

1 DUNTON

13:22:13 2 A Yes. I'm sorry. Steve Chen.

13:22:14 3 Q And when you said early on, about what period  
13:22:17 4 are you talking about before you had a tool?

13:22:19 5 A I don't remember specifically. I know we  
13:22:20 6 didn't yet have a tool when I started.

13:22:23 7 Q Okay.

13:22:25 8 A But some time probably not too long  
13:22:27 9 afterwards we had a tool where I would -- I would put  
13:22:30 10 in the link, the unique identifier for that video, and  
13:22:36 11 it would appear on the Homepage.

13:22:39 12 Q I see.

13:22:40 13 So -- and that would have been -- okay. I  
13:22:51 14 see.

13:22:51 15 So the process was automated at some point?

13:22:54 16 A Which process?

13:22:55 17 Q The process of a video becoming a featured  
13:22:59 18 video became automated at some point rather than Steve  
13:23:03 19 having to key in the code?

13:23:04 20 A So -- so at one point Steve had to -- either  
13:23:10 21 he or I would find the videos, and he would have to  
13:23:12 22 hard code it into the -- into the YouTube Homepage.  
13:23:16 23 So actually go into the HTML and position that video.  
13:23:19 24 Some point after that, we developed a tool by  
13:23:22 25 which I could put in the unique identifier for that

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13:23:25 2 video, and then it would appear on the Homepage.

13:23:27 3 Q Okay. And you said just now, I believe, that  
13:23:29 4 Steve would also find videos to use for featured  
13:23:33 5 videos?

13:23:34 6 A At some point he did, that's correct.

13:23:36 7 Q Okay. Did anyone else?

13:23:39 8 A At which -- at which point in time?

13:23:41 9 Q Any point in time.

13:23:43 10 A Well, anybody, even our user base, could send  
13:23:49 11 in suggestions for featured videos, and yes, then at  
13:23:54 12 some point it was no longer my responsibility to find  
13:23:57 13 featured videos.

13:24:00 14 Q And did other employees at YouTube -- was it  
13:24:06 15 the responsibility of anyone else at YouTube to search  
13:24:09 16 for featured videos?

13:24:12 17 MR. KRAMER: What time?

13:24:13 18 MR. DESANCTIS: After you.

13:24:14 19 THE WITNESS: After me. Yes, it -- after it  
13:24:18 20 was no longer my responsibility to feature videos on  
13:24:21 21 the Homepage, there were other employees who did that.

13:24:24 22 MR. DESANCTIS: Q. And who did it after you?

13:24:31 23 A Mia Quagliarello.

13:24:37 24 Q Anyone else?

13:24:38 25 A Not that I could think of.

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13:24:40 2 Q Do you know who did it before you?

13:24:44 3 A Steve did it, and Kevin Donahue did for a  
13:24:48 4 little while as well.

13:24:48 5 Q Anyone else that you know of?

13:24:50 6 A Not that I can think of.

13:24:55 7 Q Okay. Now, when you said before the admin  
13:24:57 8 tool --

13:24:59 9 MR. KRAMER: I don't think she said admin  
13:25:01 10 tool.

13:25:01 11 MR. DESANCTIS: I'm sorry?

13:25:02 12 MR. KRAMER: I don't think she said admin  
13:25:04 13 tool.

13:25:04 14 MR. DESANCTIS: Q. Before the tool, you said  
13:25:07 15 Steve would go in and hard code it. By that, did you  
13:25:11 16 mean he would change the source code for the Homepage?

13:25:15 17 A I meant he would take -- he would take the  
13:25:20 18 URL for the featured video, and he would have to --  
13:25:24 19 yes, he would have to change the source code for the  
13:25:28 20 Homepage. He would have to add in what videos we  
13:25:31 21 wanted to appear.

13:25:31 22 Q Okay. And once the tool was implemented, it  
13:25:36 23 would change -- the tool would change the source code  
13:25:39 24 automatically --

13:25:39 25 MR. KRAMER: Calls for speculation.

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15:13:24 2 A And I'm saying we, as far as I know and can  
15:13:30 3 recollect, we don't know if something is authorized or  
15:13:35 4 unauthorized until we receive a takedown notice.

15:13:41 5 Q Okay. Was there -- in the period of 2005,  
15:13:47 6 are you aware of YouTube removing videos without an  
15:13:56 7 ND -- without a DMCA notice because the videos might  
15:14:04 8 be on YouTube without the content owner's permission?

15:14:10 9 A At some point in our history, early on, I  
15:14:13 10 can't tell you exactly when, we did, "we" not me  
15:14:18 11 personally, but we did try. We did do some period of  
15:14:24 12 review where we proactively removed videos that we  
15:14:29 13 thought there might be the potential for it to be  
15:14:32 14 unauthorized on the website.

15:14:35 15 Q Why -- I'm sorry. Are you finished?

15:14:37 16 A Yes, I'm finished.

15:14:49 17 Q Why would YouTube proactively -- why did  
15:14:52 18 YouTube proactively remove videos that you thought  
15:14:57 19 might have the potential for it to be unauthorized?

15:15:01 20 A Because we were trying really, really hard to  
15:15:03 21 respect the rights of copyright holders.

15:15:09 22 Q But you -- did there come a time when YouTube  
15:15:12 23 stopped doing that?

15:15:14 24 A Yes, there did, because we also found we were  
15:15:17 25 really, really bad at it. We were really bad at

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15:15:23 2 trying to figure out just based on looking at a piece  
15:15:26 3 of content who owned the rights. I know we  
15:15:29 4 erroneously took down pieces of content all the time  
15:15:32 5 that, in fact, the person who owned it uploaded, so  
15:15:37 6 yes, we tried to do that. We tried to do that.

15:15:39 7 We wanted to -- we wanted to respect  
15:15:42 8 copyright owners. We wanted to -- if we saw something  
15:15:47 9 where there was the potential for it to be  
15:15:48 10 unauthorized, we wanted to -- this is early on -- we  
15:15:50 11 wanted to do what we thought was the right thing, but  
15:15:53 12 we found out very quickly this was not -- this did not  
15:15:56 13 work, because we were taking down content all the  
15:15:59 14 time, premium content, as we talked about, that in  
15:16:02 15 fact was uploaded by the right holder. So we stopped.  
15:16:09 16 We stopped doing that.

15:16:20 17 Q Do you have any estimate of how many videos  
15:16:24 18 were removed in the manner you were just describing  
15:16:29 19 without a DMCA notice?

15:16:33 20 A I have no idea.

15:16:36 21 Q Can you estimate for me? Would it be closer  
15:16:39 22 to ten or closer to 10,000?

15:16:42 23 A It -- it was not my job. It was never my job  
15:16:48 24 to respond to those videos or take down those videos,  
15:16:51 25 so I have absolutely no idea.

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15:16:52 2 Q And how -- you said you were doing a bad job  
15:16:55 3 at it. How do you know you were doing a bad job?

15:16:57 4 A We were doing a bad job because we were  
15:16:59 5 erroneously taking down videos that people who owned  
15:17:02 6 the rights to, including professional content  
15:17:06 7 creators, had uploaded.

15:17:08 8 Q But how would you know that you made a  
15:17:12 9 mistake?

15:17:12 10 A Because they would complain to us.

15:17:15 11 Q Okay. And you didn't like it when they  
15:17:17 12 complained to you; correct?

15:17:22 13 A I don't know that I personally had any  
15:17:24 14 feeling on it.

15:17:27 15 Q Well, they were your users; right?

15:17:31 16 A Anybody who uses the YouTube site is a user.

15:17:33 17 Q Okay. And was it YouTube's, you know,  
15:17:40 18 objective to keep its users happy?

15:17:46 19 A Within reason, yes.

15:17:48 20 Q Okay. And when users' videos were taken down  
15:17:58 21 mistakenly by you, meaning YouTube --

15:18:02 22 A Uh-huh.

15:18:02 23 Q -- it made them unhappy, and they complained;  
15:18:05 24 correct?

15:18:08 25 A If the person who uploaded a video owned the

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15:18:10 2 rights --

15:18:11 3 Q Right.

15:18:12 4 A -- and their content was erroneously taken  
15:18:15 5 down, then yes, I would imagine that made them  
15:18:17 6 unhappy.

15:18:18 7 Q Okay. And they complained?

15:18:22 8 A Yes.

15:18:22 9 Q That's how you knew?

15:18:23 10 A There were users who complained. Not to me  
15:18:25 11 personally, but yes, I --

15:18:27 12 Q Well, and is that why you, YouTube, stopped  
15:18:31 13 proactively removing videos, because the customers  
15:18:34 14 were complaining?

15:18:37 15 A We stopped --

15:18:39 16 MR. KRAMER: Hang on one second. I'm going  
15:18:40 17 to object to the extent that mischaracterizes the  
15:18:42 18 testimony.

15:18:44 19 You can answer.

15:18:50 20 THE WITNESS: As far as I am aware, we  
15:18:51 21 stopped proactively reviewing because we were really  
15:18:55 22 bad at determining who uploaded the content and if  
15:19:00 23 they had the rights to do so.

15:19:15 24 MR. DESANCTIS: Q. And that made your users  
15:19:17 25 angry; correct?

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15:19:19 2 A By "users," you mean?

15:19:21 3 Q Uploaders who had their videos mistakenly  
15:19:26 4 removed.

15:19:30 5 A Yes. If a user had their video mistakenly  
15:19:34 6 removed, I imagine that was upsetting to them, right.  
15:19:42 7 It happened. Happened all the time.

15:19:44 8 Q It happened all the time?

15:19:45 9 A It happened all the time.

15:19:46 10 Q How often?

15:19:48 11 A I can't tell you specifically how often it  
15:19:50 12 happened. Like I said, it wasn't my job to take down  
15:19:53 13 videos or put them back up, but it happened a lot. It  
15:19:56 14 was a regular topic of conversation.

15:19:57 15 Q Like multiple times a day? I'm just trying  
15:20:01 16 to get an order of magnitude.

15:20:03 17 A I can't remember. I can't remember  
15:20:05 18 specifically.

15:20:24 19 Q If users didn't complain to you, would you  
15:20:29 20 ever had known you were making mistakes in taking down  
15:20:36 21 videos?

15:20:37 22 MR. KRAMER: Calls for speculation.

15:20:38 23 THE WITNESS: And I don't know.

15:20:40 24 MR. DESANCTIS: Q. But you do know that when  
15:20:43 25 users complained, and you said they complained a lot,



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15:20:49 2 you changed your policy to stop taking down videos

15:20:54 3 that in your estimation, in YouTube's estimation, were

15:20:59 4 likely to be infringing.

15:21:02 5 MR. KRAMER: Objection; mischaracterizes the

15:21:04 6 testimony.

15:21:04 7 MR. DESANCTIS: Well, I wasn't -- I wasn't

15:21:07 8 characterizing the testimony.

15:21:12 9 THE WITNESS: I believe what I said is, we

15:21:14 10 stopped doing proactive reviewing because we were bad

15:21:19 11 at it, because it wasn't -- it wasn't possible for us

15:21:27 12 to always know who had -- who uploaded a piece of

15:21:31 13 content and whether they had the rights to do so or

15:21:33 14 not.

15:21:33 15 MR. DESANCTIS: Okay.

15:21:40 16 Q If the customer -- if your users didn't

15:21:43 17 complain, would you have stopped?

15:21:45 18 MR. KRAMER: Calls for speculation.

15:21:47 19 THE WITNESS: I have no idea.

15:21:49 20 MR. DESANCTIS: Q. Can you think of a reason

15:21:54 21 why you would have?

15:21:56 22 MR. KRAMER: You mean other than what she

15:22:00 23 testified? A reason other than --

15:22:02 24 MR. DESANCTIS: Other than that the user

15:22:04 25 complained.

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19:02:42 2 by "we can be pretty ghetto about it"?

19:02:47 3 A I don't remember this specific chat, but I'm  
19:02:50 4 likely referring to the technical implementation.

19:02:58 5 Meaning -- actually, I'm not quite sure what I mean.

19:03:03 6 It -- it sounds like, from reading this, to  
19:03:07 7 reuse some additional -- some existing search  
19:03:10 8 functionality we have on the site.

19:03:15 9 Q And that's what you mean by "we can be pretty  
19:03:18 10 ghetto about it"?

19:03:22 11 A We used that term, I know I've used that  
19:03:25 12 term, to refer to reusing existing stuff.

19:03:29 13 Q Okay. And after you ask Matthew Rizzo if you  
19:03:37 14 can create a saved search with alerts for the  
19:03:39 15 copyright cop stuff, he responds at line "12:16:20 you  
19:03:46 16 can have whatever you want, but it is just how much  
19:03:49 17 time do you guys want to give to these fucking  
19:03:55 18 assholes."

19:03:56 19 Did you understand -- do you understand now  
19:03:58 20 that the "fucking assholes" that Matt Rizzo was  
19:04:02 21 referring to were copyright owners -- I'm sorry --  
19:04:06 22 content owners?

19:04:10 23 A I believe, as I said, I don't remember this  
19:04:13 24 specific chat, but I believe the people that Matt was  
19:04:17 25 referring to are the people who were abusing the

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19:04:21 2 features that we gave them.

19:04:26 3 Q Why do you believe that? Is there anything  
19:04:29 4 in this text about abusing features?

19:04:33 5 A I haven't -- I haven't -- I've only read the  
19:04:36 6 parts that you've called out to me, but I can tell you  
19:04:39 7 that the Copyright Cop Content Management Tool that we  
19:04:44 8 rolled out was actually severely abused by some  
19:04:48 9 content owners, and yeah, that made us angry. That  
19:04:54 10 was upsetting.

19:04:55 11 Q So do you actually -- are you saying you  
19:04:57 12 actually remember that that -- that in this instance  
19:05:02 13 that's who "fucking assholes" refer to?

19:05:07 14 A Well, like I said, I don't remember this  
19:05:09 15 specific chat, but I do remember the CVP Tool, and I  
19:05:16 16 remember content owners abusing it; that is, they used  
19:05:20 17 it erroneously to try and take down content that was,  
19:05:23 18 in fact, not theirs and -- and yes, that angered me,  
19:05:28 19 and I think it angered Rizzo too.

19:05:32 20 Q Do you remember any specific examples of  
19:05:50 21 content owners taking down content that was not  
19:05:54 22 theirs?

19:05:54 23 A Yes.

19:05:54 24 Q What were those?

19:05:55 25 A American Idol, WWE. Those two come to mind

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19:54:13 2 sorry. An instant message exchange. I misspoke.

19:54:18 3 A That's what it looks to be, yes.

19:54:20 4 Q Okay. Before reading the document, do you  
19:54:34 5 ever remember talking about whether you could add a  
19:54:42 6 feature to the -- to the Copyright Copy Tool where  
19:54:51 7 content owners could get e-mail alerts sent to them  
19:54:56 8 whenever a video was uploaded -- uploaded with their  
19:54:59 9 designated keywords?

19:55:03 10 A Yes, I remember discussing it.

19:55:05 11 Q Okay. Do you remember whether that was ever  
19:55:07 12 implemented?

19:55:15 13 A I don't recall if e-mail alerts were  
19:55:17 14 implemented.

19:55:18 15 Q Okay. What part of that do you recall? What  
19:55:21 16 part of that issue do you recall?

19:55:27 17 A I recall there was some discussion about  
19:55:30 18 implementing it, but I don't -- I don't recall if we  
19:55:32 19 did.

19:55:35 20 Q Okay. Do you know why it was being  
19:55:41 21 discussed?

19:55:47 22 A It -- it was being discussed -- well, I was  
19:55:50 23 discussing it because it was a feature that people  
19:55:53 24 within the company were -- that certain people wanted  
19:55:58 25 to build in, so that's why that would be my

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19:56:01 2 involvement in it.

19:56:02 3 Q Were you one of the people who wanted to  
19:56:04 4 build it in?

19:56:05 5 A I don't believe I was in favor of it.

19:56:07 6 Q Do you recall why you weren't in favor of it?

19:56:14 7 A I think we may have talked about this  
19:56:16 8 previously, but because I knew it would give content  
19:56:22 9 owners or whomever was using the tool the ability to  
19:56:26 10 mass flag and take down videos based on a single  
19:56:30 11 keyword, and I also knew that keywords were not  
19:56:36 12 necessarily representative of the content.

19:56:46 13 Q Okay. Let me direct your attention to --  
19:57:06 14 sticking with Exhibit 21 -- to the line beginning at  
19:57:16 15 "12:04:05."

19:57:29 16 You raise the following, quote, "hey,  
19:57:35 17 question, so could we also do something for these guys  
19:57:38 18 where they get email alerts sent to them (either like  
19:57:43 19 daily or weekly) whenever a video is uploaded with  
19:57:46 20 their designated keyword?"

19:57:50 21 Do you remember having this discussion with  
19:57:52 22 Matt Rizzo?

19:57:56 23 A I don't remember this specific chat, but I do  
19:57:59 24 remember generally discussing the functionality.

19:58:01 25 Q With Matt Rizzo?

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19:58:07 2 A Yes, and with other people inside the  
19:58:08 3 company.

19:58:09 4 Q Okay. He responds, "yeah, but," and then  
19:58:16 5 sort of two carets. Do you know what Matt Rizzo, with  
19:58:24 6 whom you often IM a lot, means when he indicates these  
19:58:29 7 two carets next to each other?

19:58:30 8 A No, I do not. He does it all the time, and I  
19:58:33 9 have no idea what it means.

19:58:35 10 Q He does it all the time?

19:58:36 11 A He does, yeah. I have no idea what it means.

19:58:38 12 Q Did you ever ask -- did you ever ask him?

19:58:40 13 A No, I never asked.

