

1 IKEZOYE, V.

2 18:20:32 Q And so the press release says that "HFA and
3 18:20:37 AM will work together to combine AM's ability to
4 18:20:41 identify sound recordings with HFA's capacity to
5 18:20:46 identify musical compositions embodied in those sound
6 18:20:50 recordings along with the associated music publishing
7 18:20:53 rights holders"; do you see that?

8 18:20:56 A Yes.

9 18:20:56 Q What, if anything, was done in order to
10 18:20:59 accomplish what's described in that sentence?

11 18:21:01 A We've needed to match databases between our
12 18:21:08 sound recording and Harry Fox's database of
13 18:21:13 compositions and publishers.

14 18:21:17 Q And has that happened?

15 18:21:19 A Yes.

16 18:21:20 Q And how is that accomplished?

17 18:21:23 A We provide some of our database metadata with
18 18:21:33 an identifier and we send that to Harry Fox, and then
19 18:21:37 they do a process of automated and manual matching to
20 18:21:43 their database.

21 18:21:43 Q And what's the result of that process of
22 18:21:50 automated and manual matching that Harry Fox does?

23 18:21:54 MR. DESANCTIS: Objection to form.

24 18:21:55 THE WITNESS: We have a link, then when we --
25 18:22:00 when we have a sound recording, we have a link that

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2 18:49:29 Q Sure.
3 18:49:30 A Repeat the question.
4 18:49:31 Q Sure.
5 18:49:31 As of November 2006, when a number of the
6 18:49:34 content owners were added to the database, according
7 18:49:36 to the second page of Exhibit 12, Audible Magic didn't
8 18:49:41 have any fingerprints in the film and TV database that
9 18:49:45 it could have added, did it?
10 18:49:47 A No, I think we did have some. If on, you
11 18:49:50 know, Exhibit 4A we said that, 2006, we did have some
12 18:49:57 fingerprints in the database. It said nine.
13 18:49:59 Q Okay. So there were nine --
14 18:50:00 A Yeah.
15 18:50:00 Q -- film and TV fingerprints that could have
16 18:50:03 been added at that time?
17 18:50:08 A Right.
18 18:50:08 Q Earlier you testified that Audible Magic
19 18:50:13 could and would have added the film and TV database
20 18:50:17 fingerprints to the YouTube contract if YouTube had
21 18:50:21 asked; do you recall that testimony?
22 18:50:23 A Yes, and yes.
23 18:50:24 Q But it could only have done that to the
24 18:50:30 extent that it had fingerprints in its TV and film
25 18:50:34 database; correct?

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IKEZOYE, V.

18:55:31 A Correct.

18:55:31 Q So one of the things that would have had to
18:55:35 have been done in order to do the type of pilot tests
18:55:38 that's contemplated in this proposal would be to
18:55:43 obtain such fingerprints from film and TV companies?

18:57:04 A Yes.

18:57:04 Q So earlier you testified, and, again, correct
18:57:08 me if I'm wrong, don't mean to mischaracterize, that
18:57:12 audio fingerprinting is effective in identifying video
18:57:16 files; does that sound right?

18:57:19 A Yes.

18:57:19 Q And then you also said as long as Audible
18:57:22 Magic had the reference fingerprint in its database
18:57:25 corresponding to that video file; right?

18:57:27 A That's correct. Sorry.

18:57:31 Q Now, as of 2006, I think we said there were,
18:57:37 what, nine fingerprints in the TV film database; was
18:57:42 that right?

18:57:43 A Yes.

18:57:43 Q Ask -- and then even today the total is
18:57:50 approximately 129,000, according to Exhibit 4A?

18:57:59 A Yes.

18:57:59 Q If you could turn back to Exhibit 24.

18:58:58 And this was an e-mail from Lou Kvitek to

Schapiro Exhibit 114

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC., COMEDY)
 PARTNERS, COUNTRY MUSIC)
 TELEVISION, INC., PARAMOUNT)
 PICTURES CORPORATION, and BLACK)
 ENTERTAINMENT TELEVISION LLC,)
 Plaintiffs,)
 vs.) Case No.
 YOUTUBE, INC., YOUTUBE, LLC,) 1:07CV02103
 and GOOGLE, INC.,)
)
 Defendants.)

 THE FOOTBALL ASSOCIATION PREMIER)
 LEAGUE LIMITED, BOURNE CO., et al.,)
 on behalf of themselves and all)
 others similarly situated,)
)
 Plaintiffs,)
 vs.) Case No.
 YOUTUBE, INC., YOUTUBE, LLC, and) 07CV3582
 GOOGLE, INC.,)
)
 Defendants.)
 _____)

DEPOSITION OF LAUREN APOLITO
NEW YORK, NEW YORK
THURSDAY, January 7, 2010

REPORTED BY:
ERICA RUGGIERI, CSR, RPR
JOB NO: 18448

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January 7, 2010
10:03 a.m.

VIDEOTAPED DEPOSITION OF LAUREN
APOLITO, held at the offices of WILSON
SONSINI GOODRICH & ROSATI, 1301 Avenue of
the Americas, New York, New York, pursuant
to notice, before before Erica L.
Ruggieri, Registered Professional Reporter
and Notary Public of the State of New
York.

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A P P E A R A N C E S :

FOR THE DEFENDANTS YOUTUBE, INC., YOUTUBE,
LLC and GOOGLE, INC.:

WILSON SONSINI GOODRICH & ROSATI, LLP

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650 Page Mill Road

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Mrees@wsgr.com

FOR THE HARRY FOX AGENCY AND
THE WITNESS:

LIEFF CABRASER HEIMANN & BERNSTEIN

BY: DAVID S. STELLINGS, ESQ

ANNIKA K. MARTIN, ESQ.

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Dstellings@lchb.com

ALSO PRESENT:

MANUEL ABREU, Videographer

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IT IS HEREBY STIPULATED AND
AGREED, by and between the attorneys
for the respective parties herein,
that filing and sealing be and the
same are hereby waived.

IT IS FURTHER STIPULATED AND
AGREED that all objections, except as
to the form of the question, shall be
reserved to the time of the trial.

IT IS FURTHER STIPULATED AND
AGREED that the within deposition may
be sworn to and signed before any
officer authorized to administer an
oath, with the same force and effect
as if signed and sworn to before the
Court.

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APOLITO

A. Yes.

Q. The Harry Fox Agency did not end up entering into any type of collaboration agreement with Auditude; is that right?

10:46:31

A. Correct.

Q. Do you recall why there was no collaboration agreement with Auditude?

A. I recall Auditude does have fingerprinting technology; however they were not interested in working with user-generated content sites.

10:47:01

Q. Have there been any discussions between Auditude and Harry Fox Agency after the 2007 time frame?

10:47:23

A. I believe we sent them the press release of our Audible Magic collaboration and asked them if they would like to continue conversations.

Q. And were there continued conversations after that?

10:47:46

A. Not that I recall.

Q. What is the purpose of the collaboration agreement that Harry Fox Agency has with Audible Magic?

10:48:07

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APOLITO

A. Audible Magic has a database of sound recording information. They use that information to create codes, fingerprint of the audio, and then they help sites in identifying content through the fingerprints.

Although a site may use Audible Magic and determine that it's a particular sound recording, there's still a missing link, which is the publisher information. Harry Fox was hoping to facilitate licensing by also combining the publishing information with the Audible Magic information so that somebody who wanted to license could get both sets of information.

Q. What's the current status of the Harry Fox's collaboration with Audible Magic?

A. We continue to match our data sets to ensure that tracks that Audible Magic has have corresponding Harry Fox song codes.

MS. REES: Exhibit 9.

1 APOLITO
2 (Apolito Exhibit 9, potential
3 business model, marked for
4 identification, as of this date.)
5 10:50:09 (Witness reviews document.)
6 Q. Can you identify Exhibit 9?
7 A. This is one potential business
8 model that was developed.
9 Q. When you say a "potential
10 10:50:16 business model," what do you mean by that?
11 A. Different ways that we could
12 work together with, whether it be Audible
13 Magic or a similar party and a potential
14 licensee and Harry Fox.
15 10:50:26 Q. Is the business model that's
16 reflected in Exhibit 9 something that
17 Harry Fox has since implemented?
18 A. No.
19 MS. REES: Exhibit 10.
20 10:51:06 (Apolito Exhibit 10, document
21 regarding relationship between HFA
22 and Audible Magic, marked for
23 identification, as of this date.)
24 (Witness reviews document.)
25 10:52:32 Q. Can you identify Exhibit 10?

Schapiro Exhibit 115

Redacted on the Request of Plaintiffs

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Schapiro Exhibit 117

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VIACOM INTERNATIONAL, INC., COMEDY
PARTNERS, COUNTRY MUSIC
TELEVISION, INC., PARAMOUNT
PICTURES CORPORATION, and BLACK
ENTERTAINMENT TELEVISION, LLC,

Plaintiffs,

vs.

No. 07-CV-2103

YOUTUBE, INC., YOUTUBE, LLC,
and GOOGLE, INC.,

Defendants.

-----X

THE FOOTBALL ASSOCIATION PREMIER
LEAGUE LIMITED, BOURNE CO., et al.,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

No. 07-CV-3582

YOUTUBE, INC., YOUTUBE, LLC,
and GOOGLE, INC.,

Defendants.

