

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

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

vs. ) Case No. 1:07CV02103

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

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

vs. ) Case No. 07CV3582

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

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DEPOSITION OF MICAH SCHAFFER

SAN FRANCISCO, CALIFORNIA

WEDNESDAY, JULY 23, 2008

REPORTED BY:

YVONNE FENNELLY, CRP, CSR NO. 5495

JOB NO. 15376

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JULY 23, 2008

10:00 a.m.

VIDEOTAPED DEPOSITION OF MICAH SCHAFFER,  
held at the offices of SHEARMAN & STERLING,  
525 Market Street, San Francisco, California,  
pursuant to notice, before YVONNE FENNELLY, CRP,  
CSR License No. 5495.

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APPEARANCES (Continued):

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02:03 Premier League content?

02:03 A. These are very different times,

02:03 chronologically. This e-mail is from May 2006. Our  
02:03 site was a very different size then, and we were a small  
02:03 company still figuring out exactly what the appropriate  
02:03 balance was and how to scale things like this.

02:03 So one of the things that we discovered as we  
02:03 were doing this -- and of course we were doing this  
02:03 because -- we were doing this for the RIAA because we  
02:03 wanted to be helpful; right? We wanted to work with  
02:03 content owners, and especially when they first signed up  
02:03 for it, I imagine, you know, there was somewhat of a  
02:04 backlog when they first began removing their content  
02:04 from YouTube. There has got to be, you know, some extra  
02:04 content that had been previously uploaded, and we  
02:04 didn't -- you know, we felt that it would be a good  
02:04 service to provide to them to, you know, to try to help  
02:04 them with that burden.

02:04 But what we found over time was that, first, we  
02:04 weren't very good at it. We couldn't tell, you know,  
02:04 what was authorized or not. We really wouldn't know  
02:04 necessarily who had uploaded it. We wouldn't know  
02:04 whether particular videos were authorized or if, like,  
02:04 NBC -- NBC is a great example of someone who was using

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2 02:10 scans, sure.

3 02:10 Q. Do you recall any discussions about whether or

4 02:10 not to continue the practice?

5 02:10 A. I don't recall.

6 02:10 Q. You mentioned that one aspect of proactive

7 02:10 scanning involves the potential misidentifications or

8 02:10 incorrect decisions; is that right?

9 02:10 A. Absolutely.

10 02:10 Q. Were you involved in or aware of any analysis

11 02:10 that YouTube did as to the extent of misidentifications

12 02:10 from proactive scanning?

13 02:10 A. I don't recall any specifically.

14 02:10 Q. To be more particular about the point, do you

15 02:10 recall anybody at YouTube doing any analysis to see

16 02:11 quantitatively how often misidentifications occurred

17 02:11 from proactive scanning?

18 02:11 A. I think it was more anecdotal.

19 02:11 Q. You referred to difficulties with scalability

20 02:11 as videos on the site grew; is that correct?

21 02:11 A. Sure.

22 02:11 Q. Do you recall any analysis at YouTube as to the

23 02:11 viability of proactive scanning to remove content with

24 02:11 the increased traffic and number of videos at the site?

25 02:11 A. I think it was more of a general notion that

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02:29 2 In fact, you know, you meant generally?

02:29 3 Customer support, responding to copyright takedown

02:29 4 notices is a big part of it, removing inappropriate

02:29 5 content that had been flagged, support e-mails, those

02:29 6 types of tasks.

02:29 7 Q. And did Ms. Gillette have a practice of

02:29 8 creating a priority list for each day?

02:30 9 A. I don't think so.

02:30 10 Q. Do you recall what her practice was in terms of

02:30 11 generating priorities lists or what circumstances she

02:30 12 would do it?

02:30 13 A. Probably whenever she felt the need maybe. It

02:30 14 changed. I don't know. I wouldn't -- I might be on the

02:30 15 list that would receive them, but they wouldn't

02:30 16 typically define my work, so I'm not too familiar with

02:30 17 the logistics of the priorities lists.

02:30 18 Q. You recall that they were conveyed to you as

02:30 19 priorities for your work?

02:30 20 A. No. For other members of the team, but I might

02:30 21 be privy to them.