19:58:42 14 Q Okay. For the next three lines, you then  
19:58:55 15 describe how the feature would work and -- you and  
19:58:59 16 Rizzo were both describing how the feature would work.

19:59:04 17 In line 12:05:39, Mr. Rizzo says "lol u  
19:59:13 18 know."

19:59:13 19 Do you know what "lol" means?

19:59:16 20 A Laugh out loud.

19:59:17 21 Q Okay. And then you respond, "hrm i hate this  
19:59:22 22 feature. I hate making it easier for these a-holes."

19:59:27 23 By "a-holes," you meant assholes?

19:59:31 24 A Likely.

19:59:32 25 Q Okay. And by "a-holes" you were referring to

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20:01:11 2 using the tool properly; is that correct?

20:01:17 3 A I hated the tool, as I said, because I  
20:01:23 4 recognized the potential for content owners to mass  
20:01:27 5 take down content based on a single keyword, whatever  
20:01:31 6 keyword they wanted, and I also knew that keywords  
20:01:34 7 were not necessarily accurate descriptions of that  
20:01:38 8 content, and so yes, I hated the feature.

20:01:43 9 Q But you didn't know whether it might have  
20:01:48 10 been five content owners who had abused it, and 5,000  
20:01:52 11 who had been using it perfectly lawfully, because you  
20:01:57 12 don't know -- you didn't know how many were using it  
20:01:59 13 lawfully; correct?

20:02:04 14 A I have no idea the numbers of content  
20:02:09 15 providers who were using the tool were -- used it to  
20:02:15 16 take down authorized or unauthorized content. No, I  
20:02:18 17 don't have any specific numbers.

20:02:20 18 Q Okay. Do you recall, or forget it.

20:02:46 19 What -- where would I look to confirm that  
20:03:10 20 your testimony that the tool allowed takedown based on  
20:03:14 21 a single keyword?

20:03:20 22 MR. KRAMER: Calls for speculation.

20:03:24 23 THE WITNESS: No, no. What I said was the  
20:03:26 24 functionality that we were discussing would allow the  
20:03:29 25 ability for content owners to flag, to take down

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20:03:33 2 content, flag it for take down based on a single  
20:03:39 3 keyword. That's the functionality we were talking  
20:03:41 4 about.

20:03:42 5 MR. DESANCTIS: Okay.

20:03:45 6 Q And are you of -- aware of any documents or  
20:03:50 7 other place that one could look if he or she wanted to  
20:03:55 8 verify the truth of that testimony?

20:03:58 9 A That that's what we were discussing?

20:04:00 10 Q Yeah.

20:04:03 11 A We were discussing it. I mean, I --

20:04:04 12 Q Oh, I'm sorry. No, not that's what you were  
20:04:08 13 discussing, but that's what the tool would do.

20:04:13 14 A I don't -- as I think I said, I don't  
20:04:16 15 remember if we actually implemented the e-mail alert  
20:04:19 16 tool that we're talking about.

20:04:24 17 Q I see.

20:04:24 18 You don't know whether it was ever  
20:04:27 19 implemented?

20:04:28 20 A The e-mail alerts, correct.

20:04:40 21 Q In order to implement it, would the source  
20:04:43 22 code have to be altered?

20:04:44 23 MR. KRAMER: Calls for speculation.

20:04:45 24 MR. DESANCTIS: Q. Do you know whether, in  
20:04:47 25 order to implement it, a new feature like this, the



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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X  
VIACOM INTERNATIONAL INC., COMEDY:  
PARTNERS, COUNTRY MUSIC :  
TELEVISION, INC., PARAMOUNT :  
PICTURES CORPORATION, and BLACK :  
ENTERTAINMENT TELEVISION LLC :  
Plaintiffs, :  
: :  
v. : Case No.  
: 07CV-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, :  
: Case No.  
v. : 07CV-3582  
: :  
YOUTUBE, INC., YOUTUBE, LLC, :  
and GOOGLE, INC., :  
: :  
Defendants. :

-----X  
\*\*\*\*HIGHLY CONFIDENTIAL\*\*\*\*  
Videotaped Deposition of DEAN GARFIELD  
Washington, D.C.  
Tuesday, November 2, 2009  
10:24 a.m.

BY: Okeemah S. Henderson, LSR  
JOB NO. 18039

1 10:35 (Garfield Deposition Exhibit No. 1 was marked  
2 10:35 for identification.)

3 10:35 BY MR. BASKIN:

4 10:35 Q. It's a short document, Mr. Garfield.

5 10:35 So just if you take a second if you will and

6 10:35 look at Garfield Exhibit 1.

7 10:35 A. (The witness complies.) Okay.

8 10:35 Q. Now, first, sir, just for the record

9 10:36 can you identify for us and confirm that

10 10:36 Garfield Exhibit 1 consists of a document

11 10:36 reflecting an E-mail chain in which you were a

12 10:36 participant in or around April, 2006?

13 10:36 A. Correct.

14 10:36 Q. Does this document -- does Garfield

15 10:36 Exhibit 1 help to establish in your mind that

16 10:36 you were in discussions with YouTube at least

17 10:36 in and around April, 2006?

18 10:36 A. Yes, it does.

19 10:36 Q. Can you just tell briefly, the

20 10:36 ladies and gentlemen of the jury, what was

21 10:36 generally the topic of your discussions with

22 10:36 YouTube in and around April, 2006?

23 10:36 A. The discussion was about encouraging

24 10:37 YouTube to do two things; deal with content

25 10:37 that we identified on the site that was

1 10:37 copyrighted, infringement content from the  
2 10:37 motion picture studios; and two, and relatedly  
3 10:37 integrating filtering software that would  
4 10:37 address that copyrighted content.

5 10:37 Q. Now, as of April, 2006 did the MPAA  
6 10:37 find that a substantial amount of the film  
7 10:37 studios copyrighted content was being exhibited  
8 10:37 on the YouTube website?

9 10:37 MR. MCGILL: Objection. Leading.

10 10:37 A. In April, 2006 there was a lot of  
11 10:37 copyrighted content on the site that was owned  
12 10:37 or controlled by the motion picture studios and  
13 10:37 that was one of the reasons I reached out the  
14 10:37 YouTube.

15 10:37 BY MR. BASKIN:

16 10:37 Q. Now, you made reference two answers  
17 10:37 ago to a desire to institute discussions  
18 10:38 regarding filtering on the YouTube website. If  
19 10:38 you look at Exhibit 1 for a second, you will  
20 10:38 see on a couple of places, certainly in the  
21 10:38 first on the top E-mail and on the very bottom  
22 10:38 E-mail, you make reference to technical  
23 10:38 discussions or technical folks, or instituting  
24 10:38 technical folks into the dialogue.

25 10:38 Was that a reference to individuals'

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10:38 1 knowledgeable of the issue of filtering and  
10:38 2 fingerprinting technologies?

10:38 3 A. Correct.

10:38 4 MR. MCGILL: Objection to the  
10:38 5 characterization of the document.

10:38 6 A. Correct. As I mentioned, there was  
10:38 7 a two-fold purpose to the discussion and one of  
10:38 8 the purposes was to talk about integrating  
10:38 9 filtering technology software. And so I think  
10:38 10 on that very first call, I was the only one  
10:38 11 participating while YouTube had other folks and  
10:38 12 I wanted to make sure folks from our side who  
10:39 13 had the technical expertise were also part of  
10:39 14 the discussion.

10:39 15 BY MR. BASKIN:

10:39 16 Q. Now, I think the second E-mail on  
10:39 17 Garfield Exhibit 1 references at least three  
10:39 18 participants of YouTube. Was one such  
10:39 19 participant a man named Chris Maxcy, M-A-X-C-Y?

10:39 20 A. Correct. Yes.

10:39 21 Q. Do you recall what Mr. Maxcy's title  
10:39 22 was at YouTube at the time or what his position  
10:39 23 was?

10:39 24 A. I don't recall what his title was.

10:39 25 I was introduced to Chris as a result of Chris

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10:39 1 wanting to build a stronger relationship with  
10:39 2 the Motion Picture Association and  
10:39 3 conversations he had with Dan Glickman, so I  
10:39 4 followed up with him based on that.

10:39 5 Q. Then there was reference to two  
10:39 6 other individuals, a Steven Chen. Do you see  
10:39 7 that, sir?

10:39 8 A. Yes, I do.

10:39 9 Q. And a Zahavah Levine?

10:39 10 A. Yes, I do.

10:39 11 Q. Mr. Chen is denominated by Mr. Maxcy  
10:39 12 as co-founder and chief technology officer of  
10:40 13 YouTube. Was that your understanding in April  
10:40 14 of 2006?

10:40 15 A. I don't recall if I had an  
10:40 16 understanding in April, 2006.

10:40 17 Q. And Ms. Levine, Zahavah Levine is  
10:40 18 identified as general counsel and vice  
10:40 19 president of business affairs. Was that your  
10:40 20 understanding in that time period?

10:40 21 A. I did have an understanding of  
10:40 22 Zahavah's role because I knew Zahavah even  
10:40 23 before this conversation.

10:40 24 Q. You knew her prior to her arrival at  
10:40 25 YouTube?

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10:40 1 A. Yes, I did.

10:40 2 Q. Now, you mentioned a concept which  
10:40 3 you referred to as filtering or fingerprinting  
10:40 4 and the jury may sometimes here it at copyright  
10:40 5 identification tools. Based on your experience  
10:40 6 at the RIAA and the MPAA, were you familiar  
10:40 7 with many of the filtering technologies that  
10:41 8 were available as of the middle of 2006?

10:41 9 A. Yes, I was.

10:41 10 Q. Was there one such company that  
10:41 11 employed or deployed filtering technology  
10:41 12 called Audible Magic?

10:41 13 A. Yes.

10:41 14 Q. Were you in 2006 familiar with  
10:41 15 Audible Magic technology?

10:41 16 A. Very.

10:41 17 Q. In laymens term and briefly, can you  
10:41 18 explain to the ladies and gentlemen of the jury  
10:41 19 what these filtering and fingerprinting  
10:41 20 technologies what they do? Assuming what they  
10:41 21 did in 2006 and I'll just add if it's changed a  
10:41 22 lot since then, then you can tell us. But  
10:41 23 going back to 2006, can you explain to the  
10:41 24 ladies and gentlemen of the jury what these  
10:41 25 filtering technologies or fingerprinting

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10:41 1 technologies did?

10:41 2 A. Actually, fingerprinting  
10:41 3 technologies is an apt way to describe it  
10:41 4 because they work in a very similar fashion to  
10:42 5 a human fingerprint. So just as can recognize  
10:42 6 a human fingerprint, the way they would work  
10:42 7 is they would take a digital stamp of a file,  
10:42 8 in this context an audio-visual file, capture  
10:42 9 that visual, that fingerprint and then in  
10:42 10 subsequent occasions be able to tie the  
10:42 11 fingerprint to the particular audio-visual  
10:42 12 content.

10:42 13 So it's a way of identifying a piece of  
10:42 14 content beyond just the name of the movie or  
10:42 15 the song.

10:42 16 Q. I assume companies like Audible  
10:42 17 Magic use computers and technology to do these  
10:42 18 matches?

10:42 19 MR. MCGILL: Objection to form.

10:42 20 A. They do use computer and other  
10:42 21 technologies in order to be able to align a  
10:42 22 particular audio-visual work with its digital  
10:43 23 fingerprint.

10:43 24 BY MR. BASKIN:

10:43 25 Q. Now, in and around 2006, had the

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10:43 1 MPAA assessed the effectiveness of filtering on  
10:43 2 fingerprint technologies in protecting the  
10:43 3 movie industry's intellectual properties on  
10:43 4 internet websites that deploy those  
10:43 5 technologies?

10:43 6 MR. MCGILL: Objection to form.  
10:43 7 Vague.

10:43 8 A. The MPAA did conduct an analysis. I  
10:43 9 don't recall the exact timing of that analysis  
10:43 10 and whether it were concluded in April of 2008.  
10:43 11 I'm sorry 2006.

10:43 12 BY MR. BASKIN:

10:43 13 Q. In 2006 and for that matter into  
10:43 14 2007, do you know what was the MPAA's  
10:43 15 assessment of the effectiveness of  
10:43 16 fingerprinting and filtering technologies in  
10:43 17 protecting the movie industry's intellectual  
10:44 18 property on websites that deploy those  
10:44 19 technologies?

10:44 20 MR. KLAUS: If I can just interpose  
10:44 21 it's not an objection but in the course of  
10:44 22 answering the question, Mr. Garfield, if I  
10:44 23 could just caution you to confine your  
10:44 24 responses to matters that were publically  
10:44 25 discussed or discussed with others and not to

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10:44 1 reveal internal communications that may be work  
10:44 2 product.

10:44 3 MR. BASKIN: I will strike the  
10:44 4 question. That's a fair reservation on the  
10:44 5 part of your counsel. Let me phrase it this  
10:44 6 way:

10:44 7 In 2006 and 2007, from time to time you  
10:44 8 discussed with the press the MPAA's assessment  
10:44 9 of effectiveness of fingerprint technologies;  
10:44 10 isn't that right sir?

10:44 11 MR. MCGILL: Objection. Leading.

10:44 12 A. I do have a recollection of speaking  
10:44 13 to the press and generally publically about  
10:44 14 fingerprinting technologies at some points in  
10:44 15 2006. Yes.

10:44 16 BY MR. BASKIN:

10:44 17 Q. And again without belaboring the  
10:45 18 deposition, can you tell the ladies and  
10:45 19 gentlemen of the jury what you remember were  
10:45 20 the positions you were expressing to the press  
10:45 21 in and around that time period regarding the  
10:45 22 effectiveness of these fingerprinting and  
10:45 23 filtering technologies if websites chose to  
10:45 24 deploy them?

10:45 25 MR. MCGILL: Objection. Vague.

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10:45 1 A. In simplest terms, the technologies  
10:45 2 were highly viable and were worthy of further  
10:45 3 investment and integration into audio-visual  
10:45 4 sites that have an interest in discerning  
10:45 5 between content that's copyrighted and content  
10:45 6 that's not.

10:45 7 BY MR. BASKIN:

10:45 8 Q. Now, let's return if we can to your  
10:45 9 discussions with YouTube in 2006, and at first,  
10:45 10 I want to focus on the time period before its  
10:45 11 acquisition by Google. Do you have -- well,  
10:45 12 let me show you some documents, maybe that  
10:45 13 would help you differentiate between those two  
10:46 14 time intervals. But in your discussions with  
10:46 15 YouTube in 2006, you said you were you've  
10:46 16 already testified you were tempting to discuss  
10:46 17 with them their deploying filtering and  
10:46 18 fingerprinting on their website; is that  
10:46 19 correct?

10:46 20 MR. MCGILL: Objection to the  
10:46 21 characterization.

10:46 22 A. It was one of the things that we  
10:46 23 were talking about. Correct.

10:46 24 BY MR. BASKIN:

10:46 25 Q. And let me show you if I can just so

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10:46 1 we can date it. Let me show you a document  
10:46 2 that we'll mark as Garfield Exhibit 2, mostly  
10:47 3 for the purpose of dating your discussions. I  
10:47 4 understand your memory is not crisp on the  
10:47 5 dates. Is that a fair way of characterizing  
10:47 6 it?

10:47 7 A. That's a fair characterization. I  
10:47 8 have a firm recollection of much of our  
10:47 9 conversations but the exact dates I don't have  
10:47 10 a strong grasp on.

10:47 11 MR. BASKIN: Let me hand you if I can  
10:47 12 what we'll mark as Garfield No. 2.

10:47 13 (Garfield Deposition Exhibit No. 2 was marked  
10:47 14 for identification.)

10:47 15 BY MR. BASKIN:

10:48 16 Q. Sir, first can you identify for us  
10:48 17 Garfield Exhibit 2 as consisting of again an  
10:48 18 E-mail chain of which you were a participant?

10:48 19 A. Yes, I can.

10:49 20 Q. Now, using Garfield Exhibit 2 as  
10:49 21 really as a dating mechanism, is it accurate  
10:49 22 that your discussions with YouTube regarding  
10:49 23 instituting, filtering or fingerprinting on  
10:49 24 their network, on their website persisted  
10:49 25 certainly into August, 2006?

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10:49 1 A. Yes, it did.

10:49 2 Q. Do you recall during this time  
10:49 3 period whether the MPAA was discussing with  
10:49 4 YouTube particular fingerprinting and filtering  
10:49 5 vendors that YouTube might deploy on their  
10:49 6 website to protect intellectual property of  
10:49 7 movie studios?

10:50 8 A. My recollection is at some point in  
10:50 9 these conversations we talked about a range of  
10:50 10 technology companies that were competing in the  
10:50 11 content recognition, fingerprinting phase, and  
10:50 12 so yes, I don't recall discussing one company  
10:50 13 with them. I recall talking to them about a  
10:50 14 range of companies.

10:50 15 Q. And I'll show you some documents in  
10:50 16 a few minutes that might help refresh your  
10:50 17 memory but do you recall even absent some  
10:50 18 documents whether one such company was Audible  
10:50 19 Magic that you were discussing with them?

10:50 20 A. Yes, I do recall that.

10:50 21 Q. Let me show you and just so I  
10:50 22 understand the protocol in the case.

10:50 23 David, I'm going to be showing him a  
10:50 24 Google document now, which happens to be an  
10:50 25 E-mail chain with him but because as I

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10:50 1 understand that that's even though it's  
10:50 2 denominated highly confidential for purpose of  
10:51 3 the deposition, the stipulation allows us to  
10:51 4 show witnesses documents, but I want to show it  
10:51 5 to you to make sure you're comfortable in  
10:51 6 showing it to him before I do. Okay?

