ORIGINAL

MEMORANDUM ENDORSED

Subject to Protective Order – HIGHLY CONFIDENTIAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Denied. So ordered. Louis L. Stanton 5/5/10

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

Plaintiffs,

v.

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

Defendants.

Case No. 1:07-cv-02103 (LLS)
(Related Case No. 1:07-cv-03582 (LLS)
ECF Case

VIACOM'S EVIDENTIARY OBJECTIONS TO AND MOTION TO STRIKE PORTIONS OF DECLARATIONS SUBMITTED IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Viacom submits the following evidentiary objections to the declarations submitted by Defendants in support of Defendants' Motion for Summary Judgment. For the reasons stated below, portions of Defendants' declarants' testimony, and the exhibits attached thereto, do not satisfy the evidentiary requirements under the Federal Rules of Evidence and are hence inadmissible and should not be considered by the Court in deciding the parties' cross-motions for summary judgment. *See* Fed. R. Civ. P. 56(e)(1) (declarations in support of summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.").

I. Declaration of Andrew H. Schapiro

Inadmissible Testimony	**Grounds for Inadmissibility**
Schapiro Ex. 4	Personal Knowledge: With respect to the excerpt of deposition testimony relied on by Defendants – "having the content there was valuable in terms of helping the rating of our shows" – the witness testified that he was "speculating," could not "remember specifically," and was "guess[ing]": "I'd only be speculating today because I can't remember specifically, but I would guess that, that we thought we could do a deal with YouTube and also at the same time thought that having the content there was valuable in terms of helping the ratings for our shows." Schapiro Ex. 4, at at 132-133. Accordingly, the testimony is inadmissible due to a lack of personal knowledge. *See* Fed. R. Evid. 602.
Schapiro Exs. 53, 61, 77, 160, 161, 164, 174	Hearsay: Newspaper articles are inadmissible hearsay to prove the truth of their contents. *See Century Pacific, Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 217 (S.D.N.Y. 2007); Fed. R. Evid. 802.

II. Declaration of Arthur Chan

Inadmissible Testimony	Grounds for Inadmissibility
Chan Declaration ¶¶ 4, 5, 6, 7	Failure to demonstrate conditional relevance: Defendants cannot justify admission of this evidence on the basis that it demonstrates their inability to determine whether a video clip is infringing. Such a theory would require a showing that Defendants were unaware that the uploading of these trailers and marketing clips were authorized. *See* Fed. R. Evid. 104(b) (where "relevancy of evidence depends upon fulfillment of a condition of fact," it is admissible only upon "evidence sufficient to support a finding of the fulfillment of the condition"). Defendants have made no such showing and absent such a showing the evidence is irrelevant. *See* Fed. R. Evid. 402.
Chan Declaration ¶ 4	Personal Knowledge: What the declarant "understand[s]" about the reasons for the removal of videos from YouTube does not supply a foundation that the declarant has personal knowledge (not based on hearsay) of the topic. *See* Fed. R. Evid. 602.
Chan Declaration ¶ 6	Hearsay: YouTube's own statement that the clips are "no longer available due to a copyright claim by Viacom International" is hearsay inadmissible to prove the truth of the matter asserted (i.e. that the clips are unavailable for the reason stated). *See* Fed. R. Evid. 802.
Chan Declaration ¶ 9	Personal knowledge: The declarant's characterization of viral marketing on YouTube as "widespread" and practiced by "most other online marketing companies" lacks foundation. There is no showing that the witness has personal knowledge of any other company's actions on YouTube. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). Inadmissible Lay Opinion: The same characterizations are also impermissible lay opinion. The declarant supplies no foundational facts necessary to demonstrate the prevalence of such practices and therefore fails to satisfy the requirement of Rule 701(a) that lay opinion be "rationally based on [his] perception." *See* Fed.

	R. Evid. 701; *see also Leopold v. Baccarat, Inc.*, 174 F.3d 261, 270-71 (2d Cir. 1999) (affirming exclusion, for lack of personal knowledge and as impermissible lay opinion, of testimony that defendant "routinely" engaged in particular practice in absence of "statistical analysis" or "contextual facts" necessary to support witness's characterization of practice as "routine.").

