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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.)	

DEFENDANTS’ REPLY TO CLASS PLAINTIFFS’ COUNTERSTATEMENT
OF CONTROVERTED MATERIAL FACTS IN OPPOSITION TO
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

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Pursuant to Local Rule 56.1, defendants YouTube, Inc. and Google, Inc. (collectively “YouTube”) set forth in support of their Motion for Summary Judgment the following Reply to Class Plaintiffs’ Counterstatement of Controverted Material Facts in Opposition to Defendants’ Motion for Summary Judgment.

I. CLASS PLAINTIFFS’ COUNTERSTATEMENT IS IMPROPER AND SHOULD BE DISREGARDED.

Class Plaintiffs’ Counterstatement of Controverted Material Facts in Opposition to Defendants’ Motion for Summary Judgment (“Counterstatement”) violates Local Rule 56.1 and should be disregarded.¹ Each statement of material fact set forth in YouTube’s Local Rule 56.1 Statement (“YouTube’s 56.1 Statement”) should be deemed admitted for purposes of YouTube’s Motion for Summary Judgment.²

First, Class Plaintiffs’ Counterstatement violates Local Rule 56.1 by consistently failing to “*specifically*” controvert the material facts set forth in YouTube’s 56.1 Statement. Local Rule 56.1(c) (emphasis in original). Rather than adhering to the requirements of Local Rule 56.1, Class Plaintiffs improperly use their Counterstatement as a vehicle for presenting additional legal argument. The cases in this District uniformly reject that approach, and it should be rejected here as well. *See Amalgamated Lithographers of Am. v. Unz & Co. Inc.*, 670 F. Supp. 2d

¹ 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).

² The defined terms in the Reply Brief in Support of Defendants’ Motion for Summary Judgment (“YouTube Reply”) are adopted herein.

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) (“*Rule 56.1 statements are not argument*. They should contain factual assertions with citation to the record. They should not contain conclusions.”) (emphasis in original) (citation omitted); *LaPine v. Seinfeld*, No. 08 Civ. 128(LTS)(RLE), 2009 WL 2902584, at *4 (S.D.N.Y. Sept. 10, 2009) (striking elements of Rule 56.1 statement that constitute legal argument); *Pacenza v. IBM Corp.*, No. 04 Civ. 5831 (SCR), slip op., at 3, 8 (S.D.N.Y. July 26, 2007) (Schapiro Opp. Ex. 3) (striking “impermissible argument” and “conclusory allegations” from Rule 56.1 Statement); *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 (RPP), 2005 WL 22833, at *1 n.1 (S.D.N.Y. Jan. 5, 2005) (striking Rule 56.1 statements that are “argumentative and conclusory”).

“The purpose of Local Rule 56.1 is to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties.” *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001). By failing to respond directly to the undisputed material facts set forth in YouTube’s 56.1 Statement, and by citations to non-responsive evidence, Class Plaintiffs seek to create the appearance of a factual dispute solely by virtue of the number of documents they cite and cross-reference. Class Plaintiffs’ Counterstatement improperly subjects the Court to the burden of sifting through voluminous records seeking evidence that might support Class

Plaintiffs' baseless assertions. *See U.S. Info. Sys., Inc.*, 2006 WL 2136249, at *3 ("[T]he non-moving party must identify controverting evidence for the court.").

Second, Class Plaintiffs stepped far outside the bounds of Local Rule 56.1 by submitting "supplemental" counterstatements not only to the facts set forth in YouTube's 56.1 Statement, but also to YouTube's *declarations* and even statements in YouTube's *memorandum of law*. *See* Class Plaintiffs' Counterstatement at ¶¶ 172-239. Nothing in Local Rule 56.1 authorizes a party to supplement its summary judgment briefing with "counterstatements" to the *declarations* and *briefing* submitted by the opposing party. *See* Local Rule 56.1.

Class Plaintiffs' inclusion of these supplemental arguments in the guise of a Local Rule 56.1 Counterstatement is an end-run around the parties' stipulation to page limits for summary judgment briefing, which was "So Ordered" by the Court on March 4, 2010. *See* Premier League Plaintiffs' and YouTube's Joint Stipulation Regarding Class Certification and Summary Judgment dated February 25, 2010 and "So Ordered" on March 4, 2010. Class Plaintiffs should not be permitted to evade the page limitations by using their Counterstatement as a platform to "respond" to statements that appear nowhere in YouTube's Rule 56.1 Statement. *See Pacenza*, 2010 WL 346810, at *1 (affirming district court decision to strike portions of summary judgment submissions that "constituted an attempt by the Plaintiff to circumvent page-limit requirements placed on legal memoranda submitted to the court"); *see also Primmer v. CBS Studios, Inc.*, 667 F. Supp. 2d 248, 255 (S.D.N.Y. 2009) (disregarding aspect of Local Rule 56.1 Counterstatement

found to be improper under the Rules). Accordingly, paragraphs ¶¶ 172-239 of the Class Plaintiffs' Counterstatement are improper, cannot raise a genuine issue of material fact to be tried, and should be disregarded.

II. CLASS PLAINTIFFS DO NOT GENUINELY DISPUTE ANY MATERIAL FACT

Class Plaintiffs' Counterstatement fails to demonstrate a genuine issue to be tried as to any of the material facts set forth in YouTube's Local Rule 56.1 Statement.

Class Plaintiffs expressly admit as undisputed the facts in Paragraph Nos. 3-5, 61.

Other facts listed in Defendants' Rule 56.1 Statement are only disputed as to their "materiality" by Class Plaintiffs. The facts themselves are not "specifically controverted" by Class Plaintiffs, and thus are deemed admitted under Local Civil Rule 56.1(c). Moreover, to the extent Class Plaintiffs argue a fact is immaterial, even if Class Plaintiffs did dispute that fact, it could not by definition raise a genuine dispute of *material* fact. These facts are: Paragraph Nos. 1, 32-33, 44, 46-47, 68-69, 114-115, 119, 121-125, 128-135, 144-152, 159, 161, 171.

The remaining facts are also not genuinely disputed by Class Plaintiffs. Many of these facts are deemed admitted under Local Civil Rule 56.1(c) because Class Plaintiffs have not "specifically controverted" them. Indeed, most of the responses in Class Plaintiffs' Counterstatement do not state whether a fact is controverted or uncontroverted but instead launch directly into arguments from Class Plaintiffs' brief and/or new arguments that have no direct relation to the

material fact. To the extent Class Plaintiffs' responses do purport to dispute facts, the responses do "not evince a dispute that was genuine." *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 314 (2d Cir. 2008) (responses that use the word "disputed" but do not demonstrate that dispute is genuine cannot defeat summary judgment); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1101 n.1 (C.D. Cal. 2009) (court disregards plaintiff's immaterial disputes, "which do nothing more than strain the Court's resources and distract from the real issues in this litigation"). Class Plaintiffs do not specifically controvert these facts with admissible evidence. And, with respect to many of these facts, Class Plaintiffs only dispute the facts "to the extent" they suggest a particular inference with which Class Plaintiffs disagree, even though the proposed facts identify no such inferences. Thus, these facts are also not "specifically controverted" by Class Plaintiffs and are deemed admitted under Local Civil Rule 56.1(c). These facts are: Paragraph Nos. 2, 6-31, 34-43, 45, 48-60, 62-67, 70-113, 116-118, 120, 126-127, 136-143, 153-158, 160, 162-170.

