

Pursuant to Local Civil Rule 56.1, defendants YouTube, Inc. and Google Inc. (collectively “Defendants” or “YouTube”) set forth the following Reply in Response to Viacom’s Counter-Statement in Response to Defendants’ Local Rule 56.1 Statement in Support of Defendants’ Motion for Summary Judgment (“RVCS”) and Response to Viacom’s Supplemental Counter-Statement (“RV SVC”).¹

I. YOUTUBE’S REPLY TO VIACOM’S COUNTER-STATEMENT IN RESPONSE TO YOUTUBE’S LOCAL RULE 56.1 STATEMENT

Viacom raises no genuine dispute as to any material fact in YouTube’s 56.1. Viacom concedes that many facts are “uncontroverted.” *See infra* Section I. Where Viacom claims that certain facts are “controverted”, it still does not succeed in raising a genuine dispute; rather, Viacom simply cites to documents and testimony that are consistent with the asserted fact or offers irrelevant “facts” and argument that do nothing to controvert YouTube’s 56.1. Viacom’s responses are also replete with mischaracterizations of the record, omissions of dispositive facts, and inappropriate legal argument. *See infra* Section I.D.

Viacom further responds to many of the undisputed facts in YouTube’s 56.1 by reference to the arguments made in the VSUF. YouTube has responded fully to the VSUF in the CVSUF, and does not repeat those responses here.²

¹ The defined terms in the Reply Brief in Support of Defendants’ Motion for Summary Judgment (“YouTube Reply”) are adopted herein.

² YouTube hereby incorporates by reference its responses to those paragraphs from the VSUF cited in the VCS. *See* VCS ¶¶ 5, 6, 9, 16, 18, 19, 21, 22, 25, 26, 33, 36, 49, 57, 58, 87, 88, 89, 92, 95, 98, 101, 102, 109, 112, 113, 121, 128, 130, 145, 162, 164, 166, 167, 168.

A. VIACOM CONCEDES THAT MANY FACTS ARE “UNCONTROVERTED”

Viacom admits outright to sixty-nine of the undisputed facts set forth in YouTube’s 56.1. *See* VCS ¶¶ 1, 3, 4, 5, 11, 15, 17, 28, 29, 30, 31, 35, 37, 38, 39, 40, 41, 42, 43, 44, 46, 48, 50, 54, 60, 61, 68, 71, 72, 73, 74, 75, 80, 81, 82, 90, 91, 93, 94, 95, 96, 97, 99, 103, 104, 105, 108, 110, 111, 112, 113, 114, 117, 119, 120, 124, 130, 148, 150, 151, 152, 160, 161, 162, 164, 165, 169, 170, 171. Accordingly, the Court should adopt these facts as undisputed for purposes of this motion.

B. VIACOM PURPORTS TO DISPUTE SEVERAL FACTS BASED SOLELY ON EVIDENTIARY OBJECTIONS

Viacom disputes ten of the undisputed facts set forth in YouTube’s 56.1 solely based on its evidentiary objections and without attempting to offer evidence controverting the undisputed fact. *See* VCS ¶¶ 13, 32, 34, 100, 127, 145, 146, 147, 163, 168. Viacom’s evidentiary objections are baseless, and the Court should adopt these facts as undisputed for purposes of this motion.

C. VIACOM DEFERS RESPONSE TO CERTAIN FACTS AS RELEVANT ONLY TO THE CLASS ACTION

Viacom declines to respond to twenty of the undisputed facts set forth in YouTube’s 56.1 on the basis that those facts are relevant only to the Class Action. *See* VCS ¶¶ 2, 45, 116, 118, 136, 137, 138, 139, 140, 141, 142, 143, 144, 153, 154, 155, 156, 157, 158, 159. In light of Viacom’s failure to controvert these facts, the Court should adopt these facts as undisputed for purposes of this motion.

D. VIACOM DOES NOT IDENTIFY A MATERIAL DISPUTE WITH THE REMAINING FACTS IN YOUTUBE'S 56.1

Viacom does not controvert the remaining seventy-two of the undisputed facts set forth in YouTube's 56.1 because it fails to identify a material dispute as to those facts. See VCS ¶¶ 6, 7, 8, 9, 10, 12, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 36, 47, 49, 51, 52, 53, 55, 56, 57, 58, 59, 62, 63, 64, 65, 66, 67, 69, 70, 76, 77, 78, 79, 83, 84, 85, 86, 87, 88, 89, 92, 98, 101, 102, 106, 107, 109, 115, 121, 122, 123, 125, 126, 128, 129, 131, 132, 133, 134, 135, 149, 166, 167. The Court should adopt those facts as undisputed for purposes of this motion.

(1) Viacom Fails to Specifically and Genuinely Controvert These Statements

Local Rule 56.1 requires the responding party to *specifically* controvert the material facts set forth in an opposing party's statement pursuant to Local Rule 56.1(a) with citations to evidence which would be admissible. Local Rule 56.1(b)-(d). The Southern District of New York adopted Local Rule 56.1(d) for a reason, namely "to supply the Courts with an accurate factual record" and "to prohibit parties from taking ... misleading and unfair 'shortcuts' (i.e. unsupported denials) ..." *Omnipoint Commc'ns, Inc. v. City of White Plains*, 175 F.Supp. 2d 697, 700 (S.D.N.Y. 2001), *rev'd on other grounds*, 430 F.3d 529 (2d Cir. 2005). A response pursuant to Local Rule 56.1(b)-(d) should not contain argument or narrative in an effort to "spin" the impact of the admissions a party is required to make. *Goldstick v. The Hartford, Inc.*, No. 00 Civ. 8577 (LAK), 2002 WL 1906029, at *1 (S.D.N.Y. Aug. 19, 2002) (finding that plaintiff's Rule 56.1 Statement failed to comply with the

rule because the plaintiffs “added argumentative and often lengthy narrative in almost every case[,] the object of which is to ‘spin’ the impact of the admissions plaintiff has been compelled to make”); *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 ...*’ [P]laintiffs cannot evade the impact of accepting a fact by adding legal argument to their counterstatements.”) (internal citations omitted).

Rather than adhering to these requirements, Viacom frequently purports to “controvert” a fact, but then states allegations that are consistent with the asserted fact, relate to an entirely different subject matter, or constitute legal argument in an effort to “spin” the admissions that Viacom is compelled to make. Such responses do not create a material dispute and merely serve to distract from the real issues in the litigation. Courts are free to disregard such denials. *See Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 74 (2d Cir. 2001) (“Where, as here, the record does not support the assertions in a Local Rule 56.1 statement, those assertions should be disregarded and the record reviewed independently.”); *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 the dispute is genuine cannot defeat summary judgment); *Omnipoint Comm’ns*, 175 F.Supp. 2d at 700 (“The Court is permitted to disregard such general denials when not supported by citations or if cited materials do not support factual assertions.”); *Watt v. N.Y.*

Botanical Garden, No. 98 Civ. 1095 (BSJ), 2000 WL 193626, at *1 n.1 (S.D.N.Y. Feb. 16, 2000) (noting that court has the discretion to deem material facts set forth in support of party's summary judgment motion admitted where the statements are not controverted or where the cited materials do not support the factual statements); see also *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F.Supp. 2d 1099, 1101 n.1 & 1103 n.5 (C.D. Cal. 2009) (disregarding plaintiffs' denials where plaintiffs purported to dispute defendants' facts, but then stated allegations that were consistent with or unrelated to the asserted fact).

The Court should disregard these immaterial purported disputes and adopt the facts set forth in the referenced paragraphs as undisputed for purposes of this motion.

(2) YouTube's Replies to Specific Paragraphs

YouTube responds below to select Viacom responses that particularly misconstrue the record or the evidence cited. For the reasons set forth below, Viacom does not succeed in raising a genuine dispute as to any of these facts.³

- 9. YouTube's message to the public and to its users consistently has been that users should post only videos that they had created themselves or otherwise had the right to post. *Id.* ¶ 9; Decl. of Zahavah Levine ("Levine Decl.") ¶¶ 5, 7.**

Viacom's Response: *Controverted. Defendants' message to users and the public, especially throughout 2005 and 2006, has been that YouTube will do nothing to prevent infringement except respond to takedown notices that identify videos specifically by URL. See e.g., Hohengarten Ex. 356 at ¶¶*

³ Set forth below in bold font are the facts listed in YouTube's 56.1 to which YouTube is specifically replying. Viacom's response to each of those facts from the VCS is set forth in italic font, followed by YouTube's reply to Viacom's responses in normal text.

14-18 (publicly filed declaration of YouTube founder Steve Chen); Hohengarten Ex. 28, GOO001-00558783 (email from YouTube to user stating “YouTube does not regularly monitor our members’ videos for instances of copyright videos We remove videos when we receive a complaint from a rights holder.”); Kohlmann Ex. 10, GOO001-00561391 (similar email to YouTube user); Kohlmann Ex. 11, GOO001-00561394 (same); Kohlmann Ex. 12, GOO001-00607526 (same).

This has served as an invitation to millions of users to upload whatever infringing videos they choose, because most content owners will not quickly find the content that infringes their copyrights, a view Steve Chen shared. Accord Viacom SUF ¶ 47 (“what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he get in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video down.”).

YOUTUBE’S REPLY: Viacom does not genuinely dispute this fact. The evidence cited does not controvert the fact; it supports it. The cited documents demonstrate that YouTube removes videos from its site in response to DMCA takedown notices and notifies users who upload such videos that YouTube takes copyright issues seriously. Viacom’s argument that YouTube’s removal of videos in response to DMCA takedown notices is an “invitation to millions of users to upload whatever infringing videos they choose” is empty rhetoric. Viacom itself ran user-generated content websites that did not monitor user submissions for copyright violations. See CVSUF at ¶¶ 400-411. And Viacom does not genuinely dispute the many ways in which YouTube communicates to its users that they should not upload unauthorized material. See VCS ¶¶ 10, 11, 12, 13, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63, 64, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85.

As discussed in more detail below, the documents cited by Viacom do not controvert the proposed fact.

Hohengarten Ex. 356, ¶¶ 14-18: This is a declaration from Steve Chen submitted in *Robert Tur d/b/a Los Angeles News Service v. YouTube, Inc.* (C.D. Cal.). Chen explained why it was not feasible to manually screen all videos uploaded to YouTube and described the many steps YouTube takes to protect copyright, including: (1) requiring users to agree to terms of use that prohibit the uploading of unauthorized materials; (2) reminding users about those terms of use during the video upload process; (3) limiting the length of video uploads to ten minutes for standard accounts; (4) developing a Content Verification Program that allows content owners to send YouTube DMCA notices at the click of a button; (5) using hash

technology to prevent the upload of videos that have been previously removed from the service for copyright reasons; (6) registering a DMCA agent; (7) promptly removing videos in response to DMCA notices; (8) terminating the accounts of users who receive multiple infringement notifications; and (9) repeatedly warning users about the consequences of unauthorized uploads. Hohengarten Ex. 356, ¶¶ 10-18.

Hohengarten Ex. 28: Viacom selectively excerpts this email and omits material context. This document is a response to a user’s email about a video that YouTube removed based on a claim of copyright infringement. YouTube told the user that “[w]e remove videos when we receive a complaint from a rights holder,” and explained that YouTube takes copyright laws seriously:

You Tube does not regularly monitor our members[] videos for instances of copyright infringement just as we do not under any circumstances assist members in producing their own videos. We do, however, take copyright laws seriously, and so when we are notified that a video uploaded to our site infringes another[]s copyright, we respond promptly.

Please check out the YouTube[]s Copyright Tips at: http://www.youtube.com/t/howto_copyright, where you can learn more about YouTube[]s Terms of Use as well as guidelines that help you determine whether your video infringes someone else[]s copyright.

Hohengarten Ex. 28.

When receiving complaints about user submissions, a Viacom website that accepts user-generated content, Addicting Clips, informed its users that “[a]s a passive conduit, we cannot monitor user clips, but we respond to breaches of our Terms of Service when we learn of such behavior.” Schapiro Reply Ex. 70; *see also* Schapiro Reply Ex. 155 (Addicting Clips explaining that “alleged infringement is the responsibility of the user, not Atom. The DMCA limits Atom’s liability to cases in which it fails to implement a DMCA-compliant ‘notice and takedown’ procedure.”).

Kohlmann Exs. 10-12: These emails demonstrate that YouTube removes videos that are the subject of DMCA notices and informs its users that it has done so when they inquire about the reasons for removal.

Viacom SUF ¶ 47: Viacom selectively quotes from an email between YouTube’s founders and omits material context. In this exchange,

YouTube's founders stated that they would remove "movies/tv shows," but leave up "short news clips" that they assumed were fair use. See CVSUF ¶ 46. Viacom can hardly complain that Chen suggested leaving up a short CNN news clip despite the possibility that YouTube might receive a takedown notice for it given that Viacom's own online service iFilm suggested delaying removal of a video responsible for "one of [its] best days ever in terms of page views" after receiving an actual cease and desist notice. Schapiro Reply Ex. 71 ("No need to respond to c&d very swiftly.").

58. YouTube has never instructed users to engage in copyright infringement. Hurley Decl. ¶ 20.

Viacom's Response: *Controverted. It is undisputed that YouTube's co-founders and employees have uploaded infringing videos to YouTube, have shared infringing YouTube videos with others, and have encouraged users to leave infringing videos on YouTube. See Hohengarten Ex. 229, JK00007423 (Karim responding with laughter to clear infringement); Hohengarten Ex. 218, JK00009595 (Chen chastising Karim for "put[ting] up 20 videos of pornography and obviously copyrighted materials and then link[ing] them from the front page"); Hohengarten Ex. 217, JK00006166 (Chen chastising Karim for "blatantly stealing content from other sites and trying to get everyone to see it"); Viacom SUF ¶ 78 (discussing awarding an infringing user with an iPod Nano); Hohengarten Ex. 197, GOO001-00507331, at 2-3 & at GOO001000507331-32 (Maryrose Dunton starting "5 groups based on copyrighted material"); Hohengarten Ex. 377, GOO001-07169928, at 2 & at GOO001-07169928 (Matt Liu encouraging his friend to leave infringing content on the site); Hohengarten Ex. 32, GOO001-03631419 (Daily Show clip); Hohengarten Ex. 72, GOO001-03383629 (Colbert Report clip); Hohengarten Ex. 73, GOO001-01364485 (South Park clip); Hohengarten Ex. 75, GOO001-00217336 (Daily Show clip); and Hohengarten Ex. 77, GOO001-05154818 (Daily Show clip); Kohlmann Ex. 6, GOO001-00241682 (YouTube engineer Cuong Do urging other YouTube personnel to watch the Lazy Sunday clip, noting that: "[t]his was the original upload that made headlines," and that while it was public "I was too busy keeping the video streaming to our users"); Kohlmann Ex. 33, GOO001-03630988 (Jawed Karim sharing a MTV News clip); Kohlmann Ex. 52, JK00008527 (Jawed Karim sharing a Saturday Night Live clip); Kohlmann Ex. 53, JK00008555 (Jawed Karim sharing a Late Night with Conan O'Brien clip); Kohlmann Ex. 54, JK00008591 (Jawed Karim sharing a Late Night with Conan O'Brien clip); Kohlmann Ex. 55, JK00008595 (Jawed Karim sharing a Late Night with Conan O'Brien clip); Kohlmann Ex. 56 JK00008614 (Jawed Karim sharing a Saturday Night Live clip); Kohlmann Ex. 57, JK00008621 (Jawed Karim sharing a*

60 Minutes clip); Kohlmann Ex. 58, JK00008631 (Jawed Karim sharing a Daily Show clip).

Furthermore, it is undisputed that YouTube encourages users to watch infringing videos through the “related videos” and “suggested search” features, which often direct users to infringing content. See Viacom SUF ¶¶ 332, 335, 339.

