are were transferred from DC to Warner Brothers, the nonexclusive rights transferred fair market value.

THE COURT: You may conduct voir dire, if you wish.

MR. BERGMAN: Pardon me?

THE COURT: You may conduct voir dire, if you wish.

MR. BERGMAN: Okay. Thank you.

VOIR DIRE EXAMINATION

BY MR. BERGMAN:

Q: Mr. Halloran, I took your deposition recently, didn't I, on March 5?

A: Yes.

Q: And at that deposition, sir, did I ask you -- and I'm referring Mr. Toberoff to page 262 -- commencing at line 23 and ending at line -- page 263, line 3.

Did you -- were you asked the questions, and did you give the following answer:

"My question to you, sir, is what would a fair market contract be in 2002 for the nonexclusive rights that -- film rights that the Court has determined were transferred from DC to Warner Brothers?

"ANSWER: I have not formulated an opinion as to that value."

Did you give that answer to that question?

A: I think I did.

MR. BERGMAN: And down at page 263, your Honor, I'll be referring to lines 19 through 24:

"QUESTION: Okay. Let me ask you this, then. Moving over now to the television license, do you have an opinion as to what the fair market value in 2002 was of the nonexclusive television rights that the court has determined were transferred from DC to Warner Brothers?

"ANSWER: I have not formulated that opinion."

Q: Did you give that answer, sir?

A: You are reading from my deposition. I gather that I did.

MR. BERGMAN: Okay. On that basis, your Honor, since the witness did not give a fair market value in his report, and since he had not devised one as of the time of his deposition, I believe he's precluded from offering such evidence at trial.

THE COURT: Well, he's certainly precluded from answering those questions, and that is correct. I think he is clearly an expert on these various financing agreements, and he may be able to provide pertinent relevant information. I don't know. We'll have to see. But you're correct with respect to those two particular questions. This witness did not formulate an opinion in advance of

trial, and so he will not be called upon to give one, nor would the Court consider his opinion at trial.

MR. BERGMAN: Okay. Thank you, your Honor.

THE COURT: Very well. If that's all, Counsel, you may proceed. The witness is so designated as an expert on -- you said reviewing agreements. I assume you mean the formulation and the details and the creation of these various financing agreements?

MR. TOBEROFF: That's correct, and in valuing the terms in comparison to other terms for agreements.

THE COURT: We'll see the foundation of what you're specifically talking about. There may be limitations to it in light of that deposition testimony.

MR. TOBEROFF: Certainly, your Honor. I would like, if I may, to -- may I comment on that?

THE COURT: Save your comments for closing argument.

We're in the trial at this point and eliciting evidence. I'm going to give you all the time in the world to make commentary, make arguments, and --

THE WITNESS: Is there something I can add?

THE COURT: Not until a question has been asked.

THE WITNESS: Okay.

THE COURT: You may proceed, Counsel.

DIRECT EXAMINATION (RESUMED)

BY MR. TOBEROFF: Q: Before we get into the details of your opinion, in your opinion, do the terms of DC's Superman film agreement with Warner Brothers, dated November 6, 1999, constitute fair market value?

MR. BERGMAN: Same objection, your Honor.

THE COURT: Sustained.

MR. TOBEROFF: Your Honor, if I may, the witness is here to analyze what this Court has asked, whether these agreements constitute fair market value.

THE COURT: Then let's analyze it. In light of those questions, Counsel, in light of his stated indication that he does not have an opinion with respect to the particular rights that this Court has found were transferred, you are going to have to get into those nuts and bolts before you get to the ultimate question.

You are putting the cart before the horse. I'll certainly permit you to go through this deal with this witness.

But let me -- educate me, Counsel. Use your expert witness to educate me. That's the purpose of an expert witness. It's not to answer the ultimate question.

I will determine whether or not there was a fair market value, not this witness and not any other witness. Use this witness to educate me. He sounds like a very intelligent man who has a tremendous amount of experience in this area, and I suspect he has a lot to offer. A conclusory opinion does not advance the ball at all.

MR. TOBEROFF: Thank you, your Honor.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'd like to turn to the subject of Superman in general and its value in the entertainment industry.

How valuable was Superman as a film property in the late 1990's and the early 2000's?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained. Lay a foundation, Counsel.

BY MR. TOBEROFF: Q: Are you familiar with the character Superman?

A: I am.

THE COURT: That's a good first question. Now we're going in the right direction, Counsel.

MR. TOBEROFF: Thank you.

THE WITNESS: I've known Superman since I was yea high.

BY MR. TOBEROFF: Q: And have you seen the Superman television series starring George Reeves?

A: Yes. Many, many, many times.

Q: Are you familiar with the Superman feature film starring Christopher Reeve?

A: Yes, I saw it, I think, the first weekend it came out.

Q: Are you familiar with the recently released film Superman Returns, released in 2006?

A: Yes. Again, I think I saw it the first weekend it came out.

Q: What is your assessment of the value of Superman as an underlying film property in the late 90's and early 2000's?

MR. BERGMAN: Objection, your Honor. Unless we're speaking about exclusive rights to Superman.

THE COURT: I'd be curious to know, Counsel, before we get to these conclusory questions, how it is that this expert makes these valuations and what these valuations are based on. Again, if there's going to be any value to an expert witness, whether it's before a judge or a jury, it's to educate the judge or the jury. And simply having a -- someone who is, again, obviously well-qualified, obviously intelligent give me a conclusion doesn't really help me at all.

MR. TOBEROFF: I'll walk him through it before we ask any ultimate questions.

THE COURT: Thank you, Counsel. Because we also want to make sure that we're talking about what he is valuing is in fact what the Court has found was what was transferred.

BY MR. TOBEROFF: Q: Have you reviewed an agreement between

DC and Warner Brothers dated as of November 1999?

A: Yes.

Q: And do you recall when that agreement was executed approximately?

A: Yes, it was executed in 2002. I believe May of 2002.

Q: And did you also review, in preparing your expert report, a Superman television agreement between DC and Time Warner Entertainment Company, a division of Warner Brothers?

A: Yes.

Q: And do you recall when that agreement was entered into?

A: I believe 2001.

Q: As of 2002, what media, if any, had Superman been exploited in?

A: I believe Superman had been exploited in virtually every then extant medium. Started out as a comic book and subsequently was a television

series, merchandise, successful film, television program. Virtually I can't think of any media that it wasn't exploited in at that time.

Q: Was it exploited in radio?

A: Yes, radio as well.

Q: And prior to 2002, what was Superman's track record in film?

MR. BERGMAN: Objection. Lack of foundation, your Honor.

THE COURT: I'm not sure what you mean, "track record." Why don't you rephrase your question, Counsel.

Q. **BY MR. TOBEROFF:** You described to me that you are familiar with Superman films starring Christopher Reeve; correct?

A: Yes.

MR. BERGMAN: Excuse me. May I ask what the witness is looking at at the witness table?

THE COURT: I'm not really sure, Counsel.

THE WITNESS: I have my expert report. I was just looking through.

THE COURT: Just put it aside for the time being. If you need the report, let us know.

THE WITNESS: Okay.

THE COURT: It creates the mistaken impression that somehow this is scripted. I have every confidence that it is not. But appearance is sometimes very important.

THE WITNESS: I see.

BY MR. TOBEROFF: Q: And how would you assess those

Christopher Reeve films? Would you assess those films as being successful or unsuccessful?

A: Depends which one you're talking about. Certainly the original 1978 film was a huge success. And most people think that it created the tent-pole comic book franchise big budget blockbuster movie phenomenon that certainly was with us in the late 90's, early 2000's, and is with us today. And my recollection is that it did. About $134 million domestic box office, and in today's dollars, that would be $400 million.

So that was -- and it was the number one movie of the year. So it was a huge success.

Shall I go on to the other movies?

Q: You may.

THE COURT: Why don't you ask a question, Counsel.

BY MR. TOBEROFF: Q: Well, I'll stop you there. We can talk about the other movies later.

A: Okay.

Q: In valuing intellectual property, what is the significance, if any, of that property having a prior successful commercial track record?

A: It's usually -- it's a huge part of the analysis. Because what you're trying to -- if you take a snapshot in 1990, 2002, you certainly look at the prior track record of Superman over the course of 60 years, 65 years, and see that it had a continuing record of being exploited and for the most part being very successfully exploited. That would, in analyzing the value in 1999 to 2002, that would be extraordinarily important because you'd use that as a basis for looking forward and trying to capture that value on a going forward basis.

Q: Are properties that have only been intermittently exploited considered to be more or less valuable than properties that have been consistently exploited?

A: For the most part, less. Excuse me. More valuable if they have been consistently exploited rather than intermittently.

Q: And in -- how would you assess properties that have no track record in commercial exploitation, or limited track record in commercial exploitation?

A: They are less of a value. Because there's not as much of a track record in assessing the value in a certain time period, would be more risky, and thus, you would have to discount what you would pay because there wasn't the sort of track record of success in the past, and the public awareness that was created from that track record.

Q: Let's now go back to the Superman sequels that followed. The first Christopher Reeve movie that followed in 1978, the Superman 2, how successful was that?

A: It was successful, but not as successful as Superman 1.

I believe it did about 80 percent of the box office that Superman 1 did. But it was still, I think, the No. 3 movie of the year at the box office. So it was still successful.

Q: And Superman 3?

A: Superman 3 was not as -- it was less successful than Superman 2, but still, I think, relatively successful.

Q: And Superman 4?

A: Superman 4 was a disaster. Superman 4 was produced by a company called Cannon Pictures that was known for sort of, shall we say, sloggy films, and apparently they cut the budget from 35 million to 17 million. And they made a really bad, bad movie, and it did not perform well.

MR. BERGMAN: Objection, your Honor. There -- the witness wasn't asked that question and certainly hasn't shown any foundation for making that statement.

THE COURT: I don't think anybody is contending that Superman 4 was a good movie at this point. I think --

MR. BERGMAN: You are certainly right, your Honor, but the question of describing it, as Mr. Halloran did, and who distributed the film and how they distributed the film wasn't asked --

THE COURT: Fair enough. Let's -- just listen carefully to the question and just answer the question being asked. I'm almost prepared to take judicial notice that Superman 4 was not a very good movie, based on what I've heard so far.

MR. BERGMAN: If not, your Honor, we may have to show it to you.

THE COURT: Proceed, Counsel.

BY MR. TOBEROFF: Q: Which company produced Superman 4?

A: I believe it was Cannon Films.

Q: And did they also distribute the picture?

A: No. I don't think so.

Q: Do you know who distributed the picture?

A: I think Warner distributed it.

Q: And what was the budget of the picture?

A: I understand it to be 17 million or so.

Q: As a whole, did these Superman movies, some more successful than others, have a positive or negative impact on Superman's value in the entertainment industry?

A: An extraordinarily positive impact. Notwithstanding Superman 4.

Q: And why did you say notwithstanding Superman 4?

A: I said that because the consensus is -- two things in mind. Back in the 70's, the trend was that sequels, rather than becoming more successful over time, as they sometimes do now with, say, for example and Dark Knight, where it was -- the arc was going up with respect to box office. In those days, the consensus that most people shared was that the -- there would be sort of a continuing downward pitch of box office.

So if picture one was a hundred million dollars in the box office, the next one would do two thirds of that and two thirds of that and would go down. And it was the experience with film franchises like Jaws.

Now, that's changed in the 90's. There was also that trend from my analysis, similar trend in the 80's with the Batman movies, which started out and then went down and down.

MR. BERGMAN: Objection, your Honor. The witness hasn't shown any foundation for making a statement as to the trend generally or what most people thought at the time.

THE COURT: Okay, Counsel. We've talked about the speaking objections. Just object on foundation. I'm going to overrule it. I think this witness is qualified to testify on this. Proceed, Counsel.

THE WITNESS: On this one third --

THE COURT: Well, there's no question. You've answered the question.

THE WITNESS: Okay. I can explain where I got that in particular if I --

THE COURT: Wait for the question. Counsel.

BY MR. TOBEROFF: Q: Can you explain to me further how you arrived at those proportions, please?

A: In my discussions with executives at MCA, we did financial modeling of movies, and by that I mean to say we would use Excel spreadsheets and put the budget in and project a release cost and try to predict what the performance of the film would be. And it was our experience, based on both

our films and films generally in the marketplace that -- actually, excuse me, this was in the 70's. It was the rule in both the 70's and the 80's that there was that diminution. And ultimately, that rule got put on its head in the late 90's.

And we had specific discussions about that, and when we would model our discussions on a sequel, we would predict that if picture one did a hundred dollars, that the first sequel would do $67.

Q: Skipping to May 9, 2002, when the Superman film agreement was entered into, who were the two highest grossing comic book movies at that point in time?

A: At 2002?

Q: May 9, 2002.

A: If you're talking about inflation adjusted dollars, it was the first Superman and Batman.

Q: And Batman, you're referring to the Batman movie released in the 1980's?

A: 1985, I believe. Right around that time was when Spiderman came out, which had even a higher gross, I believe.

Q: How does the success of the first Superman movie starring Christopher Reeve, released in 1978, compare to the success of other comic book movies released after 2002?

A: It's on a par and as successful as virtually any other comic book based movie. I think the only one -- it's on a par with Batman and only slightly less than the first Spiderman on an inflation adjusted basis.

Q: In 1978, when the first Superman movie was released, were films released on more or less screens than in this decade?

A: Fewer in 1978 than now. If you were to look at a graph from 1978 to now, I would estimate there's at least twice as many theaters in the United States as there were then, and also what the studios have done is they now book theaters, you know, say, 3,500 in a weekend, which was very unusual in the late 70's.

They also spend a lot more to get the opening weekend gross.

Q: How do the marketing dollars spent in 1978 compare to the marketing dollars spent in this decade on releasing major films?

A: The marketing dollars have gone up substantially, both on an absolute basis and an inflation adjusted basis since 1978.

Q: What impact, if any, does this differential in the number of theaters the film is released in and the marketing dollars spent have on your analysis when comparing the success of Superman -- the first Superman movie to other more recent comic book movies?

A: It makes it look even more successful.

Q: Why is that?

A: And standing out even more. Because back in the late 70's, they weren't spending either as much to produce or to market the movie. So if you take the inflation adjusted $410 million that stands out in domestic box office, it stands out even more now because there weren't as many theaters and there wasn't as much money spent in either production or distribution of the film.

So it stands out even more, and I would draw the conclusion to that that it's an even more valuable property looking at it in that context.

Q: What was the next movie -- Superman movie developed after Superman 4?

A: Well, ultimately it was called Superman Returns.

Q: When did that development of Superman Returns or whatever its predecessor title was to the next Superman movie commence?

A: I understand it commenced in 1995 or so.

Q: Do you have an understanding of how much money was spent by Warner Brothers on the development of a new Superman film from 1995 to releasing or commencing production on Superman Returns?

A: I understand it's in the neighborhood of $30 million.

Q: When was Superman Returns released?

A: 2006.

Q: Do you know what time period in 2006?

A: Well, I -- it would have been either summer or Christmas.

It was, I think, more likely summer.

Q: And how much was Warner Brothers reported to have spent on the Superman Returns production?

A: 225 million.

Q: And how much was Warner Brothers reported to have spent on prints and advertising in connection with Superman Returns?

A: Approximately 140 million, I believe.

Q: Does this expenditure by Warner Brothers impact your analysis of Superman's value in 2002?

A: Yes.

Q: In what respect?

A: Well, putting into context both the money that was spent on development and production and release, and, you know, Warner is certainly one of, if not the top distributors in the world, they must have thought that it was -- that spending the money was a rational investment and that the property was a valuable basis for this movie, for Superman Returns.

Q: How did Superman Returns perform at the box office?

A: It did very well. It did approximately 400 million worldwide. My recollection is that breaks down to a little bit over 200 domestic and I think 190 and change foreign.

Q: How does the actual box office performance of Superman Returns, released in 2006, impact your analysis of the Superman film agreement entered into in 2002, if at all?

A: It impacts it because if you look at the period of time necessary to develop, produce, and release a film as of 2006, it means that the deal would have been made in, you know, late 90's, early 2000. And so it was obviously when that deal was made in that window, Warner Brothers must have thought that it was an extremely valuable property to spend the money on development and production and release of that film.

THE COURT: I don't know if that answers the question, though. I can certainly see where the money being outlaid before the deal was consummated, as reflecting the owner's understanding of the value, or the confidence. But how does the ultimate success of the movie -- we heard testimony yesterday from one of the plaintiff's witnesses that there really is no way of knowing for sure what movie is going to succeed or what movie is not going to succeed. I would assume you would agree with that?

THE WITNESS: As an absolute statement, yes, but I certainly think that sophisticated studios like Warners place good bets.

THE COURT: Okay.

THE WITNESS: For example, with Harry Potter, that had not had a track record of success as a movie, and it's been wildly successful.

THE COURT: I understand that. But the problem I'm having is using, you know, ultimate success as a way -- as a factor in assessing value to something which took place in the creation stage. You believe that does have a --

THE WITNESS: Well, let's break it into two halves. Maybe I can be helpful here. Because when I was at Universal, we would do this analysis. There's two parts of it. One is let's look at the past performance of this intellectual property, both commercially and in terms of awareness, you know, the so-called brand.

So we would look at -- and the brand awareness is -- doesn't directly correlate with success necessarily.

THE COURT: No, but I can see how that has a role in the negotiator's assessment of the value.

THE WITNESS: Yes. So -- but what we try to do, of course, is to -- what you try to do is to look forward and try to predict as best you can what additional value to a project having the license that the intellectual property would have.

For example, take Superman Returns and take Superman. You have the relatively unknown actors and maybe a little action. I have to believe that the contribution of the Superman name and character added enormously to the performance of that film.

THE COURT: Well, fair enough. And that's all what's known previously. And I even understand how the projected or the expected returns figure into the value.

THE WITNESS: Hm-hm.

THE COURT: But what I'm struggling with understanding is what the movie actually does, how does that change what the value was under -- what the value actually was back in 2000. If I'm negotiating with you on the sale of anything, any commodity, I place a value on it. You place a value on it. We negotiate it, and we come up with a deal. I give you the commodity. You give me money.

THE WITNESS: Correct.

THE COURT: Certainly my assessment of the value of that commodity is based on historical factors, how the commodity has done in the past, and how I expect it to do in the future.

THE WITNESS: Hm-hm.

THE COURT: Now, what direction the commodity ultimately takes after the transaction is interesting. I'm not clear -- I'm not sure how that's relevant to determining what the value really was back in --

THE WITNESS: No, it's not relevant because you didn't have the performance numbers.

THE COURT: You didn't know.

THE WITNESS: You didn't know.

THE COURT: I agree. All right. That's what I thought.

THE WITNESS: Fair enough.

BY MR. TOBEROFF: Q: When we are valuing intellectual property rights in connection with an agreement, is it correct or incorrect that you look at the value as of the date that the agreement was entered into?

A: Absolutely.

Q: Absolutely correct?

A: Absolutely, yes.

Q: Thank you. When did the Smallville television series first appear? When was the pilot released?

A: It was October 2001, right after 9/11.

Q: I should say broadcast.

A: Yeah, broadcast.

Q: And did the release of the Smallville television series have any effect on your value analysis regarding Superman prior to May 2002, when the Superman film agreement was entered into?

A: Yes. Smallville was and continues to this day to be a very successful show for Warner Brothers. It's my understanding it debuted as the number one top

show in the history of the WB network at the time, and I understand it's in its eighth season, and they have just ordered a ninth season.

So it continues to be successful, and I've seen financial documents that reflect its continuing success.

Q: And did you believe that had a positive impact on the value of Superman as a whole prior to the May 2002 film agreement?

A: Yes.

Q: Switching to a somewhat different subject. If you were representing DC in 1999 to 2002, with respect to the sale or license of Superman film rights, what factors or trends would you consider in assessing the value of the Superman film and television rights?

A: The factors or the trends, not the general factors and trends affecting the marketplace, not the specifics of the Superman character?

Q: I'd like to start with general trends affecting value of a property of this nature.

A: Sure. Well, the general trends at that time were that the studios were more and more looking towards building franchises. Franchises can be based on intellectual property with prior success, like Superman, or they can be new. Like Star Wars was new. But they tend to be based on intellectual property that had prior success.

Also at that time there was the rise of the so-called tent-pole strategy, where companies, especially companies like Warners, would sort of double down their bets on movies and spend enormous amounts on both production costs and releasing costs and place those films in typically Christmas or summer, where the movie going audience tends to go. Those were the macro trends.

Also at the time the studios, even though they were spending more money, they thought -- one of the reasons that really gave rise at that time to the value of the intellectual property was they thought they were limiting their risk and buying -- they were -- what they were essentially buying was what I guess we call prebranded awareness. And especially in a -- in a world where there's competition for eyeballs. Back in the 20's, there was like baseball and radio and horse racing and boxing. I guess that was about it. By the 90's, you had, you know, television. You had the Internet. Sports. All these competing things.

And it just became a lot more expensive for the studios to create the awareness.

What they tried to do was buy awareness, and that became a lot more valuable. That was sort of the macro trend. And I think it continues to this day.

Q: And how do comic books fit or not fit within these trends that you've mentioned?

A: Well, comic books --

MR. BERGMAN: Objection, your Honor. Lack of foundation.

THE COURT: Sustained as to comic books.

BY MR. TOBEROFF: Q: Do you have a familiarity with comic books as the source material for film and television programming?

A: Yes, I do. And I've had particular experience. I was an expert in the Spiderman case and the Watchmen case and also in the Sahara case where we looked at, you know, comic book franchises and how they worked and the value and the like. So I have a particular sort of knowledge of this area.

Q: And the Watchmen case you're referring to, the recent federal action between Warner Brothers and Fox?

A: Yes, I was an expert for Fox in that action.

Q: How do comic books factor in or not factor into your analysis of the trends that were converging in the 1999, 2002 period?

A: Well, they certainly lent themselves to the trends that I described, and they -- additionally, they had some other unique properties that made them even more valuable. The most fundamental one is that unlike a novel, you actually had a visual depiction of a character that was emblazoned into the mind of the public. I don't know anyone who doesn't know of a Superman costume, the Superman S.

So that's -- so they have a visual image which also, you know, they are going to see on the screen that hopefully brings them into the theaters. And also with the rise of special effects in the late 90's with Jurassic Park and the like, it was easier to create these comic book worlds.

Another great thing about comic books is that the awareness is so strong, that they are not so reliant on story lines. The buyers of the IP are free to, you

know, change the story lines, make people -- they can be darker or lighter. You can change different love interests. You have all sorts of freedom there.

It would be virtually impossible to do that if you had a book, you know, because the fans would think, you know, there's always been controversy about changing the books. And that was the main thing that was at issue in the Sahara case.

Clive Cussler had written a series of books based on Dirk Pitt, and he had licensed one that had not been a success, and -- and he insisted that he approve the screenplay. So the comic book, you don't have that problem. Another problem you don't have, which can be a huge problem, is stars. You know, if you have a star who is Batman, and he gets too expensive, then you get rid of him. I mean, Michael Keaton was a Batman. And I think there was a money dispute. I'm not quite sure. But it ended up being Christian Bayle, of course, who was relatively unknown at the time. Certainly in Superman Returns, the star was an unknown.

A great thing about that is that we know that, you know, some stars, like Will Smith and the like, get $20 million. Well, you don't have to pay that $20 million. You can get an unknown star and save $20 million. So the comic books have all sorts of pluses.

One other thing is that because they're visual, they tend to do well overseas. They have international appeal. That's a big plus, too.

Q: You mentioned -- you mentioned movie stars, Will Smith receiving a cash salary of $20 million.

A: Yeah.

Q: What kind of contingent compensation does a top movie star receive?

MR. BERGMAN: Objection. Lack of foundation, your Honor.

THE COURT: Overruled. Based on his experience.

THE WITNESS: The sort of standard triple A deal for an actor is $20 million against 20 percent of the gross.

BY MR. TOBEROFF: Q: 20 percent of the gross?

A: Yes. So that means that the actor would get $20 million to -- during production of the movie and then 20 percent of the gross after a hundred million dollars of gross.

Q: And do superhero movies customarily star -- have big movie stars in the lead roles of the superhero?

A: They customarily don't. And in addition to the financial reason, there is a creative reason for that, which is the real, real star is the character, Superman. The real star is not Michael Keaton in Batman.

So that's the thinking. That doesn't mean that there aren't, you know, good actors that have these roles. Obviously, if you look at Iron Man, there are good actors, but certainly -- remind me of the star of Iron Man. Robert Downey, Jr. He's certainly not in that 20 million against 20 percent gross category at all.

Q: And prior to Superman, was the first Superman movie in 1978 was Christopher Reeves --

THE COURT: It's Christopher Reeve, isn't it?

THE WITNESS: Everyone gets confused because it's George Reeves, plural, who was the star of the TV series, and it's Christopher Reeve, singular.

BY MR. TOBEROFF: Q: Was Christopher Reeve a very well-known star or an unknown star before he starred in the Superman movies?

A: He was completely unknown and fresh out of school. I think he was 23 years old. Subsequently, he became a big star based on the success of the films. And that often happens.

So you have to keep in mind, you know, well, you know, he became a big star, but as of the time that the deal was made, he wasn't a big star. And another thing you should keep in mind is that, you know, smart studios will make a multi-picture deal. They will get opposites for future pictures that don't get held up, for example.

When I was at Universal, we did Back to the Future. We were highly confident that there would be sequels. So we did a three-picture deal with Michael J. Fox.

MR. BERGMAN: Your Honor, I object.

THE COURT: Your objection is well taken. Just be careful. I know we don't have a jury and it's a little less formal, but just try to answer the question.

THE WITNESS: I was just trying to draw some parallels.

THE COURT: Next question, Counsel.

BY MR. TOBEROFF: Q: Superman Returns, who was the star of that movie?

A: His name is Brandon. I want to say Routh.

Q: And was he a major movie star before appearing in Superman Returns?

A: No, he wasn't.

Q: And how many different actors -- are you familiar with the Batman movies that appeared in the late 80's?

A: Yes.

Q: How many Batman movies were there?

A: I believe there were four.

Q: And more recently how many Batman movies have there been?

A: Two.

Q: You look at those six Batman movies, how many different actors have played Batman over that relatively short period?

A: The last two were both Christian Bale. And before that it was Michael Keaton, and oh, boy, was George Clooney Batman?

I don't know. It's not stuck in my head. But there were various Batmans.

Q: Christian Bayle, would he be considered a big movie star before his appearance in Batman Begins?

A: No.

Q: Now, you mentioned the rise of the tent-pole strategy during the period in question in the late 90's and early 2000.

And you mentioned tent poles are becoming increasingly important. Can you describe for me what you mean by a tent-pole film?

A: A tent-pole -- you got to understand because it literally holds up the distribution and release schedule for a studio. These are the most important films. They tend to be based on sort of prebranded properties like Superman and Batman, and they almost always have huge budgets both for the production cost and the releasing costs.

They are typically in the summer or Christmas when most people go to the theaters, and they are typically booked in, you know, 3,500-plus theaters. And they are almost without fail, there are huge amounts of money spent for media ads in conjunction with the opening weekend.

Q: And what types of films are usually chosen to serve as tent-pole films?

A: They are typically films that have prior awareness. They are typically franchise films. And within the franchise film arena, most of those films, not all of them. There are exceptions, like Star Wars, that are based on what we call prebranded properties, whether they are comic books or novels or video games or the like.

Q: Are tent-pole films very action-driven films?

A: They typically are action oriented. Again, because among the advantages of the action movies is they export well, and I think the American and international public has gotten used to going to a theater and having an experience where there's another world out there and, you know, I don't know about you, but I can't fly.

Q: And are tent-pole films often, very often special effects-driven films?

A: Yes. Especially after the -- you know, the mid-90's with Jurassic Park and Men in Black and the like, they became more special effects driven. And one thing that was – another trend is that the cost of the special effects, even though the cost of the movie is going up, the actual cost of the special effects with the start of computer-generated imaging started coming down. So you could do bigger, greater visual effects for less money. So that was another trend.

Q: And how important or unimportant are special effects today in major film releases?

MR. BERGMAN: Objection. Relevance.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Do superhero films require a large amount of special effects to be realized?

A: Yes. Because the superheroes are exercising sort of by definition powers that humans can't do. And so if you've got Spiderman or Batman or Superman, you know, jumping around buildings and fast cars. I mean, there's all this stuff that needs to be done within a superhero film that you don't have to take care of necessarily in a film like Out of Africa.

Q: And are special effects important to the target audience of a superhero film?

A: Absolutely. The superhero, the sort of core fan or the people who tend to be the comic readers and their – they become comfortable with that visual other world as depicted in the comics, and they want to see that replicated at least in part in the film. So it's required.

Q: Have tent-pole films, as you have described them, become more important or less important to studios over time?

A: They have become increasingly more important.

Q: In what ways have tent-pole films become more important?

A: I think they dominate now more than ever the distribution strategies of the studios.

Q: And what do you believe is the reason for that?

A: The -- I think the clear reason is that the studios want to take advantage of the trends that I described that were extant in the late 90's and early 2000's, which I think play more now, which is the competition for the eyeballs. You have the expectations of these huge movies, and they want to limit their risk by investing in properties that can be, you know, visually depicted in a grand manner and that aren't relying on stars and aren't relying on necessarily a specific story line, but which can sell like crazy all over the world.

Q: Are any studios known more than other studios for focusing on big action-driven tent-pole movies?

A: Warners is probably the number one, but certainly all the other studios are not far behind in seeking to produce these movies. But they do it better than anybody, I think.

Q: Now, you mentioned the term pre-awareness and a trend towards focusing on properties with built-in pre-awareness.

What does the term branded property mean in that respect?

A: A brand is something that people immediately associate with. Something like -- certainly Superman is a brand. Coca-Cola is a brand. And I think what owners of intellectual property try to do is to move as much as they can towards Coca-Cola. They would love it if people would buy, you know, brown water with sugar in cans.

But, you know, intellectual property is usually more complicated than that. But what you want to do is sear into the consciousness of the public the visual

images that are in your intellectual property. And comic books do great at that. They are not the only ones. Certainly there's Star Wars and James Bond and other things that are brands that aren't comic books, but certainly in the world of brands, comic books are very important.

Q: What effect does a pre-established property have on the studio's willingness to take risks in investing in that property as a feature film or television show?

A: Well, there's sort of two things going on at one time.

Because the perception is they have less risk going forward because of the track record and the contribution that the intellectual property will make, they are willing to take more risk by paying more.

So if you look at a property and you say okay, well, going forward because it's, say, Superman, among the factors is it has this prebranded awareness. I don't have to pay a star. The -- it has a great track record going forward. I can -- basically the tradeoff in my mind would be I don't have to pay a star. I can pay that money for the intellectual property, and I can increase my chances of success, and I can limit my chances of a Superman 4.

Q: You testified earlier, you used the phrase a film's opening weekend. What is the relevance of a film's opening weekends in the film industry?

A: Well, the opening weekend is kind of the whole ball game.

And certainly I've noticed over the last 10 or 15 years, and I'm sure others have, that opening weekend, it's on the news on Sunday night. It's everywhere. But the significance economically is that for the tent poles, the big bet is spending all the money in production and then huge money on releasing and what do we do that first weekend.

I'll never forget when Superman came out in 2002. I think it did 114 million at the box office, and it just blew everyone's mind.

Opening weekend is also important because there's a strong correlation between opening weekend and the ultimate financial success of the film. I remember when we did financial models at Universal, we would -- we would try to predict the -- you know, the domestic box office gross and the correlations between that and the main component in predicting the domestic box office gross with what we were going to do

8 the opening weekend.

Q: What effect, if any, does a branded property with pre-awareness have on this vital opening weekend?

A: Well, it has a great influence because the studio can sort of build on the preexisting awareness and try to leverage that into even higher awareness and hopefully translate that into ticket sales.

Q: Does pre-awareness mean that a studio must spend less on marketing?

A: Not necessarily. They -- well, certainly they get more bang for their buck from the marketing because they can again leverage the preexisting awareness, but if you look at the -- I mean, I represented Bob Doucet who, you know, has --

MR. BERGMAN: Objection, your Honor. The witness has gone way beyond the question.

THE COURT: Actually, let's go ahead and take our afternoon break at this time and pick up with a fresh question when we start. Thank you.

(Recess taken.)

THE COURT: Counsel.

MR. TOBEROFF: Thank you, your Honor.

BY MR. TOBEROFF: Q: Now, you mentioned that there was an increasing interest among the studios in franchise films. What is a franchise property?

A: A franchise property is a property that lends itself to a series of pictures, sequels. They may be prequels.

Q: Can you give me some examples of well-known franchise properties that have been exploited in film?

A: The most famous is James Bond. There's been over 20 James Bond movies, and they continue to be produced as movies with even more and more success. Star Wars is a great example. And then I think you have Superman and Batman in that league as well.

Q: Of the 10 top grossing films of all time, how many, if any, are based on franchise -- underlying franchise properties?

A: I believe it's nine out of ten, if I'm not mistaken. I think the exception is Titanic.

Q: Nine out of ten of the top ten grossing films are based on underlying franchise properties?

A: Are based on underlying --

Q: No, no. I'm just --

A: You're repeating what I said?

Q: Yes.

A: Yeah, I believe that's true.

Q: Why are franchise properties so important to studios?

A: They are the bedrock to their, you know, production and distribution strategy. They are -- typically, the franchise properties are developed and produced with the intention of them acting as tent poles for the studio's distribution slate.

THE COURT: Let me stop you for a second, Counsel.

I'm sorry, Counsel. You may proceed.

THE WITNESS: And when they hit, they can be fantastically profitable.

BY MR. TOBEROFF: Q: You mentioned sequels. Why does a studio care about a property having strong sequel potential?

A: Well, what they'd like to do is create a franchise from the beginning. So certainly they are going to make a – if they are going to place their bet and spend a lot of money on development, production, and releasing a film, they typically don't want that to be a one shot. They want to build something that can serve as the basis for a series of films.

So what they try to do is build the brand awareness or leverage -- if there's a preexisting property, they try to leverage it. If it's not preexisting, they try to create it, and then they seek to continue to profit from their investment by having subsequent films, and hopefully not only subsequent films, but the sort of spinoff merchandise and the like that is generated by those sequels.

Q: Are franchise films often episodic in nature?

A: Sometimes, yes.

Q: And are comic books episodic in nature?

A: Yes.

Q: How has the studio interest in franchise films increased or decreased in -- strike that.

Has studio interest in franchise films increased or decreased in the last decade?

A: I think it's increased.

Q: Has studio interest in tent-pole films increased or decreased in the last decade?

A: Increased.

Q: Switching back to comic books again. Do you have knowledge of the primary demographic of comic book readers?

A: I think they are predominantly young men.

Q: And what is the target audience for tent-pole films?

A: Young men and young women that hopefully go together to the movie.

Q: Is it one or the other?

A: I think it's predominantly young men. Especially young men that will keep going back again and again to a movie.

Q: Now, I'd like to go back to the period in the film industry of 1974, early 1970's. In formulating your expert opinion in this case, did you review a film agreement between DC Comics and a company owned by the Salkinds, or Alexander Salkind?

A: Yes.

Q: In 1974 were comics and/or superhero -- strike that.

Were comics important in 1974 to the film industry or unimportant?

MR. BERGMAN: Objection, your Honor. Lack of foundation.

THE COURT: Well, you know, why don't you rephrase the question. When you say whether they are important, in what sense, Counsel? And then I can better assess whether or not there's foundation. If it's in terms of valuing them or evaluating a particular industry. Let's rephrase your question.

MR. TOBEROFF: Certainly.

Q: Prior to the release of the first Superman film in 1978 starring Christopher Reeves, had any comic --

A: Reeve.

Q: Reeve.

-- had any films to your knowledge been released prior to that based on a comic book superhero? Had any films been released prior to 1978?

A: None that I'm aware of. None that had the success that the first Superman did.

Q: Are you aware of any films prior to 1974 that were based on comic books?

MR. BERGMAN: Objection, your Honor. Lack of foundation. The witness was in high school or college in '74.

THE COURT: Given his familiarity with the industry, I suspect he might be aware of this.

Are you aware of any films before 1974?

THE WITNESS: Absolutely. I was in college, but I certainly went to the movies a lot. I'm in the movie business.

BY MR. TOBEROFF: Q: When you worked for -- how many years did you work at the studios?

A: Roughly 10.

Q: And when you worked at the studios, how old were you?

A: I was 33 to -- I was 29 to 28, something like that.

Q: And at that time, when you were evaluating projects for acquisition, did you go back in history and see whether or not similar projects had been exploited?

A: That was absolutely part of our analysis.

Q: And did you place a value on those prior exploitations?

A: Absolutely.

Q: Based on your review of numerous documents in this case, how do you believe Warner Brothers viewed Superman as the basis for film and television exploitation in or about 1974?

A: It was a lot less important to them than after the success of Superman, and the thing that was most telling to me was that DC would license the production rights to a third party, to the Salkinds or --

Q: You're referring to the fact that they didn't exploit the film rights with Warner Brothers. They exploited it with the Salkinds pursuant to the 1974 --

THE COURT: Counsel, let him testify. This is your expert. You don't need to lead your expert. He's capable of answering these questions.

THE WITNESS: What I'm saying is that --

THE COURT: No. Ask a question and give an answer.

BY MR. TOBEROFF: Q: What is your opinion based on?

A: It was clear to me, from my review of the documents, that in 1974, the fact that DC Comics would agree to license the film production rights to a third party for 25 years was very telling of the value that Warners was putting on the property at the time. They were willing to -- one would think that if they highly valued it, they'd want to keep it to themselves and exploit it themselves.

Q: Do you have a basis for evaluating how Warner Brothers viewed the other major DC superhero, Batman, as the basis for film exploitation in the early 70's?

A: Yes.

Q: How did they -- how do you believe they viewed Batman as a film property in the early 1970's?

A: Well, I think they had a view of Batman very similar to Superman. They entered into an agreement with a third party to grant them the production rights to Batman for a period of time.

Q: You say they entered an agreement.

A: "They" being DC. I think it was with Melnick Productions regarding Batman.

Q: And was that agreement with a Warner Brothers company?

A: No.

Q: Who was that agreement with?

A: It was a third party. And then ultimately, I believe that agreement ended up with Casa Blanca films and at Universal.

Q: Do you believe that, given the various trends you discussed, would Warner Brothers and DC treat Superman and Batman as film properties the same way in 2002 as they would in 1994?

A: They treat them very differently.

Q: And why is that?

A: Things have changed. There was a convergence of the sort of macro trends that I talked about before, and then there was the sort of immediate sort of comic book superhero explosion in terms of both development and success in the marketplace.

The benchmark that most people use, I think, is Men in Black in 1997. After that, there was a series of very successful comic book based films, and then certainly with the success of Spiderman 2002, it really took off then.

Q: What is meant in the motion picture industry when one refers to a property as being a hot property?

A: A hot property is a property that is in demand by a multiple of people and therefore has a higher value. Because lots of people want to buy it.

Q: Do you regard studios as being competitive with one another?

A: Yes, very.

Q: What are the major studios?

A: Major studios are Universal, Fox, Time Warner, Disney, some people would say MGM, and Sony.

Q: Is Paramount a major studio?

A: Yes, I neglected to mention it. I'm sorry.

Q: Do studios track each other's development of projects?

A: Yes.

Q: Do they closely track each other's development?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Foundation. Sustained.

BY MR. TOBEROFF: Q: When you worked at a studio, did you become aware of whether or not the studio would track the development of other studios' projects?

A: Well, certainly on the business side we didn't track them quite as closely, but we read the trades every day. I think on the creative side they paid more attention, and certainly on the marketing and distribution side they paid enormous attention because they were seeking to, you know, set aside slots, you know, release slots for their pictures years and years ahead of time.

Q: Based on your experience in the motion picture and television industry, how do studios know what the competition is developing?

MR. BERGMAN: Objection. Lack of foundation, your Honor.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: How many years did you work at a motion picture studio?

A: At Orion and Universal, about 10 years.

Q: And in your private practice, do you often deal with motion picture studios and motion picture developments?

A: Yes.

Q: Do you talk to motion picture studio executives and television executives as to what their habits are in keeping track of what the competition is doing?

A: I don't think I talk to them about their habits so much as we typically talk -- people know about it, and they talk about it all the time. They don't talk to us about how you found out about that, but we talk about it. One thing that has changed, though, is there are now, you know, computer systems, I.M.D.B Pro, Film Tracker. There's a lot of information that's publicly available via computer now.

Q: But based on your relationships with studios and your having worked at the studios, have you become aware of how studios function both in terms of deciding what projects to develop and deciding what projects to acquire and in evaluating those projects?

A: Yes.

Q: And when studios make this decision, do they apprise themselves of what the competition is doing?

A: Absolutely.

Q: And does that include tracking the development of films before they are released by other studios?

A: Yes. Especially in the franchise area, you certainly want to look at, you know, what the next Bond is going to be, what the next Spiderman is going to be. Especially the big ones are very closely tracked, again, with a view of looking to develop and produce and release competing franchise movies that don't bump up exactly but compete with those pictures.

Q: Do studios anticipate the success of their competition -- the movies of the competition before they are released?

A: There certainly is a sort of buzz and awareness that's commonly held about what the big movies are going to be. Both in the press and among studios.

Q: Do studios hold audience test screenings of their films before they release the films?

A: Yes.

Q: Does that lead to the buzz or anticipation in the entertainment industry of those films?

A: It certainly contributes to it, but they also hold the screenings to test and perhaps make changes that will make the pictures even more effective, but yes.

Q: How long does it generally take from the start of production of a film to the release of a film?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Overruled. You may answer, based on your experience.

THE WITNESS: If you're talking about, you know, big movies, you're talking about probably 18 to 24 months.

BY MR. TOBEROFF: Q: And how long does it generally take from the start of development of a film to a film -- strike that.

What does it mean when a film is being fast tracked by a studio?

A: It means that they are accelerating development, and even though they haven't officially green lit or said they are going to make the movie, the odds are that they will. So when it's -- okay.

Q: Now, even with respect to a film that has been fast tracked, what is the development time period from start of development to a film's release?

A: I would think two to three years. On the super fast track, not on a typical basis, even more.

Q: And on a typical basis, I understand some films may never be produced.

A: Correct.

Q: But on a typical basis, looking at films that are developed and produced and then released, what generally is the period of time between start of development and release of the film?

A: I'd say three to five or three to six years.

Q: I'm sorry?

A: We're talking about from development to release?

Q: Yes. So you said three to five or six years?

A: Yes.

Q: Fine. Now, turning back to comic books in the film industry. As of 2002, May 2002, when the Superman film agreement in question was entered into, how important were comic books as the basis for films?

A: Extraordinarily important.

Q: Can you tell me the basis for that opinion?

A: Well, it was basically the convergence of the factors that I talked about. The franchises, the comic books as franchises, the comic books having the special attributes that were important to studios, including the prebrandedness, the ability not to have to pay for a star, and in the late 90's and early 2000's what was happening was there had been sort of the Superman success of the 70's that had dissipated, the Batman success of the 80's that had dissipated, and now you had another sort of, you know, the situation where beginning with Men in Black and with X-Men and Spiderman, it – the trajectory had gone up again.

Q: So Men in Black came out in 1997, I believe you said?

A: Correct. And then there was a Men in Black 2.

Q: And the first Men in Black, was that successful?

A: Very, very successful.

Q: And what movie based on comic books came out right after Men in Black?

A: I think Blade came out in '98.

Q: Was -- in 1998. Was that successful?

A: Yes.

Q: And what was the next major film that came out based on a comic book?

A: Well, the one I remember is X-Men in 2000, and there was the Men in Black 2 in 2001, and there was Spiderman in 2002.

So there was a succession.

Q: And when was the first Spiderman movie released?

A: 2002.

Q: And do you know what month, perhaps?

A: Yes, I do know. I think it was May. It was almost contiguous with the actual signature of the DC Comics-Warner Brothers film agreement. In fact, it came out a week before, as I recall.

Q: So Spiderman came out a week before the Superman film agreement was executed?

A: Yes.

Q: And was it successful?

A: It was mammothly successful. It did $114 million its first weekend, which was absolutely unprecedented.

THE COURT: How much again?

THE WITNESS: $114 million the first weekend.

BY MR. TOBEROFF: Q: The first weekend?

A: Yes.

Q: And you mentioned Men in Black 2 as coming out in 2002.

When did that come out? What month approximately? Do you have any idea?

A: I don't have the exact --

Q: Do you believe it was a summer release?

A: That's my recollection, yes.

Q: Do you believe that Warner Brothers was aware or not aware of Sony's development of Spiderman before it was released?

MR. BERGMAN: Objection. Calls for speculation.

THE COURT: Would you lay a foundation for that.

BY MR. TOBEROFF: Q: Well, you testified earlier that studios are aware of other studios' film development; correct?

A: I did.

Q: And you also testified that studios anticipate a way -- anticipate the success of their competitors' films before those films are released; is that correct?

A: That is correct.

Q: Do you believe that was the case with Warner Brothers with respect to Sony's development and anticipated success with Spiderman?

A: Well, I don't have any personal knowledge of exactly what Warners' executives knew, but I paid close attention to Spiderman because I was an expert in the litigation starting in 1999, and the whole town was aware of Spiderman and its history and the fact that it was designed to be a big huge success, and indeed it was.

So one would assume with high confidence that the Warner executives knew about it.

Q: Based on your knowledge of the way the entertainment industry works, do you believe that Warner Brothers would have been aware of Sony's development of a Men in Black sequel after the success of the first Men in Black movie in 1997?

MR. BERGMAN: Same objection.

THE COURT: Overruled. Explain your understanding.

You are not so much asking about the -- obviously, it would be speculation as to what Warner Brothers knew or didn't know, and in that respect, the objection is well taken. You are describing what was known in the industry at the time, and the Court will consider the evidence.

MR. TOBEROFF: Yes.

THE COURT: You may answer.

THE WITNESS: Everybody in Hollywood knew that a Men in Black sequel was in development.

THE COURT: How is that?

THE WITNESS: It would be reported in the trades, and virtually everyone who -- in the industry reads the trades.

BY MR. TOBEROFF: Q: Now, when studios track each others' development, do they also track the anticipated release dates of competing films?

A: Absolutely, yes. Because they are booking their own release dates, and they try not to bump up too closely against one another, to leave some room to grab more audience in the opening weekend.

Q: You also testified earlier that development of a film that actually gets made can be a process of between three to five or six years.

A: Or even longer.

Q: Right. And so as of May 2002, what major comic book films do you believe would have been in development that came out after that?

A: Superman, Batman.

Q: Batman Begins?

A: Batman Begins, yes.

Q: You can try and give the dates that these movies were released, that would be helpful as well.

A: Okay. Where were we? Okay. So --

Q: Why don't we start chronologically in 2002.

A: Okay. Okay. Certainly Batman Returns would have been in development.

Q: Batman Begins?

A: Batman Begins. Sorry.

Certainly the X-Men would have been in development.

Q: And when was that actually released?

A: 2000. And then there was a sequel in development after that.

Q: When was the sequel released?

A: Oh, I believe 2002.

Q: Continue.

A: Okay. So there were at least four big comic book movie franchises that were in development at that time, and studios were certainly looking to -- looking to acquire comic book based superhero properties.

Q: Was there -- you mentioned a Blade movie released in 1998.

A: Yes.

Q: Was there a sequel to that movie released after May of 2002?

A: Yes.

Q: Do you know the year by chance?

A: I don't know the exact year, but it would have been in development as well in that window.

Q: And are you familiar with a movie based on the comic book The Hulk?

A: Yes.

Q: Was a movie released based on The Hulk?

A: Yes. Actually, there's been two movies based on The Hulk.

Q: When was the first movie released?

A: I believe in 2002 by Universal, was directed by Ang Lee, and subsequently a Marvel version. So Hulk was in that window. I think Hulk would have been in development at Universal.

Q: And you mentioned the Spiderman movie released in May of 2002. Was a sequel released after that?

A: Yes. So in addition to the Spiderman movie, they would have -- it's quite likely that there was a sequel in development at the same time.

Q: Well, when was the Spiderman sequel released?

A: I believe there were two. So 2005, I want to say, in that range.

Q: Are you familiar with the comic book series Fantastic Four?

A: Yes.

Q: That's also a Marvel series?

A: Yes.

Q: Was a movie ever made based on that comic book?

A: Yes.

Q: Do you have any idea when that was released?

A: Right now I don't remember exactly when it was released.

Q: Do you have any idea, the range?

A: It was certainly in the '97 to, I think, 2002 window.

Q: We're speaking of the money Fantastic Four.

A: Okay.

Q: If you don't know --

A: Yeah, I would be guessing. I'm sorry.

Q: What value, if any, would this development of other comic book films released after May 2002 but developed prior to May 2002 have on the value of comic book properties as of May of 2002?

A: Well, it would be important and add to the value of comic book intellectual property in 1999 to 2002. There was certainly a competition among the studios to acquire and develop and release these sort of properties, and based on the, you know, historical success of, you know, Superman in '78 and Batman in the 80's and Men in Black, studios were looking at this as a way to -- they wanted to take advantage of the trend towards creating franchises based on comic book intellectual property.

THE COURT: I guess I don't understand that.

THE WITNESS: Okay.

THE COURT: We went through this before, of this idea of using future success of the value to what people knew at the time that they were negotiating.

THE WITNESS: Right.

THE COURT: How would a future release of a comic related feature film or a sequel affect the value that individuals placed on a contract prior to that?

THE WITNESS: Okay. I'll explain that to you.

THE COURT: And make that consistent with your earlier answer, where you conceded awareness of Superman Returns was not relevant to that valuation earlier, because this seems to be at odds with that testimony.

THE WITNESS: Well, I think what I testified to before was that with respect to a particular IP, you would look to the past and try to predict the future.

THE COURT: Right.

THE WITNESS: Right. In --

THE COURT: What we're trying to do here is value -- I need to determine that as of, for example, May 2002 --

THE WITNESS: Right.

THE COURT: Was that a fair market value transaction based on the information that was known at that time?

THE WITNESS: Yes.

THE COURT: I don't know how anything beyond that time, as you just testified to, could be relevant to knowing whether or not at that point in time was a fair market value.

THE WITNESS: Let me explain. What was happening at that time is that there had been this big success of comic books, and everyone was trying to get in the game and acquire the right to develop for future release comic book properties.

THE COURT: I get all of that.

THE WITNESS: So that would increase the value. If I own a comic book property --

THE COURT: I understand that.

THE WITNESS: Okay.

THE COURT: I'm talking about future sequels that you wouldn't know whether -- we don't know what's going to happen tomorrow.

THE WITNESS: We don't.

THE COURT: How does what in fact happens tomorrow affect our valuation of something today?

THE WITNESS: Well, what you do when you're valuing the property is try to project as best you can.

THE COURT: Fair enough. So projections known to people in May 2002 were certainly a factor.

THE WITNESS: Yes.

THE COURT: How is what actually happens in 2004 relevant?

THE WITNESS: Well, it's certainly relevant for your next sequel.

THE COURT: Down the road.

THE WITNESS: I'm not talking about the next sequel. I'm talking about what happened in May 2002. By definition, May 2002, you wouldn't know.

THE COURT: Right.

THE WITNESS: But you would certainly know that there was all sorts of competition, and based on that competition, other studios were competing with you. These are rational studios. Their projections were something that they had a high confidence that these would do well. So that would bring up the value.

THE COURT: I agree.

THE WITNESS: And ultimately, the marketplace in these films confirmed it.

THE COURT: That's not what we're interested in.

THE WITNESS: I understand that.

THE COURT: And in terms of your expertise, though, I'm trying to reconcile this with my own understanding of economic valuation.

THE WITNESS: Yes.

THE COURT: A future result does not -- are you testifying, because it seems that you just did, that a future result somehow reflects the value of a historical agreement?

THE WITNESS: Well, again, I think the easiest thing to do is -- let's bifurcate it, okay? You own Superman, and you bring it to me in 1999. Okay? You are DC, and I look at it. I look backwards. I look at its history.

THE COURT: Yes.

THE WITNESS: And then I try to look forward.

THE COURT: Projection.

THE WITNESS: Using projections of performance, and then what I do is I take those projections, and I do a net present value calculation.

THE COURT: Yes.

THE WITNESS: And if it's plus --

THE COURT: You go for it.

THE WITNESS: And if it's minus, you don't go for it. And that helps me --

THE COURT: I understand all of that.

THE WITNESS: Right.

THE COURT: So now we're ten years later, and we're trying to determine what was in the minds of those people back then.

THE WITNESS: Right.

THE COURT: Certainly the projections that were existent at that time were relevant as you've explained.

THE WITNESS: Yes.

THE COURT: But unless they had a crystal ball or unless they consulted with the right astrologer on Hollywood Boulevard, they wouldn't know what in fact was going to happen two years later, would they?

THE WITNESS: That is true, but let me tell you what we used to do at Universal. Do you mind if I tell you the story on how people approach? I mean -- just in general, no one can predict the future, but you hedge your bet; all right?

THE COURT: I understand that. And what I'm trying to look for from you and I'll be looking for from Warner Brothers' experts are the factors used in valuing a deal. All of the factors that you've talked about, looking backwards, projecting ahead, the understanding, that makes sense to me.

THE WITNESS: Hm-hm.

THE COURT: What doesn't make sense to me as a relevant factor in this consideration is what something actually did post hoc, after the event.

THE WITNESS: It doesn't matter.

THE COURT: All right. So we're back to that again.

THE WITNESS: But it does matter for the next sequel when you're doing a deal.

THE COURT: That's a later discussion.

MR. TOBEROFF: I think we're all saying the same thing.

THE COURT: Good.

BY MR. TOBEROFF: Q: My question is focusing on the awareness in May of 2002 that these films which came out afterwards, regardless of their ultimate success, were in the pipeline and were anticipated at the time that the Superman agreement was entered into; is that correct or incorrect?

A: That's correct, and that would be part of the analysis in assessing the value of the property at the time.

Q: Thank you. Now, you mentioned a number of – you testified to a number of -- I think it's almost four converging trends. The rise of the tent-pole films as a motion picture strategy, the rise of franchise films, a greater focus on preexisting branded properties with pre-awareness, and finally, the rise in the entertainment industry of comic books and superheroes in particular as a source of films.

Does Superman, looking at it as a property, fit or not fit within these four trends you have just discussed?

A: It fits perfectly.

Q: Could you expound on that opinion?

A: Well, certainly in terms of franchise, Superman had proved in the past that it was a franchise, and you could build not only future motion picture projects but also, you know, television. You had a history of both successful television show, when Smallville turned out to be successful.

And in the window from '99 to 2002, if I were valuing Superman, I would consider the merchandise value as well. So there's the ancillary rights. So there's franchise.

5 There's --

Q: Thank you.

A: Okay.

Q: And would you consider Superman good source material for a big tent-pole movie or not?

A: Absolutely, yes. It's --

Q: Why is that?

A: Well, it has all the attributes of a potentially successful tent-pole in that it has preexisting awareness. It lends itself to a big production budget and a big releasing budget and the potential at opening weekend.

Q: And would you consider Superman to be what you called a branded property or branded character or not?

A: It's probably -- in my mind it's the best example of a branded character in the history of the world.

Q: And among comic books, which you testified have become very popular in the -- into the late 1990's to early 2000 period, would you consider Superman to be a top comic book property or not?

A: Absolutely, yes.

Q: What is the total effect of these converging trends on Superman's value as of 1999, 2002, when the Superman film agreement and the Superman television agreement was entered into?

A: They all point to the value being higher.

Q: Do you believe that the keen interest in superhero films and the actual success of comic book films released prior to 2002, such as Men in Black and X-Men, had an effect on the perceived value of Superman for television even though those were film releases?

A: Yes.

Q: Can you tell me why?

A: Studios look at properties both in terms of exploitation about the film and TV side. And certainly, as evidenced by Smallville, there are instances where you have a prebranded property, and you can use it as the basis for a television show.

Now, those are unusual circumstances because most studios at this point are focusing on the tent-pole strategy as opposed to the television series strategy.

Q: And during the period 1999 to 2002 -- strike that.

When was Smallville released?

A: The first season started in October 2001.

Q: And do you believe the rise of importance of superheroes in comics in film would have influenced Warner Brothers' decision to produce Smallville?

A: Yes.

MR. BERGMAN: Objection. Leading, your Honor.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Do you have an opinion as to whether Warner Brothers' decision to green light a Smallville television series was affected or

not affected by the rise of importance of comic books to films during that period?

A: As I discussed before, Warner Brothers would have, in terms of exploiting certainly both the film character and TV character, they certainly would have looked at the phenomenon of the success of the prebranded comic characters in the film world as influencing, you know, the value of the property and how they wanted to exploit it.

Q: Now, between October 2001, when Smallville first aired, and May 2002, when the Superman film agreement was entered into, was Smallville considered in the industry to be successful or unsuccessful?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Overruled. Just make sure you provide a basis for that.

THE WITNESS: It was perceived to be a hit television show and a very important show for the WB network, their sort of flagship show.

THE COURT: What is that based on?

THE WITNESS: That's based on my review of the Smallville ratings and performance, and I did some Wikipedia research and watched, and I've spoken with people.

BY MR. TOBEROFF: Q: Do you follow the ratings received by a television series?

A: Yes.

Q: Do you read reviews of new television series that appear in Variety and Hollywood Reporter, the trade papers to the entertainment industry?

A: And Entertainment Weekly, yes.

Q: And did Smallville receive high ratings at the period between October 2001 and May 2002?

A: It received very high ratings.

Q: Did it receive critical praise or not?

A: It was critically successful as well, as I recall.

Q: Moving to the subject of fair market value in general, how would you define fair market value?

A: Actually, I think the best definition of – the definition in the bill that was introduced by Sheila Kuehl.

Could I have reference to that?

THE COURT: Whatever your definition is.

THE WITNESS: Okay. My definition is fair market value is determined by an open negotiation in the marketplace between disinterested parties who know what they are doing and who have time to make a marketplace deal.

THE COURT: Hold on one second. Open negotiation in the marketplace?

THE WITNESS: Yes. Unrelated parties.

THE COURT: That know what they are doing.

THE WITNESS: Know what they are doing.

THE COURT: That's your definition of the fair market value?

THE WITNESS: And had a reasonable period of time to make a deal.

THE COURT: That's your definition of fair market value?

THE WITNESS: Yes.

THE COURT: Counsel.

BY MR. TOBEROFF: Q: Could you actually repeat that definition? Because it got split up into separate words in the process. Just take your time.

MR. BERGMAN: Objection, your Honor. I don't understand that. We all got what the definition was. Why should the witness repeat?

THE COURT: Did you not get it down, Counsel?

MR. TOBEROFF: I felt that it got -- no, I didn't actually.

THE COURT: The court reporter can repeat the answer. (record read)

MR. TOBEROFF: It's okay. I don't want to take up the time. I'll move on.

THE COURT: Otherwise, I'll sustain the objection. Asked and answered.

BY MR. TOBEROFF: Q: IF you were representing DC in 1999, 2002, the period in question, how would you have gone about establishing the fair market value of Superman in television and film rights?

MR. BERGMAN: Objection. Lack of foundation. Irrelevant.

THE COURT: Overruled. How would you have gone --overruled.

MR. TOBEROFF: Shall I repeat the question?

THE COURT: No. I have it right in front of me, Counsel. I'm considering the objection. The lack of foundation is overruled. The relevancy question is, I think, a problem with the way you phrased the question. It's rather broadly stated. The question is what rights are you referring to, Counsel. I suppose if this is a foundational question, are you asking just generally how one would go about the factors that one would consider in assessing fair market value? Let me just sustain the objection instead of asking a question. Rephrase it.

BY MR. TOBEROFF: Q: I'm asking if you were representing DC during this time period in question, 1999 to 2002, and they expressed an interest in licensing their Superman film and television rights for exploitation in the entertainment industry, how would you go about assessing or, I use the word establishing, the fair market value of the Superman property during that time period?

MR. BERGMAN: Same objection.

THE COURT: I want to sustain the objection, Counsel, based on your expert's definition of fair market value. His definition of a fair market value is that it must take place between unrelated parties. We don't have unrelated parties here. So by definition, this expert is concluding that it's not fair market value.

BY MR. TOBEROFF: Q: Do you believe that the only way that you can have an agreement between -- that constitutes fair market value is between unrelated parties?

A: No. There's a mathematical possibility that you could have a fair market value deal between related parties.

Q: And how would you arrive at that?

A: How would they arrive at that deal?

Q: How would you arrive, if the parties were related, how would you arrive at a fair market deal?

A: Well, I -- with the parties, I think what we'd seek to do is try to emulate the analysis that someone like me would do.

We would look at the past performance, try to look at the potential performance in the future. We would look at analogous deals. If there was a property that was worth less than our property and it got a big deal, we'd try to get that deal. We would seek to -- we're in the -- still in the related parties?

You'd probably talk to someone like me or an agency to say what do you think this is worth in the open market. That would be the test. What would this be worth in the open market even though by definition DC is owned by Warner.

So it would be a related transaction. But there still is a methodology that you would use to try to do a marketplace deal within the confines of the ownership structure.

THE COURT: What is that methodology?

THE WITNESS: Well, the methodology is you look at the past performance of the Superman character. Both in terms of financial and in terms of something that's hard to measure, which is awareness and consciousness. Then you --

THE COURT: Financial value?

THE WITNESS: Yeah. Well, the financial value would be on the open market, what would the most aggressive potential buyer pay for these rights. And that would -- you know, the highest bidder wins. So then what would you do is you would, you know, basically, you know, you are selling. So you would -- someone like me or an agent -- let's say you're a potential buyer, and we'd go to you, and you'd have a unique opportunity. You can buy Superman.

This is the most famous prebranded comic book superhero franchise in the history of the world. We're bringing this to you in the context of this recent phenomenon of, you know, Men in Black and X-Men and Fantastic Four. And there's this whole phenomenon that everyone is jumping on this comic book train. And we're giving you the opportunity to buy this.

So we would set a very high price. We would legitimize that price in the context of what other properties had gotten.

THE COURT: So the second factor would be comparison to other properties?

THE WITNESS: Yes, you would compare it to other properties.

THE COURT: Other similar properties.

THE WITNESS: Well, not necessarily similar properties.

THE COURT: You tell me. You're the expert.

THE WITNESS: No, no. You look at it as intellectual property. You don't look at it as just comic books.

THE COURT: You said comparison. To compare you've got to compare to something. What would you compare it to?

THE WITNESS: You would compare it to option and purchase agreements.

THE COURT: Of what?

THE WITNESS: Of well-known intellectual property. And that can be well-known in the context of a comic book, well-known as a novel, well-known as a -- if it was a movie before. Well-known for all sorts of reasons. Because the way studios think, they don't look so much at the form of it as much as we're buying this awareness and trying to leverage and convert that into a movie and get the audience to come in. So -- and you know, there's been a recent phenomenon of

THE COURT: You're going beyond the question.

THE WITNESS: Okay.

THE COURT: What other factors are part of this methodology?

THE WITNESS: Comparable deals. You know, pitting people against each other as best you can, trying to create a bidding war.

THE COURT: Comparable deals. Comparable to what?

THE WITNESS: We own a unique property; all right? So we -- you would say Superman should be worth more than a Michael Creighton novel or a Dirk Pitt book or a Jack Ryan, or worth more than a Chorus Line, and you look at deals -- you might even go back to My Fair Lady. I know that's in evidence here.

But you look at the -- what studio has been paying for these prebranded properties. And some are musicals; some are books; and some are comic books. But certainly in your analysis you don't limit it to something that's exactly like Superman because there -- another thing I'd like to point out is that –

THE COURT: Well, you've got to respond to the questions. We've got to keep the format in a trial. We're going through my question to you of what methodology. You've identified past performance of the Superman character and comparable deals or comparisons to option and purchase of well-known intellectual property.

Anything else?

THE WITNESS: I mean, the main thing would be to try to -- and it's very challenging.

THE COURT: I know that. That's why I'm asking the questions.

THE WITNESS: Trying to create what you would think the marketplace would bear to buy Superman.

THE COURT: How do you figure what the marketplace would bear in your opinion?

THE WITNESS: I think you would talk to agents and lawyers who were -- who knew the marketplace, who knew the history, had a broad-based understanding of the business, and knew the sort of competitive nature of studios bidding against each other and the particular special features that had converged in the late 90's, early 2000's and use that to try to figure out what the value would be.

THE COURT: Anything else?

THE WITNESS: That's the basic methodology.

THE COURT: Very well.

Counsel?

BY MR. TOBEROFF: Q: In determining the fair market value of a property, is -- strike that.

Is the fair market value of a property more easily determined simply by offering it to bid in the open market than in a closed non-arm's length transaction?

A: It's much easier.

Q: And why is that?

A: It's really easy because you have the marketplace operating and objectively valuing the asset. Rather than you having to, as one person, as the judge and I just went through, you know, trying to create that marketplace in our brains. It's very difficult.

Right now I'm selling a movie, and we have competing bids. If we show the movie at the Tribeca Film Festival and invited everyone to come, and now we're getting bids, that's the easy way to do it.

Q: Now, when you don't do it that way and you have an internal transaction, like a transaction between closely related entities, is it correct or incorrect that the only way to determine fair market value would be try and analyze what it might be? Is that correct or incorrect?

A: Well, I certainly think that in an internal transaction, you would want to go through the methodology that I just described and not only look at an internal

calculation of what the value is but also what at that time would the marketplace pay for Superman or an asset like Superman.

It's very difficult to do it just in that sort of structure and put an appropriate value on it in my estimation.

Q: To your knowledge, based on your review of the record, did DC ever offer Superman in the open market during this time period?

A: No.

Q: Did DC ever -- strike that. Do you consider literary properties in general to be unique or not unique?

A: Unique.

Q: And of these --

THE COURT: What does that mean? I know what it means in the sense -- the common vernacular sense that everything is different. And if it's copied, then that raises a whole separate issue. But if it's unique, say that it's different in the context of what we're discussing here in trying to value fair market value, does that mean it can or cannot be compared? Because it's so unique that it can be compared, or does the uniqueness just complicate it --

THE WITNESS: Well, if you treat everything as completely unique, you could never have a marketplace.

THE COURT: That's my point.

THE WITNESS: So what you have to do is say it's like this, but it's unlike this, and then draw comparisons.

It's not easy.

THE COURT: So it's matters of degree?

THE WITNESS: It is matters of degree, yes.

BY MR. TOBEROFF: Q: But no two -- sorry.

But generally, is one literary property identical to another literary property?

A: No, if they are identical, they would have no value.

Q: So they have similarities, but they can also have many differences?

A: Correct.

Q: Now, of these literary properties, would you regard Superman as unique or not unique?

A: Unique.

Q: Would you regard it as particularly unique or not?

A: It's -- well, the particular uniqueness about it in my estimation is the degree of awareness that people have about Superman, and that separates it in large part. He has some unique features and the like, but I think in valuing, you know, if you try to compare it to Spiderman, for example, you say well, Spiderman does this, and Superman does this. I think what you really look at is okay, what sort of awareness is there at the time of the transaction and what is it worth, and, if we could, you know, bid this out.

Q: Does this uniqueness of a property have any bearing or not on your testimony that the best way to determine the fair market value of the property is by offering it on the competitive open market?

A: Well, it impacts it a lot. It -- you know, I recently bought a car for my daughter, and, you know, we went on the Internet and called a bunch of different dealers, and that was the same car. Had we -- had there been only one car in the world that we were looking for, we would have paid a heck of a lot more.

So I agree. Superman is absolutely unique, but that's not to limit that -- Spiderman is unique. They are all unique in their ways.

Q: If you had the ability to offer Superman in the open market, what would you do? How would you go about it to achieve the best price for the property?

MR. BERGMAN: Objection, your Honor. Relevant.

THE COURT: Sustained. It's completely irrelevant. The question is not what could have happened. The question is what did happen and whether or not what did happen reflects a fair market value.

I understand that this would be a much easier trial. There never would have been a trial on this issue if there would have been a much different case. It's a unique case.

MR. TOBEROFF: May I respond as to my intention for this line of questioning, your Honor?

THE COURT: Proffer your relevance, Counsel, yes.

MR. TOBEROFF: The relevance is I'm trying to establish the way value is usually determined for a unique property like Superman in the entertainment industry. And to contrast that to what did or did not take place in this case, even though --

THE COURT: That's not in dispute, Counsel. I understand that this is not happening as things normally happen. We all understand that. That's a given here.

MR. TOBEROFF: I understand --

THE COURT: And it complicates it and makes it very challenging, as the witness indicated. But the limited issue in this trial, in some way I would have been able to resolve this back on the summary judgment motion. The reason I couldn't was for the very reason that the witness here just pointed out. It's a challenge.

And at some point in time, in this trial, you're going to have to get into the agreement itself and start exploring it and giving me the tools from both sides to make an assessment as to whether or not this was in fact a deal that reflects fair market value.

MR. TOBEROFF: Yes, your Honor. I fully intend to do that.

THE COURT: Excellent. But I understand, Counsel. I'm willing to find at this point that it was not subjected to fair market value in the sense that it was not on the open market. It wasn't between nonparties. We know all that.

I'll even find that it's a unique product. It was a well branded product.

None of this is in dispute, Counsel. You've spent a tremendous amount of time so far in this trial covering ground that quite frankly, I think we all basically understand.

Let's get to the deal in question and into the mechanics of it and utilize your expert witness here, as I'm sure Warner Brothers will utilize theirs, to evaluate this particular deal.

MR. TOBEROFF: Your Honor, I fully intend to do that.

THE COURT: Let's go.

MR. TOBEROFF: Your Honor, if I may, I'd like to ask my witness questions about various matters before we start examining contractual terms which do have relevance on the --

THE COURT: I will be the judge of that. But I may ask the next question.

BY MR. TOBEROFF: Q: Are you familiar with the term vertical integration?

A: Yes.

Q: What does that term mean?

A: In the entertainment business, vertically integrated companies are companies that are in a variety of product lines at the same time. Typically, the big vertically integrated companies have motion picture and television arms, on-line merchandising, book publishing, newspapers, broadcast stations. They are in a panoply of product lines within the entertainment business.

Q: Was MCA Universal, when you worked there, a vertically integrated company?

A: Yes, it was.

14 **Q:** How do vertically integrated companies view [inaudible] --

MR. BERGMAN: Objection, your Honor. No foundation for that and how all companies view is irrelevant.

THE COURT: There's a foundation for him to describe how MCA as a vertically integrated company operated. He may testify. He has foundation to testify to that. It does not necessarily apply to all companies. You can't take your experience from one, unless you can lay the foundation to that. But you may proceed.

MR. TOBEROFF: Thank you, your Honor.

Q: Did MCA have an intellectual property library?

A: Yes, they did.

Q: And how did they view their intellectual property library?

A: We viewed it as the most important asset of the company.

Q: Why is that?

A: Because that was -- those were the assets that were the basis of -- our exploiting those assets were the basis for our cash flow and profits and the existence of the company.

Q: And when you worked at Orion, did Orion have an intellectual property library?

A: Yes.

Q: How did Orion view its intellectual property library?

A: The same way.

Q: Same answer as --

A: Same answer as for MCA.

Q: Is DC part of a vertically integrated company or not?

A: Yes.

Q: What is that company?

A: Time Warner.

Q: Based on your experience at two studios, MCA and Orion, how do you believe Warner Brothers would view DC's intellectual property?

MR. BERGMAN: Objection, your Honor. Calls for speculation.

THE COURT: As phrased, yes. No foundation.

BY MR. TOBEROFF: Q: How important or unimportant do you believe DC's intellectual property is to a vertically integrated company like Warner Brothers?

A: I'm sure that Warner Brothers views intellectual property the same way that MCA and Orion and other studios do. It's their most important asset. And one they want to protect. I know at MCA we had an absolute rule that we would not license our intellectual property to third parties.

Q: Did that rule apply at Orion as well?

A: Yes.

Q: Why won't studios license their intellectual property to third parties?

MR. BERGMAN: Lack of foundation, your Honor.

THE COURT: Rephrase it. You're going from MCA to all studios, Counsel. That's the objection. I'll sustain it as phrased. Rephrase.

BY MR. TOBEROFF: Q: Why were Universal and Orion so restrictive with regard to licensing intellectual property in their libraries to third parties?

A: Again, the -- well, two fundamental reasons. One was those properties were the life -- the financial and creative lifeblood of the companies. At Universal, for example, we had the Mummy and King Kong and Jurassic Park and, you know, all these terrific properties.

The second thing and maybe even more important is that under no circumstances does a studio want a competing studio to have a success with their intellectual property.

That is -- studios just won't let that happen.

Q: I'd like to turn to the issue of agreements between affiliated or vertically integrated entities within the same conglomerate.

Your Honor, if I may, I'd like to ask this witness some questions regarding the way that entertainment industry functions as a whole, not simply his percipient experience at Orion and Universal because he is an expert in the entertainment industry, having been a practitioner in the entertainment industry both in the studio buy side and in private practice.

He's here as an expert, not just simply as a percipient witness.

THE COURT: Counsel, you may ask your next question.

BY MR. TOBEROFF: Q: Looking at the --

THE COURT: Counsel, we went back to the beginning when you laid the foundation for his expertise. I have the two points that you indicated he was being designated as an expert. And what you indicated just now is not what you designated him. I'm not suggesting for a moment that he might not be designated for that, but you haven't done so yet, and there's a process here.

This isn't a free-wheeling trial. You have him designated as an expert in reviewing financial agreements regarding fair market value, and secondly, although this was challenged, was the values of Superman. And those were the two areas that he was designated as an expert. If there's a third area, proffer.

MR. TOBEROFF: I'd like to proffer Mark Halloran as an expert as to the practices -- customs and practices within the entertainment industry of both the major studios where he's worked and also on the level of nonaffiliated entities and talent. Entities or persons --

MR. BERGMAN: That was not the subject of his report, your Honor.

THE COURT: Was it?

MR. TOBEROFF: Yes, it was. His report did encompass in the -- the custom and -- did definitely encompass custom and practice in the entertainment industry.

THE COURT: Refer me to the report, Counsel.

MR. TOBEROFF: It's Exhibit 332.

THE COURT: What page, Counsel?

MR. BERGMAN: Perhaps I can help, your Honor.

There's a section designated virtual integration at page 10.

MR. TOBEROFF: If we look at the section on vertical integration on page 10, he's not simply referring to Orion or Universal. He's referring to trends among the major studios, including Warner Brothers. Throughout his report he refers to custom and practice in the motion picture and television industry.

On page 12, the first full paragraph again is the custom and practice in the motion picture and television industry.

THE COURT: Right. And, in fact, on page 2 is the indication that the opinion was being offered in support of his expertise on vertical integration.

So I'll permit -- I will so designate him as an expert on that, on vertical integration.

MR. TOBEROFF: I would like to designate him as an expert as to custom and practices in the film and television industry during the period in question.

THE COURT: Mr. Bergman?

MR. BERGMAN: Your Honor, the only thing I see in the report about that is in the valuation -- is a sentence that says at page 12, the custom and practice in the motion picture and television industries is that the valuation of an asset is most often determined by arm's length negotiations in the open marketplace. And as your Honor has noted, we've conceded, we recognize this is not an arm's length deal. The question is is it a fair market deal.

THE COURT: Right.

MR. TOBEROFF: Your Honor, I object to Mr. Bergman's speaking objection.

THE COURT: Well, there's been a lot of speaking on both sides, Counsel.

The custom and practice within the entertainment industry certainly forms the basis of the opinions that this witness is offering. He has extensive understanding of both the custom and the practice of the industry. I'm not going to give a full-wheeling or free-wheeling designation at this point. But

within the context of valuation, within the context of vertical integration, you may ask him questions, Counsel, based on his custom and practice.

We've reached 4:45. The Court has a 5:00 matter that I need to attend to, and I need some prep time on that. Let's resume tomorrow morning.

Actually, tomorrow morning we're resuming with the closing arguments in the last trial. We're going to resume tomorrow at 1:30 in this trial. You'll have the afternoon tomorrow. So I will see you then.

Any other matters we need to take up briefly at this time?

MR. TOBEROFF: One brief matter, your Honor. Dealing with the authentication issue in granting plaintiff's ex parte, I believe you stated that the declaration of

Mr. Ellis would be sufficient to authenticate under rule -- I believe it's 902. But you said notwithstanding that, defendants would have the right to ask Mr. Ellis questions.

THE COURT: Right. Well, 902.11 specifically provides that if the declaration is objected to, that the opposing party has a right to cross-examine the declarant.

MR. TOBEROFF: So my question is whether 902.11 would have no purpose if -- what I'm getting at is therefore, wouldn't defendants have the responsibility of subpoenaing Mr. Ellis to question him since we've already met our burden of authenticating pursuant to declaration in 902.11?

THE COURT: The way it's worded is a party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an advert party with a fair opportunity to challenge them.

I trust, based on Mr. Toberoff's statement, that you wish to challenge the authenticity, Counsel?

MR. PERKINS: We do, your Honor, and we've made that position clear from the outset. We really relied on your Honor's ruling in the last hearing.

THE COURT: Right. And the ex parte application just came in.

When was that filed, Mr. Toberoff?

MR. TOBEROFF: Approximately a week ago. April 6th, your Honor.

THE COURT: April 6th. Okay. And the Court just ruled. I don't understand what the issue is. Let's get the witness in here.

MR. TOBEROFF: The issue is --

THE COURT: What's the real problem?

MR. TOBEROFF: Well, the issue is that the defendants, would it be their responsibility to subpoena the witness and organize it as a rival here, not plaintiff's.

THE COURT: That's true.

MR. PERKINS: In fairness, your Honor, at the last hearing, your Honor said either there's a stipulation or a witness. Bring in a witness.

THE COURT: I understand, and I granted the ex parte application. I was mistaken on the law, Counsel.

MR. PERKINS: Okay. But now we are into the second day of trial.

THE COURT: We're not going to stop. This trial won't end. You'll have your opportunity to cross-examine this witness. Don't worry. This is a bench trial, Counsel. You're going to have your time to bring your witnesses in and cross-examine them.

MR. PERKINS: We'll serve a subpoena, your Honor.

THE COURT: Serve it. And who is the witness in question?

MR. TOBEROFF: James Ellis.

THE COURT: Who is?

MR. TOBEROFF: He's a --

THE COURT: The name doesn't mean anything to me either.

MR. TOBEROFF: He is a Custodian of Records for a company called AMG.

THE COURT: And they are located where?

MR. TOBEROFF: He's here, right here in Los Angeles.

THE COURT: Okay. So this shouldn't be too much of a problem.

MR. PERKINS: We'll take care of it, your Honor.

THE COURT: Take care of it. We can break up the phase if we have to accommodate him since this is kind of a last-minute thing.

All right. Very good. I will see you tomorrow at 1:30.

(Proceedings concluded at 4:50 P.M.)

TRIAL - DAY 3

THURSDAY, APRIL 30, 2009

P.M. Session

WITNESSES: Mark Edward Halloran

(Per order of the Court, Pages 402:12-18 has been placed under seal and is not contained herein)

WHEREUPON THE CASE HAVING BEEN CALLED AND APPEARANCES GIVEN, THE FOLLOWING PROCEEDINGS WERE HELD:

THE COURT: Good afternoon to you all. Counsel, you may continue with your examination.

MARK EDWARD HALLORAN, PREVIOUSLY SWORN.

THE CLERK: Mr. Halloran, please be advised you are still under oath.

DIRECT EXAMINATION (CONTINUED)

BY MR. TOBEROFF: Q: Mr. Halloran, I'd like to ask you some questions about your answer to Mr. Bergman's questions at the deposition that he read into the record yesterday. I'm referring to page 262 of your deposition, commencing at line 23 and ending at page 263, line 3:

"QUESTION: My question to you, sir, is what would a fair market contract be in 2002 for the nonexclusive rights that -- film rights that the court has determined were transferred from DC to Warner Brothers?

"ANSWER: I have not formulated an opinion as to that value."

And then referring to page 263, lines 19 through 24:

"QUESTION: Okay. Let me ask you this, then. Moving over now to the television license, do you have an opinion as to what the fair market value in 2002 was of the nonexclusive television rights that the Court has determined were transferred from DC to Warner Brothers?

"ANSWER: I have not formulated that opinion."

When Mr. Bergman asked you whether you had formed an opinion as to the value of the nonexclusive film and television rights transferred to Warner

Brothers and you answered that you had not formed an opinion as to that, what nonexclusive rights were you referring to?

A: I was referring to the rights in Action Comics 1.

Q: Why do you believe only Action Comics No. 1 was implicated by Mr. Bergman's question?

A: I understand that the Court in this matter has determined that the termination is only effective so far with respect to the rights to Action Comics 1.

Q: And what effect does that have on Action Comics No. 1?

What is your understanding of the effect that that has on Action Comics No. 1?

A: As to the Action Comics 1 copyright, the rights are not -- there's co-ownership as between the Siegels and DC Comics, and the rights are nonexclusive as between them.

Q: Now, moving to the Superman film and television agreements that you analyzed with regard to this case, what is the scope of the rights grant in those agreements?

A: Well, first of all, you start with the description of the property. And the description of the property in both is very broad. For example, in the film agreement, it's all material owned by DC, and then subsequently, there's a very broad grant of rights --

MR. BERGMAN: Excuse me, your Honor. May I ask what the witness is looking at?

THE WITNESS: Yes. This was put in front of me.

THE COURT: Not until --

THE WITNESS: Okay. I'm sorry. It was just there.

THE COURT: Don't worry.

THE WITNESS: So the grant of rights in both the film and television agreements was with respect to the entire universe of the Superman property. Including --

THE COURT: Excuse me.

Okay. Continue.

BY MR. TOBEROFF: Q: Mr. Halloran, what is the scope of the rights grant in the Superman film and television agreements that you analyzed?

A: Both of them were quite broad and included the Superman property, including, I understand, thousands of copyrights which would include DC Comics 1, but then there's a lot of additional copyrights and other material that was granted under both the film and television agreements.

Q: Is the compensation to DC and other terms in those agreements in consideration for the film and television rights to Action Comics No. 1 alone? Or to Action Comics No. 1 as part of the thousands of Superman copyrights owned by DC?

MR. BERGMAN: Objection. Compound.

THE COURT: Break it up.

BY MR. TOBEROFF: Q: Is the compensation to DC and the other terms of the agreements offered to DC in consideration for the film and television rights to just Action Comics No. 1?

A. No.

MR. BERGMAN: Same objection, your Honor.

THE COURT: Your objection to the compound nature of the –

MR. BERGMAN: Film and -- and television. Separate agreements.

THE COURT: Break it up, Counsel.

BY MR. TOBEROFF: Q: Is the compensation to DC and other terms in the film agreement in consideration for the film rights to Action Comics No. 1?

A: Yes.

Q: Yes?

THE COURT: He said "yes."

THE WITNESS: Yes, including it's part of the -- I'm sorry. There's no --

THE COURT: Next question, Counsel. He answered yes.

THE WITNESS: Well, wait, wait.

MR. TOBEROFF: It's okay. I'll re-ask.

Q: Is the compensation to DC and other terms of the agreement in consideration for the film rights to thousands of Superman copyrights owned by DC?

A: Yes.

Q: And is Action Comics No. 1 included amongst those thousands of Superman copyrights?

A: Yes.

Q: Moving to the television -- Superman television agreements. Is the compensation and other terms offered in consideration for television rights to the Superman property for only Action Comics No. 1?

A: No.

Q: Is it for the thousands of Superman copyrights owned by DC?

A: Yes.

Q: Other than Action Comics No. 1 -- pardon me. Other than Action Comics No. 1, which you've testified that you understood DC only to have nonexclusive rights to, did you construe DC as exclusively owning and transferring to Warner Brothers exclusive film rights to these other thousands of Superman copyrights?

MR. BERGMAN: Objection. Leading.

THE WITNESS: Yes.

THE COURT: What's the objection?

MR. BERGMAN: Pardon me, your Honor. Leading.

THE COURT: Sustained. Let's have him testify, Counsel.

MR. TOBEROFF: I'm sorry.

THE COURT: Let's have him testify.

MR. TOBEROFF: I'm going to rephrase the question.

THE COURT: Please.

BY MR. TOBEROFF: Q: Did you view DC as exclusively owning or nonexclusively owning the film rights to the thousands of Superman copyrights implicated in the film agreement?

A: Exclusively --

Q: Minus Action Comics No. 1?

A: Exclusively only.

Q: And in rendering your opinion, did you view DC as exclusively owning the thousands of Superman copyrights implicated in the Superman television agreement minus Action Comics No. 1?

A: Yes.

Q: Why is that, Mr. Halloran?

A: It's for various reasons. If you look at the contract, the grant of rights is for the entire property, and in addition, DC warranted to Warner Brothers that they had all the rights to grant under both the film and television agreements.

Q: And what is your understanding of the Court's ruling to date as to the issue of co-ownership of Superman copyrights between DC and the Siegels?

A: I understand that the Court has held that the termination was only with respect to DC -- excuse me, to Action Comics No. 1.

Q: So getting back to your answer in the deposition regarding both film and television, where you said you did not form an opinion as to the value of the nonexclusive film and the value of the nonexclusive television rights transfer to DC, why did you not form an opinion as to that specific value?

A: First of all, there was no separate consideration for the transfer of that in the agreements, transfer of the Action Comics only within the agreements, and I also thought, given the transfer of the thousands of copyrights, that it wasn't material to my analysis.

Q: In forming your opinion as to the fair market value of the Superman film agreement and the Superman television agreement, did you take into consideration that DC transferred to Warner Brothers only nonexclusive rights to Action Comics No. 1?

A: Yes.

Q: Did you address this in your expert report?

A: Yes.

Q: Does the fact that the film rights and television rights to Action Comics No. 1, does the fact that that -- that DC held only nonexclusive rights and therefore could only have transferred nonexclusive rights to Warner Brothers alter your opinion as to whether the relevant agreements were for fair market value?

A: No.

MR. BERGMAN: Objection. Argumentative.

THE COURT: Overruled.

BY MR. TOBEROFF: Q: Why is that?

A: Again, because there was no separate consideration in the agreement and the description of the property was very broad. The transfer was very broad; there was a transfer of literally thousands of copyrights. Action Comics was just one out of that universe of copyrights that was being transferred under both the film and the television agreement.

Q: What was the quantitative impact, if any, on Warner Brothers of certain rights, in this case, Action 1, turning out to be nonexclusive based on the Court's recent ruling?

A: I don't believe there's been any quantitative impact at this point.

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Ask him why. Why is that?

THE WITNESS: Warner has acted -- once you get past the transfer on the face of the contract, Warner post notice of termination went ahead and produced the movie, produced the television series, and has held themselves out to the public and acted as if they were the exclusive owner.

THE COURT: So that's what you mean by not having a quantity quantitative impact?

THE WITNESS: That's part of the analysis, yes, because they have gone ahead and exploited the property, including the thousands of copyrights in the marketplace.

BY MR. TOBEROFF: Q: Do you believe that Warner Brothers has de facto exclusivity pursuant to its ownership of thousands of Superman copyrights that remain exclusive or not?

A: Yes, it does have de facto, and, in fact, it's acted as if it were the exclusive owner. I understand both in terms of its representations to the public and also in terms of its production of film and other audiovisual product.

Q: Why else do you believe that Warner Brothers has de facto exclusivity of the Superman film and television rights?

A: I think I've gone through the analysis.

Q: Do any specific terms of the Superman film and television rights affect your opinion that Warner Brothers has de facto exclusivity?

A: Well, the terms are the broad grant of rights and the warranties. If you look at the face of the agreement, it's the grant of all rights. It doesn't make -- there's no carve out for Action Comics 1 in the agreement.

Q: Could you explain to me more specifically what you mean by the warranties?

A: Yes. May I make reference to the agreement or just talk about it? I can do either.

Q: Look at Exhibit 232. It's before you.

A: Okay. Okay. The representations and warranties are on page 11. So, for example, paragraph 9 says DC hereby represents and warrants that, A, DC is the sole proprietor of all rights in the property.

Q: Was this warranty and representation made after the termination notices were served or after the date of the termination or after?

A: After. My understanding is that the notices of termination were served in 1997. And these warranties were made by DC to Warner Brothers effective November 1999.

Q: And what is the -- should it turn out as it did, that DC did not hold exclusive rights to all the copyrights transferred, what would the effect be under the agreement?

A: The effect would be that DC would be in breach of its representation of the warranty to Warner Brothers.

Q: And that therefore --

A: Therefore, they would be responsible in damages for the breach of that representation and warranty.

Q: Would DC, under your reading of the agreement, have to make Warner Brothers whole for any loss, damage, or cost resulting from plaintiffs' termination?

A: Yes. There's an indemnity provision that's included in paragraph 9 that would cover that, I believe.

Q: Now --

A: Yes.

Q: Going back to Warner Brothers for a moment, we spoke earlier about Superman 1 through 4 and Superman Returns. Do you recall that?

A: Yes.

Q: What is your view as to whether Warner Brothers owns exclusive rights to any new Superman elements in those films? Do you believe it owns exclusive rights to any new Superman elements in those films or not?

A: Yes.

Q: What about trademarks?

A: I believe they would own the trademarks emanating from those as well.

Q: And do you believe that DC's Superman trademarks were affected by the termination under the Copyright Act?

A: No, they weren't.

Q: Now, you spoke that Warner Brothers has held itself out as the -- has continued to hold itself out as the exclusive owner of Superman. How about DC?

A: I believe DC has as well.

Q: Now, what is your -- who do you believe owns the – what is your understanding as to who owns the foreign rights to Action Comics No. 1, based on your review of the record in this case?

A: I understand that the Court has determined that the termination, since it's under United States copyright law, only applies to the United States. So the foreign rights -- the rights to the foreign distribution with respect to Action Comics 1 continue to be owned by Warners.

Q: And those would be exclusive?

A: Yes.

Q: Or nonexclusive?

A: My understanding is that they would be exclusive.

Q: Do you believe that plaintiffs owning nonexclusive rights, so far as determined to Action Comics No. 1, would be in a position to compete with Warner Brothers regarding the exploitation of Superman film and television rights or not?

A: No.

Q: Why is that?

A: The most fundamental reason is that it is very difficult to make deals where you are granting nonexclusive rights only, and it would be particularly difficult if you could only grant rights for the United States. In my estimation, that would make it virtually impossible to raise the financing to create the audiovisual product based on those rights.

Q: Why would it make it so difficult?

A: Well, the entertainment business is an international business at this time. And the trend certainly has been that more and more of the income that is generated from film and television is coming from outside the United States. So it logically follows from that that the financing would be looking to a smaller and smaller pie, if they were just limited to the United States, and that would make it difficult to raise the financing. In addition, I would think that if the rights were nonexclusive, that the company receiving the rights would worry about competition from Warners and the thousands of copyrights that they held and the difficulty of separating out the nonexclusive rights from the Superman property in whole.

Q: Why would they be worried about the exclusive rights that would continue to be owned by DC and Warner Brothers?

A: Well, as I said, there's the 70 years of Superman. And it consists of literally thousands of works.

Q: But why would they be worried is my question?

A: They would be worried because they would be taking the chance that their work might somehow infringe on an exclusively owned Warner copyright or trademark.

Q: That they may be -- I'm sorry?

A: Again, they could be sued and -- for either damages or perhaps for an injunction that would -- that would stop the distribution of the product, and that's not a risk that rational investors in audio-visual works like to take.

Q: Now, unlike the case of the Siegels, if you assume that a party has exclusive worldwide rights to exploit a property, would you -- how would you characterize investment in the film business even with exclusive rights? Would you characterize it as risky or not risky? Exclusive worldwide rights, I should say.

A: Even assuming that you could overcome the hurdle of nonexclusivity in the United States, even if you had rights throughout the world in general, the production and distribution of films and television programs is very risky and very capital intensive, very expensive.

Q: Same question for the television industry.

A: It applies in the same way. It's very -- it's very expensive to launch a television series, and you want to look -- A, you don't want competition; B, you don't want to get sued; and, C, you want to look to the world to get back your investment.

Q: Even with exclusive worldwide rights to a property, do the majority of TV shows developed succeed, or do they fail?

A: They fail.

Q: What about a Superman MOW for distribution in the United States only? Why couldn't the Siegels get somebody to produce a Superman MOW, Movie of the Week, and distribute it only in the U.S.?

A: They would have the same difficulties that I just outlined before, which is the financiers could only look to nonexclusivity. They would be worried about getting sued. They could only look to the United States. It's the same analysis for film.

Q: What about a Superman low -- low budget Superman direct to DVD movie for distribution only in the United States?

A: Well, it's the same analysis. And it's even more difficult today, given the home video market, which is increasingly dominated by films that have large theatrical

production budgets and releasing costs, and that's an engine to get them into Wal-Mart.

So to even -- even direct to DVD would be very, very difficult.

Q: Based on what you've just said, what impact do you believe the fact that the rights to Action Comics No. 1 are nonexclusive, what impact do you believe that has on Warner Brothers and the value of the Superman film and television rights they obtain from DC?

MR. BERGMAN: Objection. Relevance.

THE COURT: I thought it was compound. But it's relevant. Overruled.

MR. BERGMAN: May I be heard on that point?

THE COURT: Counsel.

MR. BERGMAN: The plaintiffs have no right to share in the exclusive rights that DC may have conveyed.

THE COURT: I understand. I understand your position, Counsel. This is just going to the valuation. We're not making any -- I understand what this is being introduced for. I understand your position on their right to share or not share.

MR. BERGMAN: Thank you, sir.

THE COURT: Overruled. You may proceed.

THE WITNESS: It would be helpful if I could hear the question again.

BY MR. TOBEROFF: Q: What impact, if any, do you believe that all of this has on the value of the Superman film and television rights that were transferred by DC to Warner Brothers in the relevant Superman agreements?

A: Based on the analysis, it's not material to my opinion as to the fair market value of the transfer of rights. It's something I considered, but given what we discussed and the fact that there's no way to separately value it, it's not material.

THE COURT: It's not material to valuing the transfer of rights?

THE WITNESS: Correct.

BY MR. TOBEROFF: Q: When you say material, you mean -- strike that.

Let's look at Warner Brothers' conduct with respect to these agreements.

After Warner Brothers received notice of the termination in 1997, effective 1999, how did they proceed with respect to film rights to Superman?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Lay some foundation, Counsel. Fair enough.

BY MR. TOBEROFF: Q: Did you review the record in this case?

A: Yes.

Q: And in writing your expert report, did you review the development of Superman films by Warner Brothers?

A: Yes. I also consulted some Internet resources as well.

But I did see post-termination notice writer agreements that clearly reflected that Warners was continuing to develop the Superman project that ultimately became Superman Returns.

Q: Did you take into consideration as well Warner Brothers' production of the Smallville television series?

A: Yes.

Q: Describe to me Warner Brothers' conduct after receiving the termination notices in 1997 with respect to Superman?

MR. BERGMAN: Objection. No foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Are you aware of the action taken by Warner Brothers with respect to the development of the Smallville television series?

A: Yes.

Q: Are you aware of the actions taken by Warner Brothers 2 with respect to the development of a new Superman movie?

A: Yes.

Q: Could you describe to me that development and the investment on Warner Brothers in that development?

A: As I described on the film side, I reviewed various writer agreements and other industry sources that describe the continual development of the project. I also reviewed Up in the Sky, which was the Warner produced description, homage to the Superman character, and was clear that Warners continued to develop what ultimately became Superman Returns post 1997.

Q: What was their investment in development leading up to Superman Returns after their receipt of the termination notice? What is your understanding of that have?

A: My understanding is that it's at least $30 million.

Q: And what is your understanding of the amount invested by Warner Brothers in the production and marketing of Superman Returns after they had notice of plaintiffs' termination?

A: I reviewed expert reports by accounts, and I also reviewed Internet sources, and the reported budget was $225 million for the production costs, and I believe the releasing costs were about $141 million.

Q: And as part of your analysis, did you take into account that Warner Brothers, after receiving the termination notices, has spent approximately -- I can't do the math, $375 million?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained. Ask him what he took into account. Don't tell him.

BY MR. TOBEROFF: Q: What did you take into account in arriving at your analysis on that issue of nonexclusivity not having a material impact?

A: Well, I think actions speak louder than words. So I looked at the fact that after the notice was served in 1997, that Warners continued to develop what ultimately became Superman Returns. That they green lit the project, spent $375 million exploiting Superman Returns, which was released in 2006. And I looked at the television side Smallville and that it, you know, commenced, I guess, release in 2001.

I've seen financial statements that showed that Warners has invested in excess of a half a billion dollars in the program through its other eight seasons that account for it and continues to invest in the production and release of Smallville.

Q: Did Warner Brothers act or not act as if they were concerned with this nonexclusively issue in your opinion?

MR. BERGMAN: Objection. Calls for speculation.

THE COURT: You're asking about their actions. Why don't you rephrase your question, Counsel.

BY MR. TOBEROFF: Q: In your opinion, did Warner Brothers act or not act as a studio, concerned about nonexclusively when green lighting these projects and spending these amounts of money?

MR. BERGMAN: Same objection.

THE COURT: It's the same question. It's just the cloak all act. What do you mean by act? Rephrase your question. Are you asking -- I'm not clear what you're asking, Counsel.

BY MR. TOBEROFF: Q: What is the import of these large expenditures by Warner Brothers in film and television after the termination?

A: Well, the import is that rational studios don't typically spend hundreds and hundreds of millions of dollars and release, you know, a tent-pole movie and have a hit series and are acting like they had the exclusive rights and going into the marketplace and licensing the exploitation of these works as if they were the owner.

Q: Are you aware that in this case that a settlement between DC and plaintiffs was attempted by the parties back in 2001 and 2002?

A: Yes.

Q: And are you aware that those settlement negotiations did not result in a settlement?

A: I am aware of that.

Q: Are you aware that the settlement entailed essentially a buyout of plaintiffs?

A: The proposed settlement did, yes.

Q: And did you find anything in the record to suggest that Warner Brothers ever -- in addition to making a deal with DC, ever approached plaintiffs to make a deal with them before investing millions in Smallville and Superman Returns?

MR. BERGMAN: Objection. Lack of foundation, and what record are we talking about?

MR. TOBEROFF: I'm referring to the court record, which he reviewed.

THE COURT: Overruled. You may answer.

BY MR. TOBEROFF: Q: Did you find anything in the record to suggest that?

A: If you'd repeat the question. I got interrupted.

Q: You reviewed the court record in this case?

A: Yes, I did.

Q: Did you find anything in the court record to suggest that after settlement talks aimed at buying out the Siegels entirely failed, did you see anything to indicate that Warner Brothers, in addition to making a deal with DC, tried to license plaintiffs' share of Action Comics No. 1 from plaintiffs?

A: Yes, I believe that was part of the settlement talks.

Q: But after the --

THE COURT: Wait a second. Where in the court record is that?

THE WITNESS: Your opinion, your Honor.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'm not referring to the discussions about buying out the plaintiffs entirely in the settlement negotiations that you just testified you are aware of.

A: Right.

Q: I'm referring to after settlement failed, are you aware of any attempt by Warner Brothers to enter into a separate license with the Siegels for their share of Action Comics No. 1?

A: No.

Q: I'd like to turn now, finally, to the Superman film agreement and go through the terms.

THE COURT: That's Exhibit 232?

BY MR. TOBEROFF: Q: You have a copy of Exhibit 232. Bates numbers WD 4199 to 4231.

Do you recognize this agreement, Mr. Halloran?

A: Yes.

Q: Did you analyze this agreement in the process of forming your expert opinion in this case?

A: Yes.

Q: For ease of reference, I'll refer to it as the Superman film agreement or the film agreement.

I'd like to show you what's previously been admitted as Exhibit 203. I believe you have a copy provided yesterday.

Exhibit 203 is an agreement dated November 6, 1974, between DC and Film Export AG. And I'll refer to this as the Salkind agreement.

A: Right.

Q: Had you seen the 1974 Salkind agreement before today?

A: Yes.

Q: And did you review it in connection with your report?

A: Yes.

Q: What does this agreement concern, very generally speaking?

A: It concerns the film rights to the Superman property.

Q: It's a license of those film rights to film export?

A: Yes.

Q: How does the 1974 Salkind agreement compare to the 2002 Superman film agreement?

A: In terms of the --

Q: I'm speaking in general.

A: General. Well, in general, the 1974 agreement was an arm's length transaction between DC and a predecessor to DC and the Salkind Company. And the 2002 agreement was an agreement between DC and Warner. So this was a third party agreement, and this was not an arm's length agreement.

In terms of the -- my analysis, it was clear that the Superman 2002 agreement, at least as far as the basic participation terms, mirrors the Salkind agreement. In many other ways, however, it's not as advantageous to DC as – this agreement was more advantageous to DC than the 2002 agreement in general.

THE COURT: The 1974 agreement.

THE WITNESS: This was better for DC. This was not as good for DC.

BY MR. TOBEROFF: Q: Okay. I'd like you to walk us through DC's Superman film agreement, Exhibit 232, and help us to understand the terms of that agreement for your expert testimony. I direct your attention to page 1, paragraph 1-A, Bates No. WB 4199 of the film agreement.

A: Okay.

Q: And to make this easier, we're bringing up on your screen the actual provision we're focusing on, and we can zoom in on it. So you tell me which is easier for you.

A: Well, I have my reading glasses. So I have to -- this is -- okay. If I can -- maybe somebody can help me here. If you can move this screen over here, that would be great.

Q: I'd like to draw your attention to page 1, paragraph 1-A, on Bates No. 4199.

You see it on the screen?

A: I see it.

Q: What is the effect of paragraph 1-A?

A: The effect of 1-A is that --

MR. BERGMAN: Objection, your Honor. The agreement speaks for itself.

BY MR. TOBEROFF: Q: What does this provision deal with?

A: This provision deals with the period of time during which Warners would control the rights granted in the agreement. It sets forth the option period and the payment of the option fee, and it sets forth an option period until 2033, which I understood was the expiration of the Superman copyright.

So it effectively gave Warners control of the Superman property for 30 years. It gave it effective control of the property -- what this option did was give effective control to Warners of the Superman property for, I guess, 34 years.

Q: And what is the initial option fee in the Superman film agreement?

A: It's a million and a half dollars.

Q: And what is the initial option term?

A: I believe it was three years.

Q: And after the first three-year period, you mentioned 34 years. Does that mean there are extensions of the three-year option for an additional 31 years?

A: Yes.

Q: Is it customary in the film industry to have option periods totaling 34 years?

A: I've never seen it, ever. It's uncustomary.

Q: What would be a customary initial option period in an option purchase agreement for underlining film rights to a property?

A: Customarily, it's an initial 18 months and then an extension for 18 months for a total of three years.

Q: Now, these various option renewal payments, are those mandatory payments, or are they discretionary?

A: They are by definition discretionary.

Q: So those payments are made at the discretion of Warner Brothers?

A: Correct.

Q: Does this 34-year extendable option period favor DC or favor Warner Brothers?

A: It obviously favors Warners to the detriment of DC.

Q: And why is that?

A: Because DC is giving up for an unprecedented period of time the right to exploit Superman in film. And what's more customary is for there to be a mechanism for a reversion of those rights if the studio like Warner Brothers does not continue to develop and produce and release those films. That is much more customary.

Q: Now, what effect, if any, do these option fees have on DC's participation in the agreement?

A: My understanding is that these option payments are not only credited against the contingent compensation but the contingent compensation when earned as credit against the option fees.

Q: Is that customary or uncustomary in the motion picture industry?

A: It's uncustomary.

Q: Have you ever seen in your work as a transactional attorney or your work at the studios, have you ever seen an option fee that is applicable to a rights holder's back end contingent compensation?

A: No.

Q: Does the -- does this cross-applicability of the option extension payments to DC's contingent compensation and the applicability of the contingent compensation to DC's option fees favor Warner Brothers or favor DC?

A: Warners to the detriment of DC.

Q: And why is that?

A: Warners -- well, the -- what's customary is the owner of a property, whether it be Superman, but specifically Superman, would make sure, in granting the

option to acquire the film rights, that there be constraints on the period of time during which the option was extant, during which the picture would be developed, and typically there would be a purchase price which would, you know, make the studio more pregnant and make it more likely that the picture would be produced.

Then what's very unusual here is that the option is typically deemed exercised after the option -- the three-year period would go, the option would be exercised, and a payment would be made, and there wouldn't be these option extension payments. At that point --

Q: Excuse me, Mr. Halloran. I'd like to refocus you. I'm referring only to the applicability.

A: Okay.

Q: So my first question is why does the purported applicability of the contingent compensation to the option extension payments disfavor DC?

A: Because it -- I'm sorry. If you could rephrase that.

Q: Do you understand my question?

A: No, I don't understand.

Q: You mentioned that the contingent compensation – DC receives contingent compensation of $2 million.

A: Right.

Q: For example. You testified that under the agreement, that would be applicable to the option extension payments.

A: Right.

Q: And you mentioned that is unfavorable to DC and favors Warner Brothers. And my question is why.

MR. BERGMAN: Objection.

THE COURT: Overruled.

THE WITNESS: It would reduce the amounts payable to DC.

BY MR. TOBEROFF: Q: Would it serve also to extend the option for numerous years or not?

A: Yes, at the same time it would automatically extend the option to the extent that contingent compensation was earned upon the release of the money. So,

for example, if the contingent compensation on Superman Returns exceeded these amounts, there would be no further option payments. They would all be credited based on that contingent compensation, which is very -- I've never seen it.

Q: Now, turning to page 2, paragraph 2, of Exhibit 232, the same exhibit, it's on your screen.

A: Okay.

Q: What does this provision provide?

A: We're talking about paragraph 2?

Q: Paragraph 2 on page 2.

A: It provides that Warner would exercise its option by giving DC written notice of commencement of principal photography.

Q: So the option is exercised merely by written notice?

A: It would have to start the movie.

Q: Now, is this a customary way that options are exercised in the film industry?

A: No. What's customary is that the person taking the option has to exercise the option on or before the expiration of the option period. So traditionally, Warners would have three years to pay DC the option price.

Q: But how do you -- other than giving written notice of the exercise of the option, how do you exercise an option traditionally in the film industry?

A: You pay a purchase price.

Q: Is there a purchase price in this agreement?

A: No.

Q: Is there any fixed cash purchase price or exercise price for the transfer of Superman film rights in this agreement?

A: No.

Q: What money is guaranteed, if any, under this agreement?

A: The only money that's guaranteed is the option fee.

There's no guarantee as to a purchase price or the amount of the contingent compensation.

Q: That's the million five you spoke of earlier?

A: Correct.

Q: Does the -- is the lack of a purchase price customary or uncustomary?

A: Very uncustomary.

Q: Does the lack of a purchase price favor DC or favor Warner Brothers?

A: It favors Warner Brothers.

Q: How does it favor Warner Brothers?

A: They don't have to write a check as a purchase price within a stated period of time. They can continue to develop the film by just paying these relatively modest option payments. They don't have to pay a substantial purchase price, which is certainly more customary for properties of this type. It's also good for Warner Brothers because if they -- I mean, the contingent compensation is only based on the release of the movie. So they don't have to pay the amount until a later date.

And also conceivably, Warners could not release the picture. They could make the picture based on the rights and not release it and not have any further obligations, which is very unusual.

Q: Normally under an option purchase agreement for underlying rights, once you exercise the option, what effect, if any, does that have on the obligation to renew the option?

A: Well, the option is extinguished because the option has been exercised.

Q: So once Warner Brothers exercised the option solely by commencing production of a film, are they or are they not obligated to continue to make those option renewal payments?

A: It's a little confusing. Traditionally, they would not be obligated to make those payments. But the operative effect is when they release a film and it generates contingent compensation to DC, that amount is applied against the option payment. So that helps distinguish that obligation.

Q: But as written, does Warner Brothers have any obligation to continue making those option renewal payments, which they call option renewal payments, once the option is exercised?

A: No, they don't have an obligation to pay them.

Q: As written in the contract?

A: Correct.

Q: What does the term net present value mean?

A: Net present value means that a bird in the hand is worth two in the bush. Basically, it's a financial calculation where there are future cash flows that are discounted to a present value based on a discount factor.

So the easiest way that I look at it is if you win the lottery, they give you a choice. You can get $10 million now or 30 million over 30 years. So net present value is what it's worth today.

Q: Now, you testified that Warner Brothers need not make those 31 option extension payments because you stated they were discretionary. And you also testified that once they exercised their option, the option would be extinguished and they need not renew the option. But assuming for purposes of my question that they actually made each of those payments, did you do a net present value calculation of what the net present value of those payments would be?

MR. BERGMAN: Objection, your Honor. There was no such thing in the report, nor any indication of it.

THE COURT: Counsel?

MR. TOBEROFF: Their witness, Mr. Gumpert, in his report referred to a -- these option payments as if they were a cash payment of $20 million. And my question addresses that.

THE COURT: So you are offering this as rebuttal at this point?

MR. TOBEROFF: Yes. Anticipatory rebuttal.

THE COURT: The Court will consider it as such and conditionally admit it.

You may answer.

THE WITNESS: Yes, the value, rather than the nominal approximately $20 million would be closer to $20 million on the net present value basis.

BY MR. TOBEROFF: Q: And what discount rate did you employ in reaching that result?

A: The 30-year bond rate.

Q: I'd like to draw your attention to paragraph 4 on page 2 of the film agreement, Bates No. WB 04200.

I'm sorry. I think we already covered this. I think we can move on.

Now, we spoke about option purchase agreements, what's customary for option purchase agreements in the film industry with respect to underlying rights to intellectual properties. Are all underlying rights agreements option purchase agreements, or are they sometimes flat out purchase agreements?

A: They sometimes are so-called straight purchase agreements. There's no option period. You write a big check. So, for example, if I looked at the Hand agreement and the Sahara agreement, and those are both purchases.

Q: We'll get to those specific agreements.

A: Okay.

Q: But when, in your experience in the film industry, would rights holders tend to demand an up-front commitment in the form of a purchase as opposed to an option purchase of rights?

A: Someone who has a powerful property and a hot property that's in the marketplace and where they could demand -- rather than having an option structure, that somebody write a check for the entire purchase price in order to get the property.

Q: And other than receiving a greater amount of cash in hand from an agreement, which is the straight purchase as opposed to an option purchase, are there any other benefits to a straight up purchase?

A: Well, the main benefit of it is that it gets the financier pregnant, as it were, and makes it more likely that in fact the film would be produced and released rather than just receiving a cash payment and not having the movie actually be produced and released. That's the -- that's the biggest advantage other than just, you know, getting a check.

Q: In addition to receiving the cash up front?

A: Yeah, it's -- well, the effect of the financier handing over, say, $10 million to purchase rather than option is that it makes it highly likely that the studio is going to make the movie. Studios are not in the business of writing $10 million checks and then not making movies. Not to say that's never happened in history, but it's certainly very atypical.

Q: I'd like to draw your attention to page 2, which is Bates No. WB 04200, paragraph 3.

What does paragraph 3 relate to?

A: It relates to the contingent compensation Warners would pay DC for the exploitation of the films based on the rights.

Q: Now, you've used the term "contingent" a couple times. You've now just said contingent compensation. Other times you said contingent participation.

What is it contingent on?

A: It's contingent on release of the movie. And the performance of the movie. And the creditworthiness of the person paying.

Q: Is that because the participation is a participation of revenues from the movie?

A: Yes. Distinguished from the purchase price, which is paid irrespective of the revenues of the film.

Q: What was DC's participation in the film agreement?

A: DC received 5 percent of --

Q: Excuse me. We're just talking about the agreement.

A: What was DC's participation?

Q: In the agreement.

A: It was a participation of the proceeds from the --

Q: No, I'm sorry. You said "received." What is DC entitled to receive under the agreement?

A: They are entitled to receive a participation in the revenues from the films that are released based on the grant of rights under the agreement.

Q: And what is that participation?

A: It's 5 percent of what they call a defined gross from the world or 7 1/2 percent of domestic gross, whichever is higher.

Q: And what does domestic refer to?

A: Domestic refers to the United States and Canada.

Q: Now, would you expect 5 percent of a studio's worldwide gross to be greater than or less than 7 1/2 percent of its domestic gross from a film?

A: I would expect the 5 percent to be greater.

Q: Why is that?

A: Because sort of the rule of thumb at this point is approximately two thirds of the revenue from pictures is generated outside the United States and Canada.

Q: Where do you get that statistic from?

A: From the MPAA.

Q: What is the MPAA?

A: The MPAA is a trade group that represents the studios, and among the things they do is they compile and make available to the public statistics regarding films, their costs, and the relative revenue that is generated from the films from the group that are members of the MPAA.

Q: Now, if Warner Brothers under this agreement, given what you said previously about how the option is exercised, if Warner Brothers produced and released only one Superman film under the agreement, but no Superman films thereafter for the next 30 years, what would be -- would DC have any recourse under the agreement?

A: No, they wouldn't have the traditional right to get back the film rights.

Q: And would DC's gross compensation be limited solely to the one film that Warner Brothers had produced?

A: Yes. Because it only kicks in when Warners actually produces and releases a film.

Q: And how is DC's compensation weighted in the agreement?

Is it weighted to guarantee cash, which I believe you testified was a million five? Or was it weighted towards its gross compensation?

A: It's weighted towards the gross compensation.

Q: Now, if Warner Brothers only made one film, since making a film exercises the option, would Warner Brothers need to continue making those option renewal payments?

A: I don't believe so.

Q: How does the 5 percent that DC is entitled to receive of Warner's worldwide gross from films -- in Superman films, compare to contingent compensation and other agreements for prominent properties that you reviewed in general?

A: In general, it was less than many properties that were not as valuable as Superman.

Q: How much less?

A: Half, less than half.

Q: Now, were you able to find any agreements for the film rights to a famous comic book character where the rights holder received contingent compensation greater than 5 percent of distributor's gross?

A: No, I was not able to.

Q: Why do you believe you were not able to?

A: Well, the most prominent comic book characters are controlled by two companies, DC Comics and Marvel. And DC Comics does not put out their properties into the open market in a manner which I think would generate participations in other provisions that would be better than this intercompany agreement.

The other big comic book properties that Marvel owns, like Iron Man, it was not -- the Iron Man agreement I saw was prior to Iron Man becoming a big hit property, and I also understand that the agreement for Iron Man that I saw expired, and Marvel now, rather than licensing their lead comic book properties, finances them and has them distributed on their behalf.

Q: Until this decade, with release of Iron Man movie and Spiderman movie and X-Men movie, prior to the release of those movies, what were the two most prominent superheroes --superhero characters in your opinion?

A: Superman and Batman.

Q: And those were controlled by what company?

A: By DC Comics.

Q: And was Iron Man, prior to the release of the recent hit film, was that a property that was well-known, or was it a property that was not well-known?

MR. BERGMAN: Objection. No foundation.

THE COURT: I'll sustain it. You can rephrase your question, but let's do it after the break. We'll take about a 15-minute break.

(Recess taken.)

THE COURT: Counsel.

BY MR. TOBEROFF: Q: Mr. Halloran, I'd like to show you what's been previously admitted as Plaintiffs' Exhibit 1. Exhibit 1 is an agreement between DC Comics and Time Warner Entertainment Company, LP. Regarding the film and audio-visual rights to the Batman character and property.

How is the agreement dated?

A: It's dated as of May 31, 2002.

Q: I draw your attention to page 18 of Exhibit 1. When was this agreement executed?

A: The execution date was February 3, 2004.

Q: I'd like to draw your attention back to page 1. Excuse me. Page 2, paragraph 1-A, of Exhibit 1. The page is BatesNo. WB 4084.

Under this paragraph, what is the option payment?

A: $175,000.

Q: For what period of time?

A: It's from the initial date until June 20, 2003.

Q: What period of time is that?

A: Approximately a year.

Q: And is this option payment -- option term renewable as under the Superman film agreement?

MR. BERGMAN: Objection, your Honor. There was no reference in the report of the witness to the Batman agreement or its provisions.

MR. TOBEROFF: I believe that's incorrect, your Honor. Attached to the witness's report is a very lengthy list of all of the documents that he reviewed in arriving at his opinions in this case, and the Batman agreement is included in that list.

THE COURT: Is that the case, Counsel?

MR. BERGMAN: It's included in the list but referred to in the report.

THE COURT: Well, the list, Counsel, has been incorporated in the report. The objection is overruled. You may proceed.

BY MR. TOBEROFF: Q: My question was whether this agreement provides for renewable option terms like in the Superman agreement or not.

A: Yes, it does.

Q: And are those renewable option terms -- is it your understanding that those renewable option terms are for the remaining life of the Batman copyright at the time or not?

A: Yes.

Q: I draw your attention to page 3, paragraph 3-B of Exhibit 1.

What does this paragraph provide?

A: This is the contingent compensation paragraph which mirrors the contingent compensation payable to DC under the Superman film agreement.

Q: Is it the same gross participation as in the Superman film agreement?

A: Yes.

Q: Now, you mentioned this agreement was entered into in 2004. Between May of 2002, when the Superman film agreement was entered into, and 2004, when the Batman agreement was entered into, had there been any further releases of films based on comic book superheroes?

A: Yes. The one being the release of the second X-Men movie. And there was a Spiderman movie which was about to be released about this time or certainly was in the works and people knew it was going to be released.

Q: When you refer to a Spiderman movie, are you referring to Spiderman 2?

A: Yes.

Q: Were those movies successful or not successful?

A: They were both extremely successful.

Q: I'd like to draw your attention to page 18, moving back to the Superman film agreement with Exhibit 232. Page 18 is actually labeled Exhibit B to the Superman film agreement.

It's on your screen as well. What does Exhibit B provide?

A: Exhibit B is the gross receipts definition that sets forth the amounts that the contingent compensation participation applies to.

Q: In your experience, are these defined gross definitions ever modified by amendments?

A: They typically are modified by amendments.

Q: What form do those amendments take?

A: They are called riders.

Q: R-I-D-E-R?

A: Yes.

Q: Does Warner Brothers have a rider that modifies its defined gross definition in favor of a participant or not?

A: Yes.

Q: Is that rider included in DC's Superman film agreement?

A: Surprisingly not.

Q: Is the failure to include that rider in Warner Brothers' benefit or in DC's benefit?

A: Warner Brothers' benefit.

Q: How does it benefit Warner Brothers in general?

A: Well, the notion of the rider is that it modifies the basic gross receipts definition to the -- so that the gross receipts definition is better for the participant. So that by definition is because it's better to the participant, it's worse for the studio.

Q: So not having a rider is --

A: Is detrimental to the participant. In this case, it's detrimental to DC.

Q: I'd like to move on to the subject of home video. What is a home video royalty in the film and television industry?

A: Home video royalty typically is a percentage of the wholesale price that is credited to the gross receipts upon which the percentage is then applied. And the range is here, 20 percent, which is a minimum. And it can go up in some cases to 35 or 40 percent.

Q: You say it's a minimum. Do you mean that's an industry minimum of the 20 percent home video royalty?

A: Yes, and it's the minimum here in the Warners definition.

Q: And in your experience, what kind of participant would negotiating leverage receive in terms of a home video royalty?

A: Objection. Lack of foundation.

THE COURT: Lay a foundation for that.

BY MR. TOBEROFF: Q: Do you have experience negotiating a wide variety of agreements in the entertainment industry?

A: Yes.

Q: Do you have experience negotiating underlying rights transactions in the film and television industry?

A: Yes.

Q: In your experience, when a participant has negotiating leverage, what can the range of the home video royalty be as opposed to the minimum 20 percent?

MR. BERGMAN: Objection. Lack of foundation. No indication he's done these provisions.

THE COURT: Counsel.

BY MR. TOBEROFF: Q: Do the agreements in the entertainment industry always contain provisions dealing with home video?

A: Yes.

Q: Do you have experience in negotiating these provisions?

A: I have experience negotiating these provisions, and I've also reviewed numerous documents in connection with my work in this case where there are such provisions and amounts in excess of 20 percent.

Q: Now, when a participant has leverage, can you give me an idea of the range that that participant might negotiate in the form of a home video royalty?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: What's your particular concern, Counsel? He clearly has experience dealing with these types of --

MR. BERGMAN: My concern, your Honor, based on my deposition of the witness, he has never negotiated a video provision more than 20 percent. In fact, the witness has only negotiated one acquisition agreement in the past 19 years.

(text redacted)[1]

BY MR. TOBEROFF: Q: Now, Mr. Halloran, given the comments of Mr. Bergman, is your experience solely limited to agreements that you have actually negotiated?

A: No.

Q: Give me an idea of why it's not solely limited to agreements you have negotiated in connection with your opinion in this case.

A: Well, in the first place, these sort of gross definitions 2 from the definition of home video is not only in rights agreements. It's in virtually every agreement in connection with the motion picture, be it a rights agreement, a writer agreement, a director agreement, an actor agreement. And also in distribution agreements.

So I've seen thousands and thousands of agreements that have had video royalties, and I've negotiated them hundreds of times.

Q: But your experience is not simply limited to those agreements you've negotiated?

A: Correct.

Q: Is it, or is it not?

A: No, of course not.

Q: In the course of rendering your opinion in this case, did you only look at agreements you've negotiated?

A: No. I certainly looked at the Neopets case -- Neopets agreement, which I negotiated, but the vast majority were agreements I hadn't negotiated in reviewing for my work on this case.

Q: That was for the purpose of comparing the terms of those agreements to the Superman film agreements at issue in this case?

A: Precisely.

Q: I'd like to turn to page 19 of Exhibit B in the Superman film agreement and draw your attention to paragraph 1-D. What does this paragraph provide?

A: This is the typical minimum 20 percent home video royalty paragraph.

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[1] At this point the witness revealed confidential details of another case

Q: I'd like you now to turn to page 12, paragraph 13, of the Superman film agreement. It's on your screen as well.

THE COURT: Page 12?

MR. TOBEROFF: Page 12, Bates No. WB -- excuse me. I have it the other way. It's paragraph 12 on page 13, your Honor.

THE COURT: Very good.

MR. TOBEROFF: WB 4211.

THE COURT: I see it.

BY MR. TOBEROFF: Q: What does this provision provide?

A: Looking at paragraph 12?

Q: Yes.

A: It provides for a reversion of the film rights if Warners fails to make certain payments.

Q: Is there any -- when you say certain payments, are you referring to the payments Warner Brothers would be obligated to make under the agreement?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: When you say certain payments, what are you referring to, Mr. Halloran?

A: I think this goes to the option payments. So if they fail to make the option payments, then there's a mechanism for DC to give Warners notice that they haven't made the payment and to give Warners the option to make the option payment.

Q: But as you testified earlier, once they exercise the option by starting production of a single film, the option would be extinguished, and you'd no longer renew it.

Is that your testimony?

A: That's correct.

MR. BERGMAN: Objection. Leading.

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currently under trial.

THE COURT: Sustained. Let the witness testify, Counsel.

BY MR. TOBEROFF: Q: What is the effect, if any, of the commencement of principal photography on the requirement that Warner Brothers make future option payments or else the property reverts to DC?

A: As I testified, the exercise of the option would extinguish the obligation to make those payments. I think it would make -- with that in mind, that would make this paragraph 12 illusory.

Q: Now, are there any other reversion provisions in the Superman film agreement that would permit DC to get back its Superman film rights once Warner exercised the option by producing a single film?

A: No.

Q: If Warner Brothers only made one Superman film and did not make another Superman film for the remainder of the 34 year -- strike that.

If Warner only made one Superman film and did not make another Superman film, would the Superman film rights revert to DC under the agreement as written?

A: No.

Q: What would be the effect of this on DC and therefore on plaintiffs by extension if Warner Brothers only made one Superman film under the agreement?

A: It would be devastating. Devastating both financially, because there would be no additional payments made, and it also would be devastating to the continued awareness of the Superman character, which emanates from the production and release of, you know, tent-pole films.

Q: Under the agreement, is it in Warner Brothers' sole discretion or not in its sole discretion whether it makes more than one Superman film in 34 years?

A: It's completely within their discretion to the detriment of DC.

Q: Are you familiar with reversion provisions contained in other film rights agreements?

A: Yes.

Q: What is the typical reversion provision in a film rights agreement for a well-known underlying literary property?

A: Typically it would provide that notwithstanding that the option had been exercised or a picture produced and released, that after a period of time, that if the studio was not continuing to produce one of these pictures, that the film rights would come back to the grantor, and that period is, for a high-end property is, let's say, in that sort of three- to five-year range. Sometimes less.

The notion behind it is if the studio is not going to continue to exploit the property that has been granted to them, that the rights would come back, and the owner would have the opportunity to go into the marketplace and perhaps have someone else continue to produce pictures for them.

Q: And does that sort of customary provision -- strike that. Who does that customary reversion provision benefit? The rights holder or the film studio?

A: It benefits the rights holder.

Q: I'd like to draw your attention to page 7, Bates No. WB 4205, paragraph 6-C.

A: Yes.

Q: What does this provision concern?

A: This has to do with the treatment of the merchandising rights that emanate from the new elements that are added in conjunction with a film that's produced under the agreement.

Q: And what is the -- what does paragraph 6-C provide with reference to sharing revenues from the film-related merchandising?

MR. BERGMAN: Objection. The agreement speaks for itself.

BY MR. TOBEROFF: Q: What is your understanding of what the agreement provides with reference to the sharing of merchandising -- film-related merchandising revenues?

A: I understand they were going to be shared 50/50.

Q: And what is encompassed in the term film-related merchandising?

A: The motion, especially when you have a character like Superman that has had previous merchandising that's been in the marketplace and continues to be in the marketplace, you want to be -- it's customary that prior merchandising can continue and that the rights holder continues to own the proceeds from that.

However, there may be new things that are created -- that are specific only to the picture, and then the merchandising of those elements which are distinguished from the old elements. There's typically a split of the revenue from the merchandising of those new characters which are merchandised, which are specific to the film.

Q: Now, under this provision in this agreement, what would be included in film-related merchandising? Can you give me an example of the type of merchandising that would fall under this provision?

A: It would be merchandising that could be identified as emanating from the movie. So it might --

Q: I'll break it down.

A: Okay.

Q: If merchandising included the images of actors in the movie, let's say the actor playing Superman, in your opinion, would that fall under this agreement as film-related merchandising?

A: Yes.

Q: If it included the logo of the film, would that be film-related merchandising?

A: Sure.

Q: The title of the film?

A: Sure.

Q: New elements appearing in the Superman film that weren't in the underlying Superman comic books?

A: Yes.

Q: Additional characters in the film that are not in the comic books?

A: Good example.

Q: I'd like to draw your attention to -- strike that. Now, how is merchandising licensed with respect to a Superman film produced by Warner Brothers?

MR. BERGMAN: Objection. Lack of foundation.

MR. TOBEROFF: Your Honor, may I?

THE COURT: You may.

MR. TOBEROFF: The foundation is that he's reviewed a vast number of documents in this case. He's an expert in the entertainment industry. He's reviewed the agreements in question. And he's rendered an opinion, and I'm now asking him --

THE COURT: Why don't you lay that foundation, Counsel, instead of just saying it.

MR. TOBEROFF: We have.

THE COURT: That he's reviewed the agreements related to the merchandise licensing by Warner Brothers?

MR. TOBEROFF: I apologize, your Honor.

THE COURT: Okay. I didn't think I had heard that.

BY MR. TOBEROFF: Q: Did you review an agreement between DC and Warner Brothers pertaining to the licensing of Superman merchandise?

A: Yes.

Q: And how are revenues dealt with under that agreement?

A: I believe Warners is acting as an agent, takes a 25 percent fee on the gross merchandising receipts that are received. And then that amount net of that fee is divided 50/50 as between DC and Warner Brothers.

Q: So with respect to film-related merchandising, when you combine these two agreements, how much of every dollar would be kept by Warner Brothers, and how much would DC receive?

A: Warners would keep 62 -- let's take a dollar. It would be 62.5 cents to Warner's and 37.5 cents to DC. The math being a dollar comes in. You take out a quarter to the Warner merchandising arm. There's 75 cents left. And you divide that 50/50.

Q: I'd like to draw your attention now to page 2, which is Bates No. WB 4200. It's paragraph 5 of the Superman film agreement, which continues on to page 6, 4201.

What does this paragraph concern?

A: It's the grant of rights from DC to Warner.

Q: What rights are granted from DC to Warner in the Superman property as a whole?

A: All rights subject only to the reserved rights that are enumerated.

Q: Is this typical or atypical for a prominent intellectual property that's being licensed for film exploitation?

A: Atypical. Very unusual.

Q: What is more customary?

A: What is much more customary is that rather than granting all rights subject to enumerated reserve rights, it's the opposite. The grantor grants specific rights, and to the extent that those rights are not granted, they are reserved to the grantor.

Q: And why -- does the more typical provision benefit the rights holder or benefit the licensee?

A: It's very much to the benefit of the rights holder.

Q: And why does it benefit the rights holder?

A: It benefits the rights holder because it carves out those -- it makes it clear that the only rights that the studio would have are the ones that are enumerated, and it means all other rights, including rights that might be more valuable in the future, would be continued to be owned by the licensor. It increases the economic value to the licensor because as those rights come into existence, they have the right to license them.

Q: Is that what was done in the Superman film agreement?

A: No.

Q: Is the provision in the Superman film agreement regarding the scope of the rights grant and the reversion of rights more favorable to Warner Brothers or more favorable to DC?

A: More favorable to Warner Brothers.

Q: And how does that favor Warner Brothers over DC?

A: It allows Warner Brothers to -- they end up owning more rights.

Q: How is that?

A: Because they get all rights only subject to the reserved rights. And typically the reserved rights are rights that are in existence as of the time of the agreement. So as additional -- so if there's ever any doubt or if there are additional rights that come into existence, Warner would take the position

under the contract, that they own those rights and that the licensor did not own the rights.

Q: And how important are new media rights to the entertainment industry as it exists today?

A: They are incredibly important. We've seen first there were theaters and then television, and then home video, and now Internet and mobile devices, and there continue to be rights that are more and more valuable as time goes by, and technology makes things more complicated.

Q: Now, I'd like to draw your attention to paragraph 3 on page 2 of the Superman agreement, which is again Bates No. 4200.

And I want to get a sense of what DC's gross participation that you described, what is that applicable to?

A: It's applicable to the option payments.

Q: Does Warner Brothers receive a broader grant of rights under the agreement than feature motion pictures?

A: Yes.

Q: Must it pay for the exploitation of Superman rights in any form of audio-visual works other than feature length motion pictures under the agreement?

A: No.

Q: So in your opinion, is the grant of rights broader or narrower than the payment obligation of Warner Brothers?

A: The grant of rights is broader than the payment obligation. The payment obligation is restricted to the gross receipts as defined in the exhibit.

Q: What is the net effect of that?

A: The net effect of that is that there may -- there's potentially exploitation based on the granted rights for which there would be no accounting to DC for that -- the revenue that comes from that exploitation.

Q: When you say no accounting, does that mean DC would get zero for its gross participation regardless of that exploitation?

A: Absolutely. If it -- by definition, if it doesn't go into the pot to be divided, there's no division.

Q: I'd like you now to turn, please, to paragraph E on page 8 of the Superman film agreement, Bates No. WB 4206.

What does paragraph E concern?

A: It concerns the television rights in the pictures produced by Warner. Excuse me. It talks about television rights other than the rights to the pictures -- the television rights in the pictures produced by Warner.

Q: What does it provide regarding that?

A: Well, interestingly, it provides that even though DC has on the face of the agreement reserved the television rights, that they only can exploit those through an affiliate of Warner. This is highly unusual. Because typically, when you grant rights and you reserve television rights, you want the ability to put those rights into the open marketplace and get the highest value for the rights. So if you're -- in an agreement like this, if you can only have it exploited through a Warner company, then by definition, it makes it virtually impossible to get fair market value for those rights.

Q: Is Warner Brothers obligated to exploit Superman television rights during the 34 years?

A: No.

Q: They are not obligated.

A: No.

Q: If Warner Brothers exercises the option under the agreement but doesn't feel like exploiting television rights, does DC have any recourse?

A: None. It's analogous to the reversion on the film side. So typically in these sorts of agreements, you not only have a right to get the film rights back if there's not succeeding pictures that are produced, but you reserve the television rights as well. So you can exploit those.

Q: And with a well-known property like Superman, why would it be important to a rights holder to continue to -- for the licensee to continue to exploit the property?

A: Well, in an agreement like this, it would be especially important because since there's no obligation for Warners to continue to produce and release films, the property may just lie out there unexploited. So certainly you would want – it would be especially important in an agreement like this to be able to

exploit the television rights if Warners wasn't continuing to produce and release films.

Q: I'd like to turn to a new subject, the subject of artistic approvals or creative controls of a rights holder. I'd like to draw your attention to page 9, Bates No. 4207, paragraph 7-C of the Superman film agreement.

Does this paragraph provide for DC with creative approval rights?

MR. BERGMAN: Objection. Relevance, your Honor.

THE COURT: I'll give you some latitude. Overruled.

BY MR. TOBEROFF: Q: Before we get into the actual provision, do you believe that the creative approval rights of a rights licensor has an economic impact on the rights licensor?

A: Absolutely.

Q: Why do you -- why is that your opinion?

A: It's my opinion because as an owner of a highly valued property, the last thing you want to do is to have it be diluted in a film where it is not true to that character and where you don't have controls as to how it's depicted, you know, as far as the screenplay, actors, director, and other approvals.

You want to control it to make sure that it conforms with the look and the spirit of the character and to try to increase the likelihood that in fact it will be successful.

The worst possible scenario for a high-end rights holder is that you don't have these approvals and the movie is not true to the character, and it's a fiasco, and it's a bomb.

Q: And how does that have a negative economic impact on a rights holder, if any?

A: It can have a huge impact. You know, the value of a character is based on how it's been exploited in the past, and people looking forward into the future as to its performance.

And if in fact based on these -- if there are no approvals and the movie bombs, that can have a catastrophic economic effect to the value of the property going forward after that.

Q: You testified earlier that comic books are interesting among literary property as being highly visual.

A: Yes.

Q: How does that aspect relate to the subject we're currently discussing?

A: Well, approvals for a comic book character are even more important than to a, say, novel writer, because in addition to -- or the story elements, there's the physical depiction.

So if I'm DC, I want Superman to look like Superman. And again, since there's both the sort of story character parts and also the visual parts, then it's even more compelling for a -- for the owner of a comic book character to have controls as to depiction. So when you have these -- you don't see these -- typically you don't see these sort of controls if it's just a book. But you certainly see these sort of controls if it's a comic because it's even more important to the rights holder.

Q: Now, turning back to the agreement, paragraph 7-C on page 9, does DC have actual creative approvals regarding the exploitation of the Superman character pursuant to the agreement?

A: I think they have illusory approvals.

Q: Why do you say they are illusory?

A: Well, I've never seen anything like this. There's a two-tiered provision where one, for example, so long as DC is a Warner affiliate, it's clear from here that Warner has the financial say no matter what DC thinks. And then in sub 2, it's the exact opposite. If DC is no longer owned by Warners, then they do get the final say, for example, over the screenplay.

Q: In the event of a creative disagreement between Warner Brothers and DC as to how Superman is being depicted in a Superman film, whose decision would control under your reading of the agreement?

A: Warners.

Q: Do you recall any creative approval provisions in the 1974 Salkind agreement upon which you testified this agreement was modeled?

A: Yes, there were many.

Q: And back in 1974, what was -- what, if any, were DC's creative approvals under the Salkind agreement?

A: If you could -- I had difficulty reading this because it wasn't reproduced very well.

THE COURT: I did, too.

THE WITNESS: And it's a long agreement. So if you could point me to the paragraph, I'd be happy to describe them.

THE COURT: Let me ask you this, because I have a quick telephone conference that I need to take up on an unrelated matter. How much longer do you think you have? Will you be going for a while?

MR. TOBEROFF: Yes.

THE COURT: Let's take a brief recess here. I've got to take up another matter with the receiver.

(Recess taken.)

THE COURT: Counsel, you may proceed.

MR. TOBEROFF: Thank you, your Honor.

Q: Mr. Halloran, I'd like to draw your attention to what we call the 1974 Salkind agreement. Exhibit 203. I draw your attention to page 26, WB 8606.

Does the Salkind agreement provide DC with any creative approvals regarding derivative Superman film?

A: Yes.

Q: What are those approvals?

A: The approvals are extraordinarily detailed and completely consistent with the sort of approvals that the owner of a preexisting value of a property would seek to get and characteristically gets.

So, for example, it has to conform with -- it has to be consistent with the depiction in the comic books. The picture can't be satirical or obscene. It has to be rated G or PG. The picture has to be shot in a manner consistent with the screenplay which has been approved by DC, it even has a mechanism for someone to be on the set so when there are changes, that there would be approval on the set by DC's representative.

There's a mechanism whereby even after the picture is shot, that the DC representative can review it, and if it is found inconsistent with the approvals that have been made, that there would be an arbitration to determine whether in fact the film as ultimately shot conforms with the approvals.

There's a provision whereby if they don't, an extraordinary provision where if the film does not conform with the approvals, that it cannot be released.

There's an approval over the actors that portray the main roles in the film. There's approval over the design of the Superman costume. There's approval over the title.

Q: Now, you mentioned that the 2002 Superman film agreement adopted the economic terms of the 1974 Salkind agreement. Did they adopt these creative approvals that favored DC?

A: No, they did the exact opposite. They gave all the creative approvals to Warners and stripped DC of those approvals.

Q: I'd like to draw your attention now back to the Superman film agreement to page 11, which is Bates No. WB 4209. I'd like you to take a look, please, at paragraph 9. What does paragraph 9 concern?

A: It concerns the representations and warranties that DC was making to Warners, and it has a provision for an indemnity in case DC were to breach the representations and warranties that it made to Warners. So it would -- the effect is that DC is financially responsible if in fact the guarantees as to the status of the rights and other things made turned out to be incorrect.

Q: Now, were these warranties made after both Warner Brothers and defendants had received the plaintiffs' notices of termination?

A: Yes, they were.

Q: As well after the effective date of the Siegels' termination?

A: Yes.

Q: I'd like to draw your attention to -- it's right after paragraph 9-E on page 11. Strike that. It is paragraph 9-E on page 11. And that's Bates No. WB 4209.

A: I see it.

Q: What does that paragraph provide?

A: DC owns all rights assigned to Warner free and clear of any liens, encumbrances, other third party interests of any kind, and free of any claims or litigation, whether pending or threatened.

Q: I'd like to draw your attention now to page 12 of the Superman film agreement to a section that appears immediately after paragraph 9-H.

A: I see it.

Q: What does this part of the paragraph provide?

A: It provides that if DC were in breach of the representations and warranties that were made, that it would indemnify or pay back Warner for the loss that Warner may incur based on the breach of the representation or warranty.

Q: Including the representation and warranty that there are no other third party interests of any kind and that the exclusive Superman rights being purportedly conveyed are free of any claims? Is that correct or incorrect?

A: That is correct, yes.

Q: Now, in an underlying rights agreement of this kind, when there is a preexisting dispute, as there was in this case, how is that customarily dealt with in a rights agreement? In the warranty and indemnification clause?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained. And it's a little broad, Counsel. Just rephrase your question.

BY MR. TOBEROFF: Q: In a rights agreement, when you have a preexisting dispute or claim, how does the warranty and in -- let me start from the beginning.

Are you familiar with the warranty and indemnification provisions in a variety of other underlying rights agreements?

A: Yes.

Q: And how do those warranty and indemnification conditions deal with a preexisting claim or dispute?

A: No licensor who has a claim that's extant when they are entering into an agreement and that would make them immediately in breach of an agreement -- breach of the agreement would sign something like this without carving out what the claim was and disclosing it and dealing with it.

Based on what I can see, as soon as DC signed this, they were in breach of the agreement. So what's customarily done is if there is a claim or an underlying dispute that is dealt with in the agreement, it's disclosed in the face of the agreement. So typically, it would be excluded from the warranties and indemnities because, you know, at that time it would -- it's not carved out, it

would mean that DC was immediately in breach of this agreement and would be responsible for any damages that Warners would incur.

Q: And does the failure to exclude plaintiffs' notice of termination and termination claim in these provisions favor Warner Brothers or favor DC?

A: It favors Warner Brothers.

Q: How does it favor Warner Brothers?

A: It favors Warner Brothers because they are getting a fuller -- they are getting indemnity as to the possible damage that may be caused based on that claim. The risk is kept with DC.

Q: Earlier you testified that -- to the effect that when we were dealing with the exclusivity versus nonexclusivity issue, you testified that Warner has the contractual equivalent of exclusivity.

Was this the provision you were referring to, these warranty indemnification provisions or not?

MR. BERGMAN: Objection, your Honor. Leading.

THE COURT: I'm sorry. What was the objection?

MR. BERGMAN: Leading, your Honor.

THE COURT: Yes, sustained.

BY MR. TOBEROFF: Q: When you were previously testifying that Warner has the contractual equivalent of exclusivity, what provision were you referring to?

A: I was looking both at the broad grant of rights and also to this representation warranties and indemnity provision.

Q: I'd like to now draw your attention to -- strike that. I'd like to switch topics now to your analysis of other underlying rights agreements as part of your expert evaluation in this case.

In forming your opinions regarding the Superman film agreement, did you analyze other rights acquisition and license agreements?

A: Yes, many.

Q: You don't have to give me the names, but just in general, how many agreements did you analyze?

A: Well, I think it's easier if we can put them into categories. There were the agreements that plaintiffs provided. There were agreements that Warners

provided, and there was at least one agreement that, the Neopets agreement, that I had myself negotiated.

So it was -- I took the entire universe of the rights agreements that were submitted by the parties and added the agreement that I myself had negotiated.

Q: When you compared these various rights agreements and the terms of these various rights agreements, did you or did you not take into account the overall value or prominence of the properties that each of the agreements concerned that?

A: Was crucial in my analysis.

Q: Did you attempt to compare that value to your perceived value of Superman?

A: Yes.

Q: And in so doing, did you look at the value of such properties today, or did you look at the value of such properties as of the date such contracts were entered into?

A: My analysis was what were the properties worth in the window from 1999 to 2002, when the film agreement was negotiated, and with respect to Smallville, what it was worth in 2001, which is the same period.

Q: But that answers the question as to the Superman agreements. When you looked at each of the other agreements, for example, the Iron Man agreement produced by Warner Brothers, did you look at the value of what Iron Man is today as a result of the successful film, or did you look at the value of Iron Man at the time the contract was entered into?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: When analyzing the value of properties that other agreements concerned, did you look at the value at the time the contract was entered into?

A: Yes.

Q: Did you take into consideration increased value due to subsequent success of some film?

A: No.

Q: Now, I'd like to get a better understanding of the methodology you used in comparing the contract terms to -- strike that.

I'd like to get a better understanding of the methodology you used when you compared the contract terms of these various agreements to the terms of the Superman film and television agreements.

How did the terms of an agreement for a less valuable property than Superman impact your analysis, if at all?

A: I obviously reviewed many, many agreements for intellectual property less valuable than Superman, and not surprisingly, the terms of these agreements were less favorable than the terms of the marketplace agreement for Superman in 2002.

Q: If you review an agreement for a property that you believe is less, let's say, far less valuable than Superman, that has lesser terms than the Superman agreement, would you consider that relevant to your overall analysis?

A: Not particularly.

Q: What is the impact of an agreement which concerns a less valuable property that receives equal or better terms than the terms in the Superman film and television agreements?

A: That would indicate that the Superman agreement was indeed for the fair market value.

Q: If the property is a less valuable property and it gets --

A: Excuse me. If it's a less valuable property and it got better terms, it would show that the Superman agreements were not for fair market value. If it were a -- if it were a property that was equal to Superman, and it got less valuable terms, then that would indicate that in fact the Superman agreement was for fair market value.

Q: So if you have a -- I'd like to make sure that's clear. If you have a less valuable property that's getting equal or better terms in an underlying rights agreement than the terms in Superman, less valuable property, the terms are equal or better, what do you believe that would tend to show?

A: That would tend to show that the Superman agreements were not for fair market value.

Q: And what agreements would tend to show that the Superman agreements were for fair market value?

A: If there were agreements where there was a property equal to or more prominent than Superman that had less favorable terms than the agreements I reviewed, then that would indicate that indeed that the deals were for fair market value.

Q: Did you find any such agreements in your review?

A: No.

Q: I'd like to turn now to your analysis of some of these agreements, your comparative analysis. I'd like to first focus on purchase prices as a term in an underlying rights transaction. I show you what has previously been marked for identification as Plaintiffs' Exhibit 300. Exhibit 30 is an agreement between Columbia Broadcasting System, Inc., and Warner Brothers Pictures.

Do you recognize this exhibit?

A: Yes, I do.

Q: What does -- the agreement concerns film rights to which property?

A: It's a very well-known musical based on Pygmalion.

Q: What is the name of that musical?

THE COURT: It's My Fair Lady.

THE WITNESS: I said Pygmalion, which is the --

MR. BERGMAN: No. And that that fact has come out to the fore, your Honor, we object to the introduction or the use of My Fair Lady agreement. It's a 47-year-old agreement. And I believe I explained to your Honor that it just bears no relationship to today's film world.

THE COURT: I understand your argument. That goes to the weight of the evidence, and I'll consider it in that context. Thank you, Counsel.

BY MR. TOBEROFF: Q: Did you review this agreement as part of your expert analysis in this case?

A. Yes.

Q: What is the date of this agreement?

A: January 19, 1962.

Q: What is the difference in years between this 1962 agreement and the 1974 Salkind agreement?

A: 12.

Q: I'd like to draw your attention to page 32 of the agreement in paragraph 28-A.

A: Okay.

Q: What does this paragraph provide?

A: This provides for the purchase price for the rights.

Q: What is that purchase price?

A: $5,500,000.

Q: And how is that $5.5 million paid?

A: It's paid in four installments, four equal instalments of 25 percent of $5,500,000.

Q: What would $5.2 million be in 2009 dollars if adjusted for inflation?

MR. BERGMAN: Objection. Relevance.

THE COURT: Overruled on that basis.

MR. TOBEROFF: I'm sorry, your Honor?

THE COURT: Overruled.

THE WITNESS: You could calculate what the 5 million -- well, first you would take the 5,500,000 and discount it because the payments were over a period of time.

And then you would take that amount as of 1962 and adjust it based on inflation in 2002 dollars. Or if you wanted to conceptually put it in today's dollars, I think it would be in excess of $30 million.

MR. BERGMAN: May I say, your Honor, that none of that was discussed in the report of Mr. Halloran.

THE COURT: You mean the present value calculation?

MR. BERGMAN: Yes, your Honor.

THE COURT: Overruled. Let's move along. It's really of no great moment.

BY MR. TOBEROFF: Q: Hew would the value of film rights to My Fair Lady in 1962 compare to the value of minimum rights to Superman in 2002 in general?

A: Just in general, if you look at 1962, at the purchase price, I believe at that time companies were paying very big dollars for musicals. And I think it would reflect even at a later date what studios were willing to pay for very famous, you know, prebranded properties of which there was a high awareness.

So I think it's probative of the value even at a later date to show what people are willing to pay for a unique property like My Fair Lady.

Q: And in the 60's, are you familiar with other successful musicals that were turned into films?

A: In the 60's? Yes.

Q: What was the Julie Andrews musical? The Sound of Music.

There was a bunch of them. But that was -- musicals in that day were sort of the equivalent of comic books as of 2002. I could sing you a tune, but I don't want to be accused of being leading.

I'd like to now mark for identification, and we're still on the subject of purchase price, Plaintiffs'

Exhibit 201. Specifically, the pages marked Bates numbered 4884 to 4919.

(Exhibit 201 for identification.)

BY MR. TOBEROFF: Q: The agreement is entitled Memorandum of

Agreement for Option and Purchase of Literary Agreement, and it's between Clive Cussler, Sahara Gold, LLC, Clive Cussler Enterprises, Inc., Sandecker, LLP, and Crusader Entertainment LLC.

Do you recognize this agreement, Mr. Halloran?

A: Yes, and I've seen it before.

MR. BERGMAN: For record, your Honor, we object as hearsay and irrelevant.

THE COURT: I'm not really sure what he's trying to introduce quite yet. So let's hold that thought. Counsel?

THE WITNESS: Can you repeat the question, please? I'm familiar with this agreement.

THE COURT: The only question is are you familiar with the agreement.

BY MR. TOBEROFF: Q: You mentioned you had seen it before.

What did you mean by that?

A: I was an expert for Clive Cussler in his dispute over the movie Sahara.

Q: Did that case concern this agreement?

A: Yes, it did.

Q: Did you review this agreement in connection with your expert report and reaching your conclusions in this case?

A: Yes.

Q: What is the date of this agreement?

A: May 9, 2001.

Q: I'd like to draw your attention to page 12, Paragraph 6-A of this Exhibit 201. Page 12 is Bates No. SGL 4895.

THE COURT: I'm sorry. This is the option to purchase what?

THE WITNESS: Okay. This is an option to purchase the right to produce films based on the character Dirk Pitt.

THE COURT: Dirk Pitt.

THE WITNESS: And it's confusing because Dirk Pitt was a character that was in a long series of Clive Cussler books, and Sahara was the picture that was produced based on these grant of rights that included the Dirk Pitt character.

THE COURT: Very well.

THE WITNESS: Okay.

BY MR. TOBEROFF: Q: Looking to paragraph -- I'm sorry. Did you tell me the date of the agreement?

A: Yes, May 9, 2001.

Q: I'd like to draw your attention to Paragraph 6-A on page of Exhibit 201, Bates No. 4895.

A: What was the page again?

Q: Page 12. Bates No. 4895. It's on your screen as well.

A: Right.

Q: What does this paragraph provide for?

A: It provides for a purchase price of $20 million.

Q: 20 million?

A: Yes, $20 million.

Q: Now, is that money guaranteed under the agreement?

A: Yes. Well, it's subject to the exercise of the option. It's guaranteed. But I --

Q: At the point where the licensor exercised the option, is the licensor obligated to pay the $20 million?

A: Yes.

Q: Over what period of time?

A: It's payable in seven equal annual installments over a period of seven years.

Q: And again, looking at that $20 million payment, what would be the net present value in your opinion of that $20 million payment payable over the time period as set forth in the agreement?

A: The net present value as of the date of the agreement?

Q: We can use that.

A: Less than $20 million certainly. I think it would be in the range of $17 million.

Q: Now, how prominent was Sahara in 2001 compared to Superman in 2002 in your opinion?

A: It was much less prominent.

Q: I'd like to turn now to Plaintiffs' Exhibit 128.

Exhibit 128 is an agreement dated August 8, 1997. It's between the Saul Zaentz Company and Miramax Productions. The Bates numbers are SGL 4590 to 4608.

Do you recognize this exhibit?

A: Yes.

Q: What is this agreement for?

A: This is an agreement whereby the Saul Zaentz Company, which had acquired the rights to Lord of the Rings, was granting the film rights to Miramax.

Q: Did you review this agreement in rendering your – in reaching your opinions in this case?

A: Yes.

MR. TOBEROFF: Your Honor, I'd like to move -- I'd like to move Exhibit 128 into evidence at this time.

THE COURT: Any objection?

MR. BERGMAN: No objection, your Honor.

THE COURT: It's admitted. (Exhibit 128 received.)

MR. TOBEROFF: And, your Honor, I neglected to do this. I apologize. I'd also like to move the Sahara agreement, which is Plaintiffs' Exhibit 201, into evidence at this time.

MR. BERGMAN: No objection to that, your Honor.

THE COURT: Very well. They are both admitted. (Exhibit 201 received.)

MR. TOBEROFF: And, your Honor, as well, I'd like to move Plaintiffs' Exhibit 300, the My Fair Lady agreement, into evidence at this time.

MR. BERGMAN: There is indeed an objection to that.

THE COURT: I understand. They are admitted.

(Exhibit 300 received.)

MR. BERGMAN: Pardon me?

THE COURT: They are all admitted.

BY MR. TOBEROFF: Q: Now, going back to the Lord of the Rings agreement, I'd like to draw your attention to page 4 of Exhibit 120, paragraphs 13 through 15.

A: What's the page number again?

Q: I'm sorry. Just one moment. I'm sorry. Apparently the agreement is in multiple parts. I'd like to now show you what's been marked as Plaintiffs' Exhibit 120. It's been marked as Plaintiffs' Exhibit 120 for identification.

Mr. Halloran, do you recognize this exhibit?

A: I do.

Q: What is this exhibit?

A: This is -- this exhibit is a declaration from Albert Bendich, who was a vice-president of the Saul Zaentz Company that was filed in an action of Zaentz Company against Newline relating to Lord of the Rings.

Q: Relating to the Lord of the Rings agreement?

A: Yes.

Q: What was the declaration set forth?

A: It sets forth the negotiation history and also sets forth some option amounts that were paid to the Zaentz Company by Miramax.

Q: Did you take this document into consideration when writing your expert report and reaching your opinions in this case?

A: Yes.

Q: I'd like to draw your attention to page 4 of Exhibit 120.

A: I'd like to modify. These amounts included both option amounts and purchase amounts. It's a little difficult to deal with because it's not an agreement. It's a declaration.

Q: I understand. I'd like to draw your attention to paragraphs 13 through 15 of the declaration.

What do these paragraphs describe?

MR. BERGMAN: I'm sorry, your Honor. But there's hopeless disconnect between the declaration contained in Exhibit 120 and the exhibits. They don't correspond.

THE COURT: Counsel? That appears to be the case. I don't know if it's hopeless.

MR. TOBEROFF: I'm looking at a copy of the Exhibit 120 that was handed to Mr. Bergman. And the first page is -- it's duplicated for purposes of putting the exhibit stamp, and then afterwards the Bates numbers are from the case in which this declaration was filed, and they follow sequentially 4411, 4412, 4413, 4414, and they continue to the signature page of the declaration, which ends on 4416, and then 4417 is the title page to the exhibit, and --

THE COURT: I'm sorry. Where is that? That's what I didn't have.

MR. TOBEROFF: And 44 --

THE COURT: My last page is 4416. I don't have it.

THE WITNESS: Your Honor, I can be helpful to you in analyzing this, if you like.

THE COURT: What is that?

THE WITNESS: This is a license agreement that references an option agreement. And we don't have the option agreement. We just have the license agreement. But the mechanism of the option agreement is described in this declaration. It's -- as in other agreements, like Watchmen, there's a separate option and separate purchase agreement.

So apparently here there was an option agreement that's not public record that's described by Mr. Bendich. And what is public record is the license agreement. So there -- and if you look at paragraph 1, it's dependent on the exercise of the option. But I don't believe we have the option agreement itself.

THE COURT: All right.

MR. BERGMAN: Also, if I may, your Honor, the declaration is hearsay.

THE COURT: That's the problem. Because we don't have the option agreement. Counsel, your response to the hearsay objection? It does seem to me that you are attempting to introduce this for the truth of the matter, I assume.

MR. TOBEROFF: The agreement would be introduced and is not hearsay because it has independent legal significance.

THE COURT: I agree. It's just this out-of-court declarant's description of what the agreement says. That's what counsel is objecting to.

MR. TOBEROFF: It is an authenticated declaration under penalty of perjury.

THE COURT: I understand that. Most declarations are. That leaves it with the description of the out-of-court declaration.

MR. TOBEROFF: Your Honor, we would not move for this particular Exhibit 120 into evidence.

THE COURT: Very well.

MR. TOBEROFF: But as an expert, I believe Mr. Halloran would be entitled to take a certain amount of hearsay into consideration.

THE COURT: If it was part of the group of documents that he read and it's disclosed in his expert report and counsel has an opportunity to cross-examine

and it was made as part of his basis. We're just not introducing this document. That objection is sustained.

THE WITNESS: May I point one thing out? What I was --

MR. TOBEROFF: Wait, wait.

THE COURT: Wait for a question.

THE WITNESS: Okay.

BY MR. TOBEROFF: Q: I'd like to draw your attention to page 4 of Exhibit 120, paragraphs 13 through 15.

A: Okay.

Q: What do these paragraphs describe?

A: Paragraph 13 describes a million dollar option payment that was made by Miramax to Zaentz Company. And on August 11, 1997, it talks about how on February 5, 1998, Miramax exercised its option to acquire the Lord of the Rings rights by paying another $750,000.

MR. BERGMAN: Objection, your Honor. I understand that an expert can testify based on hearsay. But to sit there and read from a document that is hearsay, I think, is quite different.

THE WITNESS: Can I point something out? There were -- in what I reviewed, there were the actual letters that transmitted the payments that were exhibits to this as well.

That buttressed what is being said here, that I reviewed, I remember those specifically.

THE COURT: I understand it's unusual, Counsel. But we can go through the exercise of him refreshing his recollection, and let's just move among.

MR. BERGMAN: Very well, your Honor.

THE COURT: Okay.

BY MR. TOBEROFF: Q: What is the total option fee for the Lord of the Rings trilogy when you add these figures together?

A: Well, there were a series of three pictures, and I believe the --

Q: For the three books in the Lord of the Rings trilogy, what is the combined total option fee?

A: $4,750,000.

Q: Does that --

A: Excuse me.

Q: I'm focusing just on the option payments.

A: Okay. So it's a million, and purchased options were -- that's two million five.

Q: And what is the purchase price in the Lord of the Rings agreement?

A: Well, for the first book, it was 750,000, and for the second book -- for the second and third books, it was a million five. So it was $750,000 per book. So a total of $2,225,000.

Q: And when you add that to the 2.5 million, what do you get?

A: Excuse me?

THE COURT: Counsel?

MR. BERGMAN: Your Honor, I understand your ruling, but the witness is adding up figures that come from a hearsay document. It isn't as if the expert has acquired this hearsay knowledge in his experience. You could take any hearsay document, put it in front of an expert, and say what does it say.

THE COURT: Have you previously reviewed this document?

THE WITNESS: Yes. It's just a little unwieldy because I'm used to looking at documents that have, you know -- and in this declaration, he's mixed the option payments with the purchase payments. So it's unwieldy.

THE COURT: I'll allow you to refresh your recollection. Overruled. Let's move along.

BY MR. TOBEROFF: Q: When you add the 2.5 million to the 2.2 -- first of all, are the option payments, you can refer to the agreement itself as well --

A: Okay.

Q: -- as well as the declaration. In fact, I'd like you to refer to the agreement, to the extent things in the declaration are also contained in the agreement, I'd like you to refer to the agreement. But are the option payments applicable or nonapplicable to the purchase payments in the Lord of the Rings agreement?

A: They do not appear to be applicable.

Q: So if the options are exercised for the Lord of the Rings trilogy, what is the total amount that Saul Zaentz would receive?

A: I believe it's $4.75 million.

Q: How prominent -- now, this is a 19 -- strike that. How prominent was Lord of the Rings in 1997 compared to the prominence enjoyed by Superman in 2002?

A: Much less prominent.

Q: And was this before the famous Lord of the Rings movies had been released?

A: Yes.

Q: What was the Lord of the Rings trilogy?

A: It was a series of three films based on --

Q: No, I'm referring to the books.

A: To the books. It was three books. It was the Hobbit -- excuse me. It was Fellowship of the Ring, Two Towers, and the Return of the King.

Q: And these were best selling novels or not best selling novels?

A: I believe they were best selling. Certainly well-known.

MR. TOBEROFF: Your Honor, I'd like to admit -- move for -- I'd like to offer Plaintiffs' Exhibit 128, which is the agreement itself, into evidence. But not the declaration.

THE COURT: 128?

MR. BERGMAN: No objection, your Honor.

THE COURT: It's admitted. (Exhibit 128 received)

BY MR. TOBEROFF: Q: I'd now like to show you what's been marked for identification as Plaintiffs' Exhibit 307. The first page of the exhibit bears the Bates No. SGL 5760. This is an agreement between the Dino De Laurentis company and Yazoo Fabrications, Inc., concerning the novel Hannibal?

A: Yes.

Q: Mr. Halloran, did you review this agreement when reaching your opinions in this case?

A: Yes.

Q: What is the date of this agreement?

A: May 20, 1999.

Q: What is the date this agreement was entered into?

A: It doesn't appear to differ. So it was effective May 20, 1999.

Q: Does it contain the date that it was signed?

A: Not that I see.

Q: I'd like to draw your attention to page 1, paragraph 2, of Exhibit 307. Bates numbers SGL 5760. What does this paragraph provide?

A: It provides for a purchase price of $10 million.

Q: How was this purchase price payable to the rights holder?

A: 10 days following signing of the agreement. Excuse me.

Half of $5 million payable 10 days after the contract was signed, and the other half on the earlier of -- start of commencement of principal photography or 12 months following the execution of the agreement.

Q: Commencement of principal photography of what?

A: Of the film based on the novel Hannibal by Thomas Harris.

Q: Did you do a net present value calculation with respect to this $10 million?

A: As of what time?

Q: Due to the fact that it's paid in installments?

A: It would be de minimis. So I didn't do a calculation.

Q: What is the -- do you have a sense of what – strike that.

How prominent was Hannibal in 2001 compared to the prominence of Superman in 2002?

MR. BERGMAN: Objection. Lack of foundation.

BY MR. TOBEROFF: Q: Are you familiar with the property Hannibal?

THE COURT: Very well. I guess it's sustained then.

MR. TOBEROFF: I'm sorry.

Q: Are you familiar with the property in Hannibal?

A: I am.

Q: How prominent was Hannibal in 2001 compared to the prominence of Superman in 2002?

A: It was less prominent. Hannibal was the sequel to Silence of the Lambs. So it was certainly known, but it wasn't a property that was nearly as valuable as Superman at that time.

MR. TOBEROFF: Your Honor, I would like to offer Exhibit 307 into evidence at this time.

THE COURT: Any objection?

MR. BERGMAN: No objection.

THE COURT: Very well. Let's call it a day, (Exhibit 307 received.)

THE COURT: Tomorrow we're going to do a 9:00 to 2:00 session. The Court has to go to Los Angeles late afternoon. So what I'd like to do is get as much time in as we can between 9:00 and 2:00. Maybe take two 20-minute breaks. So --

MR. TOBEROFF: Have a good breakfast.

THE COURT: Yes, and bring some snacks.

MR. BERGMAN: Your Honor, one, you advised us that you were keeping track of time. How are we doing?

THE COURT: They are using up a lot of time. I got to check with the court reporter, but you've used about 10 hours.

MR. BERGMAN: Okay. And also, your Honor, we have not received any notification as to what tomorrow's witnesses or the next day's witnesses are going to be.

THE COURT: Counsel, what are tomorrow's witnesses?

MR. TOBEROFF: Mr. Halloran is the witness for tomorrow. We will provide you with the 48, 72-hour advance notice that we promised to provide.

MR. BERGMAN: Well, that was for --

THE COURT: Counsel, the question -- I'm asking the question. Who are your witnesses tomorrow?

MR. TOBEROFF: Mr. Halloran.

THE COURT: That's it?

MR. TOBEROFF: I believe, given the time.

THE COURT: Very good. So Mr. Halloran will go for five hours?

MR. TOBEROFF: Potentially Mr. Sills.

THE COURT: Who is Mr. Sills?

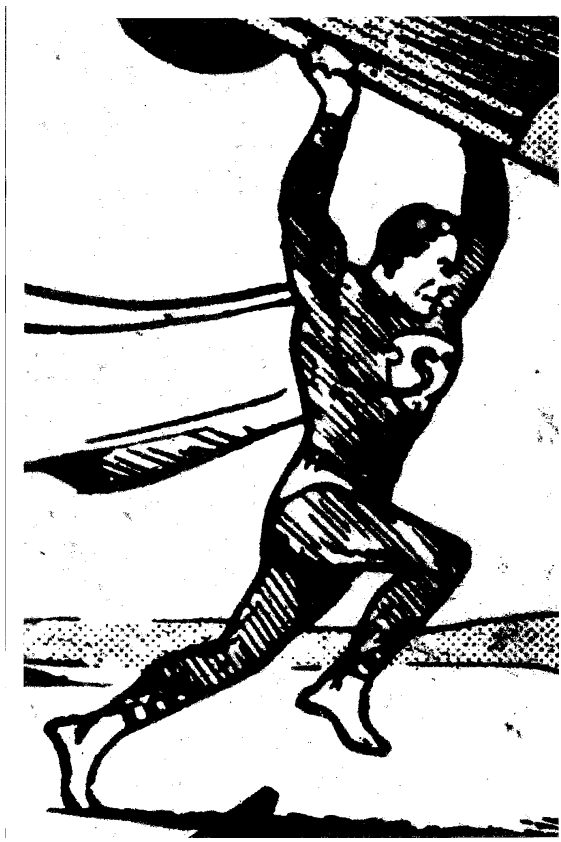
MR. TOBEROFF: Mr. Sills is the accounting expert.

THE COURT: Very well. So you'll have him on standby in case we finish up with Mr. Halloran.

MR. BERGMAN: And one more thing, your Honor. Will there be a trial on Monday?