III. Declaration of Chad Hurley

Inadmissible Testimony	Grounds for Inadmissibility
Hurley Declaration ¶ 18	Improper Lay Opinion: Mr. Hurley's opinion that "this screening process was not scalable and was ineffective in identifying unauthorized material" is improper lay opinion testimony, as there is no showing that the opinion is "rationally based on the perception of the witness." *See* Fed. R. Evid. 701(a). The witness fails to provide foundational facts that would be necessary to evaluate the rationality of his inference, such as the frequency with which YouTube successfully determined the authorized or unauthorized status of videos. Absent such a foundation, the witness cannot satisfy the rationality requirement of Rule 701(a), and his inference is mere speculative argument.

IV. Declaration of Christopher Maxcy

Inadmissible Testimony	Grounds for Inadmissibility
Maxcy Declaration ¶¶ 3, 4, 5, 7	Hearsay: What other companies allegedly told YouTube about their purported uploading and promotional activities is inadmissible hearsay and may not be used to prove the truth of the matters asserted (i.e. that other companies "were . . . uploading content to YouTube" and that there were "tremendous promotional benefits" to doing so). *See* Fed. R. Evid. 802.
Maxcy Declaration ¶ 5	Lack of personal knowledge: There is no showing that Mr. Maxcy has personal knowledge that Universal Music Group uploaded the video in question or its motivations for doing so. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e).

V. Declaration of David King

Inadmissible Testimony	Grounds for Inadmissibility
King Declaration ¶¶ 6, 19	Personal Knowledge: There is no showing that the declarant has personal knowledge to testify to the facts asserted, *e.g.*, the reason Audible Magic's technology was developed, the works in its database, and other websites' use of video fingerprinting technology. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e); *Cooper v. Niagara Community Action Program*, No. 08-CV-4685, 2010 WL 1407238, at *10 (W.D.N.Y. Mar. 31, 2010) (stating that "[u]nsupported declarations made upon 'information and belief'" are not admissible evidence").
King Declaration ¶¶ 6, 14	Hearsay: What Mr. King's co-workers and third parties told him, *e.g.*, regarding Audible Magic's database and Defendants' managers' purported support for his project, is hearsay inadmissible to prove the truth of the matters asserted. *See* Fed. R. Evid. 802.
King Declaration ¶¶ 11, 12, 13, 16	Improper Lay Opinion: The declarant's opinions and predictions about the effectiveness and availability of Audible Magic and other audio and video fingerprinting technologies involve highly "technical, or other specialized knowledge" and therefore fall outside the scope of permissible lay opinion testimony under Rule 701. *See* Fed. R. Evid. 701(c), 702. Defendants stipulated that they would not submit any expert testimony in support of their opening summary judgment brief. Mr. King's statements are inadmissible on that basis alone. Even if Defendants had not so stipulated, they have not qualified Mr. King as an expert on these topics or disclosed the basis for his opinions in accordance with Rule 703, and his statements are therefore inadmissible. *See, e.g. In re 1115 Third Ave. Rest. Corp. d/b/a David K's*, No. 03 Civ. 0586 (LMM), 2004 WL 1542261, at *2 (S.D.N.Y. July 8, 2004) ("Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing").
King Declaration ¶ 16	Personal Knowledge: The declarant admitted at

	his deposition (as the 30(b)(6) deponent for Defendants) that Defendants did not test any third-party content identification technologies. *See* Kohlmann Ex. 76 (King 30(b)(6) Tr.) at 149:4-154:21; Kohlmann Ex. 4 (King 30(b)(6) Ex. 10) (document stating that YouTube was not testing or considering third-party technology). Therefore the declarant's beliefs about third-party technologies may not be admitted for the purpose of showing that those beliefs were *correct*, as the witness lacks personal knowledge thereof. *See* Fed. R. Civ. P. 56(e); Fed. R. Evid. 602; Fed. R. Evid. 105 (evidence admitted for one purpose may be excluded for impermissible purpose).