YOUTUBE’S REPLY: Nothing in Viacom’s response controverts the asserted fact. As described below, Viacom falsely summarizes the cited documents, which do not support the propositions that YouTube co-founders and employees uploaded unauthorized videos to YouTube, shared unauthorized videos with others, or encouraged users to leave unauthorized videos on YouTube. Viacom has failed to establish a single instance of alleged infringement on YouTube and its allegations to the contrary are supported only by attorney rhetoric.

Hohengarten Ex. 229: Viacom describes this email as Jawed Karim “responding with laughter to clear infringement.” That is wrong. Karim was not responding to anything. As indicated by a preceding angle bracket, his statement “ahaha” was an original message to an unidentified person. Hohengarten Ex. 229. That person’s hearsay *response* to Karim’s message stating that clips from the television show *Chappelle’s Show* could be found on YouTube does not say anything about whether those clips were authorized. Viacom distributed “viral” clips from *Chappelle’s Show* on the Internet for marketing purposes, it allowed content from that program to remain on YouTube when uploaded by ordinary users, and YouTube has prevailed on clips from *Chappelle’s Show* that Viacom sued over and then admitted were authorized. Schapiro Opp. Ex. 285 (listing “viral placements” from *Chappelle’s Show* by Viacom marketer Iced Media); Rubin Opening Decl. ¶ 17 & Ex. 131 (describing numerous clips-in-suit from *Chappelle’s Show* that are indistinguishable from approved Viacom promotional clips); Viacom Opp. 57-62 (describing what Viacom calls its “enforcement forbearance” during 2006 and early 2007); Order Granting Viacom’s Motion to Dismiss Specified Clips With Prejudice (March 10, 2010) (Viacom dismissing with prejudice clips from *Chappelle’s Show* (rf3BHTB2RAY, Le52xv31TTM, bdRNAUTDBqY and cR5BCbGyTkc)); Rubin Opening Decl. Ex. 117.

Hohengarten Ex. 218: Viacom describes this email as Steve Chen “chastising Karim for ‘put[ting] up 20 videos of pornography and obviously copyrighted materials and then linking] them from the front page.’” That is an obvious distortion. Chen admonished Karim for uploading “viral” videos to YouTube and then noted: “**why don't i just** put up 20 videos of

pornography and obviously copyrighted materials and then link them from the front page. **what were you thinking.**” Hohengarten Ex. 218 (emphasis added). Chen was not claiming that Karim had uploaded twenty pornography and obviously copyrighted videos to YouTube and linked them from the front page, but was using hyperbole to express his displeasure with Karim uploading videos that he had found on other websites. *See* YouTube Opp. 15-16.

Hohengarten Ex. 217: Viacom describes this email as Steve Chen “chastising Karim” for uploading infringing videos to YouTube. That ignores the record. The videos that Karim uploaded were not infringing copyrights and were not from movies or television shows. Karim testified: “They were not stolen videos. I would . . . browse on the Web for airplane-related videos on aviation community Web sites, and these were user-generated videos created by aviation enthusiasts. So, for example, this would be like a 10-second shaky video camera clip of a 747 taking off, and these clips were usually already on multiple aviation Web sites.” Schapiro Opp. Ex. 77 (166:8-16). Chen’s response to Karim’s uploading proves that the goal of YouTube’s founders was to create a personal videos site.

Hohengarten Ex. 15: Viacom describes this email as YouTube employees “discussing awarding an infringing user with an iPod Nano.” Viacom distorts the document in two ways: first by claiming that the user was infringing copyrights and then by implying that YouTube employees discussed “awarding” the user an iPod Nano based on that alleged infringement. Neither is true. In November and December 2005, YouTube ran a daily contest in which one user each day won an iPod Nano. In the cited email, YouTube employees were discussing whether a user could win the contest even though he had uploaded “copyrighted” material. Hohengarten Ex. 15. Viacom conflates the term “copyrighted” with the legal conclusion “infringement” to suggest that the user was infringing copyrights. That is wrong. Almost all authorized videos on YouTube – from grainy home movies to professional material uploaded by large media companies – are protected by copyright. *See* 17 U.S.C. § 102 (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”). If Viacom is suggesting that professional content on YouTube is necessarily unauthorized, that disregards the myriad circumstances in which professionally produced videos appear on YouTube with authorization. *See* YouTube Br. 6-8, 15-16, 39-55, 63-70. Regardless, the user clearly was not chosen to win the contest *based on* his uploads given that YouTube employees were discussing whether he could win *notwithstanding* them. The debate about whether professional content owners should be treated in the same way as amateur video creators for site contests and promotions was entirely

consistent with YouTube's founding purpose as a personal videos site. *See* Schapiro Reply Ex. 72 (YouTube responding to a Viacom request to feature its content on the YouTube homepage: "Our CEO wants to hold off on featuring any professional video today – we've been doing a lot of that recently and want to keep an even mix with the user generated stuff on the home page.").

Hohengarten Ex. 197: Based on this chat, Viacom claims that Maryrose Dunton started "5 groups based on copyrighted material." That is yet another distortion. The chat describes a "hardcore" presentation in February 2006 in which attorneys alerted YouTube employees about the company's policy that if they "even _see_ copyrighted material on the site, [they were] supposed to report it." Hohengarten Ex. 197. The presentation represents YouTube's policy and the state of mind of its decision makers concerning copyright issues. An informal, after-hours discussion about the presentation between employees who did not work in the department handling copyright enforcement says nothing about YouTube's corporate position. Dunton's statement that "I guess th[e] fact that I started like 5 groups based on copyrighted material probably isn't so great" was a joke. That is why the other employee responded "ha" upon hearing her remark. And that is why Viacom has not offered a shred of evidence to establish that Dunton started five groups based on copyrighted material.

Hohengarten Ex. 377: Viacom claims that this chat shows YouTube employee Matt Liu "encouraging his friend to leave infringing content on the site." Liu was not encouraging the unidentified person using the instant message screen name "amuletp811" to leave content on YouTube. As the chat makes clear, "amuletp811" had not uploaded any videos to YouTube and did not have a YouTube account. Solomon Opening Decl. ¶ 3 (a user must register for a YouTube account to upload videos to YouTube). If Viacom is suggesting that professional content on YouTube is necessarily unauthorized, that disregards the myriad circumstances in which professionally produced videos appear on YouTube with authorization. *See* YouTube Br. 6-8, 15-16, 39-55, 63-70. In any event, if this document reflects a chat between Liu and his friend, as Viacom suggests, that communication necessarily took place outside the scope of Liu's employment and cannot be imputed to YouTube.

Hohengarten Ex. 32: Viacom does not contend that the clip identified in this email is infringing and it is not a clip-in-suit. *See* Solow Opening Decl. Exs. F, G. Viacom was allowing clips from its programs to remain on YouTube when this email was sent. *See* Viacom Opp. 57-62 (describing what Viacom calls its "enforcement forbearance" during 2006 and early

2007); CVSUF No. 130. Viacom's copyright monitoring agent, BayTSP, knew about this clip as early as September 29, 2006. Schapiro Reply Ex. 73 (GOO001-06048929 at 937-38). BayTSP then waited until October 27, 2006 to send a takedown notice to YouTube. *Id.* By that time, the clip was no longer on the service. YouTube proactively removed it on October 3, 2006 when enforcing its repeat infringer policy. Rubin Reply Decl. ¶ 15; Levine Opening Decl. ¶ 30 (describing how YouTube removes all videos uploaded to an account that has been terminated under its repeat infringer policy). Viacom chose not to bring an infringement claim over this clip even though Viacom selected the clips-in-suit from a group of videos that BayTSP had identified. Schapiro Opening Ex. 18 (148:8-18).

Hohengarten Ex. 72: Viacom does not contend that the clip identified in this email is infringing and it is not a clip-in-suit. *See* Solow Opening Decl. Exs. F, G. Greg Clayman, Executive Vice President of Digital Distribution and Business Development at MTV Networks, shared this same clip with Viacom executives on October 16, 2006. Schapiro Opp. Ex. 298. Viacom chose not to bring an infringement claim over this clip even though Viacom selected the clips-in-suit from a group of videos that BayTSP had identified. Schapiro Opening Ex. 18 (148:8-18).

Hohengarten Ex. 73: This clip was uploaded on March 7, 2007. Rubin Reply Decl. ¶ 15. Viacom sent YouTube a takedown notice for it on March 9, 2007. Schapiro Reply Ex. 74. YouTube removed the video that same day. Rubin Reply Decl. ¶ 15. Viacom suggests that all *South Park* content on YouTube is unauthorized. That is wrong. When this clip appeared on YouTube, one of Viacom's websites encouraged the public to watch *South Park* wherever it could be found on the Internet. *See* Schapiro Opp. Ex. 72 (“[South Park creators] Matt [Stone] and Trey [Parker] do not mind when fans download their episodes off the Internet; they feel that it's good when people watch the show no matter how they do it.”); CVSUF ¶ 31. Viacom uploaded *South Park* content to YouTube, allowed content from *South Park* to remain on YouTube when uploaded by ordinary users, and YouTube has prevailed on clips from *South Park* that Viacom sued over and then admitted were authorized. *See* Schapiro Reply Exs. 189A/B (eijhloJjg50), Ex. 190A/B (DkXAfEiZCs0) (clips from *South Park* that Viacom uploaded to the authorized account “ParamountGermany” over which Viacom sued YouTube and then dismissed its claims with prejudice); Rubin Opening Ex. 87 at 19 (Viacom's Response to Request for Admission No. 81: admitting that “ParamountGermany” is an authorized account); Viacom Opp. 57-62 (describing what Viacom calls its “enforcement forbearance” during 2006 and early 2007); Order Granting Viacom's Motion to Dismiss Specified Clips With Prejudice (March 10, 2010) (Viacom dismissing with prejudice

numerous clips from *South Park* (S5pUWE1WGKw, eijhloJjg50, DkXAFeiZCs0, Xo9TWFRIUN8, hSdMtP8qztA, RRrB_hitU-c, CxVxzXCbeOw, 8v8vhNKIAZ4, hhXIVDxYzvg, Vj9rdT-t8Lc, Pvz66FuaHso, QrROfhjqpDs, sIXfcdZbnUw, uJg2geqHK5U, N-4MT9u6LUs, USds5DhScmg, 29le85Vp8vI, yVUAvm3fvXQ, lz0JZvIMrOA, plilwcUpTbU, Ppm3MIsqsK4, L8GYvvm_3bE, 5Esm9Mlt5Xo, 0mZ8VNkSPaU, NdpArPebjFY, Q-VvGxYDGm0, Wqq-lfH3NNc, nyLj0T9EKAo, N0QCkXfxJs4)); Rubin Opening Ex. 117.

Hohengarten Ex. 75: Viacom does not contend that the clip identified in this email is infringing and it is not a clip-in-suit. See Solow Opening Decl. Exs. F, G. Viacom employee Jeremy Zweig shared this same clip with Viacom Executive Vice President Carl Folta on March 23, 2007. Schapiro Opp. Ex. 299.

Hohengarten Ex. 77: The clip identified in the email appears to be commentary about Viacom’s lawsuit against YouTube. Schapiro Opp. Ex. 421A/B (NpqqWW0Z7vM). Viacom does not contend that the clip is infringing and it is not a clip-in-suit. See Solow Opening Decl. Exs. F, G. Viacom’s copyright monitoring agent, BayTSP, discovered this clip on March 30, 2007 and internally debated whether to request its removal. Schapiro Opp. Ex. 300. BayTSP then reached out to Viacom legal department employee Warren Solow, who evaluated the clip and told BayTSP to “leave it up.” *Id.* Despite Viacom’s internal conclusion that the clip was not infringing, YouTube proactively removed the video on May 21, 2008 when enforcing its repeat infringer policy. Rubin Reply Decl. ¶ 15; Levine Opening Decl. ¶ 30 (describing how YouTube removes all videos uploaded to an account that has been terminated under its repeat infringer policy).

Kohlmann Ex. 6: Viacom describes this email as YouTube engineer Cuong Do “urging other YouTube personnel to watch the Lazy Sunday clip.” Do was not “urging other YouTube personnel” to watch the clip referenced in the email, but providing a single employee with information about YouTube’s history. See Schapiro Reply Ex. 75 (contemporaneous email providing historical details about YouTube). Viacom appears to claim that the Lazy Sunday clip from NBC’s *Saturday Night Live* was not authorized to be on YouTube. But Viacom does not own NBC and admits that it could not possibly tell whether content on YouTube from third-party networks like NBC is authorized. See *id.* Ex. 76 (100:14-24) (MTVN Chief Operating Officer: “I probably would have to be a lawyer at NBC to know whether [the appearance of Lazy Sunday on YouTube] was infringing.”); Ex. 77 (270:3-271:23) (Viacom Senior Vice President concerning a clip on YouTube containing a CNBC logo: “I have no way of

knowing whether CNBC uploaded it themselves or if somebody else did.”). Regardless, the story of Lazy Sunday’s appearance on YouTube highlights that major media companies routinely allow their content to remain on YouTube when uploaded by ordinary users. *See* CVSUF ¶ 89; YouTube Opp. 17-18.

Kohlmann Ex. 33: Viacom does not contend that the clip identified in the email is infringing and it is not a clip-in-suit. *See* Solow Opening Decl. Exs. F, G. The clip is a 54-second interview with Jessica Rose, a professional actress who gained worldwide fame by posing as an amateur video diarist using the YouTube account “Lonelygirl15.” Schapiro Reply Ex. 78; Ex. 79; Ex. 191A/B (CKMhcoopYuM). Karim was not employed by or consulting for YouTube when he sent this message. Schapiro Reply Ex. 80 (October 5, 2005 agreement defining Karim’s role as “an independent contractor to perform consulting services”), Ex. 81 (Karim’s consulting agreement with YouTube ended on June 28, 2006).

Kohlmann Exs. 52-57: Karim sent these messages more than three months after he left YouTube. Schapiro Reply Ex. 80 (October 5, 2005 Agreement defining Karim’s role as “an independent contractor to perform consulting services for the Company”), Ex. 82 (19:10-25, 110:17-19, 115:16-24). Viacom speculates that the clips referenced in these emails contained unauthorized content from NBC and CBS. But the messages do not indicate what or how long the clips were, who uploaded them, or whether they were authorized to be on YouTube. And Viacom admits that it could not possibly tell whether content on YouTube from third-party networks like NBC and CBS is authorized. *See* Schapiro Reply Decl. Ex. 76 (100:14-24) (MTVN Chief Operating Officer: “I probably would have to be a lawyer at NBC to know whether [the appearance of Lazy Sunday on YouTube] was infringing.”); Ex. 77 (270:3-271:23) (Viacom Senior Vice President concerning a clip on YouTube containing a CNBC logo: “I have no way of knowing whether CNBC uploaded it themselves or if somebody else did.”).