THE COURT: Monday is the Court's motion day. So we'll resume on Tuesday at 9:00. Good night, Counsel

(Proceedings concluded at 5:15 P.M.)



TRIAL DAY 4

A.M. Session

Friday, May 1, 2009 9:15 A.M.

THE CLERK: Calling item one on calendar, Case Number CV 04-08400-SGL(RZx), Joanne Siegel, et al., versus Warner Brothers Entertainment Inc., et al. Counsel, please state your appearances for the record.

MR. TOBEROFF: Marc Toberoff for the plaintiffs.

MR. ADAMS: Keith Adams for the plaintiffs.

MR. WILLIAMSON: Nicholas Williamson for the plaintiffs.

MR. BERGMAN: Michael Bergman for the defendants.

MR. PERKINS: Patrick Perkins for the defendants.

MS. MANDAVIA: Anjani Mandavia for defendants.

THE COURT: Good morning to you all. Counsel, you may proceed.

MR. TOBEROFF: Thank you, Your Honor.

THE COURT: We'll go from now until about 10:30. I'm going to take a half hour break to get some other matters done. Then from 11:00 to 12:30, take another half hour, and then we'll finish up from 1:00 to 2:00. So we'll have three smaller, shortened sessions, and at 2:00, or shortly thereafter, we'll adjourn for the weekend, and then resume on Tuesday. Counsel.

THE CLERK: Mr. Halloran, please be advised you're still under oath.

THE WITNESS: I acknowledge that.

DIRECT EXAMINATION (cont'd)

BY MR. TOBEROFF: Q: Mr. Halloran, yesterday you testified as to DC's warranty and indemnification of Warner Bros., as set forth in Exhibit 232 on Page 11, Paragraph 9, and Page 12, Paragraph 9, continuing on Page 12.

Under the indemnification and warranty provision, would Warner Bros. be obligated to indemnify DC for attorney's fees, costs, and any damages in connection with this lawsuit and/or the termination, or not?

A: Actually, DC would be obligated to indemnify Warner Bros. from any cost of the litigation.

Q: And would those costs, attorney's fees, or damages be deducted from any monies due DC under the Superman film agreement?

MR. BERGMAN: Objection. Calls for speculation, Your Honor.

THE COURT: Lay a foundation. If you can determine that under the terms of the agreement itself, you can testify to that.

BY MR. TOBEROFF: Q: Under the terms of the agreement, does the agreement call for the deduction of such attorney's fees, costs, damages in connection with the warranty and indemnification provision from any monies that would be due and owing to DC under the agreement?

A: Yes. Under the indemnity provision.

Q: Now, if plaintiffs, as co-owners of the original Superman copyright, were accounted to by DC, what effect would that have on plaintiffs?

A: It would reduce the amount of proceeds that any participation would be subject to; so, in effect, they would pay for part of the damages caused by the lawsuit, because it would reduce the amount that the participation would be calculated on.

Q: Under those indemnification and warranty provisions, plaintiffs, if accounted to by DC, would essentially have to pay their pro rata share of Warner Bros.' attorney's fees, costs, damages in connection with this lawsuit or any damages in connection with their termination?

A: Exactly.

MR. BERGMAN: Objection. Leading.

THE COURT: It is leading, Counsel. Have him explain it.

BY MR. TOBEROFF: Q: Could you explain to me the effect on those warranty and indemnification provisions on plaintiffs if accounted to.

THE COURT: Your understanding.

THE WITNESS: I can make it simple. If there were $100 in proceeds that a gross proceeds participation would be calculated on, if there were $50 in costs, legal fees, damages, that would reduce the amount to $50 that the participation would be payable -- calculated on. So it reduces -- so it, in essence, does reduce the amount that would be payable to profit participation – profit participants.

BY MR. TOBEROFF: Q: What effect would it have on plaintiffs?

A: It would reduce their share of their contingent compensation. It would reduce their share of the profits.

Q: I'd like to show you what's been marked for identification as Plaintiffs' Exhibit 315.

Exhibit 315 is an agreement dated December 29, 1978, between Thomas Meehan; Chicago Tribune - New York News Syndicate, Inc.; and Columbia Pictures pertaining to the film rights of the musical Annie.

Do you recognize this exhibit?

A: I do.

Q: Did you review this agreement when writing your report and reaching your conclusions in this case?

A: Yes.

MR. BERGMAN: Objection, Your Honor. This is one of those documents that came in subsequent to the deadline.

THE COURT: When was this produced?

MR. BERGMAN: It was certainly after December 3rd, Your Honor, when we had --

THE COURT: Was it after January -- you've never come back to this issue with the Court on whether or not the January 14th or 15th cutoff was mutual or not. You disagree on that. I asked you to talk amongst yourselves. You haven't come back to the Court, so I'm not prepared to rule on that.

MR. BERGMAN: Very well, Your Honor. We'll talk.

THE COURT: If you want that to be a demarcation, then you're going to have to address this issue, as I indicated when we brought this up a few days ago.

MR. BERGMAN: Thank you, Your Honor.

THE COURT: Otherwise, I'm going to overrule the objection.

Proceed, Counsel.

BY MR. TOBEROFF: Q: I'd like to draw your attention to Page 26, Paragraph 5-A of Exhibit 315.

What does this paragraph provide?

A: It provides for a purchase price of $9.5 million.

Q: How is the $9.5 million paid under the agreement?

A: I can't read the whole thing on the screen, so...

It's paid out over time, so it's $1,425,000 on execution, $712,500 on January 15, 1980.

Q: What is the rough span of years, if you could tell me?

A: About six years.

Q: What, if any, does this payment schedule have on the value of the $9.5 million purchase price? In other words, what would be the net present value in 1978 dollars?

A: I believe about $7 to $8 million.

Q: In today's dollars, adjusted for inflation, could you give me a rough idea of what the value of that $7 million would be.

MR. BERGMAN: Objection, Your Honor. Lack of foundation. This witness has not demonstrated that in his report or in his experience.

THE COURT: The Court has previously permitted this testimony, and it hasn't been objected to concerning the present value calculation. Based on his experience in this business, I can't imagine that he has made it this far without being able to calculate present value.

So I'm going to overrule the objection.

THE WITNESS: Approximately $20 million in today's dollars.

BY MR. TOBEROFF: Q: In 1979, do you have an idea of how prominent Annie was compared to the prominence of Superman in 2002?

A: I think Superman was more prominent in 2002, but Annie certainly was a spectacularly successful musical; but it certainly didn't have the 70 years of continuing success and exploitation that Superman had.

MR. BERGMAN: Objection. Lack of foundation, Your Honor.

THE COURT: Well, my follow-up question kind of goes to this, because I'm curious as to how you make that assessment and that comparison. That's one of the difficult issues this Court is going to have to grapple with in this trial.

THE WITNESS: Right.

THE COURT: So I would appreciate your thoughts, and I'll certainly be hearing from the plaintiffs' expert on this as well.

In comparing something like Annie to Superman, and saying that Superman is more popular, what are you saying in terms of the --

THE WITNESS: Let me tell you my methodology.

THE COURT: It seems like apples and oranges.

I would like to hear your methodology in terms of how you make this comparison, and also, precisely, what comparison you're making.

THE WITNESS: The methodology was, I looked at the agreement; but I also did research, primarily through Wikipedia, in terms of the history of Annie, how successful it was on the stage; and in doing that, I could sort of gauge the awareness. And I also put it in the context of, at that time, what was bringing the top dollar in terms of the purchase of franchise properties by studios.

Then, in terms of Superman, I would gauge, in 2002, how popular it was, and what I thought the value would be had it been on the open market and a studio -- there had been competitive bidding among studios for it. So that's how I looked at it.

It is a little bit apples and oranges, but one of the things you have to keep in mind is that back in 1978, this was sort of the end of the purchase of big musicals. Later on -- what I tried to do is put in context, in 2002 -- you know, we had rise of the comic book franchises, with the exception of A Chorus Line, which was, I guess in the '80s, a diminution of musicals. So Annie was sort of the equivalent of a comic book franchise back in the '70s.

THE COURT: But, again, when we start talking about the end of an era, we can only say that an era has ended after that era has passed; right?

THE WITNESS: That's true.

THE COURT: Okay. Very good. Counsel?

BY MR. TOBEROFF: Q: You testified yesterday with regard to the My Fair Lady agreement that at that particular time period, musicals were very hot as source materials for films, and you mentioned The Sound of Music.

A: Right.

Q: At this particular period of time, the end of 1978, when this agreement was entered into, were musicals still hot as source materials for motion pictures?

A: They were a lot less hot than they were in the '60s.

MR. TOBEROFF: Your Honor, plaintiffs would like to offer Exhibit 315 into evidence at this time.

This is one of the subpoenaed documents that in a prior motion, you ruled was timely and you did not quash the subpoenas.

THE COURT: Is there any further objection, other than the one you stated, Counsel?

MR. BERGMAN: Yes, there is, Your Honor.

The agreement reflects that there was a separate merchandising agreement that was entered into concurrently, and it has not been provided.

THE COURT: Your objection is that it's incomplete?

MR. BERGMAN: Incomplete.

MR. TOBEROFF: We're not offering the merchandising agreement into evidence --

THE COURT: I understand that.

MR. TOBEROFF: -- or commenting on any of the merchandise terms.

THE COURT: I think the objection, though, is that for this to be a complete document and to make a comparison, it would need to include all of its components.

The theory, as I understand it, of Warner Bros. -- this is something which really needs to be explored; I suspect it will be on cross-examination -- is that you need to -- there's different approaches here. We either look at the individual components of the agreement, or we look at the overall effect of the agreement. Warner Bros. is taking the position that the overall effect of the agreement places the Superman agreement much more favorably than an individual dissection of key components. Whether that's true or not, I don't know, and I won't be able to decide until I hear all of the evidence. But if the Court is going to be considering, for example, Annie, we need to have the entire agreement going forward. Is that something that you can include?

I mean, I understand you don't want to include it, but is that something that we have?

MR. TOBEROFF: I would be happy to include it. We subpoenaed it, and they didn't have that merchandising agreement. Very often, parties will engage in business in the entertainment industry and have a core agreement, and then,

for instance, have a producer agreement, where the rights holder will also be a producer.

THE COURT: I'm not going to have you testify on this, Counsel; but what I will have is -- this is how I'm going to deal with this objection: I'm going to admit this. The Court is mindful that there is a missing portion of it. You can examine that on cross-examination, and the Court will consider that in the context of this agreement.

MR. BERGMAN: My motion, of course, Your Honor, is under F.R.E. 106, because I believe that without -- as Your Honor noted, without the merchandising agreement, there's no way for us to do what we want to do.

THE COURT: Well, you can examine that on cross-examination. I'm not accepting either of your testimony right now. That's not affecting the Court. I'm only considering the evidence that I'm hearing. I will admit this. I understand that it does not have all of the agreements that are referenced therein. And we'll take that up after I've heard the evidence.

MR. BERGMAN: Very well.

MR. TOBEROFF: Thank you, Your Honor.

THE COURT: Proceed, Counsel.

BY MR. TOBEROFF: Q: I'd like to show you what's been marked for identification as Plaintiffs' Exhibit 326.

Exhibit 326 is an agreement dated July 7, 1999, between Jack Ryan, Limited Partnership, and Paramount Pictures Corporation, pertaining to the film rights to the novel Rainbow Six by Tom Clancy. Do you recognize this exhibit?

A: I do.

Q: Did you review this agreement when reaching your opinions and writing your expert report in this case?

A: Yes.

Q: I'd like to draw your attention to Page 1, Paragraph 1.1, this rights agreement, Bates No. 6118.

MR. BERGMAN: Your Honor, if I may. I have the same objection to this document; namely, that there is no provision provided for merchandising.

THE COURT: Counsel, again, I think this is ultimately going to go to the weight of the evidence. They're introducing their agreements. They may or may not be

relevant based on how the testimony comes out. I'm going to provisionally admit these and allow you to examine at length about what is and what is not included. I understand your position.

MR. BERGMAN: Thank you, Your Honor.

MR. TOBEROFF: Your Honor, I need to point out that merchandising is spoken for in this agreement. That's incorrect.

THE COURT: Then --

MR. TOBEROFF: I understand.

THE COURT: -- you can ask that. I don't accept anything you say, not because I don't trust you, not because I don't believe that you're telling me the truth, but the way we conduct trials in this country is that we have the witnesses testify and the lawyers ask questions.

So ask your next question.

MR. TOBEROFF: Thank you.

BY MR. TOBEROFF: Q: I'd like to draw your attention to Page 1, Paragraph 1.1 of the agreement. The Bates number is 6118.

What does this paragraph provide?

A: It provides for a purchase price of $5 million for the motion picture rights to the property Rainbow Six.

Q: At what point in time is the $5 million purchase price payable?

A: When Tom Clancy signed and delivered the contract to Paramount.

Q: I'd like to draw your attention to the first page of the exhibit, Bates No. 6115.

A: Yes.

Q: What is 6115?

A: It's a so-called side letter, where it's, in essence, a producer agreement. It's a producer agreement signed letter.

Q: What does this producer agreement provide?

A: It provides that if Paramount makes a picture, Tom Clancy will receive an additional million dollars for his services as an executive producer.

Q: Based on your knowledge of the motion picture industry, in such a situation where an author granting rights also receives a producer agreement, is the author expected to actually render producer services?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained. Lay a foundation.

BY MR. TOBEROFF: Q: Are you familiar with producer agreements that are entered into in conjunction with literary rights agreements?

A: Yes.

Q: When those producer agreements are entered into, does the rights holder actually render producer services, in your experience?

A: Not the producer services that are traditionally rendered.

Typically, the agreements are nonexclusive, and from the studio perspective, they're always treated as, essentially, part of the purchase price, the price to get the rights. They don't really look to the rights holder to be a producer. Now, they may look to the -- on this, for example, Tom Clancy had certain approval rights, so they would look to work with him in rendering his approvals.

Q: How is this additional million dollars viewed?

A: I didn't hear that.

Q: How is the additional million dollars viewed in addition to the $5 million purchase price for the literary rights?

A: It's viewed as a rights payment.

Q: What is the total compensation, then, under this agreement for the rights to produce a film based on a single novel Rainbow Six?

A: $6 million.

Q: I'd like you to turn to Page 21 of the agreement. It's Bates No. SGL 6158. It's not on the screen; it's a hard copy.

A: What's the Bates number, again?

Q: 6158.

A: Okay.

Q: Looking at Paragraph 2-A, what does this paragraph provide?

A: It provides for the inclusion of merchandising receipts.

Yeah, it provides for the inclusion of merchandising receipts into gross, after Paramount takes a 50 percent fee in their costs.

Q: Thank you. Now, in 1999, how would you view the prominence or value of a novel by Tom Clancy?

A: I viewed it in relation to Superman. And certainly, the character Jack Ryan, which was depicted in a series of books by Tom Clancy, would be less valuable than Superman at that time.

Q: Had film adaptations of Tom Clancy's novel been successful prior to 1999?

A: Yes. There were a series of three Jack Ryan movies, starting with Hunt for Red October, and also Patriot Games and Clear and Present Danger. Those pictures grossed in sort of the $80 to $130 million range at the domestic box office.

Q: How does that compare to the grosses of the Superman film back in 1978 and the Superman Returns film?

A: They were less. The Superman film, in '78, on an inflation-adjusted basis, did almost $400 million. So they are a lot less than Superman in 1978, on an inflation-adjusted basis.

MR. TOBEROFF: Your Honor, plaintiffs offer Exhibit 326 into evidence at this time.

THE COURT: Any objection?

MR. BERGMAN: Only the one I made, Your Honor.

THE COURT: Very well.

It's overruled. It's admitted.

(Exhibit 326 is received.)

BY MR. TOBEROFF: Q: I'd now like to show you what's been marked for identification as Plaintiffs' Exhibit 327. It's an agreement between Jack Ryan, Limited Partnership, and Paramount Pictures Corporation, dated August 9, 2002, pertaining to the film rights to the novel Red Rabbit by Tom Clancy.

Do you recognize this exhibit, Mr. Halloran?

A: I do.

Q: Did you review this agreement when reaching opinions and writing your report in this case?

A: I did.

MR. BERGMAN: Your Honor, on this agreement, there again is something missing; and it's quite vital.

What's missing from this agreement is what's called the adjusted gross receipts exhibit, which defines how adjusted gross receipts are treated.

THE COURT: Again, I think that goes to the weight of the evidence, Counsel. The objection is overruled.

You're seeking to admit it, Counsel?

MR. TOBEROFF: Yes. I'd like to -- prior to that, I have some questions that address that issue.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'd like to draw your attention to Page 1, Paragraph 1.1, of this rights agreement, Exhibit 327.

What does this paragraph provide?

A: It provides for a purchase price of $7 million.

Q: When is the $7 million payable?

A: It's due on execution of the agreement and delivery to Paramount.

Q: I draw your attention to the first page of the exhibit, Bates number 6163.

What is this exhibit? What is this page?

A: This is, again, an executive producer side letter that's virtually identical to the Rainbow Six side letter; and it provides for payment to Clancy of a million dollars.

Q: What is the total payment to Tom Clancy in the event the movie is made under this agreement?

A: $8 million.

Q: I'd like to draw your attention to the page of this document Bates-numbered 6186. It's the rider to exhibit, quote, GRP.

What is meant by "GRP"?

A: Gross receipts.

Q: What is this rider?

A: It's a rider to a definition of "gross." So it's clear to me -- even when I reviewed this, I did notice that the "gross receipts" definition was missing. But since there was this rider, this rider could not have existed without a definition of "gross receipts."

MR. BERGMAN: Your Honor, I don't want to press the question. But what possible relevance can a rider to a nonexistent agreement have? If we don't have the GRP schedule, what difference does it make what the rider does to that schedule? There's no way to tell its significance.

MR. TOBEROFF: Your Honor, the witness will answer; and I was about to ask him a question.

THE COURT: Let's give some leeway on this, Counsel.

This is a bench trial; this is not a jury trial. If at the end of the day, you're able to expose this as not being relevant, the Court can strike it from its consideration.

MR. BERGMAN: Very well.

THE COURT: Proceed, Counsel.

BY MR. TOBEROFF: Q: Mr. Halloran, do you deal with Paramount in your work as a transactional attorney?

A: Yes, I do.

Q: Does Paramount have what's called a standard gross definition?

A: Yes, they do.

Q: Is that standard gross definition used by Paramount whether or not a particular rider applies to modify that definition?

A: Yes.

Q: Is the standard gross definition found in this document?

A: It's referenced in 3.2, but it makes specific reference to Exhibit GRP, gross receipts definition.

Q: Now --

A: But it wasn't attached. But it's specifically referenced, and there's a rider. It's clear to me, from looking at this, that there was an Exhibit GRP.

Q: Now, if you look at Exhibit 326, the Rainbow Six agreement between Tom Clancy and Paramount, does that contain Paramount's standard GRP definition?

A: I was distracted for a second, because I was looking at these.

Q: If you look at Exhibit 326, which is the prior exhibit we looked at --

A: This is Red Rabbit?

Q: The Rainbow Six.

THE COURT: Is there an objection, Counsel?

MR. BERGMAN: Yes. It's lack of foundation, Your Honor.

THE COURT: He hasn't really asked a question yet.

MR. BERGMAN: He asked if it represented the standard Paramount rider, and my objection is that this witness hasn't demonstrated that --

THE COURT: Sustained as to that question.

BY MR. TOBEROFF: Q: Have you conducted negotiations with Paramount –

A: Yes.

Q: -- which resulted in signed agreements with Paramount?

A: Yes.

Q: In those signs agreements, did those agreements contain what's called Paramount's standard gross definition?

A: Yes.

Q: Please look at Plaintiffs' Exhibit 326.

A: Okay.

Q: The Bates number is 6139.

Is this Paramount's standard gross definition?

A: Yes.

Q: Do you have any reason to believe that between July 7, 1999, and August 9, 2002, Paramount changed its standard gross definition?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Overruled.

What's your answer to that?

THE WITNESS: My answer is that I have no reason to believe that Paramount changed their exhibit between 1999 and 2002.

THE COURT: How many Paramount agreements of this nature did you have an opportunity to review for that time period?

THE WITNESS: The only agreements that I reviewed in conjunction with my analysis here were these two agreements.

THE COURT: Not with respect to your analysis.

In general. I'm trying to see if you have foundation to make this opinion, to say that there has not been a change, you would have had to have looked at other agreements.

THE WITNESS: I don't have a present recollection that I negotiated a Paramount agreement between 1999 and 2002.

THE COURT: I'll sustain the objection, on foundation.

BY MR. TOBEROFF: Q: Look at the bottom of Page 6139.

What does it say under the word "confidential"?

A: It says "Exhibit GRPV1," and then there's a --

Q: That's okay.

Based on your experience in the motion picture industry, do studios frequently change their standard gross definitions, or not?

A: Very infrequently.

Q: Going back now to the Red Rabbit agreement, Exhibit 327, from looking at the rider to Paramount's standard gross definition, are you able to determine that the gross definition that it amends is the same as the gross definition contained in the Rainbow Six agreement?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained. Just lay a foundation for the particular question, Counsel.

THE WITNESS: I think the objection was sustained.

BY MR. TOBEROFF: Q: Have you negotiated agreements where you've asked for a studio's standard rider to be attached to modify their standard gross definition?

A: Yes.

Q: And in looking at a standard rider, would a transactional attorney be able to tell from the rider itself what gross definition its modifying?

A: Sometimes when reading the footer, you would know.

Q: Does this document inform you as to that? Does the rider inform you as to that, in the Red Rabbit agreement?

A: No. Because it references the Paramount lawyer Heppel, Red Rabbit writes Clancy agreement of 2003.

Q: Based on the provisions amending Paramount's gross definition, are you able to link what you're looking at, the rider, to the gross definition contained in the Rainbow Six agreement, or not?

MR. BERGMAN: Same objection.

THE COURT: Overruled. You may answer.

THE WITNESS: Okay. In Rainbow Six, could you show me where the rider is. I assume it's at the end of the document.

BY MR. TOBEROFF: Q: Bates No. 6136. And in the Red Rabbit agreement, it is 6186.

A: There is a link here, because if you look at the footer, it's Heppel too; and I know Heppel to be a lawyer at Paramount.

And the path is the same. It's rights Clancy -- this is actually agreement 04, and this is agreement 03. But based on this, in my knowledge of the way these are generated, in my review, there was indeed a link here.

So I can tell from this rider for Red Rabbit that the gross receipts definition was the same as -- or should have been the same as on Rainbox Six.

Q: Is the rider in the Rainbox Six agreement identical to the rider in the Red Rabbit agreement?

A: It's exactly identical.

Q: So if the rider is identical, can you infer from that that the gross definition that it applies to is also identical?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

THE WITNESS: Yes.

BY MR. TOBEROFF: Q: What are you able to tell from the fact that the two riders are identical?

A: Well, if you -- this is a little reverse engineering, but you can tell if there's a rider which is identical and which modifies the gross receipts definition -- if the two riders are identical, then the two definitions were identical.

Q: Now, in comparing the value or prominence of Red Rabbit, a novel by Tom Clancy, to the value of Superman in the motion picture industry in 2002, which is more valuable?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: I'll overrule the objection, but I want a follow-up question to explain what he means by "valuable."

This gets back to the issue that I raised previously.

MR. TOBEROFF : Okay.

BY MR. TOBEROFF: Q: What was your answer?

A: Superman, at that time, was more valuable.

Q: What is the basis for your opinion?

A: It's the same basis as I stated for the other Tom Clancy book, which was -- Superman had the history over 70 years, and certainly, if a Tom Clancy novel were in the open market and Superman was in the open market, I'm highly confident, in fact sure, that Superman would command a higher price than a Tom Clancy novel.

THE COURT: Besides history, are there any other factors? You've mentioned history several times. Anything else?

THE WITNESS: One of the things you have to keep in mind about Superman is that it's an evergreen character. It has 70 years of uninterrupted success. The problem with novels, especially in this time period, is that they really don't have the -- A, because they're newer, they don't have the history of success that you could look to. Remember, we talked about predicting, looking at success and trying to look forward; and Superman also -- you can't really

novelize Jack Ryan. So Superman and ancillary markets, especially merchandising, is way --

THE COURT: You talk about these evergreen characters.

In your experience, have you ever seen one of these evergreen characters reaching, or perceived to have reached, a saturation point, where their history is actually a negative as opposed to a positive?

THE WITNESS: I think Tarzan may well be at that saturation point at this time. I think that's probably a good example.

THE COURT: And that would certainly factor someone's evaluation of --

THE WITNESS: Right. Right. But one of the things you have to keep in mind, Your Honor, is there's this recent phenomenon of rebooting, where -- it just happened with The Fast and the Furious. It certainly happened -- Batman has been rebooted. And, basically, what happens is, there's a release of a series of pictures that decline in value, and then there's a waiting period; so the anticipation builds, and then you start again; and, hopefully, it goes up. That's a recent phenomenon.

BY MR. TOBEROFF: Q: Do you believe the climate as it existed in 2002 -- we've heard testimony regarding the climate in the entertainment industry in 2002. Do you believe Superman had reached its saturation point?

A: No, not at all.

Q: I'd like to show you what's been marked as Plaintiffs' Exhibit --

THE COURT: What do you base that on?

THE WITNESS: Well, Superman had continuing success in merchandising, in comics, and the like. It hadn't -- there were the series of movies that had sort of diminishing returns in the '70s to early '80s, but that was really to be expected. At this time, I think there was the anticipation, certainly in the marketplace, for a reboot of Superman; and Warner was indeed working on it; and it ended up with the release of Superman Returns in 2006.

MR. TOBEROFF: Your Honor, plaintiffs offer Exhibit 327 into evidence at this time.

MR. BERGMAN: Your Honor, defendants object to that, for the reason previous stated. And the additional reason is that this is one of the agreements that we're challenging the authentication on, and have subpoenaed the witness

to attend court. This is one of the agreements that we asserted that Mr. Toberoff had not supplied to us, the documents he received from the subpoenaed person; had not --

THE COURT: So this is one of authentication issue documents?

MR. BERGMAN : Yes.

THE COURT: Where are we now on your efforts to bring in that witness to cross-examine? Because I'll certainly give you leave to do that.

MR. PERKINS: We've served a subpoena on them, and we're waiting to go.

THE COURT: What I'll do is, I'll conditionally admit this, obviously subject to that examination. If at the end of the day, there's no authentication, or if you're able to successfully challenge that, then the agreement and the evidence related to it goes out.

MR. BERGMAN: Thank you, Your Honor.

MR. TOBEROFF: Thank you, Your Honor.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'd now like to show you what's been marked as Plaintiffs' Exhibit 316 for identification. It is an agreement between T Asset Acquisition Company, LLC, and AGV Productions, Inc., et al., dated April 12, 2007, pertaining to the Terminator character.

A: Yes.

Q: Do you recognize this exhibit?

A: I recognize this exhibit.

Q: Did you review this agreement when reaching your opinions and writing your expert report in this case?

A: Yes.

MR. BERGMAN: Your Honor, defendants object to the introduction of this agreement, because it has nothing to do with the acquisition of the literary rights an underlying property. It is a purchase out of bankruptcy of an entire business involving the Terminator, various films, various television shows in development, various other things. It is not an agreement for the purchase of literary rights to an underlying property.

THE COURT: Very well.

Counsel, all of this, I think, goes to the weight of the evidence. I'm not discounting these arguments, because I think they may very well be critical arguments to make. But I am going to permit these agreements to come in, and then afford you opportunity to cross-examine this witness and then make whatever arguments to distinguish these agreements from -- I think the better course, given that this is a bench trial, is simply to consider the various agreements that both sides are offering; consider which ones are comparable, which ones are not, which ones are apples, which ones are oranges; and go from there. These arguments go more to the weight of the evidence, so I'll overrule the objection.

MR. BERGMAN: Thank you, Your Honor.

THE COURT: Continue, Counsel.

BY MR. TOBEROFF: Q: Mr. Halloran, I'd like to draw your attention to Page 5, Paragraph 1.4 of Exhibit 316. That's Bates No. 5957.

A: Yes.

Q: What does this paragraph provide?

A: It provides for a purchase price of $25 million.

Q: Now, what was being purchased under this agreement?

A: The main asset that was being purchased were the sequel and remake rights to the Terminator character.

Q: What does this agreement provide for?

A: Well, it is styled as a sale and transfer of assets.

There's a list of the assets. And the first thing that's referenced are the sequel and remake rights to the motion picture The Terminator. Next is sequel and remake rights to Terminator 2. Next is sequel and remake -- recapture rights to Terminator 3, and then the motion picture project entitled Terminator 4, which is about --

Q: Looking at all of these assets --

A: In fairness, there are some additional assets.

Q: Looking at all of these assets, is there one asset that you view as the core asset that's acquired under this agreement?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained. Lay a foundation for the question.

BY MR. TOBEROFF: Q: Did you review all of the assets that are being acquired under this agreement?

A: Well, I think what's telling is, typically in this sort of agreement, you list the assets in order of priority. And the first assets that are referenced are the sequel and remake rights to the prior pictures and the motion picture project Terminator 4. So, in reading this, I would conclude, without knowing more, that the most important part of it were the remake and sequel rights to the Terminator character.

Q: When is the $25 million payable under this agreement?

A: It says upon closing; so that means signature of the various documents.

Q: Have you seen The Terminator motion pictures?

A: Yes, I have.

Q: Do you have a sense of the value of Terminator in the motion picture industry in 2007?

A: In 2007? Yes.

Q: The date of this agreement?

A: Yes.

MR. BERGMAN: Objection, Your Honor. Irrelevant. It's five years after the last agreement in question.

THE COURT: Counsel, it does seem to be -- what was the date of this one?

THE WITNESS: The date is April 12, 2007.

THE COURT: We seem to be getting a little bit out of 1 the -- you're going to have to reduce this, I suppose, back to some value commensurate with -- go ahead. I'll overrule the objection on that basis.

BY MR. TOBEROFF: Q: When you analyze these agreements, do you look at the value of the character at the time the agreement was entered into?

A: Absolutely. That's the core of the analysis.

Q: And do you take that in consideration with making a relative evaluation of the terms of the agreement?

A: Yes.

Q: So based on your familiarity with the industry and with Terminator, in 2007, how do you view the value of the Terminator character for motion picture and television exploitation?

A: I thought it was --

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: You asked him how; right?

MR. TOBEROFF : Yes.

THE COURT: He's getting to that, Counsel.

You may answer. How do you do it?

THE WITNESS: I think Terminator --

THE COURT: Maybe I misunderstood the question. Are you asking him how he goes about doing it?

MR. TOBEROFF : Yes.

THE COURT: Or are you asking him to actually do the evaluation?

MR. TOBEROFF: Both.

THE COURT: Let's start with the first.

BY MR. TOBEROFF: Q: How did you go about valuing the Terminator character in 2007?

A: You would look at the general awareness regarding the character; you would look at the history and timing of the success of the Terminator character. I think one of the things that added to the value at this time was that Terminator, in my view, was positioned for a reboot. There had been a series of films, but there hadn't been a Terminator film in at least a decade or so. So this was, I think, a situation where the rights were valuable, because it was ready for a reboot. And, in fact, part of what was purchased was a project Terminator 4, which is the reboot picture.

Q: Did you compare the value of Terminator in 2007, when these terms were agreed to in this agreement, to the value of Superman in 2002, when the terms were agreed to in the Superman film agreement?

A: Yes.

MR. BERGMAN: Objection, Your Honor. Relevance and lack of foundation.

THE COURT: Overruled.

BY MR. TOBEROFF: Q: What was your conclusion?

A: My conclusion was that Superman was more valuable than Terminator.

THE COURT: And what is that based on?

THE WITNESS: That's based on what I think the price would be, based on, predominantly on, the estimated future value of the proceeds from the exploitation of the character. Certainly, when you bought Terminator, you would think that there would be probably a series of pictures, certainly a Terminator 4 and maybe 5 and 6. But in 2002, when you bought Superman, not only did you have a more successful history, but in terms of projecting future revenues, especially merchandising revenues, they would be a lot higher. Basically, when a studio looks at a property, what they do is they project future revenue, and then they discount it to a present value, and they try to pay less than that, so they have a profit from those future cash flows.

When I was at Universal, that's how we would -- you know, we would do Excel models and project future income, and then try to buy the discount to a net present value of the future income. That's the basis analysis.

THE COURT: Counsel.

MR. TOBEROFF: Your Honor, plaintiffs offer 316 into evidence at this time.

THE COURT: Any further objection?

MR. BERGMAN: No, Your Honor.

THE COURT: Very well. It's admitted. (Exhibit 316 is received.)

BY MR. TOBEROFF: Q: We've just gone over the purchase prices in a number of different agreements.

Are you aware, based on your experience in the entertainment industry, of any other agreements that contain substantial purchase prices for underlying literary rights?

A: Yes.

Q: Underlying film rights, I should say, to intellectual property.

A: Yes.

Q: What other agreements are you aware of?

A: I'm aware of the Chorus Line agreement.

Q: How did you become aware of the Chorus Line agreement?

A: I followed Chorus Line quite closely. It was a phenomenal musical that originally came out in 1975, and I saw the musical in San Francisco and Los Angeles, and in London; and by coincidence, my ex-wife's uncle, Gordon Stalberg, was the executive producer of the film. He once headed Fox Studios; so, obviously, we've talked about it. And then, subsequently, became aware of the terms of the agreement.

Q: When you say "the terms of the agreement," are you referring to the rights agreement underlying the film Chorus Line?

A: Yes.

Q: How did you become aware of the terms of that agreement?

A: Well, I followed it in the trades when it was done, but I didn't remember it exactly, so I reviewed some documentation that reflected what the deal was, including a State of New York report for nonprofits that set forth the agreement.

Q: What were the terms of the Chorus Line agreement based on the State of New York report?

A: It was a purchase price of $5.5 million and 20 percent of the gross in excess of $30 million of gross.

Q: What other agreements are you aware of in the entertainment industry for high-profile intellectual properties?

A: I'm aware of the Hasbro agreement.

Q: What is the Hasbro agreement?

A: It's a recent agreement that Universal made with has Hasbro Toys.

Q: Can you tell me more about the agreement?

A: Yes.

The agreement provides for the production of four pictures over six years. It covers Monopoly, Candy Land, and I think Ouija. And the per-picture price is a total of $6 million, which is allocated $5 million to the rights and $1 million to a producer fee. And that's applicable against 5 percent of the gross until cash break-even with a 0 percent fee, at which point, it escalates to 71/2 percent. And then at cash break-even with a 10 percent fee, it escalates to 10 percent

of the gross, and then a cash break-even with a 25 percent fee. Essentially, it's 15 percent of the gross.

Q: How did you become aware of the terms of the Hasbro agreement?

A: I discussed them with Tom McGuire, who's the general counsel of Endeavor Agency.

Q: What is the Endeavor Agency?

A: The Endeavor Agency just merged with William Morris. It's one of the top four agencies in the world, talent agencies.

Q: Now, you've testified to the purchase price of $4.5 million in the My Fair Lady agreement; $4.75 million in The Lord of the Rings agreement; $5 million in the Rainbox Six agreement; $7 million in the Red Rabbit agreement; $9.5 million in the Annie agreement, not adjusted for inflation; $10 million in the Hannibal agreement; $20 million in the Sahara agreement; and an asset purchase of $25 million in the Terminator agreement.

What is the purchase price in the Superman film agreement?

A: Zero.

Q: You testified earlier that DC's contingent gross participation in the Superman film agreement was 5 percent of Warner Bros.' worldwide gross revenues from a new Superman film.

I'd like to discuss with you now gross participations, if any, in other agreements that you reviewed in arriving at your expert opinion in this case.

A: In fairness, the participation of Superman is the higher of 71/2 percent of domestic or 5 percent worldwide, but we did discuss the 5 percent worldwide would likely be the higher amount.

Q: Okay.

Moving on to the term "gross participation," I'd like to show you what was previously identified as Plaintiffs' Exhibit 307, the Hannibal agreement.

Actually, we already gave you that exhibit. It's 307.

A: What property does it concern?

Q: Hannibal.

I'd like to draw your attention to Page 1, Paragraph 3 of the Hannibal agreement. It's Bates No. 5760.

A: Okay.

Q: What does this paragraph provide?

A: It provides for a gross participation of 10 percent, payable to the author of Hannibal, Thomas Harris.

Q: Does this refer to gross revenues of the distributor of the film?

A: Yes.

Q: You previously testified that this agreement involved a $10 million purchase price.

What effect, if any, does the purchase price have on the gross participation?

A: Well, the $10 million is applicable against the 10 percent of the gross; so it would reduce the 10 percent gross participation. So what the author would receive would be $10 million and then 10 percent of the gross after there was $100 million of gross.

Q: And this is for the film rights to the novel Hannibal?

A: Yes.

Q: I draw your attention to Page 2, which is the continuation of Paragraph 3 of the agreement. It's Bates No. 5761.

A: I have it.

Q: What is the effect of this provision?

A: There's a separate paragraph in Paragraph 3.

What language are you looking at? Are you looking at the video royalty?

Q: At the top of the page --

A: Okay.

Q: -- where Paragraph 3 continues.

A: Okay.

Q: What does this provide?

A: It provides that the definition of "gross proceeds" will be the domestic distributor's customary definition, subject to good faith negotiation within the distributor's customary parameters.

Q: If another participant in the film receives a more favorable definition, does the rights holder benefit from the more favorable definition, or not?

A: Yes, he does. There's a so-called most-favored nations sentence. It says, "In no event shall such definition be less favorable to the rider than that provided to any other gross participant."

Q: You referred to that as the "most-favored nations clause"?

A: That's what it's called in the industry.

Q: How would you compare this gross participation to the gross participation found in the Superman film agreement?

A: This is much more valuable.

Q: How much more valuable?

A: Twice as valuable.

Q: I'd like to show you what's previously been identified Plaintiffs' Exhibit 326. Excuse me. You have 326. It's the Rainbow Six agreement.

A: Okay.

Q: Please look at Page 3, Paragraph 3.1, Bates No. 6120.

A Okay.

Q: What does this paragraph provide?

A: It provides for gross receipts participation of 10 percent, in excess of $60 million.

Q: I'd appreciate it, when you describe these 10 percent, if you'd tell us 10 percent of what.

A: Okay.

10 percent of adjusted gross receipts, in excess of $60 million.

Q: Is that the same as 10 percent of worldwide distributor's gross after $60 million?

A: Yes. Exactly the same.

Q: Now, you previously testified that this agreement involved a $5 million purchase price and a $1 million producing fee.

Is the $6 million in fixed compensation in the Rainbow Six agreement applicable or nonapplicable to this 10 percent gross participation?

A: I believe it's applicable.

Q: Could you please check that in the agreement.

A: Oh, I misspoke. It's exactly -- it's not applicable. So the $6 million is in addition to the 10 percent, in excess of $60 million; but the net effect, as in the Hannibal agreement, is that it's 10 percent of gross from the first dollar. And there's a prepayment of $6 million. So the net effect is the same as the Hannibal agreement.

Q: How would you compare this effect of 10 percent gross participation to the 5 percent gross participation in the Superman film agreement?

A: This is twice as good.

Q: I draw your attention now to Plaintiffs' Exhibit 327. It's the Red Rabbit agreement you previously looked at.

I draw your attention to Page 5, Paragraph 3.1, Bates No. 6168.

A: Okay.

Q: What does this paragraph provide?

A: This provides that Clancy was to receive 10 percent of the adjusted gross receipts in excess of $80 million of gross receipts.

Q: Is that the equivalent of worldwide distributor's gross after $80 million in worldwide distributor's gross is achieved?

A: Could you restate that question.

Q: When you say 10 percent of adjusted gross after $80 million, is that the equivalent of 10 percent of distributor's worldwide gross after worldwide gross equals $80 million?

A: Yes.

Q: You previously testified that this agreement involved a $67 million purchase price and a $1 million producer fee.

Is the $8 million fixed compensation in the Rainbox Six agreement that you previously testified to applicable or nonapplicable to this 10 percent gross participation?

A: Yes.

Q: Is it applicable or nonapplicable?

A: It's applicable.

Q: Could you take a look at the provision specifically, please.

A: I'm sorry. Again, I have it backwards. It's nonapplicable.

Q: Which is it?

A: There's no provision for it to be applicable.

Q: So is it nonapplicable, then?

A: It is nonapplicable. So it's $8 million, plus 10 percent after $80 million.

But the net effect is 10 percent participation from the first dollar.

Q: Why do you say the net effect? What's the rationale for that?

A: The rationale is that if you have 10 percent of the gross from zero to $80 million, that equals $8 million. So that amount is essentially prepaid as the purchase price.

Q: Is that what you mean by an effective 10 percent gross participation from first dollar?

A: Exactly.

Q: How would you compare this effective 10 percent gross to the 5 percent gross participation in the Superman film agreement?

A: It's twice as good.

Q: Yesterday, you commented on Plaintiffs' Exhibit 201, the Sahara agreement. If you can find Exhibit 201.

I'd like to draw your attention to Page 16, Paragraph 7.

What does this paragraph provide the author Clive Cussler?

A: He receives 10 percent of producer's gross receipts.

Q: Is this worldwide gross revenues?

A: Yes.

Q: You testified that this agreement involved a $20 million purchase price, with a net present value in the range of $17 million.

Is this purchase price applicable or nonapplicable to the gross participation? And please look at the agreement before you respond.

A: It's applicable.

Q: It's applicable or nonapplicable?

MR. BERGMAN: Leading.

THE COURT: It is, Counsel. Be careful what you're doing. You loose credibility when you --

MR. TOBEROFF: I apologize.

BY MR. TOBEROFF: Q: Can you please read the agreement before --

A: It says, "10 percent of producer's gross from each theatrical picture is defined as the gross sums received by purchaser from the various distributors and licensees of the rights in the theatrical pictures.... without any set-off between individual theatrical pictures, except for purchaser's right to recoup the initial fixed purchase price and second fixed purchase price from the contingent compensation otherwise payable to owner from producer's gross receipts."

Q: So that would be applicable?

A: So it would be applicable, yes.

Q: You testified that in the Superman film agreement, the Superman film agreement provided for 5 percent of distributor's gross.

I'd like to talk to you about the differences between the percentage of producer's gross contained in this agreement and the percentage of distributor's gross contained in the Superman film agreement.

Essentially, I'd like you to compare producer's gross, as it would be for this agreement, to the distributor's gross in the Superman agreement.

A: Okay. Under this agreement, Mr. Cussler got 10 percent of the money that was remitted to Anschutz, which owned the rights and which financed the film and then licensed the film to Paramount for domestic distribution. And they also sold the rights overseas, I think through Summit. So what would happen is that on the foreign side, the theatrical film agent would take out a fee, a very low fee in this case, and some minor expenses, and remit the foreign sums to Anschutz.

Philip Anschutz was the producer. He's most well-known for Chronicles of Narnia. His company did those pictures.

So that's the foreign agreement.

On the domestic side, they license the distribution rights to Paramount, but Anschutz paid not only for the production costs but the releasing costs. So under the deal with Paramount, Paramount would take a modest distribution fee, probably -- I don't know the exact the number, but probably in the range of 10 to 15 percent, and they would remit the balance to Anschutz. So that was the pot the 10 percent would be calculated based on.

One thing that you have to keep in mind is that because Anschutz financed the film at 100 percent, home video revenue would be included in the amounts that would fall to the bottom line that the percentage would be calculated based on.

So, certainly, potentially, this 10 percent -- and I think it was likely in -- 10 percent, actually -- if it was based on distributor's gross, it would be, I believe, at least 10 percent, if not more.

Q: Were you an expert in the Sahara case?

A: Yes.

Q: Do you have particular familiarity with the workings and the financing of the Sahara film, due to your work in that case?

A: Yes.

Q: Leaving aside for a moment video royalties, how would you compare the economic value received by the seller in the Sahara agreement to the economic value received by DC in the Superman film agreement?

MR. BERGMAN: Objection. Incomplete hypothetical.

THE COURT: What elements need to be added, Counsel, from your perspective?

MR. BERGMAN: Well, there's no reference to merchandising, for example.

MR. TOBEROFF: I did not exclude merchandising.

THE COURT: Overruled. Be sure to lay out exactly how you're doing the comparison.

BY MR. TOBEROFF: Q: How would you compare the economic value received by the licensor in the Sahara agreement to the economic value received by DC in the Superman film agreement?

I'm just speaking about the actual terms of the agreement.

A: Cussler's agreement was more advantageous in that he received a very high purchase price per picture. He also received a gross participation higher than the Superman participation per picture.

Q: When you say "purchase price," is that the $20 million you testified to previously for the right to make films from two Dirk Pitt novels?

A: Yes, it was. A $20 million purchase price, spread out over time; but it applied to two pictures. So it's basically $10 million per picture. And then this participation also applies per picture.

So it's more advantageous to Cussler than the Superman agreement is to DC.

Q: I'd like to show you what's been marked for identification as Plaintiffs' Exhibit 325. It's an agreement between Michael Crichton and Paramount Pictures Corporation dated October 22, 1999, pertaining to the film rights to the novel Timeline by Michael Crichton.

A: Okay.

Q: Do you recognize this exhibit?

A: I do.

Q: Did you review this agreement in reaching your opinions and writing your report in this case?

A: I did.

Q: Does this agreement contain a purchase price?

A: No, it does not.

Q: I draw your attention Page 3, Paragraph 3.1 of the agreement.

What does this paragraph provide?

A: It provides that Crichton would get 10 percent of the adjusted gross receipts until he receives $10 million, and then additional gross receipts participations, ultimately escalating to a much higher amount. You actually have to read on to 3.2. Ultimately, it goes to 20 percent of the gross receipts.

Q: Now, you mentioned "adjusted gross."

Why did you say "adjusted"? Is it first-dollar gross or adjusted gross?

A: Well, adjusted gross receipts and gross receipts are interchangeable.

This is first-dollar gross. So what this would mean is, in lieu of the purchase price, Crichton was to receive 10 percent of the gross from the first dollar until he received $10 million. So he gets 10 percent of the first $100 million of gross receipts.

Q: And after that, it escalates up to 20 percent?

A: Ultimately to 20 percent of the gross.

MR. TOBEROFF: Your Honor, plaintiffs offer Exhibit 325 into evidence at this time.

THE COURT: Any objection?

MR. BERGMAN: No, Your Honor.

THE COURT: It's admitted.

(Exhibit 325 is received.)

BY MR. TOBEROFF: Q: I'd like you to turn to the My Fair Lady agreement, which is Exhibit 300.

A: This is the one that's really hard to read.

Q: I draw your attention to Pages 32 and 33, Paragraph 28-B through C. I'd like you to tell me what these subparagraphs provide.

A: I didn't catch your reference there.

Q: Pages 32 to 33 --

A: Right.

Q: -- Paragraph 28-B through C. The Bates numbers are 5542 to 5543.

A: I'm with you.

Q: What do these terms provide the rights holder?

A: They provide the rights holder would receive 50 percent of the distributor's gross, to the extent the gross exceeded $20 million.

Q: So after $20 million in distributor's gross, 50 percent of distributor's gross is received?

A: Correct.

Q: Now, is there a payment to the estate of George Bernard Shaw provided for in the agreement?

A: Yes. My recollection is, it's a very complicated scenario, and that ultimately, the amount of gross receipts that were payable to the licensor was around 471/2 percent. There were some reductions, because there were some payments to the estate of George Bernard Shaw.

Q: And that's the author of the underlying Pygmalion --

A: Yes. I believe there's a schedule that --

Q: I draw your attention to Page 32, Paragraph 28, Bates No. 5542, of the My Fair Lady agreement.

A: Okay.

Q: You previously testified that the rights holder in the My Fair Lady agreement received $5.5 million in installments upon execution of the agreement.

A: Commencing execution, yes.

Q: Right. Is the $5.5 million that's payable in the My Fair Lady agreement applicable or nonapplicable to the 471/2 percent gross participation?

A: It's nonapplicable. In Paragraph B, it says "in addition to the payments referred to in subdivision A." So it's nonapplicable.

THE COURT: Counsel, let's take our break before we get to this next exhibit. We'll break for about a half hour.

MR. TOBEROFF: Thank you.

(Whereupon, a brief recess was held.)

THE COURT: Counsel.

MR. TOBEROFF: I'd like to mark for identification as Plaintiffs' Exhibit 331 an agreement regarding the property Neo-Pets, dated as of August 31st, 2004, between Neo-Pets, Inc. and Warner Bros. Pictures, Inc.

Let the record show I'm providing a copy of Plaintiffs' Exhibit 331 to opposing counsel.

BY MR. TOBEROFF: Q: Mr. Halloran, have you seen this exhibit before today?

A: Yes.

Q: What do you recognize this exhibit to be?

A: It's an agreement I negotiated with Warner Bros. regarding the motion picture rights to a property on a web site called Neo-Pets.

Q: Did you review this agreement when reaching your opinions in this case and writing your report?

A: Yes.

MR. TOBEROFF: Your Honor, I would now offer what's been marked for identification as Plaintiffs' Exhibit 331, as Plaintiffs' Exhibit 331.

THE COURT: Any objection?

MR. BERGMAN: The agreement is incomplete, but I will complete the agreement on my examination. I have no objection.

THE COURT: It's admitted. (Exhibit 331 is received.)

BY MR. TOBEROFF: Q: Mr. Halloran, what are Neo-Pets?

A: Neo-Pets are virtual pets that are created by children when visiting the Neo-Pets web site.

Q: Does this agreement contain a gross participation, first-dollar gross participation, for the licensor of Neo-Pets?

A: Yes.

Q: What is that first-dollar gross participation?

A: It's the same as Superman; it's 5 percent from the first dollar.

Q: How would you compare Neo-Pets to Superman in terms of the relative value of the properties?

A: I think there's no -- with all due regard to my client, Neo-Pets, I think there's no comparison. Superman is the most well known comic book character in the history of the world, and Neo-Pets was a relatively new web site; so I think Superman was way, way, way more well known and valuable at the time than Neo-Pets was.

Q: Earlier on, you were asked regarding your assessment of the high value of Superman, and what was the basis of that. I'd like you to fill us in further as to why you value Superman so highly.

A: Well, I think it's one thing to come to the conclusion that every knows Superman, and I think that's really really an important part of the analysis, because when a studio is looking to acquire a piece of intellectual property,

whether it's a comic book character or a video game or a character in a book, what they are looking at is what is the awareness in the public and how can we leverage that awareness into a successful film and successful merchandising. And using that analysis, the Superman character would be worth a multiple of Neo-Pets.

Q: Did you do any research in your process of valuing Superman? Other than researching the different media in which Superman had been exploited over the years, did you do any other research?

A: Yes. I reviewed several times the "Look Into the Sky," which was the Warner-produced homage to Superman. I recently read in -- Entertainment Weekly recently did a poll of their readers for most popular comic book character of all time. Superman was No. 1. So I tried to bring some objective measures in addition to the universally held notion that Superman is the most well known comic book character in history. And certainly in the world of intellectual property beyond just comic book characters, it's still, in my estimation, the most valuable and well known intellectual property in the world.

Q: Did you happen to review a People magazine survey regarding brands?

A: Yes, I did.

Q: What did that show?

MR. BERGMAN: Objection, Your Honor. People Magazine is hearsay.

MR. TOBEROFF: I'm asking what he reviewed for preparing his reports.

THE COURT: Overruled.

THE WITNESS: Yes, I did. And it listed Superman, I believe, as number six or seven of cultural icons of all time, ahead of any other comic book character.

BY MR. TOBEROFF: Q: Where were the other known comic characters or animated characters listed in that survey?

A: They were further down the list.

Q: Do you know where on the list?

A: They were substantially further down the list. I don't have a present recollection of exactly where, but Superman was far and away the top character.

Q: Turning to Plaintiffs' Exhibit 128, the Lord of the Rings agreement which you previously examined, it's on your desk and it's also on the screen, Page 12, Paragraph 9, the Bates No. 04601, what does this paragraph provide?

A: It provides for a participation in gross receipts.

Q: Is that distributors' gross receipts or producers' gross receipts?

A: It's Miramax gross receipts; so it's distributors' gross receipts.

Q: Could you describe for me that gross participation.

A: Yes. From the first dollar, zero to $40 million, there's no payment because there had been prior payments for the purchase of the rights; and then, from 40 to $50 million, the payment is 5 percent; and then from 50 to $60 million, it escalates to 7-1/2 percent; and then from $60 million and beyond, it escalates to 10 percent.

Q: So after $60 million in distributors' gross, the retailer receives 10 percent of gross.

A: Correct.

Q: Could you describe the effective gross participation under this agreement?

A: Yes.

You need to read down a bit more, because in addition to the gross receipts participations at their various levels, there are bonuses of $1 million once gross receipts equal $90 million; a million dollars once gross receipts reach $100 million; and then, next page, there's a payment of $1.25 million when adjusted gross receipts reach $125 million.

So what you do is if you add the previous payments that have been paid, $4.5 million, and those bonuses, the effect is that this is a 10 percent from dollar-one gross participation.

Q: Now, is it fair to compare this effective gross participation of 10 percent in the Lord of the Rings agreement to the 5 percent gross participation set forth in the Superman film agreement, or not?

A: Yes.

Q: How is that?

A: The effective gross receipts participation for Lord of the Rings is 10 percent of distributors' gross, which is twice the participation for Superman.

Q: Now, are the option fees applicable in Superman agreement to the 5 percent gross participation?

A: Yes.

Q: Is the 4.75 million option and purchase price combined in the Lord of the Rings agreement applicable to the -- is the 4.75 million combined option and purchase price in the Lord of the Rings agreement, is that inapplicable to the gross participation?

A: Yes. It's inapplicable; so those payments are plus the participation. But if you add them both up, it equals 10 percent from the first dollar.

Q: Mr. Halloran, you've testified that the Hannibal agreement provides a 10 percent gross participation; that the time timeline agreement provides a complicated 10 percent gross participation escalating to 20 percent; that the Red Rabbit and Rainbow Six agreement both provide an effective 10 percent gross participation; that the Lord of the Rings agreement provides for an effective 10 percent gross participation.

What is the gross participation again in the Superman film agreement?

A: It's half; it's 5 percent.

Q: I'd like now to discuss briefly with you a new provision, and that's the terms dealing with what's called the home video royalty. You testified earlier that a 20-percent video royalty was considered a default or a minimum standard term. I'd like you to refer to Exhibit 325, which is the timeline agreement, the Michael Crichton timeline agreement, and I draw your attention to Page 4, Paragraph 3.3.; the Bates numbers start on 6.64 and go to Bates number 6065.

A: I'm with you.

Q: What does this paragraph provide?

A: It provides that in lieu of the standard 20 percent home video royalty, it would be increased to 35 percent.

Q: I'd like you to turn now back to the Hannibal agreement, Plaintiffs' Exhibit 307, and I draw your attention to Page 2, Paragraph three, Bates number 05761. It's continued from the previous page.

A: Okay.

Q: What does this paragraph provide?

A: It provides for a 35-percent royalty.

Q: Home video royalty?

A: Yes.

Q: If there are other gross participants in a film based on a Hannibal property, what is the home video royalty?

A: The way it works is if there are other gross participants, then the video royalty is not computed on a 35-percent basis, but, rather, it would be computed based on the distributors' customary definition but subject to good faith negotiation, and it would be favored nations with the other gross participants.

Q: I'd like to show you what's been previously marked for identification as Defendants' Exhibit 101, and I'd ask the clerk to please provide Defendants' Exhibit 101 to the witness.

MR. PERKINS: There is no Defendants' 101.

MR. TOBEROFF: 1101, excuse me.

BY MR. TOBEROFF: Q: Are you familiar with this document?

A: Yes.

Q: Did you review this document in writing your expert report and rendering your opinion in this case?

A: Yes.

Q: I draw your attention to Page 1 of the rider to the defined gross receipts definition in this agreement; it's Bates number 136436. What is the effect of the bolded paragraph near the top of the page in the Harry Potter agreement?

A: I think there is some confusion here.

I was handed the Witchblade agreement; and now this is Harry Potter.

[text redacted][2]

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[2] Harry Potter information was discussed at this point. However the witness was also testifying in another case and revealed information that was subject to a protective seal/court order. Thus the testimony was redacted from the official transcripts

Q: Switching now to the topic of reversion that you alluded to earlier in this case. I'd like you to go over and explain to us the reversion of rights provision that appears in various agreements that you compared to the Superman film agreement.

A: As I discussed, the basic notion was what I perceived as a fundamental failing and not consistent with the value of the Superman property was that there was no real mechanism for – you either get back the rights if Warner stops making Superman movies. And I reviewed a multitude of agreements that provided that if after a period of time, a studio like Warners stopped making movies, then the owner of the intellectual property would have the ability to get those rights back and exploit them themselves or license them to third parties. The effect of these reversions is it forces the studio to keep making movies. In effect, under the Superman agreement, would have been that had Warners kept making movies, that even though it's relatively low gross participation, that there would be payments, continual payments, made to DC. It would increase the value of the asset to DC.

Q: I'd like to show you what's been marked for identification as Defendants' Exhibit 1105.

MR. TOBEROFF: If I could ask the clerk, please, to provide that to the witness.

BY MR. TOBEROFF: Q: Exhibit 1105 is an agreement produced by Warner Bros.; it's between Katja Motion Picture Corp. and Marvel Characters, Inc., dated August 2, 2001, pertaining to the comic book character Iron Man.

Do you recognize this exhibit?

A: I do.

Q: Did you review this agreement when reaching your opinions and writing your expert report?

A: Yes.

Q: I draw your attention to Page 18, paragraph 8-A, it's on 3 Bates No. 136615. It's also on your screen.

What does this paragraph 8-A provide?

A: It provides that -- first of all, I want to point out that Katja Motion Picture Corp. was a New Line company, just to make that clear.

THE COURT: Yes.

THE WITNESS: It provided that in order to avoid reversion of the rights, that New Line had to commence principal photography of a feature within 12 months of date of a payment and to affirmatively initially release that picture theatrically within two and a half years from commencement of principal photography.

BY MR. TOBEROFF: Q: I draw your attention to paragraph 8-B on Page 18 of the Exhibit, Bates 136615 going on to Page 19, 136616, and I'd ask you, what does this paragraph provide?

A: It has to do with subsequent productions; that would be sequels to the first picture. This clause obligated New Line to start development and hire a writer within one year from the date of the initial theatrical release of the immediately prior picture; so what that means is after the first Iron Man, New Line could not sit on the rights to the detriment of Marvel; they had to start developing and hiring a writer within one year after the release of the picture, the immediate succeeding picture.

Q: Is this what's called in the entertainment industry as a rolling reversion right?

A: Yes, it is. And by 'rolling' that means that the provisions apply to each subsequent sequel. So for example, here, we have the first Iron Man; that's released. For picture two, they have to start to development and hire a writer to write a screenplay within one year; and if there's a picture two, it rolls, and there's the same rule. After picture two is released, within one year they have to hire a writer and commence development.

What it does is it forces the studio to continue to develop and produce and release pictures. And if they don't do that, then the rights come back.

Q: And they have one year to commence development.

How long do they have to actually release a second, third or fourth picture?

A: You'd have to add up the periods, but they -- let me see -- they have to release a picture within three years.

Q: Are you familiar with the comic book character Iron Man?

A: I am.

Q: Do you have preexisting knowledge of the character and did you research it in connection with this case?

A: Yes, I did.

Q: Can you assess or evaluate the worth of film rights to Iron Man in 2001 in comparison to the value of the film rights to Superman in 2002?

A: Yes. Iron Man was a Marvel comic book character that was not terribly well known as of 2001. Superman in 2001 was an incredible success as a comic book character and universally known; so Superman would be much, much more valuable in 2001 than Iron Man.

Q: Did Iron Man subsequent to this agreement increase in value?

A: Yes. It has increased in value substantially because of the success of the recent film.

Q: But was that after the time of this agreement?

A: Yes. This was after the time this agreement was entered into.

Q: Did you review the Warner Bros. agreements, the agreements produced by Warner Bros., regarding the film rights to the character Tarzan and to the character Conan?

A: Yes.

Q: Did either of these agreements contain reversion clauses for failure to continue to exploit the character or not?

A: They both did.

Q: Does the Superman film agreement Exhibit 232 contain any such reversion provisions?

A: No.

Q: If Warner Bros. failed to release another Superman film after Superman Returns for the remaining 27-year term of the agreement, would the Superman property revert to DC prior to the expiration of 27 years at any point?

A: No.

Q: Is DC's gross compensation in the Superman film agreement dependent on Warner Bros. periodically releasing Superman films or not?

A: Absolutely. It's meaningless unless they release films.

Q: Why do you say that?

A: Because there's no purchase price, and the only way participation is calculated and paid is based on proceeds that emanate from the release of the picture; so by definition there wouldn't be any gross proceeds if there aren't pictures that are developed, produced and released.

Q: And who has the discretion to decide to develop or release pictures under the Superman film agreement?

A: It's completely Warner Bros.' discretion.

Q: Did you review the merchandising provisions implicated by the gross definitions in the Red Rabbit, Rainbow Six and timeline agreements that we have discussed?

A: Yes.

Q: Were the merchandising provisions less advantageous to the rights holder than those in the Superman agreement? I'm not asking if they were less advantageous to the rights holder.

A: They were less advantageous.

Q: Why were the provisions less advantageous on paper?

A: They were less advantageous because for novels, like the Tom Clancy novels, or especially Hannibal, the value of the merchandising rights would not be an important component of the anticipated income for the rights holder.

So, for example, you would not anticipate under Hannibal that it would be important to Thomas Harris that he have a participation in the Hannibal Lecter dolls. It's very different if you have a property like Neo-Pets or Superman, where there's previous merchandizing activities and where you anticipate that those rights will be valuable.

THE COURT: So sometimes merchandising agreements are very valuable, and sometimes they are not.

THE WITNESS: Yes. It depends on the character.

BY MR. TOBEROFF: Q: When a property has previously shown itself to be lucrative in a particular media, is the tenancy for rights holders to attempt to reserve that right or to have special provisions applicable to that right?

A: Yes.

Q: When a property has no prior exploitation or does not lend itself to exploitation in a particular medium, let's say merchandising, is the tendency not to reserve those rights and to throw it into gross receipts?

A Yes. The tendency is to grant the rights and throw it into grant receipts and leave it to the studio, if they can, to maximize the value of those granted rights.

Q: Did you recall whether any of the agreements you looked at involved properties that had prior video game exploitation?

A: Yes.

Q: Which agreement was that? Which property was that?

A: I believe it was Rainbow Six.

Q: And how were video games handled in the Rainbow Six agreement?

A: If you could point me to the provision, that would be helpful.

Q: It's Exhibit 326.

A: Okay.

Q: I believe it's on the first page of the agreement.

Actually, it's the second page, Bates number SGL 06119.

A: Okay.

Q: Paragraph 1.4.

A: Yes.

Q: Are video game rights reserved or not reserved by the rights holder?

A: They are reserved.

Q: And do you believe that's because there were prior video games exploiting that property?

A: Yes. Because there's an expressed acknowledgment they had already been licensed and have been exploited.

Q: I'd like to turn back to the subject which we discussed regarding the Superman film agreement of creative controls.

You testified earlier that DC's creative controls were extremely week, you used the term illusory, in the Superman film agreement regarding the Superman character.

I'd like you to turn back to the Iron Man agreement, Defendants' Exhibit --

A: Defendants' 1105.

Q: Yes. Exhibit 1105. I'd like to draw your attention to Page 19, Paragraph 9 of Exhibit 1105, Bates No. 6616. It's also on your screen.

A: Right.

Q: What does this paragraph provide?

A: It provides for some detailed approval rights that Marvel would exercise with respect to the character.

Q: Give me a better understanding of what those creative controls consist of.

A: Initially, they had treatment approval, which is the sort of basic outline for where the story is going to go. They also, I think, approved the -- there was a handbook -- this is very typical for characters; DC has them, I'm sure, for Superman and Batman -- there's a handbook as to exactly how the character could be portrayed and not portrayed; basically what you can do and not do. And what's important about that handbook is the licensor wants to make sure the character as depicted in the film doesn't detract from the previously valuable property.

Q: Does that mean if New Line produced a film using Iron Man, the character would have to comport to the descriptions in that handbook?

A: Yes.

Q: Turning back to Plaintiffs' Exhibit 201, the Sahara agreement. I draw your attention to Page 21, paragraph 10-A through B. It's Bates No. 4904.

A: Okay. This one is the one that's --

Q: What does this paragraph provide in the Sahara agreement?

A: It provides that Clive Cussler would have screenplay approval.

Q: What other creative approvals is the author given in the Sahara agreement?

A: He's given approval over the writers, the director and the actors.

Q: Does the writer have complete veto authority with respect to these elements under the agreement, or not?

A: Cussler had essentially complete veto over the screenplay. There's a mechanism for directors and writers and actors where there's an exchange of lists that went back and forth, and that effectively gave him approval.

Q: I'd like to turn now to the subject of warranties. You previously note that after DC and Warner Bros. had received plaintiffs' termination notices, that Warner had DC nonetheless warrant in the DC film agreement that DC held exclusive film and television rights and was not subject to any inconsistent claims and that DC agreed to indemnify Warner for any loss resulting from any breach of its warranties.

What warranty provisions, if any, do rights holders generally include in film rights agreements?

A: The basic ones are they warrant they are the sole owner of the property; that the exploitation of the property will not infringe any rights of third parties; that there are no liens or claims by third parties against the property that might interfere with the rights of the studio. Those are the basic ones.

Q: What things are excluded from such warranties?

A: What are excluded is if there are claims that are inconsistent with those warranties, then typically, those claims are scheduled and excluded from the warranties, since if they were to sign the agreement and these claims were – they would be immediately breached and they would have to indemnify the studio.

Q: I'd like you to turn back to the Lord of the Rings agreement, Exhibit 128. I'd like you to turn, please, to Page 14, Bates No. SGL 4603, paragraph 12 and paragraph 13. Can you please tell me what these paragraphs provide.

A: I think the focus is on 13. 12 just lists some documents that are going to be delivered. But 13 references a schedule which includes a list of documents that show the chain of title to the work and basically there's an exclusion of the typical 'we own all of the rights because of the complexities and potential problems with the Lord of the Rings chain of title.'

Q: What is the purpose of this exclusion with regard to the licensor?

Strike that. What is the benefit of such exclusion to the licensor, if any?

A: Licensor is not put in breach of the warranties because it's disclosed the problems to the studio ahead of time. And basically the way it works is the studio takes the risk of these imperfections.

Q: Please turn back to the Annie agreement, which is Exhibit 315.

A: Now, one of the things I noticed in E was there were some claims referenced in E; so there were not only potential problems but there were some claims outlined in E.

Q: I didn't know you were continuing.

Would you turn now to Exhibit 315, the Annie agreement. First page.

I draw your attention to Page 5, Paragraph 2 of Exhibit 315, Bates 5781.

What does this agreement provide?

A: Well, it provides for qualifications to the representations and warranties that were made by the owners of Annie.

Q: Can you tell me what those are?

A: Yes. There was exclusions of certain comic strips for Lil' Orphan Annie. There had been some Lil' Orphan Annie picture produced by RKO. There was an exclusion as to the status of the copyright in certain foreign territories. There was a reference to an agreement with RKO radio pictures. There was a reference to trademark rights.

Q: Thank you. I think we get the picture.

A: Okay.

Q: I'd like you to turn back to the Hannibal agreement, Exhibit 307. When we turn back to an agreement, we're going to show you the first page; so we'll show you what it looks like, to make it easier for you to find it.

A: Okay.

Q: Please look at Paragraph five on Page 3 of the agreement, subject paragraph C.

A: I'm having difficulty on the screen, so I have to reference --

Q: It's Bates No. 5762.

A: Right.

Q: What does this subject paragraph C provide?

A: Well, the parties acknowledge that Thomas Harris had written a book called Red Dragon that Warner Bros. had acquired under a literary purchase agreement, and that this agreement is subject to that.

Q: Is this similar to an exclusion?

A: Yes. It's effectively an exclusion. I believe the Hannibal Lecter character was in Red Dragon and there was a Red Dragon film; then subsequently there was a Silence of the Lambs picture that Orion did, and then Hannibal was after that; so the parties had to make sure that everyone understood the status of the various books that contained the Lecter character; so they were taking care of that in this provision.

Q: Briefly, I'd like to turn to the subject of cofinancing of films by a rights holder.

What's meant by the term cofinancing? Although it might be self-explanatory, what is meant by the term cofinancing in the film industry?

A: Basically, it's an agreement between the studio and a third party to share the costs, sometimes development production and releasing of a motion picture, and to share the proceeds from the exploitation of the picture as equity partners. That's probably the easiest way of looking at it.

Q: What if anything are the benefits of a rights holder having the ability to cofinance films based on the rights holders' intellectual property?

A: It's a great advantage, because, by definition, it's an option. We did this in the Neo-Pets agreements. It gives the licensor the ability to look at the project and to run numbers and assess whether it would be a good idea to cofinance. They don't have to do that, but if they want to, they can. If they do cofinance and it's a hit picture, they could make a huge multiple of what they would get under a typical literary purchase agreement.

Q: When a rights holder has a cofinancing option, can it wait and see how a first film does to see whether it wants tofinance a second or third time?

A: Depends whether that cofinancing option is rolling or not. But, yes, they could do that.

Q: And under a rolling cofinancing option, can you do that?

A: Yes.

Q: Other than the Neo-Pets agreement, are you familiar with other agreements that have a cofinancing or co-fi option?

A: Yes. I believe there was one other that I -- I don't remember the name of it right now. If you could remind me, that would be helpful.

Q: Did you investigate the terms of an agreement between Universal and Hasbro pertaining to board games?

A: Yes.

Q: Did that agreement have a cofinancing option or not?

A: Yes, it did.

Q: Under that agreement did Hasbro have the ability to choose to cofinance with Universal Films based on Hasbro board games?

A: Yes.

Q: In reaching your opinion and conducting your analysis of various comparable agreements, for instance, the Lord of the Rings agreement, did you look at the revenues of Superman Returns and the money actually made by DC under the Superman film agreement and compare it to the amount of money DC would have received with respect to Superman Returns if it had, for instance, the terms that the rights holders had in the Lord of the Rings agreement? Did you conduct that sort of analysis?

A: No, because I thought it was irrelevant.

Q: Why is it irrelevant?

A: It's irrelevant because when you look at the agreements, you look at them as of the time they were entered, and the subsequent performance doesn't -- as we discussed the other day, you try to predict the future and look into the big future. But doesn't affect the evaluation as of the time of entering the agreement by definition.

[text redacted][3]

Q: At the time the Harry Potter agreement was entered into in June 1998, what did your research show was the extent of the exploitation of Harry Potter as a novel at the time this agreement was entered into in June of 1998?

MR. BERGMAN: Objection. The Harry Potter agreement is an agreement extremely confidential agreement and was submitted on that basis by Warner, and I don't think it should be discussed in this proceeding. We are not relying on the Harry Potter agreement.

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[3] Harry Potter text again redacted due to legal reasons

MR. TOBEROFF: We have a protective order in this case which specifically states that the parties will hold documents stamped "confidential" as confidential, but we can use them at trial.

MR. BERGMAN: May we just...

MR. TOBEROFF: If I may continue.

And an issue recently came up regarding confidentiality and marking certain documents that had not been marked "confidential." And we stipulated to mark those additional documents as "confidential," at which point in time Defendants' reiterated that documents marked "confidential" can still be used at trial. And this is a document produced by Warner Bros. in this case, and it's listed as one of their exhibits in this case.

MR. BERGMAN: May we simply provide that the transcript relating to "Harry Potter" be sealed.

THE COURT: I'll give you leave to apply for that. I'm very reluctant at a public trial to place anything under seal. Discovery is one thing; the trial is something else.

However, for good cause, the Court will consider that. But I think that should be applied in writing so there's a clear record in case, down the road, there's any question as to why the Court placed something in a public trial under seal; so for First Amendment purposes, I'd ask that you go through the process to make an application for that.

Right now there's nobody in the courtroom other than your clients and associated staff. But absent an order from the Court, all of this is public; so go ahead and apply for that.

MR. BERGMAN: Very well. We'll proceed in that fashion.

THE COURT: Very well. You may proceed.

[text redacted][4]

BY MR. TOBEROFF: Q: Can you describe to me, what do you mean by net profits?

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[4] Harry Potter text redacted due to legal reasons

A: By net profits, in the spectrum of valuable participation to participants, the single most valuable participation is the first-dollar gross, and then at the other end of the spectrum, the least available is net profits.

[text redacted][5]

Q: Turning now to the Superman television agreement underlying the series Smallville.

THE COURT: The Exhibit number, Counsel?

MR. TOBEROFF: 223, Your Honor.

THE COURT: Is this a specific agreement to Smallville?

MR. TOBEROFF: It's the rights agreement, DC Warner Bros. underlying Smallville. I'll refer to this as the Superman television agreement, Smallville agreement.

BY MR. TOBEROFF: Q: In general, how are valuable franchise properties -- strike that.

Are valuable franchise properties with a prior commercial track record customarily exploited in television?

MR. BERGMAN: Objection. Lacks foundation.

THE COURT: Sustained.

Lay foundation for this.

BY MR. TOBEROFF: Q: Are you familiar, based on your transactional work and work on the studios, with how the television industry operates?

A: Yes.

Q: Are you familiar with the type of programming that appears on television?

A: Yes.

Q: Is it customary in the television industry to exploit valuable pre-established franchise properties?

A: In television?

Q: Yes.

A: Rarely.

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[5] Harry Potter text redacted due to legal reasons

Q: Why do you say that?

A: I say that because if you look at the marketplace, with respect to the top Superman and Batman and equivalent properties, most of the time but not all of the time, the studios prefer and see it more valuable to continue to make big budget tent pole movies and use that as a way to generate income, but, probably more importantly, to keep awareness going. There are exceptions to that, but typically, today, with this success of Harry Potter, you probably would not see a Harry Potter television series; given the recent success of Batman, you're not going to see a Batman television series; you're probably not going to see a Pirates of the Caribbean television series because the studios perceive it much more valuable to keep them on the tent pole track.

Q: Can films generate revenue more quickly if they succeed than a television series?

A: Yes.

Q: Why is that?

A: Because a television series typically only generates a license fee and modest amounts from foreign and video over time. One of the great advantages of the film model is that you can get that immediate hit of the opening weekend and massive amounts of film rental that come from the box office; so they can be more immediately profitable, typically, than a television series.

Q: For how long would a television series be on the air before it can recoup its production budget, approximately?

A: A rule of thumb is that it takes approximately 85 to 100 episodes in order to get the aggregate amount of episodes so you can enter syndication. And most often you don't -- the budgets for the television programs are run at a deficit up until that time, and you try to hit the home run of syndication. And it's only at that time after many seasons that the program becomes profitable. That's typical.

Q: During the approximate 30 years you've been in the entertainment industry, can you think of any television series based on a preestablished franchise property, other than Smallville?

A: Well, I'm certainly aware of, in the old days, the Batman television series and the Superman television series. But certainly, since the rise of the tent

pole, with the exception of a Smallville -- I'm sure we'll talk about that -- there hasn't really been a series based on an iconic property that is still being exploited theatrically.

Q: What about the Sarah Conner Chronicles?

A: Well, that is an exception. Sarah Conner is part of the Terminator franchise.

Q: Would that be considered what they call a spin-off?

A: Yes, it is a spin-off because it's not the Terminator character; it was a character included in the movie, but not the main-branded character. But that series -- it's not clear whether that series is still going, and it's only had limited success.

Q: Due to the fact that such franchises are rarely exploited in television, did you find it difficult to locate comparable agreements to the Superman television agreement?

A: Yes, because they don't exist.

Q: I'd like you to walk us through the Superman television agreement quickly, the way you did with the Superman film agreement. Go to Exhibit 223.

Do you recognize this agreement?

A: I do.

Q: And you reviewed it and analyzed it in rendering your opinion and in writing your expert report in this case?

A: Yes.

Q: I draw your attention to Page 9, which is the signature page, Bates number 135039.

When was this agreement executed?

A: (No audible response.)

Q: Drawing your attention to the bottom left hand --

A: The footer says February 5th, 2001.

Q: As connoting the last draft of the agreement?

A: Yes. So it had to have been signed no earlier than that date.

Q: Or it could have been signed after that date?

A: Yes. But certainly no earlier.

Q: I draw your attention to what's called the short form option which is attached to the agreement on the page Bates No.WB-135048. If you could tell me when the short form was signed.

A: February 12, 2001.

Q: I show you what was previously admitted as Exhibit 222; this is an agreement between DC Comics and Warner Bros., a division of Time Warner Entertainment Company LP, dated as of December 5th, 2000, as amended September 5, 2002, regarding the television rights to Superman underlying the series Smallville.

A: 222?

Q: Yes. Did you review this agreement as well?

A: Yes, I did.

Q: Can you summarize briefly the nature of the amendments that were made to the Smallville television agreement on September 5, 2002, pursuant to Exhibit 222? Or if you recall what they relate to.

A: I looked at this entire agreement. This was basically the operative agreement. I don't remember separately analyzing the --

Q: We can move on.

I draw your attention to paragraphs one and two of page one of Exhibit 222.

MR. BERGMAN: Objection, Your Honor. The witness just testified he didn't analyze Exhibit 222.

MR. TOBEROFF: He didn't say that, Your Honor.

THE WITNESS: I didn't say that.

THE COURT: Don't speak out. It really messes up the record.

Reask the question, Counsel.

BY MR. TOBEROFF: Q: Did you analyze Exhibit 222 in the process of forming your opinions in this case prior to writing your expert report?

A: Yes.

Q: I draw your attention to paragraph one and two, Page 1 of the agreement.

Your Honor since this is amended -- this amendment is -- this is the last agreement which contains an amendment to the prior Smallville television agreement. I think we'll work off the most recent Smallville television agreement in analyzing the terms.

THE COURT: Just refer to it by exhibit to make it clear.

BY MR. TOBEROFF: Q: Does Exhibit 22, the Smallville television agreement, contain an option fee or not?

A: It does.

Q: What is the option fee?

A: $10,000.

Q: What is the option term?

A: The option term is one year; an initial one year and right to extend for an additional one year.

Q: What does it cost to extend the option for an additional one year?

A: It's another $10,000.

Q: Showing you Plaintiffs' Exhibit 181, previously admitted; it's an agreement between DC Comics and Lorimar Productions, Inc. Exhibit 181 concerns Superman television rights as well, and these are the rights which underlie the television series Lois & Clark in 1993. For ease of reference, I'll refer to this agreement as the Lorimar agreement.

Please look at Page 1, paragraphs one and two, of the Lorimar agreement. It's Bates No. 134886.

Did you review the Lorimar agreement in reaching your opinions in this case?

A: Yes.

Q: Did you have the opportunity to compare the terms of the Lorimar agreement to the terms of the Smallville television agreement?

A: Yes.

Q: What did that comparison tell you?

A: That they were essentially the same economically.

Q: What is the option fee in this agreement?

A: It's $10,000.

Q: And the option term?

A: Initial one year with an extension for another year.

Q: In accordance with rendering your opinion, did you research the company Lorimar Productions?

A: I didn't do a separate research, but I was aware that Lorimar was a television production company that was owned by Warners.

Q: At the time of this agreement?

A: At the time of the agreement, yes.

Q: Showing you what's been previously admitted as Plaintiffs' Exhibit 15; it is an agreement between DC Comics and Cantharus Productions, dated June 15, 1987, referencing licensing rights underlying the Superboy television series.

Did you review this agreement in reaching your opinion in this case?

A: Yes.

Q: For ease of reference, I'll refer to this agreement as the Superboy agreement. Are you familiar with the company Cantharus Productions?

A: Yes.

Q: Who owned that company?

A: Elia Salkind.

Q: What does this 1987 Superboy agreement concern?

A: It concerns the license by DC to Cantharus of television rights to the character Superboy.

Q: And did the Superboy television series result from this agreement?

A: Yes.

Q: How long did the Superboy series stay on the air?

A: I don't recall exactly how long; but for a period of time, it was a successful series.

Q: I'd like to draw your attention to Page 5, Paragraph 4-A, Roman numerate iiii of the Superman agreement; it appears on Bates No. 13565. What does that paragraph provide?

A: Could you tell me the paragraph reference again.

Q: Roman numeral IV-A and then iiii.

A: It provides for a payment on execution of $800,000.

Q: What are the other terms controlling this payment?

A: Well, the reference in paragraph B -- basically this payment was a prepayment of potential revenue that DC would receive from Superman IV.

Q: When you say 'prepayment of potential revenue,' what do you mean by potential revenue?

A: That was not a fixed amount at the time, and DC, as you recall under the Salkind agreement, had a gross participation; so this was a payment to DC in lieu of that participation.

Q: Was DC guaranteed to receive $800,000 in connection with Superman IV in the form of contingent compensation or not?

A: No.

MR. BERGMAN: Objection. Lacks foundation.

THE COURT: Lay foundation, Counsel.

BY MR. TOBEROFF: Q: Are you familiar with the terms of DC's agreement which relate to Superman IV, namely the 1974 Salkind agreement?

A: Yes.

Q: Are you familiar with the contingent compensation provision in the 1974 Salkind agreement?

A: Yes.

Q: Pursuant to that contingent compensation provision, is DC guaranteed to receive $800,000 from the exploitation of Superman IV or not?

A: No.

MR. BERGMAN: Objection. Lacks foundation. The provision makes it clear that it is not referring to an earlier agreement with the 74 agreement but, rather, to an agreement with Cannon Films.

MR. TOBEROFF: Pardon me. I was referring to the wrong agreement, Your Honor.

THE COURT: Very well.

BY MR. TOBEROFF: Q: Are you familiar -- strike that.

Is it in the nature of a contingent compensation that it is guaranteed?

MR. BERGMAN: Objection. Vague and ambiguous.

THE COURT: Counsel, this is the problem with leading questions. If you just let the witness speak what he knows, you wouldn't find yourself in this type of situation. Sustain the objection.

BY MR. TOBEROFF: Q: Can you describe to me what you believe from your analysis in this case DC was entitled to with respect to the Superman IV?

A: DC was --

MR. BERGMAN: Objection. Lacks foundation. There's no evidence of any --

THE COURT: He's already indicated his basis for understanding what DC comments would receive in Superman IV; it's disconnected from the earlier question, but --

You're just asking about Superman IV right now?

MR. TOBEROFF: I'm asking about Superman IV.

THE COURT: Based on what he testified that he's reviewed?

MR. TOBEROFF: Correct.

THE COURT: Overruled.

MR. TOBEROFF: And based on that, was DC guaranteed $800,000.

THE COURT: Counsel, I overruled the objection to the last question. Don't ask another question now. If you need to have it reread, the court reporter will do that.

BY MR. TOBEROFF: Q: You can answer.

THE COURT: Are you mindful of the question?

THE WITNESS: I am.

THE COURT: Very well.

THE WITNESS: Under the provisions applicable to the payment to DC of its participation for the license of the Superman character, those payments would be contingent upon release of the picture and generation of proceeds and the credit worthiness of Cannon Films.

BY MR. TOBEROFF: Q: I'd like to move now to the subject of options, option fees and the Superman television agreement, and compare that to other agreements briefly.

Did you review any other underlying rights agreements for television series that had option fee payments?

A: Yes.

Q: Did you review an agreement that was produced by Warner Bros. for the rights to a book called "How to Teach Filthy Rich Girls"?

A: Yes.

Q: And how did the option payment in that agreement -- the option fee compare to the option fee in the Superman film agreement --

A: I believe --

Q: The Superman television agreement?

A: -- it was greater.

Q: Do you recall what that provision --

A: If I could see the agreement, I could tell you immediately.

MR. TOBEROFF: May I ask the clerk to please provide the witness with Exhibit 1100.

THE WITNESS: I stand corrected. It's equivalent. Even though it's -- it's "How to Teach Filthy Rich Girls," but it's $10,000; so it's the same option for a lesser property.

BY MR. TOBEROFF: Q: I'd like to now turn to the subject of episodic royalty and gross participation in the Superman film agreement, which is Exhibit 222. I draw your attention to paragraph two of Exhibit A, which is located on Page 8 of Exhibit 222, Bates No. 135006.

A: Okay.

Q: What television rights are granted to Warner Bros. pursuant to this provision?

A: Exclusive worldwide television production rights, except for television animation rights.

Q: What do you call those in the television industry if -- strike that.

What are live action television rights?

A: Live action rights, as opposed to animation rights, you have live human characters; animation, you, by definition, have drawings of characters.

Q: Is this a license for all live action television rights to the Superman character?

A: Yes.

Q: And does this definition include Internet rights and allied rights?

A: Yes.

Q: I draw your attention to Page 2, paragraph seven of the Exhibit Bates No. 135006. I ask you what this paragraph provides to DC?

A: It provides an episodic royalty of $45,000.

Q: What is meant by an episodic royalty in the television industry?

A: That's an amount that's payable for each episode that's produced.

Q: Is that considered a contingent payment, contingent or not?

A: It's not contingent. Well, the only contingency is that the episode be produced.

Q: So if you produce two episodes, you receive $90,000.

A: Correct.

Q: But if you didn't produced any more after that, that would be it.

A: That would be it.

Q: Now, what form of television -- for what television -- I'd like you to turn to Page 2, paragraph seven of the exhibit. And I'd ask you what triggers payment to DC under this paragraph.

A: Well, it would trigger payment would be collection of gross receipts based on exploitation of the series.

Q: Do the payments provision solely apply to episodic television series?

A: No. It's both for the pilot and the series.

Q: But it applies to exploitation of an episodic television series.

A: Yes.

Q: Are the rights granted under this agreement broader than episodic television series, or not?

A: They are broader.

Q: Are there any form of television that you can think of to which Warner Bros. would have the right to exploit but no obligation whatsoever to pay DC for that exploitation?

A: A series of Webisodes.

Q: On the Internet?

A: Yes. I don't think that would fall under this definition.

Q: Is that because they have Internet rights?

A: Yes.

Q: And what about broadcast television? Can you think of forms of television exploitation excluding episodic series covered by the rights grant?

Is a movie of the week considered an episodic television series?

A: No.

Q: Is what they call a 'television special' considered an episodic television series?

A: No.

Q: Is a documentary considered an episodic television series?

A: No.

Q: If Warner Bros. exploited any of those forms, a movie of the week, a TV special, a documentary or Webisodes on the Internet or some form of new television media, would they have an obligation to pay DC under this agreement?

A: No.

Q: Turning back to Page 2, paragraph seven of the Superman television agreement, what is the amount of the royalty?

A: The amount of royalty is 3 percent of the first 1,500,000 of gross receipts and it's --

Q: Excuse me.

A: There is no royalty.

THE COURT: Counsel, you cannot interrupt your witness in the middle of an answer, even if you don't like the answer he's giving.

Do you understand that?

MR. TOBEROFF: I'm sorry. My associate was – I apologize.

THE COURT: Very well.

MR. TOBEROFF: It wasn't that I didn't like the answer. It's that --

THE WITNESS: The royalty is in Paragraph six. The contingent compensation is in paragraph seven. That's not an episodic royalty, it's a participation in the gross from the exploitation of the pilot and series.

BY MR. TOBEROFF: Q: Moving back to the episodic royalty you mentioned, what was the amount of the episodic royalty?

A: 45,000 per episode.

Q: Does this royalty apply or not apply against DC's gross participation?

A: It applies.

Q: Now, turning to Page 2, paragraph seven, of the Superman television agreement, what does that paragraph provide? Is that the gross participation you were just speaking about?

A: Yes.

Q: What is the amount of that gross participation?

A: If you apply the 45,000 against the 3 percent, it is 5 percent in excess of $1.5 million gross receipts.

Q: Do you have an idea why the $1.5 million figure is in the agreement?

MR. BERGMAN: Objection. Calls for speculation.

MR. TOBEROFF: I'll rephrase; that was poorly phrased.

BY MR. TOBEROFF: **Q:** What is the significance of the $1.5 million figure in the agreement?

A: My understanding is that the 1.5 million was the approximate starting budget of Smallville.

THE COURT: What's that based on?

THE WITNESS: Well, I certainly know that shows like Smallville -- actually I discussed this with one of my partners, Wayne Alexander, the television

expert, and he explained to me that Smallville probably started out with a budget in the 1.5 to 2 range, and it's gone up; but I understand now that it's about $3 million. But I think the calculation that was probably made was that the budget was about 1.5 and they took 3 percent of that and came up with a 45,000 royalty.

BY MR. TOBEROFF: Q: What is the effect of the applicability of the $45,000 episodic royalty to the 3-percent gross participation?

A: It eliminated it, because there was an advance of the episodic royalty.

Q: To the first million five per episode of Smallville, does DC actually receive any participation?

A: No.

Q: If the budget of each episode, was in fact, a million five -- and I understand we don't know what the exact budget was -- how would this -- what effect would this have on DC?

A: It means that -- assuming that the license fee from Warners to produce the picture was equivalent to a million five, it means that it was likely they would not get any more revenue until there had been exploitation other than the broadcast of the film on the WB.

Q: I'd like to try and quantify this.

If Warner Bros. made -- if the budget was two million per episode, how much additional revenue would DC receive for its 3 percent going to 5 percent gross participation?

A: $15,000. They would receive 5 percent of $500,000 which is $25,000. Sorry.

Q: Do you have an understanding -- you may not have this but if you do -- do you have an understanding of what that equates to as an effective gross participation?

A: I didn't --

Q: That $25,000, what does that mean? How does that equate to the gross participation?

A: Well, it means $25,000 payable over two million; so it would be slightly in excess of 1 percent.

Q: If Warner Bros. budget was three million -- you mentioned that -- your information is that the budget may have escalated to $3 million -- if it was three million per episode, how much additional revenue would DC receive for its gross participation?

A: It would be 5 percent of $1.5 million, which is $75,000.

Q: And do you have an understanding of how that 75,000 translates to an effective first-dollar gross participation?

A: Slightly in excess of 2 percent.

Q: I'd like to turn to what we call the Lorimar agreement, which is Exhibit 181. Drawing your attention to Page 3, paragraphs six through seven, of the Lorimar agreement. What do these paragraphs provide for in general?

A: They provide for payments based on Lorimar producing a 2-hour pilot or MOW based on the character, and also an episodic television royalty.

Q: You testified earlier that the Lorimar agreement was substantially identical to the Superman television agreement. What is the per-episode royalty in the Lorimar agreement?

A: Episodic television is $45,000, which is the same as the Smallville agreement.

Q: And is it deemed in advance against the back-end participation?

A: Yes, it is.

Q: Is the back-end participation the same in the Lorimar agreement as in the Smallville agreement?

A: Yes.

THE COURT: Counsel, it's 12:30. Let's take our second break today.

MR. TOBEROFF: Thank you, Your Honor.

(Whereupon a brief recess was held.)

THE COURT: We're back on the record. Counsel.

BY MR. TOBEROFF: Q: Mr. Halloran, I'll now show you what's been marked for identification as Defendants' Exhibit 1037. It's an agreement between DC Comics and Warner Bros. Television Productions dated January 20, 2002.

Mr. Halloran, do you recognize this exhibit?

A: I do.

Q: Did you review this agreement in preparing your expert report and formulating your opinion in this case?

A: Yes.

Q: What does this agreement pertain to?

A: It pertains to the television rights for a property called Birds of Prey.

Q: I draw your attention to Paragraph 6 on Page 2 of the agreement, and ask you to tell me what it provides.

A: It provides for an episodic payment of $33,000 for each episode.

Q: Is there a gross participation in the agreement as well?

A: Yes, there is.

Q: Is this episodic royalty applicable to DC's gross participation?

A: Yes.

Q: I draw your attention to Paragraph 7 on Page 2 of this agreement, and ask you what that paragraph provides for.

A: It provides for a gross participation which is identical to the gross participation under the Superman agreement.

Q: In connection with this case, did you research the Birds of Prey property?

A: Yes.

Q: Can you tell me a little about it.

A: It's a relatively unknown property owned by DC, that doesn't compare at all to the notoriety or value of Superman.

Q: Was the television series based on the Birds of Prey property?

A: There was a pilot and then a few episodes, and then the series was cancelled.

Q: Let's turn now to the Superboy agreement, Exhibit 15. Briefly look at Page 4, Paragraph Roman Numeral IV, Subparagraph A, Romanette ii; so IV(A)(ii) of the Superboy agreement.

A: Okay.

Q: What does this provide?

A: It provides for an episodic royalty of $12,500.

Q: Is this episodic royalty applicable or nonapplicable to any gross participation of DC under the agreement?

A: It's nonapplicable.

Q: When the episodic royalty is nonapplicable, is that more favorable or less favorable to the rights holder?

A: It's much more favorable to the rights holder, because it doesn't reduce the gross participation.

Q: So does that mean it's in addition to the gross participation?

A: Yes.

Q: I'd like you to look, please, at Page 4, Paragraph IV(A)(iii) of the Superman agreement, Bates No. 16534. What does that provide?

A: It provides for a gross participation of 71/2 percent with respect to the domestic territory.

Q: Is that a first-dollar gross participation?

A: Yes.

Q: And the domestic territory refers to what?

A: United States and Canada.

Q: Is this money in addition to the $12,500 per episode, or not?

A: Yes, it's in addition to.

Q: I'd like you to try to compare the 71/2 percent of domestic gross receipts in this agreement to the 3 percent, increasing to 5 percent after $1.5 million per episode in the Smallville television agreement, and in doing so, take into account that the 71/2 percent of the Superboy agreement applies to the domestic territories, whereas the 3 percent, escalating to 5 percent, in the Smallville agreement applies to worldwide 9 gross?

A: What you would do is, you would take the 71/2 of domestic and then estimate the ratio of the domestic receipts to the worldwide receipts. So my calculation was that this would be equal to approximately 6 percent of worldwide gross.

Q: How did you arrive at that calculation?

A: Based on the result of Smallville, approximately 1/3 of the revenue, according to Mr. Sill's report, was attributable to foreign; and since this was an earlier agreement and the trend was for more receipts to come from foreign, I discounted it a little bit further and came up with 6 percent.

Q: Do you believe in 1987 foreign revenues were the same or smaller than in 2001, as a portion of worldwide television revenues?

A: Smaller.

Q: How does the Superboy character licensed in this 1987 Superboy agreement compare, in your opinion, to Superman in terms of prominence and value?

A: Certainly, the Superboy character was a lot less prominent, a lot less valuable than Superman.

Q: Did you research the history of Superboy and its exploitation before coming to that conclusion?

A: Yes.

Q: Was Cantharus Productions the licensee in the Superboy agreement, an independent third-party, or was it owned by Warner Bros. at the time the agreement was entered into?

A: It was a third party.

Q: Switching subjects, what is a royalty escalation in the television business?

A: A royalty escalation is designed to reward success; so it's typically per season, and the royalty goes up with succeeding seasons, to reward success of the television series.

Q: Is success in television measured by longevity?

A: Yes.

Q: Does that relate to what you spoke of earlier, which was a need to have at least 85 or 100 episodes before a television series is profitable?

A: Yes.

Q: Are royalty escalations customary or uncustomary in the television business?

A: They're very common and customary.

Q: Does the Superman television agreement contain any royalty escalations?

A: No.

Q: What season is Smallville in currently?

A: It's in its eighth, and the ninth season has just been ordered.

Q: When you say "ordered," does that mean they will proceed with the ninth season?

A: It means that Warners is committed to producing the ninth season.

Q: Based on the agreement, has DC's royalty ever increased with the longevity and success of the Smallville television series?

A: No, it has not.

Q: Now, Warner Bros. produced television rights agreements for the following properties: Tarzan, Global Frequency, Gossip Girl, and How to Teach Filthy Rich Girls. Did you review those agreements in writing your report and rendering your opinion in this case?

A: Yes.

Q: Did any of these contain royalty escalations key to the longevity of derivative television series?

A: I believe they all did.

Q: How do you view the value of these properties in comparison to Superman at the time the agreements were entered into?

A: Much, much less valuable.

Q: I'd like to return to the Superman television agreement, Exhibit 222, and draw your attention to Exhibit B, Page 13, Paragraph 1(A)(i)1 of the television agreement. What does this paragraph provide?

A: It provides for a 20 percent home video royalty.

Q: Is there a most-favored nations provision in the television agreement like there was in the -- that you testified to in the Superman film agreement?

A: I don't see one.

Q: How significant is home video exploitation of a television series?

A: It's become very, very significant.

Q: Do you believe home video exploitation of a television series was significant in 2001 when this agreement was entered into?

A: Yes.

Q: I'd like to draw your attention to Paragraph 3 of Exhibit A on Page 9 of the Smallville television agreement, Bates No. WB-135013.

What does this paragraph provide?

A: This paragraph provides for representations and warranties and indemnity.

Q: What is the effect of this provision?

A: The effect of this provision is the same as the effect nder the Superman film agreement, which was DC was giving Warner Bros. a guarantee that they were the sole owner and that there were no claims that would interfere with the rights. And it further provides that DC would be responsible as to indemnify Warners for any damages that Warners might be caused by the representation and warranty.

Q: And this agreement was entered into after Warner Bros.' receipt of the termination notices and the effective date of the termination?

A: Yes.

Q: I draw your attention to Page 4, Paragraph 9 of the Smallville television agreement, and ask you what this term provides.

A: This is a so-called creative controls and approvals paragraph.

Q: Does this provision give DC any actual creative controls regarding Smallville?

A: Not really.

Q: Why do you say "not really"?

A: If you look at it, it starts out -- and it does say that the depiction of the character will be consistent with the property, but there are no specific approvals such as the ones that were in the Superboy agreement.

Q: Now, in the event of a creative disagreement between DC and Warner Bros., whose decision controls?

A: Warner Bros.

Q: I'd like you to compare the 1991 Lorimar agreement, which is Exhibit 181. I direct your attention to Page 4, Paragraph 9 of the Lorimar agreement, Bates WB-134889.

A: It appears this is an identical provision.

Q: Does DC have any rights of approval as to the pilot script and casting of the lead roles in the Lorimar agreement?

A: None that I see.

Excuse me. There is a right of approval with respect to the pilot script and the roles of Superman and Lois Lane.

Q: The roles of Superman and Lois Lane?

A: Yes.

Q: And are these real rights of approval, or are they illusory, as you've described in the Superman film agreement and Superman television agreement?

MR. BERGMAN: Objection. Leading.

THE COURT: It is.

Please, Counsel.

BY MR. TOBEROFF: Q: How would you characterize these rights of approval?

A: These are actual approval rights, whereas the approval rights in the Smallville agreement was only consultation. So in this agreement, DC would have the ultimate right to approve the pilot script and the actors for Superman and Lois Lane in the Smallville agreement that was watered down to consultation.

Q: So is the 1991 Lorimar agreement, which DC and Warner Bros. uses as a template for the Smallville agreement, more favorable in this respect to DC than the Smallville agreement?

A: Yes.

Q: I'd like you to turn back to the Superboy agreement, Exhibit 15 for a moment. I direct your attention to Page 7, Paragraph 7 of the Superboy agreement.

A: Okay.

Q: What, if any, creative approvals are found in this agreement?

A: There's a multitude of creative approvals that DC had in this agreement.

Q: Could you please walk us through those approvals. .

A: It's hard to do it on the screen.

Should I try doing it on the screen?

Q: Whatever is best for you.

A: These approvals essentially track the approvals that were worked out between DC and the Salkinds with respect to the Superman film agreement. They are very strong.

Q: What approval rights does DC have under the Superboy agreement, Page 7, Paragraph 7?

A: Right. Well, first of all, the licensee can only depict the program consistent with the character, and there could be no new characters. The programs could not be satirical or obscene. There's approval of the treatment and plot outline treatment and teleplay. There was a mechanism for approval over changes to the teleplay. There was approval over the role of Superboy. There was approval over the Superboy costume. There was approval over the title.

Q: How do these approvals compare to the approvals that you spoke of earlier that are in the 1974 third-party Salkind agreement?

A: They are very much analogous.

Q: How would you compare the creative approvals found in the Superboy agreement with those found in the Smallville agreement?

A: The agreements are much, much stronger in this third-party agreement than they are with the internal agreement regarding Smallville.

Q: I'd like to turn now to a different set of agreements, and show you what's been previously admitted as Exhibit 52, an agreement between DC Comics and Warner Bros. Television Animated, dated January 1, 2000, regarding the television animation rights to Justice League of America, which includes Superman.

Mr. Halloran, did you review this agreement in connection with this case?

A: Yes, I did.

Q: I'd like you to turn to Page 2, Paragraph 6 of this Exhibit 52.

What does this paragraph provide?

A: It provides that DC would receive 30 percent of the defined proceeds from the series and a direct video program.

And defined proceeds are essentially a net profits definition. By most measures, they are meaningless.

Q: Well, turn to Page 13, entitled Exhibit B of this exhibit. I believe the definition of "defined proceeds" -- that's the definition of "defined proceeds"?

A: Yes.

Q: First of all, walk us through -- how do you arrive at defined proceeds? In other words, how are defined proceeds calculated pursuant to this agreement?

A: Do you want me to talk in general how they're done or –

Q: In general, to your knowledge of the agreement.

A: The way it works, both in the film business and the television business, is that you have -- initially, you start with the amounts of money that are included in gross receipts.

And one important measure there is how much of the video money is being included. And once you take that amount, that's on the plus side of the ledger, and then you go to the minus side of the ledger, which you take out distribution fees, which are an artificial profit center. They're usually in excess of the actual costs of distribution. And then you take out the cost of distributing the picture and the cost of producing the picture and any gross payments to gross participants, and then the balance is so-called defined net proceed; and that's what's divvied up.

Q: Is imputed interest and imputed overhead added to the cost, the net calculation --

A: That's an additional profit center.

Q: Is it deducted from revenues?

A: It is deducted from revenues.

Typically, the cost of production is -- there's an overhead component, and there's usually interest charged on the production costs, which is an artificially high rate.

Q: In a typical net profits definition like this, what are the distribution fees?

MR. BERGMAN: Your Honor, lack of foundation. There's no evidence that this man has any animation experience at all.

THE COURT: Lay a little foundation, Counsel.

BY MR. TOBEROFF: Q: Do you have experience with animation agreements in your 30 years of working in the entertainment industry?

A: Yes.

Q: Do you believe that, in the net profits definition in animation agreements the distribution fee is the same or different than in the net profits definition --

THE COURT: This is what you need to lay a foundation for, for him to know things like this.

BY MR. TOBEROFF: Q: Are you aware of the terms of animation agreements?

A: Yes.

Q: Are you aware of the way net profits are defined in animation agreements?

A: Yes.

Q: Would you be able to tell me what the typical distribution fee would be for domestic territories and foreign territories and those net profit definitions?

A: Yes.

Q: What are they?

A: They are typically 10 to 20 percent for -- they're usually 10 percent for major networks. They're a lot higher, 30 to 40 percent, outside of the United States. That's basically how they work.

Q: Are those the distribution fees in this agreement?

A: Yes.

Q: You said the profits under this definition would be -- I think "meaningless" was the word you chose. Why did you say "meaningless"?

A: Because if you take the anticipated revenue and put that on the plus side and then you take the series of deductions, the net amount that the participation that would apply to would be zero.

Q: Did you review the profit participation statements that have been produced by Warner Bros. in this case pursuant to this agreement regarding the Justice League of America?

A: I don't recall reviewing them.

Q: Did you review the profit participation statements coinciding with the various television animation agreements that you reviewed?

A: I don't remember reviewing them.

Q: Does this "net profit" definition as contained in the Justice League of America animation agreement favor Warner Bros. or favor DC?

A: It favors Warner Bros.

Q: Did you review, in connection with this case, DC's television animation agreements with Warner Bros. for the Superman derivatives the Legion of Super-Heroes and the Legion of Super-Pets?

A: Yes.

Q: Did that contain the same 30 percent of defined proceeds, or net profits, as you called them?

A: Yes.

Q: Based on the way defined proceeds are defined in these agreements, would you expect or not expect DC to receive money through their participation?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: If you were representing DC with regard to these agreements, would you advise your client that they should expect to receive money as a result of their net profit participation?

MR. BERGMAN: Same objection.

THE COURT: Rephrase your question, Counsel.

MR. TOBEROFF: It's a hypothetical.

BY MR. TOBEROFF: Q: If you were representing DC with respect to these agreements, before signing these agreements, if you were asked whether or not they could expect to receive money under these agreements, how would you advise your client?

A: I would advise them they should not expect to receive any money under this definition.

Q: Is that based on the way the "net profits" is defined inthe agreements?

A: Yes.

Q: I'd like to turn now back to a subject we touched upon in the Superman film agreement. And it was the home video royalty.

I'd like you to turn to Paragraph 19 of the Superman film agreement, Exhibit 232. Turn your attention to Page 19, Paragraph 1 (D) (a) .

A: Okay.

Q: I believe you testified that pursuant to the Superman film agreement, DC had the minimum 20 percent home video royalty. Does this paragraph provide what you referred to earlier as a most-favored nations provision?

A: No.

Q: What agreement are you looking at?

A: I'm looking at the Superman film agreement; and I'm looking at the video royalty.

Q: Page 19, Paragraph (D)(a)?

A: Yes. Oh, I stand corrected. There is a favored nations in here.

Q: I'm sorry?

A: There is a favored nations clause in here, because it says on a picture-by-picture basis, they'll include a defined gross, no less than what they pay to other participants.

Q: How is "other participants" defined in the Superman film agreement for the most-favored nations provision relating to the 20 percent minimum video royalty?

A: It says "any party entitled to share in the revenues of the picture."

Q: Are there any qualifications to the definition of "any party"?

A: No.

Q: How does this most-favored nation provision work in practice?

A: The way it works in practice is that if there's any other party that participates in the proceeds from the picture and they get an amount greater than 20 percent of the home video royalty, the participant who has the most-favored nations clause gets the advantage of that. So there's a step up of the royalty equal to the highest royalty among the people who are participating in the home video.

Q: Does this provision favor DC?

A: Yes.

Q: If any other participant receives a higher percentage of home video revenues in their participation definition, would DC be entitled to the same percentage of home video revenues in DC's definition of "gross receipts" under the Superman film agreement?

A: Yes, they would.

Q: What if the participants differed in some respect? Let's say one is an actor or a director, or one is a financier of the picture. Would that make a difference in the application of this most-favored nations provision, as written?

A: No. It's broadly drafted. It says "any party entitled to a share in the revenues of the picture."

Q: Now, when a studio such as Warner Bros. makes participations to participants and renders them an accounting statement, do they strictly follow the terms of the participations as defined in the applicable contracts?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Are you familiar with the practices of Warner Bros. with respect to rendering account statements?

A: I'm very familiar with the way that studios render statements. When I was at Universal and I did deals, the participation/accounting department would bring to me the participation, and I would check and make sure that it absolutely conformed with the agreement; and I think Warners does the same thing.

MR. BERGMAN: Same objection. He's speculating as to what Warner does.

MR. TOBEROFF: Your Honor, if I may.

THE COURT: Withdraw?

MR. TOBEROFF: He's not a percipient witness. He can draw from his experience in the entertainment industry.

THE COURT: But he can't attribute that to Warner Bros., Counsel. He can state what his experience is. Move along. We can't attribute that to Warner Bros. without further foundation.

BY MR. TOBEROFF: Q: Do you have any reason to believe that Warner Bros. would account to participants as a major studio differently than Universal would account to participants? In your experience, do you have any reason to believe they would account differently, or not?

MR. BERGMAN: Same objection.

THE COURT: I'll overrule the objection.

That now goes to the weight of the evidence.

THE WITNESS: Could you repeat the question.

BY MR. TOBEROFF: Q: You said you had experience at --

THE COURT: The court reporter will read back the question.

(Whereupon, the last question was read back.)

THE WITNESS: No. And I'd also like to add that I see participation statements from all different companies and check them against contracts, and I'm involved in audits and the like; so it's a very precise process.

BY MR. TOBEROFF: Q: And with respect to those participation statements that you've seen, do they precisely track the participation terms of the relevant contracts they're rendered pursuant to?

A: Usually on the face of them they do. But sometimes there's audits where there's adjustments made. But I've never seen it where it doesn't track how the contract works.

Q: Do you believe the most-favored nations provision is ambiguous or unambiguous as drafted?

THE COURT: You're asking about most --

MR. TOBEROFF: The most-favored nations provision.

THE COURT: In this particular --

MR. TOBEROFF : Yes.

THE COURT: I misunderstood the question.

THE WITNESS: I think it's very unambiguous.

BY MR. TOBEROFF: Q: Have you seen most-favored nations provisions with expressed limitations as to their applicability?

A: Yes, I have.

Q: Do those most-favored nations provisions ever exclude certain types of participants?

A: Yes, they do. They typically will exclude financiers.

Q: When financiers are excluded, is that expressly stated in the most-favored nations provisions you've seen, or not?

A: Yes. It's an expressed exclusion.

Q: Is there any such exclusion of financiers in the Superman film agreement's most-favored nations provision applicable to the home video royalty?

A: No, there's not.

Q: I'd like to show you what has previously been identified as Plaintiffs' Exhibit 48. It's an agreement between Warner Bros. Pictures and Legend Pictures.

A: It's Legendary, I believe.

Q: Actually, it's Legend Pictures, LLC.

THE COURT: Gentlemen, stop that.

Wait until he's finished his question. Don't correct him. When his question is done -- the court reporter just can't listen to both of you at once. She's having an understandably difficult time.

THE WITNESS: I understand. I'm sorry.

BY MR. TOBEROFF: Q: Plaintiffs' Exhibit 48 is an agreement between Warner Bros. Pictures and Legend Pictures, LLC, dated June 10, 2005.

I'd ask that the clerk please provide a copy to the witness.

Did you review this agreement in connection with your analysis in this case?

A: Yes.

Q: What does this agreement relate to?

A: It relates to a co-financing agreement between Warners and Legend Pictures, which is known as Legendary.

Q: Did Legend Pictures co-finance Superman Returns pursuant to this agreement?

MR. BERGMAN: Objection. Lack of foundation.

MR. TOBEROFF: Strike that.

BY MR. TOBEROFF: Q: This agreement you mentioned provides for Legend's co-financing of films based on the Superman character?

A: I believe it does.

Q: Please turn to Page 12 of Exhibit 48.

A: Okay.

Q: Please provide a general description of what Page 12 provides.

A: What paragraph are you talking about?

Q: Page 12?

A: Okay.

Q: Does Page 12 describe how revenues from co-financed films are shared between Legend and Warner Bros.?

A: Page 10 does, I believe.

Q: I'm sorry. My notation --

A: Without looking at it, I can describe how it works.

Q: This is Exhibit 37.

A: I'm looking at Exhibit 48. I was handed Plaintiffs' Exhibit 48.

Q: I understand. It's my mistake. I apologize.

A: They are virtually identical, so it's understandable.

Q: Exhibit 37 should now be the correct exhibit, the agreement between Warner Bros. Pictures and Legend Pictures, LLC, dated June 10, 2005.

I'd like you to turn to Page 12, and I'll ask you about the provision on Page 12.

A: This is a co-financing agreement between Warners and Legendary, and this provision talks about how the -- the preference of payments and -- first, what goes into gross, and then who gets what when.

Q: How are home video revenues treated in the Legendary agreement? Are they treated under a royalty basis, or not?

A: They are treated on a so-called 100 percent basis, not on a royalty basis.

Q: So as opposed to 20 percent of home video revenues being included in Legend's participation definition, 100 percent are included?

A: Yes.

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: What do you mean by 100 percent basis?

A: In contrast to the 20 percent of wholesale, most financiers, virtually all financiers, are entitled -- instead of 20 percent of the revenue going into the pot, they get 100 percent going into the pot. Of course, there are also expenses related to the home video distribution which dilute that 100 percent, so it's not quite apples to apples; it's not 100 percent royalty. There's no such thing. As we know in the top end, home video royalties were in the 35 to 40 percent range. The whole notion of a co-finance agreement is, your money is as good as my money, and they're treated the same.

Q: Now, under Paragraph 1(D)(a) of the Superman film agreement, which contains the most-favored nations provision, would Legend Pictures, LLC, be deemed a participant based upon your reading of that contract?

A: Yes.

Q: What is the effect of the applicability of this most-favored nations provision to the amount of home video revenues included in the Legend Pictures agreement?

A: Enforcing the most-favored nations provision, it would mean that DC would be entitled to the benefits that Legendary was entitled to under this co-financing agreement.

Q: More specifically, what does that mean?

A: That means that rather than a 20 percent royalty, there would be 100 percent put into the gross receipts, minus expenses.

Q: Based upon your review of the record in this case, was there anything to suggest that DC had ever enforced this most-favored nations provision with respect to the Legend Pictures agreement that has a more favorable definition?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Based on what the witness has reviewed. Overruled.

THE WITNESS: I've not seen participation statements that would give me that answer, but that doesn't change my opinion, which is that the most-favored nations clause would apply based on my reading of the contract.

BY MR. TOBEROFF: Q: I understand.

If you had been retained by DC Comics as their representative to bring the Superman film agreement into the open market, what do you believe you would be able to obtain in specific agreement terms, based on your analysis of these various comparable agreements in this case, based on your experience as to the marketplace, and based on your analysis of the marketplace for comic book characters in the time period 1999 to 2002? What terms do you believe, as a transactional attorney, you would be able to obtain for DC?

MR. BERGMAN: Objection. Incomplete hypothetical; calls for speculation.

THE COURT: It's a very interesting question, Counsel.

I'm just trying to think if it really is too speculative. You're asking the witness to put himself in the shoes of a hypothetical entertainment lawyer that would have been hired by DC Comics to negotiate with somebody other than Warner Bros. for the sale of the rights. Is that what you want to ask?

MR. TOBEROFF: With only one change. He's not a hypothetical entertainment lawyer; he is an entertainment lawyer.

THE COURT: Right. The hypothetical is him being retained by Warner Bros. for DC Comics.

MR. TOBEROFF : Yes.

THE COURT: I'm aware that the witness is an entertainment lawyer, and a very prominent one at that. Well, he's testified at length as to why he thinks the deal is not -- I'll conditionally overrule the objection. I want to hear the answer and the basis for the answer.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. TOBEROFF: Q: Do you understand the question?

A: Yeah, I do.

THE COURT: I suspect this is not the first time he's heard it, Counsel.

THE WITNESS: If I had the opportunity and the honor in 2002 to have gone and been able to put the Superman property, film rights, to bid, or even a property equivalent to Superman -- we don't have to say Superman, but if you had a Superman-quality character, I'm confident that I'd be able to achieve -- I'd probably be able to get a purchase price, and not necessarily have to have it optioned, of $10 million per film.

If I did do an option, it would be for 12 to 18 months for each period, and I would get at least 10 percent of the option price. So that would be a million -- of the purchase price, rather -- so it would be a million. I'd be able to get a dollar-one gross participation. The purchase price would be applicable to 10 percent from dollar one, which would escalate based on the success of the film; ultimately, I think, to the level of approximately 20 percent, as was in the timeline agreement.

Very importantly, I would be able to get the sort of creative controls that DC had enjoyed in prior agreements and the sort of creative controls that companies like Marvel insist on. I think I definitely would have been able to get a very strong merchandising deal, where the film-related merchandising would be shared at least on a 50/50 basis, and I think with a fee less than the Warners' 25 percent fee, because of the history of the success of Superman merchandising. I think I would be able to get a producer deal for Mr. Levitz, like I got in the Neo-Pets agreement, which we saw in the various other agreements, which would augment that purchase price. And on that previous deal, I think I'd be able to get an additional participation.

I most certainly would get a reversion right. There's no way a property like Superman would go on the market in 2002 and there wouldn't be a provision where the company purchasing the rights could sit on the rights. That's just -- there's no way that I would allow DC to do something like that.

And I think lastly, I would insist on a co-financing opportunity for DC. So if, in fact, they wanted to bet on the property, they would be able to do that. I know Marvel does that now for Iron Man. They have a multi-picture deal; and they, in fact, finance their pictures and make a -- based on the structure, they make a multiple of what they would otherwise get based on a traditional structure.

So I would go for all of these things.

Oh. And I would also exclude from any sort of warranty a claim akin to the claim that was brought in this case, to make sure that DC would not be potentially responsible for millions of dollars of legal fees and damages.

MR. TOBEROFF: Thank you. I have no further questions at this time.

THE COURT: Very well. We will pick up with the cross-examination on Tuesday morning at 9:00. I trust you'll be prepared, Counsel.

MR. BERGMAN: Indeed I will, Counsel.

THE COURT: Have a great weekend. I look forward to seeing you all next week.

(Trial Day 4 concludes.)

SUPERMAN

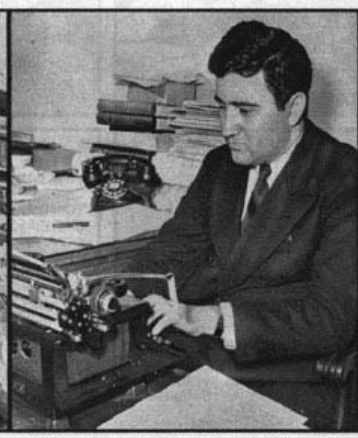
NEW COMIC STRIP HERO PROVES THERE'S BIG MONEY IN FANTASY

AN IMAGINARY MAN popped out of an imaginary planet less than two years ago. Today he is one of the most popular of all comic strip characters. He is Superman, a character who combines the best talents of a Robin Hood and a god, and every day his feats of strength, speed and benevolence bring thrills to millions of newspaper and comic magazine readers.

Co-fathers of this amazing character are Jerry Siegel and Joe Shuster, both under 30. As boyhood friends in Cleveland, Siegel and Shuster dreamed of what they would do if they were the world's strongest men. Superman is the extension of their dream, and proof that Americans still like their fantasy raw.

Fifty thousand kids own certificates like this — evidence that they belong to the Superman Club.

ACTION COMICS, with regular installments of Superman, leads the field of comic magazines (latest publishing sensation) with 600,000 copies a month, and Superman Quarterly sells a million. Newspaper syndication reaches 4,500,000 readers daily.



JERRY SIEGEL WRITES a detailed script for Superman, with dialogue and action, after the sequences have been discussed and plotted in a six-man conference, composed of Siegel, Shuster, two editors, the publisher and the circulation manager.

SHUSTER FOLLOWS Siegel's script for his drawings. One of the team's brighter ideas was to give Superman a double identity; as a timid, bespectacled reporter, Clark Kent, he scores scoops on his own amazing deeds. **CONTINUED ON NEXT PAGE**

TRIAL DAY 5

A.M. Session

Tuesday, May 5, 2009; 9:33 A.M.

WITNESS: MARK HALLORAN (cont'd)

THE CLERK: Calling item No. 2 on calendar, case No. CV 04-08400-SGL, Joanne Siegel, etc., versus Warner Bros. Entertainment, Inc., etc.

Counsel, please state your appearances for the record.

MR. TOBEROFF: Good morning, Your Honor, Marc Toberoff for plaintiffs.

MR. WILLIAMSON: Good morning, Your Honor, Nicholas Williamson for plaintiffs.

MR. ADAMS: Keith Adams for plaintiffs.

MR. BERGMAN: Michael Bergman for the defendants.

MR. PERKINS: Patrick Perkins for the defendants.

MS. MANDAVIA: Anjani Mandavia for the defendants.

THE COURT: Good morning to you all, Counsel. The Court is ready to resume with the trial. I did receive the plaintiff's motion in limine to exclude new documents subpoenaed by defendants on May 1, 2009. I trust that an opposition is being prepared for this, or not?

MR. PERKINS: We will, Your Honor. We don't have a document yet. We've served the subpoena.

THE COURT: Okay.

MR. PERKINS: But we can address it, if you would prefer.

THE COURT: Are you planning to file an opposition to this?

MR. PERKINS: Well, we just got it this morning. We didn't know whether Your Honor was going to try to address it orally or whether you'd prefer a written response.

THE COURT: I'd prefer a written response.

MR. PERKINS: We will do that, Your Honor.

THE COURT: By tomorrow morning?

MR. PERKINS: Certainly.

THE COURT: And you won't be planning to use the subpoena documents until then?

MR. PERKINS: Correct.

THE COURT: Very well. Mr. Toberoff.

MR. TOBEROFF: I was prepared to be heard regarding the subpoena.

THE COURT: Let's give them a chance to respond. Counsel, I think you're going to begin with your cross-examination this morning?

MR. BERGMAN: That's correct, Your Honor. Thank you.

THE CLERK: Mr. Halloran, please be advised you're still under oath.

CROSS-EXAMINATION

BY MR. BERGMAN: **Q:** Good morning, Mr. Halloran.

A: Good morning, Mr. Bergman.

Q: Mr. Halloran, I couldn't help but notice this morning that as you were sitting in the back row, one of counsel came back and gave you a document, and then Mr. Toberoff came back and talked to you, and then you came over to counsel table a couple of times with the document in your hand and talked to them. What was that document?

A: It's a chart that I prepared over the weekend of the various documents.

Q: Is there a copy of that that we can have?

(Document provided.)

MR. BERGMAN: Thank you.

BY MR. BERGMAN: **Q:** This morning I'd like to look a little further into your background and your experience as an entertainment lawyer. Okay?

A: That's fine.

Q: You graduated Hastings Law School in what year, sir?

A: 1978.

Q: And am I correct that from that time, before you went to Orion, in those two years, that you were at two different law firms?

A: Well, you're assuming two different -- you're saying two years.

Q: You were at one law firm in 1979; correct?

A: Yes.

Q: And then you went to another law firm in 1980; correct?

A: That's correct.

Q: And then in 1981, you went for the first time to Orion.

A: Filmways Orion, yes.

Q: I understand that Filmways became Orion, so I'm just going to refer to it as Orion.

A: That's fine.

Q: You'll understand I mean both?

A: I will.

Q: During those two years before you got to Orion, you didn't do any entertainment practice, did you?

A: I did some entertainment practice.

Q: What kind?

A: Well, I was active in the Beverly Hills Bar Committee for the Arts, and I put together a book called The Musicians Business and Legal Guide. And I also did a little bit of music law.

Q: In your Exhibit B, I believe to your report -- or I think it's Exhibit A, you refer to the type of work that you did. It isn't Exhibit A, it's in your resume.

A: Could I take a look at that?

Q: Sure. Go ahead.

A: It's in my expert report; correct?

Q: That's correct, sir.

A: Do we have my expert report?

Q: You indicated that, at the first firm that you were employed at, you did some insurance defense --

A: That's correct.

Q: -- coverage work; is that correct?

A: That is correct.

Q: And then the second firm you were employed at, you did some business litigation with an emphasis on real estate and breach of contract; correct?

A: That is correct.

Q: Now, at the time you joined Orion, who was the head of business affairs there?

A: The ultimate head of business affairs was Bill Bernstein.

Q: Okay. And --

A: The person who I --

Q: Who was the second in command?

A: Second in command was Bob Geary.

Q: Bob who?

A: Geary.

Q: G-e-a-r-y?

A: Exactly.

Q: And under Mr. Geary?

A: Under Mr. Geary, there was me and some other lawyers.

Q: Who were the other lawyers?

A: Stuart Boros was one. Orion was a bi-coastal company, so there were lawyers in New York as well; so the lawyers in New York were John Logican, John Hester. There was a Mr. Schwartz.

Q: Is that Jerry Schwartz?

A: No, that was not Jerry Schwartz. Jerry Schwartz was at Filmways.

Q: Okay.

A: And then on the West Coast, in addition to Stuart Boros, there were a few other lawyers; including, Rochelle Blackman.

Q: And when you say -- three, four, five lawyers?

A: Yeah, in that range.

Q: So two years out of Hastings when you got to Orion, you were the low man on the totem pole, were you not?

A: I wouldn't -- I don't think I was. Within the confines of the lawyers below Bob Geary, I was the head person on the music side. But I was parallel to the other lawyers on the film side.

Q: How much of your time at Orion was spent in the music area? What portion of your time?

A: I'd probably say a quarter or so.

Q: Now, am I correct, Mr. Halloran, that at your deposition, you could only recall two literary acquisitions; X-Men and The Cotton Club, that you had any involvement with at all; is that correct?

A: At the deposition, that's what I may have recalled. But I obviously was involved in more than what I recalled at the deposition.

MR. BERGMAN: Move to strike everything after "recalled," Your Honor.

THE COURT: It's stricken.

BY MR. BERGMAN: **Q:** Now, X-Men was in 1982 or 1983; correct?

A: That's my recollection.

Q: And at your deposition, you told me, didn't you, that you negotiated a rights' acquisition on X-Men from Marvel Comics; correct?

A: That's my recollection.

Q: Do you recall that as clearly as you recall all of your other experience?

A: I recall my other experience much more clearly.

Q: And you understand, Mr. Halloran, that when I talk in this case about underlying literary properties, I'm referring to works that have been previously published in one form or another as opposed to a screenplay that someone has written or something of that nature. Do you understand that?

A: I understand the distinction, yes.

Q: Okay.

Now, with respect to the X-Men agreement that you negotiated with Marvel, you don't recall the option price of that agreement, do you?

A: No.

Q: And you don't recall the exercise price.

A: No, I don't.

Q: You don't recall the contingent compensation amount.

A: No.

Q: You don't recall the merchandising split.

A: I don't.

Q: The only thing that you recall is that the licensor's contingent compensation was not first-dollar gross; correct?

A: That is correct.

Q: Isn't it a fact, Mr. Halloran, that you had nothing whatsoever to do with the acquisition of the literary rights to X-Men while you were at Orion?

A: I do remember -- what I remember specifically was I dealt with the Marvel option purchase. My best recollection was that it was X-Men, but I remember I did do a Marvel deal.

Q: Isn't it a fact that the Marvel deal for the acquisition of X-Men had been negotiated, agreed upon and executed before Orion had even gotten involved?

A: That may well have been true.

As we know, oftentimes, producers will acquire rights and then set them up with a studio. That happened in Hannibal; it happened with -- it happens very frequently.

MR. BERGMAN: Move to strike everything after "true."

THE COURT: It's nonresponsive. Mr. Halloran, during cross-examination, it's going to be a little different than it was during direct examination. Plaintiffs' attorney is going to have a chance to get up and clarify any of these questions.

THE WITNESS: Okay.

THE COURT: But it's going to be important, so we don't keep going through this, that you just answer the question being asked and leave it to Mr. Toberoff to re-examine.

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** Mr. Halloran, isn't it a fact that the acquisition of the X-Men rights from Marvel occurred by an agreement executed and dated as of April 14, 1982, between a company called Nelvana, N-e-l-v-a-n-a, Limited and Marvel Comics?

A: I don't have that specific recollection right now. If you showed me the document, I could verify it. But I don't have personal knowledge that that is, indeed, how the transfer happened.

MR. BERGMAN: Your Honor, may I approach.

THE COURT: You may. I assume you've provided a copy to counsel?

MR. BERGMAN: Unfortunately, Your Honor, I just got these documents this morning. We have not copied them yet. We will at the first break, and we'll provide it counsel.

THE COURT: Have him take a look at it to start with.

MR. BERGMAN: Sure.

MR. TOBEROFF: Your Honor, if I may, is it possible that he waits with this line of questioning until we can receive a copy? I don't know --

MR. BERGMAN: I'm not going --

MR. TOBEROFF: -- how far into the document the questions will go.

MR. BERGMAN: It will not go far at all, Your Honor.

It will not go beyond the fact that it was executed at a certain time.

THE COURT: With that foundation, I'll allow you to go forward, and then we'll make copies during the break.

(Document is provided to witness.)

BY MR. BERGMAN: **Q:** Is the agreement executed, Mr. Halloran?

A: It is.

THE COURT: Counsel?

MR. TOBEROFF: There's been no authentication of this document. We have no idea how defendants got this document.

MR. BERGMAN: I'd be glad to explain.

MR. TOBEROFF: It's not an Exhibit. It was not produced in this case.

THE COURT: Counsel, is this for impeachment?

MR. BERGMAN: Yes, it is, Your Honor.

MR. TOBEROFF: Still, there's no authentication even for impeachment.

THE COURT: Lay a foundation.

This is kind of difficult without copies. I understand that you said you just got this moments ago and didn't have a chance to copy.

Cindy, would you please make copies of this.

And then lay an authentication, lay a foundation and then proceed forward.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** Mr. Halloran, when I took your deposition and you testified that you negotiated the Marvel X-Men acquisition, I asked you who you negotiated it with; correct?

A: Yes.

Q: And who did you identify?

A: I believe I identified Linda Lichter.

Q: Okay.

Are you aware that in 1982 and 1983 Ms. Lichter was a member of my law firm, a partner of mine?

A: I am aware of that.

MR. BERGMAN: May I proceed, Your Honor.

THE COURT: Proceed on something else until we get the copy of the document.

BY MR. BERGMAN: **Q:** Putting aside whether or not you were involved at all in that underlying agreement, am I correct that the agreement, which is dated '82, didn't make its way to Orion and Bill Bernstein until 1983?

A: I don't have a specific recollection of exactly when it got there.

Q: And am I correct that Nelvana and its financing partner approached Orion with the rights, asking for a deal for the making of a movie?

MR. TOBEROFF: Objection, Your Honor. Calls for speculation.

THE COURT: If you know.

THE WITNESS: My recollection is that Nelvana did come to Orion and submit that agreement as part of a proposal.

BY MR. BERGMAN: **Q:** Okay. And am I correct, sir, that at some point in time, Orion made an offer to Nelvana and its financing partner for such a film?

A: I was not involved in that.

Q: You were not involved at all; correct?

A: No. That's not true. I wasn't involved in the offer, if any, that was made to Nelvana. I was the lawyer on the project.

Q: And as the lawyer on the project, you didn't negotiate the agreement between Orion and Nelvana and its financing partner, did you?

A: No.

Q: Do you recall who the financing partner of Nelvana was at the time?

A: No.

Q: The other film that you identified having done work on at Orion during the course of your deposition was The Cotton Club; correct?

A: Correct.

Q: Okay.

And am I correct that you had no involvement at all in the acquisition of the literary rights for Cotton Club?

A: That's not accurate.

Q: You didn't negotiate the agreement; correct?

A: I didn't negotiate the agreement, but I vetted it.

Q: And when you say you "vetted it," by that, do you mean that you did the chain of title work on the film?

A: Yes.

Q: And just so the Court has an understanding of what that entails, am I correct that when a lawyer at a studio does a chain of title, the first thing he does is get a copyright report, or the second thing he does?

A: It is certainly one of the initial things that's done in conjunction with assessing the chain of title.

Q: When you get the copyright report, the next thing you do is you look to see if there are any problems with the title; correct?

A: Yes.

Q: And if there's a document identified in the title report that shows that there may be a problem, you send for a copy of that document; correct?

A: Yes.

Q: And then you analyze that document and see whether you have, in fact, obtained the appropriate exclusive rights to do a film; correct?

A: Well, you assess it in the context of all of the agreements. But yes, that certainly is the goal to make sure that you have the rights to make the film.

Q: And you don't recall what the terms of The Cotton Club agreement were, do you?

A: Not off the top of my head, no.

Q: On direct examination, Mr. Toberoff asked you what films you worked on at Orion.

Do you recall that?

A: Yes.

Q: And you identified a number of films; including, Breathless, Cotton Club, The Falcon and the Snowman, The Hotel New Hampshire, Amadeus and The Woman in Red; correct?

A: Yes.

Q: Now, you weren't suggesting that you handled the negotiations for the acquisition of the rights to any of those films, were you?

A: Typically, Orion would rely on the producer to do that, but I would check it as part of vetting the chain of title.

Q: Could you answer my question?

A: I believe I did.

Q: You're not suggesting, are you, that you handled the negotiations for the acquisition of the underlying literary rights for those films, are you?

A: Not -- I don't think I did. I vetted them, and I checked them. I didn't necessarily negotiate them because we relied on the producers to do that.

Q: Okay.

And you didn't do anything to determine the market value of the rights underlying any of those films, did you?

A: At that point, I was a lawyer, and I wasn't involved really in assessing market value. I was concerned with the chain of title aspects.

Q: I understand. Thank you.

After four years at Orion, you moved on to Universal, I believe, as you've testified, where you were from '85 to '90; correct?

A: That is correct.

Q: And what was your first position at Universal?

A: I was business affairs' counsel.

Q: Could you explain how business affairs' counsel differs, if at all, from business affairs' executive?

A: Yes. The distinction is that business affairs' counsel would sometimes actually draft the documents. It's a hybrid position. The notion of business affairs is that you actually negotiate the upfront deal points to an agreement. If you're business affairs' counsel, you have a hybrid role and you not only negotiate, but you document, depending on the particular deal.

Q: Okay. Thank you.

If you could put yourself back in 1990, as we all wish we could, who was the head of Universal business affairs at the time you joined in '85?

A: Mel Sattler.

Q: Mel Sattler at that time was an experienced, accomplished business affairs' executive, wasn't he?

A: He absolutely was.

Q: And below Mr. Sattler, who was number two in the department?

A: Jerry Barton.

Q: And was Mr. Barton a business affairs' executive?

A: I believe he had the title of vice president.

Q: And who acted under Mr. Barton?

A: I did.

Q: When did Mr. Sattler leave Universal?

A: I believe he left Universal in the mid-to-late '80s.

Q: '87, '88?

A: That would be a good estimate.

Q: Now, did there come a time when you were promoted from business affairs' counsel to some form of business affairs executive at Universal?

A: I was promoted to vice president of business affairs.

Q: And when was that, sir?

A: 1986.

Q: Did anybody share that title in business affairs?

A: Jerry Barton may have shared that title for a while.

Q: Was it the same title, or was it a senior VP, an executive VP?

A: I'm not sure of his exact title at the time.

Q: Who did you report to until Mr. Sattler left?

A: In 1986, when I was promoted, I began answering to Tom Pollock.

Q: Am I correct that, when Mr. Pollock took over, he advised -- strike that.

Did Mr. Pollock, at some point, terminate Mr. Sattler, or did Mr. Sattler leave?

A: Mr. Sattler retired, as I recall.

Q: And what year was that again?

A: We just --

Q: '87 or '88?

A: That is our best estimate.

Q: And when Mr. Sattler retired, am I correct that Mr. Pollock told both you and Mr. Barton that you would be co-heads of the business affairs department?

A: That's not my recollection of what I was told.

Q: What do you recall being told?

A: Basically, when I was promoted to vice president, I was told by Tom that I would be running the day-to-day affairs of business affairs, and, indeed, I would run the meetings. And Tom asked me to actively reorganize the business affairs and legal departments, which is what I did. At the time, Jerry might have had a nominal title that was the same as mine. But in terms of the actual reporting lines and scope of responsibility, I was running business affairs, not Jerry.

Q: And you did that until Mr. Pollock became dissatisfied with your services; correct?

A: That's not a fair characterization of -- I'm unaware that Mr. Pollock was dissatisfied with my services. He never told me such a thing.

Q: There came a point in time when Mr. Pollock brought in someone to take over the business affairs department, which you say you were running; correct?

A: That's accurate, yes.

Q: And that someone who was brought in to head the business affairs department was Jon Gumpert; correct?

A: That is correct.

Q: And because Mr. Gumpert was brought in to assume the job that you wanted, you left Universal; correct?

A: That's not a job I wanted; it's a job I had. But it is true that Jon coming on board was one of the factors that led to me negotiating a settlement of my contract.

Q: Didn't you testify at deposition that it was a job that you were promised and were hoping to get?

A: Well, what I was promised was a title of senior vice president of business affairs.

Q: And that would come with being the head of business affairs; correct?

A: No. No. It was just an additional title, but my function would not have changed. I was told I would be senior vice president. And then sometimes studios don't keep their word, and I did not get the title.

Q: So is it your testimony that you left Universal because your VP stripes weren't made senior VP stripes?

A: That was one of the things that precipitated my leaving, yes.

Q: Wasn't the actuality of the situation that you left because you were not the head of the department?

A: No; that's absolutely wrong.

Q: When Mr. Gumpert came in, he was a head of the business affairs department, was he not?

A: I was the head of the business affairs department, and then Mr. Gumpert came in and I left.

Q: And Mr. Gumpert came in as the head of the business affairs department, didn't he?

A: Yes.

Q: And it was because he came in as head of the business affairs department that you decided to leave.

A: That was one of the factors, yes.

Q: Okay.

Now, while you were at Universal, you told me that at your deposition, you could recall only two literary acquisitions that you had anything whatever to do with at Universal, and that was The Flintstones and the uncompleted Dr. Seuss' project; is that correct?

A: At my deposition when you said "literary projects," we were talking about pre-existing major intellectual properties.

MR. BERGMAN: Move to strike, Your Honor. It's nonresponsive.

THE COURT: Next question, Counsel.

BY MR. BERGMAN: **Q:** On The Flintstones' deal, one of the two deals you've told me about at your deposition as being the only deals you could recall, you don't recall the approximate terms of that deal, do you?

A: One of the things I remember very clearly is that we negotiated the merchandising provisions quite thoroughly. And I remember spending a lot of time working on a mechanism whereby Universal would share in the so-called uplift of increased merchandising that would be triggered by the possible production of The Flintstones' film by Universal. That's the part that I remember most distinctly, because that was the part that was very complicated.

In terms of the option price and the purchase price and contingent compensation, I don't have a present recollection of those terms.

Q: You certainly didn't recall that at your deposition, did you?

A: No. I recall a lot more now than I did then.

Q: Do you recall that at the time of your deposition, which was just March 5, 2009 --

MR. BERGMAN: And I'm referring, Your Honor, to page 31, commencing at line 19 and ending at page 32, line 3.

BY MR. BERGMAN: **Q:** Do you recall being asked this question, Mr. Halloran, and giving this answer:

"QUESTION: And what terms do you recall of The Flintstones' deal?

"ANSWER: I don't remember specific terms. I remember that the structure was that it was -- there was an option payment paid, there was a purchase price, it was contingent compensation, and there was some merchandising split, but I don't remember the exact terms.

"QUESTION: Do you remember the approximate terms of each or any?

"ANSWER: No."

BY MR. BERGMAN: **Q:** Do you recall giving that answer?

A: Yes.

Q: Okay. And among the other things you don't remember about The Flintstones' deal was that you don't recall the names of the representatives of the right holders with whom you were negotiating, do you?

A: I believe that's correct.

Q: And you certainly weren't in charge of The Flintstones' literary acquisition agreement, were you?

A: I'm not sure what you mean by "in charge."

Q: Were you the individual who made the decision as to the amount of money that Universal would pay for The Flintstones' rights?

A: My recollection is that I negotiated the agreement in tandem with Bill -- with Fred Bernstein.

Q: With who?

A: Fred Bernstein.

Q: And who is Fred Bernstein?

A: Fred Bernstein was a senior executive at Universal.

Q: And it was Mr. Bernstein who made the decision, to the extent there was one, as to what Universal would pay for The Flintstones; correct?

A: We worked on the agreement as a whole, and we worked in tandem. But in terms of the -- he probably had seniority to me in terms of the actual price that was being paid.

MR. BERGMAN: Move to strike as nonresponsive, Your Honor.

THE COURT: It's stricken.

Just answer the question, if you can.

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** Mr. Bernstein was a person who made the determination as to what Universal would pay for The Flintstones' rights; isn't that true?

A: I believe that's true.

Q: Now, who made the determination as to what Universal would pay for the Dr. Seuss' literary rights that you said you were involved with?

A: I worked in tandem with Mr. Bernstein on that deal, and Mr. Bernstein would make the ultimate decision on that.

Q: You don't recall any of the terms of that Dr. Seuss' deal that was under negotiation, do you?

A: I do remember some of the terms, yes.

Q: You didn't remember any at the time of your deposition, did you?

A: My recollection is clearer now.

Q: How much work have you done since the time of your deposition on this matter, sir?

A: A substantial amount.

Q: Could you quantify that in terms of hours for me, please.

A: Maybe 40 to 50 hours.

Q: Forty to 50 hours since your deposition?

A: Yes.

Q: And how many of those hours were spent with Mr. Toberoff or someone in his office?

A: Probably 10 to 15.

Q: And before you testified, Mr. Halloran, did you receive any written communications from Mr. Toberoff regarding questions that would be asked of you on the stand?

A: Excuse me? I didn't hear what you said.

Q: What I said, sir, was: Prior to the time you began testifying --

A: Testifying in the deposition, or here now?

Q: Give me a chance to ask my question, please.

From the time you testified at your deposition until this morning, putting aside the document that's in front of you now, have you received any written communications from Mr. Toberoff?

A: Yes.

Q: And what type of communications were they?

A: They were communications regarding documents that I should look at.

Q: What documents did he want you to look at?

A: I remember I was to sort of focus on certain documents. I was sent, you know, certain agreements. That was the main thing. It was just -- you know, 'it's a good idea to refresh your recollection and look at this.'

Q: Well, you had received all of the documents that you referred to in your report prior to your deposition, hadn't you?

A: Correct.

Q: So what further documents did you receive from Mr. Toberoff before you took the witness stand?

A: I don't have a specific recollection of any specific thing that was sent to me.

Q: Do you have any specific recollection of anything that may have been said to you by Mr. Toberoff concerning any of the agreements of which you have no specific recollection?

A: I don't have a particular recollection, as I sit here.

Q: At any time prior to the time you took the stand, Mr. Halloran, did you have a meeting with Mr. Toberoff in which he advised you of certain questions he would be asking you on the stand?

A: We discussed, you know, in general, what the scope of the questions would be, but we didn't go, 'it's going to be this; it's going to be this; it's going to be this.'

Q: I didn't hear that last part.

A: I said we talked in general about the scope of what I would be discussing, but I don't recall, as I sit here, any specific, 'you have to talk about this; you have to talk about this; you have to talk about this.'

Q: I see.

But were there any times when Mr. Toberoff would open up that notebook that he used when he was questioning you and ask you a question and say, 'how would you answer that?'

A: No.

Q: None of that at all?

A: Again, we discussed things that would be -- you know, would be discussed, and we would talk about the concepts and the like. But it wasn't like, 'when I ask this, you say this.'

We didn't do any of that.

Q: Was it like if I ask you the following question -- da, da, da, da, da -- what would your answer be?

A: It wasn't that specific.

Q: That specific?

A: No, it wasn't that specific.

Q: I see.

Now, at the time that you gave your deposition, and we're talking about the Dr. Seuss' deal, you didn't remember what it was that Universal offered, did you?

A: No.

Q: And you still don't remember what it was Universal offered.

A: I remember part of it.

Q: What caused you to remember that since the time of your deposition?

A: In the context of looking over the creative controls that are customarily asserted by, you know, well-known intellectual properties and looking at them,

it occurred to me; the negotiations that we had with Dr. Seuss came back to my memory.

Q: I see.

And now that it's come back to your memory, what was it that Universal offered on the Dr. Seuss' deal?

A: The part that I recall, and the ultimate deal breaker, was that Dr. Seuss wanted creative controls that Universal chose to not live with.

Q: And why did Universal choose to not live with those controls?

A: They wanted the ultimate creative control over the movie, and Dr. Seuss was asserting controls that could have stopped the movie. And he also was known to be a very cantankerous and uncooperative elderly gentleman.

Q: Generally speaking, in your experience at the major studios, Mr. Halloran, studios don't give ultimate creative control to any licensor or grantor, do they?

MR. TOBEROFF: Vague and ambiguous, Your Honor. Which studio is he talking about?

MR. BERGMAN: If I may, Your Honor.

THE COURT: Yes. Rephrase your question.

BY MR. BERGMAN: **Q:** Mr. Halloran, at your deposition, you and I went through a list of what we both referred to as "major studios"; is that correct?

A: Yes, we did.

Q: Okay.

And am I correct, that list consists of Warner Bros., Paramount, MGM, Disney, Sony, Fox -- and I'm forgetting somebody, aren't I? There's one more? Did I say MGM?

A: Yes, you did. I think you got the list.

Q: Okay.

Can you take a crack at it for me, the major studios. We know that it's Paramount, Warner. It's Universal that we forgot.

A: Yes, we did.

Q: Now, those are the seven major studios; correct?

A: Correct.

Q: And when I refer in this examination to "major studios," you'll understand that I'm referring to those studios; correct?

A: That's fine.

Q: Okay.

Now, it's correct, isn't it, that no major studio would give any licensor the ultimate creative control over a film?

A: You'd have to define what "ultimate" is. There are various gradations of control.

Q: Okay.

In your answer, you made reference to the fact that the Dr. Seuss' people wanted ultimate creative control.

What was it that they wanted?

A: I remember they wanted -- they certainly wanted screenplay approval.

Q: What else?

A: I don't recall specifically what further controls they wanted, but I remember it was at least screenplay approval.

Q: Now, screenplay approval isn't ultimate creative control by any means, is it?

A: Well, it's a very strong part of creative control because what you do is, in the screenplay, you map out the story, and traditionally in these sort of agreements, the studio cannot materially deviate from that screenplay, so it's very, very important.

MR. BERGMAN: Your Honor, move to strike everything after "control" as being nonresponsive.

THE COURT: It is nonresponsive.

BY MR. BERGMAN: **Q:** Now, putting aside what it was that the Dr. Seuss' people wanted in terms of creative control, Mr. Halloran, what did they want in terms of money? What was the fair market value that the Dr. Seuss' people placed on that property?

A: I don't remember.

Q: What was the fair market value that Universal placed on that property?

A: Are you talking about Dr. Seuss?

Q: Yes, sir.

A: The deal didn't close.

Q: I understand that, sir.

What was the fair market value, if any, that Universal placed on that property?

A: I don't recall.

Q: Okay. Universal did place some value on it in your internal discussions, didn't they?

A: Yes.

Q: But you don't recall what that was?

A: No.

Q: So if you look at what you have told me about your experience at Universal and your experience at Orion, you were not directly involved, were you?

And by "directly involved," I mean, you were the man who determined the fair market value of any motion picture rights that were acquired by Universal or Orion during that nine years; correct?

MR. TOBEROFF: Objection, Your Honor. Vague, compound. Vague and ambiguous as to "the man."

THE COURT: It is compound, Counsel.

MR. BERGMAN: Okay.

BY MR. BERGMAN: **Q:** There was no motion picture at Universal that you determined for Universal what price to pay for underlying literary rights, were there?

A: That's not true.

Q: What film did you determine what price to pay for?

A: On both Flintstones and Dr. Seuss, I was involved in the analysis of what offer Universal wanted to make.

Q: Okay.

A: I don't remember the exact terms of those offers, but I was certainly involved in assessing what an appropriate offer would be to make.

Q: So is it your testimony, then, that Mr. Bernstein turned to you at some point and said, 'How much should I pay for this?'

A: No.

Q: Okay.

Now, after leaving Universal, you went into private practice; correct?

A: Yes.

Q: And you practice at the Halloran Law Corporation.

A: Yes.

Q: And how many lawyers are members of the Halloran Law Corporation?

A: One.

Q: That is you?

A: Yes.

Q: Do you have any associate lawyers who help you?

A: No.

Q: So you're a solo practitioner?

A: I am.

Q: And the majority of your practice, Mr. Halloran, involves representing individuals and companies involved in the production and distribution of so-called independent films; correct?

A: That is correct.

Q: And am I correct that independent films are pictures designed for release in movie theaters that are not produced, not financed and not distributed by one of the major studios?

A: That's not accurate.

MR. TOBEROFF: Compound, Your Honor. Objection, compound.

THE COURT: Well, it's more a definitional-type question, which he said is not accurate, so it will force counsel to break it up a bit.

MR. TOBEROFF: Very well, Your Honor.

MR. BERGMAN: Let me make it a little simpler.

BY MR. BERGMAN: **Q:** Isn't it true that independent films are pictures designed for release in movie theaters that are not produced, financed and distributed by one of the major studios?

A: That's generally accurate. However, there are so-called -- one of the features of an independent film is what it is creatively. And over the last ten years or 15 years, what the studios did was they acquired -- they went into the independent film business within the umbrella of studios.

So at Warner, for example, you had Warner independent pictures. At Sony, even today, they have Sony classics. So it's -- you know, it's -- one part of the definition of independent film is what kind of film it is.

MR. BERGMAN: Move to strike, Your Honor, everything after "generally true" as nonresponsive.

THE COURT: I'm going to overrule the objection, Counsel. Overruled.

BY MR. BERGMAN: **Q:** Am I correct, Mr. Halloran, that the new media, the Internet and webisodes and all of that, that's about 10 percent of your practice; correct?

A: I don't recall the exact percentage, but, yes, I am involved in new media and the creation and distribution of webisodes.

Q: At your deposition, you remember that it was about 10 percent of your practice, didn't you?

A: That sounds accurate.

Q: Okay.

And you also told me at your deposition that work involving network television is between 5 percent and 15 percent of your practice; correct?

A: That sounds about right.

Q: And your film work involving clients doing business with the major studios, as we've defined them, is somewhere between 20 and 35 percent of your practice; correct?

A: That sounds accurate.

Q: At your deposition you told me that your major studio practice was 20 to 25 percent; and then you corrected your deposition, did you not, afterwards, to make it 30 to 35 percent?

A: I believe I did.

Q: My rough math tells me that, at the highest, that comes to about 110 percent.

Can you reduce any one of those categories?

A: No. One thing that you have to keep in mind is that the percentages are certainly not absolute, and they change from time to time; so I just gave my best rough estimate.

Q: And is it correct that you've acted as an expert in 30 cases?

A: That is accurate, yes.

Q: What is your fee as an expert witness, generally?

A: It's $500 an hour.

Q: And in total, from the time you were first retained, how many hours, approximately, have you devoted to this case?

A: I'd say in the range of 150 hours.

Q: Is that about average for all your expert cases?

A: That's a little higher than most. This is a very complicated case with a lot of documents and other materials to absorb.

MR. BERGMAN: Move to strike everything after "most" as being nonresponsive.

THE COURT: It is stricken.

BY MR. BERGMAN: **Q:** What would you estimate the total amount of fees that you've collected in these 30 cases in which you've acted as an expert witness?

A: I'd say the average is around $10,000, maybe $15,000.

Q: Ten to 15,000 in the average case?

A: It's in that range.

Q: So this is about five times the average -- no, ten times the average?

A: It could be.

Q: And in private practice, Mr. Halloran, you charge either an hourly rate or make some other sort of arrangement with your clients; correct?

A: Yes.

Q: And what is the hourly rate you charge as an attorney.

A: Anywhere from 250 to $500 an hour.

Q: Now, we started to talk about the independent film industry.

You're a specialist within the independent film industry, aren't you, sir?

A: Yes.

Q: And, in fact, you even coauthored a book about the independent film industry; correct?

A: I did.

Q: And that book is titled The Independent Film Producers Survival Guide; correct?

A: It is.

Q: Now, the independent producers that you refer to in the title of your book, those are the independent producers who make independent films; correct?

A: Yes.

Q: They are not the kind of independent producers like Dino De Laurentiis or Jerry Bruckheimer who produce films for the major studios; correct?

A: That's correct.

Q: You've never represented Mr. De Laurentiis or Jerry Bruckheimer, have you?

A: No.

Q: Or Brian Glazier or John Peters?

A: No, I have not.

Q: And the course that you give once a year at Southwestern is limited to the independent film industry, isn't it?

A: No, it's not.

Q: What is the title of the course?

A: The title is "Financing and Distributing Independent Films," but it's not limited to independent films.

One of the most important things that you --

THE COURT: You were just asked for the title.

THE WITNESS: I'm sorry. That was the title.

BY MR. BERGMAN: **Q:** Now, as your survival guide points out, Mr. Halloran, there are numerous differences between how one operates within the independent film industry and how one operates within the major studio industry; isn't that correct?

A: That is correct.

Q: There are differences in how the films are developed; right?

A: Yes.

Q: And differences in how they are financed.

A: Yes.

Q: And differences in how they are produced.

A: Yes.

Q: And differences in how they are distributed, if they are distributed at all.

A: Sometimes there are differences in how they are distributed. Typically, yes.

Q: Okay.

Now, the average major studio film has a negative cost these days approaching $100 million, doesn't it?

A: It exceeds $100 million.

Q: Pardon me?

A: It exceeds $100 million by a slight amount.

Q: The MPAA average negative cost exceeds $100 million?

A: Yes.

Well, I take that back.

The average aggregate negative and releasing costs exceeds $100 million.

Q: Just so we're talking about the same thing, the negative cost is the cost of actually producing the picture; correct?

A: That's accurate.

Q: And it's called a negative cost because it refers to the film negative that is put into the can, the finished product; right?

A: That is accurate.

Q: Okay.

And what would you estimate, sir, is the current print and advertising cost for major films?

A: For major tent pole films?

Q: Let's start with major studio films.

A: The average P and A?

Q: Yes, sir.

A: It can be, easily, $100 million.

Q: And in the case of tent pole films, the figures could sky rocket; correct?

A: They could go much higher.

Q: Negative costs of a tent pole picture could be well over $200 million; correct?

A: It could exceed $200 million.

Q: And P and A could exceed $100 million in a major tent pole picture; right?

A: Yes.

Q: Okay.

By comparison, the vast majority of independent films are produced for $200,000 to $10 million; right?

A: Yes.

Q: Are you familiar with the independent film Spirit awards?

A: Yes.

Q: Okay.

And am I correct that that's sort of the equivalent for the independent film industry of the Academy awards?

A: That's an accurate way to look at it.

Q: And in fact, the independent film Spirit awards are always held on the Saturday immediately preceding the Sunday of the Academy awards; correct?

A: That's the tradition.

Q: Were you at the Spirit awards this year?

A: No, I was not.

Q: Were you at the Academy awards?

A: No, I was not.

Q: Am I correct, sir, that in order to qualify for the independent film Spirit awards, the negative cost of the film cannot exceed $20 million; correct?

A: I don't know that for a fact.

Q: You're not familiar with the rules of the independent film association?

A: Not specifically, no.

Q: Okay.

Now, the practice of law within the independent film industry is a subspecialty, isn't it, of the entertainment industry?

A: I don't know what you mean by subspecialty.

Q: Well, in fact, you describe what practicing law within the independent film industry is in your book, don't you?

A: Yes, I do.

Q: And in your book, you say that --

MR. TOBEROFF: Excuse me, Your Honor. We should have a copy of the book if he's reading from it.

THE COURT: You don't have a copy of your client's book?

MR. BERGMAN: No, Your Honor. It is his book.

THE COURT: I'm asking Mr. Toberoff.

You don't have a copy of your client's book?

MR. TOBEROFF: I do not have a copy of his book here.

THE COURT: We're not going to copy his whole book here. It's fair game for rebuttal information.

I would have assumed, counsel, that you would have taken a look at his book.

MR. TOBEROFF: I took a look at it, but I'd like to follow along when he's reading. And we've been supplying --

THE COURT: Then stand next to Mr. Bergman when he's reading.

THE WITNESS: Where's my copy?

THE COURT: I assume you would know what you wrote.

THE WITNESS: I better.

BY MR. BERGMAN: **Q:** You describe lawyers who practice within the film industry as being subspecialists within a small legal specialty.

THE COURT: Sound familiar?

THE WITNESS: That does sound familiar.

BY MR. BERGMAN: **Q:** And is it a fact?

A: It's a fact that there are very few lawyers who are in sort of the premier echelon of representing independent film makers; so it's a relatively small group of people.

Q: And, in fact, sir, you state in your book, and again, I'm quoting from page seven of your book: "There are only a tiny number of entertainment lawyers in the entire world who have both the experience and connections to be able to do a first class job for an independent film producer."

BY MR. BERGMAN: **Q:** Is that correct?

A: That's absolutely correct.

Q: And you consider yourself one of those lawyers; right?

A: I do.

Q: And you consider yourself one of those lawyers by virtue of your experience within the independent film industry; isn't that right?

A: That's part of it.

Q: And your connections within the independent film industry; correct?

A: Correct.

Q: Okay.

With respect to the last 19 years, Mr. Halloran, in which you've been in private practice, the only literary acquisition agreement you can recall negotiating with a major studio was your Neo-Pets agreement with Warner Bros.; correct?

A: That is correct.

Q: And you've never been on either side of the table in negotiation for literary rights underlying a scripted network television series, have you?

A: That's correct.

Q: In fact, you've never represented a company producing a scripted network television series like Smallville, have you?

A: That's correct.

Q: The 5 to 15 percent of your practice relating to television has involved primarily so-called movies of the week and reality programming, hasn't it?

A: That's true.

Q: Are you familiar with the television term "show runner"?

A: I am.

Q: Could you explain to the Court, please, what a show runner is.

A: A show runner in network television is someone who typically comes up with the idea and pilot script for a proposed series, and the pilot is shot. If the show is picked up, then the show runner runs the writing and production of the season for the network. Typically, show runners will stay on a network television series for a series of years and then it's not unusual for them to sort of move off and do other things.

Q: You sound very experienced at that, Mr. Halloran.

Have you ever represented the show runner of a scripted network television series?

A: No.

Q: And you've never represented the rights holder of rights to a comic book hero, have you?

A: No, I've not.

Q: It's hard, isn't it, Mr. Halloran, for a solo practitioner seeking to represent clients in the major studio film business, to compete with the major firms like Ziffren Brittenham, Hansen Teller, Gang Tyre, or Bloom Hergott; correct?

MR. TOBEROFF: Objection, Your Honor. Assumes facts as to the practice of these other firms.

THE COURT: Rephrase your question, Counsel.

MR. BERGMAN: Indeed, Your Honor.

BY MR. BERGMAN: **Q:** Are you familiar with the firm of Ziffren Brittenham?

A: Yes.

Q: Am I correct that they are one of the, if not THE most powerful transactional law firms in the entertainment industry?

A: That's an accurate description.

Q: And are you familiar with the firm of Hansen Teller?

A: I believe it's Hanson Jacobson; yes, I am familiar with the firm.

Q: And you are, of course, familiar with the firm of Gang Tyre.

A: Yes, I am.

Q: That's one of the oldest, most established law firms in the business, isn't it?

A: It is.

Q: And they represent people like Steven Spielberg and Clint Eastwood and Dreamworks and that level of clients; right?

A: They do.

Q: They were also the attorneys who represented the Siegels prior to Mr. Toberoff, aren't they?

A: I'm not aware of that.

Q: You're not aware that the Siegels were represented by Gang Tyre from 1999 until 2002?

A: I'm not aware of that.

Q: Have you read the record in this case?

A: I have, but I have no present recollection of that fact.

Q: You're aware, are you not, that at some point, the parties thought they had a settlement agreement between them; correct?

A: I don't think that's accurate. I think Warner Bros. thought they had a settlement.

Q: What makes you think that the plaintiffs didn't think they had a settlement?

A: Because this Court has ruled that there was no settlement.

Q: Well, I understand what the Court has ruled.

A: Right.

Q: My question to you is, during the period prior to the middle of May, 2002, the plaintiffs also thought they had a settlement, didn't they?

A: I'm now recollecting that the record reflects that at one point they did believe that they had a settlement. But ultimately the settlement fell apart.

Q: In fact, the record discloses, does it not, that on October 19, 2001, Kevin Marks. Partner at Gang Tyre --

A: You're walking away, so I can't hear you.

Q: In fact, the evidence shows, does it not, that on October 19, 2001, Kevin Marks of Gang Tyre wrote a letter to the defendants in effect accepting an offer that had been made. You're aware of that, aren't you?

MR. TOBEROFF: Objection, Your Honor, to this line of questioning, based on relevance. This is not the scope of his expert testimony, what happened or didn't happen in the settlement negotiations.

THE COURT: It ordinarily would be. Where I think counsel is using this for impeachment at this point. It's not going for actually the matter itself or to impeach the witness in terms of his earlier statement.

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** So are you aware of that fact, sir?

A: I'm aware that, based on my reading of the record, that there was a confirmation from a law firm on behalf of the Siegels at some point; and there was, I believe, an understanding that there was some sort of settlement. But again, ultimately, it fell apart.

Q: And do you understand from the record that after the letter from Kevin Marks was sent, that a long form agreement was prepared by the defendants and then sent to the plaintiffs?

MR. TOBEROFF: Same objection, Your Honor, as to the machinations of the settlement agreement, each step of the settlement process.

THE COURT: Overruled. The Court is not considering it for the substance being referenced, but, rather, for the impeachment value that counsel is attempting to establish.

BY MR. BERGMAN: **Q:** Sir?

A: My recollection is that there was a formal settlement agreement prepared on behalf of Warner Bros.

Q: And do you also understand, sir, that in approximately January or February 2002, that the plaintiffs' then-counsel, Kevin Marks, prepared a revised version of the long form settlement agreement?

A: I don't remember the exact details. I understand that there was a back and forth and ultimately there was a disagreement as to the material terms of the settlement agreement, and I understand that Warners has been trying to enforce it. And ultimately, the judge found it was not enforceable and there was not a meeting of the minds.

I don't remember each and every back and forth and who said what. But from reading the record, I'm aware of the back and forth and the fact that ultimately, there was no settlement.

Q: Okay.

But getting back to what started all of this, your statement that during this period of time from October 2001 until May of 2002, you stated that you know that defendants believed they had a settlement agreement.

Isn't it a fact that based on your review of the record during that same period of time, the plaintiffs thought they had an agreement?

A: I think the plaintiffs did think that there was a settlement.

Q: Okay.

So we've got this window of time, don't we, from mid October of 2001 until mid May of 2002, when all is well within the world; right? The dispute has been resolved; correct?

MR. TOBEROFF: Objection, Your Honor. Misstates the record.

THE COURT: Sustained. Rephrase. I wish all was well within the world.

MR. BERGMAN: I apologize, Your Honor. So much for poetic license.

BY MR. BERGMAN: **Q:** Mr. Halloran, isn't it correct that from mid October of 2001 until May of 2002, based upon your review of the record, that the parties were acting as if the matter had been resolved?

MR. TOBEROFF: Objection, Your Honor. He's laid no foundation for May of 2002.

THE COURT: It's based on his review of the record, and that's the focus here.

Overruled.

You may answer.

THE WITNESS: I need the question repeated, if you would be so kind, because of the interruption.

(Last question reread.)

THE WITNESS: I have -- I don't know that to be a fact.

BY MR. BERGMAN: **Q:** Okay.

Let's go back, then, to your practice as a solo practitioner and how that interacts within the major studio film business.

Am I correct that the leading film and television producers tend to be represented by the major firms, such as the firms that I have listed?

A: That is --

MR. TOBEROFF: Objection, Your Honor. Assumes facts as to -- its also vague as to the leading film. We don't know what he's talking about as to leading film producers.

THE COURT: The leading film and television -- are you referring to the major producers that you referred to earlier?

MR. BERGMAN: Yes, sir.

THE COURT: Let's use the same terminology, then.

BY MR. BERGMAN: **Q:** Like every other business, Mr. Halloran, there are producers who command the highest possible fees and producers who command the lowest possible fees, and a lot of people in-between; correct?

A: Are you talking about in the studio world now?

Q: Yes, sir.

A: Yes.

Q: Okay.

Now, isn't it a fact that at a certain level in that continuum, at the level where the producer gets the best deals, the highest compensation, the most shows, those producers tend to be represented by the firms such as the firms that I've listed who have large entertainment departments?

A: That's true.

Q: And it's true, is it not, with respect, again, to the major film business, that the so called A-list directors also tend to be represented by those large firms?

A: They tend to be, yes.

Q: And that's certainly true of the highest paid actors and actresses, is it not?

A: Generally it's true, yes.

Q: Who are the highest paid or most important, however you want to characterize it, major studio film producers who you presently represent?

A: I represent Bob Ducsay, and I represent Barnett Bain.

Q: Bob, how do you spell his last name?

A: D u c s a y.

Q: And who was the other person?

A: Barnett Bain, B-a-i-n.

Q: Who are the most important network television producers you represent?

A: At present I do not represent any important or high-level network television producers.

Q: Do you presently represent any A-list film directors?

A: I represent Hector Babenco, and I represent Jim Toback.

Q: Could you spell the last name of the gentleman you named as Hector?

A: B-a-b-e-n-c-o; he's an Academy award nominated director, and Mr. Tobeck is an Academy award nominated screen writer director; he's the director of a film recently released called "Tyson."

Q: Recently called what?

A: Tyson.

Q: That's a documentary?

A: Yes, it is.

Q: What did Mr. Babenco do, a film?

A: He's best known for directing Kiss of the Spider Woman; he was nominated for an Academy award for that film.

Q: And did you represent him in connection with that film?

A: No, I did not.

Q: With respect to either Mr. Tobeck or Mr. Babenco, have you been involved in negotiating the acquisition of any underlying rights for films?

A: Yes.

Q: Which ones?

A: For Mr. Babenco, we acquired the rights to a book called Carandiru; that was written by a Brazilian doctor who was treating AIDS patients in a Brazilian prison. We acquired the motion picture rights to that book.

Q: What were the terms of that agreement, sir?

A: They were -- I don't remember specifically, but they were very modest. In the Brazilian film industry, they don't pay the kind of dollars that we pay here.

Q: More specifically, do you remember any of the terms?