VI. Declaration of Daniel Ostrow

Inadmissible Testimony	**Grounds for Inadmissibility**
Ostrow Declaration ¶¶ 3, 4, 5	Failure to demonstrate conditional relevance: Defendants cannot justify admission of this evidence on the basis that it demonstrates their inability to identify the authorized or unauthorized status of uploaded works. Such a theory would require a showing that Defendants were unaware of the declarant's purportedly authorized uploading activities. *See* Fed. R. Evid. 104(b) (where "relevancy of evidence depends upon fulfillment of a condition of fact," it is admissible only upon "evidence sufficient to support a finding of the fulfillment of the condition"). Defendants have made no such showing and absent such a showing the evidence is irrelevant. *See* Fed. R. Evid. 402.
Ostrow Declaration ¶ 6	Personal knowledge: The declarant's characterization of viral marketing on YouTube as "widespread" and practiced by "most other online marketing companies" lacks foundation. There is no showing that the witness has personal knowledge of any other company's actions on YouTube. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). Inadmissible Lay Opinion: The same characterizations are also impermissible lay opinion. The declarant supplies no foundational facts necessary to demonstrate the prevalence of

	such practices and therefore fails to satisfy the requirement of Rule 701(a) that lay opinion be "rationally based on [his] perception." *See* Fed. R. Evid. 701; *see* Objections to Chan ¶ 9, *supra*.

VII. Declaration of Hunter Walk

Inadmissible Testimony	**Grounds for Inadmissibility**
Walk Declaration ¶¶ 3, 4, 5, 9, 22	Generalized and conclusory statements. The testimony in these paragraphs, including but not limited to testimony that videos were uploaded by "YouTube's millions of users," are "staggeringly diverse," "in every language imaginable, covering virtually every facet of the human experience," that "any attempt to capture the full scope of the kinds of videos available on YouTube in words necessarily fails[; i]t is much like trying to describe the human experience," and that "YouTube's users have used YouTube to create a new model for how individuals, companies, organizations and even governments communicate," is inadmissible because it consists of generalized and conclusory statements. *See Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir. 1999); *see also Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998).
Walk Declaration ¶¶ 12, 22	Improper Lay Opinion/Improper Expert Opinion: The statements to which Mr. Walk testifies, *e.g.*, regarding YouTube's social impact and significance, fall outside the scope of permissible lay opinion testimony and requires specialized knowledge. Defendants stipulated that they would not submit any expert testimony in support of their opening summary judgment brief. Mr. Walk's statements are inadmissible on that basis alone. Even if Defendants had not so stipulated, they have not qualified Mr. Walk as an expert on these topics or disclosed the basis for his opinions in accordance with Rule 703, and his statements are therefore inadmissible. *See* Fed. R. Evid. 701(c), 702.

VIII. Declaration of Michael Rubin

Inadmissible Testimony	Grounds for Inadmissibility
Rubin Declaration ¶¶ 2, 4, Exs. 2, 32-41, 69-83	Hearsay: Unsworn, out-of-court statements by third parties regarding their supposed "marketing and promotional uses of YouTube" and supposedly inaccurate takedowns sent to YouTube are hearsay inadmissible to prove the truth of the matters contained therein. *See* Fed. R. Evid. 802. Moreover, although some of those third parties have at times acted as agents of Plaintiffs, the statements by those third parties involve their work on behalf of third parties outside the scope of their agency relationship with Plaintiffs. *See* Fed. R. Evid. 801(d)(2)(D) (statements by agents are hearsay unless "concerning a matter within the scope of the agency"); *see also* Fed. R. Evid. 105 (evidence may be inadmissible for specific purposes).
Rubin Declaration ¶ 17	Relevance: The purported similarity between some video clips in suit and some promotional videos used by Plaintiffs is not probative of any material issue before the Court. The fact that Plaintiffs may have licensed some of their works to third parties for promotional purposes, or used them to promote Plaintiffs' works on Plaintiffs' own distribution channels, does not tend to prove that Plaintiffs licensed those works to Defendants. Therefore the evidence is irrelevant. *See* Fed. R. Evid. 401; 402.
Rubin Declaration ¶ 18	Improper Summary: The declarant has not made a showing necessary to permit evidence to be introduced indirectly by means of summary rather directly. First, there is no showing that the evidence cited is sufficiently "voluminous" to make examination of the evidence itself so "[in]convenient[]" that a summary is required in lieu of the evidence itself. *See* Fed. R. Evid. 1006; 6 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 1006.03 (Joseph M. McLaughlin ed., 2d ed. 2010). Second, the declaration fails to identify with specificity the evidence relied upon. *See id.* (documents introduced by summary rather than directly "shall be made available for examination or copying");

