

A-701

Case 1:07-cv-02103-LLS Document 285 Filed 05/21/10 Page 24 of 53

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| | identification of any infringing items and their location, not merely a ‘representative list.’”). |
| 70. YouTube’s responsiveness to DMCA takedown requests has drawn praise from content owners. Levine Decl. ¶ 22; Schapiro Ex. 120. | Controverted, to the extent that the asserted fact implies that content owners have not criticized YouTube’s responsiveness to takedown requests. <i>See, e.g.</i> , Hohengarten Ex. 244 (Letter from Viacom General Counsel Michael Fricklas criticizing YouTube’s position “that it has no obligation to implement measures to prevent or reduce the rampant infringement on its site, other than to delete or block access to specific infringing videos identified in notices provided by a rights holder”); Kohlmann Ex. 29, GOO001-02826791, at GOO001-02826794 (Letter from NBC Universal General Counsel Rick Cotton: “For many months, NBCU has been incurring the burden and expense of attempting to locate video clips from copyrighted works owned by NBCU entities and sending ‘takedown notices’ to YouTube to remove from its site thousands of such clips. Yet, in what has become an ‘evergreen’ cycle of infringement, the same content frequently reappears on YouTube’s site almost as quickly as it is removed. . . . Indeed, despite substantial efforts at sending takedown notices on a daily basis, the infringing clips on which NBCU sent takedown notices in January 2007 alone had generated more than 28 million page views on YouTube.”); Kohlmann Ex. 1, GOO001-00005708 (Email from representative of the musical artist Prince, stating: “This list below isn’t even 1/8th of the illegal Prince videos on your site. I suggest YouTube either start policing itself or else face legal ramifications. . . . You cannot expect copyright holders to police your website for you on their time while YouTube gets away with breaking the law repeatedly.”); Kohlmann Ex. 7, GOO001-00448911 (Email from content owner stating: “You were good enough to remove the last bunch of pictures |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| | <p>pirated from us and put up on your site or a site operating through YouTube, and I thank you. However, within a week someone at YouTube has helped themselves to 31 more of our pictures. . . . YouTube’s apparent lack of understanding or respect for copyright law is not my problem. I have neither the time nor the patience to continue policing your site for the illegal use of our property.”). Indeed, in handwritten notes on a printout of a document containing complaints from a content owner, YouTube’s DMCA agent Heather Gillette set out the philosophy that the founders recognized would grow YouTube’s user base the most: “the users [are] violating the law[,] not us.” Kohlmann Ex. 1, GOO001-00005708.</p> <p>Moreover, Levine Decl. ¶ 22 contains inadmissible hearsay. See Evid. Obj. at 14.</p> |
| <p>71. Since at least March 2006, when YouTube has removed a video pursuant to a DMCA notice, YouTube has contacted the user who uploaded the video to apprise that user of the allegation in the notice. Levine Decl. ¶ 23.</p> | <p>Uncontroverted.</p> |
| <p>72. Since at least March 2006, when YouTube has removed a video pursuant to a DMCA notice, YouTube has contacted the user who uploaded the video to remind that user of YouTube’s policy prohibiting the uploading of unauthorized copyrighted material. <i>Id.</i></p> | <p>Uncontroverted.</p> |
| <p>73. Since at least March 2006, when YouTube has removed a video pursuant to a DMCA notice, YouTube has contacted the user who uploaded the video to warn that user that repeated acts of copyright infringement will result in the termination of the user’s YouTube account. <i>Id.</i></p> | <p>Uncontroverted.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>74. Since at least March 2006, when YouTube removes a video pursuant to a DMCA notice, it sends this message to the user who posted the video:</p> <p style="padding-left: 40px;">Repeat incidents of copyright infringement will result in the deletion of your account and all videos uploaded to that account. In order to avoid future strikes against your account, please delete any videos to which you do not own the rights, and refrain from uploading additional videos that infringe on the copyrights of others. For more information about YouTube’s copyright policy, please read the Copyright Tips guide.</p> <p>Levine Decl. ¶ 23 & Ex. 12.</p> | <p>Uncontroverted.</p> |
| <p>75. Since at least March 2006, after an allegedly infringing video is removed from the site, YouTube has posted a notice at the video’s prior location on the site stating that the video is no longer available due to a copyright claim. <i>Id.</i> ¶ 24.</p> | <p>Uncontroverted.</p> |
| <p>76. Since at least October 2005, YouTube has had a policy for terminating the accounts of repeat infringers, which it has posted on its website. Hurley Decl. ¶ 21; Levine Decl. ¶ 27.</p> | <p>Controverted, to the extent that the asserted fact implies that YouTube had adopted a repeat infringer policy prior to October 2005. Defendants have not proffered any evidence regarding the pre-October 2005 period. Further controverted in that Defendants did not begin applying the policy until early 2006. <i>See</i> Kohlmann Ex. 18, GOO001-00830262 (December 28, 2005 email from Steve Chen stating: “ i created a UserAbuse table and it’s being used to track each time the user gets a video dinged (there are two types of dings, one is just rejecting the video but doesn’t increment the three strikes rule, the other one does increment the three strikes rule). the thing is, this part hasn’t been hooked up yet to actually closing the account.”); Hohengarten Ex. 22, GOO001-00762173, at GOO001-</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| | 00762187 (February 17, 2006 YouTube Board presentation, noting that as part of a January 19, 2006 set of site features YouTube released “[a]ccount suspension after 3 video rejections.”). |
| 77. Under YouTube’s repeat-infringer policy, a “strike” is issued to a user when YouTube receives a takedown notice for material that the user has uploaded. Levine Decl. ¶ 27. | <p>Controverted. Defendants have regularly counted multiple infringing clips uploaded by the same user as a single “strike” against that user. Defendants have counted multiple infringing acts by the same user as a single “strike” as a matter of course in two situations: (a) where multiple infringing clips uploaded by the same user are all identified in the same notice of infringement, and (b) where multiple infringing clips uploaded by the same user are identified in different notices of infringement, but those notices are all received by YouTube within the same two-hour period. <i>See, e.g.</i>, Levine Decl. ¶ 28 (“YouTube assesses a single strike per notice, including in circumstances where a DMCA notice identifies more than one allegedly infringing video for the same user”); Hohengarten Decl. Ex. 382, GOO001-08050272 (February 17, 2007 K. Walker email to M. Fricklas, stating: “YouTube’s ‘three strikes’ policy meets this test by banning users after YouTube receives a third infringement notice regarding a user (We currently deem all URL’s processed within any two-hour period to be part of the same ‘notice.’”)).</p> <p>Further, for approximately six months in 2007, Defendants failed to adequately inform users – including content owners – of their repeat infringer policy not to give strikes in response to a CYC block. <i>See infra</i> ¶ 83.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>78. When an account receives three strikes, in virtually all cases YouTube terminates that account. <i>Id.</i></p> | <p>Controverted. YouTube did not begin terminating accounts that received three strikes until at least January 2006. <i>See supra</i> ¶¶ 76-77.</p> <p>Further controverted because Defendants have regularly counted multiple infringing clips uploaded by the same user as a single “strike” against that user, as described at <i>supra</i> ¶ 77.</p> |
| <p>79. When YouTube terminates a user’s account, the account can no longer be used for any purpose on the site. Levine Decl. ¶ 30.</p> | <p>Uncontroverted that this is YouTube’s current practice. With regard to earlier periods, Viacom lacks knowledge to admit or controvert the alleged fact. In any event, the asserted fact is immaterial, because even after YouTube terminates a repeat infringer, the repeat infringer can sign up for a new account merely by using a different email address. <i>See, e.g.,</i> Kohlmann Ex. 80 (Schaffer Dep.) at 127:25-128:17 (testifying that strikes are allocated by email address and that all a user need do to bypass YouTube’s repeat infringer policy is “know to create a new e-mail address”). Opening a new email account is very simple and can be done using Google’s own free email service, Gmail. <i>See supra</i> ¶ 56, <i>infra</i> ¶ 82.</p> |
| <p>80. When YouTube terminates a user’s account, YouTube terminates all other accounts associated with that user’s email address. <i>Id.</i></p> | <p>Uncontroverted.</p> |
| <p>81. When YouTube terminates a user’s account, YouTube removes all of the videos uploaded to the site from the terminated account, including videos that were not subject to any DMCA notice. <i>Id.</i></p> | <p>Uncontroverted.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>82. When YouTube terminates a user’s account, YouTube seeks to prevent the user from subsequently creating another account by recording and blocking the email address associated with the terminated account. <i>Id.</i></p> | <p>Uncontroverted.</p> |
| <p>83. YouTube’s Terms of Service set forth YouTube’s repeat-infringer policy. Levine Decl. Exs. 1, 2.</p> | <p>Controverted for the period prior to December 2005. Defendants have not proffered any Terms of Service for period prior to December 2005. Furthermore, YouTube did not apply its repeat infringer policy by terminating repeat infringers until early 2006. <i>See supra</i> ¶ 76.</p> <p>Further, for approximately six months in 2007, Defendants failed to adequately inform users – including content owners – of their repeat infringer policy. During that period, Defendants secretly implemented a policy of not assigning any copyright strikes to users who uploaded tens of thousands of infringing clips that were blocked by YouTube’s Claim Your Content fingerprinting tool. <i>See, e.g.</i>, Kohlmann Ex. 28, GOO001-02604740, at GOO001-02604741 (March 2007 email chain in which Chastagnol says: “currently we do not give user a strike if content is taken down via CYC”); Kohlmann Ex 49, GOO001-01519246 (June 4, 2007 email from Justin Gupta to Jacob Pruess and others) (“The BBC definitely think that their CYC takedowns are actioning the strikes. . . I’ll hold them at bay until such time that it actually is.”); Kohlmann Ex. 50, GOO001-05611423 (“This is something I would rather not announce to the world.”); Kohlmann Ex. 86 (Chastagnol Dep.) at 97:10-99:15 (testifying that his understanding in March 2007 was that YouTube did not impose strikes for content removed using the CYC tool); Kohlmann Ex. 2, GOO001-00035137 (July 26, 2007 email) (“I understand that we don’t count strikes against users when their videos are taken down through the CYC tool.”).</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>84. YouTube communicates its repeat-infringer policy to its users via its website, including on the “Copyright Tips” page and the “Help” section of the site. <i>Id.</i> ¶ 27.</p> | <p>Uncontroverted that this is YouTube’s current practice. However, for approximately six months in 2007, during which Defendants failed to adequately inform users – including content owners – of their repeat infringer policy not to give strikes in response to a CYC block. <i>See supra</i> ¶ 83.</p> |
| <p>85. Users also are notified of YouTube’s repeat-infringer policy when they receive an email notifying them that a video they uploaded to YouTube has been removed due to alleged copyright infringement. <i>Id.</i> ¶ 23 & Ex. 12.</p> | <p>Uncontroverted that this is YouTube’s current practice. Controverted because for approximately six months in 2007 Defendants secretly implemented a policy of not assigning any copyright strikes to users who uploaded tens of thousands of infringing clips that were blocked by YouTube’s CYC fingerprinting tool. For each such infringing clip that was not counted as a strike, YouTube did not notify the uploading user that a video they uploaded to YouTube was removed due to alleged copyright infringement. <i>See supra</i> ¶ 83.</p> |
| <p>86. Applying its repeat-infringer policy, YouTube has terminated more than 400,000 (of the more than 250,000,000) user accounts based at least in part for copyright strikes. <i>Id.</i> ¶ 31.</p> | <p>Controverted to the extent that the asserted fact is intended to imply that only approximately 400,000 of YouTube’s user accounts have been used to commit copyright infringement. As noted <i>supra</i> ¶ 76, YouTube did not begin applying its repeat infringer policy until January 2006. Even after that time, Defendants have regularly counted multiple infringing clips uploaded by the same user as a single “strike” against that user. <i>Supra</i> ¶ 77. Thus, the number of accounts terminated for repeat infringement is likely substantially lower than the number of accounts that have been used to commit repeat infringement.</p> |
| <p>87. YouTube has received praise from content owners for its efforts to restrict and address copyright infringement by its users. <i>Id.</i> ¶¶ 32-33.</p> | <p>Controverted to the extent that Defendants imply that YouTube’s responsiveness to copyright infringement on its site has been only or even primarily subject to praise. YouTube’s policies with respect to copyright infringement on its site have drawn significant criticism from copyright owners, the media,</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| | <p>and even Google prior to the acquisition. <i>See</i> Viacom SUF ¶¶ 33, 89-91, 100, 122, 140, 142, 144, 145, 151, 152, 153, 157, 164, 165, 209, 225; Kohlmann Ex. 29, GOO001-02826792-98, at GOO001-02826792-98 (letter from NBC Universal Executive VP and General Counsel Richard Cotton).</p> <p>Defendants also rely on inadmissible hearsay to support the alleged fact. <i>See</i> Evid. Obj. at 14.</p> |
| <p>88. In March 2006, YouTube began using MD-5 hash technology to create a digital “fingerprint” of every video that YouTube removes in response to a DMCA takedown notice. <i>Id.</i> ¶ 25; Decl. of David King (“King Decl.”) ¶ 4.</p> | <p>Controverted. MD-5 hash technology does not create a digital fingerprint. Hash-based identification cannot prevent re-upload of the same infringing content to YouTube if the second video clip differs in even the slightest degree (<i>e.g.</i>, in length or resolution) from the first clip that was removed. <i>See</i> Viacom SUF ¶ 275.</p> <p>“Digital fingerprinting” refers to audio fingerprinting or video fingerprinting. <i>See</i> Viacom SUF ¶ 281. YouTube did not employ audio fingerprinting – from a vendor called Audible Magic – until February 2007, and even then provided it only to those content owners who agreed to enter into licensing deals with YouTube. YouTube never employed Audible Magic audio fingerprinting for Viacom. <i>See</i> Viacom SUF ¶¶ 293-296. Furthermore, YouTube did not employ video fingerprinting until late 2007, and did not provide it to Viacom until May 2008. <i>See</i> Viacom SUF ¶ 222; Kohlmann Ex. 5, GOO001-00241143 (showing launch of video fingerprinting for Hearst Argyle, LinTV, and Tribune on October 5, 2007).</p> <p>Further controverted because Levine Decl. ¶ 25 confuses the issues in violation of Fed. R. Evid. 403. <i>See</i> Evid. Obj. at 15.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>89. The MD-5 technology automatically prevents any user from uploading a video file identical to one that had previously been removed in response to a DMCA takedown notice. Levine Decl. ¶ 25.</p> | <p>Controverted. Viacom denies Defendants’ characterization of YouTube’s hash technology as “automatic” insofar as it implies that Defendants lack control over the process. In fact, Defendants determine when and how the hash technology will be employed. Additionally, hash-based identification cannot prevent re-upload of the same infringing content to YouTube if the second video clip differs in even the slightest degree (<i>e.g.</i>, in length or resolution) from the first clip that was removed. <i>See</i> Viacom SUF ¶ 275.</p> |
| <p>90. In March 2006, YouTube launched its Content Verification Program (“CVP”). <i>Id.</i> ¶ 18.</p> | <p>Uncontroverted.</p> |
| <p>91. CVP is open to any copyright owner. <i>Id.</i></p> | <p>Uncontroverted.</p> |
| <p>92. CVP enables copyright owners to locate and flag their videos on YouTube and send DMCA notices electronically. <i>Id.</i></p> | <p>Controverted, to the extent that the asserted fact implies that CVP assists copyright owners in locating infringing content on YouTube. Even when signed up for the CVP program, copyright owners must still use YouTube’s basic search function to attempt to locate infringing content—the same search function that YouTube users use to find videos they want to watch. <i>See</i> Viacom SUF ¶¶ 214, 215.</p> |
| <p>93. More than 3,000 content owners have registered to use CVP. <i>Id.</i> ¶ 18.</p> | <p>Uncontroverted.</p> |
| <p>94. In February 2007, YouTube launched in beta form its Claim Your Content (“CYC”) system. King Decl. ¶¶ 7-8.</p> | <p>Uncontroverted.</p> |
| <p>95. CYC used audio-fingerprinting technology to enable participating rights holders to find videos containing their content that users had uploaded to YouTube. <i>Id.</i> ¶ 7.</p> | <p>Uncontroverted, but Viacom denies any implication that YouTube’s CYC tool was available to Viacom or any other content owner in the absence of a licensing deal. YouTube expressly refused to provide CYC to Viacom in the absence of a licensing deal. <i>See</i> Hohengarten Ex. 382 (February 17, 2007 email Google Vice President and General</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--------------------------|--|
| | <p>Counsel Kent Walker). Defendants did not offer any digital fingerprinting technology to Viacom until May 2008. <i>See</i> Viacom SUF ¶¶ 207-222.</p> <p>That refusal is not called into doubt by the ambiguous statement in King Decl. ¶ 10 that four content owners used YouTube’s CYC tool to block their content from appearing on YouTube. Defendants do not cite and have not produced evidence showing when those four companies began using CYC. The scant evidence Defendants have produced indicates that none of these companies were offered CYC until well after this action was filed.</p> <p>YouTube considered offering █████ access to CYC in March 2007, but did not because “[r]ight now we have not been giving the tool to partners without a revenue share contract in place.” Kohlmann Ex. 21 at GOO001-00943107. █████ was offered CYC in August 2007 in exchange for █████’s agreement to license content for a YouTube “branded channel,” but no agreement was reached. Kohlmann Ex. 41, GOO001-00850320; Kohlmann Ex. 42, GOO001-00850304.</p> <p>█████ licensed content to YouTube on a “branded channel” in June 2007, but in September 2007 YouTube had not agreed to use fingerprinting for █████. Kohlmann Ex. 43, GOO001-04500216; Kohlmann Ex. 44, GOO001-01620064, at GOO001-01620082.</p> <p>There is no evidence that YouTube gave █████ access to CYC for more than a 3-day test period during which YouTube severely capped their CYC usage, explaining: “If they want to use our tools to help them monitor copyright content . . . , they will have to work with us as a partner.” Kohlmann Ex. 45, GOO001-09612404; Kohlmann Ex. 46, GOO001-06072619. YouTube had not agreed</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| | to provide fingerprinting for either as of July 2007. Kohlmann Ex. 46, GOO001-06072619; Kohlmann Ex. 47, GOO001-05944464, GOO001-05944475. |
| 96. Once CYC found a video, a rights holder could apply one of three YouTube policies in response to a match: (1) “block” (<i>i.e.</i> , instruct YouTube to remove the video from YouTube); (2) “track” (<i>i.e.</i> , leave it up on YouTube and receive reports about the video); or (3) “monetize” (<i>i.e.</i> , leave it up on YouTube and share in advertising revenue). <i>Id.</i> ¶ 7. | Uncontroverted, but Viacom denies any implication that YouTube’s CYC tool was available to Viacom or any other content owner in the absence of a licensing deal. <i>See supra</i> ¶ 95. |
| 97. In January 2007, YouTube began full-scale development of a video-based identification technology called “Video ID.” King Decl. ¶ 17. | Uncontroverted. |
| 98. YouTube officially launched Video ID in October 2007. <i>Id.</i> ¶ 18. | Controverted to the extent that the alleged fact implies that Video ID was available to all content owners at that time. Viacom was not given access until May 2008. <i>See Viacom SUF</i> ¶ 222. |
| 99. Between January and October 2007, YouTube had between 15 and 20 engineers and other technical personnel working full or part time on Video ID. <i>Id.</i> ¶ 17. | Uncontroverted. |
| 100. Video ID was the first video-based content identification technology to be deployed on any website dedicated to user-submitted content. <i>Id.</i> ¶ 19; Schapiro Ex. 169 (287:16-288:4). | Controverted. King Decl. ¶ 19 is inadmissible because it is not based on Mr. King’s personal knowledge, and the cited deposition testimony does not support the alleged fact. <i>See Evid. Obj.</i> at 4. |
| 101. In April 2008, YouTube supplemented Video ID by launching an audio-based content identification technology called Audio ID. <i>Id.</i> ¶ 20. | Controverted. The term “launching” is misleading because Defendants developed their own audio fingerprinting technology as early as November 2006, but did not start using it on the YouTube site to prevent infringement of any copyrighted content for over a year. <i>See Viacom SUF</i> ¶ 313. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| 102. YouTube makes Video ID and Audio ID (collectively, “Content ID”) available to content owners to allow them to identify their content on the YouTube website. <i>Id.</i> | Controverted prior to May 2008. <i>See</i> Viacom SUF ¶¶ 216, 222, 287, 293-299; <i>supra</i> ¶ 88; <i>infra</i> ¶¶ 106, 107, 109. Uncontroverted that this is YouTube’s current practice. |
| 103. Content ID works by identifying videos on YouTube that match reference files supplied by participating rights holders. <i>Id.</i> ¶ 23. | Uncontroverted. |
| 104. As of December 2009, right holders had supplied YouTube with approximately 3 million reference files for Content ID. <i>Id.</i> | Uncontroverted. |
| 105. If Content ID identifies a video as matching one of those reference files, the rights holder can block/remove the video, allow the video to appear and share any revenue generated from advertising shown alongside it, or allow the video to appear with no monetization. <i>Id.</i> ¶ 24. | Uncontroverted. |
| 106. Since its launch in October 2007, every video that a user has attempted to post to YouTube has been screened using Content ID. <i>Id.</i> ¶ 26. | Controverted to the extent that the alleged fact implies that “screened using Content ID” means anything more than that uploaded videos were compared to fingerprints of content owned by those content owners permitted to participate in Content ID. Videos were not compared to content owned by content owners, like Viacom, who were not provided access to the tool prior to May 2008. <i>See supra</i> ¶ 102. |
| 107. Content ID scans the back catalogue of videos posted on YouTube. <i>Id.</i> ¶ 27. | Controverted to the extent that the alleged fact implies that “Content ID scans” means anything more than that backlogged videos are compared to fingerprints of content owned by those content owners permitted to participate in Content ID. Videos were not compared to content owned by content owners, like Viacom, who were not provided access to the tool prior to May 2008. <i>See supra</i> ¶ 102. |
| 108. YouTube currently has a team of 40 technical staff working on Content ID. <i>Id.</i> ¶ 28. | Uncontroverted, but immaterial to any issues before the Court. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| 109. YouTube has always made Content ID available to rights holders free of charge. <i>Id.</i> ¶ 22. | Controverted prior to May 2008. Prior to May 2008, Defendants used Audible Magic digital fingerprinting to prevent infringement, but only for those copyright holders who would agree to sign a license agreement. <i>See</i> Viacom SUF ¶¶ 216, 222 287, 293-299. |
| 110. More than 1,000 content owners worldwide use Content ID. <i>Id.</i> ¶ 21. | Uncontroverted but immaterial. |
| 111. Viacom participated in the pre-launch testing of Video ID in mid-2007. <i>Id.</i> ¶¶ 18, 29; Schapiro Ex. 171. | Uncontroverted, but misleading. This testing period, which took place in the summer of 2007, did not involve any protection against infringement on YouTube for any participating content owners. <i>See, e.g.</i> , Kohlmann Ex. 40, GOO001-09603446 (June 15, 2007 email stating “We are on track for opening up the trial to select partners on July 16. Since the press coverage, many companies have voiced interest in being included. Note that this is a test period and that we will not be actively filtering during the trial period”). |
| 112. Viacom signed up to use Video ID in February 2008. King Decl. ¶ 29. | Uncontroverted, but misleading because Defendants did not actually begin protecting Viacom’s content using Video ID until May 2008. <i>See</i> Viacom SUF ¶ 222. |
| 113. Plaintiffs collectively have identified approximately 79,000 video clips that they allege to be infringing on the YouTube service (“clips in suit”). Decl. of Michael Rubin in Support of Defs. Mot. for Summary Judgment (“Rubin Decl.”) ¶¶ 7, 16. That total represents less than .02% of the more than 500 million videos ever uploaded to YouTube. Levine Decl. ¶ 26. | Uncontroverted but misleading and immaterial. Calculating the clips in suit as a percentage of all videos ever uploaded to YouTube is misleading because it does not account for the tens of millions of videos that infringed the copyrights of content owners who are not plaintiffs in the <i>Viacom</i> and <i>Premier League</i> actions, <i>see supra</i> ¶ 33, including videos that were removed from YouTube after receipt of a takedown notice, and videos blocked or removed through YouTube’s CYC tool (which included Audible Magic fingerprinting), and YouTube’s Content ID system (which includes Defendants’ proprietary Video ID and Audio ID fingerprinting systems), <i>see</i> Hohengarten Ex. 388. The numbers are also misleading in that they are heavily weighted toward the period after the <i>Viacom</i> and <i>Premier League</i> lawsuits |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| | were filed. It is undisputed that from April 2005 until the filing of those suits, the infringing content on YouTube accounted for 54 to 80% of all video views on YouTube. <i>See</i> Viacom SUF ¶¶ 55, 95, 104, 153, 170, 171, 173, 174, 176, 181. |
| 114. The majority of Viacom’s clips in suit are under four minutes long. Rubin Decl. ¶ 15. | Uncontroverted but immaterial. |
| 115. Certain of Viacom’s clips in suit are fewer than 10 seconds long. <i>Id.</i> | Controverted. None of Viacom’s clips in suit is shorter than 10 seconds long. Only one clip is 10 seconds long, 97% of Viacom’s clips in suit are over 30 seconds long, and 55% are over three minutes long. The Declaration of Michael Rubin is incorrect in citing two clips as 3 and 5 seconds long, respectively. In fact, those clips are 226 and 288 seconds long, as reflected in data produced by Defendants, and as reflected in copies of the videos themselves that Viacom obtained prior to issuing takedown notices for them. <i>See</i> Wilkens Decl. ¶ 6. |
| 116. The Premier League is suing YouTube over dozens of clips that are under five seconds long, including one that is one second in length. <i>Id.</i> ¶ 16. | 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. |
| 117. Most of the clips in suit were the subject of DMCA takedown notices. Schapiro Exs. 18 (141:10-19; 148:8-18), 17 (186:9-187:7). | Uncontroverted. |
| 118. Some of the putative class plaintiffs’ clips in suit were never the subject of any takedown request prior to being identified as alleged infringements in this case. Schapiro Exs. 20 (94:19-95:6), 21 (26:15-21), 22 (Response 35). | 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. |
| 119. Viacom’s clips in suit were identified from a pool of videos removed pursuant to DMCA takedown notices sent by Viacom. Schapiro Ex. 18 (148:8-18). | Uncontroverted. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>120. All of the clips in suit have been removed from the YouTube website. Levine Decl. ¶ 21.</p> | <p>Uncontroverted.</p> |
| <p>121. Within months of YouTube’s launch, major media companies, including Viacom, used YouTube to promote their content by uploading clips of their movies and television shows to the service. Decl. of Arthur Chan (“Chan Decl.”) ¶¶ 4, 5, 9; Decl. of Daniel Ostrow (“Ostrow Decl.”) ¶¶ 2, 4, 5, 6; Schaffer Decl. ¶ 5; Decl. of Rubin Decl. ¶ 2 & Exs. 1-41.</p> | <p>Controverted. Viacom first uploaded a handful of trailers and other specially chosen marketing clips to YouTube in February 2006, almost a year after YouTube first displayed videos to the public on its website, and after YouTube had gained substantial market power through a strategy of exploiting copyright infringing content, <i>see</i> Viacom SUF ¶¶ 29-132, 140-182. Regarding the activities of other content owners, Plaintiffs lack knowledge to admit or controvert Defendants’ assertion, but note that the purported evidence Defendants cite does not indicate any authorized uploads of clips of movies or television shows before May 2006.</p> <p>Further controverted to the extent that the asserted fact implies that YouTube was less than fully aware that the content at issue that was being uploaded by major media companies and was authorized to be on YouTube. <i>See infra</i> ¶¶ 123, 126.</p> <p>Further the following cited evidence is inadmissible: Chan Decl. ¶¶ 4, 5, 9, <i>see</i> Evid. Obj. at 1-2; Ostrow Decl. ¶¶ 4, 5, 6, <i>see</i> Evid. Obj. at 5-6; Schaffer Decl. ¶ 5, <i>see</i> Evid. Obj. at 9; Rubin Decl. ¶ 2 & Exs. 32-41, <i>see</i> Evid. Obj. at 7.</p> |
| <p>122. Viacom has allowed Viacom content uploaded by other users to remain on YouTube. Schapiro Exs. 4 (194:8-11), 51 (VIA 11787096).</p> | <p>Controverted. Defendants distort the cited evidence to misrepresent decisions to prioritize efforts to take down some content decisions to leave up other content. <i>See infra</i> ¶ 128.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>123. Viacom has uploaded to YouTube thousands of videos to market and promote hundreds of its movies and/or television shows, including many that are works in suit. Rubin Decl. ¶¶ 2, 14, 18 & Exs. 3-31.</p> | <p>Controverted, and immaterial because Defendants were fully aware of Viacom’s uploading activities.</p> <p>Further, Rubin Decl. ¶¶ 2, 18 & Exs. 32-41 contain inadmissible evidence. <i>See Evid Obj.</i> at 7-8.</p> <p>It is undisputed that Viacom uploaded trailers and other carefully selected marketing clips to YouTube in order to drive viewers to watch the full versions of Viacom’s films and television shows in theaters, on television, and on Viacom’s websites. Viacom itself uploaded approximately 600 clips to YouTube up to May 2008 using accounts that Viacom set up with YouTube’s assistance and encouragement. Wilkens Decl. ¶ 19(a). Third-party marketing firms well known to YouTube, working on behalf of Viacom and other media companies, uploaded additional trailers and carefully selected marketing clips to YouTube, again using accounts well known to YouTube. <i>See infra</i> ¶ 124.</p> <p>The asserted fact is immaterial to Defendants’ culpable intent under <i>Grokster</i> and the DMCA. Defendants were aware of the overwhelming majority of Viacom’s activities. <i>See Wilkens Decl.</i> ¶¶ 7-17, 19. The six YouTube account names that Defendants identify as having been used to upload Viacom content, but that had no discernable connection to Viacom, accounted in aggregate for 25 clips. Wilkens Decl. ¶ 19(b). Even assuming that Defendants were confused about whether those clips were authorized by Viacom – an assumption the evidence contradicts, <i>see infra</i> ¶ 125 – that could not plausibly negate Defendants’ intent to infringe, and willful blindness toward the massive infringement occurring on the site.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>124. Viacom has used marketing agents to upload its content to YouTube. Schapiro Exs. 35-44, 45 (28:6-7); Chan. Decl. ¶¶ 3-5; Ostrow Decl. ¶ 5.</p> | <p>Uncontroverted but misleading and in any event immaterial. <i>See supra</i> ¶ 123. The overwhelming majority of uploading activity by third-party marketing companies was done with YouTube’s knowledge and encouragement. <i>See, e.g.</i>, Kohlmann Ex. 67 (T. Donohue Dep.) at 115:9-116:6; Kohlmann Ex. 25, GOO001-02463138 (showing that marketing company Wiredset, at YouTube’s suggestion, created and used “director account”); Rubin Ex. 30 (showing that of approximately 250 clips of Viacom content uploaded by marketing company Fanscape in 2008, all but three were uploaded to four accounts well known to YouTube: “fanscapevideos,” “fanscapevideos4u,” “fanscapevids,” and “fanscapemtv”); Kohlmann Ex. 64, FS043563; Kohlmann Ex. 23, GOO001-01984461, Kohlmann Ex. 24, GOO001-02299635, Kohlmann Ex. 25, GOO001-02302174, Kohlmann Ex. 26, GOO001-02302195 (samples from extensive communications between YouTube and marketing company Palisades Media Group); Kohlmann Exs. 15, GOO001-00744627, Kohlmann Ex. 32, GOO001-03419774-78, Kohlmann Ex. 35, GOO001-04731508 (samples from extensive communications between YouTube and marketing company Total Assault). None of that activity was conducted so as to hide the identity of the marketing company or the content owner from YouTube. <i>See</i> Kohlmann Ex. 67 (T. Donohue Dep.) at 123:9-124:2; Hohengarten Ex. 2, at ¶ 32.</p> <p>Further controverted because the following evidence is inadmissible: Chan Decl. ¶¶ 4, 5, <i>see</i> Evid Obj. at 2; Ostrow Decl. ¶ 5, <i>see</i> Evid. Obj. at 5.</p> |
| <p>125. Viacom has taken steps to conceal that it was the source of certain videos that it uploaded to YouTube for marketing purposes. Chan Decl. ¶¶ 4, 5, 9; Ostrow Decl. ¶¶ 2, 4, 5,</p> | <p>Controverted. <i>See supra</i> ¶ 123. None of the evidence cited by Defendants shows that YouTube was unaware of any of the authorized uploading of Viacom content.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>6; Schapiro Exs. 33, 34, 46, 47 (158:20-22), 48, 49, 50; Rubin Decl. ¶ 5(a)-(f) & Exs. 4, 14, 15, 19, 22, 26.</p> | <p>Indeed, the evidence shows that Viacom informed YouTube regarding the six accounts Defendants portray as “stealth.” <i>See, e.g.</i>, Kohlmann Ex. 84 (Wahtera Dep.) at 32:8-11, 184:16-187:2, Kohlmann Ex. 60, VIA00378149, at VIA00378150, Kohlmann Ex. 63, VIA12603576 (regarding YouTube’s knowledge of “MysticalGirl8” account); Rubin Ex. 10 (regarding YouTube’s knowledge of “demansr” account). Moreover, none of the cited evidence shows an intent to conceal activity from YouTube. Kohlmann Ex. 82 (Teifeld Dep.) at 47:11-48:2; Kohlmann Ex. 84 (Wahtera Dep.) at 150:12-24, 167:7-168:8.</p> |
| <p>126. Other media companies have taken steps to conceal that they were the source of certain videos that they uploaded to YouTube for marketing purposes. Ostrow Decl. ¶ 6; <i>see also</i> Chan Decl. ¶¶ 3, 4, 9, 10; Rubin Decl. ¶ 2 & Exs. 2, 32-41; Schapiro Ex. 28 (GOO001-05161257-58).</p> | <p>Viacom lacks knowledge to admit or controvert this alleged fact, but notes that the alleged fact is unsupported by the cited evidence. The evidence cited shows that other media companies authorized the uploading of their copyrighted content to YouTube, but not that these media companies concealed authorized uploads of their content from YouTube. Indeed, many of the documents cited reflect exactly the opposite: content owners explicitly informed YouTube of authorized uploads. <i>E.g.</i>, Schapiro Ex. 28, GOO001-05161257 (responding to email from marketing company Wiredset regarding YouTube uploads, YouTube employee Julie Supan writes: “Sounds like another [partnership] opp except paid ;)”); Rubin Ex. 32, GOO001-01021878, at GOO001-01021879 (YouTube document stating to content owners: “If you have questions or would like to discuss a custom marketing solution, please contact us and we’ll be glad to assist you”) & at GOO001-01021880 (describing communications between YouTube and media companies regarding authorized uploads); Rubin Ex. 34, GOO001-09595002 (in email message to YouTube employee Heather Gillette, NBC Universal executive writes: “In order to avoid any</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| | <p>confusion or misunderstanding, I wanted to make sure you are aware that NBC is permitting YouTube to host this content . . .”).</p> <p>Further controverted because Rubin Decl. ¶ 2, Ex. 2, and Exs. 32-41, Ostrow Decl. ¶ 6, and Chan Decl. ¶¶ 4 and 9 contain inadmissible evidence. <i>See Evid. Obj.</i> at 2-3, 5, 7.</p> |
| <p>127. YouTube was aware of promotional activities occurring on its service. Schaffer Decl. ¶¶ 7-8; Botha Decl. ¶¶ 11-12; Maxcy Decl. ¶¶ 3-7; Schapiro Ex. 53; Rubin Decl. ¶ 1, Exs. 2, 32-41.</p> | <p>Controverted because Botha Decl. ¶¶ 11-12, Maxcy Decl. ¶¶ 3, 4, and 7, Schapiro Ex. 53, and Rubin Exs. 32-41 contain inadmissible evidence. <i>See Evid. Obj.</i> at 11-12.</p> <p>In particular, Defendants’ reliance on Botha Declaration ¶ 11 is misplaced. Mr. Botha’s testimony that “[v]ery early on, professional content creators began to use YouTube as a promotional outlet” has no basis, as he references only a promotional video that Nike (a shoe and athletic company, not a “professional content creator”) uploaded. Mr. Botha testified in deposition that, other than Nike, he could not recall a single other company using YouTube for promotional purposes in 2005. Kohlmann Ex. 65 (Botha Dep.) at 107:3-7. And, YouTube was aware of Nike’s upload and met with Nike personnel about that specific video. Kohlmann Ex. 65 (Botha Dep.) at 106:13-16.</p> <p>Further, contrary to Defendants’ suggestions, Botha Decl. ¶ 12 (and related ¶ 13) merely confirm Defendants’ Grokster intent to keep infringing content on the site as long as possible to build up the user base. Mr. Botha claims that “YouTube did not know who held the copyright in the Lazy Sunday clip,” Botha Decl. ¶ 13, and that NBCU (the content owner) “chose simply to leave [the clip] on the service.” But Mr. Botha’s declaration, his deposition testimony, and the documentary evidence belie that claim. YouTube did know that NBCU was the content owner. Mr. Botha testifies clearly that “Chad Hurley wrote to</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| | <p>NBC Universal asking whether NBC was aware of the clip” Botha Decl. ¶ 13; <i>see also</i> Kohlmann Ex. 65 (Botha Dep.) at 153:11-12 (“we notified the owners of that show”). Indeed, when Hurley wrote to NBCU, NBCU responded that it believed that the clip was unauthorized but would check further. Hurley Ex. 30. Hurley—illustrating that he understood the benefit of keeping infringing premium content on the site as long as possible—forwarded that response to Chris Maxcy, stating: “this is good. it’s not a yes or a no. we’ll see if they follow up or just ignore the request.” <i>Id.</i> <i>See also</i> Hohengarten Ex. 242, JK00006689 (“what? someone from cnn sees it? he happens to be someone with power?”); Hohengarten Ex. 17, GOO001-00629474 (“next time we have another lazy sunday hit, it would hurt us if the user suddenly removed the video”).</p> |
| <p>128. Viacom has knowingly left up on YouTube thousands of clips containing its content. Schapiro Exs. 57, 62, 75, 76.</p> | <p>Controverted. It is undisputed that Viacom did not grant YouTube an express or implied license to display user uploads of its copyrighted works. <i>See</i> Viacom Opp. at 57-62. From October 2006 through January 2007, while negotiating with Defendants regarding a licensing deal, Viacom enforced its rights only for the most egregious instances of infringement, and the documents Defendants cite show that Viacom worked with its takedown agent BayTSP to implement its enforcement priorities.</p> <p>BayTSP thus began by issuing takedown notices for full episodes of Viacom television shows, which would not have been covered by the license Viacom was seeking, and subsequently also began taking down clips that were more than several minutes in length. Kohlmann Ex. 73 (Hallie Dep.) at 53:14-54:25; Kohlmann Ex. 66 (Cahan Dep.) at 216:14-217:5. Given the massive volume and scope of infringement of Viacom content on YouTube, there was a “ramp up” period as</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| | <p>BayTSP gained more experience and hired and trained more employees. Kohlmann Ex. 73 (Hallie Dep.) at 109:7-17, 118:6-17, 183:24-184:5, 194:13-195:3; Kohlmann Ex. 81 (Solow Dep.) at 113:12-114:5, 341:12-23; Kohlmann Ex. 66 (Cahan Dep.) at 225:10-23.</p> <p>As negotiations progressed, Viacom continued to expand its efforts to identify infringing content on YouTube, but generally abstained from issuing takedown notices in the expectation that Viacom’s infringement claims would be settled as part of an overall licensing deal. <i>See</i> Kohlmann Ex. 72 (Fricklas Dep.) at 25:5-18; Kohlmann Ex. 81 (Solow Dep.) at 148:23-149:22, 196:9-199:11, 206:21-207:10, 226:8-227:17; Kohlmann Ex. 74 (Ishikawa Dep.) at 112:13-113:18, 228:3-229:13. When negotiations reached an impasse, on February 2, 2007, Viacom sent Defendants a takedown notice for all of the infringing content that Viacom had identified on YouTube. Viacom <i>SUF</i> ¶ 210.</p> |
| <p>129. YouTube gave instructions to its agent, BayTSP, about which clips to take down from YouTube and which clips to leave up on YouTube. <i>Id.</i> Exs. 11 (115:6-118:1), 54 (BAYTSP 001093412), 55 (BAYTSP 003724704), 56 (214:25-215:6), 57 (BAYTSP 001125605-08), 59, 60, 63-64, 65 (BAYTSP 003718201).</p> | <p>Viacom assumes that Defendants intend to state that “Viacom gave instructions to its agent, BayTSP,” not that YouTube gave such instructions. Subject to that assumption, Plaintiffs respond:</p> <p>Regarding “which clips to take down from YouTube,” uncontroverted.</p> <p>Regarding “which clips to leave up on YouTube,” controverted. <i>See supra</i> ¶¶ 122, 128.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| 130. Viacom did not share with YouTube the takedown instructions it provided to BayTSP. <i>Id.</i> Ex. 11 (118:10-19). | Uncontroverted, but immaterial. Viacom’s instructions to BayTSP did not alter the fact that user-uploaded clips of Viacom’s content were unauthorized and infringed Viacom’s copyrights. <i>See supra</i> ¶¶ 122, 128-29. Moreover, there was no reason for Viacom to share its instructions to BayTSP with YouTube, given YouTube’s refusal to work with Viacom to prevent infringement unless the parties reached a licensing deal. <i>See</i> Viacom SUF ¶¶ 209-220. |
| 131. Through at least October 2006, Viacom had an internal policy of declining to issue takedown notices for user-submitted clips on YouTube containing MTV Networks (“MTVN”) content that were less than five minutes long. <i>Id.</i> Exs. 59, 60. | Controverted. <i>See supra</i> ¶¶ 128-130. |
| 132. In October 2006, Viacom told BayTSP to leave up on YouTube any clips containing MTVN content that were shorter than 2.5 minutes in length, regardless of who had posted them. <i>Id.</i> Ex. 54. | Controverted. <i>See supra</i> ¶¶ 128-130. |
| 133. Later in October 2006, Viacom told BayTSP that all videos containing MTVN content should be left up on YouTube unless the videos were “full episodes.” <i>Id.</i> Exs. 55 (BAYTSP 003724704), 56 (214:25-215:6). | Controverted. <i>See supra</i> ¶¶ 128-130. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>134. Viacom instructed BayTSP to leave up on YouTube “full episodes” of certain of its programs (some of which are works in suit). <i>Id.</i> Exs. 11 (115:6-118:1), Ex. 57 (BAYTSP 001125605-08).</p> | <p>Controverted as well as immaterial. As discussed in detail earlier, <i>see supra</i> ¶ 128, Viacom specified the content BayTSP should identify and take down, but did not explicitly or implicitly authorize the display of other content on the YouTube site. Furthermore, the evidence Defendants cite does not support the proposition that Viacom asked BayTSP to monitor YouTube for its programs but leave up full episodes of those programs; indeed, it shows exactly the opposite. <i>See</i> Schapiro Ex. 11 (Nieman Dep.) at 117:22-23 (as of November 6, 2006, taking down “full assets is the rule for the YouTube page”); Schapiro Ex. 57, BAYTSP 001125563, at BAYTSP 001125605 (indicating that as of November 6, 2006 BayTSP was instructed to take down full episodes of listed shows).</p> |
| <p>135. Viacom has stated publicly that it was choosing to allow some of its content to remain on YouTube. <i>Id.</i> Ex. 77.</p> | <p>Controverted. As discussed in detail above, <i>see supra</i> ¶ 128, Defendants falsely portray Viacom’s decision to prioritize the removal of some infringing content as implying authorization to display other infringing content.</p> <p>Additionally, the fact is unsupported by admissible evidence. The only reference to a public statement in Schapiro Ex. 77, an email exchange between Viacom employees Michele Ganeless and Jason Witt, is quoted from an unidentified news report, which is inadmissible hearsay not falling within any exception. <i>See</i> Evid. Obj. at 1.</p> |
| <p>136. The putative class plaintiffs have licensed their content to appear on YouTube, including Rodgers & Hammerstein (“R&H”), which has issued numerous licenses that allow licensees to post R&H musical compositions on the Internet (including on YouTube). <i>Id.</i> Exs. 22 (Responses 26-29), 78 (132:24-135:13), 79 (29:22-30:22, 31:6-32:12).</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> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| 137. Cal IV has licensed its musical compositions, including certain works that the clips in suit are alleged to have infringed (“works in suit”), for general dissemination on the Internet. <i>Id.</i> Ex. 81. | 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. |
| 138. Cal IV has authorized certain of its works in suit to appear on YouTube for promotional purposes. <i>Id.</i> Ex. 82. | 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. |
| 139. Stage Three has issued licenses allowing its musical compositions, including works in suit, to appear on YouTube. <i>Id.</i> Ex. 83 (Response 17, 19). | 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. |
| 140. Cherry Lane has authorized its musical compositions, including works in suit, to be posted to YouTube. <i>Id.</i> Exs. 86 (Response 17), 87. | 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. |
| 141. Tur, Bourne, Carlin, and X-RAY DOG have licensed third parties to put their content, including works in suit, on YouTube. <i>Id.</i> Exs. 88; 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93. | 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. |
| 142. FFT and Music Force have posted their content on YouTube or authorized others to do so. <i>Id.</i> Exs. 94 (188:5-197:24), 95-97, 98 (Responses 30, 40, 41, 44), 99. | 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. |
| 143. Certain of the soccer clubs that are members of and have ownership interests in the Premier League have created official YouTube “channels” to which they have uploaded videos, including footage of matches. <i>Id.</i> Exs. 17 (276:9-297:7, 100, 101). | 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. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| 144. Certain of the putative class plaintiffs' content, including certain of their works in suit, are co-owned by other parties. <i>Id.</i> Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33), 104 (48:16-49:12). | 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. |
| 145. Viacom has sent DMCA takedown notices for videos that Viacom itself uploaded or otherwise authorized to appear on YouTube. Rubin Decl. ¶ 3 & Exs. 42-68 (retracted takedowns); Schaffer Decl. ¶¶ 15-18; Schapiro Exs. 149-150. | Controverted, as Schaffer Decl. ¶¶ 15-18 contain inadmissible evidence. <i>See</i> Evid. Obj. at 8-10. However, the alleged fact is immaterial to any issue before the Court. Any errors Viacom made in seeking the removal of infringing videos taken from its movies and television programs displayed by YouTube are irrelevant to YouTube's culpable intent under <i>Grokster</i> and the DMCA. Furthermore, the misidentifications Defendants cite in this fact comprise less than 0.05% of the takedown notices Viacom sent. <i>Compare</i> Defendants' cited evidence (purporting to show fewer than 50 inadvertent takedowns of authorized content) with Viacom SUF ¶ 210 (Viacom requested that Defendants remove over 100,000 videos on February 2, 2007 alone). |
| 146. Viacom has sent DMCA takedown notices to YouTube that resulted in the termination of Viacom's own YouTube accounts. Schaffer Decl. ¶¶ 15-16 & Ex. 4; Rubin Decl. ¶ 3 & Exs. 42, 56-67. | Controverted but immaterial to any issue before the Court. <i>See supra</i> ¶ 145. Viacom quickly worked with YouTube to rectify these mistakes. <i>See</i> Kohlmann Ex. 67 (Donohue Dep.) at 122:16-123:8; Kohlmann Ex. 87 (Hurwitz Dep.) at 78:12-80:15; Kohlmann Ex. 69 (Eddow Dep.) at 124:25-125:16; Kohlmann Ex. 83 (Tipton Dep.) at 175:22-176:2. Further, Schaffer Decl. ¶ 15 is inadmissible as improper lay opinion and contains inadmissible generalized and conclusory statements. <i>See</i> Evid. Obj. at 10. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>147. Viacom has requested the takedown of clips that other content owners had authorized to be on YouTube. Schaffer Decl. ¶ 17 & Exs. 5-7.</p> | <p>Controverted, as the cited evidence is inadmissible as hearsay. <i>See</i> Evid. Obj at 8. <i>See supra</i> ¶ 145. Further, the alleged fact is immaterial to any issue before the Court. The small number of errors Viacom made in seeking the removal of clips that other content owners had authorized to be on YouTube were regrettable, but were all but inevitable given the massive scale of copyright infringement on the YouTube site. <i>See</i> Kohlmann Ex. 81 (Solow Dep.) at 252:2-18; Kohlmann Ex. 73 (Hallie Dep.) at 184:17-25. Viacom worked quickly to rectify the errors. <i>See</i> Kohlmann Ex. 67 (Donohue Dep.) at 122:16-123:8; Kohlmann Ex. 79 (Nieman Dep.) at 270:17-272:2.</p> |
| <p>148. Viacom engaged in a “multi-step procedure designed to accurately identify” the clips in suit. Schapiro Decl. Ex. 178.</p> | <p>Uncontroverted, but immaterial to any issue before the Court.</p> |
| <p>149. Dozens of Viacom’s clips in suit were uploaded by Viacom. Rubin Decl. ¶ 9.</p> | <p>Controverted. The alleged fact is not supported by the cited evidence. The cited paragraph of Mr. Rubin’s declaration addresses clips that Viacom has already <i>withdrawn</i> as clips in suit, with permission of the Court. <i>See</i> Order Denying Partial Judgment, Dec. 18, 2009 (dkt. no. 162); Letter from Defs. Requesting Partial Judgment as to Withdrawn Clips, Dec. 1, 2009 (dkt. no. 163).</p> |
| <p>150. In October 2009, after completing a “quality check” of the clips in suit, Viacom sought to withdraw 241 clips in suit, more than 100 of which Viacom had uploaded to YouTube. Rubin Decl. ¶ 9 & Exs. 119-120.</p> | <p>Uncontroverted, but immaterial. These clips have already been withdrawn with permission of the Court. <i>See supra</i> ¶ 149.</p> |
| <p>151. On February 26, 2010 Viacom requested dismissal with prejudice of the 241 clips that it had originally sought to withdraw, plus an additional 193 clips, six of which were uploaded by Viacom’s marketing agent, WiredSet. Rubin Decl. ¶¶ 12-13 & Exs. 122-123.</p> | <p>Uncontroverted, but misleading. <i>See supra</i> ¶¶ 149-50.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| 152. Following Viacom's request for dismissal with prejudice of 434 clips on February 26, 2010, there remain clips in suit that Viacom had authorized to appear on YouTube. Rubin Decl. ¶ 14 & Ex. 128. | Uncontroverted but misleading. The five clips Defendants reference make up only 0.005 percent of the total clips in suit, and will be withdrawn by Viacom. |
| 153. The putative class plaintiffs have sent DMCA takedown notices to YouTube that they eventually retracted because of claims by other rights holders. Schapiro Exs. 103 (Response 23), 154, 155 (68:9-72:14), 156 (ST00105023-26), 102 (151:21-154:17). | 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. |
| 154. Cal IV withdrew a DMCA takedown notice it had sent to YouTube after another rights holder filed a counter-notice. <i>Id.</i> Exs. 154, 103 (Response 23), 155 (68:9-72:14). | 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. |
| 155. Stage Three withdrew a DMCA takedown notice after one of its licensees informed Stage Three that it was authorized to post the clip on YouTube. <i>Id.</i> Exs. 102 (151:21-154:17), 156. | 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. |
| 156. Certain of the putative class plaintiffs rely on a global network of subpublishers to license their content. <i>Id.</i> Exs. 79 (100:7-15), 92 (150:13-22, 102 (61:25-63:22), 152 (20:15-22), 117 (153:15-154:10). | 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. |
| 157. Plaintiff X-RAY DOG could not immediately determine whether a clip posted to YouTube that contained its content was or was not authorized to be there. <i>Id.</i> Ex. 92 (158:11-160:7) | 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. |
| 158. Plaintiff R&H could not immediately determine whether a clip posted to YouTube that contained its content was or was not authorized to be there. <i>Id.</i> Ex. 79 (13:23-18:20; 114:3-14). | 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. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| 159. Plaintiff Stage Three has retained professional musicologists to determine whether certain YouTube clips contain content that was copied from one of its musical compositions. <i>Id.</i> Exs. 85 (219:0-220:11), 102 (171:23-172:21), 157. | 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. |
| 160. YouTube is a free service. Hurley Decl. ¶ 2. | Uncontroverted but immaterial to any issues before the Court. Although YouTube does not charge users, the undisputed evidence clearly shows that YouTube receives and has received a direct financial benefit from the presence of infringing content on its site by attracting more users and more advertising revenue. <i>See Viacom Opening Mem.</i> at 30-32. |
| 161. YouTube does not charge a subscription fee and does not charge users to upload or to view video clips. <i>Id.</i> | Uncontroverted but immaterial to any issues before the Court. <i>See supra</i> ¶ 160. |
| 162. YouTube generates revenue from advertising. Reider Decl. ¶ 5. | Uncontroverted. <i>Accord Viacom SUF</i> ¶¶ 236, 238-240, 256, 257. |
| 163. YouTube's advertising offerings are consistent with prevailing industry standards. Reider Decl. ¶ 12. | Controverted. Reider Decl. ¶ 12 contains inadmissible improper lay opinion and generalized and conclusory statements. <i>See Evid. Obj.</i> at 13-14. |
| 164. Between 2006 and 2009, YouTube entered into thousands of direct partnership agreements that provide for YouTube to run advertising against videos claimed by those owners and to share the revenue from that advertising. Maxcy Decl. ¶ 9-10. | Uncontroverted but misleading to the extent the alleged fact implies that Defendants entered into partnership agreements before late 2006. <i>See Viacom SUF</i> ¶¶ 95, 104, 171, 173, 174, 181. |
| 165. YouTube's revenue-sharing deals generated approximately ████████ of YouTube's overall revenue between 2007 and 2009. Reider Decl. ¶ 5. | Uncontroverted but immaterial. |
| 166. Most of YouTube's other revenue comes from advertisements that run on the YouTube homepage and on the pages that list the results of users' search queries. <i>Id.</i> ¶ 5. | Controverted. Prior to January 2007 YouTube earned advertising revenue by displaying ads on all watch pages, including the watch pages for infringing content. <i>See Viacom SUF</i> ¶¶ 247-249. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>167. YouTube does not seek to earn revenue from users’ potentially infringing activities. <i>Id.</i> ¶ 11.</p> | <p>Controverted. It is undisputed that Defendants sought to build up YouTube’s user base through massive copyright infringement and then monetize that user base through advertising. <i>See</i> Viacom SUF ¶¶ 230-266.</p> <p>Further, Reider Decl. ¶ 11 is inadmissible because it is not based on personal knowledge and contains legal conclusions. <i>See</i> Evid. Obj. at 13.</p> |
| <p>168. None of YouTube’s advertising offerings in any way favors videos that may not have been authorized to appear on YouTube over authorized videos. <i>Id.</i> ¶ 11.</p> | <p>Controverted. Reider Decl. ¶ 11 is inadmissible because it is not based on personal knowledge and contains legal conclusions. <i>See</i> Evid. Obj. at 13.</p> <p>However, the alleged fact is immaterial to any issue before this Court. Viacom denies any inference that Defendants did not receive a direct financial benefit because they were not paid more for ads linked to infringing material. It is undisputed that Defendants have earned advertising revenue from ads displayed on watch pages for infringing videos, on search pages displaying infringing videos as search results, and on upload pages where users upload infringing content. <i>See</i> Viacom SUF ¶¶ 247-249, 258, 259, 262.</p> |
| <p>169. Most of the nation’s top 100 advertisers purchase advertising on YouTube. <i>Id.</i> ¶ 4.</p> | <p>Uncontroverted that this is currently the case but immaterial to any issues before the Court.</p> |
| <p>170. Large media companies run advertisements on YouTube. <i>Id.</i> ¶2.</p> | <p>Uncontroverted that this is currently the case but immaterial to any issues before the Court.</p> |
| <p>171. Viacom has spent more than one million dollars advertising on YouTube. <i>Id.</i> ¶ 4.</p> | <p>Uncontroverted but immaterial to any issues before the Court.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