-----X

HIGHLY CONFIDENTIAL
VIDEOTAPED DEPOSITION OF SCOTT PAUL ROESCH
PALO ALTO, CALIFORNIA
THURSDAY, SEPTEMBER 25, 2009

JOB NO. 17714

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SCOTT ROESCH

SEPTEMBER 25, 2009

8:42 A.M.

HIGHLY CONFIDENTIAL VIDEOTAPED DEPOSITION OF SCOTT
PAUL ROESCH, at WILSON SONSINI GOODRICH & ROSATI, 601
California Avenue, Palo Alto, California, pursuant to
notice, before me, KATHERINE E. LAUSTER, CLR, CRR, RPR,
CSR License No. 1894.

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SCOTT ROESCH

A P P E A R A N C E S :

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mrubin@wsgr.com
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Also Present: ARMANDO CARRASCO, Videographer

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SCOTT ROESCH

08:52:39 distributor of independent entertainment, and that
08:52:43 involved distribution of content on the web, and
08:52:45 through a number of other media channels, including
08:52:48 television, airlines, when -- various other
08:52:53 channels.

08:52:53 And so the -- the business model was
08:52:55 advertising on the website and distribution -- or,
08:52:59 actually, licenses to distribution partners.

08:53:04 Q. Can you describe how long that business
08:53:07 model was in place?

08:53:09 A. The business model is actually still in
08:53:12 place and of course it's evolved over time. The --
08:53:16 the web has become more central to the business
08:53:18 model, and the distribution efforts -- or
08:53:20 distribution channels have become, I would say,
08:53:22 secondary, but an important secondary business for
08:53:25 us.

08:53:26 Q. And over time you have added on
08:53:28 different types of businesses to that core business
08:53:34 model?

08:53:35 MR. WILKENS: Objection to the form of the
08:53:35 question.

08:53:41 THE WITNESS: Can you -- can you clarify?
08:53:42 I'm sorry. Can you repeat the question?

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08:53:44 BY MR. RUBIN:

08:53:44 Q. I believe you testified a moment ago that
08:53:46 the original business model of the company was to
08:53:49 focus on original content, the acquisition and
08:53:53 distribution of original content; is that right?

08:53:55 A. I don't think I said that. We were --
08:53:59 we're a marketer and distributor of independent
08:54:02 entertainment.

08:54:03 Q. Okay. Let -- let me -- let me ask you a
08:54:04 different question. How did Atom Films acquire that
08:54:09 originally, at the inception of the company, go
08:54:13 about acquiring that content?

08:54:14 A. We primarily licensed from independent
08:54:17 creators.

08:54:18 Q. And how did Atom Films go about getting
08:54:21 rights and clearances to distribute that content?

08:54:23 MR. WILKENS: Objection to the form of the
08:54:25 question.

08:54:26 THE WITNESS: We would, through a variety
08:54:27 of means, find content that we liked and thought had
08:54:31 commercial distribution potential; for example, we
08:54:33 would go to film festivals, we would engage -- we
08:54:39 would meet the creator and -- and discuss a -- a
08:54:42 licensing arrangement with them. If we could reach

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2 08:54:45 terms, we would execute a contract, and we would

3 08:54:48 obtain clearances.

4 08:54:51 So we would get reps and warranties from

5 08:54:54 the creator, and we would obtain clearances from

6 08:54:58 them to affirm that they held the necessary rights

7 08:55:02 to distribute the material.

8 08:55:04 Q. And by "reps and warranties," what were

9 08:55:06 you referring to?

10 08:55:07 MR. WILKENS: Objection to the form of the

11 08:55:09 question.

12 08:55:10 You can answer.

13 08:55:12 BY MR. RUBIN:

14 08:55:12 Q. You can answer.

15 08:55:12 A. Oh. The creator would, in the text of the

16 08:55:16 contracts, affirm that they held the necessary

17 08:55:19 rights to the material and the -- and the content.

18 08:55:25 BY MR. RUBIN:

19 08:55:25 Q. Was that an involved process?

20 08:55:28 MR. WILKENS: Objection. Vague.

21 08:55:30 THE WITNESS: In- -- "involved" in what

22 08:55:32 sense? Can you --

23 08:55:33 BY MR. RUBIN:

24 08:55:33 Q. Was the process of clearing the rights and

25 08:55:35 obtaining representations and warranties from those

1 SCOTT ROESCH

2 08:55:38 involved in the creation of the content an involved

3 08:55:43 process? Was it time consuming?

4 08:55:46 MR. WILKENS: Same objection.

5 08:55:46 THE WITNESS: It actually would vary

6 08:55:47 greatly between -- from deal to deal.

7 08:55:49 BY MR. RUBIN:

8 08:55:50 Q. But in certain circumstances it could be

9 08:55:52 quite time -- time consuming?

10 08:55:53 A. Yes.

11 08:55:54 Q. How -- how long would you say an average

12 08:55:56 deal took to negotiate?

13 08:55:58 MR. WILKENS: Objection to form.

14 08:56:09 THE WITNESS: It's difficult for me to --

15 08:56:11 to estimate that, because there was a wide range in

16 08:56:14 variance, but I can say a couple of weeks.

17 08:56:16 BY MR. RUBIN:

18 08:56:16 Q. Why did -- did Atom feel it was necessary

19 08:56:21 to obtain representations and warranties from these

20 08:56:24 creators?

21 08:56:25 MR. WILKENS: Objection to the form. And

22 08:56:26 I'm going to caution the witness, to the extent that

23 08:56:29 calls for attorney-client privilege or legal advice,

24 08:56:32 I instruct you not to answer as to that.

25 08:56:34 But if you can answer otherwise, go right

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SCOTT ROESCH

08:56:38 ahead.

08:56:39 THE WITNESS: Can you repeat -- repeat the
08:56:40 question?

08:56:40 BY MR. RUBIN:

08:56:41 Q. Why did Atom feel it was necessary to
08:56:43 obtain representations and warranties from these
08:56:46 creators?

08:56:53 A. We -- we wanted to build a business on the
08:56:54 distribution of content, so we wanted to make sure
08:56:56 that -- that people that contributed to the creation
08:57:00 of the content were -- you know, that -- that --
08:57:12 that they were willing participants in the -- in the
08:57:15 creation and -- and distribution of the content.

08:57:18 Q. So you took copyright issues seriously,
08:57:21 and you wanted to make sure that you were -- you had
08:57:24 cleared the copyright issues with the creators
08:57:27 before you distributed their works?

08:57:29 MR. WILKENS: Objection. Mischaracterizes
08:57:30 his testimony and calls for a legal conclusion.

08:57:33 MR. RUBIN: I -- I didn't -- wasn't
08:57:34 attempting to characterize his testimony. I was
08:57:37 asking a question.

08:57:38 THE WITNESS: Can you repeat the
08:57:39 question?

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2 08:57:40 BY MR. RUBIN:

3 08:57:40 Q. Sure. Atom Films took copyright issues

4 08:57:44 seriously and wanted to ensure that it was clearing

5 08:57:47 copyright issues with its -- with the creators of

6 08:57:50 the content it was intending to distribute before it

7 08:57:56 distributed them?

8 08:57:57 MR. WILKENS: Objection. Vague.

9 08:57:58 THE WITNESS: Yes.

10 08:57:58 BY MR. RUBIN:

11 08:57:59 Q. And you would not have advocated a

12 08:58:03 business model for Atom Films unless you believed

13 08:58:08 that that business model would have been in the same

14 08:58:10 vein of supporting copyright interests of creators'

15 08:58:14 content --

16 08:58:16 MR. WILKENS: Objection --

17 08:58:16 BY MR. RUBIN:

18 08:58:16 Q. -- is that right?

19 08:58:16 MR. WILKENS: -- to the form of the

20 08:58:17 question.

21 08:58:18 THE WITNESS: I'm not sure I understand

22 08:58:19 that. You're asking me to speculate about a

23 08:58:21 different business model?

24 08:58:23 BY MR. RUBIN:

25 08:58:24 Q. No, not at all. I'm saying, you, as a

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08:58:26 member of -- of maybe, if not the founding, the near
08:58:30 founding team of Atom, believed that the respect for
08:58:32 copyright was important to the Atom Films business;
08:58:36 isn't that right?

08:58:37 A. Yes.

08:58:38 Q. And you wouldn't have advocated a
08:58:39 direction for the business at any point that
08:58:42 deviated from that, would you?

08:58:44 MR. WILKENS: Objection to the form.

08:58:54 THE WITNESS: I don't think I did advocate
08:58:56 a direction for the business that deviated from it.

08:58:59 BY MR. RUBIN:

08:58:59 Q. So the answer to my question is: No,
08:59:01 you wouldn't have advocated a direction that
08:59:05 deviated from those core principles of respecting
08:59:07 copyright?

08:59:09 MR. WILKENS: Objection to the form, and
08:59:10 asked and answered.

08:59:10 MR. RUBIN: It hasn't been answered,
08:59:13 Scott. Stop interrupting.

08:59:15 MR. WILKENS: Objection. That same
08:59:16 objection.

08:59:17 THE WITNESS: I didn't advocate a model
08:59:19 that deviated from that. That's my belief.