	Weinstein's Federal Evidence § 1006.06 (documents relied upon "must be made available . . . for summary evidence to be admissible."). Third, the declarant's failure to identify the sources with specificity fails to carry his burden of establishing the accuracy of the summary and the conclusions he has drawn from the summarized evidence. *See* Weinstein's Federal Evidence § 1006.07 ("To be admissible, summary evidence should accurately reflect the underlying documents. The proponent of summary evidence has the burden of proving accuracy, and a failure to carry that burden may result in exclusion of the evidence.") (footnote omitted). Improper Lay Opinion: The declarant's inference that the summarized evidence reference[s] "thousands" of authorized clips is inadmissible lay opinion, as it goes beyond summarizing the evidence itself to arguing Defendants' counsel's inference as to what the evidence tends to prove. However, because the declaration fails to identify with specificity the evidence upon which it relies, it fails to satisfy the reasonableness requirement of Rule 701(a) or the helpfulness requirement of Rule 701(b).

IX. Declaration of Micah Schaffer

Inadmissible Testimony	**Grounds for Inadmissibility**
Schaffer Declaration ¶¶ 2, 3, 17, 19; Exs. 5, 6, 7	Hearsay: What Mr. Schaffer allegedly learned or was told by third parties, such as press accounts, conversations with a member of "The Lonely Island," and accusations by nonparty record labels regarding other companies' uploading practices, the authorization status of the "Lazy Sunday" video, the views of the Saturday Night Live writers, and allegations of wrongful takedowns by Plaintiffs are each inadmissible to prove the truth of the matters asserted. *See* Fed. R. Evid. 802.
Schaffer Declaration ¶ 2	Failure to demonstrate conditional relevance: Defendants cannot justify admission of this evidence on the basis that it demonstrates their inability to identify the authorized or unauthorized status of uploaded works. Such a theory would

	require a showing that Defendants were unaware that Nike's promotional uploads were authorized. *See* Fed. R. Evid. 104(b) (where "relevancy of evidence depends upon fulfillment of a condition of fact," it is admissible only upon "evidence sufficient to support a finding of the fulfillment of the condition"). No such showing has been made and the evidence is therefore irrelevant. *See* Fed. R. Evid. 402.
Schaffer Declaration ¶ 3	Personal Knowledge; Generalized and Conclusory Statement: Mr. Schaffer has no basis upon which to testify to circumstances of which "YouTube" was aware. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). The first sentence of this paragraph is also inadmissable as a generalized and conclusory statement, as Mr. Schaffer describes only one example of the relevant circumstances. *See Hollander*, 172 F.3d at 198; *see also Wahad*, 179 F.R.D. at 435.
Schaffer Declaration ¶ 5	Personal Knowledge: There is no showing that Mr. Schaffer has personal knowledge of the actions of the music groups and television programmers listed in this paragraph. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). Generalized and Conclusory Statement: The first sentence of this paragraph is inadmissable as a generalized and conclusory statement. *See Hollander*, 172 F.3d at 198; *see also Wahad*, 179 F.R.D. at 435.
Schaffer Declaration ¶ 6	Improper Lay Opinion: Mr. Schaffer's inferences about third parties' uploading to YouTube, or their supposed acquiescence in their content's presence there, is improper lay opinion testimony. The witness provides no foundational facts to support his opinions except the fact that some content owners forbear from removing all of their content from YouTube. His guessing as to the frequency of promotional uses by third parties, third parties' awareness of the presence of their content on YouTube, and third parties' motivations for forbearing to enforce their copyrights against YouTube are not rationally based on his observation, or helpful to the understanding of the facts, but are mere speculation. *See* Fed. R. Evid.