Accordingly, none of Class Plaintiffs' responses raise a genuine issue of material fact to be tried.

III. REPLIES TO SPECIFIC COUNTERSTATEMENTS

The following section provides additional discussion of certain of Class Plaintiffs' Counterstatement paragraphs and further demonstrates the lack of any genuine dispute raised by Class Plaintiffs:³

- 23. In response to a playback request, the YouTube system automatically streams a copy of the requested video from one of its video servers to the user's computer or other viewing device. Solomon Decl. ¶ 10.**

Class Plaintiffs' Response: YouTube does not automatically stream a copy of the requested video in response to a video playback request. For example, YouTube prevents access to videos that have been blocked by one of YouTube's favored content partners. See CS ¶¶ 94-96. YouTube also selectively blocks access to certain videos in certain countries or regions on behalf of favored content owners or for political reasons. Defendants also employ a team of employees to remove or block videos YouTube considers "inappropriate," 24 hours a day, 7 days a week. See CS ¶ 16 (also citing Class SUF ¶¶ 6, 28, 29; Figueira Decl. Tabs 201, 202, 204).

NO GENUINE DISPUTE – The factual proposition is that when it occurs, video playback takes place automatically at the request of a user. Class Plaintiffs do not respond to that proposed fact. Instead, Class Plaintiffs discuss instances in which playback does not occur at all because the videos have been removed or blocked. The evidence Class Plaintiffs cite does not controvert the asserted proposition. See Local Rule 56.1.

- 64. YouTube removes or disables access to allegedly infringing videos whenever it receives a DMCA-compliant takedown notice. Levine Decl. ¶ 19; Schaffer Decl. ¶ 10.**

Class Plaintiffs' Response: YouTube does not "disable access" to "infringing videos" in response to DMCA-compliant takedown notices. YouTube's policy is to disable only the specific web page or "URL" (which identifies a specific video at a specific location) listed in the

³ Each of the original facts proposed by Defendants is reprinted in bold font, followed by Class Plaintiffs' response to these facts in italic font, and then followed by Defendants' rebuttal in normal text.

notice. YouTube does not remove other instances of the infringing video located elsewhere on its website, nor does it prevent the repeated posting and viewing of the infringing video by the same or other users. YouTube has the tools and processes to do so, but has chosen to use those tools only on behalf of content owners who license their content to YouTube, or only if the content owner agrees to onerous conditions (See CS ¶36 [control/discrimination]). Moreover, YouTube does not always disable access even to the specific URLs identified in a DMCA-compliant takedown notice. YouTube never removed eight URLs infringing Cherry Lane's copyright despite a notice sent by BayTSP to copyright@youtube.com on October 9, 2008. YouTube also presents no evidence that it removed videos in response to DMCA compliant takedown notices prior to January 2006. See CS ¶¶ 94-96 (also citing Figueira Decl. Tabs 30, 86, 188, 193).

NO GENUINE DISPUTE – Class Plaintiffs do not dispute the factual proposition that YouTube removes or disables access to videos whenever it receives a DMCA-compliant takedown notice about them. They, in fact, admit that proposition. They assert other factual propositions that might bear on an alternative standard that they think should be the law. We respond to their argument in our reply brief. See Reply Brief in Support of Defendants' Motion for Summary Judgment ("YouTube Reply") 27-32. Without identifying them with specificity or suggesting that they are clips in suit, Class Plaintiffs assert that YouTube failed to remove eight out of 200 videos identified in an October 2008 DMCA takedown notice. Figueira Decl. Tab 193. That is not supported by any evidence. And it is not true. All of the videos referenced in the October 2008 notice have been removed.

65. YouTube removes almost all videos identified in DMCA notices within 24 hours of receipt. Levine Decl. ¶ 19.

Class Plaintiffs' Response: *YouTube does not remove from its site "all videos identified" in DMCA notices. See CS ¶ 64. Additionally, in 2006 YouTube failed to remove even the specific URLs identified in DMCA notices sent by Premier League's agent Netresult for nearly four days, and only took action after additional notification from NetResult (citing Figueira Decl. Tab 255).*

NO GENUINE DISPUTE – YouTube's factual proposition, that it removes almost all videos identified in DMCA notices within 24 hours, is uncontroverted. Class Plaintiffs' argument that YouTube must do more under the DMCA is both wrong as a matter of law (YouTube Reply 27-32), and out of place in a counterstatement. Class Plaintiffs

cite only a single, anomalous instance in which a DMCA notice was blocked by YouTube's junk email filter and thus not received by YouTube. *See* Figueira Decl. Tab 255. Within 8 hours after actually receiving a notice (and within four days of the original transmission), YouTube confirmed removal of the identified videos. *Id.* This anecdote does not in any way detract from the asserted factual proposition and is immaterial.

- 66. For approximately 85% of the DMCA notices it has received, YouTube removes the identified videos within a few minutes. Levine Decl. ¶ 19.**

Class Plaintiffs' Response: *YouTube does not remove from its site all of "the identified videos" in DMCA notices. See CS ¶ 64. Additionally, in 2006 YouTube failed to remove even the specific URLs identified in DMCA notices sent by Premier League's agent Netresult for four days, and only took action after additional notification from NetResult. See CS ¶ 65. YouTube admits that as of May 2007, removal time using its CVP takedown tool was "8 hours," and that were submitted to YouTube "outside of business hours." (citing Schapiro Opening Ex. 120).*

NO GENUINE DISPUTE – YouTube's factual proposition about removing the videos identified in DMCA notices is uncontroverted. Class Plaintiffs' argument that YouTube must do more under the DMCA is both wrong as a matter of law YouTube Reply 27-32, and out of place in a counterstatement. Class Plaintiffs cite a YouTube employee explaining in June 2006 that at the time removal of videos in notices received outside of business hours "takes about 8 hours." *See* Schapiro Opening Ex. 120. That communication, which describes a more than reasonable response time by YouTube back then, does not in any way conflict with the asserted factual proposition.