1 SCOTT ROESCH

2 08:59:21 BY MR. RUBIN:

3 08:59:22 Q. Okay. That answers my question. All

4 08:59:23 right.

5 08:59:24 Did Atom Films ever obtain venture

6 08:59:27 financing?

7 08:59:27 A. Yes.

8 08:59:28 Q. From whom?

9 08:59:29 A. From a variety of sources, and I'm not

10 08:59:34 going to be able to give you an exhaustive list, but

11 08:59:38 one was Allen & Co., one was Arts Alliance.

12 08:59:49 And, you know, after the merger with Shock

13 08:59:52 Wave, you know, one of their venture capitalists had

14 08:59:58 been Sequoia, and there are a number of others.

15 09:00:02 Q. How many rounds of venture financing did

16 09:00:04 Atom films have, either before or after the Shock

17 09:00:08 Wave merger?

18 09:00:10 A. I'm not entirely sure.

19 09:00:12 Q. Do you know if Sequoia invested in the

20 09:00:15 company post merger with Shock Wave?

21 09:00:21 A. I'm not sure. I'd be -- I would -- I --

22 09:00:24 I'd be speculating.

23 09:00:27 Q. Do you know when the rounds were?

24 09:00:31 A. I know that there were -- there was some

25 09:00:33 angel funding of Atom in '98, and our first round

1 SCOTT ROESCH

2 09:00:38 of -- or say "they," I guess -- was in early '99.

3 09:00:41 And then after that another -- I know there was at

4 09:00:46 least one additional round, but I -- I don't recall

5 09:00:48 when.

6 09:00:49 Q. So you don't -- you can't recall the

7 09:00:50 number of venture financing rounds that Atom had?

8 09:00:54 A. The number of rounds?

9 09:00:55 MR. WILKENS: Objection. Asked and

10 09:00:55 answered.

11 09:00:56 THE WITNESS: No.

12 09:00:57 BY MR. RUBIN:

13 09:00:59 Q. Do you know how much money was raised, in

14 09:01:01 total, through venture financing for Atom?

15 09:01:07 A. I -- I don't know the specific number.

16 09:01:10 Q. Do you have a rough number?

17 09:01:12 MR. WILKENS: Objection.

18 09:01:16 THE WITNESS: I -- I believe it was

19 09:01:17 20 million, possibly slightly higher for the Atom --

20 09:01:22 you know, for the pre Shock Wave merger atom Films,

21 09:01:27 and again, that's not -- that wasn't my area of

22 09:01:30 responsibility. So that's -- I'm doing that based

23 09:01:32 on memory.

24 09:01:33 BY MR. RUBIN:

25 09:01:33 Q. Sure.

1 SCOTT ROESCH

2 09:13:50 A. Um --

3 09:13:51 Q. -- between Atom and the individuals

4 09:13:54 referenced in the e-mail?

5 09:13:55 A. Yes.

6 09:13:56 Q. And did Atom ultimately host and

7 09:13:59 distribute content created by these individuals?

8 09:14:01 A. Yes.

9 09:14:07 Q. In addition to looking to YouTube for

10 09:14:11 content, do you ever recall Atom looking to YouTube

11 09:14:17 for feature ideas --

12 09:14:19 MR. WILKENS: Objection to the form --

13 09:14:19 BY MR. RUBIN:

14 09:14:19 Q. -- for its service?

15 09:14:21 MR. WILKENS: Objection to the form.

16 09:14:32 THE WITNESS: Would you clarify what types

17 09:14:34 of features?

18 09:14:35 BY MR. RUBIN:

19 09:14:35 Q. Any features.

20 09:14:45 A. Website features?

21 09:14:47 Q. Sure.

22 09:14:47 A. Yes, YouTube was a -- a website that we

23 09:14:50 looked at and -- and we looked at the features

24 09:14:53 on the -- on that site.

25 09:14:54 Q. Can you recall any particular features

1 SCOTT ROESCH

2 09:14:57 that Atom might have looked at on YouTube in an

3 09:15:01 attempt to incorporate them into the AtomFilms

4 09:15:04 website?

5 09:15:05 MR. WILKENS: Objection to the form.

6 09:15:10 THE WITNESS: We -- hm. I think -- I

7 09:15:32 think -- I think one feature that YouTube had, in

8 09:15:35 addition to other sites at the time, was a feature

9 09:15:38 that allowed users to upload videos directly to a --

10 09:15:42 to the web side. So we -- we looked at that

11 09:15:46 feature.

12 09:15:47 Q. Is that a feature you ultimately

13 09:15:49 implemented?

14 09:15:50 A. We uploaded -- or we implemented an upload

15 09:15:53 feature on a -- initially on a -- another website

16 09:15:57 that we controlled.

17 09:16:05 Q. Do you -- did you, or anyone else at Atom,

18 09:16:07 ever conduct a competitive analysis of YouTube?

19 09:16:11 MR. WILKENS: Objection to the form.

20 09:16:30 THE WITNESS: We conducted analysis. I

21 09:16:34 believe the analysis was in the context of a -- of

22 09:16:38 potential vendors for -- to power a white label

23 09:16:43 website. I don't recall the specific competitive

24 09:16:48 analysis that we conducted, but we did analyze the

25 09:16:53 site.

1 SCOTT ROESCH

2 09:16:54 MR. RUBIN: I'd like to introduce Roesch

3 09:16:56 Exhibit Number 4.

4 09:16:57 (Roesch Deposition Exhibit Number 4 was

5 09:16:57 marked for identification.)

6 09:17:09 BY MR. RUBIN:

7 09:17:10 Q. Mr. Roesch, this is an e-mail that Cindy

8 09:17:17 Emch sent to M_ATOM_AtomFilms_Team@Viacom.com on

9 09:17:26 October 24th, 2007, and Viacom produced in this

10 09:17:33 litigation, bearing Bates number VIA 02478789.

11 09:17:42 Who is Cindy Emch?

12 09:17:46 A. Cindy Emch was a -- a member of my team.

13 09:17:49 Q. What was her role on your team?

14 09:17:52 A. She had a couple of different roles. I

15 09:17:56 believe her role at this time was promoting content

16 09:18:01 on Atom Films and AtomUploads or AddictingClips'

17 09:18:12 website.

18 09:18:16 Q. Did you receive this e-mail?

19 09:18:18 A. Yes.

20 09:18:19 Q. Did you --

21 09:18:20 A. Well, sorry. I believe that I did,

22 09:18:22 because I was a member of this Atom Films team list.

23 09:18:26 Q. Thank you.

24 09:18:30 Do you see the first line of this e-mail?

25 09:18:32 A. Yes.

1 SCOTT ROESCH

2 10:07:09 A. I've received additional e-mail addresses.

3 10:07:12 My previous e-mail addresses have not changed.

4 10:07:15 Q. What e-mail address do you use on a daily

5 10:07:17 basis for work?

6 10:07:18 A. I use ScottR@Atom.com or SRoesch@Atom.com.

7 10:07:29 Q. Do the other e-mail addresses you just

8 10:07:32 referenced as having obtained following the Viacom

9 10:07:34 acquisition of Atom all point to one of those e-mail

10 10:07:39 addresses?

11 10:07:40 A. Yes, I believe so.

12 10:07:41 Q. When the switch to Viacom took place, do

13 10:07:45 you know what happened to the e-mails that you had

14 10:07:47 on the Viacom -- the Atom e-mail server?

15 10:07:51 A. No.

16 10:07:54 Q. Currently do you know the server on which

17 10:07:57 your e-mails are stored?

18 10:07:59 A. No.

19 10:08:02 Q. Generally speaking, as a practice, do you

20 10:08:04 save or do you delete your e-mail?

21 10:08:09 MR. WILKENS: Objection to the form.

22 10:08:13 THE WITNESS: It depends on the e-mail,

23 10:08:16 the specific e-mail.

24 10:08:17 BY MR. RUBIN:

25 10:08:18 Q. What criteria do you apply?

1 SCOTT ROESCH

2 10:08:23 A. I may -- if -- if I think there's an

3 10:08:25 e-mail that I may want to refer to again in the

4 10:08:28 future, I would -- you know, I might save that in a

5 10:08:32 folder that's easily accessible to me.

6 10:08:36 Q. And what facts determine whether or not

7 10:08:39 you're likely to want to refer to an e-mail in the

8 10:08:42 future?

9 10:08:43 A. (Witness shrugs.) If it has information

10 10:08:46 in there that may be pertinent to an ongoing

11 10:08:50 initiative or a fact that I might need to retrieve.

12 10:08:55 Q. Job-related issues, then?

13 10:08:57 A. Yes.

14 10:09:02 Q. Are you familiar with a website known as

15 10:09:06 AddictingClips?

16 10:09:07 A. Yes.

17 10:09:09 Q. What was your involvement with that

18 10:09:11 website?

19 10:09:12 A. I was responsible for that website.

20 10:09:20 Q. Can you describe that website, generally?

21 10:09:23 A. Yes.

22 10:09:28 Q. Please do.

23 10:09:30 A. AddictingClips was a website where content

24 10:09:33 creators could upload their material directly to the

25 10:09:37 site.

1 SCOTT ROESCH

2 10:09:44 Q. How did AddictingClips limit the upload of

3 10:09:50 materials to content creators?

