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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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VIACOM INTERNATIONAL INC., ET AL.,	)	
	)	ECF Case
Plaintiffs, v.	)	Civil No. 07-CV-2103 (LLS)
	)	
YOUTUBE, INC., ET AL.,	)	
	)	
Defendants.	)	
THE FOOTBALL ASSOCIATION	)	
PREMIER LEAGUE LIMITED, ET AL.,	)	
on behalf of themselves and all others	)	ECF Case
similarly situated,	)	Civil No. 07-CV-3582 (LLS)
Plaintiffs,	)	
v.	)	
	)	
YOUTUBE, INC., ET AL.,	)	
	)	
Defendants.	)	

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**DEFENDANTS' COUNTERSTATEMENT TO CLASS PLAINTIFFS'  
STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT  
OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Pursuant to Local Civil Rule 56.1(b), defendants YouTube, Inc. and Google Inc. (collectively “Defendants” or “YouTube”) set forth in support of their opposition to Class Plaintiffs’ motion for partial summary judgment the following Counterstatement to Class Plaintiffs’ Statement of Uncontroverted Material Facts in Support of Their Motion for Partial Summary Judgment (“Class SUF”).

**I. Class Plaintiffs’ Statement is Improper and Should Be Stricken**

YouTube has filed a motion to strike Class Plaintiffs’ Statement of Uncontroverted Material Facts because it violates Local Rule 56.1.<sup>1</sup>

First, Class Plaintiffs’ SUF consists almost entirely of legal argument, rather than facts.<sup>2</sup> Class Plaintiffs include un-numbered headings that are not statements of undisputed fact, but argumentative legal conclusions. These thinly disguised statements of “undisputed” fact have no place in a Rule 56.1 statement. YouTube responds to these legal arguments in its memorandum of law opposing Class Plaintiffs’ motion for summary judgment. YouTube should not be forced to repeat that exercise in responding to the Class SUF. Class Plaintiffs’ argumentative and conclusory statements violate the Local Rule and should be stricken.

Second, many of the proposed statements of fact in the Class SUF are impermissibly compound. They contain lengthy statements that include multiple

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<sup>1</sup> District courts are “free to disregard” improper Rule 56.1 statements. *Am. Med. Ass’n v. United Healthcare Corp.*, No. 00 Civ. 2800 (LMM), 2007 WL 1771498, at \*2 (S.D.N.Y. June 18, 2007); *see also Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003).

<sup>2</sup> Rule 56.1 statements that contain argument and conclusions are improper and should be disregarded. *Amalgamated Lithographers of Am. v. Unz & Co. Inc.*, 670 F. Supp. 2d 214, 217 (S.D.N.Y. 2009) (striking *sua sponte* Rule 56.1 statement where “[v]ery little of it is statements of fact; for the most part, it is legal argument.”); *U.S. Info. Sys., Inc. v. Int’l Bhd. of Elec. Workers Local Union No. 3*, No. 00 CIV. 4763 RMB JCF, 2006 WL 2136249, at \*3 (S.D.N.Y. Aug. 1, 2006); *see also Goldstick v. Hartford, Inc.*, No. 00 Civ. 8577 LAK, 2002 WL 1906029, at \*1 (S.D.N.Y. Aug. 19, 2002); *Rodriguez v. Schneider*, No. 95 Civ. 4083, 1999 WL 459813, at n.3 (S.D.N.Y. Jun. 29, 1999); *Bey v. City of New York*, No. 99 Civ. 3873 (LMM), 2009 WL 2060076, \*2 (S.D.N.Y. July 15, 2009).

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distinct facts, often mixed in with arguments and legal conclusions. On their face, these rambling and compound statements violate the express requirement of the Local Rule that each proposed fact be “short and concise.” Local Rule 56.1. It is all but impossible for YouTube (or the Court) to parse the multiple factual predicates buried in statements such as these and determine what is disputed or undisputed.

Third, many of Class Plaintiffs’ proposed material facts include language that is overbroad, vague, and unintelligible.<sup>3</sup> YouTube cannot reasonably be expected to respond to such statements.

Finally, many of the proposed facts set out in the Class SUF are not supported by simple citations to evidence as required by Local Rule 56.1, but instead include lengthy argumentative “spin” that provides Class Plaintiffs’ misleading interpretation of the documents. Other proposed facts are not supported by any evidence at all. That is improper.<sup>4</sup>

Notwithstanding YouTube’s objections to and motion to strike Class Plaintiffs’ improper Rule 56.1 statement, YouTube has made a good faith effort to provide the following responses compliant with the local rule. In light of the pervasive legal arguments appearing throughout the Class SUF, YouTube has also set forth below citations to the duplicative legal arguments in Class Plaintiffs’ summary judgment motion, with corresponding citations to YouTube’s Motion for Summary Judgment and Opposition Brief, where its responses to those arguments are set forth.

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<sup>3</sup> See, e.g., *Domnister v. Exclusive Ambulette, Inc.*, No. 03-CV-1666 (NGG), 2007 WL 4244151, at \*4 n.6 (E.D.N.Y. Nov. 29, 2007) (assertions in Rule 56.1 statements that are “vague” and “incomprehensible” may be disregarded).

<sup>4</sup> *Bey*, 2009 WL 2060076 at \*2-6 (striking statements of fact unsupported by the cited evidence).

**II. *Parties*<sup>5</sup>**

1. *The Class Plaintiffs include named plaintiffs The Football Association Premier League Limited, Bourne Co. (Together With Its Affiliate Murbo Music Publishing, Inc.), Cherry Lane Music Publishing Company, Inc., Cal IV Entertainment LLC, Robert Tur d/b/a/ Los Angeles News Service, National Publishers' Association, The Rodgers & Hammerstein Organization, Stage Three Music (US), Inc., Edward B. Marks Music Company, Freddy Bienstock d/b/a Bienstock Publishing Company, Alley Music Corporation, Fédération Française de Tennis, The Music Force LLC and Sin-Drome Records, Ltd. Second Amended Complaint (11/26/08) ¶¶ 2, 3, 10-33, 45.* (Figueira Decl. Ex. 138).

**Disputed.** The cited evidence does not support the proposed fact that “Class Plaintiffs” include National Publishers’ Associations as a named plaintiff, or that Robert Tur is a “Class Plaintiff.” *See* Second Amended Complaint ¶ 3. Robert Tur is not a putative class representative. *See* Class Plaintiffs’ Class Certification Mem. at 14 n.5. Otherwise, undisputed that the named entities are plaintiffs in this Action and serving as putative class representatives in the pending motion for class certification.

2. *Defendants are YouTube LLC, YouTube, Inc., and Google, Inc., which are affiliated entities involved in the management and/or operation of the YouTube website (www.youtube.com) (“YouTube”).* Second Amended Answer (1/16/09) ¶¶ 34, 35, 37. (Figueira Decl. Ex. 139).

**Disputed.** The cited evidence does not support the proposed fact that Google is involved in the “management and/or operation” of the YouTube website. YouTube and Google did not become affiliated until Google acquired YouTube in November 2006, and they were therefore not affiliated entities during all times plaintiffs claim are relevant to this litigation. Reider Decl. ¶ 1. Otherwise, undisputed that defendants are YouTube LLC, YouTube, Inc., and Google, Inc., and that at present, YouTube LLC and Google, Inc. are affiliated entities.

3. *YouTube is a major media entertainment company, which has over 98 million visitors per month and more than 17.5 billion pageviews per month in the United States.* (Figueira Decl. Exs. 134-136, 148).

**Disputed.** The proposed fact that “YouTube is a major media entertainment company” is not supported by the cited evidence. *See* Figueira Decl. Exs. 134-136, 148. The additional proposed fact that YouTube “has over 98 million visitors per month and more than 17.5

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<sup>5</sup> Text in *italics* represents the text being responded to taken from Class Plaintiffs’ Statement of Uncontroverted Material Facts in Support of Their Motion for Partial Summary Judgment. In addition, the defined terms in Defendants’ Opposition to Plaintiffs’ Motions for Partial Summary Judgment are adopted herein.

billion pageviews per month in the United States" is not supported by competent evidence and is not correct. *See* C. Hurley Opp. Decl. ¶ 7.

**III. *From Its Inception, YouTube Management Knew Copyrighted Content Generated Substantial Traffic to the Site.***

**Disputed.** The inclusion of argumentative, conclusory headings under the guise of "organizing" information for the Court violates Local Rule 56.1 and such statements should be stricken. *See* Local Rule 56.1. YouTube disputes all arguments made in these headings and the characterizations contained therein, each of which has been responded to in YouTube's briefs.