Kohlmann Ex. 58: Karim sent this message more than four months after he left YouTube. Schapiro Reply Ex. 80 (October 5, 2005 Agreement defining Karim’s role as “an independent contractor to perform consulting services for the Company”); Ex. 82 (19:10-25, 110:17-19, 115:16-25). Viacom speculates that the clip referenced in this email contained content from *The Daily Show*. But the message does not indicate what or how long the clip was, who uploaded it, or whether it was authorized to be on YouTube. To the extent that the clip contained content from *The Daily Show*, Viacom was allowing clips from that program to remain on YouTube when this email was sent. *See* Viacom Opp. 57-62 (describing

what Viacom calls its “enforcement forbearance” during 2006 and early 2007).

VSUF ¶¶ 332, 335, 339: The “related videos” and “suggested search” features do not and cannot distinguish authorized from unauthorized content. *See* CVSUF ¶¶ 332, 334, 335, 339. While those features help YouTube users find videos that might be of interest to them, they in no way favor unauthorized content. *See* June 20, 2008 Opinion & Order at 5 (“plaintiffs offer no evidence that the search function can discriminate between infringing and non-infringing videos”).

59. YouTube has never encouraged users to engage in copyright infringement. Id.

Viacom Response: *Controverted. See supra* ¶ 58.

YOUTUBE’S REPLY: *See supra* RVCS ¶ 58.

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

Viacom Response: *Controverted. Ms. Levine’s testimony covers only the period from March 2006 to the present, while she has been at YouTube. Levine Decl. ¶¶ 19, 4. Furthermore, Mr. Schaffer’s testimony is too general to support the proposition that YouTube has removed or disabled access to every infringing video for which YouTube has received a DMCA-compliant takedown notice. Schaffer Decl. ¶ 10. More importantly, it is undisputed that YouTube has not removed or disabled access to infringing videos identified in “representative lists,” as required by 17 U.S.C. § 512(c)(3)(A)(ii), see supra* ¶ 33.

YOUTUBE’S REPLY: Viacom does not genuinely dispute this fact, nor does it present any contradictory evidence. Viacom instead proffers the legal argument that YouTube is required to remove or disable access to videos identified in “representative lists.” As discussed in YouTube’s Reply Brief, Viacom misunderstands the notice-and-takedown regime. YouTube Reply 27-32.

Levine’s and Schaffer’s declarations plainly demonstrate that YouTube promptly removes or disables access to videos identified in a proper DMCA takedown notice. *See* Levine Opening Decl. ¶ 19, Schaffer Opening Decl. ¶ 10. Viacom’s claim that YouTube’s evidence covers its response to takedown notices only from March 2006 onward is incorrect. Schaffer’s

testimony on this point dates back to his arrival at the company in January 2006. Schaffer Opening Decl. ¶ 10; *See also* Hohengarten Ex. 356 (Chen Declaration in *Tur v. YouTube*) at ¶¶ 10, 18 (describing takedown process without time limitation). In any event, there is no evidence that plaintiffs sent any takedown notices before March 2006, or that YouTube failed to honor any valid notices that it received. *See, e.g.*, Schapiro Reply Ex. 83; Ex. 84.

- 76. Since at least October 2005, YouTube has had a policy for terminating the accounts of repeat infringers, which it has posted on its website. Hurley Decl. ¶ 21; Levine Decl. ¶ 27.**

Viacom's Response: *Controverted, to the extent that the asserted fact implies that YouTube had adopted a repeat infringer policy prior to October 2005. Defendants have not proffered any evidence regarding the pre-October 2005 period. Further controverted in that Defendants did not begin applying the policy until early 2006. See Kohlmann Ex. 18, GOO001-00830262 (December 28, 2005 email from Steve Chen stating: "i created a UserAbuse table and it's being used to track each time the user gets a video dinged (there are two types of dings, one is just rejecting the video but doesn't increment the three strikes rule, the other one does increment the three strikes rule), the thing is, this part hasn't been hooked up yet to actually closing the account."); Hohengarten Ex. 22, GOO001-00762173, at GOO001-00762187 (February 17, 2006 YouTube Board presentation, noting that as part of a January 19, 2006 set of site features YouTube released "[a]ccount suspension after 3 video rejections.")*

YOUTUBE'S REPLY: Viacom does not dispute the asserted fact: that as of October 2005, YouTube had a policy of terminating users who engaged in copyright infringement that was posted on its website. Chad Hurley's declaration plainly states that YouTube adopted a policy of terminating infringers in September 2005. Hurley Opening Decl. ¶ 21. YouTube's policy was publicly displayed at that time, and the next month the policy was incorporated into YouTube's Terms of Use with express reference to "repeat infringers." *See* Schapiro Reply Ex. 49 (YouTube "Help" section in September 2005: "If we receive a notice or otherwise have reason to believe that content you submitted infringes another party's copyright, your account may be terminated and the video removed from YouTube."); Ex. 50; Ex. 51 (October 2005 Terms of Use: "YouTube does not permit copyright infringing activities on its Website, and reserves the right to terminate access to the Website and remove all Content submitted, by any persons who are found to be repeat infringers."). YouTube revised its policy in December 2005 to adopt a "three-strikes"

approach to repeat infringers, but that merely refined the existing termination policy.

The documents Viacom cites are not to the contrary. **Hohengarten Ex. 22** is a Board Presentation which indicates that an administrative change to account suspension after 3 videos was pushed out in January 2006. The reference to a “change” in policy leaves no doubt that the 3 strikes approach was merely a modification to an existing procedure. **Kohlmann Ex. 18** is an email exchange from December 2005 between YouTube employees Maryrose Dunton, Steve Chen, Chad Hurley, Dwipal Desai and Yu Pan discussing the technical implementation of a system change that would automatically suspend an account after three strikes. Nothing in this document indicates this was YouTube’s first repeat infringer policy.

- 77. Under YouTube’s repeat-infringer policy, a “strike” is issued to a user when YouTube receives a takedown notice for material that the user has uploaded. Levine Decl. ¶ 27.**

Viacom’s Response: Controverted. Defendants have regularly counted multiple infringing clips uploaded by the same user as a single “strike” against that user. Defendants have counted multiple infringing acts by the same user as a single “strike” as a matter of course in two situations: (a) where multiple infringing clips uploaded by the same user are all identified in the same notice of infringement, and (b) where multiple infringing clips uploaded by the same user are identified in different notices of infringement, but those notices are all received by YouTube within the same two-hour period. See, e.g., Levine Decl. ¶ 28 (“YouTube assesses a single strike per notice, including in circumstances where a DMCA notice identifies more than one allegedly infringing video for the same user”); Hohengarten Decl. Ex. 382, GOO001-08050272 (February 17, 2007 K. Walker email to M. Fricklas, stating: “YouTube’s ‘three strikes’ policy meets this test by banning users after YouTube receives a third infringement notice regarding a user (We currently deem all URL’s processed within any two-hour period to be part of the same ‘notice.’)”).

Further, for approximately six months in 2007, Defendants failed to adequately inform users - including content owners - of their repeat infringer policy not to give strikes in response to a CYC block. See infra ¶ 83.

YOUTUBE’S REPLY: Viacom does not dispute the asserted fact: that under YouTube’s three-strikes policy, in place since January 2006, a user is issued a “strike” when YouTube receives a takedown notice for material the user has uploaded. Nor does Viacom identify a material dispute with

respect to YouTube's rigorous implementation of its three-strikes policy or the fact that YouTube has applied that policy to terminate thousands of user accounts. See VCS ¶¶ 78, 79, 80, 81, 82, 83, 84, 85, 86. Instead, Viacom offers the additional observation that users are not today issued multiple strikes where a DMCA notice lists more than one allegedly infringing videos uploaded by a particular user. That approach is entirely proper given the broad discretion the DMCA confers on service providers to set repeat infringer policies. Viacom's challenge to that approach fails as a matter of law. See YouTube Reply 41.

With respect to Viacom's claim about the treatment of CYC matches under YouTube's repeat infringer policy for six months in 2007, see *infra* RVCS ¶ 83.

78. When an account receives three strikes, in virtually all cases YouTube terminates that account. Id.

Viacom's Response: *Controverted. YouTube did not begin terminating accounts that received three strikes until at least January 2006. See supra ¶¶ 76-77.*

Further controverted because Defendants have regularly counted multiple infringing clips uploaded by the same user as a single "strike" against that user, as described at supra ¶ 77.

YOUTUBE'S REPLY: Viacom does not dispute the asserted fact, and concedes that YouTube has enforced its three-strikes policy since January 2006. Viacom's challenge to YouTube's manner of recording strikes is wrong as a matter of law. See *supra* RVCS ¶¶ 76-77; YouTube Reply 40-42.

79. When YouTube terminates a user's account, the account can no longer be used for any purpose on the site. Levine Decl. ¶ 30.

Viacom's Response: *Uncontroverted that this is YouTube's current practice. With regard to earlier periods, Viacom lacks knowledge to admit or controvert the alleged fact. In any event, the asserted fact is immaterial, because even after YouTube terminates a repeat infringer, the repeat infringer can sign up for a new account merely by using a different email address. See, e.g., Kohlmann Ex. 80 (Schaffer Dep.) at 127:25-128:17 (testifying that strikes are allocated by email address and that all a user need do to bypass YouTube's repeat infringer policy is "know to create a new e-mail address"). Opening a new email account is very simple and can*

be done using Google's own free email service, Gmail. See supra ¶ 56, infra ¶ 82.

YOUTUBE'S REPLY: Viacom does not dispute the asserted fact: that when YouTube terminates a user's account, the account can no longer be used for any purpose on the site. Nor does Viacom offer evidence to controvert that this was YouTube's practice in "earlier periods." Even if Viacom did genuinely dispute the asserted fact, such dispute is immaterial given that it has no impact on the legal issues before the Court. Viacom does not argue anywhere in its Opposition Brief that the potential for a user to sign-up for a new account using a different email address once his/her account is terminated somehow calls YouTube's repeat infringer policy into question. As a matter of law, it does not. See *Io Group, Inc. v. Veoh Network, Inc.*, 586 F.Supp. 2d 1132, 1143-45 (N.D. Cal. 2008) (failure to track terminated users and prevent them from surreptitiously returning to the service does not raise a genuine issue of material fact as to the reasonableness of Veoh's implementation of its repeat-infringer policy); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp. 2d 1090, 1104 (W.D. Wash. 2004) ("[t]he mere fact that [the repeat infringer] appeared on zShops under a different user name and identity does not, by itself, create a legitimate question of fact regarding the procedural implementation of Amazon's termination policy").

The remainder of Viacom's response is inapplicable; Viacom merely observes that users may be able to sign-up for a new account using a different email address once his/her account is terminated. This is not disputed. But Viacom omits material context, and excludes relevant testimony from Micah Schaffer. In his deposition, Schaffer explains that strikes are issued against a user's email address because email is the only unique, reliable identifier associated with a YouTube account that can identify a specific computer or person. Schapiro Reply Ex. 66 (127:25-131:2). He further testified that when YouTube discovers that someone whose account was previously terminated has created a new account using a new email address, YouTube immediately terminates that new account. *Id.* (129:4-25).

83. YouTube's Terms of Service set forth YouTube's repeat-infringer policy. Levine Decl. Exs. 1, 2.

Viacom's Response: *Controverted for the period prior to December 2005. Defendants have not proffered any Terms of Service for period prior to December 2005. Furthermore, YouTube did not apply its repeat infringer policy by terminating repeat infringers until early 2006. See supra ¶ 76.*

Further, for approximately six months in 2007, Defendants failed to adequately inform users — including content owners — of their repeat infringer policy. During that period, Defendants secretly implemented a policy of not assigning any copyright strikes to users who uploaded tens of thousands of infringing clips that were blocked by YouTube’s Claim Your Content fingerprinting tool. See, e.g., Kohlmann Ex. 28, GOO001-02604740, at GOO001-02604741 (March 2007 email chain in which Chastagnol says: “currently we do not give user a strike if content is taken down via CYC”); Kohlmann Ex. 49, GOO001-01519246 (June 4, 2007 email from Justin Gupta to Jacob Pruess and others) (“The BBC definitely think that their CYC takedowns are actioning the strikes. . . I’ll hold them at bay until such time that it actually is.”); Kohlmann Ex. 50, GOO001-05611423 (“This is something I would rather not announce to the world.”); Hohengarten Ex. 321 (Chastagnol Dep.) at 97:10-99:15 (testifying that his understanding in March 2007 was that YouTube did not impose strikes for content removed using the CYC tool); Kohlmann Ex. 2, GOO001-00035137 (July 26, 2007 email) (“I understand that we don’t count strikes against users when their videos are taken down through the CYC tool.”).

YOUTUBE’S REPLY: Viacom does not dispute the asserted fact: that YouTube’s Terms of Service set forth YouTube’s repeat-infringer policy. The Terms of Service have been publicly available on YouTube’s service throughout its existence, and has included a repeat infringer policy since October 2005. Schapiro Reply Ex. 51. And Viacom’s claim that YouTube has not demonstrated that its repeat infringer policy was implemented until early 2006 is incorrect. *See supra* RVCS ¶ 76.

Viacom’s accusation about the interaction between YouTube’s repeat infringer policy and videos “matched” using YouTube’s CYC tool is immaterial. *See* YouTube Reply 41-42. Since such matches do not constitute valid DMCA notices (because *inter alia* they do not contain sworn allegations of infringement), they are properly disregarded in a repeat infringer analysis. *Id.* Nevertheless, YouTube has thoughtfully considered the issue of CYC matches and its repeat infringer policy, and has adopted an approach that is more protective of copyright holders than the law requires. *Id.*

While immaterial, Viacom’s account of YouTube’s approach to CYC matches is misleading and merits a response. YouTube first rolled-out its CYC platform in February 2007. King Opening Decl. ¶ 8. For a brief period following that initial roll-out, videos blocked using the tools available to rights holders on CYC did not result in copyright “strikes” under YouTube’s repeat infringer policy. King Reply Decl. ¶ 2. There were two reasons for this. First, CYC was an extremely complex and first-

of-its-kind tool that relied in large part on a third-party service provider, Audible Magic. *Id.* From an engineering standpoint, it took YouTube some time to develop the additional functionality that would integrate CYC with the existing system for tallying copyright “strikes”. *Id.* During this period, copyright owners were always free to send DMCA notices via mail, fax or email, or to use YouTube’s Content Verification Program (“CVP”). *Id.* ¶ 3. Takedowns notices resulted in strikes to users accounts in accordance with YouTube’s policy. *Id.* The documents cited by Viacom support the fact that it took some time for YouTube’s engineers to integrate CYC with its repeat infringer system. **Kohlmann Exs. 49 and 50** consist of two emails that are part of the same email chain. In that chain, several YouTube employees discuss the fact CYC does not yet have the technical capability to assign strikes. The email chain further indicates that once the functionality is available, all strikes for historical claims will be applied. **Kohlmann Ex. 2** is another email discussing the same topic, namely, for a period of time the CYC system was not integrated with YouTube’s admin tool and thus could not technically assign strikes to users until a code change was implemented.