4 10:09:53 MR. WILKENS: Objection to the form.

5 10:10:00 THE WITNESS: The -- the site was -- was

6 10:10:02 available for anybody to upload.

7 10:10:05 BY MR. RUBIN:

8 10:10:12 Q. Was the functionality of the Ad- -- of the

9 10:10:15 AddictingClips website always such that anybody

10 10:10:18 could upload content to the service?

11 10:10:21 A. No.

12 10:10:23 Q. Can you describe the original

13 10:10:25 functionality of the Ad- -- of the AddictingClips

14 10:10:27 website?

15 10:10:28 A. Yes, the first version of AddictingClips

16 10:10:30 was a directory of links pointing out to

17 10:10:35 third-party -- to content on third-party websites.

18 10:10:44 Q. Why would Atom choose to launch

19 10:10:49 AddictingClips?

20 10:10:50 A. Well, we believed there was interesting

21 10:10:52 content on other sites that users would be

22 10:10:55 interested in, and that a -- a directory of some of

23 10:10:58 that content would be interesting to them.

24 10:11:02 Q. Who was involved in making that decision?

25 10:11:09 A. I was involved, along with a couple

1 SCOTT ROESCH

2 10:11:13 members of my team, and -- and some of the other

3 10:11:16 Atom Entertainment management.

4 10:11:18 Q. Who by name was involved in that decision?

5 10:11:22 A. Mika Salmi was involved; Peter Ignacio,

6 10:11:33 for the -- for whatever -- I think Mika and Peter

7 10:11:40 are probably the primary people involved.

8 10:11:43 Q. Would you say that anyone owned the idea?

9 10:11:45 MR. WILKENS: Objection to the form.

10 10:11:47 THE WITNESS: No.

11 10:11:49 BY MR. RUBIN:

12 10:11:49 Q. It was more collaborative then?

13 10:11:51 A. Yes.

14 10:11:52 Q. Could you pinpoint whose idea it was?

15 10:11:59 A. I can't recall.

16 10:12:03 MR. RUBIN: I'd like to introduce Roesch

17 10:12:06 Exhibit 10.

18 10:12:07 (Roesch Deposition Exhibit Number 10 was

19 10:12:07 marked for identification.)

20 10:12:24 BY MR. RUBIN:

21 10:12:25 Q. Mr. Roesch, Exhibit 10 is a document

22 10:12:29 Viacom produced in this case from your files

23 10:12:31 entitled:

24 10:12:33 "User-Generated Video (UGV) service

25 10:12:39 Recommendation, ScottR, 9/16/05,"

1 SCOTT ROESCH

2 10:12:44 bears Bates number VIA 02927282 through -84.

3 10:12:57 Do you recognize this document?

4 10:13:01 MR. WILKENS: Take your time to review it,

5 10:13:03 Scott.

6 10:14:01 THE WITNESS: I recognize the document.

7 10:14:02 BY MR. RUBIN:

8 10:14:04 Q. Did you draft it?

9 10:14:07 A. Yes.

10 10:14:09 Q. What is it?

11 10:14:13 A. It's a document that builds on internal

12 10:14:17 discussions and attempts to -- attempts to recommend

13 10:14:25 a course of action.

14 10:14:29 Q. What course of action does it recommend?

15 10:14:31 A. I'm going to take a minute and finish

16 10:14:34 reading it.

17 10:14:36 Q. Sure.

18 10:16:00 A. The document recommends expanding the

19 10:16:11 mission of Atom Films to include user-generated

20 10:16:15 video.

21 10:16:17 BY MR. RUBIN:

22 10:16:17 Q. On the first page, Mr. Roesch, do you see

23 10:16:23 number 1?

24 10:16:25 A. Yes.

25 10:16:33 Q. Do those points accurately reflect your

1 SCOTT ROESCH

2 10:16:37 reasons for wanting to launch a UGC website in

3 10:16:43 September of 2005?

4 10:16:53 A. They -- they accurately reflect some of

5 10:16:57 the -- the reasons we wanted to do that.

6 10:17:01 Q. All of the reasons listed here are

7 10:17:03 accurate though, aren't they?

8 10:17:14 A. Yes.

9 10:17:15 Q. You just indicated there were others,

10 10:17:16 though?

11 10:17:17 A. Yeah, as indicated in -- in Section 2,

12 10:17:22 the -- we believed that it would be important as a

13 10:17:29 content destination, a content site.

14 10:17:40 Q. Your goal in launching this UGC site was

15 10:17:46 not to profit from infringing videos that might be

16 10:17:51 uploaded or linked from that site, was it?

17 10:17:55 A. No.

18 10:17:59 Q. Did you recognize that by allowing users

19 10:18:03 to upload material to the service directly, it might

20 10:18:06 be possible that they might upload infringing

21 10:18:12 material to the service?

22 10:18:14 MR. WILKENS: Objection to the form.

23 10:18:17 THE WITNESS: Yes.

24 10:18:18 BY MR. RUBIN:

25 10:18:19 Q. And before launching the site you vetted

1 SCOTT ROESCH

2 10:18:22 the legality of AddictingClips; right?

3 10:18:28 MR. WILKENS: Objection to the form.

4 10:18:29 You can answer that "yes" or "no."

5 10:18:31 THE WITNESS: Yes.

6 10:18:32 BY MR. RUBIN:

7 10:18:32 Q. And you thought it was operating within

8 10:18:34 the law; right?

9 10:18:36 MR. WILKENS: Objection to the form.

10 10:18:42 Calls for a legal conclusion.

11 10:18:44 You can answer "yes" or "no."

12 10:18:46 THE WITNESS: Yes.

13 10:18:49 BY MR. RUBIN:

14 10:18:56 Q. When did that site launch?

15 10:19:23 A. The first version of the site offering

16 10:19:26 upload functionality launched in the spring of 2006.

17 10:19:35 Q. There was a version before that though;

18 10:19:37 right?

19 10:19:37 A. Yes.

20 10:19:38 Q. When -- and what did the version before

21 10:19:42 the upload functionality version provide?

22 10:19:48 A. There was a directory of links to content

23 10:19:51 on other sites.

24 10:19:53 Q. And when did that version of the site

25 10:19:56 launch?

1 SCOTT ROESCH

2 10:19:56 A. That launched in late 2005.

3 10:19:59 Q. Did it launch in December of 2005?

4 10:20:01 A. That's possible. That sounds about right.

5 10:20:03 Q. Can you describe how the links content

6 10:20:07 appeared on the AddictingClips website?

7 10:20:15 A. I rec- -- I recollect that it was a list

8 10:20:18 of links. Most of the home page was taken up with a

9 10:20:22 list of links.

10 10:20:23 Q. And what happened when a user clicked on

11 10:20:26 one of those links?

12 10:20:29 MR. WILKENS: Objection to the form.

13 10:20:32 THE WITNESS: A user would be taken to the

14 10:20:34 third party website with an AddictingClips frame on

15 10:20:42 the -- at the top of the screen.

16 10:20:45 BY MR. RUBIN:

17 10:20:45 Q. So the third-party website was framed by

18 10:20:47 an AddictingClips frame -- sorry. The third-party

19 10:20:49 content was framed by an Addicting Clips site?

20 10:20:54 A. The third-party web page appeared in its

21 10:20:58 entirety, with a very small AddictingClips,

22 10:21:01 quote-unquote, frame at the top of the page.

23 10:21:05 Q. Did Atom advertise on that iteration of

24 10:21:08 the AddictingClips website?

25 10:21:13 A. I believe there is -- there were

1 SCOTT ROESCH

2 10:21:15 advertisings on the -- advertisements on the home

3 10:21:20 page, and there were not advertisements on the

4 10:21:23 frames, and I don't recall if there were any other

5 10:21:27 advertisements on the service.

6 10:21:29 Q. When you say "the home page," are you

7 10:21:31 referring to the page with the directory of links?

8 10:21:34 A. Yes.

9 10:21:43 Q. Did Atom place the various clips it was

10 10:21:45 aggregating into categories?

11 10:21:47 MR. WILKENS: Objection to form.

12 10:21:52 THE WITNESS: I don't -- I don't recall.

13 10:21:54 BY MR. RUBIN:

14 10:22:00 Q. Did you provide descriptions of the

15 10:22:02 content?

16 10:22:04 MR. WILKENS: Objection to the form of the

17 10:22:05 question.

18 10:22:08 THE WITNESS: Yes.

19 10:22:09 BY MR. RUBIN:

20 10:22:14 Q. I see an error in one of my prior

21 10:22:18 questions. We were referring to iteration of the

22 10:22:21 site when it was linking to content. Did Atom place

23 10:22:24 the various links it was aggregating into

24 10:22:26 categories?

25 10:22:27 A. I -- I don't recall.

1 SCOTT ROESCH

2 10:22:30 Q. And you don't recall whether Atom provided

3 10:22:33 any descriptions of those links either?

4 10:22:36 A. I do recall that, and we did provide

5 10:22:39 descriptions.

6 10:22:40 Q. How did those descriptions come into

7 10:22:44 being?

8 10:22:46 A. A member of our team would write the

9 10:22:48 descriptions.

10 10:22:51 Q. Who would write the descriptions?