4. *Prior to Google's acquisition of YouTube in October 2006, YouTube management recognized the vast amount of unlicensed copyrighted content on the website and its value in attracting users to the site.* (Figueira Decl. Exs. 15, 42, 45-47, 62, 64.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments in plaintiffs' motion for summary judgment. *See* Class Plaintiffs' opening memorandum in support of their motion for partial summary judgment at 3-4, 25-30, and YouTube's response thereto at 6-17, 31-38, as well as relevant portions of YouTube's opening memorandum in support of its motion for summary judgment at pages 9-11, 30-57.

The cited evidence does not support the propositions that, during the period prior to Google's acquisition of YouTube in October 2006, YouTube's management was aware of any specific unlicensed copyrighted content on the YouTube website, let alone that its scope was vast, or that YouTube management recognized its purported value in attracting users to the site. *See* Figueira Decl. Exs. 15, 42, 45-47, 62, 64.

The evidence shows the opposite. Figueira Decl. Ex. 60 (describing YouTube's goal to become "the #1 place for personal videos on the internet"); C. Hurley Opening Decl. ¶¶ 4-13, 16-22, 27; Maxcy Opening Decl. ¶¶ 2-7; Schaffer Opening Decl. ¶¶ 2-9; Walk Opening Decl. ¶¶ 2-22; Botha Opening Decl. ¶¶ 6-7; YouTube's Response to Viacom Statement of Undisputed Facts Nos. 37, 38, 40, 44, 53-54, 95, 110, 212 (incorporated by reference herein); Chen Opp. Decl. at 3.

The assertion that YouTube's management could recognize certain content on the site as being "unlicensed" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12;

Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26; 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67 (stealth marketing documents). Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10); 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68); 98 (Response 25); 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

5. *YouTube management did not remove valuable copyrighted content from YouTube despite being aware of its extensive and unauthorized presence.* (Figueira Decl. Exs. 15, 42, 45-47, 61-64.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments in plaintiffs’ motion for summary judgment. See Class Plaintiffs’ opening memorandum in support of their motion for partial summary judgment at 8-14, 25-30, and YouTube’s response thereto at 6-21, 31-38, 98, as well as relevant portions of YouTube’s opening memorandum in support of its motion for summary judgment at pages 9-11, 30-57.

The cited evidence does not support the propositions that YouTube’s management was aware of any specific unauthorized copyrighted content on the YouTube website, that they failed to remove it upon gaining knowledge of its presence on YouTube, or that such content was “valuable.” See Figueira Decl. Exs. 15, 42, 45-47, 61-64.

The evidence shows the opposite. Levine Opening Decl. ¶¶ 16-33; Schaffer Opening Decl. ¶¶ 3-4, 10-13; C. Hurley Opening Decl. ¶¶ 17-25; King Opening Decl. ¶¶ 2-28; YouTube’s Response to Viacom Statement of Undisputed Facts Nos. 40, 44, 53-54 (incorporated by reference herein); YouTube’s Response to Class Plaintiffs’ Statement of Undisputed Facts No. 4.

The assertion that YouTube’s management was aware that certain content on the site was “unauthorized” is further disputed for the following reasons. First, content owners, including Viacom, have

frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10); 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent ability to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68); 98 (Response 25); 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

6. *YouTube has been and is capable of identifying and removing copyright infringing and other “inappropriate” content from the website through, among other things, proactive searches by YouTube personnel and “community flagging” by users; it deploys such practices when removal corresponds to its financial interests. (Figueira Decl. Exs. 15, 27-28, 32, 40, 105-107.)*

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments in plaintiffs’ motion for summary judgment. See Class Plaintiffs’ opening memorandum in support of their motion for partial summary judgment at 14-21, 30-33, and YouTube’s response thereto at 19-20, 52-53, 64-68, as well as relevant portions of YouTube’s opening memorandum in support of its motion for summary judgment at pages 9-11, 30-57.

The cited evidence does not support the propositions that YouTube is able to effectively identify unauthorized copyrighted material by proactive searching and “community flagging,” or that YouTube deploys such practices “when removal corresponds to its financial interests.” See Figueira Decl. Exs. 15, 27-28, 32, 40, 105-107. The evidence shows the opposite. C. Hurley Opening Decl. ¶¶ 18, 20; Schaffer Opening Decl. ¶¶ 11-13; Schapiro Opp. Ex. 90 (Defs.’ Am.

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Resp. to First Set of Interrog., Resp. to Interrog. No. 2); YouTube's Response to Viacom Statement of Undisputed Facts Nos. 64, 269, 272 (incorporated by reference herein).

The assertion that YouTube is capable of identifying "infringing" content on the site is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10); 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as "fair use" and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

7. *For a brief period in September 2005, YouTube's "community flagging" feature permitted users to flag unauthorized copyrighted content, but YouTube discontinued it in order to claim ignorance of the copyright infringing content on the site. (Figueira Decl. Exs. 39, 43, 63.)*

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments in plaintiffs' motion for summary judgment. See Class Plaintiffs' opening memorandum in support of their motion for partial summary judgment at 15, 30-33, and YouTube's response thereto at 19-20, 52-53, 64-68, as well as relevant portions of YouTube's opening memorandum in support of its motion for summary judgment at pages 95-96.

The cited evidence does not support the propositions that YouTube's community flagging feature was an effective method for identifying

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unauthorized copyrighted content on YouTube or that YouTube's decision to move from community flagging to more effective copyright protection methods occurred "to claim ignorance" of unauthorized material. *See* Figueira Decl. Exs. 39, 43, 63.

The evidence shows the opposite. C. Hurley Opening Decl. ¶¶ 18, 20; Schaffer Opening Decl. ¶¶ 11-13; Schapiro Opp. Exs. 90 (Defs.' Am. Resp. to First Set of Interrog., Resp. to Interrog. No. 2), Ex. 115; YouTube's Response to Viacom Statement of Undisputed Facts Nos. 64 (incorporated by reference herein).

The implication that YouTube's users were capable of identifying certain content on the site as being "unauthorized" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as "fair use" and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

8. *YouTube no longer undertakes proactive searches generally for copyright infringing content (but only for select partners).* (Figueira Decl. Exs. 31, 84.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain the improper and unsupported legal conclusion that content on YouTube was infringing copyright. The proposed facts are ambiguous and confusing. The cited evidence does not support the proposition that YouTube conducts proactive searches only for "select

partners.” *See* Figueira Decl. Exs. 31, 84; YouTube’s Response to Viacom Statement of Undisputed Facts No. 272 (incorporated by reference herein). YouTube does not manually review or proactively monitor the vast majority of user-submitted videos; it discontinued the practice of conducting manual review of the site for potentially unauthorized videos because it was ineffective; and YouTube developed a suite of tools and policies to combat the upload of unauthorized materials to the service. *See* Levine Opening Decl. ¶¶ 5-12, 17-19, 23-27, 30-33; Schaffer Opening Decl. ¶ 11-13; C. Hurley Opening Decl. ¶ 18; King Opening Decl. ¶¶ 3, 7-8, 17-20, 23-27.

The implication that YouTube was capable of successfully searching for “infringing” content on the site is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

9. *By exploiting unlicensed copyrighted material, YouTube’s founders/management effectively implemented a plan to derive financial benefits from both the operation of the site and the eventual sale of the site. (Figueira Decl. Exs. 14, 44, 46, 49, 60, 134)*

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in

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support of their motion for partial summary judgment at 3-5, 33-35 and YouTube's response thereto at 6-21, 31-38, 53-55, 98, as well as relevant portions of YouTube's opening memorandum in support of its motion for summary judgment at pages 9-11, 30-57.

The cited evidence does not support the proposition that YouTube's founders or management planned to or actually derived a benefit from "exploiting" unauthorized copyrighted content either through the operation or sale of YouTube. *See* Figueira Decl. Exs. 14, 44, 46, 49, 60, 134.

The cited email from founder Jawed Karim shows the opposite:

"First we will further grow our audience and reach to secure our position as the #1 place for personal videos on the internet. Then we will monetize the audience we have acquired by hosting video ads."

Figueira Decl. Ex. 60. So does other evidence. C. Hurley Opening Decl. ¶ 16; Botha Opening Decl. ¶¶ 6-7; YouTube's Response to Class Plaintiffs' Statement of Undisputed Facts No. 4; Chen Opp. Decl. at 3-4.