A: I don't remember the specific terms. There was a payment of, you know, a license fee to produce the film, and there may have been a small contingent compensation.

Q: When you say a small contingent compensation, are you referring to some form of defined proceeds, net proceeds?

A: There was probably produced in some form of participation and producers' proceeds or producers' gross, but I don't remember exactly.

Q: How long ago did you negotiate that agreement?

A: 2003, 2004.

Q: Who are the most important actors and actresses who you presently represent?

A: I currently do not represent any prominent actors or actresses, but I hire them every day on behalf of my clients.

MR. BERGMAN: Move to strike everything after "actresses" as nonresponsive.

THE COURT: It's stricken.

BY MR. BERGMAN: **Q:** In your report, Mr. Halloran, and in your trial testimony, you refer to several book deals involving best --

THE COURT: Let me go back to my objection.

When you say you hire them every day, do you represent them, then?

THE WITNESS: I'm representing the production companies who hire them.

THE COURT: But they are represented by somebody else.

THE WITNESS: Correct.

THE COURT: It's stricken.

BY MR. BERGMAN:

Q: Your report and testimony as referred to various book deals by best selling authors, like John Grisham, Michael Crichton and Tom Clancy; correct?

A: Correct.

Q: Those authors and maybe a handfull of others form a very elite club, don't they?

A: It is an elite club.

Q: I believe in the expert testimony you gave in the Sahara trial, you referred to them as marquee authors; correct?

A: That is correct.

Q: And their names on the marquee mean something, don't they?

A: Certainly their marquee status means something to the person who's acquiring the right to make motion pictures out of their books.

Q: And they mean something to the theater goers too, don't they?

A: In some cases, yes.

Q: You've never represented a marquee author, have you?

A: No.

Q: And except for whatever limited experience you've had with Dr. Seuss at Universal, you've never represented a buyer of a marquee author's work, have you?

A: No, I've not.

Q: What is the most expensive motion picture literary rights acquisition agreement you've negotiated with a major studio on either side of the table during the past 19 years?

A: The Neo-Pets deal.

Q: Neo-Pets?

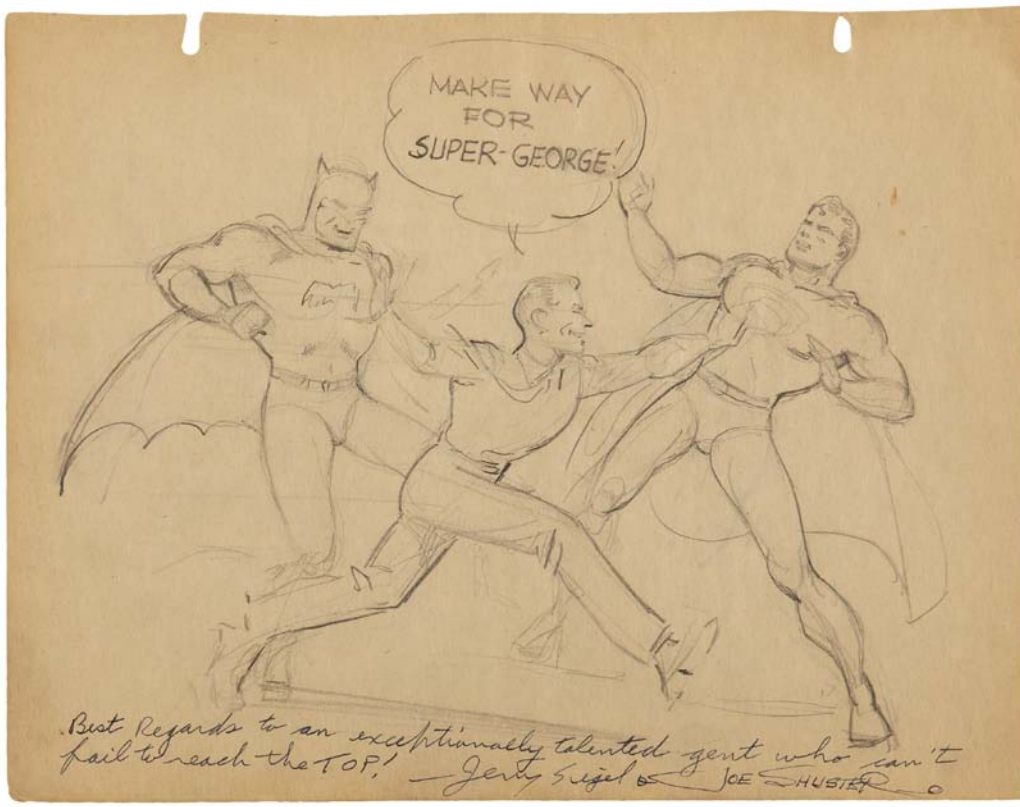
A: Yes.

THE COURT: Counsel, it's 11:00. Before we get into this, we're going to stop at this point.

The Court has an 11:00 and an 11:30 matter in chambers. We'll then break for a lunch, and I'm attending an FBA lunch this afternoon from 12:00 until about 1:30. I should be back at 1:40 or so, and I'd like to start up again at that time.

MR. BERGMAN: Very well, Your Honor. Thank you.

THE COURT: We'll recess until that time.



TRIAL DAY 6

Wednesday, May 6, 2009; 9:51 A.M.

A.M. Session

WITNESS: MARK HALLORAN (cont'd)

THE CLERK: Calling item No. 1 on calendar, case No. CV 04-08400-SGL, Joanne Siegel, et. al., versus Warner Bros. Entertainment, Inc., et. al.

May we have counsel please come forward and state your appearances for the record.

MR. TOBEROFF: Marc Toberoff for plaintiffs.

MR. WILLIAMSON: Nicholas Williamson for plaintiffs.

MR. ADAMS: Keith Adams for plaintiffs.

MR. BERGMAN: Michael Bergman for the defendants.

MR. PERKINS: Patrick Perkins for the defendants.

MS. MANDAVIA: Anjani Mandavia.

THE COURT: Good morning to you all, counsel. I presume that it's Mr. Bergman's cross-examination?

MR. BERGMAN: Thank you, Your Honor.

THE COURT: Have you filed that opposition to the ex-parte that was submitted?

MR. PERKINS: Yes, we have, Your Honor. We have another copy.

THE COURT: Would you provide that please to the courtroom deputy.

THE CLERK: Mr. Halloran, please be advised you're still under oath.

THE WITNESS: I acknowledge that.

CROSS-EXAMINATION (cont'd)

BY MR. BERGMAN: **Q:** Mr. Halloran, had you ever met Mr. Toberoff prior to your retention as an expert in this case?

A: No, I had not.

Q: Have you ever worked on any motion picture that he was associated with?

A: No.

Q: I'd like to look, if I may, at that period of time from the time you were first contacted by Mr. Toberoff until the time that you prepared and submitted your report.

At what point in time, in terms of days, after you were first contacted by Mr. Toberoff did he tell you what it was that he wanted you to testify concerning in this case?

A: Well, he told me about what was at issue at the case from the beginning. This was late January. And we had a personal meeting, and we sort of outlined what would be covered in my report.

Q: And what was said at that meeting, in substance?

A: Basically, he gave me an outline of the issues. We discussed an outline of the issues and discussed what documents I would have to review.

Q: He decided what documents you would have to review?

A: Not entirely, no. At the beginning, he said, 'You're going to have to look at this.' And then I took it upon myself to do further research.

Q: Well, at some point in time, Mr. Toberoff sent you a group of documents, agreements; correct?

A: Yes.

Q: Who decided which of the agreements would be sent to you and which would not?

A: I requested that I see, you know, all of the documents that were germane to my opinion, that they're actually sent over by Mr. Toberoff.

Q: And did you identify the particular documents that you considered germane to your opinion?

A: Early on, I identified the Neo-Pets' agreement as an agreement I thought would be germane to my opinion.

Q: And aside from the Neo-Pets' agreement, did you designate any other agreements that you thought would be germane to your opinion?

A: Not that I remember. We talked about a couple agreements where we didn't have the actual document; one was the Hasbro deal, and one was the Chorus Line deal; but that, at that time, was the universe of documents.

Q: So at that point in time, Mr. Toberoff had the discretion as to which documents, which agreements to send to you; correct?

A: Not entirely.

Q: In what way is it incorrect?

A: Again, I had the Neo-Pets' agreement, which he did not have, which I negotiated.

Q: I see.

A: But it's fair to say that the majority of the documents that I reviewed were sent to me by Mr. Toberoff.

Q: And did you, at any point in time, ask Mr. Toberoff whether he had sent you all of the agreements that he had compiled for use in this case?

A: I don't know if I said it in exactly those words, but I made it clear to Mr. Toberoff that I wanted to see the entire universe of agreements that was at issue in the case.

Q: And did he ever identify any documents that he had not given to you?

A: Never.

Q: Did you ever ask, 'Are there any documents that you received that you haven't given to me?'

A: I didn't think it was necessary to pose that question.

Q: The answer is no?

A: I did not ask Mr. Toberoff that question.

Q: Okay.

At the point in time that you were retained, did you ask Mr. Toberoff whether you were free to retain other people to assist you in any research or in connection with forming your opinion?

A: We didn't have that particular discussion, but I know from my experience as an expert that we are free to consult others.

And I think other experts in this case have taken advantage of that latitude.

MR. BERGMAN: Move to strike everything after "discussion" as being nonresponsive.

THE COURT: Stricken as nonresponsive.

BY MR. BERGMAN: **Q:** Did you commission any survey at the outset of your retention or at any other time to determine what other individuals at the major studios considered to be the fair market value of the Superman rights in 2002?

MR. TOBEROFF: Objection, Your Honor, as to "survey." It's vague and ambiguous.

THE COURT: Rephrase.

BY MR. BERGMAN: **Q:** After you got the assignment, Mr. Halloran, did you put together a list of your major studio business affairs' friends or business affairs' associates to ask them or discuss with them what the fair market value of these rights might have been in 2002?

A: No, I did not.

Q: Did you call up any studio executive to get their opinion?

A: No, I did not.

Q: Did you call anyone at the William Morris' literary department to ascertain what they thought about the fair market value?

A: No, I did not.

Q: Did you call anyone at the literary rights' department at Creative Artists Agency for that same purpose?

A: No, I did not.

Q: Or did you call anyone at the United Talent Agency or at ICM or at any of the other major talent agencies?

MR. TOBEROFF: Objection, Your Honor. Compound.

THE COURT: Break it up.

BY MR. BERGMAN: **Q:** Did you call anyone at ICM to ascertain what they thought the fair market value of these rights were?

A: No.

Q: Or did you call anyone at United Talent Agency for that purpose?

A: No.

Q: Did you call anyone at any of the specialized literary rights' agencies that exist in Los Angeles for the handling of these kind of rights?

A: I'm not aware of any specialized literary agencies in Los Angeles that specialize in the handling of these kind of rights, so I did not make a call to any such agency.

Q: You're not aware of any such individual agent or any such agency that specializes in the representation of literary rights in Los Angeles?

A: You keep changing what you are talking about.

As I understood your question, we went through the list of the major agencies, and then you asked me whether I talked to an agency that specializes in these sort of rights. And I said I was unaware of any such agency.

It's certainly true within the major agencies they have people who specialize in valuation of literary rights. But I'm unaware of any agency that's just in the business of doing it. There might be a few small ones, but they're not widely known.

Q: Very well. Did you confer with anyone, any attorney who actually handles these kind of clients and these kinds of properties, with respect to the value of the property?

MR. TOBEROFF: Objection, Your Honor. This line of questioning is vague and ambiguous. He's now talking about 'these' kinds of rights and 'these' kinds of properties. Is he referring to comic books? Is he referring to rights in general? It's too open-ended.

THE COURT: Fair enough.

MR. BERGMAN: Indeed, Your Honor.

BY MR. BERGMAN: **Q:** Mr. Halloran, did you speak with any person who -- any attorney, who represents marquee authors and ask them what their opinion was as to the value in 2002 of the Superman nonexclusive rights?

A: No.

Q: Did you consult with anyone engaged in the acquisition on either side of the table of major literary rights as to the value in 2002 of the Superman film rights?

MR. TOBEROFF: Objection, Your Honor. Also vague and ambiguous. We don't know what he means by "acquisition on either side of the table." There's a seller and there's a buyer; there's a licensor and there's a licensee.

THE COURT: I'm going to overrule the objection to the question. But you can certainly follow up along those lines, as appropriate, to break it down.

BY MR. BERGMAN: **Q:** Mr. Halloran, when you and I had our deposition, you used phrases like "both sides of the table," didn't you?

A: I may well have, yes.

Q: And by that, you mean a buyer and a seller; right?

A: That's what I mean by that.

Q: Okay. During the course of forming your opinion in this case, did you confer with anyone concerning the fair market value of the nonexclusive Superman rights, anyone who's involved in the acquisition of these rights, these kinds of high-level film rights?

A: I didn't think it was necessary, so I didn't.

Q: Do you recall telling me at your deposition that you had, throughout your career, discussed issues regarding the rights to comic book franchises with executives at many major studios?

A: Yes.

Q: And you had a statement to that effect in your report, did you not?

A: I did.

Q: And when I inquired about who those people were at the deposition, you told me that you haven't discussed issues regarding the rights to comic book franchises with such executives since you had left Universal; correct?

A: That's correct. But I now have recollection that I did have a discussion regarding that with an executive.

MR. BERGMAN: Move to strike everything after "correct," Your Honor.

THE COURT: It was nonresponsive. Yes.

BY MR. BERGMAN: **Q:** Now, you reached a point where you formed an opinion; correct, sir?

A: My opinions have been ongoing. But yes, as of the time that I had prepared the report, I had reached some opinions, yes.

Q: And you submitted that report to the plaintiffs and the defendants; correct?

A: Yes.

Q: Okay.

Before you submitted that report, after you had prepared it, what, if anything, did you do to test any of the opinions that you expressed in your report or to test any of the opinions you expressed here in court?

A: Well, it's been an ongoing process. And as you know, there's a vast amount of material that I had to digest very quickly, I think.

You have to recall that, unfortunately, the original expert for the plaintiffs took ill, so I came into the case in very late January and I prepared my report on February 16th.

And, you know, since then -- you know, as of that time, I had a lot of data that I've analyzed, and I did independent research. And since that time I've continued to absorb the information and do Internet research and the like.

MR. BERGMAN: Move to strike as nonresponsive, Your Honor.

THE COURT: What's that, Counsel?

MR. BERGMAN: The entire answer.

THE COURT: No. Actually, part of the answer is -- we're getting into this area where you really need to listen to what the question is, and --

THE WITNESS: I appreciate that.

THE COURT: Mr. Toberoff is going to be up, and he'll immediately followup and –

THE WITNESS: Right. The problem is, I don't want to mislead in my answers.

THE COURT: I have extraordinarily sophisticated attorneys in front of me who will not be misled by anything that you say or --

THE WITNESS: I gather you won't either.

THE COURT: Why don't you ask the question again. There are portions of the question which are responsive; he talks about the process.

MR. BERGMAN: I'll try to make it clearer, Your Honor.

THE COURT: Thank you.

MR. BERGMAN: You're welcome, sir.

BY MR. BERGMAN: **Q:** After you formed the opinions and expressed them in your report, did you do anything to verify that your opinions have any weight within the major studio film community?

A: I had, in my estimation, sufficient evidence from the contracts that came from major studios that showed that my evaluation was consistent with their evaluation, so I didn't feel compelled to do a survey since I already had the answer in documents.

MR. BERGMAN: Move to strike as nonresponsive.

THE COURT: It's a yes or no question. Did you do anything?

THE WITNESS: Well, I kind of feel like these are, you know, 'when did you stop beating your wife' type questions, so I'm trying to be as clear as I can.

THE COURT: Let your attorney -- or the attorney that puts you on the stand make the objections.

THE WITNESS: Okay.

THE COURT: Don't overrule your own objections.

THE WITNESS: Okay.

THE COURT: Evidence which assumes facts not in evidence, Mr. Toberoff knows how to make that objection.

THE WITNESS: Okay.

THE COURT: I know you're an attorney, as well.

THE WITNESS: Yes. It's hard.

THE COURT: It's hard, but you've got to just kind of go with the system here.

THE WITNESS: I understand.

THE COURT: It's stricken, Counsel.

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** Following the preparation of your report, Mr. Halloran, did you circulate that report to anybody at any studio to test the voracity of your report?

A: No.

Q: Did you circulate your report to any attorney involved in the actual negotiation of rights' agreements for high-level rights?

A: No, I did not.

Q: Did you circulate your opinion to anyone within the motion picture industry to find out or to at least get a reaction from that person to the substance of your opinion?

A: No, I did not.

Q: Now, in your direct examination, sir, you testified to an opinion as to the terms that you believe would have been the fair market value of the film agreement, assuming it conveyed exclusive rights; correct?

A: That's correct.

Q: The opinion that you testified to on the witness stand as to the fair market value of the Superman rights in 2002 was quite different from the same opinion that you expressed at your deposition, was it not?

A: I don't recall that it was inconsistent.

MR. BERGMAN: Your Honor, this may take a few minutes because I've got to read some of the background, but I'm going to start at page 287, line 5, and it will continue until, I believe --

THE COURT: You're reading from the deposition here; correct?

MR. TOBEROFF: I'm sorry, Counsel, give me the page numbers again.

MR. BERGMAN: It will begin at page 289, line 5, and it will continue to portions on page 289.

BY MR. BERGMAN: **Q:** Mr. Halloran, listen, please, to the questions. My question to you is going to be whether you recall being asked those questions and giving those answers. Do you understand that?

A: I understand.

Q: And you were under oath when you gave this deposition; correct?

A: Just as I am now, yes.

Q: And after you were given a copy of this transcript, you had an opportunity to -- and, in fact, you took advantage of correcting any mistakes or misstatements that may have been made; correct?

A: That is correct.

Q: Okay.

MR. BERGMAN: Resuming now?

THE COURT: You may.

BY MR. BERGMAN: **Q:** To your deposition.

"QUESTION: Mr. Halloran, let me be clear. I want to get specific figures, if you can give me specific figures, as to what the elements of a fair market deal for the Superman film rights in 2002 would have been if DC had gone to a competing studio. Now, is it your opinion that the option exercise price in that situation would have been $30 million?

"ANSWER: At a minimum."

BY MR. BERGMAN: **Q:** Do you recall giving that answer?

A: That answer was regarding a buyout of the rights, not for a single picture. So I do recall giving that answer, but based on the question you asked me, this was if someone wanted to just buy Superman, what would that be, and I said at a minimum $30 million, and I stick with that.

The fair market value opinion I've given in this case applies on a one picture by one picture basis.

Q: I think your next answer may make that clearer.

MR. BERGMAN: And here, Your Honor, I'm reading from page 289, line 1.

"QUESTION: In your opinion, if a deal were structured as an option agreement and DC had gone to a competing studio to convey the film rights to Superman that it purported to convey to Warner Bros., is it your testimony that the deal would have included option payments of at least $3 million a year?

"ANSWER: Yes.

"QUESTION: Is it your testimony that the exercise price of the option would have been at least $30 million?

"ANSWER: Had there been an exercise price included as part of the deal? Yes.

"QUESTION: Is it your opinion that the gross participation from dollar one would start at 10 percent and escalate to 20?

"ANSWER: No, I'm not saying that. What I stated was that the -- I didn't necessarily state that. The participation would be fixed in the range of 10 to 20 percent of gross. It may have escalations; it could have been just a straight --

the more -- if, in fact, it was at 10 percent, it certainly would have escalations, given the comparable participations that have been paid on the agreements that I saw."

And that ends at line 22, page 289.

BY MR. BERGMAN: **Q:** Do you recall giving that answer, sir?

A: Yes, I do.

Q: And that related to an option agreement, did it not?

A: It related to an option agreement to purchase the entire Superman rights for multiple pictures; so the $3 million was based on 10 percent of my $30 million figure.

Q: Have you asked any person, any person involved in the major motion picture industry, on either side of the table, buyer or seller, anyone in an agency, whether they agree with your deposition testimony that a fair market deal for the Superman rights, if they were exclusive, would have been $3 million annual options, a $30 million purchase price and somewhere between 10 and 20 percent of first-dollar gross?

MR. TOBEROFF: Objection, Your Honor. The question is compound. In addition, it's been asked and answered. We've been through a whole line of questions about whether after rendering his opinion he consulted with others in the entertainment industry as to his opinions.

He already answered that question.

THE COURT: I don't think this specific one has been asked and answered. Overruled. You may answer the question.

THE WITNESS: The answer is no.

BY MR. BERGMAN: **Q:** Let's focus, then -- since based on your direct testimony, you seem focused on particular elements, let's look first at the option.

Have you ever represented a rights holder in a negotiation or represented the person buying those rights on an agreement that involved a $3-million-a-year yearly option?

A: No, I've not.

Q: Or a $2-million-a-year annual option?

A: No.

Q: Or a $1-million annual option?

A: Not that I recall.

Q: How about $900,000 a year?

A: No.

Q: 800,000 a year?

A: No.

Q: 700,000 a year?

A: No.

Q: 600,000 a year?

A: No.

Q: 500,000 a year?

A: No.

Q: In the film agreement that you have argued is below fair market value, DC got escalating annual payments of from 500,000 to $700,000 a year, didn't it?

A: This was for Superman. I've never represented the Superman rights, but what you said was true.

MR. TOBEROFF: Objection, Your Honor. The question misstates the record, and the contract agreement.

THE COURT: Fair enough. Rephrase that question, then.

BY MR. BERGMAN: **Q:** Does the film agreement for Superman, of course, involve escalating option payments, annual option payments, escalating from $500,000 a year to $700,000 a year?

A: It does.

Q: Okay.

THE COURT: Is that what you're objecting to, Counsel?

MR. BERGMAN: Pardon me?

THE COURT: I'm sorry. Mr. Toberoff?

MR. TOBEROFF: Yes, Your Honor.

THE COURT: You're saying that that's not accurate? Your witness just indicated that --

MR. TOBEROFF: Excuse me, Your Honor. I'm no longer objecting to the question. The way it was phrased originally was --

THE COURT: Very well. I misunderstood your objection.

You may proceed, Counsel.

BY MR. BERGMAN: **Q:** Given the fact that you have never had annual options of 500,000 to $700,000, on what basis, in direct testimony, did you describe the Superman Returns' option payments as "relatively modest option payments"?

A: You have to, as I testified in my deposition, be -- and I think it's generally held to be true, the initial option payment for most properties is 10 percent of the purchase price.

By definition, the Superman purchase price would be an extraordinarily high number. And if you applied that 10 percent, then it would -- the option price would be higher.

I think you have to keep in mind that the option price is -- one thing that's missing from the Superman agreement is a reversion, and that's more important than the option price. The escalating option price, in addition, are illusory because contingent compensation is a credit against them. So you have to look at it in the context of the whole agreement, not just --

MR. BERGMAN: Your Honor, I ask that the answer be stricken and that the witness be cautioned not to seize upon a question to give a lecture advocating his position.

THE COURT: The answer's stricken. Let's move along.

BY MR. BERGMAN: **Q:** When you say that the 500,000 to $700,000 a year option payments are relatively modest option payments, to what agreements are they relatively modest by comparison?

A: Well, let me consult the chart here.

MR. BERGMAN: And, Your Honor, if I may, the witness has this cheat sheet. I'd prefer that he --

THE COURT: Counsel, let's not refer to it as a cheat sheet.

MR. BERGMAN: I'm sorry. Forgive me, Your Honor. The witness has this chart. I would prefer when I ask him a question, if he can answer the question, fine. If he can't answer the question and says so, that he can then look at the chart.

THE COURT: That's a fair request, Counsel.

THE WITNESS: Okay. So your question was?

BY MR. BERGMAN: **Q:** My question was, when you speak of the 500,000 to $700,000 annual payments that the Superman Returns' agreement provides as being relatively modest, to what specific agreements are you relating them to?

A: I would have to consult my chart in order to give you a complete answer to that.

Q: Then would you please consult your chart and show me what agreement has a higher annual option than 500- to $700,000.

A: Conan has an option fee of a million dollars. And I think Conan was a lesser property than Superman. In fairness, that was for 18 months, but then there was an additional million dollars for 12 months.

Q: Any others?

A: Lord of the Rings had a $2.5 million option fee.

Q: How much?

A: I believe $2.5 million in total.

Q: For how many pictures?

A: I believe that's for three.

Q: Go on.

A: Those are the ones that I see.

Q: Those are the ones that you could what?

A: Those are the ones that I could see.

Q: I see. Aside from the ones that you see on that list, do you have any personal experience, however tangential or slight, with any rights' acquisition that had anywhere near a $3 million annual option?

A: No.

Q: Have you ever heard or read in the trades of any rights' acquisition that had anywhere near a $3 million option?

A: I don't believe so.

Q: Okay.

Let's look at the exercise price of $30 million.

Have you ever represented a client, any client, whether a star, director, writer, producer or rights holder, who received a $30 million fixed payment from a studio for their rights or services?

A: No, I have not.

Q: 25 million?

A: No.

Q: 20?

A: No.

Q: 15 million?

A: No.

Q: 10 million?

A: No.

Q: 5 million?

A: No.

Q: Have you ever represented a client -- again, any client, any category, who received a first-dollar gross share from a studio as high as 20 percent?

A: No, I've not.

Q: 15 percent?

A: No.

Q: 10 percent?

A: No.

Q: And you haven't authored or coauthored any books on acquiring pre-eminent film properties, have you?

A: No, I've not.

Q: You don't contend, do you, or do you, that your expertise as to the fair market value of the Superman rights in 2002 finds any basis in the Daily Trades, Daily Variety or Hollywood Reporter?

A: The trades report on significant deals all the time. As you know, the problem we're dealing with here is that, the value of the rights has not been tested in the market, and the universe of branded comic book characters is controlled by two companies who own them and don't go to third parties; namely, DC and Marvel; so that makes it more difficult.

MR. BERGMAN: Move to strike the answer as being nonresponsive, Your Honor. The question asked is whether he contends.

THE COURT: I see what you asked, Counsel. I'm just -- you're asking him what he contends. I'm going to overrule the objection. Next question.

MR. BERGMAN: Very well, Your Honor.

BY MR. BERGMAN: **Q:** So is the gist of the answer that you just gave, Mr. Halloran, that you haven't gotten that information from the trades because these contracts are controlled by Marvel and DC, and they don't give out that information? Is that what you're saying?

A: That's part of the problem, certainly.

Q: Okay. So you haven't drawn any expertise as to the fair market value of these type of agreements from the trade papers or from People magazine or from Wikipedia --

A: You're misstating my testimony.

Q: -- for the very reason --

THE COURT: Counsel?

MR. TOBEROFF: Misstates his testimony.

THE COURT: Rephrase the question.

BY MR. BERGMAN: **Q:** Isn't it true that you haven't obtained any expertise as to the fair market value of Superman Returns in 2002 from the daily entertainment trades?

A: That's not true.

Q: Well, you just told me that that information is not printed in the trades.

A: You're talking about two different things.

Certainly, in terms of the value and recognition, I immerse myself every day with the trades and reports and television and online. And so in terms of awareness, you know, the universe of what I considered is very broad.

In terms of the exact deals, which is different from, you know, notoriety, those deals, although I have plenty to look at here, are not reported specifically in the trades. I can tell you one agreement that was reported.

MR. BERGMAN: Your Honor, there has to be some limit to this. There must be some limit to this.

THE WITNESS: He's asking me why --

THE COURT: Stop, stop. Don't talk over me. You talk over counsel, that's one thing.

THE WITNESS: Excuse me.

THE COURT: You cannot talk over me.

THE WITNESS: Okay.

THE COURT: Counsel, sit down. This is cross-examination. I know you're a lawyer and understand what cross-examination is. This isn't direct examination. Counsel is allowed to ask pointed questions to elicit, and you have to respond to the question asked. Your attorney, the attorney representing plaintiffs, will be able to ask open-ended direct questions that will allow you to expand.

THE WITNESS: Can I ask a question though? When he misstates my testimony to me, then --

THE COURT: It's your attorney's responsibility to stand up and make an objection.

THE WITNESS: Okay. I understand. Thank you.

THE COURT: Counsel?

MR. BERGMAN: Thank you, Your Honor.

THE COURT: Let's take the question from the top.

BY MR. BERGMAN: **Q:** Mr. Halloran, just to place my questions in context, these questions are based on the economics of the deal. That's what I'm concerned about, where you get your information that makes you an expert as to how much money should have been paid for this property.

We've gone over your experience; we've gone over whatever you've done to form your opinion.

THE COURT: Now, Counsel, I have to caution you. Just ask a question.

MR. BERGMAN: Yes, sir.

BY MR. BERGMAN: **Q:** At this point, I'm simply asking one question: Have you obtained any knowledge, any details as to the terms of any other deals for the acquisition of valuable comic superhero characters from the daily trade papers?

A: I believe the Chorus Line deal was in the trades.

Q: Aside from the Chorus Line deal, did you get the economic data of any other deal from the trade papers?

A: I believe -- well, I believe I was aware of The Terminator agreement because it was reported. But I have the actual agreement; but that, I believe, was in the trades, as well.

Q: Are you referring --

A: But I'm not relying on what was in the trades, but I'm relying on the agreement.

Q: Okay. Are you relying on anything that you read in Wikipedia in determining the fair market value of the Superman rights in 2002?

MR. TOBEROFF: Objection; overbroad, Your Honor.

THE COURT: Not as a foundational question, Mr. Toberoff. Overruled.

THE WITNESS: I consulted Wikipedia just with respect to the history and background and iconic nature of Superman. I didn't use Wikipedia to set the value of the rights, which I think is buttressed by the agreements that are in evidence.

BY MR. BERGMAN: **Q:** Okay. And am I correct that -- of the expert witness' cases, these 30 cases that you have testified in, am I correct that only the Sahara case involved, even tangentially, the question of the fair market value of important underlying literary rights for a film?

A: I don't think that's necessarily accurate. Certainly, in the Spiderman case, which I was involved in, which was a battle between Paramount and Fox, the value of those rights, as apparent from, you know, the fight to get them.

In that case, there wasn't a specific point as to the valuation of rights. What was at issue was who actually owned the rights.

Q: Okay. As an experienced witness, you're aware, are you not, that Federal Rule 26 requires you to list all of the cases in which you've testified at either deposition or in trial as an expert?

A: Those within the last four years, yes.

Q: Yes, sir. You're aware of that?

A: I'm aware of that.

Q: And your Exhibit B to your report, which supposedly identifies all those cases, has been introduced into evidence, hasn't it?

A: I don't know whether it's been introduced or not.

Q: I believe it has.

In preparing Exhibit B -- did you prepare Exhibit B, by the way?

A: I prepared Exhibit B, and I had some assistance from my paralegal in preparing it, as well.

Q: Okay. And after you had prepared the list of cases during the past four years in which you've testified, did you then transmit that to Mr. Toberoff?

A: Yes, as part of the expert report.

Q: And did Mr. Toberoff eliminate any case from that list?

A: Absolutely not.

Q: And you didn't purposely eliminate any case from the list, did you?

A: No.

Q: But you did omit a case, didn't you?

A: I'm not aware that I omitted a case.

Q: Okay. Didn't you --

MR. TOBEROFF: Point of clarification, Your Honor, Exhibit B has not been admitted into evidence. Exhibit A, the resumes, have been admitted.

THE COURT: Has it not been admitted into evidence, Counsel?

MR. BERGMAN: Apparently Mr. Toberoff is correct, Your Honor. I confused A and B.

THE COURT: Very well.

MR. BERGMAN: B is a list of the cases that he has appeared in as a witness in past four years, and I respectfully move that be introduced in evidence.

THE COURT: Very well. Any objection? I assume there's no objection?

MR. TOBEROFF: No objection, Your Honor.

THE COURT: It's admitted now in evidence.

(Exhibit B is Received.)

BY MR. BERGMAN: **Q:** Am I correct, Mr. Halloran, that you testified in the case of Trademark Properties versus A&E Television Networks, a South Carolina District Court case?

A: I testified at deposition in that case.

Q: Okay. And you were, therefore, under Rule 26, required to identify that case, weren't you?

A: Yes.

Q: And that deposition testimony was less than a year ago in June of 2008; wasn't it?

A: That's generally accurate.

Q: Why didn't you list that --

A: I'm not --

Q: -- in Exhibit B?

A: I'm not aware that I didn't list it.

Q: Well, I'll represent to you, and counsel can tell me if I'm wrong, that on Exhibit B you did not.

A: Well, that was inadvertent. It should have been there.

Q: I'll presume that Mr. Toberoff agrees that you did not.

Did you omit the Trademark Properties' case from your Rule 26 disclosure because all three of your expert reports were excluded by the judge in that case?

A: No. I made a mistake. And I don't know for a fact that all three were excluded.

Q: Isn't it a fact that all three were excluded?

A: I don't know whether that's true or not.

MR. BERGMAN: Your Honor, I respectfully refer the Court and opposing counsel to that case, a citation of which is 2008, U.S. District, Lexis 87731.

THE COURT: Do you have a copy, Counsel?

MR. BERGMAN: Yes.

(Brief pause.)

THE COURT: The Court has read the opinion. You may proceed.

MR. BERGMAN: May I approach the witness with a copy of the opinion, Your Honor.

THE COURT: I'll hand him mine.

THE WITNESS: I've not seen this, so...

(Brief pause.)

BY MR. BERGMAN: **Q:** You also omitted this case from your similar Exhibit in the Watchmen case, didn't you?

A: I'm unaware that I did. I keep them on an ongoing sort of rolling basis, and once they are put in, then I amend them; so apparently this didn't get in the grid.

Q: You agree that it didn't get into the Watchmen --

THE COURT: Stop. Where is this Exhibit B? What Exhibit number is it attached to?

MR. BERGMAN: It is part of the report, which was offered in evidence by Mr. Toberoff.

THE COURT: Right. What's the Exhibit number. I want to take a look at it.

MR. TOBEROFF: It's 332, Your Honor.

THE COURT: Thank you.

MR. WILLIAMSON: It's 332, Your Honor.

THE COURT: This took place in 2008?

THE WITNESS: Yes.

THE COURT: Was that before the Fox Vs. Warner Bros.' Testimony?

THE WITNESS: Yes.

THE COURT: Yes?

THE WITNESS: Yes.

THE COURT: Why exactly didn't -- you say it was inadvertent that you did not include that?

THE WITNESS: Yes. Absolutely inadvertent. I would never deliberately leave out a case.

MR. TOBEROFF: Your Honor, the implication is that the case we're talking about was within four years of the -- excuse me.

THE COURT: I'm sorry, counsel?

MR. TOBEROFF: I'm correcting myself and sitting down.

THE COURT: Very well. Counsel, you may proceed.

BY MR. BERGMAN: **Q:** Am I correct, Mr. Halloran, that the report that you submitted in the case that Your Honor referred to, the Fox Vs. Warner Bros.' case, which is the Watchmen case, also omitted to cite this rule, this South Carolina case?

A: I don't know that for a fact.

MR. BERGMAN: Your Honor, we would like to mark for identification Exhibit A to the resume of Mark Halloran submitted in the Fox case.

MR. PERKINS: Plaintiffs' Exhibit 1117, Your Honor.

THE COURT: Your next question, Counsel?

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** Am I correct, Mr. Halloran, that in that South Carolina case, the judge rejected one of your supplemental reports because the opinion in it was based on an article in the New York Times and computer research; correct?

A: No. The main reason he rejected it was -- and I think he was right, was that -- the main thing I did in my report was to take some joint venture numbers that were given by A&E, and I divided them in half; and he said any juror could do that. That was the main reason.

Q: Mr. Halloran, that was the reason why the judge --

THE COURT: Let's cut this short. The Court has just read the opinion. I know why the judge did what he did. Let's move along.

MR. BERGMAN: Very well, Your Honor.

BY MR. BERGMAN: **Q:** Now, you were also an expert witness in the Sahara case, weren't you, sir?

A: Yes.

Q: Okay. And I'm going to go into that case in some detail. But one of the issues raised in the Sahara case against the person who retained you, the author, Clive Cussler --

A: Actually, I was not. I was retained by Greenberg Glusker Fields.

Q: You were retained by Bert Fields at Greenberg Glusker; correct?

A: Yes.

Q: And Mr. Fields represented Clive Cussler; correct?

A: He did.

Q: And you were testified to act -- you were paid to act as an expert witness on behalf of Mr. Cussler, were you not?

A: Yes.

Q: One of the issues in that case was whether Mr. Cussler's disparaging remarks made in public, in newspapers and on the radio, about the film made the property less successful, made the film less successful, hurt the box office gross. Do you recall that?

A: That was an issue, yes.

Q: And on that issue that you gave an expert opinion that such disparaging remarks didn't hurt the picture and may even have increased the grosses due to the controversy; is that correct?

A: That is accurate.

Q: But when you made that opinion, when you did your report, when you testified at your deposition, when you testified at trial, you still hadn't read any of the statements, any of the disparaging statements, that had been made by Mr. Cussler in print or on the radio, had you?

A: That's not accurate. Can I amend that?

I was certainly -- my recollection is, I was -- there was no controversy, whatsoever, in the Sahara case that Mr. Cussler had issued disparaging statements about the movie. In fact, he filed the lawsuit --

THE COURT: This is not the answer to the question. The question is whether you had read them.

THE WITNESS: I certainly was aware of them, and I have a recollection of reading them, but I don't have a specific recollection that I read, he said "X," and he said "Y".

THE COURT: Let's wait for the next question.

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** During the course of your trial testimony, did Marvin Putnam of O'Melveny ask you the following question, and did you give the following answer --

MR. BERGMAN: And I'm referring, Your Honor, to page 4569, lines 19 through 23 of the transcript of that trial.

"QUESTION: Do you know what disparaging comments Mr. Cussler made about the film?

"ANSWER: Actually, I do not.

"QUESTION: And, in fact, in offering the opinion, you have no idea what he said, do you?

"ANSWER: I -- my opinions did not go -- I did not apply the facts of this case to that. What I was talking about was the general proposition as to whether a negative remark could -- the effect of negative remarks by an author -- a word is missing here -- could not -- I did not study Mr. Cussler's remarks, nor render an opinion the effect of Mr. Cussler's remarks in this case."

BY MR. BERGMAN: **Q:** Do you recall giving that answer to that question?

MR. TOBEROFF: I would appreciate it if the defendants would provide us with copies of what they're reading, so I can verify and read along with them. We've done that with them throughout the case.

THE COURT: That's a fair request, Mr. Toberoff. Counsel, I trust you probably anticipated --

MR. BERGMAN: Yes, we did, Your Honor.

THE COURT: And I know you had time yesterday to work on this, so let's try to make sure that we have that.

MR. BERGMAN: Okay. We will give a full set to Mr. Toberoff for his review.

THE COURT: For right now, Mr. Toberoff, you may, once again, join Mr. Bergman at the lectern. It is the Court's ongoing resolution to bring resolution to this matter.

MR. BERGMAN: This is the portion that I read. The question is: Did I read it correctly?

THE COURT: Let's take a brief morning recess here while you're arranging this.

MR. BERGMAN: Very well, Your Honor. In the meanwhile, we'll give a copy of the trial testimony to Mr. Toberoff.

(Whereupon a brief recess was held.)

THE COURT: Counsel, you may proceed.

MR. BERGMAN: Thank you, Your Honor. Your Honor, I think I may have garbled the last quote that I gave the witness, so I would like to repeat the question and answer so that the record is clear.

THE COURT: You may.

MR. BERGMAN: Thank you, Your Honor. And I'm beginning again at Page 4569 of the March 14, 2007 trial transcript in the Sahara case.

QUESTION: "Do you know what disparaging comments Mr. Cussler made about the film?"

ANSWER: "Actually, I do not."

QUESTION: "And, in fact, in offering this opinion, you have no idea what he said, do you?"

ANSWER: "My opinion did not go -- I did not apply the facts of the case to that. What I was talking about was the general proposition as to whether a negative review could -- the effect of negative remarks by an author. I did not study Mr. Cussler's remarks, nor render an opinion" -- I believe there's a word "on," but it's missing here -- "did not render an opinion on the effect of Mr. Cussler's remark in this case. I was not -- that's outside the scope of what I was engaged to give an opinion on."

BY MR. BERGMAN: **Q:** Do you recall giving that answer, sir?

A: Yes.

Q: Now, the issue in the case was whether these particular disparaging remarks affected the gross of Sahara, wasn't it? One of the issues.

A: I don't think that's accurate.

Q: Didn't Crusader Pictures make a claim that Mr. Cussler had disparaged the film and that, therefore, the grosses of the film had declined?

A: They certainly alleged that he had disparaged the film.

The way I was looking at it was in the context of whether he breached his contract by saying that.

Q: And --

A: They may well have alleged that they were damaged by that, but my focus was on, under the contract, and just in general, how controversies affect grosses. That's what I was focusing on. I didn't testify as to anything as to the damages that might have been caused to Crusader by those remarks.

Q: So your testimony was just in general and didn't apply to the specific facts of the case.

MR. TOBEROFF: Objection. Misstates his testimony.

THE COURT: It's a question. You may answer.

THE WITNESS: As I stated in my testimony, what I was engaged to opine as to was how controversy builds -- even if a negative can build awareness of the film, and that can actually sometimes help the grosses, because the awareness is raised.

That's what I was testifying to. As I testified, I didn't go and render an opinion as to the exact effect that there was in the Sahara case. I was just speaking in general.

BY MR. BERGMAN: **Q:** Okay. And do you recall after the quote that I read to you, Mr. Putnam actually read to you and played the audio of various disparaging comments made by Mr. Cussler concerning the film?

A: I remember that.

Q: And do you recall that the essence of what Mr. Cussler was saying to his fans was, 'Don't go see this movie; it's terrible'?

A: Unfortunately, I think that's an accurate characterization of what he was saying.

Q: And after hearing all of that, I'm going to ask whether you recall giving the following answers to the following questions, which are contained, again, in the March 14, 2007 trial transcript, at Page 4608, beginning at Line 10, ending at Line 28. This is Mr. Putnam talking:

QUESTION: "Now I'll ask the same question that I keep asking: Does this change your opinion in any way as to whether or not this would have an impact on whether -- take Mr. Cussler's fans, would want to go see the film?"

ANSWER: "No. It's consistent with -- his radio interview is consistent with what he said in the articles I looked at before.

"So I think that there's the same range of possibilities in terms of reaction of a Cussler fan. It's just this is Clive" -- it says "Clive" -- "just this is Clive stating it live on the radio, as opposed to having the words transcribed and read in the newspaper."

QUESTION: "Is there no cumulative effect?"

ANSWER: "There might be a cumulative effect, yes; and that cumulative effect, again, may well -- in my estimation, would have engendered an increased controversy and helped the financial performance of the film."

QUESTION: "So the more bad that's out there, the more likely someone is going to see this film?"

ANSWER: "It may seem strange, but I think that statement is true."

BY MR. BERGMAN: **Q:** Do you recall giving that answer to that question, sir?

MR. TOBEROFF: Your Honor, objection. When he read that, there were various words that he read incorrectly.

THE COURT: I'm sorry?

MR. TOBEROFF: There were various words, when I followed in the transcript, that he --

THE COURT: Well, I don't have a copy of the transcript in front of me, I don't think. Do I?

Counsel, did you read it accurately?

MR. BERGMAN: I sure did my best, Your Honor. Although, I have to admit that at the end of each line in this transcript, there is sometimes a word missing.

THE COURT: Refer me to the page again.

MR. BERGMAN: The page is 4608, which is from 314, and the line begins --

THE COURT: Hold on. Let me get to 4608. Why don't you consult with your colleagues there.

MR. BERGMAN: The line begins at Line 10, Your Honor.

THE COURT: Right. Line 8, you said, "Now I'll ask the same question that I keep asking."

MR. BERGMAN: Yes.

THE COURT: And you read down through what line?

MR. BERGMAN: Line 28, Your Honor.

THE COURT: Line 28?

MR. BERGMAN: Yes, sir.

THE COURT: Take a look at that (Speaking to the witness).

THE WITNESS: (Witness responds.) Okay.

BY MR. BERGMAN: **Q:** Mr. Halloran, based on your reading, did I read that correctly?

A: The gist of what you said was accurate.

Q: Let's move to some general principles. Do you agree, Mr. Halloran, that in determining the value received by a licensor for a literary property, you have to look at the entirety of the deal, not isolated provisions?

A: I think in general that's true.

Q: Am I correct, sir, that you can't determine the fair market value of a contract or the amounts paid for that contract without including all of the financial terms?

A: I think that's accurate.

Q: And those basic financial terms which have to be considered in tandem include the option; correct?

A: Yes.

Q: The purchase price, if any?

A: Yes.

Q: Any bonuses?

A: Yes.

Q: The merchandising split?

A: Yes.

Q: The contingent compensation?

A: Yes.

Q: And the video royalty; correct?

A: Yes. But you also have to look at other things like reversion, to see how that impacts. But in terms of the financial stuff on the face of the contract, that's accurate.

Q: And is it true, sir, that some elements may be more important in one type of contract than they are in another type of contract?

A: That's true.

Q: For example, the manner in which merchandising is accounted for is an essential part of any superhero film deal, isn't it?

A: That's true.

Q: When a studio looks at a deal for literary rights, part of the math as to what they're prepared to pay on the front and back end is an estimate as to how much of the merchandising revenue will fall to the studio's bottom line; isn't that correct?

A: That's not completely correct, because oftentimes, the merchandising number, for pictures like Hannibal and Timeline, is zero. So I think you have to make the distinction between a comic book, where there's either preexisting merchandising or a potential for merchandising revenue, and a literary work, where there's really no potential for merchandising. Those are two different animals.

Q: When you say the merchandising number for pictures like Hannibal and Timeline, is zero, what do you mean?

A: Well, that number would be negligible, if not zero.

Q: You mean the amounts received for merchandising by the studio or whoever is doing the merchandising?

A: Well, both the number that's projected by the studio and the number that's actually received.

Q: Okay. Is that because more people put Superman on lunch pails than put Timeline on lunch pails; right?

A: That's accurate.

Q: But the statement that I made, which, I'll be frank with you, was a direct quote from your deposition, is correct, is it not, that when a studio looks at a deal for literary rights, part of the math as to what they're prepared to pay on the front and back end is an estimate as to how much of the merchandising revenue will fall to the studio's bottom line; right?

A: That's accurate.

Q: And, of course, when the licensor does its math, it's also concerned with how much will fall to its bottom line; correct?

A: Yes.

Q: And if you were valuing Superman on either side of the table, you would certainly consider the merchandising value, wouldn't you?

A: You would.

Q: And how merchandising is treated in a particular contract is part of each side's analysis of the price that's paid; correct?

A: The price that's paid in the context of potential value, yes.

Q: Now, at the time of your deposition, which was after, of course, the preparation of your report, you didn't have a precise recollection of how merchandising was treated in the film agreement, did you?

A: No, I didn't.

Q: And you weren't aware at that time, after you had prepared your report, of the merchandising split, the actual split, in the film agreement, were you?

MR. TOBEROFF: Objection, Your Honor. The question is vague and confusing. He says "you weren't aware at that time," meaning at his deposition --

Strike that, Your Honor.

THE COURT: Rephrase the question.

THE WITNESS: I think I may have misspoke.

THE COURT: Rephrase the question. He objected. Counsel, rephrase the question.

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** At the time of your deposition, Mr. Halloran, you weren't aware of the precise split between DC on the one hand and Warner Bros. Consumer Products on the other hand, under the Warner Bros. Consumer Products merchandising agreement, were you?

A: I think I was aware of it. And I think it's in my report.

It's a little complicated, because there's the film agreement and then there's a separate merchandising agreement.

And under the film agreement, there's a 50/50 split. But what's not reflected in the film agreement is that there's an outside agreement with Warner Consumer Products, where they take a fee for the administration of the merchandising. So I put those two together.

MR. BERGMAN: Move to strike everything after "I think I was aware of it" as nonresponsive.

THE COURT: Yes. Well, "And I think it's in my report"; I'll let that in as well.

MR. BERGMAN: Pardon me, Your Honor?

THE COURT: I'll let "And I think it's in my report" in as well.

BY MR. BERGMAN: **Q:** Do you recall at your deposition, Mr. Halloran -- and I'm referring to Page 199, Lines 5 through 8 -- I asked you the following question and you gave the following answer:

QUESTION: "What was the merchandising split under the consumer products agreement between DC and Warner Bros. Consumer Products?"

ANSWER: "I don't know the exact terms of that agreement."

BY MR. BERGMAN: **Q:** Do you recall giving that answer to that question?

A: I don't recall that specifically at the time. As you know, I came in very late; I had a mass of data, so it may have been at that deposition that the consumer deal was not in my head at that time.

MR. BERGMAN: Move to strike everything after the word "specifically."

THE COURT: It is stricken.

BY MR. BERGMAN: **Q:** And at the time of your deposition, Mr. Halloran, you had no estimate of the actual merchandising revenues that were generated by Superman Returns, did you?

A: I believe that's correct.

Q: But your report states unequivocally that Warner Bros. received 62.5 percent of the Superman Returns merchandising revenues, doesn't it?

A: You're mixing apples and oranges here.

I did say that in my report, but that was based on the contracts. As of that time, I was not aware of the exact amount of merchandising revenue that was paid or retained by DC with respect to Superman Returns.

MR. BERGMAN: Move to strike everything after the word "report."

THE COURT: Given the question, though, it's overruled.

BY MR. BERGMAN: **Q:** Did you state unequivocally in your report, sir -- and I'm quoting from Page 19, Paragraph 5.6.2.10 -- "As a result, Warner received 62.5 percent of merchandising rights [sic]"?

A: I think you've misquoted the transcript.

Q: Let me try again.

I'm quoting from the fourth line down from the top of the paragraph numbered 5.6.2.10: "As a result, Warner received 62.5 percent of merchandising receipts." Do you recall making that statement in your report?

A: That was with respect to the contracts that I reviewed; and I did say that, and it's true.

Q: And in your direct testimony, you made the same contention, that Warner received 62.5 percent of something you referred to as, quote, film-related, closed quote, merchandising; correct?

A: If you take the contracts and read them, Warner Bros. was entitled to retain 62.5 percent of the film-related merchandising revenue.

MR. BERGMAN: Move to strike as being nonresponsive.

THE COURT: It's stricken.

MR. BERGMAN: May the reporter repeat my question, Your Honor?

THE COURT: Yes.

(Whereupon, the last question was read back.)

THE WITNESS: There's a mix-up here. And it's a continuing problem, which is, there's what the contract says, and then there's the downstream, whatever the financial results are. Okay.

What I know is, under the contracts, Warner Bros. was entitled to retain 62.5 percent of the film-related merchandising revenue. That's what the contract said.

MR. BERGMAN: Could you place Exhibit 1041, a copy of the film agreement, before the witness, please.

(Document provided.)

BY MR. BERGMAN: **Q:** Do you have your chart right under that?

A: Yep.

Q: Could you, without reference to --

A: We should, in fairness, look at the agreement, shouldn't we?

Q: I'm sorry, sir?

A: I'd like to look at the agreement.

Q: Oh, I thought the agreement had been placed in front of you.

A: Yeah, I have it here.

Q: Oh. Well, by all means. And let me try to focus you at least a little bit.

A: Fine.

THE COURT: Let him take a minute with it.

MR. BERGMAN: Okay.

(Brief pause.)

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** To begin with, would you point out to me, please, the provision that refers to the phrase, quote, film-related merchandising.

A: Well, it's "reserved merchandising rights related to new characters, additional characters, and new elements."

Q: Is there any place in the contract where the phrase "film-related merchandising" is utilized?

A: No. But that's what this means.

MR. BERGMAN: Move to strike everything after "no," Your Honor.

THE COURT: It is what it is. Yes, it's appropriate to strike that. Point to what you're referring to.

THE WITNESS: I was referring to the language "new characters, additional characters, and new elements."

THE COURT: Do you have that, Counsel?

MR. BERGMAN: Yes, I do, Your Honor. And I'll follow through with the witness.

THE COURT: You may.

BY MR. BERGMAN: **Q:** By using the phrase "film-related merchandising," you're using your own phrase, one that you use to characterize a provision of the agreement, do you not?

A: Yes.

Q: And you are purporting to characterize, are you not, Subparagraph 6-C, which appears at Bates-stamped Page 4205 of 1041; correct?

A: Yes. But I need to finish the line. I need to broaden the definition to make it more accurate. I didn't finish reading it.

It talks about reserve merchandising rights relating to the "new characters"; the "additional characters"; the "new elements"; the "additional elements" from logos or titles of any motion picture produced hereunder and the performers appearing in any such motion pictures.

Q: What are new characters, as used within that provision?

A: They are in quotes, but I don't see them as being defined terms here. They may be defined elsewhere in the contract, but they're not defined here in 6-C.

Q: You didn't notice them being defined when you reviewed these contracts before?

A: I know what they -- I'm confident there was a definition someplace else, and I can tell you that a new character would be a character that was added that was not within the rights that were granted by DC to Warner Bros.

Q: Are you referring to a general definition of a new character or a specific one as applied to Superman Returns?

A: Yeah, that's my general understanding. I could go back and look -- if you would be so kind, if you wanted to show me the agreement where it defines "new characters," I'd be happy to discuss that with you.

Q: I'd be pleased to, sir.

A: Okay.

Q: Turn to the page that's Bates-stamped 4209, which is Paragraph 8.

A: Okay.

Q: Can you see that the term new characters "shall mean any fictional character or characters newly created by Warner having no similarity to any of the characters contained in the property and incorporated into any motion picture produced hereunder"?

Do you see that, sir?

A: I do.

Q: Do you have any knowledge whether there were any such new characters in Superman Returns?

A: I don't.

Q: Do you have any knowledge whether, even if there were such new characters in Superman Returns, those new characters were, in fact, merchandised?

A: I don't.

Q: Do you have any knowledge whether, if there were such new characters in Superman Returns and they had been merchandised, it's Warner Bros. or DC's policy to keep any records of whether any revenue had been obtained from the merchandising of such new characters?

A: I don't have specific knowledge that DC separately accounts for these, but they should, certainly.

Q: Is that a moral judgment, they should?

A: Well, I guess it's a moral judgment, but it's based on my knowledge of how contracts and accounting work. People try to account in conformity with contracts.

Q: You have no knowledge, do you, sir, of whether any prior understandings had been reached between these two companies to the effect that even if we released any of these new characters or new elements, we can't tell how much a licensor is paying for them as opposed to Superman or Lois Lane, and, therefore, we're not going to keep any record of it?

You don't know what the parties had agreed to, do you?

A: I don't know if DC and Warner Bros. had such an understanding. I've seen no evidence of it.

Q: Okay. And, sir, if you would look down again at Page 4209, at the definition of "additional characters."

Am I correct that an additional character means, quote, any fictional character or characters newly created by Warner, and which, but for the operation of this agreement, would constitute an infringement of the copyright or trademark of DC in or to any of the characters constituting the property, closed quote?

Do you see that?

A: Yes.

Q: Are you aware, sir, as to whether there were any such, quote, additional characters in Superman Returns?

A: I'm not aware that there were any such characters.

Q: Or whether, if there were any such additional characters, such additional characters were merchandised at all?

A: I don't know.

Q: You saw the movie; right?

A: I did.

Q: Can you think, as you review the movie in your mind's eye, of any new or additional character contained in those movies?

A: Not that was prominently featured.

Q: How about any that were not prominently featured?

A: I can't think of those either.

Q: Okay.

And even if there had been any merchandising of those additional characters, you don't know what prior agreements, understandings, or practices had been developed between DC and Warner Bros. regarding the accounting for that merchandising, do you?

A: No.

Q: Okay. Now, the fact is, Mr. Halloran, isn't it, that your opinion as to the market value of Superman Returns in 2002 is predicated, at least in part, on your assumption that Warner Bros. received 62.5 percent of merchandising receipts; correct?

A: That's correct.

Q: And if the evidence were to demonstrate, Mr. Halloran, that contrary to your report and your testimony, DC received 75 percent of every merchandising dollar generated by Superman Returns, would that change your opinion that the film agreement was at fair market value?

A: It would be something that I would have to consider in the context of the entire agreement.

Q: Okay. If the evidence demonstrated that DC's share of the Superman Returns merchandising revenue was in excess of $30 million, would that change your opinion that the film agreement was a below-market deal?

A: As I've testified, the proper way to analyze this is to look at the value as of the date of the agreement and to not consider the estimated downstream revenues. So, in terms of valuing as of 1999 to 2002, I disregarded what the actual revenues were, as one would do, because as I explained before in my direct testimony, when you actually value the property, you don't know what the revenues are going to be. You make a projection, but you don't know what they're going to be.

MR. BERGMAN: Move to strike as being nonresponsive, Your Honor.

THE COURT: Overruled. I take it from that, your answer is no?

THE WITNESS: You'd have to --

THE COURT: You're incapable of rendering an opinion?

THE WITNESS: No, no, I'm not incapable of rendering an opinion. But I just wanted to --

THE COURT: The question was whether or not it would change your opinion.

THE WITNESS: It was one of the things I'd have to consider, but I don't think it would change my opinion as to --

THE COURT: So the answer is no?

THE WITNESS: You have to consider it in the entire context. But as to my basic opinions, the most important one being reversion, it wouldn't change my opinion at all.

THE COURT: So the answer is, no, it would not change your opinion; is that correct?

THE WITNESS: I don't think it would.

THE COURT: I take it from your answer that you're essentially saying no. If that's not correct, I think counsel is entitled to an answer.

Does it or does it not change your opinion?

THE WITNESS: It does not -- well, I have many opinions, but in toto, it does not change my opinion as to the market value of the Superman property in 2002.

THE COURT: Very well.

BY MR. BERGMAN: **Q:** Mr. Halloran, isn't it a fact that the fair market value of an agreement such as this is determined at the time that the contract is entered into, but that the terms are meaningless, have no significance, are incomparable from one agreement to another, until you interpret them in terms of dollars?

A: That's not true.

MR. TOBEROFF: Vague and ambiguous as to "interpret them in terms of dollars."

THE COURT: I think I understand what you're saying, Counsel, but why don't you just rephrase it to make it clear for the record.

MR. BERGMAN: Okay. And perhaps I can do it, Your Honor, with this line of questioning.

THE COURT: All right.

BY MR. BERGMAN: **Q:** Mr. Halloran, what do you understand that His Honor has determined is the question to be answered in this case?

A: Basically, what we're doing in this phase is trying to determine the fair market value of the rights that were transferred from DC to Warner Bros. We're trying to put that in context and understand it.

Q: Okay. In particular -- and I'm quoting here from His Honor's final order after the pretrial conference -- this is what the Court has said is the question, quote: Given the nature and characterization of the property in question, the trial shall determine whether the value of the various Superman option and assignment agreements between DC Comics and -- I'm going to abbreviate that to "Warner" if I may, Your Honor -- and the amounts paid to DC Comics by Warner reflect the fair market value of the nonexclusive rights that the Court has determined were transferred from DC Comics to Warner. And if not, what accounting shall be required of Warner to ensure an equitable result.

Does that sound familiar to you?

A: Yes.

Q: So we have to determine, pursuant to the Court's order, not merely whether the terms of the agreement were fair market value, but whether the amounts that were paid were fair value as well; correct?

A: I didn't do a financial calculation as to a fair market deal and what that would have yielded given Superman Returns. My understanding is that that's a matter that will be determined pursuant to the equitable power of the Court in terms of an accounting. That's my understanding as to how this was supposed to work.

Q: Do you recall, Mr. Halloran -- because this is an important point -- do you recall at your deposition giving the following answer to the following question. And I'm quoting from Page 217, Line 22, to Line 218, Line 4. And we were talking about the Terminator agreement at the time, and I asked you the following question:

QUESTION: "Is it your testimony, Mr. Halloran, that the Terminator agreement that you reviewed for your report is more economically favorable to the licensor than the Superman agreement was to DC?"

ANSWER: "You'd have to know -- because of the structure of the Superman deal, you would have to know the performance of the film to characterize them. The Terminator agreement is for $25 million, guaranteed."

BY MR. BERGMAN: **Q:** Do you recall giving that answer to that question?

A: I do recall that, yes.

Q: Okay. In fact, you emphasized that point, namely, that you have to look at the aggregate dollars rather than the bare terms, when I asked you at your deposition to compare the Iron Man deal to the Superman deal, didn't you?

A: When we're talking about dollars, we're talking about the projected dollars that -- in terms of valuation, it's projected dollars. You could, downstream, take, you know, Agreement A and do an accounting and Agreement B and do an accounting, and compare what happened ultimately. But, again, that can be misleading. What determines the value is the value at the time of entering the agreement.

MR. BERGMAN: Your Honor, move to strike as being nonresponsive.

THE COURT: It's stricken.

BY MR. BERGMAN: **Q:** Here's my question to you, Mr. Halloran --

THE COURT: Mr. Toberoff?

MR. TOBEROFF: My objection to this line of questioning is that when we're talking about dollars or amounts paid, or even the statement in your order, Your Honor, it's vague and ambiguous to the extent. Are we talking about revenues ten years down the line? Two years down the line? Or are we talking about amounts payable in contracts, which is when Mr. Halloran is referring to? And he's crossing over between the two.

THE COURT: Fair enough objection. Let's specify, Counsel.

MR. BERGMAN: With all respect, Your Honor, I disagree.

THE COURT: I've stricken the answer. The answer is stricken.

MR. BERGMAN: Yes, sir.

THE COURT: You need to rephrase your question.

MR. BERGMAN: I will, indeed.

THE COURT: Very well.

BY MR. BERGMAN: **Q:** Mr. Halloran, didn't you look at the aggregate dollars paid over time for a film, rather than to the bare terms of the contract for a film, when I asked you at your deposition to compare Iron Man to Superman?

MR. TOBEROFF: Objection. Vague and ambiguous as to "for a film," "aggregate dollars for a film," "terms of the contract for a film."

Which film?

THE COURT: Overruled. I think it's quite clear. He specifies the film in question.

THE WITNESS: Because of that, could I have the question read back so it's fresh in my head?

THE COURT: Yes.

(Whereupon, the last question was read back.)

THE WITNESS: Well, if I said that, I may have been a little confused and misspoke.

THE COURT: He's not asking for an elaboration at this point. You've answered the question. Next question.

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** You told me, did you not, Mr. Halloran, that I had to look to the aggregate number of dollars that were, in your words, sticking to the ribs of Warner Bros.?

A: Again, there's confusion here. What you have to do is look at the fair market value, what that contract should have been, and what the contract -- what dollars should -- you're talking about Warner Bros. -- it's what dollars should have gone to DC. It should have been, in my estimation, at least double what the projected dollars were, from the documents that I saw.

MR. BERGMAN: Move to strike as nonresponsive.

THE COURT: Why don't you refer to the actual testimony and base your question off of that. I think that would be clearer for the witness, and that would satisfy Mr. Toberoff's objection on vague and ambiguous.

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** I'm going to refer to Page 249 of your deposition. I'm going to commence reading at Line 3 and end at Line 13. And we had been talking about Warner Bros. Consumer Products' commission, the 25 percent; and I asked the following question of you, sir:

QUESTION: "And 25 percent, based on some other agreement that you're familiar with, is not a very high fee, is it? "

Objection by Mr. Toberoff.

THE WITNESS: "Well, it's akin to a distribution fee. And what you have to look at is what are the aggregate dollars that are sticking to the ribs of Warner Bros. And in this case, it's 62.5 percent.

"Can I finish?

"And Iron Man was zero. So you have to look at that fee in the context of the total revenues that are sticking to the ribs of the company."

BY MR. BERGMAN: **Q:** Do you recall giving that answer to that question?

A: I meant projected revenues when I said revenues, not actual revenues.

Q: Well, we weren't talking about projected revenue, were we, Mr. Halloran?

A: You'd have to put it in the context of what we were talking about.

Q: Well, how are you putting it into the context of what we were talking about?

MR. TOBEROFF: Your Honor, objection. When Mr. Bergman said, "We weren't talking about projected revenues," they were -- if you look -- it misstates the deposition record. If you look back in the deposition, they're talking about the payments payable in the contract, not to what happened after the contract. And "sticking to the ribs" refers to the contract.

THE COURT: Counsel, I'm going to certainly afford you an opportunity to flesh this out on redirect. However, this is an expert deposition. The expert has had an opportunity to correct mistakes that were made in it. I'm not going to allow that objection to change this at this point. But I'll certainly afford you the opportunity to flesh it out and explore this with your witness.

MR. TOBEROFF: Thank you, Your Honor.

THE COURT: It's past the noon hour. Let's take our lunch break at this time.

I'll see counsel at 1:30, and we'll resume at that time.

(Day 6 morning session concludes.)

P.M SESSION

1:50 P.M.

WITNESSES: MARK EDWARD HALLORAN,

Per order of the Court, Pages 771:18-773:22 have been placed under seal and are not contained herein.

THE COURT: Counsel, you may resume.

MR. BERGMAN: Thank you, your Honor. MARK EDWARD HALLORAN, PREVIOUSLY SWORN.

CROSS-EXAMINATION (CONTINUED)

BY MR. BERGMAN: **Q:** Mr. Halloran, I'm going to return to where we left off before the break. But before the break, you said something a couple times which I'd like to ask you about, and that deals with reversion. You have stated twice this morning, have you not, that reversion is the most important provision in the film agreement, haven't you?

A: It's certainly one of the most important.

Q: And why is it one of the most important?

A: Because the holder of intellectual property rights by DC wants to make sure that -- and this is true throughout the agreements I've looked at. They want to make sure that their property remains constantly exploited, whether it's on the film side or the television side.

If a studio or the network is not continuing to exploit, they want to get the rights back so they can then put those rights in the marketplace and set them up in a place where they will continue to be exploited and revenues will continue to be received.

The problem under both the film agreement and the television agreement, the way I read them, is that there is -- that Warner Brothers has essentially locked both the film and television rights essentially in perpetuity without a continuing obligation to develop, produce, and exploit motion pictures and television programs.

So certainly setting aside exactly what the participation is, if it's not -- if the product is not in the marketplace, the participation is zero. It's meaningless. So that's why it's so important.

Q: Okay. Without accepting any portion of what you've just said, am I correct that that is only important to DC?

A: Well, it would be important to DC or anyone generating revenues from DC.

Q: It would be important to DC because it is DC's exclusive rights which are under your interpretation being held by Warner Brothers; correct?

A: Well, it's certainly important to DC, but again, it would be important to those people who might derive an economic benefit from their exploitation of the motion pictures and the television programs.

Q: Well, it certainly isn't important to the plaintiffs, is it?

A: Assuming that the Court makes an equitable allocation of profits, it could be important to the plaintiffs how much money is generated.

Q: The plaintiffs have no right to share in DC's exclusive rights, do they?

A: I believe their interest post-termination is nonexclusive at this point. But what we're trying to do is make a determination of the fair market value of the rights that were in fact transferred which were exclusive rights.

Q: Am I correct, sir, that the reversion or nonreversion of rights doesn't have any consequence whatsoever to the plaintiffs' northern exclusive rights in Action Comics No. 1?

MR. TOBEROFF: Your Honor, the question is vague and ambiguous and confusing as phrased.

THE COURT: Overruled. You may answer.

THE WITNESS: Well, I think that's more a legal question than an expert question. But could you read it back?

BY MR. BERGMAN: Q: Put on your legal hat.

A: Well, I don't think that's my job here.

Q: Am I correct, sir --

MR. TOBEROFF: Objection, your Honor. He's not hired to give ultimate legal conclusions.

THE COURT: I agree. And this goes beyond the purview.

BY MR. BERGMAN: Q: Am I correct, sir, that Mrs. Siegel could leave her home today and assign to Paramount Pictures her nonexclusive film rights in Action Comics No. 1?

A: Yes, I think that's a legal issue.

Q: It's a what?

A: I believe that's a legal issue, is it not?

Q: What's your best answer? You answered that question at deposition, didn't you?

A: Well, could she go to Paramount and sell her nonexclusive rights. I explained how difficult that would be, to make it virtually impossible.

Q: Forgetting the difficulty, am I not correct that she could go out today and purport to sell her nonexclusive film rights in Action Comics No. 1?

A: I think your question is much too broad. I don't know exactly how to answer. If you want to parse that out.

Q: I don't know how to parse it out, sir. Does Mrs. Siegel have a right to convey to a third party the film rights in her nonexclusive -- her nonexclusive film rights in Action Comics No. 1? Forgetting the consequence, does she have that right?

A: And forgetting that I think it is really a legal issue, I believe that she theoretically could.

Q: She could; correct?

A: That is my understanding -- again, it's a legal issue, but I think theoretically she could. But we've discussed -- I have discussed how it's, you know, in a practical world impossible.

Q: Just as Mrs. Siegel could go out and sell her nonexclusive rights in Action Comics No. 1 today, she could do so five years from now, couldn't she?

A: Again, that's a legal question, and I understand there's a -- another termination of the co-owner that may be effective 2013. That may affect it. Again, that's a legal issue that I haven't -- it's not within the purview of what I'm testifying to.

Q: Putting that aside. Between DC and Mrs. Siegel, there is nothing at all in the reversion provision which prevents Mrs. Siegel from doing anything that she has a right to do, is there?

A: I'm not sure what you mean by in the reversion provision. Are you talking about a contract, or are you talking about a right of law under the copyright act to get rights back? They are two different concepts.

Q: Why don't you turn to the reversion provision in the contract that you testified to is the most important provision in the entire contract?

THE COURT: Which exhibit are you referring to for the record, Counsel?

MR. BERGMAN: I'm sorry, sir?

THE COURT: What exhibit are you referring to?

MR. BERGMAN: I'm referring to 1041, your Honor. And I believe the reversion provision is paragraph 12 at Bates No. 4211.

THE COURT: Counsel, your objection?

MR. TOBEROFF: Objection. Misstates his testimony. He did not state it's the most important provision in the entire contract.

THE COURT: The Court will disregard the editorial in the question. He's asking him to return to the exhibit at this time.

BY MR. BERGMAN: Q: Do you see that provision, Mr. Halloran?

A: Yes, I do.

Q: And am I correct, sir, that if Warner Brothers failed to make certain payments, then DC could elect to have its rights revert; correct?

A: Reading this just alone and not in the context of all the agreements, that's what this says.

Q: Well, that's what you're doing, isn't it? You're not reading this provision in the context of any other agreements, are you?

A: No, but I think it's crucial to understand that the payments of the continued compensation are applicable against these payments. So at this point there are no payments, and this reversion clause is very, very different from the customary reversion clauses that don't go to payments but go to actual developments, production, and distribution of the audiovisual work.

MR. BERGMAN: Move to strike everything after the word "no," your Honor.

THE COURT: Well, it goes back to the question. Your question was you're not reading this provision in the context of any other agreements, are you. I'm not really sure what you mean when you're asking whether he's reading it or you're

asking him on his testimony. So let's strike all of that and rephrase the question.

MR. BERGMAN: Will do, your Honor. Thank you.

Q: Mr. Halloran, as long as Warner Brothers continues to either make movies or pay the 500-, 600-, or $700,000-a-year options, the rights stay with Warner Brothers; correct?

A: That is correct.

Q: And the rights that stay with Warner Brothers are DC's exclusive rights; correct?

A: Again, you're getting into a legal area. But Warner Brothers has the rights that DC conveyed. And DC warranted that those were exclusive rights. So to the extent that DC could do that, and I'm not so sure they could, given the extant reversion, but to the extent they did that, then Warner Brothers would succeed to their rights.

Q: And Warner Brothers would succeed to DC's exclusive rights; correct?

A: What Warner would succeed to was the rights that were transferred by DC.

Q: And those were DC's exclusive rights, were they not?

A: DC represented in the agreements that those rights were exclusive.

Q: Okay. The reversion provision does not apply to Mrs. Siegel's nonexclusive rights, does it?

A: I believe under the contracts that it does.

Q: Under copyright law, sir, Mrs. Siegel has the right at any time under the Court's ruling to convey her nonexclusive rights to anyone she chooses, doesn't she?

A: Well, again, that's a legal issue, and what I'm doing is looking at these contracts in the context of 2002 and the fair market value and how they operate in a way that is not consistent with fair market value.

Q: Okay. Explain to me, please, how the reversion right in any way affects Mrs. Siegel's rights under the law?

A: Again, we just talked about that, and that's a legal issue.

THE COURT: You are asserting an objection that your client is not. You have been called as an expert to interpret rights.

THE WITNESS: Yes.

THE COURT: And how these rights are negotiated.

THE WITNESS: Hm-hm.

THE COURT: You are a lawyer.

THE WITNESS: Yes.

THE COURT: If you are taking the position that you are not qualified to opine on these, then state that. But the Court is not accepting a legal objection from the witness.

THE WITNESS: Okay.

THE COURT: Just for the record.

THE WITNESS: Okay. I'm not saying that.

MR. BERGMAN: May I have my question repeated, your Honor.

THE COURT: The last question was explain to me, please, how the reversion right in any way affects Mrs. Siegel's rights under the law. And here you're talking about the reversion clause in the contract between Warner Brothers and DC.

MR. BERGMAN: That is correct.

THE COURT: This is a part of what was negotiated. This is part of what you've evaluated.

THE WITNESS: Right.

THE COURT: If you don't understand how that would have operated, say it. If you do understand it, say it. Counsel?

MR. TOBEROFF: Objection, your Honor, to the use of the words "Mrs. Siegel's rights." Is he speaking about her copyright interest? Is he speaking about her right to receive money?

THE COURT: Fair enough.

MR. TOBEROFF: What right is he speaking about?

THE COURT: Fair enough. Counsel, if you'd clarify that.

BY MR. BERGMAN: Q: Am I correct, Mr. Halloran, that Mrs. Siegel at the present time holds an interest in -- a copyright interest in Action Comics No. 1?

A: That is correct.

Q: In what way is that copyright interest affected, if at all, by the reversion provision in the film agreement?

THE COURT: In your opinion.

THE WITNESS: Okay. Well, you have to look at what was conveyed by DC. DC conveyed not only an interest in Action 1 but in other copyrights and trademarks and the like.

There was -- that whole thing was transferred to Warner Brothers. The copyright law would supersede, obviously, that contract, and the Siegels could, it's my understanding, the Siegels could under copyright law, and has been found, have an ownership interest within their share of Action Comics 1.

I understand it's still sort of elastic as to how broad that's going to be. So it's very hard to measure exactly what that is. And the contracts don't give you the answer to that.

THE COURT: But the question focuses on what you just identified, in your opinion, does the reversion clause -- the Court is interested in this question as well.

THE WITNESS: Yeah.

THE COURT: Does the reversion clause have any impact on that right, that right that you have just defined? I understand it may very well be in flux.

THE WITNESS: Well, if the right was in fact transferred and that was part of the universe of rights that's subject to reversion, then it would impact on it.

BY MR. BERGMAN: Q: Yes, but DC has no right to transfer to Warner Brothers Mrs. Siegel's nonexclusive rights in Action Comics No. 1, does it?

A: Well, it purported on the face of these contracts to transfer exclusive rights, and it warranted that it was the sole owner and there were no claims. So unlike what is traditional, and things -- actually, I've done this with Warners in the Neopets case. Typically, if there's a claim that's uncertain, you schedule that, and you exclude it from the warranty. Warners and DC chose not to do that here.

Q: Warner Brothers did not have the power to transfer to -- strike that.

Given the Court's ruling in this case, that Mrs. Siegel owns an interest in the copyright in Action Comics No. 1, Warner Brothers -- DC had no right,

regardless of what it warrantied or indemnified, to deprive her of that right and transfer to Warner Brothers, did it?

A: That's not accurate. Because as of 2002, if I read the Court's -- as of 2002, it was still in flux as to whether that -- whether the termination of the Copyright Act was indeed effective. So it wasn't determined by Judge Larson until 2007, 2008. I don't know the exact date that in fact the termination was effected. And in reading the judge's opinion, it appears that Warner fought tooth and nail and took the position that in fact the termination was not effected. That's my understanding.

MR. BERGMAN: Move to strike everything after 2002, your Honor. That's not accurate.

THE COURT: Overruled. The question was whether.

THE WITNESS: I --

THE COURT: I can handle this myself. I appreciate your assistance.

You asked whether DC had no right regardless of whether it warrantied or indemnified to deprive her of that right and transfer it to Warner Brothers, did it? That's not accurate, and he explained why. I'm going to let the answer stand.

Going back to your earlier question, you said assuming that they did not -- that they had the right to transfer it. The reversion has no impact. If they did not have the right, the flip side of that, then the reversion clause does not impact it; correct?

THE WITNESS: I believe that's true, yes.

THE COURT: But at the time --

THE WITNESS: It's complicated because we're trying to, you know, retroactively --

THE COURT: Counsel, your next question.

MR. BERGMAN: Thank you, your Honor.

Q: So as far as you know, Mr. Halloran, now that you understand the Court's ruling on this matter, do you agree with me that Mrs. Siegel could go out today and sell to a third party for whatever she could get her nonexclusive film rights in Action Comics No. 1?

A: Assuming that the Court's determination overcomes this reversion provision, then I believe, again, it's a legal question. But from my understanding, she could be able to, to the extent that she could try, to sell her nonexclusive rights.

Q: Okay. And doesn't that mean, therefore, that the reversion provision affects only DC's exclusive rights and has no consequence whatsoever upon the plaintiffs' rights?

MR. TOBEROFF: Same objection, your Honor, as before. When he's referring to the rights, copyright or accounting? We don't know.

THE COURT: Counsel, why don't you clarify what rights you're referring to. I think I understand, and I think the witness understands, but just for the record. I think this is an important point.

MR. BERGMAN: Thank you, your Honor.

Q: Will you agree with me that Mrs. Siegel, by virtue of his Honor's ruling and the application of the Copyright Act, has the right to sell or license her nonexclusive film rights in Action Comics No. 1?

A: As we sit here today? I'm just trying to put this in time context. We're looking at this contract that was in 2002 before the Court's ruling. So are we talking about --

Q: Mr. Halloran, I'm speaking as we sit here today.

A: Okay. I believe they do have that right.

Q: Okay. Now, because Mrs. Siegel has that right today, there is nothing at all in the reversion provision which limits her right, does it?

MR. TOBEROFF: Same objection. If he was referring to the right in the prior question, then there's no objection. If he's referring to the right to an accounting, there's an objection. We don't know.

THE COURT: I trust you're referring to the same right --

MR. BERGMAN: I certainly am, your Honor.

THE COURT: For the record. You may answer.

THE WITNESS: The Copyright Act would supersede -- supersede this provision.

BY MR. BERGMAN: Q: Okay. So that the reversion provision, whether it's the most important provision in the contract or not, is important only insofar as DC's exclusive rights are concerned, isn't that true?

A: I think you have to look at not only the rights but the accounting provision. You have to keep those separate.

Insofar as DC's rights under this, it would only -- the only rights that Warner's got were the rights that they got from DC. So to the extent it applies to DC, then it applies to the Siegels as part of the rights -- if their rights were indeed part of the grant, then it would affect them.

Q: At the time that you -- strike that. In 2002, if you were at a competing studio in the business affairs position and DC came to you and offered the rights, the precise rights with which his Honor has found were conveyed to Warner Brothers, what projections would you make based on those rights?

A: Customarily the rights are acquired prior to the projections that are done by the studios.

Q: Correct.

A: So there may or may not have been projections, but the most important projections that are done is once you know all the components of the movie, then that's when you do a projection and decide whether or not you're going to make the movie.

Q: Right. Once you -- I'm sorry, sir.

A: Okay. But you certainly, in assessing the rights, what you would do is look at the marketplace and look at similar deals but also look at the unique factors of Superman and try to estimate the future value of the worth of the audiovisual works that you would get.

Q: But in terms of just having that bare property in front of you, not knowing the budget or location or potential stars or potential director, there's no projection to make, is there?

A: If you make a projection without putting on an Excel spreadsheet, what you would do is assess the rights and look at the universe of Superman and what that potentially could mean for the exploitation of the rights that you might acquire.

Q: So that when I asked you those questions this morning dealing with Iron Man and dealing with terminator, where you testified that that position, that you

had to look at the money that stuck to the ribs of the companies, you said it was due to a projection, but there was no projection at that point in time, was there?

A: I'm not sure what point in time you're referring to.

Q: I'm referring to the point in time that you first get a proposal, for example, from Iron Man. There's no projection that you make ahead, well, how much money am I going to make on this property. You have to know other facts; correct?

A: No, you can certainly do a -- the final projection is done once you have all the elements put together. But certainly if you have a property of the value of Superman, you know that it's going to be of enormous value without looking at an Excel spreadsheet. With its history and -- Superman is essentially in our cultural DNA. You know that, in the various ways that you're going to do it, that there is a -- and I talked about this the other day. You can use that too, and look into the future and try to leverage that awareness into profitability and various product lines.

So you have a very good sense of how valuable it is even though you might not have just a specific Excel spreadsheet doing, quote, projections.

Q: That being the case, let's go back to the question that I referred you to earlier in your deposition at page 249, lines 3 through 14. I was asking you at the time about the 25 percent return that Warner Brothers consumer products gets for the merchandising, and I asked you this question:

"QUESTION: And 25 percent, based on some other agreements that you are familiar with, is not a very high fee, is it?

"ANSWER: Well, it's akin to a distribution fee, and what you have to look at is what are the aggregate dollars that are sticking to the ribs of Warner Brothers, and in this case, it's 62 1/2 percent. Can I finish?

And Iron Man was zero.

"So you have to look. You have to -- at that fee -- you have to" --

A word was left out in the transcript. I presume it was "look."

"So you have to look, you have to look at that fee in the context of the total revenues that are sticking to the ribs of the company."

Do you recall giving that testimony?

A: Yes.

Q: When you gave that testimony, you were talking about the amount of money that sticks to the ribs of the studio when the money starts coming in, weren't you? And Mr. Toberoff should not be shaking his head no, no, no, no.

MR. TOBEROFF: Pardon me?

MR. BERGMAN: You --

MR. TOBEROFF: Your Honor I was not shaking my head no, no, no, no. I was looking at the screen.

MR. BERGMAN: That is an untruth.

THE COURT: Let's move along. I didn't see.

THE WITNESS: When you talk about stick to the ribs, you make the determination based on reading the contract and at the time of the contract. And the stick to the ribs is oftentimes -- what I was discussing is the potential stick to the ribs based on projected revenue. It's not a hindsight looking back what happened. It's at the time, let's say, you know, DC, I was negotiating with DC when I was at a studio. I would -- the terms of our contract that we were in negotiation, we would know at the time. We'd do our best to sort of see the future profitability. But it's not a -- it's stick to the ribs based on the negotiations then and the contract now, not stick to the ribs downstream because we don't know what would stick to the ribs.

BY MR. BERGMAN: Q: That's a very important point, isn't it, Mr. Halloran? Let me ask you this.

THE COURT: Counsel, next question.

MR. BERGMAN: Sorry, sir?

Q: When you negotiate the Sahara agreement and you agree that the rights holder will receive 10 percent of the producer's share, you don't know what that producer's share is going to be, do you?

A: Are you talking about me personally or a hypothetical person?

Q: I'm talking about you personally. Let's say you're the one who is there, and I come to you, and I offer you the property. And I tell you I want 10 percent of the producer's share. Do you know what 10 percent of the producer's share from Sahara will be before you even buy the property?

A: Now, who are you and who are you representing, and who am I and who am I representing?

THE COURT: Try to answer the question. Do you know?

THE WITNESS: Well, just as with the gross participation, you're not going to know exactly what it is. It's producer's share, you're not going to know exactly what it is. But what you would do is, you know, look at the contract and try to estimate what it might be. But certainly when you are negotiating a contract, you are dealing with a contract then and there, and that's when you determine fair market value.

BY MR. BERGMAN: Q: Yes, sir, and when you agree to 5 percent of the distributor's gross in the film agreement, you don't know what that's going to be either, do you?

A: You don't know what that ultimately is going to be.

Q: So tell me, what's more valuable to the licensor? 10 percent of the producer's gross or 5 percent of the distributor's gross?

MR. TOBEROFF: Vague and ambiguous as to what contract he's referring to.

THE COURT: With all other factors being the same?

MR. BERGMAN: If I may, your Honor, that's precisely the point I'm trying to make.

THE COURT: I understand. I think I have it. Overruled. He's not referring to any particular contract.

MR. BERGMAN: Yes, sir.

THE WITNESS: It depends on the contractual definition of producer's gross and distributor's gross. It is generally true that distributor's gross is more valuable based on the percentage, but there are times, depending on what gross is going in, where the 10 percent of producer's gross would exceed 10 percent of distributor's gross.

BY MR. BERGMAN: Q: Mr. Halloran, in trying to determine which is more valuable, 10 percent of producer's gross or 5 percent of distributor's gross, you must have actual numbers, must you not?

A: No.

Q: Don't you have to know, for example, on the distributor's gross, A, what is the distributor's gross; B, what is the distributor charging as a fee; and, C, what

is the distributor paying as prints and advertising? All of which must be deducted from gross before you reach producer's gross; correct?

A: That's not true.

Q: And in what way is that not true?

A: In some definitions of producer's gross, P and A is not necessarily deducted. I think -- there's no provision, for example, in Sahara for the deduction of prints and ads.

Q: Did you say Sahara?

A: There's no provision in Sahara that provides for –

Q: I'm afraid you're very mistaken --

THE COURT: Counsel?

MR. BERGMAN: I'm sorry, your Honor.

Q: Would you please point out the provision in the Sahara agreement to which you are referring?

THE COURT: Refer for the record the exhibit number so it's clear.

BY MR. BERGMAN: Q: Would you turn, please, to Exhibit 201.

A: I found it.

Q: Do you have it, sir?

A: I do.

Q: Would you turn to paragraph 7 at page 4899.

A: I'm with you.

Q: Have you read that paragraph, sir?

A: Yes.

Q: Isn't it a fact that that paragraph permits the deduction of prints and advertising before producer's gross is reached?

A: That's not the way I read it.

Q: Pardon me?

A: That's not the way I read it. I don't see a provision for the deduction of prints and ads.

Q: Do you see about 12 lines down in paragraph 7 where the line begins, "and all rights granted to purchaser hereunder"? Do you see that line?

A: Yes.

Q: All rights granted to purchaser hereunder in the literary material from all sources, uses, and media, except as otherwise provided hereinafter deductioning, after deduction of only applicable taxes, other than income taxes, out of pocket transmittal and collection costs paid to third parties, sales, agents -- here comes the language I'm referring to -- and distributors' fees and out-of-pocket expenses paid to third parties, close quote.

Does that not permit the deduction of prints and advertising before producer's gross is reached?

A: That's not necessarily how I read it. It talks about distributor's fees. It doesn't talk about prints and ads.

Q: Is that the way you remembered it in the Sahara case itself?

A: In the Sahara case, I don't remember actually that we went into the interpretation of this.

Q: Do you remember in the Sahara case whether or not you testified that Paramount deducted prints and advertising before remitting money to the producer?

A: That's different, okay? That's the agreement between Anschutz and Paramount. My recollection is that Paramount, if in fact they put up prints and ads, could take them out before there was money remitted to Anschutz. But that's an agreement the licensee had. That's not -- under this agreement, the licensee would only be entitled to deduct those things under this contract.

Q: Can you identify for me any motion picture that you can think of which was produced by an independent producer and the prints and advertising were financed by a distributor where the distributor did not deduct prints and advertising and a fee before remitting money to the producer?

A: I can't think of one.

Q: That's because there is none, is there?

A: But that's -- again, that's the agreement between the producer who holds the rights and the distributor. You have to look at the agreement.

Q: Mr. Halloran, are you testifying as an expert in this area, that this Sahara contract does not permit the distributor to deduct its prints and advertising and distribution fees prior to remitting money to the producer?

MR. TOBEROFF: Objection. Argumentative and asked and answered.

THE COURT: Overruled.

THE WITNESS: The distributor is not a party to this agreement. The distributor is not a party to this agreement.

BY MR. BERGMAN: Q: Mr. Halloran, it doesn't matter whether the distributor is a party to this agreement. The author and producer are parties to this agreement, are they not?

A: They are.

Q: And does this agreement not permit the deduction by the distributor, whoever that distributor may be, even if an affiliate of the producer to deduct distribution fees and costs?

A: It is clear that distribution fees vis-a-vis in the definition of producer's gross, there is a provision whereby it anticipates that the distributor will take out distribution fees. It's not clear from here that they are entitled to take out P and A. It doesn't say that here. I acknowledge that in the contract between the distributor and the licensee that it's customary for prints and ads to be deducted, but that's -- I don't see it here. One would expect to see it here.

Q: It's invariable, is it not, for the distribution fees and prints and advertising to be deducted by the distributor before remitting money to the producer?

A: As I just testified, in the agreement between the distributor and the producer, it is, as far as I know, invariable that before remitting sums, the distributor takes distribution fees and their costs. There are so-called rent-a-studio type deals where the prints and ads are put up by a third party or the producer, and in that case typically there's just a distribution fee taken off. And that's not, you know, legislated in here.

I would expect that if Anschutz was entitled to deduct prints and ads before determining the producer's pool, that that would be clear from this agreement, and it's not clear at all. Distributor fees, yes. But not prints and ads.

Q: So you are suggesting, as someone who is an expert in the motion picture industry, that it's possible, under the Sahara agreement, that Paramount

expended a hundred million dollars in prints and advertising and didn't deduct that from its agreement with the producer?

A: For the fourth time, Paramount is not a party to this agreement.

Q: Why is it, then, that the agreement refers to the deduction of distributor's fees and out-of-pocket expenses paid to third parties?

A: This is an agreement between Anschutz and Cussler. It talks about out-of-pocket expenses paid to third parties.

I would read this as out-of-pocket expenses that the producer had, not that the distributor had. So if the P and A was put up by the producer -- excuse me, by the studio, like Paramount, they would deduct those sums before you got to the gross receipts.

Q: Let's read the provision one more time, okay? Let's start at the top.

A: Okay.

Q: Owner shall be entitled to receive as contingent compensation an amount equal to 10 percent of the, quote, producer's gross receipts, from each theatrical picture produced hereunder. Producer's gross receipts is defined as the gross sums received by purchaser from the various distributors and licensees of rights to the theatrical pictures produced hereunder from the revenues derived from the distribution and exploitation of the theatrical pictures.

Now skip down through the parenthesis five or six lines to where it says after deduction of only applicable taxes other than income taxes, out-of-pocket transmittal and collection costs paid to third parties, sales agents, and distributor's fees and out-of-pocket expenses paid to third parties. Close quote. Those out-of-pocket expenses paid to third parties by distributor are prints and advertising costs, are they not?

MR. TOBEROFF: Your Honor, this is the fourth time he's asked the same question. And the witness has been consistent in his answer. I don't think he can just keep asking it because he doesn't like the witness's answer.

That's the objection.

THE COURT: He has given the answer you're going to get, Counsel.

BY MR. BERGMAN: Q: Would you be surprised if, when I call Steve Spira to the stand and ask him if under this provision a distributor is entitled to deduct

not only his fees but also his print and advertising costs, that he would say of course?

MR. TOBEROFF: Objection to the extent he's not permitted to ask a percipient witness questions such as this that goes to expert testimony based on specialized knowledge since this contract is not at issue in this case.

THE COURT: It's an argumentative question. I'm not really sure about what -- I'm not going to rule on the question as to a witness who is not before me. So that's way premature, but it's argumentative as to form, Counsel. Ask the next question.

BY MR. BERGMAN: Q: Have you ever had the experience of a distributor under a deal where the producer finances the picture and the distributor finances the prints and advertising? Do you know of a single instance in the history of motion pictures where the distributor hasn't deducted from gross receipts not merely his distribution fees but all prints and advertising costs?

MR. TOBEROFF: Objection, your Honor. That exact question was already asked as well of the witness.

THE COURT: It was, and he said he was not aware.

MR. BERGMAN: Thank you.

THE COURT: I assume that hasn't changed.

THE WITNESS: It hasn't changed, but there's this constant confusion. This is not an agreement with Paramount and distributor where they are taking the --

THE COURT: We're not talking about this agreement. He's asking in the agreement are you aware of any agreement in which that has happened.

THE WITNESS: I'm not --

THE COURT: I'm going to overrule the objection. I've got enough of a change now that he may answer your question. Counsel, I had thought the question was answered unequivocally, but apparently it's not.

MR. BERGMAN: Let me see if I can ask it again. Have you ever had the experience of a distributor under a deal where the producer finances the picture and the distributor finances the prints and advertising, do you know of a single instance in the history of motion pictures where the distributor has not deducted from gross receipts not merely his distribution fees, but all prints and advertising costs?

A: No.

Q: Let's stay with the Sahara agreement for a while. Am I correct that that's an agreement for the purchase of two motion pictures?

A: Two and possibly more.

Q: But putting aside options, in terms of immediacy, it's two pictures; right?

A: It's the right to produce two pictures based on the Dirk Pitt character.

Q: And in your report, you make the statement that the terms of the Sahara agreement -- and this is a quote from page 26 of your report -- quote, are far superior to the Superman film agreement, close quote. Do you recall making that statement in your report?

A: I do, and it's accurate.

Q: And I think, then, that you still have that expert opinion?

A: Yes.

Q: Then what precisely do you mean, Mr. Halloran, when you say that the terms of the Sahara agreement are far superior to the Superman film agreement?

A: The Sahara agreement provides for the -- there's no option provision. There is a purchase where Cussler receives $20 million for two films and $10 million a film. And I acknowledge that that is spread out a bit over time.

So in a present value basis, it was more like 17.

He was also entitled to receive 10 percent of the producer's gross, which I think can exceed 5 percent of distributor's gross.

Q: Do you believe it does exceed 5 percent producer's gross?

A: It can exceed.

Q: Do you believe that it does?

A: I'm not sure what you mean by does exceed.

Q: Do you believe that 10 percent of the producer's gross of Sahara exceeds 5 percent of the distributor's gross of Superman Returns?

A: I haven't -- I haven't done the comparison or the analysis, but again, you need to look at, you know, at the time the agreement was made, was this 10 percent, you know, potentially superior to 5 percent of Superman. You don't

look at just that. Perhaps the most important -- if you look at the entire agreement, in many ways it was superior to the Superman agreement, but you also have to keep in context that you have to compare Superman with Dirk Pitt and look at it in that context as well.

MR. BERGMAN: Your Honor, I move to exclude everything after "I haven't" -- "I haven't done a comparison or the analysis."

THE COURT: There's no foundation for anything after that.

BY MR. BERGMAN: Q: In your expert opinion, Mr. Halloran, did DC make more money from the -- from Superman Returns under the terms of the film agreement than DC would have made from Superman Returns under the terms of the Sahara agreement?

MR. TOBEROFF: Objection, your Honor. Calls for speculation --

THE COURT: There's no foundation for it, particularly in light of his last answer, Counsel.

BY MR. BERGMAN: Q: Did you attempt any analysis other than looking at the specific terms of the agreement to figure out how that equates to what sticks to the ribs of DC?

THE COURT: Of which agreement?

MR. BERGMAN: Of the Sahara agreement, your Honor. I'm sorry.

THE WITNESS: Again, in determining fair market value, I looked at the universe of these agreements, and I made judgments as to the relative strength of the character and tried to put the agreement in context. And again, that calculation is made -- my view in generating my opinion as to fair market value is made on the face of the contract. I found it stunning that there was no purchase price in the Superman agreement, and, in fact, for two pictures for Dirk Pitt, Mr. Cussler was guaranteed, you know, essentially $20 million among other things.

So viewed in that context, that's what my opinion was based on.

MR. BERGMAN: I move to strike that as nonresponsive, your Honor.

THE COURT: Mr. Toberoff, your response to that?

MR. TOBEROFF: He is asking precisely the basis of his opinion in a prior question which was echoed in this question. So the witness should be allowed to explain the basis of his opinion.

THE COURT: Well, cut this in half here. I'm going to strike he does explain his fair market value, what he did. When he goes beyond it to describe something that is being stunning, that clearly goes beyond what the question is being asked for. So I will strike everything from that point forward.

MR. TOBEROFF: Very well, your Honor. So counsel, I assume, asked him, and he's answered what analysis he did on the Sahara agreement.

BY MR. BERGMAN: Q: As you sit here now, Mr. Halloran, do you have an opinion, sir, as to whether DC made more money from Superman Returns under the terms of the Sahara agreement than DC would have made under the terms of the -- than DC did make under the terms of the film agreement?

Do you have an opinion?

A: Again, the focus has to be as of the time of the agreement, what these terms were. You keep making allusions to --

THE COURT: As of the time. Answer the question as of the time --

THE WITNESS: No.

THE COURT: -- of the agreement.

BY MR. BERGMAN: Q: Now I would like you to put aside as of the time of the agreement and look at the reality, as it exists now, that the Sahara picture has been distributed, now that the Superman picture has been distributed.

Do you currently have an opinion as to whether DC made more money from the release of Superman Returns under the film agreement than it would have made from Superman Returns under the terms of the Sahara agreement?

MR. TOBEROFF: Objection, your Honor. Irrelevant.

THE COURT: Overruled. You may answer.

THE WITNESS: I would have to line up the contracts and line up the accounting statements to make a comparison. As I sit here, I can't make a comparison. You have to know the actual results. I know Mr. Sills was engaged to do some --

THE COURT: This lineup that you're talking about.

In reaching your earlier conclusions in response to Mr. Toberoff's questions, did you do that same lineup?

THE WITNESS: The same lineup?

THE COURT: You have previously offered opinions in this court comparing different agreements as to whether one is more favorable than the other.

THE WITNESS: Right.

THE COURT: Did you do that same lineup of terms comparing an overall agreement to another overall agreement?

THE WITNESS: Yes, absolutely.

BY MR. BERGMAN: Q: And when you made that comparison, what did you find out?

A: The comparison between Sahara and Superman?

Q: Yes, sir.

A: I found that the purchase price -- well, first of all, there's no purchase price whatsoever in the film agreement. And the purchase price in the Cussler agreement was $20 million guaranteed. Guaranteed.

So the problem with the film agreement is, as of 2002, DC had zero guarantee that any film would ever be made.

Q: Now let's look at it, if we may, from the reality of what has happened. What was the option price for Sahara under the Sahara agreement?

A: There was no option price. It was a purchase.

Q: What was the option price that DC received for Superman Returns?

A: It was initially $1,500,000 for approximately three years, roughly $500,000 a year.

Q: Okay. So if you look at the screen --

A: Could I please have a paper copy of this? It would be helpful.

MR. TOBEROFF: Your Honor, I object. The defendants -- this is demonstrative evidence in connection with testimony of a witness. Under the rules, they have to present this to the other side 11 days before trial or it's not -- they can't use it, and they never presented this demonstrative evidence to us ahead of time so we could prepare for it.

THE COURT: I'm not sure what this is. Is this something that you should have shared with opposing counsel?

MR. BERGMAN: No, I haven't shown this to opposing counsel, your Honor.

MR. TOBEROFF: This is a continuing trend on defendant's side --

THE COURT: I don't need the editorial, Counsel. Mr. Bergman, your response?

MR. BERGMAN: Your Honor, all it does is translate numbers that I'm going to get from the witness onto a piece of paper. I don't need to show the piece of paper. I'm doing it as a tool to facilitate your view.

THE COURT: Well, generally what the Court does with this, certainly if we put up a piece of paper over here and counsel went up and wrote down numbers, I'll permit counsel to write down whatever they wanted just to kind of help us through this. If that's essentially what he's done by writing down numbers on a piece of paper in advance and there's no objection so that, for the sake of judicial expediency, it seems to make sense to proceed.

Could you at least take a look at this, Mr. Toberoff, and see if this is something that Mr. Bergman or Mr. Halloran could get up and write on the board over here?

MR. TOBEROFF: If it's merely giving a few --

THE COURT: I understand your position. I just explained the Court's position. So let's take a recess. Look at it, and let me know if you have an objection to it.

(Recess taken.)

THE COURT: Okay. Did we get this worked out on the document?

MR. BERGMAN: I think we did. But before we get to it, I have some more questions I want to ask, which may make everything a little clearer as we go along.

THE COURT: Thank you.

MR. TOBEROFF: Thank you for the opportunity to review this, but no, we did not work it out. Upon studying this, Mr. Bergman's representations are incorrect, that this is merely putting up a few contract terms. This is actually a fairly complicated financial analysis.

There are five footnotes at the bottom, numerous financial assumptions, running purported revenues from Superman Returns through the Sahara deal and at times adopting portions of legendary pictures co-financing arrangements with Warner Brothers.

It's very complicated, and the rules say that they cannot ambush the other side with this at trial. There's also no foundation for it.

THE COURT: Let's move on with your questions, Counsel.

MR. BERGMAN: Yes, your Honor.

Q: Mr. Halloran, let's assume that you were, as you were, in private practice in 2002, and DC Comics came to you and said they wanted to license the rights that his Honor has held that they had available and in fact licensed to Warner Brothers.

And they asked you whether you would recommend that they enter into the Sahara or the film agreement, what would you have advised?

A: I would advise neither. Your choice is not limited to two imperfect agreements. I would have said neither.

Q: And as between the two of them, you're not prepared to say which one you would have recommended?

A: They both have pluses and minuses. So --

THE COURT: Let me ask you about this, though. The Sahara agreement, you defined at the beginning of this trial a fair market value, you defined it in terms of an agreement reached at arm's length between individuals who had an opportunity to go away --

THE WITNESS: And intelligent individuals.

THE COURT: -- were intelligent individuals who had the ability to walk away involved in creating the Sahara agreement? Essentially what I'm asking is was that a fair market value agreement?

THE WITNESS: It was certainly a third party agreement. Certainly Clive Cussler had the ability to walk away.

THE COURT: Okay.

BY MR. BERGMAN: Q: If DC advised you, Mr. Halloran, that they were going to enter into one of those two contracts, which one would you advise them to enter into?

A: Probably the Sahara agreement.

Q: And why is that?

A: The main reason being that they would have the -- the way the Sahara agreement is set up, it was for book 1 and 2, and there were options for further books. So Anschutz, if he didn't continue to make Dirk Pitt movies, would have lost the rights.

So that was the -- also another thing that's really important in the Sahara agreement was there were very strong creative controls for the screenplay and actors and director and the like. So I would have recommended the imperfect Sahara agreement.

Q: Okay. And if DC, when they came to you, said we appreciate all your expertise, Mr. Halloran, but we're only concerned with money, we have no concern other than getting the most money we can for our exclusive rights, which of the two contracts under those circumstances would you advise them to enter into?

A: Again, the Sahara agreement.

Q: And why is that?

A: Because it would have guaranteed $20 million up front.

They could take no risk as to whether Warners would in fact ever develop, ever produce, or ever release the movie. So it would eliminate that risk and get an up-front payment. They also would have a participation in 10 percent of producer's gross, which could be potentially greater than distributor's gross because it would include a hundred percent home video, for example, and, you know, if, in fact, there was not a deduction for P and A, it would be increased. Although that's relatively unlikely, but the important thing is it would be a hundred percent home video, and it would be a higher number.

But looking at the whole agreement, the single most important advice I would give to DC is you want to make sure, DC, that the Superman movies continue to be developed, produced, and exploited. And that has repercussions not only to just the financial returns on the film side, but as to the overall value of your character.

THE COURT: The reversion is something you cite to repeatedly. From your perspective, how do you in negotiating, to use counsel's example, how do you value that in a particular negotiation?

THE WITNESS: From --

THE COURT: How do you assign a value to that reversion element?

THE WITNESS: Right. The way you would assign the value of it would be to -- you'd have to do it over a long period of time, and the difficulty with the Superman agreement is you have 31 years, and as of 2002, you'd have to value it at potentially zero. You'd have to value -- the reversion clause would be extraordinarily important because in 2002 the potential revenues were apparent.

So what you would do is you'd say you have a reversion, and you know with certainty that there would be pictures produced, or that if they are not produced, we'll have the ability to go into the open marketplace and sell the rights.

I'm absolutely convinced that if there had been a fair market value Superman deal in 2002, that it would have had a reversion in it, and that if --

THE COURT: We're going beyond my question now. Counsel?

BY MR. BERGMAN: Q: Once again, that reversion that it would have would be of no benefit whatever to the Siegels, would it?

THE COURT: You've asked that question, Counsel, and the Court is mindful of the answer.

MR. BERGMAN: Thank you, your Honor.

Q: Let's assume that DC came to you in 2002, sir, and again had a choice between two agreements. And we're concerned only with economic terms. And the two agreements were the agreement for Time Line and the agreement for Superman Returns. Time Line is Exhibit 325, sir.

What would you advise them to do as between those two contracts? Enter into Time Line or enter into the film agreement?

A: What was the Time Line number?

Q: 325, sir.

A: We're comparing these two agreements?

Q: Time Line and the film agreement.

A: Well, again, there are pluses and minuses. What you have to keep in mind is that time line was not a -- the merchandising was not worth of anything --

THE COURT: Before we get into the reasoning, why don't you just answer the question.

THE WITNESS: Okay. In terms of the financial?

BY MR. BERGMAN: Q: Yes, sir.

THE COURT: He's asking you to think of a hypothetical situation where Warner Brothers is only concerned about money.

THE WITNESS: Well, what you'd have to do is, certainly, the 10 percent of gross escalating to 20 percent of gross for the film revenue is attractive. But the distinction is that in time line, the -- instead of having a separate pot and a split, that money was included in gross. So, you know, as I sit here, I would have to do a calculation of the projections of what that ultimately, you know, might be worth.

So I can't, you know, as I sit here, you know, run the numbers in my head and say well, this is clearly better than this. This is clearly better than this.

BY MR. BERGMAN: Q: In reaching your opinion, Mr. Halloran, did you do any of those analyses?

A: Well, I didn't run the -- I didn't plug, because I didn't think it was necessary or appropriate. I didn't plug Superman Returns numbers into all these deals and do Excel spreadsheets, but I certainly considered what, if you looked at the contracts, what the most advantageous -- the test was if I represented DC in the open market, what would a deal look like, and these agreements, I thought, were compelling that, in fact, the fair market value exceeded that under the Superman agreement.

Q: Okay. And therefore, you would advise DC under those circumstances to enter into the time line agreement?

A: Again, it's -- it would depend on what we thought the projected revenues were. And again, it's impossible to leave out the fact that if time line wasn't made, that the rights would revert.

Q: Do you have an answer as to the specific question, sir, of which of these two agreements you would advise a client who was concerned only with money to enter into?

MR. TOBEROFF: Your Honor, objection. Vague and ambiguous unless he's clarifying, like he did before, that DC can only enter into one or the other.

THE COURT: I think that's pretty clear from the question, Counsel. That's my understanding.

MR. TOBEROFF: Thank you.

THE WITNESS: You know, if DC was only interested in money, and they thought that the 10 percent participation -- which is twice as much under the film agreement -- would exceed the aggregate that they might make, then you would go to the time line agreement. But again, you know, you have to keep in mind the distinction between the fact that, you know, time line did not include that merchandisable property.

BY MR. BERGMAN: Q: But you would nonetheless recommend the time line agreement?

A: For those reasons, yes.

Q: Okay. Using the same basic principles, DC comes to you.

Its interest is only money, and it comes to you in 2002, and they ask you which of the Hannibal or the film agreement they should enter into. What would you recommend?

A: Well, Hannibal has some features that are far superior to the Superman film agreement.

Q: As you're saying that, you're looking at your chart, are you not?

A: Yes, because I'm trying to put the whole thing into my brain so I can look at it. As you, yourself, have stated, you have to look at something in the whole. So I'm trying to look at best I can at the -- without having to go through 50 pages and distill the economics.

Q: Okay.

A: So what was your question again?

Q: My question is, as between Hannibal and the film agreement, which of those two agreements would you advise DC to enter into in 2002 where they were concerned just with money.

MR. TOBEROFF: Objection, your Honor, to the ambiguity of concerned just with money. Are we talking with solely financial terms like payment of 20 million? Are we talking about other terms that don't give a financial figure but have long-term economic implications? The question is unclear.

THE COURT: I really didn't discern a legal objection. I heard more of an argument there, Counsel.

MR. TOBEROFF: The objection is vague and ambiguous.

THE COURT: Overruled. You may answer the question.

THE WITNESS: Certainly the purchase price, the guaranteed $10 million is much more advantageous than the Superman agreement which has no purchase price whatsoever. The participation of 10 percent is double from what's in the Superman agreement. The video royalty exceeds the video royalty under the Superman agreement. But again, the merchandising is included in gross rather than being, you know, separate.

BY MR. BERGMAN: Q: And therefore, what would you advise, sir?

A: If they wanted the money now and they had no concern about future revenues, they would take the Hannibal agreement.

Q: Assuming the same facts and circumstances, if DC came to you asking which of the Lord of the Rings deal or the Superman Returns deal should they take, which would you advise?

A: Well, the Lord of the Rings deal had more up-front money.

The participation was more advantageous than under the Superman agreement. The video provision was more advantageous than under the Superman agreement. And the merchandising is very, very complicated. But again, if they needed the money now, now, now, they didn't care about anything, they would go with the Lord of the Rings agreement.

Also, if you know, the participation is higher on the Lord of the Rings agreement. And the merchandising is slightly less advantageous.

Q: And therefore, you would recommend?

A: Well, it also has a reversion. So I'd recommend Lord of the Rings.

Q: Are any of the agreements that have touched upon thus far, Sahara, Time Line, Hannibal, or Lord of the Rings, did any of them also include television rights?

A: I'd have to go back and look at them.

Q: Without doing that, do you know?

A: I believe some of them did grant television rights. But I'd have to go back and look.

Q: Television rights are worth money as well as film rights, aren't they?

A: Sometimes. Sometimes the television rights are not as valuable as they would be under the Superman agreement.

Q: And perhaps I didn't make this point clear, but when I said DC was interested only in money, I didn't mean that they needed money or they had to get the money right away. I'm talking about their long-term economic benefits under the respective contracts.

Does that change any of your prior answers in any way?

A: Well, you look at, you know, how much people want now and how much people want later, and that does change your analysis of the agreement. If you're not interested in money now, but long term, agreements look different.

Q: Well, just so the record is clear, sir, assuming that DC told you I'm only concerned with the overall amount of money I receive over the length of the contract, would you still recommend Sahara over the film agreement?

THE COURT: All other things being equal?

MR. BERGMAN: All other things being equal.

THE WITNESS: I would recommend the Sahara agreement.

BY MR. BERGMAN: Q: And all other things being equal but this latest wrinkle, that it doesn't matter how quickly the money comes in, would you still recommend Time Line over the film agreement?

A: It would depend on what the projection was on the merchandising gross. But if you're just looking at, you know -- it's virtually impossible to do just looking at this paper. But setting aside merchandising gross, certainly Time Line would be more favorable.

Q: How would you project the merchandising gross?

A: In representing DC?

Q: Yes, sir.

A: You would look at the prior performance of the Superman merchandise. You would look at other, you know, analogous properties and how their merchandising had done.

Q: Well, you would try to anticipate, would you not, what is called the lift or the rise or the bump in advertising in merchandising revenue in conjunction with the release of the picture, wouldn't you?

A: Well, that's a little bit of a different concept, but what you would do is you'd look at the value of the film-related merchandising.

Q: Okay. And would you still recommend the Hannibal agreement under those circumstances?

A: It would depend on what the projections on that would be. But just on the face of this, the Hannibal agreement is much more advantageous than the Superman agreement.

Q: And when you say on the face of this, do you mean on the face of the contract?

A: Yes. It provides a $10 million purchase price and 10 percent of the gross and a higher video royalty.

Q: Okay. And the -- let's ask the same question with respect to the Lord of the Rings agreement. Assuming that it doesn't matter to DC how quickly the revenue comes in, which would you recommend? The Lord of the Rings agreement or the film agreement to DC in 2002?

A: The Lord of the Rings agreement.

Q: And why is that, sir?

A: There's a guaranteed option fee. There's a purchase price before they make the movie. There's a 10 percent of gross participation, which is twice what's under the Superman agreement. There's a higher video royalty. And there's a reversion if there's not a continuing production of the pictures under the agreement.

Q: And what's the merchandising?

A: The merchandising on Lord of the Rings was very complicated because there were various people who were participating. I understand even now the Tolkien family is making a claim. So the merchandising is very complicated, and it's hard to compare it to the Superman agreement.

Q: And why is that?

A: Pardon?

Q: Why is it hard to compare the merchandising to the Superman agreement?

A: Well, there's various levels. There's various --

THE COURT: Levels of what?

THE WITNESS: Various levels of participation in the merchandising. And with DC, apparently Lord of the Rings, if you look at DC and Lord of the Rings, there were a lot of DC's that would come together, various rights holders.

BY MR. BERGMAN: Q: Well, as between Mr. Zaentz, the licensor, and Miramax, the licensee, what was the merchandising split on Lord of the Rings?

A: I'd have to look at the agreement. Another thing to keep in mind, as I recall on Lord of the Rings, is I think on top of this 10 percent, Miramax had an additional 5 percent. So the aggregate was 15 percent for the rights rather than 10 percent. But if someone would show me the agreement, I would look at it.

Q: Well, the licensing agreement, which I believe you indicate in your report that you read -- you did read the licensing agreement, did you not?

A: Yes.

Q: That is Exhibit 128, sir. That merchandising split is not part of the chart you prepared, sir?

A: It is part of the chart. If you could point me to the merchandising part of this, that would be helpful.

Q: Well, I'd like you to point me to the merchandising part that you read in forming your opinion.

A: Apparently there's a separate merchandising agreement.

Q: What did that provide, sir?

A: I gather that provided the split of merchandising on the chart.

Q: Do you consider the merchandising provision in Lord of the Rings to be superior to or inferior to from the licensor's point of view, the film agreement?

A: I think it's just looking at this in context, I believe it's inferior.

Q: If DC came to you in 2002 with a choice of selecting to execute either the Annie agreement or the Superman Returns agreement under the terms that we've stated and indicated, the concern with economic interest over the long run, which agreement would you advise DC to enter into?

A: I think the Superman agreement.

Q: And what would be your reason for that, sir?

A: Well, keep in mind what the long-term value of the character, even though it was a higher purchase price, the gross participation was not a dollar one gross participation. It was commenced at break even levels starting at two and a half times the negative cost.

So that would be a lot less advantageous, and there was additionally no reversion.

Q: If the same question were put to you, sir, under the same circumstances with respect to the Red Rabbit agreement, which one would you advise DC to enter into? It's No. 327 for identification.

A: The Red Rabbit agreement falls into the same category as Time Line and the other agreement we talked about before where the purchase price is superior. The gross participation is superior, but the merchandising is including gross because the underlying property is not merchandisable. So looking at long term, I would recommend the Red Rabbit agreement.

Q: And would your answer be the same if the agreement being contrasted to the Superman agreement was Rainbow 6?

A: Yes, because I think the long-term financial benefit under Rainbow 6 would be better than under the Superman agreement.

Q: What would your advice be if, under the same circumstances we've been talking about, your client DC asked whether they should in 2002 enter into the terms of the Watchmen agreement or the film agreement?

A: I think the film agreement -- certainly the financial terms, the film agreement is superior to the Watchmen agreement. But again, you'd have to look at the reversion under the Watchmen agreement. Because the most important thing, again, is that if the picture doesn't get produced, it would come back.

MR. TOBEROFF: Your Honor, may I ask what the exhibit number is of the Watchmen so we can follow that?

MR. BERGMAN: Certainly. It's Exhibits 1028 and 1029.

THE WITNESS: Could someone show me that? It would be helpful.

Your question again?

BY MR. BERGMAN: Q: My question, sir, was comparing those two agreements, the Watchmen on the one hand and the film agreement on the

other hand, in 2002 on behalf of DC Comics, which was concerned only with the financial returns that would gain over the long run with the picture, which of those two contracts would you recommend?

A: Probably the Superman contract.

Q: And what would be your reason for doing that, sir?

A: Well, the Superman contract is much more advantageous in terms of the moneys that would be generated, assuming a film were produced, than the Watchmen agreement. Again, the problem with the Superman agreement as opposed to the Watchmen agreement is when DC made the Watchmen agreement, they would get it back if the film weren't produced. Under the Superman agreement, there's no such provision. But if you apply -- well, that's my answer.

Q: If the reversion agreement and the Superman agreement said that these rights, DC, will never revert to you, they are ours forever, does that affect in any way the plaintiffs' rights to sell their nonexclusive rights in Action Comics No. 1?

MR. TOBEROFF: Objection, your Honor. It's -- the reversion agreement and the Superman agreement. I don't know whether he's referring to the reversion clause in the Superman agreement or another agreement or if it's just an error.

THE COURT: Sustain the objection under vagueness. Just rephrase.

THE WITNESS: Could I look at the reversion agreement?

THE COURT: Wait a second. There's no question. He's going to rephrase the question.

BY MR. BERGMAN: Q: In looking at the reversion agreement in the Superman -- I'm sorry -- the reversion provision in the Superman agreement, which is Exhibit 1041 --

A: Could you give me a Bates stamp number?

Q: You've got the provision?

A: Yes.

Q: Let's assume that provision, instead of saying you'll get your rights back if I stop paying you, DC, let's say that provision said you will never get your rights back under any circumstances, DC. Okay? There is no reversion under this agreement.

Is that understood? Mr. Halloran?

A: I think there's an objection.

MR. TOBEROFF: Objection, your Honor. Misstates the reversion provision. It doesn't say you'll get your rights back if we stop paying you.

THE COURT: It's a question. You may answer.

THE WITNESS: Okay. Could I have that read back?

BY MR. BERGMAN: Q: Let's assume that the reversion provision in the Superman agreement says to DC you will never get your rights back under any circumstances. I don't care what you do. Doesn't matter what I do, they are mine. Does that in any way damage the plaintiffs' ability to license in any way they choose their nonexclusive rights in Action Comics 1?

A: This is a reversion where the rights go back to DC, right?

Q: Yes, sir.

A: Okay. So the plaintiffs -- it's my understanding that the --

THE COURT: We're not going to go through this again. You asked this question earlier, Counsel, and he answered it.

MR. BERGMAN: Very well, your Honor.

THE COURT: It was tortured the first time. I just don't have the patience to go through this again.

MR. BERGMAN: I can well appreciate that, Judge.

THE COURT: Let's move forward.

BY MR. BERGMAN: Q: Let's just finish this analysis that we're making in what appears to be the key agreements.

Assuming that DC came to you in 2002 and showed you the Robotech agreement, which is Exhibit 1083, and the Superman Returns agreement, 1041, made the usual statements that I have been suggesting. They are concerned only with economic opportunity but over an extended period of time, which agreement would you recommend to DC that it enter into?

A: The Robotech agreement.

Q: And why would do you that, sir?

A: Because even though the Robotech agreement provides for participation that's only half under the Superman agreement, what's more important is that there would be a reversion. And so there would be more pictures that the participation would apply to.

So under this -- if you go back to the Superman agreement, even if it provided for 20 percent of the gross, if the pictures were never made and there was no -- there's no mechanism to force Warner to make pictures under the agreement, 20 percent of zero is zero. So if I have a Robotech agreement and there's a provision whereby I can make sure that either Warners continues to produce the pictures or if I don't want to, I can get someone else to do it, then it's 2 1/2 percent of something. And the merchandising would be magnified by that as well.

So I would take the Robotech agreement.

Q: Okay. Let's look at the same question as between Superman Returns under the film agreement and the Tarzan film agreement, which is Exhibit 1085. It goes all the way through Exhibit 1091. 1085 through 1091. There are various amendments that we separately marked.

A: Yes. I was waiting for you.

Q: I was waiting your answer.

THE COURT: Why don't you state the question.

BY MR. BERGMAN: Q: Assuming that DC came to you, Mr. Halloran, in 2002 and told you that they had a choice between entering into the Tarzan agreement or the Superman agreement under the film agreement, and they said to you that they were concerned about how much money they would make, what would stick to their ribs over a long period of time, which of the two agreements would you recommend they execute?

A: The Tarzan agreement. The main reason being that, again, as with the Robotech agreement, DC would have the ability to get the rights back after a period of time, and they would, once they got them back, they would be able to -- if there was a reversion, they would be able to test the value of those rights in the market.

Q: What rights would they get back?

A: Well, if you are applying Tarzan, whatever rights were transferred to -- were transferred under the Tarzan agreement would come back to the Edgar

Rice Burroughs estate if, in fact, Warner Brothers did not make the movie or continue to make the movies.

So the rights would go back under the Tarzan agreement, and then DC would own Tarzan and would be able to, you know, if Warners didn't continue to make movies, they would be able to own the rights and then put the rights out to companies that would make --

Q: In other words, DC could do whatever it wanted with its exclusive rights.

A: DC could do with whatever rights that came back to DC, they could do. I looked at -- whatever rights were transferred, they came back to DC, and then DC would have the ability to license those rights.

Q: Okay, sir. Assuming the same exact factors, and they came to you, DC did, and asked you to advise them as to which of the Iron Man or the film agreement they should execute, given the considerations that they had, which would you recommend?

A: The Iron Man agreement.

Q: And why would you do that, sir?

A: For the same reasons that are applied to the other agreements. The important thing was -- and actually -- excuse me. It's an excellent example. Under this agreement, there was an option, and again, DC would have the ability, if the option weren't exercised and the picture not made, they would have the ability to get the rights back and to continue to own and be able to license those rights over a long period of time.

One thing you have to keep in mind is that -- well, excuse me. That's it.

The -- if I were representing DC, I would recommend that they take the Iron Man deal because I think on a long-term basis, it would be more valuable than the Superman deal.

Q: How would you determine that?

A: You would determine it by looking at the potential revenue that Superman would generate if, in fact, unlike the Superman film agreement with Warners, there was a mechanism for third parties to develop, produce, and exploit continuing motion pictures based on the Superman character.

And unfortunately, one thing that -- unfortunately, under the Superman film agreement, there's no mechanism whatsoever for DC to get the rights back or

to force Warner Brothers to make any movies, and that's absolutely crucial to a rights holder. Potentially if you are to do a projected revenue under the Superman agreement over 33 years, the projection could be zero.

Q: Okay. And in that event, DC would be out of luck; correct?

A: They'd be out of luck. They'd have a Superman character that under any set of circumstances my estimation would be extraordinarily valuable in the marketplace, and they would have gotten nothing for it, with the exception of the modest option payments, which are insignificant, compared to the value of the property.

Q: But at the same time I could, if I chose, go to Mrs. Siegel and buy her rights to Action Comics No. 1, couldn't I?

A: As we sit here, I think we discussed that.

THE COURT: And the answer is?

THE WITNESS: Pardon?

THE COURT: And the answer was?

THE WITNESS: The answer was, you know, I think it's a legal thing, but in theory, you could go to the Siegels and buy those nonexclusive rights.

BY MR. BERGMAN: Q: Okay. As we --

A: Wait, wait, wait, wait, wait. We have to think this through. The nonexclusive rights are jointly held by the Siegels and DC. So you'd also have to deal with DC.

Q: And the effect of that is what?

A: I doubt that DC would be interested in selling the rights that might -- I don't think they'd be interested in --

Q: DC would not be interested. I'll stipulate to that. But that wouldn't prevent the Siegels from licensing their rights, would it?

A: To licensing their interest?

Q: Action Comics No. 1.

A: They could license nonexclusive rights.

Q: For whatever that would be worth?

A: Yes, they could license the nonexclusive rights.

Q: Let's say DC came to you and said gee, here's this Harry Potter agreement that I could sign, or I could sign the Superman agreement. Which one, sir, should I sign, given the objectives that I'm seeking, the most money over the longest period of time?

MR. TOBEROFF: Objection. Vague as to which Harry Potter agreement. If you're referring to a specific agreement, ask the exhibit number.

BY MR. BERGMAN: Q: I'm referring to the Harry Potter agreement as amended, which would be 1097 through 1099.

A: Okay.

[text redacted][6]

Q: Let's go back a little bit, if I may, to the question of producer's gross. Okay?

A: Okay.

Q: In the traditional situation where a producer brings a film to a studio, a film like Time Line, let's say, the studio finances the production of the negative cost, does it not?

A: It does.

Q: And it also finances the production of what are called the prints and advertising.

A: That's true.

Q: And prints and advertising can be a very substantial figure, can it not?

A: Yes, it can.

Q: If you exhibit a picture in 3,000 theaters, you've got to provide 3,000 prints; correct?

A: You do.

Q: And prints today of a full length feature film must be about 2,000, $2,500 each?

A: That's a very accurate estimate as far as I know.

Q: And we know prints and advertising can be from a low amount to an extraordinary amount; correct?

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[6] Harry Potter text redacted due to legal reasons

A: I don't know exactly what that means. Certainly there are lower amounts and higher amounts.

Q: Okay. Would you characterize the Superman Returns prints and advertising of $143 million to be a very large amount?

MR. TOBEROFF: Objection. Assumes facts.

THE COURT: Rephrase, Counsel.

BY MR. BERGMAN: Q: Are you aware of what the prints and advertising were for Superman Returns?

A: Yes.

Q: And how much were they, sir?

A: I believe they are approximately the number that you just stated to me.

Q: Okay. Now, does 10 percent of distributor's gross ever equal 10 percent of producer's gross?

A: You mean exactly equal?

Q: Yes, sir.

A: That is possible.

Q: And under what circumstances is it possible?

A: It's possible if the -- if the percentage is applied to the same pool of money.

Q: I understand that mathematically, sir, but under what circumstances in the production and distribution of a motion picture is that possible?

A: If you have a definition of producer's gross where you have a company like Anschutz or like Marvel or like a Lucas film, where the producer's gross would be measured just after limited distribution fees and perhaps P and A, then that number potentially could be bigger.

Q: Can there be situations where 5 percent of the distributor's gross is greater than 10 percent of the producer's gross?

A: There are situations where that could be true.

Q: And those situations would apprise most commonly, would you not agree, where the distributor, where the producer has paid for the cost of the negative film, but the distributor has paid for prints and advertising?

A: You'd have to look at the specific agreement, but, you know, sometimes that would be true. But it's -- the flip side is that typically the person who is financing the production cost will get a hundred percent of home video. So the pool is customarily bigger.

Q: Is it your testimony that it is customary, within the motion picture industry, that a producer who finances the negative cost will get a hundred percent of home video?

A: They typically will get a hundred percent of home video revenue, but there is deducted from that revenue sometimes a sort of cost distribution fee and manufacturing cost.

Q: It would be deducted from all the costs; correct?

Manufacturing, distributing, making the special material that goes on the DVD, all of that would be deducted; right?

A: Those costs are typically deducted.

Q: Whether all of those costs are deducted and the video distributor's fee is deducted, what is left becomes added to the gross in which the producer's -- producer shares; correct?

A: That is correct.

Q: And in the situation like one of the films where there is in fact a share of the producer's gross of all video, the assignor, the author, would then take his percentage share, 10 percent, whatever it is, from that additional money from video; correct?

A: Yes.

Q: Okay. Now, when the production entity has not financed the negative cost of the film, then a typical distribution fee is charged by the distributor, is it not?

A: Yes.

Q: Okay. And that typical distribution fee can be 30, 35 percent?

A: That's the common range in the net profits deal, yes.

Q: Okay. And in those situations where the producer has financed the film or there is, as in the case of Legendary, a co-financier, the distribution fee is greatly reduced; correct?

A: Vis-a-vis Legendary and a studio, the distribution fee is reduced from that 30 to 35.

Q: And the same would be true vis-a-vis the studio and the producer; correct? He would also, having financed the picture, he's entitled to a lower distribution fee, isn't he?

A: No. The way the -- the way these co-financing deals typically work is they are just -- it's a definition as between the co-financier and the studio.

Q: I'm sorry. I think I confused you. I was referring to two situations, Mr. Halloran. One situation is where the producer pays the entirety of the cost of making the film, turns it over to a distributor who does the distribution, pays a P and A. In that situation, am I correct that the producer, with respect to at least the theatrical distribution, gets a lower fee than normal charged by the distributor?

A: That is accurate.

Q: And another situation in which the co-financier is operating and is paying for half of the cost of the picture and half of the cost of the P and A, he would also get a reduced distribution fee; correct?

A: By "he," you mean a company like Legendary?

Q: Yes, sir.

A: Yes, there would be a reduced distribution fee.

Q: And would you say that those two distribution fees would be about the same?

A: They would be in the range of being the same.

Q: They would be in the range of somewhere between 11 and 15 percent?

A: 8 to 15 percent, the more common, 10 to 15. 11 to 15 is in the range.

Q: What pictures are you familiar with that has an 8 percent distribution fee?

A: Star Wars and Indiana Jones.

Q: And am I correct that in both of those instances, the producer not only financed the production of the film, but also financed the prints and advertising of the film and in effect just rented the distribution facilities of the studio for 8 percent?

A: I think that's -- as far as I know, that is accurate.

Q: So in the ordinary situation, the producer's gross is less than the distributor's gross, even where the producer has financed the film, the production of the film, the distributor has financed the P and A, the producer's gross will be the distributor's gross less a low distribution fee, as you've indicated, less whatever prints and advertising the distributor has expended; correct?

MR. TOBEROFF: Your Honor, this line of questioning is vague and ambiguous, and I'd have to explain why. Are we speaking about money coming into an entity, i.e., a certain distributor, a certain producer? Is that how we're speaking about distributor's gross versus producer's gross, or are we talking about a specific contractual definition of producer's gross versus distributor's gross, which would then bring into play how much home video goes in, what's deducted?

Those are two separate and distinct concepts, and they are being conflated here in the questions.

THE COURT: I thought adequate foundation had been laid for this. Mr. Toberoff, would you respond? I understand these terms are negotiable and vary from deal to deal, but Mr. Bergman did lay a series of foundational questions establishing certain -- familiar with the general range was the one that he used. I'd have to find it here. The common range. We went through a series and set this up.

MR. TOBEROFF: I understand, your Honor, we're speaking about a range. What I'm focusing on is whether we're talking about just money coming into an entity or definitions of producer's versus distributor's gross in a participant's agreement, and those are two completely different things.

THE COURT: Let's clarify that in the question, Counsel.

MR. BERGMAN: Yes, your Honor.

Q: I was not speaking, Mr. Halloran, about any specific contractual provision. I'm talking about custom and practice in the industry. You are familiar with custom and practice in the television industry, are you not, sir? In the motion picture industry?

A: Yes.

Q: In the motion picture industry, when a producer pays the costs of producing the film and a distributor pays the cost of distributing the film, am I

correct that the producer's gross equals the distributor's gross less the distribution fee that's been agreed upon and the distributor's prints and advertising?

A: That doesn't give a complete picture. Typically, using the Marvel model, for example, the -- they have a domestic distribution agreement whereby Paramount takes a distribution fee and, I believe, their P and A. But on the foreign side, they bifurcate the rights on the foreign side and receive payments from foreign distributors. They are typically lump amounts that include a hundred percent home video.

So you have to -- unfortunately, you have to take the further step of analyzing how the foreign is treated as well as the domestic. On the domestic side, it's true that it is traditional that the sums that are included in producer's gross are the sums less a distribution fee and the P and A that's put up.

It's also true on that side that home video is treated on a so-called hundred percent basis, which does mean a hundred percent minus typically a small distribution fee and the actual home video costs. So you have to be really careful about what goes into gross.

Q: Okay. On the average situation, you would agree with me, would you not, that the producer's gross is lower than the distributor's gross on a particular film?

A: That's impossible to say. That's impossible to say.

Q: Why is that impossible to say?

A: Because what you have to do is compare apples to apples.

Q: Right.

A: Right. So --

Q: How would you do that?

A: Well, I pointed out that on the foreign side, producer's gross typically includes, in a situation where the producer puts up the money, sums that are paid on a territory-by-territory basis.

Q: Okay.

A: And what you would have to do is compare that to what distributor's gross would be had the studio distributed the film. And that's very difficult, if not impossible, to do.

Q: How would you go about doing it?

A: What you would have to do is take the definition of -- the contractual definition of gross proceeds and apply it to each distributor in each territory and calculate what it would be.

Q: And when you say you would have to apply it to each distributor, don't you mean that you would have to apply it to the dollars earned by each distributor?

A: Yes.

Q: Putting aside foreign for a moment. And I know how important that can be.

THE COURT: Counsel --

BY MR. BERGMAN: Q: If we're just looking at domestic revenues, isn't it always true except in the case of George Lucas, where he pays the entire bill. Isn't it always true that producer's gross will be less than distributor's gross?

A: No.

Q: Why isn't that true?

A: You -- well, you have to keep in mind that it's not necessarily true that -- you could have a situation, and my memory is a little bit foggy, but I think it may well be true on Sahara that Anschutz actually put up P and A as well as the production cost.

So if you have a situation where the producer puts up both production cost and P and A and you have a hundred percent home video, the producer's gross number could exceed -- could exceed distributor's gross. And we had a great debate, as you know, earlier today about whether under the Sahara agreement Anschutz was entitled to deduct the P and A that he may have put up, and my reading of the contract is that he would not have been able to do that.

Q: And did you testify in the Sahara case that Paramount advanced the prints and advertising for Sahara?

A: I might have. It's a little bit foggy, but even had they done that, you could have a contractual provision whereby the 10 percent of producer's gross, if you have a producer who is putting up both production costs and P and A, and there's a hundred percent home video, that 10 percent of that amount could exceed 5 percent of distributor's gross.

Q: Do you recall that at the March 19, 2007, trial of the Sahara case --

THE COURT: Exhibit number, Counsel?

MR. BERGMAN: Pardon me?

THE COURT: What exhibit are you at?

MR. BERGMAN: 1118, your Honor. I'm sorry.

THE COURT: It's all right. For the record.

MR. PERKINS: This is the stack of transcripts that was marked this morning.

THE COURT: I have it. Do you have that in front of you?

THE WITNESS: No, I don't.

THE COURT: I think I handed you one.

THE WITNESS: Are we talking about a transcript?

THE COURT: Yes. I handed you one.

THE WITNESS: And I handed it back to you.

THE COURT: I have it here.

THE WITNESS: Do you mind if I read this transcript?

MR. BERGMAN: You can read the entire transcript, and I'm sure we'll wait for you.

THE COURT: If that's going to happen, I'm going to have to switch the time over.

BY MR. BERGMAN: Q: I am referring, sir, to the testimony that begins at page 4912 on March 19 at line 20 and --

A: 4912?

Q: Yes, sir.

A: Okay.

Q: I want to ask you, do you recall being asked this question and giving this answer?

A: Exactly what page are you on?

Q: 4912, line 25, Mr. Halloran.

A: Okay.

Q: Okay.

"QUESTION: And you said that's the same as Mr. Cussler. So under Mr. Cussler's deal, he gets a percentage of every dollar when it comes in regardless of who he paid, the actors, the writers, et cetera, first?

"ANSWER: Well, he's paid based on every dollar that Crusader gets.

"QUESTION: Well, that's not the same as first dollar gross, though, is it?

"ANSWER: It's described in the contract as first -- it's first dollar gross measured at the producer level as opposed to the distributor level.

"QUESTION: Let me ask again.

"ANSWER: Yeah.

"QUESTION: Is that first dollar gross?

"ANSWER: It's first dollar gross based on the producer's share of income as opposed to the distributor's share of income.

"QUESTION: So then is it the same as you said it was, as the Neopetspets deal?

"ANSWER: It's the same in the sense of what you're doing is measuring at a certain point that someone will get a percentage of the money that comes in at that point. It is true that based on the arrangements that were made by Crusader or Bristol Bay, that there were deductions made by distributors before the money got to them. So, for example, under the Paramount deal, Paramount took a distribution fee and distribution expenses before they remitted sums to Crusader."

Do you recall giving that testimony?

A: I do. But the -- when you talk about the Paramount distribution expenses, then the issue is look at the contract, they were certainly entitled to do it. But then the issue is what distribution expenses did they in fact incur that they reduced. What distribution expenses did they in fact expend and deduct before they remitted the sums to Crusader.

MR. BERGMAN: Move to strike everything after "I do" as being nonresponsive.

THE COURT: Right. The question was simply do you recall giving the testimony.

THE WITNESS: Okay. I recall giving the testimony.

BY MR. BERGMAN: Q: So am I correct, Mr. Halloran, that in the Sahara agreement, anyone participating in a share of the producer's gross is sharing in a pot that is considerably smaller than the distributor's gross; correct?

A: That's not necessarily correct. Because you have to look at what reduced distribution fee was taken out by the distributor, what distribution expenses, if any, were taken out. We know from the Lucas film deal, for example, that they put that up. So if the contractual definition applied to a structure where the producer was putting up both producer and -- producer's gross and P and A, then that would be -- there wouldn't be a deduction at the distributor level, and that wouldn't dilute the gross.

Q: Were you through, sir?

A: Yeah, I'm finished.

Q: With the exception of George Lucas and Steven Spielberg, does any producer put up the cost of financing the film and the prints and advertising for the film?

A: Yes. Michael Bloomberg.

Q: Who?

A: Michael Bloomberg.

Q: Michael Bloomberg?

A: Michael Bloomberg.

Q: Who is Mr. Bloomberg? What films has he done?

A: He did a picture called Focus that I worked on.

Q: Focus?

A: Yes.

Q: When was that released?

A: I believe in 2002.

Q: And what was the budget of that film?

A: It was about $8 million, I believe.

Q: 8?

A: Yes.

Q: So you wouldn't consider that a major studio film, would you?

A: It was released by Paramount.

Q: Was it released by Paramount, major Paramount, or by one of its independent film arms?

A: It was released by Paramount Classics.

Q: And that's one of its subdivisions that deals with independent films; correct?

A: Predominantly, yes.

Q: When you discussed the Sahara agreement, and you made several references to it, Mr. Halloran, you didn't note that there was in very substantial difference between it and the film agreement, did you?

A: Substantial difference between?

Q: Producer's gross and distributor's gross.

A: I don't think I necessarily distinguished them in my report.

Q: In fact, in your report you would refer to Sahara and the percentage that Sahara got of gross as demonstrating the inadequacy of the percentage of gross that DC received under the Superman agreement, didn't you?

A: That's true. It's a number that's double, and in addition --

THE COURT: It's double what?

THE WITNESS: 5 percent of the Superman, 10 percent under Sahara. And, as we've discussed, even with the reductions that might be made on the domestic side in distribution fees and P and A, the aggregate producer's gross worldwide could exceed distributor's gross. So it could be even better.

BY MR. BERGMAN: Q: How could the producer's gross possibly exceed the distributor's gross?

THE COURT: In what movie?

MR. BERGMAN: In any movie.

THE WITNESS: Again, if you're looking at --

THE COURT: Counsel, your question is inviting the same answer that was given before. You're excluding movies in which the producer is in fact essentially --

MR. BERGMAN: I'm excluding movies made by Mr. Lucas and Mr. Spielberg and --

THE COURT: And Mr. Bloomberg.

THE WITNESS: That fellow, Mr. Bloomberg, is the Mayor of New York.

MR. BERGMAN: I'm not denigrating him, sir. I just didn't know what film he had produced.

THE WITNESS: Okay.

BY MR. BERGMAN: Q: So your answer to the question is what?

A: The answer to the question is that 10 percent of producer's gross can sometimes exceed 10 percent of distributor's gross.

Q: Okay. Would you give me an example of how that could possibly happen?

A: It could happen in a situation where the gross receipts received by the producer -- the percentage applies to a pool of money; correct? That's the definition of gross. So if that definition of -- if the producer receives more in gross than the distributor credits to gross under the defined definition, then the 10 percent of producer's gross would exceed -- it would exceed 10 percent of distributor's gross and in some situations it certainly could exceed 5 percent of distributor's gross, which is half of 10 percent.

Q: A distributor always deducts a distribution fee, does it not?

A: No, not with respect to gross receipts. One of the essences of first dollar gross is there is no distribution fee that's taken.

Q: If a distributor in France distributes a film, does he take a distribution fee before he remits it to the U.S. distributor?

A: Not necessarily. Typically when you sell a motion picture territory by territory, you get an advance amount, and there's no fee taken out of that. It's a flat amount. And that's the amount that's put into gross. The distribution fee only applies to future revenues that are calculated under a definition that exceed the amount of the advance.

So typically on the foreign side, what goes into gross are the flat payments that are made by the foreign distributors.

Now, if you're dealing with a gross definition for a studio, the studio distributes in most major territories. So the amount of gross under a studio definition is the amount received by that distributor.

Q: Would you name a major studio film in which producer's gross has been greater than distributor's gross?

A: Sure. Comparing apples and oranges. Major studios don't give percentages of producer's gross. They give percentages based on distributor's gross.

Q: When a studio agrees with a producer, just as Paramount agreed with the producer of Sahara, to distribute a film, Sahara, doesn't it always provide for a distribution fee?

A: Yes.

Q: And isn't that distribution fee always taken out of the money that is remitted to the producer?

A: It is a deduction.

Q: Invariably a deduction?

A: It is a deduction invariably.

Q: And to the extent that the distributor has incurred prints and advertising, he deducts that amount from what he remits to the producer, does he not?

A: If in fact he has incurred it and the producer or Lucas or Spielberg hasn't paid for it, it is deducted.

Q: I'm assuming that when a distributor charges a producer for prints and advertising, that the distributor has in fact incurred those costs. If that is in fact the situation, those costs are deducted before the producer's gross, are they not?

A: They are deducted before the amount which is credited to producer's gross goes into producer's gross. But again, the producer's gross, you have to look at the whole world.

Q: So in that situation, how could a producer's gross on a picture that the producer financed and an American distributor distributed in the U.S., and you are suggesting that there are foreign distributors that distribute to foreign?

A: Yes.

Q: Under those circumstances, how could producer's gross conceivably be greater than distributor's gross?

A: It can exceed.

Q: It can exceed?

A: Yes, yes, it can exceed.

Q: Under what circumstances?

A: I did sketch out some numbers on Sahara. Assuming that Anschutz put up the P and A and there was a hundred percent home video, and that number exceeded 10 percent. And certainly even if, assuming that Paramount put up some P and A, potentially that could be a greater amount. With that being said, we have to keep in mind that Sahara, that number is 10 percent, which is twice the amount than under the Superman agreement.

Q: Yes, sir, I understand that. And as far as Sahara goes, you testified at the Sahara trial that Paramount advanced the prints and advertising, didn't you?

A: No, I did not. You have to separate what the contract says and what happened in contract. I knew that the Paramount contract provided they took a distribution fee and they took the distribution expenses to the extent they put them up. So I was looking at what the contract said, not what the actual mechanics were.

Q: Well, let's look at actualities, okay? Didn't you testify in the Sahara case that Paramount took a distribution fee and distribution expenses before they remitted sums to Crusader?

A: Well, you left out line 23, which says so, for example, under the Paramount deal. So I was talking about what the Paramount contract said.

Q: Mr. Halloran, a producer enters into a contract with a rights holder as in the Sahara case; correct?

A: Okay.

Q: Crusader entered into a contract with Cussler.

A: Correct.

Q: Crusader doesn't have distribution facilities, does it?

A: No, I think it relies on third parties to distribute --

Q: It relies on third parties.

A: Yes.

Q: And knowing that it's going to be relying on a third party to distribute its picture, everybody knows, going into the Cussler/Crusader agreement, that there is going to be a distributor, don't they?

A: Well, certainly when you enter a deal, you have to understand the distribution structure of the company and where in terms of the contractual definition of gross, where the dollars are going to be measured from. I can't testify as to what Clive Cussler and his representatives knew about how Cussler distributed pictures before they entered in the agreement.

Q: You can testify about your own experience in the industry; correct?

A: I can.

Q: And had Mr. Cussler distributed pictures prior to Sahara -- not Mr. Cussler. I'm sorry. Crusader distributed pictures prior to Sahara?

A: They were most well known for the Chronicles of Narnia series.

Q: And what studio distributed that film?

A: Well, again you have to distinguish the domestic from foreign. I know it was a major studio. I want to say Paramount, but I'm not a hundred percent sure.

Q: So let me repeat a question. When a producer or when an author like Mr. Cussler makes a sale of his rights to a producer like Crusader that does not distribute films, everybody has the expectation, does it not, that Crusader will in turn retain distributors to distribute the film to theaters?

A: That's usually true, yes.

Q: And that expectation also includes the expectation that the distributor will charge a distribution fee, does it not?

A: Again, that's incorrect. Because you have to separate foreign and domestic. Because it is traditional on the domestic side, and Canada, for the distributor to take a distribution fee and P and A to the extent that they put it up per their contract.

But the very common structure, and it's a structure that Marvel uses, used on Iron Man, for example, is that they presold the rights in specific territories. And so under the -- what Marvel did on Iron Man, the amount of the moneys paid by the foreign distributors, a hundred percent of that would go into gross without a distribution fee and without the deduction of prints and ads.

Q: I see. Well, in this case we're concerned with domestic revenues. You are advised of that. You know that, don't you?

A: We're concerned with both domestic and foreign revenues.

Q: Have you had any discussion with Mr. Toberoff as to whether the Siegels have any entitlement to participate in the foreign revenues of Superman Returns?

A: It's my understanding, based on reading the judge's opinion, that he has made a determination that the Siegels' termination is only with respect to the United States.

Q: Okay. When an author like Mr. Cussler makes an agreement with a producer like Crusader for domestic distribution, does it not assume that the domestic distributor will take a distribution fee?

MR. TOBEROFF: Vague and ambiguous and misstates the record. The agreement shows that the author did not make agreement with Crusader for domestic distribution. The Sahara agreement does not show that.

THE COURT: Counsel, your response?

MR. BERGMAN: Your Honor, I'm attempting to convert apples to apples.

THE COURT: I understand that. It's a foundational argument suggesting that you don't have an apple.

MR. BERGMAN: I'll try and make one.

THE COURT: Very well. Sustained.

BY MR. BERGMAN: Q: You are familiar, are you not, Mr. Halloran, that this case and any recovery to be made by the plaintiffs in this case applies to only domestic revenues; correct?

A: I think that's much too narrow. What we're looking at is contracts that apply to the world and looking to see whether the agreements that DC entered into with the Warner affiliates were for fair market value. And, you know, there's no -- I know it's difficult, but there are no domestic deals, separate foreign deals.

So what I've looked at and what I've been giving my opinions to are deals that cover the world. Those are the sort of deals that DC made with Warners. Why are you smirking?

THE COURT: Let's stop. I think it's probably best to take a break for the day at this point. And we'll resume with this in the morning. According to the Court's

clock, we have about 16 hours of testimony left. About 5 hours for the plaintiff, about 11 hours for the defense. Assuming that we can continue to get through five hours of testimony a day, we have all day tomorrow, all day Friday, and all day Tuesday.

That should account for that time, which means we could have closing arguments on Wednesday, which is what the Court would prefer. I have Ninth Circuit matters up in San Francisco on Thursday and Friday. So if we don't do that on that Wednesday, it pushes it over. And I've got to get another trial started that week.

So that's the plan. All day tomorrow, all day Friday, all day Tuesday. Closing arguments on Wednesday.

What the Court is going to be planning to do is devoting all of its spare time between now and then, most notably this weekend, to not only working up a resolution in this trial, as the evidence is coming in, but also finish up my order on the outstanding issues that the Court has under submission so that we can on Wednesday -- the Court can give the parties a pretty definitive understanding of what is left for the accounting trial.

MR. BERGMAN: Thank you, your Honor. Is this witness, Mr. Halloran, going to be plaintiffs' last witness? Are there more witnesses?

THE COURT: I don't think so. The plaintiff has a good five hours left. I suspect they will want to reserve some time to cross-examine your witnesses. So that's up to the plaintiff. They have a few more witnesses on their witness list.

Mr. Toberoff, are you planning to call any additional witnesses?

MR. TOBEROFF: I'd like to reserve that ability. We're --

THE COURT: Well, if you're planning to call another witness tomorrow, you need to let Mr. Bergman know now.

MR. TOBEROFF: First, I would do redirect, and after that, if I plan to call --

THE COURT: Let me make it clear. Let me know now, who is your next witness, Counsel?

MR. TOBEROFF: We may be calling Mr. Sills.

THE COURT: That's the same person we identified last week. So be prepared for Mr. Sills.

You are not obligated to call him. I just want to make sure we're not left in a situation where the other side is saying we weren't prepared for him.

MR. PERKINS: Your Honor, one housekeeping matter. The subpoenaed witness --

THE COURT: Oh, yes. That ex parte application.

I've considered that, and I've considered the opposition to it. Is that the one you're referring to?

MR. PERKINS: It wasn't, actually.

THE COURT: Well, let me deal with that first. I'm going to deny the motion in limine; however, the subpoenaed documents could only be used for the purposes of refreshing recollection and proper rebuttal. For no other purpose.

Refreshing recollection, obviously the evidence is not coming in. Rebuttal, it might depend upon whether or not you can lay a foundation for proper rebuttal. But I'm not going to exclude it as improper discovery because the cases that you cite, I've taken a look at them, and I think they stand for the proposition.

But for refreshing recollection, that's something which the courts pretty consistently seem to allow in. But the evidence will be the refreshed recollection, not the documents themselves.

MR. PERKINS: Thank you, your Honor.

THE COURT: Understood?

MR. TOBEROFF: Yes, your Honor.

THE COURT: Very well. There's another subpoenaed witness.

MR. PERKINS: Yes, your Honor. You'll recall that the plaintiffs had tendered the declaration to authenticate three agreements.

THE COURT: Yes, and you subpoenaed --

MR. PERKINS: He is available to come in tomorrow morning at 9:30, and we were hoping to be able to take him out of order, to put him on the stand and send him on his way. We think it will take 15 or 20 minutes.

THE COURT: That sounds reasonable. Very well. We'll start with that at 9:30, and then we'll resume with Mr. Halloran's marathon examination.

Very well. See you in the morning.

(Proceedings concluded at 4:54 P.M.)

TRIAL DAY 7

A.M. Session

Thursday, May 7, 2009; 9:45 A.M.

WITNESSES: James Hayes Ellis, Mark Halloran (Continued)

THE CLERK: Calling case No. CV 04-08400-SGL, Joanne Siegel, et. Al., versus Warner Bros. Entertainment, Inc., et. Al.

(Counsel make appearances as before.)

THE COURT: Good morning to you all. Mr. Halloran, would you come forward.

MR. PERKINS: Your Honor, we have another witness.

THE COURT: Oh, that's right.

MR. PERKINS: We'd like to call James Ellis to the stand.

THE CLERK: Do you solemnly state that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: My name is James Hayes Ellis. Last name is spelled E-l-l-i-s.

DIRECT EXAMINATION

BY MR. PERKINS: Q: By whom are you employed?

A: CKE Associates, LLC. 09:45

Q: What is your title there?

A: General counsel.

Q: And how long have you been at CKE?

A: Almost exactly ten years.

Q: Mr. Ellis, what is Artists' Management Group, LLC?

A: It was a large talent management company in Beverly Hills that CKE and two other partners owned. We took over the entire ownership of it in connection with the sale of assets and a wind down of the business six or seven years ago.

Q: Mr. Ellis, I'd like you to take a look at, if you would, Plaintiffs' Exhibit 322, and it should be right there in front of you.

A: Yes.

Q: It's entitled "Declaration of James Ellis."

On the second page of the document, is that your signature?

A: Yes, it is.

Q: And do you recall executing this declaration?

A: Yes.

Q: And who prepared the declaration, if you know?

A: I don't know who prepared the declaration personally.

Q: Who furnished it to you?

A: Mr. Marc Toberoff.

Q: Now, in the first paragraph, you identify yourself as the custodian of records of both CKE -- or of CKE and of Artists' Management Group.

Is that accurate?

A: Yes, it is.

Q: And the second paragraph makes reference to a subpoena

that was served on -- I'm going to call Artists' Management Group AMG; is that all right?

A: Yes.

Q: -- that a subpoena was served on AMG by the plaintiffs on December 22, 2008. Is that accurate?

A: Yes.

Q: And did AMG produce documents in response to that subpoena?

A: Yes, it did.

Q: Further on in Paragraph 2, it makes reference to three separate agreements. Do you see that?

A: Yes.

Q: Now, I'd like you to take a look, if you would, underneath your declaration, there are three exhibits there: Exhibit 325, 326 and 327. Do you see those?

A: Yes.

Q: Could you briefly identify what Exhibit 325 is.

A: Exhibit 325 is an agreement between Michael Crichton and 1 Paramount about the rights to a book called Timeline, which became a movie, Timeline.

Q: And what is 326?

A: Exhibit 326 is an agreement between a limited partnership owned primarily by Tom Clancy, the author, and Paramount for the rights to produce a movie out of a book/video game called Rainbow 6.

Q: And what about 327, could you please identify that.

A: It's yet another agreement between a limited partnership controlled by Tom Clancy and Paramount for the rights to produce a movie out of a novel called Red Rabbit.

Q: Now, Mr. Ellis, in response to the subpoena, did you produce any literary purchase agreements in addition to those that are reflected there?

MR. TOBEROFF: Objection, Your Honor. Pursuant to the Court's order, my understanding is that the calling of this witness, because it's way after discovery period, is limited to authentication of the three contracts that plaintiffs have used in this case and that they cannot go outside of that. Because to do so, would fall -- they should have done that within the discovery period.

In other words, in December when we served them with these documents, they could have subpoenaed and got additional information regarding our subpoena. A fishing expedition into the subpoena is not --

THE COURT: I understand your objection, Counsel.

I'm going to overrule the objection. I'm not necessarily going to let any other documents come in. We're not going to expand discovery at this point. But this goes to other issues besides simply seeking additional documents, I think.

I'm going to give you some latitude on these question.

I'll certainly allow you to renew your objection before any of these other agreements were to come in.

MR. TOBEROFF: Very well, Your Honor.

BY MR. PERKINS: Q: Mr. Ellis, did you produce any documents to the plaintiffs in addition to those that are identified in the declaration?

A: Yes.

Q: Can you tell me what you produced?

A: I produced an additional rights' agreement that was in AMG's files between one of the Tom Clancy entities and Paramount for The Sum of All Fears that predated our management relationship, but had been in our files; and a contemporaneous agreement between Michael Crichton and Paramount Pictures related to Timeline.

MR. PERKINS: May I approach the witness, Your Honor.

THE COURT: You may.

BY MR. PERKINS: Q: Mr. Ellis, I've placed before you what is marked for identification as Defendants' Exhibit 1119.

Do you have that before you?

THE COURT: We don't have a question yet, Counsel.

THE WITNESS: Yes.

THE COURT: Is there an objection?

MR. TOBEROFF: With the permission of the Court, I'd like to have a standing objection, my same objection as before to this line of questioning, just for the record, as to questions about this contract.

THE COURT: He hasn't asked any questions about this contract yet. He's just identifying a document for the record. Sit down. Thank you.

BY MR. PERKINS: Q: Mr. Ellis, could you take a look at the first page of this document that I have provided to you.

A: Yes.

Q: Do you recognize what that is?

A: Yes.

Q: Could you tell the Court, please.

A: It's a copy of a responsive e-mail that I sent to Mr. Toberoff, you know, in relation to complying with the document subpoena back in January.

Q: What is it that's attached to the e-mail?

A: The original e-mail attached a copy of The Sum of All Fears' rights agreement between Clancy and Paramount.

Q: And is The Sum of All Fears' agreement that you --

MR. TOBEROFF: My objection is, with permission of the Court, I'd like to have a standing objection to all questions regarding The Sum of All Fears' agreement and this production as --

THE COURT: Counsel, again, this is a bench trial.

You've got to keep in mind, for the record, the record that you are desperately trying to preserve right now. Let the question come out. You'll be much better on appeal if the Ninth Circuit can at least see the question that you're objecting to. Let him ask his question, and then make the objection.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. PERKINS: Q: The attachment to this e-mail that's a PDF, The Sum of All Fears, is that document a true copy of what was in AMG's files?

THE COURT: Now you can make your objection, Counsel.

MR. TOBEROFF: Thank you, Your Honor. I'd like to have a standing objection.

THE COURT: We're not having standing objections. Make your objection to this question.

MR. TOBEROFF: The objection is, is that defense are engaging in discovery after discovery cutoff. They could have subpoenaed this witness during the discovery period.

The cases that they've cited state that trial subpoenas can not be used for discovery. They can be used for refreshing recollection or authenticating or --

THE COURT: For impeachment.

MR. TOBEROFF: Or for impeachment.

THE COURT: Right. Or rebuttal.

MR. TOBEROFF: Actually, the cases --

THE COURT: Do you have any authority which says you cannot use a trial subpoena for a rebuttal, to obtain rebuttal documents?

MR. TOBEROFF: We cited -- both sides cited cases in common. The nSight v. PeopleSoft case, which quotes heavily from the Integra LifeSciences' case, 190 FRD 556 at 562 Southern District California, 1999, that "trial subpoenas may be used to secure documents only in narrow circumstances, such as for the purpose of memory refreshment, or to ensure availability at trial. The regional absent one of these narrow circumstances for" --

THE COURT: Counsel, she can't keep write -- again, for your record, you need to have this stuff written down.

MR. TOBEROFF: I'm very sorry.

"Absent one of these narrow circumstances, the subpoena for documents under Rule 45 constitutes a pretrial discovery must be served within the designated discovery period."

THE COURT: Okay. Again, do you have any authority which says that a trial subpoena cannot be used to obtain rebuttal documents as part of those narrow circumstances referred to in the case that you just cited?

MR. TOBEROFF: The authority is when they list the narrow circumstances, they don't list rebuttal.

THE COURT: Well, in that case, they gave two illustrative examples.

Is there any authority which suggests -- the nature of rebuttal is you don't know until you get to trial what you're going to rebut; so logic would seem to dictate that if something comes up which you cannot fairly anticipate during the discovery process, then you should be able to use a trial subpoena to obtain information to rebut it.

As bright as these attorneys are at Warner Bros., they can't see the future.

MR. TOBEROFF: And our argument is that when they were served with it back in December, months ago, they did see the future. They asked for all documents received by subpoena. And we said that, as far as we know, we're not under obligation --

THE COURT: You were asked for all documents that you received by the subpoena?

MR. TOBEROFF: They asked for any correspondence in connection with parties we subpoenaed --

THE COURT: Did you turn these over?

MR. TOBEROFF: We're not under an obligation to turn over --

THE COURT: Did you --

MR. TOBEROFF: We turned over the agreement that we intend to rely on at trial, Your Honor.

THE COURT: Did you turn over all -- did they request these documents?

MR. TOBEROFF: They asked for the documents.

THE COURT: And you didn't turn them over?

MR. TOBEROFF: We didn't turn over all documents and all correspondence because there was no discovery request pending for that.

THE COURT: Well, I can certainly see the relevance of this. They should have been turned over. They weren't turned over. They're going to come in now.

Why didn't you turn them over?

MR. TOBEROFF: Because we weren't subject to any discovery request, and we weren't relying on them at trial, and we weren't using our correspondence. And with the -- They haven't turned over documents that they've subpoenaed to us.

THE COURT: We're not going to play that --

MR. TOBEROFF: Okay. But I --

THE COURT: Don't speak over me, Counsel. All right?

MR. TOBEROFF: I apologize, Your Honor.

THE COURT: Thank you.

If they violated the rule, and if they didn't turn over something that they should have turned over, I'll take that up with them.

If you didn't turn over something that you were supposed to turn over, I'm going to take that up with you.

Pointing the finger to the other side of the courtroom does not resolve this issue in any way.

Do you understand that?

MR. TOBEROFF: I understand, Your Honor.

THE COURT: Were you requested to turn over these documents?

MR. TOBEROFF: Yes. Defendants asked us to turn over any documents, any correspondence, anything that has to do with any of the subpoenas.

THE COURT: And you did not do so?

MR. TOBEROFF: We didn't turn -- we turned over all contracts that we intended to use as exhibits at trial.

THE COURT: That's not the question. And I will spend all morning until I get an answer to --

MR. TOBEROFF: No, we didn't turn over every document.

THE COURT: You're speaking over me again, Counsel. Do I need to take a recess?

MR. TOBEROFF: Excuse me, Your Honor. I thought you had finished. I'm sorry.

THE COURT: Answer my question. You were asked to turn over these documents. Did you?

MR. TOBEROFF: No, I did not.

THE COURT: Why not?

MR. TOBEROFF: Because we weren't subject to a discovery request to turn over these documents, and we didn't intend to rely on our correspondence regarding the subpoenas at trial.

THE COURT: I guess I'm confused. You say you're not subject to a discovery request, but you just said that you were asked to turn -- that it was subject to discovery.

MR. TOBEROFF: There's no -- discovery had ended, and we weren't subject to a pending of any kind of discovery request. And there was no formal discovery request for production. They sent an e-mail saying, we want everything having to do with any of your subpoenas, supply the documents to us.

And I said, under what request for production? Can you tell me why we would be obligated to turn over any e-mail or anything having to do with these subpoenas over to you? And they never got back to me.

THE COURT: So when you said earlier it was requested, it wasn't formally requested as a discovery request?

MR. TOBEROFF: Correct, Your Honor.

THE COURT: Okay.

Counsel?

MR. PERKINS: Well, Your Honor, two things:

This is our opportunity to cross-examine their witness. Under Rule 902, we have some latitude to do that. There is an impeachment purpose here.

In addition, Your Honor, these subpoenas were served well after the close of discovery, so there would not have been an opportunity to serve a formal discovery request. Once the subpoenas were served, then we were made aware of that. We made a request that all documents that had been produced by this witness --

THE COURT: Let me stop you here.

Mr. Toberoff, I took from what you said that these documents had already been obtained prior to the close of discovery.

Did you obtain these documents after the close of discovery, as counsel just represented?

MR. TOBEROFF: Remember the rebuttal subpoenas where you allowed this in for rebuttal? There were subpoenas after the LR 16 where they delivered 23 contracts for the first time.

And then in response, we subpoenaed some additional contracts. And you said those can come in for rebuttal.

And then at the start of this trial, or at the last conference before the trial, defendants said, we would prefer that they just put the documents in as part of their case in chief. That's what this subpoena is.

THE COURT: So the answer is, these were documents that were obtained after the close of discovery?

MR. TOBEROFF: Yes, these were and that's correct.

MR. PERKINS: Your Honor, the subpoena was served on December 22, 2008.

THE COURT: Did you ever make a formal request for these documents?

MR. PERKINS: Well, we didn't make a discovery request, Your Honor, because discovery was closed. We wrote to opposing counsel and requested that they turn them over.

THE COURT: From your perspective, how did Mr. Toberoff respond to that request?

MR. PERKINS: He refused.

THE COURT: Did you ever bring it to the Court's attention at that time?

MR. PERKINS: We did not, Your Honor.

I take it back. We did bring it to Your Honor's attention in connection with our motions in limine. As part of our motion in limine, we made the point that we had requested these documents and they had refused to turn them over.

THE COURT: That was months later?

MR. PERKINS: Well, it was weeks later, Your Honor.

THE COURT: Oh, that's right, because the motions in limine were held initially in January.

MR. PERKINS: That's correct, Your Honor.

THE COURT: Well, this is a close call.

There's no question, if these documents -- the problem is that they were obtained after the close of discovery, so they're in this kind of -- these were documents that, Mr. Toberoff, you obtained after discovery had closed.

But then, on the other hand, is it fair to say that there's no request for discovery, as Mr. Toberoff suggests, that directly addresses these documents?

MR. PERKINS: No. There wouldn't -- going back to Your Honor's prior comment about seeing the future, I think there wasn't an ability to do that.

If I could just be heard on this, Your Honor. The purpose of putting this in really, Your Honor, is two-fold. One is to show that the plaintiffs have really cherry picked --

THE COURT: I get where this is going.

MR. PERKINS: Right.

THE COURT: I assume where this is going.

MR. PERKINS: Right. And the evidence will show that the terms in this agreement are really far less favorable than the terms of the agreements that they have chosen to put into evidence. And that's the purpose.

THE COURT: Well, I'm assuming that's what you're attempting to show. Whether you've showed that or not remains to be seen.

But I'm just trying to get -- I need to get an understanding of whether -- I understand Mr. Toberoff's objection. The problem I'm having with that is that -- and ordinarily, a post-discovery request that would have been subject to a request for document production before the close of discovery, that would be an easy case. Those would have to be turned over.

Mr. Toberoff's argument, as I now understand it, is that, even if these subpoenas had been served during the discovery period, they would not have been subject to any of the requests that you made.

Now, while you can't see the future, you certainly -- you never requested, I take it, all agreements that you have received?

MR. PERKINS: Your Honor, you know what, we may have. I don't want to say absolutely not. We have hundreds of documents and discovery requests in the case, and I don't recall, to be honest.

But I'm not going to sit here and represent to you that I have one and that this is responsive to it.

THE COURT: Well, maybe the answer goes back to this whole notion where I started from; that this is rebuttal evidence. These were documents that were obtained after the close of discovery by the plaintiff, a group of documents.

The defense's argument is that by only using a portion of the documents and not all of the documents, it reveals that plaintiff is, as you say, cherry picking which agreements.

Why shouldn't Mr. Toberoff, under those circumstances, out of equity, should not the defendants be able to now introduce the full panoply of documents that you subpoenaed?