11 10:22:55 A. I believe it was a variety of people. I

12 10:22:57 don't think it was limited to one person. I believe

13 10:23:01 I wrote some of the descriptions. Chris Albrecht, I

14 10:23:08 believe, wrote some of the descriptions, and I

15 10:23:11 believe Peter Ignacio wrote some of the

16 10:23:14 descriptions, possibly others.

17 10:23:16 Q. And how did you obtain the information on

18 10:23:19 which -- that you used to write the descriptions?

19 10:23:24 A. From viewing the content.

20 10:23:29 Q. Was all content that AddictingClips linked

21 10:23:36 to viewed prior to being linked to?

22 10:23:40 MR. WILKENS: Objection to the form.

23 10:23:44 THE WITNESS: Yes.

24 10:23:44 BY MR. RUBIN:

25 10:23:46 Q. Viewed by an Atom employee before being

1 SCOTT ROESCH

2 10:23:50 linked to?

3 10:23:51 A. Yes.

4 10:23:59 Q. How did Atom go about selecting the clips

5 10:24:02 that would be linked to on the AddictingClips

6 10:24:08 website?

7 10:24:11 A. By viewing other websites and looking for

8 10:24:15 clips that we found entertaining.

9 10:24:19 Q. Who was involved?

10 10:24:23 A. Peter Ignacio, I believe, found most of

11 10:24:27 those -- most of the links for that first version of

12 10:24:31 the service.

13 10:24:43 MR. RUBIN: I'd like to introduce Roesch

14 10:24:47 Exhibit 11.

15 10:24:47 (Roesch Deposition Exhibit Number 11 was

16 10:24:47 marked for identification.)

17 10:25:10 BY MR. RUBIN:

18 10:25:11 Q. Mr. Roesch, Exhibit 11 is an e-mail dated

19 10:25:22 November 30th, 2005. It was sent to Peter Ignacio

20 10:25:28 and Chris Albrecht by you, with an attachment

21 10:25:32 entitled "Pete Cut List," produced by Viacom in this

22 10:25:38 litigation, bearing Bates number VIA 08711358 to

23 10:25:45 -459. Do you recall this document?

24 10:26:07 A. Yes.

25 10:26:07 Q. And the cover e-mail, fourth -- fourth

1 SCOTT ROESCH

2 10:26:10 paragraph down, the one beginning with "Note," it

3 10:26:16 indicates that you standardized categories. Do you

4 10:26:22 see that?

5 10:26:23 A. Yes, I do.

6 10:26:24 Q. Does this refresh your recollection that

7 10:26:27 the links Atom employees were collecting to populate

8 10:26:32 the site were being categorized into links?

9 10:26:37 A. Yes, it does.

10 10:26:39 Q. Do you see that three other links were

11 10:26:41 "Jackass," "TV," and "Movies"?

12 10:26:46 A. Yes, I do.

13 10:26:47 Q. And there's another one, "Music"?

14 10:26:51 A. Yes.

15 10:27:06 Q. What were the criteria that were applied

16 10:27:10 in -- by Atom employees when selecting links for the

17 10:27:18 launch and subsequent edition of clips -- clips --

18 10:27:23 links to clips for the first version of the

19 10:27:28 AddictingClips service?

20 10:27:41 A. Entertainment value was a big criteria.

21 10:27:44 Q. Were there any clips -- any qualities that

22 10:27:49 made clips against policy to link to?

23 10:27:55 MR. WILKENS: Objection to the form. And

24 10:27:57 I'm going to caution the witness not to get into

25 10:28:00 attorney-client privilege.

1 SCOTT ROESCH

2 10:28:04 THE WITNESS: Yes.

3 10:28:05 BY MR. RUBIN:

4 10:28:05 Q. What types of links?

5 10:28:13 MR. WILKENS: That same -- same objection.

6 10:28:14 Same caution.

7 10:28:46 THE WITNESS: Clips that were highly

8 10:28:48 offensive were against policy, and clips that we --

9 10:28:53 that -- that appeared to be infringing were against

10 10:28:58 policy.

11 10:28:59 BY MR. RUBIN:

12 10:29:00 Q. How did you determine whether a clip was

13 10:29:04 infringing or not?

14 10:29:05 MR. WILKENS: Objection to the form. And

15 10:29:07 I'm going to caution the witness not to get into

16 10:29:12 attorney-client privilege.

17 10:29:15 THE WITNESS: We would -- we would have

18 10:29:17 conversation with counsel.

19 10:29:20 BY MR. RUBIN:

20 10:29:21 Q. I'm not asking, Mr. Roesch, for any

21 10:29:24 content of any communication you had with counsel.

22 10:29:27 What I'm asking is, when you, personally,

23 10:29:30 were engaged in looking at other services and other

24 10:29:34 sites out there on the Internet in an effort to

25 10:29:37 locate clips to link to from A- -- from

1 SCOTT ROESCH

2 11:09:08 links appearing on the AddictingClips website under

3 11:09:10 the "TV" category on or about January 13th, 2006.

4 11:09:17 MR. WILKENS: I'm just going to repeat

5 11:09:18 my earlier objection about the accuracy of the

6 11:09:23 Internet Archive. But we accept your representation

7 11:09:27 about when it was printed out and where it came

8 11:09:29 from.

9 11:09:30 BY MR. RUBIN:

10 11:09:32 Q. Based on your review of this document,

11 11:09:33 Mr. Roesch, do you see anything inaccurate about the

12 11:09:38 representation in the reflection of the links on

13 11:09:42 this exhibit about what would have been available

14 11:09:45 under the "TV" category of AddictingClips website on

15 11:09:51 or about January 13th, 2006?

16 11:09:54 MR. WILKENS: Take your time and look

17 11:09:55 through it.

18 11:10:18 THE WITNESS: No, I don't remember most of

19 11:10:20 these clips. It does not look inaccurate.

20 11:10:30 BY MR. RUBIN:

21 11:10:31 Q. There appear to be links to content from

22 11:10:33 "The Daily Show," "The Chappelle Show," "The Family

23 11:10:36 Guy," and "Saturday Night Live"; correct?

24 11:11:04 A. I see a link referring to "Chappelle" and

25 11:11:07 a link referring to "Family Guy" and a link that

1 SCOTT ROESCH

2 11:11:11 says it's from "SNL."

3 11:11:16 Q. Do you believe that AddictingClips was

4 11:11:18 engaged in copyright infringement when it linked to

5 11:11:25 these clips?

6 11:11:28 MR. WILKENS: Objection. Calls for a

7 11:11:31 legal conclusion, and I caution the witness not to

8 11:11:34 reveal attorney-client communications.

9 11:11:37 THE WITNESS: No.

10 11:11:37 BY MR. RUBIN:

11 11:11:38 Q. Why not?

12 11:11:41 MR. WILKENS: Mr. Roesch, I'm going to

13 11:11:42 caution you again not to reveal attorney-client

14 11:11:45 communications.

15 11:12:02 THE WITNESS: Because we -- we were

16 11:12:04 operating within guidelines that had been approved

17 11:12:10 by the legal team.

18 11:12:11 BY MR. RUBIN:

19 11:12:11 Q. Who was the legal team at the -- this

20 11:12:13 time?

21 11:12:17 A. Victoria Libin, Adam Lovingood, and the

22 11:12:27 assistant.

23 11:12:28 Q. And you respected their judgment?

24 11:12:33 MR. WILKENS: Objection to the form.

25 11:12:34 THE WITNESS: Yes.

1 SCOTT ROESCH

2 11:12:34 BY MR. RUBIN:

3 11:12:35 Q. Believed that they understood the

4 11:12:37 applicable area of law relevant to the issues that

5 11:12:42 governed the operation of the AddictingClips clip

6 11:12:47 link site?

7 11:12:49 MR. WILKENS: Objection to the form of the

8 11:12:50 question.

9 11:13:02 THE WITNESS: Yes.

10 11:13:25 BY MR. RUBIN:

11 11:13:25 Q. Did you ever have any discussions with

12 11:13:29 Victoria Libin about the DMCA?

13 11:13:33 MR. WILKENS: You can answer the question

14 11:13:34 "yes" or "no."

15 11:13:36 THE WITNESS: Yes.

16 11:13:36 BY MR. RUBIN:

17 11:13:37 Q. Did you understand the AddictingClips link

18 11:13:42 site to be protected by the DMCA?

19 11:13:46 MR. WILKENS: Objection to the form. And

20 11:13:48 I'm going to caution the witness not to answer the

21 11:13:50 question if it involves revealing attorney-client

22 11:13:55 communications.

23 11:14:02 THE WITNESS: Yes. I mean, since -- since

24 11:14:03 my knowledge wasn't formed by the legal

25 11:14:06 conversations, I'd -- I don't -- I can't answer that

1 SCOTT ROESCH

2 11:14:14 without revealing.

3 11:14:16 BY MR. RUBIN:

4 11:14:17 Q. Have you ever read Section 512 of the

5 11:14:19 DMCA?

6 11:14:21 A. I don't know.

7 11:14:23 Q. You don't know whether you've read the

8 11:14:25 DMCA?

9 11:14:28 MR. WILKENS: Objection. Asked and

10 11:14:28 answered.

