

Subject to Protective Order – HIGHLY CONFIDENTIAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC.,
COMEDY PARTNERS,
COUNTRY MUSIC TELEVISION, INC.,
PARAMOUNT PICTURES CORPORATION,
and BLACK ENTERTAINMENT TELEVISION
LLC,
Plaintiffs,
v.
YOUTUBE INC., YOUTUBE, LLC, and
GOOGLE, INC.,
Defendants.
Case No. 1:07-cv-02103 (LLS)
(Related Case No. 1:07-cv-03582 (LLS))
ECF Case
DECLARATION OF SCOTT B.
WILKENS IN SUPPORT OF
VIACOM’S OPPOSITION TO
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT

I, Scott B. Wilkens, hereby declare as follows:

1. I am a partner with the law firm Jenner & Block LLP and represent the plaintiffs in the above-captioned action (“Viacom”). I submit this declaration in support of Viacom’s Opposition to Defendants’ Motion for Summary Judgment. I make this declaration based on personal knowledge, except where otherwise noted herein.

Viacom Clips In Suit

2. Attached as Exhibits 1 through 20 are true and correct copies of 20 of the Clips in Suit at issue in this action. These clips were captured from YouTube by personnel working at the direction of Jenner & Block. For the Court’s convenience, each clip is attached in two forms: the “A” version is in the original format in which the clip was captured and the “B” version is in MPEG format. The YouTube Video ID for each clip, the duration of each clip, and the name of the Viacom Work in Suit from which each clip was copied are listed in the table below:

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<u>Exhibit</u>	<u>Video ID</u>	<u>Duration</u> <u>(minutes:seconds)</u>	<u>Work in Suit</u>
1	Mey5E9B-hHs	10:56	South Park, Episode 1102
2	2zXpVsZEK0Q	3:05	Grease
3	CnWrOdaeZfM	9:58	Daria, Episode 101
4	iZaKWmLYUas	9:39	The Godfather
5	6nJNHYOsxXo	3:35	MTV Video Music Awards, 2007
6	L5wQ_ehwl4A	10:20	Dora the Explorer, Episode 119
7	JZJuAWslb44	9:43	How to Lose a Guy in 10 Days
8	7uHO3jdxdkA	6:02	Beavis & Butthead, Episode 303
9	Bwf8ETBW64U	7:57	Braveheart
10	jeL4-kTIAJY	4:37	Chappelle's Show, Episode 102
11	39FNJprqvXs	1:45	Titanic
12	aTRZ26db1XY	9:10	Clarissa Explains It All, Episode 103
13	B5UOfWjv6hs	2:34	Raiders of the Lost Ark
14	EdcIXGe4Oco	4:14	The Hills, Episode 102
15	iLkyOWykXGs	9:53	Beverly Hills Cop
16	j8Wxc0uVcs4	3:51	BET Awards, 2006
17	9tLPoJ47IG0	9:59	The Addams Family
18	GE7z11qMobE	2:55	Spongebob Squarepants, Episode 4A
19	CA18KEOaTgg	96:26	An Inconvenient Truth
20	1WLhUJSxIbk	1:59	The Daily Show with Jon Stewart, Episode 12003

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3. During the course of discovery, Defendants produced data showing the duration of each Viacom Clip in Suit. The data were produced with the Bates numbers GOO DBDATA 001 and GOO DBDATA 023. Pursuant to Fed. R. Evid. § 1006, and based on a review of the data performed at my direction: none of Viacom’s Clips in Suit is less than ten seconds in length; approximately 97 percent of the Clips in Suit are over 30 seconds in length; approximately 86 percent of them are over one minute in length; approximately 55 percent of them are over three minutes in length; approximately 41 percent are over five minutes in length; and approximately 17 percent are over nine minutes in length.

4. The Clips in Suit include instances of full episodes of television shows or full motion pictures uploaded to YouTube serially, in segments of under 10 minutes each. Attached as Exhibit 21 is a true and correct copy of a video produced by Viacom in this litigation, created at the direction of Jenner & Block, showing the YouTube website being used to search for and watch the entirety of the Paramount motion picture “Mean Girls.” Attached as Exhibits 22 through 31 are true and correct copies of the ten Clips in Suit that are being watched in Exhibit 21. The YouTube Video IDs for Exhibits 22 through 31 are listed in the table below:

<u>Exhibit</u>	<u>Video ID</u>
22	n_E9j6cg1s8
23	n-LwttN-zbk
24	V5z6T-IhSHU
25	Uh8DVzXT3I4
26	tZqbFBYFitw

<u>Exhibit</u>	<u>Video ID</u>
27	MhvvSFka-XU
28	XCsjYApY9C4
29	xLdABJMFmBY
30	Q2SjQBYAiUY
31	UtiQdMIPhXc

5. Based on the data and review described in ¶ 3 above, approximately 3,400 Clips in Suit are between 9 minutes 50 seconds and 10 minutes in length.

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6. Defendants assert that two of Viacom’s Clips in Suit are only three and five seconds long. *See* Declaration of Michael Rubin in Support of Defendants’ Motion for Summary Judgment, ¶ 15 (citing Video IDs “iA_YOiYmoNo” and “_dtnyvBmOTw”). Each of these Clips in Suit is in fact over three minutes long. Attached as Exhibit 32 is a true and correct copy of the video clip with the Video ID “iA_YOiYmoNo,” which is a 3 minute 46 second segment of Episode 102 of the Comedy Central show “Comic Groove.” Attached as Exhibit 33 is a true and correct copy the video clip with the “YouTube Video ID _dtnyvBmOTw,” which is a 4 minute 48 second segment of Episode 4003 of the Comedy Central show “The Colbert Report.” Attached as Exhibit 34 is a true and correct copy of an excerpt of the data Defendants produced for these two clips showing that they are each over three minutes long.