The assertion that YouTube was exploiting "unlicensed" content on the site is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68); 98 (Response 25); 103 (Response 33). Fifth, certain of the content at issue may qualify as

“fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**10.** *The YouTube founders had extensive experience building internet businesses, and their explicit goal was to build an audience as quickly as possible to maximize value in an expected sale of the business.* (Figueira Decl. Exs. 48, 59, 65, 133)

**Disputed.** The cited evidence does not support the proposition that YouTube’s founders “had extensive experience building internet businesses” or that “their explicit goal was to build an audience as quickly as possible to maximize value in an expected sale of the business.” See Figueira Decl. Exs. 48, 59, 65, 133.

**Additional Material Facts:**

(1) The YouTube founders’ plan to develop their business and prepare for a future public offering or sale of the company depended on avoiding illegitimate activities. C. Hurley Opening Decl. ¶16.

(2) The founders intended YouTube to be a platform that would give users a convenient way to share personal videos and engage in a community around posting and viewing those videos. C. Hurley Opening Decl. ¶ 2.

(3) In August 2005, YouTube put together a presentation outline for Sequoia Capital in which it described YouTube’s “Company Purpose” as follows: “To become the primary outlet of user-generated video content on the Internet, and to allow anyone to upload, share, and browse this content.” C. Hurley Opening Decl. ¶ 13 & Ex. 15.

**IV. *Google Purchased YouTube After Failing to Succeed with A Competing Website and Adopted YouTube’s Policies.***

**Disputed.** The inclusion of argumentative, conclusory headings under the guise of “organizing” information for the Court violates Local Rule 56.1 and such statements should be stricken. See Local Rule 56.1. YouTube disputes all arguments made in these headings and the characterizations contained therein, each of which has been responded to in YouTube’s briefs.

**11.** *Google acquired YouTube for more \$1.65 billion in October 2006, because YouTube had attracted substantially more users than Google’s competing website, known as Google Video.* (Figueira Decl. Exs. 78, 108, 110, 118, 134.)

**Disputed.** The cited evidence does not support the proposition that the basis for Google’s decision to acquire YouTube in October 2006 for \$1.65 billion was because YouTube had a larger userbase than Google Video. See Figueira Decl. Exs. 78, 108, 110, 118, 134. Four of the five cited documents do not mention a single one of Google’s rationales for acquiring YouTube. See Figueira Decl. Exs. 78, 108, 118, 134. The proposed fact is misleading and omits material facts; Google did not decide to acquire YouTube for any single reason. Schapiro Opp. Exs.

134 (50:4-56:6, 112:13-113:14), 183 (94:8:12, 171:18-172:15), 184 (53:9-54:7).

**12.** *Prior to its acquisition of YouTube in October 2006, Google Video implemented policies and practices to identify and remove infringing content that appeared on Google Video through, among other things, proactive screening of uploads, when removal corresponded with its financial interests.* (Figueira Decl. Exs. 26, 78, 93, 117, 152.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for summary judgment. *See* Class Plaintiffs' opening memorandum in support of their motion for partial summary judgment at 5, 9, 15, 30-33.

The cited evidence does not support the proposition that Google Video was able to identify "infringing" content or that it only removed certain content when it "corresponded with its financial interests." *See* Figueira Decl. Exs. 26, 78, 93, 117, 152. The evidence shows instances of Google Video removing videos that it suspected might be unauthorized. YouTube's Response to Viacom Statement of Undisputed Facts Nos. 134, 136, 137-138 (incorporated by reference herein); Schapiro Opp. Exs. 205 (36:25-38:8, 41:9-43:20), 206 (175:21-181:17).

**13.** *Google analyzed YouTube prior to and during the acquisition process and concluded that YouTube contained and displayed substantial quantities of copyrighted material that was not authorized to appear on the site.* (Figueira Decl. Exs. 23, 108-109, 118, 176-178.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for summary judgment. *See* Class Plaintiffs' opening memorandum in support of their motion for partial summary judgment at 5-6, 25-30 and YouTube's response thereto at 90-95.

The cited evidence does not support the proposition that Google concluded that YouTube "contained and displayed substantial quantities of copyrighted material that was not authorized to appear on the site." *See* Figueira Decl. Exs. 23, 108-109, 118, 176-178. The evidence shows that Google Video employees were not involved in the YouTube acquisition process and that Google did not conduct any empirical analyses attempting to quantify unauthorized content on YouTube prior to the acquisition. Schapiro Opp. Ex. 204 (137:23-138:8); YouTube's Response to Viacom Statement of Undisputed Facts Nos. 152, 159, 168, 170-174, 176 (incorporated by reference herein).

The assertion that Google was capable of identifying certain content on the YouTube site as being "not authorized" is further disputed for the

following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68); 98 (Response 25); 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

14. *Google management recognized the risk of infringement liability arising from YouTube’s policies and practices, but nonetheless sought to expand its business by continuing those policies and practices.* (Figueira Decl. Exs. 94, 108-109, 111, 125)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in support of their motion for partial summary judgment at 6, 25-30 and YouTube’s response thereto at 90-95.

The cited evidence does not support the proposition that Google’s management “recognized the risk of infringement liability” or that Google “sought to expand its business by continuing those policies and practices.” *See* Figueira Decl. Exs. 94, 108-109, 111, 125. The evidence shows the opposite. *See* YouTube’s Response to Viacom Statement of Undisputed Facts Nos. 183-184 (incorporated by reference herein). To the extent that the proposed facts are based on the presence of an indemnification clause in the YouTube acquisition term sheet, such evidence is inadmissible under Fed. R. Evid. 411 and 403. YouTube

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incorporates its response to Class Plaintiffs' Statement of Undisputed Fact No. 13 herein.

By the time Google acquired YouTube, YouTube had registered a DMCA agent to receive notices from copyright holders of alleged infringement and, among other things: (1) required users to agree to terms of use that explicitly prohibit them from submitting copyrighted material that they are not authorized to upload; (2) provided a "Copyright Tips" page to help users understand the basics of copyright law; (3) repeatedly reminded users, via multiple messages displayed each time they upload a clip, that they are prohibited from uploading copyrighted content unless they have the right to do so; (4) imposed a 10-minute limit for most videos submitted by ordinary users to prevent the posting of full-length television shows and feature films; (5) expeditiously removed allegedly infringing materials upon receiving such notices; (6) terminated and blocked the accounts of users suspected to be repeat infringers; (7) maintained a dedicated team of employees on call around the clock to assist copyright owners in removing unauthorized material; (8) offered an easy-to-use tool that enabled copyright holders to search for videos, mark those that allegedly infringe, and request their removal with the click of a button, rather than having to prepare individual paper or email DMCA notices; and (9) deployed a "hashing" technology that created a unique digital signature for each video removed in response to DMCA takedown notices and automatically prevented identical copies of the removed video from being posted. Levine Opening Decl. ¶¶ 5-10, 12, 14, 17-19, 25; C. Hurley Opening Decl. ¶¶ 20-21; Levine Opp. Decl. ¶ 10.

After the acquisition, Google learned that YouTube's copyright policies and enforcement mechanisms were as strong, if not stronger, than Google Video's and that YouTube was ahead of Google Video in developing tools to assist content owners to identify and take down their own content. Schapiro Opp. Exs. 205 (160:10-20, 165:13-19), 206 (175:20-177:19), 203 (117:10-25), 297.

It was because of the strength of YouTube's copyright policies and enforcement mechanisms that Google elected to retain many of those policies and procedures and to work to enhance their implementation by partnering with content owners to develop even better tools to identify a content owner's content. For example, Google sought to further explore YouTube's work with Audible Magic to implement audio fingerprinting technologies to assist content owners in identifying their content and invested substantial resources in developing cutting-edge, proprietary audio and video fingerprinting technologies. King Opening Decl. ¶¶ 2, 3, 14-20, 23-26. Google implemented a conservative monetization strategy for YouTube: it chose to run ads against only those videos for which it had an individually negotiated partnership agreement. Reider Opening Decl. ¶¶ 3, 10. After acquiring YouTube, Google immediately began building a sophisticated video fingerprinting tool so that copyright owners could more readily find and manage their content on YouTube. King Opening Decl. ¶¶ 14-15.

**V. Defendants Have Clear Knowledge of Extensive Infringing Content on YouTube.**

**Disputed.** The inclusion of argumentative, conclusory headings under the guise of “organizing” information for the Court violates Local Rule 56.1 and such statements should be stricken. *See* Local Rule 56.1. YouTube disputes all arguments made in these headings and the characterizations contained therein, each of which has been responded to in YouTube’s briefs.