11 11:14:36 THE WITNESS: I -- I've read parts of the

12 11:14:39 DMCA.

13 11:14:40 BY MR. RUBIN:

14 11:14:41 Q. Have you ever read Section 512(c) of

15 11:14:44 the DMCA, the -- the -- the portion of the

16 11:14:46 statute that's designed to protect service providers

17 11:14:51 who host material uploaded at the direction of

18 11:14:54 users?

19 11:14:55 MR. WILKENS: Objection. Asked and

20 11:14:55 answered.

21 11:14:56 MR. RUBIN: Hasn't been answered, Scott,

22 11:14:58 and hasn't been asked.

23 11:15:00 MR. WILKENS: I disagree.

24 11:15:02 THE WITNESS: I don't know if I've read

25 11:15:03 Section 512.

1 SCOTT ROESCH

2 11:15:04 BY MR. RUBIN:

3 11:15:05 Q. What sections have you read?

4 11:15:06 A. I don't -- I don't recall the section

5 11:15:08 numbers.

6 11:15:10 Q. Have you ever attempted to gain an

7 11:15:12 understanding of what the DMCA means, apart from

8 11:15:16 conversations with legal counsel?

9 11:15:29 A. I don't think so.

10 11:15:31 Q. So you have no independent basis for

11 11:15:34 determining whether or not the AddictingClips link

12 11:15:38 site was operating within the boundaries of the

13 11:15:41 DMCA?

14 11:15:42 MR. WILKENS: Objection to the form.

15 11:15:47 THE WITNESS: There -- does "independent

16 11:15:50 basis" -- what does "independent basis" mean?

17 11:15:52 BY MR. RUBIN:

18 11:15:53 Q. I believe you said you couldn't answer the

19 11:15:54 question of whether or not you believed the DMC- --

20 11:15:57 the clip -- the linked version of the AddictingClips

21 11:16:01 link site was operating within the confines of the

22 11:16:05 DMCA because it was informed by counsel.

23 11:16:08 I'm asking you whether you have any

24 11:16:10 independent basis to reach that conclusion. I'm not

25 11:16:14 asking what Miss Libin or anyone else told you. I'm

1 SCOTT ROESCH

2 11:16:19 asking what you understand yourself, based on the

3 11:16:21 operation of the service.

4 11:16:22 A. I believe we were operating it in a legal

5 11:16:26 manner.

6 11:16:27 Q. Including within the confines of the DMCA,

7 11:16:29 and consistent with that law?

8 11:16:31 MR. WILKENS: Objection to the form of the

9 11:16:32 question. And I instruct you not to answer if the

10 11:16:36 answer to the question would reveal the contents of

11 11:16:38 attorney-client communications.

12 11:16:58 THE WITNESS: Yeah, I -- I -- I don't have

13 11:16:59 an independent assessment on -- on that issue.

14 11:17:03 BY MR. RUBIN:

15 11:17:03 Q. Okay. So let's just be clear. I'm not

16 11:17:06 asking you whether you were told by someone else

17 11:17:09 that it was protected by the DMCA or not.

18 11:17:11 I'm asking based on your own view. If

19 11:17:15 someone told you, in order to be protected, you need

20 11:17:17 to do X, Y, and Z, I'm not asking you what that

21 11:17:22 statement was.

22 11:17:23 I'm asking you, based on your then

23 11:17:25 understanding of how it worked, did you come to the

24 11:17:29 conclusion that it -- that service was protected by

25 11:17:31 the DMC or not?

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SCOTT ROESCH

11:17:33 MR. WILKENS: Mr. Roesch, if your
11:17:34 understanding is based on instructions with counsel,
11:17:36 I instruct you not to answer that question, but
11:17:39 if -- if -- if you have independent knowledge apart
11:17:42 from what you -- your discussions with counsel, you
11:17:44 can answer.

11:17:45 MR. RUBIN: Wildly overbroad instruction,
11:17:45 Scott, one not applied in our depositions, and this
11:17:47 is an absolutely improper instruction. It's
11:17:49 blocking important discovery.

11:17:51 MR. WILKENS: You're seeking to invade the
11:17:54 attorney-client privilege.

11:17:55 MR. RUBIN: Absolutely not. I have made
11:17:56 the record clear. I have no interest in hearing
11:17:57 anything that was transmitted between counsel.

11:17:59 I'm asking for Mr. Roesch's independent
11:18:02 understanding --

11:18:02 MR. WILKENS: He understands --

11:18:02 MR. RUBIN: -- based on the way the
11:18:04 company he was running was operating, and if he
11:18:06 cannot testify, as the general manager of the
11:18:09 company, whether he understood that it was operating
11:18:12 within the confines of the DMCA, based on his own
11:18:15 independent knowledge, then he can so state, but if

1 SCOTT ROESCH

2 11:18:18 you're going to instruct him not to answer based on

3 11:18:21 a potential conversation he may have had, that is

4 11:18:24 improper.

5 11:18:25 MR. WILKENS: Michael, let's make the

6 11:18:26 record very clear. He's already testified, and if

7 11:18:29 you look back in the transcript, it's quite clear

8 11:18:31 that he doesn't have independent knowledge.

9 11:18:33 I'm instructing him not to answer if -- if

10 11:18:35 he -- if he's -- if what he would say would reveal a

11 11:18:37 conversation with an attorney. That's completely

12 11:18:40 proper.

13 11:18:40 You're asking about legal advice on the

14 11:18:43 DMCA, and I'm instructing him not to answer on that

15 11:18:46 basis only. If he has independent knowledge he can

16 11:18:49 answer. He's already testified he doesn't have that

17 11:18:58 knowledge.

18 11:19:00 THE WITNESS: I'm not clear on the

19 11:19:01 applicability of the relation of the DMCA to Version

20 11:19:05 1 of the AddictingClips service.

21 11:19:14 BY MR. RUBIN:

22 11:19:14 Q. But you were in charge of that service;

23 11:19:18 right?

24 11:19:19 A. I was.

25 11:19:19 Q. And you were comfortable that it was

1 SCOTT ROESCH

2 11:19:21 operating in a legal manner?

3 11:19:23 A. Yes.

4 11:19:41 Q. Do you know if that -- if AddictingClips

5 11:19:46 had a registered DMCA agent with the copyright

6 11:19:52 office at that period of time?

7 11:19:55 A. I don't know.

8 11:19:56 Q. Do you know if AddictingClips had a DMCA

9 11:20:06 repeat infringer policy prominently displayed on its

10 11:20:12 website in that period of time?

11 11:20:15 MR. WILKENS: Objection to the form of the

12 11:20:16 question.

13 11:20:18 THE WITNESS: I don't know.

14 11:20:19 BY MR. RUBIN:

15 11:20:25 Q. Do you know what a DMCA repeat infringer

16 11:20:28 policy is?

17 11:20:36 A. I -- I believe it's a policy stating

18 11:20:40 consequences for misuse or for violating the DMCA.

19 11:20:47 BY MR. RUBIN:

20 11:20:47 Q. What was the repeat infringer policy of

21 11:20:53 the AddictingClips link site?

22 11:21:02 A. I -- I don't know. I -- I'm sorry.

23 11:21:04 Would -- could -- and what time period are we

24 11:21:07 talking about?

25 11:21:09 Q. The -- at launch of the clip link site,

1 SCOTT ROESCH

2 11:21:13 AddictingClips.

3 11:21:15 A. I -- I don't know.

4 11:21:16 Q. Do you know what it was at any point?

5 11:21:31 A. I -- I have probably some partial

6 11:21:34 recollection.

7 11:21:36 Q. Please explain.

8 11:21:47 A. Repeat offenders would have their

9 11:21:52 memberships removed from -- from the website in

10 11:21:55 later version -- in the later version of the

11 11:21:59 AddictingClips website.

12 11:22:00 Q. And how did you determine whether someone

13 11:22:02 was repeat or not?

14 11:22:05 A. (No audible response.)

15 11:22:05 Q. In the definition you just used.

16 11:22:09 A. If -- if we observed multiple violations

17 11:22:13 of a site policy.

18 11:22:20 Q. Is that more than one?

19 11:22:21 A. Yes.

20 11:22:23 Q. Do you know if exceptions were ever made

21 11:22:27 to that policy?

22 11:22:28 A. I don't know.

23 11:22:28 Q. Who would know that?

24 11:22:41 A. Legal may know that.

25 11:22:43 Q. Who in legal would know that?

1 SCOTT ROESCH

2 11:22:45 A. Victoria.

3 11:22:46 Q. Is that Victoria Libin?

4 11:22:52 A. Victoria Libin.

5 11:22:58 Q. Is it Libin?

6 11:23:01 A. It's Libin.

7 11:23:02 Q. Sorry. I've been pronouncing it wrong.

8 11:23:07 While you were operating the link site,

9 11:23:09 and taking clips to the first iteration, do you know

10 11:23:11 whether the company ever received a Notice of

11 11:23:13 Alleged Infringement pursuant to the DMCA?

12 11:23:18 A. I don't recall any.

13 11:23:19 Q. But it may have happened?

14 11:23:21 MR. WILKENS: Objection to the form.

15 11:23:55 THE WITNESS: What was the question?