Second, when it launched, CYC was an untested system that for the first time gave rights holders nuanced control over their content, including the ability to automatically block the upload of videos, often without anyone actually looking at those videos and without the submission of a formal DMCA notice. King Reply Decl. ¶ 2. But a “block” claim in CYC does not equate to a DMCA takedown notice. *Id.* ¶¶ 5-6. As a policy matter, YouTube wanted to be certain that (a) the system was being used properly before taking the step of issuing strikes to users’ accounts in the absence of actual review by the content owner and a formal DMCA notice; and (b) the system was technically capable of properly accounting for the various types of “block” claims. *Id.* ¶¶ 2, 4-6. The documents cited by Viacom illustrate these complexities. **Kohlmann Ex. 28** is an email exchange in which certain YouTube employees discuss providing CBS with access to CYC in time for March Madness so that CBS could claim and monetize NCAA content. But those emails also acknowledge the need to remove those same videos after CBS’s exclusive rights to the NCAA content expired. The individuals involved in the exchange grapple with how to technically implement these delayed removals and whether the system would issue a strike to a user upon removal where the video was originally embraced by an owner with rights to the content.

YouTube completed the task of linking CYC to the existing strike-tallying system in or about July or August 2007, a few months after CYC first launched. King Reply Decl. ¶ 4. From that point forward, when rights holders submitted a “block” request using the manual “claiming”

functionality of CYC, YouTube assigned a strike to the account of the user who had uploaded the video, even though that request did not constitute a formal DMCA notice. *Id.* YouTube also decided that a strike would not be assigned when a block resulted exclusively from an automated match using fingerprinting technology. *Id.* This is because a fingerprint match merely indicates that some *portion* of the video overlaps with some portion of a reference file submitted by a content owner who has designated a policy of “block” for videos that match its reference. *Id.* ¶ 5. Under these circumstances, the video is blocked automatically; the copyright owner has never looked at the blocked video and has not provided a statement to YouTube under penalty of perjury that the video is using its copyrighted material in an unauthorized way. *Id.* YouTube’s policy of not assigning strikes based on entirely automated blocks using its fingerprinting tool is not a secret, was publicly-announced in October 2007, and is explained to rights holders who sign-up for Content ID. *Id.* ¶ 7.

- 84. YouTube communicates its repeat-infringer policy to its users via its website, including on the “Copyright Tips” page and the “Help” section of the site. *Id.* ¶ 27.**

Viacom’s Response: *Uncontroverted that this is YouTube’s current practice. However, for approximately six months in 2007, during which Defendants failed to adequately inform users — including content owners — of their repeat infringer policy not to give strikes in response to a CYC block. See supra ¶ 83.*

YOUTUBE’S REPLY: Viacom does not controvert this fact. With respect to Viacom’s claim about the interaction between YouTube’s repeat infringer policy and its CYC tool for the first few months of CYC’s existence, see *supra*, RVCS¶ 83. In any event, as a matter of law, a service need not communicate the specific implementation details of its repeat infringer policy to users. YouTube Reply 42 n.31.

- 85. Users also are notified of YouTube’s repeat-infringer policy when they receive an email notifying them that a video they uploaded to YouTube has been removed due to alleged copyright infringement. *Id.* ¶ 23 & Ex. 12.**

Viacom’s Response: *Uncontroverted that this is YouTube’s current practice. Controverted because for approximately six months in 2007 Defendants secretly implemented a policy of not assigning any copyright strikes to users who uploaded tens of thousands of infringing clips that were blocked by YouTube’s CYC fingerprinting tool. For each such infringing clip that was not counted as a strike, YouTube did not notify the*

uploading user that a video they uploaded to YouTube was removed due to alleged copyright infringement. See supra ¶ 83.

YOUTUBE’S REPLY: Viacom does not controvert this fact. With respect to Viacom’s claim about the interaction between YouTube’s repeat infringer policy and its CYC tool for the first few months of CYC’s existence, see *supra*, RVCS¶ 83. Viacom’s reference to “users who uploaded tens of thousands of infringing clips” blocked by CYC is mere attorney rhetoric, unsupported by any evidence.

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

Viacom’s Response: Uncontroverted, but Viacom denies any implication that YouTube’s CYC tool was available to Viacom or any other content owner in the absence of a licensing deal. YouTube expressly refused to provide CYC to Viacom in the absence of a licensing deal. See Hohengarten Ex. 382 (February 17, 2007 email Google Vice President and General Counsel Kent Walker). Defendants did not offer any digital fingerprinting technology to Viacom until May 2008. See Viacom SUF ¶¶ 207-222.

That refusal is not called into doubt by the ambiguous statement in King Decl. ¶ 10 that four content owners used YouTube’s CYC tool to block their content from appearing on YouTube. Defendants do not cite and have not produced evidence showing when those four companies began using CYC. The scant evidence Defendants have produced indicates that none of these companies were offered CYC until well after this action was filed.

YouTube considered offering █████ access to CYC in March 2007, but did not because “[r]ight now we have not been giving the tool to partners without a revenue share contract in place.” Kohlmann Ex. 21 at GOO001-00943107. █████ was offered CYC in August 2007 in exchange for █████ agreement to license content for a YouTube “branded channel,” but no agreement was reached. Kohlmann Ex. 41, GOO001-00850320; Kohlmann Ex. 42, GOO001-00850304.

█████ licensed content to YouTube on a “branded channel” in June 2007, but in September 2007 YouTube had not agreed to use fingerprinting for █████ Kohlmann Ex. 43, GOO001-04500216; Kohlmann Ex. 44, GOO001-01620064, at GOO001-01620082.

There is no evidence that YouTube gave ██████████ access to CYC for more than a 3-day test period during which YouTube severely capped their CYC usage, explaining: “If they want to use our tools to help them monitor copyright content . . . , they will have to work with us as a partner.” Kohlmann Ex. 45, GOO001-09612404; Kohlmann Ex. 46, GOO001-06072619. YouTube had not agreed to provide fingerprinting for either as of July 2007. Kohlmann Ex. 46, GOO001-06072619; Kohlmann Ex. 47, GOO001-05944464, GOO001-05944475.

YOUTUBE’S REPLY: Viacom does not dispute, and therefore admits, 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, Viacom makes argumentative statements alleging that YouTube “refused to provide CYC to Viacom in the absence of a licensing deal” and “did not offer any digital fingerprinting technology to Viacom until May 2008.” YouTube responds fully to those allegations in our Opposition Brief and Counterstatement. See CVSUF ¶¶ 207-222; YouTube Opp. IV.A.2.

Viacom also does not dispute, and therefore admits, that four content owners used YouTube’s CYC tool solely to block their content from appearing on YouTube. Viacom instead claims that those four companies did not receive access to CYC until after this action was filed. That is unsurprising given that YouTube did not launch CYC until February 2007, just one month before Viacom filed suit. King Opening Decl. ¶ 8. If Viacom is trying to imply that its lawsuit caused YouTube to allow content owners to access its fingerprinting tools in the absence of a revenue-sharing agreement, that is false. Google’s CEO Eric Schmidt announced to the world that those tools would be made available to all content owners weeks before Viacom filed this lawsuit. Schapiro Reply Exs. 41-42. And YouTube told the MPAA on January 31, 2007 that it was “willing to prevent the posting of content that is registered with Audible Magic.” Schapiro Opp. Ex. 163.

Viacom also inaccurately describes YouTube’s relationship with the four companies who used CYC solely to block content. Viacom contends that YouTube did not give the ██████████ access to CYC in March 2007 because “[r]ight now we have not been giving the tool to partners without a revenue share contract in place.” **Kohlmann Ex. 21.** The cited email does not support that proposition. This email thread discusses the possibility of *providing* ██████████ access to CYC even though there was no

revenue-sharing agreement between the parties. *Id.* And YouTube did just that. King Opening Decl. ¶ 10.

For ██████████, Viacom implies that YouTube was providing CYC access in connection with “branded channels.” But Viacom recognizes that “branded channels” are not equivalent to a revenue-sharing content license agreement. *See* Wilkens Opp. Decl. ¶¶ 7-17 (listing what Viacom describes as its own “branded channels” on YouTube). Viacom does not controvert the fact that ██████████ used CYC solely to block content.

Viacom further asserts that “YouTube gave ██████████ access to CYC for . . . a 3-day test period during which YouTube severely capped their CYC usage, explaining: ‘If they want to use our tools to help them monitor copyright content . . . they will have to work with us as a partner.’” That is not supported by any evidence. The quoted exhibit, **Kohlmann Ex. 45**, does not concern ██████████ but a separate company, Ligue 1. An employee noted that YouTube could offer Ligue 1 access to CYC on a test basis because “we are quite strained for resources.” *Id.* She went on to state that “[i]f they want to use our tools to help them monitor copyright content **and claim them**, they will have to work with us as a partner.” (emphasis added). Viacom omits the bolded text to change the meaning of the quotation. The concept of “claiming” content generally concerns a decision whether to block, monetize or track content on YouTube using CYC. King Opening Decl. ¶ 7. As would be expected, only content owners who license their content on YouTube may elect the “monetize” option. David King then sent a follow-up email noting that it was *not* YouTube’s policy to only provide CYC access in the context of a revenue-sharing agreement. Viacom does not controvert the fact that ██████████ used CYC solely to block content.

115. Certain of Viacom’s clips in suit are fewer than 10 seconds long. *Id.*

Viacom’s Response: *Controverted. None of Viacom’s clips in suit is shorter than 10 seconds long. Only one clip is 10 seconds long, 97% of Viacom’s clips in suit are over 30 seconds long, and 55% are over three minutes long. The Declaration of Michael Rubin is incorrect in citing two clips as 3 and 5 seconds long, respectively. In fact, those clips are 226 and 288 seconds long, as reflected in data produced by Defendants, and as reflected in copies of the videos themselves that Viacom obtained prior to issuing takedown notices for them. See Wilkens Decl. ¶ 6*

YOUTUBE’S REPLY: Viacom’s response does not raise a genuine dispute of material fact with regard to the length of the Clips in Suit.

There is conflicting data regarding the length of the clips identified in Rubin Opening Decl. ¶ 15 and genuine versions of the videos referenced in that paragraph. But there is no dispute that one Viacom clip in suit is ten seconds long, at least 1,800 are shorter than 30 seconds in length, and the majority are under 4 minutes. Wilkens Opp. Decl. ¶ 3; VCS ¶¶ 114, 115. Each one of these clips is significantly shorter than the entirety of any film or television show that comprises a Works in Suit that Viacom claims to own.



122. Viacom has allowed Viacom content uploaded by other users to remain on YouTube. Schapiro Exs. 4 (194:8-11), 51 (VIA 11787096).

Viacom's Response: *Controverted. Defendants distort the cited evidence to misrepresent decisions to prioritize efforts to take down some content decisions to leave up other content. See infra ¶ 128.*

YOUTUBE'S REPLY: *See infra RVCS¶ 128.*

125. Viacom has taken steps to conceal that it was the source of certain videos that it uploaded to YouTube for marketing purposes. Chan Decl. ¶¶ 4, 5, 9; Ostrow Decl. ¶¶ 2, 4, 5, 6; Schapiro Exs. 33, 34, 46, 47 (158:20-22), 48, 49, 50; Rubin Decl.¶ 5(a)-(f) & Exs. 4, 14, 15, 19, 22, 26.

Viacom's Response: *Controverted. See supra ¶ 123. None of the evidence cited by Defendants shows that YouTube was unaware of any of the authorized uploading of Viacom content. Indeed, the evidence shows that Viacom informed YouTube regarding the six accounts Defendants portray as "stealth." See, e.g., Kohlmann Ex. 84 (Wahtera Dep.) at 32:8-11, 184:16-187:2, Kohlmann Ex. 60, VIA00378149, at VIA00378150, Kohlmann Ex. 63, VIA12603576 (regarding YouTube's knowledge of "MysticalGirl8" account); Rubin Ex. 10 (regarding YouTube's knowledge of "demansr" account). Moreover, none of the cited evidence shows an intent to conceal activity from YouTube. Kohlmann Ex. 82 (Teifeld Dep.) at 47:11-48:2; Kohlmann Ex. 84 (Wahtera Dep.) at 150:12-24, 167:7-168:8.*

YOUTUBE'S REPLY: Viacom's response does not controvert this fact. First, Viacom argues that "[n]one of the evidence cited by Defendants

shows that YouTube was unaware of any of the authorized uploading of Viacom content.” But Viacom misses the point. YouTube agrees that it was generally aware of promotional activities occurring on its service, including that Viacom itself was using YouTube for promotional purposes. *See* YouTube 56.1 ¶ 127. It is precisely because YouTube is generally aware of such activities that it cannot possibly tell whether a particular video appearing on the site is unauthorized. *See* YouTube Br. 39-48, 64-67; YouTube Opp. 4-6. But Viacom does not claim, and could not claim, that it systematically informed YouTube of every one of its thousands of viral marketing clips for purposes of affirming copyright authorization. The contexts in which YouTube employees became aware of specific clips posted by Viacom were usually *ad hoc* communications about such topics as: (1) Viacom marketers imploring YouTube to “feature” a particular Viacom clip on YouTube’s homepage so as to get as much exposure as possible, and giving YouTube effusive thanks and praise when it did so (*see, e.g.*, Schapiro Reply Exs. 86-87; Ex. 88 (Viacom to YouTube: “I LOVE YOU! THANK YOU!!!”); Exs. 89-90); or (2) Viacom marketers asking YouTube to restore a particular clip after Viacom’s copyright enforcement team mistakenly took it down, as Viacom’s own personnel were unable to determine authorization status and frequently made baseless infringement assertions against viral marketing clips (Rubin Opening Decl. ¶ 3, Exs. 42-68; Schaffer Opening Decl. ¶¶ 15-18; Schapiro Opening Ex. 149-150; Schapiro Opp. Ex. 326 (VIA10432652 at VIA10432654); Exs. 327-331, 416; CVSUF ¶ 332; Schapiro Reply Ex. 91).

The fact that Viacom’s own personnel at BayTSP and internally were unable to keep track of all of Viacom’s stealth marketing – even when given “whitelists” of videos to leave up and even with full access to Viacom’s internal records and employees – alone refutes any claim that YouTube could have somehow been able to do so. *See infra* ¶ 127. Viacom admits as uncontroverted that its instructions to BayTSP about leaving up videos were not shared with YouTube. VCS ¶ 130.