- 94. In February 2007, YouTube launched in beta form its Claim Your Content ("CYC") system. King Decl. ¶¶ 7-8.**

Class Plaintiffs' Response: *The CYC was fully "live" in February 2007, but was only offered to "partners who enter a revenue deal with [YouTube]." At its launch in February 2007, CYC included an "audio fingerprinting system" and an "advanced text search tool" that could identify content owner's content and prevent future uploads of that content; these tools were not offered to content owners absent a "revenue deal." YouTube offered the CYC system (including the "audio fingerprinting" and "advanced text search" tools) only to partners who were willing to license their content to YouTube, because YouTube did*

not want content owners to use the CYC system to take down infringing content. Instead, YouTube wanted content owners to authorize any infringing content the system identified by “claiming” it and allowing YouTube to run advertisements next to it. See CS ¶ 96. YouTube therefore demanded that content partners agree to use the system to “claim” content, not take it down, before allowing them to use it. While the King declaration cited by defendants alleges that “YouTube did not charge rights holders to sign up for or to use Audible Magic,” in fact, YouTube required rights holders to “claim” and thereby monetize content in order to generate advertising revenues for YouTube. YouTube refused to offer these tools to content owners who did not license their content to YouTube, although YouTube itself used the tools to identify and track, but not remove, infringing videos on its website when it suited its business interests. Class SUF ¶¶ 28-29. See CS ¶ 96 (also citing Figueira Decl. Tabs 9, 13, 38, 68, 71, 124, 161, 170, 182, 198, 217, 250, 285, 298, 338).

NO GENUINE DISPUTE – Class Plaintiffs do not dispute, and therefore admit, the fact that in February 2007 YouTube launched a beta version of its Claim Your Content (“CYC”) system.

Class Plaintiffs also provide a summary of its legal arguments regarding YouTube’s content identification technologies. We respond to their arguments in our briefs. *See* YouTube Br. 9-11, 71, 93-95; YouTube Opp. 44-46, 63-64, 68-80; YouTube Reply 8-11; 33-35.

Separate from the undisputed fact at issue, Class Plaintiffs make incorrect statements about YouTube’s CYC system. First, Class Plaintiffs claim that YouTube would only provide access to content identification technologies to partners with whom YouTube had a revenue-sharing agreement. That was not YouTube’s policy. The undisputed facts show that YouTube offered CYC without a revenue-sharing agreement. Maxcy Opp. Decl. ¶ 7; Schapiro Opp. Exs. 83 (268:10-14), 110 (171:22-172:19), 132 (46:4-11, 79:5-11, 83:5-85:16), 133 (51:14-53:3), 134 (140:20-142:25); King Opening Decl. ¶ 9. The internal documents Class Plaintiffs cite reflect that in the early days of its development, some employees debated whether content identification technology should be provided only to trusted partners. That debate was entirely appropriate given that content identification technology can be used to block and remove content without the protections accorded by the DMCA. Schapiro Reply Ex. 46 (81:12-83:16). But YouTube concluded that it could overcome those problems, and elected to provide its content identification tools to any copyright owner that wanted access to them. *Id.*; King Opening Decl. ¶ 9. The

deposition testimony Class Plaintiffs cite does not controvert the undisputed facts regarding the availability of YouTube's CYC system. *See* Figueira Tab 38 (deposition testimony indicating that YouTube offered its Content ID technology to Cherry Lane in the absence of a revenue-sharing agreement); Figueira Tab 124 (deposition testimony from the Premier League providing an implausible story that YouTube would not allow Premier League to enter into a trial of YouTube's video-based Content ID system in the absence of a revenue-sharing agreement); Figueira Tab 285 (testimony from Dean Garfield concerning a statement allegedly made by an unnamed person at YouTube at an unstated time that is contrary to the written record); *see also* King Opp. Decl. ¶ 11 (describing how YouTube offered Content ID to Cherry Lane in the absence of a revenue-sharing agreement); King Opening. Decl. ¶¶ 17-18 (when Content ID was ready for testing in the summer of 2007, YouTube invited a number of content owners with whom it did not have a revenue-sharing agreement to participate in pre-launch testing of the technology); King Opp. Decl. ¶¶ 6-8 (along with a group of other content owners, Viacom signed up to test Content ID in June 2007; when the system launched in the fall of 2007, all content owners had access to the system); Figueira Tab 298 (document concerning scenario in which a content owner wants to license content to YouTube without using the CYC tool).

Second, Class Plaintiffs claim that YouTube "required" rights holders to use CYC to monetize content. They cite no evidence for that proposition and it is not true. The more than 50 content owners who used CYC retained the sole discretion to decide whether to block, track or monetize content. King Opening Decl. ¶¶ 8-9. Many of them used CYC solely to block content. Schapiro Opp. Exs. 133 (51:14-53:10, 183:20-185:3, 186:8-17), 132 (49:14-50:18, 83:5-16); King Opening Decl. ¶ 10.

Third, Class Plaintiffs' assert that YouTube used CYC to "identify and track, but not remove" allegedly unauthorized videos. That statement is also not supported by evidence and is not true. YouTube always follows the policy decisions of content owners when implementing its content identification technologies. King Opening Decl. ¶¶ 7-9.

95. CYC used audio-fingerprinting technology to enable participating rights holders to find videos containing their content that users had uploaded to YouTube. King Decl. ¶ 7.

Class Plaintiffs' Response: *Disputed, see CS ¶ 94. The Audible Magic audio-fingerprinting technology that YouTube implemented as part of*

CYC was “well-established” as of February 2007, and could have been easily implemented at any time starting from the date that the YouTube website began operating in April 2005. YouTube ignored for months rights holders’ attempts to get it to implement or at least test available fingerprinting technologies. Even when YouTube decided to start using Audible Magic in February 2007, it chose not to use all of Audible Magic’s databases of reference files to identify infringements on the YouTube website. For example, when the system launched in February 2007, YouTube chose to use only the reference files belonging to the Universal Music Group (a record label with which it had a licensing deal) to identify infringements on its website, even though it could have immediately used all of Audible Magic’s music reference files (covering 6 million songs). YouTube added reference files only to the extent that it made “partnership deals” with major record labels. YouTube chose never to use Audible Magic’s database of film and television soundtracks, even though other UGC websites were using it to identify content at the time. Class SUF ¶¶ 28-29 (also citing Figueira Decl. Tabs 8, 9, 51, 69, 267, 268, 269, 273, 285, 291, 292).

NO GENUINE DISPUTE – Class Plaintiffs do not dispute, and therefore admit, the fact that “CYC used audio-fingerprinting technology to enable participating rights holders to find videos containing their content that users had uploaded to YouTube.”

Separate from the undisputed fact at issue, Class Plaintiffs make argumentative statements alleging that YouTube could have implemented audio fingerprinting technology earlier or in different ways. The undisputed facts about YouTube’s use of Audible Magic, its cooperation with content owners on fingerprinting, and its development of its own fingerprinting system are as follows:

- YouTube made its content identification technologies available to all copyright owners. *See supra* at RCCS ¶ 94.
- Audible Magic’s audio fingerprinting technology was designed to identify sound recordings on peer-to-peer networks, not to identify audiovisual works or musical compositions on video websites like YouTube.
- Audible Magic can only be used to identify content when fingerprints from that content reside in its system.
- Audible Magic did not have fingerprints for any movies or television shows until late 2006.
- Fingerprints alone can only be used to determine whether content is present on a service; they cannot be used to make authorization determinations about that content.