16 11:23:56 BY MR. RUBIN:

17 11:23:56 Q. I asked you whether you recall whether or

18 11:23:59 not, during the operation of the Addicting Clips

19 11:24:01 link site, the company had received a Notice of

20 11:24:04 Alleged Infringement pursuant to the DMCA. And I

21 11:24:07 think your answer was you didn't recall one; is that

22 11:24:10 right?

23 11:24:10 A. Yes, that was the answer.

24 11:24:11 Q. But it may have happened?

25 11:24:13 A. I don't know.

1 SCOTT ROESCH

2 11:24:26 Q. Do you know what the "Lazy Sunday" clip

3 11:24:29 was?

4 11:24:29 A. Yes.

5 11:24:29 Q. What was it?

6 11:24:31 A. It was a parody music video from "Saturday

7 11:24:36 Night Live."

8 11:24:38 Q. Did AddictingClips ever link to that clip?

9 11:24:44 A. Yes.

10 11:24:47 MR. RUBIN: I'd like to mark Exhibit 15.

11 11:24:48 (Roesch Deposition Exhibit Number 15 was

12 11:24:48 marked for identification.)

13 11:25:00 BY MR. RUBIN:

14 11:25:01 Q. This is a December 22nd, 2005, e-mail

15 11:25:04 string between you and Jason Ament, produced by

16 11:25:13 Viacom in this litigation bearing Bates number VIA

17 11:25:19 08718888.

18 11:25:24 Do you recall this document?

19 11:25:29 A. Yes.

20 11:25:34 Q. Mr. Ament sent you a YouTube clip with the

21 11:25:39 subject line "chronic-les of narnia," and that --

22 11:25:42 that's a clip -- clip you just described?

23 11:25:45 A. I think so.

24 11:25:46 Q. And you responded:

25 11:25:48 "Er, might I refer you to the same clip

1 SCOTT ROESCH

2 11:25:50 with a different link?"

3 11:25:52 And you include a link to an AddictingClips URL with

4 11:25:56 the ID "snlnarnia." Do you see that?

5 11:26:01 A. I do.

6 11:26:03 Q. Did AddictingClips have an agreement with

7 11:26:08 NBC that allowed it to distribute the "Lazy Sunday"

8 11:26:15 clip?

9 11:26:15 A. Well, we aren't distributing it.

10 11:26:19 Q. Did -- did you have an agreement with NBC

11 11:26:21 that allowed you to link to it?

12 11:26:22 A. No.

13 11:26:25 Q. Was AddictingClips infringing NBC's

14 11:26:29 copyright by linking to it?

15 11:26:34 MR. WILKENS: Objection to the form.

16 11:26:36 Calls for a legal conclusion.

17 11:26:40 MR. RUBIN: Well, please don't answer the

18 11:26:41 question yet.

19 11:26:42 What's the basis for the instruc- -- the

20 11:26:44 objection, the legal conclusion objection?

21 11:26:45 MR. WILKENS: I think it's plain from the

22 11:26:46 question. You're asking him about -- asking him to

23 11:26:47 make a conclusion about infringement.

24 11:26:49 MR. RUBIN: And so that calls for a legal

25 11:26:50 conclusion?

1 SCOTT ROESCH

2 11:26:51 MR. WILKENS: It sounds to me like it

3 11:26:52 does.

4 11:26:52 MR. RUBIN: So are you --

5 11:26:52 MR. WILKENS: So are you not asking him

6 11:26:52 for a legal conclusion?

7 11:26:52 MR. RUBIN: I'm asking him to -- to

8 11:26:52 determine whether -- to ask whether -- asking him

9 11:26:52 whether he believed it was infringing or not. And I

10 11:26:52 believe your objection is that he'd be -- need to be

11 11:26:52 a lawyer to make that determination; is that right,

12 11:26:52 Scott?

13 11:26:56 MR. WILKENS: I'm objecting that you're

14 11:26:56 asking him to make a legal conclusion.

15 11:26:57 MR. RUBIN: Right. And -- and you're

16 11:26:57 objecting he'd need to be a lawyer to -- to make

17 11:26:57 that; is that right?

18 11:26:57 MR. WILKENS: That's not what I said. I

19 11:26:57 said your question calls for a legal conclusion.

20 11:27:12 MR. RUBIN: And so you believe the

21 11:27:12 question of infringement is a legal conclusion?

22 11:27:21 MR. WILKENS: Your -- I think your

23 11:27:22 question is -- your asking him to make a legal

24 11:27:23 determination. So --

25 11:27:24 MR. RUBIN: I'm asking -- it's very clear.

1 SCOTT ROESCH

2 11:28:12 MR. WILKENS: The basis for my objection

3 11:28:14 is that you are asking -- by asking him whether or

4 11:28:16 not something is infringing, you are asking him to

5 11:28:18 draw a legal conclusion. It's very clear.

6 11:28:21 BY MR. RUBIN:

7 11:28:21 Q. Okay. You can answer the question,

8 11:28:23 Mr. Roesch.

9 11:28:28 A. Are you asking -- can I get a

10 11:28:30 clarification on time period? Are you asking as of

11 11:28:33 this date, December 22, '05.

12 11:28:36 BY MR. RUBIN:

13 11:28:37 Q. Yes.

14 11:28:38 A. I -- I did not believe that was

15 11:28:39 infringing.

16 11:28:40 Q. Did you ever remove this clip -- pardon

17 11:28:43 me. Did you ever remove this link from the

18 11:28:47 AddictingClips service?

19 11:28:48 A. I believe so.

20 11:28:49 Q. But you don't know?

21 11:28:50 A. Well, I -- I think we did. I'm -- I think

22 11:28:53 we did.

23 11:28:59 Q. At some point, I think we've touched on it

24 11:29:02 a few times already today, AddictingClips or Atom,

25 11:29:11 I'm not sure which -- the right way to refer to

1 SCOTT ROESCH

2 11:29:14 this, added the functionality of accepting user

3 11:29:17 uploads instead of merely linking to video clips;

4 11:29:21 right?

5 11:29:21 A. That's correct.

6 11:29:23 Q. When was that?

7 11:29:27 A. That was in March or April of 2006.

8 11:29:31 Q. And whose decision was that?

9 11:29:38 A. Well, I think, like the creation of the

10 11:29:40 initial service, it was a -- a collaboration, an

11 11:29:45 internal -- a few internal people.

12 11:29:48 Q. Who?

13 11:29:49 A. Myself, Mika Salmi, and Peter Ignacio was

14 11:30:04 involved in the decision to do that.

15 11:30:08 Q. Can you pinpoint whose idea it was that --

16 11:30:09 it was?

17 11:30:10 A. I don't think -- no, I don't think I can.

18 11:30:22 Q. Was it always the plan to expand the

19 11:30:27 offerings of the Addicting Clips site to include

20 11:30:29 user uploads, or was that something that developed

21 11:30:33 over time?

22 11:30:35 MR. WILKENS: Objection to the form of the

23 11:30:36 question.

24 11:30:37 THE WITNESS: I believe it developed over

25 11:30:39 time.

1 SCOTT ROESCH

2 11:30:40 BY MR. RUBIN:

3 11:30:41 Q. Do you recall what spurred the idea?

4 11:30:52 A. I think it goes back to internal

5 11:30:53 discussions we'd had dating back to and before the

6 11:30:57 document we reviewed earlier, in which I

7 11:31:01 described -- outlined some thoughts on

8 11:31:05 user-generated video.

9 11:31:07 So I believe probably -- and, you know,

10 11:31:13 the -- the concept involved, you know, sort of

11 11:31:17 the -- the -- you know, date back probably to active

12 11:31:24 thought to mid '05, but, you know, we -- some

13 11:31:28 concepts that we discussed all the way back to the

14 11:31:32 original inception of Atom Films.

15 11:31:41 Q. And you didn't want to profit from

16 11:31:44 infringement with the addition of user uploads to

17 11:31:47 the Addicting Clips site, did you?

18 11:31:50 MR. WILKENS: Objection to the form.

19 11:31:52 THE WITNESS: No.

20 11:31:57 BY MR. RUBIN:

21 11:31:57 Q. Did you do any additional legal vetting

22 11:32:01 with respect to the addition of the ability by the

23 11:32:06 general public to upload videos to the service?

24 11:32:11 MR. WILKENS: You can answer that question

25 11:32:11 "yes" or "no."

1 SCOTT ROESCH

2 11:32:14 THE WITNESS: Yes.

3 11:32:14 BY MR. RUBIN:

4 11:32:16 Q. And you wouldn't have deployed this

5 11:32:20 feature if you had determined that it would have

6 11:32:23 exposed the company to a liability, would you have?

7 11:32:26 MR. WILKENS: Objection to the form.

8 11:32:49 THE WITNESS: I'm not sure how to answer

9 11:32:51 that with a simple "yes" or "no."

10 11:32:53 BY MR. RUBIN:

11 11:32:54 Q. Answer it however you want.

12 11:32:55 A. I think we understood there was some --

13 11:32:57 some -- some risk.

14 11:32:59 Q. What were the risks that you saw?

15 11:33:02 MR. WILKENS: You can answer that to the

16 11:33:03 extent it doesn't reveal conversations that you had

17 11:33:07 with legal counsel.

18 11:33:15 THE WITNESS: Then the -- those

19 11:33:16 conversations all involved legal counsel.