MR. TOBEROFF: And the answer is, is that when we turned over documents pursuant to that subpoena and we gave them a copy of our subpoena and we gave them the documents we intended to use at trial, number one, when they requested all documents, all correspondence relating to the subpoena, everything we received, I wrote back and I said, I don't believe we're under an

obligation to do that and can you please cite me the authority, and they never cited any authority. So I didn't do it.

But number two, at that point in time, they could have subpoenaed Mr. Ellis. They didn't have to wait until trial. They could have actually sent a subpoena to all the parties that we subpoenaed asking for any correspondence with Mr. Toberoff or any agreements that the parties sent pursuant to the subpoena, and they failed to do that.

THE COURT: But they still would have been doing so after the close of discovery. So if your argument is valid with respect to doing it now, it would have been equally valid with respect to doing it in January, when we actually thought the trial was going to proceed.

If you're saying that it would have been okay for them to subpoena those documents in January, why isn't it okay for them to subpoena those documents in May?

MR. TOBEROFF: Because I believe the cases recognize the difference between trial subpoenas after one side has put in, for example, their case in chief or the majority of their case in chief, to wait to do things after that point, it doesn't put things on the same even keel as doing it before trial and putting down who you're going to call at trial as a witness and what exhibits you're going to use at trial. So if they had subpoenaed this prior --

THE COURT: I think you're right. And I could definitely see the point in the case where they were subpoenaing something new and different after your case in chief that wasn't properly rebuttal; that is something they should have obtained beforehand.

But in this case, as I understand it, they are simply subpoenaing documents that you've already subpoenaed.

Correct?

MR. TOBEROFF: Yes.

MR. PERKINS: Your Honor?

MR. TOBEROFF: May I --

MR. PERKINS: If I could make one --

THE COURT: Let Mr. Toberoff finish, and then I'll give you a chance to respond.

MR. PERKINS: Yes, Your Honor.

MR. TOBEROFF: I understand we can do this from the evidence, but I need to respond to the comment that we are cherry picking -- they're actually using our argument which we mentioned regarding Warner Bros. since Warner Bros. has a big archive of contracts and only submitted contracts with inferior terms.

The reason we didn't submit this contract is very simple: You've heard the objection of defendants as to incompleteness. The Sum of All Fears' contract is very incomplete. It's not a question of a schedule or a GRP definition you can figure out. It says on the face on page 1 that it is amending another agreement.

And the witness has testified that he happened to have this in his files, but that his company wasn't involved in this agreement, they didn't have the agreement it was amending.

So it was exceedingly incomplete. And it's for that reason we didn't -- the terms aren't bad at all. It's for that reason we didn't use this document.

THE COURT: That's a different argument altogether.

MR. TOBEROFF: I understand.

THE COURT: That's a response to the claim that this is cherry picking, but that goes to the weight of this evidence and whether or not this really is impeachment or not. That doesn't go to whether or not -- the limited legal issue that I want to decide right now is whether or not it's proper, at this point, for the defense to introduce agreements that you subpoenaed after the close of discovery that they requested that you denied that was raised in the motion in limine.

I mean, there's really no notice issue, because everybody on both sides has notice of these documents.

You indicated a few moments ago that they should have subpoenaed them back in January. The only reason why we're here in May and not January is because, unfortunately, your first expert witness, got sick, and we had to continue the trial.

I guess I'm not seeing the material difference. But let me hear from Warner Bros.' counsel.

MR. PERKINS: I guess the only other point that I would make, Your Honor, is that we didn't know about these agreements until we served the subpoena.

And if Your Honor will recall, until we got to trial last week, we were under the impression that the plaintiffs were going to be bringing Mr. Ellis in.

If you recall, Your Honor's ruling was that if there was no stipulation, there would have to be a witness. It was only after the plaintiffs argued that it really was our burden to serve a subpoena, that we served the subpoena.

And as part of that, asked for all documents that were produced by AMG.

THE COURT: And that's when you found out about these other documents?

MR. PERKINS: And that's when we found out about these other documents.

THE COURT: So you didn't know about these other documents back in January?

MR. PERKINS: We did not know about them, Your Honor.

THE COURT: Anything further, Mr. Toberoff?

MR. TOBEROFF: No, Your Honor. Just that there was no formal request for production of these documents at any time, nor was this dialog that we're entering into here ever set forth in any respect by the defendants.

Just as they've subpoenaed Fox recently, they could have sent out a subpoena. When they sent me a request by e-mail that you need to turn everything over, your e-mails, and I said please cite the authority, and they didn't cite the authority, and I didn't send it over, they should have sent a subpoena out at that point and then mark this as an Exhibit on their exhibit list or put down Mr. Ellis as a witness that they would call at trial.

THE COURT: Very well. It's a close call, but I'm going to overrule the objection given the circumstances, all of the circumstances.

Mr. Toberoff, I apologize for raising my voice. But the Court has to maintain order in this proceeding. And I'm doing it as much for your benefit as for anybody else's. You've got to wait for the question to be out before the objection is made. Otherwise, you're not going to have a record to explain what it was you were objecting to. I know you know where he's going, but the record looks terrible when you have objections halfway through a sentence and you don't have the entire sentence out.

And this court reporter cannot take down more than one person at a time. And if there's anyone she's going to take down, she's going to take down what I'm

saying, and that's going to leave you off the record. So I'm doing this really for your own good and preserving your own record. I hope you appreciate that.

MR. TOBEROFF: I do, Your Honor. And I apologize because I should know that.

THE COURT: I understand this is an emotional case. This is a very important case for both sides. I want both sides to have their full say here. It's a difficult case, and the Court is mindful of that.

But I am going to overrule the objection. I think that given the entire history of how this played out from December to the present, that justice requires that the documents come in. And then of course we can -- you know, whether or not this is evidence of cherry picking or not will be flushed out through examination and cross-examination.

The objection is overruled. Counsel, you may proceed.

MR. TOBEROFF: Thank you, Your Honor.

MR. PERKINS: Thank you, Your Honor.

BY MR. PERKINS: Q: Mr. Ellis, looking at Defendants' Exhibit 1119, is this a true copy of what resides in the records of AMG?

A: I can't really tell. The scanned document that was attached to the e-mail, that was the true copy. And if this document is a printout of that exact e-mail, then yes. Looking at it, it appears to be, but I just cannot tell.

Q: Well, I will represent to you that it is, in fact, a printout.

If that were the case, would you feel comfortable authenticating that?

A: Yes.

MR. PERKINS: At this point, Your Honor, I'd move this into evidence.

THE COURT: Aside from the earlier objection, which was overruled, is there any other objection?

MR. TOBEROFF: My objection is the document is incomplete, as I mentioned earlier. If you look at page 1 --

THE COURT: I'll sustain that objection. Let's address this completeness issue at this point. Counsel, a foundation.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. PERKINS: Q: Mr. Ellis, if you would take a look at what's been marked for identification Exhibit 1119, can you tell me whether this document is incomplete?

A: I'm having trouble with the question. This was what was in our files responsive to the subpoena.

Q: To your knowledge, was there any other document that accords with that?

A: I don't understand the question still.

MR. PERKINS: Your Honor, this is the custodian of records. He has no knowledge of whether it is or is not incomplete. I don't think there's any evidence that it is incomplete at this point.

I'd request that the document come in subject to a showing later on that it's incomplete.

THE COURT: That's a foundational objection, Counsel.

If you're attempting to -- if we're going to be going down the road of trying to compare this to other agreements, we must, as we have in all the other agreements that we've been trying to compare, make sure that we have a complete agreement. And that's in question at this point.

MR. PERKINS: Well, it's in question based on Mr. Toberoff's objection. We don't have any evidence in the record that it is incomplete.

THE COURT: Why don't I do this. What I will do is delay ruling on the objection subject to cross-examination by Mr. Toberoff. I'll take it up at that time.

MR. PERKINS: Thank you, Your Honor.

THE COURT: You'll have a chance to... Anything further on this document?

MR. PERKINS: No, Your Honor.

THE COURT: Very well. We'll put it aside for the moment.

MR. PERKINS: May I approach, Your Honor?

THE COURT: Yes.

BY MR. PERKINS: Q: Mr. Ellis, I've placed before you the document that's been marked as Defendants' Exhibit 1120 solely for identification at this point.

Mr. Ellis, can you identify what this document is?

A: It's a copy of another one of the e-mails I sent in response to the document subpoena in January.

Q: And what does the attachment purport to be, Mr. Ellis?

A: An executed rights' agreement between Michael Crichton and Paramount Pictures for the novel, Timeline.

Q: If I could ask you to take out Exhibit 325 and lay that next to 1120, please.

A: (Witness complies.)

Q: Now, Exhibit 1120, is that the literary purchase agreement for the Timeline motion picture?

A: Yes.

Q: And does Exhibit 325 also purport to be the motion picture Exhibit for Timeline?

A: It appears to be, yes.

Q: Now, Exhibit 1120, is that document in the form that it resided in the files of AMG as you produced it to the plaintiffs?

A: This e-mail? Yes.

Q: Yes.

I'd like you to turn to Exhibit 325 to the Bates No. SGL 06094.

A: Okay.

Q: And 06094 through 0611 (sic). Will you take a look at those pages, please.

A: 06111?

Q: Yes.

A: (Perusing document.) Okay.

Q: Do the pages SGL 06094 through 06111 that are in Exhibit 325, are those anywhere in Defendants' Exhibit 1120?

A: Just one minute (perusing document).

Okay. 111 is in both agreements and the subsequent pages. And then the prior ones, 94 through 110 are not; it skips from the notary page to the rider.

Q: Do you recognize the documents that are in 325 that have Bates Nos. 06094 through 06111?

A: Generally, yes.

Q: Were those pages part of the document that is 1120 as kept in the files of AMG?

A: Not in this particular file, no.

Q: Now, Mr. Ellis, did you produce the documents that are 06094 through 06111 to plaintiffs' counsel?

A: Yes.

Q: And what did you produce that with, if anything?

A: Within half an hour or so after I produced the rights' agreement, Mr. Toberoff contacted me and inquired as to that Exhibit. And I said I'll go look for it, and I found it in an adjacent folder, in another contemporaneous Michael Crichton agreement.

Q: Okay. But it was not in the file part of the motion picture agreement; correct?

A: It was in the larger file; it wasn't in this particular rights' agreement folder.

MR. PERKINS: May I approach, Your Honor?

THE COURT: You may.

BY MR. PERKINS: Q: Mr. Ellis, I've given you what's been marked for identification as Defendants' Exhibit 1121.

Could you identify what this document is?

A: Yes. It's an e-mail I sent to one of your co-counsels about forwarding a copy of an e-mail that I sent to Mr. Toberoff in response to his inquiry about the gross receipts definition.

Q: And what is the document that is actually attached to this e-mail?

A: It's the contents of that other folder, the Crichton producer agreement folder.

Q: And within that agreement, are the pages that are SGL 06094 through - 06111 found in the document that's attached to 1121?

A: That's my recollection. I had to go in and match them up. It appeared to be.

Q: Now, are those pages at the end of the agreement that's 1121?

A: No. They are additional pages.

Q: After the end of that rider; correct?

A: Yes.

Q: Now, Mr. Ellis, when you executed your declaration in this case for the plaintiffs' counsel, were you aware that plaintiffs had taken the documents SGL 06094 from the producer agreement and inserted it into the literary purchase agreement?

MR. TOBEROFF: Objection, Your Honor. Assumes facts.

THE COURT: The way it's phrased it does. Sustained.

BY MR. PERKINS: Q: Going back to Exhibit 325, did you testify earlier that when you produced the copy of the Timeline motion picture agreement, that it did not contain the rider at SGL 06094 through -06111?

A: My testimony is that, whatever e-mail was -- I didn't read the documents; I just scanned the folders and shot them over; so whatever was attached to that e-mail was exactly what was in our files.

Q: And that e-mail is Defendants' 1120; correct?

A: Yes.

Q: And do you know how the rider that's SGL 06094 through -06111 got to be inserted into the motion picture agreement?

A: I do not.

Q: When you executed your declaration, did plaintiffs' counsel inform you that he was going to be inserting that document, that rider, into the motion picture agreement?

A: There was never any discussion of anything like that.

Q: Going back to Exhibit 1121.

Is Exhibit 1121, to the best of your knowledge, a true and correct copy of the documents that reside in the AMG files?

A: The e-mail that was attached to it, yes, was whatever was in the Crichton producer folder.

Q: If I could have you turn to the second page of the Exhibit, the first page of 1121.

Could you read for the Court Paragraph 3.2 on that first page.

A: Section 3.2 is entitled "Compensation."

And it reads, "Lender and producer acknowledge that the compensation payable pursuant to the agreement dated as of October 22, 1999, between producer and PPC for the motion picture and allied rights in and to the novel, Timeline, written by producer ('rights' agreements') shall be deemed to include the compensation for producers' services pursuant to this agreement."

Q: And the rights' agreement that's referred to in 3.2, is that Plaintiffs' Exhibit 325?

A: Yes.

MR. PERKINS: Your Honor, I have nothing further for this witness.

THE COURT: Cross examination.

CROSS-EXAMINATION

BY MR. TOBEROFF:

Q: Mr. Ellis, Defendants' Exhibit 1119, which is the Clear and Present Danger agreement -- excuse me, The Sum of All Fears' agreement, I'd like to draw your attention to the first paragraph.

If you look four lines down, do you see where it says, "And amending the agreement dated May 21, 1990, as later amended, (including without limitation pursuant to an amendment dated as of June 17, 1992, between JRE and PPC in connection with the motion picture and other rights of the novels, Clear and Present Danger and Patriot Games and amending the agreements in connection with the motion picture and other rights of the novel, The Hunt for Red October, consisting of the agreement dated May 7, 1985, between JRE's predecessor and interest, The Red October Company, and the PPC's predecessor and interest, The U.S. Naval Institute, the agreement dated July 31, 1986, between U.S. Naval Institute and PPC in the agreement dated May 2, 1989, between JRE and PPC collectively The Hunt agreement.)"

Do you see all those agreements referenced in this paragraph as being amended?

A: Yes.

Q: Did you turn over, pursuant to the subpoena, all of those agreements?

A: No.

Q: And what is the reason why you didn't turn over all those agreements pursuant to the subpoena?

A: I'd have to go back and look at the subpoena to see if they were asked for. But if they weren't covered by the subpoena, then I don't have them.

The Artists' Management Group didn't start representing Tom Clancy until after this agreement.

THE COURT: So you don't even know if you have all those agreements?

THE WITNESS: I do not know.

BY MR. TOBEROFF: Q: And you mentioned that you happen to have a copy of that agreement in your file, even though Artists' Management Group did not represent the author at the time this agreement was entered into.

A: Yes.

Q: And that's the same for all the other agreements mentioned in this first paragraph of the document.

A: Artists' Management Group wasn't even formed at the time all these other agreements were dated.

Q: I understand.

Now, referring to what we call the Timeline agreement, which was Plaintiffs' Exhibit 325 and Exhibit 1121, which is Michael Crichton's producer agreement, is it, in your experience, common for very important rights holders to simultaneously enter into executive producer or producer agreements in connection with licenses of film rights to their works?

MR. PERKINS: Objection, Your Honor. Foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: You testified that you have been working with AMG and Mr. Ovitz for ten years, approximately ten years; is that correct?

A: I testified I've been working for CK Associates for ten years. AMG, I started working for in 1999 and really wound it down by 2003. I've done work for it since, but it's not a hotbed of activity as of this time.

I represented the principles of Artists' Management Group prior to taking this job when I was in private practice. And Michael Ovitz is the principal of CKE, so yes.

Q: And during that time period, have you had experience in both reviewing and negotiating rights' agreements for marquee authors, well-known authors?

MR. PERKINS: Objection, Your Honor. This is going well beyond the scope of cross, and Mr. Ellis is not an expert witness.

THE COURT: I'm going to give you some latitude, Mr. Toberoff. Overruled.

THE WITNESS: I've had some experience in that regard, yes.

BY MR. TOBEROFF: Q: And based on that experience, is it common for high-level rights holders to receive additional compensation in the form of an executive producer or producer agreement in conjunction with the rights' agreement?

MR. PERKINS: Same objection, Your Honor.

THE COURT: Sustained. Now this is going beyond foundational. I didn't know definitely where you were going with that.

BY MR. TOBEROFF: Q: The Timeline rights' agreement makes reference to a producer agreement; correct?

A: Could you -- I -- I'm trying to remember.

Q: The Timeline rights' agreement was Exhibit 325 --

A: Right. I just don't see where it makes reference to it.

Q: I'd like you to turn to page 4 of the agreement.

Do you see the reference on page 4 to Exhibit GRP, gross rights definition? It says "adjust shall be in accordance Paragraph 1 of Exhibit GRP."

A: Down at the bottom?

Q: Yes.

A: Yes.

Q: And in your files, did the Timeline rights' agreement have GRP attached to it?

A: It had the rider attached to it, to the GRP.

Q: But not the GRP?

A: Not the GRP definition.

Q: Now, if you go to Defendants' Exhibit 1121, did that have Paramount standard GRP definition attached to it?

A: As of this date, yes.

MR. PERKINS: Objection, Your Honor. Leading; foundation.

THE COURT: Overruled.

MR. TOBEROFF: It's cross, Your Honor. I think I can lead.

THE COURT: It's not a hostile witness, but in this context, I'm going to overrule it.

MR. PERKINS: Your Honor, for the record, this is plaintiffs' witness. My examination --

THE COURT: I'm aware of that, Counsel, but thank you, though, for pointing that out.

MR. PERKINS: Just for the record --

THE COURT: Thank you for pointing that out. Overruled.

BY MR. TOBEROFF: Q: Do you have any reason to believe that the GRP standard Paramount GRP definition attached to the Timeline producer agreement is different than the standard GRP definition referenced at the bottom of the page of the rights' agreement that we previously spoke about?

MR. PERKINS: Objection, Your Honor. Foundation as to characterizing it as a standard.

THE COURT: Sustained. I'm allowing leading questions simply because this is a witness authenticating a document; he's not offering opinions thereon.

BY MR. TOBEROFF: Q: Based on your experience, do you know that the standard Paramount GRP definition attached to the producer agreement is the same standard Paramount GRP definition referred to in the rights' agreement?

MR. PERKINS: Same objection, Your Honor.

THE COURT: Sustained.

MR. TOBEROFF: Your Honor, may I comment on the objection?

THE COURT: I've sustained the objection, Counsel. Move along.

MR. TOBEROFF: I have no further questions.

THE COURT: Very well. Anything further?

MR. PERKINS: No, Your Honor.

THE COURT: I'm going to sustain the foundational objection by plaintiffs to Exhibit 1119. This agreement just incorporates too many other agreements for which this witness cannot lay an adequate foundation. I note page 7, Paragraph 5 of the agreement, there's language that "wherever provisions of this agreement, namely 1119, conflicts with any provisions of the prior agreements, the provision of this agreement shall prevail." But without having those prior agreements, it's really hard to come up with an integrate agreement.

So the Court will sustain the foundational objection to that.

MR. PERKINS: In light of Your Honor's ruling, we then ask that both Exhibits 326 and 327 be excluded as well, Your Honor. Those both make reference to the definitions from The Sum of All Fears' agreement; 326, at page SGL 6121. It relies on a definition from The Sum of All Fears, as does 327, SGL 06169, again, refers to the definition from The Sum of All Fears.

THE COURT: Mr. Toberoff, your response to that?

MR. TOBEROFF: My response, Your Honor, is when these agreements were referred to a studio's standard GHP definition -- we've heard testimony that these standard definitions rarely, if ever, change. And it's usually not a major point since both sides are aware what that standard definition is based on practice, and the studio has it readily available.

The main focus is usually on the riders. And in these agreements, if the only thing missing is the standard GRP definition, but the riders are exactly the same. And you

have -- it means that the GRP -- So I think this goes to weight rather than admissibility. It's not a contract which you're incapable of understanding; it's used for making deals and for comparison purposes due to the fact that in one Exhibit, the standard GRP definition happens to be missing.

THE COURT: Perhaps the best thing is to permit Exhibit 1119 to be introduced for the purpose of providing the definitions being referred to therein, but not permit it to be introduced for the purpose of evaluating the overall agreement, because that's what I'm not clear that I have before me is the overall agreement.

Do you understand what I'm saying?

MR. TOBEROFF: Yes, Your Honor.

MR. PERKINS: I would object to that, Your Honor.

It's not clear to me that what Mr. Toberoff is saying is actually in evidence or in the record. And I'm hearing for the first time that this is the justification for not having some of The Sum of All Fears in, so I have not had a chance to review --

THE COURT: That's my tentative ruling. If you want to, after you've had a chance -- these agreements are complicated enough, but that's my inclination at this point is to allow 1119 in only for the purpose as serving the reference point to the to extent of it, or a definition in it is incorporated into the other.

I want to have foundation as to yet another agreement for points of comparison on fair market value issue without knowing that we have the full agreements before us.

MR. TOBEROFF: Your Honor, relative to this point, I'd like to point out that actually what I was referencing was 326 and 327 are both contracts for the film rights to the Tom Clancy novel with the same company, Paramount. They refer -- one has the standard GRP definition and the standard rider amending that GRP definition.

The other one has an identical rider, identical terms in -- for instance that the GRP definition is the same. So reading those two agreements together, you get a sense of what the GRP definition is. It's not a type of incompleteness which renders the agreement incomprehensible.

THE COURT: I'm permitting it for the limited purpose to the extent this is referred to. But we're not going to use this as basis for the Court's ruling. Move along. If there's no further questions of the witness, you may be excused.

Let's take our morning break, and then we'll call Mr. Halloran back up to the stand.

(Whereupon a brief recess was held.)

THE COURT: Counsel. Mr. Halloran.

THE CLERK: Mr. Halloran, please be advised you're still under oath.

CROSS-EXAMINATION (Cont'd)

BY MR. BERGMAN: **Q:** Good morning again, Mr. Halloran.

A: Good morning, Mr. Bergman.

Q: Mr. Halloran, on direct testimony, you were referring to the fact that there's a provision in the Superman film agreement which basically requires DC to make any television programming with the Warner Bros. affiliate.

Do you recall that testimony?

A: You have to look at both the film agreement and the television agreement together, but I understand the net effect is that, yes.

Q: Now, it's customary, is it not, when a studio acquires film rights to a particular project, that it also, in one manner or another, obtains a hold on the television rights to that property; isn't that correct?

A: In general, that's true.

Q: I mean, there are different ways of doing it. You can purchase both film and television rights at the same time, can't you?

A: You can, but, you know, again, when you have a previously-exploited property, it's unusual. Usually, when there's a purchase of film and television rights, the anticipation is the film be done first, and then there's television rights after that. But if there's been previously-exploited television rights, I don't think it is typical to get the television rights at the same time.

So I think that's demonstrated by the fact that in this case, there's a separate film and separate television agreement.

MR. BERGMAN: Your Honor, move to strike everything after "you can."

THE COURT: Stricken.

BY MR. BERGMAN: **Q:** Now, there are examples, are there not, Mr. Halloran, where the studio purchases both film and television rights together; correct?

A: There are those examples, yes.

Q: We saw that in the Watchmen, didn't we?

A: I think that's correct.

Q: Okay. And we saw it in Human Target?

A: I'd have to look at the actual agreements.

Q: I see. Well, does that --

A: I'd like to look at Watchmen. They vary, depending on a lot of factors.

Q: So does your chart reflect --

THE COURT: Is there an objection?

MR. TOBEROFF: I want to point out, the witness, I don't believe, has the Human Target agreement; and I would also appreciate it if counsel could name the exhibits numbers, so we can follow --

THE WITNESS: Right.

MR. TOBEROFF: -- pull these agreements and follow the testimony.

THE COURT: Sure. That's a good point.

Please, Counsel.

MR. BERGMAN: Okay.

BY MR. BERGMAN: **Q:** When I referred, Mr. Halloran, to the Watchmen agreement, I was referring to Exhibit 1029.

Do you have that, sir?

A: I do.

Q: Am I correct that the studio acquired both film and television rights in that agreement?

A: It talks about all motion picture analogous and allied rights, as defined in the exhibits.

It was defined in the standard terms.

THE COURT: Is there --

THE WITNESS: I have a definition of "net profits," but I don't seem to have --

THE COURT: Is there an objection, Counsel?

MR. TOBEROFF: I object to the Watchmen exhibit on the basis of taking the page, no pun intended, from defendants' objection. It refers to a standard definition -- it refers to the standard terms and conditions, which is a lot broader than defined gross definition. And those are missing from the agreement.

THE COURT: What's your legal objection, though?

MR. TOBEROFF: Incomplete exhibits. Excuse me, Your Honor.

THE COURT: Why don't you rephrase your question, Counsel.

MR. BERGMAN: Okay.

THE COURT: Mr. Bergman is more than capable of doing this, Counsel.

MR. BERGMAN: Your Honor, my good friend, Mr. Perkins, points out that plaintiffs have already stipulated to the admission of this agreement and that it is in evidence.

THE COURT: So it is in evidence, Mr. Toberoff?

MR. TOBEROFF: No. That's incorrect. Exhibit 1029, if you look at objections, we have a whole list of objections under "witness stipulation."

MR. BERGMAN: Mr. Toberoff is correct, Your Honor.

THE COURT: Very well.

MR. BERGMAN: I'll rephrase the question.

BY MR. BERGMAN:

Q: Would you turn, please, Mr. Halloran, to Paragraph 9-D of this Exhibit 1028.

A: Now, is this the option agreement or the purchase agreements?

Q: These are purchase agreements; I believe it's 1029; it's at Page 6. The Bates stamp is 7451.

A: I'm there.

Q: And am I correct that that talks about the theatrical motion picture rights that are being acquired; Paragraph 9, studio sequels, theatrical motion pictures?

A: No. This is not a rights acquisition paragraph. This is a paragraph having to do with how much money is paid if, in fact, there is a sequel made after the first picture. So this is not a rights paragraph.

Q: Would you turn to the next page, Subparagraph D. It would be Bates-stamped 7452.

A: Okay.

Q: Am I correct that it talks about the acquisition and payment for television pictures?

A: You're incorrect. It doesn't talk about acquisition. It only talks about sums that would be paid.

Q: Is it your testimony, Mr. Halloran, that the Watchmen agreement does not provide for the acquisition of film and television rights?

A: There's -- I'm constrained by what I have. In Paragraph 2 of the purchase agreement, it refers to motion picture, including "all motion picture analogous and allied rights in the literary property of Watchmen, as more particularly described in the standard terms and conditions." And those aren't attached. So it's difficult, if not impossible, for me to tell you exactly what rights were, in fact, acquired by Fox under this agreement.

Q: You're unable to answer the question?

A: No. I think I did answer the question. Can I finish?

Q: Surely.

A: The answer is, based on my study of this document, there's a reference in the grant of rights to all motion picture analogous and allied rights, but it's as more particularly described in the standard terms. And I don't have the standard terms. So I would have to look at the agreement as a whole, and I would have to read what the actual definition of the rights that were granted were.

Q: Okay. Let's not take the time to do that. Could you look, sir, please, at Exhibit 1097, the Harry Potter agreement.

A: This is Defendants' 1097?

Q: That's correct.

A: Okay.

Q: Am I correct that this agreement provides for the acquisition of both film and television rights?

A: It does provide for the grant of theatrical and television rights.

Q: Would you look, please, sir, at Exhibit 315, the Annie agreement.

Exhibit 315, the Annie agreement, provides for the acquisition by Columbia of both film and television rights.

A: (Witness reviewing documents).

Sorry. This is a long agreement.

Well, it's a little complicated, but there's a general grant of television rights in Paragraph 1. But then further on down, there's references to existing contractual commitments that you cannot judge from the base of this exactly what they are. And then there's some hold-back provisions.

Q: Whatever may be the other provisions, sir, isn't it a fact that the grant of television rights is contained in that agreement?

A: That's an incomplete analysis, because a lot of times, the way these work is, there's a general grant, and then there are reserve rights and carveouts. It's an incomplete analysis to just look at the first paragraph and say television rights are granted, because that's the set of rights, and then the subset is usually dealt with later in the contract.

MR. BERGMAN: Move to strike as nonresponsive, Your Honor.

THE COURT: Overruled.

THE WITNESS: So my answer is that there's a general grant of television rights, but then there are references further down to existing contractual commitments. So it's really impossible for me to --

MR. BERGMAN: Very well, sir.

THE COURT: Wait for the next question.

THE WITNESS: I'll need to finish my answer, which is that --

THE COURT: No. We're going to wait for the next question. There was no question pending.

THE WITNESS: No. I was --

THE COURT: There was a question. There was an answer. There was a motion to strike. The motion to strike was denied. And then you started just giving another answer out of nowhere. So there was no question pending, so it can't be an incomplete answer. There should not have been --

THE WITNESS: I understand, Your Honor.

THE COURT: You really need to listen to the question, answer it, and wait for the next question.

THE WITNESS: Okay.

THE COURT: Counsel, your next question.

BY MR. BERGMAN: **Q:** In addition to acquiring television rights in conjunction with film rights, Mr. Halloran, it's often done by studios, is it not, that certain rights, including television rights, are what is referred to as "frozen" during specified times during which a film is being made?

MR. TOBEROFF: Objection, Your Honor. Vague and ambiguous as to "certain rights."

THE COURT: Sustained. Rephrase your question.

BY MR. BERGMAN: **Q:** Is it not common, Mr. Halloran, for the exercise of television rights by the grantor to be frozen; that is, held in place, without anyone doing anything, absent mutual agreement, during the period of time that a film is being developed and distributed?

A: That is common, but there are exceptions.

Q: Okay. We saw that, did we not, in the Conan agreement, Exhibit 1094?

A: Let me look at the Conan agreement.

I don't have the Conan agreement.

Q: And you don't remember?

A: I would have to refresh my recollection. I don't remember each and every provision of each and every one of these documents. If I could see the document, I could quickly tell you the answer.

MR. BERGMAN: May I ask that that document, Exhibit 1094, be placed in front of the witness.

A: (Witness reviewing document).

Yes. There is a provision to that effect in Paragraph 4-A, Sub B, on Page 7.

BY MR. BERGMAN: **Q:** Okay. And am I correct, sir, that with respect to Iron Man, Exhibit 1105, there is also a freeze placed on the exploitation of television rights?

A: I'm just trying to get the paragraph number for you.

On Page 16, among the reserved rights that Marvel had in Iron Man were both animated direct to home video rights, in Subparagraph G on Page 17, subject to a freeze, and also in Sub H, live-action television, live-action direct to home video, live-action Internet, and live-action productions and other media were

reserved to Marvel but subject to a freeze while movies were being actually produced. Excuse me. One second.

During the time that New Line had the rights to produce a motion picture, there was a freeze.

Q: Thank you.

And without referring to any agreement, is it not also customary that in situations where a studio doesn't acquire the rights by an absolute grant, or provide for a freeze, that studios often provide for their having a first refusal, or first refusal and last refusal, on the exercise of reserve television rights?

MR. TOBEROFF: Objection, Your Honor. Compound; and also vague and ambiguous as to the rights.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** With respect to television rights, sir, is it not often the case that studios, if they don't have a grant of the rights, and if they don't have a freeze on the rights, will negotiate a first refusal on any utilization of those television rights?

A: That's a common provision.

Q: Okay. We spoke a lot yesterday and the day before about comic books and positions of different comic book heroes. Are you a comic book collector?

A: I am not a comic book collector.

Q: Have you ever been?

A: Not really. I mean, I would occasionally look at the comics in the daily newspaper, but I wasn't a comic book collector of specific comic books.

Q: In connection with your assignment in this matter, sir, did you read any treatises on comic books?

A: No, I did not.

Q: Did you read any historical accounts of the development of 2 the comic book business?

A: I certainly examined the utilization of comic books in connection with Superman and Batman and properties like that, but I didn't read a general treatise about the comic book business.

Q: Putting general treatises aside, what type of publications did you read with respect to Superman?

A: It wasn't just publications. I reviewed several times the documentary that was produced by Warner Bros., "Up In The Sky."

I did research on the Internet and read various articles on the Internet. I found articles in -- I was provided with a bunch of materials that I reviewed, and I found information in, you know, the normal publications that I read.

I read the trades every day, and have for 25 years, so I'm cognizant of this stuff. Beyond that, I didn't do sorts of -- I didn't intimately become an expert on the history of the comic book business.

Q: Have you found that the trade papers have extensive coverage with respect to comic book characters?

A: Yes.

Q: Comic book characters who haven't been incorporated into films or television shows?

A: They focus on comic book characters that are incorporated in film or television shows, or Broadway plays.

Q: What, to the best of your knowledge, was the ranking of Superman, in terms of the sales of comic books, in 1972?

A: I'm not aware of a year-by-year ranking of comic book sales for Superman. I know that in the aggregate, from 1938 through 2002, which is what we would be looking at, that it is one of, if not "the" top-selling comic book in the history of the world. That's my understanding.

As far as little tranches, little slices, per year, per year, I'm not familiar with those. And I think, in 2002, if you were to evaluate the value of Superman -- if I was selling Superman to a studio, I doubt that they would do the research to know what Superman comic sales were in 1972.

MR. BERGMAN: Your Honor, move to strike everything after the first sentence, "I'm not aware of a year-by-year ranking of comic book sales for Superman."

THE COURT: There's no foundation thereafter. It's stricken.

BY MR. BERGMAN: **Q:** Mr. Halloran, do you have any idea of what the ranking of Superman in terms of comic book sales was during the year 1987?

A: Again, you know, I'm -- I was aware of the general success from 1938 to 1987. I don't have a specific number for 1987.

Q: And are you aware of the ranking of Superman in comic book sales in the year 1990?

A: It's exactly the same answer. I'm aware of the overwhelming success of the comic book sales from 1938 to 1990, but I don't know the specific number for 1990.

Q: How many comic book sales has Superman made from 1938 to 1990?

A: I don't know the exact number, but I do know that it is one of, if not "the" top comic book seller in the history of the world. That's my understanding.

I don't have -- again, you have to look at the history, the aggregate history. I don't know a per-year comic book sale.

MR. BERGMAN: Move to strike everything after "I don't know the exact number."

THE COURT: Sustained. That was simply the question, How many comic book sales?

Listen to the question.

THE WITNESS: Okay.

BY MR. BERGMAN: **Q:** Just a couple more, Mr. Halloran.

A: Okay.

Q: Are you aware of the ranking of Superman in terms of comic book sales in the year 2000?

MR. TOBEROFF: Your Honor, this objection, though it's vague and ambiguous, is really asking for clarification. When we speak about Superman comic book sales -- we had heard testimony from Mr. Evanier that the way the comic book industry looks at it, they look at all Superman derivative comic books, like Lois Lane, Jimmy Olsen, things of that nature.

Is counsel referring to --

THE COURT: I'll sustain the objection. Are you talking about all potentially-derivative Superman --

MR. BERGMAN: I'll take them all, Your Honor.

THE COURT: The whole thing?

MR. BERGMAN: The whole thing.

THE COURT: With that clarification, do you know the number?

THE WITNESS: I don't know the exact number, no.

BY MR. BERGMAN: **Q:** Finally, are you aware of the ranking of Superman and all of the Superman-related comic books in 2002?

A: Same answer. I don't know that exact year, the number.

Q: At your deposition, Mr. Halloran, you told me that the studio received a zero share of merchandising under the Iron Man agreement.

Do you recall that testimony?

A: I don't remember it specifically as we sit here.

Q: Let me refer you, sir, to some deposition testimony, and inquire as to whether you recall the question and answer. I'm referring to Page 249, Lines 3 through 13.

A: I'd like to have reference to the agreement.

Q: You want to know what exhibit?

A: Yeah, that we're talking about.

Q: Okay. It is Exhibit 1105.

You have your chart there, don't you, sir?

A: I find that the chart is a guideline. I'd like to look at the specifics of the agreement.

Q: Of course.

But the chart gives the exhibit number, doesn't it?

A: Could you just -- I'm looking for -- I've now found it -- I don't use the chart to find the exhibits.

We're talking about the Iron Man agreement between Marvel and Katja Motion Picture Corp, Exhibit 1105; correct?

Q: Correct. And I'm about to read certain testimony from your deposition and ask if you recall giving it. Okay?

THE COURT: Proceed, Counsel.

BY MR. BERGMAN: **Q:** QUESTION: "And 25 percent" -- we were talking about the commission on Warner Bros. Consumer Products -- "and 25 percent, based on some other agreements that you're familiar with, is not a very high fee, is it?"

ANSWER: "Well, it's akin to a distribution fee. And what you have to look at is, what are the aggregate dollars that are sticking to the ribs of Warners? And in this case, it's 62.5 percent -- can I finish? -- and Iron Man was zero. So you have to look -- you have to look at that fee in the context of the total revenues that are sticking to the ribs of the company."

BY MR. BERGMAN: **Q:** Do you recall that question and answer?

A: I do.

Q: Now, am I correct that you refer to the fact that in the Iron Man agreement, the studio received zero?

A: Let me review the agreement. Are you talking about general merchandising of the Iron Man character or film-related?

Q: Sir, I just read to you a statement where you said "and Iron Man was zero."

What I would like to know is what basis you had for making that statement.

A: Well, I'm sorry. I need to know whether we were talking about nonfilm-related merchandising or merchandising. It's not clear to me from what you read from the deposition what we were talking about. And I need to know that to answer the question.

MR. BERGMAN: Your Honor, I'm not sure I can explain to the witness what he meant by what he said.

THE COURT: Why don't we provide a copy of the deposition that you just read, so he can see a few paragraphs before and a few paragraphs after, to put it in context.

THE WITNESS: That would be appreciated.

(Document is provided.)

MR. BERGMAN: Your Honor, may I refer the witness to a specific page to see if we can move this along quicker?

THE WITNESS: Well, this is a very, very complicated agreement, so I need to familiarize myself in order to give you an accurate answer.

BY MR. BERGMAN: **Q:** Have you looked at 6606?

A: Yes, I have.

Q: And given the provisions of Subparagraphs 1 and 2 on Page 6606 of Exhibit 1105, is it not untrue that Iron Man was zero; isn't it a fact that the studio made a share of merchandising in Iron Man?

A: They didn't.

MR. TOBEROFF: Objection, Your Honor. Compound, and vague and ambiguous.

THE COURT: Break it up. Rephrase it.

BY MR. BERGMAN: **Q:** Am I correct, Mr. Halloran, that the agreement determines what the lift in merchandising as a result of Iron Man is?

A: When I was talking about Iron Man in the deposition, I wasn't talking about this agreement. This agreement expired.

The Iron Man movie was not made based on this agreement. I was talking about Iron Man that was financed by Marvel and distributed by Paramount. This is an agreement with New Line. Iron Man was never made by New Line.

Q: Is it your testimony, Mr. Halloran, that when you testified at Page 249, you were not talking about Exhibit 1105?

A: Correct. I said like Marvel did on Iron Man. I meant the actually reproduced picture that they self-financed, not the agreement with New Line where the option expired. I know for a fact that the option has expired, and I know for a fact that the rights went back to Marvel, and I know for a fact that Marvel produced the picture based on the rights that reverted back to them under this agreement.

Q: Okay. And under that agreement that you know about, did the studio receive a percentage of merchandising?

A: It's my understanding, based on my review of the 10-K from Marvel for 2005, filed in 2006, that they reserved merchandising rights under -- it's my understanding they reserved merchandising rights under their agreement with Paramount.

Q: And you're talking about an Iron Man agreement that is not in evidence in this case; correct?

A: Yes, I am.

Q: And you're talking about an Iron Man agreement that you hadn't reviewed in connection with your report; is that correct?

A: I have not had an opportunity -- I had two weeks to look at this mass of documents. I did look at this, but I subsequently found out that this agreement expired.

Q: Yes, sir. But when you gave your deposition, the only Iron Man agreement that you had looked at at that point was 1105.

A: No, no. That's not true.

Well, if you're talking about looking at an agreement, you're right. But at the time of the deposition, I knew about the Iron Man -- the Marvel agreement on Iron Man, where they themselves owned the rights and self-financed.

Q: Okay.

Have you read the Steven Sills' audit in this matter?

A: I've skimmed it. I haven't read it in detail.

Q: Have you read what Mr. Sills stated following an audit with respect to the amount of money, if any, that Warner Bros. has received from merchandising on Superman Returns?

MR. TOBEROFF: Objection. Vague and ambiguous as to 'Have you read the Steven Sills' audit, what Mr. Sills stated?' Is he referring to Mr. Sills' expert report?

MR. BERGMAN: I'll rephrase, Your Honor.

THE COURT: Why don't you do that. Good idea.

MR. TOBEROFF: And, also, which report? Because there were two reports submitted by Mr. Sills.

MR. BERGMAN : Okay.

THE COURT: Thank you, Counsel.

BY MR. BERGMAN: **Q:** In your Exhibit B, you list two reports by Mr. Sills; correct?

A: If Exhibit B is the documents that I considered, correct.

Q: Did report number one contain any substantive conclusions?

A: There were conclusions in that report, yes. It was, in effect, an audit report. So there were conclusions that were made, in what I saw, yes.

Q: Didn't that report simply state that Mr. Sills couldn't state an opinion because he had not yet conducted an audit?

A: Well, I don't have clear exactly in my head number one and number two. I'm aware that Warners is alleging that there were substantial sums generated, but I think what's a little confusing is, are you talking about DC or Warner?

Q: I'll try to be clearer, Mr. Halloran.

Isn't it a fact that Mr. Sills states in his supplemental report, the one conducted after his audit, that Warner Bros. received zero from merchandising in connection with Superman Returns?

A: Well, you have to -- I'm going to take you at your word that he said that. But, again, that's --

THE COURT: I'm going to stop you. There's no foundation. He doesn't recall whether he read it or not, to answer your question, based on that.

Let's move on.

MR. BERGMAN: Okay.

THE COURT: You don't recall whether he stated that or not, because you said you're taking him at his word.

THE WITNESS: That's correct, Your Honor.

THE COURT: There's no foundation for the question. Let's move along.

BY MR. BERGMAN: **Q:** Do you have any information at all, sir, that Warner Bros. received any money in connection with the merchandising of Superman Returns?

A: It is my understanding that DC -- that sums from the film-related merchandising, with respect to Superman Returns, were generated to DC. I'm not exactly sure what the intercorporate shiftings of that money were. I'm not familiar with that.

Q: Okay.

In your report, sir, you state your belief that the Superman films had a proven track record of success as of 2002; correct?

A: That's correct.

Q: And you believe that Superman's proven track record of success as of 2002 is one of the things that influenced your opinion that the film deal was not a fair market deal; correct?

A: That is correct.

Q: In fact, throughout your direct testimony, you kept referring to Superman's proven track record of success; correct?

A: I did. It exists.

Q: Let's look at what the track record of Superman films in 2002 was.

The first Superman film was released when, sir?

A: In 1978.

Q: At the time of your deposition, you thought it was '85 or '86, didn't you?

A: I was -- I was just -- as I explained in my deposition, I was just coming out of Watchmen, and I was confusing the dates with the Watchmen agreement. So I was confused about that in the deposition, as I stated in the deposition.

Q: Okay.

What was the approximate domestic theatrical gross of Superman I?

A: Are you talking about then or today's dollars?

Q: I'm talking about then, at that time, those dollars.

A: My recollection is that -- well, first of all, let's put this in context. It was the biggest hit of the year. And it was -- to my best recollection, it was approximately $140 million in domestic box office. But that's the range.

In today's dollars, it would exceed, I think, $400 million.

Q: When you say "biggest hit of the year," are you suggesting that Superman was the number one grossing film of 1978?

A: If not the top, certainly in the top few.

Q: And what is your estimate of the theatrical gross of Superman II?

A: My recollection is that it decreased by about 20 percent from Superman I, so I think it was in the neighborhood of $104 million domestic box office, in nominal 1978 dollars.

Q: Okay.

And, once again, at the time of your deposition, you didn't know any of those facts, did you?

A: I knew the facts. I just wasn't able to spout them off off the top of my head, since I had only been in the case for a short while, and I was sort of suffering from data overload. So I wasn't able to --

THE COURT: I know the feeling.

THE WITNESS: But the more important -- well, we'll talk about the concepts.

BY MR. BERGMAN: **Q:** And what would be your estimate as to the domestic box office gross of Superman III?

A: It was less than II.

Q: It was much less than II, wasn't it?

A: I believe it was much less than II. I don't know the exact number.

Q: And regarding Superman IV, you know that film was catastrophic, don't you?

A: I believe the revenue was $17.8 million in domestic box office gross, or something to that effect. I think we took judicial notice that it was not a successful film.

Q: So, from I through IV, the pictures kept going down, down, down; correct?

A: The domestic box office gross, as was common at the time when you had sequels, did continue to go down.

Q: In fact, Superman II grossed 62 percent of what number one grossed; correct?

MR. TOBEROFF: Objection. Misstates his testimony.

THE COURT: I don't think he's -- you weren't attributing that to the witness, were you?

MR. BERGMAN: No, Your Honor. I was asking a question.

He had testified 20 percent. I wanted to clarify that it was closer to 40 percent.

THE COURT: Overruled.

BY MR. BERGMAN: **Q:** Am I correct, sir, that Superman II, the domestic gross was 62 percent of what number one was?

A: Well, my recollection is that the first one was $141 million or so, and the second was, like, $104 million, something like that; so there was a decrease. I don't know the exact number, but I did testify that it was common at that time for the second picture in a series of sequels to decrease. The rule of thumb was, it would go down by a third, and the next sequel and each succeeding sequel would go down by a third.

Q: You mentioned $101 million on the first picture. Isn't it true that the domestic box office on number one was $79.8 million?

MR. TOBEROFF: Objection, Your Honor. Misstates what he said. He didn't say $101 million.

THE WITNESS: Overruled. Do you remember the question?

BY MR. BERGMAN:

Q: Is that correct, sir? $79.8 million for number one?

A: Was that the box office gross?

Q: I'm asking you, sir.

A: That's not consistent with my testimony before.

Q: Do you understand that number two was $62.7 million?

THE WITNESS: He keeps mixing them up, Your Honor.

MR. TOBEROFF: Objection. Vague and ambiguous as to what we're actually talking about. Is he talking just strictly film rentals or box office --

THE COURT: Sustained.

BY MR. BERGMAN:

Q: I'm sorry. I thought I had indicated, sir, that I was referring to domestic box office. Do you understand that, Mr. Halloran?

A: But you're mixing context, and you keep restating numbers back to me that I don't --

THE COURT: Let's spell out the questions, Counsel.

MR. BERGMAN: Thank you.

BY MR. BERGMAN: **Q:** What is your best understanding, Mr. Halloran, as to the domestic gross of Superman I?

A: As I stated, I thought it was in the range of $140 million.

Q: What is your best understanding, sir, as to the domestic box office of Superman II?

A: I remember it decreased by roughly a third, and I believe it was $104 million, in that range.

Q: What is your best understanding as to the domestic box office of Superman III?

A: It was less than II, but I don't know the exact number on that.

Q: And what is your understanding as to the domestic box office of Superman IV?

A: That it was approximately $17.8 million.

Q: Do you recall what Superman IV did on its opening weekend?

A: No, I do not.

Q: Okay.

You testified to this trend that you just mentioned, of films going down after the first film to the second film, in the '70s and '80s. That happens some of the time; correct?

A: It was -- as I testified, when I was at Universal, that was the rule of thumb, that we had aggregated from the performance of various series of movies. Obviously, that changes from film to film.

Q: With numerous exceptions?

A: There are exceptions, but the trend was held to be commonly believed. And the Superman trend, as I see it, conformed with that.

It was a very different world in 2002 than 1978.

Q: What do you recall or believe, if you have any information at all, was the domestic box office of the first Dirty Harry movie in 1971?

A: I don't have a specific recollection of what the --

Q: Do you recall that Dirty Harry II had a domestic box office gross of several times the amount of number one?

A: I'm not aware of that.

Q: Do you deny it?

A: I'm not -- I'm not denying. I'm unaware of it.

Q: Are you aware that the second Lethal Weapon film did about twice, two-and-a-half times what the first Lethal Weapon film did?

MR. TOBEROFF: Objection to this line of questioning. It assumes facts, and it's also not terribly relevant.

THE COURT: It's not terribly relevant, but it's relevant enough.

I mean, he's assuming that one did better than the other, but I thought we already heard testimony to that effect.

MR. TOBEROFF: The question assumes facts as to the actual performance of these various Dirty Harry films. And there's no foundation regarding these films.

THE COURT: Foundation is based on the foundation for all of the other testimony that he's given. The objection is overruled.

You can answer if you can. If you don't know, that's fine too.

THE WITNESS: Okay. I don't know.

BY MR. BERGMAN: **Q:** Just to finish this up, let's look at Die Hard.

Number one, in 1988, did $83 million. Do you have any estimate as to what number two did?

A: No. But Die Hard was a successful series of films. But I don't have the exact number.

Q: In all three of those instances, the second film did better than the first film, didn't it?

A: That's -- I don't know those facts. You're telling me that. I'm unaware of that.

Q: Okay.

We've discussed before, and you've mentioned, have you not, how important the opening weekend of a film is in terms of its subsequent earnings?

A: Yes, I have.

Q: Okay. Do you have any estimate of what the opening weekend was for Superman IV on the five-day 4th of July weekend?

A: I have a sense that it was abysmal, but I don't know the exact number.

Q: Am I correct that the five-day 4th of July weekend is about one of the best, if not the best, weekends for film distribution?

A: It's hard for me to argue that you're wrong on that.

Q: And am I correct that Superman IV, on that five-day weekend, grossed $5.7 million?

A: I don't know the exact number. That would not be a surprising number, given the overall performance of the film.

Q: Do you recall, at the time of your deposition,

Mr. Halloran, that you couldn't identify a single superhero agreement that you had reviewed that was more economically beneficial to the licensor than the film agreement was to DC?

A: I think when that was in my head, I wasn't -- I was just -- because you --

THE COURT: The question is whether or not you could identify at your deposition, not whether you can identify now.

THE WITNESS: Okay. I couldn't at that time.

BY MR. BERGMAN: **Q:** At the present time, having done whatever you've done since the time of your deposition, can you identify for me a single comic superhero agreement that you believe was more economically beneficial to the licensor than the film agreement was to DC?

A: I believe I testified, when we went through the chart yesterday, that there were some agreements that would have been more beneficial to DC.

Q: What comic superhero agreement do you contend is more beneficial to the licensor than the film agreement is to DC?

A: Certainly, the Robotech agreement, which is an agreement between Warners and Harmony Gold.

Q: And is it your belief, Mr. Halloran, that DC would have made more money from Superman Returns under the terms of the Robotech agreement than it did, in fact, make under the terms of the film agreement?

A: You're comparing apples and oranges here. I can explain.

MR. BERGMAN: If I may, Your Honor. Robotech is not a comic superhero agreement, but I'll --

THE WITNESS: You're looking --

THE COURT: Mr. Toberoff will be able to clarify this question in terms of, did one make more money than the other. Give your answer and allow the process to take its course.

THE WITNESS: Okay. If you were assessing the potential net present value of the Superman agreement and plugging that into the Robotech agreement, the Robotech agreement is more favorable than the film agreement.

THE COURT: We're at the noon hour. Why don't we go ahead and take our recess from this trial. The Court has another matter to call up at this time.

MR. BERGMAN: Very well, Your Honor.

THE COURT: We'll resume at 1:30, or as soon after as we can.

(A.M. trial session concludes.)

WITNESSES: Mark Edward Halloran (continued)

THE COURT: Okay, Counsel. You may proceed.

MR. BERGMAN: Thank you, your Honor.

MARK EDWARD HALLORAN, PREVIOUSLY SWORN. CROSS-EXAMINATION (CONTINUED)

BY MR. BERGMAN:

Q: Mr. Halloran, going back, if I may, to the question of the performance of the four Superman films that were distributed between 1978 and 1987.

Do you recall, sir, that after we had reviewed that performance at your deposition, you suggested that the poor performance of those films might have made the rights even more valuable in 2002?

A: If I could look at the deposition transcript, that was quite helpful last time. When you repeat things to me out of context, it makes it difficult for me to give the best answer I can give.

Q: So what is it you would like to do? Would you like to look at your deposition?

A: Just as we did with -- made it clear what I was talking about with Iron Man, if I could see the deposition transcript, it would be helpful.

Q: Well, perhaps I can abbreviate that because time is awasting.

Do you recall being asked this question -- these questions and giving these answers at page 210 of your deposition, commencing at line 1?

A: Okay. I'm with you.

Q: (Reading.)

"QUESTION: Is it your opinion that in 2002, the Superman character had greater potential and greater value, economic value, for a studio in 2002 than the Batman character?"

And, your Honor, I'm going to skip objections. Shall I do that?

THE COURT: You may.

THE WITNESS: I think I testified to that.

MR. BERGMAN: (Reading.)

"QUESTION: You put your money on Batman; right?

"ANSWER: No."

THE WITNESS: Just the opposite.

MR. BERGMAN: (Reading.)

"QUESTION: You put your money on Superman?

"ANSWER: I put my money on Superman.

"QUESTION: Even though the four pictures before it had basically tanked?

"ANSWER: Well, one way of looking at the tanking of those pictures" --

THE WITNESS: I think there's a correction to Superman 4 in what I have.

BY MR. BERGMAN: Q: Okay. You mean that after you gave your deposition, you made a correction and struck those pictures and inserted Superman 4?

A: Yes.

Q: Okay. So let me go back to the question and your answer:

"Even though the four pictures before it had basically tanked?"

"**THE WITNESS**: Well, one way of looking at the tanking of Superman 4 was that was good as of 2002 because the appetite in the marketplace for the Superman films wasn't diminished that much or gobbled that -- gobbled up that much."

Do you recall giving that answer, sir?

A: Yes.

Q: Turning to the film Hannibal. Hannibal was the sequel to the Silence of the Lambs, was it not?

A: It was.

Q: And that film, Silence of the Lambs, was an extremely successful film, wasn't it?

A: It wasn't an extraordinarily financially successful film, but it won an Oscar as a very critically acclaimed film. And the character Hannibal Lecter was well known.

Q: What do you estimate was the worldwide gross box office of Silence of the Lambs?

A: I don't know exactly. But in terms of box office, my guess would be 150 to 200 range. That's just very rough.

Q: Okay. Now, the starring role of Hannibal Lecter was played by Anthony Hopkins, was it not?

A: Indeed it was, for which he won an Oscar.

Q: Pardon me, sir?

A: For which he won an Oscar.

Q: Did the film Silence of the Lambs win any other Oscars?

A: Yes.

Q: Which ones did it win?

A: I know it won best picture. Anthony Hopkins won best supporting actor. Jodie Foster won best actress. I forget the name of the director. He won an Oscar, had won multiple Oscars. Jonathan Demme was the director.

Q: And Jodie Foster won the Academy Award as best actress, not supporting actress?

A: That is correct.

Q: So Silence of the Lambs, the prequel to Hannibal, swept all five of the most important Academy Awards, didn't it?

A: Well, most people think of the Academy Awards as --there's really six. It's picture, director, and the four acting. That's how most people think of it.

Q: Let's do it this way. It won best picture?

A: It did.

Q: It won best actor? Mr. Hopkins won actor?

A: Was it actor or supporting actor?

Q: Actor.

A: Okay.

Q: And Ms. Foster won best actress?

A: Correct.

Q: Jonathan Demme won best director?

A: Yes.

Q: And a gentleman whose name I forget won best adaptation of a screenplay; correct?

A: That is probably true.

Q: Now, following Silence of the Lambs, the character Hannibal Lecter had built up great public awareness, hadn't he?

A: I think you're missing part of the -- Hannibal Lecter was originally the Red Dragon, not Silence of the Lambs.

MR. BERGMAN: Your Honor, I move to strike as being nonresponsive.

THE COURT: I know you're trying to be helpful, but it's an adversarial process that we've had for now. And we just have to go with it.

It's stricken, Counsel.

BY MR. BERGMAN: Q: Following Silence of the Lambs, the release of that picture, the character of Hannibal Lecter gained great public awareness?

A: I think that's fair to say.

Q: He was spoofed on television and caricatured in magazines; correct?

A: I remember him being caricatured on the Academy Awards by Billy Crystal.

Q: How did Hannibal the motion picture perform on its opening weekend?

A: I think it did pretty well.

Q: As a matter of fact, didn't it do sensationally?

A: It did very well. But then it tailed off, as I recall, relatively quickly.

Q: Do you agree that Hannibal was, as of the time that it opened, that the film had the third biggest opening weekend of all time at the time it opened?

A: I don't have that specific recollection. It wouldn't shock me if that were true.

Q: Would it surprise you if it came in third after Jurassic Park, Star Wars, and then Hannibal?

A: At the time that would not shock me, but you have to look at that in the context that it had a very -- I saw the movie. It was not a great movie. It had a pretty quick drop-off.

MR. BERGMAN: Move to strike everything after "shocked me," your Honor.

THE COURT: Stricken.

BY MR. BERGMAN: Q: To go back to something that we discussed a little earlier, Mr. Halloran. We were talking about the fair market value that you had attributed or said you would attribute in 2002 to the Superman rights during your deposition, and you spoke about a $3 million annual option, a $30 million purchase price, and a percentage of gross somewhere between 10 and 20 percent; correct?

A: We have to, again, as I discussed, you have to put this in context. If someone was going to do a Terminator type agreement where they would buy the right for multiple pictures, then a $3 million option and a $30 million purchase price would be appropriate. That's not on a per picture basis. That was on an aggregate, we're going to buy the Superman character for film basis.

So you have to understand it in that context.

MR. BERGMAN: Your Honor, I move to strike the answer as being nonresponsive.

THE COURT: Overruled.

BY MR. BERGMAN: Q: Have you ever encountered any agreement, Mr. Halloran, that included $3 million for each annual option, $30 million for a purchase price, and 10 to 20 percent of first dollar gross?

A: I've not seen a Superman agreement that I'm confident would show that. But I've not seen a -- again, you have to put it in context. Because the superheroes are controlled by essentially two companies, Marvel and DC. There are no third party agreements that you would see. But it is true that I haven't seen a $3 million option and a $30 million purchase price.

Q: Have you seen any agreement which contained all three of those elements?

A: No, I have not.

Q: Who are the characters in Birds of Prey?

A: The characters in Birds of Prey are characters that DC owns. I don't know -- quite frankly, I don't know exactly who they are. I believe one's a female and somehow distantly related to Batman.

Q: Are you aware that one of the Warner Brothers by the name of Huntress, H-U-N-T-R-E-S-S, is Batman's daughter?

A: That is consistent with what I stated. I'm not specifically aware of that.

Q: And are you familiar with the fact that one of the other leading characters by the name of Oracle was formerly named Batgirl?

A: I don't have a present awareness of that.

Q: And are you aware of the fact that the character Huntress was not merely the daughter of Batman. She was the daughter of Batman and Catwoman?

A: I'm not aware of that.

Q: Are you aware of any other Batman characters that are included in the Birds of Prey property?

A: Not as I sit here, no.

Q: Are you aware of the fact that the Joker is in the Birds of Prey property?

A: No, I'm not.

Q: Are you aware of the fact that Alfred, Mr. Wayne's butler, is in the Birds of Prey?

MR. TOBEROFF: Objection. I think there's confusion and ambiguity as to what is meant by the Birds of Prey property. Is it a recurring character?

THE COURT: Sustained. Just clarify what you mean by that, Counsel.

BY MR. BERGMAN: Q: You've referred throughout your testimony to the Birds of Prey, haven't you?

A: The Birds of Prey agreement, yes.

Q: Yes. And that's the one Birds of Prey agreement that you read; correct?

A: That is correct.

Q: Okay. And you understand from my questions that I'm referring to the program reflected in the Birds of Prey agreement that you read?

A: I understand that.

MR. TOBEROFF: Objection. Misstates the Birds of Prey agreement.

THE COURT: It may misstate, Counsel, but the witness understands what he's referring to, and it is set forth on the record.

MR. TOBEROFF: Very well.

THE COURT: Next question, Counsel.

MR. BERGMAN: May I approach the witness, your Honor?

THE COURT: You may.

BY MR. BERGMAN: Q: You've worked with Box Office Mojo in connection with this case?

A: I have.

Q: I'm going to show you the Box Office Mojo list of the top 100 domestic grosses, and I'll have a question to ask you about that.

Are there any Superman films -- whether it's one, two, three, four, or five -- in this list of the top 100 films of all time?

A: I need to ask you one clarification.

Q: Of course.

A: The lifetime gross, this is nominal unadjusted for inflation gross?

Q: That is correct, sir. These are unadjusted for gross.

A: Unadjusted for inflation.

Q: I believe when you testified on direct, you referred to the films on an unadjusted gross, didn't you, when you talked about the top 10 films of all time?

A: We talked about, I think, the top ten weekends. Let me think about this. Well, we've been dealing with both unadjusted and adjusted. So it's been back and forth.

THE COURT: Gentlemen, your next question. These are unadjusted for inflation. Let's go to the next question.

MR. BERGMAN: May I approach the witness again?

THE COURT: You may.

BY MR. BERGMAN: Q: I'm going to give you a similar report from Box Office Mojo, which adjusts for the increase in box office.

Looking, sir, at the --

A: It would be helpful if I could have a pen. Would someone give me a pen?

Thank you.

MR. BERGMAN: For the record, your Honor, the unadjusted exhibit was -- has been marked as Exhibit 1122 for identification. The adjusted for ticket price inflation has been marked 1123 for identification.

THE COURT: Thank you.

BY MR. BERGMAN: Q: Looking, Mr. Halloran, to --

A: I need to look at this. Because I haven't seen this.

Q: Go right ahead, sir.

Okay? Do you notice, Mr. Halloran, first of all, what the highest rated Superman movie is on the adjusted domestic grosses worldwide?

A: By rated, you mean that with the highest adjusted gross?

Q: Which one, sir?

A: You said rated.

Q: Which Superman film, Mr. Halloran, stands highest on this list of 100 top films?

A: It appears that the highest one is Superman.

Q: And what number is that, sir?

A: Number 61, and it did, with an inflation adjusted basis, $411 million.

Q: Of course, with a similar adjustment, Gone with the Wind did a billion and a half dollars; correct?

A: That's true, because it was adjusted since 1939. But you're correct.

Q: And Star Wars, which, of course, was only adjusted since 1977, am I correct?

A: That is correct.

Q: That shows almost $1.3 billion; right?

A: That is correct.

Q: In fact, sir, none of the top 10 films on the adjusted ticket price exhibit were franchise films at the time they were made, were they?

A: I disagree.

Q: Which film was a franchise picture at the time it was made?

A: How about Star Wars?

Q: Well, how about it? It was the first one, was it not?

A: Well, I stand corrected. It depends on your definition of franchise. If you're looking at something, if you look at the overall performance as a franchise, it's a franchise. But you're right. It was a franchise that was created based on the success of the films.

Q: Okay. And then you have to go down at least to No. 12, another Star Wars movie, The Empire Strikes Back, to see another franchise film; correct?

A: Your definition of franchise is it was based on a preexisting property?

Q: Yes, sir.

A: Well, Gone with the Wind was based on a best-selling book; right?

Q: I understand that, sir, but Gone with the Wind was not a franchise picture, was it?

A: There was no such thing in 1939, I don't believe.

Q: Okay. Well --

A: I'm unaware.

Q: If one were describing Gone with the Wind in 1939, one would not call it a franchise picture, would it?

A: I don't have an opinion as to what people in 1939 would be calling --

THE COURT: Let's move along. This is starting to break down here.

MR. BERGMAN: Very well, your Honor. I'm going to move all along to Mr. Halloran's Neopets agreement, which he has referred to numerous times in his report and in his testimony.

THE WITNESS: What number is that?

BY MR. BERGMAN: Q: The Neopets agreement was admitted by you -- admitted by Mr. Toberoff. Perhaps he can tell us what exhibit that was.

MR. TOBEROFF: I believe it's 331.

THE WITNESS: 331.

BY MR. BERGMAN: Q: Now, Mr. Halloran, when you were negotiating --

A: Would you be so kind? I don't have it in front of me.

Q: Okay. Let me know when you're ready, sir.

A: It's not in this stack. Do we have an exhibit number?

THE COURT: 331.

THE WITNESS: 331.

BY MR. BERGMAN: Q: Do you have it now, sir?

THE COURT: You may proceed.

BY MR. BERGMAN: Q: Do you recall that, when you were negotiating the Neopets deal with Warner Brothers, you were attempting to find out the highest price that Warner had paid anyone?

A: The highest price that Warners had paid anyone for --

Q: Did you, for example, ask anyone in business affairs at Warner Brothers what was the highest price they had ever paid for a motion picture?

A: I know I had conversations with Warners' business affairs when we discussed the highest contingent compensation that they had given out and specifically referenced Superman. But I don't remember having a discussion, as I sit here, as to the highest price they had paid. Are you talking about the purchase price or the contingent compensation?

Q: Do you recall, sir, at the Sahara trial you were talking about having found out that Harry Potter was obtained for a low price in your opinion at Warner Brothers; correct?

A: That is correct.

Q: I'm now going to read you some testimony, sir, which begins at page 4906 of that trial transcript.

A: Again, if I could look at the transcript as we're going along, it would help my answer. I think I have it right here. But if you want to give me a page number. There's four volumes. Five volumes.

THE CLERK: Where is it at?

MR. BERGMAN: 4906. It would be in the last volume of the trial.

THE WITNESS: Got it. Okay. I'm with you.

BY MR. BERGMAN: Q: Do you recall being asked this question and giving this answer, commencing at line 14 of that page:

"QUESTION: And did they, meaning 'Warner Brothers,' say how many books they got for that good price? Did they say they got all of the Harry Potter books both then written and yet to be written?

"ANSWER: No, we didn't have that discussion, but I do remember that it was in the context of my -- when I was representing Neopets and negotiating the underlying

rights to Warner Brothers, I was seeking to find the highest price that Warner had paid.

"QUESTION: Did you get that?

"ANSWER: My understanding was that the highest price they had paid was for Superman. And it was based on a percentage of the gross. And then based on that,

I -- that was one of the things that influenced me to pattern the Neopets deal after that deal, because that was based on the success of the film, that was potentially the highest amount that Warner Brothers had ever paid."

Do you recall giving that answer to that question?

A: Yes.

Q: Okay. Now, in the Neopets deal, you made a pitch to Warner Brothers; correct? You were the individual who was trying to sell Neopets to Warner Brothers?

A: I was that individual, yes.

Q: Okay. And in connection with that pitch that you were making to Warner Brothers, you emphasized the attributes of Neopets; correct?

A: We had lengthy discussions as to the attributes of Neopets.

Q: And am I correct that at that time you represented to Warner Brothers that the Neopets site had 70 million registered accounts worldwide; correct?

A: I have no present recollection of that. Whatever information I got as to how many registrations came from Neopets. My recollection is that those sort of representations were not made by me, but rather were based on discussions that Neopets was having with Warner Brothers.

I certainly don't have a recollection of representing to them that they were 70 million users.

Although in assessing the popularity of Neopets, we did talk about -- there were discussions about registered users.

Q: Do you recall, sir, that you initiated the Neopets discussions by sending a letter dated June 9, 2004, to Dan Fury, senior vice-president of Warner Brothers?

A: If you'd show me the document, I can verify the document.

Q: I'll be glad to.

May I approach, your Honor?

THE COURT: You may.

THE WITNESS: Can I have a moment to review this?

THE COURT: You may.

THE WITNESS: There is a reference in paragraph 1.1 of the June 9, 2004, letter from me to Dan Fury, which states Neopets is a youth-oriented Internet entertainment company with over 70 million registered accounts in its website worldwide.

BY MR. BERGMAN: Q: And wherever you got that representation from, you passed it along to Warner Brothers -- correct? -- as part of the pitch?

A: That information absolutely came from my client Neopets and was given to me.

Q: You wrote it in your letter?

A: I wrote it in my letter based on what my client told me.

Q: Did you believe it when you wrote it?

A: I had no reason to disbelieve it.

Q: Did you take any steps to ascertain it?

A: Neopets was a company that was known for impeccable integrity. And everything they ever told me in the course of my representation was absolutely accurate insofar as I knew.

I did not make an independent research as to whether this statement was true.

Q: Did you not say in paragraph 1.1, which is addressed to Dear Dan, Dan Fury, quote, Neopets is a youth-oriented Internet entertainment company with over 70 million registered accounts to its website worldwide, unquote?

You said that; correct?

A: I just read those exact words to you. I'm not denying that I said that. It's here in black and white.

Q: What is it you're denying you don't know? You don't know if you believed it?

A: I'm not -- I will repeat to you what I told you before.

The -- I wrote this sentence based on information that was given to me by my client Neopets, which, based on its general reputation and my personal dealing with them, had impeccable integrity as to the information that they provided regarding their site.

They told me this, and, in fact, I'm highly confident that they signed off on a draft of this before I sent it to -- to Dan Fury. I had no reason whatever to believe that this statement was untrue.

Q: Okay. But you didn't see any evidence that it was true, did you?

A: I saw what to me was perfectly fine evidence, which was that my client represented to me that this was true. That was more than enough for me.

Q: Have you ever had a client misrepresent a fact to you?

A: Unfortunately, I have.

Q: Haven't we all.

THE COURT: Present company excluded, of course.

MR. BERGMAN: Indeed, your Honor.

Q: Am I correct, Mr. Halloran, that in 2003, at the time you negotiated the Neopets agreement, Neopets led all websites in the amount of time, four hours and 47 minutes per month spent on the site by the average user?

A: Well, you just referenced 2003.

Q: Yes, sir.

A: And I know what you're talking about is called stickiness. It's a very important concept in the Internet.

Stickiness means when people go to your site, how long do they stay? That's very important in terms of looking at how successful a site is. It's called stickiness.

Q: Okay. And am I correct that from the period 2004 to 2006, Neopets was consistently rated as one of the top ten stickiest sites on the Internet?

A: I believe -- I don't have the exact numbers, but I believe that Neopets was known for its stickiness, and it would not surprise me at all that it was in the top ten.

Q: And Neopets was one of those sites which applied appeal primarily to children under 14; correct?

A: I think that's a fair statement.

Q: And it appealed primarily to young girls under 14; right?

A: I think there were more girl than boy users.

Q: And the film that you were proposing to Warner Brothers at the time was designed to appeal to that particular audience, wasn't it?

A: It was.

Q: And as you were negotiating the agreement with Mr. Fury and others, you demonstrated to Warner Brothers, did you not, how the growth of the Neopets site had increased exponentially over the years almost in a 45 degree ascension; right?

A: My recollection -- in general, you are correct. At the time I was negotiating this agreement with Warner Brothers, the website had experienced exponential growth.

Q: Okay. So that when you were trying to sell Neopets to Warner, you identified all of its strengths and notoriety in an effort to gain the best deal you possibly could; correct?

A: Indeed I did.

Q: Okay. However, in the report that you filed in this case, Mr. Halloran, when you were attempting to denigrate the fair market value of the film agreement by comparing it to Neopets, you referred to Neopets as a, quote, virtually unknown property, didn't you?

A: If you'll show me where I said that.

Q: I'll be glad to, sir. I believe it's at page 8, second line from the top over at the right-hand side of the margin.

A: Page 8 of?

Q: Page 8 of your report.

A: Would someone show it to me?

Q: I may be wrong.

A: Well, I want to see it in the context.

Q: I'll show it to you, sir. I'm sorry, sir. The page is 18, second line from the top over on the right-hand side?

A: I don't have that in front of me.

MR. BERGMAN: May I ask that this exhibit, which I believe, gentlemen, is exhibit what? 332. May that be shown to the witness?

THE COURT: Yes.

BY MR. BERGMAN: Q: The sentence begins at page 17. You were talking about the contingent compensation, your opinion as to the contingent compensation on Superman Returns, and you say, quote, the amount is much too low when compared to deals for less valuable rights and is essentially the same as a client of mine received from Warner for a virtually unknown property, Neopets, in 2004, end quote.

Do you recall making that statement?

A: Yes.

Q: Neopets was not a virtually unknown site in 2004, was it?

A: Well, again, you have to read the whole sentence. I was putting it in the context of it's too low when it's compared to deals for less valuable rights. I think it's uncontroverted that Superman was, in 2002, was way more well known than Neopets. Virtually unknown was in relation to Superman.

Q: Mr. Halloran, I read the whole sentence. The whole sentence begins at page 17. Quote, the amount is much too low when compared to deals for less valuable rights, and it is essentially the same as a client of mine received from Warner for a virtually unknown property, Neopets, in 2004, period.

Did you make that statement?

A: I made that statement, and I wrote that statement. I'd like to tell you what I meant.

Q: You can tell that to Mr. Toberoff.

A: Okay.

Q: Before you entered into the deal with Warner Brothers for Neopets, how many different studios did you submit the Neopets deal to?

A: The Neopets deal was at Disney for a while.

Q: Was what?

A: At Disney. Disney. Walt Disney.

Q: And when was it submitted to Disney?

A: I believe in -- well, prior to Warner Brothers. I believe in 2003 or so.

Q: And what was the response at Disney?

A: There were negotiations, and the terms were not acceptable to my client. So we walked away.

Q: The terms were lower than the terms offered by Warner Brothers?

A: I believe they were.

Q: Now, the Neopets picture was an animated picture, was it not?

A: Well, so far, we don't have a Neopets picture. But it was intended to be an animated picture, yes.

Q: The contract refers to it as an animated picture, does it not?

A: It does. Well, you're using the singular. It was anticipated that there would be animated pictures based on the website.

Q: The budget that was originally set for the Neopets film was $40 million; correct?

A: That's incorrect. As I recall -- let me look at it.

Q: What was the minimum budget under the Neopets –

A: The devil is in the details. The minimum was at 40-. It wasn't set at 40-. It could have been a lot more.

Q: Now, you set the minimum budget that you wanted, did you not?

A: Pardon?

Q: It was you on behalf of Neopets that established the $40 million minimum budget, was it not?

A: That was an important part of the agreement to my client, and in the negotiations, we mutually agreed to that budget amount with Warner Brothers.

Q: Why was it important to your client that it have a minimum budget of $40 million?

A: We wanted to make sure that this animation picture would be of very high quality, and it was especially important to us, given that we had the right to co-finance the picture, that it be a studio level picture that would potentially become a successful film.

Q: Okay. Now, a $40 million budget is a very low budget in 2004 for a major motion picture, is it not?

A: Well, this was for an animated motion picture. So it was -- what we were trying to do with Warner Brothers was to join forces and make relatively modestly budgeted animated pictures, not Pixar $200 million pictures, but we certainly didn't want to make low quality pictures. That's certainly not the business that Warners is in.

MR. BERGMAN: Your Honor, I move to strike everything after the word "picture." Well, this was for --

THE COURT: It is stricken. It was a yes or no question.

BY MR. BERGMAN: Q: Now, wasn't the average studio negative cost as of 2004 approximately 75- or $80 million?

A: No.

Q: What was it in 2004, the afternoon MPAA budget?

A: 2004. In the range of 60 to 70, I believe. That's my best estimate. So --

Q: Could have been 80; right?

A: I think that's highly unlikely.

Q: Now, following the agreement that you made with Warner Brothers on Neopets, that agreement was amended, wasn't it?

A: I'm unaware that it was amended.

Q: You produced the Neopets agreement, didn't you?

A: I did, but I didn't produce an amendment. I didn't negotiate an amendment that I remember.

Q: I'm sorry, sir.

A: I don't remember negotiating an amendment to this agreement.

Q: Were you still representing Neopets when it amended the Neopets agreement?

A: I was not -- Neopets was sold to Viacom. And after that time, I did not represent them.

Q: I see. So you're not aware that the Neopets budget was ultimately reduced $28 million, are you?

A: I'm absolutely unaware of that.

Q: Okay. Am I correct that the Neopets agreement that you negotiated required your client to finance half of the development costs of the film?

A: That is accurate.

Q: Okay. And am I correct that --

A: To a cap.

Q: Am I correct that the Neopets agreement that you negotiated did not contain an option fee?

A: That is correct. But it had a reversion.

MR. BERGMAN: Your Honor, I move to strike everything after --

THE COURT: It's stricken.

BY MR. BERGMAN: Q: Ultimately, Warner Brothers passed on the picture, did it not?

A: I don't know the status. I know that the picture went into development, and I don't know what happened after that because I ceased representation of Neopets when they were acquired by Viacom.

Q: Am I correct, Mr. Halloran, that the -- that your client did not earn a dollar from the Neopets agreement you negotiated?

A: I have no knowledge of what they made -- have made from the agreement.

Q: Under the contract, what would they have made had the exercise price not been executed?

A: They wouldn't have made any money.

Q: And the exercise price was not executed, was it?

A: I have no knowledge whether or not Neopets was paid the million dollar purchase price.

Q: Okay. And if Neopets was not paid the exercise price, would it be accurate to say that they did not earn a dollar under the contract?

A: That would be accurate.

Q: And would it also be accurate to say that in addition to not earning any money, they had to pay a portion of the development cost?

A: That's accurate.

Q: And am I correct that as a result of the Neopets agreement, the rights to Neopets were tied up for approximately three years?

A: By -- what rights are you talking about? I'm talking about --

Q: I'm sorry?

A: A lot of rights were reserved. There were limited rights and many reserved rights. So you have to parse out the two.

Q: Mr. Halloran, putting aside the reserved rights, looking to the rights that were purportedly granted by Neopets to Warner Brothers, am I correct that your client did not earn anything from those rights?

A: Well, the rights were not granted to Warners because the option was never exercised. The only right that Warner's had was to develop a picture for a period of time, and if they didn't make that picture, it went back to Neopets.

Q: Right. And those rights were held for three years by Warner Brothers, were they not?

A: Let me look. You can't tell on the face of the document.

There is an initial period of 12 months, and Warner Brothers could only extend if they in fact received a first draft screenplay of the picture. We wanted to make sure that they would not sit on the rights. So it was an initial 12 months.

But then, if they didn't move and have a screenplay written based on the property, then there was no transfer of rights.

So I can't say on the face of this -- on the face of the document, the option lasted 12 months.

Q: Do you recall that a screenplay was in fact written for Neopets?

A: I wasn't -- I was involved in the deal and not in the development. My last recollection is that the parties were working together to mutually approve a

writer to write the screenplay. But beyond that, I sort of lost touch with the Neopets development at Warner.

Q: Does that mean, sir, that your services were terminated by Neopets?

A: My services were never terminated by Neopets. The company was sold to Viacom.

Q: Am I correct, sir, that your rights in connection with Neopets were terminated by Viacom?

MR. TOBEROFF: Objection.

THE WITNESS: I'm sorry. I have to laugh.

THE COURT: Counsel.

MR. TOBEROFF: Objection. The question is vague and ambiguous. He asked whether his rights in connection with Neopets were terminated.

MR. BERGMAN: That's correct, your Honor. I misspoke. May I rephrase?

THE COURT: Please rephrase.

BY MR. BERGMAN: Q: Am I correct that your services in connection with Neopets were terminated by Viacom?

A: You are absolutely incorrect.

Q: How did your services terminate?

A: Well, to this day I represent the principals of Neopets at the time. Specifically, Doug Dohring, D-O-H-R-I-N-G. Doug sold the company, I believe, in 2005, 2006 and formed a company called the Dohring Company, and I currently represent the Dohring Company, and I've continued my relationship with him.

There's never been a hint that I -- that he would terminate my services. The company -- he sold the company in 2005 to Viacom. I've not had one discussion with Viacom as to either this agreement or the development of the project or my projects being terminated.

So I think -- I'm sorry if I feel insulted by the inference which I think you're trying to draw that somehow I was fired because I screwed this up.

Q: No, that certainly was not my inference --

A: I –

THE COURT: Next question.

BY MR. BERGMAN: Q: Have you rendered any services in connection with an attempt to sell motion picture rights to Neopets at any time since Viacom took the rights over?

A: No.

Q: Okay. Now, in the Sahara case, Mr. Halloran, am I correct that one of the expert opinions that you rendered was that poor performance of the film Sahara, which was based on one of the so-called Dirk Pitt novels, for which there were 17 other Dirk Pitt novels, you expressed the opinion that before Sahara was exhibited on the screen, the rights were worth $30 million. And that once Sahara was released, the rights became worthless; is that correct?

A: I do -- well, again, if you would show me the testimony, I'd be happy to --

Q: Don't you recall that testimony, sir?

A: Again, there's been a pattern of you misstating things and me not being able to look at my testimony. And I don't want to give an opinion that might be misleading. So I would beg your forbearance, and I'd like to look at the testimony that you are reading to me.

Q: I'll be glad to show that to you. But am I correct that you were cross-examined on that specific opinion for three trial days?

A: I may well have been.

Q: And that you kept maintaining the position throughout three days of testimony, which I'm not going to read, that the performance of the Sahara film rendered the rights in the remaining 17 films in the franchise, in your words, quote, worthless, quote, zero? Do you recall that?

MR. TOBEROFF: Objection to the question. Vague and ambiguous as to remaining 17 films in the franchise.

Are you referring to the novels?

THE COURT: Do you understand the question?

THE WITNESS: In general I understand.

THE COURT: Then answer the question as best you can.

THE WITNESS: I will do it as best I can.

BY MR. BERGMAN: Q: Let me read you some questions and answers and see if it refreshes your recollection.

A: Okay. That would be useful. Again, I have the transcript here --

THE COURT: He's going to read the questions.

THE WITNESS: Well, can I read along with him?

MR. BERGMAN: Yes, sir, you can.

THE WITNESS: Okay. What pages?

MR. BERGMAN: I'm going to be reading from page 4527, which is a portion of the trial testimony you gave on March 14, 2007.

THE WITNESS: Okay. Which volume is this in?

MR. BERGMAN: It is from the March 14 session. It looks like it is the second to last of your appearances. But each page is marked, sir.

THE WITNESS: Okay. 4527. Okay. I'm with you.

BY MR. BERGMAN: Q: Let's look at 4527, lines 7 through 24. And this is Bert Fields, who was the attorney who represented you, asking you --

A: Well, he didn't represent me. He retained me.

Q: Retained you. Asking you on direct examination the following question:

"QUESTION: As of September 2nd of 2003, what in your opinion was the market value of the film rights of Cussler's book?

"ANSWER: $30 million.

"QUESTION: Would you explain how you get that?"

ANSWER: Yeah. Basically a film author in selling his motion picture rights typically gets an up-front cash fee.

"QUESTION: Uh-huh.

"ANSWER: And then some contingent compensation.

"QUESTION: Before we get into your methodology –

"ANSWER: Uh-huh.

"QUESTION: What is the value of those same film rights today as a result of the financial failure of Sahara?

"ANSWER: Unfortunately, it is zero.

"QUESTION: You could not get anything for them?

"ANSWER: Nothing."

Do you recall giving that answer to that question?

A: I not only recall it, I think it is absolutely accurate as I sit here.

Q: So it's your testimony, sir, that one disastrous film ruined an 18-book franchise?

A: There were two disastrous films. Sahara was not the first Dirk Pitt movie. There were two disastrous films, and the consensus as of the debacle of Sahara is that Dirk Pitt, after two disasters, was completely dead and had no future value. And I believe that's true right now. I would wonder -- I would be shocked if any studio would offer a nickel for a Dirk Pitt -- for a Clive Cussler novel right now.

And certainly since this case, I'm unaware that any studio has bid a nickel for the right to make a Dirk Pitt movie.

What I also testified was that -- well, okay. I wanted to again put this in context.

MR. BERGMAN: Your Honor, I move to strike as nonresponsive.

THE WITNESS: Okay.

THE COURT: The portion --

THE WITNESS: You know, it's a --

THE COURT: Please, I can do this. I don't know where to begin at. What were the two movies?

THE WITNESS: The first one was called Raise the Titanic. It was a bomb --

THE COURT: What was the first one?

THE WITNESS: Raise the Titanic.

BY MR. BERGMAN: Q: Now, Raise the Titanic had been produced many years before, hadn't it?

A: It had, yes.

Q: And it was a relatively low budget picture?

A: I believe it was.

Q: Okay. And it was -- performed badly; correct?

A: It did perform badly because the -- in Clive Cussler's mind, he did not have creative control over the picture, and it was not true to his book.

Q: And, in fact, Mr. Cussler, because of the performance of that earlier film, refused to sell any of his books for film purposes for many, many years after that; correct?

A: I think that is correct.

Q: But when you were testifying to Bert Fields on direct –

A: To Bert Fields? Oh, okay. I'm sorry.

Q: In response to Mr. Fields, to support his position, you didn't refer to Raise the Titanic, did you? You didn't refer to Raise the Titanic until a hundred or so pages later, when Mr. Putnam was cross-examining you; correct?

A: I'd have to go back and go through. I mean, I testified for six days as evidenced by this. And I can't tell exactly what -- where in the transcript or the trial I talked about Raise the Titanic.

Q: Let me read you one more question, one more answer that Mr. Fields asked of you, and the answer that you gave --

A: You want to guide me to the page?

Q: Pardon me, sir?

A: Would you be so kind as to guide me to the page?

Q: Yes, I was about to do that.

A: Thank you.

Q: The page is 4537. And I'm beginning at line 14 and ending at page 4538, line 14.

Talking about the value of the franchise:

"QUESTION: Okay, and that is what is zero today?

"ANSWER: That is what is, unfortunately, zero today, yes.

"QUESTION: And why is that zero?

“ANSWER: Because Mr. Cussler cannot go into the marketplace and sell the motion picture rights to a production company or a studio for the Dirk Pitt character.

"QUESTION: Why?

"ANSWER: Because of the catastrophic financial failure of Sahara. The perception among potential buyers is that it would not be a prudent investment to invest more -- to invest money in a Dirk Pitt movie.

"QUESTION: How does the studio go about making that decision?

"ANSWER: I think I talked about that a little bit before, where a production company or a studio will look at a property like Dirk Pitt or James Bond, and they will, especially when it is in book form, they will try to assess whether the story and character in that book can be translated into a film that will be profitable in the marketplace. If one applies that analysis at this point to Dirk Pitt, unfortunately, the analysis is worthless because no one is going to invest a substantial amount of money to produce and distribute a film based on the Dirk Pitt character when everybody knows that Sahara was a disaster." Close quote.

Do you recall giving that answer to that question?

A: Indeed I do.

Q: Okay. How much did Sahara gross at the domestic box office?

A: I remember it had a decent opening weekend. But it was based on the public knowledge of the cost, it was viewed as very disappointing. I believe it was disappointing to both the production company and the studio. My best estimate is it did somewhere between 60- and 80- or $90 million domestic.

Q: And, in fact, it did $68 million; correct?

A: Not bad. That sounds about right.

Q: Here's my question to you.

A: Yes.

Q: If the Sahara film, which had domestic box office of $68 million was a disaster, a catastrophe that rendered the performance of the franchise worthless, how can you testify in this case that the performance of Superman 4, which had a much smaller domestic box office of $17 million, had no negative effect at all upon the value of the Superman rights in 2002?

A: There's lots of reasons.

First of all, you have to look at what happened to Dirk Pitt, the character, and as opposed to Superman, the character. Today if you have a very valuable

franchise, it can survive disappointing box office. As I recall, Batman and Robin was very disappointing, did about $103 million or so.

Not withstanding that disappointment, Warners was able to reboot Batman.

There is, as we sit here, Star Trek is opening tomorrow, and the anticipation in the industry is that it will probably do a hundred million dollars this weekend. The last Star Trek movie did $43 million.

Very strong properties like Superman and like Batman survive disappointment at the box office. Dirk Pitt, however, was a completely different situation. Dirk Pitt, unlike Superman, didn't have 70 years of extraordinary success in various media and comic books, on television, in film, and the aggregate. Dirk Pitt was completely, completely different.

Q: It did sell --

A: I don't think I'm finished. And understanding Dirk Pitt was -- or Sahara was 2004, and it's publicly known that Anschutz spent, I believe, $170 million on the picture, it did a very disappointing $78 million. And the consensus in the motion picture business after that was that Dirk Pitt was dead, and I am unaware of anyone -- any bids or anyone trying to invest money now in Dirk Pitt. I would be flabbergasted if Warner Brothers were to make a Superman type deal for Dirk Pitt at this point.

THE COURT: We're getting beyond the question.

THE WITNESS: Okay. Okay.

BY MR. BERGMAN: Q: Are you aware of anybody making an offer to purchase the Superman rights from 1987 until today other than Warner Brothers?

A: The Salkinds in 1974 made a deal with DC.

MR. BERGMAN: Move to strike as nonresponsive.

THE COURT: He indicated from 1987 to the present. 1974 is before.

THE WITNESS: Right. I'm unaware -- basically since 1987, I understand that DC -- excuse me. After the Salkinds had the rights and then they came back to Warners, and the Salkind agreement ended the -- the Salkind agreement amended, like a day later, after the expiration of the Salkind agreement, about a day later, there was the film agreement. And since that film agreement tied

up the DC-owned film rights with Warners, I'm unaware that DC had the ability to put the property out to bid.

So I don't know of any offers that were made to Superman.

MR. BERGMAN: Move to strike the answer as being nonresponsive, your Honor.

THE COURT: Well, everything except the last sentence. "I don't know of any offers that were made to Superman."

MR. BERGMAN: That's the bottom line.

THE COURT: That's the bottom line. Everything else is stricken.

We'll take it up after the recess.

MR. BERGMAN: Your Honor, I don't need a recess. I thank Mr. Halloran for his help, and I have no further questions.

THE COURT: Very well. We'll start with redirect after the break.

(Recess taken.)

THE COURT: Counsel.

REDIRECT EXAMINATION

BY MR. TOBEROFF: Q: Mr. Halloran, you testified earlier, when Mr. Bergman was going over your background, that after leaving Universal, you went into private practice and that you currently work at the Halloran Law Corporation.

A: That's accurate.

Q: And after leaving Universal, but prior to forming the Halloran Law Corporation, did you work as a partner in any entertainment law firms?

A: Yes. Initially, for a short while, at a firm called Halloran and Howell. And then after that, a firm called Alexander, Halloran, Nau, N-A-U, and Rose, from 1992 to 1997.

And in 1997 I formed a firm with my partner Gunnar Erickson, that was known as Erickson and Halloran. And then in 2001, when Gunnar retired, I went to the successor firm, to Alexander, Halloran, Nau, and Rose, and I'm officed and essentially of counsel at this point.

They are now known as Alexander, Nau, Lawrence, Frumes and Lebowitz.

So in essence I came back to the firm that I co-founded in 1992 after my -- Erickson, Haw, and Small dissolved.

Q: And your offices are located in the same offices as before?

A: Yes.

Q: Why are you of counsel? Why aren't you simply acting as a partner as before?

A: I decided to have a separate legal existence and a separate pension fund. I wouldn't be tied to the pension plan that the firm has.

Q: Now, Mr. Bergman mentioned a number of prestigious law firms, such as Gang, Tyre, T-Y-R-E, Sifran, and Brittenham. And the other was Hansen, Jacobson.

Would you or would you not consider the firm of Bloom Hergott to be at least as prominent as some of the firms mentioned by Mr. Bergman?

A: They are in the same league.

Q: Have you ever been -- have you ever been engaged by Bloom Hergott to work on a project involving a preexisting literary property?

A: Yes.

Q: What was the nature of that engagement?

A: Bloom Hergott represented Bruce Willis, and he was putting together a movie based on a book called Breakfast of Champions, and I co-represented Bruce Willis and Bloom Hergott in putting together the financing for that film.

Q: Did your engagement also involve the acquisition of film rights to that Kirk Vaughn book?

A: It did in the sense that I was responsible in dealing with the banks to make sure that the chain of title was appropriate. I didn't actually negotiate the terms of the Breakfast of Champions deal, but I was involved in its terms.

It's similar to what I would do at Orion.

Q: Mr. Bergman also mentioned the law firm of Gang, Tyre, Ramer and Brown as a very prestigious entertainment law firm.

Have you ever been engaged by Gang Tiree to work on a project involving preexisting literary project?

A: Yes, I was co-counsel with Gang Tyre for a company called Writers Cinema, Inc., that I described in my direct testimony.

Writers Cinema, Inc., had a joint venture with Amblin Entertainment, Steven Spielberg, to produce and license to the Turner Network Television network a series of plays and books which famous playwrights had written, and as I think I said before, included Foot, Arthur Miller, and David Mamet.

Q: Do you work in any other capacity with Bruce Ramer, one of the lead partners of Gang, Tyre, Ramer and Brown?

A: Yes, I do.

Q: What is that?

A: I work with Bruce on an almost daily basis. We are on the executive committee together for the USC Beverly Hills Bar Association, Institute of Entertainment Law and Business. And we put on an annual entertainment law program, and actually I'm in the middle of a series of meetings in designing a program with Bruce right now.

Q: Now, I noticed that Mr. Bergman limited his questions as to your clients to those clients you currently represent. Is your experience in private practice limited to clients you currently represent or not?

A: No. Since I have been in private practice, going on 20 years, you know, I have represented many clients and been involved in many transactions where I don't currently represent the client. And that's also especially true with me because oftentimes I'm brought in as special counsel on a particular project as opposed to continuing.

Q: I'd like to move back to your studio experience.

Mr. Halloran, you testified as to your experience with studio films, and I'd like to expand that and contrast that a bit to your testimony regarding independent films.

Were you counsel to the 1994 Polygram spelling film called the Usual Suspects directed by Brian Singer and starring Kevin Spacey?

A: Yes, I was.

Q: What other films did Brian Singer direct?

A: Superman Returns, X-Men.

Q: And what work did you do on that film?

A: I was production counsel, and so I negotiated and documented the agreements for Brian Singer, Kevin Spacey, and the rest of the cast. And I also did the screenplay option purchase agreement with Brian McCorey, who wrote the screenplay and I believe won the Academy Award. And, as you know, Kevin Spacey won the Academy Award for that film as well.

Q: Were you also counsel to the 1995 film entitled True Romance?

MR. BERGMAN: Objection. Leading, your Honor.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Are you familiar with the film – the 1999 film True Romance?

A: Yes, I am.

Q: Have you had any involvement in that film?

A: Yes.

Q: Was that film directed by Tony Scott and written by Quentin Tarantino and starring Christian Slater, Patricia Arquette, Dennis Hopper, and Christopher Walken?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Who directed that film?

A: Tony Scott.

Q: Do you remember the writer of that film?

A: Quentin Tarantino.

Q: Were the usual -- was the film The Usual Suspects and True Romance, which I'm using as examples of independent films you've worked on, were those films -- strike that.

Were the usual -- were the films The Usual Suspects and True Romance independent films?

A: Yes.

Q: Were they independently distributed, or were they distributed by one of the major motion picture studios?

A: The Usual Suspects was distributed by Polygram, which was not a major, and I don't -- I don't believe True Romance was -- well, let me see. True Romance. As I sit here, I'm not a hundred percent sure whether -- I believe True Romance was distributed by a major. But Usual Suspects was not. It was Polygram.

Q: Are you familiar with a 2006 film called American Pastime?

A: Yes.

Q: Did you work on the film?

A: Yes.

Q: Do you recall who distributed that film?

A: Warner Brothers Home Video.

Q: Would you call that an independent film?

A: Yes.

Q: Now, Mr. Halloran, you mentioned that you represent the A-list film producer Bob Doucet. In connection with what films have you represented him?

A: In chronological order, I represented him on Mummy 2, Van Helsing, Mummy 3, Night at the Museum, and G.I. Joe, which he's in the process of delivering to Paramount right now.

Q: Would you or would you not consider those movies to be franchise movies?

A: I would consider all of them to be franchise movies.

Q: Would you or would you not consider those movies to be tent-pole movies?

A: Yes, each of them is a tent-pole movie.

Q: Are any of those movies based on well-known preexisting properties?

A: Certainly the Mummy is based on the Universal owned character the Mummy. Van Helsing was sort of interesting because what Universal did was they put a lot of their preexisting characters, the Mummy and others, into it. Obviously G.I. Joe is based on the board game, the Hasbro board game. So these were all based on previously exploited properties.

Q: Now, in your practice representing independent films, is there any overlap between your -- pardon me. You testified that you -- your practice involves to a

certain degree independent films but that 25 to 30 percent of your practice involves work with the major studios. Is there any overlap between the two?

A: Yes, because sometimes films that are independently developed or produced can be distributed by major studios, and what's always in my mind, when I'm representing an independent producer, is that ultimately when we want to do is make a film that's of sufficient quality such that a studio would want to distribute. And sometimes in good cases that happens.

Certainly the -- in representing independent film producers, I've hired actors like, you know, Robin Williams and Susan Sarandon and Kevin Spacey and, you know, what you try to do in the independent world is design a project so ultimately it becomes distributed by the studio, although the studio might not necessarily develop or produce it.

MR. BERGMAN: Your Honor, move to strike everything after "yes."

THE COURT: It was a leading question. Yes, the answer. Everything else is stricken.

BY MR. TOBEROFF: Q: Is there overlap between your work in independent films and your work in representing your 25 to 35 percent of your practice that involves the major studios?

A: There is overlap.

Q: And I ask you to describe that overlap to me.

A: Yes, the overlap is that even though initially a film may be a so-called independent film, because it's not -- the development and production is not financed by a studio, it may be ultimately distributed by a studio.

Q: Now, do you recall that you and Mr. Bergman listed the major studios. Do you recall listing those?

A: Yes.

Q: Have you ever been retained by a major studio as an expert in a case involving the acquisition of film rights to a comic book property?

A: Yes.

Q: Which case or cases?

A: I was engaged by Paramount Viacom in the Spiderman case.

I was engaged by Fox in the Watchmen case.

Q: Just in general, did the Spiderman case involve the analysis of the terms in a rights acquisition agreement for the film rights to Spiderman?

A: Yes.

Q: Did the Watchmen case involve an analysis of contractual provisions as they pertain to underlying intellectual property?

A: Yes.

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: In a nutshell, what did the Watchmen case concern, broadly speaking?

A: Okay. The Watchmen case concerned a dispute as between Fox and Warner Brothers over the distribution rights to the picture Watchmen. And what was specifically at issue was whether the rights that DC had granted to Fox had ultimately gone via the chain of title to Warners in a manner that would enable Warners to distribute the film without claim of copyright infringement by Fox.

Q: You've also spoken at great length about the Sahara case, and you testified that you were retained by Bert Fields at Greenberg Glusker. Would you add Greenberg Glusker to that list of prominent entertainment law firms or not?

A: I would add them to the list.

Q: And who was considered the prominent lawyer at Greenberg Glusker, if there is one?

A: Bert Fields.

Q: Did he retain you?

A: Yes.

Q: Mr. Halloran, have you recently been engaged as an expert on behalf of any famous literary estate?

A: Yes.

Q: What estate is that?

A: Well, I've been engaged by the estate of Orson Wells in a case involving Citizen Kane. I've been engaged regarding a dispute involving distribution rights to the Little Prince literally within the last couple days.

Q: Do both of those cases involve intellectual property?

A: Yes.

Q: Now, skipping to your -- back to your time at Universal. Did you or did you not value underlying rights when evaluating film projects at Universal?

A: I did.

Q: Was that a commonplace part of your duties or not?

A: Very commonplace.

Q: And in valuing underlying intellectual property rights, did you create any sort of financial models to do so or not?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: How did you evaluate underlying intellectual property rights in connection with your duties at Universal?

A: We usually didn't necessarily rely on Excel in our projections. As I explained to you, we do those projections later. But what we typically do is look at the marketplace and estimate what we would pay for the intellectual property by looking at the potential profitability of audiovisual works that we might produce based on those properties.

The single most important thing was, you know, was a property well known. You know, the template was Superman.

But we didn't have Superman. So we pursued things like the Flintstones and Finger Guy, sell Dr. Suess books and the like.

Q: Now, in your current practice, when you work on independent film, do you try to ensure that the deals you enter into are consistent with the studio practice on -- strike that.

In your current practice, does it matter to you whether or not the deals that you entered into for literary rights are consistent with studio practices, or does it matter?

A: It does matter.

Q: Why is that?

A: It does matter because, as I mentioned before, ultimately the projects that I'm working on may end up at a studio. And I want to make sure that when I deliver the chain of title to the studio, that the underlying agreement for the acquisition of the intellectual property is -- they find suitable and appropriate.

Q: Jumping now to your testimony regarding the 2008 film Iron Man and your separate testimony regarding an Iron Man agreement that's been marked as an exhibit between Cache-a Motion Picture Corp. and Marvel Characters, Inc.

Was the 2008 Iron Man film -- is there any connection between the physical agreement that's marked as an exhibit and the 2008 Iron Man film that you are aware of?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Are you aware of any connection between the agreement -- strike that. Was the 2008 Iron Man film produced pursuant to the Iron Man agreement which is an exhibit?

A: No.

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Lay a foundation for that.

THE WITNESS: It would be helpful to me to look at the agreement. Do you have the number?

MR. TOBEROFF: Actually, I'm not questioning you. It's general questions. I'm not --

THE WITNESS: Okay. Fine.

BY MR. TOBEROFF: Q: I believe you testified that you have had conversations with the former COO of Marvel, and in those conversations, were you given an understanding as to how the 2008 Iron Man film was produced and under what agreement?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Did you have conversations recently with the --

THE COURT: You know, actually, overruled. That's a foundational question. You may answer that question.

THE WITNESS: Could you restate it?

THE COURT: Do you have an understanding as to how 29008 Iron Man film was produced and under what agreement.

THE WITNESS: Yes, I do.

THE COURT: Ask a question, Counsel. Don't encourage him. He does not need any encouragement.

BY MR. TOBEROFF: Q: Can you please tell us what that understanding is?

A: I had a conversation with the former COO of Marvel, and he told me that the agreement between Marvel and Cache-a Motion Pictures, the option expired, and the rights reverted to Marvel.

Is there -- he told me that -- and that the basic structure of the terms upon which Marvel produced the hit Iron Man were in public documents.

MR. BERGMAN: Move to strike. Hearsay.

THE COURT: Well, there's really no -- it's not being introduced for the truth of the matter asserted but rather as foundation. There's no substance to that answer. Counsel, you may proceed.

BY MR. TOBEROFF: Q: Are you aware of the studio which distributed the 2008 Iron Man film?

A: Yes.

THE COURT: Wait a second. There was. The option expired. The rights reverted. I'm sorry. Revisiting that last answer. So that was based on a conversation with someone -- the COO of --

THE WITNESS: The former COO of Marvel. He's a good friend of mine. I can make it easier, your Honor.

THE COURT: I'm sure you could make it easier. But I'm not going to bite right now.

Counsel, I'm going to sustain the objection. If we're going to get into the terms of the agreement, given all of your earlier objections earlier, I think it's important that we have the agreement. You succeeded in keeping out an agreement. We had the agreement. We just didn't have all of it. Now he's

trying to get into the terms of the agreement that he had a conversation with the COO.

So I don't think, given that record, this is fair game. I sustain the objection.

MR. TOBEROFF: Very well.

Q: Are you familiar with the studio? I just previously asked this, but I'm going to ask it again. Are you familiar with the studio which distributed -- are you familiar with which studio distributed the 2008 Iron Man film?

A: I believe it was Paramount.

Q: And the agreement that we spoke of earlier, was that with Paramount?

A: No, it was with a company called Cache-a Motion Pictures which, based on my experience, I know to be a division of New Line.

Q: Now, Mr. Halloran, switching to another subject, can you name any intellectual property franchises that existed in 2008, big franchises, when the Superman film agreement was entered into but that were not owned by a major studio? Any franchises?

A: By major studio, you mean a major studio or its subsidiaries like DC?

Q: Yes, I'm referring to big movie franchises for which the underlying intellectual property in or about 2002 was not owned by a major studio or a subsidiary.

A: As of 2002, my understanding is that the universe of major comic book franchises was --

Q: Excuse me. I'm not limiting my question specifically.

I'm not talking about comic book franchises. I'm talking about major film franchises. I'm not focusing on comic book franchises?

A: Thank you.

Q: So the question is --

MR. BERGMAN: Your Honor, I object. This is leading all the way.

THE COURT: Let's watch the leading, Counsel. If you're starting with the word did, it's probably a leading question. Who, where, why, what, and how. One of those five words should begin your sentence.

MR. TOBEROFF: I wasn't --

THE COURT: Rephrase your question.

MR. TOBEROFF: I'll rephrase it.

Q: Can you think of any --

THE COURT: Who, where, what, why, and how, Counsel.

MR. TOBEROFF: This is a who.

THE COURT: Okay. Who. We got our first word.

What's the next one?

MR. TOBEROFF: Or what.

Q: In 2002, what to your knowledge are major intellectual property-driven franchises that have made -- that have been turned into major film franchises?

A: As of 2002, there certainly was James Bond. There certainly was Star Wars.

Q: Now, who owns the underlying rights to the Star Wars property?

A: George Lucas.

Q: And does George Lucas have the studios finance films based on Star Wars?

A: No. I believe --

MR. BERGMAN: Objection. Leading, your Honor.

THE COURT: You had two in a row there, Counsel.

You were right on track.

BY MR. TOBEROFF: Q: Who finances George Lucas's films?

A: George Lucas.

THE COURT: He knows the stuff. You just got to --

BY MR. TOBEROFF: Q: Who finances the James Bond films?

A: I know that Cubby Broccoli has in the past financed or co-financed the James Bond films. I don't think it's public exactly, the MGM-Cubby Broccoli deal. But it's my understanding that Cubby Broccoli financed the Bond films.

Q: Can you generally describe to me how a film deal works when a rights holder finances or co-finances a film based on their rights?

A: It's very different from the option purchase model that predominates what we've looked at. In fact, you don't need an option purchase agreement because like Marvel and Iron Man, since they own the rights, they were free to produce the picture since they own the rights, and they were free to make whatever distribution arrangements they wanted.

Under that model, which George Lucas uses and which Marvel uses, the -- and also I think under the Universal -- I want to make it simple. Under the Star Wars -- under the Lucas model and the Marvel model, rather than relying on a studio such as Warners to develop and produce the pictures, the owner of the intellectual property, in order to maximize control and potential profitability, actually makes the movie themselves. They actually finance the production of the movie. And then they license the distribution of the movie around the world. So that's -- that basic model.

I know that, you know, I was -- Marvel just reported $90 million in quarterly profits based on the Hulk and Iron Man. So what you try to do is, you know, they built companies based on the value of these intellectual property assets and the fact that they can make potentially a lot more money rather than on a royalty basis, on a basis where they actually own the property, produce the picture, and then license it around the world on advantageous terms.

Q: Now, is it common or is it uncommon for the holders of rights, intellectual property rights at the highest end of the spectrum to finance or co-finance films based on their rights?

A: It's --

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Foundation. I'll let you answer the question, but follow up with the basis for that.

THE WITNESS: It would be helpful if you would ask me the question slightly differently.

BY MR. TOBEROFF: Q: For intellectual property rights or for film rights to intellectual properties at the highest end of the value spectrum, is it common or uncommon for the holder of such rights to finance or co-finance films based on such rights?

A: Well, sort of two universes. There's the universe of DC, where, you know, DC does not finance their films. And then there's the universe of Marvel in the

old days, where they didn't finance the film. So now it's Marvel in the new days, where they do. And then Star Wars, George Lucas, they finance it, but it's -- in terms of its -- in terms of that universe, it's only the people who actually own the properties that can do it.

Q: Now, maybe I should -- I phrased that poorly. I want to refocus my question.

A: Okay.

Q: The subject is intellectual property rights at the highest end of the spectrum.

A: Okay.

Q: Not all intellectual property rights.

A: Okay.

Q: And my question is is it common or uncommon for the owners of those intellectual property rights at the highest end of the spectrum to finance their own films, finance or co-finance their own films, or is it common, or is it uncommon?

THE COURT: He gave you two choices, common or uncommon.

THE WITNESS: It's common.

THE COURT: What's the basis of that answer?

THE WITNESS: Well, what we talked about, Star Wars.

THE COURT: No, no. How do you know that?

THE WITNESS: How do I know that?

THE COURT: Yes.

THE WITNESS: I've -- I go back to the George Lucas -- I worked on Howard the Duck in 1986 with George Lucas. I know him a little bit. But it's commonly known -- it's been reported for a very long time how Lucas Film in fact owns their intellectual property and produces the movies based on their intellectual property and licenses them for a very low distribution fee to the studio. That's commonly known.

THE COURT: Beyond the Lucas Film empire, any others?

THE WITNESS: Yes, Marvel. I'm aware of that through my discussions with the former COO and what's been reported in the trades and what's in the

public documents that describes exactly how they do it, and that's their -- that's their business model.

BY MR. TOBEROFF: Q: And you testified just previously to the James Bond films. Are those also -- do you believe those are also financed by the family that controls the rights or co-financed?

A: Well, I read a case in which Cubby Broccoli testified that he had invested over a billion dollars in the James Bond movies. I don't know the exact structure of the MGM-Cubby Broccoli. But it apparently includes a financing component.

Q: Now, in your opinion --

MR. BERGMAN: Excuse me, your Honor. Move to strike. Hearsay.

THE COURT: Well, an expert has some latitude in this regard, Counsel. As long as the basis is there. You can follow up, Counsel, how he knows this.

BY MR. TOBEROFF: Q: Now, you mentioned regarding James Bond, you were mentioning the basis for your knowledge. Could you elaborate on that, please?

A: Yes, there was --

THE COURT: You say you read a case. What do you mean?

THE WITNESS: I was doing some research on James Bond on the Internet, and I ran into a case that apparently there was a dispute between MGM and a gentleman named McClorey. And there was sort of a bifurcation of the James Bond rights and the competing --

THE COURT: So it's from a lawsuit.

THE WITNESS: Yes, and from a reported case I found on the Internet. And there was testimony that was in the opinion from Cubby Broccoli in which he stated that he invested over a billion dollars in the Bond movies. That's where I knew that from.

BY MR. TOBEROFF: Q: Now, why do you believe rights holders at the highest end of the spectrum finance or co-finance their films?

A: They believe -- they are confident that they are extraordinarily -- we're talking about the super high end, right?

Q: Yes.

A: They have confidence that -- with A, they want to control their property as best they can. They don't want to give up control of the property. That's very important. They don't have to worry about not being -- about the rights sitting dormant. They can make movies whenever they want.

We've got an Iron Man 2 that's coming up. They also, from an economic standpoint, they obviously think that it's more advantageous to them to take the risk, and you have to take the risk of producing films and then making distribution arrangements in order for them to maximize their profits for that property as opposed to just getting a royalty from a studio which has no contractual obligation to produce anything.

Q: Under the Superman film agreement, Exhibit 232, does DC have the option to finance or co-finance films over the next -- well, as of 2002, over the 34-year term of the agreement?

A: No, they do not.

Q: Just briefly, you testified -- Mr. Bergman asked you questions regarding the purported settlement agreement or settlement negotiations between plaintiffs and defendants in this action. Do you recall that?

A: I do.

Q: And you gave some opinions about that. Other than reading this court's summary judgment order, did you review any other documents pertaining to the parties' settlement negotiations?

A: None.

Q: Switching subjects. Are your opinions in this case solely based on agreements you personally negotiated?

A: No.

Q: What are your opinions generally speaking -- excuse me.

What agreements -- in addition to the agreements you personally negotiated, what are your opinions based on?

A: My personal negotiations are just a part of relatively -- relatively minor part of the universe of knowledge I have. I wrote my first book on copyright while I was in law school. Now I've written three books. I've been in -- a business affairs executive and a lawyer for approximately 30 years. I teach. I taught at UCLA and Southwestern. And actually, I have learned from my students.

I've been involved in numerous transactions, including intellectual property transactions. I've also, as you know, been an expert in approximately 30 cases in various industries, but oftentimes including intellectual property.

I -- one of the things that I do virtually every day is valuing properties. I'm in the midst of a negotiation right now where I'm selling Andy Garcia a movie, and I do financial projections all the time.

I read the -- I'm immersed in the motion picture business and the television business, the entertainment business in general. I read it every day, look at the product. I'm one of the co-chairs of the Institute on Entertainment Law and Business. We put on seminars.

So I take -- what I did in this case is I took the aggregate of that experience. I sort of left out my studio persons. At the studio, not only did I do Flintstones deals and negotiate Dr. Suess, but I also negotiated agreements on Back to the Future with Michael J. Fox, Born on the Fourth of July with Oliver Stone, Tom Cruise starring, Arnold Schwarzenegger for Twins, and Kindergarten Cop.

So I took the aggregate of that experience, and I was given this homework to assess. And so I looked at these agreements in the context of all of those things.

Q: Now, in addition to the Superman film agreement, the Superman television agreement, and a number of Superman animation agreements between DC and Warner Brothers, how many other agreements approximately did you look at in connection with your opinion in this case -- did you analyze?

A: Well, the agreements on this chart, there must be 30.

Q: Now, you testified earlier that based on this court's ruling so far, the Siegels and DC co-own Action Comics No. 1 and that DC has a duty to account to the Siegels for any profits derived from Action Comics No. 1.

You also testified that under the Superman film agreement, Warner Brothers has the discretion not to produce any films or TV series or any other further films or TV series and that there was no provision for the Superman rights to revert free and clear to DC. My question is --

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

BY MR. TOBEROFF: Q: My question is what impact, if any, does this have on the Siegels' right to receive a share of DC's profits?

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: It has --

THE COURT: You don't have any objection to his assertion.

MR. BERGMAN: My objection, your Honor, was to the entire question, including the introduction to the question.

THE COURT: Well, that's the assertion I was referring to. The preamble, as it were. The question itself is not leading. Overruled. You may answer.

THE WITNESS: It has a -- okay.

BY MR. TOBEROFF: Q: With that foundational part, let me rephrase the question.

What impact, if any, did these nonexclusive rights have on the Siegels' right to receive a share of DC's profits?

MR. BERGMAN: Objection. Vague and ambiguous.

THE COURT: Yes, but in light of your questioning, Counsel, I think it's fair game. You can explore it on recross. I think this opens up a can of worms, but if that's what the plaintiff wants to do, I'll overrule the objection.

THE WITNESS: Since DC and the Siegels are co-owners, by hand there's a duty to account as between co-owners of a copyright. The fact that DC is in my estimation not getting fair market value for the film and television rights, and handing them to Warner Brothers under agreements where there's no obligation for the entire term of the copyright to produce audiovisual works, has a devastating financial impact on DC and the plaintiffs as co-owners.

MR. BERGMAN: Objection, your Honor. There's a lack of foundation to show any duty to exploit.

THE COURT: I understand your objection, Counsel.

It's a conclusionary statement which essentially wraps up his testimony. It's only as good as the underlying foundation that he's elicited. It's basically an articulation of the plaintiff's theory of the case. The Court will consider that –

MR. BERGMAN: It's also an expression of a waste argument, a claim that has been abandoned by the plaintiffs in this case.

THE COURT: Permit you to examine him on that. You may proceed, Counsel.

BY MR. TOBEROFF: Q: You also testified with regard to the impact of plaintiffs' nonexclusive rights in Action Comics No. 1, that it would be extremely difficult, if not impossible, for plaintiffs on their own to receive an income by licensing their nonexclusive rights. Do you recall that?

A: I do.

Q: Why is that?

A: As I testified, the nonexclusive rights, they are co-owned with DC. And just based on that co-ownership, if the Siegels wanted to go out and license their share, it would, since the termination is under the U.S. Copyright Act, they would only be able to license the U.S. rights, not the foreign rights. And the Siegel rights are a part of the ethos that is owned by Warner Brothers.

So it would be difficult for them to transfer those rights without someone thinking, and especially since they are co-owned by DC to think oh, well, I need Warners to be involved as well. And Warners has the film and TV rights.

So there's just -- as we discussed, there may be a little direct to video or Movie of the Week or something like that, but since the rights are nonexclusive, since they are only in the United States, as I discussed, a potential buyer or financier would be reticent, to say the least, to acquire those rights.

Q: Now, aside from the relevance of this point to analyzing the impact of nonexclusivity on the value transferred to Warner Brothers in the form of Superman film and television rights, in your understanding, is this trial about how much money the Siegels can independently get for their rights, or is this trial about whether the Siegels' right to an accounting is negatively affected by DC and Warner Brothers' internal agreements? Which is it? I'm asking you to choose.

MR. BERGMAN: Objection. Leading.

THE COURT: It is. And the Court understands what the trial is about. Sustained.

BY MR. TOBEROFF: Q: Mr. Halloran, what is your understanding as to what this first phase trial is about?

MR. BERGMAN: Objection. Relevance.

THE COURT: Sustained.

THE WITNESS: What the trial is about, the first phase is set forth in the pretrial conference order.

BY MR. TOBEROFF: Q: To be clear, Mr. Halloran, when you testified that the Superman film rights -- what the Superman film rights would be worth, what the film and television rights would be worth on the open market, did you take into consideration the fact that the Court had ruled that Action Comics No. 1 is co-owned by the Siegels and DC and that accordingly, DC could only have transferred nonexclusive film and television rights to Action Comics No. 1 to Warner Brothers?

A: What I --

MR. BERGMAN: Objection. Leading.

THE COURT: It is, but it only goes to the foundation of his opinion. I will overrule it. You may answer.

THE WITNESS: What I looked at was on the face of the film and television agreements, the rights that were transferred by Warners under those agreements. And that's what I assessed.

BY MR. TOBEROFF: Q: And what rights were transferred?

A: The rights that were transferred basically were film rights, the television rights were frozen under the film agreement, and merchandising rights were reserved by DC.

Q: And of those rights, which rights were exclusive – in your understanding, which rights were exclusive and which rights were nonexclusive?

A: All the rights that were -- the film and television rights -- well, under the film agreement, the film agreement rights were exclusive. And under the television rights, the television rights were exclusive.

Q: Of the --

A: I understand. It's a little tricky because under the film agreement, the television rights were frozen.

Q: I'm actually referring to the issue of exclusivity and nonexclusivity.

A: Right.

Q: As brought up by this court in reforming those agreements.

A: Right.

Q: You understand?

A: I do.

Q: And you gave testimony earlier as to your understanding that only Action Comics No. 1 had been ruled to be co-owned and was therefore nonexclusively owned between DC and plaintiffs.

Do you recall that?

A: Yes, that's accurate.

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

MR. TOBEROFF: I'm sorry, your Honor?

THE COURT: It's sustained.

BY MR. TOBEROFF: Q: Do you remember your earlier testimony on this subject?

A: Yes.

Q: What impact, if any, does the nonexclusivity of Action Comics No. 1 have on the overall value of the film and television rights that were transferred by DC to Warner Brothers in the relevant agreements?

MR. BERGMAN: Objection. Lack of foundation, your Honor.

THE COURT: I'll permit you to get your opinion, but I want to hear the basis for it so I can evaluate whether there's foundation for it.

You may answer the question.

THE WITNESS: Well, it's easier -- okay. You want to repeat the question?

(Record read.)

THE WITNESS: If you could -- I'm a little bit tired or confused. If you could restate that. That would make it easier for me.

BY MR. TOBEROFF: Q: Let me go back to the subject.

A: Okay. I'm just a little tired.

Q: Yesterday Mr. Bergman took you through a number of agreements, and he asked you whether you would enter into those agreements or the Superman film agreement.

A: I remember that, yes.

Q: In terms of licensing the film rights to Superman.

A: Correct.

Q: You remember that line of questioning?

A: Yes, I do.

Q: He looked at the Superman film agreement. And then he would take a Hannibal agreement and another film agreement and said would you license Superman under the Hannibal agreement.

A: Right.

Q: Were any of those agreements actually for the property Superman?

A: No.

Q: Were any of those agreements in your opinion for a property as prominent or valuable as Superman?

A: No.

Q: If you were representing DC and the rights to be licensed with the film and television rights to Superman, would you or would you not have entered into any of those agreements mentioned by Mr. Bergman without further negotiation?

A: No.

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

BY MR. TOBEROFF: Q: Why is that?

A: Well, basically, my approach had -- the two most important things, one was looking at the value of Superman relative to the underlying properties of the other agreements, and then look at the sort of the value in the marketplace that agreements received based on the agreements that I looked at.

So what I would do is think okay, if I was representing Superman, and there was a fair market deal in an independent marketplace, what sort of terms would you be able to achieve. So that's the way I looked at it.

Q: Now, with the benefit of hindsight, we could theoretically plug in the actual revenues from Superman Returns into the various agreements you discussed

with Mr. Bergman. Would you consider that a useful exercise in your analysis or not a useful exercise?

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: That would not be a useful exercise since you'd have to look at the deals made and evaluation of the properties done as of the date of the agreement.

BY MR. TOBEROFF: Q: Why must you look at the date of the agreement?

A: Because, as we've discussed, you don't -- you don't look at whether agreements are fair market value based on hindsight because remember we had the discussions you can't look at the future. You don't know what the future will be. Investors, whether it's a stock, we try to look at future and try to predict as best we can what it will be. But as of 2002, there was no Superman Returns. And under the agreements, the film agreement that was entered into, there was absolutely no guarantee, as is customary and as reflected in these massive documents, that if a motion picture based on Superman was not developed and produced and distributed, that DC would get the rights back.

And even if -- and even if in the future someone thought there would be a Superman Returns, there would be no way of knowing whether there would be, you know, another Superman movie after that. I mean, we've had one Superman movie since 1987.

And as of 2002, there hadn't been a Superman movie in quite a long time. And there was -- from the DC perspective, I -- and under these agreements, there was no way for DC to force the traditional mechanisms that make studios develop, produce, and release motion pictures based on intellectual property.

I think it's especially egregious here because you have a property of a massive value of Superman that, at least as far as motion picture distribution, which most people now think is the real engine to the value of these very highly valued properties --

THE COURT: Counsel, ask your next question.

BY MR. TOBEROFF: Q: If you did take into -- if you did judge value in terms of actual performance, how would you know where to draw the line in time?

A: Well, the --

Q: Would you be able to know where and when to draw the line in terms of future performance?

A: You wouldn't because you would have no way of knowing what movies would be produced and when they would be released.

So it would be impossible, virtually impossible to predict the value that one would predict at the time under the agreements that were actually entered into. That applies to both the film and the television agreement. Under neither was there any sort of guarantee, nor were there traditional mechanisms that I know from my experience if in fact the studio was not going to exploit, that the rights would come back.

So the rights holder could seek to magnify the value of those rights as Marvel has done and others that I've described.

Q: Moving on to a different subject, the subject of reversions. You testified regarding the tremendous importance of reversion provisions to the owner of a franchise property with a proven track record and that it is customary to include such provisions in licenses for such properties.

My question is how do such reversion provisions usually function?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained. Rephrase.

BY MR. TOBEROFF: Q: You spoke -- you testified at length about the tremendous importance of reversion provisions. How do those reversion provisions usually function?

A: Well, you have to look at the reversion in the context of the agreement. The way these usually work is there's an option period when the rights are not really -- the production distribution rights are not granted, but the studio has a short period of time, typically two to three years, to develop the property and then make the decision whether it wants to purchase the motion picture rights.

What a reversion does is once -- typically once they have exercised that option and paid the money, if they don't make the picture, after a period of time, even though they have exercised the option, those rights will come back to the rights holder, and it's out of fairness because the rights holder wants to do -- wants the -- the value that they are getting from the deal is the fact that the studio actually produces and distributes the film.

So if they don't distribute the film, then the rights come back. So the rights holder has a second bite at the apple, typically in the marketplace, you know, if, say, Warners doesn't want to do it, the rights will go back to DC, and then DC could go to Fox and say do you want to make the Superman movie or go to Universal and say do you want to make the Superman movie.

Q: What effect, if any, do such reversion provisions have on the right or obligation to making sequels based on the underlying property?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Overruled.

THE WITNESS: Especially because with high end properties, you want to make sure that there is continuing movies made. You know, a good example is Harry Potter. There's been, you know -- there's going to be eight movies in like 11 years. You want to make sure that once a movie is made, that subsequent movies, if they are not made within a period of time, that right comes back, and then you could have a different studio make the sequels.

What you don't want to do is have just one picture made and then have a deal where there may never be another picture. So DC right now, Superman Returns is made, but there's absolutely no assurance under the film agreement that there will ever, ever be another Superman movie at any time.

BY MR. TOBEROFF: Q: Does the Superman film agreement have a provision that's called a reversion provision?

A: It does.

Q: What does that reversion provision provide?

A: That reversion is entirely uncustomary. What it provides is that so long as --

Q: Actually, I'll direct your attention to --

A: Can I look at it?

Q: -- paragraph 12 of Exhibit 232. It's located on page 13.

The Superman film agreement. I believe it's in your pile to your left.

A: Okay. It's a defendant or plaintiff exhibit?

MR. TOBEROFF: May we approach, your Honor?

MR. BERGMAN: Your Honor, I don't know the name or the title of the objection. But stopping the witness in the middle of an answer to ask another question has to be wrong.

THE COURT: Yes, well, it's not really another question. You're asking to look at the exhibit, as I understand it.

MR. TOBEROFF: I'm just trying to help him --

THE COURT: It's the same question.

MR. TOBEROFF: Same question. I'm trying to help him locate the exhibit to speed things along.

THE COURT: Okay. I'm not going to comment on that.

Bring forth the exhibit.

BY MR. TOBEROFF: Q: I draw your attention to page 12. Excuse me. Paragraph 12 on page 13, Bates No. WB 4211.

A: Okay.

Q: What does that provision provide?

A: It provides that if Warners fails to make a -- the so-called option payment, which, as we discussed, were basically 500,000, escalating to 600,000, escalating to 700,000 over time. If Warners failed to make one of those payments, then DC could notify Warner in writing that it desired a reversion. And then Warners would have a cure period of three months to make that payment, which would defeat the right to reversion.

This is very untypical because there's no mechanism here other than the payment of these -- in the context of Superman, very modest sums to allow DC, the rights holder, to get the rights back. What it means is that Warners can pay these modest sums for a period of time and completely lock up the Superman film and television rights and deprive DC of the obligation that even much lesser rights holders, including rights holders who have dealt with Warners themselves. They have the right to get it back if Warners doesn't keep going.

THE COURT: Let me ask you about this reversion issue. Does the fact that DC Comics and Warner Brothers are affiliates or related change your analysis in terms of the necessity for a reversion or the significance of a reversion contract of the type that you commonly find in these agreements?

THE WITNESS: The fact that they are affiliated, they should have this sort of agreement. If DC had an arm's length deal, they absolutely would have this sort of agreement, have these sort of mechanisms.

THE COURT: That's not my question.

THE WITNESS: Okay. Okay.

THE COURT: I certainly understand if one studio is dealing with a competing studio --

THE WITNESS: Right.

THE COURT: -- that the reversion agreement takes on certain significance. Because the competing studio may not have the same economic interest but have cross-economic interest vis-a-vis the studio they are entering into the agreement with.

Does the analysis change when you have affiliates of the same company, where they are essentially working for the same boss, as it were? Noting the divergence of the economic interest you have. What the competing does, does that change the analysis at all?

THE WITNESS: I think you have to start at the DC level and look at what's best for DC. The fact that --

THE COURT: So your answer is no, it does not change the analysis?

THE WITNESS: No.

BY MR. TOBEROFF: Q: Mr. Halloran, are you familiar with the entertainment industry term, quote, development hell, end quote?

A: I've been -- clients of mine have been stuck in it many times. I know what it is, yes.

Q: What does this refer to?

A: Development hell is the place that you are in when you're dealing with a studio and you have a property that's in development. The screenplay is being written, and it never gets made. That's development hell. And from a rights holder, that's where you don't want to be. You don't want to get stuck in development hell.

Q: Now, from the record that you reviewed, how long did it take Warner Brothers to develop a new Superman film resulting in the 2006 film Superman Returns?

A: My recollection was approximately 10 years.

Q: Moving on to a new subject. A great deal of time was spent the other day on the issue of producer's gross versus distributor's gross.

Are you aware of the approximate portion of total film revenues generated from the home video market?

A: As of 2002?

Q: As of the date of the Sahara agreement.

A: Okay. Approximately 50 percent.

Q: In the typical distributor's gross definition, what portion of home video revenues are included in distributor's gross?

A: 20 percent.

Q: If videos account for half of all revenues and the distributor's gross definition only includes 20 percent of home video revenues, approximately what percentage of actual revenues are going into distributor's gross if you can do the math?

A: I think the easiest way to look at it is half or so –

Just to make it easy, your Honor, the two basic models are a hundred percent of gross minus a small distribution fee minus expenses, and what's left goes into gross. The other model is that it's a percentage of that wholesale price. There are a lot of variables, but basically if you have a 20 percent royalty, that is likely at least only half of what would you get if you had either all the gross receipts minus the cost coming in or a 40 percent of wholesale royalty.

Q: What percentage of video revenues are typically included in a financing producer's definition of producer's gross?

A: It's typically a hundred percent of the total revenue received less a reduced distribution fee, say, 10 to 15 percent, less the actual costs of manufacturing and advertising of the DVD's and a hundred percent of the revenue that's left goes into the gross pot.

Q: Did Phillip Anschutz finance the film produced under the Sahara agreement?

A: Yes.

Q: On a different topic, Mr. Bergman questioned you on your testimony in another case regarding how negative publicity or controversy could actually benefit a film. Do you recall that?

A: I do.

Q: Can you think of any films where negative publicity or controversy benefited the financial bottom line of the film?

A: I can think of a couple. The Passion of Christ certainly was aided in large part by the publicity about the controversy of the Catholic church and its -- and the interview lent feeling among many Catholics, especially conservative Catholics, that the Passion of Christ portrayed Jesus Christ in a very unflattering way.

And, as you know, Passion of Christ was an independent film, so I think it's even more telling that it performed the way it did, given that controversy.

Q: Who directed that film?

A: Mel Gibson.

Q: Was there any controversy regarding Mel Gibson in that film to your knowledge?

A: You mean Mel Gibson surrounding that film?

Q: Mel Gibson with respect to the Passion of Christ?

A: There was a lot of controversy because Mel is a very devout Catholic. So there was the controversy about, you know, a devout Catholic against the Catholic church -- a devout Catholic financing and producing a film that many Catholics perceived as being not really respectful of Jesus Christ.

So there was that tension going on. And it got all sorts of controversy, and I think it, you know, certainly the Passion of Christ is, as commonly known, is driven by religious people who were interested, you know, in that controversy and otherwise.

There was a very large awareness which was attributed to by the controversy.

Q: Moving on to a new subject. You testified the other day and at your deposition that the Superman film rights could secure a purchase price of $30 million for an up-front purchase of the rights to make multiple Superman films. Is that your only opinion as to what the purchase price of the film rights would be on the open market or not?

MR. BERGMAN: Objection. Mischaracterizes the testimony and is leading.

THE COURT: Rephrase your question, Counsel.

BY MR. TOBEROFF: Q: Is your testimony regarding a $30 million purchase price, does that relate to the right to make a single film or the right to make multiple films?

A: The right to make multiple films.

Q: And is that your only opinion as to what the purchase price of the film rights to Superman would be on the open market or not?

A: No. That's actually the exception to what I think it would be. I think what DC would want to do as of 2002 would be to have the ability to license the picture on a one-picture basis with a customary reversion if the buyer did not continue to make motion pictures.

The $30 million came up in the context of the Terminator agreement, which is in evidence here, where the company that bought the terminator rights paid $25 million, but they bought the rights for Terminator 4, 5, and 6. I was trying to make it -- in the deposition what was happening was that -- when I was testifying, Mr. Bergman seemed to be trying to lead me to the opinion that it was $30 million for one picture, when that was never my intention.

So I think there was some confusion there. But certainly my opinion remains unchanged that in the unlikely event that DC would have gone to the marketplace in 2000 and sold all the movies, it would have been that price.

My opinion now is that it should have been at least $10 million on a per picture basis with the right to get it back.

Q: Now, you also mentioned an option payment as high as 3 million, using, you testified, a 10 percent norm.

A: Right.

Q: Is 3 million -- how do you arrive at the 3 million?

A: 3 million, assuming a $30 million purchase price, 3 million is 10 percent of $30 million.

Q: Do you believe if Superman was -- Superman film rights were offered in the open market, that it would entail an option?

A: That's highly unlikely.

Q: Why do you say that?

A: Given the universe of my knowledge of the industry and the universe of the agreements that I've seen, highly valued intellectual property oftentimes there's no option period.

The rights holder does not want to get stuck in development hell. Rather, there is an immediate purchase. That was done in Hannibal, and it was done, I believe, in the Red Rabbit and Rainbow 6 agreements, among others.

Q: Moving on to the Lord of the Rings agreement. You testified the other day that the Lord of the Rings merchandising rights were, quote, complicated, end quote.

What is your understanding of the scope of the licensor's merchandising rights in that agreement?

MR. BERGMAN: Objection, your Honor. In his report, Mr. Halloran did not mention or list the merchandising agreement in Lord of the Rings.

THE COURT: Counsel?

MR. TOBEROFF: I know we listed the Lord of the Rings agreement. I want to check whether he listed the merchandising aspect as well.

THE COURT: How much longer do you think you have at this point?

MR. TOBEROFF: I don't think I'd be finished by 5:00.

THE COURT: You don't think so?

MR. TOBEROFF: I think I need another half hour or so.

THE COURT: Okay. Well, in that case, I was hoping to get through with Mr. Halloran today. But we're going to have to come back tomorrow morning.

THE WITNESS: That's fine. What time, your Honor? 9:30?

THE COURT: 9:30. Counsel, just be mindful that the time is running out. You have about two hours and 20 minutes left.

MR. TOBEROFF: Oh, yesterday you mentioned -- you said five hours.

THE COURT: Right. The time has been going today.

MR. TOBEROFF: Did I use two hours today?

THE COURT: That's what I have here, Counsel.

MR. BERGMAN: May I ask, your Honor, what I have left?

THE COURT: You have eight hours and 20 minutes left.

MR. BERGMAN: Thank you, sir.

THE COURT: I don't recall what I said last night, Counsel.

MR. TOBEROFF: I'm not quibbling. I just want to clarify the time.

THE COURT: According to this, you have two hours and 20 minutes left.

MR. TOBEROFF: We started after the break. It's been cross-examination most of the day. So we were told yesterday five hours. And --

THE COURT: I may have misspoken yesterday when I looked at the clock, Counsel.

MR. TOBEROFF: With your permission, your Honor, could I try and wrap this up today, then? With your permission, I need to -- if that's the case, I need to --

THE COURT: I suspect Mr. Bergman has some follow-up as well. So we'll pick up tomorrow morning. But I -- I said 18 hours of cross-examination. And according to the chess clock, we're at 3:40. I may have given you the wrong number yesterday. I may have been looking at it. Because you've only gone this afternoon, and you went this morning.

MR. TOBEROFF: We started after the break this afternoon.

THE COURT: Right. At 3:15.

MR. TOBEROFF: It was about 3:40.

THE COURT: So an hour and 20 minutes, and then about 40 minutes this morning. So it's only been about two hours. So there's 40 minutes -- all right. I'll give you back those 40 minutes. I must have let the clock run during a break or something. But that's three hours.

MR. TOBEROFF: I appreciate that, thank you.

MR. BERGMAN: Thank you.

THE COURT: All right, very good. I'll see you tomorrow morning at 9:30.

TRIAL DAY 8

A.M. Session

Friday, May 8, 2009; 9:41 A.M.

WITNESSES: Mark Halloran (Cont'd), Paul Levitz

THE CLERK: Calling item number one on calendar, Case Number CV 04-08400-SGL(RZx), Joanne Siegel, et al., versus Warner Bros. Entertainment Inc., et al.

Counsel, please state your appearances for the record.

(Counsel state appearances as before.)

THE COURT: Good morning to you all. Mr. Halloran, good morning.

THE WITNESS: Good morning.

THE COURT: Counsel.

MR. TOBEROFF: Thank you, Your Honor.

THE CLERK: Mr. Halloran, please be advised you're still under oath.

THE WITNESS: I acknowledge that.

REDIRECT EXAMINATION (cont'd)

BY MR. TOBEROFF: Q: Mr. Halloran, you testified last week that you were aware of the Court's rulings, so far at least, that Action Comics No. 1 is co-owned by the Siegels and DC, and that notwithstanding the wording of the Superman agreement, DC, as co-owner, could only have transferred nonexclusive film and television rights in Action Comics No. 1 to Warner Bros. Did you consider this in writing your expert report?

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Yes, I did.

BY MR. TOBEROFF:

Q: How much of your report was devoted to this issue?

A: I recall it was about a page of the report. And, basically, my conclusion was that the fact that the transfer of rights was nonexclusive was not material because of the inability of the Siegels to compete with Warners.

Q: Switching to the subject of merchandising, when performing your analysis of the Superman agreements, did you assume that DC and Warner Bros. were acting according to the expressed terms of the agreement in question, or not?

MR. BERGMAN: Objection. Leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Did you base your analysis on the expressed terms of the agreements?

A: Yes, I did.

Q: Now, Mr. Bergman repeatedly, when he questioned you, read into the record that portion of the Court's pretrial conference order that stated, in effect, that the trial is to assess the fair market value of the film and television rights "transferred" by DC to TWEC, Time Warner Entertainment Company, pursuant to the Superman agreements.

Did DC "transfer" its Superman merchandising rights to TWEC in the Superman film agreements?

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: No. It reserved them.

BY MR. TOBEROFF: Q: Under the merchandising terms of the film and TV agreements, is Warner being paid by DC for the use of the title, logo, or any elements from Warner Bros.' Superman films?

MR. BERGMAN: Objection. Lack of foundation, and leading.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Did you review the Superman film and television agreements?

A: Yes, I did.

Q: Are you familiar with the merchandising provisions in the Superman film and television agreements?

A: Yes, I am.

Q: Under those merchandising terms, is Warner being paid by DC for the use of the title, logo, or any elements from Warner Bros.' Superman films?

MR. BERGMAN: Same objection. That is leading.

THE COURT: You've laid the foundation, but you've turned it from a nonleading question to a leading question. I sustaining the objection on foundation before, not leading, because you did say, "What is your understanding?" Now you've turned it into a leading question. So go back --

BY MR. TOBEROFF: Q: What is your understanding of those merchandising provisions?

A: My understanding is that the basis is that DC reserves the rights; however, if Warner Bros. chooses to produce either a film or television program, the merchandising revenue that DC gets from those rights will be -- 50 percent of that will be paid to Warner Bros.

Q: Of the revenues DC receives through Warner Bros. Consumer Products' merchandise licensing, is DC obligated to pay Warner Bros. 50 percent?

A: 50 percent with respect to so-called film-related merchandising, yes.

Q: Under your reading of the agreement, would this be a cost to DC?

A: Yes -- well, "a cost to DC," I'm not quite sure what you mean.

Q: In other words, DC is obligated to pay Warner Bros..

A: Yes. Yes.

Q: Is this 50/50 merchandising split for film-related merchandising an unusual provision, in your opinion?

MR. BERGMAN: Objection. Lack of foundation, and assumes a fact not in evidence that there was a 50/50 split.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: You just testified to a 50/50 split in the merchandising agreements that you reviewed. Is such a split common or uncommon in rights agreements of this nature?

A: It's common.

Q: Do owners of valuable IP with a prior merchandising track record sometimes retain a greater than 50 percent portion of the film-related merchandising, or not?

MR. BERGMAN: Objection. Leading.

THE COURT: Overruled.

You may answer.

THE WITNESS: Sometimes they do, especially --

THE COURT: You've answered the question.

BY MR. TOBEROFF: Q: Do you recall, through your review and knowledge of rights agreements, any examples where greater than 50 percent of film-related merchandising was retained by a licensor?

A: I believe Hasbro.

Q: Any others?

A: That's the one that I remember.

Q: Would DC receive any boost to its merchandising under the Superman film agreement with Warner Bros. if Warner Bros. never released a Superman film?

A: No. They would not get a boost.

MR. TOBEROFF: Thank you. I have no further questions at this time.

THE COURT: Redirect?

MR. BERGMAN: I have no further questions, Your Honor. But I do move that certain exhibits be introduced into evidence, and those are numbers 1118, 1122, 1123, and 1124.

THE COURT: Any objection?

MR. TOBEROFF: If I may just review those exhibits, please.

THE COURT: Sure.

(Brief pause.)

MR. TOBEROFF: Your Honor, if I may. 1118, which is the transcript from the Sahara case, we have no objection to those portions that have been placed into the record; but I believe it should only be in the record for that purpose.

THE COURT: Any other objections?

MR. TOBEROFF: 1119 --

THE COURT: He didn't ask for 1119. He said 1118, 1122, 1123, and 1124.

Correct?

MR. BERGMAN: Correct, Your Honor.

THE COURT: I've already ruled on 1119, I think.

MR. TOBEROFF: Thank you, Your Honor. I just need to look at 1123 and 1124, please.

(Brief pause.)

MR. TOBEROFF: No objection, Your Honor.

THE COURT: Very good.

As far as 1118, only those portions that were read, is that what you're seeking to introduce, or you're seeking to introduce the entire transcript?

MR. BERGMAN: That's acceptable, Your Honor.

THE COURT: Very well. You'll work on the redaction thereof. All four are admitted.

(Exhibits 1118, 1122, 1123, and 1124 are received.)

MR. TOBEROFF: Before we close our portion, I'd like to address some evidentiary issues on our side as well.

We'd like to have admitted into evidence -- I think you've already ruled on 326.

THE COURT: What is 326?

MR. TOBEROFF: The Rainbow Six agreement, Exhibit 326. We'd like that to be admitted into evidence.

And Exhibit 327 and Exhibit 325.

THE COURT: Any others?

MR. TOBEROFF: The documentary, the Warner Bros./DC documentary, "Look Up In The Sky."

THE COURT: And what number is that?

MR. TOBEROFF: Exhibit 303, Your Honor.

THE COURT: Any other exhibits?

MR. TOBEROFF: Yes, Your Honor.

Pursuant to Paragraph 13 of the Court's schedule order, the parties submitted a joint exhibit stipulation on January 13th. All exhibits to which there is no objection should be deemed admitted. We want to confirm on the record that

all of plaintiffs' exhibits in the stipulation, to which defendants did not object, are, indeed, admitted.

THE COURT: Well, if they're set forth in the stipulation, then they are admitted, yes.

All right. With respect to 326, 327, 325, and 303, are there any objections?

MR. PERKINS: Yes, Your Honor.

With respect to 327, which is the Red Rabbit agreement, this suffers from the same defect as The Sum of All Fears agreement. Paragraph 1.4 of that agreement makes reference to agreements for The Hunt for Red October, Clear and Present Danger --

THE COURT: Why don't you approach the lectern.

MR. PERKINS: Paragraph 1.4, Exhibit 327, has the same defect as The Sum of All Fears agreement. It refers to prior agreements that are not in the record. And, therefore, it's incomplete.

THE COURT: Does it incorporate those agreements in the same fashion as The Sum of All Fears agreement?

MR. PERKINS: It does, Your Honor. Paragraph 1.4 -- and I'll read it to the Court slowly -- "PPC shall retain its right pursuant to the prior agreements to produce studio-generated sequels, but PPC shall not initiate or develop any studio-generated sequel, i.e. any theatrical or television motion picture, using characters or materials from the novels The Hunt for Red October, Clear and Present Danger, Patriot Games, The Sum of All Fears, or the work or the motion pictures produced by PPC based thereon, but not following the same story line while PPC is actively developing as such term applies."

It then goes on to make reference in Paragraph 3.1, in talking about the "adjusted gross receipts" definition, 3.1, at Pages 5 and 6 -- it says -- and I'll quote the bottom of the page, "Adjusted gross receipts payable at any time prior to cash-break even, as such term is defined in the agreement made on November 18, 1998, between PPC and Jack Ryan Enterprises, Limited, relating to the motion picture project The Sum of All Fears, and which definition is calculated with no distribution fee," and so on.

THE COURT: Well, the first quote you made just made reference to the movies without incorporating anything, but the second one does seem to incorporate the prior agreements. I'll hear from the plaintiff on this.

Did you have any other objections to any of the other documents?

MR. PERKINS: I did, actually, Your Honor.

THE COURT: Let's get them all.

MR. PERKINS: Exhibit 303, which is the documentary, we object to the admission of that document, except for the portion that was played for Mr. Levitz during his testimony. It's a hearsay document, Your Honor; and although Warner Bros. was the producer, it is not the speaker of the commentary that's in that actual document.

THE COURT: Very well. Any other objections?

MR. PERKINS: No, Your Honor.

THE COURT: Very well.

325 and 326 are admitted.

(Exhibits 325 and 326 are received.)

THE COURT: Let me hear from the plaintiff on the other two objections.

MR. TOBEROFF: Regarding 327, this whole paragraph, I understand from the Court, the Court just said that the issue is 3.1 it does refer to The Sum of All Fears agreement, but we now have The Sum of All Fears agreement.

THE COURT: I excluded The Sum of All Fears agreement at your request.

MR. TOBEROFF: No. Respectfully, Your Honor --

THE COURT: Did I not?

MR. TOBEROFF: -- I believe you admitted it for the purpose of looking at a particular provision. There was a particular definition provision that you admitted in The Sum of All Fears agreement. And I would say that if the -- since we now have The Sum All of Fears agreement -- and this is only a single provision among multiple provisions in this agreement which we're primarily looking to for the basic deal terms -- that any alleged incompleteness would be resolved by the fact that we now have The Sum of All Fears agreement.

THE COURT: What was the agreement that we kept out yesterday morning?

MR. PERKINS: The Sum of All Fears, Your Honor.

THE COURT: I thought so.

MR. TOBEROFF: You admitted it for the purpose of the "GRP" definition, I believe, that's in The Sum of All Fears. May I read from the transcript?

THE COURT: Please. Refresh my recollection.

MR. TOBEROFF: (Reading.) "Perhaps the best thing is to permit Exhibit 1119 to be introduced for the purpose of providing the definitions being referred to therein, but not permitted to be introduced for the purpose of evaluating the overall agreement, because that's what I'm not clear that I have before me, is the overall agreement."

THE COURT: Counsel?

MR. PERKINS: Your Honor, that was your ruling. I don't know that the same provisions match up here. I don't think there's been an evidentiary showing of that. He had the witness --

THE COURT: That was my final ruling on that?

MR. PERKINS: Your Honor also allowed us to come back if we found something in the agreement to reargue this.

THE COURT: Well, neither side has moved 1119 into evidence, that I've heard. Warner Bros. moved 1118, 1122, 1123, and 1124, and all of the ones that are stipulated to. You moved 326, 327, 325, and 303.

MR. TOBEROFF: If it would help, I would move 1119 into evidence.

I understand that we opposed the subpoena in the process, but now that defendants have brought it in front of the Court, I believe we're entitled to use it in the case. I don't believe that this reference renders this agreement incomprehensible. It might go to the weight --

THE COURT: That was their argument yesterday, Counsel, that the references and the incorporations didn't render the agreement incomprehensible either.

MR. TOBEROFF: I never argued the incomprehensible of the agreement. They accused me of withholding The Sum of All Fears because they claimed that it wasn't good for our case, which is not true. And I merely explained that I didn't use it. Because unlike the other agreement that makes reference, it amends a number of -- it speaks that it amends a number of agreements, so I thought it was problematic to that extent.

But I would move that it be admitted solely for purposes of being able to refer to any paragraphs that are referred to in another agreement, not for purposes of its financial terms.

THE COURT: I'm going to take another look -- I'm going to have to hold off on this. I want to take a look at the transcript, because I don't remember letting in 1119 for -- I know we discussed that at some point, but let me take a look at where we are on that. Otherwise, it's kind of a goosey-gander rule here that may keep this one out.

As far as the tape, 303, your response there?

MR. TOBEROFF: My response is that the defendants' -- admission of a party opponent -- that the defendants' fingerprints are all over it. They financed it; they distributed it.

THE COURT: It comes in. I think I already overruled the hearsay objection on that.

The question is whether it's the portions that you played, as opposed to portions that you didn't play.

MR. TOBEROFF: And I'm addressing the entire documentary. I believe it should come in so that one can see the history of Superman in context of the dip in the 1970's in the portion that we played, because at issue in this case as well is that they claim that in the late '90s, Superman was a dying character due to the fact that the final film is -- people take pleasure in recognizing Superman IV as a flop. So their fingerprints are all over it. It's an admission of a party opponent, and it should come in.

In addition, Mr. Levitz was interviewed in that. Mr. Wade, their expert, was interviewed in that. The whole thing is an admission of a party opponent.

THE COURT: Very well. Did you have something further on this 1119, Counsel?

MR. ADAMS: Yes, Your Honor. Before the break, you said, "I'm permitting it for the limited purpose to the extent that this is referred to, but we're not going to use this as a basis for the Court's ruling. Move along." And then a recess was held.

THE COURT: So, then, the agreement is not in in its entirety.

MR. TOBEROFF: The Sum of All Fears agreement.

THE COURT: Right.

MR. TOBEROFF: And I would ask that it's in solely other agreement, 326, should be admitted, because it's not incomplete, since we can make reference to The Sum of All Fears agreement. That would be our position.

THE COURT: Very good. Is there anything further on the 303?

MR. PERKINS: Yes, Your Honor.

There is no evidence in the record from any competent witness that, quote, unquote, "DC's fingerprints are all over that documentary." That just simply is not the case. There was no foundation laid for that. And that does not make it a statement of a party opponent. If a studio produces a documentary, the statements in the documentary do not become the statements of the studio.

THE COURT: What about statements by the president of DC Comics in the documentary?

MR. PERKINS: Absolutely, Your Honor. We don't dispute that, which is why we're not seeking to exclude the portion where Mr. Levitz was interviewed, his words. What we object to is the narration that's being attributed to the defendants, which we think there's been no foundation for that; and it's frankly not accurate.

THE COURT: Yes?

MR. TOBEROFF: I'd like to read from a portion of Mr. Levitz's deposition regarding this -- it's from the trial transcript, at 224, Line 11, to 225, to Line 15:

QUESTION: " I'd like to show you what was previously marked for identification only as Exhibit 303. This documentary traces the history of Superman from its origin, from the 1930s up through 2006, with respect to the Superman Returns movie; correct?"

ANSWER: "I believe so."

QUESTION: "And DC provided information regarding Superman and also provided Superman materials to the filmmakers who made this documentary; correct?"

ANSWER: "Yes."

QUESTION: And DC and Warner Bros.' logo appears on the DVD of this documentary."

ANSWER: "I would assume so. Yep."

QUESTION: "And DC was provided with rough cuts of this documentary to review it for accuracy before it was finalized; correct?"

ANSWER: "We would be reviewing it for our brand management process, which would address how we wanted the materials to be portrayed."

QUESTION: "The documentary was financed by Warner Bros."

ANSWER: "Technically, I believe it might have been financed by Warner Bros. Home Video -- excuse me -- Warner Home Video, with one of its corporate entities, rather than Warner Bros. Pictures or Warner Bros. corporately. But I'm not sure."

QUESTION: "This Superman documentary was also distributed by Warner Bros.?"

ANSWER: "I believe the principal distribution of it was home video distribution."

THE COURT: All right. This is what I'm going to do: I'm going to sustain the objection to 327. I'm going to overrule the objections to 326, 325, and 303.

Certainly, in reviewing the documentary, if the Court cannot attribute any particular statements made in the documentary to anybody, that will go to the weight of the evidence in a very substantial way. But I think it's probably best just to introduce the entire documentary, and then let both sides argue as to what weight the Court should assign to various statements made in the course of the documentary.

(Exhibit 303 is received.)

MR. PERKINS: Thank you, Your Honor.

THE COURT: I'm going to keep 327 out. I'll sustain the objection on that.

Any further questions of this witness?

MR. TOBEROFF: No, Your Honor. Just one last housekeeping matter.

THE COURT: Okay.

MR. TOBEROFF: I'm referring to the stipulated facts appearing on Page 4, Line 16, to Page 7, Line 18, Facts 18 through 52 from the final pretrial conference order. I'd like to move that those facts be stipulated without objection.

There are certain objections that were made. They simply go to the corporate relationship and the fact that DC was owned directly and indirectly by TWEC at the time the agreements in question were entered into.

THE COURT: What page of the pretrial conference order?

MR. TOBEROFF: Page 4, Line 16, through Page 7, Line 18.

THE COURT: Does this relate to this witness?

MR. TOBEROFF: It's before we close our case-in-chief.

THE COURT: Okay.

"The following facts so stipulated shall be without prejudice to any evidentiary objection."

Okay. So there's no dispute between the parties as to these facts. I take it both sides -- the way I read this was that both sides were reserving potential objections to these facts.

MR. TOBEROFF: That's correct. That's why I'm bringing it up.

THE COURT: And you want to introduce all of them, labeled Paragraphs 18 through 52, on Pages 4 through 7; is that correct?

MR. TOBEROFF: Yes.

THE COURT: So I guess what we would do at this point is give Warner Bros. an opportunity to object to any of these, because you've stipulated to the facts; you reserved your objections. I know there's a lot of facts, so take your time to go through them, please.

MR. PERKINS: Thank you, Your Honor.

MR. TOBEROFF: Your Honor, we have no further questions of Mr. Halloran. You had asked me if this has to do with Mr. Halloran.

THE COURT: You may step down.

THE WITNESS: Thank you, Your Honor. It's been a pleasure.

MR. TOBEROFF: Thank you, Your Honor.

(Brief pause.)

MR. PERKINS: Your Honor, we've reviewed these, and we have no objection, except for Paragraphs 41, 46, and 47. These are three stipulated facts that

reference the Matrix motion pictures. We object on relevance grounds. There's been no testimony in plaintiffs' direct case regarding those.

THE COURT: Very well.

MR. TOBEROFF: We don't need those facts.

THE COURT: Very well. Then all are stipulated, except 41, 46, and 47 are out. Very well. The plaintiffs' next witness?

MR. TOBEROFF: Plaintiffs rest, Your Honor.

THE COURT: Very well. Defense's first witness?

MR. PERKINS: Your Honor, before calling our first witness, defendants at this time would like to make a motion for judgment on partial findings pursuant to Federal Rule 52 (c) .

We would move specifically as to the following:

First, that Time Warner, Inc., be dismissed from the case. There has been no evidence as to any contract to which it was a party.

We would move for judgment, Your Honor, as to the animation agreements. There has been no evidence adduced of the fair market value of the nonexclusive rights at issue for animation, let alone a showing that the animation agreements were not for fair market value.

THE COURT: That would be what you'd be asking the Court to find, that there's no evidence -- that they're not for fair market value?

MR. PERKINS: Correct.

THE COURT: Right.

MR. PERKINS: We would make the same motion with respect to the television agreement, that there has been no showing that there was no fair market value for the nonexclusive television rights granted thereunder.

And we would make the same motion with respect to the film agreement, that there has been no showing that we did not receive fair market value for the nonexclusive film rights that were granted.

THE COURT: Thank you, Counsel.

MR. PERKINS: Thank you, Your Honor.

THE COURT: Mr. Toberoff?

MR. TOBEROFF: Regarding Time Warner, Your Honor, we haven't -- I understand their argument -- we haven't heard all of the evidence, and we haven't heard all of it in the process of cross-examining their witnesses. Evidence may be elicited as to how and to what extent Time Warner is involved.

THE COURT: That's not the standard, Counsel. Your case is done. You just rested. Your case is done. We could walk away right now. The question is, walking away right now, you have to establish, as the plaintiff, certain elements with respect to this.

MR. TOBEROFF: I understand.

THE COURT: Obviously, the Court will consider any evidence, but Warner Bros. could walk out of the courtroom right now. That's what they're saying, that if they walked away right now, is there sufficient evidence?

Start with the first one.

Time Warner International.

MR. TOBEROFF: I understand.

As you know, the heart of plaintiffs' case is a claim for declaratory relief. And declaratory relief claims are viewed quite broadly, and they encompass -- the claim would not only encompass what Warner Bros. and DC are currently doing, but I believe any ruling should encompass and limit what Warner Bros. and DC can do in the future.

For instance, if you found that the covenant agreement was for -- one of the covenant agreements was for fair market value, since DC, Warner Bros., and Time Warner -- they're all part of Time Warner -- we would ask for a ruling in the case that they could not, within the Time Warner family, change the elements of those agreements in such a way to further dilute --

THE COURT: What I'm looking for right now, Counsel, is -- point to the Court to evidence in this trial that supports your contentions with respect to the four areas that the defense has sought partial judgment on.

MR. TOBEROFF: I understand. But what I'm arguing is, the evidence that we present in this case would be viewed in the context of our pleadings and the ultimate relief in this case; and if Time Warner is let out in the case, there would be a gap in any ultimate rulings by the Court, because the parties are all

part of Time Warner. And the evidence has shown that the parties are vertically integrated as part of the Time Warner family.

THE COURT: What evidence is that?

MR. TOBEROFF: That they are part of the Time Warner family?

THE COURT: Yes.

MR. TOBEROFF: They just stipulated to it. The stipulated evidence shows that these parties are owned, indirectly owned, but they're owned by Time Warner.

THE COURT: Now you're making an argument, Counsel, citing evidence in this case.

MR. TOBEROFF: Thank you, Your Honor.

I believe that if Time Warner is let out, there would be a hole in the effectiveness of any rulings of the Court, because it's been established that the companies are owned by Time Warner and are integrated within the Time Warner conglomerate.

THE COURT: Anything further on this point, Counsel?

MR. TOBEROFF: That's the gist of it, Your Honor.

THE COURT: Okay. Anything on the second point, with respect to the animation agreements?

MR. TOBEROFF: The animation agreements, there has been -- first of all, the animation agreements themselves are admitted into evidence. The animation agreements show that there are very small amounts of money paid to DC under the animation agreements. The agreements, to a large degree, speak for themselves. They also show that the agreements are weighted heavily to DC's contingent compensation, but that that contingent compensation, which is roughly 30 percent of defined proceeds -- the evidence has shown that "defined proceeds" is a fancy name for what used to be called "net profits," which are the net profits that received such a bad reputation, because they rarely, if ever, result in any money to the participant due to the way they're defined.

Mr. Halloran did give testimony as to that specific point, so there is record evidence, in terms of the agreement itself, that the terms of the animation agreements are not favorable to DC, are detrimental to DC, to the benefit of Warner Bros.

Similarly, with respect to the TV agreements, the agreements themselves are in the record. The live-action television agreement of the Smallville television agreement, the testimony has shown that that agreement is weighted, as well, towards a contingent participation of 3 percent, going to 5 percent of the gross; that the film agreement and the freeze on television and the film agreement, which -- we've also introduced evidence in the film agreement where -- and pointed to the paragraph in the film agreement which essentially freezes all TV rights for the remaining life of the copyright at that time, 34 years, and with no obligation to exploit the TV rights. So, even though under the TV agreement, the rights would come back after Smallville, DC could not exploit those rights unless Warner Bros. felt like doing another TV series.

And they're not obligated to do another TV series. So, in many respects, the TV provisions in the film agreement hang like a dark cloud over the TV agreement.

In addition, we've submitted evidence of the Birds of Prey agreement, which is in the record. And the Birds of Prey agreement -- again, using the analogy, if you have a hundred people at a cocktail party, every single one would know Superman and the story; it's doubtful how many people would even have heard of Birds of Prey. Yet, Birds of Prey, we showed, received the exact same contingent gross participation as what we would view as a much more valuable property, Superman.

When a much lesser property receives the same compensation as a much more valuable property, the inference is that the valuable property did not get fair market value.

We also have in evidence the Superboy agreement. The Superboy agreement is interesting, because it's a true third-party agreement, and it's between DC and one of the Salkind companies. Excuse me, I'm not -- I don't have the name of the company; I'm not positive it's one of the Salkind companies. I believe it was one of the many Salkind companies.

The Superboy agreement was entered into in the 1980's, when superheroes were not hot entertainment properties the way they were in 2001 when the Smallville agreement was entered into. Yet, the Superboy agreement provides a gross participation -- not of 3 percent, going to 5 percent of worldwide gross -- it provides a gross participation of 71/2 percent of domestic gross. And we heard testimony that at that time, foreign revenues accounted for less than a third of worldwide revenues. And from there, our expert articulated that the

71/2 percent of worldwide gross in the Superboy agreement is comparable to roughly 6 percent, nearly double the 3 percent, up to $1.5 million.

On the TV side, we also heard evidence from the witness that much of defendants' case is based on nonexclusivity, and we heard repeated evidence that although Action Comics No. 1 is nonexclusive, that due to plaintiffs inability to effectively compete without foreign rights -- and you get people to finance a movie of the week, or any other television exploitation, that there's no -- the devaluation of the television agreement due to plaintiffs' inability to effectively compete.

We also heard evidence that, like in the film agreement, where defendants simply adopted, in a rather perfunctory manner, the basic deal points of a 1974 agreement -- that with the TV agreement, there was a similar casual and perfunctory negotiation, where I established with Mr. Levitz's testimony that they simply Xeroxed a 1991 agreement relating to Lois & Clark, where two points are of interest; one, the fact that they didn't actively negotiate something and just use the prior agreement, it's rather perfunctory; and, two, that the parties adopted an agreement from 1991, where we presented evidence to show that in 1991, superheroes, as a valuable commodity in Hollywood, had not reached the point as in 2001, after very successful films like Men in Black and X-Men had come out.

THE COURT: Anything further, Counsel?

MR. TOBEROFF: Just in addition on the nonexclusivity issue, as with regard to TV and film as well, we heard evidence that due to the -- and the document speaks for itself -- that due to DC's warranty and indemnification, it held exclusive rights to Warner Bros., and that after the termination, to the extent Warner did receive any less value or damage by the termination, DC has essentially provided the economic equivalent to Warner Bros. of exclusivity by warranting and prompting to indemnify them for any loss or damage for anything less than exclusivity.

Moving on to the film agreement, the record is filled with evidence regarding the fact that the film agreement was really not for fair market value. We have evidence -- well, first in this task, we looked towards the question of, How do you value Superman? We know it's very famous; we know it's been around for a long time; but how do you value it?

And to aid the Court in that evaluation, we heard expert testimony, from both Mark Evanier and from Mr. Halloran, that there was a convergence of several important trends in 2002: The rise of franchise motion pictures, the rise of tent pole pictures, the importance of what is called pre-awareness or branded properties, so as to ensure a large opening weekend and how that large opening weekend of a film is seen as a barometer for the success of the film, being able to open big, and how that pre-awareness is so important for that.

We additionally had extensive evidence that in 2002, comic book properties had really become a hot commodity in Hollywood. I think that's fairly incontrovertible.

We also supplied evidence that by comparison, in 1974, when they simply adopted the economic terms of the 1974 agreement, even Warner Communications, which owned DC, had no interest whatsoever in exploiting Superman. They didn't even have interest in exploiting Batman. We established that as well. So DC went and made a deal with a third party.

Now we're in 2002, where every studio in town was developing comic book properties. They simply adopt terms from the 1974 agreement, where we presented evidence that Superman was at its lowest point on the nadir in its commercial history.

We've also shown that the fact that the Superman film, the first one, did extraordinarily well and was widely recognized as a big hit -- the fact that the second, third, and then the fourth declined did not devalue the property significantly, because we showed that the same thing happened roughly with Batman. And Warner Bros. has essentially taken the position with these projects, even if they decline, part of the value of a Superman or a Batman is that they can be rebooted, because the pre-awareness is so strong and such a part of our public consciousness that they can be rebooted and re exploited; and that, in fact, goes to their value.

Warner Bros. very successfully rebooted Batman, in a film called Batman Begins in 2005; and then The Dark Knight, which was a huge success. And their intention in 2002, when they made the film agreement, was to reboot Superman. And the evidence shows -- Alan Horn -- that they plowed millions of dollars into development. We showed, in fact, that they had started developing the project in 1994. And there's evidence in the record of scripts that were written for Warner Bros. in 1994. So, from 1994 to 2006, they plowed millions into a property which they now claim was a devalued or a dying character, and

proceeded to spend -- our evidence is approximately $400 million. You don't do that with a property that you think is in decline and not valuable. You do that with a property that you think has tremendous pre-awareness.

When you put $400 million into something, you expect to make a big property. So they were betting heavily on Superman, which is a recognition that when they entered into the transaction in 2002, they greatly valued it, for the reasons we've mentioned.

We also have in the record -- not one, not two, but multiple agreements for properties, unlike Superman, where you have $1.5 million up front, you have multimillion-dollar purchase prices. Holders of high-level intellectual property, we've shown by the evidence, not only want a lot of money for their properties, they don't want to mess around with options and what we've described as "development hell". They want a commitment; they want a guarantee that they will receive money for their valuable property. And these agreements show $6 million, $7 million, $10 million up front for properties.

You don't have to be an expert to look at those properties and recognize that a single novel, even by a well-known author, is less valuable than Superman that has such strong branded pre-awareness and a consistent track record in merchandising, radio, film, television, for 70 years. You don't have to be an expert to realize that. Yet, we have expert testimony as to each of these various properties and as to the properties that defendants are using in their comparison.