	701. Generalized and Conclusory Statement: The declarant's inferences about the frequency of promotional uses of YouTube and "many cases" where he believed such use might be taking place are inadmissible as generalized and conclusory statements, as he does not point to any specific content that he reviewed or describe the extent of content reviewed. *See Hollander*, 172 F.3d at 198; *see also Wahad* 179 F.R.D. at 435.
Schaffer Declaration ¶¶ 9, 12, 13, 15	Improper Lay Opinions; Generalized and Conclusory Statements: Mr. Schaffer's opinions (1) that YouTube employees could not make reliable determinations about the authorization status of clips, (2) that proactive removal of unauthorized clips was "ineffective" and "did not scale," (3) that rights holders were in a "much better position" to make determinations about the authorization status of YouTube videos, and (4) that YouTube could not determine which videos were authorized because of promotional uses of YouTube, are each improper lay opinion testimony. The witness fails to provide foundational facts that would be necessary to evaluate the rationality of his inferences, such as (1) the frequency with which YouTube *successfully* determined the authorization status of videos, or (2) *successfully* removed unauthorized videos through proactive review without complaint or incident, or (3) *successfully* identified such videos prior to the content owner becoming aware of them. Absent such facts, the witness cannot demonstrate that his inferences satisfy the rationality requirement of Rule 701(a), and his opinions are mere speculative arguments as well generalized and conclusory statements. *See* Fed. R. Evid. 701; *Hollander*, 172 F.3d at 198; *see also Wahad*, 179 F.R.D. at 435.
Schaffer Declaration ¶ 18	Personal Knowledge / Legal Conclusion. There is no showing that Mr. Schaffer has a foundation to support his claim that Viacom's takedowns were "erroneous" or that Viacom "misidentified as infringing" videos it removed. *See* Fed. R. Evid. 601, Fed. R. Civ. P. 56(e). *See also* Viacom's Objection to Schaffer Decl. ¶ 17, *supra*. Best Evidence. Mr. Schaffer's testimony is not

	admissible to prove the contents of the referenced DMCA notices and counternotices. *See* Fed R. Evid. 1002.
Schaffer Declaration ¶ 19	Improper Lay Opinion; Generalized and Conclusory Statement: Mr. Schaffer's opinion that that Viacom "made many other mistakes" is improper inference by a lay witness. *See* Fed. R. Evid. 701. The witness's foundation for his opinion is admittedly based in substantial part on inadmissible hearsay allegations by third parties not before the Court, and therefore does not satisfy the rationality requirement of Rule 701(a). *See* Schaffer Decl. ¶¶ 17-19. In addition, admissible evidence of Plaintiffs' takedown efforts speaks for itself and the declarant's speculation about evidence not in the record is not "helpful" to the finder of fact. *See* Fed. R. Evid. 702(b). His speculative assertions are further inadmissible as generalized and conclusory statements, as Mr. Schaffer provides no information about or examples of the alleged erroneous takedowns. *See* Fed. R. Evid. 701; *Hollander*, 172 F.3d at 198; *see also Wahad*, 179 F.R.D. at 435.

X. Declaration of Roelof Botha

Inadmissible Testimony	**Grounds for Inadmissibility**
Botha Declaration ¶¶ 3. 5, 6, 7 8; Exs. 1, 2, 3	Hearsay: YouTube's own claims, what its founders allegedly told Mr. Botha, and what third-parties allegedly told Mr. Botha regarding the founders' intent with regards to the website and the content on the website is inadmissible hearsay insofar as they are offered for the truth of the matters asserted. *See* Fed. R. Evid. 802.
Botha Declaration ¶¶ 11, 12. 13, 15	Personal Knowledge: There is no showing that the declarant has personal knowledge as to the facts about which he offers testimony, *e.g*, the extent and scope of third-party viral marketing use of YouTube. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e).
Botha Declaration ¶¶ 11, 12, 14, 16	Improper Lay Opinion: Mr. Botha's opinions regarding the scope of authorized viral marketing videos on YouTube, the possibility of recognizing such authorized content, and the possibility of recognizing unauthorized content are

