

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HYPERTOUCHE, INC., a California corporation,

Plaintiff,

v.

KENNEDY-WESTERN UNIVERSITY, a Wyoming corporation, and DOES 1 through 100, inclusive,

Defendants.

Case No. C 04 5203 si

CONFIDENTIAL

DEPOSITION OF JAMES JOSEPH WAGNER

August 16, 2005

Reported By:
Karen L. Buchanan
CSR 10772

File No.:
05-10400



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1 back, please?

2 (The record was read by the Reporter.)

3 THE WITNESS: So the three DNS servers are
4 located, two of them in Redwood City, and one is located
5 up near Skyline Boulevard in the mountains behind
6 Redwood City. I don't know the actual city that's in.

7 BY MS. WOOLLACOTT:

8 Q. The two in Redwood City, is that the Eagle
9 Terrace address?

10 A. Yes. The ones you photographed.

11 Q. The one on Skyline, do you know the address?

12 A. No, not off the top of my head.

13 Q. Is it a house?

14 A. Yes. It's a residence.

15 Q. Do you know who lives there?

16 A. Yes.

17 Q. Who?

18 A. Machiel Van der Loos.

19 Q. Oh, your supervisor?

20 A. Yes.

21 Q. Do you know the IP addresses for those three
22 servers?

23 A. For two of them, yes. The IP address would
24 be -- the two that you photographed are 69.33.227.203
25 and .200.

1 there for when I'm traveling and I can stay there. But
2 it's not deployed.

3 Q. Where is "up there"?

4 A. Up in the Boston area.

5 Q. And does Hypertouch Inc. pay anything towards
6 the Washington, D.C. equipment?

7 A. Towards the equipment?

8 Q. Anything. The DSL line, the name, the IP
9 address, the domain names that are there, anything
10 related to Washington, D.C.

11 A. Well, Hypertouch's Web server is there, and I
12 personally built the Web server. It's a RAID, so we
13 paid the equipment at cost.

14 The domain name served by some of those,
15 including www.hypertouch.com, are hosted on that Web
16 server. And so various clients' domains are hosted on
17 that Web server. So I don't -- so that's the best
18 answer I can give.

19 Q. I'm asking if you pay anything towards it. You
20 said you bought the box. Since you bought the box, have
21 you paid anything towards the site?

22 A. I don't quite understand. I pay registration
23 fees for domain names. I do not pay a monthly fee for
24 co-locating.

25 Q. Same with Skyline, do you pay anything towards

1 Skyline?

2 A. No.

3 Q. Did you provide the box there?

4 A. Yes. And the UPS.

5 Q. The what?

6 A. The UPS, the backup --

7 Q. Oh, and what about the DSL line?

8 A. No.

9 Q. And Eagle Terrace, you pay for the boxes and
10 you pay for the DSL line?

11 A. Correct. "You" being Hypertouch.

12 Q. Correct. We've already gone over what you've
13 individually paid, right?

14 A. Yes.

15 Q. So MegaPath Networks that we discussed, you
16 think it's upstream Washington, D.C., and you know it's
17 the DSL line in Eagle Terrace.

18 A. Yes.

19 Q. Any other relationship that you have with
20 MegaPath Networks?

21 A. Not that comes to mind.

22 Q. And now that we've been going for a while, do
23 you remember that you've had any relationship with
24 Speakeasy or Speakeasy Networks?

25 A. Again, I don't know who is the DSL provider for

1 Skyline, but that could be Speakeasy. I don't know.

2 Q. You've never had a relationship with Speakeasy?

3 A. I have attempted to get their services a couple
4 of times and, for example, they weren't available in
5 Foster City. But no. So I've done inquiries about
6 services, but I have never signed up with them that I
7 can recall.

8 Q. Are you familiar with the term a "backbone
9 provider"?

10 A. Yes.

11 Q. What does it mean to you?

12 A. Backbones are very large telecommunication
13 companies that run their own fiberoptic or cable lines.

14 Q. Hypertouch Inc. is not a backbone?

15 A. Hypertouch has its own network that's hooked
16 up, but it doesn't have a backbone that crosses state
17 lines or anything like that, no.