So we have effectively shown that if we come forth with multiple agreements, where the properties are valuable --we don't dispute that Hannibal is valuable. We don't dispute a Tom Clancy novel is valuable. But if you come forward with agreements that are of equal value or a lesser value than Superman, with much better terms, that is evidence that the terms of the Superman film agreement was not for fair market value. And we've done that. And the key points are -- reversion is a key point, locking up the property for 34 years. But we must not forget that we also have strong evidence that we have contingent compensation that is double and more, 10 percent, and in some cases, the Timeline agreement, going to 20 percent. We have up-front payments, as I said, of $10 million or $7 million.

When you combine the evidence with the fact that they essentially use the economic terms for a 1974 agreement, when Superman was at its low point, and use that, oddly, at a time when Superman was at its high point, and you

combine that with the agreements that have been negotiated in the open market, and then you take into consideration that the agreement they entered into in a rather perfunctory fashion was in the context of a vertically-integrated relationship, where DC was essentially negotiating with its owner, you have a situation that, to me, screams that this was not a fair market deal, when judged in terms of the deals that are entered into in the open market. And the agreements that are in the record, which Your Honor will see in the record, they have -- when you look at them and you look at the detail in which the terms have been negotiated, and you look at all of the provisions -- and they're very complicated -- which are essentially meant to stop the studio from taking advantage of the rights holders and to protect the rights holders' interest, and to protect creative controls, which go to economic interest when you're dealing with a pre-banded property, and to make sure that they are paid on time, and audit provisions that are exercised --

All of the things that go into an arm's length agreement, they have a -- I don't know what the word is -- a smell to them of highly-negotiated, arm's length, fair market deals. The properties have been put up in the open market.

They've negotiated. Both parties have the ability to say no, to walk away. The agreements have that kind of fully-negotiated smell to them.

When you look at the Superman film agreements and the Superman television agreements, they have a completely different smell. And I don't believe that -- I believe that this is clear from what we've shown in the record. Certainly, it doesn't support the motion -- the evidence certainly defeats the motion by defendants at this time.

THE COURT: Thank you, Counsel. Any further response?

MR. PERKINS: Thank you, Your Honor.

Going back to Time Warner, Inc., for a moment, Time Warner, Inc., is a defendant in this case solely by virtue of an alter-ego claim that was made. And the Court effectively disposed of the alter-ego claim on summary judgment. In lieu of that, it made a finding that there was a concern, specifically about the fair market value of these agreements that had been entered into, which is why this portion of the trial is going forward.

It's clear, Your Honor, that the plaintiffs have shown no evidence that Time Warner, Inc., belongs in this case. There's no evidence that they are a party to any of these agreements. It appears that the plaintiffs are seeking --

THE COURT: What specifically are you asking, though, Counsel? Are you suggesting that they have no portion in this particular aspect of the case, or the entire case?

MR. PERKINS: I think the entire case, Your Honor, because Your Honor's summary judgment ruling made it clear -- there was a footnote in that ruling that made it clear that there's been no evidence shown that they really belong in the case. And the only way that Time Warner -- and, frankly, Warner Bros. -- belongs in the case is if Your Honor finds that somehow they have an accounting responsibility by virtue of these agreements not being for fair market value.

Here, Time Warner is not -- they are not a signatory to any of these agreements. So the chain really has been broken, Your Honor. The moment that the alter-ego claims went by the wayside, Time Warner, Inc., really no longer should be in the case. There's no evidence that's been presented on their case at this point.

So, yes, we would move that they be dismissed from the case entirely, because this question is really the only thing that's keeping anyone other than DC Comics in this case.

THE COURT: As I understand it, based on the relationship, WCI is an indirect subsidiary of Time Warner and WCI basically owns Warner Bros. and DC Comics.

MR. PERKINS: Correct, Your Honor.

THE COURT: So, theoretically, Time Warner could sell that WCI to somebody else tomorrow.

MR. PERKINS: That's right.

THE COURT: And your position is, this case would be of no moment.

MR. PERKINS: That's correct, Your Honor.

There just simply hasn't been a showing that these entities are alter egos of each other. They are separate entities, and there's been no evidence to the contrary.

Arguments about vertical integration aside, the way that they may interact with one another in terms of whether or not there is an alter ego here, that's simply not been shown. I believed, by Your Honor's last ruling on summary judgment, that that claim really had been dismissed, and that this is really an equitable

proceeding to deal with the narrow issue that Your Honor was concerned about after the summary judgment motions were briefed.

THE COURT: Very good. As for the other three agreements, the Court is definitely going to take those under submission at this time. You'll have an opportunity for further argument later.

MR. PERKINS: Thank you, Your Honor.

THE COURT: I'll hear further argument on this Time Warner issue, Counsel. I understand you're making a practical argument. I just am not seeing the legal argument at this time.

I understand the relationship, but I'm not cognizant of any evidence. If you can point to something in the stipulations or in this trial which indicates that Time Warner, as opposed to Warner Bros. and DC Comics -- I can see your argument, based on the evidence in this trial -- certainly, I have yet to make a decision on this, because there's a lot more evidence to consider.

You can make the argument that Warner Bros., for the reasons I stated in my summary judgment order, may very well be involved in this. But where is the evidence that Time Warner is involved in this deal in any way?

MR. TOBEROFF: I would refer the Court to the stipulated facts, particularly 31, 32, 33, 34, and 35. Among those facts, one of the important facts is that DC, in looking at the vertical --

THE COURT: Let's not go to conclusions. 35 talks about DC Comics' relationships with Warner Bros. That's not what I'm talking about here. Right?

MR. TOBEROFF: The reason I pointed to 35 is because it's based on the declaration of Paul Levitz, where they say they report to Time Warner, Inc., through Warner Bros. Entertainment. It's just one of the facts. I'm not saying that fact is dispositive.

We also have in evidence that Warner Bros. -- that New Line Cinema, which was formerly a separate company owned by Time Warner -- there were two companies that basically consistently exploited DC comic book properties; one was Warner Bros. Entertainment, Inc., and the other was New Line Cinema.

We had testimony that New Line -- and, basically, it's the same. They don't go outside the Time Warner family in exploiting these properties. We've shown evidence of that.

And Time Warner -- and New Line was owned, at the time of certain agreements, by Time Warner, and then absorbed into Warner Bros. Entertainment.

THE COURT: I understand these companies are related.

I understand they're very related. That's not the issue.

MR. TOBEROFF: Based on the relatedness, plaintiffs have a concern that these assets, just as if they were transferred by DC to Warner Bros., could then be retransferred, kept within the Time Warner family.

THE COURT: That's a judgment issue, Counsel. That's an issue that we'll take up if -- at the end of the day -- at the end of the case, if there's a judgment against DC Comics and/or Warner Bros., and you believe that the money has been pushed off to Time Warner, I suspect you'll know how to address that at that time.

But the question here is, could there be, based on the evidence, a judgment against Time Warner itself?

Counsel is saying, no, there's no evidence of that.

All you're responding to is that from a pragmatic standpoint, because they're related and because the money goes back and forth, we should just keep Time Warner in the case. That's not a sufficient argument. It's not a sufficient legal argument.

MR. TOBEROFF: I think, just to put a cap on it and then -- the concern is that part of your ruling in this case would have prospective implications, and there's -- because, basically, the task -- what you've set out as your task is to make sure the agreements are equitable. We're talking about equity. And in that, there's broad discretion. And the concern is that there may be a prospected portion to any judgment or any ruling, and we would want to make sure that the ruling sticks and is not circumvented by, for instance, transferring Superman assets to another Time Warner entity. So if Time Warner is not a party to the agreement, then it wouldn't be bound by -- it may not be bound by your rulings.

That's our -- I'll have more clarity in the future as to why I'm concerned about it.

THE COURT: This Court certainly is mindful of the importance of enforcing its orders and enforcing its rulings.

And as attorneys in other cases have found out recently, the Court will go to great lengths to make sure that what you're worrying about does not happen.

However, the question remains. At this point, we're talking about liability. We're talking about whether or not a judgment can be entered against a particular entity. And I'm straining at this point, given the Court's earlier ruling, given the evidence in this case, to see how judgment could be imposed directly on Time Warner, given the evidence so far.

Outside of your practical concerns, is there any other evidence that you would point the Court to at this time?

MR. TOBEROFF: No, Your Honor.

THE COURT: Very well.

MR. TOBEROFF: Thank you.

THE COURT: I'm going to take this under submission as well, but the Court may very well rule on this point separate and apart from the other three.

Anything further on this?

MR. BERGMAN: My colleague, Mr. Perkins, has argued the point ably.

Could I put in one minute on the overall question of whether judgment should be answered?

THE COURT: You may.

MR. BERGMAN: Your Honor, we have heard an enormous amount of evidence. We have seen a lot of agreements; 20, 25, 30. Not one of the agreements deals with nonexclusive rights. Not one shred of evidence deals with nonexclusive rights.

Your Honor has made it clear, and has withstood several motions for reconsideration on this point, there has been no proof on the very question that Your Honor has made this trial rotate about. That is, has there been any evidence as to the fair market value of the nonexclusive rights that were transferred and the amounts paid thereunder?

And with all due respect, Your Honor, there hasn't been any.

Thank you.

THE COURT: Thank you, Counsel.

Let's take a brief recess. When we come back out, the defense may call their first witness.

(Whereupon, a brief recess was held.)

THE COURT: Counsel.

MR. BERGMAN: Your Honor, the defendants will call Mr. Paul Levitz as our first witness.

THE CLERK: Do you solemnly state that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes, I do.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Paul Levitz, L-e-v-i-t-z.

DEFENSE CASE

DIRECT EXAMINATION

BY MR. BERGMAN: **Q:** What is your occupation, Mr. Levitz?

A: I'm the president and publisher of DC Comics.

Q: And how long have you been employed in one capacity or another by DC Comics or its predecessor, National Periodical Publications?

A: I've been working with or for DC Comics since the end of 1972; so approximately 36 years.

Q: How old were you when you started working with DC?

A: Sixteen.

Q: Am I correct that in those years, you have occupied a number of positions?

A: Yes, sir.

Q: Could you briefly describe what those positions were, giving us some rough time period.

A: Certainly.

I began working for DC as a freelance writer, originally doing things like text pages and letter columns in the comics. My freelance writing continued from 1972 to approximately 1989, overlapping many of the other positions, during

the course of which I did a fair amount of writing of the actual comic books themselves. I began to work a more "staff" job as an assistant editor in the summer of 1973, and I did that through the beginning of 1976. At the beginning of 1976, I came on staff full-time as an editor and what was defined as editorial coordinator, which was basically a position responsible for the administrative side of the editorial process; schedules, talent relationships, payments, things like that.

Q: Okay.

A: I served in that capacity beginning of 1976 to the fall of 1980. In the fall of 1980, I became the manager of business affairs, and in January of 1981, I received a much broader range of responsibility and basically, although the title didn't initially change, as manager of business affairs, I became responsible for the business side of the company, reporting to the president of the company.

Q: At that point, Mr. Levitz, could you describe what it was you were actually doing in that position commencing in January of '81?

A: It was a very diverse set of responsibilities that evolved over time, but it included overseeing the existing financial department of the company, the existing, rather rudimentary sales and marketing functions of the company and building that into a more sophisticated operation; becoming the contract signatory and reviewer for virtually everything that the company entered into as an agreement; setting up a business affairs department or contract department for the company; setting up a licensing department for the company to work with the corporate ancestor of Warner Bros. Consumer Products, which was our agent at the time; devising new forms of ways of working with freelance talent contractually; generally, anything that was on the business side. As we began to do more film and television work through that period, I began to assume responsibility for negotiating those contracts as well and started to negotiate basically any major agreements that the company had.

Q: Thank you. What position did you move on to next at DC?

A: The responsibilities remained relatively similar, but the title changed in 1982 to vice president of operations, recognizing that I essentially was functioning as chief operating officer of the company; and in 1985 to executive vice president. The next significant change in the responsibilities of the position was in 1989, when the title was changed to executive vice president

and publisher to acknowledge that I additionally had the responsibility for the editorial departments, shared with the president of the company who was then president and editor in chief.

Q: And what was that person's name?

A: Jeanette Kahn.

Q: And when did you move from executive VP and publisher and president to publisher?

A: In 2002, we went through a transition process where Jeanette left to become an independent producer, and my title changed to president and publisher, and I assumed some of her previous responsibilities and rearranged other things in the process.

Q: You mentioned that you were a freelance writer as late as 1989. Do you mean that you actually wrote comic books?

A: Yes. It was custom and practice in the comic book industry from its earliest days that the salary structure for creative individuals was somewhat underpaid, and we were encouraged to make up the economic difference by writing as well and billing for that, doing that on an independent contract basis on the side.

MR. TOBEROFF: Objection as to the testimony being nonresponsive as custom and practice in the comic book industry.

THE COURT: Overruled. Next question.

BY MR. BERGMAN: **Q:** Could you briefly name some of the comic series that you have written for.

A: The longest run I did, and probably most the noteworthy, was on a strip called Legion of Superheroes, but over the years, I've probably written every major DC character; work on Superman; a little bit of work on Batman; Wonder Woman; Aquaman for a long stretch; and many characters and properties that are less noteworthy.

Q: What writing did you do in connection with the Superman property?

A: I wrote probably a dozen or 15 Superman stories for publications like DC Comics Presents, which typically featured Superman with other DC characters; I wrote some Lois Lane stories; and most notably, I did a two-year run on the Superman newspaper strip from approximately 1979 to 1981, I think.

Q: Have you achieved any recognition in the comic book industry in connection with your writing activities?

A: One of my stories for the Legion of Superheroes, a story entitled The Great Darkness Saga, was recognized by the readers of a trade publication, the Comic Book Buyers Guide, as being one of the dozen best stories of the 20th century.

Q: Have you published any articles or given any interviews in comic trade publications?

A: I've published numerous articles in comic trade publications, going back to my time as an editor and publisher of one of the early comic trade publications, The Comic Reader, before I joined DC. I've written for publications as diverse as the Comics Journal; the different program books for the different major comic book conventions in New York and Pittsburgh and San Diego Comic-Con. Over the course of my writing, I've written for everything from Seventeen magazine to the Monster Times, pretty much always about comics.

Q: Okay. We heard earlier from Mr. Evanier about the Comic-Con International Exposition in San Diego. Are you a regular attendee at that convention?

A: I've attended Comic-Con since the first one Mark drove me to, I think in 1974; and I've probably attended 30 of the 40 Comic-Cons that have gone on in San Diego.

Q: When you said 'that Mark drove you to,' were you referring to Mr. Evanier?

A: Yes.

Q: Do you have a good relationship with Mr. Evanier?

A: Mark and I have been friends since I was a kid putting out fanzines, and I published some of his columns in my fanzine.

Q: Can you describe within the context of Comic-Con what it is that DC does at Comic-Con each year.

A: Certainly.

Comic-Con is a unique event in that it is simultaneously a trade event and a consumer event; so during the course of the five or six days, we meet with the general public, put on panels to promote our projects or to recognize individual artists; we put up a booth that is probably roughly the size of this courtroom

that people pour into over the course of the entire weekend to meet the writers and artists, occasionally the actors and directors from the films that we're doing. We will have displays there of upcoming material, video monitors showing trailers, clips, other sorts of promotional material.

Simultaneous with all of this, there's also a series of business events going on where you'll have meetings with everyone from printers, suppliers, international publishers of our material, writers and artists about prospective deals. It's not unusual to ceremonially sign a contract for a new Project at Comic-Con. You may meet with a lawyer for a writer, an artist, in the course of the convention, or conduct any other form of negotiation or discussion.

It's a very important event to us, both for the contact with the consumers, but also for showing our writers and artists that we support their work appropriately and for the opportunity to meet with them, since they are scattered all over the world and it's a rare case where a large number of them are gathered together.

Q: We heard from Mr. Evanier that he was active in the area of artists' rights.

Do you share that activity?

A: Mark and I have a great deal of common history in that area, including both having been on the editorial board of the first Who's Who of American Comic Books, which is one of the pioneering efforts simply to get the artists' work attributed to them. The early days of comics were not particularly kind to writers and artists in all situations, and even the mere acknowledgment the work was theirs was very important. I'd like to think that I have done quite a number of things over the years in my time at DC to work in favor of writers' and artists' rights, and I have been active in a number of ways outside of DC.

Q: Have you or did you over the years, until his untimely passing, did you have a relationship with Jerry Siegel?

A: Jerry was a friend of mine for about 30 years.

Q: Have you personally won any awards, Mr. Levitz, at Comic-Con?

A: I received the Ink Pot Award, I believe, in 2002, which is an award basically for your lifetime participation in the field and your frequent participation at the convention. I very proudly received last year the Bob Clampett Humanitarian Award of the convention, which was presented to me by Clampett's daughter, he's a famous puppeteer and animator, and Ruth's presentation of it to me acknowledged my work on behalf of the writers and artists of the field.

Q: Aside from Comic-Con, have you had other speaking engagements at comic publishing events?

A: I've spoken at a wide variety of events in my career, from the earliest days of the New York comic convention, before the San Diego comic convention became the sizable destination, when that was the original large one, or the modern incarnation of the New York Comic-Con. Or things that are related to comics, such as when the Frankfurt book fair added a comics pavilion some years ago, they asked me to come out and deliver the keynote speech to celebrate the opening.

Q: I think you mentioned a few minutes before that you were working on a magazine or a fanzine even before you went to work for DC; is that correct?

A: That's correct. I entered the comic book field at age 14, publishing what was one of the early fan magazines about the field; it was sort of the first TV guide for the field. In those days, as I said, the attribution was fairly poor, so writers and artists often didn't know when their own work was going to be published. My publication was one of the first things that regularly provided that information, and that gave me entree to relationships with the writers and artists in the field. And I built that into a small business that I ultimately sold when I was 16, after having two years consecutively won the best fanzine award in the comic art fan awards for its work.

Q: I have a feeling I know the answer, but do you have a personal collection of comic books?

A: Yes, sir.

Q: And that's independent of what DC has in their enormous collection; correct?

A: I'd like to think it's a little better organized than the DC collection.

Q: And how large is your personal collection, sir?

A: My collection is approximately 40,000 comics and related items.

Q: What kind of comic books do you collect?

A: My collection is substantially driven by superhero material in the older material; so I go back and I have the first 30 years of Marvel comics superhero material that I enjoyed greatly; and then I have a collection of DC Comics that dates to material as early as about 1945, and becomes relatively complete by the mid 1970's onward.

Q: Thank you. I'd like to turn now to some sort of a broad understanding of what it is that DC does. Can you describe the major areas of DC's activity?

A: Certainly.

We categorize our business as being broken into three broad categories, for simplicity of explanation. The core of our business is our publishing business. We publish probably 1,200 comics and graphic novels each year which circulate largely in the U.S., Canada and England but then have secondary circulations scattered throughout the world and are then republished by licensees in, in any given year, probably something like 60 different countries and probably a similar number of languages.

We also produce ourselves a line of merchandise known as DC Direct for our collectors, which is anything from high-end bookends to sculptural shelf art to fancy action figures; things, if you were serious comic book fan, you might go to a comic book store to buy to display along with your collection.

The secondary of our business is to license the rights to the properties that were developed or created as part of our publishing business for media; anything from film, television, animation, to the experimental new media. The third area of our business, which has dominated by those properties which we have brought out in media, is the merchandising of those properties for all variety of products produced by licensees cross the world.

Q: Can you just, by way of illustration, differentiate between the last kind of merchandising that you spoke of and the direct form of merchandising that DC does.

A: Certainly.

The distinction is best made by saying that when you've got a successful film or a well-known property, you build up a great deal of public awareness, and people want to wear a T-shirt or have -- I believe someone referred to the lunchbox earlier in the course of the trial, or a toy, even if you're a fairly casual fan of it. Our characters are so well known that even in foreign countries, with relatively undeveloped economies, there are some people with money who would like to wear a Superman S-shield T-shirt, and affiliate with a character they may not know a lot about. So that tends to be the merchandising that we do through licensees, because they have a very broad range of distribution; and usually, they have a very particular expertise in knowing, for their market, the appropriate form of manufacture, quality of goods, prices; and we want to

cover the world very, very thoroughly through all of this, so it's a very large network of licensees.

On the opposite end of the spectrum, the DC direct merchandise that we create and manufacture and market ourselves is intended for our most avid readers, the kind of people who might recognize my name, certainly would recognize a particular artist's name, and know that they would love to have a Jim Lee Superman statue and not necessarily a George Perez Superman statute, or vice versa, depending on their preference, and are prepared to pay very significant amounts. There are not that many of those people in the world, and they are concentrated very heavily in the U.S. and Canada, a little bit in England.

We know how to reach them through the comic book stores, where we're already selling a great deal of merchandise. So that work we feel comfortable doing ourselves.

Q: Can you give us any approximation of the percentage of merchandising revenue that's due to what you would call the mass merchandising, as opposed to the percentage on the direct to collectors?

A: It obviously varies year to year with the things that are going on. Merchandising is a highly variable business. But in a normal, quote, unquote, normal year, we would expect to generate anywhere from 5 to 10 times the gross revenues in mass merchandising, as opposed to the direct merchandising. That further understates the relative profitability of the two businesses, because in the direct merchandising, we have to pay the costs of the objects, their distribution, often a form of royalty to the sculptor or other contributor to it. So the mass merchandising is vastly more profitable, because you're sitting there receiving royalty checks, basically.

Q: And who acts as the agent for DC on the mass merchandising?

A: Our agent is Warner Bros. Consumer Products, which, if you trace historically, was created as a spin-off from DC back when we were a family company in the 1950s, to reach out to merchandise our rights; and then over the years evolved to become a very broad-based licensing agency, at different times having represented things like James Bond, at the peak of his popularity in merchandising in the 1960s, or sports leagues; and then eventually became a part of Warner Bros. and concentrated much more heavily on film- and

television-related licensing, though they still do some other kinds of properties from time to time.

Q: And what is the fee arrangement between DC and Warner Bros. Consumer Products for that merchandising?

A: For the last couple of decades, I think the fee basis has been a 25 percent fee.

Q: Mr. Levitz, you've been sitting here in the courtroom and you've heard testimony of interpretations of contracts and statements made regarding --

THE COURT: May I interrupt you for a second. You said something that struck me. You mentioned that the James Bond merchandising reached its peak in the 1960s.

THE WITNESS: Yes, sir.

THE COURT: Even though I think we've heard earlier testimony about James Bond being one of these franchise films that we probably all know continues to be successful to this day.

Based on your experience in this area, how common or uncommon is it to see that kind of disconnect between the merchandising and the franchise film itself?

Does that make sense?

THE WITNESS: I understand your question, Your Honor.

I'm trying to think of the best way to answer it. Certain kinds of franchise motion pictures are very susceptible to merchandising; and particularly, when those motion pictures are distributed by a company that has a great deal of sophistication in merchandising, there's an enormous effort to bring as much success as you can out of the venture.

The public ultimately makes its own decisions. One would logically think that Star Wars and Star Trek, both being science-fiction motion pictures about complex universes with interesting spaceships and different-looking creatures and various aliens, would be equally susceptible potentially to merchandising. The early Star Trek motion pictures did some reasonable business in merchandising; but over time, Paramount Pictures, which is a very sophisticated company, developed an understanding that the ceiling was pretty low on this working. Star Wars, on the other hand, was considered unsalable for merchandising when it was originally released. There were no toys put out

with the first film initially. They had been unable to get a licensee. And when the film succeeded so phenomenally, Kenner Toys signed on; and that first Christmas, if you wanted to buy a Star Wars toy, you bought an empty box with a promise that you could bring it in and redeem it as soon as the figures arrived.

And it went on to become a phenomenal merchandising success that has sustained without end, and often in between the motion pictures.

James Bond became an enormous merchandising fad based on the early motion pictures, and particularly based on the car and the spy gimmicks, which were about as high tech as anything could be in the mid 1960s. And children of my generation responded to that enormously.

The car is not so cool anymore. The little gimmicks that he comes up with seem much more commonplace to many different pictures. So the merchandising opportunities for James Bond for, I would say, the last 20 years, maybe 25 years, have been very minor. They will do some merchandising as part of it. I'm sure they would like to do more.

But you combine an issue of public taste -- I believe the James Bond pictures were released, through most of those years, through MGM and UA, which are not particularly first-rank merchandising companies, due to the mixture of properties they own. And all of those things put together means that the magic hasn't happened. I'm sure they would love to have that happen, and they may occasionally attempt it on one basis or another.

THE COURT: Conversely, you take something like Mickey Mouse, which is a self-evidently iconic figure to Americana. A tremendous amount of merchandising is centered around Mickey Mouse, but you haven't seen a Mickey Mouse film in years.

THE WITNESS: Disney has a unique strategic advantage in this. One of the things to really focus on on this question, Your Honor, is that the parties have different advantages. Because of the theme park business, Disney is able to manufacture merchandise and sell it in captive retail outlets that they control.

When we want to do a merchandising program, a fair level of our success will be based on, particularly today, whether or not we can persuade a few key retailers like Wal-Mart to devote an adequate amount of space to offering our merchandise to the public, and promoting it in their environment.

Disney has an enormous captive audience through the theme parks, unparalleled by any other licensor, and as a result, has a unique set of business strategies, where their film slate is much more kid-oriented than any of the other film studios; part of the reason why they made the very expensive acquisition of Pixar Pictures a couple of years ago, to bring those properties in to refresh the theme parks, refresh the exhibits, keep people going to them, and raise the mix of merchandising that they can do there. Warner Bros., for example, does a reasonable business in Looney Tunes, because we're a very effective licensing operation at Warner Bros. Consumer Products, but not home-run business every year. We don't have the same set of theme parks to push things and the same set of tools. Disney has managed to keep Mickey Mouse going with very little comparative stimuli over the years, based on the particular mix of assets they have to offer.

THE COURT: So amongst the variables, then, you would agree, I take it, that in terms of evaluating how profitable an arrangement involving intellectual property can be, it's not just the terms of the agreement, but in whose hands that agreement is?

THE WITNESS: Absolutely. It's critical in looking at the arrangement, at the mix that you have. A further example, if I may, Your Honor, is in terms of the distribution mix you have available. Warner Bros. Consumer Products, on the licensing business I was discussing, has a vast array of worldwide offices, either that they own or where they control the relationship with a local agent who has clout.

You're often in there negotiating, with respect to an individual property, with a prospective licensee who has four or five licenses from a company. And when you're going in to say, 'This movie will be the exciting movie for next year; I'd like you to take a license for it," if you're MGM/UA, in the example Your Honor was asking about, and Bond, and your licensing agent has not sold anything to that particular licensee for many years, he probably doesn't have the best entrée, and he probably doesn't have the strongest negotiating ability or knowledge to extract the best deal. If you're a company that has a very wide range of skill in the area, you're going to be able to extract a better deal.

THE COURT: All right. Sorry, Counsel.

MR. BERGMAN: Thank you.

MR. TOBEROFF: Your Honor, as a matter of procedure -- and I'm proceeding with grave caution in making this objection very respectfully -- I have to object for the record to his testimony, even though it was an answer to Your Honor's question, because it is essentially -- if you read it, expert testimony, when it refers to Bond, DC, MGM, other studios than the relationship with Warner, and you'll notice that in the background questions, he was being set up with -- there were background qualification questions of the sort you ask for an expert. It's improper under Rule 702 and 703.

He was never designated as an expert, and he very well could have been. This is not a comment on his knowledge, because he is certainly --

THE COURT: Counsel, why don't you just state your objection, and let's get to the point here.

MR. TOBEROFF: My objection is that he's giving expert testimony and was never designated as an expert.

THE COURT: Your objection is overruled. The Court asked him based on his experience in the area. He basically is qualified, at least with respect to these questions, on lay expertise and not as an expert designated by one of the parties. The objection is overruled.

MR. TOBEROFF: Very well, Your Honor.

THE COURT: Counsel.

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** To wrap up the question of the merchandising split on the mass merchandising, Mr. Levitz, you testified to a 75/25 split. Is there any exception at all to that?

A: There are minor costs that they're entitled to deduct for certain actions they take on our behalf. They're not material.

Q: Okay.

Does DC Comics receive 75 percent of every merchandising dollar received by Warner Bros. from Superman Returns?

A: Yes, sir.

Q: Can you describe, from your perspective, the relationship between DC and Warner Bros.

A: We are -- Warner Bros. is both a term used for Warner Bros. Filmed Entertainment, and you'll also hear it used for individual companies like Warner Bros. Pictures, Warner Bros. Television. There are a number of Warner Bros. companies within Warner Bros. Filmed Entertainment. We are affiliated with all of them, as we are with all of the Time Warner companies.

Q: And does that affiliation go beyond the corporate-structured affiliations? Is there some other affiliation between the two companies that may not necessarily reflect their common ownership?

A: Because of the nature of our business, we have an extraordinary number of ordinary business relationships with different companies that we are affiliated with. We have licensed film rights to Warner Bros. Pictures. We have licensed television rights to Warner Bros. Television. We will produce a customized comic book to promote a Warner Bros. project on a fee basis. We will make toys for Warner Home Video to sell in Best Buy, along with a video unit that they're selling. Each of these relationships are structured on an individual business deal, and as close as we can to normal open market kinds of relationships between the parties, creating significant business partnerships, in many cases, that have lasted many years.

Q: Okay.

Let's turn now, if we can, to the issue of the fair market value of the post-1999 Superman agreements between DC and Warner Bros. To what extent, Mr. Levitz, if at all, is achieving the fair market value for DC properties an important goal for you?

A: It's a very important goal for me, because it's one of the places where doing the right thing is also very good business. If we're to continue to attract good, creative people to work for us, we have to do business on a basis where they will get a fair stream of revenue from licenses that we grant to other parties. And if there's a general perception that they will not be properly compensated, we're not going to be able to get them to create new things for us.

MR. TOBEROFF: Objection to the question. No foundation is laid as to the witness's understanding of fair market value or analysis of fair market value.

THE COURT: He's the president of the company.

MR. TOBEROFF: I understand, but the objection is that no specific foundation has been laid for the question.

THE COURT: Overruled. I trust the president of a company understands basically -- overruled.

BY MR. BERGMAN: **Q:** In fact, Mr. Levitz, has DC Comics instituted, at some earlier point in its history, a royalty plan for creators?

A: One of the things I'm proudest of in the course of my career is that I was one of the key people involved in putting in place the first broad-based royalty plan for our own publishing business that all creative people could participate in with enough success in 1981.

Q: Okay.

THE COURT: Mr. Toberoff, just to go back to your last objection, you can certainly examine him as to what he means by "fair market value." But I've got to assume that basic terms like "profitability," or whatever, "fair market value," these are terms that any president of a company has some understanding of, at least in terms of how they conduct their business.

You can examine him on that during cross.

MR. TOBEROFF: Thank you.

BY MR. BERGMAN: **Q:** Mr. Levitz, as the executive guiding DC, do you have any basic principles that you follow in approaching a possible license or other transaction with Warner Bros.?

A: Certainly. You approach a license with Warner Bros. the same way that you would a license with anyone else. When you look to grant a license for any category of goods, you look at it through a very specific lens; first, who the other party is; what their place in the marketplace where you're doing business is, whether that's defined as market share or specific competency.

Going back to my merchandising example, at one point there were different licensees with different competencies in different thread-count T-shirts for different levels of the market. I'm not enough of a fashionista to know what those thread counts were; under a certain quality level, they were a good licensee for Bloomingdale's, and under another, they were a good one for K-mart. So you look to those characteristics first: Is this a good company at what you want them to do?

The second thing you look at, in dealing with it, is the position your project or property is going to bring within that company and what kind of creativity they're going to bring to it, which people they're going to assign to manage it,

which creative people are going to be working on the project. That really works the same whether you're looking at a toy sculptor or whether you're looking at a motion picture director. Who will be available to actually do the work?

The third lens, which is a very easy test, obviously, for Warner Bros., is the issue of credit worthiness and whether you think they will be a workable party to actually collect from and be accounted to from. Obviously, when you're looking in the open market, you want to make sure that the deal that you're being offered, you'll actually get. And then, of course, you look to the terms of the deal itself.

THE COURT: Let me stop you there, because this is something which obviously was a sticking point for me in my previous order.

I suppose there's something almost counterintuitive that you would approach a deal with someone who Mr. Toberoff described as vertically integrated, the same way you would someone who is a competitor outside the corporate world in which you operate.

THE WITNESS: There are some ways in which you have to approach it exactly the same way, Your Honor. And there are some where it's radically different.

You have the advantage, when you're dealing with someone that you're affiliated with, that you know you're unlikely to be litigating against them, for example. So you may not boilerplate with the same level of energy about arguing about what state laws are applicable in the fashion. On the other hand, you know you're going to be able to do the equivalent of an audit without having formal audit rights, because, first of all, you believe you're going to be accounted to honestly; but second of all, you have the ability to access the common levels of management and say, 'I think there's a problem here. Let's try to figure out what it is, and let's look at the real numbers.'

I have, in those instances, for example, accessed the numbers and information that I would never have with an outside party.

Where you have to do it on exactly the same basis is on the flow of the income coming through, because if you don't treat that on a true fair market value, then you destroy your relationships with your participants, and your market dries up for your ability to deliver creative goods.

THE COURT: Is that the same case even when the participant has been a member of the fold for generations?

In the case of Superman, you're not worrying about bringing somebody in recently, and then turning around and negotiating to distribute that. Superman had been in the fold for years.

THE WITNESS: Actually, that's not completely accurate, Your Honor, because the properties are cumulative. For instance --

THE COURT: Fair enough.

THE WITNESS: -- you heard reference in the discussion to Birds of Prey to the Huntress character. The value of the Birds of Prey contract is largely driven by the fact that these were Batman characters. However, I created the

Huntress character in a story I wrote some 30 years ago, and I have a contract under which I receive a royalty based on her exploitation, and benefit from that deal to a very, very minor point. There are writers and artists working on Superman today who are creating new pieces of the mythology and were paid for a share of Superman Returns based on the appearance of, for instance, the bartender in the scene with Jimmy Olsen and Clark Kent.

THE COURT: So that's the incentive for you to ensure that you're doing a fair deal?

THE WITNESS: It is one of the very significant incentives.

THE COURT: Counsel.

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** You mentioned, Mr. Levitz, that it's one of the incentives. What are the others?

A: One of the incentives is that I'm measured on DC's revenues and profitability; and I, therefore, have an incentive to achieve what I feel is at least a fair market deal, if not the best deal that I possibly can in each situation.

Q: Approximately how many employees are employed directly by DC Comics?

A: DC has probably 280 salaried employees.

Q: To what extent, if any, does the continued employment and welfare of those employees depend upon obtaining fair market value?

A: It's the nature of corporate life that the corporation allocates resources and rewards based on the revenues and profits generated by different divisions.

If I made a practice of not maximizing DC's potential income, the ability to keep those employees would diminish, and to reward those employees or provide resources to them.

Q: There's even a possibility it might affect your continued employment, is there not?

MR. TOBEROFF: Leading, Your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** In any event, Mr. Levitz, am I correct that you follow a policy of giving a first look to Warner Bros. on various properties?

MR. TOBEROFF: Objection, Your Honor. Leading.

THE COURT: Sustained. Rephrase, Counsel.

BY MR. BERGMAN: **Q:** Do you, Mr. Levitz, treat Warner any differently than any other production entity, insofar as submitting works to them?

A: We always look first to see if we can bring our creative properties to the Warner Bros.-affiliated companies.

THE COURT: Why is that?

THE WITNESS: We believe they are extraordinarily good at what they do. We believe we have an unusual ability to work constructively with them, because our interests are aligned in so many fashions. We also believe very firmly, Your Honor, that there's a theory of what you might class as cumulative or network value. When you place the majority of your library in one place, you're able to do things that you would not if it was split.

For example, DC will be celebrating its 75th anniversary next year. We will be funding the activities of that and the promotion of that largely off what we believe will be increased sales opportunities for our old video library, the old films and television shows, that Warner Home Video will bring to market and pay royalties to us on. We're able to do that because virtually our entire library is with one party. We've watched our principal competitor, Marvel Comics, licensing its library properties to many different parties. They're unable to do things like that and unable to cross-market their properties effectively, because they don't have it all in one place.

In that regard, it doesn't matter whether it's an affiliated relationship or an unaffiliated relationship. There's simply a value in the size and scope of the

partnership relationship. You want to keep working with your partner as broadly as you possibly can.

BY MR. BERGMAN: **Q:** Mr. Levitz, have you, in the course of the past 30 or 40 years, had occasion to familiarize yourself with the way that different motion picture companies deal with comic book superheroes?

A: Yes, sir.

Q: And have you formed any opinion as to what studio deals best with such major tent pole pictures?

MR. TOBEROFF: Objection, Your Honor. Again, it's a lay witness who's giving expert testimony based on specialized knowledge. It's not percipient as to the contract at issue in this case. He's talking about the industry in general.

THE COURT: I agree, as framed, Counsel.

Rephrase this based on his particular experience. He can certainly offer an opinion based on the particular contracts that he's worked, the experience that he's had. Rephrase the question.

BY MR. BERGMAN: **Q:** Can you give us an example, Mr. Levitz, of the performance of a contract which has led you to believe that Warner Bros. may or may not be better than other competing studios with respect to the development of films based on comic book heroes?

A: I believe Warner's success, most extraordinarily with Batman over the years, is a demonstration of their unparalleled success at exploiting comic books, and particularly comic book superheroes in film. And their success with Superman, although a much more mixed history, still demonstrates the same thing. There have been any number of specific instances through the process of working with them closely on that where I've seen them able to do things that I did not observe competitors being able to do in the same situation.

Q: Have one or more of DC's visual properties been distributed on DVD by anyone?

A: Yes.

Q: By whom have they been distributed?

A: The vast majority of our library has been distributed by Warner Bros. We have also had material distributed by 20th Century Fox. There are some things that I believe are still controlled by Sony, as part of their library, though

they're very minor. And there is at least one project that's distributed by Paramount.

Q: In your dealings with Warner regarding the production and distribution of video products, have you formed an opinion as to the quality with which they do so?

A: Yes, sir.

Q: And could you tell us what that opinion is.

A: I have observed that Warner Home Video, as the consistent largest market-share player in the business, has developed a set of tools and resources that I believe are not comparable at any of the other distributors.

Q: In the course of your various dealings with Warner Bros., have you made any determination as to Warner's willingness to invest whatever money may be required to do a particular project well?

MR. TOBEROFF: Objection. Vague and ambiguous, Your Honor.

THE COURT: This is a foundational question.

Have you made such a determination?

THE WITNESS: I have never found --

THE COURT: The question is, have you made --

THE WITNESS: Yes.

BY MR. BERGMAN: **Q:** Would you tell me what you found in that respect.

THE COURT: Let's lay a foundation for that.

BY MR. BERGMAN: **Q:** Can you describe for us how you formed whatever belief you have in that respect.

A: I formed my beliefs in that respect by watching Warner's typical behavior patterns in the development of projects and the production of projects and in the marketing of projects.

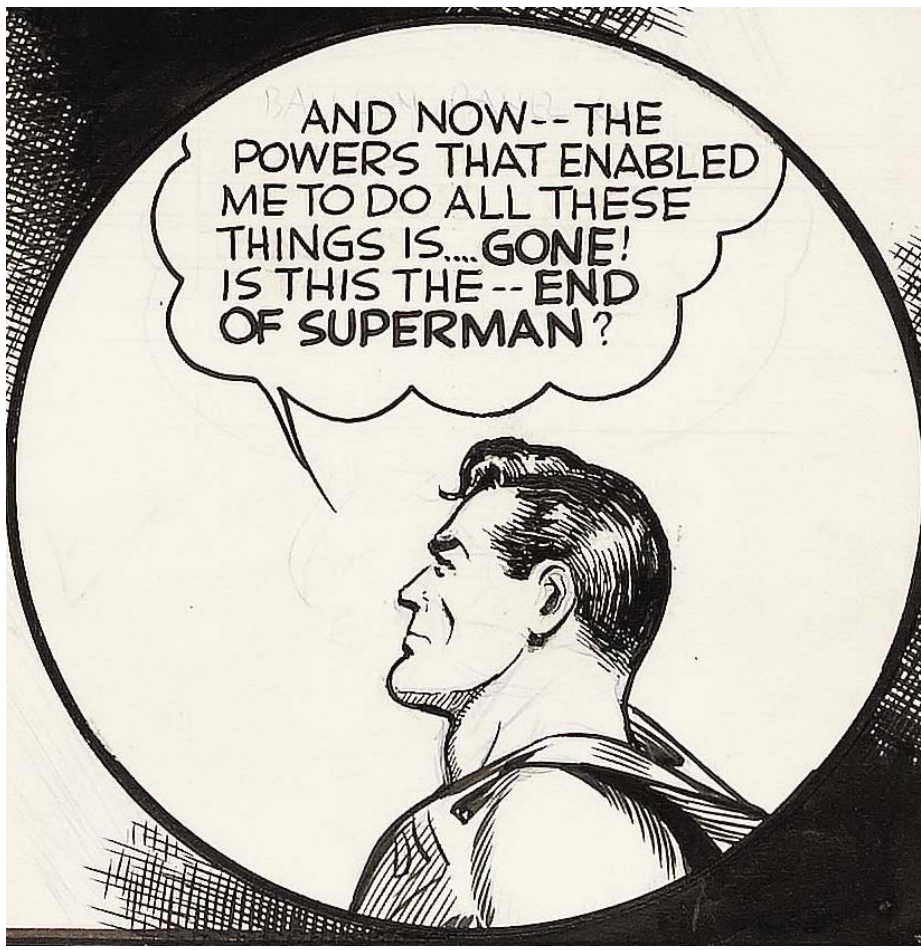
You measure, in a situation like this, basically, incremental willingness to spend to achieve quality.

When an animation director wants another set of retakes of a scene in order to get it better, it's a very arguable proposition whether the consumer will ever know the difference, or whether there will be any direct -- certainly, short-term economic reward to it.

And then there's a spectrum of behavior exhibited in the marketplace between production companies that will always say no to the incremental spending and say, 'If I'm not sure I'm going to make more money as a result of this, I don't want to do it'; companies that measure, 'How much better will this be creatively? How important is it to you if I spend this money?'; and companies that at another extreme may be foolish enough to just say, 'Oh, you want more money to do whatever you want creatively? Please go ahead." The tap will just run endlessly.

THE COURT: Let's go ahead and take our lunch break at this time. We'll resume at 1:30.

(Day 8 morning session concludes.)



P.M. SESSION

Friday, May 8, 2009

2:45 P.M.

THE COURT: Counsel.

MR. BERGMAN: Thank you.

MR. TOBEROFF: Your Honor, before we begin, with a procedural matter. Lillian Laser, general counsel of DC, is listed in an exhibit for defendants. I would ask that she be sequestered pursuant to Federal Rule of Evidence 615 if, in fact, defendants intend to call her.

MR. BERGMAN: Well, your Honor, the plaintiffs have put on their case. They haven't called her. They were going to call her. We are not going to call her. I will represent that to the Court.

MR. TOBEROFF: Then there's no problem, your Honor.

MR. BERGMAN: Okay.

THE COURT: I love when this resolves itself. You may proceed.

MR. PERKINS: Your Honor, I'm sorry. I had another matter.

THE COURT: Let's see if this one resolves as quickly. You are allowed to talk to each other, Counsel, during the breaks.

MR. BERGMAN: Yes, sir.

THE COURT: Okay. Just wanted to make sure you are aware of that.

MR. PERKINS: Your Honor, last Friday, as you may recall, there was testimony Friday morning concerning the Harry Potter agreement, J.K. Rowling, and we made an application, if you will, or made it clear to the Court that this information in that deal is highly sensitive.

THE COURT: Right.

MR. PERKINS: Your Honor told us that down the road we could make a written application to seal that, making the point that no one was in the courtroom so that we could just do that down the road.

Unfortunately, today, your Honor, we received a call from another lawyer at Warner Brothers who is being deposed in a case involving the Orson Welles estate. And the lawyer for the other side has told her that Mr. Halloran, who

has been engaged by the Welles estate, disclosed to the lawyer the video royalty rate for Ms. Rowling in that agreement. And, your Honor, Mr. Halloran received these materials pursuant to a protective order.

He signed a document agreeing to keep those things under seal. I don't know whether there was confusion based on what happened in the courtroom.

THE COURT: Well, the Court certainly did nothing to undo the protective order.

MR. PERKINS: Well, we didn't think so either, your Honor, but I guess we would ask for two things at this point. The first would be that the three documents -- the Harry Potter documents 1097, 1098, and 1099 -- be provisionally sealed until such time as we can make a formal application.

And the second, that the plaintiffs be ordered to call Mr. Halloran and remind him that the information in the Harry Potter agreements is highly confidential and that he is under obligation not to share that with third parties.

THE COURT: So the report is that after -- he was in the room when that testimony was made? Who made that testimony?

MR. PERKINS: He did, your Honor. He reviewed those --

THE COURT: He reviewed the documents.

MR. PERKINS: And he was on the stand on Friday morning. It's at pages 527 or so of the transcript. So that's our application, your Honor.

THE COURT: And this person indicates that it was Mr. Halloran who provided that information to him?

MR. PERKINS: Yes, your Honor. He's actually the lawyer who has hired Mr. Halloran. And the way that it came out was that at the deposition the Warner Brothers attorney was asked what was the video royalty in the Harry Potter case.

She said that's confidential. Then was asked -- she was asked later what's the highest that's ever been given. She gave that testimony. And then on the break, he went to her and said, you know, you don't have to say this is confidential. Mr. Halloran told me these numbers. So it's out there.

THE COURT: And when did this take place?

MR. BERGMAN: This took place today, your Honor.

THE COURT: Do you know anything about this, Mr. Toberoff?

MR. TOBEROFF: I know absolutely nothing. And it may or may not -- we're getting something sort of third hand.

So I know nothing about it, but I'd be happy to remind Mr. Halloran. He did sign a protective order in this case. And I'd be happy to remind him of that and inquire into it.

THE COURT: Mr. Halloran is a lawyer; right?

MR. TOBEROFF: Yes.

THE COURT: I'll see Mr. Halloran on Tuesday.

MR. PERKINS: Thank you, your Honor.

THE COURT: And provisionally the exhibits are placed under seal. Counsel, can you make arrangements for Mr. Halloran to be here?

MR. TOBEROFF: I'll inform him that you've ordered him here on Tuesday.

THE COURT: Thank you. And just so he has notice, I'll be inquiring as to this information, when, if, who.

MR. TOBEROFF: I'll let him know, your Honor.

THE COURT: All kinds of non-leading questions.

MR. TOBEROFF: Thanks.

THE COURT: All right. Let's proceed.

MR. BERGMAN: Thank you, your Honor.

PAUL LEVITZ, PREVIOUSLY SWORN.

DIRECT EXAMINATION (CONTINUED)

BY MR. BERGMAN: **Q:** Mr. Levitz, in the years subsequent to 1978 and the release of the first Superman film, did you have an opportunity to determine the extent to which Warner Brothers was effectively distributing the various Superman motion pictures and television series?

A: Yes.

Q: Okay. What did you determine in that regard, sir?

A: I observed that generally Warner Brothers had an extraordinarily effective distribution mechanism for exploiting the film in pretty much any marketplace internationally or domestically where there were revenues available to be derived from it.

Q: Okay. Were you aware, in the years 1999 through 2002, that Warner Brothers owned any copyrights in any of the materials contained in Superman 1 through 4?

A: Yes.

Q: And did your knowledge of that fact impact in any way upon your inclination to enter into the 1999 agreement?

MR. TOBEROFF: Objection. Leading, your Honor.

THE COURT: It's a foundational question. Overruled.

THE WITNESS: Yes.

BY MR. BERGMAN: Q: Can you explain why, sir?

A: When you allow a licensee to create material that they can have copyright or trademark rights, you are essentially giving hostages to the future. If you want to use that material again and import it in other forms and fashions of exploitation, then you have to work with them again or reach some other accommodation with them again.

In specific to Superman, for example, the simplest example to me is the John Williams theme music, which is extraordinarily familiar, a great signature tune for Superman and not anything that DC intrinsically has any control over itself without Warner Brothers' consent.

Q: Prior to the break, Mr. Levitz, I had asked you a question about whether obtaining fair market value for the Superman property was important to you as an executive of DC.

Was it important to you as an individual?

A: Yes.

Q: Can you explain in what way?

A: I grew up in this business believing that the entire industry I was in had been damaged by writers and artists not getting a fair share of the proceeds of their work and have worked most of my career to remedy those situations and structures. I think ultimately that was the cause of a great deal of the problems the comic book industry had through the 1950's and the 1960's. And I believe a great deal of the resurgence of the comic book industry and the growth of the graphic novel business has come off giving writers and artists a good shake in their work. If you don't work to a fair market standard, you defeat the purpose

of participations that you give out, and you begin backsliding back to where the whole field that I've grown up in and love ceases to be viable and healthy.

Q: You mentioned earlier the number of permanent employees that DC has. How many writers, approximately, does DC employ each year?

A: I don't get a separate tally of writers. I would guess that it's probably 100 to 200 writers.

Q: And are there other artists who also receive – strike that.

Do the artists -- do the writers receive generally royalties on their work?

A: The vast majority of things that we create, produce, or license have writers and artists as participants in some fashion.

Q: Are there other individuals besides artists who receive royalties from work they do for DC?

A: The majority of the participants are writers or artists. There are situations in which participations are either being paid to other forms of crafts people, like colorists in particular deals, and, of course, there are many situations on the older material where the work is being paid in some fashion or other to an estate.

I believe we have an orchestra in Arizona that benefits from the work of Dick Sprang somewhere.

Q: Have you ever received any guidance or instructions from any senior Time Warner executive as to how DC should conduct business dealings with Warner Brothers or other affiliated companies?

A: Among other instances, I attended a Time Warner executive conference this year at which Jeff Bucus, who is the current Chairman and Chief Executive Officer of Time Warner, delivered to -- I guess it was a group of about 40 of us -- a brief speech in which he said that he wanted us always to work to fair market value in transactions for our divisions, and that if that was a burden to any division, what they should do is go to him and ask for relief on the financial goals that were being set for them but not to disturb the fair market standard because it was important to the company.

MR. TOBEROFF: Objection, your Honor, on the basis of relevance since he's talking about a recent conference.

We're talking about the time here between 1999 and 2002. It's irrelevant what's said today.

THE COURT: I'm going to overrule the objection and also consider that in the context of evaluating the significance of the evidence. Thank you.

Counsel.

BY MR. BERGMAN: Q: Measured by comic book sales, Mr. Levitz, who is currently DC's most popular comic book hero?

A: Generally, Batman.

THE COURT: That's in terms of sales?

THE WITNESS: Collective sales of titles featuring Batman.

BY MR. BERGMAN: Q: Using that same standard, can you tell us who DC's most popular comic book hero property was during the period from 1999 to 2002?

A: Generally, Batman.

Q: Where did Superman rank among DC's properties and comic sales during that 1999 to 2002 period?

A: Probably second for most of that time.

Q: And measured by comic book sales, who was DC's most popular comic book hero character in 1973-74, when you were negotiating the Salkind film agreement?

A: Superman.

MR. TOBEROFF: Objection. The record -- I don't believe he negotiated that agreement when he was 16. The Salkind agreement.

THE COURT: Assumes facts not in evidence, Counsel.

MR. BERGMAN: I'll rephrase that question, your Honor.

Q: Are you aware, Mr. Levitz, of who DC's most popular comic book hero character was in 1973 and '74?

A: Yes, sir.

Q: And who was that, sir?

A: Superman.

Q: Again, looking to the same measure of comic book sales, and this time looking to the comic book industry as a whole, who would you say was the most popular comic book character in and around 1974?

A: The most popular heroic character at that time by sales would have been Superman. It's possible that either Archie or Richie Rich had more unit sales on the humor side.

MR. TOBEROFF: Objection. Lacks foundation.

THE COURT: Overruled.

MR. BERGMAN: May someone place 1041 in front of Mr. Levitz. That is the Superman agreement.

Q: Do you have that, sir?

A: Yes, sir.

Q: I'd like to refer you to paragraph 6-C, which is found at page Bates stamped 4205. Titled Merchandising List.

A: Yes, sir.

Q: In your dealings with Warner Brothers concerning Superman Returns, have any Superman Returns merchandise revenues been deemed to fall under this provision?

A: I don't believe so.

Q: Did the promotion and release of Superman Returns have any effect on the Superman merchandising revenues?

A: Yes.

Q: What is it called in the industry, Mr. Levitz, when the release of a film impacts the merchandising receipts of an existing property?

A: You'll frequently hear that referred to as the uplift, basically the delta between some calculated average of prior years and the results during the year, two years, three years around the film where you capture the effect of the film's marketing promotional dollars on the merchandising sales.

Q: I see. To what extent, if at all, did the promotion, release of Superman Returns affect the Superman merchandising revenue lift?

A: There was a tremendous effect from Superman Returns on our merchandising revenues. For Superman, I've not calculated a lift -- an uplift per

se versus any specific prior period, but we believe we received approximately $40 million worth of merchandising revenue at the WBCP source.

Q: And by that, do you mean, sir, that WBCP received a gross total of $40 million from the uplift?

A: The uplift or the --

Q: Brought in.

A: Yes.

Q: Of that $40 million in merchandising revenue generated by Superman Returns, how much did DC receive?

A: Approximately $30 million.

Q: Okay. Are you familiar with the role of Legendary Pictures in connection with Superman Returns?

A: Reasonably.

Q: How did you gain your knowledge of that relationship, sir?

A: Discussions with both Warner Brothers pictures executives and Legendary Pictures executives.

Q: Are you aware of how Warner Brothers accounts to Legendary regarding merchandising revenues for Superman Returns?

A: Reasonably familiar with it.

Q: Can you tell us how that is done?

A: What's done is a pro forma calculation is created as though Warner Brothers pictures got the benefit of both the Warner Brothers consumer products fees and the moneys received by DC comics for the property during a relevant period of time. And that's added to the revenue side of the equation for the calculation of Legendary's earn out or return on their investment in the picture.

Q: Are you aware of how that arrangement was reached?

A: Yes.

Q: Could you tell us what happened?

A: At some point after, I believe, Batman begins, which Legendary was also a co-financier of, Legendary asked Warner Brothers pictures for the benefit of

merchandising. Warner Brothers pictures turned to DC and said our partner wants to share in this. Can you give us back the money or give us back some of the money. We declined and instead worked out a system to help them with the pro forma accounting for it.

MR. TOBEROFF: Objection, your Honor. Hearsay as to what these third party statements -- these parties.

THE COURT: Counsel?

MR. BERGMAN: They are not being introduced for the truth of the matter asserted, your Honor. Merely how the arrangement that Mr. Levitz has already testified to came about.

THE COURT: What's it being introduced for?

MR. BERGMAN: It's being introduced, among other things, to demonstrate that the merchandising provision for DC comics was a superior merchandising provision.

THE COURT: Right. But this testimony itself was being introduced for -- that's assuming that this is true. The statement itself is being introduced for its truth?

MR. BERGMAN: Yes, sir, it is.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Are you aware, at this point in time, Mr. Levitz, after having received various accounting statements as to how Warner Brothers accounts to Legendary Pictures for the merchandising revenue from Superman Returns?

MR. TOBEROFF: Objection, your Honor. Leading in the phrase after having received various Warner Brothers accounting statements. Also lacks foundation.

THE COURT: You're simply asking if he's aware.

I'll overrule the objection as to this question, but then you'll need to lay a foundation as to how he was aware.

BY MR. BERGMAN: Q: Do you regularly receive, on behalf of DC, accounting statements from Warner Brothers on Superman Returns?

A: Yes.

Q: And have you from time to time seen similar accounting statements issued by Warner Brothers to Legendary Pictures?

A: No, I have not.

Q: When you were asked to agree to an adjustment regarding Legendary Pictures and the merchandising revenue, were you given any document at that time to demonstrate what the problem was?

A: I believe I had an opportunity to read the relevant paragraph of the Warner/Legendary agreement.

Q: Okay. And as a result of reading that paragraph and comparing it to the participation statements you received on behalf of DC, do you have an understanding as to how Warner Brothers accounts to Legendary Pictures for merchandising on Superman Returns?
MR. TOBEROFF: Objection, your Honor. Leading.

THE COURT: Overruled. It's foundational. Just a yes or no question.

THE WITNESS: Yes.

BY MR. BERGMAN: Q: Okay. Can you explain how it was done?

A: I believe that they take a pro forma document that we supply estimating our receipts for merchandising, and they add that back to the consumer products fees in their accounting to Legendary.

Q: Does any of the money that is added by Warner to that pro forma account come out of DC's pocket?

A: No.

Q: So that whatever the relationship between Warner Brothers and Legendary may be, does that have any impact upon DC's revenues?

A: We do not get the direct benefit of any money from Legendary, nor do we pay out any money that goes directly to Legendary.

Q: Mr. Levitz, are you familiar with the agreement between DC Comics and the Salkind companies entered into in 1974 regarding the rights to Superman?

A: Yes.

Q: And with whom did DC contract in those 1974 agreements?

A: The corporate entity on the other side was at the time entitled Film Export. The functional owner who controlled that entity and a number of subsequent

entities that the agreements passed through the hands of was Alexander Salkind.

Q: To your knowledge, Mr. Levitz, did Mr. Salkind or any of his companies have any relationship, corporate relationship, or ownership relationship with any Time Warner entity?

A: Not at any time.

Q: Okay. What films, if any, had Mr. Salkind produced prior to 1974?

MR. TOBEROFF: Objection. Lack of foundation. He's testifying as a percipient witness --

THE COURT: Sustained. Lay a foundation.

BY MR. BERGMAN: Q: Okay. Did you in your negotiations with Mr. Salkind and his representatives -- strike that.

Did you become aware in any way of pictures that Mr. Salkind had produced prior to Superman?

A: Yes.

Q: How did you become aware of those, sir?

A: There was a considerable controversy over a set of pictures that Salkind had produced. The Three Musketeers and the Four Musketeers because he had made the two films simultaneously under the guise of making one film and paying the actors and other participants the fees appropriate for one film. That became the subject of negotiation, litigation, controversy, and had a significant effect on Superman because he proposed to make Superman 1 and Superman 2 in the same fashion.

So I was more conscious of it than I might have been on a more civilian basis.

Q: Okay.

MR. TOBEROFF: Objection, your Honor. The prior testimony shows that in this time period, he was 16 or 18 years old. And he's purporting to testify as a percipient --

THE COURT: Lay some further foundation as to how and when he came into possession of this knowledge.

BY MR. BERGMAN: Q: How did you become aware of those facts, Mr. Levitz?

A: It was common knowledge at the time of anyone who was interested in either the film business in general or who was interested very specifically in the process of the making of Superman 1 and Superman 2. Certainly those of us who were working for the company were very intimately aware of what was going on with the evolution of Superman 1 and Superman 2 because the company was so small. It was playing out before our eyes.

Q: Were the facts of the Musketeer movies and the process that you described to us publicized in newspapers?

A: I believe you can find all of that in newspapers at the time.

Q: Do you know whether DC offered the film rights to Warner Brothers prior to making the deal with Mr. Salkind?

A: Yes.

Q: And did it?

A: Yes, it did.

Q: And do you have any information as to why Warner didn't agree to license the Superman film rights at that time?

THE COURT: Just a yes or no question.

THE WITNESS: No personal knowledge.

BY MR. BERGMAN: Q: What were the key financial terms of the Salkind agreement?

A: The critical financial term of the Salkind agreement was that DC would receive a participation in a true first dollar gross of 5 percent of worldwide or 7 1/2 with domestic, whichever was larger.

Q: And do you recall, sir, what the term of the Salkind 1974 agreement was?

A: I believe it was 25 years.

Q: Until 1999?

A: That's correct.

Q: And what is your understanding, sir, as to when, as of 1974, the copyright in Superman would have terminated?

A: As of 1974, the copyright in the first Superman story, the one in Action 1 that is the core of this action, would have terminated in April 1994.

Q: Okay. Did Mr. Salkind or his companies retain a distributor to distribute any of the four Superman films?

A: Yes.

Q: And with what distributor or distributors did it enter into such agreements?

A: The majority of the distribution rights to Salkind's four Superman movies went through Warner Brothers because Salkind tended to do business in extraordinarily complicated and convoluted fashions. There were individual countries on individual films that for some period of time were licensed to other parties.

Many of his licenses -- many of his rights to produce Superman 4 he subcontracted to Cannon Films, which contracted both with Warner Brothers domestically and then with individual distributors in individual – certain individual foreign territories or for some segments of television rights. And Supergirl is a fairly complex separate story.

MR. TOBEROFF: Your Honor, move to strike as nonresponsive. He simply asked what distributor or distributors did it enter into agreements with.

THE COURT: I'll strike the fairly complex separate story of Supergirl, but the rest seems rather responsive. Overruled.

BY MR. BERGMAN: Q: What was Supergirl?

A: Supergirl was the fifth film produced under the Salkind agreement.

Q: And what was the performance theatrically of the Supergirl film?

A: I believe the performance was quite poor. I don't remember the dollar gross figures.

Q: Do you recall who financed Supergirl?

A: The production of the Supergirl film was financed by Warner Brothers. But prior to release, Warner Brothers' interest was bought out by Tristar Pictures and again with certain individual television rights being sold separately.

Q: At that point in time, and let me ask you what point in time that was. Approximately when was Supergirl released?

A: I believe Supergirl was released in 1985, 1984.

Q: Okay. And the company that you identified as Tristar, were they -- what type of company was that at the time?

A: At the time I believe Tristar was a joint venture of Coca-Cola Company, Time, Inc., acting through its Home Box Office subsidiary, and Columbia Pictures founded as a new motion picture studio, and they had not at the time they did the deal to acquire Supergirl, they had not yet released their first motion picture.

Q: Okay. Did there come a point in time when Mr. Salkind or his companies conveyed his Superman rights prior to 1999 to some third party?

A: Yes.

Q: And to whom did he convey those rights?

A: As asked, that's a complex question because he had conveyed many individual portions of his rights on different occasions to parties such as Cannon Films for making Superman 4 and to various distribution parties in different fashions.

Q: Did there come a point in time when Warner Brothers succeeded to the rights of Mr. Salkind's company in the Superman property?

A: Yes.

Q: And can you tell me when that was, sir?

A: I believe it was approximately 1991 when Warner Brothers essentially bought out the Salkind contract.

Q: Superman 4 was released in what year, Mr. Levitz?

A: '84, '85.

Q: Between 1984 and '85 and 1999, was any other Superman related motion picture released by Warner Brothers?

A: I'm sorry. Between what dates?

Q: From 1987 through the end of that decade, 1999.

A: Following Superman 4 and Supergirl, which I don't think you're referring to, the only Superman related motion picture that Warner Brothers released was Steel.

Q: Can you tell us what Steel, the motion picture, was?

A: Yes, in 1993 in the comics, when we did a successful story about the death of Superman and his return, there was a period in the story line in which there were multiple heirs to Superman running around in his absence. One of them

was a man named John Henry Irons who built himself a set of metallic armor to a giant sort of hammer-shaped weapon to try to fill the gap that Superman's death or disappearance had caused and began calling himself Steel.

Q: And was that picture actually released?

A: Yes.

Q: And do you recall approximately what the domestic box office was?

A: I believe it was a million or $2 million.

Q: Following Superman 4 in 1987, Supergirl, and Steel, did you receive on behalf of DC any inquiry from anyone to purchase any rights in Superman? Film rights?

A: Not film rights that I recall.

Q: Did DC have -- strike that. How would you characterize the extent of DC's creative controls under the Salkind agreement?

A: I would categorize them as being extraordinary by the standards of the film industry.

MR. TOBEROFF: Objection. This is expert testimony.

He's applying a specialized knowledge, it characterizing terms and agreements, something the experts have been doing. And they have experts to do that.

THE COURT: I don't know if this is expert testimony or not. Depends what it's based on. Why don't you rephrase your question, Counsel, and make sure it's clear what he's basing his testimony on.

BY MR. BERGMAN: Q: Are you familiar with the extent of creative controls that DC had under the Salkind agreement?

A: Yes.

Q: Are you familiar with the extent to which DC had creative controls on Supergirl?

A: Yes.

Q: And are you familiar with the extent to which DC had creative controls on Steel?

A: Yes.

Q: Did DC exercise its creative controls on any of those films?

A: DC exercised many measures of creative controls on all of those films.

Q: Was the creative control that DC exercised adopted by Mr. Salkind's companies?

MR. TOBEROFF: Vague and ambiguous.

THE COURT: Sustained.

BY MR. BERGMAN: Q: When DC, Mr. Levitz, made recommendations or attempted to exercise their approvals under their agreements with Mr. Salkind, were those agreements honored by giving DC the controls to which it was contractually entitled?

A: I believe we were ultimately able to enforce every control that we tried to exercise under the contract.

Q: Now, if you exercised all those controls, sir, how would you explain the performance of Superman 4, Supergirl, and Steel?

A: The level of creative controls are different for Steel, which is post the Salkind agreement, than the other movies.

But lumping them together as you asked, the creative controls that you achieve as an intellectual property licensor enable you to defend your property against certain types of ills.

The methodology being mangled, the costume being redesigned to be something stupid, a completely inappropriate actor being cast for the role, and in some cases it even enables you to have a very significant role in script development.

Ultimately, they are not in my experience adequate to make a film good. Whether a film is going to be good or not is largely driven by the director's vision and their ability to achieve it. And no amount of backseat driving or backseat controls can remedy that failure.

Q: How would you characterize DC's working relationship with Mr. Salkind?

THE COURT: At what time period, Counsel?

MR. BERGMAN: From 1974 until approximately 1993, your Honor, when the rights went to Warner Brothers.

THE COURT: Let's lay a foundation for him having an understanding of DC's working relationship.

MR. BERGMAN: Thank you, sir.

Q: From the time that you became involved in business affairs at DC until the expiration of Mr. Salkind's rights, did you have an occasion to observe -- be involved with the various dealings that DC had with Mr. Salkind?

A: Yes.

Q: And as a result of those various dealings that you had occasion to be involved with, how would you characterize the working relationship between DC and Mr. Salkind?

MR. TOBEROFF: Objection to the extent that we're talking about any time prior to 1981 when Mr. Levitz started in business affairs. No foundation.

THE COURT: I'll sustain the foundational objection.

MR. BERGMAN: My question was prefaced on when he started.

THE COURT: So from 1981, then?

MR. BERGMAN: Yes, sir.

THE COURT: Very well. With that in mind.

THE WITNESS: I would describe the relationship as challenging, contentious, and frequently litigious or near litigious.

BY MR. BERGMAN: Q: Were DC and/or Warner Brothers to your knowledge made parties to various lawsuits brought by individuals against Mr. Salkind in connection with the Superman films?

MR. TOBEROFF: Leading, your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: Q: To your knowledge did Mr. Salkind's production and distribution of any of the Superman 1 through 4 films result in any litigation?

A: I believe Alex Salkind was sued by virtually everyone he did business with, including his son.

Q: And did that include the screenwriter, Mr. Puzo?

MR. TOBEROFF: Objection, your Honor. Leading.

THE COURT: Given its nature, overruled. You may answer.

THE WITNESS: I don't know whether Puzo was a litigant.

BY MR. BERGMAN: Q: Okay. Who do you remember being litigants against Mr. Salkind?

A: Marlon Brando, a list of parties whose names I don't recall who were rights purchasers or who had some form of financial interest in some fashion or another in the films. As I say, his son Iliya. I believe there were other actors and writers and participants at different points.

Q: Are you familiar with the circumstances which resulted in Warner Brothers acquiring the balance of Mr. Salkind's rights in 1993?

A: Reasonably.

Q: Could you explain what you know in that regard, sir?

A: Yes. From the conclusion of Superman 4, the Salkind production entities had made repeated attempts to develop a script and what's termed package of elements that would be acceptable to DC as the licensor under its creative controls and to Warner Brothers or an alternate financial and distribution partner. They had proved unable to do so for whatever reasons. It was our belief and Warner Brothers' belief that there were still significant opportunities to exploit the Superman rights that had been granted to Salkind and that, at that point, the problem was intrinsically a Salkind problem and that there would be an opportunity if those rights could move from Salkind to Warner Brothers to do something with Superman. In particular, at that point Jeanette Kahn, when I mentioned earlier as the then president of the company, who was devoting much of her time to working in film and television, had come up with a concept for being able to do a Superman television series for network that could be done within affordable network budgets by using the kind of tonality that was popular at the time on a show called Moonlighting, the very much flirtatious byplay between the protagonists in an adventure environment with a little bit of comedic taste to it. She felt that if it were applied to Superman and the action were centered not on Superman's heroic adventures but on the adventures at the Daily Planet between Lois Lane and Clark Kent, that that had the potential to capture the interest of the marketplace at the time.

And for a period of, I believe, a couple of years, she energetically importuned the Warner Brothers executives with whom she worked to buy out Salkind and free up those television rights so that we could try to get that show on the air.

Q: Did Warner Brothers ultimately do so?

A: Yes.

Q: And did that show become Lois and Clark?

A: Yes.

Q: During the term of the Salkind agreement, again, after you became in 1981 or the early 80's involved in business affairs, did you have occasion to work with various Warner Brothers personnel in connection with different aspects of the Superman films?

A: Yes.

Q: And with whom did you frequently interact at Warner Brothers during this period of time?

A: From somewhat before this time I began to interact with John Schulman with regard to his work for Warner Brothers originally as an outside attorney and then later as an executive of the company in regard to Salkind matters.

Q: And when you refer, sir, to Mr. Schulman in his individual capacities as an attorney, was that in connection with litigation involving Alex Salkind?

A: When I first met John, he was an outside attorney retained by Warner Brothers and Warner Communications in some fashion to deal with some of the many issues relating to Salkind, and he was given me as one of the Superman experts to educate him on the character.

MR. TOBEROFF: Objection, your Honor. I didn't want to interrupt. Leading.

THE COURT: Overruled.

BY MR. BERGMAN: Q: Mr. Levitz, after Warner Brothers acquired the Salkind film rights in or about 1993, did you have any conversations at that point in time with anyone at Warner Brothers concerning what would happen upon the expiration of those rights in 1999?

A: Yes.

Q: And with whom did you have those conversations?

A: I probably had those conversations with several people, but the majority of them were with John Schulman.

THE COURT: Counsel, I need to take a wiretap for a few moments. We're going to take about a 15-minute break.

(Recess taken.)

THE COURT: Counsel.

MR. BERGMAN: Thank you, your Honor.

Q: Mr. Levitz, I have a few more questions about the comic superheroes. As of 1973, what was Superman's ranking in terms of all comic books, not just those made by DC?

A: The Superman titles had the largest sales of any heroic or adventure kind of character. As I think I said, it's possible Archie or Richey Rich might have equaled or surpassed him on the humor side.

Q: And what was the relative ranking of Superman throughout the industry during the period 1997 through 2002?

A: On a good day, he might have hit number four. He didn't consistently hold -- necessarily hold that place.

Q: And who were the comic book characters who occupied one, two, and three?

A: Generally through that period, X-Men, Spiderman, Batman, in that order.

Q: Okay. And who is the leading comic book seller from the period, oh, from 1978 to date?

A: Throughout that period the X-Men franchise has been by far the best selling comic book franchise.

Q: Okay. Beginning in 1981, did you undertake any efforts to inform yourself about the market for film and television licenses to comic properties?

A: Yes.

Q: And could you tell us what you did, sir?

A: The baseline was conversation with other people engaged in that marketplace, either working at competitive comic book companies or lawyers or agents who were particularly interested in the field.

Q: Okay. As a result of those activities, did you consider yourself experienced in negotiating film and television licenses for such properties?

MR. TOBEROFF: Objection, your Honor. Leading.

THE COURT: It's kind of a -- rephrase your question. You're asking what he considers himself? Let's lay a foundation another way, Counsel.

BY MR. BERGMAN: Q: To what extent do you believe that your experience has given you a good appraisal of the comic book market as of 2000?

THE COURT: Sustained. His self-assessment is not relevant, Counsel.

BY MR. BERGMAN: Q: What steps have you taken from 1981 until 2000, if any, sir, to apprise yourself of the activities in the comic book market?

A: Comic book market for sales of comic books themselves?

Q: And their value for film?

A: With respect to their value for film, I had continual conversations with other people involved in that area, either as buyers or sellers. I personally was involved in the negotiation of probably 15 or 20 agreements during that time, which is probably more than any other single individual, with the possible exception of Michael Uslan.

Q: Can you identify some of the agreements that you were in the process of negotiating?

A: Black Hawk, Plastic Man, Watchmen, Green Lantern agreement during that time, agreements for television, for Superman, Plastic Man, Batman, many, many others.

Q: When was the Watchmen deal entered into?

A: I believe we made the essential deal in 1986 around the time the third issue of the comic was published.

Q: And who handled those negotiations for DC?

A: I did.

Q: Following the negotiation of the Watchmen agreement, did you take any other steps prior to 2002 to ascertain market value for comic book heroes?

A: Yes.

Q: Could you identify what it was you did, sir?

A: Again, continuing conversations on the subject and awareness of what the other deals in the field were.

Q: Did you gain any awareness, for example, as to Marvel's deals?

A: Yes.

Q: Could you tell us how you gained that experience and what it was you learned as a result of that?

A: Because of the nature of Marvel's ownership, I had at least two opportunities, I believe in 1989 and in the mid-1990's to examine their deals.

The first case, when the company was up for sale and we were being invited to bid. In the second case, when they were bankrupt, and we were being invited to either bid for the company or bid for its assets, and at that point I had a thorough opportunity to look at pretty much any agreement they had ever done.

Q: And what Marvel agreements did you become aware of at that time?

A: I saw a wide variety of their film and television agreements at the time as well as many agreements for other aspects of the company's business, distribution agreements, rental agreements.

MR. BERGMAN: Your Honor, may I approach the witness?

THE COURT: You may.

MR. BERGMAN: Your Honor, I have given the witness and opposing counsel a copy of the document which has been marked as Exhibit 1125 for identification. This agreement has been produced by Fox pursuant to a confidentiality agreement, and I ask that, of course, that the provisions of that agreement be maintained by counsel.

THE COURT: This will be a further exhibit, I take it, that you'll be seeking to place under seal?

MR. BERGMAN: Yes, your Honor.

THE COURT: I'll provisionally place this under seal at this time.

MR. BERGMAN: Thank you, sir. Is there any objection to the exhibit itself?

MR. TOBEROFF: Yes. The exhibit has not been admitted. This is one of the exhibits that you specifically ruled earlier that can only be used to refresh the witness's recollection.

THE COURT: Oh, this is the --

MR. BERGMAN: I merely said it was being marked for identification. I'm going to --

THE COURT: Very good. Excellent. Well, lay the foundation for need for recollection before we get into it.

MR. BERGMAN: I will.

THE COURT: Fair enough.

BY MR. BERGMAN: Q: Mr. Levitz, do you recognize this exhibit, 1125?

A: Yes, sir.

Q: And is this the agreement that you reviewed in the mid-1990's?

A: I believe this is the agreement I saw in the offices of Marvel's bankruptcy attorneys in Newark when I reviewed their documents.

Q: Has looking at the document refreshed your recollection as to what the terms were?

A: Yes, it has.

Q: With that refreshed recollection, can you identify what the terms are?

MR. TOBEROFF: Objection. Now that his recollection has been refreshed, I believe the document should be withdrawn from the witness.

THE COURT: Well, he should be testifying from his refreshed recollection. Although there is no limit on the number of times that the document can be given to him to refresh his recollection. Once you have it refreshed, why don't you just testify as to what you remember. What we don't want is you simply to be reading from the document.

THE WITNESS: I won't. But if I could look at one more provision.

THE COURT: Please. If it will help refresh your recollection.

THE WITNESS: Yes.

THE COURT: You may proceed, Counsel.

BY MR. BERGMAN: Q: Having refreshed your recollection, sir, what were the terms, the economic terms, of the X-Men agreement?

A: The key terms that I recall and that I've been refreshed on are an initial option of $150,000 against a purchase price of a million five and a contingent compensation formula that basically began to be effective after some form of artificial break even.

Q: Okay. Did you do any other analysis of the comic book market other than what you've told us about during the period 1999 to 2002?

A: Yes.

Q: Could you tell us what else you've done?

A: I looked for any confirmation that was available to me that the numbers that we had achieved on the Superman deal and the negotiation that was going on, continued to represent the top of the market.

Q: And conducting that analysis, did you consider the then existing market for any books by best selling novelists, such as Michael Creighton or John Grisham?

A: I believe the market for novels was fundamentally different. So I did not.

Q: Okay. As part of that analysis -- well, strike that. Can you tell us why you considered them to be fundamentally different?

A: Yes. If you look at the history of film making, you would find that novels exhibit several very different characteristics than comic books. A novel represents generally a very specific story textbook for doing a film as it's adapted. Either it works as a film or doesn't. Michael Creighton is an excellent example of an author who is well acknowledged to write novels that are intended to be easily adapted into screenplays and have frequently been very commercial.

THE COURT: I'm sorry?

MR. TOBEROFF: Objection. This is sounding identical to expert testimony.

THE COURT: I'm going to overrule these objections, Counsel. The witness is being asked to describe his process and the analysis he used in working out the deal in question. That's fair game, Counsel, in a case like this.

MR. TOBEROFF: Thank you, your Honor.

THE COURT: You can fully cross-examine him on this. But given his position as president of DC Comics and given his position over the agreement in question here, his entire thought process and how he reached the agreement and why is all fair game for both sides.

MR. TOBEROFF: Very well, your Honor.

THE COURT: So just to make this clear. These objections concerning his expertise, I know it sounds like an expert witness, but he's testifying as the president of DC Comics, as essentially the defendant in this case.

Overruled.

MR. BERGMAN: Thank you, your Honor.

Q: Had you concluded your answer?

A: No, I had not.

Q: Could you continue to do so.

A: In addition to my perception of that, in my experience negotiating, the parties on the other side were not ever willing to look at novels or musicals or even children's books as appropriate precedent in an argument about the price they were willing to pay for comic book rights.

Generally, the fact that comic books, because we were generally licensing a character where multiple stories could be created around the character, created an opportunity for the licensee to hopefully develop a more ongoing series of stories than they might off a finite novel. But at the same time they viewed it, they argued that there was less value inherent in it because they did not have as clear a road map to it. So never mind what we paid for that. This is what we paid for comic books.

Q: Mr. Halloran, plaintiff's expert, cited a number of superhero films to support a statement that comic book properties were, quote, extremely hot during the 1997 to 2002 period.

Do you agree with that statement?

A: I believe there was more activity in comic book rights in that period than there had been in the previous years. There had yet to be a string of particularly successful movies that enabled the overall pricing structure to move massively beyond where it was.

The X-Men price that I just cited was at the time the highest price that I believe anyone had achieved for a comic book property other than our Superman and Batman deals, and that was better than had existed four or five years previously, certainly, but it still had not moved the market into the territory it would go into five or six years later.

Q: Okay. Plaintiff's expert also testified about what he termed the recent phenomenon of rebooting in connection with comic book or literary characters in film. Do you know what it means to reboot a comic character in a film?

A: The term rebooting comes out of the comic book industry where it originally acquired its meaning in essentially throwing out the history of the character. We are now going to retell the story of Superman from Krypton to Earth. None of his previous adventures count. He's going to meet Lois Lane for the first time. Fact that he fell in love with her last time doesn't mean that this time he will fall in love with her. There may be a new visual look.

We did that very famously with Superman and the comics in 1985 and very successfully. It's been done with other characters going back as early probably as the classic case of the Flash in 1956 when a new costume, a new secret identity, a new origin for the character was invented and the consistent pieces were simply the name Flash, the fact that it was a character who had super speed powers, and a lightning bolt as part of the insignia, though the insignia had changed radically.

THE COURT: From your perspective, is there any limit to how much of a fundamental redesign you can do in a rebooting effort?

THE WITNESS: It peculiarly goes to sort of your fan sensibility, your Honor. You have to preserve the essence of the property, or there is nothing there. What that essence is, you probably could get many fans lined up, and if you took a survey of them, I suspect you'd find a remarkably consistent central set of conclusions. Superman comes from Krypton. Krypton blows up. He wears a red and blue costume. He has an S on his chest.

The further out you get in the stories, the more willing fans are to look at what might change in that process and the less well known or less beloved a character is, the more willing they are to see the things change.

THE COURT: Counsel.

BY MR. BERGMAN: Q: Did you execute the film agreement, sir, all at once -- strike that. Did you execute it all at once?

A: I don't believe so.

Q: When did you execute, to the best of your recollection, the main license agreement?

A: I believe it was March or April of 2002.

Q: Did there come a time when you were later informed that something was missing?

A: Yes.

Q: What was missing?

MR. TOBEROFF: Objection. Leading, your Honor.

THE COURT: Well, not the last question, what is missing. That's clearly a non-leading question. The previous one was foundational. Overruled.

THE WITNESS: I believe I had forgotten to sign some portion of the agreement or a copy of the agreement, as happens from time to time in the stack of documents I sign.

BY MR. BERGMAN: Q: Okay. And did you subsequently sign it?

A: Yes.

Q: In the late 1990's and early 2000's, when you were negotiating the Superman film agreement, were you aware of any comic book based film that did not have a top dollar actor which had succeeded in reaching a hundred million in gross or more, domestic gross?

A: I believe the only comic book based film that did not have expensive film talent that reached that kind of number was Teenage Mutant Ninja Turtles. The first film.

Q: What did you conclude, Mr. Levitz, as a result of your market analysis prior to executing the Superman film agreement in 2002?

A: I concluded that the deal that we were proposing to do was still by far the best deal that had been done for a comic book superhero property.

Q: Prior to executing the agreement, did you take any further action to test the conclusion that you had reached as to the fair market value of the Superman rights?

A: Yes.

Q: Did anyone else evaluate the then fair market value of the prior Lois and Clark agreement or the prior Salkind agreement for you?

A: Yes.

Q: And what did that evaluation show, if anything?

A: That evaluation showed that they felt that it was a fair level for a deal even though it was between related parties.

Q: And who were the individuals who reached that conclusion?

A: Bruce Ramer and Kevin Marks.

Q: And can you explain the circumstances under which Mr. Ramer and Mr. Marks concluded that and expressed it to you?

A: Yes. As part of our discussions of a resolution to the Siegel claims, we produced and were negotiating a set of terms. As part of that process, Bruce Ramer, Kevin Marks, and their colleagues examined our proposal to dub the existing deals' safe harbors that would be acceptable in future situations to base such deals on and not be challengeable by them.

Q: And did they in fact confirm that they would indeed be safe harbors?

A: Yes.

Q: And was that in fact confirmed in the October 19 letter?

A: I believe that was the date of their letter.

Q: Mr. Halloran, plaintiff's expert, testified that in the license of literary rights, quote, the highest bidder wins. Do you agree with that statement?

A: No.

Q: In what ways do you disagree with it?

A: At the very least, if you're going to conduct an auction for literary rights, whether it's a novel being offered to multiple publishers or film rights being offered to multiple producers, you want to confirm the bona fide nature of the possible bidders, and at the best case, you want to place your property with the best partner for that particular property because in many cases, as I talked about earlier today, a particular partner will either have complementary rights to offer, as Warner Brothers does in the case of Superman, or particular expertise at one marketplace or another. If you feel the property is a good merchandising property, for example, you would be foolish to value a bid from Paramount equally to a bid from Warner Brothers or Disney, for example. It doesn't mean that Paramount is a worse movie studio necessarily, but their expertise doesn't weigh as heavily in that particular direction.

Q: Is there a difference for DC in having a major studio as a partner in the making of a film as opposed to an independent producer?

A: There's an enormous difference.

Q: And what are those differences, sir?

A: When you're dealing with an independent producer, you not only have the question of whether the project can be assembled with all of the correct elements, but whether ultimately the financing will be available or whether the entire thing will be revised when it goes to a major studio or distribution partner.

It's not dissimilar to what Mr. Halloran commented on in the independent film business, where if you're putting together an independent film, one of your ideals is that ultimately you would like to have a major studio distribute it. If you're going to one independent producer, he may put together the actor and the director and the screenplay, but then go to a major studio to get distribution for it, and the studio may say that's really close, but could you just change everything that's green to blue.

You lose a year, and you're back to square one.

Q: Putting economic terms aside, might there also be a difference in making a film with one studio as opposed to another studio, regardless of who is bidding the most money?

MR. TOBEROFF: Objection. Leading.

THE COURT: Sustained.

BY MR. BERGMAN: Q: In your experience, Mr. Levitz, are there different ways in which different major studios handle the production and distribution of films based on comic book heroes?

A: Absolutely.

Q: Okay. And do those differences have an impact upon the quality or performance of the picture?

A: In my experience, different studios have different appetites for how much they are willing to finance projects like this. What types of marketing skills they bring to bear and how they manage the process which gives you an utterly -- a -- not only a better or worse chance of success, but different kinds of opportunities of success.

One will be better internationally than another at a given point. One will be, as I've said, better at merchandising. One will be better at home video.

Frequently you can make a distinction between the studios in terms of what age consumer they are good at reaching. I don't believe there's any argument that Disney's skill at reaching young children and cross-marketing to them is equaled by any of the other studios at any given time. So if you were going for a property that you felt dead centered on six year olds, a bid from Disney would be vastly more valuable than a bid from another studio perhaps.

Q: What was your primary goal while you were negotiating the film agreement?

A: My primary goal in negotiating the Superman film agreement was to extend the constructive partnership that we had with Warner Brothers pictures in a way that would maximize the long-term return to DC Comics for the health of our business and of the property that we were working with.

Q: Were there particular terms that were of particular importance to you in that effort?

A: The gross participation terms were disproportionately important in their economic effect. The ability to not only free the television rights for exploitation but to exploit them on highly profitable terms for DC was of tremendous economic effect, and the general structure being at a full fair market value was, of course, a primary consideration.

Q: Do you recall the initial negotiating position that you took on the Superman Returns film deal?

A: The negotiations happened over a very extended period of time. So it's hard for me to recall each of the positions that either I took or Warners took specifically in order.

In general, my approach was to try to continue the key terms from the Salkind agreement because I had found them to still be top of the market.

Q: And generally speaking, what was Mr. Schulman's initial negotiating position?

A: That since we were no longer negotiating with a fly-by-night independent producer who caused him more grief than anybody else in his life, we should be thrilled to accept lesser consideration, lesser controls, and be deeply grateful for being in Warner Brothers' presence.

MR. TOBEROFF: Objection. Hearsay, your Honor.

THE COURT: It's not being introduced for the truth of the matter asserted but rather the position being taken in the negotiation conduct of the negotiator.

Overruled.

BY MR. BERGMAN: Q: Mr. Levitz, were you in the courtroom when Alan Horn testified regarding his appraisal of the value of Superman in 2002, that he considered it to be, quote, viable but challenging, close quote?

A: I think it was viable but challenged. But yes.

Q: Did you take the declining performance of the four prior films into consideration?

A: Yes.

Q: Did you also take into consideration the safe harbor discussions that you had with Mr. Ramer and his partner?

MR. TOBEROFF: Objection, your Honor. Both these questions are leading.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Can you tell us, Mr. Levitz, among other things, what considerations, what matters you took into consideration in determining to execute the 2002 film agreement that we have introduced in evidence?

A: I took into consideration the virtues that I perceived Warner brought to the table, including the continual efforts and investments that they had been willing to make in developing the Superman film while we were going through this negotiating process.

They went through several very expensive scripts and preparatory commitments that showed the kind of film that they were anxious to make. I took into consideration the fact that it would still be the premiere deal for the category in the marketplace, and when that time period was reached, that in fact I had my presumption there accepted or confirmed by the reaction of as tough a negotiator as Bruce Ramer and his firm. I measured the likelihood of future success based on the agreement as I had achieved it.

Q: Thank you. How long did the negotiation of the Superman Returns film agreement continue?

A: I think it depends on the definition of negotiation. We began talking about the fact that we would need to either extend the Salkind agreement or negotiate a new agreement to replace it pretty much as soon as Warner

Brothers took Salkind's place on the pictures. You don't spend tens of millions of dollars to develop a film, much less the quarter of a billion dollars you can spend producing and releasing one unless you have some confidence that you're going to be able in success to amortize that and amortize that over a series of pictures.

So you need a number of years ahead to look. So discussions probably began as early as perhaps 1994 or 1995 in a very informal fashion, and the heart of the negotiations probably took place over a three- or four-year period, commencing in the late 1990's.

Q: With respect to the basic issue of the gross participation, how was that resolved in the agreement?

A: It was resolved by sticking with the formula from the Salkind agreement.

Q: With respect to the size and frequency of the option payments, how was that resolved in the film agreement?

A: I had tried to negotiate for an inflation driven COLA system on the option payments, given the length of the agreement. And we resolved it instead with a simpler schedule of escalating option payments over the life of the agreement.

Q: And am I correct that there were -- I'm sorry. I'm not correct in saying that.

In terms of developing a film like Superman Returns, in your experience how long does that take?

A: It's been the nature of comic book properties historically that the development process is extraordinarily long. The first of the Tim Burton Batman films was the culmination of a nine-and-a-half-year process where we went through three or four directors and three or four finished scripts.

The process on Superman between the failed development efforts by the Salkinds, the failed development efforts at Warner Brothers, and then ultimately Superman Returns goes over a period of, depending on how you want to measure it, perhaps 15 years.

On the other hand, if you measure the period between Brian Singer walking in with the idea for Superman Returns and going into production, it was a matter of months. Because at that point he had an idea that the studio instantly bought into, felt the time was right for, his qualifications were right and appropriate. So it really can vary enormously until the lightning strikes.

Q: Did you at any point in your negotiations with Warner take the position you must make this picture within a year, or you must make this picture within two years, or it will revert?

A: In my experience, that's a completely counterproductive position to take.

Q: And why do you say that, sir?

A: I have seen at an extreme case –

THE COURT: Let me stop you there. The question was whether or not did you that.

THE WITNESS: I'm sorry. Can you repeat the question?

BY MR. BERGMAN: Q: The question was and why do you say that, sir? The prior question had been did you at any point in your negotiations with Warner take the position that you must make this picture within a year, or you must make this picture within two years, or it will revert?

The witness said in my experience, that's a completely counterproductive position --

THE COURT: That was nonresponsive. The question was did you ever at any point take that position.

THE WITNESS: No.

BY MR. BERGMAN: Q: Why didn't you take that position, sir?

A: In my experience that's totally a counterproductive maneuver. I observed Marvel, for example, find itself in a position where there was a limited amount of time left on one of their film licensees, time to either make a movie or allow the rights to revert and find themselves with a Fantastic Four move that I kept them from making, a good Fantastic Four movie for over a decade thereafter.

Making a bad movie is a significant detriment to the value of a property. And you can't force a good movie to happen in a certain time, or certainly I don't have the expertise, nor do I believe any combination of my predecessors had the expertise to independently judge all the elements that would make a movie successful in a way to say this is absolutely right. You must make this film.

Q: How was the issue of the escalating annual options resolved in the film agreement?

A: I believe it works as a schedule that escalates from 500,000 a year to 700,000 a year over the life of the agreement.

Q: And finally, what was done with respect to any issues regarding the video royalty in the film agreement?

A: I had taken the position in negotiating the agreement that I desired an increased video royalty. Warners took the position that at that time they never gave a greater video royalty.

We resolved it with language that addressed a couple of circumstances in which if Warner's position changed, either because they gave another individual specifically on a Superman film a higher video royalty or if their general practice in the business went to a higher number, that we would get the benefit of that higher calculation.

Q: Do you have a copy of 1041 in front of you, sir?

A: Which is 1041?

Q: 1041 is the Superman agreement.

A: Yes.

Q: Would you turn to the favored nations provision, which is found, I believe, at Bates stamped page 4218.

A: Yes, sir.

Q: Do you see, sir, in subparagraph DA there is a reference to a term, quote, other participant, close quote?

A: Correct.

Q: And do you see the definition that is drafted here of other participant?

A: Yes.

Q: Is it your understanding that Legendary Pictures is a participant in the film Superman Returns?

A: No.

Q: What is your understanding, sir?

A: I understand that they are an investor, a co-financier of the film.

Q: Have you ever said to Warner Brothers, look, the contract says other participants shall mean any party entitled to share in the revenues of the picture? Doesn't that include Legendary?

A: I have discussed Legendary with Warner Brothers in that connection. But it was quickly clear to me, when the Legendary deal was explained to me, that in very basic accounting terms the definition here says a participant in the revenues of the picture. Legendary is a participant in the profits of the picture as an investor. It's a different category.

Q: While you have the agreement out, could you please turn to page 8 of that agreement, which is Bates stamped 4206, and in particular, sir, I want to refer you to paragraph 7 entitled character integrity/consultations.

A: Yes, sir.

Q: Do you see that?

A: Yes, sir.

Q: Were the approval rights that DC obtained in the film agreement less than the approval rights they had obtained in the Salkind agreement?

A: Yes.

Q: Was that purposeful?

A: Yes.

Q: Could you tell us what the purpose was?

A: Certainly. In the circumstance where you are working with -- I'd make three distinctions.

One, an independent producer who may basically assign the project to anyone in the world to actually make.

Two, a party to whose interests are not in any way aligned with yours other than with regard to the picture, they may decide that they can best monetize their rights by doing something you find completely contrary to the long term value of the property.

And, three, you require a layer of assurances because the course of actions of that party are far from predictable. They may want to make a very cheap film. They may want to make a pornographic film. They may want to make a film that's suitable only for home video distribution. That wouldn't have been the case in the Salkind era. That didn't exist. But analog.

So you go into that situation, first of all, with greater leverage, because they know that they are a weaker party, but second of all, with more confidence in your own judgment relative to the person who is making it. And more need to

protect yourself. When you go into an agreement where many of the fundamental interests of the party are aligned, the behaviour pattern of the other party is extremely well known and to a very good standard. You know, Warner Brothers is not going to make a cheap, junky picture. They will make a picture that can fail. They certainly have done that in their history, but it will not be for lack of effort or lack of investment generally. They are not going to make an X-rated movie, for example. Then you can go to a much lesser level of control. We addressed some of that in this agreement because of the long length of it by saying that in the event that DC and Warner's interests ever became unaligned, that they were no longer affiliated companies, that our controls would be strengthened to a level more comparable to what they had been with Salkind. It was not reasonable to get them to the -- what I would categorize as extraordinary level we had with Salkind because no one in their right mind would have committed to make a motion picture with the level of controls that we had in place with Salkind, most of which simply were not practical to actually exert.

Q: Very good, sir.

THE COURT: You mentioned that in negotiating with somebody else other than Warner Brothers, they would be in a weaker position. What do you mean by that?

THE WITNESS: First of all, if you separate the categories of independent producer versus a studio, an independent producer is fundamentally in a weaker position because he does not bring all the assets necessary to consummate the deal. He's coming in generally without the financial financing, without the distribution. So there will be really a second negotiation to follow. So that weakens his position.

When you're measuring studio versus studio, then it's a combination of three things in terms of the negotiating position. The skill sets they bring to bear for the category of project that you want to do, as I illustrated before, I would argue that Warners would be in a better negotiation position for a film that was heavily merchandisable than Paramount.

Second, in this very peculiar case, the hostages we had already given to fate, that Warners had a set of complementary copyrights and trademarks that had great value to us to incorporate in a sequel motion picture or a sequel television series that we would either have to buy from them or be working with them to have access to, everything from the John Williams score to the crystal

structure of the planet Krypton and the crystals that Superman uses in the course of it, which were invented during the movies that Warner Brothers had rights to, and the copyrights in those elements to the extent that they are separately copyrighted were never transferred to DC by operation of any of the agreements that we had.

Third, you have the cumulative value of working together. It would only be, for example, with Warner Brothers that we could offer a boxed set of Superman 1 to 4 plus Superman Returns as a home video product or cross-sell those things for distribution or theatrical exhibition because they would continue to hold the rights to those negatives. I've watched many times in my career Marvel be placed at a severe competitive disadvantage, because, for example, 20th Century Fox, with their successful X-Men motion picture, was unable to market the many volumes of X-Men animated cartoons that had been produced because they were produced by three or four different entities. Marvel didn't control any of those libraries.

MR. PERKINS: So they were disadvantaged. In case of negotiating with Warner versus negotiating with Universal, Warner was able to say well, if you give us the rights in the future to the Superman movie, we will be able to make more money for you on the Superman material that we already have because we will be able to do a coordinated marketing program.

THE COURT: Very good. Counsel, we're at the five o'clock hour. Why don't we go ahead and conclude for this week. You may step down.

MR. BERGMAN: Thank you, your Honor. It's clear, given the amount of time that's left, that we're not going to be able to conclude the testimony on Tuesday, as I was hoping, and it will spill onto Wednesday. But we will definitely have the testimony wrapped up by Wednesday.

THE COURT: The Court has -- I have to attend a Ninth Circuit jury instructions committee. I'm on the Ninth Circuit jury instructions committee redoing the criminal instructions this year, and we're meeting Thursday and Friday in Pasadena. So I only have the two days next week.

So what I'm going to do is we are going to wrap up the trial on Wednesday, and I don't want to go straight from the last witness, though, to closing arguments. So I'm going to schedule on Wednesday a date for the closing arguments the following week. Given that you have the transcripts and

everything, that will give you an opportunity to really have outstanding closing arguments with pinpoint cites and all the rest.

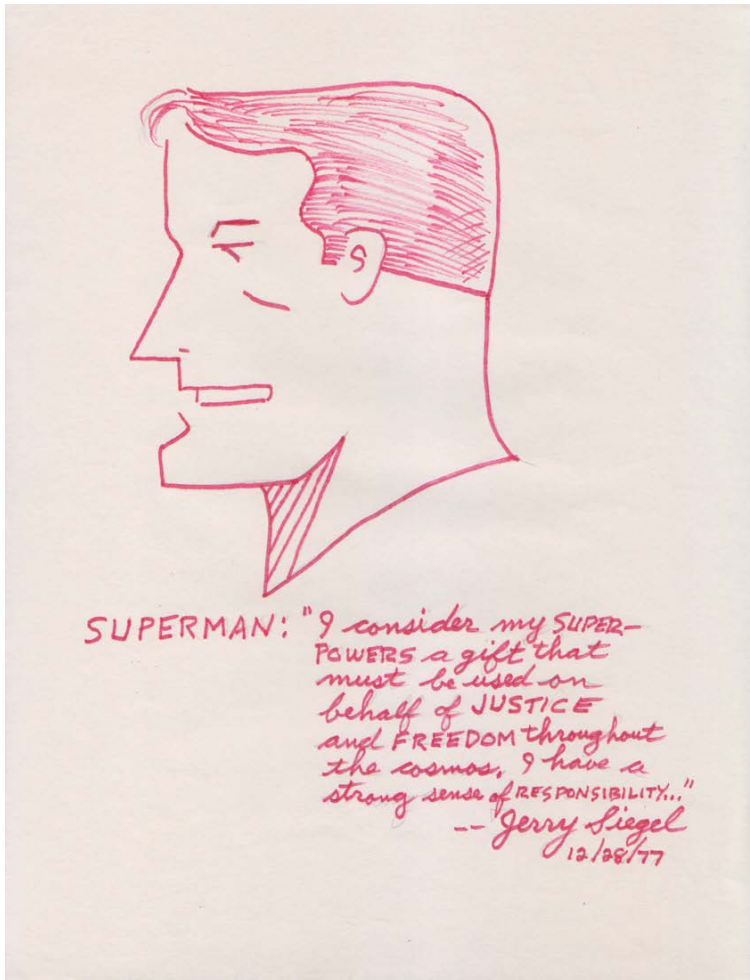
So in any event, I just wanted to give you a heads up so you're not spending this weekend working on your closing arguments. Next week we'll finish up the trial Tuesday and Wednesday, and then I'll carve some time out of the trial, just like time was carved out of this trial for closing arguments the following week.

MR. BERGMAN: Thank you.

MR. TOBEROFF: Thank you.

THE COURT: Have a good weekend, everybody.

(Proceedings concluded at 5:00 P.M.)



TRIAL DAY 9

A.M. Session

Tuesday, May 12, 2009; 10:09 A.M.

WITNESS: Paul Levitz (Cont'd)

THE CLERK: Calling case number CV 04-08400-SGL, Joanne Siegel, et. al., versus Warner Bros. Entertainment Inc., et. al.

May we have counsel please come forward and state your appearances for the record.

MR. TOBEROFF: Marc Toberoff for the plaintiffs.

MR. WILLIAMSON: Nicholas Williamson for plaintiffs.

MR. ADAMS: Keith Adams for plaintiff.

MR. BERGMAN: Michael Bergman for the defendants.

MR. PERKINS: Patrick Perkins for the defendants.

MS. MANDAVIA: Anjani Mandavia for defendants.

THE COURT: Good morning to you all. Before we resume with the trial, there's a couple of issues that I want to take up.

First of all, I received yesterday, plaintiffs' trial brief regarding impermissible expert testimony and request for continuing objection thereto from the plaintiffs. Do the defense have a response to this? I trust you received this, as well?

MR. PERKINS: We did. We filed a response this morning, Your Honor.

THE COURT: Do you have a copy of your response? It hasn't made its way into my hands yet.

(Document provided.)

THE COURT: Yes. Mr. Toberoff, the argument analysis being made by the defense, which basically tracks the Court's thoughts the other day, is exactly the Court's position. You've made your objection.

Mr. Levitz is in a very unique role. He negotiated the deal. The Court's inquiry and counsel's inquiry and, I trust, your inquiry focuses on his state of mind and his analysis in entering the deal, which is highly relevant to placing the deal in context. It's not like he's being brought in -- as a witness, been brought in from the outside to evaluate a deal; he's a percipient witness -- he is a percipient player in the deal itself. And that's where his understanding of the deal, and how the deal was made, and how the deal was structured, and why it was structured the way it was, is relevant.

The Court is well aware -- and as I indicated, this is not a jury trial, this is a bench trial -- the Court is well aware of the nature of the testimony and the proper purposes for which it can be used and for which it can't be used.

But your objection is noted. It's overruled for the reasons I stated previously, as well as the well-articulated Warner Bros. brief, so we'll move along on that.

The other concern I had is with respect to this issue regarding the Harry Potter video rates. I've received the declaration of Steven Ames Brown.

Who is this Katherine Chilton?

MR. PERKINS: She's a lawyer for Warner Bros., Your Honor, and she is actually here today.

THE COURT: She's in-house?

MR. PERKINS: Yes.

THE COURT: Okay.

MR. PERKINS: She's an in-house lawyer.

THE COURT: The declaration from Mr. Brown indicates that Ms. Chilton revealed the information concerning Ms. Rowling in response to a general question -- what's the highest percentage ever reported -- spontaneously in advance of any discussion that would have taken place with Mr. Halloran.

Is that true?

MR. PERKINS: That is true, Your Honor. And that is what we represented to the Court on Friday.

THE COURT: So then there's no issue here.

MR. PERKINS: Well, the issue that we had, Your Honor, and why we came in, was simply to get a sealing order with respect to these things.

What the declaration Mr. Brown indicates is consistent with what I said on Friday, which is that he reported to Ms. Chilton that this information had been testified to in open court; that is public.

He goes to great pains in his declaration to explain that Mr. Halloran said to him that he couldn't discuss the testimony; that there was a provisional sealing order, but that the Court had first amendment concerns.

But he didn't report any of that to Ms. Chilton, so Ms. Chilton came away with the following information: That Mr. Halloran had testified about this in open court, and that the deal terms were public.

That's what drove us to come here, Your Honor, on Friday simply to get Your Honor to provisionally seal this information until such time as we can make a formal application.

THE COURT: Have you made that formal application? It's now been several days since this happened.

MR. PERKINS: Your Honor, when we discussed this on Friday, we indicated that we were going to make one omnibus application at the conclusion of the trial so that we could make an application with respect to all of the confidential information at one time.

THE COURT: I understand that. But given the particular concerns that you have about this particular piece of testimony --

MR. PERKINS: Your Honor, we will have it on file by tomorrow morning.

THE COURT: Let's address it so that we can put this to rest.

MR. PERKINS: Yes, Your Honor.

THE COURT: I think that's probably the better course. Counsel?

MR. TOBEROFF: Your Honor, may I be heard on this issue, please.

THE COURT: Yes.

MR. TOBEROFF: It is incorrect that defense counsel Mr. Perkins represented to the Court on Friday what's stated in his declaration.

What prompted the Court to seriously order this seal provisionally was the distinct impression that Mr. Halloran had provided confidential information to Steven Brown in the other case; and that, due to these leaks, a red scare was created to prompt the Court to seal the record.

That was not the case.

I would ask that defendants provide the Court with a transcript, which will show everything that's being said in this declaration is correct. If it does show that it's correct, I believe that defendants should reimburse Mr. Halloran for his time in coming out here due to their misrepresentation as to what he had done. Steven Ames, by the way, does not go to great pains in his declaration to say that Mr. Halloran told him he couldn't speak because --

THE COURT: Do you have a copy, Mr. Toberoff, of the statements -- I mean, I recall the statements, but I'd like to see them exactly -- from Friday?

MR. TOBEROFF: Yes.

(Document provided.)

THE COURT: What page?

MR. TOBEROFF: Starts on Page 2, line 2.

THE COURT: Here it is.

(Brief pause.)

THE COURT: Well, reading all of the pages in context, Mr. Perkins did indicate that the lawyer for Warner Bros., this Ms. Chilton -- she's not identified by name, but I assume that's who we're talking about -- was asked about the video royalty in the Harry Potter case, and she said that's confidential.

Then she was asked what's the highest rate that's ever been given, and she gave the testimony indicated. Mr. Brown says that he did not ask her about Harry Potter or Ms. Rowling; that he simply asked what's the highest percentage ever reported, and she identified Ms. Rowling.

So there's some inconsistency, but I don't know if it really rises to the level of a material inconsistency that you're suggesting, Counsel.

This is why we try to get to the bottom of things, and this is why we need to use transcripts and get the witnesses, the people who are in here, themselves. I can certainly see how one thing gets told to another and the concern comes out the way it did.

MR. PERKINS: I would just make one other point, Your Honor. And that is that Ms. Chilton's deposition was pursuant to protective order. Again, notwithstanding the concern that whether she said it or when she said it during

deposition, under -- Mr. Brown concedes that was under protective order. The concern, again, arose after the deposition testimony.

THE COURT: But the problem is, Counsel, the way you presented this to the Court -- and I'm not saying – beginning with your first explanation to the Court, you say -- this is on Page 2 -- you say, "Unfortunately, today, Your Honor, we received a call from another lawyer at Warner Bros. who was being deposed in a case involving the Orson Welles' estate. The lawyer for the other side has told her that Mr. Halloran, who is engaged by the Welles' estate, disclosed to the lawyer the video royalty rate for Ms. Rowling in that agreement." Now, when you first said it, you did not indicate that that was after Ms. Chilton had already voluntarily disclosed the rate in the deposition.

You do, later on, clarify that that took place. But you indicate in the record, and this is on Page 3, that it was in response to a specific question about the Harry Potter case. Mr. Brown says that it was not.

So what that left the Court with the impression on Friday was that Mr. Halloran allegedly had disclosed to his lawyer, that had retained him as an expert, that asked about the Harry Potter rate -- because that's the highest rate -- that was what was implicitly -- that was the understanding of the Court.

I can see this is a subtlety, so I'm not -- you know, at the same time, I understand Mr. Toberoff's position that -- you know, that's why we have a hearing on these things, to kind of get to the bottom of it.

Mr. Toberoff?

MR. TOBEROFF: Yes, Your Honor. The key phrase, as you noted, is on page -- the key section is at the bottom of Page 3, and I'd like to point out something specific to the Court.

Mr. Perkins says, "And the way it came out was that, at the deposition, the Warner Bros.' attorney asked, 'What was the video royalty in the Harry Potter case?'"

THE COURT: I just said that. I see that, Counsel.

MR. TOBEROFF: Suggesting that he had information from Mr. Halloran.

And then he misrepresented. She said, "That's confidential." Then when later asked what's the highest that's ever been paid, she gave the testimony.

THE COURT: I understand. That's what I think I just said.

MR. TOBEROFF: And then at the end on Page 4, and to prompt you to seal the record, he says, "So it's out there, Your Honor. So it's out there." Meaning, this is being leaked by Mr. Halloran.

I don't see this, from my perspective, as accidental. And it worked. And I just think under the circumstances, the defendants should supply the transcript from that case so the Court can see in black and white what actually happened.

THE COURT: Well, they're not disputing that Mr. Brown's representations are correct. Are you?

MR. PERKINS: At this point, Your Honor, I'm not going to stand behind any third party's representation.

THE COURT: Okay.

MR. PERKINS: However, Your Honor, Ms. Chilton is here if the Court wishes to inquire of her. We brought her in this morning for that very purpose, if Your Honor would like to hear about it.

THE COURT: Well, I trust you've shown her this declaration of Mr. Brown, have you not?

MR. PERKINS: Yes, we have.

THE COURT: Does she agree that Mr. Brown's declaration is accurate?

MR. PERKINS: Not entirely, Your Honor. She stands by her recollection of her testimony. Apparently, there was --

THE COURT: Why don't you proffer for the Court. What's her recollection?

MR. PERKINS: Well, her recollection is that there was, in fact, a question asked about the Harry Potter royalty, and that she said that it was confidential. And that later he asked her a question, "What's the highest you've ever paid?" At which point there was a -- she says, in colloquy with counsel, "Look, I've already told you who got the highest. If I tell you what the number is, you're going to know." Eventually, she did testify, as I mentioned, that the deposition is pursuant to protective order. But, again, the impression that she came away with in this conversation, after having testified and what was represented to us, was that Mr. Brown knew that.

Your Honor, Mr. Brown is an officer of the court; he's put in a declaration under oath; we drew a conclusion based on the information that we had.

I would point out, I did not come in, Your Honor, and ask for sanctions against Mr. Halloran for him to be held in contempt. Our concern was, we just want to ensure that there was no confusion as a result of what was said when we objected to it in the beginning; and that perhaps this provisional sealing would be the way to go.

And that was our entire objective, Your Honor, in bringing this to the Court's attention. Again, I represented to the Court, to the best of my knowledge, what I had been told; the conclusion that had been drawn by the Warner Bros.' lawyer. And I reported that to the Court.

To the extent that Mr. Halloran has been unfairly impugned in this matter, I apologize. It was certainly not the intent. Again, we did not come in asking for contempt citations. We wanted to keep the genie in the bottle and make sure --

THE COURT: The Court has its own responsibilities when an allegation of this nature is made against an officer of the court; he's a member of the bar. Whether he's in this court as a witness or as a litigant, the Court has its obligations to make sure that orders are being abided by. Who's this Welles v. Turner Entertainment? Who is that before? What court is that before?

MR. PERKINS: Your Honor, I don't know actually. I can find out. I don't know.

THE COURT: Is it a state court case?

MR. PERKINS: I don't even know the answer to that.

THE COURT: Do you know, Counsel?

MR. TOBEROFF: I believe it's the United States District Court for Central District, Western Division. The case number is CV 08-01399-JFW.

THE COURT: Okay. That's Judge Jack Walter. Maybe I should just send everyone over there.

MR. TOBEROFF: Your Honor, if I may, at least now that everyone's curiosity is raised, I think defendants should produce the transcript.

THE COURT: Well, it's not a matter of just curiosity, but I do think I probably should take a look at the transcript and that would probably resolve it.

You know, if this did come out from the Warner Bros.' attorney in response to general questioning, without a specific prompt in Harry Potter, that does lesson, significantly I think, the concern here.

At the same time, Mr. Halloran -- even if it had come out from Warner Bros., just because one person does something -- releases information, indicates that it's confidential, that still doesn't fully explain why Mr. Halloran would have said what he said during the break.

MR. TOBEROFF: We don't know what he said until we question him. But, Your Honor, what has been relayed to me was that when -- he's the expert in that case, so naturally he That's hardly disclosing confidential information in violation of protective order, by confirming that you've testified on the same thing in open court today.

He did tell him that there was a pending motion to seal the record. Also, Your Honor, I would like to --

THE COURT: Well, that's what I just meant. I mean, I'm accepting Mr. Brown's testimony as to what Mr. Halloran said, so you've just confirmed. So we do know, at least from your prospective, what he did say.

MR. TOBEROFF: Yes.

THE COURT: When you're subject to a protective order -- as you well know, Counsel -- you discuss neither the content nor the subject of the matter that is subject to the protective order.

MR. TOBEROFF: Yes. But it -- I understand.

THE COURT: You're back in -- and I don't need to use a silly example, but you understand that simply disclosing the subject matter of that which is the subject of the protective order is a violation of a protective order.

MR. TOBEROFF: I understand that.

THE COURT: I wouldn't necessarily expect a lay witness to understand that, perhaps; but certainly a lawyer would understand that. When you've been ordered not to discuss something that's been basically sealed or provisionally sealed in a courtroom, you can't even say what the subject was in the courtroom.

So that's why I made the comment that I did. Even accepting your proffer and Mr. Brown's proffer of what Mr. Halloran said, he's not off scot clean on this. But it certainly lessens the Court's concern that he provided -- because quite frankly, what I thought, based on the statements that Mr. Perkins made, was that essentially Mr. Halloran fed Mr. Brown a question to ask the Warner Bros.'

attorney. And that appears, no matter whose version I accept, that that's not the case.

And now we're more on a level where I think simply an admonition to everybody to be quiet about this until the Court has considered the application, responds to it, and issues an appropriate order, we should leave well enough alone. But as far as people paying for -- I mean, both of you brought out witnesses this morning. It sounds like nobody is entirely -- there was some miscommunication, apparently, to counsel here. Mr. Halloran probably went into a subject that he shouldn't have. You know, perhaps this is one of those things that we all walk away from.

I understand that. And that's an argument that I want to have briefed. That's why I'm encouraging Warner Bros. to submit that brief soon. I'll certainly urge you to respond to it. And the Court will make a decision.

I'm more concerned about basically the provisional sealing that I did until we could get to this point of resolving it. It sounds like the issue is not as egregious as the Court understood it to be based on counsel's remarks last week.

I think it's probably best that we just move forward at this time. I'll accept Mr. Brown's -- I'll credit Mr. Brown's declaration. There's no objection to it from the defense. On further reflection, I don't think there's any need for the Court to look at that transcript. I'll leave it to you, Mr. Toberoff, to advise Mr. Halloran not to discuss either the contents or even the subject matter of the Rowling/Harry Potter agreement until the Court has issued a further order on this.

MR. TOBEROFF: Very well, Your Honor.

THE COURT: And I'll advise your client just to – I suppose they can disclose it to whoever they want. I mean, that's not a problem. But obviously, there was some miscommunication here, and it's just a good lesson in making sure that we have all the facts straight.

MR. PERKINS: Thank you, Your Honor.

THE COURT: Very well.

MR. TOBEROFF: Very well, Your Honor.

THE COURT: Let's proceed. You should all be thankful that this did not unfold before another judge.

THE CLERK: Mr. Levitz, please be advised you're still under oath.

THE WITNESS: Thank you.

MR. BERGMAN: Your Honor, may I approach to show the witness an Exhibit book.

THE COURT: Yes.

DIRECT EXAMINATION (cont'd)

BY MR. BERGMAN: **Q:** Good morning, Mr. Levitz.

A: Good morning.

Q: Sir, I've placed before you a book which contains four exhibits; 1003 through 1006. Could you briefly look at those documents and identify what they are.

A: Certainly.

MR. TOBEROFF: Excuse me, Your Honor. May we have copies of these exhibits.

THE COURT: I'm sorry?

MR. TOBEROFF: I would just request a copy of these exhibits to be able to follow.

THE COURT: Does counsel not have these?

MR. BERGMAN: Don't you have copies of our exhibits?

THE COURT: Do you have them, Mr. Toberoff?

MR. TOBEROFF: Yes, now we do.

THE COURT: Very well. Proceed.

BY MR. BERGMAN: **Q:** Would you tell us what those documents are, sir?

A: These appear to be copies of the statements from Warner Bros. with regard to Superman I, II, III and IV for DC's participation from our files.

Q: Can you tell me, sir, as of what date those participation reports reflect the income of those four films?

Why don't you turn, for example, in Exhibit 3 to Page 5409.

A: They appear all to be as of March 31, 2002.

Q: And that was prior to the time you entered into the agreement?

A: Prior to the time I executed the agreement. We probably received the -- we received these statements just after I executed the agreement, judging by the date of the check on the second one. They would be essentially identical to the previous quarter. There was no great activity for any of these four films at that point.

Q: And do these documents reflect the total income that had come in on the respective pictures from their first date of release until that date in 2002?

A: Yes; there's a cumulative number on each.

Q: Looking, sir, to 5409, which is Superman I, what were the reportable gross receipts from that picture as of that date?

A: Approximately $92 million.

Q: And looking to Exhibit 1004 at Page 5505, can you tell me what the total gross receipts on Superman II were as of that date?

A: Comparable numbers, approximately 78 million.

Q: And looking at 1005, Page 7703, can you tell me what the comparable gross receipts was on Superman III as of that date?

A: Approximately $49 million.

Q: And looking, sir, to Exhibit 60 at Page 7776, can you tell me what the reportable gross receipts were for Superman IV as of that date?

A: Approximately $17 million.

Q: Okay.

MR. BERGMAN: Your Honor, I would move these documents into evidence.

MR. TOBEROFF: Your Honor, objection to these numbers on the basis of relevance since they are in nominal -- The bulk of the revenues in a '78 release film is in nominal dollars in '78, which is then reflected here in nominal dollars; so it lacks real relevance to probative value.

Also, he's looking at a statement and he's asking him, 'can you tell me what the revenues, in fact, were,' and he's giving an answer. When essentially he's just reading from the document, and the document speaks for itself.

THE COURT: The document does speak for itself. I'll overrule the relevancy objection. Your argument goes to the weight of the evidence being submitted.

The document is admitted.

MR. BERGMAN: Thank you, Your Honor.

(Exhibit 60 is received.)

BY MR. BERGMAN: **Q:** Mr. Levitz, there was some testimony in the case last week about the purported value of reversion rights.

To what extent has reversion rights provisions been generally important to you when you're negotiating a rights license on behalf of DC Comics?

A: Reversion rights are relevant depending on the type of contract and the type of contracting party. In cases where we are not expecting the contracting party to be making a significant investment or long-term commitment, like a T-shirt license at one extreme, we would go for a very short term and a very, very quick reversion, if they don't act in the marketplace.

That scales up to categories like the motion picture industry, where it's very difficult, in my experience, to get reversion terms. And, again, it measures with who the party is. We would be more concerned about that with a party where we felt we had no other negotiating leverage to go back and adjust the relationship if production were abandoned or development were abandoned than with a party where we have numerous other bases of relationships, where we would have the strength to solve it, other than by operation of the contract itself.

Q: Okay. Was there a reversion provision in the Watchmen agreement that you negotiated with Fox?

A: There was no reversion provision once the purchase price was paid, and you went option, option; and then if the purchase were exercised, regardless of whether they made a film or not, they held the rights perpetually.

Q: To what extent was the reversion provision important to you in negotiating the Superman film agreement?

A: I was not particularly concerned about reversion as a priority item in the film agreement, because I was negotiating with Warner Bros. and I had past experience of being able to resolve problems of -- or opportunities to recapture rights with Warner Bros. to do other things.

Q: We also heard testimony, sir, regarding co-financing provisions.

THE COURT: Before you move on past reversion, Counsel.

The length of the agreement, without reversion, would that not give you some concern?

THE WITNESS: In my experience in the motion picture industry, a motion picture licensee generally tries to capture rights in perpetuity. They feel they're investing so much money that they have to have the right to exploit it indefinitely. The length of time that you would expect to be working together on Superman films, in a success scenario, would naturally be for decades. It's a very natural kind of process.

THE COURT: But this is 34 years.

THE WITNESS: Correct, Your Honor. We survived 25 years under the previous agreement. And our Batman agreement, which was done with third parties initially, as long as option payments continued to be made, or films, but option payments were sufficient to keep it going, they could continue it perpetually.

Functionally, in success, these agreements tend to go on for decades and decades. Marvel, as we saw from their deal with Fox, has a much inferior deal, but as long as Fox continues to make a movie every certain number of years, they get to keep it forever, and they get to continue paying Marvel a nonadjusted-for-inflation price that rolls on.

THE COURT: Counsel, do you have an objection?

MR. TOBEROFF: Yes, I do, Your Honor. And I'd like to request a standing objection on this, so as not to disrupt the flow.

I object to the testimony as expert testimony based on special knowledge at the points where he was speaking about Marvel deals and what's generally done in the motion picture industry.

THE COURT: The Court has ruled on this objection, Counsel. You have sustained it for the record. You've provided it for the record. You've submitted a brief on it. Counsel, this is a bench trial. The Court is only eliciting this for the purpose of his state of mind.

MR. TOBEROFF: I understand, Your Honor. I'm just asking, may I have a standing objection to this type of testimony, so I don't have to keep popping up, for the record?

I need to object for the record.

THE COURT: You have made your objection, Counsel, several times now.

The Court has overruled your objection.

MR. TOBEROFF: May I have a standing objection, under Rule 103, to this line of testimony?

THE COURT: I don't know what "this line of testimony" means, so I'm not going to accept that. Make your objection. Don't make it a speaking objection.

MR. TOBEROFF: I understand, Your Honor.

THE COURT: All right. Overruled. Please continue.

THE WITNESS: I'm sorry. Could the reporter give me my last sentence.

THE COURT: The problem that I'm having is trying to identify what you got for a 34-year turnover. You speak about what you would get assuming success, but I'm more concerned about the opposite scenario. If there's 34 years -- essentially, you're held hostage by Warner Bros. for 34 years, at their whim; and you have nothing for that except the relatively small payment for the option.

THE WITNESS: Well, Your Honor, if they had done nothing throughout the entire time, we would have earned over $20 million in option payments over the entire period. And we would have known -- for instance, we already had the Smallville deal in place, so they had already given us back, quote, unquote, a piece of rights that has, in fact, earned us separately another over $20 million. So had they never made a Superman movie, we would have found ourselves with well over $40 million in place.

And I believe, and certainly it was my judgment at the time, rightly or wrongly, that in the event that Warner Bros. would abandon development or would not pursue a movie ultimately for one reason or another, I would not have an obstacle in getting those rights back to exploit in some other fashion, regardless of what the contract provision said.

THE COURT: Thank you. Counsel?

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** In the event that --

THE COURT: I'm sorry. How would you do that?

THE WITNESS: How would I do that?

THE COURT: Yes.

THE WITNESS: I would first go to Warner Bros. Pictures, as a starting point, and say -- I'll make up a hypothetical set of circumstances.

THE COURT: But if they had taken the position that they didn't want this film produced and they wanted to keep the rights, there's nothing you could have done, is there?

THE WITNESS: Yes, Your Honor, there is. Because we are both part of the same corporation, I have access to people whose responsibilities don't simply include the film division.

THE COURT: So you would have to go, essentially, over their heads?

THE WITNESS: I would have to go over their heads to our common owners and say, 'This isn't good for the business overall. DC Comics can make money by getting a Superman movie made. I believe there's an opportunity, and' –

THE COURT: So that's part of what --

THE WITNESS: That's part of what I'm expecting. I have experience, Your Honor, in my dealings that Warner Bros. Pictures doesn't always determine what we do. If Warner Bros. Pictures' interests were being served, then they would automatically have rights to everything DC had ever done, and they wouldn't have to pay for it. But our more senior management has said, 'You must do this at a measure of fair market arm's length dealing.' And in certain circumstances, we support DC in going outside and licensing properties like Watchmen elsewhere, when that's the right opportunity to be pursued.

THE COURT: How would they automatically have rights if they wanted to?

THE WITNESS: If they had their ideal fantasy, the pictures division would say, 'DC is an affiliated company. Why can't we just do anything that they have the rights to without compensating them?'

THE COURT: So, theoretically, they didn't have to negotiate with you, if they would have gone over your head?

THE WITNESS: If they had gone over my head and been sustained that fair market value didn't matter, then they wouldn't have had to negotiate with us at all.

THE COURT: Counsel.

MR. BERGMAN: Thank you.

BY MR. BERGMAN: **Q:** If they had gone over your head with such a request, what would the response, in your experience, have been?

A: The response has always been that you have to do it on fair market terms.

Q: Okay. If there was a reversion of the DC rights, would DC get, for example, ownership of the Superman theme?

A: Not in an ordinary reversion.

Q: Would it, under the ordinary circumstances, get back any of the rights that Warner Bros. had acquired in the derivative films and television shows?

A: Not in any ordinary reversion.

Q: Okay.

Have you ever had an experience with Warner Bros. regarding any property where they have taken the position they want to simply take it off of the market, whether they exploit it or not?

MR. TOBEROFF: Objection. Leading, Your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** To what extent have you had any experience in which Warners has taken a position that it would not exercise rights but would not release them?

A: The only circumstance in which we've had a situation like that is where Warners felt they had a right to that piece of property under a previously-existing agreement, and they read a grant broadly.

Q: Let me continue, then, to the issue of a co-financing opportunity.

As you may recall, plaintiffs' expert asserted that such provisions could be important. Has DC ever sought such co-financing opportunities from any party?

A: Not on our own behalf.

Q: Why not?

A: DC's business model is not to invest in film or television production. That's a particularly sophisticated task that requires building considerable expertise in those situations, and we've never felt inclined to move into that business.

Q: Have you ever invested $100 million or $150 million in the development of any project?

A: No.

Q: Would you do that under your business model?

A: I don't believe that it works under our business model or that the staff of DC Comics has the appropriate competency for that.

Q: At the time you signed the film agreement, Mr. Levitz, what was your understanding, what was your state of mind, as to whether or not the parties -- DC, Warner, and the Siegels -- had reached a settlement of their dispute?

A: At the time that I signed the film agreement in April or May of 2002, I believed that we had agreement on settlement terms.

Q: At that time, what was your understanding as to the amount of the participation that the Siegels would have in the Superman Returns revenues?

A: They would participate in a percentage of DC's revenues from Superman Returns, and they would receive -- 6 percent, I believe, was the number at the time, of DC's revenues. So if you assume that we get 5 percent of world, then it's 6 percent to 5 percent.

MR. TOBEROFF: Objection on the basis of best evidence rule. The settlement documents are the best evidence for the terms discussed in the settlement, and that's not been presented.

THE COURT: Overruled.

BY MR. BERGMAN: **Q:** Does that book in front of you, Mr. Levitz, go up to Exhibit 1027?

A: Yes.

Q: Could you look at Exhibit 1027, please.

A: Certainly.

Q: Would you identify what Exhibit 1027 is.

A: This is the report from Warner Bros. Pictures, on Superman Returns, as of June 30, 2008.

Q: And looking at that document, sir, how much money has DC received from Superman Returns, pursuant to the film license, as contingent compensation?

A: As of the date of this, $11,600,000 and change.

Q: And as of that date, how much money had DC received, pursuant to the film agreement's reservation of rights, from Superman Returns merchandising?

A: I believe we had earned, by approximately that date, some $30 million.

Q: To what extent have you found, in your experience at DC, Mr. Levitz, that merchandising revenue is or is not dependent upon the performance of the film?

A: A successful film generally has a very positive effect on merchandising usually for a couple of year's period thereafter, in my experience.

THE COURT: Is there an objection to the question?

MR. TOBEROFF: Same objection as to specialized knowledge expert testimony, Your Honor.

THE COURT: Overruled.

THE WITNESS: An unsuccessful film will still increase merchandising revenue, because you will generally have managed to sell some into the stores, and you'll have some retail space because a film exists. But it will have a vastly smaller effect, because it won't motivate people to go and be excited by the film. It's, to some extent, proportionate to the type of failure.

A film that is unsuccessful in the ways that, for example, Supergirl was, where there was very little support from the motion picture studio advertising and promoting it in advance, and very little word of mouth built up, and then nobody ultimately cared about the movie, will have an extraordinarily bad effect on merchandising. A film like Superman IV will come close to that, where you have some marketing, some promotion, somebody looking forward to it; so you might get some retail space, but very little buyer excitement.

BY MR. BERGMAN: **Q:** Okay. At what point in time in the development or release of a motion picture like Superman Returns -- and let's look at Superman Returns -- at what point in time does merchandising revenue begin coming into DC?

MR. TOBEROFF: Same objection, Your Honor, to the extent that he's not specifically talking about Superman Returns.

THE COURT: What's your objection, Counsel?

MR. TOBEROFF: The question was his expert testimony based on specialized knowledge.

THE COURT: Overruled. It goes to his state of mind.

THE WITNESS: You generally will begin selling merchandising deals, based on a film, prior to the film actually commencing production. It will usually -- in our practice, we'll begin selling merchandising rights as much as 18 months or two years prior to a film's actual release date. Some money comes in as you do those deals. Some value comes in in excess of the actual cash that comes in, because you're generally entering into contractual relationships that have significant guarantees. And the majority of the money from many films' merchandising programs, in my experience, will be booked by opening day. A film that motivates an unanticipated high level of retail action going on in retail sales may have continuing overages that benefit you for the next year or two years thereafter.

BY MR. BERGMAN:

Q: To what extent, if any, was the merchandising split under the film agreement a factor in your decision to enter into that agreement?

A: The merchandising split is --

MR. TOBEROFF: Lacks foundation, Your Honor.

THE COURT: Overruled. You may answer.

THE WITNESS: The merchandising split is a critical term for us, particularly with a property like Superman, where we know it has a long history of successful merchandising, and we know we have the ability to generate historically large sums. And in the marketplace as it existed at the time that we were doing the Superman Returns deal, we would have hoped to have done at least as much in merchandising as we would from the film itself, and possibly more.

BY MR. BERGMAN: **Q:** Okay. Plaintiffs' expert testified that it was his reading of the film agreement that Warner Bros. could make a number of different types of audio visual works based on Superman, but would only have to compensate DC for the theatrical motion pictures that were released under that.

Does DC and Warner Bros. have a customary way of dealing with audio visual Superman works other than feature films?

A: Yes.

Q: Can you tell us what that is.

A: Yes. Consistently, when there's been an opportunity to exploit the property in a different form, we either look to the contractual formula for the film agreement to see if that's appropriate for that property, in that form -- for instance, we did, I believe, two Superman-directed video projects, where we agreed that the compensation would flow on the gross formula in the film agreement -- or we look to see if there is a new form or new formula that's appropriate for that form of exploitation, to more closely approximate the fair market value.

Q: And did you, in fact, agree upon the more appropriate terms?

A: We've done that with -- Smallville is the clearest example, and we continue to do that with a variety of different projects that we've done or have under discussion.

Q: Okay. Does that book go up to 1040?

A: It does not.

MR. BERGMAN: May I approach, Your Honor?

THE COURT: You may.

(Document provided.)

MR. BERGMAN: Before I move on to that, Your Honor, may I offer into evidence Exhibit 1027 that the witness has testified concerning?

THE COURT: Any objection?

MR. TOBEROFF: No objection, Your Honor.

THE COURT: It's admitted.

(Exhibit 1027 is received.)

BY MR. BERGMAN: **Q:** Would you turn, sir, to Exhibit 1040.

A: Yes.

Q: Would you identify what that document is.

A: This is the 2002 Batman film agreement that replaced and restated the Bat Film agreement of -- I think it was 1979 or 1980.

Q: That was the one with an unaffiliated party?

A: Yes.

MR. TOBEROFF: Leading, Your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** The earlier agreement you referred to, sir, with whom was that with?

A: It was negotiated with a company called Bat Film, which was controlled by Ben Melnicker, who was a former general counsel of MGM in the 1950's, and Michael Uslan, who had been an Orion Picture's lawyer. The two of them had formed Bat Film as a motion picture production company.

Q: And did Bat Film, the production company, have any relationship, corporate relationship, with any Time Warner company?

A: No.

Q: What is the contingent compensation provision in Exhibit 1040, the 2002 Batman agreement?

A: I believe it's basically the same Salkind formula; 5 percent of world gross, or 7½ percent of domestic gross, either from the first dollar.

Q: And are there annual options within that Batman agreement?

A: The Batman agreement operated on a slightly different structure, where a new film had to be released every three years, or in the absence of a film being released, there was a $175,000 option payment, or rights continuance payment.

Q: And if that $175,000 payment were made, would Warner continue to have the rights?

A: Yes.

Q: Okay.

What films, if any, have been produced pursuant to that 2002 Batman agreement?

A: Batman Begins and The Dark Knight.

MR. BERGMAN: I'd offer Exhibit 1040 into evidence, Your Honor.

THE COURT: Any objection?

MR. TOBEROFF: No objection.

THE COURT: It's admitted.

(Exhibit 1040 is received.)

BY MR. BERGMAN: **Q:** Turning now to the television licensing of the Superman property.

Was there a television component of DC's agreements with Mr. Salkind's company?

A: I believe the television component of the film export was a blackout provision, where we were unable to exploit those rights ourselves.

Q: Did any of the Salkind companies exercise those television rights?

A: Ultimately, I believe it was Cantharus, another Salkind entity, that he had assigned the rights to that produced a syndicated Superboy television program.

Q: Is the full title of that program The Adventures of Superboy?

MR. TOBEROFF: Leading.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** What is the full title of that series?

A: I don't remember. It may have been The Adventures of Superboy.

Q: Okay. Was that a network television show?

A: No. As I described it, it was a syndicated program. It was designed basically to be syndicated to second-tier television stations for play Saturdays at 4:30 in the afternoon. It was a niche that a couple of different syndicators prospered in for a couple of years.

Q: What was the compensation payable to DC under that Superboy agreement?

A: I believe that it was negotiated as 7½ percent of the domestic revenues. We operated under several different agreements over the short life of the show, as Salkind moved in and out; and ultimately, Viacom took control of the program.

Q: Was there an episodic fee on the Superboy show?

A: I believe there was.

Q: And do you recall what that amount of the episodic fee was?

A: I think it was $12,000, $12,500.

Q: And how was the 7½ percent of domestic gross arrived at?

A: My memory is that those programs were produced under a particularly byzantine set of deal structures between Salkind and various partners, where he had sold rights in many places; and we had no confidence, at that point in the relationship, in collecting from him or his likely partners.

MR. TOBEROFF: Move to strike, as it lacks foundation that he was involved in the negotiation of that agreement.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** During the course of time at DC, have you become familiar with the terms of the Superboy agreement?

A: Yes.

Q: Did you have any involvement in the negotiation of that agreement?

A: I believe I had some involvement in it.

Q: Why was DC's interest in the Superboy television show limited to an interest in domestic as opposed to foreign revenues?

MR. TOBEROFF: Assumes facts, and leading.

THE COURT: As phrased. Rephrase, Counsel.

BY MR. BERGMAN: **Q:** Under the terms of the Superboy agreement, does DC receive any share whatsoever of the revenues from the foreign territories?

A: I believe we did not during the original production of the show.

Q: Okay. And how did that come about?

A: The set of deal structures to create the financing to allow the show to be produced fractured the rights between a of parties; and by that point, we had had significant challenges collecting from Salkind, so we wanted to be assured that if the show was going to go forward, a more responsible party would be paying us. So the deal was structured so that the domestic financing partner, Viacom, would pay us directly, and we could be assured that we would get our income stream properly.

Q: Okay.

MR. BERGMAN: May I approach again, Your Honor?

THE COURT: You may.

(Document provided.)

BY MR. BERGMAN: **Q:** I'm going to ask, sir, that you turn to Exhibit 1015, which is a copy of the agreement we've been discussing; is it not?

A: This is a copy of the Smallville agreement.

Q: I'm sorry. Exhibit 1015?

A: Yes.

MR. BERGMAN: May I approach, Your Honor?

THE COURT: You may.

(Document provided.)

BY MR. BERGMAN: **Q:** Would you turn in that book to Plaintiffs' Exhibit 15 and identify that agreement, please.

A: This appears to be the agreement covering the Superboy television program we were discussing.

Q: Okay. Were you present in the courtroom, Mr. Levitz, when Mr. Halloran made reference to that agreement as providing an $800,000 option fee?

A: Yes.

Q: Does that agreement provide an $800,000 option fee for the

Superboy property?

A: Let me refresh myself with this for a moment, please.

Q: Would you look, please, sir, at Page 6535.

THE COURT: Counsel, do you have an objection?

MR. TOBEROFF: Objection. Misstates the record, where he says the testimony -- there's an $800,000 option fee.

THE COURT: I'm sorry, Counsel. So Mr. Halloran did not indicate that there was an $800,000 option fee?

MR. TOBEROFF: No. He indicated there's simply an $800,000 payment. That's not stated in the agreement as an option.

THE COURT: Very well. That testimony speaks for itself, but you may explore the issue with proper characterization of the $800,000.

MR. BERGMAN: Thank you.

THE WITNESS: Yes, sir.

BY MR. BERGMAN: **Q:** There is a provision in this agreement for the payment of $800,000 to DC, is there not?

A: There is.

Q: Does the agreement reflect what that $800,000 was for?

A: Yes. It's in exchange for $800,000, payable from Warner Bros. to DC, in regard to Superman IV.

Q: And in exchange, was that $800,000 payment made for the Superboy property?

A: No.

Q: Prior to entering into this Superboy agreement, was DC entitled to an $800,000 payment pursuant to the Superman IV agreement?

A: My memory is that we were entitled to $800,000 that was due us with regard to Superman IV.

Q: In connection with receiving that $800,000 under the Superboy agreement, what, if anything, did DC do with its contractual right to receive that $800,000?

A: We waived the right to recover it in the other fashion.

Q: Was that right, in fact, assigned to the Cantharus company?

A: Yes.

Q: What was the net effect of that $800,000 payment?

A: The net effect of the $800,000 payment in the Superboy agreement was to enable DC to collect that money that was owed us on the Salkind films, which had not previously been paid us because the film had not been successful enough to be liquid enough to enable that payment; and the Salkind parties had not previously paid what was due in that circumstance.

Q: Okay.

And why was the $800,000 payment included within the Superboy agreement?

A: Before we were willing to proceed with new business, we wanted to be made whole on previous business.

Q: Approximately, how much money did DC earn from that Superboy exploitation?

A: I don't remember off hand. A couple of million dollars.

Q: With what entity did DC contract regarding the television series Lois & Clark?

A: I believe the original contract was with Lorimar, which was then a separate television unit of Time Warner and Warner Bros.

Q: Prior to entering into that contract for Lois & Clark, were those television rights available to DC under the Salkind agreement?

A: No. For a very long time, we had been frustrated that our television rights had been tied up and all we had actually been able to do was the Superboy series, which had been very trivial, in both economic effect and in any ability to affect any licensing or other forms of our business.

Q: And how were those rights freed up?

A: Over the period of a couple of years, Jeanette Kahn, who was then the president of the company and our primary creative person on film and television projects at that period, spoke to Warner Bros. executives and said that she had developed an idea for a way to do a successful network, a Superman television show. At that point, the obstacle to doing Superman in prime time network exploitation had been a feeling that the movies had set a generally high standard of special effects that wouldn't be duplicatable in a prime time show, so no one would be interested.

Jeanette had come up with the concept of taking the style of a then-popular television program Moonlighting and applying it to the relationship between Lois & Clark, setting most of the show at the Daily Planet, with only a little touch of superhero action. She convinced the Warner Bros. executives that this might be a viable prospect, and as a result, motivated them to go in and buy out those rights, and ultimately buy out the film rights, from Salkind.

Q: Did they, in fact, buy out those rights?

A: They did.

Q: Did that enable the production of Lois & Clark?

A: That enabled us to go in and pitch Lois & Clark, develop it for network; and we were successful in selling it, so the show was able to be produced.

Q: What involvement did you have, if any, Mr. Levitz, with the negotiation of the Lois & Clark agreement with Warner Bros.?

A: I believe I was our primary negotiator for that agreement.

Q: With whom did you negotiate it?

A: Bruce Rosenbloom, who was their business affairs guy at the time.

Q: What were the primary issues in that negotiation?

A: The primary issues were, first, that it was very rare to do a television deal and retain the right to exploit the same property on film at the same time. Lorimar was concerned that they would be unable sell the show to a network under those conditions, because the network might insist on, I guess, the blackout on film rights during the same period, DC's creative involvement, and the economics of the deal itself.

Q: What were the economic issues, if any, that were discussed in the course of negotiating the Lois & Clark agreement with Mr. Rosenbloom?

A: I took the position in the negotiation that DC and the Superman property deserved a gross participation in the program. That was unprecedented, according to Mr. Rosenbloom, and he resisted that energetically. And then we had a number of discussions, as well, in shaping the per-episode fee and the form of participation, as well as all of the other reserved rights that we wished to have.

Q: Ultimately, did you obtain a first-dollar gross participation on Lois & Clark?

A: We did.

Q: And what was that participation on an episodic basis?

A: I believe the participation was structured as 3 percent on the first million and a half dollars, and then 5 percent thereafter.

Q: And what were the episodic fees paid to DC pursuant to that agreement?

MR. TOBEROFF: Leading. There's no testimony there were episodic fees. Lacks foundation.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** Were there episodic fees under the agreement?

A: Yes.

Q: What were they?

A: I believe they were $45,000 an episode.

Q: At the time the deal was concluded for Lois & Clark between DC and Warner Bros. Television, what network, if any, had the Lois & Clark series been scheduled for broadcast on?

A: The program ultimately ran on ABC television. My memory doesn't go to the synchronicity of when the agreement was concluded versus when ABC picked it up. I believe that ABC picked it up very early in the process, but it may have been before or after the agreement was actually signed.

MR. TOBEROFF: Move to strike as nonresponsive. He simply asked what network it ran on.

THE COURT: There's no foundation, given that he can't remember.

Sustained.

BY MR. BERGMAN: **Q:** Do you recall, sir, whom Lois & Clark agreement was "pitched" by Warner Bros. Television?

MR. TOBEROFF: Lacks foundation, Your Honor.

THE COURT: Overruled. It is a foundational question.

Do you recall?

THE WITNESS: Yes.

BY MR. BERGMAN: **Q:** And what network was that, sir?

A: I believe it was ABC.

Q: Was that pitch, to your best recollection, made before or after the consummation of the Lois & Clark agreement between Warner and DC?

A: I don't remember with certainty. I think it was very early on.

Q: Okay.

Was the Lois & Clark series an economic success for DC?

A: Yes.

MR. BERGMAN: May I approach again, Your Honor?

THE COURT: You may.

(Document provided.)

BY MR. BERGMAN: **Q:** I'd like to call your attention, Mr. Levitz, to Exhibit 1015, which is the Smallville agreement.

A: Yes, sir.

Q: How did the idea for Smallville originate?

A: Warner Bros. Television, working with a production company named Tollin-Robbins, had developed a young Batman television idea that we were unwilling to proceed with. When that got turned down, they came up with the idea for Smallville as an interesting way of doing a young part of the Superman legend.

Q: And what was DC's reaction to that concept?

A: DC was pleased, because it looked like an opportunity to exploit a different part of the Superman mythology effectively.

Q: At the time of entering into that contract, did you consider the effect, if any, that the Smallville series would have upon any prospective Superman film?

A: Yes.

Q: And what, if anything, did you conclude in that regard?

A: We concluded that there was some possibility of a positive effect in continuing to keep the awareness of Superman out there, and that because the boundaries, if you will, for the program creatively were going to be no large-scale superheroics and no use of the Superman costume, that it wouldn't be preemptive of a film, because it would not satisfy the same creative desires that ultimately we would hope to reach with a film project.

Q: Was there an expression that the people associated with the program used to convey the fact that there would be no major superhero adventures and no costume?

MR. TOBEROFF: Objection. Leading.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** Do you recall how the people involved in the show described the concept which you have just described?

A: One of the phrases they used to describe it was "no flights, no tights."

Q: Okay. What involvement, if any, did you have in the negotiation with Warner Bros. Television for the acquisition of the right to produce a Smallville series?

A: I believe I was the primary negotiator.

Q: With whom did you conduct the negotiations?

A: I think Brett Paul was the primary business affairs person on the Warner Bros. TV side.

Q: And what position did DC take in connection with the economic basis for that agreement?

A: We believed that our precedent from Lois & Clark should govern this.

Q: What, if anything, had you done in the intervening years, between Lois & Clark and the time that you entered into the Smallville agreement, to monitor the market for live-action television rights to comic superheroes?

A: We had done a number of deals in the marketplace during the intervening years for other properties, and I continued to pay attention to any deals for comic book properties that were being done, either to discuss them with the other companies that had licensed rights or other lawyers [sic] who had been active in the field. Not other lawyers; lawyers for other parties.

Q: What, in essence, did you learn as a result of that analysis concerning the value of the Smallville rights?

A: My investigation of the marketplace for comic book rights for television continued to show that the deals were typically for royalties of between $5,000 and, perhaps, $7,000 an episode, and back-end participations that were denominated in net-profits structures that could pay off in success of a very successful television show, but most often did not.

MR. TOBEROFF: Objection, Your Honor. Expert testimony based on specialized knowledge.

THE COURT: Goes to his state of mind. Overruled.

BY MR. BERGMAN: **Q:** What was Mr. Paul's response to your position that the Smallville deal adhere to the Lois & Clark precedent?

A: I think he started with the fact that that was a Lorimar deal and they were crazy, and this was Warner Bros. Television and they were unwilling to pay that kind of money.

MR. TOBEROFF: Objection. Move to strike as hearsay.

THE COURT: Sustained.

Counsel, the appropriate time to make the objection is after the question but before the answer; so if you have an objection to the answer, you can stand up right away.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** Did Mr. Paul accept your position that the deal adhere to the Lois & Clark precedent?

A: Not initially.

Q: What were the reasons for that failure?

A: He maintained that Warner Bros. Television --

MR. TOBEROFF: Objection. Calls for hearsay.

THE COURT: Counsel?

MR. BERGMAN: I don't believe it's hearsay, Your Honor. It's not being introduced for the truth of the matter asserted. It's just to find out what the negotiation was and what it consisted of.

THE COURT: If you're introducing it to find out what the negotiation was, as opposed to what his state of mind was in the negotiation, then it is being introduced for the truth of the matter asserted.

Sustained.

BY MR. BERGMAN: **Q:** In resisting the adherence to the Lois & Clark precedent, what was Warner Bros.' justification for that resistance?

MR. TOBEROFF: Objection. Assumes facts.

THE COURT: Lay a further foundation.

BY MR. BERGMAN: **Q:** Did Warner Bros. resist your request that the Lois & Clark precedent be adhered to?

A: Yes.

Q: What was Warner Bros.' basis for doing so?

A: First, that Warner Bros.' precedence did not include paying those size fees per episode or gross participations; and, second, that in their view, this was a less valuable program than Lois & Clark, because we were not giving them the rights to portray Superman in costume.

MR. TOBEROFF: Move to strike as hearsay.

THE COURT: Counsel?

MR. BERGMAN: Again, Your Honor, it's hard to express what the negotiation back and forth was without understanding what positions --

THE COURT: Make it clear, then, in your questions that you're asking his understanding, as opposed to the way it's being asked and answered in terms of, in fact, what did happen.

MR. BERGMAN: Thank you.

MR. TOBEROFF: Defendants can also show us documents that show the declaration and the objected manifestation of the parties' intent.

THE COURT: The documents could be helpful, but I will permit this witness's understanding of the agreement, just as I permitted, extensively, your expert to testify as to his understanding of numerous agreements. This witness's understanding is much more closely tied as the person who actually engaged in the negotiations, than your witness's understanding, who did not engage in the negotiations and simply read the documents.

MR. TOBEROFF: Very well.

THE COURT: I'll overrule the objection. But let's make it clear going forward, Counsel, that you're eliciting his understanding.

MR. BERGMAN: Certainly, Your Honor.

THE COURT: Very well.

BY MR. BERGMAN: **Q:** Mr. Levitz, based on your understanding of the negotiation's progress, what was the basis for Warner Bros.' refusal to adhere to the Lois & Clark precedent?

A: I understood their position to be that Warner Bros. Television did not customarily pay gross participations on anything to intellectual property licensors, nor fees as large as $45,000 an episode; and further, that they felt that Lois & Clark was an inappropriate precedent, since in this case, we weren't going to allow them to use the Superman costume as part of the material.

Q: And what was your understanding at the time, sir, of the respects in which Warner wanted to deviate from the Lois & Clark precedent?

MR. TOBEROFF: Objection. Assumes facts, and leading.

THE COURT: Establish the fact of deviation.

BY MR. BERGMAN: **Q:** Did Warner Bros. initially agree to the adherence under the Smallville agreement of the precedent established in Lois & Clark?

A: No.

Q: What was your understanding, sir, of how Warner Bros. wanted to change that Lois & Clark precedent?

A: I no longer remember the specifics of their first offer, but I believe it was a much smaller per-episode royalty against a more traditional net-profits position.

Q: Okay. Did you agree to lower the episodic fees?

A: No.

Q: Did Warner Bros. ultimately accept your position on the episodic fees for Smallville?

A: Yes.

Q: What were the, and what are the, episodic fees for Smallville?

A: $45,000 an episode.

Q: Did Warner Bros. ultimately agree to apply the same first-dollar gross participation to Smallville as was provided for in Lois & Clark?

MR. TOBEROFF: Leading, Your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** What does the agreement, Exhibit 1015, reflect in terms of the contingent participation agreed to by Warner Bros. Television?

MR. TOBEROFF: Objection to Exhibit 1015. It's not the signed agreement. It's an agreement sent out for signing, but it's not the fully executed agreement that plaintiffs have provided.

THE COURT: Foundation objected to. Sustained.

BY MR. BERGMAN: **Q:** Does that book have Exhibit 1043, sir?

A: No.

MR. BERGMAN: May I approach, Your Honor?

THE COURT: You may.

(Document provided.)

BY MR. BERGMAN: **Q:** Is Exhibit 1043 a copy of the final amended, executed Smallville agreement, sir?

A: It appears to be.

Q: Okay. Pursuant to the terms of Exhibit 1043, what is the contingent compensation earned by DC Comics under the Smallville agreement?

A: 3 percent of the first $1.5 million, and 5 percent thereafter.

Q: Over what period of time did your discussions with Mr. Paul, regarding the Smallville agreement, continue?

A: A month or two.

MR. BERGMAN: May I approach again, Your Honor?

THE COURT: You may.

(Document provided.)

BY MR. BERGMAN: **Q:** Would you identify what Exhibit 1067 is, Mr. Levitz.

A: 1067 is a letter from Brett Paul discussing Smallville, establishing that we've approved the name, specifying some approval stages, and making reference to the Lois & Clark agreement as the financial basis for the Smallville agreement.

Q: Do you have Exhibit 1026 in that book?

A: Nope. It's the one you just took back.

MR. BERGMAN: May I approach again, Your Honor?

THE COURT: You may.

(Document provided.)

BY MR. BERGMAN: **Q:** Would you turn, please, to Exhibit 1026 and identify, if you can, what that document is.

A: This is the participation statement for Smallville as of June 30, 2008.

Q: And as of June 30, 2008, what was DC's share of its contingent compensation under the Smallville agreement?

A: Approximately $24 million.

MR. BERGMAN: Your Honor, I offer Exhibits 1015, 1026, and 1067 in evidence.

THE COURT: Any objection?

MR. TOBEROFF: No objection, Your Honor.

THE COURT: All three are admitted.

(Exhibits 1015, 1026, and 1067 are received.)

BY MR. BERGMAN: **Q:** Please turn briefly, Mr. Levitz, to the animation agreements. In terms of the intended markets, what demographic are the DC animation agreements aimed at?

A: Different programs have varied somewhat over the years.

The core of the animation business generally is very young children.

Q: Okay. What similarity, if any, do these animated programs bare to prime-time animated shows like The Simpsons or Family Guy?

MR. TOBEROFF: Vague and ambiguous; lacks foundation as to what animated programs he's referring to.

THE COURT: Overruled.

THE WITNESS: Animated programs like The Simpsons or Family Guy, or even if you go back in history to the Flintstones in its original incarnation, were designed as situation comedies for the usual adult audience. The programs that we've produced under these agreements were intended for children on production budgets for the kinds of sizes of audiences that were available for them.

MR. TOBEROFF: Objection, Your Honor, to the first half of the answer as expert testimony based on specialized knowledge.

THE COURT: Overruled.

BY MR. BERGMAN: **Q:** Has DC, over the years, negotiated these types of animation agreements with entities that were not affiliated with Time Warner?

A: Yes.

Q: Can you identify any of those?

A: During the period prior to 1989, when Warner Bros. Animation entered the business, we negotiated agreements like this with Hanna-Barbera, Ruby-Spears. We had agreements with Nelvana, though nothing was produced under them, as I remember.

And I certainly negotiated towards deals that were never consummated with DIC. Pretty much anyone who was in the game.

Q: Over the course of your years at DC Comics, have you become familiar with the television animation business?

A: Yes.

Q: Has that business changed in any way from the '70s and '80s to today?

MR. TOBEROFF: Objection. Lacks foundation, and also calls for expert testimony based on specialized knowledge.

THE COURT: It's fairly broad, Counsel. Rephrase the question. I'll overrule those objections.

BY MR. BERGMAN: **Q:** From your personal view, your understanding, Mr. Levitz, what changes, if any, have occurred in the animation business from the '70s and '80s to today?

MR. TOBEROFF: Same objection as to expert testimony.

THE COURT: Overruled.

THE WITNESS: The critical driving force in how we could exploit the animation business is the shift from their being a model that was based on three networks with Saturday morning, and generally afternoon syndication on secondary markets, to a cable-driven marketplace today. There was a very significant opportunity to generate income from the programming itself when we were in the earlier business model, and we could get the networks occasionally to bid against each other for the rights to put our programs on Saturday morning, and build up a library that could generate some significant revenue from being exploited in afternoon -- what's called strips -- running five days a week. When the afternoon strips disappeared, the networks fairly quickly got out of the Saturday-morning business, and the economic opportunity for animation became converted to simply supporting your merchandising business.

BY MR. BERGMAN: **Q:** In addition to the animation agreements that you've discussed with Hanna-Barbera and Ruby-Spears and the others, have you personally negotiated animation agreements with Warner Bros. Animation?

A: Yes.

Q: I'd like you to take all of the agreements, the animation agreements, that you've negotiated with the other parties as one group, and the animation agreements that you've negotiated with Warner Bros. Animation as another group.

How, if at all, do you compare the two groups?

A: The fees per episode that we would receive on production are generally higher in Warner Bros. agreements. The possibility of earning anything in the net-profits statements, or net-profit formulas, varied in the first group with the success of the program. Some of them were very successful.

Most of them were not and didn't earn anything out. By the time of the Warner Bros. Animation agreements, there was relatively little possibility to earn out under a net-profits basis.

Q: In today's television animation market intended for young children, what's the economic driver behind those programs?

MR. TOBEROFF: Objection. Expert testimony based on specialized knowledge.

THE COURT: Overruled.

The Court is just considering it for his state of mind.

THE WITNESS: We do television animation these days to get kids to buy toys.

MR. BERGMAN: Thank you, Mr. Levitz.

I have nothing further.

THE COURT: Very well.

Let's take our break at this time. We'll begin with cross-examination at 1:30.

Court is in recess.

(A.M. session concludes.)

P.M. SESSION

1:55 P.M.

WITNESSES: Paul Levitz, Brett Paul, Steven Spira

THE COURT: Mr. Toberoff, you may conduct your cross-examination.

MR. TOBEROFF: Thank you, your Honor.

PAUL LEVITZ, PREVIOUSLY SWORN.

CROSS-EXAMINATION

BY MR. TOBEROFF:

Q: Good afternoon, Mr. Levitz.

A: Good afternoon.

Q: Mr. Levitz, you testified with respect to the Superman film agreement, which is Plaintiffs' Exhibit 232, regarding creative controls that you had negotiated, much stronger creative controls in the event DC is no longer a Warner Brothers affiliate.

Is that basically correct?

A: I don't know whether it was a Warner Brothers affiliate or a Time Warner affiliate.

Q: I'll represent to you it's a Warner Brothers affiliate.

A: Okay.

Q: However, there is no reversion provision over 34 years in the agreement for lack of exploitation if DC is no longer a Warner Brothers affiliate, is there?

A: I believe that's correct.

Q: You also did not negotiate stronger accounting and audit provisions if DC is no longer an affiliate; correct?

A: Correct.

Q: You would also expect Warner Brothers to collect its 50 percent of film-related merchandising if DC was no longer an affiliate under the strict terms of the agreement, wouldn't you?

MR. BERGMAN: Objection, your Honor. I think that question is internally inconsistent.

THE COURT: Rephrase your question, Counsel.

BY MR. TOBEROFF: Q: You would also expect Warner Brothers to collect from DC 50 percent of film-related merchandising pursuant to the terms of the agreement in the event DC was no longer an affiliate, wouldn't you?

MR. BERGMAN: Objection. Vague and ambiguous as to film-related merchandising.

THE COURT: Do you understand the question?

THE WITNESS: I think I understand the question.

THE COURT: Why don't you rephrase, Counsel, just to make it clearer.

BY MR. TOBEROFF: Q: Do you understand what I mean by film-related merchandising under the Superman film agreement?

A: I understand the paragraph you are referring to.

Q: You can answer the question.

A: I think it would depend on several circumstances. If we were no longer affiliates because the contract had been assigned away from Warner Brothers, which is one of the circumstances contemplated in the agreement, then obviously Warner Brothers would not collect. Some successor in interest might. It would also depend on whether, prior to the agreement either being assigned or the companies becoming unaffiliated, the agreement was amended to adjust anything.

And it would depend on the cumulative pattern of how the companies had worked to the time when they became unaffiliated.

Q: You also did not negotiate payment for -- strike that. Earlier on, you testified that there was in effect -- I'm not trying to quote you, but in effect you testified that as to -- since there was a broad grant in the agreement of audiovisual rights, but that the payment was purely for feature films, that you would expect that you would work out with Warner Brothers certain payment schedules for audiovisual works that were exploited which fall through the cracks of the agreement.

Do you recall testimony to that effect?

A: I don't believe I testified to that effect.

Q: Okay. Do you recall testimony regarding how you would expect to in the future negotiate payment for a certain type of audiovisual works?

A: Yes.

Q: Okay. And do you understand in the agreement there's a broad grant of audiovisual rights subject to the reservations of rights, like the reservation of TV rights?

A: I don't agree with your characterization of the agreement.

Q: Do you agree that the agreement purports to grant audiovisual rights to Superman subject to DC's reserved rights?

A: I'd have to examine the specific language of the agreement.

Q: I see. And do you negotiate any special provisions regarding any other audiovisual works in the event DC was no longer an affiliate of Warner Brothers?

A: No.

Q: Now, you testified, and I'm speaking broadly and only summarizing here, that with respect to terms in the Superman film agreement, like the 34-year term with no reversions, that you and DC had a certain degree of comfort or a large degree of comfort due to DC's close relationship with Warner Brothers and because in your opinion Warner Brothers does a good job.

Is that basically correct?

MR. BERGMAN: Object to the question, your Honor. It mischaracterizes the witness's testimony.

THE COURT: Rephrase, Counsel.

BY MR. TOBEROFF: Q: I'm attempting only to summarize your testimony, not to quote you. And that summary is that with respect to terms of the Superman film agreement, in the Superman film agreement that might appear disadvantageous, like the 34-year term with no prospect of reversions in the event Superman is not exploited, that you had a large degree of comfort due to DC's close relationship with Warner Brothers, and because in your opinion Warner Brothers does a good job.

Is that basically correct?

A: No, sir, I think that's an inadequate summary of what I said.

Q: How is it incorrect?

A: It's incorrect, first, in that I pointed out that we had confidence that we would have continuing negotiating leverage to resolve problems that would continue to -- could continue to come up over the life of the agreement irrespective of our corporate affiliation because it would be an ongoing process.

Second, because there is a continuing income stream to us through that time which provides further opportunity for resolution of any of the problems or further evidence of the continuing desire of the licensee to work on the projects.

And, third, because I believe I gave a more nuanced and complicated set of answers to the questions that I can't replicate from memory.

Q: I wasn't attempting to get every point. I was basically summarizing.

THE COURT: Counsel, I'm going to stop this. Just ask another question.

BY MR. TOBEROFF: Q: Do you have a large degree of comfort from the fact that DC has a close relationship with Warner Brothers?

A: I have a large degree of comfort that the complexity of our business relationship will always give me the opportunity to solve problems constructively.

Q: And do you also take comfort in the fact that Warner Brothers in your experience does a very good job?

A: I take a great deal of comfort in the fact that in most of the areas where we work with Warner Brothers, they do an exemplary job.

Q: But, Mr. Levitz, you were aware that under the Superman film agreement, Warner Brothers has the right to assign all or part of the Superman film agreement and its rights under the Superman film agreement to another major studio or any financially responsible party. You are aware of that; correct?

A: I'm aware they have the right to assign in certain circumstances.

Q: And you are also aware under the Smallville television agreement, Warner Brothers Television has the same right to assign the Superman television rights it's received under that agreement?

A: My memory is the rights to assign are not identical between the two agreements but that they -- there is certainly a right to assign in certain circumstances.

Q: And what are those circumstances?

A: I don't remember, sir. I'd have to look at the agreement to get --

Q: Aren't the circumstances that the assignee must be a major film studio or other financially responsible party?

A: As I just said, I don't remember. I'd have to look at the agreement. If you want to furnish it to me, I would be happy to review it and tell you.

Q: I'd like you to -- I'll show you the agreement. May we approach, your Honor?

THE COURT: What exhibit number is it?

MR. TOBEROFF: Exhibit 223.

THE COURT: You may approach.

BY MR. TOBEROFF: Q: Turn to page 4, paragraph 13, which is Bates No. 135034 of the exhibit we've just handed you, Exhibit 223, which is the Smallville television agreement. Could you just read what that says regarding assignment, please?

A: I'm sorry. Which paragraph are you suggesting?

Q: Paragraph 13.

A: Thank you.

Q: Page 4.

A: Right. This is, I believe, different than the one in the film agreement.

Q: What does it say, please?

A: "The agreement is fully assignable and shall be binding upon and inure to the benefit of each party's respective successors and assigns. In no event shall Warner have any fewer rights by reason of this agreement than any member of the public may now or hereafter have. All notices and payments to owner hereunder shall be sent to owner at DC Comics, 1700 Broadway, New York, New York" --

Q: I just meant the first sentence, not the notice and payment provision. I'm sorry.

A: That's okay.

Q: Would you turn, please, to the Superman film agreement. You have it up there, Exhibit 232, paragraph 14, which is on page 14.

A: Yes.

Q: Could you please read the relevant assignment sentence.

A: "Warner shall have the right to assign any and all of its rights under this agreement to any person, and upon such assignment, Warner shall have no further obligations to DC hereunder, provided, however, that unless such assignment is to a so-called major motion picture company or other financially capable party which assumes such obligations in writing, such assignment shall not relieve Warner of its payment obligations to DC under this agreement, except with regard to -- with respect to percentage participations, under paragraph 3 hereof, if any."

Q: Thank you. I'd like to turn to a different subject, the subject of Batman. You view Batman as an extremely valuable property; correct?

A: Yes, sir.

Q: In fact, in 1999, 2002 when the Superman film agreements were negotiated, Batman was a more popular property than Superman; is that right?

A: Correct.

Q: The same is true after 2002?

A: Generally speaking, I'd say Batman has been a more valuable property during the last decade.

Q: My question is whether the same is true after 2002.

A: Generally.

Q: I'd like you to turn to Exhibit 1, the Batman agreement, which is in front of you.

A: Yes.

Q: Is that your signature on the page Bates stamped WB 4101?

A: It appears to be.

Q: Is that your signature?

A: I think so.

Q: You signed this agreement on February 3rd, 2004?

A: I don't know the date I signed it on. Is there a marked date on it at some point?

Q: If you look to Bates No. WB 4101. It says date of execution, February 3, 2004.

Do you see that?

A: I'm sorry. It could say that. It's fairly unreadable on this copy. But I'll stipulate that that was the date.

Q: Now, the Batman agreement in paragraph 1-A contains successive option terms which run until the end of any Superman copyrights; correct? Batman copyrights; correct? Excuse me.

A: I don't remember them having any end date. It's possible. Let me take a look.

Q: Let me draw your attention to the second sentence in paragraph 1-A on Bates stamp 4084. It reads, quote, the initial option period shall commence on the date hereof and continue until and including June 20, 2003, open paren, initial period, close paren, and may be extended by Warner for successive option periods of 12 months each through duration of a copyright thereof, including without limitation all renewals and extensions. Do you see that?

A: Yes.

Q: So the Batman agreement may be extended for successive option terms for the duration of any Batman copyrights. Is that your understanding of the agreement?

A: Yes. I would say this is -- this is essentially perpetual as long as there's new Batman material coming out.

Q: And that would include any extensions of copyright by Congress; correct?

A: Correct.

Q: The Superman film agreement contains successive option terms amounting to 34 years; correct?

A: Correct.

Q: So the term of the Batman agreement is potentially considerably longer, isn't it?

A: Yes.

Q: The Batman agreement contains the same contingent compensation equal to 5 percent of Warner's worldwide gross revenues as is in the Superman film agreement; correct?