	inadmissible lay opinion. The declarant fails to supply foundational facts to support his opinions and therefore fails to satisfy the requirements of Rule 701(a) that the opinions he offers be "rationally based on the perception of the witness." *See* Fed. R. Evid. 701; *Leopold*, 174 F.3d at 270-71.
Botha Declaration ¶¶ 12, 14	Generalized and conclusory statements: The testimony that major media companies "often chose simply to leave on the service clips of their content," and that YouTube "had no practical ability to make determinations" regarding the authorization status of videos on the service and "actively cooperated with copyright holders," are inadmissible as generalized and conclusory statements. *See Hollander*, 172 F.3d at 198; *see also Wahad*, 179 F.R.D. at 435.
Botha Declaration ¶¶ 13, 14	Evidence shielded by attorney-client privilege: Defendants informed the Court on June 9, 2009 that they are not asserting an advice of counsel defense in this case. On that basis, Defendants have blocked all discovery into privileged communications at YouTube and Google regarding YouTube's compliance with the copyright laws. Mr. Botha's testimony about what the company thought about "whether . . . approval was required" from the copyright owner of the "Lazy Sunday" clip and about what the company "recognized" about copyright compliance, and what the company "discussed" regarding copyright compliance, and its reasons for implementing the policies listed is therefore inadmissible. *See United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("the attorney-client privilege cannot at once be used as a shield and a sword. . . . [a] defendant may not use the privilege . . . to disclose some selected communications for self-serving purposes") (internal citations omitted); *Cary Oil Co. v. MG Refining & Marketing, Inc.*, 257 F. Supp. 2d 751, 761 (S.D.N.Y. 2003) (excluding evidence regarding defendant's "motivations" for taking certain action "if that same testimony or evidence was withheld from Plaintiffs during discovery based on attorney-client privilege.").

Botha Declaration ¶ 14	Substantially More Prejudicial Than Probative: The declarant's use of the term "fingerprinting" to reference YouTube's system to "block any user from uploading to the service a file that had previously been removed from the service based on allegations of copyright infringement" is substantially more prejudicial than probative because it tends to create "confusion of the issues." *See* Fed. R. Evid. 403. "Fingerprinting" and "hashing" are distinct technologies. *See* Viacom's SUF ¶¶ 274-276. Defendants used hashing, but not fingerprinting, in the manner the declarant describes. *See id*. His use of the term "fingerprinting," therefore, creates prejudicial "confusion of the issues" by conflating two distinct technologies defendants used for distinct purposes. Fed. R. Evid. 403.

XI. Declaration of Suzanne Reider

Inadmissible Testimony	Grounds for Inadmissibility
Reider Declaration ¶¶ 10, 11.	Personal Knowledge; Legal Conclusion: The second sentence of paragraph 10, and all of paragraph 11 are inadmissible, as Ms. Reider has no basis upon which to testify about the beliefs or intent of YouTube as a while, or other YouTube employees. *See* Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). Furthermore, insofar as Defendants rely upon these statements to prove that YouTube lacked knowledge of infringement of copyright, or did not earn a financial benefit from infringement, the testimony purports to state legal conclusions on ultimate issues as to which a witness may not properly testify. *See AUSA Life Ins. Co. v. Dwyer*, 899 F. Supp. 1200, 1202 n.2 (S.D.N.Y. 1995). The statements in paragraph 11 are also inadmissible as generalized and conclusory statements. *Hollander*, 172 F.3d at 198; *see also Wahad*, 179 F.R.D. at 435.
Reider Declaration ¶ 12	Improper Lay Opinion: Ms. Reider's description of advertising offered by other video websites is lay opinion that fails to satisfy the requirements of Fed. R. Evid. 701.

	Generalized and Conclusory Statement: The final sentence of this paragraph is also inadmissible as a generalized and conclusory statement. *See* Objections to Reider Decl. ¶ 11, *supra*.