**15.** *YouTube identifies “premium” content on its site and understands that this content is copyrighted, routinely uploaded without authorization, and a major attraction that generates traffic.* (Figueira Decl. Exs. 18, 22, 25, 41, 66, 98, 108, 141-142.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 7-14, 18, 34, 35, and YouTube’s response thereto at 6-17, 31-38, as well as relevant portions of YouTube’s opening memorandum in support of its motion for summary judgment at pages 30-57. The proposed facts are also vague and ambiguous.

The cited evidence neither supports the proposition that YouTube identifies “premium” content, nor that it has an understanding that such content was routinely uploaded without authorization and acted a “a major attraction” to generate traffic. *See* Figueira Decl. Exs. 18, 22, 25, 41, 66, 98, 108, 141-142. The evidence shows the opposite. *See* YouTube’s Response to Viacom Statement of Undisputed Facts No 96 (incorporated by reference herein).

The assertion that YouTube is capable of identifying content uploaded to the site “without authorization” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses

17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**16.** *Defendants conducted analyses of “query streams” (search results) and identified with specificity premium content across a broad range, including infringing content, that is popular among YouTube’s users.* (Figueira Decl. Exs. 22, 24, 66, 85, 127, 132, 152.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 8, 17-18, 25-30 and YouTube’s response thereto at 31-35.

The cited evidence does not support the propositions that YouTube ever “identified with specificity” any “infringing content” as a result of query stream analyses. Nor does the cited evidence support the conclusion that “infringing content” was popular among YouTube’s users. *See* Figueira Decl. Exs. 22, 24, 66, 85, 127, 132, 152; *see also* YouTube’s Response to Viacom Statement of Undisputed Facts No. 96 (incorporated by reference herein).

The fact that a YouTube user entered particular terms to search for content on YouTube does not mean that the search returned results for unauthorized content or that YouTube was aware of or permitted such content to be on the service. Schapiro Opp. Ex. 110 (231:4-235:8). One purpose of YouTube’s analyses of search queries was to assess whether to pursue licensing deals with particular content owners. Schapiro Opp. Exs. 301 (138:12-162:18), 110 (231:4-235:8). YouTube concluded that it should consider pursuing deals with some content owners because users were looking for, but not finding, certain types of content on the site. Figueira Ex. 22; Figueira Ex. 41; Schapiro Opp. Ex. 301 (138:12-162:18), 110 (231:4-235:8; 257:2-260:20).

The assertion that Defendants are capable of identifying certain content on the site as “infringing” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10;

Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

17. *Defendants adhere to a policy that they would only take down videos in response to a formal DMCA notice, and then only remove the specific URLs listed in the individual notice and only future uploads that specifically match the unique “hash mark” known as a “md5 hash” that YouTube created for each URL.* (Figueira Decl. Exs. 11, 30, 46-47, 89, 116, 121-122.)

**Disputed.** The cited evidence does not support the proposed facts. The statement that YouTube only removed videos in response to formal takedown notices is false. YouTube has removed millions of videos from the website, including for copyright reasons, that were never the subject of DMCA notices. *See* Schapiro Opp. Ex. 90; *see also* Schapiro Opp. Ex. 93 (228:7-232:3).

YouTube has developed and deployed myriad other policies and tools dedicated to preventing copyright infringement on the site. Beginning with its launch and continuing today, YouTube requires its users to agree to Terms of Service before being permitted to upload a video to the site. C. Hurley Opening Decl. ¶ 8; Levine Opening Decl. ¶ 6. YouTube’s Terms of Service have always prohibited users from submitting copyrighted material that they are not authorized to upload. C. Hurley Opening Decl. ¶ 8; Levine Opening Decl. ¶ 6. Virtually every page of the YouTube website contains a direct link to YouTube’s Terms of Service. Levine Opening Decl. ¶ 6. In addition, YouTube has had a “copyright” link on the bottom of every page throughout the site which directs users to instructions on how to send YouTube a DMCA notice. Levine Opp. Decl ¶ 10.

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Since October 2006, YouTube has displayed “Community Guidelines” on its site instructing users to “respect copyright” and only to “upload videos that you made or that you are authorized to use.” Levine Opening Decl. ¶ 7. Since at least March 2006, each time a user seeks to upload a video, YouTube informs its users, via multiple messages displayed in the upload process, that they are prohibited from uploading copyrighted content unless they have the right or authorization to do so. Levine Opening Decl. ¶ 8. Since at least March 2006, YouTube has provided a “Copyrights Tips” page that gives users guidance on copyright issues and describes the consequences to users of copyright infringement on the site. Levine Opening Decl. ¶¶ 9, 15. The Copyrights Tips page links to other pages containing additional information about copyright. Levine Opening Decl. ¶ 9. Since March 2006, YouTube has limited the duration of videos uploaded by most users to 10 minutes to prevent users from uploading a video consisting of an entire television show or feature-length film. Levine Opening Decl. ¶ 12. 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 Opening Decl. ¶ 23. 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. Levine Opening Decl. ¶ 23. 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. Levine Opening Decl. ¶ 23. 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:

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.

Levine Opening Decl. ¶ 23 & Ex. 12.

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. Levine Opening Decl. ¶ 24. Also since March 2006, the MD-5 hash technology implemented by YouTube 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 Opening Decl. ¶ 25; King Opening Decl. ¶ 4.

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In March 2006, YouTube launched its Content Verification Program (“CVP”). CVP which was made available to any copyright owner. Levine Opening Decl. ¶ 18. CVP enables copyright owners to locate and flag their videos on YouTube and send DMCA notices electronically. Levine Opening Decl. ¶ 18.

In February 2007, YouTube launched in beta form its Claim Your Content (“CYC”) system. King Opening Decl. ¶¶ 7-8. CYC used audio-fingerprinting technology to enable participating rights holders to find videos containing their content that users had uploaded to YouTube. Id. ¶ 7. Following an initial testing period, CYC was made available to all copyright owners, irrespective of whether the owners had licensing agreements with YouTube. Schapiro Opp. Exs. 142, 133 (59:3-21), 145 (66:1-71:22), 146 (222:14-223:16), 83 (268:10-14), 110 (171:22-172:19), 132 (79:5-11, 83:5-16, 85:1-9); King Opening Decl. ¶ 9. That policy was set by Google’s CEO, Eric Schmidt. Schapiro Opp. Ex. 134 (140:20-142:25; 150:12-16).

In October 2007, YouTube launched Video ID, the first video-based content identification technology to be deployed on any website dedicated to user-submitted content. King Opening Decl. ¶ 18-19. Schapiro Opening Ex. 169 (287:16-288:4). In April 2008, YouTube supplemented Video ID by launching an audio-based content identification technology called Audio ID. YouTube makes Video ID and Audio ID (collectively, “Content ID”) available to any copyright holder free of charge to allow them to identify their content on the YouTube website. King Opening Decl. ¶¶ 22-23; Schapiro Opp. Ex. 145 (106:17-24; 169:14-170:3). Content ID works by identifying videos on YouTube that match reference files supplied by participating rights holders. King Opening Decl. ¶ 23. 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. King Opening Decl. ¶ 24. Since its launch in October 2007, every video that a user has attempted to post to YouTube—whether private or not—has been screened using Content ID. King Opening Decl. ¶¶ 26-27. Content ID scans the back catalogue of videos posted on YouTube. King Opening Decl. ¶ 27.

With regard to Audible Magic, YouTube included content in the databases it requested Audible Magic utilize for fingerprint matching from various sources, not only content owners with whom it had partnership agreements. Hohengarten Ex. 340 (King 30(b)(6) Dep.) at 47:16-50:14. YouTube’s policy is not, and was not, to make fingerprinting technology (including Audible Magic) available only to content owners that entered into revenue-sharing agreements. King Opening Decl. ¶ 9; Maxcy Opp. Decl. ¶ 7; Schapiro Opp. Exs. 132 (46:4-11, 79:5-11, 83:5-85:9), 133 (51:14-53:3, 183:20-185:3, 186:8-17), 134 (140:20-142:25, 150:12-17) (CEO of Google describing decision that YouTube’s fingerprinting tools “would be available to media companies independent of whether they did a deal with us”), 83 (286:10-14) (CEO of YouTube testifying that “[w]e want to make our tools available generally to anyone. They don’t need to enter a licensing agreement

because of it”), 110 (171:22-172:19) (“it was always the policy that this suite of tools should be made available to anyone who wanted to use them, whether they were licensing content to YouTube or not”).

18. *Defendants permit videos containing content that had been the subject of DMCA takedowns to be reposted on the website.* (Figueira Decl. Exs. 30, 86, 188.)