A: Correct.

Q: The Batman television rights are also frozen for the entire term of the agreement and can only be exploited with a Warner brother affiliate; is that correct?

A: Correct.

Q: The option fee on page 2 is an annual fee of 175,000 without escalations; is that correct?

A: Correct, except I don't believe it has to be paid in the years when there is a film or immediately following the film.

Q: The option payments in the Superman agreement of 500,000 escalate after a certain number of years. Is that your understanding?

A: Correct.

Q: But even the 500,000 option payment is nearly three times the 175,000 of the Batman agreement; correct?

A: Correct.

Q: And that's even though Batman was more valuable than Superman at the time the Batman agreement was signed?

A: No, I don't think that's the reason for it. The Superman agreement represented a renegotiation of an agreement that was lapsing where we had certain levels of leverage. The Batman agreement that this replaced had not expired. So we had different level of leverage.

There really was no opportunity to set any new financial terms in the process. We were simply moving it to a new forum.

MR. TOBEROFF: Your Honor, I move to strike as nonresponsive after the word "no."

THE COURT: Sustained. Stricken.

BY MR. TOBEROFF: Q: Now, you testified on direct at length that prior to entering into the Superman film and television agreements with Warner

Brothers, you conducted extensive research into the market in Hollywood for rights to comic books. Do you recall that?

A: Yes.

Q: You also testified that you communicated with a number of different people regarding your market analysis. Do you recall that?

A: Yes.

Q: In connection with plaintiffs' request for all documents relevant to DC's negotiation of the Superman film and television agreements, why did you not produce a single document evidencing any such market analysis?

A: I like using the phone.

Q: So it's your testimony that there is not a single written document reflecting this market analysis?

A: I can't testify whether there are or there aren't. If there were, they would have been turned over.

Q: Other than what would have been turned over, you are not aware of any documents in your possession, written documents reflecting the market analysis you conducted; is that correct?

A: I believe we did a very thorough search of the files to try to turn over any responsive documents.

MR. TOBEROFF: Move to strike as nonresponsive.

THE COURT: It was an awkward question, Counsel.

Other than what you would have -- what would have been turned over. He said he turned over everything. Were there any other documents. It's all getting a little tangled up. Let's go on to your next question.

BY MR. TOBEROFF: Q: Are you aware of a single document evidencing your market analysis that you testified to?

A: I don't remember preserving anything like that in my files.

Q: I'd like to talk to you about the Steel character. In the period 1993 to 1997, would you agree that -- strike that. In 1993 to 1997, comic books were not as valuable in Hollywood as in -- excuse me -- as in 2004 after hit films like Men in Black, X-Men, Spiderman, and X-Men 2 had been released; correct?

A: I would agree that comic book rights grew more valuable in Hollywood post the first Spiderman movie, 2002, I believe.

Q: And also after Men in Black, X-Men, and X-Men 2; correct?

A: I don't believe Men in Black had any positive effect on the pricing of comic book film rights in Hollywood because it was not perceived that the film was based on a comic book.

The success of the second X-Men film probably was helpful to the price of comic book rights.

Q: But in 1993 and 1997, comic books were not as valuable in Hollywood as in 2004; correct?

A: Correct.

Q: I'd like you to turn to Exhibit 226, which is in front of you. It's the Steel purchase agreement dated August 2, 1996, between Warner Brothers and DC.

A: Correct.

Q: Is that your signature on page DCC 66044?

A: I think so. Looks like it.

Q: This exhibit has been admitted into evidence. The alter ego of the DC superhero Steel is a man named Dr. John Henry Adams; correct?

A: No.

Q: Is it Dr. John Henry Adams Steel?

A: No. That's not the correct name.

THE COURT: What is the name?

THE WITNESS: John Henry Irons.

BY MR. TOBEROFF: Q: Steel swings a big sledgehammer like the folk hero John Henry; right?

A: Right.

Q: I'd like to draw your attention to page 1, paragraph 2, of Exhibit 226.

A: Okay.

Q: Under the heading Purchase Price. The gross participation described in this paragraph -- DC's gross participation as described in this paragraph is the

same gross participation that DC has in the Superman film agreement and in the Batman agreement; correct?

A: Correct.

Q: But the film rights to Steel are not nearly as – were not nearly as valuable when you entered into this agreement as the film rights to Batman and Superman, are they?

A: They were not granted at that time.

Q: Does this agreement convey film rights to Steel?

A: This agreement conveys rights that Warner Brothers already possessed.

Q: Does this agreement convey any rights DC may have in Steel?

A: None that Warner Brothers did not already possess.

Q: So Warner Brothers already possessed the rights to Steel?

A: Correct.

Q: But DC received the same compensation -- the gross participation under this agreement that it received for Batman and Superman; correct?

A: They possessed the rights to Steel under the Superman agreement. So the compensation was the same as in the agreement that granted it to them.

MR. TOBEROFF: Move to strike as nonresponsive.

THE COURT: It's stricken.

BY MR. TOBEROFF: Q: Could you answer my question, please?

A: Could you repeat it, please?

THE COURT: Mark?

(Record read.)

THE WITNESS: Yes.

BY MR. TOBEROFF: Q: And that's despite the fact that Steel is a far less valuable character than Batman and Superman; correct?

A: Yes.

Q: I'd like to show you what's been marked for identification as Plaintiffs' Exhibit 335.

May we approach, your Honor?

THE COURT: You may.

THE WITNESS: Yes, sir.

BY MR. TOBEROFF: Q: May I draw your attention -- pardon me. Plaintiffs' Exhibit 335 is a printout from the Internet site Box Office Mojo --

THE COURT: Is this any different? There was a similar listing worldwide grosses No. 1 through a hundred. Is this the same or different?

MR. TOBEROFF: I was just about to --

THE COURT: I'm sorry.

MR. TOBEROFF: It's similar to Defendants' Exhibit 1122. However, instead of showing domestic theatrical box office figures, this shows worldwide theatrical box office figures. I would like to point out that Box Office Mojo does not have an adjusted for inflation column under its worldwide figures as it does for its domestic printouts.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'd like to draw your attention to No. 200 regarding Superman in 1978. It shows a worldwide box office gross of 300.2 million unadjusted for inflation; is that correct, Mr. Levitz?

A: That's what it says.

Q: Number 200. Do you see that?

A: Yes, sir. I said that's what it says.

Q: Adjusted for inflation using the Consumer Price Index, that figure would be over $900 million today.

Does that sound about right to you, Mr. Levitz?

A: At least, I think. That might be a little low for inflation.

Q: The exact figure is 978 million. Does that sound right to you?

A: Sounds closer.

Q: Please look at item No. 101. It shows Batman released in 1989 as a worldwide box office gross of 411.3 million unadjusted for inflation.

Do you see that?

A: Yes, sir.

Q: Now, if you adjusted that for inflation under the Consumer Price Index, that figure would be 705 million.

Does that sound right to you?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Are you familiar with adjusting dated nominal financial amounts for inflation? Are you familiar with that process?

THE COURT: I seem to recall you objected on foundational grounds to a similar question by Mr. Bergman that I sustained.

MR. TOBEROFF: That's why I'm rephrasing it, your Honor.

THE COURT: All right.

THE WITNESS: I'm familiar with the process.

BY MR. TOBEROFF: Q: And are you familiar with the fact that oftentimes one uses the Consumer Price Index to adjust financial figures for inflation?

A: I'm familiar with how to do that.

Q: Does the $705 million figure that I mentioned sound right to you for adjusting a 1989 $411.3 million figure?

MR. BERGMAN: Objection, your Honor. That's really asking an expert question, something to which Mr. Toberoff has objected.

THE COURT: Overruled.

THE WITNESS: It --

THE COURT: If you're able to.

THE WITNESS: It happens that I don't offhand remember the conversion from the late 80's as well as I do from the late 70's. I apologize.

BY MR. TOBEROFF: Q: Please look at No. 46. Men in Black. It shows Men in Black 1997. It shows a worldwide box office gross of 589.4 million.

Do you see that?

A: Yes.

Q: Men in Black was extremely successful; correct?

A: More the motion picture studio, yes.

Q: Now, look at item No. 207, X-Men released in the year 2000, showing a worldwide box office gross of 296 million unadjusted for inflation.

Do you see that?

A: Yes, sir.

Q: X-Men was also very successful for the studio, wasn't it?

A: Yes, sir.

Q: Now look at item No. 18, Spiderman released in 2002, showing a staggering worldwide box office gross of 821.7 million. Spiderman was a huge success; correct?

A: Absolutely.

Q: Now, look at item No. 89, Men in Black 2, released in 2002, showing a worldwide box office gross of 441.8 million. Again, Men in Black 2 was very successful; correct?

A: I'm looking at it. I'm not offhand particularly familiar with the film's numbers. Looks like a very positive number.

Q: And finally, if you look at item No. 104, the film X 2, X-Men United released in 2003 shows a worldwide box office gross of 407.7 million. This film was also very successful; correct?

A: Looks like a good number to me.

Q: Would you agree that the film was very successful?

A: I don't know what any of these films cost. So I don't know -- in a case like this, I don't know if it was successful for the studio or not. It was a box office success, certainly.

Q: Do you view the X-Men sequel as a successful film?

A: I think it was written up as a successful film.

Q: Now, you and Warner Brothers adopted the 1974 compensation figures from the Salkind agreement when you entered into the Superman film agreement in 2002; correct?

A: Correct.

Q: And at this time many studios were developing major films based on comic books; is that right?

A: I believe so.

Q: After 1974, the first Superman film in 1978 and the first Batman movie in 1986 had each proved to be huge successes; correct?

A: The first Batman film was 1989, but I would categorize them both as great successes.

Q: And as we just noted, starting with Men in Black in 1997 and X-Men in 2000, successful films based on comic books had more recently been released at the time you entered into the Superman film agreement; is that right?

A: I believe there were successful films based on comics, certainly going back straight through the Batman films, including the ones you mentioned.

Q: But in 2002, with all of this activity, not only did you use the 1974 compensation terms in the Salkind agreement, you proceeded to lock those 1974 rates in for 34 years until 2033; isn't that right?

A: Yes.

Q: And then after the successful Men in Black, X-Men, Men in Black 2, and X 2, and after the staggering success of the 2002 Spiderman movie, which grossed 821.7 million worldwide, you then executed the Batman agreement with Warner Brothers in 2004; correct?

A: Correct.

Q: But despite all of this success, you locked in the 1974 Salkind rights in the 2004 Batman agreement for the remaining life of the Batman copyrights; is that right?

A: I believe the Batman agreement did not change in any way, shape, or form the already existing expiration date of the Batman rights grant that Warner had.

Q: Did you lock in the 1974 Salkind rates in the Batman agreement for the remaining life of the Batman copyrights?

MR. BERGMAN: Objection. Asked and answered.

THE COURT: Not fully. Overruled.

THE WITNESS: I believe they were already locked in.

BY MR. TOBEROFF: Q: Did the agreement lock them in?

A: No. It was already done, sir. I don't think it changed anything.

Q: And when, according to you, were these 1974 Salkind rights locked in for the remaining life of the Batman copyrights?

A: I believe they were locked in in the Bat film agreement. I think it's a 1979 document.

Q: And Warner Brothers was simply assigned that agreement?

A: They were a successor in interest ultimately to it.

Q: Did it require your consent?

A: No.

Q: Then why did you enter into a Batman film agreement if Warner simply -- all Warner had to do was be assigned the prior agreement?

A: Warner already had been assigned a prior agreement over a decade previously. We entered into this agreement to clean up language for administrative purposes.

Q: Does this agreement amend the prior agreement?

A: Not in any of the material terms.

Q: Does it supersede the prior agreement?

A: I believe it does.

Q: Now, at the time you entered into the 2002 Superman agreement and the 2004 Batman agreement, agreements with rights to comic book properties had gotten consistently better over the years; is that correct?

A: Yes.

Q: When you entered into the Superman film agreement, you viewed any comic book characters other than Batman to be -- pardon me. When you entered into the Superman film agreement, you did not view any comic book characters other than Batman to be of the same order of magnitude as Superman; correct?

A: It depends on what you're looking at them for.

Q: I'm talking generally.

A: For purposes of selling or marketing comics, I would think either Spiderman or X-Men would be superior properties to Superman or Batman at that time, and for purposes of licensing film rights, I believe that if I were representing

Marvel at the time, I would have made an argument that either of them were more valuable properties to make a deal on than Superman or Batman.

MR. TOBEROFF: Move to strike as nonresponsive. I said I was speaking generally.

THE COURT: Rephrase your -- go to your next question, Counsel.

MR. TOBEROFF: I think I'll clear it up when I read from his deposition.

THE COURT: Very well.

BY MR. TOBEROFF: Q: I'd like to read from your deposition, which you previously testified that had been taken under oath on November 6, 2006. Starting on page 204, line 24, going to page 205, line 10:

"QUESTION: So you tried to find characters that had been licensed that were of the magnitude of a Superman?"

ANSWER: Of the magnitude or simply of the significant worth as literary property?

"QUESTION: In the comic area, did you look at comics for any characterization in the USA on the magnitude of Superman?

"ANSWER: I'm not sure at that point we would have perceived there to be a comic book character that was ultimately of the magnitude of Superman, but we certainly did all the deals that we were able to identify."

Did I ask you those questions and you give those answers at your deposition?

A: I believe I did. You're reading it out loud to me.

Q: Since 1997, what are the five best known DC -- I'm moving on to a new subject.

Since 1997, what are the five best known DC properties that are being developed at a studio other than Warner Brothers or Warner Brothers affiliate?

A: Since 1997, Watchmen would certainly have been the best known one that was developed completely outside Warner Brothers during that time.

Q: Actually, let me strike that question. My question was really since 1997, what are the five best known DC properties that have been licensed by DC to a studio other than Warner Brothers or a Warner Brothers affiliate?

MR. BERGMAN: Objection, your Honor. After a witness answers a question and counsel doesn't like the answer, I don't think you can move to strike it.

THE COURT: The only person in this room that can strike an answer, Counsel, is the Court. The fact that Mr. Toberoff or anybody else is suggesting that an answer be stricken has no effect on the record.

MR. BERGMAN: Thank you, sir.

THE WITNESS: I believe the properties that we have published that have been licensed to other studios include Red, Preacher, Ocean. Probably a couple others. I don't keep the list carefully in my head.

BY MR. TOBEROFF: Q: And those are the five best known DC properties you can think of that have been licensed to other studios since 1997?

A: You're asking with regard to -- film rights to film studios?

Q: Yes.

A: Yes.

Q: Earlier in this case we went through the cover of a Justice League of America comic book featuring most of DC's better known characters. Since 1997, none of these characters have been licensed for film and television development outside the Warner family; correct?

A: Correct.

Q: In fact, the vast majority of DC's active film and TV licenses are to Warner Brothers; is that right?

A: Correct.

Q: According to Plaintiffs' Exhibit 306, which has been admitted, 130-page status report of DC's film and television projects in development, over 90 percent of DC's products are with Warner Brothers or Warner Brothers affiliates. Does that sound right to you?

A: I'm not familiar with the exhibit you're referring to. Do you want to show it to me?

Q: I'll show it to you. May we approach, your Honor?

THE COURT: You may.

THE WITNESS: Okay. What was your question? I'm sorry.

BY MR. TOBEROFF: Q: Pursuant to that document, we calculated that over 90 percent of DC's products are with Warner Brothers or a Warner Brothers affiliate.

Does that sound right to you?

A: It's possible. I've never calculated it. This document incorporates material that goes back to the 1940's.

Q: I'd like to turn to the topic of the alleged settlement agreement with plaintiffs. DC and Warner Brothers claim a settlement was reached with the Siegels on October 19, 2001, based on a letter of this date from the Siegels' attorney, Richard Marks; is that correct?

A: Correct.

Q: I'd like to look at Plaintiffs' Exhibit 223, the Smallville television agreement, dated as of December 5, 2000.

A: Yes.

Q: This agreement, dated December 5, 2000, contains warranty and indemnification provisions as to DC's exclusive ownership of Superman; correct?

A: Without checking, I can't tell you for sure, but I would assume so.

Q: When you entered into this agreement in early 2001, you were aware of plaintiffs' Superman notices of termination; is that right?

A: Yes.

Q: You also understood at that time that plaintiffs – that if plaintiffs' termination was effective as to certain early Superman works, that the Siegels would co-own the copyrights to such works with DC after the termination had become effective in 1999?

A: Can you repeat the question, please? I'm sorry. There was a nuance in there I didn't manage to hear.

Q: You also understood at the time that if plaintiffs' termination was effective as of certain early Superman works, that the Siegels would co-own the copyrights to such works with DC once the termination became effective in 1999.

A: Yes.

Q: You further understood that in such event, DC would own only nonexclusive rights to such recaptured Superman works; right?

A: Yes.

Q: You also understood that pursuant to DC's warranty and indemnification provisions in the Superman television agreement, DC would be obligated to indemnify Warner for their attorney's fees, costs, and any damages in connection with the Siegels' termination; correct?

A: Absolutely.

Q: And even defendants do not claim that DC had a settlement agreement with plaintiffs by December 5, 2000.

A: By December 5, 2000?

Q: The date of this agreement.

A: I don't remember the status of our settlement discussions at that point. But we certainly hadn't reached a final handshake with them by that point.

Q: Had defendants claimed that they had a settlement agreement prior to October 19, 2001?

A: I don't believe we've made such a claim.

Q: I'd like you to turn now to Plaintiffs' Exhibit 41. It should be in front of you. It's comprised of a cover letter dated February 26, 2001, from Jay Kogan of DC to John Schulman of Warner Brothers, enclosing the then latest draft of what became the Superman film agreement.

A: I see it. Plaintiffs' 154 here with something from Jay. I don't see anything else from Jay in this stack.

MR. TOBEROFF: May we approach, your Honor?

THE WITNESS: I'm sorry. It's here. I apologize.

BY MR. TOBEROFF: Q: I draw your attention to paragraph 9 on page 11 of the agreement. Bates No. WB 6406 of Exhibit 41.

The paragraph is entitled Representations and Warranty.

A: Yes, sir.

Q: Warranties. Excuse me. Now I'd like you to turn to Plaintiffs' Exhibit 232, which is the executed Superman film agreement.

A: Yes.

Q: I draw your attention to paragraph 9 of that agreement. The warranty and indemnification provisions.

A: Yes, sir.

Q: Do you see that paragraph 9 in Exhibit 41 dated by the cover letter as February -- as that being a February 26, 2001, is identical to paragraph 9 in the final executed Superman film agreement?

A: No.

Q: In what respect do they differ?

A: The Exhibit 41 includes a footnote referring to the Siegel termination.

Q: Other than that footnote.

A: Other than that footnote, without reading them very slowly against each other, they appear to be identical. If you'd like me to check the wording word by word, I certainly could do that.

MR. TOBEROFF: I have no further questions, your Honor.

THE COURT: Any further direct?

MR. BERGMAN: Just a couple, your Honor.

REDIRECT EXAMINATION

BY MR. BERGMAN: **Q:** Mr. Levitz, on cross-examination Mr. Toberoff asked you whether any of you had produced any of the documents that you analyzed in reaching your conclusion as to the value of the Superman rights in 2002.

Do you recall that testimony?

A: Yes.

Q: Okay. Did you in fact rely upon the Marks letter of October 19, 2001, in reaching that conclusion?

A: Yes.

Q: And did you in fact produce that letter to Mr. Toberoff?

A: I assume we did. I didn't see the document production myself.

MR. BERGMAN: Your Honor, now that Mr. Toberoff has opened the door to this letter, I would like to offer it as defendants' next exhibit in order.

THE COURT: What number would that be?

MR. BERGMAN: That would be 00975, your Honor. I'm sorry. Exhibit 1126.

THE COURT: 1126.

MR. TOBEROFF: May I see a copy of the exhibit, please?

THE COURT: You may. And the Court would like to see it as well.

MR. BERGMAN: Of course.

Q: Now, you were asked questions, Mr. Levitz, with respect to the television agreement, whether you had consummated the settlement agreement with the plaintiffs by that time. And your answer was no.

Had you by that time discussed with Mr. Ramer and with Mr. Marks precisely what the terms of the Salkind agreement were, what the terms of the Lois and Clark agreement were, what the terms of the Warner Brothers consumer product agreements were, and what the terms of the animation agreements were?

MR. TOBEROFF: Objection, your Honor. Compound.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Had you by that point in time,

Mr. Levitz, discussed with Mr. Ramer and Mr. Marks what the terms of the Salkind film agreement had been?

A: Yes.

Q: And did they in fact agree with you, sir, that the recurrence of those terms in the future would be what they termed in their discussions as well as in Exhibit 1126, a, quote, safe harbor, close quote, for future deals?

MR. TOBEROFF: Objection, your Honor. The question calls for hearsay.

THE COURT: The Court will not consider it for the truth of the matter asserted. You may proceed, and you may answer the question.

MR. BERGMAN: May I approach the witness, your Honor?

THE COURT: You may.

BY MR. BERGMAN: Q: I've placed before you, Mr. Levitz, a copy of Exhibit 1126. Would you turn, sir, please, to paragraph 10, which is found at page 979.

A: Yes.

Q: Would you read, please, the first full sentence of paragraph 10 aloud?

A: "Siegel family to have full audit rights. Intercompany transactions will be covered by, quote, safe harbors, unquote, established at a level consistent with the Salkind Superman theatrical motion picture deal, the Lois and Clark television program deal, the WB television animation deal, and the existing fee arrangements with Warner Brothers consumer products."

Q: Thank you, sir. Is the Steel character related in any way to the Superman universe?

A: Yes. The Steel character --

MR. TOBEROFF: Objection. Leading, your Honor.

THE COURT: Rephrase it. What, if any, relation.

BY MR. BERGMAN: Q: What, if any, is that relationship?

A: The Steel character is a derivative character introduced in the Superman comics.

Q: Does the fact that you obtained the same terms for Steel as you did with Superman and Batman demonstrate to you that Warner Brothers underpaid for Superman and Batman or that it overpaid for Steel?

MR. TOBEROFF: Objection. Leading, your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: Q: What does the fact that you obtained the same terms for Steel as for Superman and Batman reveal to you?

THE COURT: If anything.

THE WITNESS: What it reveals to me is that I was able to maintain the price of a good that I had already sold and simply give away essentially an extended term on the good. We had sold Steel as part of the Salkind deal, which Warners was successor to by that point. The only thing that the Steel agreement granted them transactionally was the term to exploit the term in, which would otherwise have ended with the Salkind term because we had not yet extended that.

MR. BERGMAN: Thank you. No further redirect, your Honor.

THE COURT: Anything further from the plaintiff?

MR. TOBEROFF: No, your Honor. Thank you.

THE COURT: Very well. The defense's next witness.

MR. BERGMAN: Your Honor, has 1126 been put in evidence?

THE COURT: 1126. Any objection?

MR. TOBEROFF: Yes, your Honor. 1126 is hearsay except to the fact it's introduced for Mr. Levitz's state of mind.

THE COURT: It will only be considered for that purpose. It's admitted for that purpose, Counsel.

(Exhibit 1126 received.)

MR. BERGMAN: Thank you.

THE COURT: You may step down. Thank you very much.

MR. TOBEROFF: If I may, your Honor, I neglected to ask that the Box Office Mojo be moved into evidence.

THE COURT: Any objection to that, Counsel?

MR. BERGMAN: No, your Honor.

THE COURT: Very well. It's admitted as well.

(Exhibit 335 received.)

MR. BERGMAN: Shall I call my next witness?

THE COURT: You may.

MR. BERGMAN: Defendants call Mr. Brett Paul.

THE CLERK: Please raise your right hand.

BRETT PAUL, SWORN.

THE CLERK: Please take the stand. Please state your full name for the record, and spell your last name.

THE WITNESS: Brett Paul. B-R-E-T-T, P-A-U-L.

DIRECT EXAMINATION

BY MR. BERGMAN: **Q:** What is your present occupation and title?

A: I am the executive vice-president of Warner Brothers Television Production.

Q: And in that capacity, what are your primary responsibilities?

A: I have a general oversight responsibility for the business operations of the production division. I oversee the business affairs department, our finance department, production, legal, and certain other administrative functions.

Q: When were you first employed by Warner Brothers?

A: September 1995.

Q: And in what capacity was that, sir?

A: I was a vice-president of business affairs.

Q: Have you been involved in one aspect or another of business affairs at Warners, then, for the past 14 years?

A: Yes.

Q: Can you explain briefly what it is that business affairs does at Warner Brothers Television?

A: Sure. Business affairs is essentially the department that is responsible for the negotiating function of the business terms on both the buy and acquisition side of our business and on the licensing side of our business to our first-run network broadcast partners. Sort of generally speaking.

Q: Over those 14 years, sir, do you have any estimate of how many underlying rights acquisition agreements you've either negotiated or supervised the negotiation of?

A: I would say dozens. It would be hard for me to give you an exact number.

Q: When a business affairs executive looks at a particular property for acquisition, are there certain factors you take into consideration regarding the value of that property?

A: Yes, there are.

Q: Can you identify what those factors are?

A: In terms of valuing the property, very often we look at sort of the marketplace, the precedential marketplace for similar properties. We look at the -- quite honestly, the desire of our creative executives to develop a property. We look at whether or not the property has been previously exploited, and we try to do a comparative analysis to other properties in the marketplace that you could argue are similar in certain ways.

MR. TOBEROFF: Your Honor, I'm lodging my specialized knowledge expert opinion objection.

THE COURT: Overruled. The witness is testifying as to his understanding, his state of mind in negotiating deals on behalf of Warner Brothers. The Court will consider the evidence for that purpose.

BY MR. BERGMAN: Q: When you say, sir, that you look to the marketplace for similar properties, can you explain what you consider to be similar properties, giving us an example?

A: It really depends on the nature of the particular rights.

If it's a literary property, we may look at the number of books sold or whether or not, you know, something appeared on the New York Times best-seller list. If it's a -- if it's an underlying format, we may look at -- television format, how many episodes were done. If it's a movie, we may look at the performance of the feature.

So it really kind of depends on the particular rights that we're talking about.

Q: What if we're talking about comic superhero rights?

MR. TOBEROFF: Objection. Lacks foundation.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Have you been involved in the acquisition of the television rights for comic superhero characters?

A: Yes.

Q: In those acquisitions, have you looked to the marketplace for similar properties?

A: Yes.

Q: When considering the value --

THE COURT: I'm sorry. Is there an objection?

MR. TOBEROFF: Objection, your Honor. The questions are soliciting specialized knowledge. It's expert testimony.

THE COURT: Overruled.

BY MR. BERGMAN: Q: When considering the value of a comic superhero, what similar properties would you look to?

A: Well, when you say a comic superhero, we would probably look at, if we've done other deals that are similar based on comics, but that's probably a limited universe.

So we would try to look at maybe literary properties or properties that were based on characters that were well known potentially in other media. I mean, we would look at a broad panoply of underlying rights with an eye towards maintaining a certain line item for rights within our overall production budgets.

Q: When you're dealing in instances where you're dealing with the same party, whether it's a rights holder, an actor, producer, or anyone else, to what extent, if any, do you often use a prior contract with that party as the basis for a new deal?

A: That's pretty common practice. We rely on precedent, and there's a quote system that is very prevalent, and so if there's a preexisting course of dealing between the parties with respect to, you know, it's not just with respect to rights, but it sort of extends to most of the talent or writers, the precedent is a major piece of how we determine market value.

MR. TOBEROFF: Move to strike for the same reasons.

The answer regarding custom and practice.

THE COURT: Am I correct that Mr. Paul negotiated the Smallville practice for Warner Brothers?

MR. BERGMAN: He did, your Honor.

THE COURT: Very well. Overruled.

BY MR. BERGMAN: Q: In terms of precedents, Mr. Paul, how important a factor are precedents for television when negotiating for rights?

A: They are a very important factor to consider. And when they are expensive, we try to ignore them. When they are not, we try to enforce them. But they are definitely a -- an important factor in considering a new deal.

Q: Now, what involvement, if any, did you have in the negotiation of the Smallville deal points?

A: The basic arrangement essentially was -- I was working with someone else who at that time was head of the business affairs department, who I reported to, and so I was sort of sitting second chair, I would say, and when the deal was initially conceived, my direct involvement was when we started to put our

production budgets together and the show was actually licensed to the particular broadcast network where I ended up, which was the WB, I attempted to renegotiate downward some of the components of the deal.

Q: You referred to someone else who had started the negotiation?

A: Yes.

Q: Who was that?

A: His name is Craig Hunigs.

Q: Did there come a time when he in turn asked you to become involved?

A: Yes.

Q: What were the circumstances under which he asked you to get involved?

A: Well, it wasn't so much that he was asking me to get involved. What happened was we ended up licensing the project to the WB, and the WB was a fledgling network, and we were putting together our production budget for the show. When we knew how much the initial license fee was, I was concerned, given some of the other participants in the show, that we were being stretched pretty thin on the production budget.

So I initiated a conversation with DC Comics to attempt to renegotiate certain components of the acquisition price.

Q: And with whom did you attempt to renegotiate those aspects of it?

A: Paul Levitz was one. And there may have been -- and I'm just forgetting a name. There may have been another woman lawyer there at the time. But I had several conversations with Paul about it.

Q: Were the conversations that you had with Mr. Levitz in person or on the telephone?

A: On the telephone.

Q: And generally speaking, at Warner Brothers what percentage of your rights acquisition agreements are made over the telephone?

A: Oh, 98 percent.

Q: All in all, how many conversations did you have with Mr. Levitz before a deal was reached?

A: Well, I was actually unsuccessful. So we just lived with the deal that had been structured. I would say I spoke to Paul four or five times over the course of a few weeks.

Q: And when you say you were unsuccessful, what specifically were you attempting to do?

A: I was trying to reduce the episodic fee that we were paying.

Q: And how much was that episodic fee?

A: It was -- well, structured as a percentage of the initial license fee, but actually, it was a dollar amount, $45,000, and it was against a certain percentage of the license fee, but the percentage of the license fee was lower. So it was actually a $45,000 per episode fee.

Q: At the time that you were negotiating with Mr. Levitz, were you familiar with the terms of the Lois and Clark agreement?

A: I was aware of them, yeah.

Q: And what do you recall of your discussions with Mr. Levitz concerning the reduction of the episodic fees?

A: Well, I remember explaining to Paul that we anticipated that, given some of the production values that we anticipated for the show, given the fact that we had a -- what we call a pod production company, a nonwriting production company involved, and we had certain high level show runners, it's really the combination of all of those factors.

I was concerned that we wouldn't have enough money to produce the show within the traditional ways that we produce. So I suggested to Paul that we try to come up with an arrangement where some of that money that was being paid to DC would either be reduced or deferred so that we'd have more money to produce the show.

Q: Okay. And what was Mr. Paul's -- Mr. Levitz's position?

A: He didn't want to do that. He rejected it basically.

Q: And how was the difference of opinion between the two of you resolved?

A: We lived by the terms of the deal that had been struck. We didn't get a reduction.

Q: So that you applied the same terms as had been applied in Lois and Clark?

A: Yes.

Q: We just recently saw the letter that you sent to Mr. Levitz confirming that Lois and Clark would control the deal. Following that letter, who was it who actually prepared the long form agreement?

A: It would have been someone from the Warner Brothers legal department. I don't remember or know off the top of my head who that was.

Q: Okay. Is it customary for legal affairs at Warner Brothers to take -- bring the finalization of an agreement after the deal points have been agreed to over to the legal department?

A: Yes.

Q: And they actually draft the agreement?

A: Yes.

MR. TOBEROFF: Objection, your Honor. Leading.

THE COURT: Sustained.

BY MR. BERGMAN: Q: What is the normal procedure that you follow at Warner Brothers after business affairs has negotiated the book deal points?

A: Well, it does vary depending upon the nature of the deal, but typically what happens is the negotiator in the business affairs department will negotiate the sort of broad stroke economic deal points, either send a short form memo to the legal department or send a short form memo to the client representatives simultaneously, sending that memo to the legal department, and then the legal department will draft the long form agreement.

It's far more common, particularly in the rights category, for us to do it that way since it's important for us to attempt to get some sort of writing. And that's the procedure we typically follow.

Q: Okay. I'd like to -- strike that.

What are the key deal points in any Warner Brothers Television acquisition agreement?

A: I would say -- the key deal points?

Q: Yes.

A: From an economic point of view?

Q: Yes, sir.

A: I would say the episodic fee, which is --

THE COURT: Counsel, is there an objection to the question?

MR. TOBEROFF: Yes, the question solicits expert testimony based on specialized knowledge, your Honor.

THE COURT: Overruled. You're referring to the particular agreement in question, Counsel?

MR. BERGMAN: Yes, your Honor.

THE COURT: You may answer.

THE WITNESS: I would say the episodic fee and the -- if there is a back end participation, the equity participation.

BY MR. BERGMAN: Q: And when you use the term back end participation, are you referring to contingent compensation?

A: Yes.

Q: To what extent, if any, does Warner Brothers Television typically grant option fees on television deals?

A: We pay option prices. I just -- that's not typically one of the points I would describe as material. They tend to be --

THE COURT: What's the objection?

MR. TOBEROFF: Same objection. He's asking what they do typically. He's not speaking to the agreement in question. So the objection is solicits expert opinion based on specialized knowledge.

THE COURT: I'll overrule that objection. But there is a foundational question I suppose with respect to that. It's not clear to the Court the scope of the question. It may implicate some foundational issues.

MR. BERGMAN: Very well, your Honor.

Q: Let's focus in, then, on the episodic fees and the contingent compensation.

Are you familiar, Mr. Paul, with the episodic fees paid by Warner Brothers Television for literary rights acquisitions for television series?

A: Am I familiar with them generally?

Q: Yes, sir.

A: Yes.

Q: What is the usual range of fees paid by Warner Brothers Television to rights holders? Range of episodic fees?

MR. TOBEROFF: Same objection, your Honor.

THE COURT: I'm going to overrule the objection, Counsel. Your obsession with that particular objection may be blinding you to other objections that are appropriate. That objection on that basis is overruled.

You may answer the question.

MR. TOBEROFF: Lack of foundation.

THE COURT: You may answer the question.

THE WITNESS: I would say generally speaking, and again, rights can sort of fall into various different kinds of categories; so I'm going to try to give you a general answer. Somewhere between 5,000 -- royalty of $5,000 an episode to 15,000 an episode.

Q: To your knowledge what are the highest episodic fees that Warner Brothers Television has ever paid to any rights holder other than DC Comics?

MR. TOBEROFF: Lack of foundation, your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Are you aware, Mr. Paul, of the episodic fees that are paid by Warner Brothers Television to various rights holders?

A: Yes.

Q: Is that a matter that falls under your supervision?

A: Yes.

Q: And is it a matter that is discussed at regular meetings?

A: Yes.

Q: To your knowledge, sir, what are the highest episodic fees that Warner Brothers Television has ever paid to any rights holder other than DC Comics?

A: I want to -- that we ever paid? I sort of want to distinguish a little bit between rights, formats, books. I mean, I want to -- go ahead.

Q: Let me try to focus that.

THE COURT: Are you withdrawing the question?

MR. BERGMAN: Pardon me?

THE COURT: Are you withdrawing the question?

MR. BERGMAN: Yes, the question is withdrawn.

THE COURT: Very well.

BY MR. BERGMAN: Q: With respect to underlying literary properties, such as a comic character, what are the highest episodic fees that Warner Brothers Television has ever paid to any rights holder other than DC Comics?

A: For underlying literary rights, I would say probably -- that we've contracted for, probably $25,000 an episode.

Q: And do you recall --

A: The reason I'm expressing some reluctance is that I'm thinking it's some, but they weren't actually paid. They were deals that were made where the series might not have gone forward.

Q: Let's look at the broader question.

A: Okay.

Q: Whether the series was made or not, what to your knowledge, sir, are the highest episodic fees that Warner Brothers Television has ever paid for an underlying literary property?

MR. TOBEROFF: Vague and ambiguous as to the word paid and whether the series was made or not, because if it wasn't a series made, there would be nothing paid. I think he means payable.

THE COURT: Rephrase your question, Counsel.

MR. BERGMAN: Yes, your Honor.

Q: What are the highest per-episode fees that Warner Brothers Television has ever agreed to, to your knowledge, for the acquisition of television rights to an underlying literary property?

A: I would say somewhere between 20- and $25,000 per episode in the first series year.

Q: Can you think of a particular series that had that highest fee?

A: Well, the one that occurs to me is the Tarzan franchise.

That did go forward to series, and I believe it was in the 20- to $25,000 per episode range in the first series year.

Q: Are you familiar with the contingent compensation terms utilized by Warner Brothers Television for various participants, particularly holders of underlying literary rights?

A: I am.

Q: Of the various forms of contingent compensation that are available to be used by Warner Brothers Television, what is the form that is most favorable to any participant?

A: Well, any formula that doesn't charge any form of fees, any distribution fees or any overhead charges that require recoupment of any production costs would be most favorable. It's commonly known as a gross participation. Warner Brothers Television doesn't typically pay for those participations.

MR. TOBEROFF: Objection, your Honor. Specialized knowledge.

THE COURT: Overruled.

BY MR. BERGMAN: Q: What form of contingent compensation is given to DC Comics pursuant to the Smallville agreement?

A: That was a gross participation.

Q: Pardon me?

A: That was a gross participation.

Q: Is that something that is referred to within the company as first dollar gross?

A: You could call it first dollar gross, yes.

Q: What is the amount of first dollar gross paid to DC for Smallville?

A: I believe it was a percentage that increased when certain revenue thresholds were achieved. And I believe it was 3 percent against a million five in revenue and had bumped up to, I think, 5 percent.

Q: Okay. To what extent, if at all, has Warner Brothers Television given first dollar gross deals to any literary rights holder other than DC Comics?

A: I'm not aware of us having done that with any other underlying literary rights holders.

Q: Excluding the deals with DC, but including all forms of participants, whether a director, actor, producer, whatever, how many first dollar gross deals have you negotiated for Warner Brothers Television?

A: Zero.

Q: Have there, in your experience over the past 14 years, been any first dollar gross deals paid by Warner Brothers Television to any participant?

A: No.

Q: Other than DC.

A: There have not.

Q: Are there other participants aside from DC in the Smallville series?

A: Yes.

Q: And do any of those other participants in Smallville receive a share of first dollar gross?

A: No.

Q: What forms of contingent compensation are paid to the other participants in Smallville?

A: We refer to it as a modified adjusted gross participation. Technically, that means that there are distribution fees that apply to the revenue. There are overhead charges that are applied to production costs, and production costs and interest costs need to be recouped by the studio before any profit participation becomes due.

Q: So with respect to every other participant in the show, the studio must first recoup the costs of making the show, overhead charges, and a distribution fee?

A: And certain interest charges on production costs, yeah.

MR. BERGMAN: May I approach the witness?

THE COURT: You may.

BY MR. BERGMAN: Q: Would you turn, please, to Exhibit 1103.

Can you tell us what show that agreement pertains to, sir?

A: Gossip Girl.

Q: What involvement, if any, did you have with the negotiation of the Gossip Girl rights acquisition agreement?

A: It was done under my supervision by someone in my department.

Q: And what is the Gossip Girl show based on?

A: It's based on a series of books.

Q: And is the show, to your knowledge, a commercially successful show on the CW?

A: Yes. We like to think it is commercially successful.

Q: How do the terms of the Gossip Girl agreement compare to the average terms agreed to by Warner Brothers Television?

I'm trying to place it in terms of whether it's at the low end, the high end, or the middle.

MR. TOBEROFF: Objection. Specialized knowledge, expert testimony.

THE COURT: Overruled.

THE WITNESS: I know the deal pretty well and am familiar with it. I would say it's at the upper end of the spectrum of rights deals.

BY MR. BERGMAN: Q: Okay. Could you look, please, sir, and tell me what the exercise price of that agreement is?

A: It's -- the purchase price is a hundred thousand dollars.

Q: And what are the episodic fees under that agreement?

A: There's also production bonuses of $50,000, which is considered part of the purchase price.

Q: The episodic fees?

A: The episodic fees start with $4,000 per episode in the first and second years, increased to 5,000 for the third year, and increased further to 6,000 for the fourth and all subsequent production seasons.

Q: And what is the form of contingent compensation that is payable -- I think you'll find that on page 8 of the agreement, which is Bates stamped 6537.

A: It's a 5 percent of defined proceeds.

Q: Now, what are defined proceeds?

A: Well, defined proceeds are -- as I was describing modified adjusted gross, defined proceeds typically have slightly higher distribution fees than do the typical modified adjusted gross definition. And so again, there would be a distribution charge. There's production cost recoupment.

There is an overhead charge on production costs, and there's interest associated on the recouped production costs as well.

Q: How would you compare 5 percent of the net profits to 5 percent of the gross above 1.5 million an episode?

MR. TOBEROFF: Objection, your Honor. The question calls for expert testimony based on specialized knowledge.

THE COURT: Within the context of this particular deal, overruled.

THE WITNESS: How would I compare them? I would compare them by saying that the 5 percent on gross is a more favorable definition than 5 percent on defined proceeds.

BY MR. BERGMAN: Q: Do you have any opinion as to the extent to which it's more favorable?

A: It's significantly more favorable.

Q: I believe you referred earlier to the Tarzan agreement as containing the highest episodic fees paid to anyone other than DC. Would you turn to Exhibit 1102 in that book, which is the Tarzan television agreement.

Is this an agreement that was negotiated under your supervision?

A: It was not. It was negotiated while I was a member of the department, and I was familiar with it. But it was negotiated by someone who at the time was of similar stature in our department as I was at the time.

Q: What involvement, if any, did you have with the Tarzan acquisition agreement?

A: Well, we would consult with each other. We're sort of a, you know, a collegial group and share information. And we met a couple times a week to talk about deals we were working on.

I did have some informal conversations with the woman that negotiated this deal and probably was helpful in her clarifying certain positions she took. But I didn't negotiate it directly myself.

Q: Based on your review in connection with this matter, sir, is the Tarzan agreement the most beneficial, economically beneficial agreement to the rights licensor other than the Superman Smallville agreement?

MR. TOBEROFF: Objection. The question is vague and ambiguous as phrased.

THE COURT: I'll sustain that objection.

BY MR. BERGMAN: Q: Is there any agreement that you are aware of that Warner Brothers Television has entered into, other than its agreements with DC, that is more beneficial to the licensor than the Tarzan agreement?

A: I'd say not for an underlying literary rights property, no.

Q: Okay. I notice that this exhibit is addressed to a person by the name of David Nochimson at the Ziffren Brittenham firm. Are you familiar with David Nochimson?

A: Yes.

Q: Are you familiar with the Ziffren Brittenham firm?

A: Yes.

Q: How would you characterize the stature of that firm within the television community?

MR. TOBEROFF: Leading, your Honor.

THE COURT: Overruled.

THE WITNESS: I would describe them as one of the most influential entertainment law firms in town.

BY MR. BERGMAN: Q: Okay. Could you turn, please, to the contingent compensation provision of this agreement, which is paragraph 7, found at page 6506.

It reads, quote, 7.5 percent of MAG reducible by the total points over 25 percent MAG for all third parties to a floor of 6.25 percent MAG.

A: Yes.

Q: Let's start first with what is MAG?

A: Well, again, in order to fully flesh out what MAG refers to in this case, you need to look at the last sentence which talks about distribution fees and overhead percentages. So MAG is a percentage of the back end revenue after certain deductions and charges.

Q: Would you please turn in that exhibit to a page Bates stamped 6525. Could you read into the record the definition provided in this agreement for modified adjusted gross?

A: Sure.

Q: Paragraph 1-A.

A: "Modified adjusted gross means the excess, if any, remaining after deducting from gross receipts the aggregate of the following in the following order of priority:

Distribution fees, distribution expenses, production costs, and interest thereon, all contingent deferments and other contingent amounts approved by Warner excluding only other MAG participations or defined proceeds participations which are not advanced or guaranteed. If pursuant to the agreement participant receives advances of participant's share of modified adjusted gross, such advances shall be applied against any reduction of participant's share of modified adjusted gross."

Q: And what is meant, sir, by a floor of 6.25 percent?

MR. TOBEROFF: Objection. Specialized knowledge, expert testimony.

THE COURT: Sustained. Counsel, I'm giving you free leeway in terms of any agreement that has been negotiated by the witness as to his understanding. You don't have an adequate foundation with this witness.

MR. BERGMAN: I understand.

Q: Are you familiar with Warner Brothers Television's use of the term, quote, floor, close quote?

A: Yes.

Q: Can you tell us what that term generally refers to within Warner Brothers?

A: It's a -- it's a calculated amount by which the profit participant's share will not be reducible.

THE COURT: Counsel, I'm going to take a brief afternoon break to take up some matters in chambers. We'll resume around 4:00.

(Recess taken.)

THE COURT: Counsel.

MR. BERGMAN: Thank you, your Honor.

Q: Mr. Paul, prior to the break, we were discussing the Tarzan television agreement and were looking at Exhibit G, which is page 6525 of Exhibit 1102.

Do you still that have open before you?

A: Yes.

Q: Looking to paragraph 1(b)(1), can you just tell us what the video royalty is under the Tarzan agreement?

A: That is a 20 percent royalty.

Q: To what extent is a 20 percent video royalty customary at Warner Brothers Television?

A: That's pretty much across-the-board royalty that is payable to the modified adjusted gross pot.

Q: Has Warner Brothers Television to your knowledge ever negotiated a television literary rights agreement in which the video royalty is more than 20 percent of wholesale?

A: No.

Q: How many networks does Warner Brothers Television sell shows to?

A: Currently five.

Q: And how many shows do you currently have on the air?

A: Approximately 14 to 15. I will know in a week whether or not that has increased or not.

Q: Are you generally aware of the efforts Warner Brothers Television made to pitch or sell the Smallville show to a network?

A: Yes.

Q: Before the show was pitched to or bought by the WB, which is now called the CW, was Smallville offered by Warner Brothers Television to any other network?

MR. TOBEROFF: Assumes facts.

THE COURT: Sustained.

BY MR. BERGMAN: Q: How many networks was the Smallville series offered to?

A: I'm aware of at least one other.

Q: One other than the WB?

A: Correct.

Q: And what was that one other, sir?

A: Fox.

Q: And to whom did Warner Brothers offer Smallville to first? Fox or the WB?

A: I believe it was offered to -- actually, you know, I can't speak to that. I can't tell you who it was offered to first. I'm not sure.

Q: Did Fox want the show?

A: Yes.

Q: Why wasn't it sold to Fox?

A: Ultimately, I believe it came down to a difference in the initial commitment that was made by the WB.

Q: How would you compare the commitments that were being made by the WB to the commitment being offered by Fox?

A: Well, at the time the WB extended a very large commitment. It was a series commitment, on-air series commitment of 13 episodes, and Fox's commitment was to a pilot, just to produce a pilot.

Q: And when you say just to a pilot, does that mean that -- what happens if Fox doesn't like the pilot?

MR. TOBEROFF: Objection. Hearsay as to what Fox's offer was. Lacks foundation.

THE COURT: Lacks foundation. Let's establish that.

BY MR. BERGMAN: Q: In the various discussions that you had with other business affairs executives, was there a discussion of what the negotiations with Fox had been?

A: I'm aware of what the Fox offer was by virtue of conversations that I've had internally with other executives at Warner Brothers, yeah.

Q: And are those conversations consistent with the fact that Fox was only offering a pilot?

A: Yes.

MR. TOBEROFF: Objection. Hearsay.

THE COURT: What are you introducing this for, Counsel?

MR. BERGMAN: Pardon me, your Honor?

THE COURT: I'm sorry. What are you introducing this for?

MR. BERGMAN: I am introducing this simply to show that there was another network that was interested in the property and that the property did not go to them.

THE COURT: Okay. Then it's being introduced for the truth of the matter asserted. Objection sustained.

BY MR. BERGMAN: Q: To your knowledge, Mr. Paul, does Warner Brothers Television ever share in any of the advertising revenues earned by any network that broadcasts any of its series?

A: No, we do not.

MR. BERGMAN: Thank you, sir. I have nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. TOBEROFF:

Q: Mr. Paul, do you recall being deposed in this action on November 3rd, 2006?

A: I do.

Q: And you testified under oath at that time?

A: I did.

Q: I'd like to read from a portion of your deposition, starting on page 115, line 17, then going to line 21. In speaking of the Smallville agreement, I asked you the following question:

"QUESTION: What do you recall about the negotiation?

"ANSWER: I recall it being concluded.

"QUESTION: Right.

"ANSWER: I really don't remember much about the negotiation itself."

Did I ask you those questions and you give me that answer?

A: I'll take your word for it.

Q: Warner Brothers Television is not currently – strike that.

Warner Brothers Television is not developing a live action Harry Potter television series, is it?

A: No, I don't believe we are.

Q: Warner Brothers Television is also not developing a live action television Batman television series, is it?

A: Currently?

Q: Yes.

A: No.

Q: Are you aware of any live action James Bond television series?

A: No.

Q: Are you aware of any live action Spiderman television series after the success of the first Spiderman film in 2002?

MR. BERGMAN: Objection, your Honor. I was confined to asking only about Warner Brothers. And counsel is going well beyond that.

THE COURT: Let's lay a foundation for this, Counsel.

BY MR. TOBEROFF: Q: Are you aware, in addition to those shows being developed at Warner Brothers or produced at Warner Brothers Television, are you aware of what shows are -- have been produced by other studios?

A: Am I aware of what shows have been produced? For the most part.

Q: And do you keep yourself abreast of what television shows are being developed by competing TV studios?

A: Usually it's --

THE COURT: Counsel, you asked about shows that have been produced, and now you're asking a question about shows that are being developed.

MR. TOBEROFF: Correct. I'm laying the foundation for both.

THE COURT: Well, you haven't laid the foundation for the ones that are being developed.

MR. BERGMAN: Your Honor, I also object on the grounds that it goes far beyond the scope of --

THE COURT: I don't know where he's going with this. So I'm not in a position to rule on that.

Counsel.

BY MR. TOBEROFF: Q: Do you keep abreast of what shows are developed at other television studios?

A: I'm going to have to say generally the answer is no. I'm aware of what shows have been developed which are produced, but because it's competitive information, typically I don't have access to that information until things become public and/or are produced and licensed.

Q: Sticking to just shows that have actually been produced, are you aware of any live action James Bond television series that have ever been produced?

MR. BERGMAN: Same objection, your Honor.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. TOBEROFF: Q: Are you aware of any live action Spiderman television series that have been produced after the success of the first Spiderman movie in 2002?

A: Neither before nor after, no.

Q: Are you aware of a Pirates of the Caribbean television series that has been produced?

A: That is produced? I'm not.

Q: Are you aware of any Pirates of the Caribbean television series that are in the works?

A: No.

Q: I'd like to show you what's been marked as Defendants' Exhibit 1037.

May we approach, your Honor?

THE COURT: You may.

BY MR. BERGMAN: Q: Exhibit 1037 is the agreement between DC Comics and Warner Brothers Television for the TV rights to the Birds of Prey property.

Are you familiar with this agreement?

A: I am aware of it. I haven't looked at it in a while. So I'm not intimately familiar with it, but I could be if I had a chance to look at it.

Q: Would you please turn to page 2, paragraph 7.

A: Yes.

Q: Bates number -- the page is 147541. That paragraph provides the identical gross participation to DC Comics as the gross participation in the Smallville television agreement; correct?

A: It looks like it's the same, yeah.

MR. TOBEROFF: Your Honor, I'd like to offer to move Exhibit 1037 into evidence at this time.

THE COURT: Any objection?

MR. BERGMAN: No, sir.

THE COURT: Sustained.

(Exhibit 1037 received.)

MR. TOBEROFF: No further questions.

THE COURT: Anything further from the defense?

MR. BERGMAN: Nothing further, your Honor. Shall I call our next witness?

THE COURT: Yes.

THE CLERK: Please come forward and stop next to the court reporter.

STEVEN SPIRA, AFFIRMED.

THE CLERK: Please take the stand. Please state your full name for the record, and spell your last name.

THE WITNESS: My name is Steven Spira, S-P-I-R-A.

DIRECT EXAMINATION

BY MR. BERGMAN:

Q: Mr. Spira, by whom are you employed?

A: Warner Brothers.

Q: What is your present title?

A: I am president of worldwide business affairs.

Q: Can you basically describe for us what your responsibilities are as president of worldwide business affairs.

A: I am responsible for and supervise a team of people who are involved with the business side of the motion picture business in terms of film production. It's

limited to the so-called above the line transactions, which means writers, producers, directors, actors, rights holders, and things of that nature.

Q: And when did you join Warner Brothers, sir?

A: 1985.

Q: And what was your title when you first joined?

A: I was actually untitled. I was an entry level business affairs executive.

Q: And did there come a point in time where you received a title?

A: Yes.

Q: What was that first title?

A: In 1986, less than a year later, I was promoted to vice-president.

Q: Okay. Can you describe generally what your duties were in that capacity.

A: I was part of a group of executives who were again responsible for servicing the creative department, which I'm sure you've heard testimony are the people who find the material and choose the actors and writers and directors and other elements in the production of a film.

Q: And during the course of your employment at Warner Brothers, without going into the specific titles, did you keep moving up until your present position?

A: Yes.

Q: How many literary properties would you estimate Warner Brothers options or purchases in any given year?

A: Several dozen.

Q: To what extent, if any, are those acquisitions made under your supervision?

A: Well, I'm responsible for the entire group. So all of them.

Q: Do you conduct regular meetings of the business affairs executives at Warner?

A: Yes.

Q: And at those meetings, are all the deals discussed?

A: Most of the deals that have material things happening around them.

Q: And with respect to any and all major or important acquisitions, are they subject to your final approval?

A: It's sort of a collective process, but yes.

Q: Okay. How do you go about determining how much Warner Brothers will pay for a literary property?

A: We actually respond or react to the seller. The seller sets a price on the script or book or idea or treatment or property, and we react to that, as it were.

Q: And unless I indicate otherwise, when I refer to literary properties, I'm going to be speaking about properties that were previously published in one form or another.

Do we understand that?

A: Yes.

Q: Okay. What factors do you look to?

A: Well, again, responding to the priorities set by the seller, we will go back to our creative executives and gauge their appetite, try to get an understanding of what the project actually is, and then depending on how they feel about something, in our general experience we will try and respond to the seller's priorities and sort of take our collective experience and bring it to the table.

There are factors internally that involve our own development budgets because there's a finite amount of money that you can spend from year to year. There are factors that include how likely is this thing to become a movie, because many projects are developed over a year, and few of them, the vast minority of them actually mature into actual movies. It's really – development is really an R & D process and kind of hit and miss.

We will, of course, talk about how recognizable it is, what do we think has anyone paid the price they are asking, for what types of things have they paid that price, have we ever paid that price, what types of things have we paid that price for, and what is the collective appetite of the creative group, because we're not the consumer. We're sort of their advocator, their representative. And things of that nature.

Q: You made reference, Mr. Spira, to budgetary considerations. Can you explain what you mean by that?

A: Each creative group is charged with coming up with a slate of films. Different studios have different size and scale. So one studio might try to make 12 pictures a year, and one might try to make 20 pictures a year. They need to get those films out of their development slate so that when they have a group of executives whose job it is to find material, develop the material, meaning write a screenplay, hopefully attract an appropriate director, hopefully attract actors, hopefully write a screenplay that that group feels is compelling enough to try to make it to a film, and that's an R & D process that they are charged with.

They have a finite amount of resources with which to do that, so towards the end of the year, sometimes, they will be running out of money. At the beginning of the year, that will be a factor. And how much of any of that resource they want to allocate to the individual project will limit the amount of money they will have left to get into an entire slate.

MR. TOBEROFF: Objection, your Honor. Lacks foundation and also veers into verbalized knowledge and expert testimony as to the industry as a whole, what other studios do.

THE COURT: Are you speaking just about Warner Brothers, or the industry as a whole?

THE WITNESS: I was speaking about the industry, but it's true about Warner Brothers as well because they are all more or less comparable.

THE COURT: Okay. I'm going to sustain the objection.

Counsel, make it clear that he's speaking with Warner Brothers unless you lay a foundation.

MR. BERGMAN: I will, your Honor.

THE COURT: Thank you.

BY MR. BERGMAN: Q: Just so the record is clear, the statements that you just made concerning the budgetary considerations, do they apply to Warner Brothers as well?

A: Yes.

Q: As Warner Brothers treats these budget considerations, what happens if, by a point in the year, the development fund has been completely used up? Can you still acquire properties?

A: I would have to get dispensation, as it were, from your people you report to, management.

Q: And at what point does the cost of a film move from the development area into the production area?

A: Well, if the creative group is satisfied with the script, meaning they like the beginning, the end, the middle, the characters, and think that it's compelling enough to try to put together, they will try to add a director. That can happen at any point. It can happen in the beginning, the middle, or later.

All along there's an ongoing dialogue with management where they sort of get a sense of direction that the project is taking in the hopes that they are going down the direction that will be acceptable as an end product to finance a film. And if they get a script that they like and a director that they like, they try to find the appropriate actors for the project and at the same time figure out what an appropriate cost for the film would be that makes it an acceptable risk.

Q: What would you estimate, Mr. Spira, are the number of active development projects at Warner Brothers at any given time?

A: Development is a very broad term, but we have active in any year probably 150 to 200 plus projects out of which we hope to make our production slate every year.

Q: Recognizing the distinction you draw at Warner Brothers between development and production budgets, from what budget would an option payment come?

A: That would come from the development budget.

Q: You also mentioned the element of risk, development risk, production risk. What do you mean by that?

A: Well, some literary properties are more challenging than others. Less formed and more difficult to adapt.

Q: And the implications of those that are less difficult to adapt are what?

A: They are -- you are more easily to visualize the end product and what that movie would be, what the story is and the characters are, and its ultimate general cost or approximate cost.

Q: Within that context, Mr. Spira, at Warner Brothers how would you distinguish risk between a project based upon a comic superhero on the one hand or a project based on a novel by John Grisham?

MR. TOBEROFF: Objection. Lacks foundation.

THE COURT: Overruled.

THE WITNESS: We have developed and made a number of John Grisham novels. And not just -- a general principle, whether it's John Grisham or a novel in general, when you read it, you know the entire story. You know the beginning, the middle, and the end. You have an idea if it's satisfying or unsatisfying. You have the right when you buy it to tinker it.

So you can fix an ending if you don't think it's satisfying, but you can visualize the size and sale of the movie and what it would potentially cost within a reasonable range. You can visualize who you want to put in it, and you don't have to, quote, unquote, crack the story.

What was the second part of the question? I'm sorry.

BY MR. BERGMAN: Q: It was a question of distinguishing the risk between a project based upon a comic superhero and one based upon a novel by a leading author.

A: Well, with a comic superhero, you obviously have the main character. The challenge, of course, is to figure out what story to tell, who the villain will be, and it could go in any number of directions. You have a lot of information, but you don't have the movie in front of your face.

MR. TOBEROFF: Objection. Expert testimony as to the development challenges of various forms of literary properties.

THE COURT: Overruled.

BY MR. BERGMAN: Q: With respect to the distinction that you just drew between the comic character and the novel, which one of those poses less of a development risk to Warner Brothers?

A: The novel.

Q: And why is that?

A: Because before you decide to acquire it, you have a greater idea of what you're trying to assemble and what it will be and what it will look like and whether that would ultimately be something you think, if everything came

together properly, you would make into a film or be willing to risk being made into a film and gamble on it, as it were.

Q: Because of that or in light of that lesser risk, is there any difference in the basic approach that Warner Brothers takes to how it acquires a novel by a Creighton or a Grisham or a Clancy as compared to how it acquires an interest in a comic book superhero property?

A: Well, the three authors that you specifically mentioned are obviously high profile authors, and their material is usually very, very expensive. And more often than not, it is brought to you with a director attached, but not always, and you would be willing to spend more money, and we've acquired books from at least two of them. Grisham, Creighton, and I forgot who the third one was, but we have acquired books from each of them in the seven figure range and produced every one of those films, I believe.

Q: And why is Warner Brothers more likely to purchase a novel than it is to purchase a superhero property?

A: Well, in the case of those particular authors --

MR. TOBEROFF: Objection. Assumes facts.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Based on your experience, Mr. Spira, is Warner more likely to purchase a novel outright --

MR. TOBEROFF: Objection. Leading. Excuse me. I thought you finished.

BY MR. BERGMAN: Q: -- or to purchase a comic superhero property outright?

THE COURT: Is there an objection or not?

MR. TOBEROFF: No.

THE COURT: Okay.

THE WITNESS: I don't think I can actually answer that question the way it was asked.

THE COURT: I guess there is an objection.

THE WITNESS: I'm not objecting. It's a perfectly fine question.

THE COURT: Why don't you rephrase, Counsel. Just when I thought we had navigated through.

THE WITNESS: Sorry.

BY MR. BERGMAN: Q: With respect to these novels by the leading authors, does Warner Brothers customarily obtain any rights regarding the use of their name and likeness in connection with publicity for the picture?

MR. TOBEROFF: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. BERGMAN: Q: And why is that, sir?

A: In the case of the authors we've just discussed, their books tend to be current. They tend to be very popular. And you are acquiring them because you know at least there is a, quote, audience or fan base, a minimal amount that you could expect would want to see your film so long as you have the sort of author's Good Housekeeping Seal OF Approval.

If you have a prominent author and he were to reject or disavow your adaptation of his work, you would undermine the one audience you can expect to get. As you develop a movie, you hope to attract people beyond that audience, but as sort of an insurance policy or sort of as a minimum threshold, you expect the people who are familiar with it and have great affection for it to want to see it adapted, and if the author were not on board, it would lose that foundation for the audience.

Q: If the property that you are trying to evaluate at Warner Brothers is a comic superhero property, what kinds of properties would you look to for comparables?

A: They would be the superheroes that we have acquired over the years as well as our knowledge of competition and others in the industry who have acquired comic properties.

MR. TOBEROFF: Vague and ambiguous as to the extent there's no sense of time, what time period we're talking about.

THE COURT: Sustained. Are you talking about the entire period of time or a particular period?

MR. BERGMAN: Yes, your Honor.

Q: Throughout the period of your employment at Warner Brothers, during the course of your analyses of how much you would pay for a comic book property, what types of comparables would you look to?

A: We would look to other comic books and comic book-like material.

Q: Would you under those circumstances look to the prices paid for, for example, a Creighton novel?

A: No.

Q: Why not?

A: Because it's apples and oranges.

Q: You also made a reference earlier, when we were talking about factors, to appetite. Do you recall that?

A: Yes.

Q: Can you explain what you mean by that?

A: We are the advocates for or representatives of the creative department. And they have an enormous amount of pressure to execute a film program. And there are times where they are convinced that it's the most valuable, most important thing, and they know what to do with it, and that it has value beyond what we, you know, lowly business people might attribute to it.

Q: What was the extent of your involvement, Mr. Spira, in the acquisition of the Superman property for the film agreement?

A: My department is responsible for the acquisition of all literary material. The Superman property was a bit unique because of its legal history and because of the multiple pictures we had parts of and the Salkinds and the whole long tortured history, which I suspect you know a whole lot more about than I do.

So we were in effect consulting with John Schulman, who is the general counsel, who is not charged with doing business transactions and does not otherwise do them, ultimately did the transaction. But we were consulted as to our perception of its value.

Q: And did you, together with other members of Warner Brothers business affairs department, consider during the 1999 to 2002 period what the value of the Superman property was to Warner Brothers?

A: Yes.

Q: And can you describe what you concluded?

A: We internally had hoped that we could get a reduction of the deal that had previously been made to the Salkinds.

Q: And why was that, sir?

A: A number of factors. The creative department or creative people, as it were, were concerned that Superman was very unhip. It was very particularly American in an environment where the foreign marketplace was becoming more and more important for you to recover your costs and hopefully make money. It was perceived as damaged goods because of the failure of the last two sequels, and even Supergirl. And I think they had been excoriated by the critics.

THE COURT: Counsel?

MR. TOBEROFF: Objection. Hearsay as to what the creative department, how it viewed Superman.

THE COURT: Okay. Again, this is not going to state of mind. This is not going to the truth of the matter asserted. This is going to his state of mind in negotiating the deal.

MR. BERGMAN: Correct.

THE COURT: Overruled.

THE WITNESS: And finally, we had been developing Superman from the mid-90's -- I don't have the exact date -- with Tim Burton and six well regarded writers, respected writers, and attempted to make a movie with Nick Cage. And by the time this negotiation came around, we had had an aborted $30 million miss because of what we perceived, its difficulty to reintroduce and adapt. In order to overcome those problems --

THE COURT: What do you mean by aborted $30 million miss?

THE WITNESS: We had hired six writers. We had hired Tim Burton. We had hired Nick Cage. And we had vigorously tried to mount a film.

THE COURT: That cost $30 million?

THE WITNESS: We shut that effort down and started over.

THE COURT: And that cost $30 million?

THE WITNESS: Plus or minus $30 million. Plus, actually.

BY MR. BERGMAN: Q: Now, Mr. Spira, after you had that involvement on that film with Mr. Burton and those six writers, did Warner Brothers continue to try to develop a Superman film?

A: Yes.

Q: And in addition to the $30 million that you've just referred to on the Tim Burton film, how much more, sir, did Warner Brothers spend in trying to develop a Superman film?

A: An additional 30-plus million dollars.

Q: So in total Warner spent $60 million trying to develop a film prior to 2002?

A: Not prior to -- that was from 2002 -- from 1990 something until finally we got the movie that got made by Brian Singer.

THE COURT: You spent over $30 million?

THE WITNESS: We spent $60 million.

BY MR. BERGMAN: Q: Was that $60 million added to the cost of Superman Returns?

A: No.

Q: What was done that that 60 million?

A: It was written off.

Q: Now, you made reference, sir, to a perception of Superman in 2002 as damaged goods. Can you explain what you meant by that?

A: Yes. We had, as I said, the history of the last several sequels, which were creative and financial disasters. We had the feeling that he was kind of unhip and uncool in a world where teenagers were the biggest element, movie-going element. We had the unsuccessful attempt with one of the coolest, hippest directors at the time, Tim Burton, who had successfully reintroduced the Batman series for us, and we had failed to come up with a movie that we were willing to make.

And I think that the frustration trying to crack it and its recent commercial and critically sort of panned nature left it sort of damaged in our mind.

THE COURT: Then why pursue it?

THE WITNESS: Because if you could do it, it was an asset that we owned with Time Warner, or AOL Time Warner -- I forget -- but it obviously could have led

to a series of films. And if you made a film, it raised the licensing boat which was out there, the publishing boat and everything else, it was worth doing because if you did it successfully, you'd have a series of films, and it would enhance or reinvigorate the value of an asset that had been in the company for a long time.

BY MR. BERGMAN: Q: Following up with that, Mr. Spira, if the film was successful, as you were viewing it in the 1999 to 2002 period, would it have an effect upon the other films that Warner owned, Superman 1 through 4?

MR. TOBEROFF: Lacks foundation.

THE COURT: Sustained.

BY MR. BERGMAN: Q: When you say, sir, that a successful picture would lift the boat, why does that happen?

A: Well, again, it creates a positive -- it reintroduces it to a new group of people. It creates a positive image around it, and in the same way that we had successfully reintroduced Batman to the world at one point, it increased the merchandising, increased the value of -- to some limited degree anything we had in our inventory, whether it be in video or publishing or licensing.

Q: To what extent, if at all, does the likely cost of a prospective film play a role in Warner's determination as to its value?

MR. TOBEROFF: Objection. Lacks foundation. Vague and ambiguous.

THE COURT: I suppose as phrased. You're talking about his particular assessment?

MR. BERGMAN: Yes, sir.

THE COURT: With that clarification, you may answer. Why don't you rephrase and make it clear. You're asking for his assessment.

BY MR. BERGMAN: Q: At the point that you were determining, discussing the value of the Superman film agreement during the 1999 to 2002 period, did the consideration of what that film might cost the studio to produce play any role in your determination as to its value?

A: When you say value, do you mean ultimate purchase price you would pay?

Q: That's correct. What you would pay for it.

A: Yes.

Q: And can you explain in what way that occurs?

A: Well, at the time we were developing with Tim Burton, we already had a prominent producer attached who got first dollar gross. We had a prominent director, Tim Burton, who also got first dollar gross, and we were attempting to make a movie with Nick Cage, who also got first dollar gross.

In any construct of what the purchase price was, gross participation will be, you are hoping to design it in a way that doesn't make it prohibitive to make the film.

Because if it's too much or too expensive, if they successfully develop it, you've created a new hurdle, which is it doesn't make sense to make the movie. It's too expensive.

The price is too high. There's too much gross out the door, which is incremental cost before you get paid back and have a return on your risk.

So you have to have one eye on the ultimate production of the film while separately considering what's appropriate to spend and develop.

Q: In that regard, Mr. Spira, we've heard testimony in this case that a studio can afford to give more money to a rights holder in a comic superhero situation because you don't need big stars to perform in the film.

Has that been your experience at Warner Brothers with respect to Superman and/or Batman?

MR. TOBEROFF: Misstates the testimony.

THE COURT: Why don't you rephrase the question, Counsel.

MR. BERGMAN: Yes, sir.

Q: Are you familiar with the various Superman films that have been made?

A: The ones from the early 70's, not as much.

Q: Are you familiar with the Batman films that have been made?

A: Yes.

Q: Are you familiar with the actors who have been retained to render services in those films?

A: Yes.

Q: Have you negotiated many of those agreements?

A: Yes.

Q: Is it true, with respect to Superman or Batman, that you don't have to hire important, expensive stars in connection with those pictures?

MR. TOBEROFF: Lacks foundation and vague and ambiguous.

THE COURT: Overruled on those two objections. You may answer.

THE WITNESS: Well, you don't have to do anything. Our history on the Batman, Batmans, plural, is that we were very villain conscious. Actually, Michael Keaton, the first Batman, was a gross from first dollar player, I believe. We had Arnold Schwarzenegger, we had Danny DeVito, we had Jim Carrey. We had Jack Nicholson as the original Joker. We had Michelle Pfeiffer as the Catwoman.

All of these people are gross from first dollar players. And many times the villain in a superhero film is the interesting component that you would cast to be someone spectacular to sort of enhance the profile of the film.

But some superheroes are gross players, and some aren't. I don't think there's a rule of thumb. And I think, frankly, when you develop something, you don't know until you come out the other end what you can do.

MR. TOBEROFF: Objection. Move to strike as nonresponsive. He simply was asked whether it was true that for a Batman or Superman film, you don't have to hire expensive stars.

THE COURT: I suspect Mr. Bergman will have no objection to striking the answer. At the end of the day, you're saying that these are expensive stars?

THE WITNESS: Yes.

THE COURT: Yes.

BY MR. BERGMAN: Q: Have you negotiated with Paul Levitz for DC properties other than Superman?

A: Not directly with Paul that often, but yes.

Q: In those negotiations that you have had with Mr. Levitz, how do you characterize his negotiation posture vis-à-vis Warner Brothers?

A: Okay. He's a terrific guy. We'll start with that. But he's tenacious, strong willed, and I dare say stubborn.

MR. TOBEROFF: Vague and ambiguous as to the negotiation posture.

THE COURT: Overruled.

BY MR. BERGMAN: Q: Have you found him to be submissive to the will of Warner Brothers?

A: Sadly, no.

MR. TOBEROFF: Objection. Leading.

THE COURT: Overruled.

BY MR. BERGMAN: Q: Do the majority of rights agreements have contingent compensation agreements of one kind or another at Warner Brothers?

A: Yes.

Q: And what is a form of contingent compensation at Warner that is most favorable to the participant?

A: First dollar gross or gross from first dollar.

Q: Under what circumstances, if any, does Warner Brothers grant a rights holder a share of first dollar gross?

A: When you can't convince someone we won't pay it to them.

That's the truth.

Q: Aside from the Superman property and aside from the DC agreements, can you think of any rights acquisition agreement that Warner Brothers has made within the past 10 years where first dollar gross was paid to the rights holder?

A: I'm unclear on time periods, but it has happened, yes.

Q: Frequently?

A: Reasonably. Not infrequently. When appropriate.

Q: On those occasions, when a share of first dollar gross has been paid to a rights holder, what is the typical percentage of first dollar gross?

A: It can range from 1 percent to 5 percent.

Q: Does a first dollar gross deal entered into by Warner Brothers in 2002 have a different financial impact on Warner Brothers than the same gross deal made in 1974?

A: Yes.

Q: Can you explain how?

A: Yes. In two ways. One, because of the change in the motion picture business, the growth of the foreign marketplace, the growth of the worldwide television market, the growth of videocassette revenue, and the way in which pictures are released, there is likely to be considerably more revenue on the initial release of the film than there would have been, I guess it's 30 some odd years ago.

And secondarily, the cost of the films to us are exponentially greater. The marketing costs are exponentially greater. So that amount of money that we are adding to pay out will add to -- will push back the point in time where we actually are whole and hopefully making money.

THE COURT: Counsel?

MR. TOBEROFF: The objection is the question lacks foundation, particularly as to 1974, and that the answer is also based on specialized ex -- expert testimony based on specialized knowledge of financial equivalents.

THE COURT: I will sustain the objection on the former part in terms of his understanding of the 1974, in that time period, Counsel. I'll overrule the latter part of the objection.

BY MR. BERGMAN: Q: Let me confine myself to the period from 1985. Would a first dollar gross deal entered into by Warner Brothers in 2002 have a different impact upon Warner Brothers than the same gross deal made in 1985?

MR. TOBEROFF: Lacks foundation.

THE COURT: '85, '86, when he became vice-president.

Overruled.

THE WITNESS: My answer is the same. The gross dollars that it would cost us obviously are higher because of the extreme growth in new markets, videocassettes, growth in the television market, growth in the international markets where they have a lot more theaters and we generate a lot more revenue.

THE COURT: From your vantage point at Warner Brothers, when did you see that growth? When did that growth take place?

THE WITNESS: It's actually now just recently sort of leveled off and started to diminish. But consistent almost throughout the period. We've had spikes. In the earlier period it would be larger. But more or less with very little flattening out.

There's a trajectory, both domestically and internationally in terms of the revenue.

So the value of the growth dollars is more expensive, and the impact to us, because of the increased cost of the films in the marketing, means that it adds to our cost of the film extensively, and adds to our risk profile.

THE COURT: Counsel?

MR. TOBEROFF: Objection as to specialized knowledge, expert testimony.

THE COURT: Overruled.

BY MR. BERGMAN: Q: Mr. Spira, does a 5 percent of first dollar gross deal on a film budgeted at $40 million have a different financial impact on Warner than the same 5 percent deal on a $200 million picture?

MR. TOBEROFF: Objection, your Honor. This is specialized testimony, expert testimony. The cases specifically hold that you don't ask percipient witnesses hypotheticals.

THE COURT: I'm going to overrule that objection.

But I sua sponte have to raise a foundational objection, Counsel. Lay some foundation for this.

MR. BERGMAN: Very well, your Honor.

Q: As part of your function as worldwide head of business affairs, Mr. Spira, are you called upon to determine the impact of various forms of compensation upon the studio?

A: Yes.

Q: And would you describe that as a science, an art, or something else?

MR. TOBEROFF: Leading.

THE COURT: Sustained.

Counsel, it's five o'clock. Why don't we pick up with this tomorrow morning. It will give both sides a chance to think about this overnight. Both sides are about down to a couple hours each.

So we should be able to wrap this up tomorrow. And just given the number of hours that we have, how many more witnesses after this witness do you anticipate?

MR. BERGMAN: We will only have one more witness, your Honor.

THE COURT: And who would that be?

MR. BERGMAN: That would be John Gumpert.

THE COURT: Very good. All right. And then the plaintiff may call, if they have time remaining, any rebuttal witnesses that they feel are appropriate. And then we'll hear a surrebuttal, and that will wrap up the testimony tomorrow.

And then next Tuesday we'll have the closing arguments.

MR. BERGMAN: Very good, your Honor.

THE COURT: Any other matters that we need to take up at this time?

MR. TOBEROFF: No, your Honor.

THE COURT: Very well. Have a good evening.

(Proceedings Concluded)

TRIAL DAY 10

Wednesday, May 13, 2009; 9:37 A.M.

A.M. Session

WITNESSES: Steven Spira (Cont'd), John Gumpert

THE CLERK: Calling Case Number CV 04-08400-SGL, Joanne Siegel, et al., versus Warner Bros. Entertainment, Inc., et al.

(Counsel make appearances as before.)

THE COURT: Good morning to you all.

I've received the defendants' application to have certain Phase 1 trial exhibits and related testimony placed under seal.

Should I anticipate an opposition?

MR. TOBEROFF: Yes, Your Honor.

THE COURT: When do you think you can get that in?

MR. TOBEROFF: What's the deadline, Your Honor?

THE COURT: I haven't set one. How much reasonable time do you need, Counsel?

MR. TOBEROFF: Next week, the following week, Tuesday.

THE COURT: This is an ex-parte application. This is something which we need to address sooner as opposed to later. The Court's standing order requires 24 hours, but I'm willing to give you some additional time; but not a week's time or so.

MR. TOBEROFF: Friday? Is Friday good?

THE COURT: Let's get this, so that I can -- before the trial ends, and the closing arguments end, we can get this under seal, or not, or partly under seal, whatever we're going to do.

MR. BERGMAN: Your Honor, don't we have closing argument on Tuesday?

THE COURT: Tuesday, right. And he said Friday, this week.

MR. BERGMAN: Okay. Thank you.

THE COURT: So then I can decide it on Tuesday at the closing argument.

Provisionally, until Tuesday, it's under seal.

MR. TOBEROFF: Very well, Your Honor.

MR. BERGMAN: Thank you.

THE COURT: Let's continue with the examination. If the witness would come forward.

THE CLERK: Mr. Spira, please be advised you're still under oath.

THE WITNESS: Yes. Thank you.

DIRECT EXAMINATION(cont'd)

BY MR. BERGMAN: **Q:** Good morning, Mr. Spira.

Mr. Spira, prior to the time that the business affairs department gives the go-ahead on an acquisition to creative or to whoever it does give it to, does it go through any sort of an analysis or projection as to costs?

A: Are you referring to production or development? Can I ask that?

Q: Yes.

THE COURT: If there's an objection, Counsel, please state it before the answer.

MR. TOBEROFF: Vague and ambiguous as to time.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** Prior to the time that the business affairs department gives a green light to production, does business affairs go through an analysis, an economic analysis, based on projections, of a film?

A: Business affairs doesn't green-light films.

MR. TOBEROFF: Objection, Your Honor.

THE COURT: Overruled.

You may answer.

THE WITNESS: Business affairs provides financial data to management, who actually green-lights the films. We are part of a process where we do financial analysis and then the management of the company, who actually green-lights the films, analyzes it together and makes a decision as to whether or not it is an acceptable risk that they're willing to take.

BY MR. BERGMAN: **Q:** But as an initial matter, that's done by business affairs?

A: Yes.

Q: As a result of those kinds of analyses, Mr. Spira, does a 5 percent of first-dollar gross on a deal that is budgeted at, let's say, $40 million have a different financial impact upon Warner Bros. with respect to a picture that's budgeted at $200 million?

MR. TOBEROFF: Objection. Lacks foundation; incomplete hypothetical.

THE COURT: Sustained on foundation.

BY MR. BERGMAN: **Q:** As part of the analysis that you have just testified to, that you make in turning the financial data over to the creative department, does the business affairs department actually look to the terms of the contract, an acquisition agreement, and attempt to determine what the financial impact of that agreement will be?

MR. TOBEROFF: Same objection, Your Honor.

THE COURT: You're asking, in his role, given his background --

MR. BERGMAN: Precisely. I'm just concerned with what Warner Bros. Television does.

THE COURT: Very well. Overruled.

MR. TOBEROFF: Warner Bros. Pictures.

MR. BERGMAN: Warner Bros. Pictures does.

THE COURT: Right.

THE WITNESS: Yes.

It might be helpful if I go through the green-light process a little bit, to explain what we do.

BY MR. BERGMAN: **Q:** Please do.

THE COURT: And, perhaps, that's part of the foundation that we need to lay, Counsel. I'll let you do that through questions.

BY MR. BERGMAN: **Q:** As part of that analysis, do you go through what is called, in the business, in Warner Bros. in particular, a "green light analysis"?

MR. TOBEROFF: Leading.

THE WITNESS: Yes.

THE COURT: It is leading.

Just ask him to explain the process, Counsel.

BY MR. BERGMAN: **Q:** Would you explain the green-light process.

A: Yes.

Once there's a script that the creative department is comfortable with, and they believe that management is comfortable with, and there's a director attached, and there are either actors attached or identified actors with whom you don't have deals, you put together a financial model. In that model, you obviously have the cost of the picture; and as part of the cost of the picture, you will know what the deals are and what the participations are or what monies will be paid out to the talent pursuant to their deals.

The creative material is usually circulated, but not always, to the distribution people, the marketing people, the video people, and to a lesser extent, the television people, because those prices are usually based on a contract that has a formula that's tied to some film performance.

They will then give their best-case low, medium, and high estimates for how they feel the film will perform; and the marketing people will put a number on what they think that needs to be, to be spent in marketing the film, to achieve certain levels.

At those points, we are able to calculate at different film performances what, if anything, the individual participants in the film would be entitled to be paid. If they are gross-from-first-dollar players, there's usually an advance against it, but at some point, it kicks in and pays them more money. And we're able to then calculate all of the costs and all of the revenue and see, at those levels, how the film would perform financially.

They're, obviously, people's best guesstimates. We sometimes green-light a film based on those numbers. We sometimes go back and try to reduce the budget of the film in those numbers. We sometimes go back and try to renegotiate the deals, to make it an acceptable bet. We sometimes go back and rewrite the script to make it cheaper. Anything can happen. And we will sometimes say -- not we, but management people who make these decisions, primarily Mr. Horn and Jeff Robinov, will figure out whether they want to actually pull the trigger and make the film, go back to the drawing board,

maybe with different actors or with a different ending, or rewrite it, or frankly, not make the film, or go forward.

THE COURT: Counsel.

MR. BERGMAN: Thank you, Your Honor.

BY MR. BERGMAN: **Q:** Mr. Spira, as a result of making those financial models as part of the green-light analysis at Warner Bros., does 5 percent of first-dollar gross granted by Warner Bros. on a $50 million budgeted film, as compared to 5 percent on a $200 million budgeted film, have a financial impact on the studio?

MR. TOBEROFF: Lacks foundation.

THE COURT: Limited to Warner Bros.

MR. BERGMAN: As I indicated, Your Honor.

THE COURT: With that understanding, overruled.

THE WITNESS: Yes.

BY MR. BERGMAN: **Q:** Can you tell me what that impact is. How would you explain that?

A: Obviously, the goal is to have all of the money that you spend on marketing and on the film, and any other money that you pay out, be recovered and have a profit and a reasonable rate of return under normal film performance. Obviously, there are average performances that are lower and higher, but in your best guesstimate of what you think it's going to do -- the economic impact on a $40 million film is that obviously, the 5 percent of the gross will be worth far fewer gross dollars in a situation where you're recovering the $40 million that you spent, plus your marketing costs, plus that 5 percent of the gross. You will achieve a profit sooner, and it adds less gross-dollar element to your risk that you need to recover in order to hopefully get a return and have a profitable film.

MR. TOBEROFF: Move to strike as expert testimony based on specialized knowledge.

THE COURT: Overruled.

BY MR. BERGMAN: **Q:** Mr. Spira, what is Warner Bros.' policy, if any, regarding the share of royalty, video royalties, that it will grant to participants?

A: With very rare exceptions, participants receive a 20 percent royalty into the overall pot of revenue into which their participation will be calculated based upon.

Q: Does Warner Bros. make any exceptions to that policy?

MR. TOBEROFF: Objection. This line of questioning lacks foundation as to whether we're talking about television, film, animation.

THE COURT: Sustained.

BY MR. BERGMAN: **Q:** Mr. Spira, you're not involved in television, are you?

A: No, sir.

Q: And you're not involved in animation; correct?

A: Film animation, we are.

Q: Your past years at Warner Bros. have been addressed primarily to what sort of audio visual works?

A: Live-action and animated motion pictures.

Q: Okay. Now, with respect to live-action motion pictures, what is Warner Bros.' policy, if any, regarding the share of video royalties that it will share with participants?

A: We include 20 percent of the gross video amount into the into pot as a royalty, and out of our 80 percent, we absorb the costs and retain the rest.

Q: Now, are there any exceptions, in your experience at Warner Bros., to the policy that you have just expressed?

A: Well, the policy -- again, it's all about bargaining strength; so the A, A+ actors, the ones who command a large amount of first-dollar gross, can typically get 35 percent of the video included into the pot of revenue upon which we're going to calculate their participation. And in the rarest of rarest of A+++ directors, we may make exceptions.

Q: Are you aware, sir, of the contingent compensation that's been paid to each of the participants in the Superman Returns film?

A: Yes.

Q: Okay. Does any participant in Superman Returns receive more than a 20-percent video royalty?

A: No.

Q: Are you familiar with the terms of the Warner Bros.' Legendary deal?

A: Yes.

Q: What is Legendary's role in connection with the film Superman Returns?

A: Legendary is a co-financier of the film, which means that they invest side-by-side with us in the negative costs of the film. We advance on behalf of both parties all of the marketing costs, which is typically done because they are returned first and not perceived to be at risk.

Q: In accounting to financiers such as Legendary, to what extent, if at all, are they treated differently than individuals such as producers, actors, rights holders, and the like?

A: They are treated like the studio and not like the people who have worked on the film, but not invested in taking any risk.

MR. TOBEROFF: Lacks foundation.

THE COURT: Sustained. Lay a foundation, Counsel.

BY MR. BERGMAN: **Q:** Let me ask you, are you familiar with various deals at Warner Bros. entered into with co-financiers?

A: Yes.

Q: Can you name a few of those deals.

A: We have a co-financing arrangement with an Australian company called Village Roadshow. We have an overall co-financing arrangement with a company called Legendary Pictures. We have an output distribution deal with a company called Alcon, A-l-c-o-n, Pictures. We do one-off individual co-finance pictures with a number of individual co-financiers, including -- I'm blanking out; I apologize -- Gary Barbara's company; I forgot the name; it will come to me in a second -- and other one-off individual co-financing arrangements.

Q: Have you personally been involved in the negotiation of such agreements?

A: Yes.

Q: In accounting to financiers such as the ones you've indicated, to what extent, if at all, are they treated differently by Warner Bros. than individuals such as producers, rights holders, and other people involved in the picture?

A: They are not paid a salary, and they do not receive a participation. They are side-by-side with the studio in funding the production costs, and risking the production costs, and, therefore, participating or sharing in the success or failure of the film as a partner.

MR. TOBEROFF: Move to strike, Your Honor. Hearsay.

THE COURT: The Court won't be considering that for the truth of the matter asserted. Overruled.

BY MR. BERGMAN: **Q:** Mr. Spira, based upon your negotiation of these co-financing agreements, are financiers paid a salary?

A: No.

Q: Based upon your negotiation of these agreements, do co-financiers receive a participation?

A: No.

MR. TOBEROFF: Same objection, Your Honor. Hearsay. He's speaking about out-of-court documents and the contents.

THE COURT: Let me make sure that I'm correct, Counsel.

What is the purpose that you're introducing this for, Mr. Bergman?

MR. BERGMAN: My purpose is to establish, Your Honor, that there is a difference between a co-financier and what is referred to in the Superman agreement as a participant, a point which counsel has been making in saying that we didn't give DC the benefit of the favored-nations provision that is contained in the film agreement.

THE COURT: Then let's tie this to that agreement, Counsel. Let's make this more explicit, and let's a lay foundation for it.

MR. BERGMAN: Okay.

MR. TOBEROFF: Your Honor, if I may.

The Legendary Pictures' co-financing agreement with Warner Bros., I believe, is an exhibit in this case, and they could offer that to the witness and have him explain the terms of it.

THE COURT: That would be part of the foundation that I would anticipate being laid.

MR. TOBEROFF: Thank you, Your Honor.

THE COURT: Let's tie this into where you're going, Counsel, because that wasn't clear to the Court. Frankly, if it's not clear to the Court, then it really doesn't help you in any event.

BY MR. BERGMAN: **Q:** Are you familiar with the terms of the Superman Returns agreement?

A: Generally, yes.

Q: And are you familiar with the fact that it contains what is commonly referred to as a "favored-nations provision"?

A: Yes.

Q: And are you familiar that the favored-nations provision in the agreement refers to DC getting the same video treatment as any, quote, participant, closed quote, in the film?

MR. TOBEROFF: Leading.

THE COURT: Sustained. Let's go back to the foundation. How are you familiar with the Superman Returns agreement?

THE WITNESS: I'm familiar with it generally from its history, and from our trial preparation.

THE COURT: What do you mean "from its history"?

THE WITNESS: Well, when it was originally negotiated and when it --

THE COURT: Were you involved in those original negotiations?

THE WITNESS: As I think I said yesterday, in John Schulman's role as the general counsel, he doesn't do business deals; and I don't do, thank God, paperwork, or legal work. So we don't draft -- the way business affairs is designed, business affairs executives negotiate the transaction, send a memo to the legal department with the basic deal terms, and they turn two pages into 80 pages. Go figure.

So while we do the transactions, the lawyers paper the transactions and then interact with us to the extent that the issues that come up are, quote, unquote, deal related. And that's sort of a subjective area. But they always err on the side of wanting us to make the decisions, as it were. So we represent the creative department in terms of making the deal, quote, unquote; the legal department services us in terms of doing the paperwork; and we collectively negotiate its conclusion. But the setting of a price or a value is a business

affairs function, which is why I said yesterday that we would go to John Schulman and say -- he would say, 'What do you think the value or the price would be?' And we would say to him, 'We would attempt to make it different or better or a smaller deal on it.'

THE COURT: All right.

MR. TOBEROFF: Objection. Move to strike as nonresponsive to your question, Your Honor.

THE COURT: No. Actually, it was very responsive and illustrated that he has no foundation to discuss the agreement itself.

I'll sustain your earlier objection on foundation, unless you want me to strike it, Counsel, and disregard it and start all over.

MR. TOBEROFF: No, Your Honor.

THE COURT: Thank you.

BY MR. BERGMAN: **Q:** At Warner Bros., Mr. Spira, does the word "participant" have a customary meaning?

A: Yes.

Q: What is that meaning, sir?

A: It is someone who has worked on the film and in consideration, or as part of the consideration for their services, is entitled to an additional payment based on the performance of the film and a calculation of its revenues at a given point in time based on a formula.

MR. TOBEROFF: Objection, Your Honor. Specialized knowledge expert testimony.

THE COURT: It's not. And that objection really doesn't apply.

But there is a foundational concern here, Counsel.

I just heard from this witness that he's not involved in putting together the agreement, the legal agreement itself. So you're not going to be able to use this witness to examine the terms of the legal agreement.

If you want to use this witness to examine what went into that, what was sent over, that might be something else. But I really think there's a foundational problem here.

MR. BERGMAN: And I, of course, accept that, Your Honor. I was just asking whether the term had a meaning within the --

THE COURT: But what's the foundation for him to know?

MR. BERGMAN: Among the foundation, Your Honor, this man has been in charge of worldwide business affairs, and must necessarily, in that role, have gained an understanding as to how a term is utilized within the studio.

THE COURT: That's not clear. It may very well be the case, but there seems to be this distinction that's being drawn between drafting up the legal agreement itself and working out the business terms. And the focus that I believe, based on your proffer, that you're trying to rebut is an explication offered by Mr. Halloran concerning the agreement itself. And there's a fundamental foundational defect here with this witness to address that.

I've given you a lot of latitude in this trial to allow, for example, Mr. Levitz, who was involved in particular agreements, to explicate their understanding of the agreements that they were involved in.

I understand that this witness was involved in the deal in general terms, but not specifically in the agreement in particular terms, as I understand his explanation.

If I'm misunderstanding his explanation, then the burden is on you, through questions, to establish the foundation. Otherwise, I'm sustaining a foundational objection.

Frankly, this nonsense about the expert testimony, Counsel, you can continue to make this objection, but this is going nowhere with this Court. These are percipient witnesses.

Given the nature of this case, I am permitting this testimony, not necessarily for the truth of the matter asserted, not as I would an expert witness, but to express their understanding of the terms of the agreement. And you can impeach them through cross-examination, given the fact that they are, in fact, Warner Bros. speaking. And I heard he is from Warner Bros. people, and I understand that. But I am not viewing this as expert specialized knowledge. Rather, this is reflecting their understanding.

Do you understand the Court's position?

And I'm not asking for further argument. You have briefed the issue. You have made the objection a lot of times.

I just want to make sure you understand the Court's position.

MR. TOBEROFF: I understand the Court's position, Your Honor, but if I may.

This is not further argument on this topic in general, but specifically, with this witness, if he's not involved with the negotiation and the terms of this particular agreement, then his state of mind --

THE COURT: And I'm sustaining a foundational objection on that basis.

Counsel, you're winning. Don't talk me out of it.

MR. TOBEROFF: I'm not trying to, Your Honor. Very well, Your Honor.

MR. BERGMAN: Your Honor, in the interest of time, I understand Your Honor's position. I'll address it with the expert and move on to another topic, the final topic with Mr. Spira.

THE COURT: Very well.

BY MR. BERGMAN: **Q:** Mr. Spira, there's been testimony in this case by an expert witness that the fair market value of the Superman exclusive rights in 1999 to 2002 consisted of a $1-million-a-year option, a $10-million-per-picture purchase price; 10 to 20 percent of first-dollar gross, and a readjusted merchandising provision.

I'd just like to ask you, sir, to your knowledge, in all of the time that you've been at Warner Bros., to what extent, if any, have underlying rights holders been paid as much as a $10 million purchase price?

MR. TOBEROFF: Objection. Lacks foundation.

THE COURT: You're simply asking him, based on his experience at Warner Bros., has anyone else been offered, to his knowledge?

MR. BERGMAN: Precisely, sir.

THE COURT: Overruled. You may answer.

THE WITNESS: We have never made a deal, to my knowledge, with a $10 million purchase price.

BY MR. BERGMAN: **Q:** Looking again solely to Warner Bros., and to the amount of time in which you've been involved in business affairs, to what extent, if any, has Warner Bros. paid as much as 10 percent of first-dollar gross for the acquisition of literary rights?

A: Never.

Q: How does that suggested deal, based on your experience at Warner Bros., compare with the value placed upon the Superman rights by your department in the 1999-2002 period?

A: I think I testified yesterday that for a number of reasons, we would have hoped and attempted to actually renegotiate the Salkind deal downward.

Q: Okay. Thank you, sir.

MR. BERGMAN: I have nothing further, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. TOBEROFF: Q: Mr. Spira, you did not negotiate the Superman film agreement with DC, did you?

A: No.

Q: You also did not negotiate the Smallville television agreement with DC?

A: Correct.

Q: You also did not negotiate any of the Superman animation agreements with DC?

A: That's correct.

Q: Warner Bros.' then general counsel, John Schulman, negotiated the Superman film agreement?

A: I believe so.

Q: Mr. Schulman and Mr. Levitz agreed to adopt the economic terms of the 1974 Salkind agreement?

A: I believe so.

Q: You testified that you did not recommend doing this; correct?

A: Yes.

Q: Obviously, Mr. Schulman did not follow your recommendation; correct?

A: Correct.

Q: He just as clearly did not follow your valuation on what your recommendations were based.

A: I guess that's a question.

Correct.

Q: You did not determine any of the terms of the Superman film agreement, did you?

A: No.

Q: Nor the Smallville television agreement?

A: No.

Q: Nor the Superman animation agreement?

A: That's correct.

Q: Animation agreements. Excuse me.

The business affairs valuation was that the 5 percent of worldwide gross payable under the Salkind agreement should be reduced, as you just testified.

A: Yes.

Q: Mr. Schulman ultimately agreed to a deal in which DC was paid 5 percent of worldwide gross for the rights to Superman; correct?

A: Yes.

Q: So Mr. Schulman ultimately concluded the agreement he did not follow any of your suggestions.

A: That's correct.

MR. TOBEROFF: Plaintiffs move to strike Mr. Spira's testimony regarding the Superman agreements, as his state of mind and lay opinions regarding Superman and the valuations of Superman are irrelevant since he did not negotiate or determine any of the terms of the agreements in question in this case.

THE COURT: The Court addressed the objections and sustained various foundational objections while the testimony was being made, Counsel.

The Court will be mindful of this foundational evidence, as well, in evaluating any of the testimony made by this witness.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. TOBEROFF: Q: Mr. Spira, after you conduct an evaluation of an underlying property's worth, based on comps or precedent, has your division

ever ended up agreeing to pay a lot more for a property than it initially wanted to?

A: I don't think there's an "initially wanted to" involved.

Q: What do you mean by that?

A: What I mean is, there's a process. And if you would like, I can go through the process. I can go through the process. That's not really the question.

Q: Please.

A: Negotiations are common in the business. As I think I stated yesterday, there's first and foremost the creative department's appetite, desire for things; there are the factors that the seller imposes on the property; and then there are all sorts of factors that come into play all the time. I don't think -- we, obviously -- anytime you conclude a transaction, at the end of that process, you decided if that's what you want to pay.

So there is no number -- there's a number which you won't go beyond, and you may have an instinct or an appetite -- and that appetite can decrease or increase, depending, again, on the passion of the creative people or new elements or more information or good negotiating. You don't go in with -- you know, it's a negotiating process, and it evolves based on the dialogue and based on, sometimes, changing factors or educational factors; you're educated about something; or because we are not the end user, the creative people may persuade us to do things that we are not entirely comfortable with. We are charged with acquiring the things they want and that they need so that we can get films developed and films made. We have a little joke in our department, because there's an inherent tension between commerce and creativity and their wanting and needing the things they need to do their jobs, that if we can hold them down to a misdemeanor and not a felony, we've done a good job.

Q: Mr. Spira, if Warner Bros. has a strong appetite for a property and other studios are competing for the acquisition of the same property, that would naturally increase the negotiating leverage of the rights holder, wouldn't it?

A: Sometimes.

THE COURT: When would it not?

THE WITNESS: A lot of times it will depend on who the competition is.

THE COURT: Why would that matter? If there were other people competing for the same property, why wouldn't that necessarily increase the bargaining position of the rights holder?

THE WITNESS: Because all buyers are not equal.

You may choose a studio over an independent because you believe the studio will generate way more revenue, and the smaller deal at a studio will be more valuable than a larger deal at an independent. You may decide that one studio has particular strengths for your film that another studio doesn't, whether they have a strong foreign distribution, a strong video distribution. Some studios are perceived, rightfully or wrongfully, to do better with big action movies and others with comedies.

THE COURT: I certainly understand why, in the final analysis, you might choose one studio over another, or why one studio over another might be in a better position; but why wouldn't the introduction of a competing studio, even if they were in an inferior position to one of the other already-competing studios -- not in the marketplace, at least enhance on some level -- we haven't quantified what that is -- the bargaining position of the rights holder.

THE WITNESS: I didn't hear the question studio, but even in the cases of studios -- for instance, there are weak studios and there are strong studios. Today, there are studios that don't have the financial capacity to finance a lot of expensive films because they are financially handicapped; and we like to think of ourselves as a valuable buyer. So, obviously, competition is a factor and can increase the price. But it's not always the case.

THE COURT: Okay.

BY MR. TOBEROFF: Q: My question, Mr. Spira, was limited to studios, not independents.

A: Well, again, all studios are not equal, but it can, of course, have an impact on the price.

Q: The interest of competing studios in the same property also serves to validate Warner Bros.' interest in that property, wouldn't it?

A: I think we often buy properties that other studios have passed on and are not interested in, so not necessarily.

Q: I'm addressing a situation where multiple studios are interested in the same property as Warner Bros.

Doesn't that also serve to validate Warner Bros.' interest in the property as a valuable property?

A: Not Warner Bros.' interest. The owner's interest, perhaps.

Q: And if a bidding war ensues between competing studios, that would tend to drive up the costs of the property to Warner Bros., wouldn't it?

A: To some extent, yes.

Q: Ultimately, the market value of a property is determined by offering it for sale in the competitive open market; isn't that correct?

A: Yes.

Q: Can you give me some examples of bidding wars in which you've been involved in regarding underlying property rights?

A: There are so many, it's actually hard. But, yes.

Q: What's a good example?

A: Every few years, Roland Emmerich, who is a very popular director and writer, will, on spec, which means for his own account, write a script, do a budget, and then offer it to studios as a 'go' film and have the studios bid to have a film.

Q: Any other good examples you can think of?

A: Every meaningful author of a current best seller, whether it's John Grisham or Michael Crichton, will try to create an auction of their property.

Q: Do you recall an auction for the Michael Crichton novel Timeline?

A: Not specifically Timeline, but pretty much every Michael Crichton book had an auction.

Q: Do you recall an auction for Microsoft's property Halo?

A: Yes.

Q: Was Warner Bros. involved in that auction?

A: I believe so.

Q: What studio ended up with the property?

A: I want to say Fox.

Q: And Warner Bros. did not end up with the property because the price became too high as a result of that bidding?

A: I don't remember specifically, but I'm sure that's the case.

Q: Ultimately, when Warner Bros. acquires film rights to a property on the open market, whether it be a comic book or a novel, the price and other terms are ultimately determined by Warner Bros.' appetite for the property and what it must agree to in order to induce the licensor to license the rights to the property; is that fair to say?

A: What we're willing to agree to.

Q: Is that fair to say?

A: The difference between "must" and "willing to," yes, because oftentimes, they will actually accept our counteroffer and our terms.

Q: When Warner Bros. ends up paying big money for an underlying property, and agreeing to a number of terms that actually favors the rights holder in a rights acquisition, and then proceeds to invest heavily in that property, it's because Warner Bros. believes it has the potential to make a very large profit on that property; isn't that correct?

MR. BERGMAN: Objection. Incomplete hypothetical.

THE WITNESS: No.

THE COURT: Wait one second.

What do you believe is missing, Counsel?

MR. BERGMAN: What kind of film it is. Is it a novel? Is it a comic book superhero property? Are there directors who are interested? Producers? Actors?

THE COURT: At least with respect to genre, I think that's a fair request, Counsel. I'll sustain the objection.

BY MR. TOBEROFF: Q: When Warner Bros. ends up paying big money for the film rights to a novel, and agrees to a number of terms that protect or favor the author, I take it it does so because it believes that it can make money with that property; correct?

A: No.

Q: Why do you say no?

A: Because what we are doing in the first instance is acquiring it, and our motivation is that we think there's a reasonable, and hopefully decent,

likelihood that we can develop it into a packageable film. When we make the decision whether or not to make the film, we have to face whether or not we think we can make money with it.

The first part of the process is development, and development is -- I don't have a scientific number, but usually, the odds are against you. Many prominent novels don't get produced. You asked me about Halo, which was a very big bidding war, but the movie didn't get made. And many of the Crichton books haven't gotten made. So our goal is to acquire something that we believe we have the ability to package into a film that we then hope will green-light.

Q: Warner Bros. is in the business to make money, is it not?

A: Absolutely.

Q: And when you spend money in acquiring property, your ultimate goal -- I'm not referring to every step in the process -- but your ultimate goal is to make money from the acquisition of that property?

A: From the acquisition, the aggregate amount of things we put into development -- it would be nice if you could make every single one, but the odds are always against you.

Q: You're not spending money on a particular property because you think you're not going to make money on that property; isn't that right?

A: We make money for the opportunity to make money. We spend money for the opportunity to try to make money.

Q: Are you aware that participants in a film or in TV series sometimes complain about transactions between related companies as reducing their participations?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained.

MR. TOBEROFF: I'm trying to ask -- it's a foundational question.

THE COURT: You need to rephrase it if it's a foundational question, because you have the conclusion built in there.

BY MR. TOBEROFF: Q: Are you aware of an issue in the motion picture and television industry regarding transactions between affiliated companies where the claim of participants is that such transactions tend to reduce the amount of their participations?

MR. BERGMAN: Objection. Lack of foundation; calls for an expert opinion.

THE COURT: As a yes or no question, you may answer the question.

THE WITNESS: Yes as to film.

BY MR. TOBEROFF: Q: Are you aware that legislation was introduced in the California State Senate, supported by the AFLCIO and the WGA and other unions, called the Fair Market Value Bill?

MR. BERGMAN: Objection. Beyond the scope of direct.

THE COURT: Sustained, on relevancy grounds; relevancy as to whether this witness is aware of it.

MR. TOBEROFF: Your Honor, if I may.

The witness has testified at length regarding a number of factors, in a very broad sense, that go into the decision-making process regarding films, how much money to spend, the green-light process, the development process. And I'm asking -- that's the basis on my cross for asking him this question.

THE COURT: I don't see where this is going, Counsel. Proffer to the Court.

Whether he's aware of something before in Sacramento, how does that affect his -- are you asking whether that affects his decision-making?

MR. TOBEROFF: He's opined regarding issues pertinent to fair market value and assessing fair market value, and the bill that was introduced in Congress is called the Fair Market Value Bill, which contains a very interesting definition for "fair market value." I want to ask this witness about that, and I'm laying the foundation as to his awareness of this issue in Hollywood.

THE COURT: That would go to exactly what you have sought and successfully kept out, his testimony as an expert on fair market value. I'm not considering any of his testimony as expert testimony concerning what is or what should be fair market value, what is or what should be fair terms for a deal.

He's testifying as to what he has done at Warner Bros., much like Mr. Levitz testified what he has done at Warner Bros.

I understand the similarity between the questions, for example, that you asked Mr. Halloran, and Mr. Bergman asked Mr. Levitz, or this witness. But the Court is considering them for different purposes. And what you're now seemingly trying to get into is exploring objectively a definition of "fair market value."

Now, that doesn't seem relevant to the Court.

If you want to ask him about his decisions in any of these movies or any of these films for which he has been involved in the business end, how he has negotiated them or how the market has operated in those particular deals, that's fair game, and you can get into any of that.

I don't see the relevancy, though, of exploring a definition that is in some piece of legislation pending in Sacramento, for its own sake.

Objection sustained.

BY MR. TOBEROFF: Q: Mr. Spira, you've testified at great length about the process of valuing comic books in connection with rights acquisitions by Warner Bros. What comic book properties were you specifically referring to?

MR. BERGMAN: Objection. Misstates the testimony of the witness; lacks foundation.

THE COURT: Rephrase your question, Counsel.

You can inquire as to what comic book properties he was referring to in his previous answers.

BY MR. TOBEROFF: Q: In your previous answers, what comic book properties were you referring to, Mr. Spira?

A: We have, you know, lists of our rights, writers, producers, directors; and we'll go back and refer to those lists.

If you're asking me for titles, they all kind of come together. But it would have been anything in the last 25 years that we negotiated with DC Comics and any other comic books or anime or animated things that we've done.

Q: I was asking specifically what comic book property acquisitions you were referring to.

A: Well, again, the titles are a little bit elusive, and -- there's an old -- I mean, the one that I think back a million years, there was a thing called Blackhawk, and there's Wonder Woman and Justice League and Flash. I mean, most of it is DC, but there are some others that don't come to mind at the moment.

Q: Was Blackhawk a comic book acquisition?

A: I don't remember. It's one of the earliest ones, from, maybe, 20, 25 years ago. I remember it because my boss had the poster on his wall.

Q: Other than Blackhawk and acquisitions of DC comics, can you tell me of any other comic book acquisitions you had in mind when you were testifying?

A: Well, we were involved over the years in a number of negotiations with Marvel where we did not acquire the properties. Again, the titles, they don't come to mind. I apologize. I'm not a comic book person. I'm more of a sports guy.

Q: Switching to a different subject, are you familiar with the litigation between 20th Century Fox and Warner Bros. over the underlying rights to the comic book/graphic novel Watchmen?

A: Yes.

Q: What was your involvement in that litigation?

A: I don't remember if I was a witness. I certainly was part of the studio side of the litigation team, as it were.

Q: Did your department oversee the acquisition of underlying rights to the Watchmen comic book?

A: My department negotiated the acquisition of the overall package of rights from Paramount, which had green-lit a movie and shut it down; and we bought from Paramount -- or made a deal with Paramount for the aggregate project, not the underlying rights.

Q: And producer Larry Gordon, were his rights part of the rights acquired by Warner Bros. to the underlying Watchmen rights?

MR. BERGMAN: Objection, Your Honor. This does go beyond the scope of the direct examination and is totally irrelevant.

THE COURT: Where are you going with this, Counsel?

MR. TOBEROFF: If I tell you where I'm going, then it will sort of give the answers to the cross.

THE COURT: If you can give me a general -- what issue of the case is this relevant to?

MR. TOBEROFF: Generally, it's to illuminate issues regarding indemnification provisions and how the studio operates.

THE COURT: How Warner Bros. operates?

MR. TOBEROFF : Yes.

THE COURT: I'll give you some latitude.

MR. TOBEROFF: Thank you, Your Honor.

BY MR. TOBEROFF: Q: Was the producer Larry Gordon part of the rights acquisition package, if you will?

A: Yes.

Q: And in his agreement, did he warrant and represent certain rights to Warner Bros.?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Are you familiar with the agreement?

THE WITNESS: Again, in the same way that I testified before, I didn't negotiate it. I've never read it. I've never -- we don't draft them. We do the material deal terms. This is a contract or legal term.

THE COURT: This is going to be the flip-side, Counsel, of the objection that went in your favor during direct.

Sustained.

BY MR. TOBEROFF: Q: From your knowledge of this lawsuit, you're aware, aren't you, that Larry Gordon had warranty and representation provisions in his agreement relating to the Watchmen rights; correct?

MR. BERGMAN: Same objection.

THE COURT: Counsel, I stopped Mr. Bergman from going into the agreement, based on the lack of foundation of the witness, based on your objection. I think it's only fair that I do the same thing here.

MR. TOBEROFF: Your Honor, he testified that he's aware of the Watchmen case. It was a highly-publicized case. It was also highly publicized that Warner Bros. is seeking indemnification for Larry Gordon based on warranty and representation provisions in his agreement. And he said he's very familiar with the case. That's the foundation for my asking him questions.

I'm just inquiring as to what he knows.

MR. BERGMAN: May I ask a question of the witness on voir dire, Your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. BERGMAN: **Q:** Mr. Spira, the knowledge that you have concerning the Watchmen agreement and matter, have you obtained that from any source other than counsel employed by Warner Bros.?

A: No.

MR. BERGMAN: Thank you, sir.

THE COURT: Move along.

MR. BERGMAN: I object on that basis.

THE COURT: Let's move along.

MR. TOBEROFF: No further questions, Your Honor.

THE COURT: Anything further, Mr. Bergman?

MR. BERGMAN: Just a couple, Your Honor.

REDIRECT EXAMINATION

BY MR. BERGMAN: **Q:** Mr. Spira, with respect to bidding wars, you testified on cross that you've participated with respect to novels and with respect to spec scripts. Have you ever participated in a bidding war with respect to a comic book property?

A: I don't recall. That's not the same as "no," to be honest.

Q: In response to Mr. Toberoff's question, in essence as to whether competition might drive up the price, you answered, quote, to some extent, closed quote. Could you explain what you mean by that.

A: Well, our appetite or desire to do something is primarily driven by our internal factors. We obviously negotiate and try to make the best deal that we can. And that is determined by the willingness of the seller to sell something. There are sellers who come in and say, 'Look, these are my five red lines, and I won't cross them; I must have complete control over the final script,' or 'I must get X dollars,' or 'I must get something,' and then we have a decision to make, even in the absence of competition. So there are a lot of factors that can determine what you will or won't spend.

Q: And in addressing those five lines of what the seller wants, if they are granted to the seller, is there any compensation made in other terms of the agreement?

A: You try to look at the entire agreement comprehensively.

There are financial elements. There's a certain amount of cash, but maybe you'll give them more gross, or maybe you'll give them more cash and less gross or a different royalty. It all comes down to sort of one aggregated deal,

and in your best judgment, whether you want to develop it under those circumstances, or hire the person, if, in fact, you're talking about production, under those circumstances.

Q: And in the bidding wars that you've been involved with, has the price, the economic price being paid for any of the options, been the decisive factor in where the picture ultimately wound up?

A: You'd have to ask the sellers, but I know that one of our frequent tactics is to match the highest bid and let them choose between, in effect, the prettier studio.

Q: Thank you.

MR. BERGMAN: I have nothing further, Your Honor.

THE COURT: Mr. Toberoff?

MR. TOBEROFF: Nothing further, Your Honor, of this witness.

THE COURT: Very well. You're excused. Thank you, sir.

THE WITNESS: Thank you very much, Your Honor.

THE COURT: Let's go ahead and take a break. You have one more witness, Mr. Bergman?

MR. BERGMAN: Yes, Your Honor.

THE COURT: We'll take a brief break before we call that next witness.

(Recess taken.)

THE COURT: Counsel, you may call your next witness.

MR. BERGMAN: Thank you, Your Honor. We call John Gumpert.

THE CLERK: Do you solemnly state that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: John Gumpert, G u m p e r t.

DIRECT EXAMINATION

BY MR. BERGMAN: **Q:** Good morning, Mr. Gumpert.

What is your occupation, sir?

A: At the moment, I am a motion picture consultant and I'm also a principal in a company that's negotiating to acquire a film library, and hopefully future film libraries as well.

Q: Have the defendants retained you to testify as an expert witness in this matter?

A: Yes, they have.

Q: Are you being compensated for the time that you have put into this matter?

A: Yes, I have.

Q: At what rate have you been compensated?

A: At the rate of $500 an hour.

Q: Are you also a lawyer, sir?

A: Yes, I am.

Q: And what state are you admitted to?

A: I'm admitted to the bar for the state of New York.

Q: How long have you been involved, if at all, as a film business affairs executive?

A: Essentially 35 years, going back to 1974, when I joined Columbia Pictures.

Q: Let's start there.

What was your title at Columbia Pictures in 1974?

A: I was assistant general counsel.

Q: And can you briefly explain, sir, what your responsibilities were in that position.

A: A broad range of responsibilities, ranging from some corporate matters, because Columbia Pictures was a public company at that point, to financing transactions, to talent deals and acquisitions of literary properties basically when the key players were based in New York.

Q: When did you leave Columbia?

A: 1980.

Q: And when did you join Universal Pictures?

A: 1990.

Q: From 1980 to 1990, can you describe what you were doing, and where, during that ten-year period.

A: Yes. I bounced between coasts. I started off at Time Life Films in New York, which was a short-lived motion picture company, at that point in time, incorporated. That company morphed into Home Box Office, and I worked at Home Box Office essentially what's called pre-buying films for exhibition on pay television; generally the script stage. And then I moved over to MGM/UA, first in New York and then in Los Angeles. And then I worked at Warner Bros. for about a year, always in business affairs. And finally, I went back to New York and worked as president of a company called World Film Services which was an independent production company with offices in New York and London.

Q: In 1990, sir, when you joined Universal pictures, what was your title?

A: My title was senior vice president of legal and business affairs.

Q: What were your responsibilities in that position?

A: I was in charge of both the legal department and the business affairs department, as well as being the principal negotiator for the studio with respect to talent deals and rights acquisitions.

Q: And did there come a time after 1990 when you were promoted to a different position at Universal?

A: First, the promotion was just an increase in title, not really so much in responsibilities, from senior vice president to executive vice president of legal and business affairs. And then in 1996, I was promoted to executive vice president of the motion picture group where I had a broader range of responsibilities involving lots of areas of the studio.

Q: And did those areas include the acquisition of literary properties?

A: Yes, it did. I always continued to supervise both the legal department and the business affairs department throughout my entire tenure at Universal.

Q: When did you leave Universal, sir?

A: 2001.

Q: During the 11-year period in which you were at Universal, who was the primary Universal negotiator for the acquisition of film rights to important literary properties?

A: That would be me.

Q: On what percentage of Universal's important literary property acquisitions during those years were you the primary negotiator?

MR. TOBEROFF: Objection. Lacks foundation; vague and ambiguous as to important literary properties.

THE COURT: Sustained on the vagueness and ambiguity.

BY MR. BERGMAN: **Q:** Were you responsible at Universal for the negotiation of all properties?

A: Yes, I was.

Q: Including the unimportant ones?

A: Yes.

Q: During the 11-year period, sir, on what percentage of Universal's literary acquisitions were you the primary negotiator?

A: Well, subject to occasional absences for illness, essentially 100 percent.

Q: From 1990 to 2001 while you were at Universal, who was the individual at Universal in the business affairs department who determined the value to be paid by the studio for literary properties?

A: That would be me.

Q: And in what percentage of the cases?

A: Again, 100 percent, when I was there.

Q: What did you do when you left Universal in 2001, sir?

A: I joined a large independent production company called Intermedia Films which was a German public company and had access to film financing funds through German tax shelters.

Q: And what was your title at Intermedia?

A: I was the vice chairman and head of motion picture operations.

Q: How long were you at Intermedia?

A: From 2001 through 2006.

Q: During that five-year period, sir, how many films did Intermedia, approximately, negotiate for the acquisition of?

A: Well, I think you might have asked me two different questions. We produced about ten films. In terms of how many properties we acquired during that period? Could be as many as 50.

Q: Among the ten films that you have produced at Intermedia, can you identify some of them?

A: The highest profile films would be Terminator III, with Arnold Schwarzenegger and Oliver Stone's Alexander.

Q: Now, what type of a film company was Intermedia?

A: I'm not sure I understand that question.

Q: Was it a production entity? A distributor?

A: It was a production entity. At one point we also had a foreign sales operation where we would sell the foreign rights to the films, territory by territory, to local distributors.

But after awhile, we gave that up and used an outside sales agent.

Q: So what was it that Intermedia actually with respect to the production of the film?

A: We developed the scripts; we assembled the package of talent; and we physically produced the film. And then we sought distribution through the majors for domestic distribution.

Q: What were your responsibilities during this five-year period at Intermedia?

A: I was the chief business officer, so I had less to do with the creative side of it but everything to do with the business side of it.

Q: With respect to all of the acquisitions made by Intermedia during that period of literary properties, were you the primary negotiator?

A: Yes, I was.

Q: And while at Intermedia, did you bear the ultimate responsibility for determining how much to pay for the rights you were acquiring?

MR. TOBEROFF: Leading, Your Honor.

THE COURT: Sustained. Rephrase.

BY MR. BERGMAN: **Q:** Can you describe for us, sir, what role you played, if any, in determining the value of the rights that were being acquired by Intermedia?

A: Basically, it would be my --

MR. TOBEROFF: Objection. Lacks foundation.

THE COURT: You're asking for what role, if any, he played. Overruled.

THE WITNESS: May I answer?

THE COURT: Yes.

THE WITNESS: Basically, it would be my responsibility to assess the value of the property and ultimately to either make the deal or supervise the deal and bless it.

BY MR. BERGMAN: **Q:** Did you have any involvement while at Intermedia in negotiating with distributors for distribution agreements?

A: Yes, I did.

Q: Are you a member of any major motion picture organizations?

A: Yes. I'm a member of the Academy of Motion Picture Arts and Sciences.

Q: The people who give out the Academy Awards?

A: Yes.

Q: Have you previously testified as an expert in motion picture cases?

A: Not in court, but I have testified; I have acted as an expert witness.

Q: Can you identify those cases within the past four years in which you have acted as an expert?

A: This is now a memory test.

One of the more recent ones was the Watchmen where I acted for Warner Bros. in a lawsuit brought by 20th Century Fox; it was a copyright infringement action which was ultimately settled before trial.

I'm presently serving as an expert witness for a writer/director named Paul Haggis who directed the film Crash; and in an accounting lawsuit against a production company where the production company is trying to deduct the payments made to its financing partner, as if Warners would deduct the

payments made to Legendary in accounting to a participant in Superman Returns.

I have been an expert witness for the Walt Disney company in connection with the Roger Rabbit lawsuit which, again, involved an accounting where the issue was whether or not the nonmonetary value of certain promotional activities that Disney entered into, particularly with McDonald's, that put the Roger Rabbit characters on millions of cups, whether the benefits of those arrangements should be included in gross receipts. And again, that case went to trial, but I did not testify at trial.

I was an expert witness for a company called River Road Entertainment in connection with a case brought by a former executive of the company claiming that she was deprived of executive/producer credit. That case was settled.

And I know I'm missing a couple.

Q: Were you involved as an expert for Paramount on No Country For Old Men?

A: Yes. Thank you.

I am currently an expert witness, because it's a case brought by the actor Tommy Lee Jones against Paramount claiming that he had taken a much-reduced fee for the film No Country For Old Men that ultimately won an academy award, in the belief that it was a very small art film, and it turned out to be a film with a reasonable sized budget and a very high marketing spend, particularly the academy award campaign. It was a case that was removed to Texas state court, but then Paramount successfully moved it back to an arbitration tribunal in Los Angeles.

Q: And finally, were you involved for Mr. Zaentz in the case against New Line involving Lord of the Rings?

A: Yes. New Line has a practice, as did its predecessor Miramax in Lord of the Rings, of not accounting for foreign receipts at the source; rather, they presale the foreign rights to territorial distributors, as I described something that Intermedia did.

Mr. Zaentz complained that despite New Line's practice, he was entitled under his contract to gross at the source rather than the gross that New Line received, the gross at the distributor level. That case, again, was settled.

Q: So when you draw those distinctions between the source and the amounts received by New Line, sir, could you describe the process from the first dollar that's earned in foreign and how it works its way, if at all, to the producer, Mr. Zaentz?

A: Sure. It's a very important --

MR. TOBEROFF: Lacks foundation; vague and ambiguous.

THE COURT: In this particular deal, Counsel?

MR. BERGMAN: Yes, Your Honor.

THE COURT: Overruled.

THE WITNESS: It's a very important distinction.

What companies like New Line and Miramax and other independent producers do is they hire a foreign sales agent that takes a commission and then goes to individual distributors in individual territories and licenses the distribution rights in exchange for typically a minimum guarantee.

If you look at it from the licensee's point of view, the local distributor, they would not be paying that minimum guarantee unless they believed that they could recoup the distribution fee, recoup all of their distribution costs, recoup the advance that they have been given plus interest, and make a profit.

So, clearly, what's going into the gross and coming back to the gross to a participant in that film is far less than in a case with just Warner Bros. which distributes at the source; and therefore, 100 percent of the distributors' gross gets into the pot.

In the case with New Line, what they put into the pot, the minimum guarantees they receive and any overages they receive. But again, because there is another party, the local distributor, earning a profit, as well as a sales agent earning a commission, clearly less than 100 percent is going into the gross.

MR. TOBEROFF: Objection. Lacks foundation; the answer lacks foundation.

THE COURT: Lay some further foundation on that last point, Counsel.

BY MR. BERGMAN: **Q:** The information that you have just given us, sir, regarding what New Line did and how the pre-payments were handled, is that material that you gathered from your services as an expert in that case?

A: Oh, also from my 35 years of being in the business, yes.

Q: Is it experience that you gathered as vice counsel of Intermedia?

A: Vice chairman.

Q: Vice chairman.

A: In part, yes.

Q: And from your participation at Universal Pictures?

A: Correct.

MR. BERGMAN: Is that a sufficient foundation for that, Your Honor?

MR. TOBEROFF: He's talking about Warner Bros. and New Line, and there has not been a foundation laid for that.

THE COURT: Overruled.

BY MR. BERGMAN: **Q:** What has been your experience, if any, as a major speaker or panelist at entertainment symposiums, sir?

A: I've spoken at the USC entertainment symposium; at the UCLA law symposium; at the Beverly Hills Bar Association; at various symposiums put together by law firms in Los Angeles; and symposiums conducted by a firm called Kagen & Associates.

Q: And have you served as a guest lecturer at any law schools?

A: Yes. I've served as a guest lecturer at USC Law School and at Southwestern Law School.

Q: Mr. Gumpert, in connection with your report that was filed in this case, under your qualifications, you listed what must be approximately 20, 25 cases of films that you have had involvement with.

Are those cases that you, in fact, negotiated the acquisition of rights to?

A: Yes.

Q: I know this is a hard question. Can you name some of those films?

A: I could name some of them. I think I gave you a representative sample and I focused on preexisting characters, because that seemed to be the most relevant, and they included characters such as Rocky and Bullwinkle, Ritchie Ritch, Dudley Do-Right, Alvin and the Chipmunks, Little Rascals, the Flintstones, on and on and on.

Universal had a particular agenda while I was there, because of its ownership of theme parks, which was to acquire characters which hopefully could be used as a basis for a successful movie and then be the basis of a ride or an attraction at a theme park.

Universal competed head to head with Disney, both in Hollywood and in Orlando, and unlike Disney, we did not have Mickey Mouse so we had to create our own characters.

Q: Was that part of the reason why you were also involved in Casper the Friendly Ghost, The Cat in the Hat, Flipper, and The Grinch Who Stole Christmas?

MR. TOBEROFF: Leading.

THE COURT: Sustained.

MR. BERGMAN: Your Honor, may I place the report before the witness to refresh his recollection?

THE COURT: You may.

MR. BERGMAN: Thank you.

BY MR. BERGMAN: **Q:** Look at the list and see if it refreshes your recollection.

A: Yes, it does. Additional properties that I negotiated the acquisition of includes --

THE COURT: Wait a minute.

You've refreshed your recollection.

THE WITNESS: I apologize.

THE COURT: You still have to testify from your recollection.

BY MR. BERGMAN: **Q:** As your recollection has been refreshed, Mr. Gumpert, can you name any additional pictures that you were involved in the acquisition of?

A: Yes.

The Grinch Who Stole Christmas, The Cat in the Hat, The A-Team. Again, there were just so many.

Q: Okay.

Have you, sir, reviewed each of the contracts, the other agreements for other rights, that were offered in this case by the plaintiffs?

A: Yes, I have.

Q: Have you reviewed each of the agreements that were offered by the defendants in this case?

A: Yes, I have.

Q: And have you made any attempts since you were retained to obtain the studio data concerning other comic superhero characters?

MR. TOBEROFF: Leading.

THE COURT: Overruled. Foundation. It's yes or no.

THE WITNESS: Yes.

BY MR. BERGMAN: **Q:** Can you describe what you've done in that regard, sir.

A: I spoke to the business affairs executives at Columbia Pictures to find out the essential deal terms for such properties as the Lone Ranger, Green Hornet, Ghost rider, and Flash Gordon.

Q: Did you disclose that additional research that you had done to the plaintiffs counsel at your deposition?

A: Yes, I did.

Q: Had you, in fact, prepared a chart of that data?

A: Yes.

Q: And did you produce that chart to counsel?

A: Yes, I did.

Q: Okay.

What have you been retained to do by the defendants, Mr. Gumpert?

A: I've been retained to assess the post-termination licenses between DC and Warner Bros. with respect to the Superman film, television shows, and merchandising arrangements, to determine whether or not those arrangements are fair market value.

Q: For what rights?

A: The film rights, television rights, and the merchandising rights.

Q: Does your opinion include the fair market value of the nonexclusive rights determined by the Court?

MR. TOBEROFF: Objection. Leading.

THE COURT: Overruled. But let's let the witness explain what he means by that.

THE WITNESS: Yes.

THE COURT: What do you mean by that?

THE WITNESS: The basis is that I have read Your Honor's decision and I'm aware that the Court has ruled that with respect to Action Comics No. 1, the rights are co-owned between DC Comics on the one hand and the heirs of Mr. Siegel on the other hand.

BY MR. BERGMAN: **Q:** And in what way, to your expert understanding, does that render the rights that DC transferred to Warner Bros. nonexclusive?

A: I think, as a matter of law, because the two parties are co-owners, one party can only grant nonexclusive rights.

Q: Did you, in fact, formulate an opinion as to the fair market value of the terms of the agreements and the amounts received thereunder by DC in connection with the film agreement?

A: Yes.

Q: Before we get to that opinion, could you describe what you did to formulate your opinion?

A: Well, as a matter of methodology, I based my opinion on my own personal experience with respect to rights acquisitions that I had been involved with. I reviewed the contracts produced by both parties in this matter. I did a fair amount of research on the Superman property in particular and superhero properties in general. And I obtained some information regarding comparable properties that had been acquired that had not been involved with, such as the ones I mention where I got the information from Columbia Pictures.

MR. BERGMAN: Thank you.

Your Honor, based on the witness's experience and the analysis, that he said he's done, I move that he be recognized as an expert witness on this.

THE COURT: Designated in what area, Counsel? For what purpose?

MR. BERGMAN: For two purpose. One, for the purpose of giving an expert opinion on the fair market value of the nonexclusive film rights that were transferred by DC to Warner Bros. and the amounts received by DC thereunder; that's one.

And the second is as a rebuttal witness to certain of the statements offered by Mr. Halloran.

THE COURT: Counsel?

MR. TOBEROFF: Permission to voir dire the witness, Your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. TOBEROFF: Q: Mr. Gumpert, you recently had a deposition taken in my offices on April 3, 2009.

A: Yes.

Q: At that time you were deposed under oath.

A: Yes.

Q: After the deposition, you reviewed your deposition transcript and provided us with any changes you wished to make of that transcript; correct?

A: Yes.

Q: You've never been involved in the stand-alone acquisition of television rights to a literary work, have you?

A: That's correct.

MR. BERGMAN: Objection. That's improper voir dire. I'm not asking this witness anything regarding television.

THE COURT: Overruled.

THE WITNESS: That's correct.

BY MR. TOBEROFF: Q: You've never negotiated television series agreement with a broadcast network; correct?

A: That's correct.

Q: You've also never worked as a television executive at a studio.

A: Correct.

Q: You've never worked for a television company in any capacity, in fact.

A: Other than Home Box Office, to the extent it's a pay television company.

Q: And that was for less than a year.

A: That was for a little more than a year; but yes, in that range.

Q: You've never been involved in the development of a television series.

A: Correct.

Q: Nor have you been involved in the production of a television series.

A: Correct.

Q: And you've never been retained as a television industry expert in any case, have you?

A: No.

Q: You've also never been involved in the negotiation of a stand-alone animated television rights agreement, have you?

A: That's correct.

MR. TOBEROFF: Your Honor, Plaintiffs move to preclude Mr. Gumpert from offering any testimony regarding the Smallville television agreement or the Superman animation agreements as he does not qualify as a television industry expert nor an expert in television transactions.

Defendants designated a separate expert, Mr. Richard Marks, to opine as to the Smallville television agreement, and he is a television industry expert.

THE COURT: Counsel?

MR. BERGMAN: As I indicated, Your Honor, I'm not going to be asking this witness to express any opinion on the Smallville agreement or on the animation agreement.

THE COURT: Very well. So the Court will grant the request by the defense to designate this witness as an expert regarding the fair market value of those rights as indicated.

MR. BERGMAN: That is agreeable, Your Honor.

THE COURT: Those agreements containing those rights in exchange for the value.

MR. TOBEROFF: I have a little bit left of my voir dire, Your Honor.

THE COURT: Oh, I'm sorry.

Let's wait until you are completely done then, before you make your request.

BY MR. TOBEROFF: Q: While at Universal, you were senior vice president of legal and business affairs from 1990 to 1992; correct?

A: Yes.

Q: And then executive vice president of legal and business affairs from 1992 to 1996, and executive VP of the motion picture group from 1996 through 2001.

A: Correct.

Q: Throughout your career in the entertainment industry, you've served in a business affairs capacity; correct?

A: Except when I was executive vice president of the motion picture group at Universal, my responsibilities expanded beyond business affairs.

Q: You've never served as a creative production executive, have you?

A: No, I have not.

Q: And you've never served as a distribution executive, have you?

A: Only in the sense that at Intermedia we had a foreign sales distribution operation, and I was involved with that.

Q: You've never served as a creative development executive, have you?

A: No.

Q: Never served as a marketing executive.

A: No.

Q: As head of business affairs at Universal, it was not within the scope of your duties to decide which films to green light for production, was it?

A: That's not the case. At Universal, decisions to green light films was done by a committee of which I was a member, and I spoke at those meetings from a business and financial point of view which I would suggest to you is equally important as what a creative executive might say at those meetings or what a marketing executive might say at those meetings.

Q: Mr. Gumpert, is it correct to say you have no opinion as to the comparative value of Superman film rights?

MR. BERGMAN: Objection. Vague and ambiguous, Your Honor.

THE COURT: Rephrase.

BY MR. TOBEROFF: Q: Part of the reason we're here is to value Superman; is that correct?

A: Well, not really. We're here to determine whether or not the licensing arrangements between DC and Warner Bros. were of fair market value or not.

Q: Do you believe the value of Superman is relevant to that determination?

A: In part.

Q: But you have no opinion as to the comparative value of Superman compared to other properties, do you?

A: Actually, I do. As a motion picture executive of 35 years, I absolutely have an opinion.

Q: I'd like to read a section from your deposition, starting on Page 38 at line 10 and going to line 19 on Page 38.

"QUESTION: Based on that experience, I'd like you to make your best approximation on a scale from 1 to 10 of the value of Superman. You spoke at great lengths that it's a declining character. You mentioned things like that. That would lead me to believe that your answer would be one to three."

"I'd like to clarify that portion in your report."

"ANSWER: I wish I could do that for you,

Mr. Toberoff. I just can't. They are undoubtedly valuable. How valuable they are, I don't know, and I'm really not sure."

"QUESTION: Okay --"

MR. TOBEROFF: Actually I read beyond; I ended at line 19.

MR. BERGMAN: Your Honor, that is not voir dire. It's cross-examination, and that doesn't go to the witness's qualifications.

THE COURT: I appreciate that, Counsel. This goes to his foundation, though, in terms of his ability to offer an opinion and be designated as an expert in this area. It may very well, at the end of the day, turn on weight, but the Court

needs to determine, from a Daubert perspective[7], whether or not there's a basis to give the opinion before I assess the weight of that opinion.

MR. BERGMAN: Yes, sir.

MR. TOBEROFF: Your Honor, I reassert that the witness be precluded from testifying as to the television agreements. We had covered that earlier.

THE COURT: We've already gotten through that.

The record could not be clearer that he's not going to be talking about television agreements.

MR. TOBEROFF: Fine.

Your Honor, based on the questions and answers I read from the witness's deposition, I also move to preclude Mr. Gumpert from offering expert testimony as to the comparative value of Superman to any other literary character, since he answered that he could not answer that question and did not have an opinion as to that.

THE COURT: Let me hear from Mr. Bergman on that. I don't know if you want to ask further questions or just argue, but I do need a response to this.

MR. BERGMAN: Your Honor, I don't believe that question related to the exclusive rights on the film, the value of the exclusive rights.

The witness has stated in his report that for reasons which he's going to bring out in his testimony, he can't compare the value of the nonexclusive rights of Superman. He doesn't know. And he will explain why he doesn't know.

THE COURT: All right.

Well, I think this is probably best something to be played out. I'll be mindful of his testimony, Counsel, in terms of a foundational challenge to any opinions that are predicated on the value of Superman, which clearly the witness has indicated that he does not know. And we'll see how that plays out.

MR. TOBEROFF: Thank you, Your Honor.

THE COURT: Thank you.

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[7] The Daubert standard is a rule of evidence regarding the admissibility of expert witnesses' testimony during United States federal legal proceedings. Pursuant to this standard, a party may raise a Daubert motion, which is a special case of motion in limine raised before or during trial to exclude the presentation of unqualified evidence to the jury.

You may proceed, Counsel.

MR. BERGMAN: Thank you.

DIRECT EXAMINATION (Cont'd)

BY MR. BERGMAN: **Q:** Mr. Gumpert, as a result of the investigation and the analysis and the reading that you have done, can you tell me what the fair market value of the nonexclusive rights conveyed by DC to Warner Bros. is?

A: I believe --

MR. TOBEROFF: Objection, Your Honor.

As Your Honor pointed out earlier in the case, that's an ultimate question for the court.

THE COURT: I tend to agree, Counsel.

Unless you're asking him to identify what rights he isn't going to attempt to place a value on. Maybe you should rephrase your question.

MR. BERGMAN: Yes, Your Honor, I will.

BY MR. BERGMAN: **Q:** Are you going to give an opinion, sir, as to the dollar value of the nonexclusive rights transferred by DC to Warner Bros. in 2002 under the film agreement?

A: Yes, I am.

Q: What is that dollar value?

A: Well, it's very difficult.

I guess what I'm trying to say is that the dollar value of a nonexclusive rights is less than what Warners actually paid.

Q: Can you, by virtue of all of the work you've done, all your experience, give me the dollar amount of the value of the nonexclusive rights as of 2002?

A: No. I cannot do that.

Q: Why can't you do that?

A: Because there's a very limited market for nonexclusive rights. And in my experience, I've never acquired nonexclusive rights.

Q: Can you give me an opinion as to the value of the Superman rights that were conveyed, had they been exclusive rights?

A: Well, I can certainly say that they would be more valuable.

Q: Can you compare, on the basis of what you've done, the value of the exclusive rights in Superman, had they been exclusive, to the exclusive rights in the other agreements?

A: Yes, I can.

MR. TOBEROFF: Lacks foundation.

THE COURT: I don't know, counsel, because I have not heard the opinion and the basis for it.

What I'm going to do, I'm going to be mindful of your objection, as well as the voir dire that you have just conducted. I'm going to permit the testimony to proceed, and then I'll reevaluate your objection after I've heard the testimony and your cross-examination.

I'll take your objection under submission.

MR. TOBEROFF: Very well, Your Honor.

MR. BERGMAN: Thank you, sir.

BY MR. BERGMAN: **Q:** Mr. Gumpert, I'm going to be referring to the Court's final pretrial conference order, beginning at Page 7, and I'm going to abbreviate some of the terms that His Honor used; that is, I'm going to change TWEC, Warner Bros. entertainment's predecessor in interest, to Warner; so that's abbreviated.

Have you, sir, formed an opinion as to the value of the various Superman option and assignment agreements between DC Comics and Warner Bros., and the amounts paid to DC Comics by Warner Bros., reflects the fair market value of the nonexclusive rights that the Court has determined were transferred from DC Comics to Warner Bros.?

MR. TOBEROFF: Vague; ambiguous. Also, the question solicits an answer that would refer by definition to the television agreements.

THE COURT: He's basically already given the answer to this.

I'm going to overrule the objection subject to the same foundational concern the Court has previously expressed.

Let's get to the basis of his opinion. That's what matters to the Court.

MR. BERGMAN: Okay.

THE COURT: That's what I don't know.

MR. BERGMAN: May I ask what the opinion is, Your Honor?

THE COURT: Go ahead.

I've already heard it, counsel, but you can lay it out, if you want.

BY MR. BERGMAN: **Q:** What is your opinion, sir, as to the value of those nonexclusive film rights that were transferred to Warner Bros. in 2002?

A: Certainly a lot less than if the rights were exclusive.

Q: And have you reached an opinion as to whether the rights, if exclusive, were for fair market value in 2002?

A: Yes.

Q: What is the opinion you've reached on that question?

MR. TOBEROFF: Same objection as to the ultimate –

THE COURT: I understand. That's the part of the objection that's under submission.

THE WITNESS: May I answer?

THE COURT: Please.

THE WITNESS: I concluded that the agreement reflected an above-fair-market-value arrangement.

BY MR. BERGMAN: **Q:** For exclusive rights?

A: For exclusive rights, yes.

Q: Now, what are the bases of that opinion, sir?

A: Apart from my own experience, I compared the terms of the Superman film agreement, for example, with about five other agreements that I considered to be comparable, that if I was a business affairs executive, I would refer to, in trying to figure out what to pay for the Superman film rights.

Q: Okay.

To what extent is your opinion based on the nonexclusivity of the rights?

THE COURT: Wait a second.

There's two opinions that you elicited from him. The only parties at the time thought they were exclusive rights. That's what the Court is interested in at this point.

Let's stay focused on that for the time being.

I understand the nonexclusive rights. I understand that's been ruled by the Court post hoc; that really wasn't in the minds of the people negotiating the agreement. Let's focus on the second opinion that you elicited from him with respect to the fair market value of what the parties believed they negotiated at that time.

We'll eventually, of course, have to cross this bridge of the actual value of the nonexclusive rights that were in fact transferred, but let's keep it focused on this for the time being, and let's get the basis out.

MR. BERGMAN: Certainly, Your Honor.

THE COURT: You've got less than an hour.

MR. BERGMAN: Yes, sir.

BY MR. BERGMAN: **Q:** What is the basis of your opinion that, even if exclusive, the rights transferred were transferred at or above fair market value?

A: Well, in part, I looked at the prior performance of the four Superman films and the one Supergirl film: I looked at the fact that the property had been exploited in a number of television series over the years. I particularly focused on the first four Superman films which had significantly declining box office results, with the most recent one, the fourth one,being pretty much catastrophic. And then I also focused on other agreements for what I regarded as comparable situations, as I said, that I would have looked at if I was a business executive trying to determine what to pay.

Q: One of the factors that you have identified is the prior performance of the prior Superman films.

How does that figure into your evaluation of the exclusive rights for Superman Returns?

MR. TOBEROFF: Leading. He did not mention -- misstates the testimony. He did not mention the prior performance of the Superman films; he just said he looked at them.

THE COURT: Rephrase the question.

MR. BERGMAN: Yes, sir.

BY MR. BERGMAN: **Q:** When you say that you looked at the four prior films, sir --

MR. BERGMAN: As a matter of fact, my associate points out to me that the answer to the question, Your Honor, was, 'well, I partly looked at the prior performance of the four Superman films.'

The witness did actually testified to that. But let me ask you once again.

BY MR. BERGMAN: **Q:** When you looked at the four Superman films, did you mean that you viewed the four Superman films or that you analysed the agreements?

A: I meant that I looked at the box office results of the four films; and in terms of domestic box office, the first film did about $138 million at the domestic box office; the second film did, I think, $108 million; the third film did $160 million; and the fourth film did about 15, $16 million, which is an enormous drop off from the first film.

Q: What does that prior performance demonstrate to you as a buyer of Superman rights in 2002?

MR. TOBEROFF: Lacks foundation and misstates. He's not a buyer.

THE COURT: Overruled.

THE WITNESS: It demonstrates to me, in part, the property was damaged goods; that you really had to reinvent the property if you were going to have a successful film.

BY MR. BERGMAN: **Q:** There's been some testimony in this case, sir, that the sort of downward spiral trend reflected by the four Superman films is somehow customary, and was customary during the '70s and '80s.

Does that comport with your understanding?

MR. TOBEROFF: Misstates the record; leading as to downward spiral trends.

THE COURT: It is leading, Counsel. Let's avoid this. This is the problem we had earlier in the trial with Mr. Toberoff with Mr. Halloran.

Let these experts speak for themselves.

BY MR. BERGMAN: **Q:** Does that performance that you just described of those four Superman films, how does that factor into your expert opinion as to fair market value in 2002?

A: I give it a great deal of weight.

Q: Can you explain why?

A: Sure.

The first thing you learn in business affairs is that there are no rules, and you cannot say, as a rule of thumb, that if film number one did X amount of business, that film number two will do some percentage of that business. There are examples after examples of franchises, such as Lethal Weapon, for example, X-Men, for example, where the sequels did better than the original film; so when I see a trend which starts at $138 million at the domestic box office and ends up at something like $16 million at the domestic box office, obviously it affects my view as to the value of the property after those four films had been released.

Q: Does the fact that Warner Bros. holds some copyright interests in the prior films and television shows affect in any way your evaluation as to the fair market value of the DC rights that were transferred to Warner?

A: Yes.

Q: In what way does that figure in, sir?

A: Because of the copyrights held by Warners with respect to the prior films, it would be very difficult to find a substantial buyer, a studio for example, for the Superman rights after the fourth film had been released.

Q: Why is that?

A: Because you run the risk of infringing on Warner Bros. rights. You have to be very careful about that. And Warners could always come up with a competing product using the copyrights that they control.

Q: Was your opinion as to the fair market value of the exclusive rights of Superman in 2002 affected in any way by any trends that seem apparent to you in terms of superheroes at the time?

A: Yes. I think I quoted in my report from an article in Time Magazine, the basic premise of which Superman was not cool.

MR. TOBEROFF: Lacks foundation as to trends.

THE COURT: Let's lay a foundation for that.

We're going to take our lunch break at this time. When we resume, let's spell out the trend there.

Counsel, just to make sure that I did not misinstruct you concerning the opinion, as you're doing now, as you're going through his opinion with respect

to the exclusive rights that the parties believed, I will certainly permit you, as I will permit the plaintiff, to explore the value of the nonexclusive rights that the Court has found was, in fact, transferred. I just don't want them mixed up, going back and forth between the two.

MR. BERGMAN: I understand, Your Honor. Thank you.

THE COURT: Just making that clear.

We'll take our lunch recess. We'll resume at 1:30.

MR. BERGMAN: Thank you, Your Honor.

MR. TOBEROFF: Thank you.

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THE STORY BEHIND SUPERMAN #1

By Jerry Siegel

Joe Shuster and I are very pleased that National Periodical Publications, Inc. is reprinting SUPERMAN #1 in a large format FAMOUS FIRST EDITION.

Joe drew it, I wrote it, and this is the story behind the publication of SUPERMAN #1, back in 1939. I researched through a lot of musty old correspondence to authenticate exactly how it all came about.

WITNESSES: John Gumpert (Cont'd)

THE COURT: Counsel, there was some issue relating to time raised with my court reporter or something?

MR. PERKINS: Yes, your Honor. We have been keeping track, and our records show that we have an hour and 53 minutes left.

THE COURT: And hour and how much?

MR. PERKINS: 53. And I think I have an explanation as to where the time has gone.

THE COURT: Where the missing hour is because according to her, it's about 50 or 51 minutes.

MR. PERKINS: On Friday during the -- we had a 45-minute pause during -- in Paul Levitz' testimony. And Mr. Levitz indicated, when he got back on the stand, he heard the clock was still ticking during that 45-minute break. So --

THE COURT: That could very well have been. Is there any -- I have an hour and 16 minutes for the plaintiff. Does that sound about right on your end?

MR. TOBEROFF: Yes, your Honor.

THE COURT: Plus or minus a few minutes. All right. Well, as long as we make sure the plaintiff gets all of their time, and the big thing is to finish this afternoon. So let's make sure we get through it. I'm not going to give the plaintiffs a hard time if they go over or the defendants a hard time. As long as the plaintiffs get all of their time. That's the critical thing and most importantly, that we finish today.

All right. Very well. Let's proceed.

MR. BERGMAN: Your Honor, in the voir dire that Mr. Toberoff conducted, he read a small portion of

Mr. Gumpert's deposition. I believe he started at page 38, line 10.

THE COURT: That's correct.

MR. BERGMAN: I would like, if I may, to read a few pages prior to that, or either refer your Honor to reading it, whatever you would prefer.

THE COURT: Well, why don't you go ahead and read and make sure it's all part of the record.

MR. BERGMAN: Okay. I'm going to start, please, at page 35, line 17.

THE COURT: Through?

MR. BERGMAN: Through 38, 19, where Mr. Toberoff stopped.

THE COURT: I see.

MR. BERGMAN: Beginning at line 17:

"QUESTION: Do you believe that the DC Superman rights, as they exist today, have tremendous value?" Objection.

"THE WITNESS: I don't know what you mean. I'm sorry.

"QUESTION: Very valuable, very valuable."

Objection.

"THE WITNESS: I can only answer by saying they are valuable. I don't know the degree to which they are valuable.

"QUESTION: Well, there's not very valuable, there's valuable, and there's very valuable. In what spectrum, how would you describe the Superman rights?"

Objection.

"THE WITNESS: The reason for any hesitancy is that there haven't -- before Superman Returns, before the Superman movies with declining box office results and Superman Returns itself, despite what might appear to be impressive gross was deemed to be a failure. It just may be from a movie point of view a played out character.

"QUESTION: Based on your -- I would take your decision what -- that would take your last statement, in your opinion, you do not believe DC Superman rights are very valuable?

"ANSWER: No, I didn't say that.

"QUESTION: Well, again --

"ANSWER: Again, I don't know how to define valuable. I did say that they were valuable. That was my answer to your first question. I don't know what very valuable, highly valuable. I don't know how to answer that.

"**MR. TOBEROFF**: Let's try it this way. On a scale, you understand that people use the word terms very valuable all the time in normal conversation to describe something. So on a scale from one to ten, how would you describe the value of DC's Superman rights as they exist today?"

Objection.

"THE WITNESS: Well, even if I knew the answer to that, I would have a hard time quantifying it that way.

I just couldn't.

"QUESTION: The answer to the objection, what's one, what's ten? It's a given that the rights are valuable; correct?

"ANSWER: I believe I indicated that, yes.

"QUESTION: Okay.

"ANSWER: I believe they are valuable.

"QUESTION: One to ten, as a spectrum as to value.

"ANSWER: Um-hm.

"QUESTION: If three or four or five would be more valuable than one, ten would be the most valuable on the spectrum of value. If you -- I'd like you to try and give your best estimate of your belief as to the value on a scale from one to ten."

Question by me.

"THE WITNESS: Forgive me. One of your early admonitions was not to speculate. That would be purely speculating.

"QUESTION: That fits into -- you've had vast experience in the entertainment industry, have you not?

"ANSWER: Yes, I have.

"QUESTION: In fact, this is basis in which you are testifying as an expert in this case; correct?

"ANSWER: Yes.

"QUESTION: Based on that experience, I'd like you to make your best approximation on a scale from one to ten of the value of Superman. You've spoken at great length that it's a declining character. You've mentioned things

like that. That would lead me to believe that your answer would be one to three. I'd like to clarify that portion in your report.

"ANSWER: I wish I could do that for you,

Mr. Toberoff. I just can't. They are undoubtedly valuable. How valuable they are I don't know, and I'm really not sure."

JOHN GUMPERT, PREVIOUSLY SWORN.

DIRECT EXAMINATION (CONTINUED)

BY MR. BERGMAN:

Q: Mr. Gumpert, with all of the agreements you've reviewed in this case or referred to in your report --

THE COURT: Counsel, wait until he gets his question out.

MR. TOBEROFF: I'm very sorry to interrupt. We just have a technical problem.

(Pause.)

BY MR. BERGMAN: Q: So my question to you, Mr. Gumpert, is of all the agreements you've reviewed in this case or referred to in your report, which ones would you, wearing your buyer's hat, consider to best reflect on the fair market value of the Superman rights in 2002 had they been exclusive?

A: Right. I considered three agreements, and then two transactions where I didn't actually have the agreement. The three agreements were Conan, Tarzan, and Iron Man. And in addition, I was able to ascertain the terms of Columbia Pictures' acquisition of the rights to Green Hornet and Columbia and Disney's acquisition of the rights of the Lone Ranger.

Q: Okay. The first agreement that you mentioned was the Conan agreement. Can you tell me, first of all, is it your opinion that the Conan agreement provides a more beneficial economic return to the licensor than the film agreement provides to DC?

MR. TOBEROFF: Leading, suggests the answer.

THE COURT: Asked and answered with this witness?

MR. TOBEROFF: And lacks foundation.

THE COURT: Well, it's leading, and I'm not really sure. Let's present the foundation for this.

MR. BERGMAN: He did represent that he reviewed these agreements.

THE COURT: Okay. I'm sorry. Did he?

BY MR. BERGMAN: Q: Let me ask you again. Mr. Gumpert, to what extent did you review the five agreements that we are referring to in this phase?

A: I reviewed three of the five agreements: Conan, Tarzan, and Iron Man. And I reviewed the terms of two other transactions, which were the Lone Ranger and Green Hornet.

Q: Okay. Let's turn first to the Conan agreement. How do the economic terms of the Conan agreement compare to the economic terms of the film agreement insofar as the licensor of the exclusive rights is concerned?

A: In my view, the more favorable deal for the licensor is the Superman Returns agreement.

Q: Can you explain briefly why?

A: Yes. Well, let's start backwards. When your -- in a rights transaction like this, the most important considerations for a licensor are really two. One is the gross, and the other is the merchandising. In terms of the gross, in the case of Superman Returns, it's 5 percent of the gross in excess of $30 million. In effect, because a million five is advanced against that.

In the case of Conan, it was 2 1/2 percent of the gross with an advance of $2.75 million after the deal was amended, which means that the licensor would not see any further money until $110 million of gross as compared to $30 million of gross.

Q: Okay. With respect to the Tarzan agreement, how do you compare the economic benefits of Edgar Rice Burroughs to those obtained by DC under the film agreement?

A: Again, I believe that the terms of the Superman Returns agreement are much superior to the terms of the Tarzan agreement.

Q: And why is that, sir?

A: The Tarzan agreement had a relatively low option payment, a purchase price of a million and a half dollars that was subsequently amended to 1,750,000 and a gross participation that was nowhere year 5 percent of the gross from first dollar.

Q: Okay. If I may go back briefly to the Conan agreement.

A: Sure.

Q: Did the merchandising provision of the Conan agreement have an impact on your opinion, and if so, why?

A: Yes, it did. I'm aware that in the Superman Returns transaction, when you cut through it all, the licensor receives 75 percent of every merchandising dollar. While in the case of Conan, the split was much more in favor of the licensee than the licensor.

Q: Okay. The third agreement that you identify in your report is the Iron Man agreement. Can you compare for us the economic benefits to the licensor in the Iron Man agreement as compared to those of the licensor in the film agreement?

A: Sure. The Iron Man agreement contained a guaranteed payment of $900,000 as compared to a million and a half dollars in the Superman agreement. And in terms of the gross participation in the Iron Man agreement, it was, I believe, 5 percent of the gross after break even.

Q: Okay. Can you define for the Court what break even means within the film industry?

A: Yes. Break even is the point in time in which a studio has recouped its production costs, its marketing costs, very often a distribution, and any what I'll call prebreak participations to third parties.

Q: And by comparison, how is the 5 percent of gross dollar gross compute?

A: As the name implies, it's from the very first dollar without any deductions.

Q: The fourth agreement you identified is one that I believe you obtained subsequent information about, and that is the Lone Ranger.

Can you tell us in what ways -- can you compare for us the economic benefits to the licensor in the Lone Ranger agreement as opposed to those to DC in the film agreement?

MR. TOBEROFF: Your Honor, with your permission, I'd like to voir dire the witness as to the basis under which he's received this information.

THE COURT: The Lone Ranger information?

MR. TOBEROFF: The Lone Ranger and the other -- there's another agreement he mentioned as well, the Green Hornet.

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. TOBEROFF: Q: Earlier on in this -- earlier on in your testimony, you testified that you received information from business affairs executives, plural, at Columbia.

Do you recall that?

A: I do. That was not an accurate statement. Forgive me.

Q: How was it inaccurate?

A: I received it from a single business affairs source who is an assistant to my son who works at Columbia Pictures.

Q: So the sole source of this information was a secretary or assistant at Columbia?

A: Correct.

Q: Is that right?

A: Correct. It is common practice --

Q: Let me ask the next question, please.

And that information you received solely over the phone?

A: It was received, I believe, in an e-mail. Well, two separate -- you're asking two separate topics. I don't know whether you're referring to the Lone Ranger or Green Hornet.

Q: I'm asking you as to the information that you received as to the purported terms of the Lone Ranger agreement. Was that in a telephone conversation with this assistant?

A: No. It was in an e-mail.

Q: An e-mail from the assistant?

A: Yes, I believe so.

Q: And the information as to the Green Hornet was in a telephone conversation?

A: Was in a telephone conversation, yes.

Q: Other than that telephone conversation and the e-mail, is there any other information that you received regarding those two properties?

A: No.

MR. TOBEROFF: Your Honor, I'd like to move for the exclusion of testimony regarding the Lone Ranger and Green Hornet under rule -- Federal Rules of Evidence 703. An expert may rely on facts or data only if the facts or data are of a type reasonably relied on by experts in the particular field in forming opinions. That's a quote. No expert in this field would or could reasonably rely on the information received over the phone or in an e-mail from an assistant or secretary at a studio.

THE COURT: What's the basis for that, Counsel?

MR. TOBEROFF: Federal Rule of Evidence 703.

THE COURT: No, that last statement there. I'm familiar with Rule 703. But there was a statement that you made that I don't think is included in 703, the part about no reasonable expert could rely on that.

What is your basis for that?

MR. TOBEROFF: The basis for it is that experts in the industry would rely on information from colleagues, business affairs executives like themselves who would rely on actual contracts. But a random phone conversation from a secretary at a studio, the key basis, he said he relied on five agreements, and two of them are based on hearsay over the phone from an assistant at a studio. He doesn't have the reasonable indicia of reliability that an expert would rely on.

THE COURT: Mr. Bergman?

MR. BERGMAN: Yes, your Honor.

THE COURT: You may question and/or argue this point.

MR. BERGMAN: Yes.

DIRECT EXAMINATION (RESUMED)

BY MR. BERGMAN: **Q:** Mr. Gumpert, when you obtained this information, you said from your son's assistant, what position does your son hold at Columbia?

A: President of Business Affairs AND Administration.

Q: And is his assistant properly referred to as the secretary or within a broader meaning of assistant as used in the film industry?

A: He's an assistant who has been with my son for 10 years now.

MR. TOBEROFF: Objection. Leading.

THE COURT: Overruled.

BY MR. BERGMAN: Q: And when the assistant gave you that information, did he give it to you from his memory, or did he say he would look it up on the computer system?

MR. TOBEROFF: Calls for speculation.

THE COURT: Well, there may not be sufficient foundation for that. Why don't you ask him what he knows about where the earlier information came from.

BY MR. BERGMAN: Q: How did you go about finding the information that you got from Columbia?

A: First and foremost, there's a practice in the industry of obtaining quotes from other business affairs departments. And because business affairs executives typically are busy, it's their assistants that you deal with. So the process was I called on the phone. I spoke to Jason, which is his name. I said, "Can you please get me the quote for the Lone Ranger, and by the way, I understand that after you, Columbia, dropped the option, it was picked up by Disney. Could you get me that quote as well?"

He called me back or sent me an e-mail, two separate e-mails actually, one with the Columbia quote and one with the Disney quote. In deal making, I would rely on that all the time. There's no distinction between the business affairs executive and his assistant.

Q: And following that, did you put that information into a chart?

A: Not the Lone Ranger.

Q: Did you put the information regarding Green Hornet into a chart?

A: Yes, I did.

Q: And did you show that chart to Mr. Toberoff in your deposition?

A: Yes, I did.

MR. BERGMAN: Your Honor, I believe there's a sufficient foundation.

THE COURT: I'm going to deny the motion to exclude; however, all of this will go to the weight the witness is testifying on and the opinion that it's based on those agreements.

MR. BERGMAN: Thank you.

Q: Could you then for us, Mr. Gumpert, compare the economic benefit received by the licensor under the Lone Ranger agreement to the economic benefit received by DC under the film agreement?

A: The economic benefits received by DC under the film agreement are far superior. The terms of the Lone Ranger agreement at Columbia was an option payment of $375,000 against I believe 1,750,000. At Disney, it was $500,000, I think, against two and a half million. But in both cases the gross participation was a post break even gross participation, not a first dollar gross participation.

Q: When you say post break even --

A: After the studio has recouped its production costs, its marketing cost, prebreak gross participations and sometimes a distribution fee.

Q: And by the way, and he'll get into this if we have time further, have you reviewed documents which show you whether or not Superman Returns has hit break even?

A: Yes, I have. I've reviewed the participation statement issued by Warner Brothers to Legendary Pictures.

Q: And what does that statement demonstrate?

A: It shows that the film is seriously in a deficit position at the moment.

Q: Can you estimate how much of a deficit position?

A: Roughly about 160-, $170 million deficit.

Q: If a film released in 2006 is in $175,000 deficit --

A: Million.

Q: 175 million -- forgive me. I don't think along those lines. If it's in a 175 million deficit in 2009, will it ever break even?

A: It's difficult to say. But given where it is in the spectrum of exploitation, which is basically it's been through theatrical release, it's been through video release, it's been through pay television and first run syndication, and it's now in a situation where the grosses are ever diminishing, if it breaks even at all on a 10-year ultimate basis, which is the way studios look at things, it would just break even. It certainly wouldn't result in --

MR. TOBEROFF: Lacks foundation, your Honor.

THE COURT: Overruled.

BY MR. BERGMAN: Q: Finally, with respect to the Green Hornet agreement, terms of which you reviewed, how would you compare the economic benefit to the licensor in that agreement as compared to the benefit to DC under the film agreement?

A: Again, I would think that the benefit to DC under the film agreement was far superior.

Q: And can you explain why?

A: Sure. The Green Hornet transaction at Columbia, there was a $250,000 option payment against the $2.5 million purchase price, but the gross participation of the licensor again was post break even. Rather than from first dollar.

Q: In determining comparable agreements, I notice you haven't selected any novels. Is there a reason for that?

A: In my view, they are totally different animals. A novel is a story written in three acts with defined characters. A property like Superman is totally different because you buy the property, and then you have to sit down with a blank piece of paper and come up with a story line, which you don't have to do in the case of a novel or a play for that matter, which is why the novels typically get high purchase agreements.

The more prominent ones, the ones written by John Grisham or Tom Clancy or Michael Creighton are not optioned.

They are purchased outright because you know what you're buying. You're buying a store. You're buying these characters. All you have to do is adapt it into a screenplay format.

Q: Okay. The plaintiffs' expert in this case gave testimony at the conclusion of his opinion, of his testimony, as to what he would, if he had the honor of representing DC Comics, would have obtained for Superman Returns.

And with your Honor's permission, I'd like to read what Mr. Halloran said as a prelude to my questions to Mr. Gumpert.

THE COURT: You may.

MR. BERGMAN: And I'm beginning to read at page 577, which was Trial Day 4, May 1, and the testimony begins at line 17 of page 577:

"THE WITNESS: If I had the opportunity and the honor in 2002 to have gone and been able to put the Superman property film rights to bid, or even a property equivalent to Superman, we don't have to say Superman, but if you had a Superman quality character, I'm confident that I'd be able to achieve -- I'd probably be able to achieve a -- to get a purchase price and not necessarily have to have it optioned of $10 million per film."

Q: Would you just make a notation, sir, of purchase price, $10 million.

THE COURT: I'm not sure what the question is.

BY MR. BERGMAN: Q: All I'm asking you to do is to place on a pad or in your head that $10 million purchase price that Mr. Halloran referred to.

THE COURT: Is there an objection, Mr. Perkins?

MR. PERKINS: I was just going to approach the witness with a pad and paper.

THE COURT: That's fine.

THE WITNESS: Thank you so much.

BY MR. BERGMAN: Q: Mr. Halloran continues with his definition of what he would get as a fair market value at line 25 of page 577:

"If I did do an option, it would be for 12 or 18 months for each period, and I would get at least 10 percent of the option price. So that would be a million of the purchase price."

So enter that onto your pad, please, too, as well.

He goes on at line 3:. "I'd be able to get a dollar one gross participation. The purchase price would be applicable to 10 percent from dollar one, which would escalate based on the success of the film ultimately, I think, to the level of approximately 20 percent as was in the time line agreement."

You read the time line agreement, didn't you, sir?

A: Yes, I did.

Q: Mr. Halloran goes on to continue at line 9: "Very importantly, I would be able to get the sort of creative controls that DC had enjoyed in prior agreements and the sort of creative controls that companies like Marvel insist on. I think I definitely would have been able to get a very specific merchandising deal where the film-related merchandising would be shared at least on a 50/50 basis, and I think with a fee less than Warner's 25 percent fee because of the history of the success of Superman's merchandising."

So would you put down a fee of less than 25 percent?

What's the lowest fee that you have come across on a merchandising deal where there's a 50/50 split?

A: Probably a 15 percent fee.

Q: Okay. Would you put down 15 percent fee, please.

He goes on, line 16: "I think I would be able to get a producer deal for Mr. Levitz like I got in the Neopets agreement which we saw in the various other agreements which would augment that purchase price."

Do you recall what the producer's payment was in the Neopets agreement?

A: No, I don't.

Q: Okay. I'm going to represent to you that it was $625,000. So would you put that down as additional compensation.

And Mr. Halloran goes on to say: "And on that previous deal" --I think he meant the producer's deal -- "I think I'd be able to get an additional participation."

Let me ask you, sir, based on all of your experience in the industry, when a producer, when someone gets a producer fee in a film deal like this, not an author or owner, when does that film deal kick in? When does the interest kick in?

A: It would typically be post break even.

Q: Okay. And then finally, Mr. Halloran says: "I most certainly would get a reversion right."

And then over at page 579, line 2, Mr. Halloran says, "When I think lastly, would I insist on a co-financing opportunity for DC."

That is the fair market deal that Mr. Halloran has promoted. And what I would like you to do, sir, is I would like you to compare that fair market deal that Mr. Halloran has proposed to the actual deal that was obtained by DC on Superman Returns.

THE COURT: Counsel?

MR. TOBEROFF: Objection, your Honor. Mr. Bergman skipped over on page 578, line 22, through line 1 on page 579. May I read it?

THE COURT: Is there a term there that needs to be included?

MR. BERGMAN: I'm sorry, sir. Let me look at it.