- Audible Magic provides information about sound recordings, not about the publishing rights in those recordings.
- There is no evidence that any of the putative Class Plaintiffs had fingerprints of their content in Audible Magic's system or that they ever asked YouTube to prevent their content from appearing on YouTube by using Audible Magic.
- There is no evidence that Audible Magic could have been used at any time to locate the putative Class Plaintiffs' works on YouTube or any other website.
- YouTube was the first website hosting UGC to license Audible Magic's technology.
- Audible Magic was not used on any video website until 2007.
- Throughout 2006, YouTube engaged in friendly discussions with the MPAA about content-identification technologies, and YouTube told the MPAA in January 2007 that it was willing to block content that was registered with Audible Magic.
- YouTube had legitimate concerns about the reliability of using Audible Magic's audio-based fingerprinting technology to identify audiovisual content—and Viacom's own agent, BayTSP, expressed similar concerns to Viacom.
- In part because of its concerns about the Audible Magic's shortcomings, YouTube began building its own video-fingerprinting technology in January 2007 to help content owners identify their content on its service.
- More than 1,000 content owners use YouTube's Content ID system to locate their content on YouTube.

See YouTube Opp. 43-46, 68-80; CVSUF ¶¶ 281-314; CCSUF ¶¶ 28-30.

96. **Once CYC found a video, a rights holder could apply one of three YouTube policies in response to a match: (1) “block” (i.e., instruct YouTube to remove the video from YouTube); (2) “track” (i.e., leave it up on YouTube and receive reports about the video); or (3) “monetize” (i.e., leave it up on YouTube and share in advertising revenue). King Decl. ¶ 7.**

Class Plaintiffs' Response: In addition to the foregoing at CS ¶¶ 94 and 95, YouTube used – and encouraged its major record label partners with whom it had struck licensing deals to use – the “track” option to identify specific musical works that were being uploaded to the YouTube website but for which YouTube or the labels knew that they lacked the requisite music publishing rights. As early as December 2006, when Audible Magic was first being integrated into the site, YouTube product managers acknowledged that the “track-only [option]

will be used on the publishing right uncleared videos.” (Tab 311) (emphasis added). YouTube did this so that the musical works would continue to draw traffic to its website. Class SUF ¶¶ 23-24. See CS ¶105 (also citing Figueira Decl. Tabs 66, 100, 167, 195, 199, 200, 206, 265, 266, 270, 273, 319).

NO GENUINE DISPUTE – Class Plaintiffs do not dispute, and therefore admit, the fact that rights holders using CYC can apply one of three usage policies when a video is found using that tool.

Separate from the undisputed fact at issue, Class Plaintiffs make argumentative statements about the “track” feature of CYC. First, they seem to imply that the feature is only used in situations where YouTube has a license to a sound recording embodied in a video on YouTube, but lacks knowledge about the associated publishing rights. That is not accurate. YouTube’s CYC system allows rights holders to “claim” videos on YouTube containing their content and to instruct YouTube about what to do with those videos. King Opening Decl. ¶¶ 2-3, 7-10. Copyright owners have three options for each video that they “claim”: (1) monetize the video by allowing advertising to be run alongside it; (2) “block” the video from appearing on YouTube; or (3) “track” the video without monetizing it. *Id.* at ¶¶ 7, 24; Maxcy Opp. Decl. ¶ 4; Levine Opp. Decl. ¶ 7. Any copyright owner, for any reason whatsoever, may select the “track” option when making a claim. *See* Levine Opp. Decl. ¶ 7; King Opening Decl. ¶ 31 (describing Viacom’s use of the track option). There are any number of reasons why copyright holders might want to track a video: they may want their works to generate promotional exposure from being on YouTube but have contractual limits on their ability to monetize those videos; they may be interested only in gathering information about how often a given video is being seen on YouTube; or they may have licensed a particular work to a third party and want to make sure that they are being properly compensated by that party. The track option is also used where YouTube’s policies do not allow monetization. With music videos, for example, YouTube only allows its record-label partners to monetize videos when the label affirmatively represents that it has accounted for the publishing rights. Reider Opening Decl. ¶ 9; *see also* Figueira Decl. Tabs 66, 206, 318. Where the label cannot do so, it must either track or block the video. By not allowing monetization, YouTube goes out of its way to avoid monetizing potentially unauthorized content or even giving the appearance that it is doing so. In all cases where a content owner selects the “track” option, it affirmatively represents to YouTube that its content appears in the claimed video and that it does not want YouTube to remove that video. *See* Viacom

Opp. 40-41 (describing how the track feature is used “for authorized clips”).

Second, Class Plaintiffs argue that in situations where one of YouTube’s record-label partners decides to track a video, YouTube knows that it “lack[s] the requisite music publishing rights” in the video. That is not true. *See* YouTube Opp. 43-45. When sound recordings are identified using YouTube’s fingerprinting tools, that fact provides no information about who owns the musical compositions embodied in the sound recordings. Nor does it speak to the question of whether the owners of the compositions have authorized them to appear on YouTube. The user who created the video may have obtained the relevant rights to use the composition (indeed, during the upload process, the user represented to YouTube that it did just that). Levine Opp. Decl. ¶ 4; Levine Opening Decl. ¶¶ 6-8. In other cases, YouTube itself may have a blanket license with the relevant publisher(s), but may not have been able to identify the composition to allow the video to be monetized. Levine Opp. Decl. ¶ 4; *see also* YouTube Opp. 41-43.

While YouTube does not monetize videos when it is unsure about the publishing rights for music contained in them, that practice reflects a conservative monetization strategy, not knowledge of unauthorized materials on the service. Like all other content owners, music publishers can request that YouTube remove any video that they contend is unauthorized. And YouTube honors music publishers’ takedown requests—even where the owner of an associated sound recording has licensed the video to appear on YouTube. Levine Opp. Decl. ¶¶ 3, 7. The fact that a record label may be tracking a video is no obstacle to the publisher securing its removal.