02:30 22 Q. There is a reference in item 12 here, Proactive

02:30 23 scans copyright scans (don't forget American Idol)?

02:30 24 A. Yes.

02:30 25 Q. Do you recall whether the operations team

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02:30 2 scanned for American Idol?

02:31 3 A. On occasions.

02:31 4 Q. Were you involved in proactive scans for  
02:31 5 American Idol?

02:31 6 A. On occasions.

02:31 7 Q. And what occasions would give rise to the  
02:31 8 proactive scans?

02:31 9 A. We had been in -- some of this is probably  
02:31 10 privileged.

02:31 11 MR. SCHAPIRO: Can you give as much of an  
02:31 12 answer as you can without discussing any legal advice  
02:31 13 that you received or sought?

02:31 14 THE WITNESS: Yes, I can try to be general  
02:31 15 enough.

02:31 16 So we had been working with -- I believe it's  
02:31 17 Fremantle owns American Idol. They were very adamant --  
02:32 18 they were very upset by the presence of content that  
02:32 19 they felt -- or content that they owned that was being  
02:32 20 uploaded to YouTube. And we would ask them, plead with  
02:32 21 them really for URL's, for specific links, for specific  
02:32 22 indications what content they were talking about, and  
02:32 23 they were not very cooperative. They refused to provide  
02:32 24 on most occasions specific information and were  
02:32 25 threatening to sue us on a fairly regular basis on very

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02:32 2 strong terms. And particularly this would happen, you  
02:32 3 know, right around the time -- of course it's a cyclical  
02:32 4 show; right, it's a series. So right during the time a  
02:33 5 show would air they would come down; they would get  
02:33 6 particularly more upset.

02:33 7 And, you know, in August we were still -- you  
02:33 8 know, we hadn't been bought by Google yet. We were very  
02:33 9 resource constrained. And even though we were operating  
02:33 10 within the law, my feeling at least, and I imagine the  
02:33 11 feeling of others was that a lawsuit would be very bad  
02:33 12 and that we might not be able to adequately defend  
02:33 13 ourselves. So even though I don't think we were  
02:33 14 obligated to go scan and guess which content was  
02:33 15 American Idol, and I know mistakes were made because  
02:34 16 there is many different idol shows around the world,  
02:34 17 there are parodies, there are lots of videos. I mean,  
02:34 18 people, you know, singing in their bathrooms or their  
02:34 19 bedrooms, and they would tag it American Idol because  
02:34 20 they are doing their best, you know, or they're  
02:34 21 commenting on American Idol, and things like that. And  
02:34 22 sometimes, you know, inevitably those videos would get  
02:34 23 swept up in this, but we kept doing those scans for a  
02:34 24 time simply because it was -- you know, if we had gotten  
02:34 25 sued at that point, even though we were doing nothing

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02:34 2 wrong, it wouldn't necessarily matter that we were in  
02:34 3 the right because we didn't necessarily have the  
02:34 4 resources to adequately defend ourselves, so, you know,  
02:34 5 they bullied us. And even though we really -- and the  
02:34 6 irony is we really wanted to cooperate. We really  
02:34 7 genuinely wanted their content down; and, that's why in  
02:35 8 the end we'd grudgingly do these searches for them even  
02:35 9 though it really wasn't the most effective use.

02:35 10 We offered them the tool repeatedly, you know,  
02:35 11 our content verification program. We pleaded with them  
02:35 12 to work with us. And we really, you know, sort of, in  
02:35 13 the absence of their cooperation, we bent over backwards  
02:35 14 trying to accommodate them.

02:35 15 Q. Did you speak to anyone at Fremantle?

02:35 16 MR. SCHAPIRO: When?

02:35 17 BY MR. SHAFTEL:

02:35 18 Q. By August of 2006, about their concerns over  
02:35 19 the infringing content on the site?

02:35 20 A. I don't know if I personally had contact with  
02:35 21 them directly. And again, getting into privilege, I  
02:35 22 would be hesitant to characterize my knowledge of other  
02:35 23 communications.

02:35 24 MR. SCHAPIRO: Don't answer further.

02:35 25 BY MR. SHAFTEL:

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02:41 2 A. I didn't see the second page. Hang on a  
02:41 3 moment.