THE COURT: What term are you referring to, Mr. Toberoff?

MR. TOBEROFF: Starting at 578, line 22: "I most certainly would get a reversion right. There's no way a property like Superman would go on the mark net 2002 and there wouldn't be a provision where the company purchasing the rights could sit on the rights. That's just -- there's no way that I would allow DC to do something like that."

MR. BERGMAN: My omission was because it didn't apply to the --

THE COURT: I understand that.

BY MR. BERGMAN: Q: Mr. Gumpert, given the standards set by the plaintiffs' expert, how does it compare to the actual deal that DC got on Superman Returns?

A: We're going to have to go through the math.

Q: Please do.

A: But as a preamble, I don't believe any licensor of a Superman property could get these terms.

Q: Putting that aside, sir --

THE COURT: That's not responsive, and the Court will strike it on its own.

BY MR. BERGMAN: Q: I just want you to compare what the two deals would actually yield.

A: Okay. So we need to know first of all what the gross pool was.

Q: The gross pool was $220 million without video.

MR. TOBEROFF: Objection. Leading, lacks foundation.

THE COURT: Well, actually there was a question from the witness. So if anyone was leading, the witness was leading.

MR. TOBEROFF: Objection. Mr. Bergman's testifying.

THE COURT: The defense has conducted a very proper hypothetical for the purposes of expert examination. If there are any other elements that should be in here, let's get them out on the table now. Is there any other elements that the plaintiff believes needs to be before this witness to properly make this comparison? Because I think it's a very legitimate comparison to make.

MR. BERGMAN: I have read everything that

Mr. Halloran --

THE COURT: No, I understand that. But now the witness has indicated that he needed the gross -- what did you need?

THE WITNESS: I need to know the amount of gross that we're talking about in order to apply the percentage to it.

THE COURT: Right. Anything further from the plaintiff?

MR. TOBEROFF: The gross figure that Mr. Bergman mentioned does not include video revenues.

MR. BERGMAN: As I said.

MR. TOBEROFF: Which is a major component of gross for a studio.

THE COURT: Very well. Noted for the record.

MR. BERGMAN: The reason why I didn't include it was Mr. Halloran hadn't included it, but I'm going to cover it, your Honor.

THE COURT: I understand. All right.

BY MR. BERGMAN: Q: Would you turn to the exhibits that are before you to Exhibit 292, page 5885, which is the participation statement given by Warner Brothers to its partner Legendary Pictures.

A: I'm there.

Q: Would you exclude video for the moment, as this excludes video, and do you see the figure of total defined gross of 244?

A: Yes.

Q: And do you see defined gross after distribution fee, 219?

A: Yes, I do.

Q: And am I correct that the distribution fee that was applied was 11 percent?

A: That's correct, yes.

Q: And how would you compare an 11 percent distribution fee to the ordinary distribution fee?

A: That's extremely low because an ordinary distribution fee ranges from 30 to 35 percent.

Q: Okay. Since no distribution fee was taken out on the Superman deal -- it's a pure gross deal -- let's take out that distribution fee, okay?

A: Okay.

Q: And figure out, without a distribution fee, without any video, what the total worldwide gross was for Superman based on Exhibit 282, which is in evidence.

A: The distribution fee was roughly $25 million as I read this. 24.8. I'm rounding it up to 25.

Q: And that is what reduces -- am I correct?

A: With deducting that from $220 million.

Q: Isn't that deducted from 244 million?

A: Oh, yes, yes, it would be. Sorry. That would be the right way to do it.

MR. TOBEROFF: Objection, your Honor. Leading.

MR. BERGMAN: We're just --

THE COURT: Overruled.

BY MR. BERGMAN: Q: Looking to the document. After you deduct the distribution fee, am I correct that there's $219, 621, 253?

A: That's correct.

MR. TOBEROFF: Leading, your Honor.

THE COURT: Sustained. You'll have to have the witness do this, Counsel.

BY MR. BERGMAN: Q: Would you look at the line designated defined gross after distribution fee and tell us what that amount is?

A: Yes. On a cumulative basis the amount is 219,621,253.

Q: Would you round it out to 220 million and proceed with your comparison, please.

A: So 10 percent of that is $22 million.

Q: Yes, sir. So they would have received a $10 million purchase price, which is -- is that purchase price applicable to the contingent compensation?

A: Yes, it is.

Q: And they would have received another $12 million under Mr. Halloran's concept as their share of gross; correct? At 10 percent.

A: 10 plus 12 is 22.

MR. TOBEROFF: Objection. Leading. The witness is very capable of making his own calculations.

THE COURT: Sustained.

Counsel, your expert needs to be able to do this on his own.

MR. BERGMAN: Okay, your Honor.

Q: Would you then, Mr. Gumpert, run through your analysis from top to bottom comparing these two, the proposed Halloran and the actual agreement?

A: Okay. So sticking to the Halloran formula, the gross participation was worth $22 million. There would be no escalation because the film never reached break even. The merchandising in Mr. Halloran's example was $40 million of merchandising, and he's saying take 15 percent off, and then split it 50/50. So we're dealing with 42 1/2 percent of $40 million, which is $17 million if this calculator is correct. Plus a producer deal of $625,000.

Q: Is the 17 added to gross?

A: I've added the 17 to gross, yes. As a -- as the merchandising deal.

Q: Okay.

A: So I've come up with 17, 22, and .65. $39,650,000.

Q: Okay. Now let's give --

THE COURT: Counsel, is there an objection? You've got to speak up.

MR. TOBEROFF: I understand. I wanted to let him finish his analysis before I made an objection as to this line of questioning.

He's being asked based on the actual results of the particular film under a -- an agreement that was made in 2002.

He's being asked based on the actual --

THE COURT: What's your legal objection?

MR. TOBEROFF: My legal objection is, as the Court has noted, relevance. As the Court has noted, these agreements are being valued at the time they are made, not due to one particular film or another particular film breaking even or not breaking even.

THE COURT: I understand that argument, and we'll see how that plays out. I'm going to overrule the objection as far as the testimony is concerned, but we'll

take up the relevance of the evidence, the applicability of the evidence to the underlying issues in this case at a later time.

MR. TOBEROFF: Thank you.

BY MR. BERGMAN: Q: Mr. Halloran also mentioned a producer's fee for Mr. Levitz.

A: Which I included in my calculation. The $625,000 fee.

Q: So we had 22 million gross, 17 from the merchandising?

A: Correct. And six and a quarter. I think I said six fifty. Which is -- whoops. Sorry. 39,625,000.

Q: Okay. Now, Mr. Halloran did not mention a video revenue.

A: Right.

Q: But we've heard evidence in this case of, at the highest being paid to a participant, 35 percent of gross as a video royalty.

MR. TOBEROFF: Objection. Misstates the record. I think we now all know what the highest video royalty is.

THE COURT: Counsel, we've had quite an issue over the highest.

MR. TOBEROFF: That we're not allowed to talk about.

BY MR. BERGMAN: Q: Mr. Gumpert, let's give him 40 percent.

A: 40 percent? Okay.

Q: And would you explain how that works?

A: So as I read this accounting statement, the video gross is after distribution fee and expenses, which would always be applicable, is roughly $87 million, rounding up.

THE COURT: Roughly $34 million?

MR. TOBEROFF: Objection, your Honor. That figure only counts domestic --

THE COURT: Counsel, you're going to have a cross-examination, and if you want to rip him to shreds, you can. But I want to finish this testimony, or I'm going to start crediting this to your time. It's his calculation. If his calculation is wrong, that's your cross-examination.

THE WITNESS: $35 million, and 10 percent of that is $3.5 million, which would be added to what would go to the licensor.

THE COURT: So your calculation is three and a half million dollars for the video.

THE WITNESS: Correct.

THE COURT: At 40 percent?

THE WITNESS: At 40 percent, assuming a 10 percent gross participation. So we add 3.5 million, and we get a grand total of 43,125,000.

BY MR. BERGMAN: Q: 43,125,000 with the increased 40 percent fee and the producer's fee?

A: 40 percent video royalty.

Q: 40 percent video royalty.

A: Yes.

Q: Now let's figure out what DC made under the agreement.

A: Okay. DC made $11 million out of the gross because it's 5 percent of 220-. DC made, as I understand it, $30 million in merchandising. So that takes you to $41 million.

Q: Did you include merchandising?

A: I said $30 million for merchandising.

Q: And video, sir?

A: Video I haven't done yet.

Q: Pardon me?

A: Video I haven't done yet. Video, they have 20 percent royalty. So going back to my number of $87 million, 20 percent of that is 87.2 times .05. They would get another 4. --

Q: They only got 5 percent.

A: They would get $4.36 million. Let me try again just to make sure. 87 million --

Q: Are you using -- the gross video figure is, I believe, 170 million.

A: Well, you're right. I'm using the one after distribution fee --

Q: But they don't pay distribution fees, DC; correct?

A: Correct.

MR. TOBEROFF: Objection. Leading, your Honor.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Could you proceed with your calculation of the proper video --

A: If I use the --

THE COURT: What are you using? You're starting to confuse me. You've got to use the same thing you used with Mr. Halloran's --

THE WITNESS: No, I can't -- well, you're right. In one case we were losing video gross less a distribution fee and video costs. So I think you're right, your Honor, we have to use the same number.

BY MR. BERGMAN: Q: Then proceed to use the same number if that's your best opinion.

A: Yes. So it's 87 million, 20 percent video royalty.17.4. And 5 percent of that -- I'm not sure that's right.

Sorry. It's $870,000. So roughly $42 million.

BY MR. BERGMAN: Q: Comes to exactly $41,870,000?

A: Correct.

Q: So that the difference between Mr. Halloran's fair market value agreement and the money actually received by DC is how much, sir?

A: It's a little over a million dollars.

THE COURT: Well, I've got to interject here.

Because I want this to be helpful to the Court. This is a bench trial. There are other elements of Mr. Halloran's agreement.

THE WITNESS: To the economic terms, you mean?

THE COURT: Not in terms of money, but, for example, the reversion provided.

MR. BERGMAN: Very good point.

THE COURT: Do those have value?

THE WITNESS: Not in this context, I don't believe.

THE COURT: I'm sorry?

THE WITNESS: They may have value in certain contexts, but not in the context of Superman.

THE COURT: That needs to be explored, Counsel, one way or the other by both sides.

BY MR. BERGMAN: Q: Why do you say that the reversion right has no value in the terms in the context of the Superman agreement?

A: Well, two principal reasons. One is because Warner Brothers already owns the copyrights to four films which diminishes the value because you need to be careful not to infringe upon Warner Brothers's rights. And the other reason is, as I understand it, the heirs of the co-creator have noticed a termination which becomes effective in 2013. So that there's a limited period of time.

In effect, since the agreement was effective in 1999, it's a 13-year license.

Q: Rather than a 40-year license?

A: Rather than, yes.

Q: Was there any other factor of economic value besides reversion to the incident it has any economic value in Mr. Halloran's estimate?

A: I don't regard the creative controls as having economic value. And the co-financing opportunity, whether it's in an agreement or not, always exists in the sense that every studio wants a co-financing partner. And had DC co-financed Superman Returns, they would be in the same deficit position that Legendary finds itself in now, which is $174 million.

Q: To what extent at all has your opinion of the fair market value of the nonexclusive rights been affected by the fact that they are indeed nonexclusive?

A: I took that into consideration.

Q: And what was the impact of taking that into consideration?

A: I think there was a material impact because I don't believe there is a significant market for nonexclusive rights.

There is a market among bottom feeders who want to jump on the back of a major studio and put out an inexpensive Movie of the Week or direct to video.

But in terms of traditional studios, other studios, I think they would shy away from acquiring nonexclusive rights. I know I certainly would have.

Q: By virtue of your experience in the industry, sir, what is your opinion as to whether or not there are individuals out there, not major studios or reputable producers, who would buy the Siegel rights, the nonexclusive film rights to Action Comics No. 1 and seek to exploit them?

A: Oh, sure. They are opportunists. I call them bottom feeders. But they see an opportunity to, again, ride the back of Superman and get out a direct to video, even if they can only exploit it domestically in the United States because of the Court's ruling.

Still, they could do it for under a million dollars and make some money. You know, these kind of people, if they can make a million dollar investment, if they can make $250,000, they love it.

Q: Have you, Mr. Gumpert, at my request, made an analysis of certain novel agreements which have been mentioned in this case -- Time Line, Hannibal, Sahara, and Lord of the Rings -- and made a determination, sir, as to whether DC would have made more money from the exploitation of Superman under the film agreement than it would have made from the exploitation of Superman Returns under the Time Line, Hannibal, Sahara, and Lord of the Rings agreement?

MR. TOBEROFF: Same objection, your Honor. The question elicits irrelevant testimony as to the after-the-fact performance, and it's an unfair comparison because you're comparing an agreement that was negotiated based on the relative value and leverage of Superman to agreements that were negotiated relative to the value of a different property.

THE COURT: Counsel, there's plenty of testimony from both sides in this case trying to compare what some might argue are apples and oranges. That's not unique to Warner Brothers' position.

MR. TOBEROFF: My objection is that --

THE COURT: I don't necessarily disagree with you on that point.

MR. TOBEROFF: My objection is that what they are doing is running Superman revenues through an agreement that pertained to a novel. So in addition to them engaging in after-the-fact hindsight analysis --

THE COURT: I tend to agree with you, Counsel, that all of the testimony concerning these novels and the agreements reached in these novels is probably not relevant, frankly.

MR. TOBEROFF: That's not my objection.

THE COURT: I know it's not. You want the benefit of being able to compare the novel agreement but not see the effect of running the Superman numbers through the novel agreement.

MR. TOBEROFF: Actually, the novel agreements are presented to show what a rights holder with leverage in a valuable property can get in an arm's length negotiation with a studio. That's it.

THE COURT: I understand the importance, Counsel, of placing this in the context of what was negotiated at the time and not whether the agreement was successful or not. But to many respects, running the numbers through the agreement, as the exercise that we're doing now, gives some indication, I'm not sure how much, but some indication of what the agreement was designed to do, how it actually functioned in the real world.

So I could see potentially some relevance from this. I'll certainly give you leave to argue in closing what level of weight the Court should put on any of this. And as I just indicated, I'm somewhat circumspect of all of these agreements that are from novels and outside the area that we're talking about here. I mean, this was a very unique agreement that was negotiated. It's part of the difficulty of evaluating the fair market value of this agreement because it is almost sui generis.

Having said that, I've given you a lot of latitude, and I'm now giving Mr. Bergman latitude in trying to test this market.

MR. BERGMAN: I appreciate that, your Honor. And if I might just add a couple of words to that to explain why I'm doing this. We're in an equitable proceeding here. The purpose of this trial is to determine at the end of it whether any more money, dollars, should be put into the DC pot that the Siegels are going to share in. Well, in order to determine that, we have to have dollars.

THE COURT: I understand. And just for the record, if I didn't say this, the objection is overruled.

BY MR. BERGMAN: Q: Based on your analysis, would DC Comics have made more money from the release of Superman Returns under the terms of the film agreement than it would have made from Superman Returns under the terms of the Time Line agreement?

A: Yes.

Q: Would your answer be any different with respect to the Hannibal agreement?

A: No, it would not.

Q: Incidentally, on the Hannibal agreement, sir, Mr. Halloran referred to it as providing for a 35 percent video royalty.

Have you examined that agreement?

A: Yes, I have.

Q: Okay. Is there really a 35 percent video royalty?

A: It's a bit illusory because what the provision says is that it's a 35 percent royalty unless there is another gross participant. And, in fact, as everyone knew, there was going to be another gross participant, namely, Anthony Hopkins, who was a first dollar gross actor.

Q: In fact, in the agreement, in the paragraph that immediately follows the statement that it will be 20 percent unless there's a third party gross participant, in which event it will be 35 percent, does the very next paragraph require the producer to utilize his best efforts to obtain the services of Anthony Hopkins to play the role of Hannibal Lecter at his customary rate?

MR. TOBEROFF: Objection. Leading.

THE COURT: Sustained.

BY MR. BERGMAN: Q: Okay. Would you turn, please, sir, to the Hannibal agreement which --

A: Which exhibit is that?

Q: Exhibit 307 in the book before you. Do you have that agreement, sir?

A: I do. It's the last one in the book.

Q: Okay. Would you turn, please, to page 5761 of Exhibit 307.

A: Yes, I'm there.

Q: Okay. Could you read the paragraph that begins, the first full paragraph on that page that reads -- begins with notwithstanding.

A: "Notwithstanding anything herein to the contrary, in the event there is no other gross participant, the parties agree that in defining gross proceeds, the video royalty should be computed on the basis of 35 percent of wholesale."

Q: Okay. Would you now read the very next paragraph.

A: "Captioned services of Hopkins." And it reads: "Producer shall use its best efforts to engage the services of Anthony Hopkins on the picture to perform the role of Hannibal Lecter, taking into account Mr. Hopkins' customary motion picture deal terms."

Q: Do you know Mr. De Laurentiis?

A: Yes, I do.

Q: And do you know who Mr. Janko (phonetic) is?

A: Yes, I do.

Q: In your opinion, would anybody with experience in the motion picture industry assume that Anthony Hopkins in the role of Hannibal Lecter would not be a gross participant?

A: No. In fact, there is no movie Hannibal without Anthony Hopkins. Anthony Hopkins is Hannibal.

MR. TOBEROFF: Leading.

THE COURT: Let's stop the leading, Counsel.

BY MR. BERGMAN: Q: If you were acting as the buyer in this agreement, and you read that provision, what would your conclusion be as to the video royalty?

A: My conclusion would be it is in essence a 20 percent video royalty.

Q: And did you -- have you taken any steps to ascertain, as a matter of fact, whether Anthony Hopkins received a gross participation on Hannibal?

A: Yes, I know it from my personal knowledge, but yes.

Q: And the answer is?

A: The answer is he's a first dollar gross participant.

Q: Finally, -- first, let me ask you, before we get to the Lord of the Rings, if I may, your Honor, Mr. Toberoff introduced the Lord of the Rings license agreement. That license agreement refers to a contemporaneously executed merchandising agreement.

In Exhibit 121, which Mr. Toberoff submitted but didn't offer, there was a redacted copy of the licensing agreement. When I discovered that a couple of months ago, I got an unredacted copy, gave the copy to Mr. Toberoff, and I

would like to have that unredacted copy of the Lord of the Rings agreement entered into evidence as Exhibit 1127.

THE COURT: Any objection, Counsel?

MR. TOBEROFF: The exhibit they are referring to was produced by defendants after the January 14th deadline and with quite a long period of delay after we actually had produced the Lord of the Rings agreement. Your Honor ruled that anything coming in after January 14 is not coming in.

THE COURT: But the -- it's simply an unredacted -- is it in fact what counsel represents, an unredacted version of a document that you have introduced into evidence?

MR. BERGMAN: It was in --

MR. TOBEROFF: I believe it is an -- I haven't compared it personally, but I believe it was an unredacted version.

THE COURT: Okay. Very well. Then it's coming in.

(Exhibit 121 received.)

BY MR. BERGMAN: Q: When you made your analysis, did you use the unredacted merchandising agreement for Lord of the Rings?

A: Yes, I did.

Q: And, sir, have you reached a conclusion as to whether the licensor under the Lord of the Rings deal made more money or less money than the licensor DC under the film agreement for Superman?

A: The merchandising arrangements for Superman are vastly superior to the Lord of the Rings agreement.

Q: And the impact of that --

THE COURT: I'm sorry?

MR. TOBEROFF: Vague and ambiguous. I'm unclear now whether we're running revenues from Superman Returns to the Lord of the Rings agreement, or are we talking about the Lord of the Rings merchandising?

THE COURT: Clarify, Counsel.

BY MR. BERGMAN: Q: Utilizing the merchandising royalty that's payable under the Lord of the Rings agreement, have you reached an opinion as to whether DC Comics made more money from Superman Returns under the

terms of the film agreement with Warner than DC Comics would have made from Superman Returns under the terms of the Lord of the Rings agreement?

MR. TOBEROFF: Objection, your Honor. This testimony is not anywhere in Mr. Gumpert's expert report.

THE COURT: Counsel?

MR. BERGMAN: Well, he certainly, to the same extent as Mr. Halloran, listed the agreements in his report.

THE COURT: Are these listed in --

MR. BERGMAN: Pardon me, sir?

THE COURT: Are these listed in his report?

MR. BERGMAN: Yes, sir.

THE COURT: Counsel?

MR. TOBEROFF: The agreements are listed. I was referring to him -- the exercise and the opinions he's rendering here. They are not in the report.

THE COURT: Given the latitude that I afforded to Mr. Halloran and given the notice that -- of what was going to be used in this trial, the Court think it's sufficient.

Objection is overruled.

MR. TOBEROFF: Very well, your Honor.

BY MR. BERGMAN: Q: Your answer to the question, sir?

A: My answer to the question would be that the licensor would be better off under the terms of the Superman Returns agreement than under the terms of the Lord of the Rings merchandising agreement.

Q: Thank you. We have -- in connection with the various film agreements that you've negotiated, sir, are there any restrictions customarily placed on film agreements regarding television?

A: Yes, there are.

Q: And what form do those restrictions customarily take?

A: They run the gamut. In some cases the film company acquires all rights and all media, including television rights, and in that case there's a prenegotiated episodic royalty for the licensor.

In some cases there's a hold-back which generally runs through the entire period of first run exploitation of the film. In some cases there's simply a freeze, which means that neither party can exploit the rights without the consent of the other. And when you cut through it, it really means that the licensor can exploit the television rights without doing it through the licensee.

Q: In your report, Mr. Gumpert, you refer to the Superman Returns film agreement as being in a sense a purchase agreement, do you not?

A: Correct.

Q: Why do you say that?

A: Because the way the agreement is structured, the $20 million, which is the full amount that would be payable for the 34-year term of copyright, seems to me to represent a purchase price. And, in fact, if the agreement is treated as a purchase price in the sense that the gross participation, or it is -- I'm sorry. The $20 million is an advance against the gross participation to the extent it is fully paid.

Q: In agreements where properties are purchased by the studio, does the grantor have a reversion right?

A: No. Not in a purchase situation.

Q: So that if the -- what happens if the studio decides to never make a movie out of that purchase?

A: If they never make a movie after spending $20 million, they ought to be fired. But they have the right to do that.

MR. BERGMAN: Thank you very much, Mr. Gumpert.

I have no further questions, your Honor.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. TOBEROFF: Q: Mr. Halloran, you are familiar with the four Batman films that were produced and distributed by Warner Brothers from 1989 to 1997?

A: First I'd like to correct the record. My name is Gumpert, not Halloran.

Q: Excuse me. I apologize. Good afternoon, Mr. Gumpert.

A: Good afternoon.

Q: You are familiar with the four Batman films produced and distributed by Warner Brothers from 1989 to 1997?

A: Generally familiar with them, yes.

Q: From the first of these films to the last of these Batman films in the series, the box office revenues decreased substantially; isn't that correct?

A: I don't remember offhand, no.

Q: Are you aware that the last film, Batman and Robin, was critically panned and financially unsuccessful?

A: I'm not aware of that, no.

Q: No knowledge of that whatsoever?

A: Sorry.

Q: Are you aware that Warner Brothers very successfully rebooted the Batman film franchise with the film Batman Begins in 2005 and then the hugely successful film The Dark Knight in 2008?

A: Yes, I am.

Q: In fact, that's one of the virtues of a branded franchise property like Batman is, that it can be rebooted, isn't it?

A: That is one, yes.

Q: Moving to the Superman film agreement, there's no fixed purchase price in the Superman film agreement, is there?

A: Well, I mean, I view the ongoing option payments as a purchase price. You may disagree, but that's how I view it.

Q: Putting aside the way you view it, is there a purchase price in the Superman agreement, or is there not?

A: There's no option defined as a purchase price.

Q: There's no amount designated as the purchase price in the agreement; correct?

A: Correct.

Q: Isn't it very unusual for an option purchase agreement to have no purchase price?

A: It's unusual but not unheard of.

Q: But it's usual, isn't it?

A: It is, yes, I agree.

Q: You testified that looking at comps or comparable agreements is a valid test of an intellectual properties value and that this is just as valid as offering it on the open market; isn't that right?

A: I didn't hear the last part. I'm sorry.

Q: You testified at your deposition that looking at comparable agreements is as valid a test of an intellectual properties value as offering it on the open market; isn't that right?

A: Yes, I did.

Q: You also testified that the way studios test the value of a property they wish to buy or sell is by looking at precedents and comps; correct?

A: Correct.

Q: But neither Warner nor DC provided you with any precedents or comps that they looked at, actually looked at in arriving at the terms of the Superman film agreement, did they?

A: No, they did not.

Q: And you were unaware of any precedents or comps that Warner Brothers or DC looked at in arriving at the terms of the Superman film agreement?

A: I'm unaware of the process they went through in arriving at those terms, yes.

Q: And you never asked Warner Brothers or DC what process they went through, did you?

A: No, because there is a generally accepted process.

MR. TOBEROFF: Strike after "because," your Honor.

THE COURT: As?

MR. TOBEROFF: Move to strike after "because."

THE COURT: As? For what reason?

MR. TOBEROFF: As nonresponsive, excuse me.

THE COURT: Okay. It's stricken.

BY MR. TOBEROFF: Q: Now, moving to the option term of the Superman film agreement, the consecutive option terms in the Superman film agreement, Exhibit 232, run for 34 years; isn't that right?

A: Yes. Three years plus successive three-year options.

Q: And you reviewed the Batman agreement as well, Plaintiffs' Exhibit 1?

A: I did.

Q: The Batman agreement is structured along similar lines with consecutive option terms through the life of the Batman copyright; correct?

A: Correct.

Q: But the custom in the industry is for the consecutive option periods in a rights option purchase agreement to run for just three years; isn't that correct?

A: You mean the initial term of option? Is that what you're asking?

Q: The initial and the renewal term for a total of three years. Isn't that the norm?

A: Not necessarily.

Q: I'd like to read from a portion of your deposition transcript, on page 129, lines 1 through 4:

"QUESTION: Other than the Batman and the Superman agreements, what's the next longest consecutive option period you've seen in an option purchase agreement?

"ANSWER: We've seen three years, and I'm struggling to remember if I've seen five years, but that's the range."

A: Correct.

Q: So at the top of that range would be five years; is that correct?

A: In my experience, yes.

Q: And the combined total of -- if you look at the combined tottal of an initial term and the renewal term, the norm is more like three years; is that correct?

MR. BERGMAN: Objection. Asked and answered.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Mr. Gumpert, outside the Superman film agreement and the Batman agreement, are you aware of any option terms that run as long as 34 years?

A: No, I'm not.

Q: Now, your opinion is that a studio executive in negotiating an option purchase agreement will try to get as long an option term as possible for as little as possible; isn't that correct?

A: Yes.

Q: Your opinion is also that if a studio executive has leverage, they may indeed use it to make a rights deal on terms less favorable to a rights holder than another studio would have without leverage; correct?

A: Well, I hear you, but I'm not sure what you mean by leverage.

Q: Negotiating leverage.

A: I don't know how to answer that. I mean, to the extent -- a party has leverage, obviously they can make a better deal. But I'm not sure how leverage fits into this context.

Q: Well, at your deposition, you seemed to understand what's meant by leverage. I'd like to read from your deposition at page 90, lines 9 through 16: "QUESTION: Isn't it true that deals will be made in the ordinary course in the open market that are less than what a typical deal would be for underlying rights?

“ANSWER: Well, again, you mentioned before, it depends on the leverage of the parties. If the studio has enormous leverage, they may indeed make a deal that probably is less favorable to the owner of the rights than perhaps another studio would have made."

Do you recall that question and making that answer?

A: I do, yes.

Q: Outside of the Batman and Superman agreements, you are not aware of any agreements with an option term longer than five years; correct?

MR. BERGMAN: Asked and answered.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: You are familiar with 20th Century Fox's rights agreement for the comic strip entitled the Wizard of Id?

A: No, I'm not.

Q: I'd like to read a portion of your deposition starting at page 17, line 12, and running to 19:

"QUESTION: What rights agreement have you been involved with that have a first dollar gross participation on 5 percent?

"ANSWER: Several. I'm not sure I can tick them off for you, but the one I do remember which I mention in my expert report was Wizard of Id, which is a million dollar and a half purchase price against 5 percent of the gross. No film ever came of it."

A: That's correct. That was a deal with Universal. You asked me whether I was familiar with the Wizard of Id deal at 20th Century Fox, which is why I said no.

MR. TOBEROFF: Move to strike as nonresponsive.

THE COURT: It's stricken. We can deal with this in further direct. There's no question pending.

BY MR. TOBEROFF: Q: The Wizard of Id agreement was entered into in the late 1990's; correct?

A: Yes, Universal.

Q: The Wizard of Id agreement contained a fixed purchase price of a million five; correct?

A: Yes.

Q: And also provided for 5 percent of first dollar gross as you testified to in your deposition?

A: Correct.

Q: DC received the same 5 percent of first dollar gross in the Superman agreement as the licensor of the Wizard of Id rights; correct?

A: Yes.

Q: But DC received no purchase price per se?

A: Well, they received a guaranteed amount of a million and a half dollars, the same amount as Wizard of Id.

Q: Was that designated as an option payment in the agreement?

A: Yes.

Q: Then it's not a purchase price, was it?

A: I didn't say it was. I said it's a guaranteed amount.

MR. TOBEROFF: I move to strike as nonresponsive the answer to my question that DC received no --

THE COURT: It's stricken. Just listen carefully to the questions.

BY MR. TOBEROFF: Q: You also referred in your deposition to a rights agreement for a property called Revisited; correct?

A: I've never heard of that. Forgive me. Revisited?

Q: Yes.

A: I'm blanking.

Q: I'd like to read from your deposition at page 83, lines 9 through 18:

"QUESTION: What do you believe the back end would be?

"ANSWER: Probably 5 percent of gross of first dollar.

"QUESTION: Even though an option payment would only be for -- strike that.

"Even though an option payment would only be $150,000 or a purchase price would be a million or a million and a half?

"ANSWER: I've done that very deal.

"QUESTION: For what property?

"ANSWER: Revisited. Just to mention one that comes to mind."

A: Someone -- I just missed it when I reviewed my testimony. I've never heard of a project called Revisited.

THE COURT: That wasn't a question that he asked you.

THE WITNESS: I'm sorry.

THE COURT: There's no question pending. So there's nothing to object to.

Your next question.

BY MR. TOBEROFF: Q: Did you have the opportunity to review the transcript of your deposition?

A: Yes, I did.

Q: After you participated in the deposition?

A: Yes, I did.

Q: And to make all corrections you saw fit to make?

A: Yes, I did.

Q: And was there any reason at that deposition -- excuse me.

The questions that I just asked you, did you understand those questions at the time you were deposed?

A: I promise you I didn't use the word Revisited. I understood the question. But the stenographer clearly took down something wrong, and I missed it in reviewing it.

MR. TOBEROFF: Move to strike as nonresponsive.

THE COURT: The question was did you understand the questions at the time you were deposed?

THE WITNESS: Yes, I understood the questions.

THE COURT: Everything else is stricken.

BY MR. TOBEROFF: Q: The rights holder -- strike that. Now, your opinion, as set forth in your report, is that the property the Green Hornet is as valuable a property as Superman was in 2002; is that correct?

A: Correct.

Q: And this is based solely on your personal point of view that Green Hornet is a, quote, cooler character, end quote, than Superman; correct?

A: And also based on my experience at Universal in developing the Green Hornet character as a film that we almost made at Universal.

Q: I'd like to read from your deposition at page 168, line 25, through page 169, line 2.

And this was regarding testimony as to the Green Hornet.

"QUESTION: What is the basis of your pain?

"ANSWER: My own point of view. I think the Green Hornet is a cooler character than Superman. Period." The Green Hornet was a basis for a television show that was canceled after just one season in 1966-1967; correct?

A: I don't know if it was one season, but it didn't run very long, yes.

Q: Yet your opinion is that the Green Hornet character is iconic based on this short-lived television series; correct?

A: In part, yes.

Q: Other than the film rights to Action Comics No. 1, which have been so far held to be -- to have been nonexclusively transferred to Warner Brothers, the remaining of the Superman copyright interest transferred to Warner Brothers in the Superman film agreement were exclusive in your opinion; correct?

A: Yes.

Q: So you would agree, then, that the vast majority of the rights licensed to Warner Brothers in the Superman film agreement remained exclusive to Warner Brothers; correct?

A: Correct.

Q: In your opinion is that in 1999, 2002, Superman was not a good candidate for a franchise movie; is that right?

A: Yes.

Q: Did you consult --

MR. BERGMAN: Excuse me, Mr. Toberoff. May I just ask the witness to speak up.

THE WITNESS: Oh, I'm sorry.

BY MR. TOBEROFF: Q: Did you consult with Alan Horn, who green lit the development of the Superman move and Superman Returns before forming your opinion?

A: No, I did not.

Q: Did you consult with Paul Levitz before forming your opinion?

A: No, I did not.

Q: Did you review the Warner Brothers documents dated between 1999 and 2006, which state that Superman was viewed by Warner Brothers as the basis for a, quote, tent-pole picture, end quote?

A: I have not seen those documents.

Q: Did you review the Warner Brothers documents dated between 1999 and 2006, which stated that Superman was viewed by Warner Brothers as the basis for a franchise motion picture?

A: I did not see any such documents.

Q: You nonetheless opine in your report that it would have been a stretch to assume that a new Superman movie would be a tent-pole movie; isn't that right?

A: Correct.

Q: Superman Returns was in fact a big summer tent-pole movie, wasn't it?

A: In the sense that a lot of money was spent on the production and marketing of the movie, yes.

Q: Warner Brothers spent over $400 million on producing and marketing the film; correct?

A: Yes.

Q: And starting in the mid-1990's, Warner Brothers invested tens of millions of dollars. We heard testimony that it in fact spent $60 million developing a new Superman movie; is that right?

A: Correct.

Q: But Superman was not a highly valuable franchise property in your opinion?

A: I believe my opinion was that it was a valuable property.

And beyond that, I didn't know how to quantify that.

Q: How it's not a franchise property. That would be a stretch; correct?

A: At the time. In view of the four previous Superman films, my view is that it would be a stretch.

Q: Switching to the subject of comic books. You're not particularly familiar with the comic book industry, are you?

A: No, I'm not.

Q: In forming your opinion about the supposed unpopularity of Superman between 1999 and 2002, you did not view a single demographic study as to Superman's popularity, did you?

A: No, I didn't find that relevant.

MR. TOBEROFF: Move to strike after "no."

THE COURT: It's stricken after "no."

BY MR. TOBEROFF: Q: Yet you opined that the Superman character appeals principally to middle-aged men and women; isn't that right?

A: Yes.

Q: You did not conduct any demographic research to support this conclusion, did you?

A: No, I did not.

Q: You did not review any demographic evidence to support this conclusion either, did you?

A: No.

Q: You did not ask defendants for any such evidence, did you?

A: No.

Q: And defendants did not provide you any such demographic studies or evidence, did they?

A: They did not.

Q: You also did not ask defendants for any marketing information regarding Superman before forming your opinions, did you?

A: Correct.

Q: Defendants never provided you with any?

A: Did not, yes.

Q: You testified in your deposition that comic books are less valuable to film studios as underlying material for a film because they lack well delineated story lines; is that correct?

A: Correct.

Q: Now, you served as an expert on behalf of Warner Brothers in the recent lawsuit between 20th Century Fox and Warner Brothers over the film rights to the comic book Watchmen; right?

A: Yes.

Q: Are you familiar with the film Watchmen?

A: Yes, I am.

Q: Didn't the Watchmen film in fact follow the graphic Watchmen story line almost panel by panel?

A: I'm not familiar with the novel. So I can't answer that question.

Q: You also testified in your deposition that comic books are less valuable to film studios because comic books purportedly lack fully realized characters.

Do you recall that?

A: Yes, I do.

Q: Batman and his alter ego Bruce Wayne is not a fully realized character?

A: Not in the sense of what I was referring to.

Q: Superman and his alter ego Clark Kent are not fully realized characters?

A: Again, not in the sense that I was referring to.

Q: You are familiar with Universal made a very lucrative deal with Hasbro over the film rights to five or six board games, are you not?

MR. BERGMAN: Objection. Assumes a fact not in evidence.

THE WITNESS: I've never --

THE COURT: Wait a second. It's a question. Are you familiar with this?

THE WITNESS: Not at all.

THE COURT: Move along.

BY MR. TOBEROFF: Q: Regardless of your familiarity with that agreement, do board games like Battleship have well delineated story lines and characters?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Are you familiar with the board game Battleship?

A: Yes.

Q: Does Battleship have well delineated story lines and characters?

A: Not necessarily, no.

Q: Does Monopoly have well delineated story lines and characters?

A: No.

Q: If I told you that Universal made a very lucrative deal for Hasbro in which they licensed the film rights to Monopoly and Battleship, what in your opinion would be the reason Universal was making that deal?

MR. BERGMAN: Objection. Assumes a fact not in evidence and calls for speculation.

THE COURT: I assume the reason they are doing the deal is because they want to make money. Counsel, I don't know what --

MR. TOBEROFF: I'm asking for his perception of value in acquiring --

THE COURT: There's no foundation for him to assess that value. Objection sustained.

BY MR. TOBEROFF: Q: You are aware that the Disney film franchise Pirates of the Caribbean comes from a Disney theme park ride, are you not?

A: Yes, I am.

Q: Do theme park rides such as Disney's Pirates of the Caribbean have well delineated story lines and characters?

A: Not typically.

Q: You are an expert in the -- on behalf of the producer Saul Zaentz in his case against Newline involving the Lord of the Rings film series; correct?

A: Yes.

Q: In that case Newline contended that for purposes of Saul Zaentz's gross participation, you cannot include the amounts of money received by Newline's foreign subdistributors; correct?

A: Correct.

Q: However, your opinion on behalf of Mr. Zaentz was that for purposes of Mr. Zaentz's gross participation, gross should include what Newline sub distributors received at the source; isn't that correct?

A: Based on my clear reading of the agreement, yes.

Q: Now, you testified that Superman Returns is in a serious deficit position for both Legendary and Warner Brothers.

A: Based on the participation statements that I've received, yes.

Q: And that participation statement was particularly a participation statement from Warner Brothers to Legendary Pictures dated March 31, 2008; correct?

A: I believe so, yes.

Q: And based on that participation statement, your opinion is that the worldwide gross of the picture inuring to Warner Brothers, quote, from all sources, end quote, was $220 million; correct?

A: I think that's --

MR. BERGMAN: Objection. Misstates the testimony.

THE WITNESS: I just don't remember the --

THE COURT: Wait. I'll sustain the objection. And go ahead and read the testimony if you have that. That would be helpful, Counsel.

MR. TOBEROFF: I'm reading from your expert report at page 7 first.

"According to the participation statement as of March 31, 2008, issued by Warner to Legendary Pictures in respect of Superman Returns, the worldwide gross of the picture inuring to Warner from all sources as distinguished from the theatrical box office gross which Warner shares with exhibitors, as of that date amounted to $220 million.

Do you recall writing that in your report?

A: Yes, I do. I would have to review the participation statement to remember my methodology.

Q: I'd like to show you what's been previously admitted by plaintiffs -- previously been admitted as Plaintiffs' Exhibit 292. It's the March 31, 2008, participation statement from Warner Brothers to Legendary.

THE COURT: Counsel, how much longer do you have with your examination approximately?

MR. TOBEROFF: I'd say about 50 minutes, your Honor, 45 minutes.

THE COURT: Okay. Why don't we go ahead and take our break at this time. We'll come back in about 15 minutes.

You have no further witnesses after this witness; is that correct?

MR. BERGMAN: That's correct.

THE COURT: Very well. All right.

(Recess taken.)

THE COURT: Counsel, you may proceed.

MR. TOBEROFF: Thank you, your Honor.

Q: Do you have in front of you Plaintiffs' Exhibit 292, participation statement from Warner Brothers to Legendary?

A: Yes, I do.

Q: This is the participation that you reviewed in forming your opinion that the gross of Superman Returns for Warner Brothers was $220 million; right?

A: It is the statement I reviewed, yes.

Q: I'd like to direct your attention to the line located on the page Bates numbered WB 135885. That says, quote, defined gross after distribution fee, end quote.

A: Correct.

Q: And what's that number?

A: 219, 6000, 000 .

Q: Is this the source of your opinion that the worldwide gross of the picture inuring to Warners from all sources was $220 million?

A: Yes, although I intended to say excluding video, as I see what the error was.

MR. TOBEROFF: Move to strike after "yes."

THE COURT: It's stricken.

BY MR. TOBEROFF: Q: The line above says distribution fee in the amount of 24,842,742.

Do you see that?

A: Yes, I do.

Q: And that distribution fee would be paid to Warner Brothers, wouldn't it?

A: Yes, for service.

Q: You neglected also to include this nearly $25 million figure in the gross inuring to Warner's benefit, didn't you?

A: Yes, because I believe that Warner Brothers cost based distribution fee is roughly 11 percent so that it was a wash.

And I just factored it out.

MR. TOBEROFF: Move to strike after "yes."

THE COURT: It is. Just answer the question. Your Warner Brothers attorney will be up and will ask you some follow-up questions.

THE WITNESS: I see. Thank you.

BY MR. TOBEROFF: Q: I'd like to draw your attention, please, to the lines above the distribution fee where the statement lists the sources of revenues.

A: Yes.

Q: None of these sources include video revenues; correct?

A: That's correct.

Q: Video revenues typically comprise nearly 50 percent of worldwide revenues, don't they?

A: Could be, yes.

Q: You nonetheless based your opinion that Warner Brothers was in a serious deficit position on Superman Returns without including Warner Brothers distribution fee or video revenues; is that correct?

A: That's incorrect.

Q: Did you include the video revenues in your determination that Warner Brothers was in a serious deficit position?

A: Yes, I did.

Q: Is that in your expert report?

A: I'm not sure that it is, but it's on the face of the participation statement that I had reviewed which shows a deficit of $174 million.

Q: But it's not in your expert report, is it?

A: Well, forgive me. I referred to distribution expenses of $165 million and an investment and negative cost of $242 million.

Q: But you don't refer to the video -- revenues of Warner Brothers, do you?

A: That's correct.

Q: And you also don't refer to the money Warner Brothers makes from its distribution fee in your report?

A: Which I did not regard as exploitation proceeds, yes, I did not.

MR. TOBEROFF: Strike as nonresponsive everything before "yes."

THE COURT: Stricken.

BY MR. TOBEROFF: Q: Now, Mr. Gumpert, your opinion is that the first Superman movie released in 1978 was the 196th highest grossing film of all time; isn't that correct?

A: It was based on research that I had done, I believe, on the -- on the Box Office Mojo website.

Q: This ranking is not adjusted for inflation, is it?

A: That's correct.

Q: And are you aware that Box Office Mojo website actually has figures adjusted for inflation?

A: Yes, I do.

Q: But you chose not to use those figures; correct?

A: I don't know their methodology. So I chose not to use it.

Q: In fact, throughout your report in mentioning figures and comparing figures of various films, you never adjust for inflation; isn't that right?

A: Just as any business affairs executive doesn't adjust for inflation, yes.

MR. TOBEROFF: Move to strike everything before "yes" as nonresponsive.

THE COURT: Granted. Just try to answer the question.

THE WITNESS: I apologize.

BY MR. TOBEROFF: Q: In fact, defendants introduced into evidence Exhibit 1123 showing that the 1978 Superman film was actually number 61 with a box office of nearly 412 million once adjusted for inflation. Are you aware of that?

A: No, I'm not.

Q: And in 1978, major films were released in not nearly as many theaters as the 3500 theater releases would have; isn't that correct?

A: Probably correct, yes.

Q: Nor do they spend nearly as much money marketing such films, did they, back in 1978, when compared to today?

A: That's correct.

Q: You believe that $10 million in 1970 has a much greater value than in 2008; correct?

A: Are you saying $10,000 in 1970 versus $10,000 today? $10 million dollars today?

Q: $10 million in 1970 has a much greater value than in 2008?

A: Yes.

Q: Nonetheless, in writing your expert report, you did not account for inflation when computing box office results across time, did you?

A: That is correct.

Q: You also did not adjust for inflation when comparing the economic terms of agreements, did you?

A: I'm not sure what you mean, but I did not adjust for inflation.

Q: Did you adjust for inflation when comparing financial terms in agreements?

A: No, did not.

Q: You also did not do any net present value analysis when speaking of the payment of the annual option renewal fees in the Superman film agreement which you have now testified to as being for $20 million; isn't that correct?

A: Yes.

Q: Even though those payments are spread out over 34 years?

A: Correct. Possibly, I should add.

Q: Your opinion is that in -- strike that.

Your opinion is that under the Superman film agreement, Warner's option payments aggregating $20 million over a 34-year period are the equivalent of a $20 million purchase price; is that right?

A: Yes.

Q: Warner is not under any obligation to make any payment other than the initial million five option payment under the Superman film agreement, is it?

A: They are under no obligation, but they run the risk of losing the rights, yes.

MR. TOBEROFF: Move to strike as nonresponsive after "obligation."

THE COURT: Stricken.

BY MR. TOBEROFF: Q: And you did not consider the net present value of the $20 million payments in 2002 when the parties entered into the agreement, did you?

A: No. Because it is --

THE COURT: I'll stop you there. It's a yes or no question. It's cross-examination.

THE WITNESS: No.

BY MR. TOBEROFF: Q: Switching to the topic of Tarzan. You reviewed the Tarzan rights agreement, Defense Exhibit 1085, to 1086? Did you review it in connection with your expert report in rendering your opinion in this case?

A: Which one was that dated? There were several Tarzan agreements.

Q: I'm referring to all the Tarzan agreements.

A: I looked at all the Tarzan agreements, and, as I said in my report, I decided to exclude the 2006 agreement as not being within the time period.

MR. TOBEROFF: Move to strike after "agreement."

THE COURT: Your question was I'm referring to all the Tarzan agreements. I'm not sure what your question was.

So I'm not going to strike the question or the answer. Your next question.

MR. TOBEROFF: Very well.

Q: In reviewing the Tarzan agreements, did you check when the first Tarzan book by Edgar Rice Burroughs was published?

MR. BERGMAN: Objection. Relevance.

THE COURT: I'm not sure what the relevance is, Counsel. Where is this going?

MR. TOBEROFF: Its relevance is to valuation of Tarzan.

THE COURT: I'll overrule it and give you some latitude. Overruled.

THE WITNESS: I believe I did some Internet research. I indicated that the first Tarzan publication was early in the 20th Century.

BY MR. TOBEROFF: Q: Are you aware that the first Tarzan book was published in 1912 to be exact?

A: I believe so.

Q: Are you also aware that works published before 1923 are in the public domain?

A: Yes.

Q: And that if -- were you aware that there were a total of approximately 40 Tarzan stories by Edgar Rice Burroughs?

A: I believe that was an exhibit to one of the agreements that I saw, yes.

Q: Of these first 20 Tarzan stories published before 1923 in the public domain -- you're aware of that fact?

A: If they were published before 1923, I'm aware that they were in the public domain.

Q: In analyzing and comparing the terms of the Tarzan agreement to the terms of the Superman agreement, you did not take into effect the fact that the Tarzan character itself was in the public domain, did you?

A: The Tarzan character itself?

Q: Yes.

A: It may be the case. I'm just unaware that the Tarzan character itself is in the public domain. I'm aware that certain of the prior works are in the public domain.

Q: Are you aware that the Tarzan character appeared in the first 22 Tarzan stories?

A: I assume so, but I don't really know. Never read them.

Q: You also reviewed the Conan agreements in connection with your analysis, Defense Exhibits 1093 to 1094; correct?

A: Yes.

Q: Do you know who created Conan?

A: As a matter of fact, I don't.

Q: Do you know when Conan was first created?

A: I'm not sure.

Q: Did you investigate whether any of the Conan works were in the public domain like the Tarzan works?

A: I did not, no.

Q: In valuing the terms of the Conan agreement, did you take into account that the Conan stories created between 1932 and 1963 were in fact in the public domain due to the failure to renew the copyright to those stories?

MR. BERGMAN: Objection. Assumes facts not in evidence.

THE COURT: As phrased. Rephrase, Counsel.

BY MR. TOBEROFF: Q: Were you aware that whether or not -- did you investigate whether or not the Tarzan stories were under copyright -- excuse me.

Were you aware as to whether Conan stories created between 1932 and 1963 were in the public domain?

MR. BERGMAN: Same objection, your Honor.

THE COURT: It does assume a fact not in evidence as phrased.

BY MR. TOBEROFF: Q: Were you aware as to the copyright status of the Conan stories created between 1932 and 1963?

A: No, I'm not.

Q: Moving to a new topic.

You negotiated the co-financing and distribution agreement between Universal and Warner for the movie Twister on behalf of Universal; correct?

A: Yes.

Q: And as the chief negotiator for Universal, you were concerned with whether Warner's intercorporate agreement with HBO was for fair market value.

Isn't that so?

A: Correct.

Q: You raised this issue with Warner -- you raised the issue of Warner's internal arrangements with HBO with your counterpart at Warner; correct?

A: Yes.

Q: In fact, Warner's arrangements with HBO were more favorable to Warner Brothers than Universal's comparable arrangements with Starz Encore; is that correct?

A: Yes, it is.

Q: This would mean that such arrangements were less favorable to HBO and more favorable to Warner Brothers; correct?

A: I don't know how to answer that question. All I can say is that the amount of license fees paid by HBO to Warner Brothers were greater than what would have been paid by Starz Encore to Universal.

Q: So since the amount of fees were greater for Warner Brothers, that term was more favorable to Warner Brothers and less favorable to HBO; correct?

A: I don't know how to answer that. HBO has a far greater subscriber base than Starz Encore.

Q: The Warner executive you dealt with regarding that transaction informed you that Warner had a strict policy of ensuring that transactions between affiliates were at the top of the market; correct?

A: Yes.

Q: My question is if a transaction is at the top of the market for one affiliate, isn't it naturally at the bottom of the market for the other affiliate?

A: It would be pure speculation on my part.

Q: Now, you worked at Universal Pictures from 1990 until 2001; correct?

A: Yes.

Q: During that time, isn't it true that the novel Time Line by Michael Creighton, Plaintiffs' Exhibit 325, was subject to a bidding war amongst multiple studios while you were at Universal?

A: I'm not sure if I'd described it as a bidding war, but the novel was offered to Universal as well as to Paramount, I guess, that ultimately acquired it.

Q: I'd like to read your answer from your deposition at page 102, line 21, to page 103, line 6:

"QUESTION: Do you recall any bidding wars for the next work by a best selling author?

"ANSWER: Yes. For the John Grishams and Tom Clancy's of this world.

"QUESTION: Which bidding wars do you recollect regarding John Grisham and Tom Clancy?

"ANSWER: Michael Creighton, one. Airframe and Time Line, which I think is also Michael Creighton."

Did I ask those questions and did you give those answers at your deposition?

A: Yes, I did.

Q: While you were at Universal, Universal was also involved in a bidding war for the Thomas Harris novel Hannibal; correct?

A: No, it's not.

THE COURT: You understand what a bidding war means?

THE WITNESS: Yes. Universal didn't acquire the Thomas Harris novel. Dino De Laurentiis did.

MR. TOBEROFF: Move to strike the last sentence.

THE COURT: Well, there was no --

MR. TOBEROFF: As nonresponsive. There's no question pending.

THE COURT: There's no question pending. Stricken.

BY MR. TOBEROFF: Q: When Universal acquired the rights to Hannibal, being the successor of the Hannibal agreement, which is Exhibit 307; isn't that correct?

A: That is correct.

Q: And Universal did not object to the terms in that agreement. They accepted them and succeeded to the agreement?

A: They accepted the terms, but they weren't happy about them.

Q: Did they object to the terms?

A: No. What they did was bring in a financing partner, MGM, because there was so much gross out.

MR. TOBEROFF: Move to strike after "no" as nonresponsive.

THE COURT: Stricken.

BY MR. TOBEROFF: Q: Now, agents representing high end literary properties usually offer their clients works to more than one studio, don't they?

A: What sort of literary properties are we talking about?

Q: Well-known literary properties?

A: On the contrary, with respect to novels and what I'll call spec screenplays, typically that is the case, where agents offer them to a variety of studios.

With respect to characters, which I think is what we're talking about, that's hardly ever the case. Generally the agent picks a studio that they want to do business with on that character for whatever reason they have, and that's -- and the negotiation is between two parties.

Q: But according to you, they don't do that with novels or screenplays?

A: That's correct.

Q: Just with everything else.

A: Generally, yes.

Q: Are you familiar with the bidding war that occurred over Microsoft's game Halo?

A: Not at all.

Q: Was -- do you know what Halo is?

A: I know what it is.

MR. BERGMAN: Objection. Assumes facts not in evidence and goes beyond the direct.

THE COURT: Overruled. Do you know what Halo is?

THE WITNESS: Halo, as I understand it, is a Microsoft game.

BY MR. TOBEROFF: Q: Did Universal bid on Halo?

A: I wasn't there at the time. I don't know.

Q: Are you aware otherwise?

A: I believe that Universal and 20th Century Fox jointly acquired the rights.

Q: Was Halo a novel or spec screenplay?

A: No.

Q: Are you aware whether Hasbro, after the success of the Transformer movie, are you aware that Hasbro offered the film rights to board games to a

number of different studios, and it ended up at Universal? Are you aware of that?

MR. BERGMAN: Objection. Assumes facts not in evidence.

THE WITNESS: No, I'm not.

THE COURT: As phrased, sustained.

BY MR. TOBEROFF: Q: Now, when an agent offers a property to various studios, as you've testified, they normally do it at the highest end of the market. They normally set the price at the highest end of the market, don't they?

A: I assume so, yes.

Q: Mr. Gumpert, you testified that Warner Brothers' copyright interests from the prior Superman films would make it, quote, very difficult, end quote, to find a buyer for DC's rights because of the possibility that Warner Brothers launch a competing product based on the copyrights Warner Brothers already controlled.

Do you recall that testimony?

MR. BERGMAN: Objection. Misconstrues and misstates the testimony.

THE COURT: Rephrase your question, Counsel.

BY MR. TOBEROFF: Q: Mr. Gumpert, do you recall testifying that Warner Brothers copyright interest from the prior Superman films 1 through 4 would make it, quote, very difficult, end quote, to find a buyer for DC's rights because Warner Brothers could purportedly launch a competing product based on the Superman copyrights they control?

Do you recall that testimony?

MR. BERGMAN: Same objection. Misstates the testimony.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: The testimony is on --

THE COURT: If you have it, Counsel, let him read the testimony.

MR. TOBEROFF: I'll retrieve it. It's on page 81, lines 7 through 21.

THE COURT: 81, lines 7 through 21.

MR. TOBEROFF: Your Honor, may my colleague read it into the record?

THE COURT: Yes.

MR. ADAMS: And this is from the rough from this morning.

"Does the fact that Warner Brothers holds some copyright interest in the prior films and television shows affect any way your evaluation as to the fair market value of the DC rights that were transferred to Warner?

"ANSWER: Yes.

"QUESTION: In what way does that figure in, sir?

"ANSWER: Because of the copyrights held by Warner

Brothers with respect to the prior films, it would be very difficult to find a substantial buyer, a studio, for example, for the Superman rights after the fourth film had been released.

"QUESTION: Why is that?

"ANSWER: Because you run the risk of infringing on Warner Brothers's rights, you have to be very careful about that. And Warner Brothers could always come up with a competing product based on the copyrights that they control."

THE COURT: And your question with respect to that testimony, Counsel?

BY MR. TOBEROFF: Q: My question is other than distributing the old Superman films, Warner Brothers could not launch a competing product without a license from DC, could it?

A: I'm not sure that they couldn't do a remake of one of the prior films without a new license from DC. I'm just not sure.

Q: Do you know one way or another?

A: I think they could until somebody shows me evidence of the contrary.

Q: Even though they don't have a license of the underlying Superman copyrights of which the films are derivative works, you believe they could go and make more Superman derivative works?

A: That's not what I said. I said they could do a reprice remake of the films to which they own the copyrights.

Q: Even though they wouldn't have underlying rights to the Superman copyright?

A: I think that --

MR. BERGMAN: Objection. That question assumes facts not in evidence.

THE COURT: Sustained.

MR. BERGMAN: And is argumentative.

BY MR. TOBEROFF: Q: Now, in your expert report at page 9, the middle of the page, quote, if Warner had, quote, dark, end quote, motives, its motivation might have been to skew the licensing arrangements in favor of DC due to the trend towards co-financing.

Do you recall that?

A: Yes, I do.

Q: Are you familiar with co-financing agreements?

A: Yes, I am.

Q: A co-financing arrangement is generally between a studio and a financing partner; correct?

A: Correct.

Q: And those financing partners are made aware of gross participation before they agree to co-finance; correct?

A: Typically.

Q: All the other factors being equal, financing partners would prefer a lower level of gross participations before financing a film, wouldn't they?

A: Yes.

Q: Gross participations on DC -- on Superman would include DC; isn't that right?

A: Yes.

Q: And would also include the plaintiffs to the extent they participated in the profits of DC, wouldn't it?

A: Yes. Wouldn't add to the -- to the gross participations. But they may be two participants instead of one.

Q: And Legendary in financing, co-financing Superman Returns would consider DC, of course, to be an affiliate of Warner Brothers?

A: It is --

MR. BERGMAN: Objection as to what they would consider.

THE COURT: Sustained. Foundation.

BY MR. TOBEROFF: Q: DC is an affiliate of Warner Brothers, isn't it?

A: As I understand it, yes.

Q: Do you believe that a financing partner financing a Superman film would understand that any gross participations paid by Warner Brothers to DC would essentially be paid to the benefit of Time Warner?

MR. BERGMAN: Objection. Calls for speculation. No foundation.

THE COURT: Sustained.

BY MR. TOBEROFF: Q: Do you believe that a gross participation of -- paid to DC would be viewed by a financing partner as inuring to the benefit of Time Warner?

MR. BERGMAN: Objection. Lack of foundation.

THE COURT: These questions concerning his belief of what somebody else would think are speculation. No foundation. Sustained.

BY MR. TOBEROFF: Q: Do you view that the gross participations paid by Warner Brothers to DC inure to the benefit of Time Warner?

A: I have no idea how internally Time Warner accounts for these things. No idea at all.

Q: Turning to a different subject. You testified that you reviewed the Conan, Tarzan, and Iron Man agreements; correct?

A: Yes.

Q: The Tarzan agreement contains reversion provisions that operate even if a purchase price is paid, even if the option is exercised and the purchase is made; correct?

A: Correct.

Q: The Conan agreement also contains reversion provisions that operate even if the option is exercised and the purchase price is paid; correct?

A: Correct.

Q: And finally, the Iron Man agreement contains reversion provisions that operate even if a purchase price is paid and the option is exercised; correct?

A: Correct.

MR. TOBEROFF: I have no further questions at this time, your Honor.

THE COURT: Very well.

Redirect?

MR. BERGMAN: Yes, just a bit, your Honor.

REDIRECT EXAMINATION

BY MR. BERGMAN: **Q:** Does a reversion right have any economic value, Mr. Gumpert?

A: Not really. Not in this context, no.

Q: Did Universal enter into a so-called bidding war for the Grisham novel as Mr. Toberoff suggested?

A: No.

Q: Did it make an offer for the Grisham novel?

A: I'm not sure which Grisham novel we're talking about.

The one that Universal acquired during my tenure was The Chamber, and my recollection is there was no bidding war. It was a situation where Ron Howard, the director, came to Universal indicating an interest in directing the film. And that's the reason we bought it.

Q: If Warner Brothers, after exercising its option under the Superman agreement, doesn't make any further option payments, what happens?

A: It loses its rights under the Superman Returns agreement.

Q: In the film business, Mr. Gumpert, when you talk to other people in the business, when you send offers back and forth and you refer to a film's performance, do you adjust it for inflation?

A: No. That's not the methodology that business affairs executives at studios use.

Q: To clear up the great mystery of Revisited, have you ever heard of a movie called Revisited?

A: I have not, no.

Q: Have you heard of a movie called Wizard of Id?

A: Well, I've heard of a property called Wizard of Id.

Q: And was that Wizard of Id deal with 20th century Fox, as Mr. Toberoff suggested?

A: No.

Q: Who was it with?

A: With Universal Pictures.

Q: And as you review that deposition page, does it appear to you that the stenographer wrote Revisited when you wrote Wizard of Id?

A: Yes, I think too many Z's.

Q: Okay. Does the fact that you didn't include or separately determine the video revenue when you were analyzing Exhibit 292, does that affect in any way the bottom line that the report shows the picture to be at $174 million deficit?

A: No, it does not.

Q: Finally, when you compare comic book heroes, one to another, what basis do you use?

A: Well, there are a number of factors. One is obviously the prior performance of productions in which the characters have been exploited, such as in Superman's case, the four prior films that would carry a lot of weight. The other is what I'll call the adaptability of the character to a film. What is the film?

Third, and I think very importantly, is the notion of whether or not the character is a movie star. I guess that's the best way to put it. As prominent as a character may be, it doesn't necessarily mean that it translates into the basis for a successful movie.

The current trend, and the trend that's been in existence at least since 2002 and maybe earlier, maybe 2000, starting with X-Men, 2002 is when Spiderman -- the first Spiderman was released, is that audiences are interested in characters with flaws, darker characters than Superman. Superman is flawless except for his -- except for kryptonite. And that's, I guess, why the creators of Superman Returns used kryptonite as their plot device, and now that's been done.

So I don't know how you now make a film about Superman that fits in with the current trend for what audiences are interested in.

MR. BERGMAN: Thank you, sir.

Your Honor, I just have a few exhibits to enter into evidence, and at that point we will rest.

THE COURT: Very well. Why don't we have some further foundation with Mr. Toberoff.

MR. TOBEROFF: I just have some questions.

THE COURT: Some questions. You may proceed.

RECROSS-EXAMINATION

BY MR. TOBEROFF: Q: Mr. Gumpert, you mentioned that the Shuster termination relating to the Superman copyright interests of the other co-author of Superman, Joseph Shuster, would be effective as 2013.

Do you recall that?

A: Yes

MR. BERGMAN: Objection. Beyond the scope of the redirect.

THE COURT: Sustained.

MR. TOBEROFF: No further questions, your Honor.

THE COURT: I take it there's nothing further for the witness?

MR. BERGMAN: Nothing further of the witness.

THE COURT: You are excused, sir. Thank you.

THE WITNESS: Thank you very much.

THE COURT: All right. As far as exhibits?

MR. BERGMAN: The additional exhibits we'd like to offer in evidence, your Honor, are Exhibits 1002, 1026, 1027, 1028, 1029, 1030, 1085, 1086, 1093, -94, and -95, and -96, all relating to Conan. And 1102, 1103, 1104, 1105, 1106, and 1107.

THE COURT: They relate to what?

MR. BERGMAN: To go back to the beginning, the 1002 relates to Justice League of America.

1026 and -27 are participation return statements from Warner Brothers to DC regarding the agreements in question. agreements we've been discussing.

1030 relates to the 1979 Batman agreement.

Exhibits 1085 and 1086 relate to Tarzan.

Exhibits 1093 through 1096 relate to Conan.

Exhibits 1102 relates to the Tarzan agreement.

1103, to Gossip Girl.

1104, to Human Target.

1105 through 1107 relates to Iron Man.

THE COURT: Any objections?

MR. TOBEROFF: Your Honor, may I have a moment to review these exhibits?

THE COURT: Yes.

MR. TOBEROFF: Thank you. Your Honor, regarding 1026 to 1027, no objection.

1030 --

THE COURT: What about 1002?

MR. TOBEROFF: I was going to do the no objections. You want me to do them in order?

THE COURT: Please.

MR. TOBEROFF: Okay.

THE COURT: And state the objection.

MR. TOBEROFF: 1002, there's been no testimony whatsoever on either side regarding that agreement. So the objection is lack of relevance. No foundation for the agreement.

1026 and 1027, no objection. 1028, the Watchmen agreement, and if I may just skip over one for a moment. 1085 to 186, the Tarzan agreement, 1093 to 1096, the Conan agreement. 1102, again, Tarzan. 1103, Gossip Girl. 1104, Human Target. And 1105 to 1107, the Iron Man agreements, the objection is relevance. Plaintiffs offered testimony in the form of expert opinion of Mark Evanier that none of these properties are anywhere near comparable to Superman in stature, commercial track order, literary or cultural prominence.

We presented the expert testimony of Mr. Halloran, who opined similarly to Mr. Evanier from the perspective of an entertainment industry executive and expert of the defendants offered no evidence whatsoever to rebut that, offered no evidence whatsoever as to whether these characters or properties are anywhere as comparable to Superman.

So if they are not comparable to Superman and they contain -- and we have evidence saying they contain lesser terms to the Superman agreement, they have no relevance because the lesser property with lesser terms can only be expected and doesn't shed light on the issue before the Court.

The Exhibit 1030, the 1979 Batman agreement, no objection to that.

THE COURT: Mr. Bergman?

MR. BERGMAN: Your Honor, all of the agreements to which counsel is objecting were all discussed during the course of the trial. Our witnesses made reference to their comparability. Mr. Gumpert just made references to comparability. We have admitted in without any objection all of the agreements that the plaintiffs have offered.

Obviously, the weight to be given to any of these agreements is a matter for your Honor to determine, just as the relevance of them is for your Honor to determine. To argue that Iron Man and these other agreements aren't relevant to the issue is to ignore what we've been doing for the past two weeks.

THE COURT: What about 1002? Counsel, there's no testimony as to the Justice League action heroes.

MR. BERGMAN: That may be true, your Honor. We had a tendency throughout the proceeding to deal with the animation agreements as a group. And that is one of the animation agreements, and I won't represent to the Court, but I believe I asked Mr. Levitz about it, but I don't make that representation.

THE COURT: Anything further?

MR. BERGMAN: Nothing, your Honor.

THE COURT: All right. With respect to

Exhibit 1002, I'll sustain the objection. With respect to 1026 and 1027, they are admitted without objection. With respect to 1028 and 1029, the objection is overruled. The argument goes to the weight to be assigned to the evidence.

1030 is admitted without objection. 1085, 1086, 1093, 1094, 1095, 1096, 1102, 1103, 1104, 1105, 1106, and 1107, the objection is overruled. They are admitted. The argument goes to the weight to be assigned to the evidence.

Anything further from the defense?

MR. BERGMAN: No, your Honor.

THE COURT: You rest?

MR. BERGMAN: We rest.

THE COURT: Any rebuttal from the plaintiff?

MR. TOBEROFF: Our only rebuttal, your Honor, is we would also, in light of your Honor's ruling just now regarding the admission of these exhibits, we'd ask for admission of the Harry Potter agreements that have been consistently referred to in this case, which are Exhibits 1097 to 1099. Defendants offer those exhibits, and we have no objection.

THE COURT: Counsel?

MR. BERGMAN: Your Honor, we have the same sealing issue with respect to those agreements, your Honor. But given that there is this provisional order, I have no objection.

But I would like to reserve the right to withdraw them if they are not going to be put under seal.

THE COURT: Very well. They are admitted. 1097 and 1098 and 1099, the provisional sealing applies to those exhibits.

(Exhibits 1026, 1027, 1028, 1029, 1030, 1085, 1086, 1093, 1094, 1095, 1096, 1102, 1103, 1104, 1105, 1106, and 1107 received in evidence.)

THE COURT: We'll take up the issue of sealing as soon as I receive the opposition from the plaintiffs.

MR. TOBEROFF: And the only thing left in rebuttal is I would respectfully ask your Honor to revisit one exhibit in which there was a certain amount of confusion in discussing it relating to your Honor's prior testimony regarding that exhibit and relate exhibits. And that is Exhibit 327. It was the Red Rabbit agreement.

And the reason I believe your Honor did not admit it was because of an argument by defense -- defendants that a certain paragraph which made reference to the Sum of All Fears agreement, which your Honor also has before it, without the Sum of All Fears agreement, it would be rendered incomplete.

THE COURT: Right.

MR. TOBEROFF: And plaintiffs would submit that your initial ruling regarding the Sum of All Fears agreement was that it would be admitted for reference

purposes. And given that you have it and you can refer to it and would like these agreements before you, I believe it's -- if the Sum of All Fears agreement is looked at for reference purposes, there's no problem remaining regarding the Red Rabbit agreement. And I would ask that that be admitted along with these other agreements.

THE COURT: Counsel?

MR. PERKINS: Your Honor, we have a different view of that. We don't believe that the Sum of All Fears agreement, first of all, should be looked at for reference.

It is incomplete. And second of all, we don't believe that it cures the problem with Red Rabbit. It's simply incomplete.

They are both incomplete, and we respectfully request that they not be admitted.

THE COURT: How is the Sum Of All Fears that we have here for reference incomplete?

MR. PERKINS: Well, if you'll recall, your Honor, we tried to put the Sum of All Fears agreement into evidence, and Mr. Toberoff objected strenuously to that. And he said that the reason he hadn't put it in was not because the terms were less favorable as we had posited, but rather that there were a number of pieces missing to that document.

THE COURT: Fine.

MR. TOBEROFF: Your Honor, if I may, using an agreement for reference purposes --

THE COURT: I don't understand this for reference purposes. Either an exhibit is in, and I take the exhibits, I go back in my chambers, and I have the exhibit. I don't have some document out here for reference purposes. It's either in or it's out. And the Sum of All Fears is out. On your objection; correct?

MR. TOBEROFF: Actually, the Court's response was that you were going to -- I may not be using the --

THE COURT: You objected to the Sum of All Fears being introduced; correct?

MR. TOBEROFF: I objected. And over that objection, the Court -- we read from the record -- stated that it would take the Sum of All Fears agreement for purposes of -- maybe reference is the wrong word. But my memory was that

something was stated to the effect of you were going to use it because the other agreements that were in evidence or that had been identified for admission into evidence would make reference to it.

THE COURT: Let's do it one way or the other. Is it going to come in, or is it going to come out from your perspective?

MR. TOBEROFF: In.

THE COURT: I'm not going to refer to something that's outside the record. It's either in or it's out at this point. Now that the trial is over.

MR. TOBEROFF: I think at this point --

THE COURT: Do you withdraw your objections?

MR. TOBEROFF: Yes, I do, your Honor.

THE COURT: All right. Let's bring the Sum of All Fears in and Red Rabbit. They are both in. Let's move forward. What exhibit is the Sum of All Fears?

327 is in. The Sum of All Fears is in.

(Exhibits 327 and 1119 received.)

MR. PERKINS: Your Honor, the defendants introduced it, and we gave it a number, and I left that piece of paper at the hotel. I apologize.

MR. TOBEROFF: We can find it in the transcript if we have a moment.

THE COURT: Find it in the transcript and the record is clear that that document is coming in. Just be sure to let the courtroom deputy know what that document number is. Is there anything further from the plaintiff?

MR. TOBEROFF: No, your Honor.

THE COURT: Very well. Anything further from the defense?

MR. BERGMAN: No, your Honor.

MR. PERKINS: Actually, yes, your Honor. I have two questions about the argument.

THE COURT: Yes.

MR. PERKINS: What time on Tuesday, and how much time are the parties being allotted?

THE COURT: Well, let me ask you this. It now turns out that the trial that we thought we were going to have next week has been continued. So I don't have

trial on the 26th, which means you don't get a week to argue this case next week because I have a lot of work to catch up on and a few other matters to turn my attention to. But I will give you a reasonable amount of time on Tuesday.

How much time do you need for your -- do you anticipate needing for your closing argument?

MR. BERGMAN: An hour and a half at the outside.

THE COURT: And Mr. Toberoff?

MR. TOBEROFF: Within two hours, your Honor.

THE COURT: Okay. That sounds reasonable. What we'll do is we'll start at 10:00. And I'll hear the closing argument from the plaintiff, and then we'll take lunch, and I'll hear the closing argument from the defense. And then you'll have a brief period of rebuttal.

Counsel?

MR. BERGMAN: And may I assume, your Honor, that even though we underbid by half an hour, that we would have an equal time if necessary.

THE COURT: Thank you, Counsel. I will have a hearing on an ERISA matter at 9:00, but that should definitely be done by 10:00. Thank you all, and let's just make sure that we have this exhibit number to the courtroom deputy and there's agreement on what's in. I think there is.

The record should be clear, but let's make sure we have that agreement before we leave the courtroom tonight. I look forward to seeing you next Tuesday.

(Proceedings concluded at 4:20 P.M.)

TRIAL DAY 11

A.M. Session

Tuesday, May 19, 2009

Plaintiff Closing Arguments

THE CLERK: Calling calendar item number two, Case Number CV 04-08400-SGL, Joanne Siegel, et al., versus Warner Bros. Entertainment, Inc., et al. Counsel, please state your appearances for the record.

MR. TOBEROFF: Marc Toberoff for plaintiffs.

MR. WILLIAMSON: Nicholas Williamson for plaintiffs.

MR. ADAMS: Keith Adams for plaintiffs.

MR. BERGMAN: Michael Bergman for the defendants.

MR. PERKINS: Patrick Perkins for the defendants.

MS. MANDAVIA: Anjani Mandavia for the defendants.

THE COURT: Good morning to you all. We're on calendar this morning for closing arguments in this trial. Mr. Toberoff, you may proceed first.

MR. TOBEROFF: Thank you, Your Honor.

Before I begin, I'd just like to take this opportunity to introduce the Court to the plaintiffs in this case, Jerry Siegel's widow, Joanne Siegel; and his daughter, Laura Siegel Larson, who are here today with us.

CLOSING ARGUMENT - PLAINTIFFS

MR. TOBEROFF: In this first phase trial, the issue before us is whether equity shall permit defendants to shield a large portion of their profits derived from their Superman copyrights based on corporate formalities, when in practice, DC and Warner Bros. comprise and function as a closely-knit, integrated entity.

The objective test, fashioned by this Court, is whether the Superman film and TV agreements entered into in 2001 and 2002 by DC, with its owner, Time Warner Entertainment Company, TWEC, reflect fair market value for the rights, quote, transferred from DC Comics to TWEC, end quote, order Page 8, Line 23.

Plaintiffs' objective analysis, as presented at trial, is comprised of three basic parts;

First, an analysis of the tremendous market value of Superman film and television rights in 2001 and 2002, when the agreements were entered into;

Second, an analysis of the terms in the Superman agreements, which tend to greatly favor Warner Bros. to DC's detriment, and failed to comport with industry custom and practice;

Third, a detailed comparison of the terms in the Superman agreements to the terms of arm's length transactions for other high-profile properties to demonstrate custom and practice and what buyers will indeed pay in the competitive open market for valuable intellectual properties.

First I'll turn to the market value of Superman rights in 2001 and 2002, as demonstrated at trial.

Plaintiffs showed that Superman has unparalleled value. Plaintiffs' comic book historian Mark Evanier first walked us through Superman's history of near continuous commercial exploitation, over seven decades, from comic books to radio to television to films, and throughout ubiquitous merchandising, to give the Court an overall sense of Superman's demonstrable market power and status as a highly-branded franchise property. I refer the Court to the transcript at Page 46, Line 5, to Page 50, Line 24:

In the course of trial, defendants had to concede that in entering into the Superman film agreement, they not only adopted the financial terms of the 1974 Salkind agreement, but they proceeded to lock those terms in for 34 years, until 2033.

Plaintiffs' comic book historian Mark Evanier, therefore, contrasted the waning popularity of Superman in 1974, when Superman was at its nadir, to Superman in 2001-2002, when interest in comic books and superheroes was sky-rocketing due to the enormous success of major films based on comic books.

I refer the Court to the transcript at Page 55, Line 25, to Page 57, Line 2.

Mr. Evanier's detailed account of Superman's waning popularity due to the counter-culture revolution in the late '60s and mismanagement by DC was not only credible, it comported with the statements and images in defendants' own Superman documentary, 'Look Up In The Sky,' which is Exhibit 303.

Defendants, at trial, attempted to distance themselves from this documentary, but such attempts were unconvincing, as their fingerprints are all over the documentary. Warner Bros. financed and distributed the documentary. DC and Warner Bros.'s logos appears on the cover.

It contains interviews with Paul Levitz. And even defendants' designated comic book expert, Mark Wade, is interviewed in the documentary. Mr. Levitz admitted all of this at trial, and even that DC supplied materials for the documentary and was submitted rough cuts of the documentary for substantive review.

Though, perhaps, a cliché, the phrase 'actions speak louder than words' reverberates through this case, when defendants' actual conduct is compared to the many after-the-fact rationalizations advanced by them at trial.

Here, Mr. Levitz admitted that from 1974, he, quote, had a lovely note in my file from Warner Bros. turning down Superman in the early 1970s and saying, quote, "go license it out to Alex Salkind; we don't think anyone will care."

That's Exhibit 150, and at the transcript at Page 223, Line 23, to Page 224, Line 4.

Mr. Levitz also testified that Ilya Salkind, the independent producer DC ended up transacting with in 1974, had a particularly unsavory reputation due to many alleged improprieties, including a prior litigation involving a film based on The Three Musketeers.

If Superman film rights were so valuable in 1974, as defendants contend, why would DC have transferred their rights to Mr. Salkind of all people?

In 1974, not only had Superman reached a low point, but comic books unfortunately had no track record whatsoever as source material for films.

By contrast, in 2002, when defendants' Superman film agreements were entered into, Superman and Batman had already proven themselves as major film franchises, and the first Superman film in 1978 and the first Batman film in 1989 were huge hits.

Moreover, plaintiffs showed that by 2002, a string of recent hits based on comic books, such as Men in Black, Blade, X-Men, and the phenomenally successful Spider-Man, had been released.

At trial, we walked through with Mr. Levitz the huge worldwide box-office grosses of these films and their admitted success.

I refer the Court to the transcript at Page 1194, Line 1, to Page 1198, Line 6; and to Exhibits 61 and 335.

Mr. Levitz himself said in 2003, quote, we're coming to a point where the interest in comics by other media is probably higher than it has ever been. Last year, comic book properties did about twice the box office that they had ever done before.

I refer you to the transcript at Page 219, Line 20 to Line 25, quoting Exhibit 8.

At this period, when the Superman agreements were entered into, every studio in Hollywood was literally scrambling to develop superhero films. Yet, DC refused to enter this booming marketplace before signing the Superman film and television agreements. It is in this climate that DC, as of November 1999, when the 1974 Salkind agreement had finally ended, and it fortuitously had the rights back to Superman, admits this booming marketplace. And in their hands was arguably the most famous and lucrative comic book superhero of all time.

What did DC do? Did it solicit a single offer from any of the other major studios; Sony, Disney Paramount Universal?

No.

Did it test the value of Superman in the open market, trying to create a bidding war while offering Warner Bros. a right of first refusal?

Not a chance.

Warner's witness Steve Spira testified that every meaningful author of a best-selling novel will try to create an auction for the film rights to that novel.

That's at Page 1300 of the transcript, Line 9 through 25.

Instead of putting the property out to bid, or even just testing the property in the market where superheroes were now worth big money, DC and Warner Bros. proceed in 2002 to lock up Superman film and television rights for 34 years at 1974 Salkind rates; low upfront payment and no obligation to even exploit the property, instead of testing the property on the open market.

Defendants' anti-market behavior reflects their closely-affiliated corporate structure.

Paul Levitz is clearly an intelligent man, so what does this counterintuitive anti-market behavior really mean?

It means what we already suspect from the fact that DC is owned by and reports to TWEC: At the end of the day, DC and Mr. Levitz could have conversations with Warner Bros., even negotiations of sorts, but they obviously did not call the shots. Warner Bros. did; and their lopsided arrangement with Warner Bros., in an internal transfer of valuable corporate assets, has little to do with fair market value.

From 2002, Spider-Man grossed $820 million worldwide, and a string of successful superhero films followed, with

Men in Black II in 2002, Blade II in 2002, X-Men II in 2003, and Spider-Man 2 in 2004.

I refer the Court to Exhibit 335.

To put this heightened marketplace in perspective from the vantage point of DC and Warner Bros., plaintiffs showed that development of a major feature film takes approximately, at a minimum, three to five years, if not longer.

Alan Horn, Warner Bros. president and chief operating officer, testified that studios like Warner Bros. closely tracked development at other studios, and through release schedules, are aware of competitive releases 6 to 24 months in advance.

I refer the Court to the transcript at Page 131, Lines 7 through 18.

This means that in forming a conception of the marketplace, not only do we look at the films that were released prior to the entering into of the Superman film and TV contracts in 2001 and 2002, we look at the films that came out afterwards, because the studios, in tracking each other's development and in looking at these release schedules, are aware of the upcoming competition and the appetite in the marketplace for this type of product.

Plaintiffs' industry expert Mark Halloran confirmed the same, adding that competing studios' awareness of upcoming films is heightened by advanced screenings, marketing, and word of mouth.

Transcript at Page 311, Line 19, to Page 312, Line 6.

Mr. Evanier testified to the excitement and expectation of upcoming superhero movies years in advance at Comic-Con, the annual comic book convention attended by over 150,000 people, and testified to Hollywood's increasing presence at Comic-Con since the mid 1990s, due to the rise of comic book-based movies.

I refer the Court to the transcript at Page 35, Lines 1 through 9; Page 74, Line 13, to Page 77, Line 5.

Mr. Levitz himself confirmed DC' extensive presence at Comic-Con each year.

Transcript, Page 1020, Line 25, to Page 1022, Line 1.

Thus, in 2002, DC and Warner Bros. were not only well aware of the successful comic book adaptations released before they fully executed the Superman film agreement on May 9, 2002 -- the date of that is stipulated fact number two -- but were well aware of the highly-anticipated sequels

Men in Black II, Blade II, X2, The Hulk, Spider-Man 2, and Fantastic Four in 2005.

After the tremendous success of these additional movies, particularly Spider-Man's unbelievable grosses, DC proceeded in February of 2004 to enter into its Batman agreement, which is Exhibit 1, assigning therein DC's audio visual rights to Batman for the remaining life of any Batman copyrights, again at 1979 rates, with no obligation on Warner's part to exploit the Batman franchise.

Mr. Levitz testified that in 1999 to 2004, although Superman was valuable, Batman was even more valuable. Yet, the Batman agreement is for an even longer duration than the Superman agreement, and is for even less money than the Superman agreement, $175,000-a-year option versus a $500,000-a-year option, as an advance against the same 5 percent contingent gross participation in the Superman agreement.

Now, in stricken nonresponsive testimony, Mr. Levitz alluded to DC being locked into disadvantageous terms pursuant to a prior agreement that Warner Bros. succeeded to; but then why a new agreement from DC in 2004, which, as Mr. Levitz admitted, superseded the prior 1979 agreement?

A closer comparison of the 1979 Batman agreement to the 2004 Batman agreement, Exhibit 1, gives us the answer.

The 1979 Batman agreement is Exhibit 1030. And when you compare it to Exhibit 1, the 2004 Batman agreement, it reveals that DC's rights grant in 1979 only pertained to Batman feature-length films, and that the rights grant in 2004, in the Batman agreement, were of all audio visual rights and the grant is far broader, mirroring the broad grant in the 2002 Superman agreement.

Moreover, pursuant to the 1979 Batman agreement, 100 percent of video revenues would be included in gross revenues for purposes of DC's 5 percent

gross participation, as there is no provision in the 1979 Batman agreement for video royalties.

The 2004 Batman agreement includes a 20 percent video royalty, like the one in the 2002 Superman agreement, effectively reducing DC's 5 percent gross participation in the 1979 Batman agreement to 3 percent, since video royalties amount to roughly 50 percent of worldwide revenues.

The 1979 Batman agreement contains a holdback on DC's exploitation of Batman television rights during production of a Batman film, and for just three years after the release of the film.

This equals roughly four years. That's it.

The 2004 Batman agreement, like the 2002 Batman agreement, freezes television rights during the lengthy term of the agreement, so that such rights can only be exploited with Warner Bros.

What did DC get in 2004 when superheroes were all the rage for this much broader Batman grant, including valuable new media and Internet rights to Batman, and their agreement to a reduced 20 percent video royalty, which reduced their 5 percent gross participation to effectively 3 percent?

They got a $25,000 raise in the yearly option payment. In the 1979 agreement, it's $150,000. In the 2004 agreement, it's $175,000. That's it.

Warner Bros. obviously needed to redo the Batman agreement so the rights transfer comported with the multiple new media platforms in which Warner Bros. exploits intellectual property, and to make sure that a 20 percent video royalty appeared in the agreement.

But where was DC's purported internal ability to fairly simply work things out with Warner Bros. in 2004, or 2002, for that matter, as testified to by Mr. Levitz?

After all, Batman and Superman, at this point in time, were DC's jewels in the crown; and DC, in large, paid a very large part in branding these properties, through 70 years of exploitation.

Where in 2004 was DC's ability to achieve fair market value for the many participants who helped make Batman what it was, as testified to by Mr. Levitz?

Again, I have no doubt that Mr. Levitz has the best intentions. I have no doubt that he tried his hardest to achieve the best terms he could under the affiliated structure with Warner Bros.

But unfortunately, the Batman agreement, like the Superman agreement, demonstrates that it is simply not his call.

We showed at trial that DC's library is a captive asset of Warner Bros. Defendants implied, but never stated, that Mr. Levitz was somehow free to take Superman where he pleased. However, the evidence proffered by plaintiffs paints a very different picture.

Gregory Noveck, DC's senior vice president for creative affairs, admitted that DC has a first-look deal with Warner Bros. -- at Page 182, Lines 17, to Page 183, Line 5 -- in that Warner Bros. must completely pass on a property before DC can offer it to a competing studio.

Several internal memos that Mr. Noveck wrote, and which are admitted into evidence, including Exhibits 92, 187, and 191, specifically describe how DC must first pitch its products to Warner Bros. before it can take them elsewhere.

It's more than that. DC must wait for a final rejection before it goes outside the Warner Bros. family, a process that often takes several years. Mr. Noveck confirmed that DC has to shop to Warner Bros. with respect to even its most minor characters.

I refer to Exhibit 191, and to the transcript at Page 187, Line 4, to Page 189, Line 23.

If they have such a stranglehold even on DC's minor characters that we've never heard of, one can just imagine Warner Bros.' unspoken restrictions with respect to DC's major characters like Superman, Batman, and Wonder Woman, and DC's leading characters comprising that Justice League of America cover that we looked at, Exhibit 334.

As Mr. Levitz testified at Page 1204, Lines 3 to 23; and Mr. Noveck testified at Page 196, Line 11 to 19; and Page 201, Lines 3 to 23; and as shown by DC's media status report admitted into evidence as Exhibit 306, every notable DC character is covered and bound by an agreement with Warner Bros. In fact, Mr. Levitz reluctantly agreed that roughly 90 percent of DC's properties in development are under agreement with Warner Bros.

Transcript, Page 1204, Lines 3 to 23.

In practice, there can be no doubt about it, DC functions as Warner Bros.' IP stable. DC's media status reports date back to at least 2002; and they have all been admitted into evidence as Exhibits 93 to 108.

Mr. Noveck discussed in Exhibit 191 how the character Metal Man was first pitched to Warner Bros. in 2004, and by 2006, two years later, DC had still not gotten a response from Warner Bros. one way or the other.

Transcript 187, Line 4 through 19.

He admitted in Exhibit 187 that if DC takes a project to another studio, even after waiting two or three years, Warner Bros. would still have the right, if it so chooses, to co-finance the project and then negotiate with the other studio how distribution rights to the film and television project would be divided between them.

Transcript 182, Line 25, to 183, Line 5.

This sort of encumbrance obviously gravely devalues the property in the open market.

Turning back to Superman's extraordinary value.

Let there be any doubt that Superman is an incredibly valuable property, plaintiffs had Mr. Levitz admit this at his deposition, and thus at trial. When asked at trial whether Superman is an enduring cultural icon of extraordinary value, Mr. Levitz responded, quote, absolutely.

Transcript 217, Lines 19 through 22.

But plaintiffs did not stop at that. Plaintiffs demonstrated step by step that through the convergence of a number of trends, comic book superheroes in general, and Superman in particular, have become extraordinarily valuable in 2001-2002, when the relevant Superman agreements were entered into.

The first trend, demonstrated by plaintiffs, is the rise of the tent pole picture, a phenomenon for which

Warner Bros. is particularly well known. As Warner Bros. president and COO Alan Horn explained, quote, tent pole pictures, end quote, hold up the studios entire annual slate of pictures; appealed to a broad, quote, four-quadrant audience, end quote, young, old, male, female; are usually very expensive and are aggressively marketed for release during a period like summer where people can attend.

I refer the Court to the transcript at Page 121, Line 8, to Page 122, Line 3; Page 133, Line 12 to Line 23.

Mr. Horn admitted what was obvious, that the unusually expensive and ubiquitously-marketed film Superman Returns was intended as a big summer tent pole picture.

I refer the Court to the transcript at Page 121, Lines 20 through 21; and to Exhibits 233 and 279, documents produced by the defendants which say exactly that.

The second converging trend in the period in which these agreements were entered into was the rise of the franchise picture phenomenon, where sequels dominate the film marketplace. Although franchises have existed before, any movie-goer will know that one movie after another today is a franchise, whether it's Shrek 5 or Spider-Man 3.

The Superman property, which was episodic in nature, and which existed as a branded franchise character for decades, was particularly well suited for exploitation in a string of franchise motion pictures like Batman, X-Men, and Spider-Man.

Mr. Horn also admitted that Superman was viewed as a major franchise film property, as is clear from Warner Bros.' marketing study introduced into evidence, and from Mr. Horn's testimony that reinvigorating the franchise was one of his key objectives when he came to Warner Bros.

Transcript, Page 114, Line 21 through 24;

Exhibits 233, 279, 293.

The third converging trend demonstrated by plaintiffs is the focus by studios on what are known as "branded properties"; namely, underlying properties that have instant recognition and goodwill attached to them.

Through the testimony of Alan Horn and plaintiffs' industry expert Mark Halloran, plaintiffs showed the essential importance and value of this pre-awareness in anticipation in an industry where the fate of a $300 to $400 million investment in a major motion picture often depends on its opening weekend grosses.

I refer the Court to Exhibit 233, 293, and the transcript at Page 126, Line 22, to Page 127, Line 16.

This pre-awareness was so strong that dozens of Fortune 500 companies signed up to be a part of Superman Returns, as demonstrated by Exhibit 233 and noted by Mr. Horn in his testimony.

The fourth converging trend, already alluded to, is the rise of comic books as the source material for franchise motion pictures. Plaintiffs demonstrated through expert testimony that this was no accident.

Transcript, Page 313, Line 15, to Page 314, Line 6.

Comic books, due to their inherent visual qualities, export well and are very well suited to branding and ancillary exploitation, such as video games, merchandising, and new media.

Transcript, Page 291, Lines 7 through 18.

Comic books are also naturals for franchise motion pictures because they are episodic in nature.

Transcript, Page 291, Lines 19 through 24.

The subject and story lines of comics are also naturals for commercial action-driven films. Moreover, the advanced special effects technology has made it finally possible to realize the fantastical characters and story line in comics in a market where special effects themselves have become a major star component of a film.

Transcript, Page 297, Lines 7 to 14.

Finally, in a world where top movie stars command a fee of $20 million against 20 percent of first-dollar gross, the current perception is that special effects-driven superhero movies do not need movie stars in the lead, as demonstrated by all of the Spider-Man, X-Men, and current Batman, and the Superman films in this decade.

Transcript, Page 292, Lines 14 to 23.

However, when looking at the value of comic book properties, DC looked at a 1993 X-Men agreement underlying the successful films in order to find a market -- rather than to find a market by the tremendous success of the films before it in 1999 and 2002.

It makes no sense that you would look at old contracts underlying successful films in 1999 and 2002, and then proceed to lock in 1974 terms rather than

measure the market leverage by the success of recent films. It just doesn't add up.

Defendants engaged in a series of rationalizations regarding the Superman films. Defendants insisted that due to the declining box-office returns of the sequel to the first hit, 1978 Superman film starring Christopher Reeve, that Superman was not valuable.

First, as I've said, it is undisputed that the 1974 Superman film was a major, major hit. The figures show that the gross of the first sequel, Superman II, of $108 million was only 20 percent less, and that Superman III was about half of that.

Exhibit 61.

Plaintiffs' expert Mr. Halloran testified that when he worked at Universal in the 1985-1990 period, it was expected that sequels would do about 1/3 of the business of the preceding film, a trend which differs greatly from today, when sequels like The Dark Knight actually exceed the grosses of preceding films.

Transcript, Page 279, Line 11, to Page 281, Line 7.

Finally, I think the Court can take judicial notice of the fact that the anti-nuclear film Superman IV was a flop, and that it is universally accepted as one of the worst movies ever made.

I believe most people are smart enough in such an instance to blame the movie, not Superman.

Batman exhibited the same downward spiral in the 1980s. The four Batman movies followed a similar trend in the 1980s and 1990s, what defendants dramatically dubbed a downward spiral.

Transcript, Page 1345, Line 17 to Line 20.

In fact, the last film, Batman & Robin, in 1997 was also a critical and financial flop, although it failed to topple Superman IV's blooper status.

I refer the Court to the transcript at Page 130, Lines 3 through 8.

The downward trend in Batman did not stop Warner Bros. from rebooting the Batman franchise with Batman Begins in 2004 and The Dark Knight in 2008, which had a staggering worldwide gross of over $1 billion.

Exhibit 335.

In fact, the ability to reboot is part of the value of an evergreen franchise property like Batman and Superman.

In apparent desperation, defendants have disparaged their own property, arguing that in 2002, Superman was a dying character, and that Superman was a tired character, and that he just wasn't cool. Well, I think Superman is cool. However, I have serious doubts whether I, Mr. Bergman, Mr. Spira, or Mr. Gumpert are qualified on the subject of coolness.

I refer the Court to the transcript at Page 1405, Lines 7 through 14.

What we do know is that Superman is a beloved cultural character, and that there is tremendous affection and goodwill associated with the character and his story. You can clearly see that on the faces of Paul Levitz, Mark Evanier, and Alan Horn when at the end of Alan Horn's testimony, he confessed, quote, I happen to love the Superman character myself, so I have a kind of bias in favor of Superman; I like Superman.

Transcript, Page 153, Lines 20 through 21.

Defendants' own actions -- and this is the most important part -- demonstrate Superman's value in the marketplace. Superman's purported downward spiral didn't seem to stop Warner Bros. in 1993 from seeking out and buying the remainder of the 1974 Salkind agreement. In Mr. Levitz's own words, quote, it was our belief and Warner Bros. belief that there was still significant opportunities to exploit the Superman rights that had been granted to Salkind, end quote.

I refer the Court to the transcript at Page 1077, Lines 10 through 12.

Warner Bros. didn't hesitate in investing an unprecedented $60 million into tenaciously developing a new Superman film based on this "tired" character. From 1994, and continuing, despite repeated setbacks, until the release of Superman Returns in 2006, Warner Bros. continued to tenaciously develop the property and spend a fortune on it.

It is admitted that Warner Bros. spent at least $400 million on the production and marketing of Superman Returns. Mr. Bergman, after proclaiming that, quote, Superman had fallen off his perch, at Page 24, Lines 16 through 17, announces a moment later, to support his merchandising argument, that Warner Bros. proceeded to invest a staggering $424 million to make and market Superman Returns, oblivious to the contradiction.

Transcript, Page 26, Lines 6 and 7.

Again, the cliché is ringing in our ears, 'actions speak louder than words.'

With a $60 million and extra in development costs, that brings Warner Bros.' investment to nearly half a billion dollars in Superman Returns. In addition to that, commencing in 2001, Warner Bros. has spent roughly a half a billion dollars on the production of the Smallville television series.

It is axiomatic that studios are in the business to make money; and in hearing Steve Spira, that Mr. Brett Paul's bottom line, we know this is true.

I refer the Court to the transcript at Page 1303, Lines 8 through 12.

Studios do not invest a half a billion dollars in downward spirals or tired characters. They invest in things when they believe they have incredible value, or as Mr. Levitz agreed, quote, extraordinary value, end quote.

Transcript Page 217, Lines 17 to 22.

Even Mr. Spira acknowledged that Superman, quote, obviously could have led to a series of films, end quote, and would list all boats in the company, including the licensing and publishing boats.

Transcript, Page 1260, Lines 7 through 15.

If Superman could elicit this degree of tenacious investment by Warner Bros., just think of what the underlying rights would have gone for in the competitive open market.

Mr. Halloran's opinion of $10 million per film against an escalating 10 percent of the gross starts to come into focus as we see the big picture.

Please excuse the pun.

In comparing the terms of other rights agreements, we must engage in a comparative analysis of the nature and the value of the properties in question. The best comparisons are to other high-profile properties negotiated at arm's length in the competitive open market.

Plaintiffs informed the Court of their objective methodology from the start. Deals with better terms for properties of equal or less value than Superman will squarely demonstrate that the Superman agreements were not for fair market value.

Plaintiffs have offered numerous such agreements into evidence on properties ranging from Hannibal to Lord of the Rings. Deals with equal terms, for

properties of considerably less value, will also tend to show that the Superman agreements were not for fair market value. Plaintiffs offered into evidence deals for properties ranging from Neo-pets to Hasbro board games, to Steel and Birds of Prey, none of which even come close in the value to Superman, but had the same terms in their agreements as in the Superman film and television agreements, respectively.

Conversely, defendants would need to point to arm's length deals with lesser or equal terms for properties of equal or greater value to Superman, something that they absolutely never even came close to doing.

Defendants offered no such agreements. Instead, they have offered agreements for Tarzan, Conan, and Iron Man. These deals for properties far less valuable to Superman at the time they were entered into shed no light whatsoever on the fair market value of the Superman agreements in question, as their lesser terms are only to be expected.

Before turning to the Superman agreements in question, let's dispel the straw man advance by Mr. Bergman in his opening statement.

In analyzing whether DC received fair market value for the Superman rights transfer to Warner Bros., plaintiffs indeed looked to the entire agreement as a whole. After making this accusation, it is defendants that ignore key terms of the agreement, dubiously claiming that provisions of obvious economic imports, such as the lack of any reversions for failure to exploit Superman, or the illusory creative control provisions that fail to protect the Superman brand, are of no economic consequence whatsoever; nor do plaintiffs cherry-pick terms from the rights contracts of other properties, another straw man argument made by defendants. The record reflects one agreement after another presented by plaintiffs that contain in the same agreement multi-million dollars purchase prices and high first-dollar gross participations of 10 percent or greater in the same agreement.

Plaintiffs presented evidence regarding numerous high-level contracts negotiated at arm's length for the film rights to desirable properties. These deals squarely show what studios and other buyers will pay for the rights to properties which they believe are valuable and will generate profits for them, whether it be a novel by a branded best-selling author; a famous, successful musical; a branded board game title like Monopoly or Candy Land; the remake and sequel rights to a popular film franchise like Terminator; a popular video game like Halo; or even virtual Internet pets.

These lucrative agreements and the details of their highly-protected provisions demonstrate the leverage of valuable IP rights in the competitive open marketplace.

The agreements generally follow the same contractual structure comparable to that in the Superman film agreement, although the terms are far more favorable to the rights holder.

Whether option purchase agreements are outright licenses, these agreements can cover the same recurring variables. The agreements apply for a term. They have fixed compensation in the form of option fees and purchase prices, and contingent back-end participations in the form of a percentage of the first-dollar gross from derivative films.

For defendants to dismissively claim with a wave of the hand that these agreements for novels and musicals are absolutely irrelevant as apples and oranges is disingenuous and just a little bit too convenient.

Apples and oranges is an old studio negotiating tactic, at best. The comparison here is not comics versus novels, but branded properties versus nonbranded properties.

Brett Paul, head of business affairs for Warner Bros. Television, testified, as we would expect, that Warner Bros. indeed looks at, quote, other literary properties, end quote, characters that were well known, quote, and, quote, a broad panoply of underlying rights, end quote, when evaluating comparable deals.

Transcript, Page 1216, Lines 14 through 20.

Defendants themselves listed as trial exhibits 23 contracts for properties, as wide-ranging as radio serials, to vintage movies, to novels, to comic books, to

Saturday-morning cartoons, which they asserted were comparable. The only thing these projects had in common, however, were that they had been cherry-picked from Warner Bros.' vast contractual archives for their inferior terms.

Plaintiffs did not have this luxury, and were at a decided disadvantage in coming up with comparable agreements. It took tremendous efforts to ascertain the generally confidential terms of high-level rights deals in Hollywood and then to go out and actually obtain those contracts. Yet, defendants came up with multiple contracts, six or seven contracts, and additional information, on rights deals to prove a point.

All literary properties are unique and can be distinguished from one another, particularly by a savvy negotiator like Mr. Spira, whether it be a spy novel, a science-fiction trilogy like Lord of the Rings, a graphic novel, or a comic book.

Such precedent language and quotes are commonly used as a negotiating tactic. Brett Paul, head of Warner Bros. business affairs, testified that comps are, quote, a very important factor to consider, and when they are expensive, we try to ignore them, and when they are not, we try to enforce them.

Transcript, Page 1217, Lines 14 through 17.

Defendants attempt, in their apples-and-oranges arguments, to ignore or trivialize the obvious market forces that forged the prices in the contracts plaintiffs brought to trial: Leverage, the ability to walk, competition, and bidding wars. Yet, it seeped out in the testimony from their executives. Steve Spira, head of business affairs for

Warner Bros. Pictures, said of bidding wars that, quote, there are so many, it's actually hard to think of examples.

Transcript, Page 1299, Lines 25, to Page 1300, Line 2.

Mr. Spira also said Warner Bros. pays gross when they, quote, can't convince someone we won't pay it to them, suggesting how deals are really done in the competitive marketplace.

Transcript, Page 1265, Line 21.

At the end of the day, once studio negotiating rhetoric is put aside, it's clear that the terms of such arm's length agreements reflect the buyer's ultimate assessment of how profitable the rights acquired will be for it, the competition for such rights, and the greed to which buyers are willing to go to acquire such rights.

A buyer does not pay $10 million up front against

10 percent of the gross because it's acquiring a novel versus a musical or some other type of property. It pays it because it must acquire the property in the open market and believes that despite the lucrative terms of that acquisition, it will be very profitable for the studio.

A buyer does not pay $6 million per film against 5 percent of the gross for the film rights to Battleship or Monopoly because it's a Hasbro board game. It pays this money because it must, in an arm's length negotiation, acquire these

branded titles, and rightly or wrongly believes it will greatly profit from the brand recognition and pre-awareness the properties entail.

After attempting to distinguish agreements for the rights to novels by best-selling authors, defendants admit that top dollar is paid for the film rights to the next Michael Crichton, Tom Clancy, or John Grisham novel, due to the fact that they are, quote, very popular, end quote, and that translates into built-in pre-awareness and a fan base that these branded authors evoke.

I refer the Court to the transcript at Page 1254, Lines 13, to Page 1255, Line 2.

In the case of a Tom Clancy novel, Red Rabbit, which is in evidence, the brand is both the author, Tom Clancy, and the Jack Ryan character he created, as personified by Harrison Ford. Paramount agreed to pay big money for this pre-awareness because the prior Jack Ryan films based on Clancy books, like The Sum Of All Fears and Clear and Present Danger, had been successful.

In the case of the novel Hannibal, Universal agreed to pay big money in the rights contract because it was an adaptable -- not because it was simply an adaptable novel, but because the prior film, starring Anthony Hopkins as Hannibal Lecter, was a huge success, and as a result Hannibal had become a branded character. Defendants themselves elicited this very testimony at Page 888, Line 22, to Page 889, Line 4.

It's the same with Microsoft's popular Halo video game, Terminator, Disney's branded Pirates of the Caribbean theme ride, a Monopoly board game, or a branded comic book franchise like Superman and Batman. These properties have tremendous value in the film business due to their branded pre-awareness and the goodwill they evoke. And that's worth a lot to a studio as a source for tent pole films, where the average marketing budget is north of $100 million.

The studios pay big money for these rights because it's a hedge against risk, and it gives them an advantage on opening weekend right out of the starting gate.

Defendants proceeded to bend over backwards to advance the dubious notion that a single novel by a best-selling author is much more valuable than the entire branded Superman or Batman franchises, arguing that a novel with a fully-realized character is much easier to adapt to film than comic books. As they say in the South, that dog don't hunt.

Major studios don't appear to have any problem successfully adapting comic books to film, as demonstrated by the recent unprecedented success of the X-Men, Spider-Man, Iron Man, and Batman films. Moreover, anyone who has read Robert Ludlum's Cold War novel, The Bourne Identity, will tell you that the only thing it has in common with the movie is it's basic hook or premise, a CIA assassin with amnesia, not its detailed characters or story line. In fact, Hollywood is famous for taking great liberties with underlying works. The versatility of a long-run comic book and the studio's ability to tailor that franchise to its current marketplace and target an audience demographic is a major plus, not a minus.

Defendants, in rebuttal, rely on only five agreements to argue that the terms of the Superman agreement are for fair market value. And for two of these, we don't even have the agreements. All we have is hearsay from a studio assistant about the supposed terms of these rights deals.

The five deals are for Tarzan, Conan, Iron Man, and then The Lone Ranger and The Green Hornet, based on hearsay. However, none of those five properties are in Superman's league. Even though it's obvious, defendants provided extensive testimony, both from our comic book expert

Mr. Evanier and our industry expert Mr. Halloran, on that subject. The Lone Ranger, Tarzan, Conan, and The Green Hornet may be old and known, but that does not translate to the goodwill associated with a famous cultural icon like Superman.

I don't want to disappoint Mr. Bergman, but these are not cultural icons in any respect.

With respect to Iron Man, as Mr. Evanier testified, when the agreement was entered into in 2001, Iron Man was a, quote, lower-tier, end quote, comic book character with no history of significant media exploitation.

I refer the Court to the transcript at Page 84, Line 21, to Page 85, Line 15.

Now, after the successful release of the 2008 film Iron Man, created under an entirely separate agreement not produced by defendants, Iron Man is a much more valuable property.

Defendants attempt to use the awareness of Iron Man today to mislead the Court into thinking Iron Man was comparable to Superman in 2001, when it was nowhere even close to Superman's league prior to the release of the 2008 film.

As to Tarzan, we know of Tarzan. It's been established in the record that there were around 20 Tarzan stories published before 1922, all of which are now in the public domain.

I refer the Court to the transcript at Page 91, Line 11 through 15.

The fact the entire character is in the public domain certainly would affect its value and be reflected in the lesser terms of the Tarzan agreement. Moreover, as testified to by Mr. Evanier, Tarzan declined in the 1960s, and hasn't really recovered since. As Mr. Evanier further testified, Tarzan just doesn't have anywhere near the track record of success that Superman has.

I refer the Court to the transcript at Page 91, Line 24, to Page 93, Line 4.

Turning to Conan, Conan is principally known for a couple of Arnold Schwarzenegger films in the 1980s.

Mr. Evanier testified that Conan has nowhere near the iconic stature or successful track record of Superman.

Transcript, Page 93, Line 5 through 12.

Defendants' own expert was not even aware of Conan's author, Robert Howard, and the copyright status of the many early Conan works, which are widely known to also be in the public domain.

Transcript, Page 1424, Lines 10 through 12.

Turning to The Green Hornet, The Green Hornet, as Mr. Evanier testified, has neither remained popular, nor had the sustained success of Superman.

I refer the Court to Page 81, Line 25, to Page 82, Line 19.

Finally, there is simply no comparison between The Loan Ranger and Superman. As Mr. Evanier testified, and this Court rightly noted, The Lone Ranger really hasn't been around for a while.

Transcript, Page 80, Line 25, to Page 82, Line 12.

Defendants offer no real evidence that any of these properties were even remotely comparable to Superman when the agreements in question were entered into.

The Lone Ranger and The Green Hornet agreements are not in evidence. As mentioned, Mr. Gumpert solely relied on information relayed over the phone and a short e-mail by an assistant at Columbia Pictures in characterizing the terms of the underlying rights agreements.

I refer the Court to Page 1361, Line 16, to Page 1362, Line 22.

Mr. Gumpert did not offer any testimony as to the merchandising terms of either of these agreements, which defendants have consistently stated are crucial with respect to the Superman agreements. Moreover, while Mr. Gumpert was purportedly able to assess the terms for properties like The Green Hornet and The Long Ranger, he didn't retrieve or relay the terms of the rights agreements for Columbia's Spider-Man movies, either before or after the highly-successful Spider-Man films, which renders his conversations with Columbia somewhat suspect, and suggests that what he asked for was their better known properties with the worst terms.

The Court must also keep in mind that while valuing defendants' agreements, defendants produced agreements for all manner of properties, comic books, children's novels, animated television series, and serialized novels; however, defendants did not produce agreements for the film rights to novels by John Grisham testified to by Mr. Spira, nor did they produce agreements for their 2004 film based on the incredibly successful Phantom of the Opera, nor did they produce their agreements with Stephen King for the underlying rights to The Green Mile, which was a best seller and resulted in the 1999 film.

I suggest that these agreements were not produced because they show vastly superior terms than those in the other Warner Bros. contracts that were produced.

With these market forces and converging trends and the tremendous value of Superman in mind, we turn to the terms under which Warner Bros. acquired Superman film and television rights, for what was at that time, the remaining life of the original Superman copyright.

The Superman film agreement is Exhibit 232, and it has the following key terms:

A 34-year term with no reversion, even if

Warner Bros. fails to exploit Superman film or television rights. A fixed initial option payment of $1.5 million for a three-year term, with no other guaranteed payment. Discretionary annual option extension fees of $500,000 a year, escalating to $600,000 in year 14 and $700,000 a year in year 24. A contingent participation equal to 5 percent of Warner Bros.' worldwide gross, but computed with a video royalty of only 20 percent, meaning that only 20

percent of video revenues are included in worldwide gross for purposes of computing DC's 5 percent participation.

DC reserved television rights in the agreement, but for the entire 34-year term could only exploit those rights with a Warner Bros. company. DC reserved merchandising rights subject to a 50/50 split with Warner Bros. for any film-related merchandising revenues, and also subject to DC's long-standing exclusive agreement with Warner Bros. Consumer Products, which gives Warner Bros. an off-the-top fee of an additional 25 percent.

There are also issues in the agreement regarding the creative control provisions and the warranty and indemnification provisions.

As we go along, I'll be comparing these terms to the terms found in the arm's length agreements that we have in evidence, and examined in great detail.

When you look at the arm's length agreements that we have placed into evidence, keeping in mind the nature of the properties, each of those agreements are for far better terms than those contained in the Superman film agreements, for the Superman property.

This brings us to another important point.

Mr. Bergman stressed in his opening statement and throughout defendants' case-in-chief the large amounts of money that DC actually received under their agreements from Superman Returns and Smallville. This is clearly intended to prejudice the trier of fact and is not probative. As explained by Mr. Halloran, and seemingly acknowledged by this Court, the only objective way to judge the fair market value of a property and the terms of an agreement pertaining to that property is at the time the agreement was entered into.

I refer the Court to the transcript, Page 325, Lines 11 through 20.

You do not judge the terms of these agreements in hindsight, depending on whether Warner Bros. actually made a film or TV series, on how successful it happened to be or unsuccessful it happened to be, or in what respect it was followed by another film or not followed by another film.

One can only assume that if DC has only a 5 percent gross participation, and the market for a branded franchise of Superman's value would be at least 10 percent, that DC would have ended up making twice as much money.

For the same reason, defendants exercise of having both Mr. Halloran and Mr. Gumpert plug in the financial results from the single 2006 Superman Returns

movie into agreements for other properties is unbelievable, even if we accepted the $30 million figure that they say DC received from merchandising, which does not comport with the objective terms of the Superman agreements in question.

I'd like to examine that $30 million figure for a moment.

The foundation for defendants' hindsight argument rests on its claim that DC kept twice as much film-related merchandising revenue than it was permitted to keep under the Superman film agreement, again replacing the objective terms of the agreement in question with an unverifiable, intracorporate deal, testified to by Mr. Levitz.

Again, we need to objectively value the agreements' terms at the time the agreements were entered into. There is no objective way to value the agreements depending on what defendants do or don't do after this lawsuit was commenced in internal arrangements that are unverifiable by the Court.

Turning to the option term and the issue of reversion, the option and renewal option terms of the film agreement are for 34 years. This lengthy term ties up Superman film and television rights for what at the time was the remaining life of the original Superman copyright.

As Mr. Halloran testified, option agreements tend to be for two consecutive 18-month periods, totalling only three years.

I refer the Court to the transcript at Page 382, 2 Line 25, to Page 383, Line 4.

Mr. Gumpert, defendants' expert, confirmed, both in court and at his deposition, that option terms are generally three years and could not think of a single agreement with an option term greater than five years.

I refer the Court to the transcript at Page 1399, Lines 8 through 22.

Mr. Gumpert further confirmed that a studio will try to get as long an option term as possible for as little money as possible, once again bringing into focus the market forces that are at play in the real open market.

Transcript, Page 1400, Lines 7 through 11.

It became clear at trial that under the Superman film agreement, Warner Bros. is under no obligation to exploit the Superman franchise by releasing either a Superman film or television series. So if Warner Bros. never made a film or television series in 34 years, all DC would have is relatively modest option payments. The continuing exploitation of a franchise property which has a

history of throwing off annual income is, indeed, an exceedingly important economic term.

The owner of a branded franchise property like Superman, with an historic cash flow over seven decades, and the potential to generate considerable money from film and television, would never agree in an arm's length transaction to tie up such assets for 34 years, for minimal fixed compensation and no obligation on the licensor to exploit.

As Mr. Halloran testified, this would have a devastating impact on DC, because much of the continuing value of Superman is tied up in having the character remain in the public eye. And this is fueled by the continuing release of major motion pictures or TV series.

Defendants unwittingly confirmed the vital importance of such ongoing exploitations themselves when making their merchandising argument.

Mr. Levitz testified about the tremendous uplift in DC's Superman merchandising due to Superman Returns.

I refer the Court to the transcript at Page 1061, Lines 15 through 2.

However, if no films are released, DC will not receive that boost in its merchandising revenues. If it had made a deal on the open market, where after a certain number of years a studio had not released a picture and it was able to develop a picture at another studio, it could do something about this to ensure a continuing uplift to its merchandising revenues.

As Mr. Spira testified, a major Superman film, quote, floats all boats, improving Superman publishing and merchandising and the value of the Superman asset in general.

Transcript, Page 1260, Lines 7 through 15.

Owners of branded properties, branded franchise properties, know this very well. That's why it is absolutely customary in rights agreements for branded franchise properties to have detailed reversion provisions, to make sure that either films are periodically produced and released or that the rights revert to the licensee, so it can set up a film project with another studio.

Transcript, Page 405, Line 24, to Page 407, Line 12.

These important reversions mean that the buyer has three years to make a film, then three to four years after that to make a sequel, or the rights go back to the seller.

Transcript, Page 406, Line 24, to Page 407, Line 12.

A reversion provision should have been especially important to DC.

To put this in perspective, Warner Bros. had been developing a Superman film since at least 1994; stipulated fact number 36. And as testified to by Mr. Spira and Mr. Horn, such development had been plagued by delays and commercial setbacks.

I refer the Court to Page 146 of the transcript, Line 25, to Page 150, Line 3; and Page 1258, Line 3, to Page 1259, Line 11.

So, in 2002, after eight years of such frustrated film development, what did DC do? It handed over Superman to Warner Bros. for another 34 years, with no obligation whatsoever to release a single picture.

The reversion provisions that are absent in the Superman agreement are common in the real competitive marketplace.

Mr. Levitz testified, however, that it's, quote, very difficult to get a reversion provision and that he didn't view reversions as particularly useful.

Transcript, Page 1133, Line 2, to Page 1134, Line 7.

There are two major problems with this statement. The first problem is that reversions are not hard to get in an arm's length negotiation. The three main agreements Warner Bros. relies on, the Iron Man, Tarzan, and Conan agreements, all deal with potential franchises, through for lesser properties. And because of that, all have what's called "rolling reversion provisions," where a studio not only has to make one film within a short period of time, but has to keep making films or the rights return to the owner.

I refer the Court to Exhibits 1085, 1086, 1094, 1095; and Exhibits 1005, 1106, and 1107.

As both Mr. Halloran and Mr. Gumpert testified, these important reversion provisions operate even if the purchase price is paid to the licensor.

Transcript, Page 513, Line 16, to Page 514, Line 20; Page 515, Lines 16 to 22; and Page 1435, Line 4 to Line 15.

If you look at the Lord of the Rings agreement, Exhibit 128, on Pages 5 through 7, you'll see extremely dirt-detail reversion provisions as well. It's a common term, particularly for franchise-type properties and those properties capable of being sequelized like Superman or Batman.

However, it's absent from the Superman and Batman agreements entirely.

The second problem with Mr. Levitz's statement is that DC's own agreements frequently have such reversion provisions. If you look at Exhibit 306, which a summary in grid form of the film and television deals DC has entered into, there is even a separate column for reversion provisions. In fact, many of DC's agreements with Warner Bros. even have reversions. But not Superman or Batman.

We ask why.

And the answer is obvious. In the market, as it existed in 2002 and 2004, the Superman and Batman assets were far too valuable for Warner Bros. to ever let them go to a competitor.

DC engaged in one rationalization after another to try to justify a 34-year term with no reversions. DC claimed that a 34-year term is justified because it takes a long time to develop a good film, and that a bad film can be damaging to Superman. These are mere hindsight rationalizations. Warner Bros. seems to be able to launch Batman Begins in 2005, and just three years later, The Dark Knight, in 2008, with tremendous success. Men in Black I was followed by Men in Black II in five years. Spider-Man 1, 2, and 3 were released over just a six-year period. X-Men I, II, III, and IV were all released over just eight years.

I refer the Court to Exhibits 61 and 335 as proof of this.

DC's new rationalization, as articulate by Mr. Gumpert, was that due to a termination filed by Joseph Shuster, with an effective date of 2013, moots the 34-year term and moots out the problem with not having a reversion provision.

Firstly, the Shuster termination was served in November of 2003, after the Superman film and television agreements were entered into. Secondly, the Shuster termination has not been litigated, and we expect that it will be an equally long six- or seven-year war of attrition before it's ever decided whether that termination is effective.

Again, you look to the value of the agreements at the time the deals were entered into, not retroactively in terms of post-deal pictures, performance, or post-deal legal developments.

Mr. Bergman also offered a straw man argument regarding waste, which goes like this:

If DC as a copyright co-owner has no obligation to exploit Superman, then why should Warner Bros., its licensee, have a contractual obligation to exploit Superman? If DC can sit on the property, then why can't Warner Bros.?

The natural extension of this argument, however, is that DC could make any deal they want to with Warner Bros.,even a 1 percent deal, because they have no obligation to exploit Superman. However, DC's transfer of Superman rights to Warner Bros. for compensation itself constitutes an exploitation of Superman copyrights, triggering DC's duty to account to plaintiffs.

Market forces and DC's self-interest would tend to dictate favorable terms in DC exploited the valuable Superman franchise property at arm's length in the open market. Since DC never even offered the rights in the open market in the period in question, and instead entered into an affiliated transaction, tieing up the rights for 34 years, and since they have a duty to account under that agreement, equity requires that their deal be for fair market value. Otherwise, the transaction transfers the valuable Superman asset in a way that unfairly dilutes plaintiffs' profit share, while shifting and retaining the profits inside the Warner Bros. family.

The Superman film agreement unusually has a rights grant that is far broader than the exploitation provisions that trigger payments to DC. The Superman agreement, exhibit 232, transfers all audio visual rights in the Superman property to Warner Bros., subject to reservation of rights by DC. At the same time, under Paragraph 3, DC receives participation only in pictures which are defined as feature-length motion pictures under the agreement.

There are no other provisions for the payment to DC for new media exploitations and all sorts of other forms of exploitation that falls under the broad definition of "audio visual works" in the agreement.

As such, Warner Bros. is unfairly free to exploit audio visual Superman copyrights without accounting to DC.

Now, Mr. Levitz claimed that if the Superman property was being exploited, and they weren't being paid for that exploitation, he would simply work it out at Time Warner at a higher level and somehow get the rights back, or he would get them to pay for this use. He similarly testified that if Warner Bros. exploited Superman audio visual rights in new media, and that if this fell within the broad rights grant in the agreement, that even though Warner Bros. had no

contractual obligation to pay DC, DC and Warner Bros. would reach some sort of fair arrangement based on their closer relationship.

I refer the Court to the transcript at Page 1142, Line 2 through 16, and Page 1136, Line 20, to Page 1138, Line 15, regarding the reversion problem and Mr. Levitz's solution that he would simply work it out.

Unfortunately, these terms are not arm's length terms and they are not fair market terms. They are completely dependent on the relationship that DC has with Warner Bros. and Time Warner. We can't judge these rationalizations in any verifiable extent, simply based on Mr. Levitz's testimony that he feels he could work it out at a higher level with Time Warner.

What's more, and even more important, Mr. Levitz confirmed that Warner Bros. is able to freely assign its rights under both the film and television agreements.

I refer the Court to the transcript at Page 1183, Line 14, to Page 1184, Line 3; and to Exhibit 232, Paragraph 14 on Page 14; and Exhibit 223, Paragraph 13 on Page 4, both of which demonstrate that under the Superman film agreement and Superman television agreement, DC at any time can freely assign all or any part of its rights under that agreement to another studio or financially-responsible entity.

If it did that, DC would have no recourse whatsoever and could not simply, quote, work things out with a new studio by going over the heads of Warner Bros. Entertainment to Time Warner, something that I find dubious to begin with. In fact, Warner Bros. could simply act as a broker of the rights in the agreement as it exists. They could sell the rights to another studio for a much higher rate, say 10 or 20 percent of the gross, and keep the difference as a reported mere licensee of DC. That would be very inequitable to plaintiffs. One part of the Time Warner corporation profits greatly from the sale of the same exploitation of the same Superman rights, while plaintiffs get a mere smidgen based on a reduced deal with DC.

If any of these things happen, all of the problems that Mr. Levitz says he could simply work out within the company would remain, and DC would have no recourse under the agreement or any leverage to fix such problems.

Moreover, where was DC's ability to fairly work things out when it entered into the Batman and Superman agreements with Warner Bros. in the first place?

These agreements, in most respects, favor DC's owner to DC's and plaintiffs' detriment.

Defendants made much of the fact that the overall relationship between DC and Time Warner and DC and Warner Bros. is a valuable term in and of itself.

First of all, Warner Bros., although it's a great and powerful company and has a great merchandising division, is matched by Paramount, which is owned by Viacom, which also owns CBS; Sony, which is a worldwide conglomerate that puts out one hit picture after another; Universal, which also owns NBC; 20th Century Fox; and Disney.

While these studios are better sometimes at one thing than another, they are all competitors, with great resources.

I don't buy the argument that Warner Bros. itself is a term of the agreement. And, again, under the agreements, Warner Bros. can simply assign its rights in Superman to another studio, and that's supposed term of the agreement, meaning the value of Warner Bros. and DC's relationship with Warner Bros., would evaporate. There's another disturbing asset to the focus on DC's overall favorable relationship with Warner Bros.

If we look at the Warner Bros. Consumer Products agreement, which is in evidence, the same 25 percent off-the-top fee charged to huge franchises like Superman and Batman apply to all of DC's characters, even very minor characters.

In an economic sense and to anyone savvy in the motion picture business, it would appear that DC essentially uses these big-branded franchises with a consistent, enormous merchandising cash flow to carry all of its lesser properties. Now, while this might be good for DC as a company, and as a whole, it certainly doesn't benefit plaintiffs, who only participate in the profits from Superman.

What guaranteed sum did DC receive in return for giving Warner Bros. control over Superman film and television rights for 34 years?

$1.5 million.

There is no purchase price in the film agreement, which, as both Mr. Halloran and Mr. Gumpert testified, is highly unusual.

I refer the Court to Page 387, Lines 16 through 18; and Page 1396, Line 20, to Page 1397, Line 7.

This lack of a purchase price becomes even more unusual once you look at the other agreements that are in evidence and realize that sellers of valuable

intellectual properties routinely secure purchase prices of $5 million to $10 million per film.

or example, Sahara has a guaranteed purchase price of $20 million spread out over seven years, with a net present valve of approximately $16 million.

I refer the Court to Exhibit 2001 and to the transcript at Page 433, Line 9, to Page 434, Line 25.

The Hannibal agreement shows a purchase price of $10 million on signing.

I refer the Court to Exhibit 307 and the transcript at Page 444, Line 24, to Page 445, Line 15.

The Red Rabbit agreement has a purchase price of $7 million guaranteed, plus a $1 million nominal producer fee that in the business is considered part of a rights transaction.

I refer the Court to Exhibit 327 and the transcript at Page 468, Line 18, through Page 469, Line 8.

Rainbow Six had a purchase price of $5 million, plus a $1 million producer fee.

I refer the Court to Exhibit 326 and the transcript at Page 464, Line 8, through Page 466, Line 7.

And Mr. Halloran testified the Hasbro agreement for film rights to its board games like Monopoly and Battleship provided a $5 million purchase price and a $1 million nominal producer fee for each film based on its board games.

Transcript, Page 488, Line 15, to Page 489, Line 8.

Lord of the Rings had a $4.75 million total purchase price, including the nonapplicable option payments. Most option payments are applicable.

I refer the Court to the transcript at Page 441, Line 9, to Page 443, Line 9.

As to the musicals, My Fair Lady had a purchase price of $5.5 million, which is over $30 million once you adjust for inflation.

I refer the Court to Exhibit 300 and the transcript at Page 430, Lines 3 through 25.

Annie had a purchase price of $9.5 million in 1978, over $20 million when adjusted for inflation.

I refer the Court to Exhibit 315 and the transcript at Page 456, Line 19, to Page 457, Line 20.

A Chorus Line had a $5.5 million purchase price in the late 1970s.

Transcript, Page 487, Lines 11 through 14.

By the way, with respect to these musicals, the notion that you pay multi-million dollar purchase prices because they are musicals, and not comic books or novels, is ludicrous. Those prices were paid because of the prior success of those musicals and the goodwill associated in the public mind with those titles and the pre-awareness they evoke, which helps the studio hedge against the risk of releasing and investing in a major motion picture.

Many of these agreements reflect that when an owner of a high-level property goes into the marketplace, they won't even accept option payments or option terms. They won't wait for the studio to make up its mind to make a film. They want a multi-million dollar purchase price guaranteed up front. Notably, in the Red Rabbit, Hannibal, and Rainbox Six agreements, the licensor is paid the guaranteed purchase price on signing the agreement, avoiding the speculation involved with development and the lack of certainty.

Such guaranteed fixed compensation is cash in hand. It's better to have guaranteed $10 million now than a possible $15 million sometime in the future, if and when the film is actually made and released.

Plaintiffs are not cherry-picking. Each of these agreements, with the exception of the Annie agreement, also has a substantial first-dollar gross back-end participation which equals 10 percent of first-dollar gross or higher.

Even the lesser Tarzan and Conan agreements relied on by defendants had purchase prices ranging from $1.5 million to $2.7 million.

I refer the Court to Exhibits 1085 and 1086, 1093 and 1094.

If we look at Exhibit 306, even DC's film and television deals for lesser properties with Warner Bros. have very substantial purchase prices: Aquaman, $2 million; Flash, $3 million; Green Lantern, $2.25 million; Justice League, $3 million. None of this appears in the Superman or Batman agreements.

Turning to the issue of gross participation, DC's contingent or back-end participation in the Superman film agreement is 5 percent of distributors worldwide gross, what Mr. Bergman is fond of calling "first-dollar gross." When Mr. Bergman asked Mr. Spira how often Warner Bros. awarded first-dollar gross to rights holders, Mr. Spira responded, quote, reasonably, not infrequently, when appropriate.

Transcript, Page 1266, Line 4.

THE COURT: Counsel, I'm sorry to interrupt you, but we've reached the 12:00 hour. I'm going to need to give the court reporter a break at some point in time.

How much longer do you think you have at this point? I'm asking whether we should take our break or continue.

MR. TOBEROFF: Do you know how long I've been going so far?

THE COURT: We started about an hour and a half ago.

MR. TOBEROFF: I think an hour and a half.

THE COURT: Another hour and a half?

MR. TOBEROFF: Yes. Based on my --

THE COURT: Keep in mind that you're trying to persuade the Court. My attention span is long, but it's not indefinite.

MR. TOBEROFF: I understand. During the break, I'll try and --

THE COURT: Why don't you do that.

Why don't we go ahead and take our break. We'll resume at 1:15.

I'll give you 45 minutes, Counsel, but you're going to have to wrap this up in 45 minutes. The Court has heard a three-week trial. I'm well aware of the issues and the evidence in this case.

I want to afford you an opportunity to summarize that for the Court.

MR. TOBEROFF: I understand, Your Honor.

THE COURT: But a three-hour closing for a three-week trial is a little much. We talked about two hours. That's what you indicated last week. So I'll give you more than that; I'll give you 45 minutes. But work on wrapping it up in 45 minutes. We'll get back at 1:15, and then I'll give Mr. Bergman an opportunity to address the Court as well.

MR. TOBEROFF: Very well, Your Honor.

THE COURT: Have a good lunch.

(A.M. session is concluded.)

P.M. SESSION

Closing Argument By Counsel For The Plaintiffs (Continued)

Closing Argument By Counsel For The Defense

Rebuttal Argument By Counsel For The Plaintiffs

(Per order of the Court, Pages 1514:24-1513:3 and 1578:16-1579:4 have been placed under seal and are not contained herein.)

THE COURT: Counsel, you may proceed.

MR. TOBEROFF: Thank you, your Honor.

CLOSING ARGUMENT BY COUNSEL FOR THE PLAINTIFFS (CONTINUED)

MR. TOBEROFF: DC's -- to put DC's 5 percent first dollar gross participation in perspective, Superman, a world famous, highly branded franchise property, with a successful commercial track record in multiple media over 70 years, receives the same 5 percent gross participation as Mr. Halloran was able to negotiate with Warner Brothers at arm's length for something called Neopets, virtual pets created by kids on the Internet.

Transcript 503, line 8, 504, line 9, Exhibit 331.

It just doesn't add up.

DC receives 5 percent of distributor's worldwide gross in the Superman film agreement, and by contrast, the Hannibal, Rainbow 6, Red Rabbit, and Lord of the Rings agreement all receive 10 percent of distributor's gross double that in the Superman agreement. Exhibits 307, 326, 327, 128, transcript pages 491 to 508.

The agreement for My Fair Lady has 5.1 million paid plus a 47 1/2 percent of gross after the first $20 million, which effectively equates to 27 1/2 of first dollar gross.

Exhibit 300, transcript 501, 4, 502, 4.

A Chorus Line got 5.5 million plus 20 percent of the gross after $30 million, which effectively translates to 18 percent of first dollar gross, transcript page 47, lines 11 through 14.

The Sahara agreement provides the licensor with a 10 percent gross participation in the producer's gross which -- but the producer financed the production, and most of the marketing costs of the film, and because of that, there was a reduced distribution fee charged in that case ranging from 10 to 15 percent and, as Mr. Halloran testified, producer's gross can equate or exceed distributor's gross, particularly as in the case of Sahara, a hundred percent of videos included in the definition of gross as opposed to only 20 percent.

Turning to the 20 percent video royalty in the Superman agreement, both Mr. Halloran and Mr. Spira testified that a 20 percent video royalty is the basic minimum and that larger video royalties can indeed be negotiated.

If we look at the Timeline agreement, Exhibit 325, transcript 509, 2 to 14, it contains a 35 percent video royalty. Hannibal also secured a 35 percent video royalty if there are no other gross participants and a most favored nations provision if there were other gross participants. Exhibit 307, transcript 509, line 15, to 510, line 5.

In addition, DC's Superman agreement contains a most favored nations provision which says if any other participant in the revenues of the film receives a better video royalty, DC would get the benefit of that greater amount of video revenues he included in his gross definition; however, DC never enforced that provision, which is another problem that we have with the affiliated nature of their relationship. We show from Exhibit 37, page 12 and page 41, Legendary in its definition of defined gross gets a hundred percent of video revenues included.

There is no carve-out for financing participants or any other kind of participants in the film agreement. It simply says participation -- a participant in the revenues. Yet DC never got the benefit. Mr. Levitz testified that DC accepted Warner's fast style explanation that Legendary was a participant in, quote, profits, not revenues, and therefore excluded from the most favored nations provisions.

Transcript page 1103, line 7, to 1104, line 1.

As we all know, a profit participant participates in revenues after revenues exceed costs. And absolutely they should have the benefit of a hundred percent of video revenues in their gross definition, but they don't because due to their affiliated relationship, that provision was never enforced.

Defendants have made much of the fact, in fact they base their entire case on the fact that DC reserved merchandising rights to Superman in the film agreement. They attempt to salvage this entire agreement based on this reservation of rights.

Firstly, the coordinates pretrial order at page 8, lines 2 through 3, stated that the trial is to examine whether DC received fair market value for the rights, quote,

transferred from DC comics to Time Warner Entertainment Company, end quote. As DC retained the Superman merchandising rights, they are not at issue in this trial. DC remains the co-owner of such rights with the Siegels and will simply account directly to the Siegels for their merchandising revenues.

We should be looking at the fair market value of the rights that were transferred, not the value of the rights that were not transferred. If Superman merchandising rights are indeed value, as they are, DC, not Warner Brothers, deserves the benefits of the owner and manager of this property for 70 years, including any increase in merchandising due to a Superman film released by Warner Brothers.

It's DC who is obligated under the agreement to pay Warner Brothers 50 percent of merchandising revenues related to the film, not the other way around. This would show up in their statements as a cost to DC, not a cost to Warner Brothers.

Moreover, and this is the most important point, reservation of merchandising rights by the owner of a property that has a preexisting history of merchandising revenues or of a property that is susceptible to merchandising is absolutely standard and common in the industry. Transcript 980, lines 4 to 15.

When there is preexisting merchandising like there is with Superman, Batman, or any other comic book character, the norm is to reserve merchandising rights and split film-related merchandising 50/50 or some approximation thereof. Transcript 980, lines 4 through 15.

Even the film deals that Warner Brothers relies on in this case -- Tarzan, Conan, Iron Man, and DC's old Watchmen agreement with Fox -- all reflect this customary reservation of merchandising and split of the film-related merchandising revenues 50/50 because all of these properties are susceptible

to merchandising. Those are Exhibits 1085, 1086, 1105, 1106, 1107, 1028, and 1029.

Even if one looks at Exhibit 306, which tracks all of DC's film and television deals for its properties, merchandising is always reserved by DC even for properties of minor value that don't compare to Superman or Batman. It's absolutely standard in the industry.

Now, if you look at some of the novel agreements for the Tom Clancy novels and for Hannibal, they didn't receive merchandising, not because there was a trade for the large up-front purchase prices or the 10 percent of gross figures that appear in those agreements. They didn't reserve merchandising because nobody is about to merchandise a Hannibal Lecter doll. The properties themselves are not susceptible to merchandising. If they were, they would have been dealt with in the agreement and reserved.

Transcript 516, line 19, to 518, line 3. Transcript 686, line 8, to 687, line 13.

Notably, since Red Rabbit had been previously exploited as a video game, video game rights in the agreement for that novel are reserved. Transcript 518, line 4, to 518, line 2.

In addition, for Warner Brothers and DC to claim that the merchandising benefits to DC make up for the deficiencies in the agreement is far too speculative because, as I said before, if Warner Brothers is not compelled to make a film, there will be no bumps in merchandising, and you have to value the agreements as of the time they are entered into.

Finally, DC's entire merchandising argument rests on an unverifiable fact, which could be fiction, that DC keeps 75 cents on every dollar of merchandising. This does not comport with the terms of the agreement.

If you look at paragraph 6-C on page 7 of Exhibit 232, it says plain as day that Warner Brothers keeps 50 percent -- that Warner Brothers must be paid by DC 50 percent of any film related merchandising, and when you combine that with Warner Brothers consumer products, 25 percent off the top fee in Exhibit 319, you are left with a figure not of 75 cents on every dollar, but 37 1/2 cents on every dollar. Yet Paul Levitz says that Warner Brothers apparently doesn't enforce the 50/50 provision in the film agreement. Transcript 1060, 25, to 1061, 3.

After all, they are related companies, and as Mr. Levitz testified, whether Warner Brothers or DC benefits from a deal, the ultimate owner, Time Warner, quote, benefits obviously, end quote. Transcript 237, 10 through 11.

However, there is no verifiable documentary evidence anywhere in this case to show that DC is entitled to keep all of film related merchandising instead of splitting it 50/50 pursuant to the terms of the agreement.

Another issue in the agreement are the warranty and indemnification provision in the agreement. DC said it was the exclusive owner of Superman rights free and clear of any claims whether it entered into the film agreement and when it entered into the television agreement. And DC must indemnify Warner Brothers for any damages arising from the breach of that warranty.

Paul Levitz admitted that DC is, quote, absolutely, end quote, obliged to indemnify Warner Brothers for any costs or attorneys' fees resulting from a breach of that warranty, transcript 1206, lines 8 through 13.

Yet this is highly uncustomary, as Mr. Halloran testified, the standard practice is to specify any problems with the rights and to avoid indemnification for known problems. Transcript 423, 4, to 424, 1.

And this is exactly what was done in the Hannibal agreement, the Annie agreement, and the Lord of the Rings agreement. Exhibits 128, 307, and 308, transcript 521, 23, to 524, 14.

DC's uncustomary warranty and indemnification provisions entered into after they had full notice of plaintiffs' claims to termination and the effective date of the termination in 1999 detract from its compensation as any damages, costs, or attorneys' fees associated with plaintiffs' claims would be deducted from DC's compensation under the agreement implicating any fair market value analysis.

But it's worse than that. And this is an important point when dealing with equity. If plaintiffs are solely limited to a share of what DC receives from Warner Brothers, then pursuant to DC's warranty indemnification provisions in the film and television agreements, plaintiffs in effect will be unfairly charged for a pro rata portion of Warner Brothers legal fees and costs in connection with plaintiffs' termination in this lawsuit.

Moving to the television agreement, we cannot look at the television agreement, a Smallville television agreement, Exhibit 222, in a vacuum. We must keep in mind that under the film agreement, television rights to Superman

can only be exploited through Warner Brothers over 30 years with no obligation whatsoever to exploit. If Warner Brothers does not feel like exploiting Superman television rights for the remaining 27 years of the agreement, DC is stuck.

If Warner Brothers does feel like exploiting TV rights, DC ultimately will have to accept whatever Warner Brothers is willing to offer if it wants to exploit Superman television rights, or those rights will not be exploited at all.

As such, the television terms of the Superman film agreement hang like a dark cloud over any analysis of whether DC received fair market value for the transfer and encumbrance of Superman television rights.

Now, if we look at the Smallville agreement, whereas the film agreement simply copied the basic economic terms of the 1974 Salkind agreement, the 2001 Smallville agreement simply copied or xeroxed the terms of the 2001 television agreement between DC and another Warner affiliate, Lorimar, relating to the series Lois and Clark. The 1991 Lorimar agreement is Exhibit 181.

So despite the fact that in 2001 comic books had gone through the roof in the entertainment industry, again, Warner Brothers decided to simply copy the terms in a perfunctory fashion of an agreement entered into a decade earlier.

Now, we don't have many comparable agreements in the television area pertaining to big branded franchise properties, and there's a very good reason for this. When a property is capable of being exploited in film, because

film -- a big opening on a film gives rise to a lot of cash quickly as opposed to the TV industry, where you have to wait at least four years before a TV show can be profitable, studios always tend to reserve for film the big branded properties. Smallville was an exception. But because of that, comparable agreements are not readily available.

We do have one comparable open market agreement, and that's the agreement DC entered into in the open market for Superboy. The Superboy agreement has a $12,500 per payment, but unlike the -- payment in the Smallville agreement, it is in addition to the gross participation, not an advance against the gross participation, and that gross participation is 7 1/2 percent of all domestic gross, which was, as indicated by

Mr. Halloran's unrebutted testimony, would be the equivalent of roughly 6 percent of worldwide receipts today, exceeding the 3 percent up to a million five per episode, going to 5 percent in the Smallville agreement.

The Superboy agreement is Exhibit 15. I refer to the transcript at 554, lines 10 through 14.

The Superboy agreement demonstrates the leverage possessed by a rights holder of a valuable property in the open market, even though I think we all agree that Superboy is not anywhere nearly as valuable as Superman.

In that agreement, DC also secured $800,000 up front, which defendants say is illusory because it waived the right to receive $800,000 in connection with Superman 4.

That's incorrect. They also testified that due to Mr. Salkind, there was tremendous insecurity regarding getting any money out of Superman 4, and for that reason, an agreement to get paid $800,000 up front is a meaningful term.

We also have another DC property, Birds of Prey, which until today I never heard of, and I doubt many people in this court had heard of except in connection with this case. Yet Birds of Prey for TV receives the exact same gross compensation as Superman, which makes no sense.

Nor does the television agreement contain any royalty escalations with the success of the show, whereas in the TV business, participants are rewarded for the success of a show which is measured by the longest a show is on the air. So DC receives the same royalty for season 1 as it does for season 9, and Smallville, a big success, is currently in its ninth season with no royalty escalations.

Regarding television, DC offered no substantive evidence or expert testimony. Instead of expert testimony of Richard Marks, who they designated as a TV industry expert, they offered only the testimony of a Warner Brothers executive, Brett Paul, which the Court limited to Brett Paul's state of mind.

Firstly, Brett Paul testified that he only partially negotiated the Smallville TV agreement after it had already been agreed between Paul Levitz and another Warner Brothers executive to simply adopt the terms of the 1991 Lorimar agreement.

Mr. Paul testified they tried to change those terms but was unable to. So effectively, his participation didn't affect any of the terms of the agreement. Transcript 1218, line 7, to 1210, line 19.

It sounds similar -- I mean it sounds familiar.

Mr. Spira testified to the same thing with the film agreement, where he, quote, consulted with the general counsel of Warner Brothers, but was unsuccess in attempting to modify the Superman film agreement and did not participate in the negotiation of that agreement.

Warner Brothers did introduce two television agreements, and that's it. No expert testimony, just two television agreements. And all Brett Paul testified to was what Warner Brothers customarily does, but what Warner Brothers customarily does does not define the market for purposes of a fair market value analysis. You need an expert to talk about what all the studios do, which Warner Brothers failed to put into evidence.

The two television agreements they did offer in television was one for Tarzan, which we've already spoken about, and one for Gossip Girl, Exhibits 1102 and 1103 respectively.

Mr. Evanier testified that Tarzan was in its decline in the 1960's and hasn't really recovered since and doesn't have anywhere near of a track record or prestige of Superman, transcript 912, 4. As to Gossip Girl, I don't think anybody would claim that Gossip Girl is a comparable franchise property to Superman.

Mr. Halloran confirmed at trial that Gossip Girl was nowhere near comparable in value to the Superman property, transcript 556, 23, 556, 1, and defendants offered no rebuttal evidence regarding the value of Gossip Girl or Tarzan.

As to the animation agreements, we heard Mr. Halloran's testimony that those agreements all contain substantively identical net profit definitions. Transcript 561, 18, to 562, 8, 565, lines 15 to 22.

And we heard Mr. Halloran testify that these net profit definitions were unlikely to show any proceeds to the licensor. Even Paul Levitz confirmed this, saying there was little possibility of ever earning a participation under any of the animation agreements even if the programs were successful. Transcript 117 -- excuse me. 1172, line 23, to 1173, line 6.

Mr. Levitz further confirmed that there was indeed a possibility of earning a participation under prior agreements that they had entered into in the open market, which are in evidence as well. Exhibits 69, 141, and 184.

Turning briefly to the subject of nonexclusive rights, Mr. Bergman has made tremendous fuss in this case over the fact that DC is the co-owner of these -- of the copyright to Action Comics No. 1 could convey only nonexclusive film and television rights in the works to Warner Brothers.

It was admitted, however, by Mr. Gumpert and seemed clear from the evidence at trial and from what we know as a matter of law that DC was able to convey exclusive film and television rights to the vast majority, to thousands and thousands of Superman works and copyrights comprising the Superman mythos, all of which were conveyed exclusively to Warner Brothers. In addition, Warner Brothers has acted and held itself out to the world as though they had an exclusive exploiting the copyrights and holding themselves out as an exclusive holder of Superman film and television rights, transcript 366, lines 5 through 14.

The Superman film agreement and television agreements each contain short form option and assignment forms at the end of the agreements that summarize the terms of these agreements. These forms are for filing with the U.S. Copyright Office and state unequivocally that Warner Brothers was transferred exclusive film and television rights respectively in both the film and television agreement.

Exhibit 232 at pages WB 4229 to 4330, Exhibit 223, pages WB 135050 to 135051.

In addition, as part of the Superman film agreements and TV agreement, DC warranted that they were granting exclusive film and television rights and agreed to indemnify Warner Brothers. DC would therefore be responsible for any loss caused Warner Brothers by such nonexclusivity.

DC thereby gave Warner Brothers the contractual equivalent of exclusivity even if certain rights were nonexclusive.

This, given the fact Warner Brothers exclusively controls film and television rights to the vast majority of Superman works, has an additional effect even if the unlikely event that plaintiffs found someone willing to exploit their limited nonexclusive rights, where they only had U.S. rights and couldn't exploit in the foreign territories, which is necessary to make such exploitations economically

viable, that party would be greatly dissuaded by the fact that by doing so, they would expose themselves to a potential lawsuit for unknowingly infringing some element or some story line found somewhere in the thousands of Superman comics exclusively owned by DC and Warner Brothers. Transcript 370, 18 to 25.

Testimony was admitted into evidence regarding the fact that since plaintiffs do not have foreign rights and since these entertainment projects -- the investment in these projects are only justified if you can exploit foreign rights, that they would not be able to launch even a direct to video movie or a Movie of the Week for television. Transcript 379, lines 12 through 23, 369, lines 18 to 370, line 12.

Even Mr. Spira testified that the film business has become an increasingly international film marketplace dominated by the foreign revenues. Transcript 1257, lines 11 to 18.

And again, to evoke the cliche, actions speak louder than words. It is hard to imagine that Warner Brothers would have invested half a billion dollars in Superman Returns if it felt that it was at risk through competition from the Siegels, based on their nonexclusive ownership of just U.S. rights to a single comic.

Defendants' own actions contradict their claim that the Superman rights were devalued by plaintiffs' termination. Defendants have massive evidentiary problems in this case. Defendants did not present sufficient evidence to rebut plaintiffs' evidence that the Superman agreements were for less than fair market value. The defendants' April 10, 2009, trial brief states that the Court must look at, quote, objective results of the parties' negotiations. It is those final terms and how they stack up to objective considerations of market value that ultimately are the appropriate focus of this trial, end quote. Trial brief at page 3, lines 4 through 8.

And yet defendants have not focused on an objective marketwide analysis of what the market would bid for Superman film and television rights but instead have focused their defense on DC and Warner Brothers' subjective state of mind in entering into those agreements and what Warner Brothers does or does not do in film and television.

As noted earlier, fair market value is not what Warner Brothers alone would give for Superman rights but is what the market would pay when given the chance to bid on the Superman franchise.

Every contract defendants have offered, and they haven't offered many into evidence, involves Warner Brothers or an affiliate, such as Newline, with the sole exception of Mr. Gumpert's hearsay deals for the rights to the Lone Ranger and Green Hornet.

In contrast, plaintiffs provided contracts – one other. The 1986 Watchmen agreement with Fox.

In contrast, plaintiffs provided contracts from Columbia, Universal, Paramount, and Warner Brothers to show what the fair market value of Superman was -- is, or what could be achieved in the open market.

Plaintiffs offered -- also offered extensive expert testimony from Mr. Halloran, who provided an industry-wide analysis, not analysis that focused solely on what Warner Brothers does or does not do.

Defendants also shied away from objectively focusing on the operative agreements on their face because they know these agreements do not reflect fair market value.

Instead, they argued away the negative terms, claiming, based on their affiliated relationship, that in practice they either don't follow the deals, or that if a problem arose, they could supposedly work out the negative implications.

This is not the objective analysis defendants insisted must be used at this trial. There is no way to value these deals based on what defendants purportedly do in practice behind closed doors. The vast bulk of the evidence presented by defendants has focused on the state -- on their state of mind in entering into the agreements. However, there's a big problem.

Scienter and intent or ill motive is not an element of plaintiffs' case. We are ascribing no ill motives to Warner Brothers or DC, and therefore, their state of mind is marginally relevant at best to an objective analysis of whether the terms in their agreements constitute fair market value when measured against the agreements negotiated in the open market and when measured against the custom and practices of other studios in the open market.

Mr. Levitz testified purportedly not as an expert but what his state of mind was when he negotiated the Superman film and television agreements, transcript 1135, 24 to 25.

Mr. Levitz, however, did not discuss in any detail his dealings with licensing to other studios largely because the overwhelming majority of DC's characters are controlled by Warner Brothers, and all of the major ones are controlled by Warner Brothers. Exhibit 306.

The same reasoning applies to Brett Paul, who negotiated the TV deal with Mr. Levitz or who claims to have negotiated the TV deal with Mr. Levitz. Mr. Paul's state of mind when negotiating this deal is largely irrelevant because no scienter element -- there's no scienter element in this case.

Mr. Paul testified about what was customary at Warner Brothers regarding video royalty and the usual range of episodic fees at Warner Brothers. But as I said, Warner Brothers is not the test, and Warner Brothers is not the only game in town.

In fact, this focus on Warner Brothers supports plaintiffs' conclusion. If Warner Brothers will only pay 5 percent for film or will only pay a certain royalty or certain gross, all the more reason for DC to offer these rights in the open market.

As for Mr. Spira, as pointed out to the Court, he admitted finally that he did not negotiate the Superman film agreement and thus there was no foundation for his testimony. Transcript 1288, 16 through 19, 1289, 11 through 20, 1290, 5 through -- excuse me. 1290, line 5, through 1291, line 23, 1289, lines 13 through 17.

Additionally, Mr. Spira admitted that any advice he gave to Mr. Schulman, who did negotiate the deal, was ignored. Transcript 1294, 2 through 20. Mr. Spira also admitted that he did not negotiate the Superman film television agreement or animation agreements. 1295 -- excuse me. 1294, lines 18 through 24.

So all three of defendants' lay witnesses' testimony is limited to their state of mind, which is largely -- which is of only marginal relevance to an objective determination of whether the terms of the agreements were for fair market value.

To the extent it is relevant, and Mr. Spira's testimony is plainly not because he was not involved in the negotiation, their lay testimony focuses only on

Warner's internal dealings, which does not rebut the marketwide analysis offered by plaintiffs into evidence.

Defendants also, as I said, provided no expert testimony in the fair market value of the Superman television agreement when they could have. The only testimony about Mr. Paul's state of mind at the time of the deal.

They also do not provide any expert testimony in the fair market value of the Superman animation agreements, only brief state of mind testimony by Mr. Levitz. Transcript 1173, lines 12 through 13.

The one expert defendants did offer, Mr. Gumpert, was found not qualified to discuss television or animation and was not offered for that purpose. Transcript 1333, lines 3

through 15.

In contrast, plaintiffs' expert, Mr. Halloran, offered extensive expert testimony on the deficiency with the television agreement, transcript 531, line 18, through 563, line 13, Exhibits 222 and 223, and the animation agreement, transcript 563, line 21, to 567, line 1, Exhibits 52 to 54 and Exhibit 225.

Accordingly, with respect to television and animation, plaintiffs' evidence and testimony is unrebutted and plaintiffs should prevail.

As far as the film agreement is concerned, neither Mr. Spira nor Mr. Paul provided admissible evidence regarding the fair market value of the terms of the agreements themselves.

Warner Brothers -- strike that.

Neither Warner Brothers' state of mind nor its business practices are on trial. The issue is whether the deal terms of the Superman agreements reflect fair market value for the rights transferred.

Amidst this lengthy adversarial contest and the practical rigors of this case, it is all too easy to lose sight of why we are here in the first place. We are here because Congress shows to relieve authors and their families of the inequities which result from their unequal bargaining power and thereby strengthen a fundamental purpose of the copyright act, to provide financial incentives to authors to create, as this is beneficial to both our culture and our economy.

This concerted Congressional objective was recently stressed by the Ninth Circuit in an appeal I successfully handled in the case of Classic Media versus Newborn, 532 F.3d 978 at page 983, Ninth Circuit 2008.

But if there was ever a case that fell squarely within the legislative purpose of the Copyright Act's termination provisions, it is that of Jerry Siegel and his family. As a young high school student in Cleveland, Ohio, growing up during the depression, Mr. Siegel created Superman with his buddy, Joe Schuster. They naively signed a publishing release for $130 and were later held to have signed away their copyright in their favorite comic book character forever. The devastating effect these events had on Jerry Siegel coupled with the financial difficulties that he incurred dominated his life and the life of his family and continues to this day, given defendant's ongoing war of attrition.

Yet when comic book expert Mark Evanier sat in this courtroom and said that he owes a debt of gratitude to Jerry Siegel, it struck a cord. When we think of all the kids who from the late 1930's to this day have jumped off their beds with towels wrapped around their necks yelling look at me, I'm Superman, you realize we all share this debt. Congress got it right, designing this very special law to benefit authors like Jerry Siegel and their families.

This Court should not permit the emasculation of plaintiffs' statutory rights and profit participation by severe dilution of its clearly intended financial benefits.

THE COURT: Thank you, Counsel.

CLOSING ARGUMENT BY COUNSEL FOR THE DEFENSE

MR. BERGMAN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. BERGMAN: Your Honor, I found Mr. Toberoff's closing to be noteworthy indeed. Not for what he said, but for what he didn't say.

Once again, as was true throughout the trial, Mr. Toberoff failed to identify a single agreement, film or television, which, taken as a whole, is more economically beneficial than the film or television agreements are to DC.

The evidence, not the argument, has shown that there are no such agreements.

Secondly, Mr. Toberoff did not once address the fact of plaintiffs' burden of proof, let alone refer to any evidence which might satisfy.

And finally, Mr. Toberoff did not once mention the fair market value of the nonexclusive rights which this trial was convened to evaluate.

And Mr. Toberoff says that I've been fussing about those nonexclusive rights from the very beginning. I'm going to continue to do so, your Honor.

In our last two hearings before trial, your Honor went to great lengths to frame the precise question that this trial was to determine. You gave it once. You then revised it slightly, gave it again, and then you put it into the final pretrial conference order.

And what you said, your Honor, was not what Mr. Toberoff began his closing with, namely the value of the rights transferred to TWEC. On the contrary, your Honor stated, and I'm again quoting, just abbreviating the references to Warner Brothers and its successor, quote, given the nature and the characterization of the property in question, the trial shall determine whether the value of the various Superman option and assignment agreements between DC Comics and Warner Brothers and the amounts paid to DC Comics by Warner Brothers reflect the fair market value of the nonexclusive rights that the Court has determined were transferred from DC Comics to Warner Brothers.

And the Court's emphasis upon the value of the nonexclusive rights has been maintained over at least two motions for reconsideration, however those motions were denominated.

And as we all know, the Court's final pretrial conference order regarding those nonexclusive rights supersedes the pleadings and defines with legal certainty the issue to be tried. That horse cannot be changed in midstream because the plaintiffs realize that they cannot meet the resulting burden. And that burden was clearly defined by your Honor at our January 26, 2009, hearing, namely, that plaintiffs have the burden of proving that one or more of these agreements is below fair market value for those nonexclusive rights.

That burden necessarily carries with it the obligation of showing the amount of dollars by which the agreements allegedly fell below that market value. That's necessary so that the Court could show if it deemed it to be appropriate, how much to equitably add to DC's revenues.

Plaintiffs have done nothing to meet their burden as designated by the Court. Mr. Toberoff has no page or line citations to demonstrate any such evidence. And since hackneyed phrases appear to be the style, may I say that there is not a shred of evidence in this record to show what the fair market value of those nonexclusive rights were in 2002.

The only witness who even addressed this question on plaintiffs' behalf was Mr. Halloran. And he still hasn't expressed an opinion on that critical specific question. He didn't have an opinion as to the fair market value of the nonexclusive rights in his report. He hadn't formulated an opinion as to the nonexclusive film or television rights at his deposition, and on the witness stand, despite all his excuses as to why he couldn't do so, how difficult it is to obtain agreements, Mr. Halloran still didn't offer any evidence upon which your Honor could determine the fair market value of the nonexclusive rights transferred in either of those agreements.

Unable to offer any evidence on the issue the Court has mandated, the plaintiffs have decided by their own fiat to change the issue. Refusing to recognize the Court's prior findings and orders re nonexclusivity, plaintiffs challenged those findings for the third or fourth time and argued throughout the trial that the rights were almost exclusive, that they were for the most part exclusive, that the grants included thousands of copyrights owned by DC and only one co-owned by the plaintiffs.

But that totally misconstrues the issue before your Honor. The plaintiffs have no right to benefit from the revenues derived from DC's exclusive rights. The value of those rights belongs to DC alone. Plaintiffs can't use the existence of defendants' exclusive rights to prove the value of their nonexclusive rights.

Plaintiffs have no right to complain even if DC gave away its exclusive rights. It simply doesn't affect the plaintiffs.

The plaintiffs have their rights. Congress in its wisdom has bestowed those rights on the plaintiffs. They are free to exercise them today, tomorrow, and 30 years from now.

But we have to bear in mind that by filing their notices of termination, the plaintiffs created a critical defect in the rights to this property. Their actions were the direct cause of the nonexclusivity that hangs over these rights.

Plaintiffs had an obligation, a burden of proof to persuade the Court as to the fair market value of what they had by their own actions created, but they failed to present any evidence upon which the Court could determine what the fair market value of those nonexclusive rights were.

The whole purpose of this phase of the trial was to determine if a fair amount of money had been paid by Warner Brothers to DC. Well, you have to look to

the money that was paid. And you have to look to what that money was paid for.

Having failed to demonstrate what the fair market value of their nonexclusive rights are, plaintiffs can't prove that any of the agreements in question were below that unknown, undesignated, unascertained fair market value.

What was it? Where does the Court begin its computations? There is no starting place. There's no evidence of it. There's no evidence to support the Court in making the determination that has brought us together for all these weeks.

And rather than attempting to address that issue, the issue that we're here for, the plaintiffs have attempted to deal with the contracts in question as if they transferred exclusive rights. But that evidence is irrelevant. That's not the issue which the Court has ordered answered, and it's not the question properly addressed in this proceeding.

The Court's unambiguous order has been ignored by the plaintiffs, and the absence of any evidence as to the fair market value of these nonexclusive rights establishes that plaintiffs have failed to meet their burden. And that failure is, I respectfully submit, your Honor, case dispositive. Your Honor's reminded all of the counsel in this case that we are engaged in a process here. There are rules to be met, requirements to be adhered to. The Court defines the issues.

The parties address them with competent evidence. And the Court determines, based upon that evidence alone, whether the plaintiffs have met their burden. That process has to be applied in this case as in all others.

Nonetheless, as I mentioned in my opening argument, the defendants have prepared for the approach that the plaintiffs were clearly going to take. And we have demonstrated by testimony and agreement after agreement that the DC Warner Brothers' Superman agreements are at the very top of the market, even if they were to be considered as transferring exclusive rights.

And before reviewing that evidence with you, your Honor, I believe it warrants noting that virtually all of plaintiffs' substantive testimony in this case has been given by their designated expert, Mr. Halloran. And with all due respect to Mr. Halloran, I submit that he lacks the qualifications to support the testimony he has given.

On the contrary, the evidence shows that over the length of Mr. Halloran's private practice, a period of almost 20 years, he simply hasn't conducted a legal practice at this level of deal making. He is not testifying from personal experience, and his testimony is not the product of reliable principles or methods.

Mr. Halloran, aided by trade papers and the Internet, is testifying to deals that he has never made, terms he has never achieved, and a level of legal practice that he has never attained. For example, in the television area, as to which he was the sole witness on behalf of the plaintiffs, Mr. Halloran has never represented a company producing a scripted network television series. He's never represented the show runner of such a network series. He's never been involved on either side of the table in the negotiation of underlying literary rights for such a television series. And by his own admission, he doesn't represent any important or high level network television producers.

On the film side, in private practice Mr. Halloran has never represented any rights holder of a comic book hero. He has never represented a marquis author. He has never represented a buyer of a marquis author's work. He doesn't represent any prominent actors or actresses, and in 19 years, he has only negotiated one literary rights acquisition agreement with a major studio, one agreement in 19 years. And that was the Neopets agreement with Warner.

I'm going to talk about that agreement later, but it should be borne in mind that this was a $40 million small picture, that Mr. Halloran made a deal where he got no option, where his client is obligated to pay half the development costs of the film, where no exercise was ever made of the rights, and no film was ever made. His client had his rights tied up for three years and didn't earn a penny from it.

And in addition, before forming his opinions, Mr. Halloran did not confer with any studio executive, did not confer with any agent at any of the major talent agencies, did not speak with any attorney who represents marquis authors, did not speak with anyone actually involved in the acquisition of high level film rights.

Once he formed his opinions and prepared his report, Mr. Halloran didn't distribute those opinions or report to any studio executive to test their veracity. He didn't circulate it to any attorney actually involved in the negotiation of these high level agreements. He didn't circulate his opinions to anyone within the motion picture industry to get any reaction to those opinions.

In short, defendants question whether Mr. Halloran's qualifications even meet the requirements of Rule 702.

But in any event, your Honor, I respectfully submit that his testimony should be viewed in the framework of his obvious lack of personal experience or other substantive real world bases for his opinions.

Before turning to the agreements that are truly at issue in this case, the film agreement and the television agreement, I'd like to renew defendants' pending Rule 52 motions regarding TWI, the Warner Brothers consumer products agreement, and the animation agreements.

With respect to TWI, your Honor, there has simply been no evidence whatever of any contractual dealings between TWI and DC concerning the Superman property. TWI simply has no involvement in this matter. It is not implicated in any way in this phase of the case. It did not produce or distribute any of the works that will be involved in the next phase of this case. And it doesn't bear any liability for any award that may be made against DC or Warner Brothers, both of whom are quite capable of satisfying any award that your Honor might decide upon.

As for the merchandising agreement, the Warner Brothers consumer products agreement, it has become apparent from the evidence, or accurately from the lack of evidence, that plaintiffs have offered no challenge to the fair market value of the Warner Brothers consumer products agreement pursuant to which Warner Brothers consumer products acts as DC's merchandising agent for a 25 percent fee, with DC keeping 75 percent of all merchandising revenues.

And while I have determined, your Honor, not to respond to each and every one of Mr. Toberoff's charges, I was offended personally by his reference to the fact that this 75 percent could be a fiction. It could be a fiction if Mr. Levitz committed perjury repeatedly. It could be a fiction if Mr. Sills, the plaintiffs' accountant, had not reflected in his report that Warner Brothers didn't receive any money from the merchandising of Superman Returns. It could be a fiction if Warner Brothers wasn't compelled out of fairness to establish a phantom merchandising fund for Legendary Pictures, its partner, in order to give Legendary a decent share of the merchandising revenue, failing which there would have been no share of the merchandising revenue going to Legendary.

So this notion that the 75 percent might be a fiction is not only without any basis in fact, it is offensive and should not have been made.

The Warner Brothers consumer products agreement which charges 25 percent is clearly within fair market value. Many agreements, such as the Sahara agreement, charge 25 percent. Some, like Rainbow 6, charge 30 percent. Neopets charged 30 percent.

Moreover, the undisputed evidence demonstrates that no participant in any of the agreements in evidence receives as much as the 75 percent of every dollar that DC receives.

And finally, with respect to the animation agreements, I heard what Mr. Toberoff said in his closing argument. I listened carefully to what Mr. Halloran said while he was on the stand, and I heard nothing which would show or have a hearing upon whether these animation agreements received fair market value. It simply wasn't the subject of testimony.

All Mr. Halloran did was take these agreements, without identifying one or the other, and simply say that they favored Warner Brothers. We saw no evidence as to what the fair market value of those agreements were. And we certainly saw nothing to show that their value was below fair market.

On the contrary, Mr. Levitz identified several third party agreements with Hanna Barbera, Ruby Spears, and Novana, in which the episodic fees were all less than the episodic fees in the Warner agreements.

Moreover, the exhibits in evidence demonstrate that DC received a higher percentage of net proceeds under the Warner Brothers agreements than it did under the third party agreements. It received 30 percent versus 25 percent.

The fact that those net proceeds definitions don't throw off a lot of money is true whether you're getting 25 percent of nothing or 30 percent of nothing. These agreements are not designed, as Mr. Levitz testified, to generate profit today. They don't generate profit. They are designed to sell merchandise.

For all those reasons, your Honor, we once again ask that those particular agreements be the subject of a Rule 52 partial finding by your Honor.

