

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs, )

vs. ) NO. 07-CV-2103

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

Defendants. )

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

Plaintiffs, )

vs. ) NO. 07-CV-3582

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

Defendants. )

VIDEOTAPED DEPOSITION OF WARREN SOLOW  
NEW YORK, NEW YORK  
DECEMBER 18TH, 2009

JOB NO. 18304

1  
2 VIDEOTAPED DEPOSITION OF WARREN  
3 SOLOW, held at the offices of Wilson,  
4 Sonsini, Goodrich & Rosati, PC, 1301  
5 Avenue of the Americas New York, New  
6 York, pursuant to notice, before  
7 Maureen Ratto, Registered Professional  
8 Reporter and Notary Public of the State  
9 of New York on December 18, 2009, at  
10 10:10 a.m.

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1           A P P E A R A N C E S

2

3           FOR THE PLAINTIFFS:

4           JENNER & BLOCK, LLP

5           BY: SUSAN J. KOHLMANN, ESQ.

6           919 Third Avenue, New York, NY 10022

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9

10          FOR THE DEFENDANTS:

11          WILSON, SONSINI, GOODRICH & ROSATI

12          BY: MICHAEL H. RUBIN, ESQ.

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1 VIDEOPHOTOGRAPHER: This is DVD No. 1  
2 of the video deposition of Warren Solow  
3 in the matter of Viacom International  
4 Inc., et al, versus The Football  
09:25:06 5 Association Premier League Limited, et  
6 al versus YouTube, Inc., et al.

7 This deposition is being held at  
8 1301 Avenue of the Americas, New York,  
9 New York on December 18, 2009 at  
09:27:05 10 approximately 9:51 a.m.

11 My name is Manuel Abreu from the  
12 firm of David Feldman Worldwide and I  
13 am the legal video specialist. The  
14 court reporter is Maureen Ratto, in  
09:27:27 15 association with David Feldman  
16 Worldwide.

17 Will counsel please introduce  
18 themselves?

19 MR. RUBIN: Michael Rubin from  
09:52:16 20 Wilson, Sonsini, Goodrich & Rosati for  
21 defendants YouTube and Google.

22 MS. KOHLMANN: Susan Kohlmann,  
23 Jenner & Block for the Viacom  
24 plaintiffs.

25 \* \* \*

1 W A R R E N S O L O W, having been  
2 first duly sworn according to law by  
3 the Officer, testifies as follows:

4 DIRECT EXAMINATION BY MR. RUBIN:

09:52:34

5 Q. Good morning, Mr. Solow.

6 A. Good morning.

7 Q. How are you today?

8 A. I'm well. Thank you.

09:52:43

9 Q. Do you understand you're being  
10 deposed today in connection with a  
11 lawsuit by Viacom Incorporated against  
12 Google and YouTube?

13 A. Yes.

09:52:50

14 Q. I want to go over a few ground  
15 rules for today's deposition. First,  
16 if you need to take a break, let me  
17 know and we'll do so.

09:53:02

18 In fact, if anyone in this room  
19 needs to take a break let me know and  
20 we'll do so, myself included. However,  
21 the only request I'll make is that if  
22 I'm in the middle of a question, I ask  
23 that you finish the answer prior to --  
24 prior to us taking a break?

09:53:11

25 Also, please answer my questions

1 We're back on the record.

13:30:09

2 Q. Mr. Solow, do you have an  
3 understanding of when Viacom began to  
4 instruct BayTSP to start accumulating  
5 clips in connection with the mass  
6 takedown?

7 MS. KOHLMANN: Objection. Lacks  
8 foundation.

13:30:23

9 A. I don't think that there was  
10 ever an instruction that said begin  
11 accumulating clips.

12 Q. What was the first instruction  
13 that Viacom issued to BayTSP in  
14 connection with the mass takedown?

13:30:39

15 A. In practical terms it was please  
16 monitor YouTube to identify infringing  
17 clips.

18 Q. When did that instruction occur?

13:31:33

19 A. I believe BayTSP was always  
20 working on strengthening their ability  
21 to identify clips and their -- their  
22 tools were under development and much  
23 of the fall was, I would characterize,  
24 as work shopping process and -- and how  
25 the project will take off. In terms

13:32:05

1 of -- of -- of focus on really  
2 identifying and being comprehensive  
3 and -- and penetrating the -- the  
4 YouTube library, I would say that  
13:32:31 5 happened in December, sometime.