**Disputed.** The proposed facts are argumentative and contain the improper legal conclusion that YouTube “permits” user-uploaded videos to be submitted to the service. That is false. YouTube uses MD-5 hash technology to create a digital “fingerprint” of every video that YouTube removes in response to a DMCA takedown notice. Levine Opening Decl. ¶ 25; King Opening Decl. ¶4. The MD-5 technology automatically prevents any user from uploading a video file identical to one that has been removed in response to a DMCA takedown notice. Levine Opening Decl. ¶ 25. YouTube’s terms of use prohibit the upload of unauthorized material. Levine Opening Decl. ¶ 6. When YouTube removes a video pursuant to the DMCA, it contacts the user who uploaded the video to alert the user to the allegation contained in the DMCA notice. Levine Opening Decl. ¶ 23. YouTube also reminds the user about its policy prohibiting the upload of unauthorized copyrighted material and that acts of copyright infringement will result in the termination of the user’s account. *Id.* In January 2007, YouTube began full-scale development of a video-based identification technology called “Video ID.” King Opening Decl. ¶17. YouTube officially launched Video ID in October 2007. King Opening Decl. ¶ 18. That technology is available to any content owner who wishes to prevent its content from appearing on YouTube. King Opening Decl. ¶¶ 21-28. *See* YouTube’s Response to Class SUF No. 17.

19. *By their own analysis of content, including infringing content, on YouTube, Defendants recognize professionally produced sports programming as among the array of content attracting substantial viewership.* (Figueira Decl. Exs. 21-22, 47, 117, 119, 126, 130-131)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. See Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 3, 7-10, 25-30 and YouTube’s response thereto at 31-35, 39-40, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 30-57.

The cited evidence does not support the proposition that defendants were aware “infringing content” on YouTube. The evidence shows the opposite, as YouTube had to “estimate the number of video views that [it] could potentially experience if the content of certain content providers was on the site.” *See, e.g.*, Figueira Decl. Ex. 130. That particular terms were used by users to search for content on YouTube is not evidence of what content was returned as a search result or what

content is on the website. *See* Schapiro Opp. Exs. 301 (103:12-104:3); 110 (213:14-214:15; 231:4-235:8).

YouTube has entered into many content partnerships with professional sports organizations and teams, such as the NBA, NHL and the USTA. Maxcy Opening Decl. ¶ 9.

The assertion that Defendants are capable of identifying certain content on the site as “infringing” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**20.** *YouTube has been repeatedly informed that sports content is being exploited on YouTube without authorization.* (Figueira Decl. Exs. 71, 128-129, 137.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of argument set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 3-4, 9-10, 25-30, and YouTube’s response thereto at 31-35, 39-40, as well as relevant portions of YouTube’s opening memorandum in support of its motion for summary judgment at pages 30-57.

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The cited evidence does not support the proposed proposition; it instead evidences decisions by parties not to join the class lawsuit, including the decision of former plaintiff Scottish Premiere League Limited to drop out of this litigation. *See* Figueira Decl. Exs. 71, 128-129, 137. YouTube does not exploit unauthorized content. It gives content owners access to industry-leading tools to help them keep their content off of the site if they so choose, and YouTube expeditiously removes material in response DMCA notices. Levine Opening Decl. ¶¶ 5-10, 12, 14, 17-19, 25; C. Hurley Opening Decl. ¶¶ 20-21; King Opening Decl. ¶¶ 7-27; *see also* YouTube's Response to Class Plaintiffs Statement of Undisputed Fact No. 17.

The implication that YouTube has knowledge that certain content is on the site "without authorization" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as "fair use" and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**21.** *Defendants concluded that Premier League was a sports entity with content on YouTube that could be exploited financially for YouTube's benefit. (Figueira Decl. Exs. 22, 119, 126-127, 130.)*

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions. The cited evidence does not support the proposition that YouTube sought to "exploit financially" Premier League content "for YouTube's benefit."

*See* Figueira Decl. Exs. 22, 119, 126-127, 130. YouTube explored the possibility of entering into a content partnership with the Premier League. Schapiro Opp. Exs. 203 (229:13-20); 253, 309, 324, 382.

22. *YouTube did not license Premier League content despite knowledge that videos of Premier League footage on YouTube were unauthorized.* (Figueira Decl. Exs. 85, 92, 123, 127, 152.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions. The cited evidence does not support the proposition that YouTube had knowledge that specific videos containing “Premier League content” were unauthorized. *See* Figueira Decl. Exs. 85, 92, 123, 127, 152; *see also* YouTube’s Response to Class Plaintiffs Statement of Undisputed Fact No. 21. That a query was conducted using the term “Premier League” does not mean that it returned as results content owned by the Premier League. Schapiro Opp. Ex. 301 (138:12-162:18), 110 (231:4-235:8). The Premier League currently uses YouTube’s Video ID technology, having previously not used used Audible Magic or providing it with reference content. Schapiro Opp. Ex. 165 (231:12-22; 252:20-253:10).

The assertion that Defendants had knowledge that certain Premier League content on the site was “unauthorized” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content

at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

23. *By their own analysis of content, including infringing content, on YouTube, Defendants recognize professionally-produced music as among the array of content attracting substantial viewership.* (Figueira Decl. Exs. 22, 24, 41, 62, 66- 67, 149, 162.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. See Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 5-14, 34, and YouTube’s response thereto at 31-35, 39-40, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 30-57.

The cited evidence does not support the proposition that YouTube was aware of “infringing” music content on YouTube. See Figueira Decl. Exs. 22, 24, 41, 62, 66-67, 149, 162. YouTube has content licensing agreements with major music companies, including all four of the major record labels and their major publisher affiliates (Universal Music Group, Warner Music Group, Sony BMG Music Entertainment, and EMI Group), as well as hundreds of indie labels and publishers. Maxcy Opening Decl. ¶¶ 3, 5-6, 9.

The assertion that Defendants are capable of identifying certain content on the site as “infringing” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Exs. 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize

such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**24.** *Defendants were aware that the exploitation of music requires the execution of licenses with multiple entities, including publishers, record labels, and performance societies.* (Figueira Decl. Exs. 61, 66, 72, 76, 82-83, 87-88, 115, 150, 153-154, 158, 164, 175)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 10-12, 25-30, and YouTube’s response thereto at 41-46, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 30-57.

The cited evidence does not support the proposed proposition. Users who upload content to YouTube, including music, provide YouTube with a license to that content. Levine Opening Decl. ¶ 6. Music companies are among those that have uploaded their music directly to YouTube or otherwise authorized it to be there without the negotiation of a license with YouTube. Maxcy Opening Decl. ¶¶ 3, 5-6. Among these are Class plaintiffs, including all of the music publisher plaintiffs, each of which has authorized its content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 98 (Responses 30, 40, 41), 103 (Response 24).

Many of the music publisher plaintiffs’ Works in Suit are co-owned by third parties, who have an independent right to authorize that content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107

**25.** *Defendants refused to negotiate and secure licenses from music rights owners whose works appear on YouTube without authorization, in situations where the specific content owner represents only a “small market share.”* (Figueira Decl. Exs. 36, 149, 162)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions. The cited evidence does not support the proposition that content from music rights owners has appeared on YouTube without authorization. *See* Figueira Decl. Exs. 36, 149, 162. YouTube has entered into many licensing deals with content owners big and small, including hundreds of independent record labels and music publishers. Maxcy Opening Decl. ¶ 9;

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Schapiro Opp. Dec. Ex. 383. Music content is authorized to appear on YouTube without individually negotiated license agreements between YouTube and the rights owners, including when the content owner has uploaded or authorized the upload of music content to YouTube. Maxcy Opening Decl. ¶¶ 3, 5-6. Class plaintiffs, including all of the music publisher plaintiffs, have authorized their content to be on YouTube. Schapiro Decl. Ex. 78 (132:24-135:13; 194:23-196:10), Ex. 22 (Responses 26-29), Ex. 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), Ex. 82, Ex. 83 (Responses 17, 19), Ex. 84, Ex. 85 (117:20-118:20, 123:4-124:5), Ex. 86 (Response 17), Ex. 87, Ex. 88, Ex. 89 (Responses 16-18), Ex. 90 (Responses 17, 19), Ex. 91 (Responses 17, 19), Ex. 92 (124:7-125:5), Ex. 93, Ex. 94 (188:5-197:24), Ex. 95, Ex. 96, Ex. 97, Ex. 98 (Responses 30, 40, 41). Many of the music publisher works in suit are co-owned by third parties who independently authorize content to be on YouTube. Schapiro Opening Exs. 83 (Response 68); 98 (Response 25); 103 (Response 33); 104 (48:16-49:12). The only evidence offered to support the allegation that YouTube did not license music rights from owners with a small market share is the self-serving testimony of a single content owner. Figueira Decl. Ex. 36.