- 136. The putative class plaintiffs have licensed their content to appear on YouTube, including Rodgers & Hammerstein (“R&H”), which has issued numerous licenses that allow licensees to post R&H musical compositions on the Internet (including on YouTube). Schapiro Exs. 22 (Responses 26-29), 78 (132:24-135:13), 79 (29:22-30:22, 31:6-32:12).**

Class Plaintiffs’ Response: None of class plaintiffs’ clips in suit were authorized to appear on YouTube. The Premier League, FFT and Robert Tur have not licensed any works-in-suit to appear on YouTube. With respect to the remaining class plaintiffs, all of whom have rights in musical works, as demonstrated below for each of the Statements Nos. 137 through 141, the terms of their licenses were restricted in each

case to certain websites, territories, and/or for a certain duration and thereby precluded use of the work on YouTube, or, in any limited instance where a Class Plaintiff did grant a license that permitted a party to upload a work to YouTube, that license, by its express terms, necessarily limited the licensed use specifically to, inter alia, use in conjunction with a particular video, and did not grant the licensee or any other party (including YouTube) the right to exploit the work on its own or in conjunction with any other material. Accordingly, all such licensed uses were readily identifiable (and the plaintiff received appropriate remuneration). Class Plaintiffs dispute any inference that defendants would have had difficulty in identifying the voluminous infringements of musical works at issue in this case because of the existence of any such licensed use. In many cases, the video itself, its title, its description, or user comments accompanying the video identify it as an obvious infringement. Moreover, had Defendants made available to Class Plaintiffs the same content identification tools that they made available to favored partners, Class Plaintiffs could have easily determined the “source” of the material identified by those tools, to the extent Defendants had any doubts. Class SUF ¶¶ 28-29, 33. See CS ¶ 35 (also citing Gitterman Decl. Ex. 3).

NO GENUINE DISPUTE – Class Plaintiffs’ response does not controvert the asserted fact: that Class Plaintiffs have licensed their content to appear on YouTube. Instead, Class Plaintiffs purport to dispute a different issue – whether their *clips in suit* only were licensed to appear on YouTube. Class Plaintiffs concede that videos were licensed to appear on YouTube by admitting instances “where a Class Plaintiff did grant a license that permitted a party to upload a work to YouTube.” Class Plaintiffs also concede in this response that their *works in suit* were authorized to appear on YouTube, except for Tur, FFT and Premier League. But Tur has issued licenses that allow his content to be posted on YouTube (Schapiro Opening Ex. 88), and Tur testified that the co-owner of his *works-in-suit* may have licensed them to appear on YouTube. Schapiro Reply Ex. 59 (320:22-321:15, 322:3-11). FFT employees have uploaded FFT content onto YouTube (Schapiro Opening Exs. 94 (188:5-197:24), 97), and several of the Premier League clubs have uploaded videos (including Premier League match footage) to YouTube (Schapiro Opening Exs. 17 (276:9-297:7), 100, 101). Class Plaintiffs’ argument (not supported by any citation to evidence) that any licensed use of YouTube would have been “readily identifiable” because of specific terms in those licenses is meaningless: Class Plaintiffs do not claim to have informed YouTube of such licenses, and offer no explanation as to how they could possibly have been “identifiable” to YouTube. See Schapiro Opening Exs. 102 (206:14-

207:19), 85 (126:13-17), 92 (135:18-23), 79 (121:15-20). Even if the licenses had been disclosed to YouTube, YouTube could not distinguish between authorized and unauthorized clips, as Class Plaintiffs themselves are unable to make those determinations. See Schapiro Opening Exs. 85 (192:17-193:10), 151, 152 (111:4-24, 115:14-24), 155 (68:13-72:14); Schapiro Opp. Exs. 109 (91:23-92:11), 108 (69:7-71:2); Schapiro Reply Exs. 60 (155:11-15, 158:11-160:7), 61 (171:9-172:15), 62 (217:10-18, 219:9-221:14, 230:24-231:16, 234:9-21), 63.

- 137. Cal IV has licensed its musical compositions, including certain works that the clips in suit are alleged to have infringed (“works in suit”), for general dissemination on the Internet. Schapiro Ex. 81.**

Class Plaintiffs’ Response: *None of Cal IV’s clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, the specific use granted in the Cal IV license cited to by Defendants is subject to a substantial fee of \$25,000 (Schapiro Ex. 81), and is limited to a use only in conjunction with specific video images (i.e., the motion picture or the motion picture trailer).*

NO GENUINE DISPUTE – Class Plaintiffs’ response does not controvert the asserted fact: that Cal IV has licensed *works in suit* for general dissemination on the Internet. Class Plaintiffs’ response instead purports to dispute – with no evidentiary support whatsoever — whether any “*clips in suit*” were authorized to appear on YouTube. In fact, Class Plaintiffs’ response admits that the license agreement cited permitted the dissemination on the Internet of the motion picture and the motion picture trailer incorporating the musical compositions at issue. Further, approximately 40 of the 50 works for which Cal IV sent YouTube a takedown notice had co-owners who could have independently authorized the works to appear on YouTube. Schapiro Reply Ex. 64 (176:8-178:2).

- 138. Cal IV has authorized certain of its works in suit to appear on YouTube for promotional purposes. Schapiro Ex. 82.**

Class Plaintiffs’ Response: *In fact, the document cited by Defendants shows that the licensee claimed the use was for “promotional purposes,” not Cal IV, and that, despite the licensee’s claim, Cal IV required a license agreement “specific to each use,” and required that “the URL of each video” that was being licensed “be listed in the license agreement.” Cal IV also warned the licensee that any other use of the song would be*

infringing. Cal IV thus had complete control over the exact uses or uses being licensed. Despite these efforts to protect the value of its content, Cal IV's works continued to be infringed on YouTube.

NO GENUINE DISPUTE – Class Plaintiffs' response does not controvert the asserted fact. Moreover, the cited document *does* demonstrate Cal IV's belief that the clip was used for promotional purposes: The President of Cal IV instructed that, "[w]e will need to issue a gratis use for the specific promotional instances for Carey and get those permitted videos back up. Please send the links and any other info to Carey's videos that need to be on YouTube and we will notify them." Schapiro Opening Ex. 82. The President of Cal IV further characterized the use in question as "truly promotional," as specifically *distinguished from* infringing uses. *Id.* Also in the same email string, the Director of Administration at Cal IV wrote to the licensee, "we are willing to grant certain promotional licenses for the YouTube platform." *Id.*

139. Stage Three has issued licenses allowing its musical compositions, including works in suit, to appear on YouTube. Schapiro Ex. 83 (Response 17, 19).

Class Plaintiffs' Response: *None of Stage Three's clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, any licenses allowing other uses of any Stage Three content on YouTube require that the use be "in combination with certain specified footage and in exchange for the payment of a license fee," and be subject to additional restrictions such as duration and territory. Accordingly, each such use was readily identifiable and was properly paid for, as demonstrated by the evidence cited by defendants.*

NO GENUINE DISPUTE – Class Plaintiffs' response does not controvert the asserted fact that Stage Three has licensed its musical compositions, including works in suit, to appear on YouTube. Class Plaintiffs' response instead purports to address – with no evidentiary support whatsoever – whether any of the "*clips in suit*" were authorized to appear on YouTube. Class Plaintiffs' argument (not supported by any citation to evidence) that any licensed use of YouTube would have been "readily identifiable" because of specific terms in those licenses is meaningless: Class Plaintiffs do not claim to have informed YouTube of such licenses, and offer no explanation as to how they could possibly have been "identifiable" to YouTube. *See* Schapiro Opening Exs. 102 (206:14-207:19), 85 (126:13-17), 92 (135:18-23), 79 (121:15-20). Even if the licenses had been disclosed to

YouTube, YouTube could not distinguish between authorized and unauthorized clips, as Class Plaintiffs themselves are unable to make those determinations. *See* Schapiro Opening Exs. 85 (192:17-193:10), 151, 152 (111:4-24, 115:14-24), 155 (68:13-72:14); Schapiro Opp. Exs. 109 (91:23-92:11), 108 (69:7-71:2); Schapiro Reply Exs. 60 (155:11-15, 158:11-160:7), 61 (171:9-172:15), 62 (217:10-18, 219:9-221:14, 230:24-231:16, 234:9-21), 63.