10:51 7 MR. MCGILL: Sure. I appreciate  
10:51 8 that.

10:51 9 MR. BASKIN: So why don't we mark as  
10:51 10 Garfield Exhibit 3 the document in my hand.  
10:51 11 I'm going to give YouTube's counsel a copy. I  
10:51 12 will not give out any other copies until -- I  
10:51 13 might give one to co-counsel.

10:51 14 MR. MCGILL: You can go ahead and  
10:51 15 mark it. We have no objection.

10:51 16 (Garfield Deposition Exhibit No. 3 was marked  
10:51 17 for identification.)

10:51 18 BY MR. BASKIN:

10:52 19 Q. Does Garfield Exhibit 3 help you  
10:52 20 refresh your recollection when you have lunch?  
10:52 21 But beyond that, can you identify Garfield  
10:52 22 Exhibit 3, although it is not a document from  
10:52 23 the MPAA, can you identify it again as a  
10:52 24 document consisting of an E-mail chain in which  
10:52 25 you are a participant in and around September,

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10:53 1 2006?

10:53 2 A. Yes.

10:53 3 Q. And based on that, can you confirm  
10:53 4 that your discussions with YouTube regarding  
10:53 5 instituting possibly filtering systems  
10:53 6 continued into September, 2006?

10:53 7 A. Yes, I can.

10:53 8 Q. Now, if you look at the very last  
10:53 9 E-mail on the chain, you'll see that Mr. Maxcy,  
10:53 10 Chris Maxcy, wrote to you on and about  
10:53 11 September 25th. "We are very close to getting  
10:53 12 our fingerprinting systems licensed and wanted  
10:53 13 to take you up on your offer to do some testing  
10:53 14 of your members." Do you see that?

10:53 15 A. It says testing for your members. I  
10:53 16 don't know if that makes a difference but.

10:53 17 Q. You're right. Thank you for that.  
10:53 18 But the question that I have for you, as you  
10:53 19 sit here today, do you recall which  
10:53 20 fingerprinting system Mr. Maxcy advised you  
10:53 21 they were very close to licensing as of the end  
10:54 22 of September, 2006?

10:54 23 MR. MCGILL: Objection to the  
10:54 24 characterization of the document.

10:54 25 A. I don't recall.

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10:54 1 BY MR. BASKIN:

10:54 2 Q. Now, I could represent to you that  
10:54 3 YouTube, the acquisition of YouTube by Google  
10:54 4 for approximately \$1.7 billion was announced in  
10:54 5 early October, 2006 and my question for you is,  
10:54 6 sir, am I correct that this testing described  
10:54 7 by Mr. Maxcy on Garfield Exhibit 3 did not  
10:54 8 occur as of October, 2006; is that correct,  
10:54 9 sir?

10:54 10 MR. MCGILL: Objection. Lacks  
10:54 11 foundation.

10:54 12 A. We did not engage in a testing with  
10:55 13 them as of October, 2006.

10:55 14 BY MR. BASKIN:

10:55 15 Q. So just so the record is clear, for  
10:55 16 the ladies and gentlemen of the jury, in the  
10:55 17 six or seven months between April, 2006, which  
10:55 18 was I believe the date on Garfield Exhibit 1  
10:55 19 and October, 2006, did YouTube ever agree to  
10:55 20 use available filtering technologies to protect  
10:55 21 the film industry's content on its website?

10:55 22 MR. MCGILL: Objection to form. Also  
10:55 23 lacks foundation.

10:55 24 A. I'm sorry. Could you read the  
10:55 25 question back?

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10:55 1 BY MR. BASKIN:

10:55 2 Q. In the six months between the time  
10:55 3 you started the negotiations in April until the  
10:55 4 acquisition by Google in October, and we're  
10:55 5 going get to what happened post acquisition,  
10:55 6 would it be fair to say that YouTube never  
10:56 7 agreed to use available fingerprinting  
10:56 8 technologies on its website to protect the  
10:56 9 MPAA's members in intellectual property?

10:56 10 MR. MCGILL: Same objections.

10:56 11 A. To the best of my knowledge they had  
10:56 12 not agreed to do that.

10:56 13 BY MR. BASKIN:

10:56 14 Q. Now, in fact in the course of your  
10:56 15 negotiations with YouTube prior to the  
10:56 16 acquisition by Google, did you have a  
10:56 17 conversation with YouTube executives on the  
10:56 18 topic of why they would not filter?

10:56 19 MR. MCGILL: Objection. Lacks  
10:56 20 foundation.

10:56 21 A. We had multiple conversations about  
10:56 22 that topic. Yes.

10:56 23 BY MR. BASKIN:

10:56 24 Q. And do you recall prior to October  
10:56 25 2006 -- strike that. Can you describe to the

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10:55 1 BY MR. BASKIN:

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10:55 3 you started the negotiations in April until the  
10:55 4 acquisition by Google in October, and we're  
10:55 5 going get to what happened post acquisition,  
10:55 6 would it be fair to say that YouTube never  
10:56 7 agreed to use available fingerprinting  
10:56 8 technologies on its website to protect the  
10:56 9 MPAA's members in intellectual property?

10:56 10 MR. MCGILL: Same objections.

10:56 11 A. To the best of my knowledge they had  
10:56 12 not agreed to do that.

10:56 13 BY MR. BASKIN:

10:56 14 Q. Now, in fact in the course of your  
10:56 15 negotiations with YouTube prior to the  
10:56 16 acquisition by Google, did you have a  
10:56 17 conversation with YouTube executives on the  
10:56 18 topic of why they would not filter?

10:56 19 MR. MCGILL: Objection. Lacks  
10:56 20 foundation.

10:56 21 A. We had multiple conversations about  
10:56 22 that topic. Yes.

10:56 23 BY MR. BASKIN:

10:56 24 Q. And do you recall prior to October  
10:56 25 2006 -- strike that. Can you describe to the

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10:56 1 ladies and gentlemen of the jury as best you  
10:57 2 can recall what reason you were given by  
10:57 3 YouTube executives or executive, and we'll hash  
10:57 4 out who that was in a second, as to why they  
10:57 5 were not filtering in and around in 2006.

10:57 6 MR. MCGILL: Again objection. Lacks  
10:57 7 foundation.

10:57 8 A. So just if I can disaggregate that a  
10:57 9 bit. There were ups and flows in the  
10:57 10 conversation with YouTube where they at various  
10:57 11 points in time over that six-month period, I  
10:57 12 think it was expressed an interest but never  
10:57 13 came to a firm agreement on integrating any  
10:57 14 content recognition or fingerprinting  
10:57 15 technologies.

10:57 16 At some point in those discussions when  
10:57 17 asked what's taking so long and why hasn't this  
10:57 18 progressed to an actual agreement, there were a  
10:58 19 range of reasons given including the fact that  
10:58 20 the copyrighted content on YouTube was a major  
10:58 21 lure for their users. I don't remember the  
10:58 22 exact date of that conversation, but I firmly  
10:58 23 recall that conversation and that being one of  
10:58 24 the reasons offered.

10:58 25 I do also recall that there were

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10:58 1 additional reasons. I don't recall what all of  
10:58 2 those other reasons were but that one stood out  
10:58 3 in my mind.

10:58 4 BY MR. BASKIN:

10:58 5 Q. And who communicated to you as best  
10:58 6 you can recall that a reason for not signing up  
10:58 7 with filtering was because copyrighted content  
10:58 8 on YouTube website was serving as a lure for  
10:58 9 the users?

10:58 10 MR. MCGILL: Objection.  
10:58 11 Mischaracterization.

10:58 12 A. My conversations with YouTube often  
10:58 13 included multiple people, so I don't recall  
10:58 14 specifically. I do recall that in that  
10:58 15 conversation I think Zahavah Levine and Steve  
10:59 16 Chen were a part of that discussion. And I  
10:59 17 also recall that there was a third person who  
10:59 18 was a technology, someone with a technology  
10:59 19 expertise.

10:59 20 I don't recall which person specifically  
10:59 21 said that but I do recall very strongly that  
10:59 22 that was one of the reasons offered. It stood  
10:59 23 out in my mind.

10:59 24 BY MR. BASKIN:

10:59 25 Q. Now, do you recall whether among the

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10:59 1 other reasons that you mentioned being recited  
10:59 2 to you was the notion that having copyrighted  
10:59 3 content on their website provided YouTube with  
11:00 4 a leverage in its negotiations with the movie  
11:00 5 studios?

11:00 6 MR. MCGILL: Objection. Leading.

11:00 7 A. I don't recall.

11:00 8 BY MR. BASKIN:

11:00 9 Q. Now, after Google's acquisition of  
11:00 10 YouTube, again I represent to you it happened  
11:00 11 in October, 2006, it was announced at least I  
11:00 12 think, the merger was consummated thereafter  
11:00 13 but it was announced in early October, 2006.  
11:00 14 Did you engage in discussions with  
11:00 15 YouTube/Google on the topic of instituting,  
11:00 16 filtering or fingerprinting on the YouTube  
11:00 17 website?

11:00 18 A. Close to the acquisition or the  
11:00 19 announcement yes. Absolutely.

11:00 20 MR. BASKIN: Just so we can date  
11:00 21 things and put a little flesh on the bones, let  
11:00 22 me show you what we will mark as Garfield  
11:01 23 Exhibit 4.

11:01 24 (Garfield Deposition Exhibit No. 4 was marked  
11:01 25 for identification.)

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11:03 1 A. Okay.

11:03 2 BY MR. BASKIN:

11:03 3 Q. Mr. Garfield, first once again can  
11:03 4 you identify for us Garfield Exhibit 4 as  
11:03 5 consisting of an E-mail and attachment or an  
11:03 6 adjunct of an E-mail that was sent by you to  
11:03 7 Mr. Maxcy at YouTube in and around October 12,  
11:03 8 2006?

11:03 9 A. Yes, I can.

11:03 10 Q. Now, by the way, did Mr. Maxcy ever  
11:04 11 tell you how it felt to be rich?

11:04 12 A. I don't recall. I recall that we  
11:04 13 had some phone conversation but it was largely  
11:04 14 in jest.

11:04 15 Q. Now, you will see attached at the  
11:04 16 bottom of Garfield Exhibit 4 there is something  
11:04 17 called denominated as a proposal through  
11:04 18 October 13, 2006 copyright identification and  
11:04 19 filtering pilot test. Do you see that, sir?

11:04 20 A. I do.

11:04 21 Q. Was this a test and a proposal that  
11:04 22 you were proffering to Google and YouTube in or  
11:04 23 around October, 2006?

11:04 24 A. Yes.

11:04 25 Q. Can you in your own words maybe in

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11:04 1 laymen's language explain to the ladies and  
11:04 2 gentlemen of the jury what were the basic  
11:05 3 content of this proposal that you proffered to  
11:05 4 YouTube and Google in and around October, 2006?

11:05 5 MR. MCGILL: Objection. The document  
11:05 6 speaks for itself?

11:05 7 A. As I mentioned before, the way  
11:05 8 content recognition technologies generally work  
11:05 9 at a high level is just like fingerprinting.  
11:05 10 So with the fingerprint, you take a  
11:05 11 fingerprint, that fingerprint is connected with  
11:05 12 a particular person.

11:05 13 In simplified terms the same content works  
11:05 14 with consent recognition which is take a  
11:05 15 digital fingerprint of a file and that's  
11:05 16 associated with that file, that has a name.  
11:05 17 And the idea was integrating that same, those  
11:05 18 same technologies into the publication process  
11:05 19 at YouTube/Google.

11:05 20 So as we understood in advance of a file  
11:05 21 making it up on the site after a user submits  
11:05 22 it, YouTube engaged in certain processes and we  
11:06 23 were suggesting simply integrating content  
11:06 24 recognition into those processes as a way of  
11:06 25 recognizing and then removing unless they were

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11:06 1 otherwise licensed, copyrighted motion picture  
11:06 2 content.

11:06 3 Q. Now, if I could direct your  
11:06 4 attention in particular to the second page of  
11:06 5 Garfield Exhibit 4, there's reference to MPAA  
11:06 6 test. Do you see that, sir?

11:06 7 A. Correct.

11:06 8 Q. And in particular the proposed test  
11:06 9 contemplated using Audible Magic's music  
11:06 10 filtering service in the test. Had you learned  
11:06 11 by then that that was the fingerprinting  
11:06 12 technology that Google and YouTube were  
11:06 13 instituting or had a license institute on the  
11:07 14 site?

11:07 15 MR. MCGILL: Objection.

11:07 16 Mischaracterization of the document.

11:07 17 A. I did learn at some point in time  
11:07 18 that Audible Magic and YouTube had a business  
11:07 19 relationship and that YouTube was working with  
11:07 20 Audible Magic. I don't recall the exact date  
11:07 21 and this document doesn't help me to recall.

11:07 22 BY MR. BASKIN:

11:07 23 Q. Do you recall, it's not in the  
11:07 24 document, maybe you have an independent  
11:07 25 recollection, do you recall approximately the

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11:06 1 otherwise licensed, copyrighted motion picture  
11:06 2 content.

11:06 3 Q. Now, if I could direct your  
11:06 4 attention in particular to the second page of  
11:06 5 Garfield Exhibit 4, there's reference to MPAA  
11:06 6 test. Do you see that, sir?

11:06 7 A. Correct.

11:06 8 Q. And in particular the proposed test  
11:06 9 contemplated using Audible Magic's music  
11:06 10 filtering service in the test. Had you learned  
11:06 11 by then that that was the fingerprinting  
11:06 12 technology that Google and YouTube were  
11:06 13 instituting or had a license institute on the  
11:07 14 site?

11:07 15 MR. MCGILL: Objection.

11:07 16 Mischaracterization of the document.

11:07 17 A. I did learn at some point in time  
11:07 18 that Audible Magic and YouTube had a business  
11:07 19 relationship and that YouTube was working with  
11:07 20 Audible Magic. I don't recall the exact date  
11:07 21 and this document doesn't help me to recall.

11:07 22 BY MR. BASKIN:

11:07 23 Q. Do you recall, it's not in the  
11:07 24 document, maybe you have an independent  
11:07 25 recollection, do you recall approximately the

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11:07 1 cost of engaging in this test what it would  
11:07 2 have cost YouTube and Google to use Audible  
11:07 3 Magic's service for purposes of this test?

11:07 4 MR. MCGILL: Objection. Calls for  
11:07 5 speculation.

11:07 6 A. I don't recall the call structure  
11:07 7 for Audible Magic. I knew it at one point but  
11:07 8 I don't recall what it was, but my recollection  
11:07 9 was at some point we spoke to YouTube/Google  
11:08 10 about us deferring the cost.

11:08 11 In fact in the memo one of the things that  
11:08 12 it points out is minimizing the out-of-pocket  
11:08 13 expense. So I know that I was always mindful  
11:08 14 of not just with YouTube but with all of our  
11:08 15 and my overtures to use a generated sites like  
11:08 16 YouTube was to make sure that whatever we  
11:08 17 propose were dealing with copyright  
11:08 18 infringement was cost efficient for the site,  
11:08 19 if you will. So not adding a significant, new  
11:08 20 expense to their operating cost and that was  
11:08 21 the same in this context with YouTube.

11:08 22 Q. And I'm going to show you in a  
11:09 23 second a second iteration from this proposal  
11:09 24 from about a month later. Do you recall  
11:09 25 whether your offer to have the MPAA defray the

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11:16 1 BY MR. BASKIN:

11:16 2 Q. Nothing further except for one line  
11:16 3 in the document. If you turn in the middle of  
11:17 4 the first page you will see that Mr. Kelly  
11:17 5 Liang wrote, "We look forward to launching a  
11:17 6 content filtering pilot with the MPAA some time  
11:17 7 towards the end of the year." Do you see that,  
11:17 8 Mr. Garfield?

11:17 9 MR. MCGILL: Objection. Document  
11:17 10 speaks for itself.

11:17 11 A. Yes, I do see that.

11:17 12 BY MR. BASKIN:

11:17 13 Q. And do you remember who Mr. Liang  
11:17 14 was at this point in time? I think he was  
11:17 15 introduced in an earlier E-mail?

11:17 16 A. I do recall. My recollection was  
11:17 17 that Chris transitioned some of the  
11:17 18 conversation and his involvement to Kelly who  
11:17 19 in addition to I think having some business  
11:17 20 role also had some technical expertise and so  
11:17 21 there were other folks from Google/YouTube who  
11:17 22 continued to be a part of the conversation but  
11:17 23 Kelly helped to drive a lot of it over this  
11:18 24 ladder part of the year.

11:18 25 MR. BASKIN: Now, in that period, I'd

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11:18 1 like to show you next what we will mark as  
11:18 2 Garfield Exhibit 7.

11:18 3 (Garfield Deposition Exhibit No. 7 was marked  
11:20 4 for identification.)

11:20 5 A. I traveled a lot when I worked at  
11:20 6 the MPAA, that's clear from these E-mails. So  
11:20 7 I'm ready. I have reviewed it.

11:20 8 MR. BASKIN: You mean you physically  
11:20 9 traveled to --

11:20 10 A. Yes. Every evening it says I'm on  
11:20 11 the road or I'm traveling here or traveling  
11:20 12 there.

11:20 13 BY MR. BASKIN:

11:20 14 Q. First, can you identify for us  
11:20 15 Garfield Exhibit 7 as an E-mail and  
11:20 16 accompanying proposal that you E-mailed to  
11:21 17 Kelly Liang in and around November 8, 2006?

11:21 18 A. Yes.

11:21 19 Q. Now, based on the E-mail paragraph  
11:21 20 beginning Hi Kelly, it makes reference to "I am  
11:21 21 attaching below a revised proposal based on our  
11:21 22 last discussion as well as the RFI we  
11:21 23 discussed." Do you see that, sir?