The assertion that Defendants are capable of identifying certain content on the site as appearing “without authorization” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, all of the music publisher plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fourth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

26. *By their own analysis of content, including infringing content, on YouTube, Defendants recognized professionally produced news and other programming as among the array of content attracting substantial viewership.* (Figueira Decl. Exs. 40, 46, 62)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for summary judgment. See Class Plaintiffs' opening memorandum in support of its motion for partial summary judgment at 7, 14, 26, and YouTube's response thereto at 31-35, 39-40, and YouTube's opening memorandum in support of its motion for summary judgment at pages 30-57.

The cited evidence neither supports the proposition that YouTube had knowledge of any specific unauthorized "professionally produced news" or "other programming" content on YouTube, nor does any cited evidence show YouTube's "recognition" or "analysis" that news clips generate "substantial viewership" on YouTube. See Figueira Decl. Exs. 40, 46, and 62.

The implication that Defendant can identify certain content on the site as "infringing" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, all of the Class Plaintiffs, including Robert Tur, have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as "fair use" and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**27.** *Movies and TV shows are other examples of premium content that Defendants exploit without authorization on YouTube.* (Figueira Decl. Exs. 22, 24, 106)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain multiple improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for summary judgment. See Class Plaintiffs' opening memorandum in support of their motion for partial summary judgment at 3, 14, 25-30, and YouTube's response thereto at 6-21, 31-38, 53-55, 98, as well as relevant portions of YouTube's opening memorandum in support of its motion for summary judgment at pages 30-78.

The cited evidence does not support the proposed proposition. YouTube does not exploit unauthorized content, and none of the documents cited by plaintiffs reflects a single instance of YouTube exploiting an unauthorized movie or TV show. See Figueira Decl. Exs. 22, 24, 106. The cited evidence shows YouTube employees discussing whether YouTube should pursue certain content licensing agreements based on data showing what some YouTube users had searched for on the website. See Figueira Decl. Exs. 22 & 24. That particular terms were used by users to search for content on YouTube is not evidence of what content was returned as a search result or what content is on the website. See Schapiro Opp. Exs. 301 (103:12-104:3); 110 (213:14-214:15; 231:4-235:8).

YouTube has entered into many content partnerships with movie and television content owners, such as CBS, NBC Universal, BBC, MGM Worldwide Digital Media, Sony Pictures Television, Inc. and Lions Gate Entertainment. Maxcy Opening Decl. ¶ 9.

The implication that Defendants are capable of identifying certain content on the site as appearing "without authorization" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94

(188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

**VI. *Defendants Restricted Use of Technical Measures to Avoid Knowledge of Infringing Content.***

**Disputed.** The inclusion of argumentative, conclusory headings under the guise of “organizing” information for the Court violates Local Rule 56.1 and such statements should be stricken. *See* Local Rule 56.1. YouTube disputes all arguments made in these headings and the characterizations contained therein, each of which has been responded to in YouTube’s briefs.

**28.** *YouTube designed systems and databases, including Claim Your Content (“CYC”), to monitor, manage, and monetize infringing content, but only made these tools available to favored, select counterparties.* (Figueira Decl. Exs. 9, 51, 68, 155-157, 160-161, 164, 166-167, 170-172, 182.)

**Disputed.** The proposed facts are ambiguous and confusing and not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 10-14, 16-17, 19-21, 29, and YouTube’s response thereto at 68-73, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 94-96.

The cited evidence does not support the proposition, which is false. *See* Figueira Decl. Exs. 9, 51, 68, 155-157, 160-161, 164, 166-167, 170-172, 182. It was never Google’s policy to make its content protection tools available only to “favored, select counterparties.” King Opening Decl. ¶ 9; Schapiro Opp. Exs. 134 (140:20-142:25), 83 (268:10-14), 110 (171:22-179:19); Maxcy Opp. Decl. 7; *see infra* YouTube’s Response to Class Plaintiffs Statement of Undisputed Fact No. 17.

**29.** *When financially beneficial to Defendants in relationships with favored, select counterparties, the Defendants offer certain content owners technical measures, commonly known as “fingerprinting,” to match sound or video reference files with copyrighted content on YouTube.* (Figueira Decl. Exs. 7, 13, 33-34, 37-38, 52, 71, 114, 124.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative

and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for partial summary judgment. *See* Class Plaintiffs' opening memorandum in support of its motion for partial summary judgment at 18-20, 29, 31-32, and YouTube's response thereto at 76-78, and YouTube's opening memorandum in support of its motion for summary judgment at pages 94-96.

The cited evidence does not support the propositions that YouTube offered fingerprinting technology when "financially beneficial" to do so or that YouTube only provided fingerprinting technology to "favored, select counterparties." *See* Figueira Decl. Exs. 7, 13, 33-34, 37-38, 52, 71, 114, 124; *see also* YouTube's Response to Viacom Statement of Undisputed Facts No. 216 (incorporated by reference herein). YouTube has made its fingerprinting available to all content owners, whether or not they have a content partnership agreement with YouTube. *See supra* YouTube's Response to Class SUF ¶ 17; King Opp. Decl. ¶ 8, 11 (describing YouTube's unsuccessful efforts to work with Cherry Lane to allow it to use YouTube's Content ID technology).

30. *Rather than avail itself of existing third party technology, Google's strategy was to develop its own proprietary fingerprinting technology to create a product it could license to third parties, even though that both limited and delayed copyright protection tools for content owners.* (Figueira Decl. Exs. 7-8, 50, 53, 66, 69, 73-74, 77.)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for summary judgment. *See* Class Plaintiffs' opening memorandum in support of its motion for partial summary judgment at 20, and YouTube's response thereto at 76-78, and YouTube's opening memorandum in support of its motion for summary judgment at pages 71-78.

The cited evidence does not support the propositions that YouTube had a strategy to develop fingerprinting technology "to create a product it could license to third parties," thereby limiting and delaying copyright protection tools for content owners, nor that YouTube failed to "avail itself of existing third party technology." *See* Figueira Decl. Exs. 7-8, 50, 53, 66, 69, 73-74, 77.

There is no evidence that an interest in licensing its technology to third parties motivated Google to develop Content ID. Google developed its own fingerprinting technology for a number of reasons, including: (i) at the time that YouTube began full-scale development of its video fingerprinting technology, there was no commercially available video-based content identification technology for use on sites like YouTube; (ii) Google had already done significant work on video-identification technology at the time it acquired YouTube, believing that a video-based fingerprinting technology would be a meaningful new way to further help rights holders find videos that might contain their content; (iii) by developing its own fingerprinting system,

YouTube could customize it specifically to run on its systems. King Opening Decl. ¶ 16. None of these reasons involve an interest in licensing the technology to third parties or delaying protection for content owners. The cited evidence only shows that some at YouTube explored the *idea* of allowing other user-generated content websites to use Content ID—months after VideoID launched—not that any such licenses ever occurred. *See* Figueira Decl. Exs. 73, 77; *see supra* YouTube’s Response to Class SUF ¶ 28.

The evidence also shows that YouTube has deployed existing third party technology copyright protection tools to assist content owners. *See supra* YouTube’s Response to Class SUF ¶ 13 (discussion of YouTube’s adoption and use of Audible Magic).

## **VII. *Defendants Capitalized on Infringing Content Rather Than Remove It.***

**Disputed.** The inclusion of argumentative, conclusory headings under the guise of “organizing” information for the Court violates Local Rule 56.1 and such statements should be stricken. *See* Local Rule 56.1. YouTube disputes all arguments made in these headings and the characterizations contained therein, each of which has been responded to in YouTube’s briefs.

- 31.** *In situations where it advances their financial interests, Defendants have a practice of offering licenses to favored, selected licensors of content, both in the United States and in other territories.* (Figueira Decl. Exs. 22, 161, 163-166, 170-171.)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are ambiguous and confusing, and not susceptible to a response consistent with Local Rule 56.1.

The cited evidence does not support the propositions that YouTube entered into partnership agreements “where it advances [its] financial interests,” that YouTube has a practice of “offering” content licenses, or that YouTube entered into content partnership agreements only with “favored, selected licensors of content.” *See* Figueira Decl. Exs. 7, 13, 33-34, 37-38, 52, 71, 114, 124. The cited evidence reflects that, to complement the array of user-generated content its users have uploaded to the service, YouTube has entered into hundreds of agreements with content owners, including major movie studios, television networks, record labels and sports organizations. *See* Maxcy Opening Decl. ¶ 9; Levine Opp. Decl. ¶ 2; Schapiro Opp. Ex. 110 (90:13-17, 91:2-10, 126:4-10, 234:24-235:8).