But I'd like to move on now to the television agreement. It can be stated unequivocally, your Honor, that the evidence leaves no doubt but that the television agreement, even if considered exclusive, stands at the very top of the market. Plaintiffs failed to offer a single television literary rights acquisition agreement in an effort to show market value. Rather, they attempted, just as Mr. Toberoff just has, to derive the value of the Smallville television agreement by pointing to the Salkind Superboy agreement for a 1987 show that was

syndicated locally in the afternoon, a show that by Mr. Levitz's testimony produced virtually no profit, yielding only a fraction of what was earned by DC from Smallville.

And as for this $800,000, Mr. Toberoff has once again misstated what that agreement unequivocally clearly says, just as Mr. Halloran did. Mr. Halloran at his deposition pointed to the Superboy agreement as being the only television agreement that was superior to the Smallville agreement, and he rested that opinion on the fact that it contained an alleged $800,000 option payment.

At trial Mr. Halloran abandoned that contention because the contract leaves no question but that that $800,000 was received for a payment that was due under a different contract for Superman 4. So instead of waiting for somebody to pay it $800,000, DC used the opportunity of that agreement to get $800,000 from Salkind and to give Salkind the right to receive the $800,000. It had nothing whatsoever to do with the Superboy agreement. Again, that was a syndicated show.

They are made for a fraction of the budget of a network show. They produce a fraction of the gross, and they run for a year, two years. This may have run for three.

The only other supposed evidence relied upon by plaintiffs in connection with the television agreement, again referred to by Mr. Toberoff in his closing, the plaintiffs haven't changed their position one whit from their contentions of fact and law, to their expert's report, through the trial, through the closing. Same argument.

They argue that the fact that DC was able to obtain a similar contingent compensation, not episodic fee, but contingent compensation for this Batman-related series somehow indicates that they got less than fair market value for Smallville. And that simply doesn't make any sense.

If anything, it may show that the parties overvalued Birds of Prey. It doesn't indicate in any way whether the value received by DC under the Smallville agreement was or was not fair market value. That question has been answered unequivocally by the defendants' testimony.

Mr. Levitz first testified to obtaining an unprecedented first dollar gross participation when he negotiated the Lois and Clark agreement. It had never been done before, according to Mr. Levitz and to the executive who represented that fact to him.

Mr. Levitz testified to the economic benefits that that gross share in Lois and Clark threw off to DC, and he testified to his determination to maintain that precedent in connection with Smallville. Maintaining precedence is by all of the experts' testimony very important. But to Mr. Toberoff, it's xeroxing a prior agreement. To Mr. Halloran, it's, quote, mimicking, close quote, a prior agreement.

But to the people who were actually involved, to the people who negotiated those agreements, that precedent was vitally important to DC and resisting as much as it could by Warner Brothers.

As the Court will recall, the television agreement provides on a per episode basis for DC to receive 3 percent of the first $1.5 million of gross and 5 percent of all subsequent gross. And after explaining the enormous fans and economic desirability of a first dollar gross participation, as compared to other forms of contingent compensation, Mr. Paul testified that the television agreement is the only first dollar agreement that Warner Brothers Television has made with any other rights holder or participant than DC of any kind.

No producer, no writer, no lead actor, no one gets a first dollar gross participation.

And the result of that exceptional gross participation is hardly open to dispute. Exhibit 1026, which is a participation report dated as of June 30, 2008, shows that this first dollar gross participation had already yielded almost $24 million to DC. There has been no testimony of any exclusive television agreement that even comes close to that first dollar gross position, that even comes close to the $45,000 per episode that was paid to DC under the film agreement, and certainly none that comes close to the actual amounts earned by DC, namely $24 million.

Closest agreement, according to Mr. Paul's testimony and according to the absence of any other agreement, is the Tarzan agreement. That was a deal negotiated between Warner Brothers Television and Edgar Rice Burroughs at the same time basically as the television agreement. It was negotiated in 2002. The TV agreement was negotiated first in 2001 and then amended in 2002.

The Edgar Rice Burroughs company was represented in this negotiation by the Cipherin Brittenham firm, a firm recognized by Mr. Halloran as one of the, if not the, most powerful law firms in the entertainment industry. And that Tarzan agreement, which is Exhibit 1102, is a very poor second indeed to the

Smallville agreement. This third party agreement negotiated with one of the biggest licensors in the list, represented by one of the leading law firms in the country, has an option fee of $10,000, a $150,000 exercise price, episodic fees that begin at $20,000 per episode for the first year, go to 25,000 per episode for the second, and then 30,000 per episode forever as compared to the 45,000 which began on the first program on Smallville.

And the Tarzan agreement provides for a contingent compensation interest, not of gross, not of first dollar gross, but 7 1/2 percent of something called modified adjusted gross, which is a figure arrived at by first deducting all distribution fees, all distribution costs, all production costs, and interest.

The plaintiffs haven't disputed the superiority of the Smallville agreement over this Tarzan agreement or any other television agreement as a whole, nor could they.

And, as your Honor may recall, Mr. Paul testified that he attempted to reduce the richness of the deal. He didn't want to xerox the Lois and Clark deal. He didn't want to mimic the Lois and Clark deal. Instead, he wanted to reduce the Lois and Clark precedent in arriving at the Smallville deal.

The testimony of both Mr. Paul and Mr. Levitz demonstrates that Mr. Levitz successfully resisted breaking the Lois and Clark precedent, and the evidence has disclosed at least one of the reasons why Mr. Levitz refused to do so.

And that is because plaintiffs' then lawyers, Bruce Ramer and Kevin Marks, eminent partners in one of the finest entertainment law firms in the country, who were then representing the plaintiffs, had reviewed the Lois and Clark agreement and had communicated to Mr. Levitz that it represented a safe harbor within which to license the TV rights once again and that the plaintiffs would not object to a license on those terms.

And, as Mr. Levitz testified, that safe harbor assurance was one of the factors that he relied upon in entering into the television agreement.

In short, there's no evidence to show that the television rights, even if they were exclusive, did not obtain fair market value from Warner Brothers. On the contrary, there is overwhelming evidence, none of it disputed, that the television agreement and the amounts paid thereunder to DC, $24 million, are and were in 2001 at the top of the market.

And there is no testimony to challenge that statement.

Turning to the film agreement, your Honor, the evidence has shown that in considering the value of film rights to an underlying literary property, there are a number of factors that are typically considered by studios. Primary among these are the prior film performance of the property, comparable deals, public awareness, and the precedence between the parties.

The evidence as to each of these customary factors demonstrates the economic superiority of DC's rights and the amounts they received thereunder, even if those rights be considered exclusive, which they should not be.

Insofar as prior film performance is concerned, the evidence painted a very vivid picture of the situation as it existed during the 1999 to 2002 period.

The first performance of the -- the performance of the four prior Superman films had demonstrated a steady downward spiral. Exhibits 1003 through 1006 are participation statements delivered by Warner Brothers to DC at the time that the film agreement was entered into. And those participation statements show that the cumulative earnings of each of those pictures, like their box office revenues, just went down, down, down, down.

The third film did less than half of what the first film did. And the release of that third Superman film was followed by the release of Supergirl, an undisputed bomb that earned nothing but critical and audience contempt.

And immediately following Supergirl, there was the catastrophic failure on every level of Superman 4. The evidence shows that the box office of Superman 4 was only about 10 percent of the box office of Superman 1. And that abysmal 1987 failure marked the end of Superman's film career for almost 20 years.

Plaintiffs attempted to dismiss this critical decline and public interest in the film property through Mr. Halloran's testimony that such steep box office declines were simply part of a trend that studios expected. As if any studio would make a sequel that it expected to earn 10 percent of the original.

And if Mr. Halloran's trend argument didn't hold water, as I demonstrated, it did not through examples like Dirty Harry, Die Hard, and Lethal Weapon, then Mr. Halloran had another thought.

He suggested that the complete failure of Superman 4 may have actually stimulated the market for Superman Returns. You'll recall his testimony that,

quote, one way of looking at the tanking of Superman 4 was that was good as of 2002 because the appetite in the marketplace for the Superman films wasn't diminished that much or gobbled up that much. That's at page 886, lines 9 through 13.

That may be Mr. Halloran's way of looking at the failure of S4 in this case. It certainly wasn't the mean he expressed when he testified in the Sahara case. In that case, where he had been retained by the author, Mr. Halloran testified that one disastrous film, the first in a series of 18 books featuring the Dirk Pitt character, had rendered the entire franchise, all 17 remaining books, quote, worthless, unquote.

In that case Mr. Halloran testified that the $68 million box office that Sahara earned reduced a franchise that was previously worth $30,000 to, quote, zero, close quote. But in this case he refused to acknowledge that Superman 4's $17 million box office reduced the value of the Superman property at all. Consistency was not one of Mr. Halloran's attributes.

Perhaps the most credible testimony concerning the value of the Superman film rights following Superman 4 came from the people in the best position to know its value to Warner Brothers. The company's chief executive officer, Alan Horn, and the worldwide head business affairs, Steve Spira.

Mr. Horn was as forthright and honest a witness as you could imagine. He answered every question without hesitation, without self-censorship. When Mr. Toberoff asked if Mr. Horn had looked at what Mr. Toberoff referred to as the, quote, success, close quote, of the prior Superman films before he invested Warner's money in Superman Returns, Mr. Horn responded at pages 127 and 128, quote, I looked at the last one, Superman 4, and was frankly daunted by the fact that it had done something like $15 million in the entire U.S. and Canadian box office. And I thought that was frightening, close quote.

He later added, quote, I just felt that the franchise had gone downhill, and I thought that it was a little scary, close quote.

And when Mr. Toberoff asked Mr. Horn whether today he still considered Superman as an evergreen source of revenue, Mr. Horn responded, quote, my view of Superman as an evergreen theatrical motion picture property is that it is viable but not -- but challenged. That's at page 150, lines 6 through 12.

Mr. Spira testified to conferring with Mr. Schulman regarding the value of the Superman property in 1999 to 2002, and having considered the value of that property with other members of Warner Brothers' business affairs department.

Mr. Spira explained that business affairs hoped to get a reduction of the deal that had been made with Salkind based on the following factors. Quote, the creative department or creative people, as it were, were concerned that Superman was very unhip. It was very particularly American in an environment where the foreign marketplace was becoming more and more important for you to recover your costs and hopefully make money. It was perceived as damaged goods because of the failure of the last two sequels and even Supergirl. And I think they had been excoriated by the critics.

That's at page 1257, lines 7 through 18.

That, then, is how Warner Brothers viewed the prior performance of the Superman films during this period. It was frightening and scary to Mr. Horn, and it was viewed as damaged goods by Warner Brothers' business affairs. That, by the way, is precisely the same term, damaged goods, that Mr. Gumpert used in talking about the value of the Superman property as a film property in 2002.

But notwithstanding that appraisal, Mr. Spira and in turn Mr. Schulman were unsuccessful in convincing Mr. Levitz to depart from the Salkind precedent. And once again, one of the primary reasons why Mr. Levitz resisted such attempts was because he knew, and indeed relied on the fact that the sequel's own attorneys, Mr. Ramer and Mr. Marks, had analyzed the Salkind deal and communicated directly to DC and Warner Brothers that future deals entered into at the same level as the Salkind deal would not be challenged.

Specifically, Mr. Marks wrote in his October 19, 2001, letter, and I quote, intercompany transactions will be covered by safe harbors established at a level consistent with the Salkind Superman theatrical motion picture deal, the Lois and Clark television program deal, the Warner Brothers Television animation deal, and the existing fee arrangements with Warner Brothers consumer products, close quote.

The evidence shows that another key factor looked to by studios to determine the fair market value of an underlying property is what it and others have paid for comparable deals.

And we had a great deal of discussion at the trial, your Honor, with respect to what were comparable deals.

The defendants offered what they believed to be comparable deals. And those were agreements for various superheroes, including Tarzan, who Mr. Horn testified they are going to be making a tent-pole picture of -- Iron Man, Conan, Watchmen -- and then defendants over plaintiffs' opposition, introduced an X-Men agreement. And in addition, Mr. Gumpert provided details of agreements for three additional comic characters: Flash Gordon, the Lone Ranger, and the Green Hornet.

And by the way, when Mr. Toberoff refers to the agreements testified to by Mr. Gumpert that aren't physically in evidence, they are hearsay. But when he refers to the agreements that Mr. Halloran spoke of, such as this Hasbro Monopoly game, whatever that is, suddenly it isn't hearsay. It's gospel. The fact is, either expert has a right to testify based on hearsay evidence.

And what Mr. Gumpert had done was he had obtained from Columbia Studios data as to what those three -- Flash Gordon, Lone Ranger, and Green Hornet -- deals showed.

Mr. Toberoff suggests we should have found out what Spiderman provided.

Mr. Toberoff should have found out what the Spiderman agreement provided. It's been four years since Mr. Toberoff and plaintiffs first alleged that there was a sweetheart deal between Warner Brothers and DC. They have had four years within which to collect every comic book superhero agreement they could possibly have. They used the subpoena power of this court to acquire novel agreements, to acquire musical comedy agreements, but not a single comic superhero agreement ever.

They have never submitted a single superhero agreement for comparison to the film agreement so that your Honor might have some basis on which to determine whether these exclusive agreements, because all of these agreements are exclusive agreements, has any hearing on the fair market value of the nonexclusive agreements that we're here to determine.

Plaintiffs issued 16 subpoenas to studios and production entities, but not a single one sought a superhero property. They have actively avoided, they have actively resisted any attempt to introduce superhero agreements. Whereas we raised no objection, in fact waived our objection to having all of their

agreements come in at one time so that we could deal with it in an orderly fashion.

Our agreements were met with relevancy objections, with objections that oh, no, Iron Man is incomparable to Superman so you can't even admit the Iron Man agreement. There's been no attempt to provide a basis, a context within which the Court could determine fair market value of even exclusive rights for the only properties that are comparable to Superman. Novels are not comparable to Superman. My Fair Lady, which is almost as old as I am, is not comparable to Superman. Mr. Spira, Mr. Gumpert, Mr. Levitz have all testified that these are different types of agreements, novels, musical comedies. They have different economic structures.

And, of course, the evidence demonstrates why plaintiffs have not introduced any superhero agreements than those introduced by the defendants, and that is because those superhero agreements on their face, without injecting any figures into them, are each less economically beneficial to the licensor than the film agreement is to DC.

Mr. Gumpert testified to that fact at great length, and plaintiffs have not offered any testimony to the contrary.

Indeed, it appears that the financial superiority of the superhero agreements has been conceded by plaintiffs. Rather, their response to defendants' reliance on this group of agreements is that none of these characters are equal to Superman. Superman is incomparable. He is, according to Mr. Halloran, the most valuable and important intellectual property in the world. Wow. That's a mouthful.

Superman is a very important valuable property. He represents values that are -- that this country holds dear.

He has been an active icon in this country for 70 years due to DC's activities, by the way. But he's not incomparable. He's just a character.

And how do you distinguish between the value of Superman and the value of Batman as film properties? How do you distinguish between Iron Man and Spiderman? Is there a formula? Is there some basis upon which to draw those fine distinctions? Or should the Court properly conclude that once a character has reached a certain level of public awareness, the public is aware of them? The public is as aware of Spiderman as they are of Superman. The public knows as much and has as much familiarity with Batman as Spiderman or Iron

Man or Watchmen or Superman. They are all well known. They are all part, as Mr. Halloran referred to Superman, of our DNA.

The novels, on the other hand, have no bearing upon the market for superheroes. As I noted, they are just different animals. The pictures are different. They are half the budget, half the gross. And they have got an author whose name can be plastered above the title and who brings people in.

To eliminate any question that the Court may have had on this issue, however, Mr. Gumpert demonstrated by his testimony that the DC film agreement was more economically beneficial to DC than any of those novel agreements would have been.

Mr. Gumpert testified that he worked out the numbers on the deals for Hannibal, Lord of the Rings, Sahara, and Timeline, utilizing the actual cost and performance figures of Superman Returns, and concluded that DC made more money from Superman Returns under the terms of the film agreement than DC would have made from Superman Returns under the terms of Hannibal, Lord of the Rings, Sahara, or Timeline. He didn't just rely on the superior value of the five superhero agreements, all of which he testified had greater value -- had lesser value than the D C agreement.

He looked to these other agreements, and he looked to them in the only way they could be meaningfully looked at. And I know that this issue concerned your Honor. You asked several questions about it. Several questions about whether the performance of the film at the box office affects the value that was agreed to at the time of contracting.

And the answer is that it doesn't affect the value but that the box office can certainly be plugged into the deal to give economic meaning to the bare terms that had previously been agreed to.

And that's how the defendants have used the actual performance of Superman Returns and the cost. They have used it only when it was necessary to translate some of the other contracts' terms into meaningful comparable factors.

To do so in those cases, to truly compare apples to apples, you have to convert the terms into some common denominator. Some actual costs and revenues, in order to ascertain the value that those terms bring.

For example, if you wanted to compare the Sahara agreement to the film agreement to determine which one most favored the licensor, you have to

convert producer's gross into actual dollars in order to compare it to distributor's gross. And, your Honor, to expand on that distinction just one bit, the statement made by Mr. Toberoff built on the statements by Mr. Halloran, that producer's gross can sometimes be as high or higher than distributor's gross, is sheer absolute nonsense. If you told that to anyone in the film business, they would say you're crazy. Because the way it works, as Mr. Gumpert testified, and he ran the biggest independent production company for five years, is that a big production company will finance the production of the picture.

And because they finance the production of the picture, they get a sharply reduced distribution fee from whoever is going to distribute it.

Instead of 30 or 35 percent, they pay anywhere from 10, 11, to 15 percent.

But nobody, none of these independent producers, no one except Steven Spielberg and the producer of Star Wars, George Lucas, no one else finances the prints and advertising for the picture. That's always done by the distributor. So the distributor takes in a million dollars. He deducts his 10 or 11 percent or 12 percent distribution fee, and he deducts every dime he spent on prints and advertising. And in the case of Superman, if we were dealing with a producer, before that producer who had financed the picture, the production, received a dime, Warner Brothers or any other studio would recoup its distribution fee, and in the case of Superman Returns, the $142 million that it spent on prints and advertising.

As a matter of fact, if you were to take pencil to paper and figure out the difference between the distributor's gross on Superman and what the producer's gross from that same film would be, it's approximately one third of the amount.

Those are the only instances in which we've used actual figures to make that determination. Is 10 percent of producer's gross worth more than 5 percent of distributor's gross? The answer is no, it is not. But you can't find that answer. You can't reach that answer without knowing what the distribution fees were and what the prints and advertising costs were that were charged and recouped by the distributor.

Is Timeline's $10 million purchase price, 10 percent of gross, and 30 percent of 75 percent of merchandising better than the film agreement's zero purchase

price, 5 percent of gross, and a hundred percent of 75 percent on merchandising?

Well, you have to figure that out. When you did, you find that it's not. You'd find that DC makes out better financially than Timeline does, even though Timeline has a $10 million purchase price, which is always applied against the contingent compensation, and twice as much of the gross participation, but less than half as much of the merchandising revenue.

So it's to make those points, your Honor, that we actually utilized the real figures from Superman in comparing some of these agreements. Most of them, as Mr. Gumpert testified, are so obviously inferior, that no such translation is necessary. You look at Tarzan, and you say well, it got whatever it got. I think 7.5 percent of modified adjusted gross. Anyone who knows anything about the business knows immediately that that cannot begin to compare to 5 percent of first dollar gross.

THE COURT: Counsel, why don't we go ahead and take our afternoon break right now. 10 or 15 minutes, and we'll resume.

(Recess taken.)

THE COURT: Counsel, you may continue.

MR. BERGMAN: Thank you.

Your Honor, if I may, one final point on the issue of public awareness, which we all understand is important. But what is it that is important? The question is not who sells the most comic books or who is the individual character who is most easily recognized by the most people. The question is who sells the most theater tickets? Who brings the most people into the theater to generate money for everyone? And the evidence is demonstrated, for one reason or another, that it is not Superman. Superman is not the movie star that Spiderman is, the three Spiderman movies being among the top five movies, I believe, of the box office.

He's not the kind of movie star that Batman is. A billion dollar worldwide gross income for The Dark Knight. It is not just a question of is Superman known. Is Superman known and attractive enough to people who go to movie theaters to go and buy their tickets.

Mr. Toberoff referred to an exhibit that none of us have referred to during the course of the trial, and I regret not having done so, and that is Exhibit 182, I

believe, which is a market research report commissioned by Warner Brothers prior to the release of Superman Returns.

It demonstrates, surprisingly enough, that the group of people most interested in the anticipation of seeing the Superman movie were not the tweens and the teens who go to theaters and see movies time and time again, but rather were middle-aged women, of all things, who remember the Christopher Reeve movies and who thought the most of the property because of those.

It's a very interesting report. I've been through it a couple of times.

Another thing that contributes to the value of film rights in a property are precedents. Everyone has testified to that. And the testimony of Mr. Levitz made it clear that based on his analysis of the property's value in the late 90's, an analysis to which he testified at great length, he concluded that the essential terms of the Salkind film deal continue to be the best market terms available for the property.

Yes, they were terms entered into 25 years ago with a rather questionable independent producer who had no leverage. They were 25-year-old terms, but 5 percent of 2002 dollars is a lot more than 5 percent of 1974 dollars. There's a built-in standard of living increase between those two.

And in any event, it was determined that was the best price he could get. And he maintained that precedent over the arguments of Spira and Schulman. With all his years at DC, he's been there for 35 years, he's watched every animation property go through the mill, comic book, television, and film. He knew where the money was, and the money was in merchandising and in a share of gross, and he made sure that when he entered into the film agreement, he reserved merchandising rights, and that, of course, affects the value of that agreement.

It's very cute to say well, if you reserve something, you're not transferring it. Well, that's true, but the question is what is the value of the deal. And if I hold on to something that's going to bring me $30,000 rather than splitting it with the next guy, that affects the value of the deal.

Another interesting thing that we've had very little comment about is that in addition to reserving the merchandising rights under the film agreement, DC reserved the television rights.

Now, Mr. Toberoff properly states that they were obligated, DC, to do television in connection with Warner Brothers Television. But this is the only agreement

that we've seen where you have money coming in from the movie theaters and at the same time money coming in from television. $66 million from the two.

And it all resulted from the fact that DC reserved those rights, and Warner Brothers permitted it for its own reasons, of course, to exercise those rights at the same time that the movies were being developed. $66 million. And there's no amount of cherry-picking that can be done by the defendants that negates the fact that the agreement as a whole is more financially lucrative to DC than any other agreement, excluding My Fair Lady, taken as a whole.

It doesn't matter, and it's been going on -- Mr. Toberoff did it in his contests of fact and law.

Mr. Halloran did it in his report, did it throughout the trial. And this morning Mr. Toberoff did the same exact thing. This contract has an $8 million purchase price. This contract has no purchase price. Yeah, but this contract doesn't have any merchandising right, and this one has 75 percent.

You cannot take contracts apart and say because it has this term, it's better than this contract. You have to look at the thing as a totality. How much money is DC going to make from the contract? Not from the term but from the contract. DC is not going to be sharing any terms with the Siegel heirs. It's going to be herring money. And it's the money that it makes that counts.

It doesn't matter that in one case a film has a purchase price of $10 million which is applicable to the gross. And in another case no purchase price and a gross of a hundred million dollars. It's the same thing.

If it's a $200 million gross, as in Superman Returns, it's twice as good.

We've been challenging the plaintiffs to consider the entirety of one agreement to the entirety of another agreement for months. Our trial brief, my opening statement, everything that we've done has been to try to focus the plaintiffs upon looking at the totality of what a licensor earns under an agreement. And they have refused to do that.

And in a further attempt to obfuscate matters, the plaintiffs have placed their emphasis on non-monetary terms such as creative control, or the absence of a provision whereby the rights would revert to DC in the event Warner Brothers decided for some inexplicable reason not to make any more Superman movies.

And the latter point, your Honor, as I listened to the questions that you posed, was of concern to you, or appeared to be of concern to you. I realized that -- I think Mr. Toberoff realized it, too, because halfway through Mr. Halloran's testimony, suddenly, out of nowhere, the reversion provision became the most important provision in any acquisition agreement. He actually said that.

And he said that because your Honor showed some concern about it. And it's a red herring. It has no bearing whatever upon the economics of the deal. And I'd like to take a few minutes to demonstrate why.

First of all, there is a reversion provision in the contract. It's a reversion provision that if Warner Brothers doesn't make the $20 million worth of option payments, then the film returns -- the rights return to DC.

More importantly, the plaintiffs have failed to show how the lack of a reversion provision tied to the production and release of future pictures actually economically impacts DC or the plaintiffs.

What difference does it make in terms of the money that we're looking at? That's what the trial is all about.

How much money did DC receive, how much money, if any, does Warner Brothers have to add to the pot. How much money will the Siegels get.

And your Honor wanted to know the answer to what the value of reversion was, and you asked Mr. Halloran point-blank -- this is at page 750 -- the Court, the reversion is something you cite to repeatedly. From your perspective, how do you in negotiating, to use counsel's example, how do you value that in a particular negotiation? How do you assign a value to that reversion element?

And as an examination of Mr. Halloran's answer will show, your Honor never got an answer to that. No value is placed on it. He didn't tell you how any value is placed on it. He just kept repeating that the reversion right was extremely important, perhaps the most important term in any rights deal.

Mr. Halloran said that he would actually advise DC to pick any agreement over the actual Superman film agreement as long as there was a reversion right, even if the economic terms were otherwise less favorable. But there's no logic to that at all. Nor is there any evidence as to how much that supposedly missing reversion right was worth.

What was it worth in terms of dollars to DC or plaintiffs? What does your Honor do with it? How does it figure into the entire problem that your Honor has to

resolve before October? Mr. Gumpert, defendant's expert, who I think was indeed by virtue of experience a qualified expert, testified that in this case he didn't think the reversion right had any value at all. And he had a couple of reasons.

The first dealt with the difficulty, even if there had been a reversion, of DC going to another studio to sell those rights. Because that studio would have to consider and deal with not merely the termination of the Siegel heirs' rights, but also the fact that Warner Brothers had its own copyrighted interests in the Superman property.

Warner Brothers has copyrights in various films, television shows, and other audiovisual presentations of the Superman character. A studio, another studio considering buying DC's rights in 2002 would recognize that, of course, and would recognize that they would have to skirt anything that was contained in the Warner Brothers own Superman films that wasn't in the DC-owned rights. And there's a great deal of it.

Mr. Halloran also testified to precisely the same thing. At page 370, he said that there would always be the concern at another studio about potentially infringing on exclusively owned Warner copyrights or trademarks.

The second reason why Mr. Gumpert determined that the reversion right had no real value was the fact that the heirs of Joseph Schuster had noticed a termination of his copyright grant effective in 2013. When that happens, your Honor, the entire Superman situation shifts drastically. At that point any Superman derivative works, certainly any major feature films, will be severely curtailed, if not entirely eliminated in 2013, provided the Schusters' termination is record as proper, just as your Honor has approved the termination of the Siegels'.

THE COURT: That wasn't known at the time the DC Comics deal was worked out with Warner Brothers.

MR. BERGMAN: Well, your Honor, we -- it certainly was the law at that time. The Schusters hadn't exercised their termination right yet, but no one had any doubt that they would. That they are, after all, represented by Mr. Toberoff. It's the same situation. So that while there had been no actual filing of the termination notice, no one doubted for a moment that it was coming. And when it comes, you have a situation where the Siegels and the Schusters own 100 percent of Action Comics No. 1.

But there's not much they can do with it. DC owns thousands of Superman properties, but they can't make a movie without infringing on No. 1. So for all practical purposes, Superman doesn't fly after 2013.

For another reason, a reversion prior to 2013 would essentially be meaningless. And that is this, your Honor. If you recall, plaintiffs' expert, Mr. Halloran, testified as to what typically happens with the reversion provision when there is one. The studio has a two- or three-year option period within which to develop a picture and decide whether to purchase the rights and proceed with production.

Then the studio has another period of time to actually produce and release the picture. Mr. Halloran testified that it's typically 18 to 24 months.

Then after the release of the first picture, the studio has a period of time to release the next picture in order to avoid reversion.

Mr. Halloran testified that the typical reversion period is three to five years after the first picture is released. That is, that the rights revert unless a second picture is produced and released within three to five years of the release of the first picture.

Now, putting those time periods into the context of the Superman film agreement, the agreement was executed in 2002. Superman Returns went into production by 2005, and the movie was released in 2006. So far, all of these time periods fall within what Mr. Halloran testified is typical. So no reversion would have been appropriate prior to the time of the release of the picture, even if there had been a reversion provision.

And since it's now been less than three years since Superman Returns was released, what Mr. Halloran refers to as a typical three- to five-year window to make and release a second film also hasn't expired yet.

So the earliest the Superman film rights would revert to DC under what Mr. Halloran describes as a typical time frame is this coming summer, the summer of 2009.

But DC can't do anything with those Superman rights if it got them back this summer, and the reason why it can't do anything is that that leaves a period of less than four years until the rights evaporate. There's no studio that is going to buy the rights to Superman with four years left. Because as Mr. Halloran testified, the whole idea in buying these kinds of properties is that you have a

franchise, one picture after another. That can't happen anymore. There is just no time left for that.

And that's the cold reality. And there's one more point about reversion, your Honor. I tried to make this when Mr. Halloran was on the stand. I don't know if it came out clearly. It didn't appear to me that it came out convincingly. And that is that Mr. Halloran testified that the reason reversion provisions are important is because a rights holder wants to make sure that there's a continuing exploitation of the rights and that they are not being tied up with a studio just sitting on them doing nothing.

But that concern has no application here. Even if we're looking at the full 34-year term through 2033. Nothing in the Superman film agreement constitutes an impediment to the exercise of the plaintiffs' recaptured rights in Action Comics No. 1 whenever and wherever and however they deem fit.

Since your Honor has ruled that termination effective, DC's license of any interest in Action Comics No. 1 is necessarily nonexclusive, and plaintiffs, as a matter of law, can fully exploit Action Comics No. 1 today, or anytime in the future, and gain whatever financial benefit they can from it subject only to their obligation to account, like DC to its co-owner.

DC may not be able to exploit its exclusive rights until the end of that 34-year term. DC may have locked up its exclusive rights for 34 years. But that doesn't do any damage to the plaintiffs. The plaintiffs have no right to share in defendants' exclusive rights. So whether defendant tied up their rights for three years or 300 years is irrelevant to the plaintiffs' bottom line, to the money they might be entitled to in the accounting phase of this trial.

In short, your Honor, the plaintiffs' expressed concerns about the lack of a reversion provision in the Superman film agreement are entirely speculative and unsupported by any evidence in the record, and in any event, they haven't shown to be of any value. And if they are of value, and one can hypothetically think gee, that's some value, your ability to take your picture back, how much is it?

Is your Honor going to determine based on this record what the reversion value is? I doubt that. You certainly have no basis on which to draw.

And, you know, ironically it was Mr. Halloran's testimony that dealt the death knell to plaintiffs' claim that the film agreement was below market value. At the conclusion of plaintiffs' direct examination, Mr. Toberoff asked Mr. Halloran

what terms he would have been able to obtain for DC had he been its representative in bringing the film rights into the open market.

Mr. Halloran responded in detail, listing the elements that he believed he would be able to get or would at least, quote, go for, close quote. And that was all contained at pages 576 through 579 of the transcript.

And he listed the elements of his dream contract ala carte, picking the best purchase, the best option, the best this, the best that.

During the direct examination of plaintiffs' expert, Mr. Gumpert, I laid each of those elements out, quoting directly from the official transcript of Mr. Halloran's testimony, and asked Mr. Gumpert in essence to quantify Mr. Halloran's fair market value deal and compare it to the deal DC actually made.

And after I did so, your Honor addressed both Mr. Toberoff and I, and you stated, quote, if there are any other elements that should be in here, let's get them out on the table now. Is there any other elements that the plaintiff believes needs to be before the witness to properly make this comparison? Because I think it's a very legitimate comparison to make.

And that, your Honor, was at page 1374 of the transcript, lines 6 through 12.

And in response to your Honor's question, Mr. Toberoff added the element of a TV royalty -- a video royalty, an element that Mr. Halloran had not included. In other words, Mr. Halloran didn't say I could get more than 20 percent. He didn't say anything. Mr. Toberoff raised the video issue. And I said okay, let's give them the highest. And I thought 35 percent was the highest.

(TEXT REDACTED)

…video revenue to the question posed to Mr. Gumpert. That is, take this money and figure out how much they get under this agreement, how much they get under Mr. Halloran's a la carte fair market value agreement, and let's compare them.

Mr. Gumpert itemized the value of the Halloran fair market value agreement as follows: 22 million for the gross participation. There was a gross of 220 million other than video. 17 million for the merchandising share. A $625,000 producer's fee for Mr. Levitz. When Mr. Halloran described it, he said as in Neopets, and in Neopets, they got a $625,000 producer's fee. And a three and a half million dollar video fee computed at that highest rate of 40 percent.

Mr. Gumpert accurately calculated those revenues to total $43,125,000 as the amount of money that would result from his ala carte fair market value agreement that he would obtain or would at least go for if he, in his words, had the honor of representing DC in the negotiations.

I then asked Mr. Gumpert, as your Honor will recall, to compute by way of comparison the moneys that were actually earned by DC from Superman Returns under the film agreement. And he calculated an $11 million share of gross, which is 5 percent of the 220 million, 30 million for merchandising, which is the undisputed testimony, and $870,000 for the video royalty. Figures which came to a total of $41,870,000.

In short, after ten trial days, we found that plaintiffs' version of a fair market value film agreement, $43,125,000, resulted in only $1,255,000 more than the 41,870,000 actually received by DC under the film agreement, a difference of less than 3 percent.

And I submit, your Honor, that it hardly needs saying that if the film agreement is within 3 percent of the best fair market value deal that could be constructed by the plaintiffs' own expert, then it certainly is itself a fair market value deal.

The fact is that each of the agreements in question have been shown to be at fair market value even treating them as conveying exclusive rights, which they do not. Moreover, these agreements, each and every one of them, had in 2001, according to the testimony of Mr. Levitz, been expressly approved as being within safe harbors established by plaintiffs' prior counsel, Mr. Ramer and Mr. Marks.

And given the reliance placed by defendants upon the guidance of plaintiffs' prior lawyers, plaintiffs' present lawyer can hardly be heard to now complain that such reliance was misplaced.

Based on the evidence the Court has heard over the past 10 trial days, equity neither requires or permits any addition from Warner Brothers to the $66 million thus far received by DC under these agreements.

Rather, your Honor, with all due respect, I say this. It's time to move on with the case to determine what portion of those revenues the plaintiffs are entitled to share in.

Thank you.

THE COURT: Thank you, Counsel.

Mr. Toberoff, I will give you 30 minutes for rebuttal.

MR. TOBEROFF: Thank you, your Honor.

REBUTTAL ARGUMENT BY COUNSEL FOR THE PLAINTIFFS

MR. TOBEROFF: Mr. Bergman's closing argument seems to be based on what defendants wanted to get into evidence as opposed to what they actually got into evidence. The Court noted that we had a week to do our closing arguments and ask for pinpoint cites, and defendants shied away from this. The large majority of the closing argument only gave pinpoint cites for actual quotes. And there's good reason for this.

The majority of Mr. Bergman's closing statement is not supported by the record. It's not supported by admissible evidence or admitted evidence.

An example, just to throw out one, is he puts great emphasis on the hearsay statements of Ramer and Marks during the settlement negotiation and reads from an actual letter, which is Exhibit 1126. Exhibit 1126 is not in evidence.

Plaintiffs did indeed address the minimal impact of the nonexclusivity of Action Comics No. 1 at trial. I refer the Court to the transcript at page 358, line 13, to 379, line 11. When plaintiffs brought up this issue of exclusivity, not asking for reconsideration, but really asking for clarification, and discussed it in front of the Court, the Court then turned to Mr. Bergman, after I made my statement that it really applies to action 1 and the rest of the copyrights transferred were exclusive, and Mr. Bergman restated essentially what I had just said. And then the Court looked at both of us and said, "I think we're all talking about the same thing here." And we are indeed all talking about the same thing.

The agreement, while it would have conveyed only nonexclusive rights to Action 1, conveyed exclusive rights to all the other copyrights comprising the Superman mythos. The compensation in the agreement was for the entire Superman mythos, not just Action 1. So there's no basis to -- it doesn't further the analysis to value the nonexclusive rights to Action Comics No. 1 because even if you were able to do so, you'd have nothing to compare it to in the agreement in order to assess whether the agreement was for fair market value, since the compensation for the agreement is for the entire Superman mythos, the vast majority which was exclusive.

We also address in great detail why because you don't have foreign rights and because essentially Warner Brothers preempts the marketplace with all these

exclusive rights, how there's no risk of competition, and the risk of competition from the Siegels is the only thing that could possibly devalue the rights.

We show that obviously Warner Brothers actions show that they didn't consider these rights devalued, or they wouldn't have plowed half a billion dollars into them with the Superman Returns movie and another half a billion dollars into Smallville.

As far as Mr. Halloran's expertise is concerned, the foundation was laid for his expertise at page 253, line 15, to 267, line 19. With regard to TV, the foundation for his expertise was laid at 259, line 16, to 264, line 18.

In addition, at page 259, 6 through 10, Halloran shows that he indeed engages in major film business with all the studios he represents, a big producer that has produced many franchises, including Mummy and now G.I. Joe.

In addition, this expert is not limited to those agreements that he has actually negotiated. And yes, he negotiated the Neopets transaction with Warner Brothers. An expert obviously takes into account the knowledge and education and experience that he's gleaned over his entire life. And in this case, we show that, as an executive at the studios for 10 years and afterwards, he certainly qualifies as an expert.

But just as importantly, defendants did not voir dire Mr. Halloran or move to exclude any of his testimony as plaintiffs did with Mr. Gumpert with regard to television.

We voir dired Mr. Gumpert specifically as to his lack of television experience. We asked for exclusion, and defendants conceded that they could not -- would not offer Mr. Gumpert for TV. Defendants did not do this.

Defendants complain that Mr. Halloran did not distribute or circulate his opinions to distributors and other people in town while making him a scapegoat under his protective order regarding the Harry Potter matter.

I think it's plain that Mr. Halloran could not offer his opinions around town because such opinions naturally deal with whether the Superman film agreement was for fair market value, and the terms of that agreement are confidential.

It's almost conceded that -- turning to the TV agreement, it's almost conceded that Birds of Prey is a much less valuable property than Superman. Yet it got the same 3 to 5 percent gross participation in TV as Superman. This is -- when

you have a much more valuable property like Superman, getting the same participation as a much less valuable property, plaintiffs submit it is indeed evidence that the more valuable property did not get major market value, not that they simply got lucky with a less valuable property.

Mr. Paul did not testify at trial that no one gets first dollar gross. He testified that he personally had not negotiated a first dollar gross deal. And I'll represent to the Court that at his deposition he clearly stated that their first dollar TV gross participation is at Warner Brothers Television.

MR. BERGMAN: Object to that reference. It is not only improper, it's inaccurate.

THE COURT: Sustained.

MR. TOBEROFF: Regarding the Tarzan agreement –

THE COURT: On the improper part. It's not before the Court.

MR. TOBEROFF: I understand.

Regarding the Tarzan agreement, there is evidence in the record that indeed the Tarzan character is in the public domain. The estate holds in later stories and elements which allows it to enter into these agreements, and the estate has made it much cheaper to get an inexpensive license from them rather than to litigate with them over possible infringement of later stories.

The record -- turning to the value of Superman, the record reflects that Warner Brothers started to vigorously develop Superman in 1994, which is only seven years after the flop Superman 4, and proceeded to plow $60 million into it.

We submit that that's evidence that Superman 4 did not have the devastating effect on the value of Superman that defendants suggest.

Horn may have testified that Superman is viable but challenged. Yet we know that despite this, he green lit the expenditure of $60 million in development and $400 million in production and marketing.

Why we ask? And the answer is because it's Superman. And the value in these properties has demonstrated with Batman lies in the ability to reboot these properties because of the evergreen nature of the properties. They are so much a part of our culture, both in terms of their story lines and their imagery, that people will allow you to make up for an isolated failure with a new film. And the studios are demonstrating this, and, as Halloran testified to this, not just with Superman, but with Batman, with Star Trek, with all sorts of

other properties where they are rebooting the properties based on the branded nature of the properties, which is a hedge against risk.

The defendants -- Mr. Bergman spoke at great length about Mr. Levitz's negotiation of the Superman film agreement and how he insisted that Warner Brothers could not depart from 1974 precedent, and the question is why can't they exceed 1974 precedent? Why are we stuck in 1974 in 2002, when comic books, as the source of films, are going through the roof?

The goal is not to maintain 1974 rates. The goal is to maximize a core asset of DC based on the current market. And in doing that, you don't go to the 1993 X-Men agreement underlying a successful 2000 X-Men film.

You look at the success of the X-Men film.

We know that Mr. Levitz was not allowed to test the market for Superman. While claiming that novels are noncomparable and relying on what is in this case I don't believe state of mind testimony but expert testimony, Mr. Levitz, Spira, the only expert there would be Gumpert.

The next line from Mr. Bergman is novels have authors whose names can be plastered above the title and bring people in.

What this means to me, and I think to everyone else in this courtroom, is that the names of these authors have branded titles, which is exactly why you compare novels to Superman, to board games, to a theme park ride. Because it's the brand. It's the preawareness that the studio is paying for, not because they can adopt the novel.

Mr. Bergman referred to Mr. Gumpert's five superhero agreements. Mr. Gumpert did not have five superhero agreements. He had an old agreement for Iron Man, before Iron Man became a household name, due to the success of a film made years later on a completely different agreement.

And he had information regarding the Green Hornet. None -- neither of these properties are at all comparable to Superman, and, in fact, the deals have inferior terms is only to be expected.

In talking about the Sahara agreement, Mr. Bergman mixes distributor's gross in the pure sense, which means all the money made by the actual distributor, with distributor's gross referred to by Mr. Halloran and saying producer's gross can be greater than distributor's gross. When Mr. Halloran refers to a distributor's gross, and I'm referring to a distributor's gross, we're referring to

the gross that only adds 20 percent of video -- worldwide video revenues included in distributor's gross as opposed to a hundred percent of worldwide video revenues in a world where video accounts for 50 percent of the worldwide marketplace.

It's in that respect that when producer's gross includes a hundred percent of video, even with a distribution fee of 10 to 15 percent, which is reduced due to the financing of the producer, that indeed distributor's gross -- we're talking here about defined terms, not civilian terms. In fact, Sahara, which was financed by the billionaire Phillip Anschutz, who in fact put up marketing money for the movie, contrary to Mr. Bergman's statements.

MR. BERGMAN: That's contrary to the evidence, your Honor.

THE COURT: Sustained. You may continue.

MR. TOBEROFF: Mr. Bergman referred to Timeline as having a $10 million purchase price and other terms in his closing statement. Timeline, Exhibit 325, doesn't have any purchase price. That's the agreement that in lieu of up-front money, the author negotiated a 10 percent of first dollar gross participation escalating to 20 percent of first dollar gross.

Again, engaging in post-2002 hindsight rationalizations, Mr. Bergman refers to the actual performance of Superman Returns, the movie, which actually did better, we showed at trial, than the first Batman reboot film, Batman Begins, in 2002. Excuse me -- in 2004.

But he refers to that to say Superman is not the movie Spiderman or Batman is. It's not the movie star Spiderman or Batman is. Well, if Batman is such a movie star, then why did DC get less for the Batman agreement for Batman than it did even for the Superman agreement? Again, it makes no sense and there's no rhyme nor reason to these affiliated transactions but for the fact that they are affiliated transactions.

And again, defendants' arguments are belied by their own conduct. After the $1 billion theatrical gross of The Dark Knight in 2008, you can be sure that Warner Brothers is anxious to bring Superman back, and Mr. Horn testified to that fact. The reason is, when you look at each of these studios, if you look at Sony, which is Columbia, they have Spiderman.

And they make a lot of movies with Will Smith. In an industry where you're supposed to drop names, I forgot the name.

THE COURT: Both sides have dropped a sufficient number of names.

MR. TOBEROFF: Sony has Spiderman. Universal, which lacked these branded characters had to go back to their archives and pulled out the Mummy. Fox has X-Men. Paramount now has Iron Man. What does Warner Brothers have? It has Batman, Harry Potter, and Superman, all three of which are now of tremendous value.

The question is how did Mr. Levitz know what the market was for Superman rights if, as he admitted on the record, he never shopped the rights to another studio, he never hired a top talent agency, nor did he hire the Brittenham firm or the Ramer firm or all the other top entertainment firms Mr. Bergman keeps complimenting.

He functioned solely within the closed Warner Brothers universe and did the best he could given that affiliated relationship.

But there is no doubt that the agreements in question are not agreements that were pinned to a fair market value or any fair market value analysis. They are asset transfers within a closely held corporation. They are asset transfers from a company where the record shows is essentially an IP stable for Warner Brothers to Warner Brothers. And when Warner Brothers saw the tremendous value after 2000 of these superhero brands in the marketplace, they made sure to lock up these properties with no chance of reversion, notwithstanding whether they made a movie or a TV series or sat on the property. They wanted to control this asset.

That brings us back to reversion. Mr. Bergman asked what difference does it make anyway, reversion. Who cares about reversion. What's the economic importance of reversion.

In fact, Mr. Halloran did answer the Court and did testify at page 406, lines 8 through 15, that reversion has tremendous economic importance. But even without that testimony, it's obvious. If you have a property like Superman and you are sitting watching while Spiderman and all these other movies make money, and you can't do anything about it to launch a movie and must simply wait for the parent studio to make a movie, and for year after year they don't make a movie, it has tremendous economic impact.

THE COURT: Let me give you an opportunity, Counsel, to answer the question that I don't think Mr. Halloran has answered, and perhaps I missed it. But the Court's question is how do I value it quantitatively? If, at the end of the day, I'm

left with a situation that I believe the absence of that reversion clause, the one that you're referring to, as opposed to one that actually does exist in the agreement, is of significance to evaluating the fair market value of the rights transferred, how do I quantify that? That is the question that -- my question to you is is there evidence in the record as to that quantification as opposed to a more general sense that it's of value?

MR. TOBEROFF: First, and I say this with -- I will try and answer that question as to quantification. But first, and with due respect, the mission before us is to decide whether or not an internal affiliated agreement was made for fair market value. If you see that something has devastating economic impact, the fact you can't put a dollar figure on that because to do so involves all sorts of different potential scenarios doesn't mean that you don't take that into account when judging whether the agreement as a whole was for fair market value.

Remember, defendants keep saying we look at the agreement as a whole. This is a part of the agreement as a whole. What plaintiffs need to show is that it has devastating economic impact. But I'm going to offer some things to quantify it.

If you have an agreement with only a million five of fixed compensation up front where other agreements have 8, 9, 10 million of guaranteed compensation, even $20 million, and it's weighted -- the entire agreement is weighted to a 5 percent contingent gross participation, that means if they don't make any films for 34 years or make only one film, you are going to get a fraction of the money you could get if you were in the marketplace and making deals with studios where they have three or five years to make a movie, and then after that movie, they have to make another movie within three or four years or it goes back to you, allowing you to set up the movie at another studio who will make the movie in three to four years.

THE COURT: And that analysis assumes that you could make a movie at another studio?

MR. TOBEROFF: Yes, and with Superman I believe there's no question that every studio in town would be chomping at the bit. Because like I said, a lot of these studios don't own a DC. They don't have the luxury of having Superman and Batman already owned by the conglomerate. That's why I mentioned that Universal had to go back into its archives and revive the old Mummy character from one of its old films. That's why Universal had to make a deal with Hasbro,

which is all over the trades, to make movies based on branded board games, which is a far cry from a Batman or a Superman, because they don't have that.

Every studio in town would jump at the chance to make Superman movies. As evidenced by the amount of money Warner Brothers plowed into Superman in both the film and TV.

Now, Mr. Bergman referred to, well, why wouldn't Warner Brothers make Superman movies? Of course, they continue to make Superman movies, but with the same breath he says Superman is not the movie star Spiderman and Batman is.

Superman is a tired character. It's not hip. The two -- those two arguments completely fight each other.

The point is when you make a deal that's weighted to a contingent participation, you don't leave yourself at the mercy of the licensee for 34 years. It could have devastating economic impact. If you want to actually quantify it with a number, you can look at the returns of Superman Returns. You can look at the revenues from Superman Returns. You can look at the revenues which are in the record of the other superhero films. And you can develop the mean average for superhero movies and figure out what that 5 percent would be if they made a movie every five years.

The other studios are making movies, not only every five years, they are making -- a Spiderman movie has come out something like every two and a half or every three years.

Same with the X-Men franchise I referred to earlier, and same with Batman. The time between the first Batman Begins movie in 2004 and The Dark Knight was four years.

So they have the ability to crank out these movies every four years, and the failure to do so and every time they don't do that, you are losing a fortune in revenues. That's how you can quantify it if you need to put a number on it. But I submit that -- the fact that you can surmise a devastating economic impact is enough to show the agreement is not for fair market value, particularly when you look at the fact that of the five agreements offered by Warner Brothers in this case, three of them, these rolling reversion periods for lack of exploitation -- we don't know what the reversion terms are in the Green Hornet and Lone Ranger deals that Mr. Gumpert got over the phone because he never told us.

As far as the ultimate hindsight argument of defendants, which is the Schuster termination, as the Court noted, the Schuster termination wasn't served until after the agreements were entered into. It was served in November 2003.

It's too speculative to take that into account. We don't know if the Superman termination will be upheld. We don't know to the extent it will be litigated. There are too many unknowns.

To be able to say in retrospect that the reversion has no impact because if it turns that the Schuster termination is upheld, then the term we're left with is only up to 2013, then what does it matter? Defendants insisted that we objectively analyzed these agreements.

When we focused on the internal relationship or the cozy relationship and the inferences that can be drawn from that and how that's counter intuitive, defendants kept slamming us, saying you have to look at the objective terms of the agreement. Yet at trial, they didn't do so. They spoke about their best intentions and what they were thinking when they negotiated it, and what Warner Brothers does and doesn't do. They didn't give us the objective evidence regarding the marketplace.

And I submit that plaintiffs did do that. And that was their focus. And all of these hindsight rationalizations about how Superman Returns happened to do and how it happened to make money in this way or that way or if you run the Superman figures through other agreements, these are all hindsight rationalizations.

You can't make an objective judgment with this kind of after-the-fact -- these kinds of after-the-fact numbers, because where do you draw the line? Do you draw it after one film that was successful or another film that is more successful or a third film that's less successful?

Where do you draw the line if you're going to determine whether an agreement in 2002 was for fair market value by looking into the future of how movies actually turned out or what their revenues are?

I understand that running those numbers can explicate some of the terms and give the Court a better understanding, but it's not the basis of an objective analysis.

The argument that -- it took me a while to even understand the argument, that plaintiffs can exploit Action 1 and therefore the reversion provisions do not affect them does not make any sense.

DC's Superman film agreement transferring rights for money constitutes an exploitation of the Superman mythos triggering a duty to account. The Superman Returns that is produced pursuant to that agreement and for which defendants must account constitutes a post-termination derivative work for which defendants must account.

Thank you.

THE COURT: Thank you, Counsel.

Just to clarify the record, you seem to raise another objection concerning Mr. Levitz's testimony concerning the comparability of novels as expert testimony. Just so the record is clear on that, I thought we resolved this issue during the trial.

The Court is not considering that evidence as expert testimony but basically, as you indicated moments after that, how would Mr. Levitz know what fair market value was, it's precisely for his state of mind that the Court is considering that testimony.

All right. The Court has heard closing arguments.

And I've also obviously considered the evidence carefully over the last three weeks. Three things are clear to me at this point.

First of all, the motion with respect to Time Warner, Inc., is granted. Time Warner is out at this stage.

The Warner Brothers consumer products agreement, the merchandising agreement, there is certainly insufficient evidence to establish that it is not a fair market agreement or within that ballpark, and the same can be said of the animation agreement. The film agreement I need to think about some more in light of the arguments that were made this afternoon. But I do hope to get a decision out on that promptly. But that's where I'm at at this point.

And I will get that decision out, along with my order regarding briefs on additional issues together, and that will tee up our next phase of this trial.

There is a motion, an ex parte application to have certain Phase 1 trial exhibits and related testimony placed under seal. The Court has read both the application and the opposition. I grant the application. The proposed order needs to be modified to further include references to the under seal testimony that were made by both sides in the closing argument.

So I'll ask counsel for the defense to resubmit an amended proposed order on the application.

Any other matters that we need to take up at this time?

MR. BERGMAN: Your Honor, just to clarify the record, Exhibit 1126, the letter from which I quoted, was admitted into evidence. It was admitted into evidence for the purpose of Mr. Levitz's state of mind. And that's found at page 1212, line 16, of the transcript.

THE COURT: Mr. Toberoff?

MR. TOBEROFF: Originally Exhibit 1126 was to refresh the recollection of Mr. Levitz. The objection was Mr. Bergman was reading from the letter itself, not from Mr. Levitz's testimony. 1126 --

THE COURT: But the testimony came in.

MR. TOBEROFF: The testimony came in, but Mr. Bergman in his closing argument was reading from the letter itself. He was quoting the letter itself. That was the objection. The letter was --

THE COURT: Is there anything that Mr. Bergman quoted that was at odds or at variance from the testimony given by Mr. Levitz?

MR. TOBEROFF: I'd have to go back and study.

MR. BERGMAN: I can't answer that off the cuff.

THE COURT: Very well.

MR. TOBEROFF: Thank you.

MR. BERGMAN: One final question. You didn't mention the Smallville television agreement. Is that also under submission?

THE COURT: Yes.

MR. BERGMAN: Thank you, sir.

MR. TOBEROFF: Thank you, your Honor.

THE COURT: All right. Court is in recess.

(Proceedings concluded at 4:45 P.M.)

Status conference

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

Case No: No. CV 04-08400-SGL

HONORABLE STEPHEN G. LARSON, JUDGE PRESIDING

JOANNE SIEGEL and LAURA SIEGEL LARSON,

Plaintiffs,

vs.

WARNER BROTHERS ENTERTAINMENT INC.; TIME WARNER, INC.; DC COMICS; and DOES 1-10,

Defendants.

Riverside, California

Monday, July 6, 2009

3:39 P.M.

THE CLERK: Calling Item Number 23 on calendar, Case Number CV 04-08400-SGL, Joanne Seigel, et cetera, versus Warner Bros. Entertainment, Inc., et cetera.

Counsel, please come forward and state your appearances for the record.

MR. TOBEROFF: Marc Toberoff for the plaintiffs.

MR. WILLIAMSON: Nicholas Williamson for plaintiffs.

MR. BERGMAN: Michael Bergman for the defendants.

MS. MANDAVIA: Anjani Mandavia for defendants.

THE COURT: Good afternoon, counsel. I apologize to you as well for the delay this afternoon.

I put this on as a status conference. You had submitted a stipulation concerning our Phase 2 trial. I did vacate the current dates, which had trial scheduled for October 20th, and I scheduled this status conference.

The Court has finished both its opinion on the bench trial on Phase 1, as well as its opinion concerning the work-for-hire and other issues. I will be publishing the latter this week; my chambers is doing the final proofreading on that; it's a 72-page opinion, which will be the last in the instalment, as it were, on the termination and the scope of the termination.

And then simultaneous with that, as I indicated before, I'm issuing my opinion on the trial, the fair market value issue.

I called the status conference for two reasons, not just to announce the pending opinions. One of the most disconcerting aspects of the trial -- and this is fleshed out in great detail in the Court's decision on the trial -- was the Court's dissatisfaction, frankly, with the expert witnesses, on both sides; I'm not limiting this to one side; so disappointing that the Court believes that it needs to take the extraordinary measure for the final trial of perhaps appointing its own expert, or special master, to assess the evidence and ultimately testify at trial.

Frankly, as you'll see from the Court's opinion, I did not rely much on either expert witness in reaching the opinion. I just do not want to find myself in that same position at the bench trial on this final phase.

One of the biggest problems that I had in reaching a decision on the fair market value is that what the Court used were not the most relevant agreements that could have been introduced or relied upon or utilized by the experts. Instead, I had agreements presented by both sides that, while favoring the respective positions, did little to shed light on the question before the Court. So I wanted to advise counsel that in addition to issuing the Court's opinion on the fair market value -- the work-for-hire and other related termination rights issues, as well as the opinion on the fair market value trial -- the Court will also be submitting to counsel proposed names of individuals that the Court might consider designating as court-appointed experts in this case, or a court-appointed special master. I would also, of course, invite counsel, if they could agree on somebody, to submit that to the Court. But failing that, the Court will be looking for any objections that counsel might have to individuals suggested by the Court.

That was the first thing that I wanted to raise with you at the status conference. The second thing is scheduling.

While I agree that with the opinions coming out only this week, and particularly in light of the Court's tentative thought to have its own expert or a special master review and ultimately submit a recommendation or testify at the trial, to give that person time to review the discovery material, that a trial date much later in the year would be necessary. But I wanted to hear from counsel and get a sense of what their schedules were like in the November/December time frame.

So let me hear from you on that.

MR. TOBEROFF: Your Honor, I'm free in November and December for trial.

MR. BERGMAN: We are free and would be available at any time, Your Honor. I think November or December might be rushing it, but I think we'll be in a much better position to know after Your Honor has decided the additional issues.

THE COURT: The Court has decided them; you just don't have them in your possession yet.

Very well. All right.

The Court will, along with the orders, then, submit a new revised scheduling order.

I'm simply going to set the trial date and the pre-trial conference date. I'm not going to set any other dates. I know that you had a series of dates that you had essentially agreed to amongst yourselves in terms of disclosures and that type of thing; and that's all fine. It doesn't need the Court's input on that. But I will give you a new trial date and a new pre-trial conference date, and we'll go from there.

Anything further at this time?

MR. TOBEROFF: Yes, Your Honor. One housekeeping point.

For accounting purposes, another quarter has passed, which ended on June 30th; and we would like, as part of the order now, that defendants update their financial discovery as of the last quarter, June 30th.

THE COURT: Well, what we probably should have is -- once the Court has set a trial date, I trust that the defendants will continue to honor their discovery

obligations up through the time of trial, or at least some time period reasonably in advance of trial so that we have the most current data that we can have.

MR. TOBEROFF: What we did the last time is, we sort of fixed the accounting at a certain point so that the experts could revise their expert reports based on sort of a fixed accounting date.

THE COURT: Do you have a date that you had proposed?

MR. TOBEROFF: The date is simply that enough time be afforded, like 30 days after your order, for them to submit the updated financials for their last quarter that has just passed.

MR. PERKINS: Your Honor, logistically, that creates an issue. Generally, the end-of-quarter reports are going to take no less than 60 days to get all of those numbers together; you're generally one quarter behind to do it. And ending June 30th, I don't see -- it's really September until those numbers can be put together and provided to the plaintiffs.

MR. TOBEROFF: Actually, Your Honor, we took a look at that precise issue, and it's historically been 45 days.

THE COURT: Okay.

I will have a date for disclosure in the Court's scheduling order.

Anything else from the plaintiffs' perspective?

MR. TOBEROFF: No, Your Honor.

THE COURT: Anything from the defense?

MR. BERGMAN: Nothing, Your Honor.

THE COURT: All right. Thank you. Good afternoon.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING TRIAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

3470 Twelfth Street, Riverside, CA 92501

CIVIL MINUTES – GENERAL

Case No. CV 04-08400-SGL (RZx) Date: July 8, 2009

Title: JOANNE SIEGEL, an individual; and LAURA SIEGEL LARSON; an individual *-v-*

WARNER BROS. ENTERTAINMENT INC., a corporation; TIME WARNER INC., a corporation; DC COMICS INC., a corporation; and DOES 1-10

PRESENT: HONORABLE STEPHEN G. LARSON,

UNITED STATES DISTRICT JUDGE

Cindy Sasse: Courtroom Deputy

None present: Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: None present

ATTORNEYS PRESENT FOR DEFENDANTS: None present

PROCEEDINGS: IN CHAMBERS (NO PROCEEDINGS HELD)

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING TRIAL

In March, 2008, this Court held that plaintiffs, the widow, and the daughter of Jerome Siegel,the co-creator of the iconic comic book superhero Superman, had successfully terminated the1938 grant Jerome Siegel and his creative partner Joseph Shuster had conveyed to DC Comics'predecessor-in-interest, Detective Comics, to the copyright in the Superman material published in the comic book Action Comics No.1. Left unanswered for trial was, inter alia, the question of "whether the license fees paid" by Warner Bros Entertainment Inc. ("Warner Bros") to its corporate sibling, DC Comics, for the audiovisual rights to the Superman copyright pursuant to various licensing agreements entered into during the 1999 to 2002 period "represents the fair market value therefor, or whether the license for the works between the related entities was a 'sweetheart deal.'"

To answer that question, the Court conducted a ten-day bench trial. In resolving this portion of the case, the Court must, based on the evidence at trial, ascribe a value for the audiovisual rights to the Superman copyright in the marketplace during the relevant time period, circa 1999 to 2002, and then discern whether the audiovisual licensing arrangements DC Comics entered into with Warner Bros. during that same time reflect, despite their closely-affiliated corporate nature, that market-based economic value[8]. After considering hundreds of exhibits, hours of testimony from several witnesses, and several hours of closing arguments, the Court enters the following findings of fact and the conclusions of law drawn therefrom beginning with the relevant agreements at issue in this case, as the remaining evidence introduced at trial has been evaluated by this Court with reference to and in the context of these agreements.

General Terms Used in Film Licensing Agreements

[8] At the conclusion of the trial and after listening to the closing arguments of counsel, the Court dismissed Time Warner, Inc. as a defendant in this case (there being no evidence that DC Comics licensed anything to Time Warner, Inc.) and likewise found in favor of defendants as to Warner Bros.' Consumer Products Division Agreement and the Superman Animation Agreement, there being no credible evidence produced by plaintiffs at trial demonstrating that either agreement was for below fair market value.

As testified to by numerous witnesses and confirmed by the various film licensing agreements in evidence, payment for the film rights to a literary property is the product of a fixed fee (in the form of a guaranteed advance, option payment and/or purchase price) and participation in contingent compensation derived from the later release of a film, expressed in a given percentage of some measure of the money received by the film at the box office and the surrounding activities from the exploitation of the film, including film-related merchandising and home video sales. Determining the amount of contingent compensation expressed as a percentage of the money thus generated is a complicated task.

The money received by the film's distributor (typically the studio) is referred to as the "distributor's gross," includes most, if not all, the money received at the box office, and typically serves as the largest pool of money available from which participation can be measured. From that, the monies paid to "gross profit participants" as well as the "production costs," "distribution costs," and "distribution fees" incurred by the distributor are deducted to arrive at a "breakeven point."[9] This last term is more fluid than it might appear, as the parties to a particular film agreement often decide that not all possible deductions should be made in determining the breakeven point, creating a contractually defined "artificial breakeven point" that differs from the standard formulation set forth above. Regardless, if the number that is arrived at after deducting from the distributor's gross some or all of those variables (depending upon the particular formulation used in the agreement) falls below the breakeven point, then no contingent compensation is owed thereunder.

Thus, all participants' right to receive contingent compensation is dependent upon what amount of money comes into play after a breakeven point. It is in

[9] "Gross profit participants" are those participants (such as well-known directors and actors) who have negotiated and executed agreements providing them a share of the distributor's gross. "Production costs" are all the costs directly attributed to producing and shooting the film so as to put it on a final film negative (sometimes referred to as "negative costs"). "Distribution costs," principally production of prints and advertising, are costs attributable to marketing and releasing a particular film; in contrast, "distribution fees" are not related directly to specific costs, but instead are assessed as a percentage of receipts, with the percentage varying based on the source (such as domestic box office or foreign box office).

defining the breakeven point that distinguishes “net profits,” “first dollar gross profits” participants, and the various gradations of participation in between.

The "net profit participants" normally must rely on the standard definition of a breakeven point noted earlier, that requires deductions for all the costs, fees, and expenses incurred in making and releasing the film before receiving any of their contingent compensation. For an obvious reason, and for perhaps one less obvious reason, this form of participation is less desirable than those held by other participants. The obvious reason is that a net profit participant collects compensation only if a film makes a profit after all the deductions identified earlier that could be made against the box office receipts are in fact made. The less obvious reason this position is less desirable relates to how other participants' share factors into the calculation of the breakeven point, which, in turn, triggers the net profits participants' right to compensation. The net profits participants stand in line behind the gross profits participants in that the gross profits participants' share of the box office receipts is deducted from the distributor’s gross before the breakeven point, meaning that a film has to generate more revenue at the box office before a net profits participant is paid.

In contrast, the so-called “first-dollar gross" participation is only set off against the participants' fixed fee (amounting to a non-refundable advance against the contingent compensation) with no other deductions taken; literally, the first dollar generated at the box office from the release of a film goes into the available pool from which the first dollar participant takes a percentage share. In this sense, the first-dollar gross participant has a fixed breakeven point — the fixed fee divided by the percentage sharing rate — that again is calculated on box office receipts, with no deductions for production costs, distribution fees and distribution expenses. In this sense, first dollar gross participation is the most desirable measure upon which to share in the box office receipts generated by a film’s release.

In between these two extremes in contingent compensation participation are gradations thereof, sometimes referred to as “adjusted gross” or “defined gross.” That compensation functions in some respects as a net profits deal in that, unlike with first dollar gross, deductions are taken against the distributor’s gross before arriving at a breakeven point; however, the breakeven point is reached sooner than for a true net profits participation because certain of the

cost variables are not deducted, or are deducted at lesser amounts than for their true full measure.

With that general understanding of the terms used in such agreements, the Court turns to the particular agreements at issue at trial.

Superman Film Agreement

On November 6, 1999, DC Comics and Warner Bros. memorialized an Option Purchase Agreement for Warner Bros. to gain the exclusive rights to produce a film utilizing all the copyright in the Superman works owned by DC Comics (hereinafter referred to as the "Superman film agreement"). The Superman film agreement, however, was not formally executed until May 9, 2002, although the agreement that was executed remained largely unaltered from the earlier one, save for three minor modifications to the agreement itself and more sizable changes to the shortform option and assignment to more fully describe the property at issue. See Defs' Ex. 1047.

The executed Superman film agreement provided for an up-front payment by Warner Bros. to DC Comics of $1.5 million, which provided Warner Bros. the option to purchase the film rights to all the Superman works by December 31, 2002, subject to Warner Bros. having the ability to extend the initial option period for successive one-year periods for the remaining thirty-one years of the Superman copyright's term through the payment of option extension fees that began at $500,000 per year for each of the first eleven years after December, 2002, escalated to $600,000 per year for each of the next ten years, and then escalated to $700,000 per year for the remaining ten years. In total, the option extension payments amounted to $18.5 million, payable over thirty one years.

Although designated as "option extension" payments, these payments were, in fact, treated in the agreement as a staggered, non-refundable purchase price, although complete payment of the contemplated total could be discontinued,

necessarily ending Warner Bros.' rights to the Superman property itself. (See Defs' Ex. 1041 ¶ 4 (noting that even after "Warner [Bros.]

exercises its option and a Picture is theatrically released" the agreement nonetheless noted that "Extension Payment(s)" still would "come(s) due")).

Both the initial and extension option payments were designated as a "non-returnable advance" against the participation from the contingent compensation due and owing to DC Comics under the agreement from the gross receipts generated from the theatrical release of any Superman film developed thereunder. The agreement provided that Warner Bros. "may exercise its option by [simply] giving DC written notice of its commencement of principal photography of a feature-length motion picture"; no purchase payment was called for in the agreement upon Warner Bros.' exercise of the option.

For each Superman film released by Warner Bros., the agreement provided that DC Comics would receive "an amount equal to 5%" of the first dollar of worldwide distributor gross, or 7½% of the first dollar of domestic distributor gross, whichever is greater. The Superman film agreement further provided that, "in the event Warner" failed "to make any payment due to DC" for the initial option or the extension option fee, or any payment for contingent compensation, then DC Comics had the right to notify Warner Bros. of its "desire to effect a reversion of rights," subject to Warner Bros. having a three month period from receipt of such reversion notice to cure said deficiency by

making "the applicable payment due to DC for the then-current Extension Period." If, however, Warner Bros. failed to make such payment, the rights granted under the agreement would automatically revert to DC Comics. In addition, the agreement provided Warner Bros. the right to assign any or all of its rights under the agreement to anyone without any requirement for approval

or input by DC Comics before doing so, the only proviso being that, if Warner Bros. assigned its rights to a party aside from "a major motion picture company," it would continue to be obligated to make the option extension payments called for in the agreement.

DC Comics reserved certain rights to the Superman property to itself, the most notable being the merchandising rights. In this regard, the agreement provided that, although DC Comics reserved all said “merchandising rights,” Warner Bros. was entitled to receive a share of the net proceeds from the merchandising generated utilizing new or additional characters or elements that were contained in any film that was released under the terms of the agreement. The precise extent of Warner Bros.' share of said “net proceeds” was never delineated in the agreement; although it was provided that, in arriving at what constituted “net proceeds,” DC Comics’ costs and expenses were to be deducted as well as a 20% “overhead factor.” There is, however, unrebutted testimony in the record that this specific provision in the agreement has not yet been applied, and that all the profits generated from merchandising done so far has been split on a 75/25 basis in favor of DC Comics.

The Superman film agreement also contained a litany of creative controls concerning the screenplay, costume, and actors used in any film, the stringency of which was tied to whether Warner Bros. and DC Comics were corporate affiliates at the relevant time: If so, then the creative controls were ultimately left to the discretion of Warner Bros.; if not, DC Comics’ decision was considered final.

Finally, the agreement provided that, despite DC Comics’ reservation of its television rights, its ability to exploit those reserved rights was limited to an affiliate of Warner Bros., a provision not surprising given the Superman television rights agreement (described below) that the parties had entered into just prior to the Superman film agreement.

Superman Television Agreement

On December 5, 2000, DC Comics and Warner Bros. Television Production, a division of Warner Bros., memorialized a “Smallville” Rights Option and Assignment Agreement for Warner Bros. to gain the exclusive rights to produce a television series utilizing the copyright in the Superman works owned by DC Comics (hereinafter “the Smallville television agreement”). The

Smallville television agreement was not fully executed until February 12, 2001, although, again, the final agreement remained largely unaltered from the one put in writing by the parties in 2000.

The Smallville television agreement provided that, in exchange for an up-front payment of $10,000, Warner Bros. was granted the exclusive option to acquire, within one year, the television rights to the Superman works owned by DC Comics. The initial option period could be extended by Warner Bros. for an additional year with the payment of another $10,000, and could be exercised by Warner Bros. giving DC Comics written notice of its intention to do so along with the payment of $45,000. The Smallville television agreement further provided that, should Warner Bros. actually produce "an episodic television series" utilizing the material so licensed, Warner Bros. was obligated to pay DC Comics $45,000 for each episode produced, to which the prior option payment(s) were made applicable. The agreement also provided for a contingent compensation package for DC Comics should Warner Bros. produce the television series on a "per episode basis" for an amount equal to 3% of the first dollar distributor gross from the first $1.5 million garnered, and then 5% thereafter.

The Smallville television agreement also provided that, should Warner Bros. fail to begin filming a television production within two years of exercising its option under the agreement, the rights granted thereunder would automatically revert to DC Comics without any possibility for Warner Bros. to cure or to extend the period. Insofar as creative controls was concerned, DC

Comics was accorded a right of consultation "concerning all treatments and teleplays to be used," but the decision on whether to integrate such comments was left to Warner Bros.' sole discretion.

Regarding money generated from the merchandising "based upon the pilot or [television] series," the agreement provided that the "net proceeds" from the same would be split 50/50 between Warner Bros. and DC Comics, again subject to a 20% deduction in favor of DC Comics for costs and expenses if the merchandising activity in question was done "primarily" by DC Comics.

The Smallville television agreement was thereafter amended by the parties by written instrument on September 5, 2002, with the basic terms outlined above remaining unaltered from the prior agreement (See Defs Ex. 1043).

The Evidence Presented

The Witnesses

In assessing the testimony at trial, the Court found some witnesses very credible and others not very credible at all. The Court found the testimony by plaintiffs' comic book historian expert, Mark Evanier, as well as the testimony of the head of DC Comics, Paul Levitz, and the head of Warner Bros., Alan Horn, both credible and persuasive. Considering their demeanor and testimony, the Court observed that each attempted to answer directly and honestly the questions put to them without equivocation or evasion, even when their answers resulted (as was especially the case with Mr. Levitz) in the admission of certain facts that were not altogether beneficial to their companies. At the same time, certain witnesses were notable for their lack of credibility. In particular, the Court singles out the film industry expert witness testimony proffered by both parties, Mark Halloran for plaintiffs and John Gumpert for defendants. It is apparent to the Court that, at various points in their testimony, each film industry expert attempted to couch or shape answers to benefit the party paying their fees. Their testimony, therefore, is relied upon by the Court only to the extent that it is consistent with (and thus corroborated by) the limited universe of third party film licensing agreements introduced by the parties. However, even with this understanding, plaintiffs' film industry expert, Mr. Halloran, deserves special mention.

Mr. Halloran unquestionably possesses knowledge of and experience with the customs and practices of the film industry and, as the Court found following voir dire, is technically and professionally qualified to render opinions on the subjects and categories for which he proffered testimony in this case (defendants' protestations notwithstanding), but it is in how he put that knowledge to use that made him a particularly less-than-credible witness.

Observing Mr. Halloran's demeanor on the stand, his reaction to questions posed to him by both counsel, and his failure to make certain material disclosures in his expert report convinces the Court that his testimony should be afforded the least amount of weight of all who testified at trial.

The problems with Mr. Halloran's credibility permeate his testimony. The Court finds especially disturbing his failure to disclose in his February 16, 2009, expert report (see Pls' Ex. 332), as is required by Federal Rule of Civil Procedure 26(a)(2)(B)(v), recent testimony he provided in a 2008 case, see Trademark Properties, Inc. v. A&E Television Networks, 2008 WL 4811461 (D.S.C. Oct. 28, 2008), in which the federal district court judge excluded his expert testimony on Daubert gatekeeping grounds because the methodology Mr. Halloran used to arrive at his expert opinion was suspect. Id. at *2. This omission is all the more notable in that Mr. Halloran also failed to disclose this same testimony in the expert report he submitted in connection with the Watchman case that was recently litigated and settled. When confronted with this repeated failure on his part, Mr. Halloran sought to ascribe it to an inadvertent mistake. The Court is not convinced. Given the nature of the information and the fact that Mr. Halloran has failed to make this disclosure in the two matters in which he has testified since his expert testimony was barred in the Trademark Properties action, the Court can only conclude that the failure was a deliberate effort to bury negative information.

Furthermore, Mr. Halloran's demeanor and answers to questions – notably the long pauses before answering defense questions (which grew in length as the trial progressed) and his repeated requests for defense counsel to repeat questions and/or provide him copies of agreements or prior deposition testimony, his repeated need to refer to his chart to answer fairly simple questions, and his attempts to interject objections to questions posed to him on crossexamination – leave the Court with the distinct impression that Mr. Halloran's opinion is, at worst, largely malleable, bent and shaped to produce pre-determined results to help his client, or, at best, so highly idiosyncratic as to be largely devoid of evidentiary value. Because the Court finds both parties' experts inadequate, both in terms of credibility and, as will be demonstrated below, in terms of the evidence they considered in reaching their

opinions, the Court is reluctant to rely solely on the parties' designated expert witnesses in the accounting trial in this matter.[10]

The Agreements

Experts aside, the Court is left with the dozens of third-party film and television licensing agreements, apparently negotiated at arms length, that were introduced by the parties as a basis to provide a "comparable" to what the Superman film and television licenses at issue in this case would have garnered on the open market. As with the parties' film industry experts, the Court is similarly troubled by the highly stilted nature of the evidence presented. The parties have presented evidence as if the film and television rights to the entirety of the Superman property was comparable in value to, in the case of plaintiffs, well-known musicals (My Fair Lady, Annie) or bestselling novels by marquee authors (Tom Clancy, Michael Crichton, J.R.R. Tolkein, Clive Cussler, Thomas Harris); or, in the case of defendants, as if Superman was equivalent to a low-tier comic book character that appeared mostly on radio during the 1930s and 1940s and that has not been seen since a brief television show in the mid-1960s (the Green Hornet); an early 20th century series of books (Tarzan) or a 1930s series of pulp stories (Conan) later intermittently made into comic books and films; or a television, radio, and comic book character from the 1940s and 1950s, much beloved by my father, that long ago rode off into the proverbial sunset with little-to-no exploitation in film or television for decades (The Lone Ranger). It is this limited universe of largely *incomparable* agreements from which the parties have forced the Court to make a choice as to which is more like Superman.

In sum, the third party licensing agreements presented by the parties provide the Court with an incomplete and largely inadequate record upon which to

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[10] As disclosed by the Court at the status conference on July 6, 2009, the Court intends to appoint, subject to any sustained conflict-related objections by the parties, a Special Master and/or expert witness to review, and if necessary employ experts to review, all pertinent discovery herein, and thereafter submit an independent report and recommendation to the Court, which report will be

subject to cross examination by the parties and may be used as evidence by the parties and the Court at the accounting trial.

decide what a comparable property to Superman would and did achieve in the open market at or near the relevant time period, and thus largely complicating the Court's task in assessing the valuation of the film and television rights to the Superman property transferred by DC Comics to Warner Bros.

Many of the most obvious comparable properties — namely, arms-length transactions for the film licensing rights to other notable and contemporaneously popular comic book characters — were not presented or, if so, were presented by defendants, albeit in an incomplete fashion to refresh a witnesses' recollection. Notably, despite plaintiffs' counsel's repeated refrain to the Court that the Superman film rights were highly valuable because comic book film rights were "hot properties" during the relevant period — expressly referencing the box office success of such comic book characters as X-Men and Spider-Man — nowhere did plaintiffs' counsel introduce (nor apparently even seek to subpoena) the film licensing agreements for these very comic book characters. For example, plaintiffs' counsel failed to introduce or even obtain the mid-1990s film licensing agreement between Twentieth-Century Fox and Marvel Entertainment Group, Inc. (henceforward "Marvel Comics") for the X-Men comic book, or the 1999 film licensing agreement between Sony and Marvel Comics to the Spider-Man comic book character, or the film licensing agreement between Marvel Comics and Twentieth Century Fox to the Fantastic Four comic book, or the film licensing agreement between Marvel Comics and Universal Studios to The Incredible Hulk comic book. In lieu of providing licensing agreements for the film rights to intellectual property of similar popularity and awareness and from the same genre as the one at issue in this case, the Court was instead presented by plaintiffs' counsel with a patchwork of agreements covering varying types of literary properties outside the comic book genre, including musicals from the 1950s to 1970s (My Fair Lady, Annie, Chorus Line), recent best-selling novels (Tom Clancy's Rainbow Six, Red Rabbit and Sum of All Fears, Michael Crichton's Timeline, or Thomas Harris' Hannibal), or, even more incredibly, a web creation then popular with little girls — the NeoPets.

The reason for such a lack of direct comparable evidence on plaintiffs part was never explained by plaintiffs' counsel, even when expressly challenged in defense counsel's closing arguments.[11]

Although, as noted above, defendants did no better in presenting truly comparable works, the Court is mindful that the burden of proof is on plaintiffs.

It is with these witnesses and exhibits that the Court is left to render a judgment, however incomplete and challenged that record may be, on "what a willing buyer would have been reasonably required to pay to a willing seller" for the film and television rights to Superman. Frank Music Corporation v. Metro-

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[11] The Court's puzzlement concerning this point was, in some measure, put to rest when it stumbled across a case involving a dispute between Stan Lee (the artist who helped create Spider-Man, X-Men, and The Incredible Hulk) and Marvel Comics over profit participation in the film receipts from those properties. See Lee v. Marvel Enterprises, Inc., 386 F. Supp. 2d 235 (S.D.N.Y. 2005). In the order resolving the parties' cross-motions for partial summary judgment, the district judge (Honorable Robert W. Sweet) quoted certain of the direct economic terms of the film licensing agreements of these two comic book properties — Spider-Man (which was characterized "as Marvel's most valuable asset," id. at 240) and The Incredible Hulk. For instance, Judge Sweet observed that the Spider-Man film agreement "contained a gross-participation provision," id. at 240, although it appeared that said participation was for less than a "first dollar gross profit participation" and keyed to some lesser measure of "gross receipts." Marvel Comics' chief creative officer, for instance, conceded that there were "deductions taken off revenues before calculating the gross proceeds in which Marvel would participate" under the Spider-Man agreement. Id. at 241 n.3. Nonetheless, Marvel Comics garnered "more than $50 million" in contingent compensation under the agreement against the "more than $800 million" the 2002 Spider-Man film generated in "worldwide box-office gross"; this amount would roughly translate into 6¼% of first dollar worldwide gross, but was probably a higher percentage given that the agreement did not give Marvel Comics a share of first dollar gross. Id. at 240. Likewise, Marvel Comics' 2001 report, which consisted of the company's Form 10-K financial statement and also referenced in Judge Sweet's opinion, appears to suggest that the up-front fixed fee Sony paid for the property was significantly higher (perhaps approaching $10 million) than that contained in the comic book film agreements in the record before the Court. Id. at 241-42. Judge Sweet further elaborated on the merchandising arrangement in the Spider-Man agreement, noting that "Marvel reserved all merchandising rights and then contributed these rights to a limited partnership known as Spider-Man Merchandising LP. This entity is owned 50% by Sony and 50% by Marvel, and Marvel is entitled to 50% of its profits." Id. at 243. Insofar as the merchandising for The Incredible Hulk agreement, Judge Sweet noted that the studio, Universal Pictures, "handle[d] all film-related international merchandising, with the revenues therefrom to be split evenly after certain deductions by Universal." Id. at 243. Interestingly, Stan Lee's accounting expert in the matter before Judge Sweet (and thus someone who had access to the agreements at issue in that case) is also plaintiffs' accounting expert in this case — Steven Sills. Id. at 242. Although the Court takes judicial notice of the district court's published opinion in Lee, the Court does not rely on that opinion, or the information contained therein, in deciding the issues at stake in this trial. It does, however, go a long way in addressing the Court's curiosity as to why neither party sought to introduce the most comparable film agreements at the time.

Goldwyn-Mayer, Inc., 772 F.2d 505, 512 (9th Cir. 1985) (setting forth the test for fair market value in the copyright infringement context). Such a market value approach is an objective analysis, focusing on such considerations as expert testimony as to market value, previous dealings between the parties, and the compensation obtained on the open market for the license of similar rights to other comparable literary properties. See Jarvis v. K2 Inc., 486 F.3d 526, 534 (9th Cir. 2007).

Analysis of Superman Film Agreement

To begin, the Court wishes to put to rest the interminable contest between the parties as to precisely how valuable in general the Superman character as a film franchise and a comic book character was during the relevant period in question. Defendants' film industry expert witness, Mr. Gumpert, termed Superman as "damaged goods," a character so "uncool" as to be considered passé, an opinion echoed by Warner Bros. business affairs executive, Steven Spira. Plaintiffs' witnesses, on the other hand, provided a glowing assessment of Superman, terming him as being near the zenith of his value, due in some measure to his seventy years of continued exploitation and deep public awareness, but even more so because he was a comic book character and such properties had an overall high value to film studios at the relevant time as they were amenable to being developed into "tent-pole" franchise films, meaning big-budget film productions that appeal to all or most demographics of movie-goers.

The Court finds the assessment provided by Warner Bros.' President, Mr. Horn, as the most persuasive, reflecting a measured assessment that took into account all the positive factors mentioned by plaintiffs (but downplayed by defendants' expert), while acknowledging the sobering reality reflected in Superman's prior theatrical track record over the four films released in the 1970s to mid 1980s, a factor downplayed by plaintiffs' expert. Indeed, Mr. Horn admitted to being "daunted" by the fact that the 1987 theatrical release of Superman IV had generated around $15 million domestic box office, raising the specter of the "franchise [having] played out." (Trial Tr. at 128-29). As Mr. Horn gauged Superman's theatrical value: "My view of Superman as an

evergreen theatrical motion picture property is that it is viable but not – but challenged." (Trial Tr. at 150).

Based on all the evidence, the Court is likewise convinced that, during the 1999 to 2002 period, Superman as a film property was indeed a potentially valuable franchise, subject to a studio's ability to successfully "reboot" it by adding something – a storyline or a perspective on the character – that perhaps had not been sufficiently explored, highlighted, or exploited before.

The Superman property's potential value is illustrated by the fact that Warner Bros. was willing to spend over $60 million over a decade in an attempt to develop a film based on the property before it finally settled on beginning production of Superman Returns. At the same time, the property's challenge is also illustrated by the fact that Warner Bros. spent more than 10 years creating different scripts and attaching different directors and actors in its valiant attempt to translate Superman to the screen before it settled on the formula used in Superman Returns.

Next, the Court also rejects the argument put forward by plaintiffs' counsel and their film industry expert, Mr. Halloran, that the film licensing agreements to best-selling novels or wellknown musicals from times past should serve as the lodestar for gauging the fair market value to a well-known comic book superhero such as Superman circa 1999 to 2002. There are two reasons why the Court finds the film license agreements to such musicals and best-selling novels (and importantly the economic terms bargained for the same) are not the most comparable to, and are largely unpersuasive evidence of the value of, the Superman property.

First, as several witnesses testified, and the Court finds persuasive, best-selling novels are much more valuable than comic book characters from a film-making perspective because the former are a more "known quality" in terms of what exactly the film studio is purchasing (or optioning to purchase). The film script is already in a more or less concrete form and has already

been test-marketed in a similar form (as a novel) to the public; comic books may have well-known characters, but the storylines upon which a movie involving said characters are featured is not necessarily known or well-defined at the outset. This point is underscored by the numerous different film scripts, with different possible storylines and utilizing different actors and/or directors, that were being developed by Warner Bros. over the course of more than a decade prior to even bringing the property to the screen. (Trial Tr. at 74, 126).

Second, the further one gets away from literary properties that are not based on comic books, the more problematic it becomes to assess and calculate individual terms or provisions in licensing agreements. For instance, the opportunities and areas in which the audiovisual rights for novels or musicals can be exploited for profit are much narrower than comic-book based properties. This has a direct effect on the valuation of certain economic terms in the respective film agreements involving one category of properties as opposed to the other. A review of the film licensing agreements for best-selling novels submitted by plaintiffs, for example, demonstrates that the economic bottom-line is largely confined to the profits made by the box office receipts from those properties' theatrical release. Many of the novel and musical licensing agreements contain small or meager economic terms related to film-merchandise associated with the properties' film release.

Plaintiffs' expert, Mr. Halloran, acknowledged that there is a "distinction between a comic book, where there's either preexisting merchandising or a potential for merchandising revenue, and a literary work, where there's really no potential for merchandising. Those are two different animals." (Trial Tr. at 686). Indeed.

It is thus not surprising that, with respect to novels, parties focus on the value of the film license in terms of box office terms, namely, the purchase price (and/or option payments) and the percentage level of contingent compensation generated from a film's release. The audiovisual exploitation opportunities for comic books, on the other hand, are more broad-based, with the overall "value" of the property being divided into various streams of revenue arising from a theatrical release, including not only box office receipts but also

merchandising, video games and the like. The limited number of file licenses submitted concerning comic book properties (again, nearly all of which were submitted by defendants) demonstrate this insight.[12] The merchandising rights and the split in profits concerning the same are much more aggressively negotiated than in the case of a novel, for example, by Michael Crichton, Clive Cussler, or Tom Clancy, or a movie based on a book by Thomas Harris concerning the character Hannibal Lecter. Given this, it is not surprising to find that, for instance, the levels of contingent compensation are much lower across the board for the comic book properties in question than for novels, or that the purchase price for, or option payments toward, acquiring said comic book properties is much lower than for novels.[13]

Conversely, it also appears generally true that the merchandising arrangements for comic book properties are much higher than is generally the case with novels.

To do as plaintiffs and their expert, Mr. Halloran, insist and use this "inflated" purchase price for novels and musicals as the basis for determining the fair market value for a comic book property, even one as well known as Superman, would be truly comparing apples to oranges. The proposed test and the one adopted by the Court in reaching its conclusion looks at the overall economic package contained in the film license agreements; it does not cherry-pick one or two terms from one license agreement (or even a class of

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[12] Again the distinction observed by the Court is predicated upon the comic book film licensing agreements that were presented at trial. Perhaps such a distinction would not hold up to scrutiny when speaking of well-known comic book characters, such as those entered into for Spider-Man, X-Men, and The Incredible Hulk. Again, plaintiffs' counsel never attempted to subpoena, let alone introduce, said licensing agreements against which this observation could be tested and either verified or disproved.

[13] 6 For instance, the film license to the Clive Cussler work Sahara provides for the rights holder to receive 10% of producer's gross and a purchase price of $20 million; the film license to Thomas Harris' work Hannibal contains a 10% of first dollar gross and a $10 million purchase price, the film license to the musical Annie contains a participation of 10% of first dollar gross escalating to 12.5% and a purchase price of $9.5 million; the film license to the Michael Crichton work Timeline has a participation of 10% of "adjusted gross" (which appears to be less than distributor gross) escalating to 20%; and the film licenses to the Tom Clancy works Rainbow Six and Red Rabbit have a participation of 10% in "adjusted gross" with a purchase price of $6 million and $7 million, respectively.

properties such as a novel's or musical's purchase price and contingent participation) and then add to it the merchandising levels found in other agreements relating to comics book characters.

Fair Market Valuation of the Direct Economic Terms

Based on the evidence at trial, the Court finds that the most comparable deal for the Superman property at issue would be that for a well-known comic book circa 1999 to 2002.

Accordingly, the Court further finds that, *among the agreements produced at trial by the parties*, the deal reached for the film rights to the comic book X-Men best represents a reasonable range for adducing the fair market value for the Superman character and for judging the reasonableness of the terms in the Superman film agreement. The Court was presented with un-rebutted evidence that, during the period of 1997 to 2002, Marvel Comics' X-Men comic was the most popular comic book published and that sales of the comic ranked as the highest among the top four comics at that time (the remaining comics being ranked, in order, as Spider-Man, Batman, and then Superman "on a good day"). (Trial Tr. at 1080). Moreover, there is unrebutted testimony that the deal terms of the X-Men film agreement in evidence represented the most that a film studio had paid for a comic book property at the time of its execution. (Trial Tr. at 1088-89).

The X-Men film rights licensing agreement between Marvel Comics and Twentieth Century Fox was, according to the testimony of Mr. Levitz, executed sometime in the "mid-1990s" (based on his recollection from inspecting Marvel Comics books and records upon its filing for bankruptcy).

Although the agreement itself was never admitted into evidence (instead it was identified by Mr. Levitz and shown to him to refresh his recollection of its terms), Mr. Levitz testified that the core economic terms were as follows: "[A]n initial option [payment] of $150,000 [made] against a purchase price of [$1.5 million] and a contingent compensation formula that basically began to be

effective [in that money was paid out] after some form of artificial break even [point]." (Trial Tr. at 1085-86). At no point did plaintiffs' counsel seek to further examine Mr. Levitz as to the terms to which he testified, nor ask about the remaining terms in the X-Men film licensing agreement, nor seek to introduce the actual agreement into evidence. Instead, plaintiffs' counsel scoffed at the terms revealed in the mid-1990s X-Men agreement, suggesting that later amendments to the agreement executed after the hugely successful theatrical release of the X-Men film in 2000 led to large increases in the economic terms testified to by Mr. Levitz. Of course, what is notable about plaintiffs' counsel's argument is that it is based entirely on conjecture; plaintiffs' counsel never once introduced, much less even attempted to subpoena, these much-touted later amendments to the X-Men film agreement. Instead, the Court is presented with the economic terms to the agreement as testified to by Mr. Levitz after consulting with the actual agreement itself to refresh his recollection.

In comparison, much of the economic terms in the Superman film agreement are within the same range as those identified in the X-Men film agreement. Admittedly, not all the possibly relevant direct economic terms in the X-Men film agreement are in the record (for instance, no mention is made of the merchandising split, or the exact percentage participation in contingent compensation), but there is enough to make a useful comparison. Thus, although no specific participation percentage was disclosed by Mr. Levitz for the X-Men agreement, the 5% of first dollar distributor worldwide gross in the Superman film agreement is as good as and, indeed, may be better than, that in the X-Men film agreement. The rights holder in the X-Men agreement does not even begin to receive payments on the contingent compensation from the film's box office receipts until the film crosses "some form of artificial break even [point]." DC Comics, on the other hand, receives payment under the agreement's contingent compensation provisions from the first dollar that is generated at the box office.

Moreover, the amount of the initial, up-front option payment and/or purchase price contained in both agreements are equal to one another: An up-front "option fee" of $1.5 million in the Superman film agreement and a $1.5 million purchase price to be paid at some point after the execution of the X-Men film

agreement. Admittedly, the X-Men film agreement was entered into just on the cusp of the period when comic book characters were considered, in plaintiffs' counsel's words, "hot properties," but the relevant Superman film agreement itself was, for the most part, entered into by the parties only a few years later, in 1999 (the formal execution of the agreement coming three years later with relatively small changes of no consequence).

That the direct economic terms in the Superman film agreement circa 1999 stand in good comparison to those in a film agreement for a comparable comic book property (X-Men) undermines the suggestion that the Superman film agreement was a "sweetheart deal" entered into at the expense of DC Comics. Whether this comparison still holds three years later when the

Superman film agreement was formally executed (as opposed to being initially memorialized) requires a comparison to what exists in the record from that later period.

Other arms length film licensing agreements involving comic book characters introduced by defendants confirm that much of the direct economic terms in the Superman film agreement are within the range of fair market value circa 2002. Although the film licensing agreements for the comic book properties in the record that were entered into between 2001 and 2004 are not in the same league as a Superman, and thus do not serve as a wholly adequate "comparable," the absence of any other evidence concerning what the film rights to a well-known comic book character would garner on the open market circa 2002 leaves the Court with little left in the record upon which to make a true "apples to apples" comparison.

- The 2003 Tarzan film agreement provided for a two-year initial option period in exchange for $250,000 that could be extended for three years for a payment of $750,000. The Tarzan film agreement also provided that, upon the exercise of the option, the purchaser would be required to make a payment of $1.75 million, for which the earlier option payments were made applicable. Although the purchase price amount the purchaser paid in securing the film rights to Tarzan was slightly more than the same price paid for Superman, one significant

difference is that DC Comics realized the money from said payments up front, at the execution of the agreement, whereas the rights holder to Tarzan could be forced to wait for up to four years to realize the relatively same amount of money. Utilizing a net present value calculation, the purchase price for the Tarzan film rights comes in as roughly the same as that of the Superman film rights. Moreover, the contingent compensation in the Tarzan agreement of 2 ½%, escalating to 5%, of "defined gross" (again, something that would total less than the first dollar distributor gross in the case of the Superman film agreement) was much less than that provided to DC Comics in the Superman film agreement.

- ! The 2002 Conan film agreement similarly provides for an initial 18 month option in exchange for the purchaser paying the rights holder $1 million that could be extended for another year with the payment of an additional $1 million. Upon the exercise of the option, the Conan film agreement called for the purchaser to pay a purchase price of $2.75 million, again with the previous option payment(s) made applicable to the purchase price. Although the Conan film agreement ultimately provided for a larger option/purchase price than was the case with Superman, DC Comics stood to realize the gain from its licensing arrangement immediately, upon the execution of the agreement, whereas the rights holder in the Conan agreement may have to wait up to two and half years to realize the same, and even then that was only if the purchaser decided to exercise the option, a contingency not required for DC Comics to realize the $1.5 million for Superman. Nonetheless, even with these caveats, the purchase price in the Conan film agreement was significantly higher than that provided in the Superman film agreement (exceeding the latter on a net present value basis by over $1 million). Moreover, the contingent compensation in the Conan agreement of 2½%, escalating to 5%, of "defined gross" was less than that provided to DC Comics in the Superman film agreement. Finally, the film-related merchandising split in the Conan agreement was on a 50/50 basis after a 20% deduction in favor of the rights holder as an administrative fee, which effectively translated to a 60/40 split in favor of the rights holder. The Superman

film agreement's merchandising split, in comparison, was more advantageous (a 75/25 split in favor of DC Comics).

- The 2001 Iron Man film agreement (later amended in 2002 and 2004) also contained relatively modest option payments in comparison to those called for in the Superman film agreement – an 18 month option in exchange for $250,000 that could be extended one year with the payment of $650,000 — with no purchase price payable upon the exercise of the option. The contingent compensation in the Iron Man film agreement was 2½% of first dollar gross escalating to a "hard floor of 5%" of first dollar gross, which is less than that provided for in the Superman film agreement of 5% of first dollar world-wide gross or 7½% of first dollar domestic gross whichever was greater.[14] Finally, the merchandising split in the Iron Man film agreement is based on sales exceeding a baseline established for the two and half years preceding the film's release, any merchandising money generated in excess of this baseline being split on 50/50 basis subject to a deduction up to 40% (beginning at 25%) in favor of Marvel Comics as a distribution fee, which effectively made the split 37.5/62.5 up to a 30/70 split. The Superman film agreement's merchandising split, in comparison, was more advantageous.

Certainly none of these comic book characters were as well-known (outside of comic book fans) or as pervasively exploited at the time of the film licensing agreements as was Superman.

Plaintiffs' comic book expert, Mr. Evanier, for instance, noted that, despite Iron Man's current popularity and heightened public awareness brought about in large measure by the successful release of the Iron Man film in 2008, at the time when the film rights to the property were sold, the comic book character was considered a "minor" or "lower-tiered" property held by Marvel Comics.

[14] Defendants also introduced the 1987 film licensing rights to the Watchman graphic novel entered into between DC Comics and Twentieth Century Fox, but given its age as well as its relatively little known nature (again outside the context of comic book afficionados), the Court did not consider it noteworthy for performing a valuation of the Superman film rights at issue in this case.

(Trial Tr. at 84-85).

Despite these problems, the film agreements for these lesser known comic book characters do provide a useful purpose, serving as a sort of baseline or floor for evaluating the Superman film agreement. Significantly, market valuation is not tied to finding what was the best price that DC Comics could have obtained for the film rights to the Superman property, but what a "reasonable" price would have been paid for it by a willing buyer. Cf. Jarvis, 486 F.3d at 534-35 (approving of district court's decision on market valuation as the value placed fell "within the range of" that supported by the evidence in the record). Although none of these comic book characters are fully comparable to Superman, the Court finds that some of these direct economic terms in the Superman film agreement, including the contingent compensation and merchandising provisions, well exceed this floor. Also significantly, these same terms in the Superman film agreement exceed those that a more comparable comic book property (that is, X-Men) fetched only a few years earlier. Indeed, even when judged against many of the novel and musical film licensing agreements produced by plaintiffs, which given their nature can be viewed to serve as a sort of ceiling for evaluating reasonability, these same provisions stand fairly well in comparison. This point is all the more noteworthy given that the terms at issue are the ones in those musical and

novel agreements upon which much of the value of the property was poured into. Accordingly, the Court finds that the merchandising split and the contingent compensation provisions in the Superman film agreement were at fair market terms.

That said, one other direct economic term in the Superman film agreement lies, at best, at the lower end (perhaps very bottom) of the range of what a willing seller would have sold the property for — namely, the up-front fixed fee that DC Comics received under the agreement. The fixed fees for Tarzan and Conan equaled or exceeded those found in the Superman film agreement despite the fact that those properties were less-known or imbedded in the public's awareness than Superman. Although the up-front fixed fee in the X-Men agreement was the same as that found in the Superman agreement, Mr. Levitz acknowledged that, at the time of its execution, the X-Men agreement "still had not moved the market into the territory it would go into five or six

years later." (Trial Tr. at 1089). Finally, when judged against the perhaps artificially inflated ceiling in the novel and musical film agreements, the up-front fixed fee in the Superman film agreement pales in comparison.

Given the close proximity of the Superman initial option payment to that found in the film agreements for the lesser known comics mentioned above, the value of well-known properties with great public awareness, and allowing for some inflation of the purchase price terms for the X-Men film licensing agreement from the mid-1990s (due to the increased interest studios exhibited for comic book properties at the time), the Court finds that a reasonable, market-driven, up-front fixed purchase price/initial option payment for the Superman property during the relevant period would have been somewhere in the range of $4 to $6 million, rather than the $1.5 million in the film agreement. An even higher purchase price may have been warranted but for the fact of the generous contingent compensation and merchandising provisions in the agreement. If such a market-determined term was inserted, then the share that Warner Bros. would have to contribute would be between $2.5 to $4.5 million (deducting the $1.5 million already conveyed as the initial

option fee).

Significance of the Nature of the Transferred Rights

Despite this fair market "defect" in one portion of the value of the direct economic terms in the Superman film agreement, there lies a fundamental problem with the evidence presented by plaintiffs at trial that precludes recovery: Their failure to even attempt to place a value on that part of the Superman property which DC Comics transferred to Warner Bros., of which plaintiffs are coowners and, pursuant to this Court's earlier orders, have an undivided one-half interest.

Plaintiffs spent nearly the entirety of the trial focusing on the value of the overall Superman property, as if they have an ownership interest in and right to an accounting for the same. Far from it. This point is not, as plaintiffs' counsel sought to diminish at the outset of the trial, an effort to "glom onto" something

in an effort to obscure the issues in the case; it reflects the reality of what plaintiffs actually own and have an interest in and, consequently, to which DC Comics owes a duty to account. As the Final Pre-Trial Conference Order in this case clearly spelled out, the matter for trial was "whether the value of the various Superman option and assignment agreements . . . and the amounts paid . . . thereunder, reflect the fair market value of the nonexclusive rights that the Court determined were transferred from DC Comics to [Warner Bros.], and, if not, what accounting shall be required of Warner Bros. . . . to ensure an equitable result."

In finding that DC Comics only transferred its non-exclusive rights in the Superman copyright to Warner Bros., the Court only spoke in terms of that portion of the copyright that is found in Action Comics No. 1. Outside of the copyright to the Superman material found in that one work, DC Comics did indeed transfer its exclusive rights to the remainder of the copyright in the other Superman works that had been created over the past seventy years in which it has been exploited. In this respect, both plaintiffs' film industry expert, Mr. Halloran, and defendants' film industry expert, Mr. Gumpert, both agreed that, by itself, a non-exclusive license to Action Comics No. 1 was "not marketable," in Mr. Halloran's words, and that there existed "a very limited market for nonexclusive rights," in Mr. Gumpert's words. Why this is so is not surprising. Just as a party can force a buyer's bidding war when it owns the exclusive rights to a valuable property, as indeed was testified to have occurred with respect to some of the marquee authors referenced in this case, the opposite is true with respect to the sale of non-exclusive rights, especially where there is more than one owner of the rights for sale. In that context, the buyer can force the co-owners of said rights to bid against themselves, leading to a lowering of the asking price. There is, in effect, a selling war — with each co-owner having the incentive to price down what they have for sale so as to underbid their co-owner of those same rights. The situation may be different were there but a single owner (or a commonly represented/assignee of the co-owners) of Action Comics No. 1.

Without coordination, an increasing number of sellers has a negative depressing effect on the price for the property. Given that plaintiffs have

presented no evidence indicating what value, if any, there would be to the non-exclusive rights to Action Comics No.1 that DC Comics transferred, there is simply no evidentiary basis upon which the Court could even engage in the process of determining whether the Superman film agreement (or for that matter the Smallville television agreement) was consummated at less than fair market value.

This Court sits in equity in this case, but that does not license the Court to increase the assignment of that which plaintiffs own. At present, plaintiffs are the co-owners to the copyright in the Superman material published in Action Comics No. 1. They are not the owners of the entirety of the Superman copyright. Although, as noted above and below, there are, at least with respect to the Superman film agreement, certain troubling valuation questions raised by the evidence as to DC Comics' transfer of its remainder in the exclusive Superman audiovisual rights, plaintiffs have done nothing to value DC Comics' non-exclusive transfer of what they own.

Plaintiffs' counsel's general reference in closing argument (no specific reference being made, instead simply a citation to a twenty page portion of the trial transcript) to the testimony of his expert witness, Mr. Halloran, as somehow addressing the problems raised by defendants concerning valuation of the only relevant rights transferred, and hence at issue, does not advance his clients' cause. In essence, Mr. Halloran testified that attempting to value separately the nonexclusive rights in Action Comics No. 1 transferred by DC Comics to Warner Bros was immaterial on its own; the value of any of the various copyrights (be they the original or derivatives thereof) that have been amassed over the course of the past seventy years, he testified, comes in their "package deal" nature -- one is as essential to the overall copyright as the remainder combined (and, by extension, so too the valuation of the same). As Mr. Halloran testified:

> Q. Does the fact that the film rights and television rights to Action Comics No. 1, does the fact that that – that DC held only nonexclusive rights and therefore could only have transferred nonexclusive rights to Warner Brothers alter your opinion as to whether the relevant agreements were for fair market value?

A. No.

Q. Why is that?

A. Again, because there was no separate consideration in the agreement and the description of the property was very broad. The transfer was very broad; there was a transfer of literally thousands of copyrights. Action Comics [No. 1] was just one out of that universe of copyrights that was being transferred under both the film and television agreement.

Q. What was the quantitative impact, if any, on Warner Brothers of certain rights, in this case, Action [Comics] 1, turning out to be nonexclusive based on the Court's recent ruling?

A. I don't believe there's been any quantitative impact at this point.

Mr. Bergman: Objection. Lack of foundation.

The Court. Ask him why. [To the witness:] Why is that?

A. Warner has acted — once you get past the transfer on the face of the contract, Warner post notice of termination went ahead and produced the movie, produced the television series, and has held themselves out to the public and acted as if they were the exclusive owner.

(Trial Tr. at 364-366).

There is much intuitive appeal to the notion that no film studio would seek to purchase, much less develop for film, a Superman motion picture that did not include the well-recognized costume, the familiar storyline template, and other noted elements contained in the material published for the first time in Action Comics No. 1. Of course, it may also be true that no studio would wish to develop a Superman film without the ability to utilize some of the other famous elements associated with the Superman character, be they arch villains, additional powers and abilities (for example, the ability to fly as opposed to simply leaping over buildings and x-ray vision), or weaknesses (kryptonite), all of which are found in the Superman material published after Action Comics No. 1. But even if this common-sense understanding as to the interwoven nature of the value of the component parts to the overall Superman character (as developed over seventy years) is acknowledged, there is no indication that

this would have rendered the value of the particular rights conveyed by DC Comics in Action Comics No. 1 as being co-extensive with the remainder that were conveyed.

At present, the copyright to Action Comics No. 1 is co-owned. This co-ownership dilutes the value of this particular subset of the overall Superman property from the rest, as it allows for any buyer of such rights to force a bidding war among the co-owners, playing each off the other to obtain the lowest possible purchase price. In this sense, plaintiffs cannot piggyback off the value to the entire 70 years' worth of Superman material to overcome the need to present proof as to the separate value of the non-exclusive rights to Action Comics No. 1. Some separate valuation was needed by plaintiffs -- an evidentiary burden they never attempted to meet.

Indeed, Mr. Halloran's opinion is predicated upon his view that Warner Bros., once it received the non-exclusive rights in Action Comics No. 1, was not impeded in its efforts to develop the property so transferred into a feature film. That point, however, does not address what Warner Bros. would have done, or been able to do, had it not had the rights to Action Comics No. 1, be they exclusive or nonexclusive for that matter, at the time. That Warner Bros. felt comfortable with the rights so transferred to make a Superman film is not surprising given that it had all the rights it would need, especially since all those rights, save for the one in a single comic book, were transferred to it on an exclusive basis. And it is that question, the value of those non-exclusive rights that must be addressed for purposes of this trial.

Mr. Halloran's further observation that DC Comics would be in breach of the warranties and indemnification provisions in the film agreement because it represented that all the rights it conveyed were exclusive is similarly immaterial to the valuation of the non-exclusive rights in Action Comics No. 1 itself. Mr. Halloran testified that such a breach would expose DC Comics to

an action "in damages for the breach of that representation and warranty." (Trial Tr. at 367).

What is missing from Mr. Halloran's testimony is any suggestion that Warner Bros. would not have purchased all the rights conveyed to it in the Superman film agreement for the same price even if it were made known that one of those rights was transferred on a non-exclusive basis.

Finally, Mr. Halloran made much of the fact that Warner Bros. did not make any attempt to enter into a separate license with the plaintiffs to procure their share of Action Comics No. 1 after the parties' settlement talks broke down; the implication being that, if the exclusivity of said rights was important or viewed more valuably by Warner Bros., such an effort would have been undertaken after they received only non-exclusive rights from DC Comics.

However, all this proves is that once Warner Bros. had some legal right to exploit the rights in Action Comics No. 1, it no longer became important as to the exact nature of the rights so held, especially after having received the exclusive rights to the remaining seventy years of Superman works from DC Comics.

Indeed, this underscores the Court's earlier observation that co-owned, non-exclusive rights face a downward pressure on their value in the marketplace, especially if the co-owners are willing to license their rights as was the case here. Where that value -- or range of values – eventually settled is unknown to the Court in light of plaintiffs' failure to present evidence or testimony placing a separate value on their non-exclusive rights.

Fair Market Valuation of Indirect Economic Terms (Reversion of Rights)

From the Court's review of the various film licensing agreements submitted by the parties and the testimony regarding the same, it is apparent that the key problem with the Superman film agreement is not so much its direct economic terms (although as indicated earlier there is at least one problem with those terms), but the very real danger of the property's value being substantially diminished by the action or inaction of Warner Bros. What on paper appears to be largely, albeit not entirely, a reasonable price for the Superman property

may prove illusory. The entire economics, the valuation if you will, of the Superman property in the agreement (as is true of any film agreement for a franchise property) is keyed to the ongoing development and theatrical release of the property at the box office. Simply put, the continued development and exploitation of the property in the marketplace is the economic lifeblood for the film rights to a literary property such as Superman. (See Trial Tr. at 711-12). Without continued theatrical release, DC Comics (nor any similar rights holder, for that matter) would not receive payment under the contingent compensation package nor would there be, as Mr. Levitz persuasively noted, any "uplift" in the merchandising realized from the property.

Moreover, unlike the direct economic terms discussed above, the non-exclusive nature of the rights transferred by DC Comics are largely irrelevant to the discussion over the continued ability to develop and exploit the Superman property in film. Whatever value those non-exclusive rights might have, they are certainly worth more than nothing, but without a mechanism to ensure the continued development and exploitation of the Superman property in film there raises the very real specter that nothing is exactly what DC Comics would receive in exchange for those rights.

Under the Superman film agreement, once the initial option payment is made, the economic value DC Comics can secure through its film licensing agreement of Superman with Warner Bros. is predicated entirely on the contingent compensation terms, which themselves are only triggered upon the release of a film. The agreement contains no purchase price when the option is exercised, and the option extension payments themselves are strung out in relatively small increments over the remaining term of the Superman copyright; even then, the option extension payments can be largely or wholly wiped away with any payment made to DC Comics by Warner Bros. under the contingent compensation generated from a single release of a Superman film.

The record presently indicates that DC Comics has received $12.1 million under the contingent compensation terms in the agreement with the 2006 Warner Bros. release of the movie Superman Returns. (Defs' Ex. 1027). Under the terms of the Superman film agreement, Warner Bros. does not have to

make any option extension payment to DC Comics that would otherwise have been due and owing from 2003 to 2023 in order to continue to hold onto the film rights to Superman because of the contingent compensation made for Superman. That is, save for the initial option payment and the contingent compensation received for the first film (totaling $13.6 million), DC Comics in essence has locked its film rights to the Superman property for 21 years with Warner Bros. without any guarantee that it will receive any further payment during that time or, just as importantly, without any means of it extracting the property from Warner Bros. to shop the property to other studios for possible development. Such a result was not unavoidable as there

exists a provision to rectify such a situation customarily found in nearly all of the third-party film agreements presented by the parties — namely, a reversion of rights clause keyed to the failure to develop and then release a film utilizing the licensed property within a set period of time.

The presence of such a reversion provision keyed to the development of both an initial film release as well as sequels thereafter is found in nearly all the third-party, arms-length agreements produced by both sides. It is contained in the agreements produced by defendants — the Iron Man film agreement, the Tarzan film agreement, and the Conan film agreement. It is found in the licensing agreements to various novels produced by plaintiffs such as the Tom Clancy film rights to Rainbow Six and Red Rabbit, Thomas Harris' film rights to his book Hannibal, and the Lord of the Rings agreement.

Of particular note, the Iron Man agreement contains incentives to force the purchaser to make a movie — either staggered out and reduced option extension payments if a director has been attached or filming has commenced, or reversion of the exclusive license if filming has not commenced within certain set period of time — pegged at 18 months from the exercise of the option for the first film and three years thereafter for making sequels. Thus, unlike Superman, Marvel Comics made sure that its Iron Man property would not fall into "development hell," as Mr. Halloran described; either Iron Man would be made into a movie by the purchaser within a certain relatively short period following exercise of the option and that sequels would be made quickly and repeatedly thereafter, or the rights would revert to Marvel Comics and it could look elsewhere to develop the property.

As the evidence at trial made clear, the value of a piece of intellectual property, especially that of the franchise nature such as Superman, X-Men, Batman, or Spider-Man, is not in just the large, one-shot economic windfall that comes from the release from a single movie, but from the continuing ability to exploit and ensure more such windfalls for a long period of time. For instance, X-Men was not only made into a blockbuster movie by Twentieth Century Fox in 2000, but the property was and continues to have been exploited in that fashion for nearly a decade since, including the recent release of X-Men Origins: Wolverine this year. Similarly, the ability to extract value from the Spider-Man film rights was not how much Marvel Comics could receive for the single release of a Spider-Man movie, but in its continuing ability to have film sequels made, released, and then receive a share of the box office receipts therefrom (as happened with the release of the Spider-Man sequels Spider-Man 2 and Spider-Man 3). That potential for sustained, large scale economic profit makes these properties of the character Warner Bros.' President Alan Horn described as a tent-pole, franchise movie. The lack of a reversion clause as described by the Court makes the potential for DC Comics to realize such gains from its Superman property problematic.

When defendants' film industry expert, Mr. Gumpert, was asked about the impact on valuation such an omission in the Superman film agreement would have, he testified that it may have value "in certain contexts, but not in the context of Superman." (Trial Tr. at 1383). When asked to explain, Mr. Gumpert opined that Warner Bros. held free and clear of DC Comics the copyrights to the first four Superman films, making it very difficult for DC Comics to sell the property to another studio because the other studio would "need to be careful not to infringe upon Warner Brothers' rights." (Trial Tr. at 1383). This same argument was also made by DC Comics' president, Paul Levitz, who noted that Warner Bros. holding the rights to the John Williams famous film score and the crystal depiction of kryptonite rendered DC Comics "hostage" to its corporate affiliate. The hostage scenario appears to the Court to be overblown. When pressed on crossexamination, Mr. Gumpert could not identify any means by which Warner Bros. could compete with (and hence impair) DC Comics' ability to market the Superman property to other studios other than Warner Bros.' ability to re-release old Superman films or perhaps make a

remake of those same four films. (Trial Tr. at 1431-32). As for Mr. Levitz's concern with infringing the John Williams film score or use of the particular crystal structure of kryptonite utilized in the prior Superman films, the Court cannot help but note that new film scores can be commissioned and new ways of depicting kryptonite can be fashioned, especially in industries as noted for their creativity and imagination as are the comic book and film industries.

The other objection cited by Mr. Gumpert to placing a value on the lack of a reversion provision keyed to the development of the property was that the length of the Superman film agreement would be cut short in 2013 once the termination notices submitted by the representative of the Joseph Shuster estate become effective. As Mr. Gumpert testified: "[T]he other reason is, as I understand it, the heirs of the co-creator have noticed a termination which becomes effective in 2013. So that there's a limited period of time. In effect, since the agreement was effective in 1999, it's a 13-year license." (Trial Tr. at 1383).

Although it is true that, should the Shuster estate be successful in terminating the grant to the copyright in Action Comics No. 1, then at that point in time plaintiffs and the Shuster estate, not DC Comics, would hold the entirety of the copyright published in that comic book and would sit, assuming common representation, in much the same position Warner Bros. was said to have sat at the beginning of the negotiations over the Superman film agreement — they would hold a very valuable, and perhaps, indispensable portion of the Superman copyright, rendering any effort to exploit the remainder of the television and film rights difficult, if not impossible, without their assent.

At that point, the equities which plaintiffs have so desperately sought the Court to take into consideration in viewing and valuing the agreement entered into by DC and Warner could suddenly reverse themselves — plaintiffs would be a position to dictate terms for future exploitation of the Superman property in all forms of media, including television, film, and animation.

The problem with this line of reasoning, however, lies in its speculative nature. Although the Court recognizes that there are competing cross-currents of leverage over the near term that could render the likelihood or potential for

future exploitation and development of Superman film much more fluid and much more beneficial from a monetary point of view, the demands presently required by equity cannot be left unaddressed due to the possibilities of the future, especially a possibility keyed to successfully navigating the formalistic and complex termination provisions in the 1976 Copyright Act. It is by no means a foregone conclusion that the Shuster estate will be successful in terminating the grant to the Superman material published in Action Comics No. 1.

In considering the reversion of rights issue, the Court certainly acknowledges that the potentially illusory quality of the direct economic terms in the Superman film agreement may indeed give way should it be determined by Warner Bros. that Superman is a marketable film property – there has been no evidence introduced by plaintiffs evincing an intent on Warner Bros.' part to actually handcuff the Superman property even if it is marketable. Far from it.

Every Warner Bros. executive who testified at trial noted that the company's bottom line has been and remains making money. That said, there may be instances when parties disagree as to the present marketability and profitability of a particular property. Under the Superman film agreement, as it is presently structured, Warner Bros.' opinion on that subject vis-à-vis Superman is determinative.

Subject to the making of a relatively small option extension payment (which it may not even need to make until 2023), Warner Bros. retains the ability to keep the Superman property under wraps if it views it as not presently profitable, but nonetheless believes that it may become profitable sometime in the near to mid-future. And it is precisely that circumstance that could prove the direct economic terms contained in the agreement meaningless as judged over a period of the next fourteen years; the Superman property laying dormant and unexploited for more than a decade when perhaps other studios would be more than willing to pay for, develop, and release another Superman film. Mr. Horn's judgment may indeed be correct that Superman, at present, is a viable, but challenged, property to develop (based on his testimony, the Court has great confidence in his assessment and judgment in such matters);

however, other studio executives may decide otherwise. It is this precise circumstance which is what a reversion clause keyed to development is meant to avoid, and its absence calls into question whether the otherwise largely reasonable direct economic terms in the Superman film agreement (save that of the up-front fixed fee) are illusory.

Accentuating this concern is the tangled corporate and intellectual property web that presently exists between DC Comics and Warner Bros., and that was extant before the Superman film agreement was entered into by the parties. This complicated arrangement had, with respect to DC Comics' other intellectual property, locked in DC Comics' audiovisual rights to the same, keeping them from full and free exposure to the marketplace for ongoing exploitation and development. Mr. Levitz suggested that this business model was actually sought by DC Comics as a means to build a long term business partnership with Warner Bros. built on each company's unique talent, expertise, and assets. That may be so, but it is precisely this web that lies at the center of any problem that may exist on account of the lack of a reversion of rights clause. And indeed, DC Comics' experience under the 1974 Salkind agreement (which did have a reversion mechanism keyed to development, albeit one with a much longer period of time allowed between a film's release and when the option period would lapse, namely, fifteen years from the release of a film or possibly up to twenty-five years from the date of the agreement) only buttresses the Court's concern with the nature of the "reversion" clause in the Superman film agreement.[15] Again, Mr. Levitz testified about how DC Comics had to plead with Warner Bros. to assist it in buying out Salkind twenty-three years after entering into the Superman film licensing agreement with him.

The Court is hard pressed to identify exactly who DC Comics could turn to "rescue" it out of a similar dilemma circa 2020 if Warner Bros. has yet to commence filming a sequel to Superman Returns by then.

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[15] In the early 1970s, Warner Bros. passed on developing a Superman film, directing DC Comics to "go license it out to Alex Salkind; we don't think anyone will care." (Trial Tr. at 223-24). As a result DC Comics shopped the property on the open market and eventually entered into a licensing agreement with a questionable independent film maker, Mr. Salkind, which then led to the production of the first four Superman films.

Mr. Levitz also sought to diminish the fact that the Superman property was potentially tied up for close to the remainder of its copyright term without any mechanism to ensure its continued development by observing that, the agreement's provisions notwithstanding, he could always go over the head of the executives at Warner Bros. and seek to extract or gain better terms with executives at Time Warner. However, Mr. Levitz later admitted on examination by the Court that, by the same token, Warner Bros. executives could also try to go over his head and seek a reduction in the amount owed to DC Comics under the agreement. Mr. Levitz's efforts to diminish the omission of a reversion of rights clause keyed to development in the Superman film agreement only underscored the Court's concern; his testimony indicated that the provisions were themselves "flexible" and subject to change without formal amendment, but ultimately determined and subject to change by the heretofore unidentified custom and practice within the Time-Warner interlocking corporate structure itself.

To that end, an internal memorandum from DC Comics not long after the Superman film agreement was entered into by the parties only bolsters the Court's concern regarding DC Comics' ability to extract the Superman property from Warner Bros. should things go as badly as they did under the Salkind agreement. In October or November, 2004, DC Comics' senior vice president of creative affairs, Gregory Noveck, generated an Annual Status Report in which he placed as one of the targets for development the ability to "successfully set up DC properties outside the Warner Bros. family once they have been fully considered internally." (Pls' Ex. 187). Under the heading of goals for the coming year, Mr. Noveck listed "Selling Elsewhere" as "the hardest arena to crack," observing that, "[w]hile this has been a primary goal, a number of different factors have conspired to prevent a true success in this area. . . . The most important part of the process however, is the ability to extract properties from the [Warner Bros.] studio in a timely manner." (Pls' Ex. 187).

Other documentary evidence submitted by plaintiffs reveals that the vast majority of DC Comics' intellectual property has been solely pitched and/or licensed to Warner Bros. Mr. Noveck's report provides a bird's eye view of DC

Comics and Warner Bros.' interactions concerning treatment of DC Comics' intellectual property at a point close in time to when the Superman film agreement was executed. The portrait painted by the report is of a business relationship in which Warner Bros. held the leverage as to when and whether a DC Comic property would be developed. Indeed, Warner Bros. enjoyed a first refusal right vis-à-vis DC Comics' properties and could even intrude in DC Comics' subsequent dealings with another studio (should it pass on its first look).

With this understanding, the value of the Superman film agreement may well be below fair market given the length of the agreement (the remaining term of the Superman copyright before portions of the works comprising it begin to fall into the public domain) and the lack of a reversion mechanism tied to the failure to develop (and continue to develop) the property (in lieu of the relative modest option extension payments, when required). If so, perhaps as a measure of damages for bringing the agreement into conformity with what would have been insisted upon in the open market, the agreement should be "reformed" to double or triple the price of the annual option extension payments required of Warner Bros. and further render any payments made to DC Comics for the contingent compensation received from the release of Superman Returns or other film releases not applicable to said option extension payments. This necessarily would increase the amount of money DC Comics would have received under the Superman film license agreement, which would in turn be distributed between DC Comics and the plaintiffs in the later accounting trial, to the tune of $7 million to $10.5 million, assuming Warner Bros. had up to this point applied its contingent compensation payments against the option extension payments called for in the Superman film agreement.

Doing so would increase the overall "purchase price" (loosely used) for the Superman film rights over the remainder of the thirty-four years of the copyright from essentially $20 million over 34 years to $60 million over that same period. Such an increase in the amount of the "purchase price" would ostensibly make it less likely that the scenario noted above would occur (where Warner Bros. decides to store away Superman, thinking it is not presently profitable but the option extension payments (if even due at the time) were modest enough to

allow continued payment so that it could still keep its rights to the property in case it becomes more valuable 5 to 10 years

down the road). Increasing the option extension payments required would lessen the incentive for Warner Bros. to "hedge its bets" with the property and increase the incentive to seek out an opportunity for continued development (either at Warner Bros. or elsewhere).

The rationale for placing the multiplier at two or three times the current level of the option extension payments called for in the Superman film agreement is arrived at by the Court's examination of the amount required to extend the reversion of rights period in the third-party agreements noted earlier. These agreements demonstrate that said extensions are pegged to the same price as that paid for either the purchase price of the property itself ($900,000 to extend reversion period for filming of sequel in Iron Man, and $900,000 purchase price of property) or the price for the initial option period ($1 million for extending the reversion period for filming a sequel in Conan, and a $1 million initial option payment; $250,000 for extending the reversion period for filming a sequel in Tarzan, and $250,000 initial option payment). Here, the Superman film agreement's initial option payment was set at $1.5 million, but the option extension payments (upon which the reversion clause in the agreement is keyed to continued payment of) is set at roughly a third of that — only $500,000 per year, escalating to $700,000 per year for the last 10

years of the agreement.

However, in the Court's final analysis of this issue, it is not enough for plaintiffs to show that the lack of a reversion clause keyed to film development could cause harm or require damages in the form of higher option extension payments owed to ensure that such a sequel had been made or the film rights had reverted. "In a copyright action, a trial court is entitled to reject a proffered

measure of damages if it is too speculative. Although uncertainty as to the amount of damages will not preclude recovery, uncertainty as to the fact of damages may." Frank Music, 772 F.2d at 513 (emphasis added). For plaintiffs to succeed in proving that the Superman film agreement was in fact below fair market value, they must establish that there would have been a film sequel or

a reversion of rights by this point if the agreement contained such a reversion clause keyed to film development. This they have not shown.

Mr. Horn testified that, aside from his "hopes" to develop the Superman character, at present the property is not under development at Warner Bros. (Trial Tr. at 166). No script has been written, filming has not commenced, and the earliest a Superman film could be theatrically released would be in 2012. (Trial Tr. at 155). As Mr. Horn explained, "we had hopes to keep the [Superman] character alive and to once again reinvent Superman. We are — our hope is to develop a Superman property and to try again. What hurt us is that the reviews and so on for the Superman movie . . . did not get the kind of critical acclaim that Batman got, and we have other issues with Superman that concern us." (Trial Tr. at 153). Thus, in the seven years since the

Superman film agreement was executed a single movie has been released and no further development has occurred. How does this compare to film licensing agreements with reversion provisions keyed to continued film development?

The Tarzan film agreement provided that the rights granted would automatically revert to the rights holder if the purchaser had not commenced filming the first film within four years after exercising the option, and that reversion would also occur if the purchaser had not commenced filming a sequel within four years after the release of the prior film (with said period to make a sequel subject to an extension for another two years upon payment of $500,000). Gauged under this agreement, Warner Bros. would not be required to begin filming a sequel and hence no harm would befall DC Comics due to the lack of a reversion clause, until 2010 at the earliest, and possibly 2012 (with the payment of a half million dollar extension).

Similarly, the Conan film agreement provided that the rights granted thereunder would automatically revert to the rights holder if the purchaser had not commenced filming the first film within two and half years following execution of the agreement (a period that could be extended by a year with the payment of $1 million). Moreover, the Conan film agreement provided that

reversion would occur if the purchaser did not commence filming a sequel within two and half years after the release of the prior film, said period again subject to extension for an additional four years provided payment of $1 million. Gauged under this agreement, reversion of rights or filming of a Superman sequel possibly could have occurred by now, save for the four-year extension payment upon which no filming of a Superman sequel would have been compelled until 2012 and hence no harm from the lack of a reversion clause.

The Iron Man film agreement likewise required filming to commence within a year after the final option payment was made (which could be upwards of two and half years after execution of the agreement itself). Thereafter the agreement called for the hiring of a screenwriter for a sequel within a year after the release of the prior film and commence filming within three years of the prior film's release along with a payment of $900,000 to the rights holder.

Gauged under this agreement, the lack of a reversion clause in the Superman film agreement would be considered harmful. The film Superman Returns was released in 2006 and per the Iron Man agreement filming of a sequel would be required to commence sometime this summer, a fact which Mr. Horn's testimony clearly indicates has not and will not occur.

Although the lack of a reversion clause has shown to be harmful under one particular agreement, the Court must look to the totality of the agreements presented to judge the certainty of the existence of any damages attributable to the lack of a reversion mechanism keyed to continued development of the property in film. In this context, the average reversion period for filming a sequel to commence or reversion to occur is three to five years after the release of the prior film.

Indeed, even the testimony of plaintiffs' own film industry expert, Mr. Halloran, on this point did not differ from the Court's conclusion. Mr. Halloran testified that the industry custom was that, "notwithstanding that the option had been exercised or a picture produced and released, that after a period of time, that if

the studio was not continuing to produce one of these pictures, that the film rights would come back to the grantor, and that period is, for a high-end property is, let's say, in that sort of three- to five-year range. Sometimes less." (Trial Tr. at 407). Judged under this standard, no reversion would have occurred, and no filming would have commenced on a sequel to Superman Returns, until 2009 to 2011 even if the Superman film agreement contained a customary reversion clause keyed to continued development. Given that Mr. Horn testified that the release of a sequel to Superman Returns movie could occur in 2012, it is certainly now possible, based on the only competent evidence related to this issue introduced at trial, that filming of such a sequel could occur within the 2009 to 2011 time frame. Unless and until it can be shown at that point in time that no filming of a sequel to Superman Returns has commenced, it cannot be said, with any degree of certainty, that the Superman film agreement's failure to contain a reversion clause keyed to continued and regular development of the property in film has caused any harm.

In making this statement, the Court is certainly mindful of how close this market deficiency in the Superman film agreement is from shifting from speculation to concrete harm. Even under Mr. Horn's hopeful estimate, no filming of a Superman sequel will commence this year nor is it likely that it will commence next year. Without a script, and there is none at present, filming cannot be commenced. It is only the possibility that filming could begin on a Superman sequel in 2011 that has stayed the Court from making a finding on the reasonable certainty of harm having occurred. Given that the potential for said commencement of filming exists at the present time, plaintiffs have not shown that the Superman film agreement, sans a reversion clause, is below the reasonable range for what a willing buyer would pay for the property from a willing seller. If, however, by 2011, no filming has commenced on a Superman sequel, plaintiffs could bring an accounting action at that time to recoup the damages then realized for the Superman film agreement's failure to contain a reversion clause.

Accordingly, the Court finds for the remaining defendants because there is insufficient evidence that the Superman film agreement between DC

Comics and Warner Bros., whether judged by its direct economic terms or its indirect ones, was consummated at below its fair market value.

Analysis of Smallville Television Agreement

The Court now turns to the Smallville television agreement, an agreement that received little attention from the parties at trial and one for which the Court finds that there is no evidence introduced at trial that demonstrates that the Smallville agreement was for less than fair market terms. The Smallville agreement's direct economic terms were within a "reasonable" range a willing buyer would have paid. The agreement has a per episode payment scheme above that of any of the other television agreements introduced by the parties, a comparable merchandising split, and a comparable contingent compensation participation. The other television licensing agreements submitted by the parties contain like or, more often than not, lesser terms.

The 2002 Birds of Prey television agreement between DC Comics and Warner Bros. Television Production concerns teen-aged comic book superheros associated with the Batman franchise. In some meaningful respects it has lesser terms than those in the Smallville agreement, such as a $33,000 per episode payment (as opposed to the $45,000 episodic fee in Smallville) and a contingent compensation participation percentage equal to that in the Smallville television agreement. Despite plaintiffs' counsel's statement to the contrary (see Trial Tr. at 1000), the Birds of Prey agreement is not for a "lesser known property" but is for essentially the same thing as that conveyed in the Smallville television agreement — a depiction of the Batman universe (without Batman himself) built on characters with superpowers in their teenage years, not all that much different from Smallville except that Superboy is a character that had been more widely and consistently exploited in comic books over the course of several decades as opposed to those portrayed in the Birds of Prey agreement.

Similarly, the arms length transaction for the television rights to Tarzan between Warner Bros Television and the rights holder, Edgar Rice Burroughs,

Inc., also bolsters the conclusion that the Smallville television agreement was within the fair market range. The 2002 Tarzan television agreement provided a comparable $25,000 one-year option payment (made applicable to the exercise/purchase price) as well as an additional $25,000 to extend the option period for an additional year (not applicable to the exercise/purchase price). If the option was exercised by Warner Bros. then it was required to make a purchase payment to the rights holder of $150,000 (less the initial option payment) which would be applied against the contingent compensation generated from the property' exploitation. To that end, the Tarzan television agreement provided that the rights holder would receive $20,000 per episode for the first season and gradually increasing to the maximum of $30,000 per episode for the third season onwards. Furthermore, the rights holders share from the contingent compensation generated from the television production of Tarzan was set at 7.5%, reducible to a floor of 6.25% of modified adjusted gross, defined to mean gross receipts minus distribution fees and expenses and production costs (as opposed to DC Comics' receipt of a percentage of straight first dollar distributor gross under the terms of the Smallville agreement, which is a much bigger percentage of the overall amount of money generated from the exploitation of the property than the "adjusted gross" referenced in the Tarzan agreement).

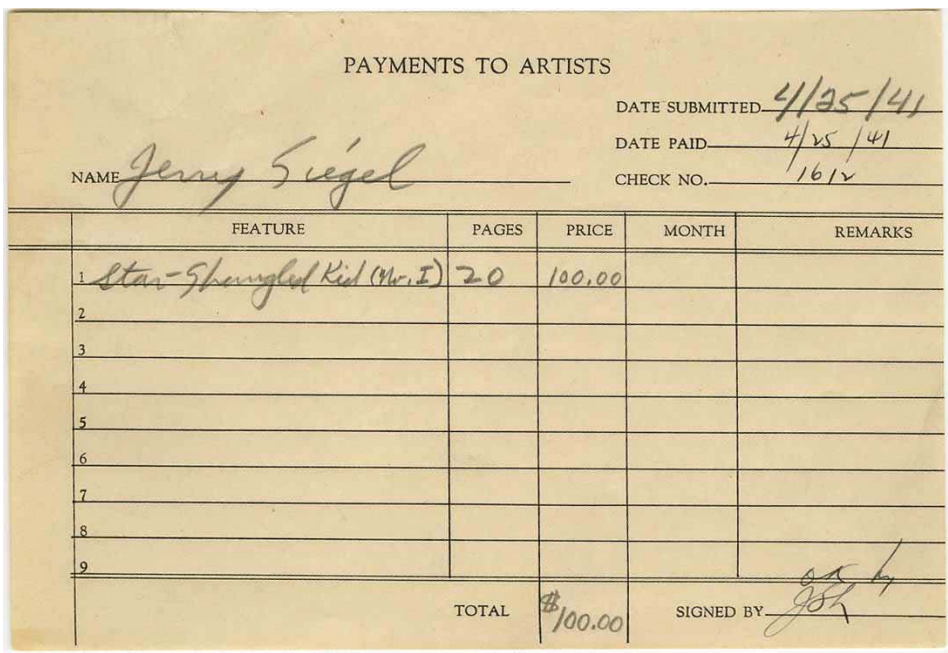
Plaintiffs' reference to the 1988 Superboy television agreement (negotiated between DC Comics and Salkind) containing a 7½% gross participation (as opposed to the 3% escalating to 5% gross participation in the Smallville agreement), only underscores how close the Smallville agreement lies in the ballpark of fair market value to those negotiated at arms length by unrelated corporate affiliates. Plaintiffs' counsel's focus (and that of its expert Mr. Halloran) on the provision in the Superboy television agreement requiring payment to DC Comics of $800,000 has been convincingly explained away by Mr. Levitz without any refutation by plaintiffs: Mr. Levitz testified that the $800,000 payment was meant for certain payments then outstanding from the then recent release of the Superman IV film. In other words, the $800,000 had nothing to do with payment for the exploitation of the Superman television rights in the Superboy agreement, but instead everything to do with an outstanding dispute over the recent exploitation of the Superman film rights. To this plaintiffs offer no evidentiary response.

Accordingly, the Court finds that the non-exclusive rights conveyed by DC Comics to Warner Bros. in the Smallville television agreement was not for below fair market value and, therefore, finds for the remaining defendants on this point as well.

Conclusion

The Court decides this case, as it must, not on the evidence that could have been submitted or even the evidence that should have been submitted, but rather on the evidence that was in fact admitted at trial. Based on the preponderance of that evidence, the Court is compelled to reach the conclusions set forth above and accordingly finds in favor of defendants on the issue tried before the Court.

IT IS SO ORDERED.



PAYMENTS TO ARTISTS

DATE SUBMITTED 4/25/41

DATE PAID 4/25/41

NAME Jerry Siegel

CHECK NO. 1612

	FEATURE	PAGES	PRICE	MONTH	REMARKS
1	Star-Spangled Kid (No. I)	20	100.00		
2					
3					
4					
5					
6					
7					
8					
9					
	TOTAL		$100.00	SIGNED BY	

Status Conference

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

Case No: No. CV 04-08400-SGL

HONORABLE STEPHEN G. LARSON, JUDGE PRESIDING

JOANNE SIEGEL and LAURA SIEGEL LARSON,

Plaintiffs,

vs.

WARNER BROTHERS ENTERTAINMENT INC.; TIME WARNER, INC.; DC COMICS; and DOES 1-10,

Defendants.

Monday, September 21, 2009

11:52 A.M.

(The following proceedings were heard in chambers.)

THE CLERK: Calendar item 16, case number CV 04-08400-SGL, Joanne Siegel, et al, versus Warner Bros. Entertainment, et al.

THE COURT: I wanted to talk a little bit about the status of the case, and in light of everything that's going on, I thought we would be more comfortable here in chambers.

I've received your joint report, and I appreciate that. We're obviously at a turning point here. As I'm sure you have heard, I'm going to be leaving the bench in the next month or so; by November 2nd I'll definitely be out.

There's been a meeting of the court's case management committee last week, and we discussed this case. This is one of the probably eight cases that I have which will not be reassigned in block to one of the in-coming new judges, just because of the complexity of it and the history of it. This will mostly be going to one of our senior members of the court that has the time and the resources to devote to it. That will become effective at some point in time over the course of the next month to six weeks.

I know that you spent some time trying to settle the case; there was an exchange and there was a one-day meeting with your mediator.

MR. BERGMAN: That's correct.

THE COURT: I know this is a complicated case, and at least as far as the judges go, I probably know this case as well as anybody at this point in time. What I wanted to suggest at this point is that I would be willing to take some time over the course of the next month and try to sit down with you myself and see if we can't work out a resolution of this, if there was an interest on your part in having me do so. And I have no stake one way or the other. If you do not want to do that, if you think that it's a waste of time, I completely get that.

Frankly, I'm going to be making the same offer in a few of the other bigger cases, just because you have an institutional knowledge and you hate to have that entirely go to waste if it can be of some service to the parties. I issued the order that I did because I still feel very strongly that it's in the business interest of both sides to try to resolve this case. I know there have been some developments in terms of Disney and Marvel, and I understand there are more developments on your front, and I'm kind of following all of this with interest. I just thought that if there's going to be a resolution, it probably should be now.

You have the big unknown of who's going to get the case and how that's going to affect the case, and all of that. Anyway, I'm not looking for an answer now. I'd like you to think about it, discuss it with your clients. If you're amenable to that, I'd like to put aside a substantive amount of time to sit down and see if we can't work out something.

MR. TOBEROFF: Your Honor, for myself, I think it would be extremely beneficial to use this transition here constructively and to have further settlement discussions.

I also want to say on a personal note, in recognition of the tremendous work that you have put into this case, that we were both saddened and empathetic

with the announcement that you are retiring from public service. I think you've given this case a great deal of time and attention, and we appreciate that. And I wanted to pass that along.

THE COURT: I appreciate those thoughts. And, like I say, I'm very happy to help.

I know you have an institutional client, so you will probably want to speak with your client before making any decision.

MR. BERGMAN: Yes, your Honor.

THE COURT: I'd just like you to let Cindy know within the next few days, because I am trying to plan out these last five weeks, and there's a lot of things tugging at my time. But this is something I've invested a lot of time in.

Michael Kowsari, my law clerk on this case, has invested a lot of time in this, he has a tremendous interest in this, and together I think we'd like to do what we can to see if we cannot resolve this. If we can't, we can't, but I think it's well worth the effort.

MR. BERGMAN: We certainly appreciate that, Your Honor. I'll confer with the client and see.

THE COURT: Thank you. The second thing is, as I'm sure was not lost on anybody, I was not overwhelmed with the expert testimony on the last trial, and the Court has indicated both in that order and the subsequent order of its intention to appoint a Special Master on a going-forward basis to help with this process and provide a third objective assessment of the evidence as we lead up to the auditing trial, if there's going to be an auditing trial. The Court was looking for any names that you might agree on yourself. I gathered from the report that I have that you have not done so.

MR. BERGMAN: That is correct, Your Honor.

MR. TOBEROFF: That's correct, Your Honor.

THE COURT: What I'm going to do is -- I've been doing some calling around and trying to identify people that I think are both qualified and that I have confidence in, and I'll submit those names to you. Then what I'd like to do is have any objections made in-camera. Because one thing I always try to avoid, whenever I'm asking a Special Master or a Discovery Master, somebody outside, the last thing I want it to be is a negative experience for them where they have objections made publicly; so I have those submitted in-camera.

If there's somebody that is not objected to by one side or the other, that makes the decision easy. Particularly, if I have conflict-based objections, then it's going to be back to the drawing board. That's something else that I want to get accomplished before time runs out.

MR. BERGMAN: I think we had some -- the defendant, I'm not speaking for Mr. Toberoff -- had some reservations about agreeing to the appointment of a Master without knowing exactly what the future foretold for us; what kind of a case we would be having; what proof would be required; what it would be that the Master would be doing.

THE COURT: What I'll try to do is in this same order, understanding that this is all preliminary and the Court has not made the appointment yet, what I would do at the same time that I provide some names for your consideration, I'll try to spell all that out in some greater detail so that you have that before you so you know what it is that you're looking at. I appreciate that.

The footnote in the one brief and the minute order probably does not go into the detail that it should. I did not want to get ahead of myself, but at the same time -- and a part of it is matching the person with the duties. But I'll try to lay that out as best I can.

MR. TOBEROFF: Your Honor, on a related issue, we'd like to request -- we feel we'd like to use this transition period also to appoint a new expert; one, to try and satisfy some of the Court's complaints as to the level of experts; but also because originally you'll recall that we had a very strong expert, Wayne Lewellen, who was the head of distribution for Paramount who, sadly, was diagnosed with advanced cancer and has since passed away.

THE COURT: I'm sorry to hear that.

MR. TOBEROFF: So we had a relatively short period to find a new expert.

THE COURT: And I do appreciate that.

MR. TOBEROFF: Plaintiffs were, in many ways, victimized by the misrepresentation of Mr. Halloran. As the Court was -- when you interview an expert, they submit a resume, and when you found a certain limitation by Mr. Halloran's failure to disclose that he had been Dalberted out, if that's a verb, out of a case, it affected us as well.

And obviously we cannot call him. And we would give defendants ample opportunity to take the deposition of a new expert. I think that could be helpful.

THE COURT: That was very disappointing that Mr. Halloran did that. For what it's worth, I appreciate that was Mr. Halloran's responsibility to have disclosed that and not -- anyway, I know that the primary responsibility rests with Mr. Halloran on that. I do appreciate the circumstances and the difficulty of bringing in a new expert in the time you did.

Having said all that, I just don't think that -- whether it's me or somebody else, there needs to be an appointment of someone.

Also, as part of my thought process, and not just in terms of the value for the trial itself, but in terms of facilitating a resolution of this case, I think there's value there as well, to have somebody come in to make that objective assessment in terms of apportionment issues and the various issues coming up in the accounting phase; so that's my thinking on that.

MR. TOBEROFF: Just to clarify, what I was asking is that during this transition period, whether we could appoint a replacement expert; give defendants ample time to submit an expert report; give them ample time -- because if there's an imbalance now without Halloran. They have three or four experts who are -- as opposed to literary experts, comic book experts, experts in the area of the studio and the impact this has on profits.

THE COURT: So you're going to use Mr. Halloran for his --

MR. TOBEROFF: His expert report covered apportionment as well. So we wanted to bring in so there's not an imbalance of three or four experts, one expert. And I think they would have ample time to take his deposition.

THE COURT: I think this is probably something which is more suitable for a motion, and I would be happy to consider this between now and the time -- this is not the kind of shoot-from-the-hip-type thing, because I'm sure the defense has a position on this as well.

MR. BERGMAN: Yes, we do, Your Honor.

THE COURT: I would imagine. So let's go ahead and -- I'll certainly give you leave to file that motion just in terms of your request for leave -- basically the substitute of experts is what you're looking for?

MR. TOBEROFF: Yes.

THE COURT: And the defense, of course, opposes it.

MR. BERGMAN: Yes.

THE COURT: Let's notice that for -- we only have two motion days right now -- I'll give you leave to file that motion for October 19th.

Why don't you notice that for October 19th.

MR. TOBEROFF: Yes, your Honor.

THE COURT: That will be my last formal contribution to this case. And if I cannot settle it, then I'll leave it up to you all to talk to your clients.

MR. BERGMAN: We may offer Your Honor another opportunity, with all due respect.

THE COURT: What's this?

MR. BERGMAN: We have prepared a motion for reconsideration of the August 12th order, and wanted to file it but we found that all your days were closed up until the time you were leaving the court.

THE COURT: Right.

MR. BERGMAN: Could we have leave to file that motion returnable on that date in October?

THE COURT: What issues is it focusing on?

MR. BERGMAN: It primarily focuses on the harmless error finding that you made for the failure to list the early comic strips; it deals also with the work-for-hire point, but the primary point is the harmless error.

THE COURT: If it's focused on harmless error, I'd be inclined to go ahead and give you leave. If it's a broader reconsideration -- and I understand how that might affect other things, but in terms of that that's the argument that you want to focus on, I'll give you a -- well, before I go down this road, were you planning on filing a motion for reconsideration?

MR. TOBEROFF: I would say that if they file – this is a surprise to me -- I would say that if they file a motion for reconsideration on that specific issue, we would want to file a cross-motion for reconsideration on the specific issue regarding the newspaper strips and the specific issue of whether the expense prong of the 1909 practice was met.

THE COURT: If you would both be willing to live with limited page limits -- and, understand, this would be literally what I would devote my last week to doing --

MR. BERGMAN: Yes, Your Honor.

THE COURT: -- is resolving this, I'd be inclined to grant that because I would like to have that -- I really want to have all that stuff put to rest, if these are the two fine points.

And when I say limited page numbers, I mean, we're talking a 7-page brief, a 7-page opposition, and a 3-page reply, and just focus on those two issues. Notice it for the

19th. Let's have the motions filed by -- a week from this Friday would be October 2nd -- so if we have the briefs on October 2nd, the opposition on October 9th, and the reply on October 16th, and then we can have our hearing on the 19th.

MR. BERGMAN: Fine. We appreciate that.

THE COURT: Seven, seven, three; so that's what we'll do.

MR. TOBEROFF: And, Your Honor, as I have not discussed this with my client -- we may not bring this motion -- I would --

THE COURT: The expert motion as well?

MR. TOBEROFF: No. The motion for reconsideration. I have not discussed it yet with my client; so if it turns out that we do not file --

THE COURT: You don't have to file.

MR. TOBEROFF: I understand that.

THE COURT: Please, Mr. Toberoff, understand, you do not have to file the motion.

And I say the same thing to you, Mr. Bergman, you do not have to file a motion.

MR. BERGMAN: Yes, sir.

THE COURT: I've got plenty to work on.

MR. BERGMAN: I'm sure you do.

THE COURT: But that does make sense.

I would have been surprised if there had not been some motion for reconsideration on that at some point in time. I would prefer to have that work-for-hire issue resolved, at least from my perspective.

MR. BERGMAN: Fine.

THE COURT: And then after that other minds can address it.

Get back to me in the next couple days, because if we're going to do a settlement, I'd like to set something up. I'm going to be out of the country, actually, from the 9th through the 13th, so some time after that, like mid-October, I would like to set up a couple of days, if you're open to it. If you're not, I certainly understand that as well.

MR. BERGMAN: Very good, Your Honor. We appreciate that.

THE COURT: Just to make a productive use of our time.

MR. TOBEROFF: Thank you very much, Your Honor.

THE COURT: Thank you.

CREATION OF A SUPERHERO

By Jerry Siegel

Motions

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

Case No: No. CV 04-08400-SGL

HONORABLE STEPHEN G. LARSON, JUDGE PRESIDING

JOANNE SIEGEL and LAURA SIEGEL LARSON,

Plaintiffs,

vs.

WARNER BROTHERS ENTERTAINMENT INC.; TIME WARNER, INC.; DC COMICS; and DOES 1-10,

Defendants.

Monday, October 19, 2009

11:03 A.M.

THE CLERK: Calling calendar item number eight, case number CV 04-084000-SGL, Joanne Siegel, et al, versus Warner Brothers Entertainment Inc., et. al.

May we have counsel please come forward and state your appearances for the record.

MR. BERGMAN: Michael Bergman for the defendants.

MR. TOBEROFF: Marc Toberoff for the plaintiffs.

MR. WILLIAMSON: Nicholas Williamson for plaintiffs.

MS. MANDAVIA: Anjani Mandavia for defendants.

MR. PERKINS: Patrick Perkins for defendants.

THE COURT: Good morning to you all.

We have several motions before the Court. We have the competing motions for reconsideration, one brought by the defense, one brought by the plaintiffs. I also have the responses to the order to show cause for the appointment of a, quote, appointed expert or special master.

Let's take up the motions for reconsideration first, and then the Court will address not only the OSC issue but further proceedings in the case post this Court's departure from the bench; so let's begin with the motions for reconsideration, and the one that I want to focus on is the defense motion for reconsideration.

Mr. Bergman?

MR. BERGMAN: Thank you, your Honor.

THE COURT: I have read your papers. I appreciate your perspective. It's not a clear case, one way or the other, to this Court. I understand that the Court is kind of charting new waters, as it were, in this particular area.

Part of it is that the two cases that you rely on most forcefully, Burroughs and Music City {sic}, the analysis is not what I would call in-depth. The court, in both those cases, did make reference to the requirement for the termination notice. In the case of Tarzan, that they weren't specified and, therefore, that was a problem. But it's not like there was really an exhaustive analysis of what are the outer limits of the harmless error analysis?

The other factor is you focus on the subsection of the regulation which lists examples of harmless error, but it's also clear that is not an exhaustive list. And to adopt the rule that Warner Brothers seems to be urging the Court to adopt would suggest that the list, the illustrative list, is exhaustive.

MR. BERGMAN: I agree with Your Honor that the list that is contained in E-2 is not exhaustive.

THE COURT: So then my question to you is, how do we frame a harmless error analysis that goes beyond that?

MR. BERGMAN: I believe, Your Honor, that we begin and end with the admonition that's contained in B-2 of 201.10; namely -- and this is a quote just

excising irrelevant language -- "a notice of termination must include a clear identification of the title of each work to which the notice of termination applies."

Must include. It's imperative. It's a word that bespeaks of necessity; obligation. You must follow the law.

THE COURT: I certainly get that.

But if that's the interpretation, the understanding, then what room is there for harmless error analysis?

MR. BERGMAN: Well, the guide to the harmless error analysis lies, I believe, within the regulation itself, because the regulation makes it clears that there are some requirements that are mandatory and others that are not necessarily so.

And there are numerous examples, Your Honor. While the notice must include the title of the work, it only has to include the registration number of the work if it is, quote, possible and practical.

THE COURT: But then it wouldn't be error, if, let's say, it was not practical to include the registration number. It really would not be subjecting it to a harmless error analysis because it would not be error at all.

Do you understand what I'm saying?

MR. BERGMAN: I believe it would be an example of what the copyright office considers to be a harmless error. Another example, Your Honor, it must include a clear identification of the title, but the identification of the grant need only be reasonable.

In other words, once again, differentiating between the standard of adherence. Although the heirs are required by B-7 to provide certain specified information, the regulation requires that you only have to supply such information as is currently available.

When you look at those examples and you look at the various examples that are expressly stated in E-2, you begin to get a picture of the overall scheme. But the overall scheme has other requirements. The must-include requirement, the notion of 'what is a clear identification', the statute goes to great lengths to say what a clear identification is. It requires a complete and unambiguous statement of facts in the notice itself, without incorporation by reference of information and other documents or records.

THE COURT: Is there any legal support for what you are telling me right now? I mean, specific.

I've read Burroughs a hundred times at this point.

I'm talking, is there any analysis -- with the analysis that you are presenting to the Court, is there a district court, somebody, somewhere, that has articulated this?

MR. BERGMAN: Your Honor, I've made the same search that Your Honor has, and I have not found anything of that nature at all, which is an interesting point in and of itself.

For example, Burroughs, whatever the depth of its analysis, represents a clear rule: You either identify the work, or the termination is ineffective with respect to that work.

THE COURT: But the district courts there had five different alternative theories for rejecting the preliminary injunction. The error was trying to stop the Tarzan movie; there were five different arguments made; the Second Circuit upheld without making any clear specific reference.

That's a lot to hang that hat on.

MR. BERGMAN: While I understand, Your Honor, that they did not go into an extensive analysis, the holding is clear; and that holding has been in existence for almost 30 years. The copyright office has not looked at it and said, Well, we better change a regulation because that's not what we intended.

I believe the statute reflects precisely what was intended when it states that a document, the notice, must include an identification.

It's very hard, Your Honor, to make that rule somehow into a harmless error, when a harmless error is defined as something which does not materially affect the validity of the notice.

Well, how can something which the statute requires must be included, the omission of which does not materially affect the adequacy of the notice?

It's almost a misnomer.

THE COURT: Lets refocus on the wording of the regulation: Harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of section 304(C).

MR. BERGMAN: Yes, sir. And the purpose of section 304(C) --

THE COURT: Is to provide notice.

MR. BERGMAN: -- is an orderly termination pursuant to the statute.

THE COURT: Let me ask you this: How much of the total universe of Superman works were papered by the notice?

MR. BERGMAN: Far too many. There were 15,000, of which only three were terminable.

THE COURT: And we have two weeks of newspaper strips that slipped through the cracks.

MR. BERGMAN: Well, Your Honor, that assumes a conclusion.

I don't say it slipped through the cracks; I say it was omitted.

THE COURT: Intentionally.

MR. BERGMAN: Intentionally or not.

The statute says it must be included. And there's a reason for that that goes beyond the termination notice and that goes beyond the grantee, because the termination provision is simply one part of the overall copyright scheme.

The statute provides that when you terminate, effectively, a work, that is recorded; and then from that point on, every time the studio or a publisher or anyone else gets a copyright report, looks at the record, if it's been terminated, it's right there. If it has not been identified in the termination notice, it never shows up in the records of the copyright office; so when someone is looking at those records, trying to find out whether a work has been terminated or not, there's no way they can discern that.

The notice that you must give to the grantee serves a dual purpose to serve the public, and the copyright statute recognizes that.

THE COURT: Certainly, the public. To the extent that it serves the purpose of notifying the public, the public certainly had a clear idea of what was going on here, given the catchall language.

MR. BERGMAN: A good idea?

I'm not sure that's true at all. I don't think that people recognize how extensive or how superficial the attack on the Superman copyright is. I've followed all of the secondary authorities and the blogs and all of that that follow this case, and they basically misinterpret it; certainly, the entertainment trade papers do.

The catchall phrase, Your Honor, to which you've placed some, not all, but some importance, when you look at the language of the catchall, it's absurd. Each and every other work that embodies any character, story element, or indicia reasonably associated with Superman or Superman's stories.

What does that tell you as to whether the 12 early strips have been terminated?

It tells you nothing; it invites an examination of a 70-year span.

The whole purpose of the statute is to provide out in the open a notice, unequivocal, which must include the identification of the work.

THE COURT: Very good.

Thank you, counsel.

MR. BERGMAN: Thank you, Your Honor.

THE COURT: Mr. Toberoff, I'll hear from you now on this.

MR. TOBEROFF: Thank you, Your Honor.

In our initial motion, defendants made much hay of the fact that the regulations provide near examples, and they claim those examples were exclusive. In their reply, they admitted they were not exclusive.

In fact, in giving the examples in section E-2 of the regulation, 201.10E2, they state, quote, without prejudice to the general rule provided in E-1. The general rule, they are referring to the harmless error rule.

If it's a general rule, it means by definition that the register of copyrights anticipates that a court will apply that general rule on a case-by-case basis.

THE COURT: I agree with you, and I think counsel is forced to concede that.

But his point that I'd like you to address is – and I think it's probably the best point they have -- is that as opposed to the various requirements where there is some equivocation, there is this singular requirement that is unequivocal in terms of identifying the title, and that is the point that he is insisting upon; that is the point that Burroughs and Music Pictures picks up on, however limited the analysis.

MR. TOBEROFF: I could distinguish Burroughs and – I think it's Music Sales.

THE COURT: They are very distinguishable, and I have that in mind.

MR. TOBEROFF: I'll address that point.

First of all, the termination notices, the title of the newspaper strips is all the same: It's Superman. There's no issue about constructive notice. When you go to the web site of the copyright office and you type in "Superman," you immediately see the termination notices. You type in any title having anything to do with Superman, you immediately come up with the termination notices.

There's no constructive notice problem in this case, nor would any -- first of all, you have the licensee rule where licensees, when you have a co-ownership situation, would not even have to account, let alone stop exploiting the work, but nobody is simply going to exploit those first handful of Superman newspaper strips without the other rights in question here.

There's no pragmatic or practical problem here with constructive notice. If you type in the registration number -- a renewal registration number will work -- the termination notices do not come up. They come up under broad titles like Superman.

The purpose of the harmless error rule is obvious: Not to invalidate terminations based on inadvertent mistakes in the drafting of a termination notice, which is exactly what happened here.

THE COURT: How do I know it was inadvertent?

MR. TOBEROFF: By the clear, unequivocal statement in the catchall provision in the termination notice saying that this is intended to terminate all works portraying Superman; and to the extent any works are left out, it says -- and I can read you the quote -- it says, that was involuntary and unintended.

So lest there be any doubt from the 546 pages of works from the listing of hundreds of the newspaper strips from listing every single grant of Superman, or even potential grants that were not even grants, like the 1975 agreement, and lest there be any doubt that the intention was to terminate all of the newspaper strips, the termination notice says so as clear as a bell.

So here, there is no real question, as the Court pointed out as to whether the defendants had actual notice. They knew there was an intent to terminate. They are using this as a technicality to invalidate the termination notices as to one of the few things the Court has ruled is not work for hire and that's exactly what the harmless error rule is meant to avoid.

As far as Burroughs, we found some very interesting things. We dug deeper into the case. It turns out the omission of the five works was not inadvertent, as

in this case. The omission of the five works was because they were not subject to termination.

The termination in the Burroughs case applied to the termination of a 1923 grant. Four of the works of the five that were omitted were published after the 1923 grant, so they weren't even subject to termination.

In addition the relevant termination windows that would apply to those four omitted works do not fall within the window of that termination notice; that leaves one other early work, and I think it was the second Tarzan book. The second Tarzan book was published in a magazine, in an All Star Weekly; then it was published in a book form after that. We went down to the Los Angeles public library where they have the actual volumes containing the registration numbers, and all of those initial serials were registered for copyright. We then looked up the renewals. None of them were registered. We did the same for the book. The original book was registered for copyright; the renewal wasn't registered.

Which leads one to believe that that initial work was in the public domain.

If you examine Zissu's declaration, although it's artfully drafted, he admits -- he says in paragraph eight of the declaration, he says, quote, the notice of termination at issue in Burroughs included only 35 works that the heirs could correctly list in the notice as being subject to termination.

That's pretty much an admission that in that case it was not inadvertent; that he knew those were not subject to termination and they were not listed in the notice. That means that any comments in the Burroughs court regarding harmless error is moot, because if they are not subject to termination in the first place, whether or not they listed them in the notice is moot.

The Music Sales Corp. Versus Morris, which is a lower court case, a southern district case, they point to verbiage of the court mentioning, saying, "However, you must list the work," citing Burroughs. That was an attempt by the Southern District to pay tribute to the Second Circuit decision in Burroughs, but to also distinguish that case from Burroughs. At issue in that case was not the omission of a work from a notice; the notice did not fail to include all relevant works. At issue was a very vague, broad grant language that the Court said, just looking at the grant language itself, this would not reasonably identify the grant; but given the fact that the Court under the facts of that case believed that the defendants had actual notice, it ruled that was harmless error.

Exactly what you did here, Your Honor.

THE COURT: I'm mindful of your argument, counsel. Very good.

I'll issue an opinion on this in the next couple of weeks and I'll certainly take a careful look at both side's arguments again. I don't need to hear anything further on the plaintiff's motion for reconsideration. The Court is prepared to move forward on that; that leaves these two OSCs, or the one OSC and the two responses.

The Court has made no secret of the fact that it was less than overwhelmed by the experts in the last trial. I think there is wisdom in having someone appointed that will offer an objective assessment as we proceed with the next trial. The Court offered four names; three were objected to by one or both sides; only one name was not objected to by either side.

I'm mindful of the concerns being expressed by the parties, though, about the appointment. Given that this case will within the next two weeks be transferred to another district judge, and given the impact that such an appointment would have on the shape of the trial, I think I'm going to defer any such appointment to the judge who's going to be inheriting the case; and it's going to be Judge Mariana Pfaelzer who will be taking over both the Superman and the Superboy cases as soon as I've ruled on these motions.

I've set out, both in my order following the trial, as well as in the OSC order, my thinking with respect to that appointment, and I'll simply defer to her decision as to whether or not she wants to proceed with that, and we'll leave it at that. But I'll definitely take care of these two motions for reconsideration within the next couple of weeks before I leave the bench.

I did want to say that, in looking back over nine years on the federal bench and literally the thousands of cases that have crossed my desk, there's always a handful that you go forward remembering, and this is certainly one of them, and it's a tribute, counsel, to all of you. It's been an extraordinary pleasure to work with you these last several years on this case. It has been as fascinating and as exciting a case as I could have imagined to have worked on. You have raised issues and litigated issues that are extraordinarily cutting edge in the way that you've developed the arguments, and you've been extraordinarily professional with the Court, and I greatly appreciate that.

You have not held back on any punches, but that means you've done your duty. You've represented Warner Brothers and DC Comics extraordinarily well.

And Mr. Toberoff, I'm sure the heirs are extremely pleased with how zealously you and your colleagues have represented their interests.

I wish you all the best of luck.

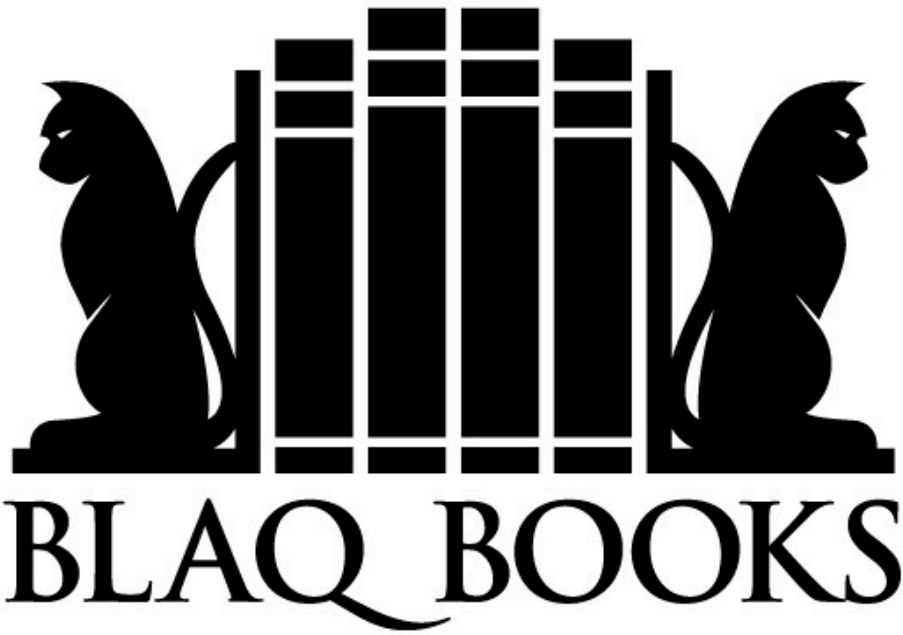
I do think that ultimately this case needs to resolve itself, because I think, as I've expressed previously, it has consumed, obviously, a lot in terms of fees. And I understand that it's complicated, given the interrelationships and, of course, we have the pending termination coming up in 2013 of other rights related to Superman. But I do encourage you to continue to keep that in mind.

Thank you for the privilege of working with you on this case. And I'll get these orders out within the next couple of weeks.

MR. BERGMAN: Thank you, your Honor. It's been a privilege to be before you.

MR. TOBEROFF: Thank you, your Honor.

THE CLERK: Court stands in recess.



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