11:21 24 A. I do.

11:21 25 Q. Can you just explain, first of all

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11:21 1 to the ladies and gentlemen of the jury, what  
11:21 2 the reference to RFI is?

11:21 3 A. The reference to RFI is a reference  
11:21 4 to a request for information and I don't know  
11:21 5 if that's an apt term, it's a term that we used  
11:21 6 at the time. It was really a request for  
11:21 7 proposals in around that time the MPAA  
11:22 8 sponsored and ran a request for proposals  
11:22 9 around content recognition technologies.

11:22 10 Q. And as you sit here now, other than  
11:22 11 the reference in that paragraph do you recall  
11:22 12 the proposal dated November 9, 2006 was a  
11:22 13 result of your discussions with Mr. Liang?

11:22 14 A. Yes. There were changes in the  
11:22 15 document that reflect our conversation and some  
11:22 16 of those changes are reflected in the end of  
11:22 17 the document.

11:22 18 Q. For example, if you turn to page  
11:22 19 that's Bates, the second page of the document,  
11:22 20 it appears that the test period from the first  
11:22 21 proposal to the second has grown from 30 to 45  
11:22 22 days. Is that one of the changes that you were  
11:22 23 just referring?

11:22 24 A. Yes, it is, as well as coming up  
11:22 25 with Key Metrics, which I recall that YouTube

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11:23 1 and Google were interested in and we are were  
11:23 2 as well, so it wasn't a huge deal to agree  
11:23 3 that's something that should be included.

11:23 4 Q. Can you tell again the ladies and  
11:23 5 gentlemen of the jury what you mean by Key  
11:23 6 Metrics, what that phrase refers to?

11:23 7 A. It was an attempt to have clarity  
11:23 8 going into the pilot and how we would evaluate  
11:23 9 whether the tests worked and were successful,  
11:23 10 and so defining the measurements up front would  
11:23 11 prevent misunderstandings midway or after the  
11:23 12 pilot.

11:23 13 Q. Now, there is a reference under test  
11:23 14 parameters one of the metrics was number  
11:23 15 fingerprints generated from manual review  
11:23 16 (blacklist and white list). Do you see that?

11:24 17 A. I do.

11:24 18 Q. The reference to blacklist or white  
11:24 19 list was also found in a couple of bullet  
11:24 20 points above that you'll see as well. Can you  
11:24 21 explain to the ladies and gentlemen of the jury  
11:24 22 what was meant by blacklist and white list?

11:24 23 MR. MCGILL: Objection. Calls for  
11:24 24 speculation.

11:24 25 A. I was the one who was largely

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11:24 1 drafting this document, so I can tell you how I  
11:24 2 was using the terminology. So there I guess  
11:24 3 there are multiple ways but two popular ways of  
11:24 4 dealing with recognizing content and then  
11:24 5 filtering it in or out. So the filtering  
11:24 6 process is essentially like a strainer and so  
11:24 7 you have content going through the strainer;  
11:24 8 some things make it through the strainer and  
11:24 9 some things end up being caught in the  
11:25 10 strainer.

11:25 11 If you take a blacklist approach, then you  
11:25 12 identify a list of stuff that should be  
11:25 13 excluded out and that should be caught in the  
11:25 14 strainer. If you take a white list approach,  
11:25 15 you create a list of stuff that should make it  
11:25 16 true as opposed to a list that should be kept  
11:25 17 out. That's the blacklist versus white list.  
11:25 18 Was that clear?

11:25 19 Q. Well, we're going to go into it a  
11:25 20 little bit more but it was certainly a good  
11:25 21 first articulation. So let's take it a little  
11:25 22 bit further. If I understand your answer, you  
11:25 23 were saying that the blacklist would consist of  
11:25 24 fingerprints of videos which the studios would  
11:25 25 disapprove for uploading and hence would be

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11:25 1 captured by the strainer; is that correct, sir?

11:25 2 A. Correct.

11:25 3 Q. And by contrast, the white list  
11:25 4 would consist of fingerprints of videos which  
11:26 5 the studios authorized or approved for  
11:26 6 uploading and hence, they would pass through  
11:26 7 the strainer; is that correct?

11:26 8 A. Correct.

11:26 9 Q. Why might a studio choose to have a  
11:26 10 white list, have it placed on a white list --  
11:26 11 strike that. Why might a studio choose to have  
11:26 12 placed on a white list videos that were  
11:26 13 authorized to be uploaded on the website?

11:26 14 A. Well, I can just tell you what I  
11:26 15 knew based on my using the language which is  
11:26 16 that there were, it was simply a recognition of  
11:26 17 fact that the studios were authorizing and  
11:27 18 doing deals with sites like YouTube, Google  
11:27 19 where they would authorize certain content to  
11:27 20 be used.

11:27 21 So in order for this to be effective so as  
11:27 22 not to train out or eliminate content that the  
11:27 23 studios actually wanted to make available on  
11:27 24 any of these sites, we would have that approach  
11:27 25 of having a white list.

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11:27 1 Q. So to sort of sum up for the jury,  
11:27 2 the second proposal after your discussions with  
11:27 3 Mr. Liang contemplated that this fingerprinting  
11:27 4 and filtering technology would be used to  
11:27 5 distinguish between videos that were uploaded  
11:27 6 with authorization and videos that should be  
11:27 7 blocked because they were uploaded without  
11:27 8 authorization; is that correct?

11:27 9 MR. MCGILL: Objection to the  
11:27 10 characterization and the leading nature.

11:27 11 A. I'm sorry. I just misheard you.  
11:27 12 Could you just say it again? I just want to  
11:28 13 make sure I heard you properly?

11:28 14 BY MR. BASKIN:

11:28 15 Q. This proposal as of November, 2006  
11:28 16 contemplated using fingerprinting and filtering  
11:28 17 technology to distinguish between videos that  
11:28 18 were being uploaded with the permission of the  
11:28 19 studios versus videos that were being uploaded  
11:28 20 without authorization and permission?

11:28 21 MR. MCGILL: Same objection.

11:28 22 A. Yes. Correct. That was the  
11:28 23 contemplation. Just one thing on Kelly Liang.  
11:28 24 We've been saying mister. I don't recall if  
11:28 25 Kelly is a man or a woman. Sorry.

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11:37 1 pilot and their filtering processes would be  
11:37 2 used for their business partners and those who  
11:37 3 established a licensing relationship with  
11:37 4 Google/YouTube but not with the studios  
11:37 5 generally.

11:37 6 BY MR. BASKIN:

11:38 7 Q. The jury may not understand what you  
11:38 8 mean or what they meant by the fact that the  
11:38 9 technology, the filtering technology would be  
11:38 10 reserved for their business or licensing  
11:38 11 partners. Can you explain to the ladies and  
11:38 12 gentlemen of the jury what that means, sir?  
11:38 13 What was meant by licensing and business  
11:38 14 partners?

11:38 15 A. The way I interpreted it was we were  
11:38 16 having a conversation earlier about the white  
11:38 17 list and the blacklist and filtering and  
11:38 18 filtering out. The studios developed, marketed  
11:38 19 movies, television shows, they then make a  
11:38 20 decision on partners with whom they're going to  
11:38 21 exploit those copyrighted works, so market and  
11:38 22 distribute those copyrighted works.

11:39 23 So Google essentially conveyed that they  
11:39 24 would work on getting authorization from the  
11:39 25 studios and licenses from the studios and

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11:39 1 others and those who would license, they would  
11:39 2 then in the context of that licensing  
11:39 3 arrangement work in integrate filtering. But  
11:39 4 for those companies who were not and did not  
11:39 5 develop a licensing arrangement with Google,  
11:39 6 they weren't going to be doing this sort of a  
11:39 7 pilot initiative or filtering.

11:39 8 MR. BASKIN: I think we have to break  
11:39 9 for the tape. Shall we break for the tape now?

11:39 10 THE VIDEO OPERATOR: This is the end  
11:39 11 of tape 1. Off the record at 11:39.

11:49 12 This is the beginning of tape 2 in the  
11:49 13 deposition of Mr. Garfield. On the record at  
11:49 14 11:49.

11:49 15 BY MR. BASKIN:

11:50 16 Q. Sir, again to help you with the  
11:50 17 dates a little bit. Let me show you what we  
11:50 18 will mark as Garfield Exhibit 10.  
11:50 19 (Garfield Deposition Exhibit No. 10 was marked  
11:51 20 for identification.)

11:51 21 A. Okay. I have read it.

11:51 22 BY MR. BASKIN:

11:51 23 Q. Sir, first, again can you identify  
11:51 24 for us Garfield Exhibit 10 as consisting of an  
11:51 25 E-mail chain in which you were a participant

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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. )

NO. 07-CV-2203 )

YOUTUBE, INC., YOUTUBE, LLC, )  
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. )

NO. 07-CV-3582 )

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

Defendants. )

VIDEOTAPED DEPOSITION OF HEATHER GILLETTE

SAN FRANCISCO, CALIFORNIA

TUESDAY, AUGUST 12, 2008

BY: ANDREA M. IGNACIO HOWARD, CSR, RPR, CLR

CSR LICENSE NO. 9830

JOB NO. 15481

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GILLETTE

11:09:59 recall -- I don't even recall really what the wording

11:10:04 I had issue with was.

11:10:05 Q Well, were you in a position to know at that

11:10:12 time whether a statement like that was accurate?

11:10:14 MR. SHAPIRO: Objection; foundation.

11:10:20 You may answer.

11:10:21 THE WITNESS: Again, if -- because it is -- I

11:10:26 remember my concern with that was with regard to

11:10:29 copyright. The only thing that I could know for sure

11:10:33 that I was accurate about was the operational portion

11:10:36 of this, and I -- I know at that time we were not

11:10:40 reviewing everything for that reason.

11:10:46 MR. BROWNE: Q. For what reason?

11:10:47 A For copyright.

11:10:49 Q Was there any time when you were reviewing

11:10:56 everything for copyright?

11:10:57 A Everything, no. As far as I know, no, while

11:10:59 I was there.

11:11:04 Q Were there times where -- where you were

11:11:06 reviewing some things for copyright?

11:11:08 A Yes.

11:11:08 Q What times were those?

11:11:17 A At various stages pre-acquisition, I believe,

11:11:36 yes. I'm -- I'm fairly sure that pre-acquisition we

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GILLETTE

11:11:42 did do -- we did scan portions of the site to try and  
11:11:48 locate what we thought might be unauthorized content.

11:11:52 Q Who did that?

11:12:00 A That changed over time. The people that were  
11:12:03 involved definitely changed over time.

11:12:10 Q What people were involved at any point in  
11:12:18 time?

11:12:20 A So I can -- I can start from the point where  
11:12:23 I joined the company. At that very early stage, I can  
11:12:33 recall a few people helping, and there may have  
11:12:35 definitely been more. Again, it was a small company,  
11:12:38 so everyone helped with a little bit of everything,  
11:12:40 but I helped. Brent Hurley helped.

11:12:56 I -- I think -- you know, I definitely know  
11:13:09 that there were more people helping, but I think we  
11:13:11 were the key players.

11:13:12 Q And how did you -- how did you scan the site  
11:13:20 to try to locate unauthorized conduct -- content?

11:13:26 A I -- I believe at that time, again, very  
11:13:30 early stage, we were really -- the content that  
11:13:35 appeared to be most popular and shared at that stage  
11:13:40 that we suspected could be unauthorized was really  
11:13:43 just South Park.

11:13:47 Q So again though how did you scan the site to

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GILLETTE

11:13:50 find that content?

11:13:52 A I'm sorry. A lot of it was if we happened to  
11:13:58 come across it, of course, and I believe there --  
11:14:07 there was key word searching to try to locate that  
11:14:13 content, and if -- if in the early stages there were  
11:14:22 other methods, I'm not aware. That's my firsthand  
11:14:26 knowledge.

11:14:27 Q Were there other methods at later stages?

11:14:33 A For South Park specifically, I don't think  
11:14:36 so. Again, I could be wrong. Things did change. Our  
11:14:42 approach and our attempt at trying to help with --  
11:14:45 with unauthorized content changed over time  
11:14:49 definitely. So as it pertains to South Park, I don't  
11:14:57 think so.

11:14:57 Q I didn't mean to confine it specifically to  
11:15:00 South Park though.

11:15:01 A Okay.

11:15:02 Q If at later stages there were other methods  
11:15:06 for searching the site for what you thought might be  
11:15:09 unauthorized conduct -- content, what were those  
11:15:12 methods?

11:15:13 A Yes. We had a -- at one time we had an  
11:15:19 ability to review videos that were over ten minutes  
11:15:22 long, and that lasted for a very short period of time.

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GILLETTE

11:15:30 We were not capable of keeping up with the volume, and  
11:15:37 at some point, and I don't remember when exactly, that  
11:15:41 queue, we basically just removed it.

11:15:44           Also, I know that on occasion, again, because  
11:15:53 the sheer volume on the site was, of course, growing  
11:15:56 very quickly, on occasion we would ask engineering to  
11:16:00 do queries. Yeah, I mean, again we're talking about a  
11:16:07 large span of time, so....

11:16:13       Q    But within that large span of time, were  
11:16:15 there any other methods, other than the ones that  
11:16:19 you've named, that you remember that were used to --  
11:16:22 to scan the site to try and locate unauthorized  
11:16:25 content?

11:16:31       A    I mentioned key word searching. I'm not  
11:17:03 thinking of any other methods. Although, again, I  
11:17:07 could very well be forgetting something.

11:17:08       Q    Well, now when you said that at least  
11:17:12 sometimes engineering would -- would be asked to do  
11:17:14 queries --

11:17:16       A    Yes.

11:17:16       Q    -- what did you -- what did you mean by that?

11:17:18       A    One of the things that we noticed was content  
11:17:30 owners definitely were interested in -- in videos that  
11:17:36 where they had broken up something that was longer

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GILLETTE

11:17:39 than the ten-minute limit. I should explain that we,  
11:17:44 at some point, made -- created a ten-minute limit.

11:17:50 The -- so the -- they would do things like  
11:17:54 put part one, part two, part three, and this -- this  
11:18:00 definitely was something that we suspected could be an  
11:18:05 indication of something that was unauthorized. Of  
11:18:09 course, not always, and we would have engineering run  
11:18:22 inquiries looking for, I think, the word "part" or  
11:18:28 "part one," or there could have been other terms too.

11:18:33 As time went on too, users changed, you know,  
11:18:39 their trends as well.

11:18:40 Q Why did you have engineering run those  
11:18:42 inquiries as opposed to just doing them yourselves?

11:18:45 A Because the volume was massive. There was no  
11:18:47 way we could in any way tackle that, so we were trying  
11:18:50 to somehow find a subset that we might be able to  
11:18:54 help.

11:18:59 Q Who was in the engineering department that  
11:19:02 ran these queries?

11:19:06 A Oh, God. Well, of course, Steve was there.  
11:19:10 Steve Chen was always there.

11:19:21 I think this is still pretty early on, and if  
11:19:24 I'm right about that, you know, I could -- I could  
11:19:28 list off the engineers that I -- I knew we had early



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GILLETTE

11:19:31 on, although I don't know if they were directly  
11:19:33 involved.

11:19:34 Q Why don't you just tell me approximately how  
11:19:36 many there were?

11:19:37 A Engineers?

11:19:38 Q Uh-huh, involved in this.

11:19:39 A Involved.

11:19:44 Maybe two.

11:19:48 Q And when the engineers ran these queries, I  
11:19:51 presume they came back with results; is that right?

11:19:55 A Yes.

11:19:55 Q And then -- and then what would the engineers  
11:19:57 do with those results?

11:19:59 A They would give them to -- it may have been  
11:20:04 me, it may have been a member on my team.

11:20:08 Q And then what -- what would you or your team  
11:20:11 do with those results then?

11:20:14 A We would make an attempt. Although I'm  
11:20:17 not -- first of all, I don't recall how many times we  
11:20:20 did this, and I don't recall whether or not we did  
11:20:24 this. We were able to actually successfully go  
11:20:31 through these lists.

11:20:31 I don't -- I remember the scale of everything  
11:20:32 was getting so big so fast that a lot of times we

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GILLETTE

11:20:36 would intend on, you know, going forward with  
11:20:39 something but, you know, the -- the numbers we're  
11:20:41 talking about, and I'm talking about beyond copyright,  
11:20:45 the numbers that we're talking about were big quickly.

11:20:48           So I know on at least one occasion we  
11:20:53 attempted to look through those, and our intent was to  
11:20:55 try and find unauthorized content to help content  
11:21:01 owners. That was the bottom line.

11:21:03       Q   And then on that occasion, do you -- that  
11:21:07 you're thinking of, is that in reference to specific  
11:21:10 work or more than one work?

11:21:11       A   I don't recall a specific work, no.

11:21:13       Q   And again this occasion, at least this one  
11:21:16 occasion that you're thinking of, when was that,  
11:21:18 approximately?

11:21:19       A   I have no idea.

11:21:20       Q   And when you -- were you, in fact, successful  
11:21:30 in finding some things that you believe may have been  
11:21:32 unauthorized content?

11:21:34       A   We -- there's no way we could determine that.  
11:21:37 There was no feedback, and definitely one thing we  
11:21:40 were successful at was learning that we were not  
11:21:44 qualified to be making these calls, but as -- as to  
11:21:49 the success of actually locating unauthorized or

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GILLETTE

11:23:02 counterclaims. We also became aware of the thousands  
11:23:07 of mistakes we made for content producers where --  
11:23:17 where it was original content, but even mainstream  
11:23:20 media companies. There were -- there were many  
11:23:26 different points of feedback basically that came our  
11:23:29 way.