- 32.** *Defendants did not seek licenses for certain content despite knowledge that they were exploiting it on YouTube.* (Figueira Decl. Exs. 36, 70, 75, 83, 90-91, 123, 144-147, 153, 158)

**Disputed.** The proposed facts are not susceptible to a response consistent with Local Rule 56.1. The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for partial

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summary judgment. *See* Class Plaintiffs' opening memorandum in support of its motion for partial summary judgment at 7, 9-10, 12-13, 26-27, and YouTube's response thereto at 6-17, 31-35, 39-40, 43.

The cited evidence does not support the propositions that YouTube knew about specific unauthorized content on the service, was "exploiting" it and did not seek licenses for it. *See* Figueira Decl. Exs. 36, 70, 75, 83, 90-91, 123, 144-147, 153, 158. YouTube has entered into hundreds of agreements with content owners, including major movie studios, television networks, record labels and sports organizations. Maxcy Opening Decl. ¶ 9; Levine Opp. Decl. ¶ 2; Schapiro Opp. Ex. 110 (90:13-17, 91:2-10, 126:4-10, 234:24-235:8). YouTube has made available a number of widely-adopted methods for content owners to remove content from the YouTube website if they do not want it there, including a robust DMCA notice-and-takedown program, automated DMCA takedown tools, audio fingerprinting and video fingerprinting. Levine Opening Decl. ¶¶ 5-10, 12, 14, 17-19, 25; C. Hurley Opening Decl. ¶¶ 20-21; King Opening Decl. ¶¶ 7-27; *see also* YouTube's Response to Class Plaintiffs' SUF No. 27. When Cherry Lane provided specific notices of allegedly unauthorized content, *see* Figueira Decl. Exs. 144-146, YouTube promptly removed the identified videos. Schapiro Opp. Decl. Ex. 418 (174:24 - 175:25) ("I don't believe I have an objection as to the length of time it takes YouTube to take down a specific URL").

The implication that Defendants are capable of identifying certain content on the site as unlicensed is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response

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68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

33. *YouTube indexes its inventory of videos by, among other things, a title and certain descriptives provided by users (“metadata”), and uses that metadata a variety of purposes, including associating advertising with particular videos.* (Figueira Decl. Exs. 13, 54, 140, 161, 166, 170.)

**Disputed.** The proposed facts are ambiguous and confusing with respect to the phrases “certain descriptives” and “including associating advertising with particular videos,” and thus not susceptible to a response consistent with Local Rule 56.1. It is otherwise undisputed that YouTube indexes the video title and certain other information that users provide when they upload videos.

34. *YouTube internally acknowledged that providing a tool that would alert a copyright owner that an uploaded video contained a specified keyword associated with the copyright owner “isn’t hard” to provide, but “hate[d] making it easier” for copyright owners.* (Figueira Decl. Ex. 16.)

**Disputed.** The proposed facts are argumentative and not susceptible to a response consistent with Local Rule 56.1. They are also duplicative of arguments set forth in plaintiffs’ motion for partial summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 16, 24, and YouTube’s response thereto at 66-67.

The cited document, a chat between two employees, does not support the propositions that keywords were “associated with [a] copyright owner” or that YouTube as a company “acknowledged” that it “hate[d] making it easier for copyright owners.” The potential feature being discussed would send an email to content owners when a video was uploaded to YouTube with metadata containing a keyword designated by the content owner. *See* B. Hurley Opp. Decl. ¶ 5. YouTube already offered similar functionality at the time of the chat. *Id.* at ¶¶ 2-3. YouTube later adopted the feature referenced in the chat. *Id.* at ¶ 4. *See also* YouTube’s Response to Viacom’s Statement of Undisputed Facts Nos. 112-115 (incorporated by reference herein).

35. *Defendants refer to videos on YouTube as “inventory” for purpose of selling to advertisers and otherwise monetizing.* (Figueira Decl. Exs. 5, 12, 67, 80, 97, 142)

**Disputed.** The proposed fact is ambiguous and confusing with respect to the phrase “for purpose of selling to advertisers and otherwise monetizing,” and thus not susceptible to a response consistent with Local Rule 56.1. It is otherwise undisputed that YouTube sometimes uses the word “inventory” in reference to videos.

36. Defendants sell advertising in connection with videos, including contents that infringe the rights of Class Plaintiffs. Those ads are displayed both on the pages where the videos are viewed (“watch pages”) and on the search pages that list the videos generated by a user search (“search result pages.”) The advertising is contextually targeted to these videos by subject, title and other metadata associated with the videos. (Figueira Decl. Exs. 4-5, 12, 35, 113, 183-187.)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for partial summary judgment. See Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 2, 6-7, 13, 16-18, 20, 24, 31, 34-35, and YouTube’s response thereto at 93, 98-99, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 71-78. The proposed facts are compound, ambiguous, confusing and not susceptible to a response consistent with Local Rule 56.1.

The proposition that YouTube sold advertising in connection with videos “that infringe the rights of Class Plaintiffs” is an argumentative legal conclusion unsupported by the evidence. See Figueira Decl. Exs. 4-5, 12, 35, 113, 183-187. The cited screenshots are inadmissible and lack foundation. See Figueira Decl. Exs. 35, 113, 183-187. YouTube does not display advertising on pages where users watch videos—except where the video in question is expressly claimed by one of YouTube’s content partners who indicated that it wanted ads to appear. See Reider Opening Decl. ¶¶ 9-10. The cited evidence does not support the proposed fact that advertising is “contextually targeted” to videos “by subject, title and other metadata associated with the videos.” Advertisements that appear on search results pages are related to categories associated with search queries entered by users. See Schapiro Opp. Ex. 196 (176:19-177:4).

The implication that Defendants are capable of identifying certain content on the site as “infringing” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response

17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

37. *YouTube concluded that tying advertisements to the videos on search result pages is the most profitable because users are drawn to YouTube in the first instance to search for so-called “premium” content.* (Figueira Decl. Exs. 25, 29, 79, 100.)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for partial summary judgment. *See* Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 17-18, 35, and YouTube’s response thereto at 93, 98-99, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 71-78. The proposed facts are compound, ambiguous, confusing and not susceptible to a response consistent with Local Rule 56.1

The cited evidence does not support the proposition that YouTube has ever tied advertisements to videos on search pages or elsewhere. *See* Figueira Decl. Exs. 25, 29, 79, 100. Advertisements that appear on search results pages are related to categories associated with search queries entered by users, not to videos present on YouTube. *See* Schapiro Opp. Ex. 196 (176:19-177:4). Nor does the evidence support the proposition that search page monetization is more profitable because “users are drawn to YouTube in the first instance to search for so-called “premium” content,” or that YouTube ever reached that conclusion. *See* Figueira Decl. Exs. 25, 29, 79, 100.

38. *YouTube’s business model was and is to create a substantial inventory of videos, including those with infringing content, in order to attract users for advertising and other monetization.* (Figueira Decl. Exs. 3, 6, 10, 14, 20, 45, 60, 66, 70-71, 111, 141.)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for partial summary judgment. *See* class plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 4 -7, 34, and YouTube’s response thereto at 6-17, 81-82, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 25-78. The proposed facts are compound, ambiguous, confusing and not susceptible to a response consistent with Local Rule 56.1.

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The proposition that YouTube's "business model is to create a substantial inventory of videos, including those with infringing content" is an argumentative legal conclusion unsupported by the evidence. *See* Figueira Decl. Exs. 3, 6, 10, 14, 20, 45, 60, 66, 70-71, 111, 141. One of the cited documents, an email from founder Jawed Karim, shows the opposite:

"First we will further grow our audience and reach to secure our position as the #1 place for personal videos on the internet. Then we will monetize the audience we have acquired by hosting video ads."

Figueira Decl. Ex. 60. YouTube's business model has never depended on the presence of unauthorized materials. Reider Opening Decl. ¶¶ 9-10; C. Hurley Opening Decl. ¶¶ 2, 13, 16. YouTube has entered into hundreds of agreements with content owners, including major movie studios, television networks, record labels and sports organizations. Maxcy Opening Decl. ¶ 9; Schapiro Opp. Ex. 110 (90:13-17, 91:2-10, 126:4-10, 234:24-235:8). YouTube has made available a number of widely-adopted methods for content owners to remove content from the YouTube website if they do not want it there, including a robust DMCA notice-and-takedown program, automated DMCA takedown tools, audio fingerprinting and video fingerprinting. Levine Opening Decl. ¶¶ 5-10, 12, 14, 17-19, 25; C. Hurley Opening Decl. ¶¶ 20-21; King Opening Decl. ¶¶ 7-27; *see also* YouTube's Response to Class Plaintiffs' SUF No. 27.