6 MR. RUBIN: I'd like to  
7 introduce Exhibit 4.

8 (Exhibit 4 is received and  
9 marked for identification.)

13:33:05 10 Q. Mr. Solow, Exhibit 4 is an  
11 exhibit that BayTSP produced in  
12 response to a YouTube subpoena bearing  
13 Bates number BAYTSP 004289493 through  
14 '97. Do you recognize this document?

13:33:58 15 A. Yes.

16 Q. Have you seen this document  
17 before?

18 A. I believe so.

19 Q. When did you see this document  
13:34:06 20 before?

21 A. Sometime over the last 48 hours.

22 Q. If you would turn to the first  
23 page of the document, please? This  
24 document describes a project entitled  
13:34:24 25 YouTube Video Streaming Project. Do

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1 A. I could not follow that  
2 question. That was very long. I think  
3 I need some help on that question.

14:17:05

4 Q. Didn't Viacom send a DMCA  
5 takedown notice for 100,000 plus clips  
6 to YouTube on February 2nd, 2007?

7 A. Yes.

14:17:20

8 Q. Had Viacom identified a number  
9 of those clips on a rolling basis  
10 starting in December of 2006?

11 MS. KOHLMANN: Objection. You  
12 can answer.

13 A. Yes.

14:17:30

14 Q. Couldn't Viacom have issued a  
15 DMCA takedown notice for the clips that  
16 it had identified at any point prior to  
17 February 2nd, 2007?

18 A. Yes.

14:17:38

19 MS. KOHLMANN: Objection.

20 THE WITNESS: I'm sorry.

21 MS. KOHLMANN: Go ahead.

22 A. Yes.

14:17:48

23 Q. What was the basis for waiting  
24 until February 2nd, 2007 to issue those  
25 DMCA takedown notices?



1           A.     The intense desire to finalize  
2           an agreement with Google to receive  
3           compensation for the exploitations of  
4           our content on -- on YouTube.

14:18:08

5           Q.     Did you believe you were being  
6           harmed during that period of time?

7                   MS. KOHLMANN:  Objection.

14:18:21

8           A.     Viacom believed that there was  
9           harm to not controlling the  
10          distribution of its content.

11          Q.     That wasn't my question.

12          A.     That was my answer.  I mean --

14:18:33

13          Q.     Let me ask it again.  Did Viacom  
14          believe during the pendency of the  
15          December to -- December 19th, 18th,  
16          2006 to February 2nd, 2007 period of  
17          time that it was being harmed by the  
18          presence of its content on the YouTube  
19          service?

14:18:44

20                   MS. KOHLMANN:  Objection.  Asked  
21          and answered.

22          A.     Yes.

14:18:51

23          Q.     And at any point in time during  
24          that period of time it could have asked  
25          YouTube to remove its content, right?

1 if we will go with the 30 seconds or  
2 the minute, but that number will assist  
3 in the decision making. Isn't that  
4 right?

15:29:46

5 MS. KOHLMANN: Objection.  
6 Document speaks for itself. You can  
7 answer.

8 A. Yes. That is what it says here.

15:30:01

9 Q. As of December 18th, 2006 was  
10 Viacom following a takedown protocol  
11 such that taking down all clips 30  
12 minutes or longer would be a change in  
13 the protocols criteria?

15:30:21

14 A. I have no recollection of a 30  
15 minute metric.

16 Q. Do you have a recollection of a  
17 five minute metric ever being in place?

15:30:39

18 A. No. I think what was -- what  
19 was happening during this time period  
20 was that we were still -- Viacom was  
21 still wrapping its arms around what the  
22 characteristics were of a typical  
23 infringing clip and that with -- with  
24 each day we were learning more about  
25 the nature of the infringement on

15:31:07

1 the -- on the YouTube service.

15:31:24

2 Q. If that were the case, wouldn't  
3 Viacom continually strengthen its  
4 protocol and lower the threshold for  
5 identification of clips?

6 MS. KOHLMANN: Objection as to  
7 form. You can answer.

15:31:31

8 A. Yes. That was the case. It  
9 wasn't -- it's not an if. That was the  
10 case. There is another component to  
11 the strengthening that you have to take  
12 into account and that is that as you  
13 strengthen, and by strengthen I -- I --  
14 well, I won't assume. I'm not sure  
15 what you mean by strengthen. Can  
16 you -- can you clarify?