Respectfully submitted,

By: _____/s/_____

Stuart J. Baskin (No. SB-9936)
John Gueli (No. JG-8427)
Kirsten Nelson Cunha (No. KN-0283)
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

By: _____/s/_____

Paul M. Smith (No. PS-2362)
William M. Hohengarten (No. WH-5233)
Scott B. Wilkens (*pro hac vice*)
Matthew S. Hellman (*pro hac vice*)
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Susan J. Kohlmann (No. SK-1855)
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 891-1690
Facsimile: (212) 891-1699

Subject to Protective Order – HIGHLY CONFIDENTIAL

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 SUPPLEMENTAL COUNTER-STATEMENT IN RESPONSE TO FACTS
ASSERTED IN DEFENDANTS’ SUMMARY JUDGMENT MEMORANDUM OF LAW
BUT OMITTED FROM DEFENDANTS’ LOCAL RULE 56.1 STATEMENT

Stuart J. Baskin (No. SB-9936)
John Gueli (No. JG-8427)
Kirsten Nelson Cunha (No. KN-0283)
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

Paul M. Smith (No. PS-2362)
William M. Hohengarten (No. WH-5233)
Scott B. Wilkens (pro hac vice)
Matthew S. Hellman (pro hac vice)
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Susan J. Kohlmann (No. SK-1855)
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 891-1690
Facsimile: (212) 891-1699

Attorneys for Plaintiffs

Subject to Protective Order – HIGHLY CONFIDENTIAL

LEGEND

Pursuant to Local Rule 56.1, Viacom submits this Counter-Statement in response to factual allegations that Defendants made in their Motion for Summary Judgment but omitted from their Local Rule 56.1 Statement.¹

This Counter-Statement responds to factual allegations that Defendants made in their Motion for Summary Judgment but omitted from their Local Rule 56.1 Statement. Because Defendants omitted these allegations from their Local Rule 56.1 Statement, they have failed to identify them as undisputed and material to summary judgment. Consequently, the Court should disregard the omitted allegations. *See Pharm., Inc. v. Am. Pharm. Partners, Inc.*, 511 F. Supp. 2d 324, 332 (E.D.N.Y. 2007) (“Pursuant to Local Rule 56.1, the movant is required to include not just some but all of the facts material to its motion that movant contends are undisputed, properly supported by citation to evidence”); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73-74 (2d Cir. 2001) (“The purpose of Local Rule 56.1 is to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties.”). To the extent that the Court nonetheless entertains these factual assertions in ruling on Defendants’ summary judgment motion, Viacom submits responses in this Counter-Statement. 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.

¹ Viacom also incorporates by reference the facts included its own Local Rule 56.1 Statement, which demonstrate not only that Defendants’ asserted facts are disputed but that the material facts supporting Viacom’s motion for summary judgment are undisputed.

Subject to Protective Order – HIGHLY CONFIDENTIAL

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.

“Resp. to Defs. SUF” refers to Viacom’s Counter-Statement in Response to Defendants’ Local Rule 56.1 Statement in Support of Defendants’ Motion for Summary Judgment, filed herewith.

“Wilkins Decl.” refers to the Declaration of Scott B. Wilkins, filed herewith.

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.

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.1. YouTube was named Time Magazine’s “Invention of the Year” for 2006.</p> <p>Defs. Opening Mem. at p. 4 (citing Schapiro Ex. 1).</p> | <p>Uncontroverted but immaterial to any issues before the Court.</p> |
| <p>1.2. In November of that year [2006] Google acquired YouTube.</p> <p>Defs. Opening Mem. at p. 4.</p> | <p>Uncontroverted. <i>Accord</i> Viacom SUF ¶¶ 16, 17.</p> |
| <p>1.3. Although it only scratches the surface, a short video called “This is YouTube” . . . provides a useful introduction to the array of creative and inspiring material found on YouTube.</p> <p>Defs. Opening Mem. at p. 5 (citing Schapiro Ex. 2).</p> | <p>Controverted. Contrary to the portrayal in this self-serving, highly selective video created by Defendants for purposes of this litigation, the undisputed evidence shows that YouTube has hosted a vast multitude of infringing content. <i>See, e.g.,</i> Viacom SUF ¶¶ 193, 195, 215, 292.</p> |
| <p>1.4. YouTube’s users have filled the service with personal videos of endless variety: from amateur dance and comedy routines to raw video footage taken on the streets of Tehran as the Iranian government clashed with students; from clips of cats playing the piano to instructional videos teaching people how to fix a leaky faucet or bake a chocolate cake.</p> <p>Defs. Opening Mem. at pp. 5-6 (citing Walk Decl. ¶¶ 9, 14, 20).</p> | <p>Controverted, but immaterial to any issues before the Court. <i>See supra</i> ¶ 1.3. Further, Walk Decl. ¶ 9 contains inadmissible generalized and conclusory statements. <i>See</i> Evid. Obj. at 6.</p> |
| <p>1.5. [D]uring the 2008 election, all the major candidates for President posted videos to YouTube.</p> <p>Defs. Opening Mem. at p. 6 (citing Walk Decl. ¶ 6).</p> | <p>Uncontroverted.</p> |
| <p>1.6. [I]n two of the 2008 presidential debates, Americans were able to pose questions directly to the candidates through videos uploaded to YouTube.</p> <p>Defs. Opening Mem. at p. 6 (citing Walk Decl. ¶ 6).</p> | <p>Uncontroverted.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.7. [T]he White House posts a weekly video address on YouTube, and the President recently sat down for an interview in which he answered questions from ordinary people submitted through YouTube, an event the <i>New York Times</i> described as “the 21st century equivalent of Roosevelt’s fireside chats.”</p> <p>Defs. Opening Mem. at p. 6 (citing Walk Decl. ¶ 6).</p> | Uncontroverted. |
| <p>1.8. [T]he 111th Congress created a “hub” on YouTube for members of the House and Senate to post videos about the issues of the day, and hundreds of members of Congress have set up their own channels on YouTube.</p> <p>Defs. Opening Mem. at p. 6 (citing Walk Decl. ¶ 6).</p> | Uncontroverted. |
| <p>1.9. John McCain’s presidential campaign congratulated YouTube for its “groundbreaking contributions” to the democratic process: “By providing a platform for political candidates and the American public to post, view, share, discuss, comment on, mash-up, re-mix, and argue over campaign-related videos, YouTube has played a prominent and overwhelmingly positive role in the 2008 election.”</p> <p>Defs. Opening Mem. at pp. 6-7 (citing Levine Decl. ¶ 29 & Ex. 13).</p> | Controverted to the extent Defendants rely on inadmissible hearsay. <i>See Evid. Obj.</i> at 14. Immaterial to any issues before the Court. |
| <p>1.10. Students seeking admission to those colleges, and colleges seeking to recruit students, have likewise turned to YouTube.</p> <p>Defs. Opening Mem. at p. 7 (citing Walk Decl. ¶ 13).</p> | Uncontroverted. |
| <p>1.11. Under [YouTube’s content partnership agreements], [content owners] make content available to YouTube by uploading it directly</p> | Controverted to the extent that the asserted fact implies that this activity occurred throughout YouTube’s existence. It is undisputed that YouTube did not enter into its first content partnership agreement with any |