11:23:29 Q And you -- you removed thousands of instances  
11:23:33 of stuff that you believe was unauthorized content?

11:23:37 A I can estimate for you, and again it's really  
11:23:40 guessing. I do not have any record of the numbers. I  
11:23:46 mean, actually I don't -- I don't -- I don't even know  
11:23:48 a ballpark in this instance.

11:23:50 Q But you believe that you -- that you became  
11:23:55 aware of thousands of mistakes that you made?

11:23:58 A Mistakes, my estimate is definitely  
11:24:01 thousands. I mean, it's -- it's very likely many,  
11:24:05 many thousands.

11:24:07 Q So then you would have had to remove -- maybe  
11:24:09 I'm not understanding something, but to have made  
11:24:12 thousands of mistakes, am I right that you would have  
11:24:15 had to remove thousands of videos?

11:24:17 A Yes, I think that's a fair deduction.

11:24:22 Q And how did you become aware of these  
11:24:28 mistakes? Actually, how were --

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GILLETTE

12:39:43 Q Three or four -- approximately three or  
12:39:45 four months after you joined is your best  
12:39:46 recollection?

12:39:47 A Approximately.

12:39:48 Q Okay. And -- and when the Live Site Team was  
12:39:52 initially formed, how many people did it have?

12:39:57 A Yeah, I -- we, of course, brought in people  
12:40:05 gradually. We -- we had one, and then we had two, and  
12:40:13 then I think we got up to about five, approximately,  
12:40:19 at -- at that early stage of development.

12:40:27 Q And you mentioned, I think, that the Live  
12:40:31 Site Team responded to videos that were, quote,  
12:40:34 "flagged by the community"?

12:40:36 A That's correct.

12:40:36 Q And what did you mean by that?

12:40:38 A Our -- our users can flag a video as it's  
12:40:42 called on the site if they suspect that it's  
12:40:43 potentially inappropriate, and so flagging sends  
12:40:47 something to us. Basically our Live Site Team.

12:40:50 Q And can -- can any YouTube user flag a video?

12:40:56 A Yes, if they are logged in.

12:40:58 Q And what is the process that a user would  
12:41:04 actually go through to flag a video?

12:41:06 A So from the page where you can watch an

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GILLETTE

12:41:13 individual video, there is a mechanism there in the  
12:41:17 interface that you can select, and it's a button.  
12:41:21 It's labeled "Flag as Inappropriate," and from there  
12:41:25 you can -- you can narrow down your flag through a  
12:41:29 decision through sort of a tree, and then hit  
12:41:34 "Submit."

12:41:36 Q And then what happens after the user hits  
12:41:40 "Submit"?

12:41:40 A It goes to my team virtually immediately.

12:41:44 Q To the Live Site Team?

12:41:47 A Correct, and by the way, I just said, "My  
12:41:49 team," but as of Friday that's not my team anymore.  
12:41:55 Sorry.

12:41:59 Q And then what does the Live Site Team do with  
12:42:02 that flag that comes in from the user?

12:42:04 A They review those videos for terms of use  
12:42:07 violation, noncopyright terms of use violation.

12:42:12 Q Do they review all the videos that are  
12:42:19 flagged?

12:42:19 A Yes.

12:42:19 Q Do they review the videos in their entirety?

12:42:25 A No --

12:42:25 Q Okay.

12:42:26 A -- not necessarily.

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GILLETTE

12:42:27 Q For what reasons would they not review the  
12:42:36 entire video?

12:42:40 A Volume and the pace at which we have to keep  
12:42:42 up.

12:42:44 Q But they may, in certain instances, review an  
12:42:47 entire video?

12:42:48 A They may have, correct.

12:42:49 Q In the instances that they don't review the  
12:42:51 entire video, what do they do?

12:42:53 A They look at thumbnails. We now have up to  
12:43:02 46 thumbnails that can represent the content in a  
12:43:05 video. And then there, of course, is information, you  
12:43:08 know, the user has also entered with regard to the  
12:43:13 video, like meta tags, and then there's a description.  
12:43:17 The flag in the information also shows many details  
12:43:21 basically.

12:43:27 Q Can they also -- are they able to hear any  
12:43:30 audio that's associated with it?

12:43:31 A If they choose to, yeah, when they watch it.

12:43:34 Q If they're just looking at the thumbnails,  
12:43:36 can they also hear the audio?

12:43:38 A No.

12:43:38 Q So if a member of the Live Site Team reviews  
12:43:47 the video in all or in part, for what purpose are

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GILLETTE

12:43:53 they -- they reviewing it?

12:43:55 A To determine if there is, in fact, a  
12:43:58 noncopyright terms of use violation, or if it is  
12:44:01 something that is not intended for anyone younger than  
12:44:05 18 or not appropriate.

12:44:08 Q And what -- what would be examples of the  
12:44:11 noncopyright terms of use violations that the Live  
12:44:15 Site Team reviews for?

12:44:16 A Sure.  
12:44:16 Child pornography, adult pornography, child  
12:44:26 abuse, animal abuse, suicides, school shooting  
12:44:36 threats, murder, snuff videos. Think of anything  
12:44:44 horrible basically, and these are things that we come  
12:44:48 across and also police.

12:44:51 Q Are there any members or at any time were  
12:44:55 there members of -- sorry -- at any time, were there  
12:44:58 employees of YouTube who would review videos and flag  
12:45:01 them?

12:45:02 A Employees of YouTube who would review videos  
12:45:04 and flag them?

12:45:05 Q As part of their job.

12:45:07 A Review videos and flag them?

12:45:09 Q As opposed to community. That's what I'm  
12:45:11 getting at.

1 a performance or display under the Copyright Act where there is  
2 an automatic system where some users upload content and other  
3 users view the content. But if they show that it is, and that  
4 the copyright laws apply in the first instance and there is  
5 infringement, then the question becomes whether the provisions  
6 of the Digital Millennium Copyright Act do apply. And there  
7 will be questions there too, Judge, while it is a defense, as  
8 to who has the burden on particular issues. And those are  
9 legal issues that we'll hash out as we go forward.

10 Finally, your Honor, in terms of an overview, we  
11 haven't really touched on Premier yet, but we do believe the  
12 Premier case is inappropriate for class treatment. There's too  
13 many individual issues that are going to predominate, but I  
14 won't take up a lot of time on that right now.

15 One last thing I would say, your Honor, is that  
16 because this bears on some of the requests that have been made  
17 for very expedited approach by Premier, for example, that we  
18 are today, we being YouTube and Google, we are today working  
19 very intensively and cooperating with some of the major content  
20 providers in the world on what we hope will be an effective  
21 technology fix that we believe would go well beyond any legal  
22 obligations that we have but would hopefully eliminate largely  
23 any such disputes in the future.

24 And without getting into the nuts and bolts of the  
25 technology fix, it basically would be somebody who has a



1 copyrighted video, for example, would provide it to us and say  
2 we don't want this up on YouTube. And then we're developing a  
3 way to take basically an electronic or video or digital  
4 fingerprint of this material so that if somebody does try to  
5 upload it, within a minute or so the computers will figure out  
6 that that's one of the items that the copyright owner said they  
7 don't want up on the system, and we would be able to pull that  
8 down until any issues are resolved.

9 As I said, we're working hard on that. We have  
10 invited major content companies to help us in that effort in  
11 terms of testing it. Many of them are cooperating, and we hope  
12 to have this in place -- hope and expect to have it in place  
13 sometime in the fall, hopefully in September.

14 If we're successful in that regard --

15 THE COURT: What does "in place" mean?

16 MR. BECK: What does "in place" mean?

17 THE COURT: Yeah.

18 MR. BECK: It means up, running and effective. So  
19 anybody that wants to could say -- a movie production house, a  
20 studio, could say here's our new Tom Cruise movie and we don't  
21 want any knuckleheads with their video cameras in the theater  
22 videoing our movie and then uploading a ten-minute segment onto  
23 YouTube, so take our movie. And we would get the movie from  
24 them, and then our computers would do their magic, and that's  
25 what's being worked on now, so there would be key information

1 extracted from the video and stored on a computer. And then  
2 when somebody uploads -- any video that gets uploaded basically  
3 gets filtered through the fingerprint database, and like the  
4 AFIS that the FBI has, and if there's a hit, then within  
5 minutes the computer knows that and pulls it down. So we hope  
6 that -- when I say "in place," I mean operating and available  
7 to any content provider in the world.

8 So that's the plan that we're working on. As I said,  
9 we believe it goes way beyond any legal requirements, but we're  
10 not interested in having legal fights if we can avoid them and  
11 we're interested in trying to cooperate with people if we can,  
12 and we're going to put that in place. We hope that obviates  
13 any future disputes. We may still have disagreements about  
14 what happened before we were able to develop this technology,  
15 and we'll resolve those in due course.

16 THE COURT: Thank you.

17 Mr. Verrilli, did you --

18 MR. VERRILLI: Well, I think it might make sense to  
19 hear from the class plaintiffs on the issues Mr. Beck raised  
20 and circle back to scheduling.

21 THE COURT: Sure.

22 MR. SOLOMON: Good afternoon, Judge, I'm Lou Solomon  
23 from Proskauer Rose. I'm here with Mr. Coffey from the  
24 Bernstein Litowitz firm. We too have a signed proposal.

25 THE COURT: I had a conference with Mr. Coffey earlier

To: "Chris Maxcy" <chris@youtube.com>, "Mark Yoshitake" <myoshitake@google.com>, "Richard Kuo" <rkuo@google.com>  
 From: "Franck Chastagnol" <fchastagnol@youtube.com>  
 Cc: "Matthew Liu" <matthew@youtube.com>, "Chad Hurley" <chad@youtube.com>  
 Bcc:  
 Received Date: 2007-02-01 22:53:50 GMT  
 Subject: Re: CYC Tool For Viacom - Urgent Request

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yes, it should not be a problem to set them up with an account

the only thing I would be concerned is if we open the tool and they use it only for takedown without signing a deal with youtube to upload some of their content. because then just facilitate take downs.

Chris: can you confirm we are negotiating a content deal with viacom ?

Mark/Richard: would you be able to allocate a TAM for Viacom in order =to:

1. create an account on CYC for them, with the appropriate settings
2. educate Viacom on the CYC tool (in particular to make sure when claiming videos having Viacom audio they make sure to set the "Apply to other matched videos" checkbox in order for fingerprint to get generated).
3. follow up with SQUAD to give them a heads up regarding approving =promptly Viacom claims in CYC admin review queue

thanks,  
franck

On Feb 1, 2007, at 2:00 PM, Chris Maxcy wrote:

- > Hey Guys,
  - >
  - > We have just run into a situation with Viacom where they have
  - > apparently found a large amount of their content on YT. They were
  - > planning on sending the content squad links for removal but I
  - > wanted to see if we could get them set up on the CYC tool so any
  - > "removed" files actually get fingerprinted by AM & blocked going => forward. There is a time sensitivity to the request as Viacom will => be sending their takedown request today/tomorrow. Any chance we
  - > can make them our first "partner" on the CYC tool. If so can this =20
  - > be done this week?
  - >
  - > Thanks,
  - >
  - > Chris
  - >
- 

DATE: 12/10/08  
 DEPONENT: Chastagnol  
 EXHIBIT# 8  
 CASE: Viacom, et al., v. YouTube, et al., The Football Association Premier League, et al., v. YouTube, et al., Case Nos. 07-CV-2203 and 07-CV-3582  
 A. Ignacio Howard, CLR, RPR, CSR No. 9830

From: Steve Chen [REDACTED]  
 Sent: Sunday, June 26, 2005 11:05 AM  
 To: Chad Hurley <chad@youtube.com>  
 Cc: Karim Jawed [REDACTED]  
 Subject: Re: crappy videos

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I think we should reject them. I agree.

I agree with your stance. We have to look at each of them carefully but the uploading of an entire season of shows is just stupid.

-s

On Jun 26, 2005, at 12:03 PM, Chad Hurley wrote:

> Yo guys,  
 >  
 > This user, TheOCRox311, is uploading crappy videos... like the  
 > entire season finale of "Charmed" in 5 parts.  
 >  
 > I really want to start rejecting copyrighted material now. I think  
 > the key to our success is personal videos. If we are going to build  
 > this service, I think we should do it right and start enforcing  
 > this rule. We are not another "StupidVideos" or "Bittorrent".  
 >  
 > Viral videos are fine, like the airplane videos you found on the  
 > web or funny commercials people upload. But when it blatantly comes  
 > from a network or movie, we shouldn't mess around... we are going  
 > to be big and will perhaps someday even offer premium content, so I  
 > don't want to get sued or piss anyone off.  
 >  
 > What do you think? Do you care if I reject all of "TheOCRox311's"  
 > crap right now?  
 >  
 > -Chad  
 >

DATE: 4.22.09 EXHIBIT# 2  
 DEPONENT: Hurley, C

CASE: Viacom, et al., v. YouTube, et al., The Football  
 Association Premier League, et al., v. YouTube, et al.,  
 Case Nos. 07-CV-2203 and 07-CV-3582  
 A. Ignacio Howard, CLR, RPR, CSR No. 9830

**From:** Steve Chen <steve@youtube.com>  
**Sent:** Thursday, September 8, 2005 5:12 AM  
**To:** YouTube Group <all@youtube.com>  
**Subject:** committed changes

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Flagging for Inappropriate/Copyrighted Content:

scroll to bottom -- <http://dev.youtube.com/~steve/watch.php?v=KfTh163I560>

this is hooked up now. if you cancel, it brings you back to the video. if you type in a comment and hit submit, it'll create a row in ut\_complaint and bring you back to the video. still need to create some way for administrators to pull this data out of ut\_complaint but we can do this after the push.

Categories:

Just hooked this up. The feature relies on two tables, UT\_Category and UT\_Category\_Map. UT\_Category defines the categories, most importantly, UT\_Category.id and UT\_Category.name. UT\_Category\_Map is a map between the UT\_Category and the UT\_Video.

This is hooked up in two main places - the watch page and the browse page. The browse page (<http://dev.youtube.com/~steve/browse.php>) lists the categories with a count of all the videos in each category and an image id that we choose. We can add more information on this page to fill it out more (Chad!! Can you clean this up?)

By clicking on the category, you can browse through all the pages of videos that are in the category. Each video can belong in multiple categories.

This is also hooked up on the watch page ([http://dev.youtube.com/~steve/watch.php?v=XX\\_9Krs9T\\_Y](http://dev.youtube.com/~steve/watch.php?v=XX_9Krs9T_Y)). By clicking on the category name, it brings you back to the browse category page.

We will need to split up the work to categorize the videos on the site.

Also, please comment/revise the categories list that I created:

- | Babies and Kids |
- | Cars |
- | Cooking |
- | Events & Weddings |
- | For Sale & Auctions |
- | Funny & Humor |
- | Gadgets |
- | Holidays & Festivities |
- | Instructional & Education |
- | News |
- | People |
- | Pets |
- | Real Estate |
- | Short Movies |
- | Travel & Places |
- | Video Games |

DATE: 4-22-09  
DEPONENT: HURLEY, C. EXHIBIT# 42  
CASE: Viacom, et al., v. YouTube, et al., The Football Association Premier League, et al., v. YouTube, et al., Case Nos. 07-CV-2203 and 07-CV-3582  
A. Ignacio Howard, CLR, RPR, CSR No. 9830

| Videoblogging |

-s

To: "Fricklas, Michael" <Michael.Fricklas@viacom.com>, "rick.cotton@nbcuni.com"  
<rick.cotton@nbcuni.com>  
From: "Kent Walker" [REDACTED]  
Cc:  
Bcc:  
Received Date: 2007-02-17 04:12:10 CST  
Subject: Getting Back re YouTube Content Issues

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Hey guys --

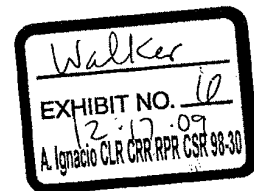
Sorry this is so late -- it's been a busy week/day, but wanted to get you something before the week was out. Thanks very much for your recent letters re YouTube and your copyrighted works. I wanted to share our thoughts on the legal issues raised by your letters, address your description of several violations of YouTube's policy against copyright infringement, and respond to your interest in furthering our discussion of automated tools and other issues. (As we've discussed, I appreciate your continued consideration in keeping our discussion confidential.) Let me start with the legal issues:

Specification of Potentially Infringing Items. Because this question has come up several times, it's probably useful to note at the outset that copyright owners can't indiscriminately take down items merely by providing a list of items that may be infringed. Under the safe harbor of the Digital Millennium Copyright Act (17 U.S.C. Section 512(c)), copyright owners must provide specific identification of any infringing items and their location, not merely a "representative list".

Among other requirements, 17 U.S.C. Section 512(c)(iii) says that a DMCA takedown notice must include, "Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site." Note that this section applies to the copyrighted works that you own, not potentially infringing works. The very next section (Section 512(c)(iii)) deals with potentially infringing works -- a copyright owner must also provide a service provider with "[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material".

In other words, identification of what has been infringed can be accomplished with a "representative list" of the works infringed, but there is no parallel provision for identification of "the material that is claimed to be infringing." Congress specifically stated that a representative list of infringed works suffices; its decision not to state specifically that a representative list of infringing works shows its intent to require that a DMCA notice identify the location of infringing material that the copyright owner wants a service provider to remove.