Second, Viacom claims that it did not take steps to conceal that it was the source of certain videos it uploaded to YouTube for marketing purposes. This statement is demonstrably incorrect and is not supported by the documents Viacom cites. Viacom went to great lengths to conceal the origin of the stealth accounts identified in YouTube’s 56.1 ¶ 125. For example, with respect to the account “MysticalGirl8”, a Paramount employee registered an anonymous email address, used that address to create a YouTube account with no apparent connection to Paramount (*i.e.*, “mysticalgirl8”), and then went to Kinko’s to upload a clip of its film *The Heartbreak Kid* (a work in suit) for marketing purposes. Schapiro Reply Ex. 92 (148:4-150:24, 158:19-159:5, 166:21-168:22); Ex. 93 (Kang Decl. ¶

2); Ex. 94. It was only when the clip was identified by YouTube's users as containing "racy" content and placed behind an age-gate that Paramount contacted YouTube in order to have the age restriction removed. See **Kohlmann Ex. 60**; **Kohlmann Ex. 63**. Upon receiving a message from Paramount about an "inappropriate clip," YouTube immediately responded and said it would be happy to "escalate to the content team for takedown," thinking it was unauthorized. But Paramount responded "It is not copyrighted... Please do not remove." **Kohlmann Ex. 63**. The evidence demonstrates that Paramount did not contact YouTube to inform YouTube of the video's authorized status as part of some copyright enforcement policy; to the contrary, only the chance occurrence of a "racy" designation by YouTube's users prompted Paramount to contact YouTube at all. **Kohlmann Ex. 60**. And the employee who created the "MysticalGirl8" account and uploaded the clip from Kinko's offered to do it again. Schapiro Reply Ex. 95.

Viacom's assertion that none of the cited evidence supports that YouTube was unaware of Viacom's specific marketing activities is also incorrect. Viacom ignores the "GossipGirl40" account, which was created by MTV's agent Fanscape using a "fake" email address and then used to upload Viacom clips. Schapiro Opening Ex. 33 ("covert operation: Noone can know that Fanscape or MTV is involved in this . . . Huge success with leaks for MTV. MTV will most likely do this more often."); Schapiro Opp. Ex. 55; Schapiro Reply. Ex. 13 (74:20-76:1, 76:22-77:9). The operation was so "covert" that Viacom's copyright enforcement team took down the video (having no reason to know it had been posted at MTV's direction) and Fanscape did not ask to have it restored. Instead, Fanscape noted with approval that users had reposted the video "so the video continues to stay viral." Schapiro Opp. Ex. 55. When Fanscape reported that the clip had received an astonishing 600,000 views before being taken down, MTV Vice President David French was congratulatory: "shows the power of these viral clips when we get the footage and do it right. Good stuff." Schapiro Opp. Ex. 60. MTV's President of Entertainment likewise commented "This is great!!!" (Schapiro Reply Ex. 96) and "FANTASTIC" (Schapiro Reply Ex. 97). Not surprisingly, MTV did in fact continue to use the GossipGirl40 account for "leaked" videos thereafter. For example, Fanscape uploaded a video from MTV's "A Shot at Love" with the title "Tila Tequila Leak – Lesbian Sandwich", where the video had a "timecode" superimposed on it to make it look like it had been leaked from the studio in rough, unfinished form. Schapiro Opp Ex. 62 (also showing another video in this account titled "Tila Tequila Leak – Kristy's Ass"). Pursuant to Fanscape's plan to perform a "covert operation," nothing about the "GossipGirl40" account showed its connection to MTV or Fanscape – the "fake" email address used to create it was "gossipgirl40@yahoo.com".

Schapiro Opp. Ex. 417. Viacom provides no evidence of any communications with YouTube about the true nature of the GossipGirl40 account.

The other evidence cited by Viacom further supports the asserted fact. Viacom cites to **Rubin Ex. 10** as evidence that YouTube was aware of the stealth Viacom account “demansr.” But that email does not evidence any communications with YouTube about the “demansr” account. To the contrary, the email describes SpikeTV’s intention to sign up for an “official” YouTube account in addition to the “fake grassroots” demansr account, and the Viacom employee’s description of the phone conversation with YouTube is clearly referencing the “official” account where “there’s an approval process involved.” Rubin Opening Ex. 10. Viacom decided it would “go both routes, as many places do” – *i.e.*, use an “official” account known to YouTube and a “fake” account hiding its origins. *Id.* Viacom offers no evidence that Viacom ever communicated with YouTube about the true nature of its “fake grassroots” demansr account.

Any suggestion by Viacom that it freely shared with YouTube all information about its stealth marketing practices is also belied by its actions in this litigation. Viacom initially asserted a purported “copyright monitoring privilege” in an effort to avoid producing such documents. YouTube was required to litigate the issue before Viacom finally agreed to production. Then, when YouTube learned about the existence of a previously-unproduced whitelist during a deposition and requested it, Viacom resisted, producing other nonresponsive documents instead, requiring YouTube to repeatedly request the correct document. Rubin Reply Decl. ¶ 27. When Viacom finally did produce it, Viacom marked the document “Highly Confidential” – a designation that does not allow YouTube personnel to view it. Schapiro Opening Ex. 140 (whitelist document including “gossipgirl40” account). When YouTube asked Viacom to confirm that Viacom did not want the document disclosed to YouTube, Viacom replied, “Yes, that is correct.” Rubin Reply Ex. 193. To this day, Viacom considers its whitelist information showing which accounts it uses to upload content to YouTube to be so proprietary and confidential that it refuses to share it with YouTube personnel.

Viacom also employed a variety of other methods to obscure its involvement in promotional uploading activity, including:

- Using third party marketing agents to upload material on its behalf. Schapiro Opening Exs. 35-44, 45 (28:3-8); Chan Opening Decl. ¶ 3-5.

- Deliberately using email addresses that “can’t be traced to [Viacom]” when registering for YouTube accounts. Schapiro Opening Ex. 46; *see also* Rubin Opening Ex. 22 (videos should be “uploaded from [a] personal [account] and not associated with the film”); Rubin Opening Ex. 26; Schapiro Opp. Exs. 4, 417 (lists of accounts used by Viacom or its agents to upload videos to YouTube); Schapiro Reply Ex. 9.
- Altering its own videos to make them appear stolen, like “footage ... from the cutting room floor, so users feel they have found something unique”. Rubin Opening Ex. 4; Ex. 20 (describing how Viacom would “rough up” clips with time codes and other internal studio markings to make them seem illicit, even though the clips were actually part of a carefully crafted marketing initiative); Ex. 14 (“the goal is to make [the video clip] looked ‘hijacked’”); Schapiro Opening Ex. 50 (promotional video “[d]eliberately made to look like it was cut together by a 16 year old”).
- Otherwise striving to make the posting appear to have been from a fan rather than Viacom. Schapiro Opening Ex. 34 (clip “should definitely not be associated with the studio – should appear as if a fan created and posted it”); Ex. 46 (Paramount employee instructed to use a “NON-PARAMOUNT” YouTube account); Rubin Opening Ex. 15 (VIA00369535) (“THIS MUST BE VIRAL AND NOT DIRECTLY CONNECTED TO US!”); Ex. 19 (instructing that a clip get posted on YouTube but without a Paramount logo or association); Rubin Reply Decl. ¶¶ 2, 4.

Given this activity, while YouTube was generally aware that content owners were using YouTube to post their content for marketing purposes, YouTube could not possibly have known all of the details about the full extent of Viacom’s, or any other content owner’s, marketing activities as Viacom implies. *See* Schaffer Opening Decl. ¶¶ 6-9; Botha Opening Decl. ¶¶ 11-12; Maxcy Opening Decl. ¶¶ 3-7; Rubin Decl. ¶1, Exs. 2, 32-41; Schapiro Opening Ex. 53; *see also infra* RVCS ¶ 126, 127.

- 126. Other media companies have taken steps to conceal that they were the source of certain videos that they uploaded to YouTube for marketing purposes. Ostrow Decl. ¶ 6; see also Chan Decl. ¶¶ 3, 4, 9, 10; Rubin Decl. ¶ 2 & Exs. 2, 32-41; Schapiro Ex. 28 (GOO001-05161257-58).**

Viacom’s Response: Viacom lacks knowledge to admit or controvert this alleged fact, but notes that the alleged fact is unsupported by the cited evidence. The evidence cited shows that other media companies authorized

the uploading of their copyrighted content to YouTube, but not that these media companies concealed authorized uploads of their content from YouTube. Indeed, many of the documents cited reflect exactly the opposite: content owners explicitly informed YouTube of authorized uploads. E.g., Schapiro Ex. 28, GOO001-05161257 (responding to email from marketing company Wiredset regarding YouTube uploads, YouTube employee Julie Supan writes: “Sounds like another [partnership] opp except paid ;”); Rubin Ex. 32, GOO001-01021878, at GOO001-01021879 (YouTube document stating to content owners: “If you have questions or would like to discuss a custom marketing solution, please contact us and we’ll be glad to assist you”) & at GOO001-01021880 (describing communications between YouTube and media companies regarding authorized uploads); Rubin Ex. 34, GOO001-09595002 (in email message to YouTube employee Heather Gillette, NBC Universal executive writes: “In order to avoid any confusion or misunderstanding, I wanted to make sure you are aware that NBC is permitting YouTube to host this content . . .”).

Further controverted because Rubin Decl. ¶ 2, Ex. 2, and Exs. 32-41, Ostrow Decl. ¶ 6, and Chan Decl. ¶¶ 4 and 9 contain inadmissible evidence. See Evid. Obj. at 2-3, 5, 7.

YOUTUBE’S REPLY: Viacom does not dispute this fact; instead it claims a lack of knowledge. Moreover, Viacom’s assertions regarding the cited documents do not support its immaterial arguments.

First, Viacom’s assertion that the cited documents do not support a claim that other media companies concealed their stealth uploading “from YouTube” misses the point. Media companies engaging in stealth marketing took steps to conceal their connections to clips from the perspective of a person looking at the website (*e.g.*, a user or a YouTube employee who had not personally communicated with the media company about the clip at issue). Viacom does not claim that other media companies provided YouTube with comprehensive, detailed information about all of their uploaded clips in order to inform YouTube about copyright authorization. Rather, YouTube was generally aware of these activities through *ad hoc* communications with media companies and their marketing agents arising in other contexts, as demonstrated by YouTube’s cited evidence. For example, in Schapiro Opening Ex. 28, an employee of a stealth marketing firm, Wiredset, introduced himself to one person at YouTube who forwarded that email to one other person at YouTube. The email says that Wiredset uploads “many of our clients videos” to YouTube but gives just two examples (a music video for “Flyleaf” and an MTV show, “Call to Greatness”, although without citing specific clip URLs or usernames). Wiredset used a number of usernames for its uploading on

YouTube, including non-obvious ones like “tesderiw.” Rubin Opening Decl. Ex. 47. And even when Wiredset used usernames that Viacom would presumably consider obvious, like “wiredsetassets,” Viacom still could not identify those as its authorized clips. Viacom is *still suing YouTube* in this action on at least two authorized videos uploaded under the wiredsetassets username. Rubin Opening Decl. ¶ 14a. Viacom failed to “withdraw” those videos in October 2009 when it sent YouTube its “revised” list of clips-in-suit, it failed to dismiss those clips with prejudice in February 2010 when it dismissed other authorized clips, and its employee Warren Solow submitted a declaration to the Court swearing that these authorized videos were “infringing” and that they appeared “without authorization”. See Hohengarten Ex. 2 (Solow Decl. ¶ 16, 26). Viacom cannot seriously argue that YouTube employees should have known of the authorized status of these videos when Viacom, even after thorough investigation and review by lawyers, did not. See also Rubin Opening Decl. ¶ 13 (Viacom dismissed with prejudice numerous clips from “Wiredset” username almost three years into this lawsuit).

Moreover, YouTube’s cited documents provide ample support for the use of YouTube by media companies to market content without disclosing their connection. For example, filmmakers created a series of videos that appear to be amateur testimonial from a young woman and posted them to the YouTube account “Lonelygirl15” without revealing their connection to the videos. Rubin Opening Ex. 36. Likewise, the Walt Disney Company’s Hollywood Records was behind videos of Marie Digby, whose “simple, homemade music videos of her performing songs have been viewed more than 2.3 million times on YouTube.” Rubin Opening Ex. 41. Viacom itself believed that YouTube was a “powerful marketing platform that most networks are using for promotion”. See Schapiro Reply Ex. 5; see also Rubin Reply Decl. ¶¶ 2-4.

Indeed, in addition to Viacom, other media companies also used YouTube to promote their content by posting videos that were characterized as “stolen” or “leaked” in order to create “buzz.” Viacom concedes that such practices are “ordinary marketing activities.” Viacom Opp. 57 n.32. For example, A&E Networks authorized its marketing agent, Fanscape, to post videos to YouTube of Gene Simmons titled “Stolen Gene Simmons Home Video” in order to make it appear as if the videos were illicit and exciting. Schapiro Reply Ex. 98; <http://www.youtube.com/watch?v=5 Wx-qI4Rs0> (Schapiro Reply Exs. 192A/B); Ex. 99; <http://www.youtube.com/watch?v=ONHxYF2u3gc> (Schapiro Reply Exs. 193A/B); Ex. 100. One of the descriptions of the videos even implies that it should be watched quickly because is likely to be removed soon: “This is candid footage of badass Gene Simmons acting like a softy goofball with

his family. It was shot while filming his new reality show, but left on the cutting room floor where it was leaked. Enjoy it while it lasts!” *Id.*; see also *id.* Ex. 99 (screen shot including video located at <http://www.youtube.com/watch?v=5 Wx-qI4Rs0>); Ex. 100 (screenshot including video located at <http://www.youtube.com/watch?v=ONHxYF2u3gc>).

127. **YouTube was aware of promotional activities occurring on its service. Schaffer, Decl. ¶¶ 7-8; Botha Decl. ¶¶ 11-12; Maxcy Decl. ¶¶ 3-7; Schapiro Ex. 53; Rubin Decl. ¶ 1, Exs. 2, 32-41.**

Viacom’s Response: *Controverted because Botha Decl. ¶¶ 11-12 Maxcy Decl. ¶¶ 3, 4, and 7, Schapiro Ex. 53, and Rubin Exs. 32-41 contain inadmissible evidence. See Evid. Obj. at 11-12.*

In particular, Defendants’ reliance on Botha Declaration ¶ 11 is misplaced. Mr. Botha’s testimony that “[v]ery early on, professional content creators began to use YouTube as a promotional outlet” has no basis, as he references only a promotional video that Nike (a shoe and athletic company, not a “professional content creator”) uploaded. Mr. Botha testified in deposition that, other than Nike, he could not recall a single other company using YouTube for promotional purposes in 2005. Kohlmann Ex. 65 (Botha Dep.) at 107:3-7. And, YouTube was aware of Nike’s upload and met with Nike personnel about that specific video. Kohlmann Ex. 65 (Botha Dep.) at 106:13-16.