XII. Declaration of Zahavah Levine

Inadmissible Testimony	**Grounds for Inadmissibility**
Levine Declaration ¶¶ 3, 22, 29, 32, 33; Exs. 13, 14, 15, 16, 17	Hearsay: What the founders allegedly told Ms. Levine regarding their intent, what third parties said about YouTube's copyright practices, and what third parties asserted about mistaken takedowns by Plaintiffs are each hearsay inadmissible to prove the truth of the matters asserted. *See* Fed. R. Evid. 802.
Levine Declaration ¶¶ 3, 13	Evidence shielded by attorney-client privilege: Defendants informed the Court on June 9, 2009 that they are not asserting an advice of counsel defense in this case. On that basis, Defendants have blocked all discovery into privileged communications between Ms. Levine and YouTube and Google regarding compliance with the copyright laws. Ms. Levine's testimony regarding the directions and information she received from management concerning copyright issues is inadmissible, and her company's compliance with the DMCA are inadmissible on this basis. *See Bilzerian*, 926 F.2d at 1292; *Cary Oil Co.*, 257 F. Supp. 2d at 760-61.
Levine Declaration ¶ 13	Legal conclusion: The declarant's claim that Defendants were "complying with the requirements . . . of the . . . DMCA" states a legal conclusions on ultimate issues as to which a witness may not properly testify. *See AUSA Life Ins. Co.*, 899 F. Supp. at 1202 n.2.
Levine Declaration ¶ 18	Lack of personal knowledge: Ms. Levine's mere "belief" is insufficient foundation to admit testimony that "YouTube was the first online video service to offer such functionalities to content owners." *See* Fed. R. Evid. 602; *Cooper*, 2010 WL 1407238, at *10 (stating that "[u]nsupported declarations made upon 'information and belief' are not admissible evidence").

Levine Declaration ¶ 25	Substantially More Prejudicial Than Probative: The declarant's use of the terms "fingerprinting" and "specific video" to reference YouTube's "MD-5 filtering technology" are substantially more prejudicial than probative because they tend to create "confusion of the issues." *See* Fed. R. Evid. 403. "Fingerprinting" and "hashing" are distinct technologies. *See* Viacom's SUF ¶¶ 274-276. Defendants used hashing, but not fingerprinting, to prevent taken-down files from being re-uploaded. *See id*. Moreover, MD-5 hash technology identifies only identical copies of computer files, not "specific video[s]." *See generally* Viacom's SUF ¶¶ 217, 274-276, 281-285. The declarant's use of the terms "fingerprinting" and "specific videos," therefore, create prejudicial "confusion of the issues" by conflating two distinct technologies defendants used for distinct purposes, which outweighs substantially the probative value of her terminology. *See* Fed. R. Evid. 403.
Levine Declaration ¶¶ 26, 28	Generalized and conclusory statements: The statements that "[j]ust as we could not and do not manually pre-screen or review each of the videos uploaded, we cannot feasibly undertake thorough investigations as to the legitimacy of every DMCA notice we receive . . . I know that improper and invalid notices are a regular occurrence" and "[a]fter receiving notice and an explanation that a strike has been assessed, users routinely inform us that they have modified their behavior" are each inadmissible as generalized and conclusory statements. *See Hollander,* 172 F.3d at 198; *see also Wahad,* 179 F.R.D. at 435.
Levine Declaration ¶ 26	Improper Lay Opinion/Improper Expert Opinion: The declarant's opinions as to the impossibility of YouTube's pre-screening videos or investigating the accuracy of DMCA notices require specialized knowledge and may not properly be the subject of lay opinion testimony. Defendants stipulated that they would not submit any expert testimony in support of their opening summary judgment brief. Ms. Levine's statements are inadmissible on that basis alone. Even if Defendants had not so stipulated, they have not

	qualified Ms. Levine as an expert on these topics or disclosed the basis for her opinions in accordance with Rule 703, and her statements are therefore inadmissible. *See* Fed. R. Evid. 701(c); 702.

CONCLUSION

For the foregoing reasons, the challenged portions of Defendants' declarations in support of their Motion for Summary Judgment should not be admitted to evidence and should be excluded from consideration in deciding the parties' respective cross-motions for summary judgment.

Respectfully submitted,

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