18 Q. Do you know what a "wholesale ISP" is?

19 A. Wholesale ISP?

20 Q. ISP, Internet service provider.

21 A. I'm not sure what terminology you would use
22 when you say "wholesale ISP."

23 Q. Do you consider SBC to be a backbone?

24 A. I think of backbones as super high-bandwidth
25 trunk lines. I do not know if SBC has their own

1 did not ever click on the Kennedy-Western opt-out?

2 A. I do not recall ever doing that, correct.

3 Q. So therefore, you don't know what would have
4 happened, good or bad, had you done so, correct?

5 A. That is correct. I don't recall having ever
6 tested that.

7 Q. Have you ever filed an FTC complaint?

8 A. I have filed FOIA requests with the FTC.

9 Q. F-O-I-A, all caps?

10 A. Freedom of Information Act complaints with the
11 FTC. I don't recall complaining to the FTC about
12 e-mail, about spam. I could be wrong, but I don't
13 recall.

14 Q. When did you first look at the FTC Web site and
15 see that it had a method by which you could complain
16 about spammers?

17 A. I don't recall exactly. I'm pretty sure it
18 would be prior -- it would be sometime in 2003 or
19 earlier. I'm not sure. Maybe 2003, but I'm not sure.

20 Q. So can I take it you have not filed a complaint
21 with the FTC about Kennedy-Western University?

22 A. Correct.

23 Q. Do you believe Hypertouch Inc. has any actual
24 damages from any e-mails received by you that advertised
25 Kennedy-Western University?

1 A. I guess "actual damages" has a legal
2 definition, so I'm not quite sure the parsing of that.

3 But Hypertouch could have on its mail servers
4 virus checking, but those are charged at a number of
5 e-mails per-hour rate. And so to the extent that
6 Kennedy-Western's spam increases the per-hour rate, it
7 prices out -- it makes it much more expensive by
8 multiple orders of magnitude to get virus protection for
9 a server.

10 Hypertouch's bandwidth needs are dictated for
11 its mail servers by the amount of e-mail it has. Since
12 spam compromises the vast majority of e-mail that goes
13 to Hypertouch's servers, the size of the bandwidth
14 connection that I have to get is increased because of
15 spam. And Kennedy-Western is part of that spam load.

16 Hypertouch's backups take up disk space, which
17 costs money and, when burned to a CD or DVD, costs money
18 per burned backup.

19 And the logs are much bigger, significantly
20 bigger because of spam, including Kennedy-Western spam,
21 and the backups of the logs are much bigger.

22 And the e-mail accounts that are backed up,
23 while they are still on the mail servers, are much
24 bigger because of spam.

25 Q. And how much -- what is your bandwidth?

1 A. I don't recall for sure. It might be 768
2 symmetric, but I'm not positive what I set it at for the
3 mail servers.

4 Q. And given that you've sued other alleged
5 spammers, how much of this increased bandwidth disk
6 space, logs and backups of logs do you attributed to
7 Kennedy-Western as opposed to everybody else?

8 A. The total amount for Kennedy-Western would be a
9 small percentage, well under 1 percent.

10 Q. Does it sound right to you that there's about
11 2,000 e-mails on the disk that you produced in
12 discovery?

13 A. That sounds about right.

14 Q. And how many -- how much of your space on your
15 computers does that take up?

16 A. I don't recall. I'd have to look at the file.

17 Q. Less than 1 percent?

18 A. Yes.

19 Q. Do you have any sense of how many spams
20 Hypertouch Inc.'s computers receive every day?

21 A. Um -- I know it is often over 90,000 a day.
22 Sometimes -- it's been going steadily. Last year, it
23 was on the order of 30,000 a day or so. And it has --
24 it's been increasing -- or actually under 30,000 a day,
25 and it has peaks now. It goes in ebbs and tides.