*Further, contrary to Defendants’ suggestions, Botha Decl. ¶ 12 (and related ¶ 13) merely confirm Defendants’ Grokster intent to keep infringing content on the site as long as possible to build up the user base. Mr. Botha claims that “YouTube did not know who held the copyright in the Lazy Sunday clip,” Botha Decl. ¶ 13, and that NBCU (the content owner) “chose simply to leave [the clip] on the service.” But Mr. Botha’s declaration, his deposition testimony, and the documentary evidence belie that claim. YouTube did know that NBCU was the content owner. Mr. Botha testifies clearly that “Chad Hurley wrote to NBC Universal asking whether NBC was aware of the clip” Botha Decl. ¶ 13; see also Kohlmann Ex. 65 (Botha Dep.) at 153:11-12 (“we notified the owners of that show”). Indeed, when Hurley wrote to NBCU, NBCU responded that it believed that the clip was unauthorized but would check further. Hurley Ex. 30. Hurley—illustrating that he understood the benefit of keeping infringing premium content on the site as long as possible—forwarded that response to Chris Maxcy, stating: “this is good. it’s not a yes or a no. we’ll see if they follow up or just ignore the request.” *Id.* See also Hohengarten Ex. 242, JK00006689 (“what? someone from cnn sees it? he happens to be someone*

with power?”); Hohengarten Ex. 17, GOO001-00629474 (“next time we have another lazy sunday hit, it would hurt us if the user suddenly removed the video”).

YOUTUBE’S REPLY: Viacom does not genuinely dispute the asserted fact. This is particularly apparent given that Viacom’s purported dispute is not even consistent with Viacom’s other responses to YouTube’s 56.1. *See* VCS ¶¶ 123-125 (asserting that YouTube was aware of promotional activities on its site). Viacom’s remaining purported “dispute” consists of nothing more than baseless evidentiary objections and Viacom’s distortion of the events surrounding the appearance of the video clip “Lazy Sunday” on YouTube (which, like the posting of the professionally-produced Nike commercial, occurred in 2005). *See* CVSUF ¶¶ 47, 83, 89, 90, 91, 92, 98, 99.

Even disregarding Viacom’s inconsistent responses to YouTube’s 56.1, Viacom misses the point. It is precisely because YouTube is generally aware of the promotional activities of content owners on the site (including Viacom) that it cannot know whether any particular video appearing on the site is unauthorized. *See* YouTube Br. 39-48, 64-67; YouTube Opp. 4-6. That those promotional activities create confusion as to authorization is evidenced by the fact that the content owners themselves—including Viacom—are often unable to distinguish the material they have authorized to be on YouTube from the material they contend is unauthorized, despite concerted efforts to do so. *See* Rubin Opening Ex. 64; Schapiro Opening Ex. 65; Exs. 141-148.

For example, Viacom developed detailed instructions and elaborate record-keeping in an effort to distinguish clips that Viacom wanted to remain on YouTube from those it wished to take down. *See* Schapiro Opening Ex. 57; Ex. 135; Ex. 136 (109:19-112:3); Ex. 137; Ex. 138; Schapiro Opp. Ex. 269 (150:12-151:2); Schapiro Reply Ex. 77 (55:2-56:12, 172:4-173:1, 244:2-19); Ex. 92 (5:14-46:17); Ex. 139 (239:14-242:14); Ex. 143 (159:7-21). Viacom also attempted to maintain internal “whitelists” of approved YouTube user accounts (although Viacom admitted that those internal whitelists were consistently incomplete and unreliable). Schapiro Reply Ex. 17 (414:24-420:6); Ex. 105 (162:6-10, 167:22-168:7); Rubin Opening Decl. ¶ 5(a)-(f) & Exs. 84-116; Schapiro Opening Ex. 140; *see also* Schapiro Reply Ex. 154 (VIA11789373) (“it would be a significant task to keep you updated on each and every clip we post ongoing”). Under Viacom’s theory that it is not just possible but easy to distinguish between authorized and unauthorized material at a glance, there would have been no reason for Viacom to create these elaborate instructions and white lists. But it did, and even then it was not successful in keeping track of

unauthorized vs. authorized material. Viacom and its agents routinely made mistakes in sending DMCA takedown notices, demanding that YouTube remove videos that turned out to be authorized by Viacom. Rubin Opening Decl. ¶ 3, Exs. 42-68; Schaffer Opening Decl. ¶¶ 15-18; Schapiro Opening Ex. 149-150; Schapiro Opp. Ex. 326 (VIA10432652 at VIA10432654); Exs. 327-331, 416; CVSUF ¶ 332; Schapiro Reply Ex. 91. Viacom's mistaken takedown requests have even resulted in the suspension of Viacom's own YouTube accounts or the accounts of its authorized marketing agents. Schaffer Opening Decl. ¶¶ 15-16, Ex. 4; Rubin Opening Decl. ¶ 3 & Exs. 42, 56-67. Other content owners have experienced the same problems. Rubin Opening Decl. ¶ 4 & Exs. 70-83.

Viacom has not even been able to distinguish authorized from unauthorized material on YouTube in this litigation. Viacom mistakenly sued YouTube over hundreds of videos uploaded by Viacom or its marketing agents, despite an elaborate vetting process by its litigation team and multiple attempts to dismiss authorized videos from the lawsuit. VCS ¶¶ 148-152. And Viacom still has not located all the clips in suit that were uploaded by it or its agents.

Even after all of Viacom's efforts to remove from this lawsuit clips that it authorized, Viacom is *still suing* YouTube for infringement as to videos that Viacom posted on YouTube or authorized third parties to post on YouTube. In addition to the authorized clips that are still clips-in-suit identified in YouTube's opening motion (*see* Rubin Opening Decl. ¶ 14), there are an untold number of additional authorized clips-in-suit, a non-comprehensive sample of which is listed below. *See* Solow Decl. ¶¶ 16, 26 & Ex. F (list of clips on which Viacom is still suing and that its employee, Warren Solow, averred under oath were "not authorized.")

- UtNKMRNl7r4 (clip introduced by *Jackass 2* movie actors saying "Thank you for watching us on YouTube") Schapiro Opp. Ex. 397A/397B; *see also* Schapiro Reply Ex. 136 (identifying this URL as clip placed on YouTube by Paramount as paid home page advertisement).
- SPEexW7gXMw (clip alleged to be from MTV Jaime Kennedy show uploaded by "fcreetus," a username referenced in Viacom marketer Total Assault's documents as being used in connection with its uploads of Jamie Kennedy videos). *See* Schapiro Reply Exs. 194A/B; Ex. 137; Rubin Reply Decl. ¶ 11 (username for uploader of this clip is fcreetus); *see also* Ostrow Decl. ¶¶ 2-5.

- W4UW2CBWrO4 (Clip alleged to be from *Showbiz Show* with interview of Tila Tequila, an MTV reality show personality, uploaded by Tila Tequila’s official account). See Schapiro Reply Exs. 195A/B; Rubin Reply Decl. ¶ 11.
- jlwMQBzfm4 (clip allegedly from *Broken Bridges* film, uploaded by username BrokenBridgesMovie, including description saying “DVD AVAILABLE IN STORES JANUARY 9TH! This is the official music video for "Broken" by Lindsey Haun.”). See Schapiro Reply Exs. 196A/B; Rubin Reply Decl. ¶ 11.
- cGrnebuquSk (clip allegedly from *The Daily Show*, uploaded by username NateDernComedy, including description saying “From the June 28, 2007 Daily Show with Jon Stewart, this is a very funny piece done by Rob Riggle on the iPhone. You can see me and some of the other TDS interns spattered throughout the vid. I'm the bearded on playing Jenga. <http://natedern.com>”). See Schapiro Reply Exs. 197A/B; Rubin Reply Decl. ¶ 11.

Viacom’s stealth marketing efforts actually misled YouTube users, as Viacom intended them to. For example, Viacom posted on YouTube a video of animated slugs to promote the movie *Flushed Away*. Rubin Opening Decl. Exs. 15-16. Viacom instructed its employees to upload multiple copies of the video, saying “THIS MUST BE VIRAL AND NOT DIRECTLY CONNECTED TO US!” *Id.* Ex. 15. Shortly after the video was posted, YouTube received an email from a user titled “stolen content” about the video. Schapiro Reply Ex. 101. The user informed YouTube that the video was “stolen content or copyright issues or whatever from the new movie ‘flushed away’” because “if you watch the previews or see when it comes out that the EXACT SAME SLUGS are in it . . . and in the tags are also that it says ‘trailer clip,’ AND movie’.” *Id.* YouTube responded that if the user was the content owner, he should send a notice meeting DMCA requirements. *Id.* While the user concluded the clip was infringing due to various indicia including the content of the clip and the tags associated with it, as it turns out, the video was not infringing at all: Viacom had uploaded it and heavily promoted it as a marketing vehicle for its movie. This also encapsulates yet another problem with Viacom’s “user-flagging” argument: Viacom’s efforts to hide its connection to viral marketing clips from users is yet another reason why users would have no ability to distinguish infringing from authorized clips. See YouTube Opp. 51-53.

128. Viacom has knowingly left up on YouTube thousands of clips containing its content. Schapiro Exs. 57, 62, 75, 76.

Viacom's Response: *Controverted. It is undisputed that Viacom did not grant YouTube an express or implied license to display user uploads of its copyrighted works. See Viacom Opp. at 57-62. From October 2006 through January 2007, while negotiating with Defendants regarding a licensing deal, Viacom enforced its rights only for the most egregious instances of infringement, and the documents Defendants cite show that Viacom worked with its takedown agent BayTSP to implement its enforcement priorities.*

BayTSP thus began by issuing takedown notices for full episodes of Viacom television shows, which would not have been covered by the license Viacom was seeking, and subsequently also began taking down clips that were more than several minutes in length. Kohlmann Ex. 73 (Hallie Dep.) at 53:14-54:25; Kohlmann Ex. 66 (Cahan Dep.) at 216:14-217:5. Given the massive volume and scope of infringement of Viacom content on YouTube, there was a "ramp up" period as BayTSP gained more experience and hired and trained more employees. Kohlmann Ex. 73 (Hallie Dep.) at 109:7-17, 118:6-17, 183:24-184:5, 194:13-195:3; Kohlmann Ex. 81 (Solow Dep.) at 113:12-114:5, 341:12-23; Kohlmann Ex. 66 (Cahan Dep.) at 225:10-23.

As negotiations progressed, Viacom continued to expand its efforts to identify infringing content on YouTube, but generally abstained from issuing takedown notices in the expectation that Viacom's infringement claims would be settled as part of an overall licensing deal. See Kohlmann Ex. 72 (Fricklas Dep.) at 25:5-18; Kohlmann Ex. 81 (Solow Dep.) at 148:23-149:22, 196:9-199:11, 206:21-207:10, 226:8-227:17; Kohlmann Ex. 74 (Ishikawa Dep.) at 112:13-113:18, 228:3-229:13. When negotiations reached an impasse, on February 2, 2007, Viacom sent Defendants a takedown notice for all of the infringing content that Viacom had identified on YouTube. Viacom SUF ¶ 210.

YOUTUBE'S REPLY: Viacom does not genuinely dispute this fact; to the contrary, it admits that Viacom knowingly left up on YouTube thousands of clips containing its content and simply offers legal argument about the effect of its leave-ups. Though not material to the disposition of YouTube's motion, Viacom's argument is incorrect.

First, Viacom's claim that it did not grant YouTube an express or implied license to display user uploads of its copyrighted works is incorrect. See CVSUF ¶ 208; YouTube Reply 22-27. Second, Viacom admits in this response that it "generally abstained" from issuing takedown notices

during its negotiations with YouTube through 2006 and into early 2007. But Viacom's purported explanation for its leave-up activity is incomplete. There were numerous reasons for the leave-ups:

- (i) Part of Viacom's negotiation strategy was to withhold takedown notices and allow videos to accumulate on YouTube so that it could threaten a mass takedown as leverage in the negotiations. Schapiro Opening Ex. 10. Viacom expressly told YouTube during those negotiations that it was deliberately leaving up videos. Maxcy Opp. Decl. ¶ 8. *See also*:
 - BayTSP to Viacom: "We believe that with this information you will be able to drive a much better advertising deal with Google/YouTube at the end of the day"; Response from Viacom: "[T]his is not part of a piracy effort and would not involve take-down notices. It is intelligence gathering so that we can be better informed about traffic so we are better positioned for negotiations." Schapiro Reply Ex. 102.
 - BayTSP: Viacom "is interested in getting negotiation leverage as we discussed." Schapiro Reply Ex. 103.
 - Viacom told BayTSP that it was primarily interested in tracking "metrics" information about what material was available on YouTube and only incidentally envisioned "taking down at least some of our material as well". Schapiro Reply Ex. 104; Ex. 105 (59:21-61:8).
- (ii) Viacom wanted to amass takedowns but not send them in order to have a "dramatic" event that would create negative PR for YouTube. Schapiro Opening Ex. 10; Schapiro Reply Ex. 26 (BayTSP004313354 at BayTSP004313355) ("Want to be sure we do not issue any takedowns this week...Would like to amass as much as possible in one go."); Ex. 106 ("the press will be all over YouTube after the announcement tomorrow, so we will no longer be holding back notices."); Ex. 27 (observing that the Viacom executive in charge of the takedowns made commitments "over the volume of infringements and is having a hard time meeting those numbers").
- (iii) During this time period, Viacom was having BayTSP monitor and identify lists of videos purportedly containing Viacom content for Viacom to "approve" or "decline" for takedown. Schapiro Opening Exs. 54-77; Ex. 11 (134:19-136:10, 138:25-139:14, 161:9-21); Schapiro Opp. Ex. 130; Shapiro Reply Ex. 18 (VIA16072901 at VIA16072906) (set of videos for which Viacom declined to send

notices had 3.3 million views); Ex. 107 (Viacom “declined” takedowns for 147,610 videos); Ex. 4 (chart with rules as of 11/22/06 listing numerous shows with no takedowns authorized); *see also* CVSUF ¶ 130. There was no significant “ramp up” time needed to effectuate take-downs; if Viacom had chosen to take down the videos, BayTSP could have accomplished that very quickly by immediately issuing the takedowns rather than holding them. As BayTSP put it, “we are leaving a majority of the content on YouTube” due to Viacom’s decision not to issue takedowns. Schapiro Opening Ex. 75; *see also* Schapiro Reply Ex. 108 (“I can have this ramped up 1 week after you tell me it’s a go”).

- (iv) Viacom wanted to keep its material on YouTube to reap the promotional benefits that free exposure gave to its shows and movies. Schapiro Opening Ex. 58 (Viacom executives felt “very strongly” they didn’t want to stop “the colbert and daily clips”); Schapiro Reply Ex. 76 (132:19-133:24) (“having the content there was valuable in terms of helping the rating of our shows.”); Ex. 109 (“If we pull our content down and sue YouTube with no alternative I bet Jon Stewart and Colbert will have a fit”); Ex. 28 (“please continue pulling full episodes . . . leave random clips up because they are promotional in nature for us”); *see also* Schapiro Opp. Ex. 238 (Viacom personnel formulating the leave-up policy were told “there are A LOT of clips they [VH1] have seeded to YouTube” and SpikeTV posted “a minimum of four clips a week” as YouTube “is a powerful marketing platform that most networks are using for promotion.”); Schapiro Reply Ex. 111 (Viacom marketing personnel reacting to news of mass takedown: “Fuck.” “Horrible.”).
- (v) Viacom was affirmatively using user-uploaded YouTube clips of shows like *Jackass* in its marketing campaigns. Schapiro Opp. Exs. 373; 370 (117:10-23; 61:4-63:4; 119:4-21); Ex. 55 (Viacom agent Fanscape noting with approval that users had reposted a Viacom clip it uploaded “so the video continues to stay viral.”). Such campaigns would have been compromised if Viacom took down the very videos those campaigns relied on.
- (vi) Viacom had trouble distinguishing between the “boatload” of marketing clips it had uploaded to YouTube and other clips. Rubin Opening Ex. 17. So it told BayTSP to “err on the side of leaving up some infringing material rather than being overly aggressive and taking down one of the many approved clips.” Schapiro Opening Ex. 65; *see also* Ex. 64 (directing leave-ups of Paramount clips under 8 minutes in length due to “the problem with the marketing clips”); Schapiro Reply Ex. 30 (Dec. 2006 directive from MTV to

“stop taking down Comedy Central Presents clips immediately” to avoid removing clips posted by “the comedians who performed on the show.”).