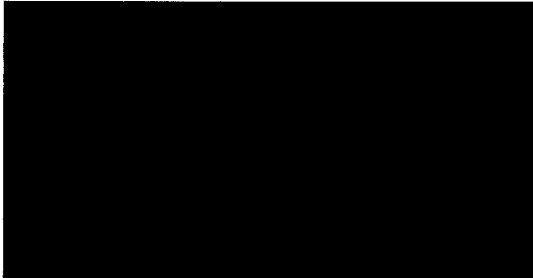
Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>Defs. Opening Mem. at p. 8 (citing Walk Decl. ¶ 10).</p> | <p>major media company until late in the third quarter of 2006. <i>See</i> Viacom SUF ¶¶ 299, 300.</p> |
| <p>1.12. By February 2006 . . . users were watching more than 18 million videos per day.</p> <p>Defs. Opening Mem. at p. 8 (citing Hurley Decl. ¶ 23 & Exs. 28, 29).</p> | <p>Uncontroverted.</p> |
| <p>1.13. In 2006, the Motion Picture Association of America (the anti-piracy association for the major movie studios) told the press: “YouTube has been a good corporate citizen and has taken off copyrighted material.”</p> <p>Defs. Opening Mem. at p. 11 (citing Levine Decl. ¶ 32 & Ex. 14).</p> | <p>Controverted in that the undisputed evidence shows that, in 2006, YouTube repeatedly refused to work with the MPAA to prevent the infringement of the copyrighted works of MPAA’s members, including Paramount. <i>See</i> Viacom SUF ¶¶ 225-229 (citing deposition testimony of former MPAA President Dean Garfield).</p> <p>The cited evidence is also inadmissible hearsay. <i>See</i> Evid. Obj. at 14.</p> |
| <p>1.14. That same year, NBC hailed YouTube as a “bright light” on copyright protection and proclaimed that: “YouTube is the perfect online media partner . . . We are thrilled to be partnering with this forward-thinking company.”</p> <p>Defs. Opening Mem. at p. 11 (citing Levine Decl. ¶ 33 & Exs. 15, 16).</p> | <p>Controverted to the extent that Defendants are seeking to rely on the out of court statements of a third party for the truth of the matter asserted. <i>See</i> Evid. Obj. at 14.</p> <p>Further controverted to the extent that the asserted fact implies that NBC Universal was satisfied with YouTube’s compliance with the copyright laws. NBC Universal Executive VP and General Counsel Richard Cotton complained to YouTube about “the persistent infringement of NBC Universal . . . copyrighted content on the YouTube.com website.” Kohlmann Ex. 29, GOO001-02826792-98 (letter from NBC Universal General Counsel Richard Cotton). NBC Universal also submitted an amicus brief in opposition to YouTube’s motion of summary judgment in <i>Tur v. YouTube</i>, pointing out the numerous flaws in YouTube’s copyright policy. <i>See</i> Brief of Amicus Curiae NBC Universal, Inc. in Support of Plaintiff’s Opposition to YouTube Inc.’s Motion for</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| | Partial Summary Judgment, <i>Tur v. YouTube Inc.</i> , 06-cv-04436, 2007 WL 1893635 (C.D. Cal. June 20, 2007) (Dkt. No. 75). |
| <p>1.15. Warner Music similarly lauded YouTube’s “commitment to creating a framework in which the needs of [its] users and copyright holders can coexist in a mutually beneficial environment.”</p> <p>Def’s. Opening Mem. at p. 11 (citing Levine Decl. ¶ 33 & Ex. 17).</p> | <p>Controverted to the extent that Defendants purport to rely on this statement for the truth of the matter asserted. <i>See</i> Evid. Obj. at 14.</p> <p>Further controverted as misleading, in that the quoted statement was made only after Warner Music and YouTube reached an agreement in which YouTube agreed to provide Warner with digital fingerprinting. <i>See</i> Viacom SUF ¶ 299.</p> |
| <p>1.16. [D]ozens of separate third-party marketing agencies working on [Viacom’s] behalf have posted a host of clips from Viacom television programs and movies to YouTube.</p> <p>Def’s. Opening Mem. at pp. 11-12.</p> | <p>Controverted as unsupported by the proffered evidence and as misleading. Defendants have alleged only that over the past four years, Viacom’s various divisions have worked with 18 marketing agencies to promote one or more Viacom’s films or television programs—not “dozens of agencies”—and the evidence proffered by Defendants does not even demonstrate that. <i>See infra</i> ¶ 1.59. This purported fact is also immaterial to any issue before the Court.</p> |
| <p>1.17. To the frustration of many within [Viacom], Viacom’s efforts to acquire YouTube proved unsuccessful.</p> <p>Def’s. Opening Mem. at p. 12 (citing Schapiro Ex. 5).</p> | <p>Controverted. While some Viacom employees briefly considered the idea of exploring a possible acquisition of YouTube, Defendants dramatically overstate the seriousness of Viacom’s consideration of such an acquisition. <i>See</i> Resp. to Def’s. SUF ¶ 46.</p> |
| <p>1.18. [I]n early 2006, Viacom proposed the idea of a content-partnership agreement with YouTube, which the parties negotiated for months.</p> <p>Def’s. Opening Mem. at p. 12 (citing Maxcy Decl. ¶ 8, Schapiro Exs. 6, 7).</p> | <p>Controverted to the extent that the asserted facts suggests that Viacom was willing to enter a licensing agreement in the absence of being properly compensated for the use of its content and for settling its copyright infringement claims. Further controverted as misleading to the extent that the asserted fact suggests that Viacom was willing to enter into a licensing agreement in the absence of YouTube’s agreement to prevent the infringement of Viacom’s works, through digital fingerprinting and other means. <i>See</i> Viacom SUF ¶¶ 203-210.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.19. Before a deal could be struck, however, Google announced that it was acquiring YouTube.</p> <p>Defs. Opening Mem. at p. 12.</p> | <p>Uncontroverted, but immaterial to any issues before the Court.</p> |
| <p>1.20. With Google now sitting at the table, Viacom opted for a “strong arm approach” under which it would “push for significantly better terms.”</p> <p>Defs. Opening Mem. at p. 12 (citing Schapiro Exs. 8 and 9).</p> | <p>Controverted to the extent that the asserted fact is intended to suggest that Viacom failed to negotiate in good faith. It is undisputed that Viacom negotiated in good faith but was unable to reach an agreement with Defendants. Hohengarten Ex. 314 (Schmidt Dep.) at 179:9-18 (agreeing that Viacom negotiated in good faith). Moreover, internal YouTube emails show that Defendants</p>  |
| <p>1.21. During these negotiations, Viacom deliberately allowed its content to remain on YouTube, in part because it thought that “having the content there was valuable in terms of helping the rating of our shows.”</p> <p>Defs. Opening Mem. at p. 12 (citing Schapiro Ex. 4 (132:19-133:24)).</p> | <p>Controverted. Not supported by admissible evidence in light of the witness’s testimony that he was speculating. <i>See</i> Evid. Obj. at 1.</p> <p>Further, misleading because the purported fact uses a speculative statement by one witness to distort the evidence regarding Viacom’s forbearance of enforcement of its rights during the pendency of the parties’ licensing negotiations. <i>See</i> Resp. to Defs. SUF ¶ 128.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.22. After the negotiations stalled, Viacom developed a plan to send YouTube a large DMCA takedown notice in the hopes of gaining leverage and “provide [Viacom] the economics” it had requested.</p> <p>Defs. Opening Mem. at p. 12 (citing Schapiro Ex. 10).</p> | <p>Controverted. The cited document refers to the mass takedown Viacom issued to YouTube, which was implemented in an attempt to combat the massive infringement of Viacom’s works on YouTube. Viacom opted not to remove all of the clips that it was able to locate on YouTube during the pendency of the negotiations between Viacom and YouTube because of the expectation that Viacom’s infringement claims would be settled as part of an overall licensing deal. <i>See Resp. to Defs. SUF ¶ 128.</i></p> |
| <p>1.23. Viacom wanted a mass takedown to occur in “one dramatic event (as opposed to drips).”</p> <p>Defs. Opening Mem. at pp. 12-13 (citing Schapiro Ex. 10).</p> | <p>Controverted, but immaterial to any issues before the Court. <i>See supra ¶ 1.22.</i></p> |
| <p>1.24. To that end, Viacom put in place a “find and hold” strategy: For months it searched YouTube for videos allegedly containing Viacom content, but instead of promptly requesting their removal, Viacom added the clips to an internal list.</p> <p>Defs. Opening Mem. at p. 13 (citing Schapiro Ex. 11 (161:9-21, 167:10-18, 202:14-19)).</p> | <p>Controverted, but immaterial to any issues before the Court. <i>See supra ¶ 1.22.</i></p> |
| <p>1.25. Despite Viacom’s apparent expectations that YouTube’s traffic would decrease and traffic to Viacom’s own websites would soar after those videos were removed, neither prediction came true.</p> <p>Defs. Opening Mem. at p. 13 (citing Hurley Decl. ¶ 26; <i>see also</i> Schapiro Exs. 13 (234:17-288:14), 14, 15).</p> | <p>Controverted. Viacom personnel did believe that once many videos infringing Viacom’s copyrights were removed from YouTube, more videos would be viewed on Viacom’s own sites. And that is precisely what took place. Indeed, video views did increase on a variety of Viacom online properties in the month following the February 2, 2007 takedown. <i>See, e.g., Kohlmann Ex. 62, VIA01108775.</i></p> <p>Further controverted to the extent that Defendants have provided no evidence to suggest that Viacom believed that YouTube traffic would decrease following the February</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| | 2, 2007 takedown. |
| <p>1.26. Some of Viacom’s executives soon came to doubt the wisdom of [this lawsuit].</p> <p>Defs. Opening Mem. at p. 13 n.2 (citing Schapiro Ex. 16).</p> | <p>Uncontroverted with respect to the two Viacom employees in the last-in-time email in Schapiro Ex. 16, but immaterial to any issues before the Court.</p> |
| <p>1.27. Viacom alleges that 63,497 user-uploaded video clips that once appeared on YouTube infringed copyrights in approximately 500 different television programs and motion pictures that Viacom claims to own.</p> <p>Defs. Opening Mem. at p. 14 (citing Rubin Decl. ¶ 7).</p> | <p>Controverted. The correct number of clips in suit is 62,632. <i>See</i> Viacom SUF ¶ 7. Viacom is withdrawing the five clips identified by Defendants as authorized by Viacom, at Rubin Decl. ¶ 14. The correct number of infringed Viacom works is 3,085, not 500. <i>See</i> Viacom SUF ¶ 6.</p> |
| <p>1.28. These clips have been removed from YouTube; most were the subject of DMCA notices, and taken down in response.</p> <p>Defs. Opening Mem. at pp. 14-15 (citing Schapiro Ex. 18 (141:10-19, 148:8-18); Levine Decl. ¶¶ 19-21).</p> | <p>Uncontroverted.</p> |
| <p>1.29. [M]any of the clips in suit are under one minute long.</p> <p>Defs. Opening Mem. at p. 15 (citing Rubin Decl. ¶ 15).</p> | <p>Controverted. Less than 14 percent of the clips in suit are under one minute long. <i>See</i> Wilkens Decl. ¶ 3.</p> |
| <p>1.30. Many other clips in suit, even if not themselves directly uploaded to YouTube by Viacom, are identical to or indistinguishable from the promotional materials that Viacom has authorized to appear on YouTube.</p> <p>Defs. Opening Mem. at p. 15.</p> | <p>Controverted. <i>See infra</i> ¶ 1.63.</p> |
| <p>1.31. The YouTube website has consistently offered detailed instructions about the information that copyright holders should include in any notices that they wish to send to YouTube’s designated agent.</p> <p>Defs. Opening Mem. at p. 22 (citing Levine</p> | <p>Controverted. The cited evidence deals primarily with the instructions currently available on YouTube’s website, with only Hurley Decl. ¶ 21 containing the vaguest of statements regarding historical instructions. The current instructions are not detailed and merely state the “elements of notification”</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| Decl. ¶¶ 15-16; Hurley Decl. ¶ 21). | requirements of the DMCA, with only the following additional text: “Providing URLs in the body of an email is the best way to help us locate content quickly.” <i>Compare</i> Kohlmann Ex. 90 (screenshot of YouTube Copyright Infringement Notification page) with 17 U.S.C. § 512(c)(3). Plaintiffs lack knowledge to admit or controvert the alleged fact as to any moments in time in which an earlier version of the current instructions appeared on YouTube’s site. |
| <p>1.32. YouTube has taken pains to make its notification system easy and efficient for copyright holders to use.</p> <p>Defs. Opening Mem. at p. 25 (citing Levine Decl. ¶¶ 17-18).</p> | <p>Controverted, in that Defendants have refused copyright owners’ requests that Defendants comply with the “representative lists” requirement under the DMCA. <i>See</i> Hohengarten Ex. 244, VIA01475466-67 (letter from Viacom General Counsel Mike Fricklas and NBCU General Counsel Rick Cotton to Google General Counsel Kent Walker and Google Senior Vice President David Drummond asking that YouTube respond to representative lists). But YouTube takes the extreme position that content owners must point to the URLs of specific infringing videos before YouTube takes action to remove them. <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 (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”).</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| | Further controverted to the extent the alleged fact rests on inadmissible testimony in Levine Decl. ¶ 18. <i>See Evid. Obj.</i> at 14. |
| <p>1.33. Early in its existence, YouTube created a first-of-its-kind automated tool that lets copyright holders click a button to send electronic DMCA notices directly to YouTube’s agent.</p> <p>Defs. Opening Mem. at p. 25 (citing Levine Decl. ¶ 18).</p> | <p>Controverted, but immaterial to any issue before the Court. Plaintiffs deny Defendants’ characterization of YouTube’s CVP tool as “automatic” insofar as it implies that Defendants lack control over the process. Further, this tool was not available until March 2006 and was not specifically offered to Viacom until February 5, 2007. <i>See Levine Decl. ¶ 18; Hohengarten Ex. 93, GOO001-00751570, at GOO001-00751570.</i></p> <p>Further controverted to the extent the alleged fact rests on inadmissible testimony in Levine Decl. ¶ 18. <i>See Evid. Obj.</i> at 14.</p> |
| <p>1.34. [W]here YouTube determines that a particular user who has received fewer than three strikes is nonetheless flagrantly abusing the service’s terms of use, YouTube terminates the account and removes all of the user’s videos.</p> <p>Defs. Opening Mem. at p. 25 (citing Levine Decl. ¶ 30).</p> | <p>Controverted to the extent that the asserted fact suggests that Defendants terminate some users for infringing copyright fewer than three times. Defendants have proffered no evidence to support such an assertion. Uncontroverted to the extent that the asserted fact implies that Defendants sometimes terminate users for violations of the Terms of Service that do not involve copyright infringement. The asserted fact is immaterial to any issue currently before the Court.</p> |
| <p>1.35. YouTube also sends an email message to any user whose videos are the subject of a takedown notice, giving the user an opportunity to challenge the notice</p> <p>Defs. Opening Mem. at p. 25 (citing Levine Decl. ¶ 23).</p> | <p>Uncontroverted but immaterial to any issue before the Court.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>1.36. A computerized system [] tallies the number of strikes that each user’s account receives.</p> <p>Defs. Opening Mem. at p. 25 (citing Levine Decl. ¶ 28).</p> | <p>Controverted to the extent that the asserted fact implies that the system for tallying strikes does not involve human interaction by Defendants’ employees. First, Defendants’ employees designed the system for tallying strikes and have made continuous modifications to it over time. <i>See</i> Resp. to Defs. SUF ¶¶ 77-78. Second, Defendants’ employees have substantial discretion in deciding whether strikes should be applied in particular cases. <i>See, e.g.,</i> Levine Decl. ¶¶ 27-29; Kohlmann Ex. 48, GOO001-00515036 (noting that admin users had the option to “Reject & Strike (copyright)” or merely to “Reject (copyright)”; Kohlmann Ex. 9, GOO001-00515280 (same); Kohlmann Ex. 39, GOO001-06674342 (“Not to be obvious here, but [there is an] inconsistency in how we as an entity handle/decide strikes & suspensions per our users . . . too much random discretion is being used by us, thus the inconsistency”).</p> |
| <p>1.37. The required standards-setting process [for the development of “standard technical measures”] has never occurred.</p> <p>Defs. Opening Mem. at p. 26.</p> | <p>Controverted. To the extent that Defendants are offering a conclusion about whether the standards-setting process described in the DMCA has occurred, they are offering an impermissible legal conclusion.</p> <p>Moreover this purported fact is not relevant to any issues before the Court.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.38. The facts concerning how such videos come to be stored on YouTube’s system, and what happens to them once they are there, are undisputed.</p> <p>Def’s. Opening Mem. at p. 27 (citing Solomon Decl. ¶¶ 2-10).²</p> <p>YouTube operates a website located on the Internet at http://www.youtube.com, where users around the world can upload videos free of charge to computer servers owned or leased by YouTube. YouTube’s systems are capable of simultaneously playing millions of these authorized, user uploaded videos at the same time to YouTube users around the world. The process of uploading a video to YouTube is initiated by YouTube users. As has always been the case since I began working on the YouTube service, 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.</p> <p>Solomon Decl. ¶ 2.</p> | <p>Controverted. <i>See</i> Resp. to Defs. SUF ¶¶ 16, 18, 19, and 20.</p> |

² Defendants’ Memorandum of Law asserts: “The facts concerning how such videos come to be stored on YouTube’s system, and what happens to them once they are there, are undisputed.” The allegedly undisputed facts Defendants reference are stated only in Mr. Solomon’s declaration, not in Defendants’ Memorandum of Law or Rule 56.1 Statement. For the Court’s convenience, Viacom responds separately to Paragraph 2 of Mr. Solomon’s declaration in this paragraph, and to Paragraphs 3-10 in ¶¶ 1.39-1.46, *infra*.