Financial Benefit. Section 512(c)(1)(B) provides that, in order to take advantage of the 512(c) safe harbor, a service provider cannot "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." The first half of this clause requires a financial benefit "directly attributable to the infringing activity." The legislative history notes that "where the infringer makes the same kind of payment as non-infringing



users of the provider's service," that is not a financial benefit "directly attributable to the infringing activity." And Congress made clear that service providers offering a general-purpose platform can directly receive payment from an infringer and still not be deemed to have received "a financial benefit directly attributable to the infringing activity." The legislative history allows service providers to receive set-up fees, periodic payments, and traffic fees for hosting content that may include infringing material. YouTube does not receive any sort of financial benefit due to infringing content that is different in kind from the any financial benefit it receives due to non-infringing content.

**Right & Ability to Control.** Under the DMCA, even a financial benefit directly attributable to infringing conduct is not necessarily disqualifying unless a service provider has the "right and ability to control" the infringing activity. Just the existence of content on YouTube's system, with YouTube being capable of removing, it is not enough, since that situation is true of every service provider and would render the words surplusage. So a number of courts have simply refused to interpret the "right and ability to control" in section 512(c)(1)(B) that broadly. Reflecting the reasonableness standard embodied in the DMCA's allocation of responsibilities between copyright owners and service providers, the words are better read as saying that a service provider has to have both the legal right and the reasonable ability to control content.

**Repeat Infringer Policy.** Under Section 512(i)(1)(A) of the DMCA, in order to rely on the 512(c) safe harbor, a service provider must have "adopted and reasonably implemented, and inform[] subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." YouTube's "three strikes" policy meets this test by banning users after YouTube receives a third infringement notice regarding a user, regardless of whether a court ultimately finds that the posted content was actually infringing. (We currently deem all URL's processed within any two-hour period to be part of the same "notice.")

This policy actually goes beyond what the law requires. The legislative history is clear that Section 512(i) was not intended to require that the service provider "make difficult judgments as to whether conduct is or is not infringing." YouTube could legally require a court judgment prior to branding its users "infringers." Instead, YouTube regularly terminates user accounts based on mere allegations of infringement. Further, Congress did not intend "repeat" simply to mean "twice." The legislative history states that Section 512(i) is intended to address users who "repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others," and that such users should know "that there is a realistic threat of losing that access." YouTube's repeat infringer policy is completely consistent with these aims.

Finally, the statute requires termination of repeat infringers "in appropriate circumstances" -- the mere fact of being a repeat infringer does not require termination. Under YouTube's policy, users will generally receive two warnings before being terminated. Because not all of YouTube's users are IP lawyers, and some may not fully understand types of postings are legal or illegal under the complexities of copyright law, giving two warnings before taking the severe step of terminating a user seems reasonable.



YouTube's Pre-Existing Tools & Policies. YouTube already has a number of tools and policies designed to protect copyright that go well beyond the requirements of the DMCA. It has an industry-leading content verification tool that helps copyright owners identify content and file DMCA notices. Also, YouTube already implements "automated filtering" to the extent feasible, by making a unique "hash" of every video removed for copyright infringement and blocking any attempts to re-upload of identical video files. (The possible identification and blocking of content that is similar to or overlaps with allegedly infringing content raises lots of complexities and challenges, including important legal and technical issues discussed below.) As you know, YouTube also has a 10-minute limit on user-uploaded videos for the overwhelming majority of user accounts, which helps stop unauthorized uploads of full-length commercial programming.

Other Tools to Locate Potentially Infringing Content. As you recognize, the allocation of responsibility under the DCMA requires copyright owners to handle the identification of infringing materials, while requiring service providers to promptly remove identified infringements. The DCMA doesn't require service providers to use all possible technological measures to police their sites and filter out infringing content, or require YouTube to invest substantial resources to develop, deploy, and distribute to every copyright owner in the world complex audio fingerprinting technology services. Nor has YouTube promised to do so. YouTube announced its commitment to work collaboratively with a handful of partners to develop, test, and launch audio fingerprinting optimized for the context of those specific business partnerships. Deploying audio fingerprinting technologies is a complex undertaking that will necessarily have unintended consequences and overbroad results, as I mentioned above. Moreover, the rapid scaling of any such system introduces significant technical challenges and costs. We are currently working with some of our music label partners to help us develop, test, and ultimately run filtering tools that address their unique needs.

Note that all of the identification technologies you mention - Audible Magic, Gracenote, Auditude - are primarily designed for use with music recordings, and rely on "fingerprinting" of the audio track only. For a wide variety of content, this can result in significant numbers of false positives and false negatives (see, for example, the scenario I noted in the previous paragraph regarding soundtracks that are multiply licensed). We continue to test these technologies and expect to be able to refine our assessment of their feasibility and application in the near future. Filtering for TV content has its own unique challenges, which we are just beginning to understand and address.

Moreover, available tools may be able to identify (with some number of errors) the use of specific content -- but cannot identify whether the use of that content infringes a copyright interest. For example, you can imagine a technological tool that could tell (to some degree of certainty) that a video clip includes some or all of a specific song. But that isn't the same as infringement, since the producer of the video may have licensed that song, or the use of the song (or an excerpt of the song) may be fair use (e.g., the song or excerpt may be newsworthy or the video may be a critical commentary on the song). It is quite common for video to be accompanied by soundtracks that are separately copyrighted. So while the content owner may own the copyright to a video as a whole, someone else could easily own the rights to the soundtrack standing alone. That other rights owner might have licensed that soundtrack to many other video content producers. The audio fingerprint of one video work could thus easily flag

as potentially infringing many other entirely different and entirely lawful works. As a result, we expect that any technological tool that we develop will be both underinclusive (it will not catch all infringing uses of a work) and overinclusive (it will flag material that is not infringing, e.g., because it's licensed or fair use). YouTube may offer the use of such a tool while knowing it may block users from posting some legal content. YouTube is not, however, required by any legal principle to offer this imperfect service.

Going beyond fingerprinting, we have also made private commitments to develop a couple of more-advanced and more-targeted content filtering tools with a handful of partners. One of these tools is an enhanced metadata search tool, which enables partners to define search terms via XML feeds and automatically and regularly receive search results matching the defined search terms. The tool displays thumbnail images of the videos in the search results to enable the copyright owner to determine ownership and submit removal requests with the click of a mouse. This tool is in the early stages of testing, but we would like to talk with you about whether you might like to be among our first partners to help us test and further develop it.

Identified Violations of YouTube's Policies. As discussed, YouTube has traditionally had a policy against the posting of unauthorized copyrighted material. We appreciate your bringing to our attention instances of specific potential violations of those policies, and your concerns about whether some of those policies may need to be even more rigorous. We'll investigate your reports of violations, and keep refining our policies and fine-tuning the enforcement of those policies on the YouTube site.

Further Discussions. Re your request that we expand our existing tools (capable of blocking digitally identical copies) to include tools that may be capable of identifying or blocking audibly similar but digitally dissimilar copies, we are continuing to evaluate those tools and are open to discussing your possible participation in these tests. I will leave it to our business teams to move forward with those discussions, and understand that our representatives will be in touch.

Best,  
-- Kent

Kent Walker  
VP & General Counsel  
Google Inc.  
1600 Amphitheatre Parkway  
Mountain View, California 94043  
[REDACTED]

---

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Subject: RE: YouTube/Viacom  
From: "Cahan, Adam" <EX:/O=VIACOM/OU=MTVUSA/CN=RECIPIENTS/CN=CAHANA>  
To: Salmi, Mika; Rockwell, Nick  
Cc: Date: Mon, 05 Feb 2007 22:21:22 +0000

just wrote him to say how lame they are being.  
The issue they have is that they are claiming use of the tool requires a deal.  
and we are calling bullshit on that one

---

From: Salmi, Mika  
Sent: Mon 2/5/2007 2:14 PM  
To: Cahan, Adam; Rockwell, Nick  
Subject: Re: YouTube/Viacom

Whatever!

----- Original Message -----  
From: Cahan, Adam  
To: Rockwell, Nick  
Cc: Salmi, Mika  
Sent: Mon Feb 05 16:15:36 2007  
Subject: RE: YouTube/Viacom

call just cancelled... he needs to get permission for something.  
and call me one-on-one  
Ha!!!

---

From: Rockwell, Nick  
Sent: Mon 2/5/2007 1:14 PM  
To: Cahan, Adam  
Subject: Re: YouTube/Viacom

Adam - I'm on the call, no one else, is it on? Is there a web demo or something?

----- Original Message -----  
From: Cahan, Adam  
To: 'maxcy@google.com' <maxcy@google.com>; Salmi, Mika; Rockwell, Nick  
Sent: Sat Feb 03 11:47:56 2007  
Subject: Re: YouTube/Viacom

Chris -

I'll have lana send out dial-in number for the call - 1pm pst 4pm est on monday.

Mika/nick we're going to preview the tool youtube are developing to let us crawl the site for our content. Please join the call if you can.

Thanks - adam

----- Original Message -----  
From: Christopher Maxcy <maxcy@google.com>  
To: Cahan, Adam  
Sent: Fri Feb 02 20:04:53 2007

---

Subject: RE: YouTube/Viacom

1pm Monday.

Thx,

C

---

From: Cahan, Adam [mailto:Adam.Cahan@mtvn.com]  
Sent: Friday, February 02, 2007 12:31 PM  
To: maxcy@google.com  
Subject: Re: YouTube/Viacom

Am on a flight. Let's put something definitive down for monday. What works?

----- Original Message -----

From: Chris Maxcy (maxcy) <maxcy@google.com>  
To: Cahan, Adam  
Sent: Fri Feb 02 15:14:13 2007  
Subject: Re: YouTube/Viacom

Hey,

Got caught on another issue can we speak later today?

Thx,

C

-----  
Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Cahan, Adam  
To: Chris Maxcy; chad@youtube.com; chris@youtube.com  
CC: Dooley, Tom; Mark Yoshitake; David Eun; Fricklas, Michael  
Sent: Fri Feb 02 10:34:24 2007  
Subject: RE: YouTube/Viacom

The takedown notice was sent to copyright@youtube.com, Chad was cc'ed. let me know if you would like me to forward a copy to you as well.

Please call me on my cellphone for the tech team

415-250-5787

---

From: Christopher Maxcy [mailto:maxcy@google.com]  
Sent: Friday, February 02, 2007 1:21 PM  
To: Cahan, Adam; chad@youtube.com; chris@youtube.com  
Cc: Dooley, Tom; 'Mark Yoshitake'; 'David Eun'  
Subject: RE: YouTube/Viacom

Adam,

---

I'd be happy to get you set up on the tool in order to get this & any future content down. If we get going quickly Viacom would be the first to use the tool (still in alpha). I assume the 105k takedown went through the proper DMCA channels? Are you available at noon today to discuss with our technical team?

Cheers,

Chris

---

From: Cahan, Adam [mailto:Adam.Cahan@mtvn.com]  
Sent: Friday, February 02, 2007 7:25 AM  
To: chad@youtube.com; chris@youtube.com  
Cc: Dooley, Tom  
Subject: YouTube/Viacom  
Importance: High

Chad/Chris -

This morning we have asked YouTube to take down an additional 105K Viacom/MTV Networks video assets representing 1.15B views. Unfortunate that we could not close the gap here for a partnership.

Going forward we're going to require your support in ensuring our assets do not continue to reappear.

Our current identification tool is insufficient for our needs. We've discussed YouTube's plans for a search tool to enable us to review all current hosted videos. When is that available to us?

Best - Adam

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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,
v.
YOUTUBE INC., YOUTUBE, LLC, and
GOOGLE, INC.,
Defendants.
Case No. 1:07-cv-02103 (LLS)
(Related Case No. 1:07-cv-03582 (LLS))
ECF Case

VIACOM'S COUNTER-STATEMENT IN RESPONSE TO DEFENDANTS' LOCAL
RULE 56.1 STATEMENT IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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**LEGEND**

Pursuant to Local Rule 56.1, Viacom submits the following counter-statement in response to Defendants’ Local Rule 56.1 Statement.

This Counter-Statement contains a two-column table. The left-hand column contains Defendants’ factual assertions and citations to evidence, and the right column contains Viacom’s response to each factual assertion, including evidence and references to evidentiary objections, as appropriate.

As used herein:

“Defs. SUF” refers to Defendants’ Rule 56.1 Statement, filed in support of Defendants’ Motion for Summary Judgment.

“Kohlmann Decl.” refers to the Declaration of Susan J. Kohlmann, filed herewith.

“Hohengarten Decl.” refers to the Declaration of William M. Hohengarten, filed under seal March 5, 2010, in support of Viacom’s Motion for Summary Judgment.

“Solow Decl.” refers to the declaration of Warren Solow, filed under seal March 5, 2010, in support of Viacom’s Motion for Summary Judgment.

“Viacom SUF” refers to Viacom’s Statement of Undisputed Facts In Support of Its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense, filed under seal March 5, 2010. Citations to the “Viacom SUF” incorporate by reference any exhibit cited therein.

“Viacom Evid. Obj.” refers to Viacom’s Evidentiary Objections and Motion to Strike Submitted in Support of Defendants’ Motion for Summary Judgment.

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Exhibits to any declaration are indicated as “[Declarant Name] Ex.” followed by the exhibit number. Citations to paragraphs in any declaration or the Viacom SUF incorporate by reference any exhibit cited therein.



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Asserted Undisputed Fact	Response
<p>1. Plaintiffs in the action <i>Viacom Int'l Inc., et al. v. YouTube, Inc. et al.</i>, Civil No. 07-CV-2103 (LLS), are Viacom International, Inc. (“Viacom”), Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation, and Black Entertainment Television, Inc. Viacom Am. Compl. ¶¶ 15-19.</p>	<p>Uncontroverted.</p>
<p>2. The putative class plaintiffs in the action <i>The Football Association Premier League Limited, et al. v. YouTube, Inc., et al.</i>, Civil No. 07-CV-3582 (LLS), are Bourne Co. (“Bourne”) and its affiliate Murbo Music Publishing, Inc. (“Murbo”); Cherry Lane Music Publishing Company, Inc. (“Cherry Lane”); Cal IV Entertainment, LLC (“Cal IV”); The Rodgers &amp; Hammerstein Organization (“R&amp;H”); Stage Three Music (US), Inc. (“Stage Three”); Edward B. Marks Music Company, Freddy Bienstock Music Company d/b/a Bienstock Publishing Company and Alley Music Corporation (collectively, “Carlin”); X-Ray Dog Music, Inc. (“X-Ray Dog”); and The Music Force Media Group LLC, The Music Force LLC and Sin-Drome Records, Ltd. (collectively, “Music Force”). Second Am. Class Action Compl. ¶¶ 16, 18-20, 24-30, 33.</p>	<p>The alleged fact is not relevant to the <i>Viacom</i> action and to the extent it is disputed it is addressed in the <i>Premier League</i> Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment.</p>
<p>3. Defendants are YouTube, Inc., YouTube, LLC, and Google Inc. (collectively, “YouTube”).</p>	<p>Uncontroverted.</p>
<p>4. YouTube operates a website located on the Internet at <a href="http://www.youtube.com">http://www.youtube.com</a>. Decl. of Michael Solomon in Support of Defs. Mot. for Summary Judgment (“Solomon Decl.”) ¶ 2.</p>	<p>Uncontroverted.</p>
<p>5. YouTube was founded in February 2005 by Chad Hurley, Steve Chen, and Jawed Karim. Decl. of Chad Hurley in Support of Defs. Mot. for Summary Judgment (“Hurley Decl.”) ¶ 2.</p>	<p>Uncontroverted. <i>Accord Viacom</i> SUF ¶ 10.</p>

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Asserted Undisputed Fact	Response
<p>6. The founders created YouTube to provide a platform for users to conveniently share personal videos and to build a community around users posting and viewing such videos. <i>Id.</i> &amp; Exs. 4, 15; Decl. of Andrew H. Schapiro in Support of Defs. Mot. for Summary Judgment (“Schapiro Decl.”) Ex. 158.</p>	<p>Controverted. As shown in Viacom’s moving papers, it is undisputed, based on internal YouTube emails, that YouTube’s co-founders sought to build up YouTube’s user base through infringing content, which they knew from the outset was being uploaded to the site in large quantities. <i>See</i> Viacom SUF ¶¶ 29-132. The founders decided to turn a blind eye to the massive infringement so that they and YouTube could continue to benefit from it. <i>Id.</i></p> <p>The evidence cited by Defendants does nothing to contradict the clear intent shown through the co-founders’ emails.</p> <p>Hurley Decl. ¶ 2 &amp; Schapiro Ex. 158: Chad Hurley’s self-serving and conclusory declaration, dated five years after the events in question, does not even attempt to address or diminish the damning internal emails that show the co-founders’ true intent in operating the YouTube service. Similarly irrelevant is the brief, selective excerpt of Mr. Hurley’s deposition testimony. Mr. Hurley could not recall many of the internal emails that contemporaneously memorialize the co-founders’ intent. <i>See, e.g.</i>, Kohlmann Ex. 88 (C. Hurley Dep.) at 68:17-69:14, 80:23-81:6, 82:14-83:8. He even testified that he could not “even remember what [YouTube’s copyright] policies were,” <i>id.</i> at 57:16-17, 59:23-25, and explained that he could not “speak for” his co-founders in analyzing their statements in an email exchange. <i>See, e.g., id.</i> at 61:16-18 (“I can’t speak for -- for Jawed, you know. I -- I don’t know, you know, the situation that we were in at that time.”).</p> <p>Hurley Ex. 4: Defendants rely on a document containing a quote from Steve Chen stating that YouTube should be a “blend of Flickr and Hot-Or-Not.” Flickr is the very website that Chen later explained to Roelof Botha</p>