140. Cherry Lane has authorized its musical compositions, including works in suit, to be posted to YouTube. Schapiro Exs. 86 (Response 17), 87.

Class Plaintiffs' Response: *None of Cherry Lane's clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, any licenses allowing other uses of Cherry Lane content on the internet limit such uses in a variety of ways that make them readily identifiable, including through the payment of a fee, limitations on the use to certain websites, limitations on duration and territory, and contextual limitations, for example as part of a specific contest or promotion or in combination with specific video footage, as demonstrated by the evidence cited by defendants.*

NO GENUINE DISPUTE – Class Plaintiffs' response does not controvert the asserted fact that Cherry Lane has licensed its musical compositions, including works in suit, to appear on YouTube. Class Plaintiffs' response purports instead to address – with no evidentiary support whatsoever – whether any of the “*clips in suit*” were authorized to appear on YouTube. Class Plaintiffs' argument (not supported by any citation to evidence) that any licensed use of YouTube would have been “readily identifiable” because of specific terms in those licenses is meaningless: Class Plaintiffs do not claim to have informed YouTube of such licenses, and offer no explanation as to how they could possibly have been “identifiable” to YouTube. *See* Schapiro Opening Exs. 102 (206:14-207:19), 85 (126:13-17), 92 (135:18-23), 79 (121:15-20). Even if the licenses had been disclosed to YouTube, YouTube could not distinguish between authorized and unauthorized clips, as Class Plaintiffs themselves are unable to make those determinations. *See* Schapiro Opening Exs. 85 (192:17-193:10), 151, 152 (111:4-24, 115:14-24), 155 (68:13-72:14); Schapiro Opp. Exs. 109 (91:23-92:11), 108 (69:7-71:2); Schapiro Reply Exs. 60 (155:11-15, 158:11-160:7), 61 (171:9-172:15), 62 (217:10-18, 219:9-221:14, 230:24-231:16, 234:9-21), 63.

141. **Tur, Bourne, Carlin, and X-RAY DOG have licensed third parties to put their content, including works in suit, on YouTube. Schapiro Exs. 88; 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93.**

Class Plaintiffs' Response: *None of Tur's works-in-suit have been licensed for use on YouTube. The license agreement cited by Defendants provides that Tur's copyrighted work "can not be taken from the broadcast program identified above and used in any other... media presentation," thus preventing its use on YouTube. (Schapiro Ex. 88). None of Bourne's, Carlin's, or X-Ray Dog's clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, any licenses allowing other uses of any Bourne, Carlin, or X-Ray Dog content on YouTube limit such uses in ways that make them readily identifiable, including that the uses be in combination with certain specified footage and in exchange for the payment of a license fee, as demonstrated by the evidence cited by defendants.*

NO GENUINE DISPUTE – Nothing in Class Plaintiffs' response controverts the asserted fact. Class Plaintiffs' response purports instead to address – with no evidentiary support whatsoever – whether any of the “clips in suit” were authorized to appear on YouTube. Class Plaintiffs also do not raise a genuine dispute about whether the works-in-suit of Tur, Bourne, Carlin, and X-Ray Dog were licensed to appear on YouTube. The license agreements cited by YouTube clearly allow posting on Internet sites such as YouTube, and the other irrelevant provisions in the licenses that Class Plaintiffs point to do not change the locations where the work may be distributed or displayed. Likewise, Class Plaintiffs' argument (not supported by any citation to evidence) that any licensed use of YouTube would have been “readily identifiable” because of specific terms in those licenses is meaningless: Class Plaintiffs do not claim to have informed YouTube of such licenses, and offer no explanation as to how they could possibly have been “identifiable” to YouTube. *See Schapiro Opening Exs. 102 (206:14-207:19), 85 (126:13-17), 92 (135:18-23), 79 (121:15-20). Even if the licenses had been disclosed to YouTube, YouTube could not distinguish between authorized and unauthorized clips, as Class Plaintiffs themselves are unable to make those determinations. See Schapiro Opening Exs. 85 (192:17-193:10), 151, 152 (111:4-24, 115:14-24), 155 (68:13-72:14); Schapiro Opp. Exs. 109 (91:23-92:11), 108 (69:7-71:2); Schapiro Reply Exs. 60 (155:11-15, 158:11-160:7), 61 (171:9-172:15), 62 (217:10-18, 219:9-221:14, 230:24-231:16, 234:9-21), 63.*

- 142. FFT and Music Force have posted their content on YouTube or authorized others to do so. Schapiro Exs. 94 (188:5-197:24), 95-97, 98 (Responses 30, 40, 41, 44), 99.**

Class Plaintiffs' Response: FFT has never authorized the posting of any FFT content on YouTube. Defendants cite no evidence that any of FFT's works-in-suit, nor any French Open match footage, has ever been posted by anyone at FFT to YouTube (with or without authorization). None of Music Force's works-in-suit have ever been uploaded to YouTube by any Music Force employee (with or without authorization), and on the few occasions where Music Force content not relating to Music Force's works-in-suit was uploaded, the employees who uploaded the videos were acting without authorization. Figueira Decl. Tabs 299, 324, 329.

NO GENUINE DISPUTE – Class Plaintiffs do not controvert that FFT and Music Force employees posted their employers' content to YouTube. While Class Plaintiffs may now seek to disavow the actions of their employees and claim that they were not authorized, that does not controvert the fact that those employees posted their employers' content to YouTube. At a minimum, this is apparent authorization, and a service provider in the position of YouTube would not have been in a position to second-guess authorization status.

- 158. Plaintiff R&H could not immediately determine whether a clip posted to YouTube that contained its content was or was not authorized to be there. Schapiro Ex. 79 (13:23-18:20; 114:3-14).**

Class Plaintiffs' Response: RHO quickly determined that the clip at issue was not licensed to appear on YouTube. Once RHO determined that the party uploading RHO's work had a license to use the work on television but not the Internet, RHO subsequently decided to issue a license covering Internet uses. Had defendants made available the tools that they provided to their preferred partners been deployed to identify class plaintiffs' works, defendants would have had no difficulty in quickly identifying (and removing) the infringing content.