The implication that Defendants are capable of identifying certain content on the site as "infringing" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-

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owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

39. *YouTube edits, reviews, promotes and distributes its inventory of videos across multiple media platforms.* (Figueira Decl. Exs. 17, 19, 55-58, 95-96, 112, 143.)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for partial summary judgment. See Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 23-24, 32, and YouTube’s response thereto at 58-60, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 5, 29. The proposed facts are compound, ambiguous, confusing and not susceptible to a response consistent with Local Rule 56.1.

The cited evidence does not support the propositions. See Figueira Decl. Exs. 17, 19, 55-58, 95-96, 112, 143.

Exhibits 55 through 58 to the Figueira Declaration are excerpts of deposition testimony from a YouTube software engineer explaining that when a user enters a search query into the search box on YouTube, the search system eliminates duplicate videos from the results by using YouTube’s Content ID technology. Exhibits 95 and 96 to the Figueira Declaration are excerpts of deposition testimony from a YouTube employee explaining that YouTube has entered into certain agreements with third parties that enable users to access the YouTube service from various platforms, such as mobile phones and other consumer electronics devices. Exhibits 112 and 143 to the Figueira Declaration are excerpts of documents discussing how *users* can promote the videos *they* have uploaded to the YouTube service. None of this evidences that YouTube “*edits, reviews, promotes and distributes its inventory of videos across multiple media platforms.*”

Exhibits 17 and 19 to the Figueira Declaration are excerpts of deposition testimony from a YouTube employee explaining that certain videos were selected to be “featured” on the YouTube home page “[t]o highlight, to show entertaining, relevan[t], content for our community.” Although this testimony says nothing about YouTube reviewing videos, editing, promoting, or distributing its inventory of videos across multiple media platforms, YouTube does review certain videos in order to feature them. See Schaffer Opening Decl. ¶ 5.

40. *Defendants generate revenue from the sale of advertising space on search result pages by matching keywords from searches with the metadata of the videos in YouTube's inventory. By selling advertising space that is tied to key words, advertising is thus targeted to the videos being searched on YouTube, including videos that infringe the rights of Class Plaintiffs.* (Figueira Decl. Exs. 1-2, 4, 79, 81, 99, 100, 104, 120, 151, 159, 168-169, 173-174, 179-181)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs' motion for partial summary judgment. See Class Plaintiffs' opening memorandum in support of its motion for partial summary judgment at 16-18, 31, and YouTube's response thereto at 31-38, 93, 98-99, and YouTube's opening memorandum in support of its motion for summary judgment at pages 71-78. The proposed facts are compound, ambiguous, confusing and not susceptible to a response consistent with Local Rule 56.1.

The proposition that YouTube sold advertising in connection with "videos that infringe the rights of Class Plaintiffs" is an argumentative legal conclusion unsupported by the evidence. See Figueira Decl. Exs. 1-2, 4, 79, 81, 99, 100, 104, 120, 151, 159, 168-169, 173-174, 179-181. The cited evidence does not support the proposed fact that YouTube sells advertising "on search result pages by matching keywords from searches with the metadata of the videos in YouTube's inventory" or that "advertising is . . . targeted to the videos being searched on YouTube." Advertisements that appear on search results pages are related to categories associated with search queries entered by users, not the videos returned as results on those pages. Schapiro Opp. Exs. 196 (176:19-177:4), 122 (172:13-25, 174:21-175:7)(YouTube's advertising system is independent from its search functionality). That particular terms were used by users to search for content on YouTube is not evidence of what content was returned as a search result or what content is on the website. See Schapiro Opp. Exs. 301 (103:12-104:3), 110 (213:14-214:15; 231:4-235:8); YouTube's Response to Viacom's SUF ¶ 259 (incorporated by reference herein).

The implication that Defendants are capable of identifying certain content on the site as "infringing" is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded

or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

41. *Defendants sold advertisements that appear on search result pages that display and link users to unauthorized copyrighted content of the named Class Plaintiffs.* (Figueira Decl. Exs. 101-103, 183-187)

**Disputed.** The proposed facts are argumentative and contain improper and unsupported legal conclusions that are duplicative of arguments set forth in plaintiffs’ motion for partial summary judgment. See Class Plaintiffs’ opening memorandum in support of its motion for partial summary judgment at 18, 20, 35, and YouTube’s response thereto at 31-38, 93, 98-99, and YouTube’s opening memorandum in support of its motion for summary judgment at pages 71-78. The proposed facts are compound, ambiguous, confusing and not susceptible to a response consistent with Local Rule 56.1.

The cited evidence does not support the proposition that YouTube sold advertisements on search result pages that display and link users to any class plaintiff content. See Figueira Decl. Exs. 101-103, 183-187. There is no evidence that any video represented by a thumbnail image on the cited exhibits is owned by a class plaintiff, let alone that such content is unauthorized. *Id.* The cited screenshots are inadmissible and lack foundation. *Id;* see Defendants’ Motion to Strike.

The ads displayed on search results pages appear regardless of the content of the videos listed in the search results. See Schapiro Opening Ex. 159 (172:21-25) (“Our advertising system is a completely separate system.... It runs independent of search. And search runs independent to advertising”). Advertisements that appear on search results pages are related to categories associated with search queries entered by users, not to videos. See Schapiro Opp. Ex. 196 (176:19-177:4). Search results pages display thumbnails of videos, not videos themselves. Solomon Opp. Decl. ¶ 7. YouTube does not display advertising on pages where users watch videos—except where the video in question is expressly claimed by one of YouTube’s content partners who indicated that it wanted ads to appear. See Reider Opening Decl. ¶¶ 9-10.

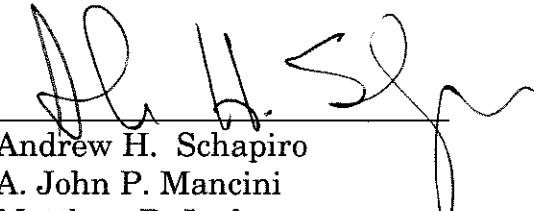
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The implication that Defendants are capable of identifying certain content on the site as “unauthorized” is further disputed for the following reasons. First, content owners, including Viacom, have frequently uploaded clips to YouTube for promotional purposes, often using third party agents with instructions to conceal the fact that the video was uploaded with the authorization of the content owner, or allowed their content to remain on the site when uploaded by ordinary users. Rubin Opening Decl. ¶¶ 2-14 & Exs. 1-128; Chan. Opening Decl. ¶¶ 4, 5, 10; Ostrow Opening Decl. ¶¶ 5-6; Maxcy Opening Decl. ¶¶ 3-7; Schaffer Opening Decl. ¶¶ 6-8; Botha Opening Decl. ¶¶ 11-12; Schapiro Opening Exs. 4 (194:8-11, 199:22-201:2), 11 (115:6-118:19, 134:19-136:10, 138:25-139:14), 12 (83:6-84:8), 24 (22:11-22:20, 70:16-71:24), 25 (43:17-22), 26, 27 (23:3-24:23, 205:17-206:20, 207:9-22), 29 (38:10-21), 30, 31 (26:20-27:10), 32 (151:17-152:20), 33, 34, 35, 47-49, 51-77; Schapiro Opp. Decl. Exs 5-67. Second, Class Plaintiffs have uploaded or otherwise authorized their content to be on YouTube. Schapiro Opening Exs. 22 (Responses 26-29), 78 (132:24-135:13, 194:23-196:10), 79 (81:2-82:2, 115:15-120:17, 29:22-30:22, 31:6-32:12), 82, 83 (Responses 17, 19), 84, 85 (117:20-118:20, 123:4-124:5), 86 (Response 17), 87, 88, 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93, 94 (188:5-197:24), 95, 96, 97, 98 (Responses 30, 40, 41), 103 (Response 24). Third, Premier League Clubs have established channels on YouTube, and in some cases have uploaded Premier League match footage onto YouTube. Schapiro Opening Exs. 100, 101. Fourth, certain content that has appeared on YouTube, including several of the music publisher works in suit, is co-owned by third parties who have an independent right to authorize such content to be on YouTube. Schapiro Opening Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33). Fifth, certain of the content at issue may qualify as “fair use” and thus is authorized by law to be on YouTube. 17 U.S.C. § 107.

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Respectfully submitted,



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