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Asserted Undisputed Fact	Response
	<p>contained “truckloads” of copyrighted material. Viacom SUF ¶ 60 (“Again, similar to Flickr . . . you can find truckloads of adult and copyrighted content.”).</p> <p>Hurley Ex. 15: This document shows that, from its earliest days, YouTube had a plan to “possess[] the fastest-growing audience,” amass an “audience reach [that] rivals that of traditional media networks,” and then to “position[] [itself] to syndicate traditional media content (news, entertainment, MTV, etc.)” Hurley Ex. 15, JK00009892, at JK00009894.</p> <p>Further, while Mr. Hurley in his declaration describes an email exchange that purportedly shows the founders’ benign intent, that exchange in fact shows nothing of the sort. <i>See</i> Hurley Decl. ¶ 12 (citing Hurley Ex. 14). Mr. Hurley’s characterization of the exchange is misleading. In the same e-mail exchange, Mr. Chen openly suggested stealing movies directly from another site; as he said, “steal it!” Mr. Hurley responded, “hmm, steal the movies?” Mr. Chen responded “haha ya. or something.” The statements Mr. Hurley quotes in his declaration merely reflect a potential business decision not to steal content from a “stupidvideos.com-type of site” because “sites like this and bigboys.com will never go public.” The founders thus openly considered stealing content based on whether it made business sense -- something entirely consistent with Defendants’ intent to grow the site using infringement. <i>See, e.g.</i>, Viacom SUF ¶¶ 55-58, 84, 85, 86, 91, 99, 104, 128, 152, &amp; 156.</p>

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Asserted Undisputed Fact	Response
<p>7. The founders named the new company “YouTube” to emphasize their goal that the site become a hub of short, personal videos emphasizing “you.” Hurley Decl. ¶ 7; Schapiro Ex. 162.</p>	<p>Controverted. <i>See supra</i> ¶ 6. Indeed, none of the evidence Defendants cite addresses the period from late April 2005 forward. Furthermore, none of the evidence cited supports the contention that users’ videos were supposed to be “short.” To the contrary, Schapiro Ex. 162 and Hurley Ex. 7 both expressly state that “[t]here is no time limit on your video.”</p>
<p>8. The founders chose the slogan “Broadcast Yourself” so that users would “understand what the site is supposed to be when they visit.” Hurley Decl. ¶ 7.</p>	<p>Controverted. <i>See supra</i> ¶¶ 6, 7.</p>
<p>9. YouTube’s message to the public and to its users consistently has been that users should post only videos that they had created themselves or otherwise had the right to post. <i>Id.</i> ¶ 9; Decl. of Zahavah Levine (“Levine Decl.”) ¶¶ 5, 7.</p>	<p>Controverted. Defendants’ message to users and the public, especially throughout 2005 and 2006, has been that YouTube will do nothing to prevent infringement except respond to takedown notices that identify videos specifically by URL. <i>See e.g.</i>, Hohengarten Ex. 356 at ¶¶ 14-18 (publicly filed declaration of YouTube founder Steve Chen); Hohengarten Ex. 28, GOO001-00558783 (email from YouTube to user stating “YouTube does not regularly monitor our members’ videos for instances of copyright videos . . . . We remove videos when we receive a complaint from a rights holder.”); Kohlmann Ex. 10, GOO001-00561391 (similar email to YouTube user); Kohlmann Ex. 11, GOO001-00561394 (same); Kohlmann Ex. 12, GOO001-00607526 (same).</p> <p>This has served as an invitation to millions of users to upload whatever infringing videos they choose, because most content owners will not quickly find the content that infringes their copyrights, a view Steve Chen shared. <i>Accord</i> Viacom SUF ¶ 47 (“what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he get in touch with cnn legal. 2</p>

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Asserted Undisputed Fact	Response
	weeks later, we get a cease & desist letter. we take the video down.”).
10. On April 23, 2005, YouTube launched the “beta” version of the website, describing itself to the public as “the first online community site that allows members to post and share personal videos.” Hurley Decl. ¶¶ 4-5.	Controverted only to the extent that “beta” implies anything less than a fully functional website. YouTube was a fully functional and operable website whose user base was growing significantly each day long before what Defendants claim was the site’s “official” launch. See Hurley Decl. ¶ 23.
11. In April 2005, YouTube’s founders publicized their new website to the blog “Video Link” as follows: “A site called ‘YouTube’ has just launched. It allows members to post and share personal videos they’ve made. The site aims to become a community of digital video authors and their videos.” Schapiro Ex. 163.	Uncontroverted, but immaterial.
12. In April 2005, YouTube ran the following advertisement on the website “Craigslist”: “YouTube.com is a web-based community based around creative and fun videos. We are seeking folks who possess a dash of technical know-how and a truckload of flare.” <i>Id.</i> Ex. 165.	Immaterial, but controverted to the extent that the cited document does not show that the text of Mr. Chen’s email ever actually appeared on the Craigslist website.
13. In early May 2005, YouTube told the online technical publication <i>The Register</i> : “We just launched a new website, www.YouTube.com, based on the idea of video blogging where members would take clips ranging from the mundane to the fascinating. Our hope is that a community would be built around ‘channels’ such as ‘Sports’, ‘Kids’, ‘Vacations’, ‘Cars’, etc.” <i>Id.</i> Ex. 164.	Controverted, but immaterial. The cited evidence is inadmissible hearsay. See Evid. Obj. at 1.
14. On December 14, 2005, YouTube officially launched its website. Hurley Decl. ¶ 23.	Controverted to the extent that “officially launched” is meant to suggest that the YouTube website was not yet fully functioning. See <i>supra</i> ¶ 10.

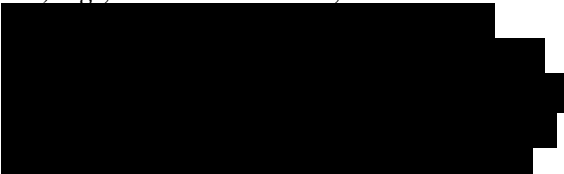
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Asserted Undisputed Fact	Response
<p>15. The YouTube website allows users from around the world to upload videos free of charge to computer servers owned or leased by YouTube. Solomon Decl. ¶ 2.</p>	<p>Uncontroverted.</p>
<p>16. The process of uploading a video to YouTube is initiated by YouTube’s users. <i>Id.</i> ¶ 2.</p>	<p>Controverted to the extent that “initiated by YouTube’s users” obscures the full nature of the uploading process. The process by which videos are uploaded to the YouTube website is a process designed and implemented by YouTube. With respect to what occurs when a user uploads a video using that YouTube-designed process, Viacom does not dispute that a YouTube user chooses which video to upload and uses YouTube’s upload functionality to complete the task, so long as that language accounts for the following: (1) YouTube’s co-founders and employees themselves uploaded videos to YouTube and thus are included within the term “users”; (2) YouTube has solicited users to upload videos; and (3) YouTube has compensated users for advertising run next to videos those users uploaded. <i>See</i> Viacom SUF ¶ 78; Hohengarten Ex. 133, GOO001-02027618; Hohengarten Ex. 182, GOO001-02866493-512; Kohlmann Ex. 75 (Karim Dep.) at 131:12-24; Kohlmann Ex. 88 (Hurley Dep.) at 26:25-28:13; Kohlmann Ex. 51, JK00004875.</p>
<p>17. A user uploads a video by visiting the YouTube website, creating an account, selecting a video file from the user’s computer or other storage device, and then clicking a button to instruct the YouTube system to upload that video. <i>Id.</i> ¶ 3.</p>	<p>Uncontroverted.</p>
<p>18. YouTube does not control which videos a user chooses to upload to the site. <i>Id.</i> ¶¶ 3, 9.</p>	<p>Controverted to the extent that the asserted fact implies that YouTube does not control which videos are uploaded to the site. Although a YouTube user can select a video to upload to YouTube, YouTube determines whether the video will appear on the site. For example, if a user selects a video in a format</p>

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Asserted Undisputed Fact	Response
	that YouTube’s upload process does not support, that video will be rejected. If a user selects a video that is identical to a video that YouTube had previously blocked, that video will be blocked using YouTube’s MD5 Hash technology. <i>See</i> Viacom SUF ¶¶ 274-276. And starting in February 2007, YouTube also began blocking videos for certain content owners using digital fingerprinting. <i>See</i> Viacom SUF ¶¶ 293-298.
19. Uploaded video files are automatically processed by YouTube’s computer systems and converted into file formats that are supported by a variety of viewing devices. <i>Id.</i> ¶¶ 6-7.	Controverted. Viacom denies Defendants’ characterization of YouTube’s file conversion process as “automatic” insofar as it implies that Defendants lack control over the process. Videos uploaded to YouTube are copied and transcoded pursuant to a process that YouTube designed and implemented for its own benefit. <i>See</i> Viacom SUF ¶¶ 315-321. Further, YouTube manually transcoded a variety of videos that already were on YouTube into formats suitable for mobile platforms. <i>See</i> Viacom SUF ¶ 330; Hohengarten Ex. 324 (Doig 30(b)(6) Dep.) at 43:2-48:21.
20. The series of events that is triggered by a user’s decision to upload a video to YouTube and ends with the user’s video being made playable on YouTube is fully automated and does not involve the intervention or active involvement of YouTube personnel. <i>Id.</i> ¶ 2.	Controverted. Viacom denies Defendants’ characterization of YouTube’s file conversion process as “automatic” insofar as it implies that Defendants lack control over the process. <i>See supra</i> ¶ 19.
21. Anyone with Internet access and standard Internet browsing software can view for free the videos that users have stored on YouTube. <i>Id.</i> ¶ 9.	Controverted. The video files that users submit to YouTube’s upload process are stored by YouTube in their original format, and those video files are not viewable by the public. <i>Accord</i> Solomon Decl. ¶¶ 6, 7. Only the transcoded copies that YouTube creates and stores are made accessible to the public on the YouTube website. <i>See</i> Viacom SUF ¶¶ 315-323.
22. A user initiates playback of a YouTube video by selecting the video that the user wishes to view on the YouTube service. <i>Id.</i>	Controverted to the extent that the asserted fact suggests that YouTube does not control which videos the user can select, or that

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Asserted Undisputed Fact	Response
	YouTube is not involved in the user’s selection process. YouTube not only controls the videos that are available for viewing, <i>see supra</i> ¶ 18, but also suggests which videos the user should select for playback. <i>See</i> Viacom SUF ¶¶ 261, 331, 333-336, 338-342.
23. In response to a playback request, the YouTube system automatically streams a copy of the requested video from one of its video servers to the user’s computer or other viewing device. <i>Id.</i>	Controverted to the extent that the word “stream[ing]” is meant to suggest that YouTube does not send a complete copy of the video to the user’s device. YouTube does in fact send a complete, durable copy of the video to the user’s device. <i>See</i> Hohengarten Decl. ¶ 408.
24. In almost all cases, YouTube prohibits users from downloading videos from the site, and does not offer that functionality to users. <i>Id.</i> ¶ 10.	Controverted. It is undisputed that when a user plays a YouTube video, YouTube downloads a complete, durable copy of the video to the user’s device. <i>See supra</i> ¶ 23.
25. Users may search the YouTube website for videos by entering a query of terms the user deems relevant into search fields provided on various pages throughout the site. <i>Id.</i> ¶ 11.	Controverted to the extent that this fact as stated implies that there are no other ways to search YouTube for videos. To the contrary, YouTube provides a variety of ways—including browse and category pages and the suggested search function—for users to search YouTube. <i>See, e.g.,</i> Viacom SUF ¶¶ 261, 331, 333, 338-42.
26. In response to the query, the service automatically returns a results page that shows the user a page or pages containing single, reduced-size images of the video clips that the search algorithm identifies as being responsive to the user’s query, accompanied by a portion of the text the user who uploaded the video provided to describe the video. <i>Id.</i>	Controverted. Viacom denies Defendants’ characterization of YouTube’s search query process as “automatic” insofar as it implies that Defendants lack control over the process. YouTube’s search function is designed and controlled by Defendants. The index of information that the search function draws upon to deliver search results is constantly and actively updated by Defendants. <i>See</i> Viacom SUF ¶¶ 279, 337. Furthermore, the ranking of search results is determined by Defendants. <i>See, e.g.,</i> Kohlmann Ex. 19, GOO001- 



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Asserted Undisputed Fact	Response
	<div style="background-color: black; width: 100%; height: 20px; margin-bottom: 5px;"></div> <p>Further, while it is correct that users who upload videos provide information that YouTube incorporates into the search function, it is YouTube that has required users to provide that information. <i>See</i> Hohengarten Ex. 364 (deposition “cheat sheet” prepared by Cuong Do listing data YouTube maintains regarding videos); Hohengarten Ex. 344 (Liu Dep.) at 63:22-64:23 (describing how YouTube requires the entry of certain information during the upload process).</p>
<p>27. When YouTube officially launched in December 2005, it was receiving approximately 6,000 new video uploads each day, and its users were watching nearly 2.5 million videos each day. Hurley Decl. ¶ 23 &amp; Ex. 28.</p>	<p>Controverted. <i>See supra</i> ¶ 14.</p>
<p>28. By February 2006, the number of daily video uploads to YouTube was 25,000. <i>Id.</i></p>	<p>Uncontroverted.</p>
<p>29. In July 2006, users uploaded to YouTube more than 2.1 million videos to the site, and watched more than 3 billion videos. <i>Id.</i></p>	<p>Uncontroverted.</p>
<p>30. By December 2007, users were uploading to YouTube more than 300,000 videos each day and site traffic had reached 800 million daily video views. <i>Id.</i> ¶ 23.</p>	<p>Uncontroverted.</p>
<p>31. By July 2008, uploads to YouTube had reached more than 400,000 videos per day. <i>Id.</i></p>	<p>Uncontroverted.</p>
<p>32. More than 500 million videos have been posted to YouTube. Levine Decl. ¶ 26.</p>	<p>Controverted. The cited evidence is inadmissible as it contains improper lay opinions and generalized and conclusory statements. <i>See</i> Evid. Obj. at 15-16.</p>

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Asserted Undisputed Fact	Response
<p>33. Less than 1% of the more than 500 million videos posted to YouTube have been the subject of a DMCA takedown notice or an equivalent takedown request sent to YouTube by a copyright owner. <i>Id.</i></p>	<p>Controverted, and in any event immaterial to any issue before the Court. To the extent that the asserted fact is intended to indicate the percentage of videos uploaded to YouTube that infringe copyright, it is contradicted by Defendants’ own contemporaneous internal assessments that the volume of infringement on YouTube ranged from 54% to 80% from YouTube’s launch in mid-2005 through late 2006, when YouTube first began to enter into licensing agreements with content owners. <i>See</i> Viacom SUF ¶¶ 55, 95, 104, 153, 170, 171, 173, 174, 176, 181.</p> <p>The asserted fact is also misleading in that it ignores all evidence of infringement other than what YouTube has considered to be a “DMCA takedown notice or an equivalent takedown request,” under YouTube’s flawed interpretation of the DMCA. For example, Defendants have refused copyright holders’ requests to remove videos unless the copyright holder identifies specific URLs to YouTube. <i>See</i> Hohengarten Ex. 382, GOO001-08050272 (rejecting Mr. Fricklas’s request that YouTube respond to representative lists); <i>see also</i> Kohlmann Ex. 13, GOO001-00707687 (“I will need the specific URL to the video”); Kohlmann Ex. 3, GOO001-00040895 (“Please understand that we need the links to the videos themselves.”), Kohlmann Ex. 31, GOO001-02975607-08 (August 2007 email from Pim Dubbeldam, who “heads up the copyright pod” within YouTube’s content review department, identifying three videos of the same content, only two of which were the subject of a takedown notice, and noting that “[i]n order for the active video to be blocked, we need to receive a separate DMCA request from the content owner”). The asserted fact also ignores the millions of videos that have been blocked or removed from YouTube in 2007-2010 by YouTube’s digital fingerprinting technology. <i>See</i> Kohlmann Ex.</p>

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Asserted Undisputed Fact	Response
	<p>30, G00001-02925393 [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] Kohlmann Ex. 14, G00001-00730943, at G00001-00730974 (“one of the conclusion that I think we should also draw from these tests is that it seems we have a pretty high percentage of our content that will be flagged as copyrighted as soon as we start using fingerprinting technology.”).</p> <p>Furthermore, the asserted fact is not supported by the cited evidence, Levine Decl. ¶ 26. Ms. Levine’s declaration states that “YouTube has removed approximately 4.7 million videos from the service <i>in response to</i> DMCA take down notices and equivalent take down requests.” <i>Id.</i> (emphasis added). Her declaration does not state how many videos were “<i>the subject of a DMCA takedown notice and equivalent takedown requests.</i>” Further, her declaration does not state how many videos were the subject of a DMCA takedown notice, but were not removed, nor does her declaration state how many videos would have been alleged to infringe copyright had YouTube treated such notices as “representative lists.”</p> <p>Finally, the cited evidence is inadmissible as it contains improper lay opinions and generalized and conclusory statements. <i>See Evid. Obj.</i> at 15-16.</p>
<p>34. YouTube hosts hundreds of millions of videos that no one has ever alleged to infringe any copyright. <i>Id.</i></p>	<p>Controverted. The cited evidence is inadmissible as it contains improper lay opinions and generalized and conclusory statements. <i>See Evid. Obj.</i> at 15-16.</p>
<p>35. At present, more than 24 hours of new video is uploaded to YouTube every minute, or almost four years worth of new video every day. Hurley Decl. ¶ 26.</p>	<p>Uncontroverted.</p>