NO GENUINE DISPUTE – Nothing in Class Plaintiffs' response controverts the asserted fact. Moreover, Class Plaintiffs' invocation of "tools . . . to identify class plaintiffs' works" is a non-sequitur: fingerprinting tools have no ability to determine authorization status. And Class Plaintiffs' claim that YouTube should have identified and removed the "infringing" content is specious in light of its admission that R&H "issue[d] a license covering Internet uses" to the video in

question – confirming that R&H wanted the clip to remain on YouTube, not to have it removed, and that the use of the video was not infringing based on the license R&H granted.

167. YouTube does not seek to earn revenue from users’ potentially infringing activities. Reider Decl. ¶ 11.

Class Plaintiffs’ Response: *YouTube’s advertising offerings are focused on deriving maximum revenues from infringing content. YouTube knows that targeted or content-specific advertisements on its search pages are more valuable than advertisements elsewhere on its site. YouTube knows that its users primarily use its search pages to search for unauthorized premium content. YouTube sells advertisements on its search pages that are specifically targeted to users’ searches for that unauthorized content — including class plaintiffs’ content. Advertisements on watch pages of infringing videos are also targeted to class plaintiffs’ infringing content, and are more lucrative because they are so targeted. See CS ¶ 160, 164. Class SUF ¶ 37 (premium content); SUF ¶¶ 15-16, 36, 38 (definition of premium content) SUF ¶ 41 (advertisements) (also citing Figueira Decl. Tabs 1, 54, 81, 99, 120, 159, 173, 174, 179, 180, 181, 226, 293, 294).*

NO GENUINE DISPUTE – YouTube’s factual proposition, that it does not seek to earn revenue from users’ potentially infringing activities, is uncontroverted. Class Plaintiffs’ have not created a genuine dispute by making the bald claim that “YouTube’s advertising offerings are focused on deriving maximum revenues from infringing content.” That broad contention is unsupported by the cited evidence, which is largely unrelated to the specific contentions they make here. It is indisputable that YouTube avoids opportunities to earn revenue from potentially infringing activities and goes to great lengths to enable content owners to remove unauthorized content from the service. Maxcy Opp. Decl. ¶¶ 3-4; King Opening Decl. ¶¶ 7-28; Levine Opening Decl. ¶¶ 18-19, 22; Levin Opp. Decl. ¶¶ 4, 7; Reider Opening Decl. ¶¶ 9-11; YouTube Br. 9-11; 75-77.

The specific contention that YouTube users primarily use YouTube’s search page to search for “unauthorized premium content” and that, knowing this, YouTube sells advertisements on search results pages that are “specifically targeted to users’ searches for that unauthorized content — including class plaintiffs’ content” is wrong. It rests on the false equivalence of “premium content” with “unauthorized content,” and inaccurately suggests that search page advertisements are targeted to unauthorized content. They are not. *See Schapiro Opp. Ex.*

196 (176:19-177:4) (noting that search page ads are not directly tied to users' search queries). The input for targeting of search results advertisements targeting is the user's search query, not the videos (or their metadata) that are returned in response to their query. The systems that YouTube uses for determining which advertisements to show based on a given search query and for determining which videos to return in response to that same search query are entirely separate. CVSUF ¶¶ 195, 254-55, 259, 339, 344; Schapiro Reply Ex. 47 (54:18-55:17; 129:22-130:22); Schapiro Reply Ex. 48 (174:21-175:7).

Class Plaintiffs also falsely claim that "[a]dvertisements on watch pages of infringing videos are also targeted to class plaintiffs' infringing content, and are more lucrative because they are so targeted." None of the evidence Class Plaintiffs cite supports this contention and Class Plaintiffs' purported dispute based on this point is not genuine. YouTube does not place ads on watch pages except where content has been claimed by a rights owner. During the period of time when YouTube did place advertisements on watch pages, those advertisements were targeted not to the specific video, but rather to the generic category that the user selected at the time the video was uploaded. Schapiro Opp. Ex. 312. In the case of music videos, YouTube only allows its record-label partners to monetize videos where the label affirmatively represents that it has accounted for the publishing rights. See Figueira Decl. Tabs 66, 206, 318. YouTube has never placed ads on any watch pages that it believed to contain infringing content. Reider Decl. ¶¶ 9-11.

- 239. Def. Mem. at pp. 38 and n.13: Plaintiffs cannot seriously contend that it would have been apparent to any reasonable service provider "from a brief and casual viewing" of short clips from works like these that they misappropriated plaintiffs' copyrighted content.**

Class Plaintiffs' Response: *With respect to the videos cited by defendants, containing certain of Class Plaintiffs' "clips in suit," Class Plaintiffs dispute any inference that YouTube was without information or reason to believe that these were what they appeared to be, and note that, in addition to the video and audio content, the titles, descriptions and other metadata associated with the videos made plain that they were likely infringing of Class Plaintiffs' premium copyrighted content (for example, by identifying the song and the artist or composer, or the sports match being played). The metadata for the videos cited by defendants are attached as Gitterman Decl., Ex. 2. Class plaintiffs also note that defendants misdescribe Schapiro Ex. 193A/193B (Def. Mem.*

n. 13). In fact, as the description for the video makes plain, the video contains the song “I’m confessin” performed by Lizz Wright. The publishing rights to that song are owned by plaintiff Bourne Company. Id. at 2, cell D5.

YOUTUBE’S REPLY: This “supplemental” counterstatement to a statement in YouTube’s Memorandum of Law cannot raise a genuine issue of material fact. With respect to the description of Schapiro Opening Ex. 193A/193B, an incorrect video was submitted erroneously. The correct video is attached as Schapiro Reply Ex. 188A/188B. However, Class Plaintiffs’ description of that video is unsupported by evidence and does not appear anywhere in Gitterman Decl. Ex. 2.

IV. REPLIES TO CLASS PLAINTIFFS’ ADDITIONAL MATERIAL FACTS

240. Class Plaintiffs’ Additional Material Fact ¶ 240.

More than two years after YouTube’s launch, music represented the majority of playback queries, all of which were for established and well-known music stars. In May 2007, music was the most-searched category on YouTube. See CS ¶ 25; see also Statement 241, infra.

YOUTUBE’S RESPONSE: Immaterial and does not raise a genuine dispute. Although Class Plaintiffs fail to identify the specific document they are purporting to rely on, to the extent they are referencing a draft document analyzing the “Top 100 Playback Queries,” that document provides no support for the proposition that, “[m]ore than two years after YouTube’s launch, music represented the majority of playback queries.” Schapiro Reply Ex. 65 (257:2-22) (identifying document as an “earlier draft”). As the author of the document (Alex Ellerson) acknowledged, his analysis of the queries was attenuated and based on guesswork. *Id.* (214:18-215:3) (“This analysis -- so just to be clear, I looked at top hundred queries, so that’s already an aggregation of query stream data. And then I further aggregated it into these broad buckets, music, nonmusic, premium, adult, other.”); *id.* (215:4-7) (testifying that he aggregated the stream data into broad buckets by “making a best guess”). The result was “an imperfect, back-of-the-envelope analysis at best.” *Id.* 216:3-5. But even this imperfect and attenuated analysis does not support the proposition advanced by the Class Plaintiffs. As Ellerson explained, it “doesn’t mean that the video that the user watched was music. It means that the keywords that they typed in, it was my guess that was a music-related keyword.” *Id.* 231:4-232:2.