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.39. Before being able to upload a video to YouTube, a user must first register and create an account with the service. Once that one-time registration process has been completed and the user is signed-in to his YouTube account, the first step a user takes to upload a video involves navigating to the upload portion of the YouTube website. The user then selects a video file to upload to the YouTube system from the selection available on the user’s personal computer, webcam, mobile phone, or other storage device, depending on how the user is accessing the service. Having selected the video he wishes to upload, the user then instructs the YouTube system to upload that video by clicking on a virtual upload “button.”</p> <p>Solomon Decl. ¶ 3 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted to the extent that the asserted fact implies that YouTube plays no role in the video upload process. To the contrary, YouTube designed and controls every step of the upload process. <i>See</i> Resp. to Defs. SUF ¶¶ 16, 18-20.</p> |
| <p>1.40. When a user uploads a video, the user also provides a title of his own making for the video and chooses “tags,” or keywords, that the user believes describe the video. For instance, a surfing video might be tagged with “surfing,” “water,” and “waves,” and be titled “Sarah’s 30th Birthday.” Like the title the user provides for the video, the choice of tags is completely up to the user. Similarly, the user selects a category from the broad selection of categories presented by the YouTube system that the user believes fits the uploaded video. The selection of category is entirely within the user’s discretion.</p> <p>Solomon Decl. ¶ 4 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted. Viacom does not dispute that, pursuant to the processes Defendants designed, users provide titles and tags for videos they upload, and that users choose to place those videos into categories chosen and provided by Defendants. But Viacom controverts Defendants’ contention that providing a title or tags, or choosing categories, is “entirely within the user’s discretion” or “completely up to the user.” Defendants have carefully worded this factual statement, leaving out the fact that YouTube has required users to provide this information. <i>See</i> Viacom SUF ¶ 342; Hohengarten Ex. 344 (Liu Dep.) at 63:18-64:23. Defendants also omit that they have designed a system that suggests tags to users. <i>See</i> Kohlmann Ex. 90 (Screenshot of November 14, 2007 Official YouTube Blog post) (stating: “SUGGESTED TAGS You can choose from a set of new ‘suggested tags’ when you upload or edit a video.”).</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.41. I have confirmed that each one of the video clips at issue in this lawsuit was uploaded to YouTube by a user of the service in a process similar to the one I just described.</p> <p>Solomon Decl. ¶ 5 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Uncontroverted.</p> |
| <p>1.42. YouTube users are able to upload video files in a number of common and widely-used file formats, including Windows Media Video (WMV), .3GP, .AVI, .MOV, .MP4, .MPEG, and Flash (.FLV). Because most Internet browsers are not able to easily play video files in all of these formats, a user’s video upload prompts the YouTube system to convert the user’s video into the Flash file format, which is a more common file format that most Internet browsers can play. This conversion process is known as “transcoding,” and it occurs automatically and without any human intervention.</p> <p>Solomon Decl. ¶ 6 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted. <i>See</i> Resp. to Defs. SUF ¶ 19.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.43. In light of the increasing popularity of using mobile phones and other consumer electronics devices to view Internet content, the YouTube system began allowing users to view videos from mobile phones and other consumer electronics devices, in addition to their personal computers. These devices typically have different file format requirements than personal computer-based Internet browsers and often cannot play Flash files. Using an automated transcoding process similar to the one used to convert user-uploaded videos into Flash, the YouTube system now transcodes user-uploaded videos into several other file formats supported by a variety of viewing devices. One such example is the transcoding of user-uploaded video files into the H.264 format, which is playable on Apple’s iPhone. Adopting new encoding formats is an example of YouTube’s efforts to remain current and compatible with evolving technology, enabling the user uploaded videos it stores to be accessible to the largest number of users in the most efficient manner.</p> <p>Solomon Decl. ¶ 7 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted. Viacom does not dispute that YouTube’s transcoding process creates transcoded copies in Flash format of videos uploaded to YouTube, though the use of the word “converts” is misleading, because the system in fact creates several new copies, <i>see</i> Viacom SUF ¶¶ 315-16. However, Viacom disputes that YouTube’s transcoding process does so “[b]ecause most Internet browsers are not able to play video files in all of these formats.” In fact, it does so because Defendants chose to design their system that way so that videos would “display[] nicely everywhere.” Hohengarten Ex. 239, JK00008859. Further controverted that the process occurs automatically. <i>See</i> Resp. to Defs. SUF ¶ 19.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.44. After a user uploaded video has been transcoded, the original video file and any transcodes are stored by YouTube on its network of computers and servers. As a part of this process, the YouTube system makes more than one copy of the stored version of the user’s video files in order to increase the utility and reliability of the service for YouTube’s users. This process also ensures that users’ uploaded videos can remain playable in instances where any single storage device fails, and enables YouTube to efficiently distribute the load of storing millions of videos and speeding their playback in response to requests coming from users across the globe.</p> <p>Solomon Decl. ¶ 8 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted to the extent that the reference to “the YouTube system” suggests that YouTube employees are not involved in deciding how many copies of videos should be made and stored by YouTube, and in what format. <i>See</i> Resp. to Defs. SUF ¶ 19.</p> <p>Further controverted to the extent that Defendants claim that making more copies of a video makes storing that video more “efficient.” <i>See infra</i> ¶ 1.47.</p> |
| <p>1.45. Anyone with Internet access and standard Internet browsing software can view for free the videos that other users have stored on YouTube. As noted above, YouTube users can also access the YouTube service from mobile or other consumer electronics devices. Users initiate video playback of a YouTube video by visiting YouTube and selecting the video that they wish to view. Like the choice of whether and which video to upload to YouTube, the decision of which video to view is made entirely by the user.</p> <p>Solomon Decl. ¶ 9 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted. As noted, “the videos that . . . users have stored” are <i>not</i> the videos that are viewable on YouTube. The transcoded copies that YouTube creates are viewable on YouTube. <i>See</i> Resp. to Defs. SUF ¶ 21. Further, while a user may choose which video to click, YouTube promotes particular videos in a variety of ways, including (but not limited to): (1) sorting videos into browse pages, <i>see</i> Viacom SUF ¶¶ 261, 333; (2) categorizing videos, <i>see</i> Viacom SUF ¶ 341-42; (3) giving videos prominent placement on the site, including on its home page, <i>see</i> Viacom SUF ¶¶ 329, 331, 333; and (4) directing a user to videos that are “related” to a video on a watch page that a user views, which accounts for 58 percent of YouTube’s video views, <i>see</i> Viacom SUF ¶¶ 334-36.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.46. The YouTube system allows users to view videos stored on YouTube’s servers through a process known as “streaming.” The streamed files can begin playing on a user’s computer before the complete video file has been fully transmitted. 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 personal computer (or other device, such as an iPhone), where it plays for the user to watch. In almost all cases, YouTube prohibits users from downloading videos off the site, and does not offer that functionality to users. In the context of viewing YouTube videos on a personal computer, for example, streaming differs from downloading because during streaming a complete copy of the video being streamed is not stored on the end user’s computer before viewing can begin.</p> <p>Solomon Decl. ¶ 10 (cited in Defs. Opening Mem. at p. 27, <i>see supra</i> n.1).</p> | <p>Controverted. As stated in Viacom’s response to ¶¶ 23-24 of Defendants’ SUF, YouTube does create a full and durable copy of a video on a user’s computer.</p> |
| <p>1.47. [D]uring the upload, storage, and playback processes, a certain number of copies of videos . . . are made to facilitate the efficient storage and viewing of user-submitted videos.</p> <p>Defs. Opening Mem. at p. 27 (citing Solomon Decl. ¶¶ 6-8).</p> | <p>Controverted as to Defendants’ claim that YouTube’s act of copying every uploaded video facilitates efficient storage. As Defendants also retain the original copy of these videos, <i>see</i> Viacom SUF ¶ 315, the claim that additional copies make the storage of the videos more efficient is nonsensical.</p> <p>Viacom does not controvert the fact that YouTube makes copies of all videos uploaded to its site in order to facilitate the viewing of these videos. <i>Accord</i> Viacom SUF ¶¶ 315, 316.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.48. [D]uring the upload, storage, and playback processes, a certain number of copies of those videos are made automatically by operation of YouTube’s system.</p> <p>Defs. Opening Mem. at p. 27 (citing Solomon Decl. ¶¶ 6-8).</p> | <p>Controverted. <i>See</i> Resp. to Defs. SUF ¶¶ 16, 19, 23, 24.</p> |
| <p>1.49. YouTube employees have never even seen the overwhelming majority of the more than 500 million videos that have been posted to the service.</p> <p>Defs. Opening Mem. at p. 34 (citing Levine Decl. ¶ 28; Schaffer Decl. ¶ 11; Hurley Decl. ¶ 18).</p> | <p>Controverted, as Levine Decl. ¶ 28 contains inadmissible generalized and conclusory statements and Hurley Decl. ¶ 18 contains inadmissible lay opinion testimony. <i>See</i> Evid. Obj. at 3, 15.</p> <p>However, the alleged fact is immaterial to any issues before the Court. Whether Defendants viewed most or all videos displayed on the YouTube site is irrelevant to Defendants’ culpable intent under <i>Grokster</i> and the DMCA. <i>See, e.g., A&M Records, Inc. v. Napster, Inc.</i>, 239 F.3d 1004, 1021-22 (9th Cir. 2001).</p> <p>The alleged fact is also misleading. It is undisputed that, in YouTube’s early days, YouTube’s founders were among the top six most active viewers of videos on YouTube, having watched nearly 8,000 videos by August 2005. <i>See</i> Viacom SUF ¶ 51. Moreover, only two days before opposition papers were to be filed, Defendants produced non-anonymized YouTube viewing records for certain YouTube employee accounts. Although Defendants notably refused to produce any viewing records for YouTube co-founder Jawed Karim beyond October 2005, the newly produced data could show that YouTube's founders and other employees did know of and watch many specific infringing videos. The Viacom Plaintiffs have not yet been able to analyze this data. <i>See</i> Wilkens Decl. ¶ 20.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.50. Ordinarily, therefore, no one at YouTube will know that a given video has been posted at all, let alone actively viewed that video.</p> <p>Defs. Opening Mem. at p. 34 (citing Levine Decl. ¶ 26; Schaffer Decl. ¶ 11; Hurley Decl. ¶ 18).</p> | <p>Controverted. The cited evidence does not support the proposition. Paragraph 28 of Ms. Levine’s declaration says only that YouTube tracks notices and administers strikes in an automated fashion. Paragraph 11 of Mr. Schaffer’s declaration says that while YouTube did not review <i>every</i> video during his time at the company, it did “spot check” videos and remove content on behalf of several companies, but not Viacom. This demonstrates that YouTube was perfectly capable of using human review to police its site for copyright infringement when it chose to do so. Viacom SUF ¶¶ 272-273.</p> <p>Paragraph 18 of Mr. Hurley’s declaration says—without any documentary support whatsoever—that screening videos was “not scalable and was ineffective in identifying unauthorized material,” and that YouTube ceased screening “as a general matter.” Moreover, YouTube’s founders and early employees were among the most frequent watchers of YouTube videos during key periods relevant to the case. <i>See Hohengarten Ex. 185. See also supra</i> ¶ 1.49, <i>infra</i> ¶ 1.102.</p> <p>Moreover, the cited evidence is inadmissible, because Levine Decl. ¶ 26 contains generalized and conclusory statements and Hurley Decl. ¶ 18 contains improper lay opinion testimony. <i>See Evid. Obj.</i> at 3, 15.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>1.51. Among Viacom’s works in suit are: <i>Call to Greatness, Distraction, Dog Bites Man, Gerhard Reinke’s Wanderlust, The Hollow Men, Human Giant, Insomniac with Dave Attell, Noah’s Arc, Premium Blend, Rob and Big, Run’s House, Shorties Watchin’ Shorties, Stardust, A Shot At Love, The Shot, Trick My Truck, True Life: I’m An Alcoholic, Viva Hollywood, Viva La Bam, The White Rapper Show, Wildboyz, and Wonder Showzen.</i></p> <p>Defs. Opening Mem. at p. 37 (footnote 11) (citing Rubin Decl. ¶¶ 117, 120).</p> | <p>Uncontroverted.</p> |
| <p>1.52. [A] Viacom employee explained to <i>The Wall Street Journal</i>: “you almost can’t find a better place than YouTube to promote your movie.”</p> <p>Defs. Opening Mem. at p. 39-40 (citing Schapiro Exs. 23 at 3; 24 (70:16-71:24); Rubin Exs. 3, 9 (GOO001-01855886)).</p> | <p>Controverted to the extent that the asserted fact is meant to suggest that Viacom favored the upload of infringing clips of its films and television shows to YouTube. In making the quoted statement, Andrew Lin, a former Paramount employee, was referring to two specially created marketing clips that he uploaded to YouTube with YouTube’s assistance to the official YouTube accounts “ParamountClassics” and “ParamountVantage.” Kohlmann Ex. 77 (Lin Dep.) at 76:18-77:15. In any event the alleged fact is immaterial to any issue before the Court.</p> |
| <p>1.53. [A]n MTV marketing executive described posting clips to YouTube as a “no brainer” and raved that the benefits of placing content on YouTube were “overwhelming.”</p> <p>Defs. Opening Mem. at p. 40 (citing Schapiro Exs. 25 (43:17-22), 26).</p> | <p>Controverted to the extent that the asserted fact is meant to suggest that MTV Networks favored the uploading of infringing clips of its programs to YouTube. The cited evidence does not support - and indeed controverts - any such suggestion. Tina Exarhos, the MTV Networks marketing executive quoted in the alleged fact, testified that she was referring to the carefully selected trailers and other marketing clips that MTV Networks uploaded to YouTube as part of marketing campaigns. See Kohlmann Ex. 70 (Exarhos Dep.) at 44:4-45:10; 48:12-16; 50:13-17; 56:11-15; 105:4-24 ;165:11-15. In any event the alleged fact is immaterial to any issue before the Court.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.54. [T]he filing of this lawsuit did not curtail [Viacom’s] uploading of clips to YouTube.</p> <p>Defs. Opening Mem. at p. 40 (citing Rubin Decl. ¶¶ 2, 3 & Exs. 23-31, 60-66; Schapiro Ex. 27 (23:3-24:23)).</p> | <p>Uncontroverted but immaterial to any of the issues before the Court. Viacom is not suing YouTube for any clips that Viacom authorized to appear on YouTube. YouTube was fully aware of the vast majority of Viacom’s uploading of authorized trailers and other marketing clips. <i>See</i> Resp. to Defs. SUF ¶¶ 123, 124.</p> |
| <p>1.55. As one of Viacom’s own marketing agents explains in a sworn declaration accompanying this motion, the “practice by viral marketers of using YouTube to promote music, television programs, and motion pictures is widespread.”</p> <p>Defs. Opening Mem. at p. 40 (citing Ostrow Decl. ¶ 6; Chan Decl. ¶¶ 3, 4, 9; Rubin Decl. ¶ 2 & Exs. 2, 32-41; Schapiro Ex. 28 (GOO001-05161257-58)).</p> | <p>Controverted. Rubin Decl. ¶ 2, Ex. 2, and Exs. 32-41, Ostrow Decl. ¶ 6, and Chan Decl. ¶¶ 4 and 9 contain inadmissible evidence. <i>See</i> Evid. Obj. at 2, 5-7.</p> <p>Further controverted in that Defendants’ characterization of Mr. Chan as Viacom’s agent is misleading. Mr. Chan is an employee of Palisades Media Group, a company that briefly did marketing work for Viacom. Mr. Chan submitted a declaration in this case at YouTube’s behest, and as documents produced by Defendants show, Mr. Chan’s relationship with Defendants has been a longstanding and close one. <i>See</i> Kohlmann Ex. 23, GOO001-01984461, Kohlmann Ex. 24, GOO001-02299635, Kohlmann Ex. 25, GOO001-02302174, Kohlmann Ex. 26, GOO001-02302195 (samples from extensive communications between YouTube and marketing company Palisades Media Group); <i>see also</i> Kohlmann Decl. ¶ 54.</p> |
| <p>1.56. Viacom sometimes places material on YouTube openly.</p> <p>Defs. Opening Mem. at p. 40 & n.14 (citing Schapiro Exs. 29 (38:10-21), 30, 31 (26:20-27:10), 24 (22:11-22:20), 32 (151:17-152:20)).</p> | <p>Uncontroverted that Viacom places material on YouTube openly. Controverted to the extent that “sometimes” is meant to suggest that Viacom uploads clips to YouTube in a manner that conceals their origin from YouTube. <i>See</i> Resp. to Defs. SUF ¶¶ 123-125.</p> |
| <p>1.57. Viacom and its agents use accounts that lack any discernable connection to Viacom (such as “MysticalGirl8,” “Demansr,” “tesderiw,” “GossipGirl40,” “Snackboard,” and “Keithhn”).</p> | <p>Controverted, to the extent it implies that YouTube does not know that such accounts are being used to upload authorized Viacom content. For example, it is undisputed that Viacom informed YouTube the following day that it had uploaded an authorized clip using</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>Defs. Opening Mem. at p. 41 (citing Ostrow Decl. ¶ 6; Chan Decl. ¶ 4; Rubin Decl. ¶ 5(a)-(f)).</p> | <p>the account MysticalGirl8. <i>See</i> Kohlmann Ex. 84 (Wahtera Dep.) at 32:8-11. Further controverted to the extent that the asserted fact suggests that numerous clips of Viacom content were uploaded to these accounts. In total, 25 clips were uploaded to the six accounts identified in the asserted fact. <i>See</i> Wilkens Decl. ¶ 19(b). The asserted fact is immaterial to any issues before the Court.</p> <p>Further controverted as Ostrow Decl. ¶ 6 is inadmissible because it contains improper lay opinion testimony and is not based on personal knowledge, and as Chan Decl. ¶ 4 is inadmissible because it is not based on personal knowledge and because there is insufficient evidence to demonstrate its relevance. <i>See</i> Evid. Obj. at 2, 5-6.</p> |
| <p>1.58. Viacom has deliberately used email addresses that “can’t be traced to [Viacom]” when registering for YouTube accounts.</p> <p>Defs. Opening Mem. at p. 41-42 (citing Schapiro Ex. 46, Rubin Exs. 22 & 26).</p> | <p>Controverted to the extent that the asserted fact implies that it was Viacom’s general practice to upload clips using such accounts. The cited evidence shows that this practice occurred on one occasion and involved only one clip. Further controverted, to the extent that the asserted fact implies that Viacom’s intent was to conceal the source of the uploads from YouTube, or that YouTube was unaware that the accounts were affiliated with Viacom. In fact, YouTube was well aware of the accounts and the clips uploaded to them. <i>See</i> Resp. to Defs. SUF ¶ 125; <i>see also supra</i> at ¶ 1.57.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.59. Viacom has used at least 18 separate firms to upload content to YouTube on its behalf: ICED Media, Special Ops Media, M80, WiredSet, New Media Strategies, Cornerstone Promotions, Fan2Band, Fanscape, Total Assault, Filter Creative Group, Carat, T3, BuzzFeed, ADD Marketing, TViral, Deep Focus, Red Interactive, and Palisades Media Group.</p> <p>Defs. Opening Mem. at p. 41 n.16 (citing Schapiro Exs. 36-45, Chan Decl. ¶¶ 3-4).</p> | <p>Controverted. At least as to New Media Strategies, T3, and BuzzFeed, the purported fact is not supported by the cited evidence. It is also immaterial to any issue before the Court.</p> |
| <p>1.60. Viacom’s employees have made special trips away from the company’s premises (to places like Kinko’s) to upload videos to YouTube from computers not traceable to Viacom.</p> <p>Defs. Opening Mem. at p. 42 (citing Schapiro Ex. 47 (158:20-22), Schapiro Exs. 48, 49).</p> | <p>Controverted as well as immaterial. The cited evidence shows only that one Paramount employee, on one occasion, uploaded a video to YouTube from a Kinko’s copy shop. It is undisputed that the Paramount employee did not attempt to hide the origin of the clip from YouTube, and that within a few days of the upload, Paramount informed YouTube that the upload was authorized. <i>See</i> Kohlmann Ex. 84 (Wahtera Dep.) at 32:8-11; <i>see also supra</i> at ¶ 1.57.</p> |
| <p>1.61. Viacom has altered its own videos to make them appear stolen, like “footage from the cutting room floor, so users feel they have found something unique.”</p> <p>Defs. Opening Mem. at p. 42 & n.17 (citing Rubin Ex. 4; Rubin Exs. 20, 14; Schapiro Ex. 50 (VIA10406143)).</p> | <p>Controverted as misleading, and in any event immaterial to any issues before the Court. None of the cited evidence refers to any content made to appear to YouTube as if it was “stolen,” and none of the cited evidence even uses that word. To the contrary, the cited evidence refers to the use of outtakes – footage from the cutting room floor – to attract viewers, a practice that is common and hardly nefarious. In any event, Defendants were entirely capable of determining the origins of clips given their extensive communications with Viacom and third-party marketing companies. <i>See</i> Resp. to Defs. SUF ¶¶ 123-125.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.62. Viacom has further obscured the line between authorized and unauthorized clips by broadly releasing various videos featuring its content. These videos are designed to spread virally over the Internet to generate publicity for Viacom’s television shows and movies. When users post these videos, as Viacom hopes that they will, on sites like YouTube, Viacom acknowledges that their presence is authorized.</p> <p>Def’s. Opening Mem. at p. 42 (citing Schapiro Ex. 27 (205:17-206:2) & (206:4-20)) (internal citation omitted).</p> | <p>Controverted as misleading, and in any event immaterial to any issues before the Court. The “broadly releas[ed]” videos Defendants reference are trailers and other carefully selected marketing clips included in the Paramount “Electronic Press Kits” that are prepared for Paramount motion pictures. Kohlmann Ex. 83 (Tipton Dep.) at 16:5-16; <i>see also id.</i> at 28:5-7 (testifying that any distributed clips were approved “through the publicity team, through filmmakers, through the creative team, and through the interactive [team]”); Kohlmann Ex. 84 (Wahtera Dep.) at 101:9-10 (describing “EPK materials” as akin to “trailers”). There is no evidence to suggest that Paramount authorized the online distribution of any clips except these specifically chosen trailers and marketing clips.</p> |
| <p>1.63. Viacom itself was confused . . . when selecting its clips in suit, many of which turned out to be identical to Viacom’s authorized promotional videos.</p> <p>Def’s. Opening Mem. at p. 43 (citing Rubin Decl. ¶ 17).</p> | <p>The evidence submitted by Defendants supports only the claim that 100 clips in suit closely resemble trailers and other marketing videos that Viacom authorized to appear on various websites as part of its marketing strategy. The fact that Viacom authorized a trailer to appear on one website does not mean that Viacom authorized the trailer to appear on YouTube.</p> <p>Further controverted because is Rubin Decl. ¶ 17 inadmissible as irrelevant. <i>See Evid. Obj.</i> at 7.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>1.64. YouTube knew that the promotional activities of which it was aware were just the tip of the iceberg, and that Viacom and a wide variety of major media companies were extensively using the service for promotional purposes without telling YouTube (or anyone else) what they were doing.</p> <p>Defs. Opening Mem. at p. 43 (citing Schaffer Decl. ¶ 6; Maxcy Decl. ¶¶ 3-7; Schapiro Ex. 53; Botha Decl. ¶¶ 11-12).</p> | <p>Controverted. With respect to Viacom’s marketing practices, the evidence shows that YouTube was aware of the overwhelming majority of Viacom clips authorized to appear on YouTube. <i>See</i> Wilkens Decl. ¶ 19; Resp. to Defs. SUF ¶¶ 123-125. With respect both to Viacom’s practices and those of other “major media companies,” this alleged fact is unsupported by admissible evidence. Despite the voluminous discovery in this case from Viacom and third parties, and despite their own analysis of the data that they maintain for every YouTube account and every YouTube video, Defendants have cited no evidence to support their “tip of the iceberg” claim, or to support the claim that they have been unaware of the authorized uploading activities of Viacom and other major media companies. <i>See</i> Resp. to Defs. SUF ¶¶ 123-125.</p> <p>Further controverted because some of the cited evidence is inadmissible. <i>See</i> Evid. Obj. at 1, 3, 9-12.</p> |
| <p>1.65. YouTube routinely received takedown requests that were subsequently withdrawn after the media companies who sent them realized that their notices had been targeted to content that they themselves had uploaded or authorized.</p> <p>Defs. Opening Mem. at p. 44 (citing Rubin Decl. ¶ 4 & Exs. 69-83).</p> | <p>Controverted as to “routinely.” Defendants claim that YouTube has removed 4.7 million videos pursuant to takedown requests, <i>see</i> Levine Decl. ¶ 26, and the evidence Defendants cite shows fewer than a hundred mistaken takedowns of authorized content. Even if the number of mistakes was 50 times what Defendants have demonstrated, that would still represent only one tenth of one percent of the total takedowns of infringing material content owners have submitted to YouTube. Given the massive scale of infringement on the YouTube site and the problem content owners face in dealing with a site that refuses to take down infringing content unless it is identified specifically by URL, some mistakes are all but inevitable.</p> <p>Also controverted because Rubin Decl. ¶ 4 and Exs. 69-83 are inadmissible as hearsay. <i>See</i> Evid. Obj. at 7.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.66. [T]he former President of MTV candidly explained: “While we were issuing takedown notices against some of the content, there was other content which we were allowing to continue to be on YouTube.”</p> <p>Defs. Opening Mem. at p. 45 (citing Schapiro Ex. 4 (194:8-11)).</p> | <p>Controverted. Viacom temporarily abstained from sending takedown notices for some infringing content while negotiating with YouTube regarding a potential licensing deal and compensation for past copyright infringement, but sent those notices when negotiations broke down. Viacom never authorized YouTube to display that infringing content. <i>See</i> Resp. to Defs. SUF ¶ 128.</p> |
| <p>1.67. Viacom’s executives felt “very strongly that [they didn’t] want to stop the colbert and daily clips” on YouTube.</p> <p>Defs. Opening Mem. at p. 46 (citing Schapiro Ex. 58 (VIA01676948)).</p> | <p>Uncontroverted that the one cited document, an email exchange between two Comedy Central executives, includes the quoted language. Controverted insofar as the alleged fact misleadingly suggests this was the view of Viacom as a whole. It is undisputed that Viacom did not authorize YouTube to display user uploaded clips from <i>The Daily Show</i> and <i>The Colbert Report</i>. <i>See</i> Resp. to Defs. SUF ¶ 128.</p> |
| <p>1.68. The former President of MTV testified that Viacom did not want to take down “clips from Jon Stewart and Stephen Colbert” because “we were concerned that Jon Stewart and Stephen Colbert believed that their presence on YouTube was important for their ratings as well as for their relationship with their audience.”</p> <p>Defs. Opening Mem. at p. 46 (citing Schapiro Ex. 4 (199:22-201:2)).</p> | <p>Controverted. First, the cited evidence is inadmissible as it is not based on personal knowledge. <i>See</i> Evid. Obj. at 1.</p> <p>Second, the purported fact is misleading insofar as Viacom <i>did</i> send takedown notices for content from <i>The Daily Show</i> and <i>The Colbert Report</i> during the fall of 2006, the period at issue in Mr. Wolf’s testimony, and temporarily abstained from sending takedown notices for other infringing content while negotiating with Defendants regarding a licensing deal and compensation for past copyright infringement. <i>See</i> Resp. to Defs. SUF ¶ 128.</p> |
| <p>1.69. Accordingly, through at least October 2006, Viacom had a specific internal policy of declining to issue takedown notices for clips of [<i>The Daily Show</i> and <i>The Colbert Report</i>] that were less than five minutes long.</p> <p>Defs. Opening Mem. at p. 46 (citing Schapiro Exs. 59, 60).</p> | <p>Controverted to the extent that the asserted fact is intended to imply that during the pendency of the parties licensing negotiations in October 2006, Viacom authorized infringing content to appear on YouTube. <i>See</i> Resp. to Defs. SUF ¶¶ 128, 129-133. Immaterial as to any issues before the Court.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|---|
| <p>1.70. Viacom later adjusted that rule and confidentially instructed its agent BayTSP to leave up all clips of these shows shorter than three minutes.</p> <p>Defs. Opening Mem. at p. 46 (citing Schapiro Exs. 59, 60).</p> | <p>Controverted and immaterial to any issue before the Court. <i>See</i> Resp. to Defs. SUF ¶ 129.</p> |
| <p>1.71. Not only did Viacom apply its various leave-up rules to clips of the show, but one of Viacom’s most senior executives publicly blessed users’ practice of uploading clips from <i>South Park</i> to YouTube.</p> <p>Defs. Opening Mem. at p. 46 (citing Schapiro Ex. 61).</p> | <p>Controverted. Viacom did not in fact authorize users to upload videos taken from <i>South Park</i> to YouTube, and it is undisputed that Viacom did not give YouTube an implied license for any user-uploaded clips from <i>South Park</i> or any other work in suit. Defendants’ allegation to the contrary is unsupported by admissible evidence. The only statement Defendants cite suggesting that Viacom “publicly blessed” such uploads is a news report of an imprecise “passing comment” made by an MTV Networks executive on her way into an event. <i>See</i> (McGrath Dep.) at 256:19-21 (“A passing comment on the way into the dinner, I have no recollection of this.”); <i>id.</i> at 259:4-6 (“I don’t recall this at all, so I can’t verify whether [the story] is accurate or inaccurate.”). In her deposition, that executive clarified that, if she had made any comment about user uploads of <i>South Park</i> content to YouTube, it was only that Viacom was not currently issuing takedown notices for all user uploaded <i>South Park</i> clips “during a period when we [were] trying to do a deal to legitimately be compensated for the use of our content on YouTube,” <i>see</i> Kohlmann Ex. 78 (McGrath Dep.) at 256:9-13, not that Viacom accepted or encouraged such infringing activity. <i>See id.</i> at 269:5-13 (testifying that YouTube was violating Viacom’s copyright by displaying <i>South Park</i> clips at the time).</p> <p>Further controverted because Schapiro Ex. 61 is inadmissible hearsay. <i>See</i> Evid. Obj. at 1.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>1.72. [I]n November 2006, when Viacom found 316 <i>South Park</i> clips on YouTube, it requested removal of only one, and chose to leave up or “pass on” the remaining 315.</p> <p>Defs. Opening Mem. at p. 46-47 (citing Schapiro Ex. 62 (BAYTSP001093518), Ex. 11 (134:19-136:10, 138:25-139:14)).</p> | <p>Controverted to the extent that the asserted fact suggests that Viacom authorized any of the infringing clips to appear on YouTube. It is undisputed that the parties were in licensing negotiations at the time, and that Viacom did not give Defendants an express or implied license to exploit <i>South Park</i> or any other work. <i>See</i> Resp. to Defs. SUF ¶ 128.</p> |