15:31:45

17 Q. If it's your claim that Viacom  
18 modulated its protocol for the location  
19 of clips on the YouTube service because  
20 it was only at this stage in time that  
21 it was becoming aware of clips on that  
22 service, wouldn't it go to follow that  
23 as it learned more information it would  
24 implement protocols that would result  
25 in more clips being taken down or

15:32:11

1 marked for takedown, not fewer?

2 MS. KOHLMANN: Objection as to  
3 form. Misstates the record.

4 A. Right. At this date, in  
15:32:26 5 December, Viacom was aware that there  
6 were clips and for at least a few  
7 months that there were clips on YouTube  
8 but the -- the nature of the clips was  
9 becoming more and more apparent as a  
10 deeper dive -- there's a difference  
15:32:45 11 between hey, I know that there are  
12 clips up there, you know, I've done an  
13 ad hoc search and the information that  
14 you'll have after you've looked at  
15:32:58 15 thousands, right? You know more after  
16 a thousand than you do after one and  
17 you know more after 10,000 than you do  
18 after a thousand. So yes, with time  
19 and -- and understanding of the -- of  
15:33:12 20 the nature and characteristics of the  
21 infringements the time period for the  
22 parameters would be strengthened as you  
23 said but the -- the countervailing  
24 concern is that as you strengthen  
15:33:29 25 those -- those parameters you also have

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1 to be careful and mindful of your Q and  
2 A process to make sure that -- that the  
3 clips are -- are valid takedowns.

4 For example, if -- if you're  
15:33:49 5 looking for a whole episode, your QC  
6 might not nearly be as -- as robust as  
7 it would be if your metric is find your  
8 content at 30 seconds. A -- a whole  
9 episode is a whole episode. And easier  
10 to identify than a 30 second clip that  
11 is infringing.

12 Q. Indeed, Mr. Solow, we saw in  
13 Exhibit 7 Michelena Hallie's e-mail to  
14 Mr. Fricklas and Mr. Cahan that BayTSP  
15:34:43 15 in December of 2006 had a roughly 7 to  
16 14 percent hit rate for actual alleged  
17 infringements. Isn't that right?

18 MS. KOHLMANN: Objection.  
19 Document speaks for itself.

15:35:02 20 A. All I see on the face of the  
21 document is 50 to 100,000 and a 700,000  
22 number. So I don't -- I can't -- no, I  
23 don't know.

24 Q. Well, based on those numbers I  
15:35:16 25 can represent it's 7 to 14 percent.

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1 MS. KOHLMANN: It's okay.

2 THE WITNESS: Sorry. Here.

3 A. Yes. This appears to be a list  
4 of assets.

15:44:50

5 Q. And the purpose of sending this  
6 list was to enable BayTSP to find  
7 additional alleged infringements on the  
8 YouTube service. Isn't that right?

15:45:05

9 MS. KOHLMANN: Objection as to  
10 form.

11 A. It was a progression to -- to  
12 continue the growth of the project.

15:45:30

13 Q. To increase the number of clips  
14 that could be included in the ultimate  
15 takedown that was effected on February  
16 2nd, 2007, right?

17 MS. KOHLMANN: Objection.

15:45:43

18 A. To be more comprehensive in the  
19 identification of our content on the  
20 YouTube service.

21 Q. And identify more clips that  
22 could be included in the takedown that  
23 was effected on February 2nd, 2007,  
24 right?

15:45:50

25 MS. KOHLMANN: Objection. You

1 can answer.

15:46:01

2 A. No. To identify as many --  
3 our -- our goal, our ultimate goal here  
4 is to identify our content and we are  
5 taking steps to do that in a more  
6 comprehensive fashion.

7 Q. The ultimate goal from the  
8 outset was to identify your content, is  
9 that your testimony today?

15:46:10

10 A. Yes.

11 Q. And from the outset, Viacom  
12 provided the information BayTSP would  
13 need to accomplish that, is that right?

15:46:25

14 MS. KOHLMANN: Objection as to  
15 form.

16 A. Could you repeat that question,  
17 please?

15:46:34

18 Q. From the outset of the project  
19 Viacom provided BayTSP with the  
20 information they would need to  
21 accomplish your goal?

15:46:50

22 A. Yes. It was -- it was Viacom's  
23 intent to provide the tools that our  
24 vendor would need to accomplish the  
25 task that they had been hired to

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1 MS. KOHLMANN: Same objection.

2 A. I don't understand the question.  
3 In what time period or when are we  
4 talking?

16:19:33 5 Q. In the fall of 2006?