To the extent that Class Plaintiffs are purporting to rely on a document referencing “just a quick update on a quick and dirty analysis of [YouTube’s] top queries,” as evidence that [REDACTED] of a limited sample of videos fell into the category of “Music,” that “quick and dirty analysis” is neither reliable nor supportive of the claim that “music was the most-searched category on YouTube” in May 2007. In any event, it is not surprising that queries relating to music videos were popular given that YouTube had entered into content partnership agreements with the major record labels and their major publisher affiliates. See Maxcy Opening Decl. ¶ 9.

241. Class Plaintiffs’ Additional Material Fact ¶ 241.

Legal use of music involves two distinct copyrights, one in the sound recording and a second in the underlying musical composition. Music publisher authorization to use the underlying musical composition embodied in a song is required in virtually every scenario where music content is posted to the site. YouTube was aware of the need to obtain publisher licenses for all music content posted on the site, including by individual users, and that such publisher licenses might be required from multiple publishers for a single sound recording. See Tabs 66, 72, 157, 170, 194, 200, 206, 270, 311, 317-322; See also, Class SUF ¶ 24; (Tab 320) (King Tr. 6:25-7:2) (King started in January 2007); (Tab 317) (GOO001-01401528); (Tab 318) (“For music content, we need the following information before we can consider our license complete: Sound recording license from label. Composition licenses from publishers totaling 100%”) (GOO001-01517877-78); (Tab 199) (“we have been delaying sharing the CYC tool with music partners until the publisher deals are in place. However does it makes sense to share the tool with UPAG and EMI label with the understanding that they can only claim official label produced videos where they already have the rights.”).

YOUTUBE’S RESPONSE: Immaterial and does not raise a genuine dispute. Class Plaintiffs’ formulation concerning “the need to obtain publisher licenses for all music content posted on the site” is simply a legal argument, and an incorrect one. It ignores that the content might be a noninfringing fair use, authorized by a co-owner of the content without the other co-owners’ knowledge, or in the public domain. It also ignores that users who upload videos specifically represent that they have obtained the relevant rights during the upload process. See Levine Opp. Decl. ¶ 4; Levine Opening Decl. ¶¶ 6-8; see also Schapiro Opp. Ex. 133 (135:5-9).

Music publishers are free to request that YouTube block or remove any video that they believe is infringing their copyrights, and YouTube promptly complies. Even in cases where the owner of a sound recording has authorized the recording to appear on YouTube, YouTube continues to process takedown requests from music publishers. See Levine Opp. Decl. ¶¶ 3, 7; Figueira Decl. Tab 157. Plaintiffs do not dispute that YouTube removed each of their clips in suit promptly upon their identification of them to YouTube. CCS ¶¶ 118, 120.

With respect to monetization, YouTube only allows ads to be displayed on video watch-pages where a content partner has claimed the video and designated the videos for monetization. Reider Opening Decl. ¶¶ 3, 9. In the case of music videos, YouTube only allows its record-label partners to monetize videos where the label affirmatively represents that it has accounted for the publishing rights. See Figueira Decl. Tabs 66, 206, 318; see also RCCS ¶ 167, *supra*.

242. Class Plaintiffs' Additional Material Fact ¶ 242.

David King proposed building content management tools that would allow copyright owners to have insight into what was happening with their content on YouTube, however YouTube recognized the potential for conflicting directives from record labels and music publishers, and did not want to remove videos from the site in the event the owner of a sound recording claimed user-generated content, but did not have music publisher authorization. (Tab 157) (GOO001-01179621); (Tab 72) (GOO001-01905261).

YOUTUBE'S RESPONSE: Immaterial and does not raise a genuine dispute. The documents cited by Class Plaintiffs confirm that YouTube made it possible for music publishers to block content from appearing on YouTube. When music publishers exercised that option, YouTube hoped to persuade the publishers to unblock the content so that the publisher could monetize the video through revenue sharing. Figueira Decl. Tab 157. If publishers still wanted to block videos that partners had claimed without "corresponding publisher clearance," YouTube adhered to its standard takedown procedures. Figueira Decl. Tab 72 (such claims "may result in a takedown"); see also Levine Opp. Decl. ¶¶ 3, 7.

243. Class Plaintiffs' Additional Material Fact ¶ 243.

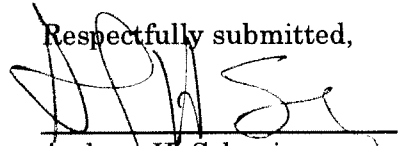
YouTube delayed offering use of its content management tools until it had deals in place with large music publishers. During 2007, YouTube entered into licensing relationships with publishers EMI Entertainment World, Inc., Sony/ATV, and Universal Music Publishing. These publisher licensing deals required the music publisher to enter into agreements allowing the record label to pass through licensing rights from the publisher to YouTube for content produced by the record label. The publisher licensing deals also authorized YouTube to use such publisher's compositions when included in user-generated content. See Statement 241 above. See also, (Tab 161) (EMI Music Marketing – Schedule 2: providing for “audio fingerprinting” and “text-based searches in the User-inputted metadata”); SonyATV (GOO001-09684819-850) (Tab 170) (2(a): providing for “a content identification and filtering solution at least as good as the industry standard solution” including “[a]udio fingerprinting” and “text-based searches”); (Tab 322) (GOO001-09595431); (Tab 323) GOO001-09595472); (Tab 321 (GOO001-09684720) (UMPG Agreement)

YOUTUBE'S RESPONSE: Immaterial and does not raise a genuine dispute. The evidence cited by Class Plaintiffs addresses only one of YouTube's content management tools – CYC. Class plaintiffs cite no evidence pertaining to any of YouTube's other content management tools, such as MD5 hashing and Content ID. It is undisputed that copyright holders began using YouTube's CYC tool in February 2007, before any of the above-referenced music publisher agreements were in place. King Opening Decl. ¶ 8. All of YouTube's content management tools—CYC included—were made universally available after passing appropriate tests. The reason YouTube tested CYC with record-label partners was because (1) the record labels had prior experience with Audible Magic's audio fingerprinting technology and had actually submitted references files to Audible Magic, unlike Class Plaintiffs or Viacom; and (2) YouTube wanted to make sure the fingerprinting technology actually worked and scaled appropriately after being integrated into the CYC tool. Maxcy Opening Decl. ¶ 5. And even after YouTube made fingerprinting technology broadly available following testing, YouTube refrained from monetizing videos where it had no knowledge of whether publishing rights were authorized. See Reider Opening Decl. ¶ 9; see also Levine Opp. Decl. ¶¶ 3, 7; Figuiera Tab 72 at G-1905258.

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