- (vii) Viacom’s own video websites were not as robust as YouTube. Viacom was concerned that there would be consumer backlash if clips of its shows disappeared from YouTube while Viacom lacked an adequate, comparable platform where the videos could be alternatively viewed. Schapiro Reply Ex. 112; Ex. 1 (344:2-345:24); *see also* Ex. 109 (predicting that takedown of content would cause Viacom to “suffer consumer, press, and talent backlash for sure”).
- (viii) Even when Viacom did the mass takedown of approximately 100,000 videos on February 2, 2007, it still left up large quantities of videos it believed to contain Viacom material: “There are many, many clips that use material from our shows and movies that have not been removed because it is possible that there could be a fair use claim and we did not have the resources to do the analysis”. Schapiro Reply Ex. 24.
- (ix) Viacom actively encouraged users to share *South Park* clips online and therefore had no motivation to take them down. *See* CVSUF ¶ 31.
- (x) Viacom marketers were pleased when user-uploaded clips appeared on YouTube, and they did not want to take them down. Schapiro Opp. Ex. 28 (“YouTube - Please note that there are a ton of placements being put up by additional users which is fantastic and resulting [in] thousands of views (although Viacom’s lawyers may not think so)”; Ex. 43 (Paramount marketers deemed “a lot of duplicates” of *Transformers* clips uploaded by users to YouTube “a good thing”); Schapiro Reply Ex. 29 (MTV Vice President agreeing that user-uploaded clips of *The Hills* should remain on YouTube because “in the end, its all good for the show”); Ex. 23 (instruction from Paramount to BayTSP to leave up movie clips: “its actually good, we should turn a blind eye”); Ex. 113 (Viacom marketer approvingly notes “crazy” YouTube video from a “user” including *Sweeney Todd* clips; another Viacom marketer responds “You’re funny. We produced this.”); Rubin Opening Ex. 27 (Paramount directing BayTSP to leave up long list of clips relating to *Iron Man*).

129. **YouTube gave instructions to its agent, BayTSP, about which clips to take down from YouTube and which clips to leave up on YouTube. Id. Exs. 11 (115:6-118:1), 54 (BAYTSP 001093412), 55 (BAYTSP 003724704), 56 (214:25-215:6), 57 (BAYTSP 001125605-08), 59, 60, 63-64, 65 (BAYTSP 003718201).**

Viacom's Response: *Viacom assumes that Defendants intend to state that "Viacom gave instructions to its agent, BayTSP," not that YouTube gave such instructions. Subject to that assumption, Plaintiffs respond:*

Regarding "which clips to take down from YouTube," uncontroverted.

Regarding "which clips to leave up on YouTube," controverted. See supra ¶¶ 122, 128.

YOUTUBE'S REPLY: *See supra RVCS ¶ 128.*

131. **Through at least October 2006, Viacom had an internal policy of declining to issue takedown notices for user-submitted clips on YouTube containing MTV Networks ("MTVN") content that were less than five minutes long. Id. Exs. 59, 60.**

Viacom's Response: *Controverted. See supra ¶¶ 128-130.*

YOUTUBE'S REPLY: *See supra RVCS ¶ 128.*

132. **In October 2006, Viacom told BayTSP to leave up on YouTube any clips containing MTVN content that were shorter than 2.5 minutes in length, regardless of who had posted them. Id. Ex. 54.**

Viacom's Response: *Controverted. See supra ¶¶ 128-130.*

YOUTUBE'S REPLY: *See supra RVCS ¶ 128.*

133. **Later in October 2006, Viacom told BayTSP that all videos containing MTVN content should be left up on YouTube unless the videos were "full episodes." Id. Exs. 55 (BAYTSP 003724704), 56 (214:25-215:6).**

Viacom's Response: *Controverted. See supra ¶¶ 128-130.*

YOUTUBE'S REPLY: *See supra RVCS ¶ 128.*

- 134. Viacom instructed BayTSP to leave up on YouTube “full episodes” of certain of its programs (some of which are works in suit). *Id.* Exs. 11 (115:6-118:1), Ex. 57 (BAYTSP 001125605-08).**

Viacom’s Reponse: Controverted as well as immaterial. As discussed in detail earlier, see supra ¶ 128, Viacom specified the content BayTSP should identify and take down, but did not explicitly or implicitly authorize the display of other content on the YouTube site. Furthermore, the evidence Defendants cite does not support the proposition that Viacom asked BayTSP to monitor YouTube for its programs but leave up full episodes of those programs; indeed, it shows exactly the opposite. See Schapiro Ex. 11 (Nieman Dep.) at 117:22-23 (as of November 6, 2006, taking down “full assets is the rule for the YouTube page”); Schapiro Ex. 57, BAYTSP 001125563, at BAYTSP 001125605 (indicating that as of November 6, 2006 BayTSP was instructed to take down full episodes of listed shows).

YOUTUBE’S REPLY: *See supra RVCS ¶ 128. Viacom’s response does not create a genuine issue of material fact for the reasons set forth in Paragraph 128, supra, as well as because Viacom itself claims that the fact is “immaterial” and because Viacom fails to controvert the fact in any event.*

The chart at BAYTSP001125605 (Schapiro Opening Ex. 57) has no takedown instructions checked for certain shows – meaning that even full episodes would be left up. The shows where full episodes were to remain included “Hogan Knows Best,” “Breaking Bonaduce” and “VMA Awards”, all of which are works-in-suit. Other charts with takedown instructions provided by Viacom to BayTSP had even broader full episode leave-up rules. Schapiro Reply Ex. 4 (BAYTSP003749923 at BAYTSP 3749925) (no takedown instructions at all for “Chappelle Show”, “Reno 911”, “Comedy Central Presents,” “Drawn Together,” “Mind of Mencia”, “Upright Citizens Brigade” and others).

- 135. Viacom has stated publicly that it was choosing to allow some of its content to remain on YouTube. *Id.* Ex. 77.**

Viacom’s Response: Controverted. As discussed in detail above, see supra ¶ 128, Defendants falsely portray Viacom’s decision to prioritize the removal of some infringing content as implying authorization to display other infringing content.

Additionally, the fact is unsupported by admissible evidence. The only reference to a public statement in Schapiro Ex. 77, an email exchange

between Viacom employees Michele Ganeless and Jason Witt, is quoted from an unidentified news report, which is inadmissible hearsay not falling within any exception. See Evid. Obj. at 1.

YOUTUBE’S REPLY: *See supra* RVCS ¶ 128. Viacom does not genuinely dispute this fact, both for the reasons set forth in Paragraph 128, *supra*, and because its evidentiary objection is baseless. The email itself is a party admission with statements from Viacom’s employees confirming the content of the news stories (such as “there are still cc clips on youtube that in fact, they were never asked to remove them all”). Moreover, YouTube’s fact also goes to what was announced and reported publicly and its effect on YouTube, not the underlying truth of the matter asserted, and therefore is not hearsay. Viacom cannot seriously controvert the public reporting in the fall of 2006 that it was deliberately leaving short clips on YouTube. *See* Schapiro Reply Ex. 114; Ex. 115; Ex. 118 (Viacom employee commenting on article that it “got the full episodes vs clips thing right”); Ex. 116; Ex. 117. And, in fact, Viacom’s instructions to BayTSP in that time frame directed no takedowns for short clips, including for shows such as the Colbert Report and the Daily Show. Schapiro Opening Ex. 57; *see also supra* RVCS ¶ 134.

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

Viacom’s Response: *Controverted. It is undisputed that Defendants sought to build up YouTube’s user base through massive copyright infringement and then monetize that user base through advertising. See Viacom SUF ¶¶ 230-266. Further, Reider Decl. ¶ 11 is inadmissible because it is not based on personal knowledge and contains legal conclusions. See Evid. Obj. at 13.*

YOUTUBE’S REPLY: Viacom does not genuinely controvert this fact, and there is no evidence supporting Viacom’s assertions. As there has never been “massive copyright infringement” on YouTube (indeed, Viacom’s summary judgment motion did not even shown a single infringement of a single Viacom work), there can be no “user base” based on infringement. YouTube is a legitimate service used overwhelmingly for non-infringing uses; its generic advertising programs cannot be equated with a benefit from alleged infringement. YouTube Reply I.E.

YouTube’s desire to avoid seeking to obtain revenue from even potentially unauthorized videos is shown by the fact that it does not allow advertisements to appear on watch pages of videos unless the content owner had entered into a partnership agreement with YouTube and

affirmatively indicated that it wants advertising. Reider Opening Decl. ¶ 9. Even during the short time period in 2006 when YouTube allowed advertising to appear on watch pages of videos generally (approximately April 2006 through December 2006), very few of the clips-in-suit (██████████) had such ads. Schapiro Opp. Ex. 312. For those clips, the advertising revenue from the Google AdSense network was a total of ██████████ (which includes revenue from watch pages of the authorized clips-in-suit on which Viacom mistakenly sued YouTube). *Id.* Indeed, during the entire time period when there were ads on watch pages, Viacom was “forbearing” from taking down videos and authorizing the videos to be left up. *See supra* RVCS ¶¶ 128-135.

II. RESPONSE TO VIACOM'S SUPPLEMENTAL COUNTER-STATEMENT

Pursuant to Local Civil Rule 56.1, YouTube sets forth the following Response to Viacom's Supplemental Counter-Statement.

A. VIACOM'S SUPPLEMENTAL COUNTER-STATEMENT IS IMPROPER AND SHOULD BE DISREGARDED

Viacom has separately submitted a document that it titles Viacom's Supplemental Counter-Statement in Response to Facts Asserted in Defendants' Summary Judgment Memorandum of Law But Omitted From Defendants' Local Rule 56.1 Statement (“VSCS”). In the document, Viacom pulls out individual assertions not from YouTube's 56.1, but from YouTube's brief, and then offers paragraphs of argument and evidence in response. The proper place for Viacom to respond to the assertions in YouTube's Opening Brief was in Viacom's opposition. Nothing in Local Rule 56.1 authorizes Viacom to supplement its responsive brief with a separate document that serves the same purpose. *See* Local Rule 56.1. Through the submission of the VSCS, Viacom has effectively arrogated to itself an additional 43 pages of briefing beyond the agreed-upon and Court-ordered page limits for summary judgment. That is improper, and the VSCS should be

disregarded. *See Pacenza v. IBM Corp.*, No. 09-2025-cv, 2010 WL 346810, at *1 (2d Cir. Feb. 2, 2010) (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); *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) (district courts are “free to disregard” improper Rule 56.1 statements) (citation omitted).

B. RESPONSE TO CERTAIN STATEMENTS INCLUDED IN THE VSCS

Given the improper nature of the VSCS, YouTube will not endeavor to respond to each statement set forth therein. YouTube sets forth below its reply to select Viacom responses that particularly misconstrue the record or the evidence cited. However, nothing in the VSCS does (or could) raise a genuine issue of material fact for trial. First, Viacom’s gratuitous “responses” to selected statements in YouTube’s *memorandum of law* are immaterial; the facts set forth in YouTube’s Local Rule 56.1 Statement are not genuinely disputed and, on those facts, summary judgment should be granted in YouTube’s favor. Whether Viacom disputes statements in YouTube’s memorandum of law does not bear on the existence of genuine issues of material fact for trial. Second, nothing in the VSCS actually raises a genuine dispute in any event. Viacom outright admits that it does not controvert twenty-nine of the statements it included in the VSCS. *See* VSCS ¶¶ 1.1,

1.2, 1.5, 1.6, 1.7, 1.8, 1.10, 1.12, 1.19, 1.26, 1.28, 1.35, 1.41, 1.51, 1.54, 1.76, 1.80, 1.87, 1.88, 1.92, 1.93, 1.97, 1.98, 1.101, 1.103, 1.110, 1.116, 1.117, 1.118. Other statements are purportedly disputed based solely on meritless evidentiary objections. VSCS ¶¶ 1.9, 1.37, 1.86, 1.94, 1.104, 1.108, 1.115. With respect to all of the remaining statements in the VSCS, Viacom simply offers irrelevant assertions and legal argument, and raises no genuine factual disputes.⁴

1.11 *Under [YouTube’s content partnership agreements], [content owners] make content available to YouTube by uploading it directly Defs. Opening Mem. at p. 8 (citing Walk Decl. ¶ 10).*

Viacom’s Response: *Controverted to the extent that the asserted fact implies that this activity occurred throughout YouTube’s existence. It is undisputed that YouTube did not enter into its first content partnership agreement with any major media company until late in the third quarter of 2006. See Viacom SUF ¶¶ 299, 300.*

YOUTUBE’S REPLY: Viacom’s response does not raise a genuine dispute with this statement and it is therefore not controverted. The agreement that Viacom references in VSUF ¶¶ 299 and 300 was not the first agreement by which a content owner – a “major media company” or otherwise – agreed to make content available to YouTube by uploading it directly. Since its earliest days, content owners agreed to place their content on YouTube in writing and orally, expressly and by implication, by uploading it directly or by knowingly allowing content uploaded by ordinary users to remain there. Maxcy Opening Decl. ¶¶ 3-7, 9-10; Schaffer Opening Decl. ¶¶ 2-3, 5-6; Botha Opening Decl. ¶¶ 11-12; Rubin Opening Decl. Exs. 1-2, 3-14, 33-35.

⁴ YouTube sets forth below in bold font the facts listed in YouTube’s 56.1 as to which YouTube is specifically replying. Viacom’s response to each of those facts from the VSCS is also set forth in italic font, followed by YouTube’s reply to Viacom’s responses in normal text.

1.13 In 2006, the Motion Picture Association of America (the anti-piracy association for the major movie studios) told the press: “YouTube has been a good corporate citizen and has taken off copyrighted material.” Defs. Opening Mem. at p. 11 (citing Levine Decl. ¶ 32 & Ex. 14).

Viacom’s Response: *Controverted in that the undisputed evidence shows that, in 2006, YouTube repeatedly refused to work with the MPAA to prevent the infringement of the copyrighted works of MPAA’s members, including Paramount. See Viacom SUF ¶¶ 225-229 (citing deposition testimony of former MPAA President Dean Garfield). The cited evidence is also inadmissible hearsay. See Evid. Obj. at 14.*

YOUTUBE’S REPLY: Viacom does not dispute, and therefore admits, the fact that the Motion Picture Association of America (the anti-piracy association for the major movie studios) told the press: “YouTube has been a good corporate citizen and has taken off copyrighted material.”