02:41 4 No.

02:41 5 Q. Have you ever seen a document in which the  
02:41 6 format resembles this?

02:41 7 A. No, I don't recall ever seeing a document that  
02:41 8 looked like this.

02:41 9 Q. Do you see in the middle of the page there is a  
02:41 10 number of what appears to be TV shows or other  
02:41 11 entertainment content identified that begins with  
02:41 12 American Idol, Simpsons, Family Guy?

02:41 13 A. Yes.

02:41 14 Q. Does that grouping of content have any meaning  
02:42 15 to you?

02:42 16 And specifically, were those videos that at  
02:42 17 this point in time were being proactively scanned for?

02:42 18 A. In the context of the document, I'm not sure if  
02:42 19 they're necessarily search terms. I think it's probably  
02:42 20 a reasonable assessment that they are related to content  
02:42 21 to proactively look for.

02:42 22 Q. In August of 2006, how many videos do you  
02:42 23 recall approximately being on the YouTube site?

02:42 24 A. I have no idea. Lots.

02:42 25 Q. Do you recall whether YouTube engaged in any

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02:43 2 proactive scanning to remove content after the  
02:43 3 acquisition by Google in November of 2006?

02:43 4 A. I don't recall specifically. I guess it comes  
02:43 5 back to exactly what we mean by "proactive."

02:43 6 If being threatened and prompted and instructed  
02:43 7 by Fremantle, for instance, and then taking action based  
02:43 8 on the information they provided and conveyed and  
02:43 9 requested, I would say, then, I do recall that  
02:44 10 happening. I forget the level of detail. I know  
02:44 11 eventually they began providing us with more detailed  
02:44 12 information about what they would like removed, and we  
02:44 13 responded, you know, to those requests.

02:44 14 I don't recall with regard specifically to  
02:44 15 proactively searching for content without prompting in  
02:44 16 that regard.

02:44 17 Q. So I can understand, you recall searching for  
02:44 18 Fremantle content to remove without specific URL's from  
02:45 19 Fremantle or DMCA notice after the Google acquisition;  
02:45 20 is that correct?

02:45 21 A. I believe so.

02:45 22 I believe there were instances where they  
02:45 23 provided -- I know at some point they began -- I  
02:45 24 remember receiving, I think it was like a printout of  
02:45 25 search results that Fremantle had provided and doing

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02:45 2 removals based on that. And I know there was some back  
02:45 3 and forth around that.

02:45 4 Q. Do you recall doing that for anyone else  
02:45 5 besides Fremantle after the Google acquisition?

02:45 6 A. I believe there were probably others.

02:45 7 Q. Who do you recall?

02:45 8 A. And to varying degrees, of course; right? As I  
02:45 9 said earlier, we regularly remove content without  
02:46 10 fully -- without fully formed technically valid DMCA  
02:46 11 takedown notices. And it's kind of a spectrum of, you  
02:46 12 know, of the amount of specificity and the amount of  
02:46 13 technical accuracy, and we try to respond appropriately  
02:46 14 based on the circumstances. And I know we've removed a  
02:46 15 substantial amount of Viacom content without fully  
02:46 16 formed DMCA notices as well.

02:46 17 Q. Do you recall removing Viacom content that was  
02:46 18 uploaded after the date of whatever communication you're  
02:47 19 relying on, even if it's not, as you put it, a fully  
02:47 20 formed DMC notice?

02:47 21 MR. SCHAPIRO: Objection; vague, ambiguous.

02:47 22 BY MR. SHAFTEL:

02:47 23 Q. You've described the situation where a content  
02:47 24 owner submits a notification that I believe you put it,  
02:47 25 is not fully formed; it may have some technical defect.

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03:27 2 know, fraud detection and spam and things like that.

03:28 3 YouTube has not yet fully integrated with

03:28 4 Google's account management system. I believe we have

03:28 5 plans to in the near term, and it involves a lot of

03:28 6 other moving pieces, but to the extent possible, we try

03:28 7 to leverage that system.

03:28 8 BY MR. SHAFTEL:

03:28 9 Q. Thank you.

03:28 10 You had testified earlier today about MD5

03:28 11 hashes.