| <p>1.73. Viacom’s confidential instructions to BayTSP about what to take down and what to leave up grew so detailed and complex that the Viacom employee responsible for overseeing the BayTSP relationship compared them to <i>Crime and Punishment</i>.</p> <p>Defs. Opening Mem. at p. 47 & n.19 (citing Schapiro Ex. 12 (83:6-84:8); Schapiro Exs. 63, 64, 65) (BAYTSP003718201).</p> | <p>Controverted as misleading, in that the witness was referring to counsel’s request that he recite from memory policies that were several years old, and that he was not responsible for at the time. <i>See</i> Schapiro Ex. 12 (83:6-84:8); Kohlmann Ex. 81 (Solow Dep.) at 286:16-21. Immaterial to any issues before the Court. <i>See</i> Viacom Resp. to Defs. SUF ¶ 130.</p> |
| <p>1.74. Viacom came up with new rules every few days—sometimes even changing the rules within the same day.</p> <p>Defs. Opening Mem. at p. 47 (citing Schapiro Exs. 66-74).</p> | <p>Controverted and immaterial. <i>See</i> Viacom Resp. to Defs. SUF ¶ 128. Further, the purported fact is misleading and inaccurate in its description of changes to the instructions. For example, the evidence does not support the proposition that Viacom changed the “rules” it provided to BayTSP within the same day. <i>See</i> Schapiro Exs. 73 & 74 (showing only that Viacom in one instance gave an instruction and then “clarified [a] misunderstanding” regarding that instruction).</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.75. Viacom even crafted marketing campaigns around its decisions to leave up certain user-posted videos.</p> <p>Defs. Opening Mem. at p. 47 (citing Rubin Ex. 28).</p> | <p>Controverted and immaterial to any issues before the Court. Contrary to the misleading wording of the asserted fact, the evidence cited by Defendants pertains to a single decision not to remove from YouTube copies of the official trailer for one film, Cloverfield. As reflected in the cited document, Paramount had already released the official trailer in order to encourage viewers to see the full motion picture. <i>See</i> Rubin Ex. 28. Having released the trailer, Paramount decided not to issue takedown notices for copies of that specific marketing clip appearing on YouTube. There is no evidence that Viacom crafted a marketing campaign around pirated clips of the film itself, as Defendants suggest.</p> |
| <p>1.76. The vast majority of the takedown notices that YouTube receives are processed through this tool [CVP] and thus are removed within minutes.</p> <p>Defs. Opening Mem. at pp. 55-56 (citing Levine Decl. ¶ 19).</p> | <p>Uncontroverted.</p> |
| <p>1.77. A number of the plaintiffs have signed up for YouTube’s automated takedown tool and have used it for years to secure the removal of videos containing their content.</p> <p>Defs. Opening Mem. at p. 56 n.25 (citing Schapiro Exs. 17 (205:25-210:23), 105, 106, 107 (94:13-95:11), 108 (80:22-83:16, 84:8-16, 109).</p> | <p>Controverted to the extent that the asserted fact implies that the CVP tool assists copyright owners in locating infringing clips on YouTube, or that the CVP tool is an adequate means to prevent copyright infringement. <i>See</i> Resp. to Defs. SUF ¶ 92. Indeed, when YouTube offered CVP to Viacom in February 2007, YouTube at the same time refused to use digital fingerprinting technology to prevent infringement of Viacom’s works absent a licensing deal. <i>See, e.g.,</i> Viacom SUF ¶¶ 211, 214-217.</p> |
| <p>1.78. Viacom’s agent for sending takedown notices (BayTSP), has repeatedly acknowledged that YouTube makes it easy to send DMCA notices and that it removes the material identified quickly and effectively.</p> <p>Defs. Opening Mem. at pp. 56-57 (citing Schapiro Exs. 120, 121).</p> | <p>Controverted to the extent that the asserted fact implies that YouTube adequately responds to all takedown notices. It is undisputed that Defendants refuse to respond to takedown notices that provide Defendants with “representative lists” of infringements. <i>See</i> Resp. to Defs. SUF ¶ 33.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.79. For months, Viacom had been accumulating these notices because it wanted, for strategic reasons, to send them all at one time.</p> <p>Defs. Opening Mem. at p. 57 (citing Schapiro Ex. 4 (149:4-25;195:9-196:14), Ex. 123, Ex. 124, Ex. 125).</p> | <p>Controverted as misleading regarding Viacom’s forbearance from enforcing its rights during the pendency of the parties’ licensing negotiations. <i>See</i> Resp. to Defs. SUF ¶ 128. Irrelevant to any issues before the Court.</p> |
| <p>1.80. It is not remotely the case that YouTube exists “solely to provide the site and facilities for copyright infringement.” . . . Even the plaintiffs do not (and could not) suggest as much. Indeed, they have repeatedly acknowledged the contrary.</p> <p>Defs. Opening Mem. at p. 60 & n.28 (citing Schapiro Exs. 126, 127 (129:21-130:14), 128 (79:7-80:3, 81:17-24, 83:12-16, 84:14-18), 129 (215:25-218:8, 224:2-225:13), 130 (19:10-14, 55:21-24), 25 (253:10-19), 112 (16:19-25), 20 (100:12-103:9), 131, 78).</p> | <p>Uncontroverted but immaterial to any issues before the Court. Defendants cannot claim protection under the DMCA safe harbor merely because their site had some legal functions.</p> |
| <p>1.81. YouTube could not manually review the massive volume of videos uploaded to its site in an effort to determine what those videos are and whether they infringe plaintiffs’ copyrights. Various witnesses unaffiliated with YouTube have recognized as much.</p> <p>Defs. Opening Mem. at p. 62 n.29 (citing Schapiro Exs. 132 (92:15-21), 133 (36:23-37:16)).</p> | <p>Controverted to the extent that the asserted fact suggests that YouTube was incapable of engaging in any manual review. Before Google acquired YouTube, Google’s own video service manually reviewed each video uploaded to its service without difficulty, except of course that it was losing the war for traffic to YouTube. <i>See</i> Viacom SUF ¶¶ 134-138. More broadly, rather than review <i>every</i> video, YouTube could have performed targeted review using various methods that YouTube considered and either never adopted or adopted only briefly, including community flagging for copyright infringement, reviewing videos with “hot tags,” and reviewing videos close to ten minutes long. <i>See</i> Viacom SUF ¶¶ 63, 75-77, 131. Defendants’ own documents show that they review <i>millions</i> of videos each year as part of their existing flagging system. <i>See</i> Hohengarten Ex. 13, GOO001-00044974, at GOO001-00044979 (May 2007 presentation noting that 19,000 flagged videos were</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| | reviewed per day). The cited testimony does not dispute that manual review could have played a meaningful role in YouTube’s copyright protection efforts when combined with other techniques. |
| <p>1.82. The varied uses that plaintiffs have made of YouTube make it difficult even for them to easily determine whether videos containing their content are actually unauthorized to be on YouTube.</p> <p>Defs. Opening Mem. at p. 64 n.30 (citing Schapiro Exs. 47 (45:14-46:17), 25 (239:14-242:11), 27 (55:2-56:12) (244:2-19), 134 (159:7-21), 11 (150:12-151:2)).</p> | <p>Controverted and immaterial to any issue before the Court. The cited evidence does not show any connection between Viacom’s marketing practices—of which YouTube was aware, <i>see</i> Resp. to Defs. SUF ¶ 125—and Viacom employees’ ability to determine whether a clip infringes its copyrights. Furthermore, the cited evidence does not have any bearing on Defendants’ culpable intent to infringe, or their ability to prevent infringement.</p> |
| <p>1.83. Viacom recognized that without detailed instructions and elaborate record-keeping, even its own monitoring agents would be unable to effectively distinguish clips that Viacom wanted to remain on YouTube (and other sites) from those that it wished to take down.</p> <p>Defs. Opening Mem. at p. 64-65 & n.31 (citing Schapiro Ex. 135, 136 (109:19-112:3), 27 (172:4-173:1), 57, 137 (BAYTSP003742451), 138 (BAYTSP001125473)).</p> | <p>Controverted to the extent Defendants imply that Viacom's communications with its monitoring agent have any bearing on Defendants' ability to distinguish infringing from non-infringing content. Viacom offered to work with Defendants to remove infringing content from the YouTube site, but Defendants rejected that offer and refused to take down videos displayed on the YouTube site that infringed Viacom's copyright unless Viacom sent a takedown notice listing the URL of the specific video. <i>See</i> Viacom SUF ¶¶ 209-220. Moreover, when Viacom and its agents occasionally made errors in taking down infringing content, they worked quickly to rectify those mistakes. <i>See</i> Resp. to Defs. SUF ¶ 146.</p> |
| <p>1.84. In an effort to prevent the removal of videos that Viacom had authorized (and to avoid the continued embarrassment of misdirected takedown notices), Viacom has tried to maintain internal “whitelists” of approved YouTube user accounts.</p> <p>Defs. Opening Mem. at p. 65 & n.32 (citing Schapiro Ex. 122 (414:24-420:6), 139 (162:6-10, 167:22-168:7); Rubin Decl. ¶ 5(a)-(f);</p> | <p>Uncontroverted that Viacom maintained internal whitelists, but controverted as to Defendants' characterization of those whitelists. <i>See supra</i> ¶ 1.83. Further controverted as to the claim that "whitelists" are "of approved YouTube user accounts." The names on the whitelist include account names used to upload authorized content as well as account names against which Viacom elected not to send takedown notices,</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| Schapiro Ex. 140). | including, for example, accounts that Viacom determined were used to upload content that may have constituted fair use. <i>See, e.g.</i> , GOO001-04945320 (correspondence from Viacom's agent regarding reinstatement of videos to YouTube account LiberalViewer); Rubin Exs. 101 & 106 (whitelists including LiberalViewer account). |
| 1.85. Despite Viacom's efforts, however, its whitelists consistently were incomplete and inaccurate. Defs. Opening Mem. at p. 65 (citing Rubin Decl. ¶ 5(a)-(f) & Exs. 84-116). | Controverted to the extent Defendants imply that Viacom's records as communicated to its copyright enforcement agents had any bearing on Defendants' ability to distinguish infringing from non-infringing content. <i>See supra</i> ¶ 1.83. |
| 1.86. [O]ne frustrated company [] complain[ed] to YouTube about Viacom's "blatant abuse of the DMCA takedown statute." Defs. Opening Mem. at p. 66 (citing Schaffer Decl. ¶ 17 & Exs. 5-7). | Controverted to the extent that the evidence on which Defendants rely is inadmissible hearsay. <i>See Evid. Obj.</i> at 8. |
| 1.87. Each day, a single advertiser is allowed to purchase an ad that runs for a 24-hour period on the YouTube home page. Defs. Opening Mem. at p. 76 (citing Reider Decl. ¶ 3). | Uncontroverted that this is the current practice. Viacom lacks information to confirm or deny the asserted fact, but notes that the prices of YouTube's home page ads have risen along with the size of YouTube's user base, confirming that Defendants derive a direct financial benefit from infringement. Kohlmann Ex. 34, GOO001-03676696, at GOO001-03676712. In any event the asserted fact is immaterial to any issue before the Court. |
| 1.88. YouTube allows advertisers to purchase advertising on the pages where the results of users' search queries are displayed. Defs. Opening Mem. at p. 76 (citing Reider Decl. ¶ 3). | Uncontroverted. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>1.89. [T]he ads that appear on search-results pages have nothing to do with the presence of any video on YouTube, or even with the particular videos that are listed in response to a user’s search.</p> <p>Defs. Opening Mem. at p. 76 (citing Schapiro Ex. 159 (172:21-25)).</p> | <p>Controverted. Defendants’ wording of the asserted fact is misleading. It is undisputed that the advertisements on YouTube’s search pages are targeted to the search terms that a user employs to find videos. <i>See</i> Viacom SUF ¶ 258. Thus, when a user searches for infringing content on YouTube by entering search terms like “South Park” or “Daily Show,” the search results page will list infringing clips and will also display advertisements that are targeted to users who like to watch <i>South Park</i> or <i>The Daily Show</i>. <i>See</i> Viacom SUF ¶ 259.</p> |
| <p>1.90. The revenue earned from the homepage ads, for example, is fixed based on how long the ad runs and has no connection to the presence of any given video (or kind of videos) that may be available for viewing on YouTube at any given time.</p> <p>Defs. Opening Mem. at p. 76 (citing Reider Decl. ¶ 6).</p> | <p>Controverted. Defendants may sell their home page ad at a fixed price in a given quarter, but there is no doubt that that price has increased over time as the size of YouTube’s user base grew exponentially. <i>See</i> Kohlmann Ex. 34, GOO001-03676696, at GOO001-03676712 (showing an increase in the per-day price of a homepage ad from ██████ in Q4 2007 to ██████ in Q2 2008); Kohlmann Ex. 37, GOO001-05311155, at GOO001-05311159 (projecting growth in cost-per-1,000 impressions (“CPM”) for home-page ads as total homepage impressions increase from Q4 2006 through Q4 2007). As more users have seen the home page in a given day, the daily price of the ads YouTube displays on that page has increased, which shows a clear relationship between the volume of YouTube’s traffic and the site’s revenue.</p> |
| <p>1.91. As for “watch-page” ads, YouTube allows such advertising to appear only alongside videos that have been posted or claimed by a content partner who has affirmatively instructed YouTube to display advertising next to its videos.</p> <p>Defs. Opening Mem. at pp. 76-77 (citing Reider Decl 9).</p> | <p>Controverted. This was not true prior to January 1, 2007. As Viacom made clear in its opening filing, on that date YouTube “for legal reasons” removed advertising from watch pages containing content that had not been posted or claimed by a YouTube content partner. <i>See</i> Viacom SUF ¶¶ 249-50. As a result, prior to that date, YouTube frequently showed advertisements next to, and earned revenue directly from, videos that infringed Viacom’s copyrights. <i>See</i> Viacom SUF ¶</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| | <p>251.</p> <p>Defendants’ own calculations with respect to advertisements displayed using a single advertising network (Google’s AdSense network) from April 2006 through December 2006 show that YouTube showed advertising on the watch pages of 11,013 clips in suit. <i>See</i> Defendants’ Supplemental “Highly Confidential” Responses and Objections To Plaintiffs’ Second Set of Interrogatories at 3-4.</p> |
| <p>1.92. At certain times prior to January 2007, watch-page ads were not limited (as they have been since) to pages displaying videos affirmatively claimed and designated for advertising by a content partner.</p> <p>Def. Opening Mem. at p. 77 (citing Reider Decl. ¶ 10).</p> | <p>Uncontroverted. <i>See supra</i> ¶ 1.91.</p> |
| <p>1.93. YouTube received the same rates from ads that appeared on watch pages regardless of what videos those ads appeared next to.</p> <p>Def. Opening Mem. at p. 77 (citing Reider Decl. ¶ 10).</p> | <p>Uncontroverted but immaterial to any issue before the Court. It is undisputed that the massive infringement on YouTube attracted additional users to the site and that those additional users generated additional advertising revenue for YouTube. <i>See, e.g.,</i> Viacom SUF ¶¶ 35, 36, 57, 85, 95, 171, 173, 174, 232, 233, 236, 240.</p> |
| <p>1.94. Other video-hosting services such as Daily Motion, Vimeo, Veoh, and Atom (which Viacom operates), as well as many other popular websites relying on user-submitted content (including MySpace and Facebook), all earn revenue from advertising and offer ad products comparable to those allowed by YouTube.</p> <p>Def. Opening Mem. at p. 77 (citing Reider Decl. ¶ 12).</p> | <p>Controverted because the cited testimony is inadmissible. <i>See</i> Evid. Obj. at 13-14.</p> |
| <p>1.95. YouTube was in no way intended or designed to lure users of any “pirate” service or to encourage any of its own users to infringe.</p> | <p>Controverted. Defendants in their earliest communications showed a desire that their site be as big, in terms of usage, as some of the most popular infringing services—</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| <p>Def's. Opening Mem. at p. 85 (citing Hurley Decl. ¶¶ 11, 16-22, 24-25).</p> | <p>“napster,” “kazaa,” and “bittorrent”—and implemented that plan by turning a blind eye to rampant infringement and removing infringing videos only after receiving DMCA notices from content owners. <i>See</i> Viacom SUF ¶¶ 29-132. That Defendants intended to build their service based on infringement, but may not have intended to lure users of a <i>particular infringing service</i>, is immaterial.</p> |
| <p>1.96. In an internal email from April 2005, for instance, Hurley explained his hope “that our site would become the hub of short, personal videos.”</p> <p>Def's. Opening Mem. at p. 85-86 (citing Schapiro Ex. 160, Schapiro Ex. 161, Schapiro Ex. 162, and Hurley Decl. ¶ 7).</p> | <p>Undisputed that Schapiro Ex. 160 contains the quoted language, but Viacom denies any inference that the statement fully encompasses the co-founders’ intentions when they founded YouTube. In that same e-mail exchange, Steve Chen and Jawed Karim both advocate YouTube becoming a “Flickr-like video site”; Steve Chen (in an email on which Chad Hurley and Jawed Karim are copied) later described “Flickr” to Roelof Botha as a site on which “you can find truckloads of adult and copyrighted content,” <i>see</i> Hohengarten Ex. 230, JK00007479. <i>Accord</i> Viacom SUF ¶¶ 29-132.</p> <p>Further controverted because Schapiro Ex. 160 and Schapiro Ex. 161 contain inadmissible hearsay. <i>See</i> Evid. Obj. at 1.</p> |
| <p>1.97. As Steve Chen put the point in an internal email from April 2005: “The ‘broadcast yourself’ is such a succin[c]t and exact slogan for what we want.”</p> <p>Def's. Opening Mem. at p. 86 (citing Hurley Ex 8; Botha Decl. ¶ 6 & Ex. 1).</p> | <p>Uncontroverted that Hurley Ex. 8 contains the quoted language. Similar statements in Botha Decl. ¶ 6 and Botha Ex. 1 are inadmissible hearsay. <i>See</i> Evid. Obj. at 11.</p> <p>Further controverted with respect to Defendants’ misleading reliance on materials from the Botha Declaration. In ¶ 6, Mr. Botha purports to describe Sequoia Capital’s “pre-investment meetings with the YouTube founders,” but at Mr. Botha’s deposition Defendants’ counsel blocked, on privilege grounds, all questioning regarding a known meeting about copyright issues. Kohlmann Ex. 65 (Botha Dep.) at 42:12-46:17. That privilege assertion is baseless, <i>see id.</i> at 35:14-37:22 (testifying that Mr. Botha’s</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| | company was still in arms length negotiations with YouTube when he attended the meeting), but regardless of its merit it precludes Mr. Botha from testifying now regarding the YouTube founders’ pre-investment statements. Furthermore, Botha Ex. 1 (a document identical to Hurley Ex. 15) does not support Defendants’ claims. <i>See</i> Resp. to Defs. SUF ¶ 6. |
| <p>1.98. [A]fter seeing one of the site’s early ads, a woman discovered YouTube and reported: “My son-in-law is serving in Iraq right now, but his server won’t let him open videos through email. My daughter has been burning DVDs of their new baby to send to him, but I wanted to find a faster way to get him in touch with his son, so I started googling for ‘video blogs’ and ‘free video blogs’ etc. Your site was listed to the right as a sponsored link. We’ve only just started today, so the jury is still out on whether he can open the website from there or not—still, your site is an incredible and a wonderful public service. It’s easy to use too.”</p> <p>Defs. Opening Mem. at p. 87 (citing Schapiro Ex. 166).</p> | Uncontroverted but immaterial to any issues before the Court. |
| <p>1.99. When [instances in which YouTube users disregard YouTube’s rules and warnings about copyright infringement] are brought to its attention, YouTube takes them seriously and firmly reminds users that the posting of unauthorized copyrighted material is prohibited.</p> <p>Defs. Opening Mem. at p. 88 (citing Levine Decl. ¶ 23).</p> | Controverted. YouTube accepted “notice”—and thus only allowed infringement to be “brought to its attention”—through DMCA notices that complied with YouTube’s rigid, narrow interpretation of the DMCA. <i>See</i> Resp. to Defs. SUF ¶ 33. Further, there is no evidence that YouTube’s messages to users were effective at reducing infringement, and Defendants’ internal communications belie such a claim. <i>See</i> Viacom SUF ¶¶ 29-132; Kohlmann Ex. 20, GOO001-00839838. |
| <p>1.100. Such warnings have long been part of YouTube’s communications with users suspected of violating YouTube’s copyright policies.</p> | Controverted. Defendants’ use of the word “suspected” is misleading because they responded only to takedown notices according to their rigid, narrow interpretation of the DMCA. <i>See</i> Resp. to Defs. SUF ¶ 33. In |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|---|
| <p>Defs. Opening Mem. at p .88 (citing Levine Decl. ¶ 23).</p> | <p>other ways, Defendants assiduously sought to hide from facts that would make them suspicious. <i>See, e.g.</i>, Hohengarten Exs. 202, GOO001-00829702, at 4 & at GOO001-00829704; Hohengarten Ex. 214, JK00000832; Hohengarten Ex. 232, JK00008043; Hohengarten Ex. 233, JK00008331; Viacom SUF ¶¶ 294-310. Further, there is no evidence that Defendants’ messages to users were effective at reducing infringement. <i>See supra</i> ¶ 1.99.</p> |
| <p>1.101. As early as April 2005, the founders created an email message that would be automatically sent to users whose videos were rejected for violating YouTube’s Terms of Service; the email made clear YouTube’s “rules” for what types of videos users were allowed to upload, including “No copyrighted material.”</p> <p>Defs. Opening Mem. at p. 88 (citing Hurley Decl. ¶ 8 & Ex. 9; <i>id.</i> ¶ 11 & Ex. 13).</p> | <p>Uncontroverted, except that Defendants have not provided any evidence that Defendants ever sent this email to any YouTube user. Further, the purported fact is immaterial to any issue before the Court.</p> |
| <p>1.102. In YouTube’s early days, when it was sufficiently small that one-on-one communications with users seemed practical, YouTube’s founders sent similar messages to users who tried to post material forbidden by the service’s rules. For instance, in July 2005, Chad Hurley wrote to a user whose video was rejected, explaining that “it was rejected because it was copyrighted material. We are trying to build a community of real user-generated content.”</p> <p>Defs. Opening Mem. at p. 88 n.41 (citing Hurley Decl. ¶ 17 & Ex. 22).</p> | <p>Uncontroverted that Chad Hurley sent to one user the e-mail described in the asserted fact. Controverted to the extent that the asserted fact implies that the e-mail is truthful and that YouTube actually carried out the measures set forth in the email. The email states that “moving forward we are going to be more proactive about screening videos upfront. Some early videos were not properly screened, so you may see some violations on the current site. We are going to be reviewing and removing these shortly.” <i>See</i> Hurley Ex. 22. In other words, Mr. Hurley represented to the user that YouTube would begin doing exactly what Google Video did before Google relaxed its copyright enforcement policies to compete with YouTube: “screen[] videos upfront.” <i>Id.</i>; <i>see also</i> Viacom SUF ¶¶ 134-37 (describing Google Video’s practices until September 1, 2006). YouTube’s practice has</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|--|--|
| | not been to pre-screen videos but instead has been to wait for DMCA notices from content owners. |
| <p>1.103. The President’s weekly video addresses are available for viewing on YouTube.</p> <p>Defs. Opening Mem. at p. 89.</p> | Uncontroverted and immaterial to any issue before the Court. |
| <p>1.104. [A]vailable for viewing on YouTube are: . . . highlights of the Stanley Cup Playoffs, NBA Finals, and U.S. Open, uploaded by the NHL, NBA, and USTA; videos posted by users of their pets performing tricks; music videos uploaded or claimed by major record labels including Sony Music, EMI, Universal Music, and Warner Music Group; amateur video footage of an amazing confrontation between lions, crocodiles, and buffalo in Kruger National Park that has been viewed nearly 50 million times; holiday greetings home from soldiers stationed around the world to their families back home; videos of astronauts giving a tour of the International Space Station and responding from outer space to questions posed by YouTube users; lectures given by professors from leading universities on subjects ranging from particle physics to Shakespeare; and even a presentation given at the Library of Congress about YouTube’s impact on society and culture.</p> <p>Defs. Opening Mem. at pp. 89-90 (citing Walk Decl. ¶¶ 6, 7, 12, 17, 18, 20, 21).</p> | Controverted to the extent that Walk Decl. ¶ 12 contains improper lay opinion. <i>See</i> Evid. Obj. at 6. |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.105. [P]laintiffs’ own analyses of YouTube suggest that it consists overwhelmingly of user-generated material and videos appearing pursuant to YouTube’s license agreements with its array of content partners.</p> <p>Defs. Opening Mem. at p. 90 n.42 (citing Schapiro Exs. 167 (VIA00316621), 168 (VIA00857223), 180 (¶ 16)).</p> | <p>Controverted, but immaterial. It is undisputed that Defendants’ own analyses of the volume of infringing content on YouTube put the figure between 54% and 80%. <i>See</i> Viacom SUF ¶¶ 55, 95, 104, 153, 170, 171, 173, 174, 176, 181. The documents cited by Defendants do not create a material dispute on this point. Schapiro Ex. 167 was a presentation prepared in August 2006, stating nearly all of YouTube’s “top 100 viewed clips of all time” were user-generated. <i>Id.</i> at VIA00316621. Because YouTube screened its “most viewed” page to remove infringing clips, <i>see</i> Hohengarten Ex. 128, GOO001-01535521, Hohengarten Ex. 198, GOO001-01931799, at 5 & at GOO001-01931806, this quote does not in any way quantify the volume of infringement on YouTube. Furthermore, Schapiro Ex. 168 says nothing about the quantity of infringement or non-infringement on YouTube. Schapiro Ex. 180 is Robert Tur’s <i>complaint</i> against YouTube; the cited paragraph says that “substantial use of YouTube’s website was and is made by users uploading their own homemade videos,” but it also says that “consumers viewed, millions of times, copyrighted material from major television networks, e.g., NBC, Fox, and cable networks.”</p> |
| <p>1.106. [T]he number of YouTube accounts terminated in whole or in part based on allegations of infringement represents less than <i>two-tenths of one percent</i> of the overall number of accounts registered since YouTube was founded in 2005.</p> <p>Defs. Opening Mem. at p. 91 n.43 (citing Levine Decl. ¶ 31).</p> | <p>Controverted as misleading. <i>See</i> Resp. to Defs. SUF ¶ 86.</p> |
| <p>1.107. In early 2007, YouTube began using audio-fingerprinting technology from Audible Magic.</p> <p>Defs. Opening Mem. at p. 94 (citing King Decl. ¶ 4).</p> | <p>Controverted to the extent that the asserted fact implies that YouTube began using Audible Magic to prevent infringement of all copyrighted content on YouTube. In fact, YouTube only deployed Audible Magic to protect the copyrighted content of those</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| | content owners who agreed to license their content to YouTube. <i>See</i> Viacom SUF ¶¶ 294-310. |
| <p>1.108. YouTube devoted over 50,000 man-hours and spent millions of dollars developing this sophisticated copyright-protection tool [Video ID].</p> <p>Defs. Opening Mem. at p. 94 (citing King Decl. ¶¶ 11, 13-17).</p> | <p>Controverted to the extent the purported fact relies on King Decl. ¶¶ 11, 13, 14, and 16, which are or contain inadmissible evidence. <i>See</i> Evid. Obj. at 4-5.</p> |
| <p>1.109. YouTube was the first (and to our knowledge the only) website dedicated to user-submitted video that built its own video fingerprinting system.</p> <p>Defs. Opening Mem. at p. 94 (citing King Decl. ¶ 19; Schapiro Exs. 169 (287:16-288:4), 170 (202:23-203:3)).</p> | <p>Controverted. The cited deposition testimony does not support the purported fact, and King Decl. ¶ 19 is inadmissible because it is not based on Mr. King’s personal knowledge. <i>See</i> Evid. Obj. at 4; <i>see also</i> Resp. to Defs. SUF ¶ 100.</p> |
| <p>1.110. [M]ost major television networks, movie studios, and record labels, as well as most major sports leagues in the United States and abroad have started using Content ID to find and manage their content on YouTube.</p> <p>Defs. Opening Mem. at p. 94-95 (citing King Decl. ¶ 21).</p> | <p>Uncontroverted but immaterial to any issues before the Court.</p> |
| <p>1.111. In the site’s first months, YouTube’s twenty-something founders grappled with how best to address situations where it seemed that users had uploaded videos in violation of YouTube’s rules.</p> <p>Defs. Opening Mem. at p. 95 (citing Hurley Decl. ¶¶ 15-18).</p> | <p>Controverted. Defendants’ internal communications make unambiguous their intent to grow the site by turning a blind eye to rampant infringement. <i>See, e.g.,</i> Viacom SUF ¶¶ 29-132.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.112. Working out of Hurley’s garage, and lacking legal training or counsel, the founders first installed an ad hoc monitoring program under which they removed videos they came across that they thought might be unauthorized.</p> <p>Defs. Opening Mem. at p. 95 (citing Hurley Decl. ¶ 17).</p> | <p>Controverted. The founders’ intent was to give only the “perception” of copyright compliance while still allowing “truckloads” of infringing content on the site. Hohengarten Ex. 230, JK00007479. For example, Steve Chen explained that he wanted only to remove “whole movies” and “entire TV shows,” but that he wanted to keep “everything else.” Hohengarten Ex. 228, JK00007420.</p> <p>Defendants have not supported that the founders worked out of Hurley’s garage during this period, or that they were unsophisticated. All had long histories at PayPal, another Internet startup. <i>See</i> Viacom SUF ¶¶ 11-12. They had already had several meetings with venture capital firms, <i>see, e.g.</i>, Viacom SUF ¶ 49, and they either had already or soon thereafter moved into office space provided by Sequoia Capital. <i>See</i> Kohlmann Ex. 65 (Botha Dep.) at 91:4-92:21; Kohlmann Ex. 38, GOO001-05639863, at GOO001-05639864.</p> <p>Further, Defendants blocked testimony into the substance of non-privileged conversations between Mr. Hurley, Mr. Botha, and counsel about copyright infringement issues. <i>See supra</i> ¶ 1.97. Defendants waived an advice-of-counsel defense in this action, so they cannot rely on that advice to establish their good faith. <i>See</i> Viacom Opp. at 12.</p> |
| <p>1.113. For a short period of time in the fall of 2005, the founders tried to rely on a “community flagging” system, whereby users could flag videos as being “copyrighted” for YouTube to review and remove based on guesses about what was unauthorized.</p> <p>Defs. Opening Mem. at p. 95 (citing Hurley Decl. ¶ 20).</p> | <p>Controverted to the extent that the words “tried to rely” and “guesses” are intended to suggest that community flagging was ineffective or flawed, or that YouTube was unable to distinguish infringing content from legitimate content. <i>See infra</i> ¶ 1.114.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL


| Asserted Undisputed Fact | Response |
|--|--|
| <p>1.114. Quickly realizing that those approaches were flawed, and having secured financial backing from investors, YouTube consulted with outside counsel, installed a formal DMCA program, and brought in an in-house lawyer with a background in copyright law.</p> <p>Defs. Opening Mem. at p. 95 (citing Hurley Decl. ¶ 21; Levine Decl. ¶¶ 3-4, 13).</p> | <p>Controverted. Other than self-serving testimony in this litigation, there is no documentary evidence <i>whatsoever</i> in the record to suggest that anybody at YouTube believed that community flagging for copyright infringement was “flawed,” or that any of the numerous approaches considered but never implemented (<i>see</i> Viacom SUF ¶¶ 75-77, 112-115) would have been flawed in practice. Rather, the documentary evidence shows conclusively that community flagging was shut down to avoid putting YouTube on “notice,” <i>see</i> Hohengarten Ex. 232, JK00008043, and that other measures never were taken because YouTube employees “hate[d] making it easier for these a-holes” -- referring to copyright owners -- and were “just trying to cover our asses so we don’t get sued.” Hohengarten Ex. 202, GOO001-00829702, at 4 & at GOO001-00829704.</p> <p>Further controverted because Levine ¶¶ 3 and 13 are inadmissible. <i>See</i> Evid. Obj. at 14-15.</p> |
| <p>1.115. The mainstays of the Internet economy—sites such as Google, Facebook, MySpace, Twitter, Yahoo—and Internet sites for traditional media like <i>The New York Times</i> and CNN—all use [a “free public access supported by advertising”] model.</p> <p>Defs. Opening Mem. at p. 96 (citing Reider Decl. ¶ 12).</p> | <p>Controverted because Ms. Reider’s testimony on this issue is inadmissible. <i>See</i> Evid. Obj. at 13-14.</p> |
| <p>1.116. So do Viacom’s own video-sharing services.</p> <p>Defs. Opening Mem. at p. 96 (citing Schapiro Ex. 172 (22:10-24)).</p> | <p>Uncontroverted but immaterial to any issues before the Court.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