6 A. I don't have specific  
7 recollection of that.

8 Q. Do you have an understanding  
9 that in the December 19th, 2006 to  
16:19:52 10 February 2nd, 2007 time period Viacom  
11 instructed BayTSP to return to those  
12 clips that had been passed on, under  
13 the previous protocols, to determine if  
14 any of those clips should be taken down  
16:20:10 15 pursuant to the newly established  
16 protocols?

17 MS. KOHLMANN: Objection as to  
18 form. You can answer.

19 A. Yes, as we developed additional  
16:20:18 20 information and understanding and  
21 training, we were more confident with  
22 going with a tighter protocol and we  
23 instructed them to go back to their --  
24 their previous work and -- and  
16:20:35 25 reevaluate it, leveraging the



1 information that they had gleaned in  
2 the ensuing time.

16:20:44

3 Q. What information had been  
4 gleaned in the ensuing time was  
5 leveraged other than a shortening of  
6 clip length instruction provided by  
7 Viacom?

16:20:52

8 MS. KOHLMANN: Objection as to  
9 form. You can answer.

16:21:17

10 A. Practical experi- -- the  
11 practical experience of their  
12 employees, continuing interaction with  
13 us about -- about the project, their  
14 employees' use of their tool. There  
15 were plenty of -- there was plenty of  
16 material -- material experience that's  
17 gleaned as a project matures.

16:21:35

18 Q. And that was the reason Viacom  
19 chose to change the rule for past  
20 identifications that they had been  
21 aware of from the preexisting protocols  
22 to the protocol that was in place for  
23 the takedown that ultimately occurred  
24 on February 2nd, 2007?

16:21:44

25 MS. KOHLMANN: Objection as to

1 and answered.

2 A. In context to the number of  
3 takedowns, not many.

16:53:42

4 Q. In context to the number of  
5 videos of individuals that were taken  
6 off of the service without any right,  
7 it was a significant number, right?

8 MS. KOHLMANN: Objection to  
9 form.

16:53:54

10 A. Comparing the 103,000 number to  
11 the number of -- of detected errors, I  
12 think it's a small number, significant  
13 to each individual affected but  
14 mathematically a very small number.

16:54:07

15 Q. Viacom's -- Viacom is serious  
16 about the fact that it made those  
17 errors presumably?

18 A. Absolutely.

16:54:14

19 MS. KOHLMANN: Objection as to  
20 form.

21 You've got to give me a chance.

16:54:47

22 Q. In fact, those errors led to a  
23 modification in Viacom's process,  
24 didn't it? What could be approved to  
25 be taken down and what could not be you

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1 I also act as the copyright  
2 administrator, serving a variety of  
3 functions in that regard. I would say  
4 those are the highlights.

10:31:32

5 Q. Does your job in anyway involve  
6 interacting with BayTSP?

7 A. Yes.

10:31:51

8 Q. Do you have supervisory or  
9 management responsibility with respect  
10 to Viacom's relationship with BayTSP?

11 MS. KOHLMANN: Objection as to  
12 form. You can answer.

13 A. I have at times.

10:31:58

14 Q. Do you today?

15 A. Yes, to some extent.

10:32:15

16 Q. When did you begin to have  
17 supervisory or management  
18 responsibility with respect to Viacom's  
19 relationship with BayTSP?

20 A. I believe that officially began  
21 in February of 2007.

10:32:43

22 Q. Has there been a period of time  
23 between February of 2007 and the  
24 present during which you did not have  
25 management or supervisory

1 form. You can answer.

2 A. If we're speaking of the time  
3 period of March, 2007, I believe that  
4 that was not the case because that  
12:02:07 5 project was winding down.

6 Q. Which project was winding down?

7 A. The project that included the  
8 monitoring of the four sites and the  
9 P2P networks.

12:02:32 10 Q. Why was that project winding  
11 down?

12 A. We were reevaluating Bay's  
13 ability to -- to scale to the point of  
14 handling the four sites, as we  
12:03:01 15 developed a more granular understanding  
16 of the scale of the infringing content  
17 that we were -- conduct that we were  
18 identifying on YouTube, Bay was having  
19 a -- there was the perception that Bay  
12:03:28 20 was having issues managing those as one  
21 project, which is the reason why there  
22 is a Project 2 on that sheet and why  
23 you see YouTube in both columns.

24 Q. And Project 1 what ultimately  
12:04:06 25 put into abeyance because of the

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