03:28 12 Am I correct that when content is removed

03:28 13 pursuant to the DMCA process, YouTube then takes some

03:28 14 action based on MD5 hashes?

03:28 15 A. Yes.

03:28 16 Q. How does it work?

03:28 17 A. So when content is removed for terms of use

03:29 18 violation or in response to a copyright notification,

03:29 19 our system automatically implements a block on the

03:29 20 originally uploaded files, MD5 hash.

03:29 21 Q. Do the MD5 hashes, have they ever at YouTube

03:29 22 operated to delete videos that were existing on the

03:29 23 system before the video that is taken down?

03:29 24 A. So the question is about preexisting?

03:29 25 Q. Exactly.

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2 04:56 Are you aware of any ideas that were expressed  
3 04:56 within YouTube or then Google post-acquisition to detect  
4 04:56 or exclude copyrighted infringing material on a site  
5 04:56 that the company didn't implement?

6 04:56 A. You said "detect," or is there another part?

7 04:56 Q. Exclude. Block.

8 04:56 A. So it involved blocking as a result of  
9 04:56 detecting?

10 04:56 Q. (Nods head.)

11 04:56 A. None that I can recall.

12 04:56 Q. I'd asked you earlier about private videos or  
13 04:57 Friend Share videos.

14 04:57 A. Yes.

15 04:57 Q. Do you understand that to be a program where  
16 04:57 the uploader can limit the number of visitors to the  
17 04:57 uploader's video or site page?

18 04:57 A. I'm sorry?

19 04:57 Q. What's the private -- what's the private video  
20 04:57 program? What does it mean?

21 04:57 A. Users can designate a video as private either  
22 04:57 when they upload it or subsequently by altering their  
23 04:57 preferences and allows the video to be viewed by a  
24 04:57 limited audience of their choosing.

25 04:57 Q. And how are private videos monitored for your

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2 05:40 MR. MCGILL: Are we up to Exhibit 17 or 15?

3 05:40 THE WITNESS: The last one was 15.

4 05:40 MR. MCGILL: So this should be 16.

5 05:41 THE WITNESS: Okay.

6 05:41 BY MR. COX:

7 05:41 Q. In this declaration, Mr. Chen states that

8 05:41 YouTube does not manually screen videos before they are

9 05:41 made available through the service.

10 05:41 Do you agree with that statement?

11 05:41 A. So at the time of this declaration -- actually,

12 05:41 I see the date of the hearing. I'm not sure when the

13 05:41 declaration was executed.

14 05:41 January 5th, apparently, 2007. I don't believe

15 05:41 that was our standard practice, no.

16 05:41 Q. I'm sorry. To clarify, you don't believe that

17 05:41 screening videos manually before they were made

18 05:41 available was your standard practice? So you agree with

19 05:42 the statement?

20 05:42 A. I don't believe that was our practice.

21 05:42 Q. Do you know of any other time when that was

22 05:42 your practice?

23 05:42 A. I think the sentence is slightly ambiguous. I

24 05:42 wouldn't want to preclude the kinds of things we

25 05:42 discussed earlier with regards to private videos, though



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2 05:42 I suppose those were available. So no, I guess I'm not  
3 05:42 aware of any circumstances.

4 05:42 Q. After the videos were made available through  
5 05:42 the service at the time of this declaration, were you  
6 05:42 aware of efforts YouTube was making to manually screen  
7 05:43 videos?

8 05:43 MR. SCHAPIRO: Objection to the form of the  
9 05:43 question.

10 05:43 THE WITNESS: Well, again, I think the term  
11 05:43 "manually screen videos" is ambiguous.

12 05:43 BY MR. SHAFTEL:

13 05:43 Q. In what way?

14 05:43 A. So I'm not sure -- it could mean any number of  
15 05:43 things.

16 05:43 Q. What are the different things you think it  
17 05:43 could mean?

18 05:43 A. It could refer to -- and again, we're talking  
19 05:43 about after they're available through the service?

20 05:43 Q. Yes.

21 05:43 A. It could refer to when a content owner sends in  
22 05:43 a nonspecific takedown notice, perhaps involving search  
23 05:43 terms, or even search results that would require us to  
24 05:44 go through and manually look through the content that's  
25 05:44 being referred to.