YouTube Director Accounts and Branded Channels Used By Viacom

7. Attached as Exhibit 35 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-01855543 - 44, which identifies “paraccount” as a YouTube “Director Account” or branded channel used by Viacom.

8. Attached as Exhibit 36 is a true and correct copy of a document produced by Defendants marked with the Bates number range GOO001-01855929 - 35, which identifies “MTV2” as a YouTube “Director Account” or branded channel used by Viacom.

9. Attached as Exhibit 37 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-01857954 - 55, which identifies “mtv2allthatrocks” as a YouTube “Director Account” or branded channel used by Viacom.

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10. Attached as Exhibit 38 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-03413745 - 48, which identifies “beheard” as a YouTube “Director Account” or branded channel used by Viacom.

11. Attached as Exhibit 39 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-00858714 - 15, which identifies “Spiketv” as a YouTube “Director Account” or branded channel used by Viacom.

12. Attached as Exhibit 40 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-01864135 - 37, which identifies “VH1staff” as a YouTube “Director Account” or branded channel used by Viacom.

13. Attached as Exhibit 41 is a true and correct copy of a document produced by Defendants marked with the Bates number range GOO001-01868561 - 62, which identifies “ParamountVantage” as a YouTube “Director Account” or branded channel used by Viacom.

14. Attached as Exhibit 42 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-05167419, which identifies “ParamountClassics” as a YouTube “Director Account” or branded channel used by Viacom.

15. Attached as Exhibit 43 is a true and correct copy of a document produced by Defendants marked with the Bates number GOO001-01600695, which identifies “bestweekever” as a YouTube “Director Account” or branded channel used by Viacom.

16. Attached as Exhibits 44 and 45 are a true and correct copy of excerpts from the transcript of the deposition of Amy Powell taken on December 15, 2009 and a true and correct copy of a screenshot of the YouTube channel page for the account name “theloveguru,” which identify “theloveguru” as a YouTube “Director Account” or branded channel used by Viacom.

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17. Attached as Exhibits 46 and 47 are a true and correct copy of excerpts from the transcript of the deposition of Matthew Waite taken on October 8, 2009 and a true and correct copy of a screenshot of the YouTube channel page for the account name “strangewildernessuk,” which identify “strangewildernessuk” as a YouTube “Director Account” or branded channel used by Viacom.

Number of Clips Uploaded to Certain YouTube Accounts

18. During the course of discovery, Defendants produced data regarding videos that have been removed from the YouTube website, including the YouTube account name used to upload a video and the title, tags, and categories associated with the video (“Removed Video Data”). The data were produced with the Bates number GOO DBDATA 001.

19. Pursuant to Fed. R. Evid. § 1006, based on the Removed Video Data, and based on the publicly accessible YouTube account information for the YouTube accounts identified in the following paragraphs, Jenner & Block personnel acting at my direction summed the total number of all clips of Viacom content uploaded to those YouTube accounts, through May 1, 2008. None of the video clips listed in this paragraph are asserted by Viacom as Clips in Suit in this action, as to which Viacom has made copyright infringement claims.

a. YouTube director accounts and branded channels used by Viacom, as identified *supra* at ¶¶ 7-17

<u>Account Name</u>	<u>Number of Clips</u>
paraccount	120
MTV2	10
mtv2allthatrocks	42

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<u>Account Name</u>	<u>Number of Clips</u>
beheard	45
Spiketv	159
VH1staff	36
ParamountVantage	2
ParamountClassics	6
Bestweekever	140
theloveguru	32
strangewildernessuk	17
<i>TOTAL</i>	<i>609</i>

For the account “paraccount,” Defendants’ Removed Videos Data shows that a total of 24 clips had been removed from the paraccount as of May 1, 2008. A screenshot of the YouTube channel page for the account dated May 28, 2009, and attached as Exhibit 30 to the Declaration of Andrew H. Schapiro, shows that 96 videos were still active on the account as of May 28, 2009. The number in the table above is a sum of the 24 removed clips and the 96 active clips.

b. YouTube accounts identified in Defendants’ Memorandum of Law as “lack[ing] any discernable connection to Viacom.”

<u>Account Name</u>	<u>Number of Clips</u>
MysticalGirl8	2
Demansr	3
Tesderiw	5
GossipGirl40	3
Snackboard	7

<u>Account Name</u>	<u>Number of Clips</u>
Keithhn	5
<i>TOTAL</i>	<i>25</i>

For the account name “Keithhn,” which is no longer publicly accessible on YouTube, the Removed Video Data show that the account was used to upload 120 clips. Based on the Removed Video Data for these clips, it appears that only five of them are Viacom content. For all other account names in the table above, the number of clips listed is the total number of all clips uploaded to the account.

YouTube Video Viewing Records for YouTube’s Co-Founders and Employees

20. For more than two years, Viacom has sought to obtain discovery of the non-anonymized YouTube video viewing records for YouTube’s co-founders and certain other YouTube employee accounts. Viacom submitted letters to the Court on this issue on more than one occasion, and the parties engaged in lengthy negotiations over the scope of viewing records that would be produced. On April 28, 2010, Defendants produced on a disk in readable form non-anonymized YouTube viewing records for certain YouTube, Viacom and Class Plaintiff employee accounts. The Viacom Plaintiffs have not yet been able to analyze that data. Notably, Defendants have refused to produce any viewing records for co-founder Jawed Karim beyond October 2005.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28 day of April, 2010, at Washington, DC.



Scott B. Wilkens