| Asserted Undisputed Fact | Response |
|---|--|
| <p>1.117. Most of the nation’s top 100 advertisers have purchased advertising on YouTube, including Procter & Gamble, General Electric, PepsiCo, American Express, Bank of America, Kraft Foods, and Sears.</p> <p>Defs. Opening Mem. at p. 97 (citing Reider Decl. ¶ 2).</p> | <p>Uncontroverted but immaterial to any issues before the Court.</p> |
| <p>1.118. Large media companies and other prominent copyright owners (Time Warner, Walt Disney, News Corp., Lions Gate Entertainment, and the NBA, among many others) also routinely run ads on YouTube (and have done so for years).</p> <p>Defs. Opening Mem. at p. 97 (citing Reider Decl. ¶ 2; Schapiro Ex. 173).</p> | <p>Uncontroverted but immaterial to any issues before the Court.</p> |
| <p>1.119. Viacom’s marketing personnel raved about the successful promotions they were able to achieve using YouTube.</p> <p>Defs. Opening Mem. at p. 97 (citing Schapiro Exs. 25 (43:17-22), 26).</p> | <p>Controverted. <i>See supra</i> ¶ 1.53.</p> |
| <p>1.120. Viacom’s executives and employees regularly use YouTube—posting, watching, and sharing personal videos, just like millions of other YouTube users around the world.</p> <p>Defs. Opening Mem. at p. 98 (citing Defs. Opening Mem. at 60 n.28; Schapiro Ex. 174).</p> | <p>Controverted to the extent that the asserted fact implies that Viacom executives and employees “regularly” engage in these practices, or that most or all of them do. The cited evidence does not support that claim. In any event, the asserted fact is immaterial to any issues before the Court.</p> <p>Further controverted to the extent the alleged fact relies on Schapiro Ex. 174, which is inadmissible hearsay. <i>See Evid. Obj.</i> at 1.</p> |

Subject to Protective Order – HIGHLY CONFIDENTIAL

Respectfully submitted,

By: 

Stuart J. Baskin (No. SB-9936)
John Gueli (No. JG-8427)
Kirsten Nelson Cunha (No. KN-0283)
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

By: 

Paul M. Smith (No. PS-2362)
William M. Hohengarten (No. WH-5233)
Scott B. Wilkens (*pro hac vice*)
Matthew S. Hellman (*pro hac vice*)
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Susan J. Kohlmann (No. SK-1855)
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 891-1690
Facsimile: (212) 891-1699

To: " [REDACTED] ", "jmarsh@google.com"
<jmarsh@google.com>
From: "eFax Corporate" < [REDACTED] >
Cc:
Bcc:
Received Date: 2007-02-12 21:34:19 GMT
Subject: Corporate eFax from 12126644733 - 7 page(s)

You have received a 7 page fax at 2007-02-12 21:31:28 GMT.

* The reference number for this fax is oak1_did11-1171315701-6506181833-1.

Please visit <https://www.efaxcorporate.com/corp/twa/page/customerSupport> if you have any questions regarding this message or your service. You may also e-mail our corporate support department at corporatesupport@mail.efax.com.

Thank you for using the eFax Corporate service!

Attachments:

d0dca31.pdf

EXHIBIT 30
Drummond
Feb 2-12-09



RICHARD COTTON
EXECUTIVE VICE PRESIDENT and GENERAL COUNSEL
NBC UNIVERSAL, INC.
30 Rockefeller Plaza, Room 5249E
New York, New York 10112
Phone: (212) 664-7024
Fax: (212) 664-4733

To: Mr. David Drummond

Fax:

Telephone:

Date: February 12, 2007

Pages being sent including transmittal sheet: 7

The information contained in this facsimile message is confidential information intended only for the use of the individual or entity named above. If the recipient of this facsimile message is not the intended recipient as named above, or the employee or agent responsible to deliver it to the intended recipient, he/she is hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify by telephone, and return the original message to us at the above address. Thank you.



RICHARD COTTON
Executive Vice President
and General Counsel

30 Rockefeller Plaza
New York, NY 10112
212 664 7024 tel
212 664 4733 fax
rick.cotton@nbcuni.com

February 12, 2007

WITHOUT PREJUDICE

Via Fax and FedEx

David Drummond
Senior Vice President, Corporate Development
Kent Walker
Vice President and General Counsel
Google, Inc.
1600 Amphitheatre Parkway
Mountain View, California 94043

Zahavah Levine
General Counsel and Vice President, Business Affairs
YouTube, Inc.
1000 Cherry Ave.
San Bruno, CA 94066

Re: NBC Universal/YouTube

Dear Mr. Drummond, Mr. Walker and Ms. Levine:

I am writing to request your urgent attention, and prompt action on your part, to address the persistent infringement of NBC Universal ("NBCU") copyrighted content on the YouTube.com website. As discussed in greater detail below, the status quo simply does not work as an ongoing proposition for conduct of business by our respective companies, either independently or in prospective partnership, and it must change. We urgently request that YouTube immediately take all necessary steps, including deployment of a preventive filtering system for copyrighted content across its platform, that will effectively and pro-actively prevent the constant, endlessly repetitive appearance of wholesale amounts of NBCU copyrighted content on YouTube which NBCU has not authorized.

As you know, NBCU has entered into a variety of agreements with YouTube authorizing the exhibition of a variety of NBCU content. Those arrangements have worked to our mutual benefit. What does not work to our mutual benefit – and indeed damages NBCU greatly and irreparably – is the constant appearance on the YouTube site of NBCU content that NBCU has *not* authorized. NBCU executives have repeatedly discussed with YouTube personnel the absolute need for YouTube to take pro-active steps to screen out unauthorized NBCU content, as opposed to its current enunciated practice of posting and exhibiting vast volumes of copyrighted material unless and until it receives a notice to remove it. In YouTube's situation, where it both knows of the huge volume of infringing material and benefits financially from the traffic this illegal content drives to the site, it must do more.

Indeed, we write this letter now because YouTube has been stating for months that it *would* do more. For instance, YouTube publicly announced that “[b]y the end of the year [2006],” YouTube would provide “sophisticated tools to help content owners identify their content on the site” and “[a]utomated audio identification technology to help prevent works previously removed from the site at the request of the copyright owner from reappearing on the site.” (Press Release, Sept. 25, 2006, <http://youtube.com/press_room_entry?entry=CtO5EcMt2yM>.) But YouTube has not provided such tools to prevent infringement.

For many months, NBCU has been incurring the burden and expense of regularly attempting to locate video clips from copyrighted works owned by NBCU entities and sending “takedown notices” to YouTube to remove from its site thousands of such clips. Yet, in what has become an “evergreen” cycle of infringement, the same content frequently reappears on YouTube's site almost as quickly as it is removed. In addition, there is a constant stream of new unauthorized uploads of other NBCU works that YouTube copies to its servers and displays. Each scenario offers fresh opportunities for YouTube to attract viewers and garner advertising income using NBCU's content, without benefit of a license. Indeed, despite NBCU's substantial efforts at sending takedown notices on a daily basis, the infringing clips on which NBCU sent notices in January 2007 alone had generated more than 28 million page views on YouTube.

A few concrete examples will demonstrate why the status quo is untenable and why YouTube's current system is wholly inadequate to prevent continuous, rampant infringement:

- Episode 12 of NBC's hit television program “Heroes” aired on January 22, 2007. By no later than the next day, YouTube began hosting and streaming at least three separate and complete copies of Episode 12. Although these clips were removed in response to NBCU notices, YouTube continued to host and stream complete copies of that same episode, as it was uploaded multiple times within that one week period alone, specifically on January 24, 25, 26 and 29. Indeed, over the course of the same period, YouTube hosted and streamed complete copies of almost the entire season of “Heroes” despite having received numerous prior notices of infringement concerning that title.

- Universal Studios released the motion picture "American Pie 5: The Naked Mile" ("American Pie") for home video on December 19, 2006. By the following day, YouTube was hosting and streaming a complete copy of "American Pie" in twelve segments. The YouTube subscriber who uploaded these videos tagged them simply as "AP," presumably to frustrate copyright monitoring based on key word searches. Available filtering technology, which does not depend on key words, would have been able to identify this video before it was uploaded. The infringing "American Pie" videos have to date generated more than 1.5 million page views from YouTube's servers. Many users presumably found the videos through pirate link sites, such as Flickpeek.com, which index complete TV episodes and motion pictures available on YouTube and elsewhere. Flickpeek, like many pirate sites, does not charge its users any fee but rather generates revenue through Google AdSense. In other words, YouTube and Google are not only both generating revenue for themselves from the 1.5 million plus views of "American Pie," but are also enabling pirate sites such as Flickpeek to earn advertising income. At the same time, YouTube and Google are providing no compensation to NBCU for unauthorized use of its content.
- Although YouTube claims to terminate users who are repeat infringers, its policies and/or practices regarding repeat infringers are inadequate and go unimplemented. For example, "hakabish," a user who has been the subject of multiple notices, continues to upload complete episodes of "Heroes" as well as Warner Bros.' "Smallville." Indeed, the YouTube home page for this user announces that he will upload "Heroes" every Tuesday (the day after it airs on NBC) as well as episodes of "Smallville" on Fridays. Hakabish has a Director's Account, which appears to allow him to exceed the 10-minute clip limit that YouTube claims applies to regular user accounts. Hakabish has indicated in comments readily viewable on YouTube that he may create a private channel on YouTube (viewable only upon invitation of the channel owner) to avoid monitoring by copyright owners.