20 11:33:18 BY MR. RUBIN:

21 11:33:29 Q. Did you understand the upload version of

22 11:33:32 the site to be protected by the DMCA?

23 11:33:37 MR. WILKENS: I -- to the extent that the

24 11:33:40 answer to that question would reveal discussions you

25 11:33:44 had, or information you were provided by counsel,

1 SCOTT ROESCH

2 11:33:48 legal advice you were provided by counsel, I

3 11:33:51 instruct you not to answer. Otherwise, you can

4 11:34:00 answer the question.

5 11:34:15 THE WITNESS: Yes.

6 11:34:16 BY MR. RUBIN:

7 11:34:28 Q. Atom put out a request for a proposal for

8 11:34:32 a user-generated content site, didn't it?

9 11:34:36 A. We did.

10 11:34:37 MR. RUBIN: I'd like to mark Exhibit 16.

11 11:34:38 (Roesch Deposition Exhibit Number 16 was

12 11:34:38 marked for identification.)

13 11:34:51 BY MR. RUBIN:

14 11:34:52 Q. Before we get to this exhibit, I just want

15 11:34:54 to close the loop on something.

16 11:34:55 A. Uh-huh.

17 11:34:56 Q. Again, I'm not interested in the content

18 11:34:58 of your conversations with your counsel, but in the

19 11:35:01 discussions around the legality of extending the

20 11:35:04 feature set of the AddictingClips site from linking

21 11:35:07 to clips to allow user uploads, was that with the

22 11:35:11 same set of lawyers that you had been working with

23 11:35:15 internally -- Victoria Libin, Adam Lovingood, and

24 11:35:20 this third unknown -- that you had been working with

25 11:35:23 all along?

1 SCOTT ROESCH

2 11:35:24 A. I should clarify. The third unknown was

3 11:35:26 not involved in many conversations.

4 11:35:28 Q. Okay.

5 11:35:30 A. It was with the same legal team.

6 11:35:34 Q. And you -- and you thought their advice

7 11:35:36 was good, and you relied on it, and you were

8 11:35:39 comfortable with it?

9 11:35:40 MR. WILKENS: Objection to the form.

10 11:35:41 BY MR. RUBIN:

11 11:35:41 Q. Is that right?

12 11:35:51 A. Yes.

13 11:35:52 Q. Okay. Exhibit 16 is a document that I

14 11:35:54 believe is the Request for Proposal that Atom Films

15 11:36:01 circulated on or about November 16th, 2005, for a

16 11:36:06 user-generated content site, produced by Viacom in

17 11:36:10 this litigation. It's Bates numbered VIA 09280170

18 11:36:18 to -72.

19 11:36:21 Do you recognize this document,

20 11:36:23 Mr. Roesch?

21 11:36:47 A. I -- I do.

22 11:36:48 Q. Did you author this document?

23 11:36:58 A. I -- I contributed to this document. I

24 11:37:04 don't believe I authored it.

25 11:37:06 Q. Do you know who the lead author of this

1 SCOTT ROESCH

2 11:37:08 document was?

3 11:37:08 A. I believe that was Joel Sanders.

4 11:37:12 Q. Who is Joel Sanders?

5 11:37:14 A. He, at this time, was our -- our product

6 11:37:19 manager for the website.

7 11:37:22 Q. At some point did he stop being the

8 11:37:25 product -- the product manager of the website?

9 11:37:29 A. He -- no, he continues to be an Atom

10 11:37:33 employee today in a slightly higher management role.

11 11:37:36 Q. What role does he have now?

12 11:37:38 A. Senior director of site operations.

13 11:37:42 Q. When he transitioned from product manager

14 11:37:46 to his current role, did someone assume his product

15 11:37:49 manager role?

16 11:38:00 A. I'm having trouble remembering the

17 11:38:03 sequence of events. I don't recall exactly when he

18 11:38:08 was promoted and when other personnel changes on the

19 11:38:11 team happened.

20 11:38:13 Q. Fair enough.

21 11:38:16 Does this document accurately reflect --

22 11:38:17 or is it the Request for Proposal that Atom sent out

23 11:38:29 for the UGC site it wanted to launch as a component

24 11:38:34 to AddictingClips?

25 11:38:38 A. This either is the RFP or a version of it.

1 SCOTT ROESCH

2 11:40:33 On the front page, VIA 01499561, there is

3 11:40:38 handwriting and doodles of some sort. Is that your

4 11:40:42 handwriting?

5 11:40:42 A. I think so.

6 11:40:46 Q. So do you recall seeing this document

7 11:40:47 before?

8 11:40:50 A. Yeah, I have seen the document.

9 11:40:55 Q. Did Atom Films ultimately determine to use

10 11:41:01 a white label solution for its user-generated

11 11:41:05 content site?

12 11:41:06 A. Yes.

13 11:41:07 Q. Did it ultimately determine to use Reality

14 11:41:10 Digital?

15 11:41:11 A. Yes.

16 11:41:14 Q. What services did Reality Digital provide

17 11:41:17 to AddictingClips or Atom, as it were?

18 11:41:23 A. It provided software development, hosting,

19 11:41:28 website support. They managed a streaming vendor.

20 11:41:42 Q. What streaming vendor did they manage?

21 11:41:51 A. I don't -- I don't recall.

22 11:41:53 Q. What do you mean by "streaming vendor"?

23 11:41:57 A. I'm referring to a -- a third-party

24 11:42:00 company -- I believe it was a third-party company --

25 11:42:03 that would host the video files that end users

1 SCOTT ROESCH

2 11:42:09 accessed through the website.

3 11:42:13 Q. You don't recall the name of the company?

4 11:42:18 A. No, I -- I don't.

5 11:42:20 Q. What type of company was it? Do you know?

6 11:42:29 A. A technology company.

7 11:42:30 Q. Was it a content delivery network or CDN?

8 11:42:35 A. It -- I -- you know, I've heard that term

9 11:42:38 used, and I -- I know what it's -- I -- I -- I know

10 11:42:42 that we've used CDNs. I'm not exactly sure if this

11 11:42:47 particular company was a CDN. May have been.

12 11:42:50 Q. Is the name of the company Spidera?

13 11:42:53 A. Possibly.

14 11:43:04 Q. What components of the UGC site didn't

15 11:43:11 Reality Digital provide, pursuant to its arrangement

16 11:43:15 with AddictingClips or Atom?

17 11:43:21 MR. WILKENS: Objection to form.

18 11:43:30 THE WITNESS: What elements of the site?

19 11:43:31 BY MR. RUBIN:

20 11:43:32 Q. Uh-huh, or of the service in general.

21 11:43:34 A. They did not provide content. They did

22 11:43:36 not provide users. They did not design the website.

23 11:43:53 And I believe that they did not provide the web

24 11:43:58 search function. The web video search function.

25 11:44:02 Q. Who provided the content?

1 SCOTT ROESCH

2 11:44:05 A. End users.

3 11:44:11 Q. And who provided the users?

4 11:44:25 A. Atom Entertainment.

5 11:44:27 Q. In what way did Atom Entertainment provide

6 11:44:27 the users?

7 11:44:28 A. We promoted the service from Atom Films

8 11:44:31 and from our AddictingGames website.

9 11:44:34 Q. In fact, didn't users simply come to the

10 11:44:36 site and sign up?

11 11:44:40 MR. WILKENS: Objection to the form.

12 11:44:48 THE WITNESS: Not clear on the distinction

13 11:44:49 you're making.

14 11:44:50 BY MR. RUBIN:

15 11:44:50 Q. I just want to know, was there

16 11:44:52 pre-existing user base provided to Reality Digital

17 11:44:56 for the site --

18 11:44:57 A. Did --

19 11:44:58 Q. -- or did the site obtain users through

20 11:45:01 advertisements and other word of mouth?

21 11:45:06 MR. WILKENS: Objection to the form of the

22 11:45:06 question.

23 11:45:12 THE WITNESS: There was a pre-existing

24 11:45:14 user base from the first version of AddictingClips.

25 11:45:20 As I've stated, they were no registered members.

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SCOTT ROESCH

AFTERNOON SESSION

THURSDAY, SEPTEMBER 29, 2009; 12:32 P.M.

12:32:53 THE VIDEOGRAPHER: We are now going back
12:32:55 on the record. The time is 12:33 p.m.

12:32:56

12:32:56 EXAMINATION RESUMED

12:33:00 BY MR. RUBIN:

12:33:02 Q. Mr. Roesch, before lunch, I introduced a
12:33:07 number of exhibits that reflected some of the
12:33:09 project scope and textural language that was going
12:33:15 to go on to -- and form a part of the UGC site that
12:33:28 AddictingClips was launching. I think they were
12:33:29 Exhibits 18 and 19. Do you recall those?

12:33:33 A. Yes.

12:33:33 Q. You may need to refer to those in the
12:33:36 context of some of these question. If you do,
12:33:39 please do, if you feel it would be useful.

12:33:42 Did you ever upload a video to the
12:33:47 AddictingClips website once the functionality for
12:33:50 enabling that had been rolled out?

12:33:53 A. Yes.

12:33:56 Q. Could you walk us through the process or
12:34:00 the work flow for how a user, or for how you did