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Asserted Undisputed Fact	Response
<p>36. YouTube does not manually prescreen or review each of the videos uploaded to the service by its users. Levine Decl. ¶ 26; Hurley Decl. ¶ 18; Decl. of Micah Schaffer in Support of Defs. Mot. for Summary Judgment (“Schaffer Decl.”) ¶ 11.</p>	<p>Controverted. YouTube co-founder Jawed Karim testified that YouTube likely did pre-screen videos for some period of time. He also stated that YouTube’s doing so later in YouTube’s existence would have been a “one-line code change.” See Viacom SUF ¶ 280.</p> <p>Levine Decl. ¶ 26 is inadmissible as it contains improper lay opinions and generalized and conclusory statements. See Evid. Obj. at 15-16.</p> <p>Hurley Decl. ¶ 18 is inadmissible as it contains improper lay opinions. See Evid. Obj. at 3.</p>
<p>37. YouTube is a platform for aspiring artists and filmmakers. Decl. of Hunter Walk in Support of Defs. Mot. for Summary Judgment (“Walk Decl.”) ¶ 16.</p>	<p>Uncontroverted, but immaterial to any issues before the Court. YouTube traffic also consisted overwhelmingly of infringement, as quantified by Defendants themselves. See, e.g., Viacom SUF ¶¶ 57, 60, 95, 104, 153, 170, 171, 173, 174.</p>
<p>38. YouTube is a source of political information. <i>Id.</i> ¶¶ 6, 8, 9.</p>	<p>Uncontroverted. See <i>supra</i> ¶ 37.</p>
<p>39. Governments and other official bodies have established channels on, and posted videos to, YouTube, including the Vatican, the Kremlin, the Queen of England, the United Nations, and the governments of Iraq, Israel, South Korea, and Estonia. Walk Decl. ¶ 8.</p>	<p>Uncontroverted. See <i>supra</i> ¶ 37.</p>
<p>40. Colleges and universities have posted videos to YouTube, including tens of thousands of video-lectures on academic subjects. <i>Id.</i> ¶ 12.</p>	<p>Uncontroverted. See <i>supra</i> ¶ 37.</p>
<p>41. Nonprofit organizations have posted videos to YouTube to publicize their causes. <i>Id.</i> ¶¶ 10-11.</p>	<p>Uncontroverted. See <i>supra</i> ¶ 37.</p>
<p>42. Law enforcement officials have posted videos to YouTube seeking the public’s help in identifying criminal suspects. <i>Id.</i> ¶ 19.</p>	<p>Uncontroverted. See <i>supra</i> ¶ 37.</p>

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Asserted Undisputed Fact	Response
<p>43. Movie and television studios (including CBS, NBC/Universal, BBC, and Lions Gate), sports leagues (including the NBA and NHL), record labels (including Universal Music Group, Sony, Warner Music Group, and EMI), and music publishers have entered into content partnership arrangements with YouTube. Decl. of Christopher Maxcy in Support of Defs. Mot. for Summary Judgment (“Maxcy Decl.”) ¶ 9.</p>	<p>Uncontroverted.</p>
<p>44. Viacom executives and employees have uploaded and watched videos on YouTube. Schapiro Ex. 127 (129:21-130:14), Ex. 128 (79:7-80:3, 81:17-24, 83:12-16, 84:14-18), Ex. 129 (215:25-218:8, 224:2-225:13), Ex. 130 (19:10-14, 55:21-24), Ex. 25 (253:10-19), Ex. 112 (16:19-25).</p>	<p>Uncontroverted as to the specific Viacom personnel identified in the cited documents, but immaterial to any issues before the Court.</p>
<p>45. Employees of the putative class plaintiffs have uploaded and watched videos on YouTube. Schapiro Ex. 20 (100:12-103:9), Ex. 78 (235:1-238:7), Ex. 131.</p>	<p>The alleged fact is not relevant to the <i>Viacom</i> action and to the extent it is disputed it is addressed in the <i>Premier League</i> Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment.</p>
<p>46. Viacom considered buying YouTube. <i>See</i> Schapiro Ex. 3 (77:7-15).</p>	<p>Uncontroverted that in or about July 2006, Viacom personnel considered whether an acquisition of YouTube would be desirable and feasible from a financial perspective. <i>See</i> Kohlmann Ex. 61, VIA00613146; Kohlmann Ex. 71 (Freston Dep.) at 72:9-16. After a preliminary evaluation, they concluded that an acquisition could not be justified financially. <i>See</i> Kohlmann Ex. 59, VIA00258309 (Bob Bakish writing to Jason Witt on July 17, 2006, stating that there was “less than one tenth of a percent chance” of going forward with an acquisition); Kohlmann Ex. 85 (Wolf Dep.) at 84:24-87:2 (testifying that “we could [not] build a sufficient business model that would justify an acquisition”).</p> <p>Controverted to the extent that the asserted fact suggests that Viacom personnel conducted</p>

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Asserted Undisputed Fact	Response
	any diligence beyond the above-described activities. Defendants have presented no evidence that they produced any acquisition materials to Viacom or even that Viacom sought due diligence materials, engaged with any legal analysis or prepared a term sheet for a potential acquisition – let alone offered to buy YouTube. Indeed, Viacom made no such offer to acquire YouTube. Kohlmann Ex. 71 (Freston Dep.) at 94:6-8. The asserted fact is immaterial to any issues before the Court.
47. Senior executives at Viacom viewed the prospect of acquiring YouTube as a “transformative acquisition.” <i>Id.</i>	Controverted as misleading. <i>See supra</i> ¶ 46.
48. Beginning with its launch and continuing today, YouTube requires its users to agree to Terms of Service before being permitted to upload a video to the site. Hurley Decl. ¶ 8; Levine Decl. ¶ 6.	Uncontroverted.
49. YouTube’s Terms of Service have always prohibited users from submitting copyrighted material that they are not authorized to upload. Hurley Decl. ¶ 8; Levine Decl. ¶ 6.	Controverted to the extent that the asserted fact implies that the prohibition on infringement in the Terms of Service has been effective in keeping users from uploading infringing material to YouTube. It is undisputed that in 2005 and 2006, YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material. <i>See Viacom SUF</i> ¶¶ 29-132. It is also undisputed that Defendants decided to turn a blind eye toward that infringement so that YouTube’s user base would continue to grow rapidly. <i>Id.</i>
50. Virtually every page of the YouTube website contains a direct link to YouTube’s Terms of Service. <i>Id.</i>	Uncontroverted.
51. Since October 2006, YouTube has displayed “Community Guidelines” on its site instructing users to “respect copyright” and only to “upload videos that you made or that you are authorized to use.” <i>Id.</i> ¶ 7.	Controverted to the extent that the stated fact implies that YouTube has displayed the Community Guidelines to all users, when in fact they are seen only by users who click on the “Community Guidelines” link on the YouTube website. <i>See Kohlmann Decl.</i> at ¶

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Asserted Undisputed Fact	Response
	<p>103.</p> <p>Further controverted to the extent that the asserted fact implies that displaying a link to the Community Guidelines has been effective in keeping users from uploading infringing material to YouTube. The undisputed evidence establishes that YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material, and that YouTube turned a blind eye to that infringement. <i>See supra</i> ¶¶ 37, 49.</p>
<p>52. Since at least March 2006, each time a user seeks to upload a video, YouTube informs its users, via multiple messages displayed in the upload process, that they are prohibited from uploading copyrighted content unless they have the right or authorization to do so. <i>Id.</i> ¶ 8.</p>	<p>Controverted to the extent that the asserted fact implies that these messages have been effective in keeping users from uploading infringing material to YouTube. The undisputed evidence establishes that YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material, and that YouTube turned a blind eye to that infringement. <i>See supra</i> ¶¶ 37, 49.</p>
<p>53. Since at least March 2006, YouTube has provided a “Copyrights Tips” page that gives users guidance on copyright issues and describes the consequences to users of copyright infringement on the site. <i>Id.</i> ¶¶ 9, 15.</p>	<p>Controverted to the extent that the stated fact implies that YouTube has displayed the “Copyright Tips” page to all users. In fact, YouTube only displays the “Copyright Tips” page to those users who see the “Copyright Tips” link on the YouTube website and who choose to click on that link. Kohlmann Decl. ¶ 104.</p> <p>Further controverted to the extent that the asserted fact implies that displaying a link to the Copyright Tips page has been effective in keeping users from uploading infringing material to YouTube. The undisputed evidence establishes that YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material, and that YouTube turned a blind eye to that infringement. <i>See supra</i> ¶¶ 37, 49.</p>

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Asserted Undisputed Fact	Response
54. The Copyrights Tips page links to other pages containing additional information about copyright. <i>Id.</i> ¶ 9.	Uncontroverted.
55. Since at least March 2006, YouTube has required that users submit a valid and working email address to YouTube before uploading any videos. <i>Id.</i> ¶ 11.	Controverted to the extent that the asserted fact implies that requiring users to submit a valid and working email address to YouTube before uploading any videos has been effective in keeping users from uploading infringing material to YouTube. The undisputed evidence establishes that YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material, and that YouTube turned a blind eye to that infringement. <i>See supra</i> ¶¶ 37, 49.
56. Since at least March 2006, YouTube has verified the accuracy of its users’ email addresses to ensure there is a mechanism for warning users of improper use of the YouTube service. <i>Id.</i>	Controverted to the extent that the asserted fact implies that verifying the accuracy of user’s email addresses is effective in keeping users from uploading infringing material to YouTube. The undisputed evidence establishes that YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material, and that YouTube turned a blind eye to that infringement. <i>See supra</i> ¶¶ 37, 49.



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Asserted Undisputed Fact	Response
<p>57. Since March 2006, YouTube has limited the duration of videos uploaded by most users to 10 minutes to prevent users from uploading a video consisting of an entire television show or feature-length film. <i>Id.</i> ¶ 12.</p>	<p>Controverted to the extent that the asserted fact implies that the ten minute limit has been effective in keeping users from uploading infringing material to YouTube. The undisputed evidence establishes that YouTube’s co-founders and other employees knew that YouTube users were uploading massive amounts of infringing material, and that YouTube turned a blind eye to that infringement. <i>See supra</i> ¶ 49. The undisputed evidence also shows that YouTube users have uploaded infringing works longer than ten minutes by chopping them up into several ten minute parts, a process known as serial uploading. YouTube considered taking steps to address this problem but did not do so. <i>See</i> Viacom SUF ¶¶ 109, 125, 131; <i>see also</i> Wilkens Decl. ¶¶ 3, 4(b) (regarding serial uploading of Viacom’s clips in suit).</p> <p>Further controverted to the extent that the asserted fact implies that Defendants imposed the ten minute limit solely to prevent copyright infringement. The ten minute limit provided YouTube with significant cost savings on bandwidth and storage space. <i>See</i> Kohlmann Ex. 68 (Dunton Dep.) at 211:13-23.</p>
<p>58. YouTube has never instructed users to engage in copyright infringement. Hurley Decl. ¶ 20.</p>	<p>Controverted. It is undisputed that YouTube’s co-founders and employees have uploaded infringing videos to YouTube, have shared infringing YouTube videos with others, and have encouraged users to leave infringing videos on YouTube. <i>See</i> Hohengarten Ex. 229, JK00007423 (Karim responding with laughter to clear infringement); Hohengarten Ex. 218, JK00009595 (Chen chastising Karim for “put[ting] up 20 videos of pornography and obviously copyrighted materials and then link[ing] them from the front page”); Hohengarten Ex. 217, JK00006166 (Chen chastising Karim for “blatantly stealing content from other sites and trying to get everyone to see it”); Viacom SUF ¶ 78 (discussing awarding an infringing user with</p>

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Asserted Undisputed Fact	Response
	<p>an iPod Nano); Hohengarten Ex. 197, GOO001-00507331, at 2-3 &amp; at GOO001000507331-32 (Maryrose Dunton starting “5 groups based on copyrighted material”); Hohengarten Ex. 377, GOO001-07169928, at 2 &amp; at GOO001-07169928 (Matt Liu encouraging his friend to leave infringing content on the site); Hohengarten Ex. 32, GOO001-03631419 (<i>Daily Show</i> clip); Hohengarten Ex. 72, GOO001-03383629 (<i>Colbert Report</i> clip); Hohengarten Ex. 73, GOO001-01364485 (<i>South Park</i> clip); Hohengarten Ex. 75, GOO001-00217336 (<i>Daily Show</i> clip); and Hohengarten Ex. 77, GOO001-05154818 (<i>Daily Show</i> clip); Kohlmann Ex. 6, GOO001-00241682 (YouTube engineer Cuong Do urging other YouTube personnel to watch the Lazy Sunday clip, noting that “[t]his was the original upload that made headlines,” and that while it was public “I was too busy keeping the video streaming to our users”); Kohlmann Ex. 33, GOO001-03630988 (Jawed Karim sharing a MTV News clip); Kohlmann Ex. 52, JK00008527 (Jawed Karim sharing a <i>Saturday Night Live</i> clip); Kohlmann Ex. 53, JK00008555 (Jawed Karim sharing a <i>Late Night with Conan O’Brien</i> clip); Kohlmann Ex. 54, JK00008591 (Jawed Karim sharing a <i>Late Night with Conan O’Brien</i> clip); Kohlmann Ex. 55, JK00008595 (Jawed Karim sharing a <i>Late Night with Conan O’Brien</i> clip); Kohlmann Ex. 56, JK00008614 (Jawed Karim sharing a <i>Saturday Night Live</i> clip); Kohlmann Ex. 57, JK00008621 (Jawed Karim sharing a <i>60 Minutes</i> clip); Kohlmann Ex. 58, JK00008631 (Jawed Karim sharing a <i>Daily Show</i> clip).</p> <p>Furthermore, it is undisputed that YouTube encourages users to watch infringing videos through the “related videos” and “suggested search” features, which often direct users to infringing content. <i>See</i> Viacom SUF ¶¶ 332,</p>

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Asserted Undisputed Fact	Response
	335, 339.
59. YouTube has never encouraged users to engage in copyright infringement. <i>Id.</i>	Controverted. <i>See supra</i> ¶ 58.
60. Since September 2005, YouTube has displayed information on its website instructing copyright holders how to provide notice to YouTube’s designated agent of allegedly unauthorized materials uploaded by users. Hurley Decl. ¶ 21; Levine Decl. ¶¶ 15-16.	Uncontroverted but immaterial. Defendants’ DMCA Defense requires Defendants to have a designated agent registered with the Copyright Office. 17 U.S.C. § 512(c)(2). Defendants concede that they did not register an agent with the Copyright Office until October 21, 2005. <i>See</i> Defs. SUF ¶ 61; Hurley Ex. 26.
61. YouTube formally registered its DMCA agent with the Copyright Office in October 2005. Hurley Decl. ¶ 21.	Uncontroverted.
62. YouTube’s DMCA agent’s contact information is accessible through YouTube’s “Copyright Infringement Notification” page. Levine Decl. ¶ 15.	Controverted as to any period of time prior to October 21, 2005, as YouTube did not have a registered DMCA agent at that time. <i>See supra</i> ¶¶ 60-61.
63. Since at least March 2006, a link to the Copyright Infringement Notification page has been included at the bottom of virtually every page of the YouTube website. <i>Id.</i>	Uncontroverted as to March 2006 and later. Controverted prior to March 2006, as Defendants have offered no evidence relevant to that period of time.
64. YouTube removes or disables access to allegedly infringing videos whenever it receives a DMCA-compliant takedown notice. <i>Id.</i> ¶ 19; Schaffer Decl. ¶ 10.	Controverted. Ms. Levine’s testimony covers only the period from March 2006 to the present, while she has been at YouTube. Levine Decl. ¶¶ 19, 4. Furthermore, Mr. Schaffer’s testimony is too general to support the proposition that YouTube has removed or disabled access to every infringing video for which YouTube has received a DMCA-compliant takedown notice. Schaffer Decl. ¶ 10. More importantly, it is undisputed that YouTube has not removed or disabled access to infringing videos identified in “representative lists,” as required by 17 U.S.C. § 512(c)(3)(A)(ii), <i>see supra</i> ¶ 33.

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65. YouTube removes almost all videos identified in DMCA notices within 24 hours of receipt. Levine Decl. ¶ 19.	Controverted. <i>See supra</i> ¶ 64.
66. For approximately 85% of the DMCA notices it has received, YouTube removes the identified videos within a few minutes. <i>Id.</i>	Controverted. <i>See supra</i> ¶ 64.
67. YouTube employs a dedicated team throughout the world to process manually-submitted DMCA notices and to assist copyright holders and users with issues arising from the notice process. <i>Id.</i>	Uncontroverted that Defendants currently employ such a team. Defendants have not proffered any evidence regarding earlier periods.
68. On February 2, 2007, Viacom (through its agent, BayTSP) sent DMCA notices requesting that YouTube remove more than 100,000 videos from the service. Levine Decl. ¶ 20; Schaffer Decl. ¶ 14.	Uncontroverted.
69. YouTube removed virtually all of the videos identified in Viacom’s February 2, 2007 mass takedown notices before the next business day. Levine Decl. ¶ 20; Schaffer Decl. ¶ 14.	Controverted. As noted, YouTube has not removed or disabled access to infringing videos not identified in “representative lists,” as required by 17 U.S.C. § 512(c)(3)(A)(ii), <i>see supra</i> ¶ 33. Indeed, Viacom’s General Counsel demanded that YouTube treat the February 2, 2007 notice as a representative list: “[T]ake down all instances of the copyrighted programming identified in today’s take down notices, whether or not the particular file has been specifically identified in an individual notice. In other words, differing excerpts and full length copies of each of the works identified in a notice must be taken down immediately. . . . [R]emove all infringing Viacom copyrighted content that can reasonably be identified based on the representative lists provided thus far.” Hohengarten Ex. 244, VIA01475466, at VIA01475466-67. Google’s General Counsel refused to remove any content other than the specific URLs listed in Viacom’s notice. <i>See</i> Hohengarten Ex. 382, GOO001-08050272 (“[C]opyright owners must provide specific