While we could continue to give examples illustrating the deficiencies of YouTube's current "notice-and-takedown" processes, we think it best to quote a YouTube subscriber who posted the following comment after the removal of Episodes 12 and 13 of "Heroes": *"[F]or god SAKE someone else UPLOAD 12 AND 13 AGAIN and if they take it off SOMEONE ELSE DO IT AGAIN, they cant take it off the second u upload it FFS. USE UR HEAD PEOPLE!"* Regrettably, but unsurprisingly, YouTube continues to host and stream complete and unauthorized copies of Episodes 12 and 13 of "Heroes" even as of today. Indeed, its business model now seems designed to benefit from traffic generated by these infringements and the many thousands more like them.

For several reasons, we firmly believe that the DMCA affords YouTube and Google no protection under these circumstances. YouTube's purported status as a mere passive "service provider" offering "storage at the direction of a user" is completely eviscerated by its

employment of technology to copy, reformat and index the uploaded video on its servers for easier viewing, its display of advertising alongside the video while it is viewed, its sorting of videos into numerous categories, and its distribution of the video, among the many other active steps it takes to enhance its viewers' experience and draw them to its website. As such, YouTube is responsible for the massive infringements occurring on its own site, and its refusal to employ systems to prevent that infringement is legally indefensible.

Many months of operating experience have conclusively demonstrated that paper policies against infringement, combined with a "notice and remove" system, are futile means to address the massive amount of copyright infringement taking place on YouTube. This trail of experience unequivocally calls for affirmative measures to prevent copyright infringement on YouTube using available means, whether technological or human. More specifically, YouTube can and should at a minimum take the following steps:

- YouTube should promptly deploy "fingerprint"-based filtering technology, such as Audible Magic, to screen all uploaded video against a database of copyrighted works and prevent upload and/or display of unauthorized video, both as to full copies of works and clipped excerpts. The content fingerprint database should be populated over time not only by NBCU and other copyright owners, but also by YouTube itself using video clips that YouTube has removed due to copyright infringement. YouTube should work cooperatively with whichever technology vendor it selects, and with content owners, to fine tune the filtering system and improve its performance, especially as hackers attempt to circumvent it. Again, we will be pleased to work cooperatively with you to that end, as we are doing with MySpace, which has announced a plan to roll out Audible Magic filtering on its site to prevent copyright violations. In addition to Audible Magic, we note that Philips, GraceNote and Guba have all developed filtering solutions that establish the feasibility of technologically detecting and excluding unauthorized content.
- While the technological filtering solution is being ramped up, YouTube should use human filtering to prevent uploading and/or display of video that is identifiable as copyrighted and unauthorized, just as it apparently does now for pornography, hate speech and other inappropriate material.
- When YouTube receives a takedown notice or otherwise obtains knowledge of a clip that has eluded the filtering system, it should immediately remove not only the clip (or full work) in question, but all other versions or excerpts of the same copyrighted programming identified in the notice, in addition to "hashing" and "fingerprinting" the copyrighted work to prevent future unauthorized uploads as discussed above.
- YouTube should also actively monitor its site, including private channels, for additional unauthorized copies of NBCU's copyrighted works using keywords, tags, and other information we provide to you, and remove them when they are located without waiting for a specific notice.

David Drummond, et al.
February 12, 2007
Page 5

- YouTube should notify users who have uploaded clips that are subsequently removed, as well as those whose attempted uploads are turned back by the filtering system, that their uploads violated copyright law and YouTube's own Terms of Use, rather than just a notice asserting that the content has been removed at the request of the copyright owner.
- YouTube should immediately implement an effective system to terminate the user accounts of repeat infringers, including a process for preventing their resubscription under new user accounts.
- YouTube should implement procedures to block the use of YouTube to host "hidden" copyrighted content for pirate link sites such as Flickpeek discussed above. These procedures should include a means, such as a designated YouTube e-mail account, for copyright owners to notify YouTube of such pirate link sites.

We harbor no unrealistic expectations that such means would be 100% effective at all times. But we do expect implementation of available preventive steps to address wholesale infringements of this magnitude, especially because these infringements are a direct by-product of the way YouTube is designed to operate. Since technological means are currently available to reduce radically the amount of infringing material that reaches YouTube users, there is no excuse not to adopt them.

Deployment of such preventive measures cannot be conditioned on first reaching a commercial agreement. Other user-generated content sites both large and small — including MySpace, Revver and Guba — have taken significant steps to prevent copyright infringement on their sites without such a prerequisite. Indeed, YouTube's commercial offer indicates that, as a technological matter, YouTube is fully capable of identifying our copyrighted material on an automated basis. But despite its previously declared intention to do more to prevent copyright infringement, YouTube now seems to be taking the position that it will not deploy such technology to meet legal obligations, but will only offer it to copyright owners that submit to YouTube's commercial demands. While we are happy to work with you on the technological and legal fronts in developing a filtering system that meets our respective needs and those of other content owners, meeting your legal obligations must be completely independent of any business discussions.

In this connection, although much of this information is already available to you, as a first step in the process we will shortly provide you with a list of NBCU's copyrighted works, as well as a list of the authorized user accounts from which NBCU content may be uploaded to YouTube. Each of those will be a living document that we intend to update regularly, and we expect that they will be used as part of a preventive program. In the meantime, we will continue to send takedown notices, but for the reasons discussed above that simply cannot be regarded as an acceptable solution to the current state of affairs.

David Drummond, et al.
February 12, 2007
Page 6

It is our sincere hope that both the business and filtering discussions can and will proceed toward a common goal of a mutually beneficial business relationship that recognizes the value and copyrighted nature of NBCU's content. Both of these discussions have now been ongoing for extended periods of time. From our point of view, we are quickly approaching a crossroads. By the close of this week, we ask for the following: (i) a commitment and plan for rapid deployment of a system and procedure to prevent uploading and display of *unauthorized* content, and, (ii) to the extent both parties seek to *authorize* substantial NBCU content on YouTube, an agreement in principle on a commercial deal that clearly delineates the scope and terms for carriage of such authorized NBCU content.

I suggest we talk on Friday, February 16th, to determine where we are on both questions.

The foregoing is not intended to be a complete statement of the facts, rights or claims relating to this matter. NBC Universal expressly reserves all of its rights, claims and remedies with respect to the issues addressed in this letter.

Sincerely,



Richard Cotton

cc: Jeff Zucker
Beth Comstock

A-785

To: "Patrick Walker" <pjwalker@google.com>, "Jeff Nathenson" <jeffn@google.com>, "Lori Scott" <loriscott@google.com>, "Anthony Zameczkowski" <anthonyz@google.com>
From: "Sathya Smith" <sathya@google.com>
Cc: "Adam Coates" <acoates@google.com>
Bcc:
Received Date: 2007-03-07 16:23:20 CST
Subject: Please read: guidelines for deploying YT tools

Hello all,

I have a conversation with SBO Engineers and PMs last night regarding CYC, CVP, SFTP and other tools. One of the things we talked about is the distribution of these tools. Here is the final verdict on this. Please pass it on to other SPDs and anyone else who might be pitching YT to partners.

CYC: should only be given to signed, non-music partners. This is what legal has authorized. The tool was purposely built for partners and does not address the needs of non-partners. In particular, it is built around the idea of creating claims which then drive royalty reporting, and as claims require metadata to make reporting happen, the process is more effort than the streamlined CVP process. There seems to be a misapprehension that CYC is a higher service level when it is actually a means to manage parameters that relate specifically to partnerships.

SFTP: only for signed partners. There is considerable effort involved in setting up drop boxes and YT will not support un-signed, promotional, potential partners under any circumstances. They will set up SFTP if the partner has signed a deal or is very close to signing a deal.

CVP: is for everyone. There are no restrictions on use of this.

The xls to xml conversion script: This is a script written by one of the SEs it is crude and it is unsupported. We can provide this script to partners to help them out, but we will not support it. If the script does not work or if there are bugs, the partner will have to debug it themselves. bottom line it is only for guidance.

Please let me know if you have any questions.

cheers
Sathya

--

Sathya Smith
Sales Engineer, Google Inc.,
Direct: [REDACTED]
Mobile: [REDACTED]

To: "Sathya Smith" <sathya@google.com>
From: "David G King" <dgking@youtube.com>
CC: "Franck Chastagnol" <fchastagnol@youtube.com>, "Richard Kuo" <rkuo@google.com>, "Matthew Liu" <matthew@youtube.com>, "Eric Mauskopf" <mauskopf@google.com>, "Mark Yoshitake" <myoshitake@google.com>, "Frey Waid" <frey@youtube.com>, "Adam Coates" <acoates@google.com>
BCC:
Sent Date: 2007-03-06 23:22:50 GMT
Subject: Re: CYC Availability & Electronic Arts

Sorry, I've been locked up in meetings. I've answered some of your questions inline below. As Matthew said, bottom line is CYC only for non-music partners, and CVP for everyone else.

Sathya Smith wrote:

> Franck,
>
> "so for now we recommend giving the CVP tool to non-partner."
>
> I guess you meant partners not non-partners?
>
> David, can you provide more feedback? Your definition of partner vs.
> non partner will be very helpful. Also what is the ETA on opening the
> tool to non-partners?
>
> thanks
> Sathya
>
>

> On 3/6/07, *Franck Chastagnol* <fchastagnol@youtube.com
> <mailto:fchastagnol@youtube.com>> wrote:
>
> adding david king PM responsible for CYC
>
> our guideline is to provide CYC tool only to partners for now.
>
>
> David can give you more details
>
> thanks,
> franck
>

> On Mar 6, 2007, at 11:12 AM, Sathya Smith wrote:

>
>> Thanks Richard.
>>
>> My stand until now has been if a partner signs a commercial
>> contract with us then we will give them the tools. If not they
>> will have to use the content verification tool and normal DMCA
>> procedure. The sales team is pushing for everyone to have access
>> to this tool.
>>
>> I think this is a bad idea, for the following reasons(to name a few):
>> - stability of the tool
>> - someone has to support it
>> - volume of claims that will have to be validated
>> - add to this the legal issues, and users removing content

>> because they can, etc.

>

I agree with your reasons. We are only rolling out the tool to the first two partners this week. We need to stabilize the platform before we add tons of users to it. The tool was purpose built for partners and does not address the needs of non-partners. In particular, it is built around the idea of creating claims which then drive royalty reporting, and as claims require metadata to make reporting happen, the process is more effort than the streamlined CVP process. There seems to be a misapprehension that CYC is a higher service level when it is actually a means to manage parameters that relate specifically to partnerships.

>

>>

>> I need solid information I can use to push back on Sales.

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

>>

Some of you might think that this is a bit harsh, but I have to consider the amount of work the TAMs and TSE will have providing support to partners.

So, solid guidelines of YT's tools deployment will be very very helpful. Looking forward to hearing from you and YT's official policies.

Cheers
Sathya

On 3/6/07, *Richard Kuo* <rkuo@google.com
<mailto:rkuo@google.com>> wrote:

Hey guys,

This question came up again recently from the UK end. The

>> sales team is pushing to promote access to the CYC tool in
>> all their deals when the partner wants to be able to take
>> down content. Are there any general guidelines / timelines
>> around providing access to the CYC tool in deals? Aka, who
>> and when are we giving access out to?

>> Richard

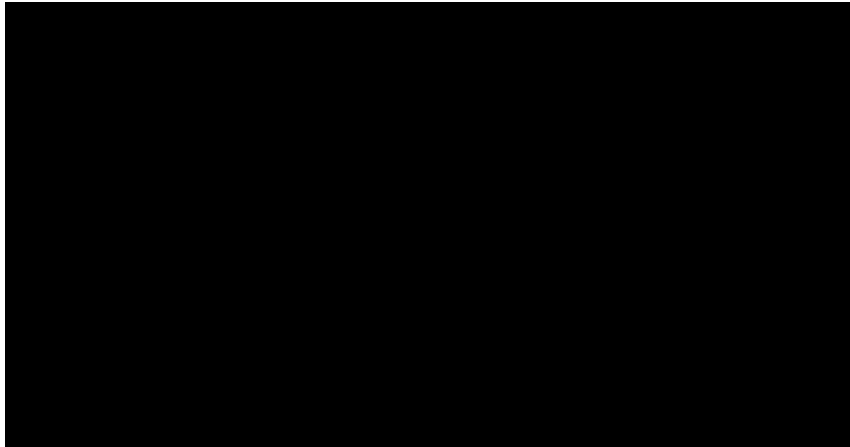
>> On 2/22/07, *Richard Kuo* <rkuo@google.com
>> <mailto:rkuo@google.com>> wrote:

>> Couple of questions...

>> What are the general criteria we are using to decide what
>> partners get access to the CYC tool? Are we going to be
>> promoting it broadly or only on a case by case
>> basis...and is there any sort of imagined timeline for
>> piloting more before rolling out more broadly? If case
>> by case, who is the gateway for that decision, if any?

>> Does setting the video to "Track" do anything right now,
>> then? Or is it an empty option at the moment?

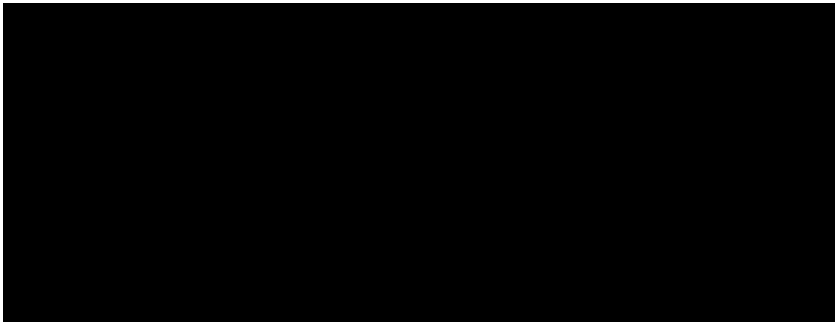
>> On 2/21/07, * Matthew Liu * < matthew@youtube.com
>> <mailto:matthew@youtube.com>> wrote:



>> Matt

>> On Feb 21, 2007, at 11:37 PM, Eric Mauskopf wrote:

>>> Hi Mark and Franck -



A-790

Case 1:07-cv-02103-LLS Document 374-4 Filed 06/25/10 Page 5 of 5

February 3, 2007

Viacom Tells YouTube: Hands Off

By [GERALDINE FABRIKANT](#) and [SAUL HANSELL](#)

In a sign of the growing tension between old-line media and the new Internet behemoths, [Viacom](#), the parent company of MTV and Comedy Central, demanded yesterday that YouTube, the video-sharing Web site owned by [Google](#), remove more than 100,000 clips of its programming.

Viacom, along with other major media companies, including the [News Corporation](#) and NBC Universal, has become increasingly frustrated with YouTube as it has amassed a vast library of copyrighted clips, placed on the site by its users.

While such companies regularly ask YouTube to remove their material, Viacom's demand, which it disclosed in a statement circulated by e-mail, was the most militant and public move of its kind so far.

As it has with the similar request from other companies, Google removed the Viacom clips from the YouTube site yesterday.

The dispute underscored the tense dance that major media companies are doing with Google, which bought YouTube for \$1.65 billion last October. Google hopes to strike deals that will give it the rights to mainstream programming and also wipe away its potential liability for any violations of copyright law by YouTube so far.

Despite intense negotiations in recent months, Google has not been able to announce any such deals with media companies. YouTube is supported by advertising, but in most cases it does not share that revenue with copyright holders.

Viacom is particularly unhappy because so many of its shows, like "The Daily Show With Jon Stewart," a YouTube favorite, appeal to the young audiences who visit the site.

"We cannot continue to let them profit from our programming," Philippe P. Dauman, Viacom's chief executive, said in an interview. Mr. Dauman said that Viacom had been in discussions with Google for months, but that Google kept delaying and did not make what Viacom saw as a serious offer.

David Eun, a vice president for content partnerships at Google, said that his company had been "very serious" about the talks, but that the companies could not agree on financial terms. "We put in a lot of time to figure out what would be a mutually beneficial deal," he said.

A Viacom spokesman said the company had repeatedly asked YouTube to filter out its programming automatically, but that Google had not responded.

“They choose not to filter out copyrighted content,” said the spokesman, Carl D. Folta. He added that the company apparently had the technology to filter out pornography and hateful material, which is rarely seen on YouTube.

Chad Hurley, the co-founder and chief executive of YouTube, said the company was still working on its filtering technology. He said it had agreed to use it to identify and possibly remove copyrighted material from Warner Music, and it would discuss a similar arrangement with Viacom as part of a broader deal.

Mr. Folta said he found that stand unacceptable. “They are saying we will only protect your content if you do a deal with us — if not, we will steal it.”

Whether YouTube is stealing content by serving up clips of copyrighted programs is very much up for debate. Like most big Internet companies, Google says it is protected by the Digital Millennium Copyright Act, so long as it removes material whenever a copyright owner requests it.

John G. Palfrey Jr., the executive director of the Berkman Center for Internet and Society at [Harvard](#) Law School, said Google may well be able to use this defense, but “I don’t think the law is entirely clear.” And if Google loses, “the damages could get astronomically high,” he said.

Viacom’s move comes at a time when it and other media companies have contemplated creating a service to rival YouTube. There have been off-again-on-again negotiations among a variety of companies, including the News Corporation, NBC Universal and the [Walt Disney Company](#).

Viacom’s cable networks, meanwhile, are increasingly putting clips from their programs on their own Web sites and selling advertising on them.

In the face of uncertainty, media companies have taken different approaches to YouTube. For the last year, NBC Universal has demanded that the site remove most clips of its material, other than a small set provided by NBC itself. Others, like [CBS](#), have largely allowed their content to remain on YouTube. CBS has struck a deal to provide some clips to YouTube and share in the advertising revenue associated with it.

It was not clear yesterday how Viacom’s demand might affect the rest of the industry and whether other media companies would follow suit.

Andrew Butcher, a spokesman for the News Corporation, which owns the Fox television network and the social networking site MySpace, said his company supported Viacom’s move. “They’ve got every right to protect their content in whatever way they deem appropriate,” Mr. Butcher said. “So far we’ve been dealing with YouTube and others on a case-by-case basis.”

Reports have been circulating in the industry that Google had offered to pay \$100 million a year for the use of Viacom’s programming.

Mr. Dauman of Viacom denied there had been a deal on the table. He said Viacom “never had any kind of an agreement with Google that it could say yes to,” adding: “There was not enough to be a detailed offer. They have shown no sense of urgency to enter into an agreement with anyone.”

Some analysts said the removal demand was simply a business tactic on Viacom’s part.

“This is a negotiating strategy to get paid, and I think both sides need a middle ground,” said Michael Nathanson, a media analyst at Sanford C. Bernstein & Company. “Both sides have clear needs in this negotiation. What they are arguing about is price.”

Viacom’s demand was “a risk worth taking,” Mr. Nathanson said. He and others pointed out that the music industry was once afraid to take a similarly aggressive stance when its product appeared on the [Napster](#) music-sharing service. “If content is available free and it is tolerated, it erodes your core business,” Mr. Nathanson said.

But others said the move could hurt Viacom if young YouTube users become angry when they upload clips to the site and realize that Viacom is insisting that they be removed. Yesterday, Google tried to position Viacom’s move as hostile toward YouTube users.

“The biggest feeling we have right now is regret that Viacom may miss out on the chance to interact with the YouTube community,” Mr. Eun said.

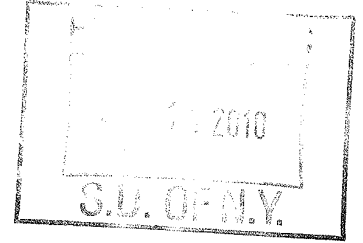
The effort to integrate old and new media has made some inroads. Just a few months ago, Viacom and Google were cozying up so successfully that Viacom struck a deal to have Google distribute clips from its shows on its Google Video service. The deal included an arrangement for the two companies to share revenue from adjacent advertising. Mr. Dauman characterized that deal yesterday as an “experiment.”

Richard Siklos contributed reporting.

[Copyright 2007 The New York Times Company](#)

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)

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

NOTICE OF APPEAL

Notice is hereby given that all plaintiffs in the above captioned action hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on the 10th day of August, 2010, which refers to the Opinion and Order dated June 23, 2010 granting Defendants' motion for summary judgment on all of Plaintiffs' claims.

Dated: August 11, 2010

Respectfully Submitted,

By:

Paul M. Smith (No. PS-2362)
William M. Hohengarten (No. WH-5233)
Scott B. Wilkens (*pro hac vice*)
Matthew S. Hellman (*pro hac vice*)
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
Telephone: (202) 639-6072
Facsimile: (202) 639-6066

Susan J. Kohlmann (No. SK-1855)
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 891-1690
Facsimile: (212) 891-1699

Stuart J. Baskin (No. SB-9936)
John Gueli (No. JG-8427)
Kirsten Nelson Cunha (No. KN-0283)
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

To: Andrew H. Schapiro
A. John Mancini
Matthew D. Ingber
Brian M. Willen
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
Telephone: (212) 506-2500
Facsimile: (212) 262-1910

David H. Kramer
Maura L. Rees
Michael H. Rubin
WILSON SONSINI GOODRICH & ROSATI PC
650 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 493-9300
Facsimile: (650) 493-6811