Separate from the undisputed fact at issue, Viacom makes argumentative statements regarding YouTube’s interactions with the MPAA. Viacom claims that in 2006 YouTube “repeatedly refused to work with the MPAA.” That is false. As Dean Garfield, MPAA’s Executive Vice President, wrote to Viacom’s General Counsel on January 31, 2007:

We recently contacted YouTube to pick up our file-removal and filtering discussion where we left off last year. YouTube’s position has not changed. ***They are willing to move forward with a pilot*** that would involve YouTube using a list of 1,000 titles to (a) remove any content that we identify as being unlicensed, and (b) using the hash from those titles to create a “blacklist” of files that will not be permitted onto the system in the future.

In addition to removing motion picture and television shows based on a title list and then blacklisting those files, ***YouTube is willing to prevent the posting of content that is registered with Audible Magic. YouTube has an agreement with Audible Magic. Thus, the extent your content is registered with Audible Magic, YouTube will include those registered fingerprints in a directory that is checked before any materials are posted.***

Schapiro Opp. Ex. 163 (emphasis added); *see also* CVSUF ¶¶ 225-229. That email reflects in Garfield’s own words that YouTube was willing to collaborate with the MPAA on fingerprinting issues during 2006. YouTube was not only willing to engage in fingerprinting testing with the MPAA, it did so. When YouTube’s proprietary system was ready for testing in early June 2007, YouTube reached out to the MPAA. Schapiro Reply Exs. 43, Ex. 44. And the parties then entered into an agreement under which the MPAA evaluated YouTube’s fingerprinting technology. Schapiro Reply Ex. 45 (GOO001-06126509, GOO001-06126510). The undisputed evidence shows YouTube’s continuing cooperation with the MPAA on copyright issues.

1.17 To the frustration of many within [Viacom], Viacom’s efforts to acquire YouTube proved unsuccessful. Defs. Opening Mem. at p. 12 (citing Schapiro Ex. 5).

Viacom’s Response: *Controverted. While some Viacom employees briefly considered the idea of exploring a possible acquisition of YouTube, Defendants dramatically overstate the seriousness of Viacom’s consideration of such an acquisition. See Resp. to Defs. SUF ¶ 46.*

YOUTUBE’S REPLY: Viacom does not genuinely controvert the asserted proposition, nor could it. Viacom’s senior most executives were extraordinarily enthusiastic regarding the prospect of acquiring YouTube. *See e.g.*, Schapiro Opp. Ex. 185 (“We (MTVN/Viacom) have to buy YouTube.”); Ex. 186 (“I WANT TO OWN YOUTUBE, I think it’s critical”); Ex. 187 (“Help us get YouTube. We cannot see it go to Fox/NBC”), 188 (MTVN Chairman: “If we get UTube....I wanna run it[.]” Viacom CEO: “You’ll have to kill me to get to it first[.]”); Ex. 189 (“YouTube! I’m banging my shoe”); Schapiro Reply Ex. 119 (Viacom Sr. VP: The more I look at the [Long Range Plan] the more I think we need to buy YouTube”); Ex. 120 (“HIGHLY CONFIDENTIAL – we are now talking with NBC about buying YouTube in a partnership”; “We should just buy YouTube outright”); Ex. 121 (“Let’s BUY YOUTUBE”); Ex. 122 (Blair Harrison (Ifilm CEO): “We should just buy YouTube outright”; McGrath: “I couldn’t agree more. Let’s go get [CEO Tom] Freston’s checkbook”; “I ... told [Wade Davis] to figure out a way to buy it, as it will probably take some financial gymnastics.”).

Viacom’s “best minds” were tasked with doing their “best thinking” about an acquisition, and they unanimously recommended buying YouTube, viewing it as a “transformative acquisition” for Viacom. Schapiro Reply Ex. 76 (65:5-14, 79:20-80:21); Schapiro Opening Ex. 173. This group of Viacom executives (including seven executive or senior vice presidents)

prepared an extensive presentation on the potential acquisition which included a thorough analysis of the service's operations, and a detailed financial assessment. Schapiro Opp. Ex. 216 ("Project Beagle").

After a lengthy meeting about YouTube with Viacom's CEO and other top company executives, a senior vice-president reported: "YouTube – we had a very deep conversation (over an hour) about the potential, the risk and why strategically it is so critical...[T]hey are extremely serious about buying and only want to lose it once we are convinced we cannot make the number work (600m)." Schapiro Reply Ex. 123. But Viacom concluded in July 2006 that it could only afford to pay \$600-800 million for YouTube and could not afford the \$1.5 bones YouTube was seeking. Schapiro Reply Ex. 124 ("How did YT call go? I heard they wanted 1.5 bones."); Ex. 125 (VIA00343418) (Viacom CEO: "I gather that the YouTube valuation from your guys only gets you to \$500-600MM?"); Ex. 126 ("The answer on beagle is not for sale"). Senior executives within Viacom were frustrated. Schapiro Opening Ex. 5 (McGrath: "Probably not buying YouTube, if I had to wager...Because it's our fucking company."); *Id.* (Van Toffler: "It takes 3 months and 58 meetings to get a 1million dollar acquisition done at our company. We're fast becoming those we scorned.").

But in October 2006, when rumors of Google's acquisition of YouTube surfaced, Viacom's desire to acquire an ownership interest in YouTube returned with vigor. Schapiro Opp. Ex. 190 ("Google and YouTube....shouldn't Viacom/MTVN get into this deal? Throw in our ENTIRE library."); Schapiro Reply Ex. 127 (Viacom's Cahan to several Google executives on October 6, 2006: "So the idea would be Viacom and Google buy YouTube"); Ex. 128 (Cahan to MTVN Chairman and MTVN President: "Is there any chance of getting us in the deal meaning a small investment from us...") And Viacom executives were again bitter that they were unable to acquire an interest. Schapiro Reply Ex. 129 ("Are you SURE there is no appetite for Viacom figuring out a play here? A small investment in the Google/YouTube deal?"); Ex. 130 (MTVN Chairman: "What a fucking mess. I pitched Philippe and Tom on getting us in this somehow, or looking at Facebook....nothing.").

1.21 During these negotiations, Viacom deliberately allowed its content to remain on YouTube, in part because it thought that "having the content there was valuable in terms of helping the rating of our shows." Defs. Opening Mem. at p. 12 (citing Schapiro Ex. 4 (132:19-133:24)).

Viacom's Response: Controverted. Not supported by admissible evidence in light of the witness's testimony that he was speculating. See Evid. Obj.

at 1. Further, misleading because the purported fact uses a speculative statement by one witness to distort the evidence regarding Viacom's forbearance of enforcement of its rights during the pendency of the parties' licensing negotiations. See Resp. to Defs. *SUF* ¶ 128.

YOUTUBE'S REPLY: See RVCS ¶ 128.

- 1.22 After the negotiations stalled, Viacom developed a plan to send YouTube a large DMCA takedown notice in the hopes of gaining leverage and “provide [Viacom] the economics” it had requested. Defs. Opening Mem. at p. 12 (citing Schapiro Ex. 10).**

Viacom's Response: *Controverted.* The cited document refers to the mass takedown Viacom issued to YouTube, which was implemented in an attempt to combat the massive infringement of Viacom's works on YouTube. Viacom opted not to remove all of the clips that it was able to locate on YouTube during the pendency of the negotiations between Viacom and YouTube because of the expectation that Viacom's infringement claims would be settled as part of an overall licensing deal. See Resp. to Defs. *SUF* ¶ 128.

YOUTUBE'S REPLY: See RVCS ¶ 128.

- 1.25 Despite Viacom's apparent expectations that YouTube's traffic would decrease and traffic to Viacom's own websites would soar after those videos were removed, neither prediction came true. Defs. Opening Mem. at p. 13 (citing Hurley Decl. ¶ 26; see also Schapiro Exs. 13 (234:17-288:14), 14, 15).**

Viacom's Response: *Controverted.* Viacom personnel did believe that once many videos infringing Viacom's copyrights were removed from YouTube, more videos would be viewed on Viacom's own sites. And that is precisely what took place. Indeed, video views did increase on a variety of Viacom online properties in the month following the February 2, 2007 takedown. See, e.g., *Kohlmann Ex. 62, VIA01108775.* Further controverted to the extent that Defendants have provided no evidence to suggest that Viacom believed that YouTube traffic would decrease following the February 2, 2007 takedown.

YOUTUBE'S REPLY: The evidence cited does not controvert YouTube's statement. **Kohlmann Ex. 62** compares videos streams on certain Viacom websites in March 2007 with streams in February 2007, March 2006 and the “previous 6 month average”; it does not demonstrate an increase in traffic subsequent to the February 2, 2007 mass takedown

when compared to traffic prior to February 2, 2007. Roughly a month after the mass takedown, Viacom's CEO and COO each made false claims that the traffic to Viacom's sites had increased in the wake of the takedowns. Schapiro Opening Ex. 13 (279:3-282:20) (President of Comedy Central admitting that Viacom's CEO and its COO made misrepresentations about traffic going up after the takedown). Referring to Viacom's CEO, Comedy Central President Michelle Ganeless wrote on March 7, 2007: "He is still out there touting that traffic increased to our sites after the takedown which our data contradicts....Traffic to our sites has been down over the last few weeks." Schapiro Opening Ex. 15. And Viacom's Executive Vice-President in charge of Viacom's online sites was even more blunt, admitting that the attempt by Viacom's senior-most executives to correlate an increase in traffic on Viacom sites to the YouTube takedown was "specious." Schapiro Reply Ex. 131; Ex. 132 (334:11-335:10).

1.29 [M]any of the clips in suit are under one minute long. Defs. Opening Mem. at p. 15 (citing Rubin Decl. ¶ 15).

Viacom's Response: *Controverted. Less than 14 percent of the clips in suit are under one minute long. See Wilkens Decl. ¶ 3.*

YOUTUBE'S REPLY: Viacom's response does not raise a genuine dispute with this statement and it is therefore not controverted. Viacom admits that that nearly 9,000 Clips in Suit are under one minute long, but takes semantic issue with the word "many." Each one of these thousands of clips is *just a fraction* of the entire film or and television show that comprises a Works in Suit that Viacom claims to own.

1.33 Early in its existence, YouTube created a first-of-its-kind automated tool that lets copyright holders click a button to send electronic DMCA notices directly to YouTube's agent. Defs. Opening Mem. at p. 25 (citing Levine Decl. ¶ 18).

Viacom's Response: *Controverted, but immaterial to any issue before the Court. Plaintiffs deny Defendants' characterization of YouTube's CVP tool as "automatic" insofar as it implies that Defendants lack control over the process. Further, this tool was not available until March 2006 and was not specifically offered to Viacom until February 5, 2007. See Levine Decl. ¶ 18; Hohengarten Ex. 93, GOO001-00751570, at GOO001-00751570. Further controverted to the extent the alleged fact rests on inadmissible testimony in Levine Decl. ¶ 18. See Evid. Obj. at 14.*

YOUTUBE’S REPLY: Viacom’s response does not raise a genuine dispute with this statement and it is therefore not controverted. Viacom falsely asserts that YouTube’s CVP tool “was not specifically offered to Viacom until February 5, 2007.” YouTube offered Viacom’s BET division the CVP tool nearly a year before that in April 2006, and BET accepted and created an account. Schapiro Reply Ex. 133. Soon thereafter, through its agent BayTSP, Viacom created multiple CVP accounts for many of its various entities:

Creation Date	Viacom Entity	Account Name
Apr. 17, 2006	BET	t1e1b
Jun. 21, 2006	Paramount	rapyab
Sep. 8, 2006	MTVN	v1t2m
Sep. 8, 2006	Viacom	mocalilv
Sep. 13, 2006	Atom Entertainment	molt1a
Oct. 9, 2006	Spike	eki1p1s
Oct. 9, 2006	Comedy Central	ydem1o1c
Oct. 9, 2006	Country Music Television	t1m1c

Rubin Reply Decl. ¶ 12 & Exs. 82, 83, 84, 85, 86, 87, 88; Schapiro Reply Ex. 134. Viacom’s other contentions about YouTube’s CVP tool are similarly inaccurate.

1.38 The facts concerning how such videos come to be stored on YouTube’s system, and what happens to them once they are there, are undisputed. Defs. Opening Mem. at p. 27 (citing Solomon Decl. ¶¶ 2-10). FN2 YouTube operates a website located on the Internet at <http://www.youtube.com>, where users around the world can upload videos free of charge to computer servers owned or leased by YouTube. YouTube’s systems are capable of simultaneously playing millions of these authorized, user uploaded videos at the same time to YouTube users around the world. The process of uploading a video to YouTube is initiated by YouTube users. As has always been the case since I began working on the YouTube service, the series of events that is triggered by a user’s decision to upload a video to YouTube and ends with the user’s video being made playable on YouTube is fully automated and does not involve the intervention or active involvement of YouTube personnel. Solomon Decl. ¶ 2.

FN2: Defendants’ Memorandum of Law asserts: “The facts concerning how such videos come to be stored on YouTube’s system, and what happens to them once they are there, are undisputed.” The allegedly undisputed facts YouTube references

are stated only in Mr. Solomon's declaration, not in Defendants' Memorandum of Law or YouTube's Rule 56.1 Statement. For the Court's convenience, Viacom responds separately to Paragraph 2 of Mr. Solomon's declaration in this paragraph, and to Paragraphs 3-10 in ¶¶ 1.39-1.46, *infra*.

Viacom's Response: *Controverted*. See *Resp. to Defs. SUF* ¶¶ 16, 18, 19, and 20.

YOUTUBE'S REPLY: Viacom has admitted to the proposed facts set forth in YouTube's 56.1 ¶¶ 16, 18, 19, and 20 by failing to identify a material dispute or citing to specific evidence that controverts them. Instead, Viacom included irrelevant assertions about collateral matters and argument about its characterization of the technical operation of the YouTube system. Viacom does not dispute that: (a) YouTube users choose which videos to upload to YouTube (VCS ¶¶ 16, 18), (b) YouTube users use the YouTube system's upload functionality to upload their videos (VCS ¶ 17), (c) it is the users' decision to upload a video that triggers the YouTube system to process and converted the user's video file into other formats that are supported by a variety of viewing devices (VCS ¶¶ 19, 20), or (d) the technical processes involved occur happens automatically without the intervention or active involvement of YouTube personnel (VCS ¶¶ 19, 20.).

1.49 YouTube employees have never even seen the overwhelming majority of the more than 500 million videos that have been posted to the service. Defs. Opening Mem. at p. 34 (citing Levine Decl. ¶ 28; Schaffer Decl. ¶ 11; Hurley Decl. ¶ 18).

Viacom's Response: *Controverted, as Levine Decl. ¶ 28 contains inadmissible generalized and conclusory statements and Hurley Decl. ¶ 18 contains inadmissible lay opinion testimony. See Evid. Obj. at 3, 15. However, the alleged fact is immaterial to any issues before the Court. Whether Defendants viewed most or all videos displayed on the YouTube site is irrelevant to Defendants' culpable intent under Grokster and the DMCA. See, e.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021-22 (9th Cir. 2001). The alleged fact is also misleading. It is undisputed that, in YouTube's early days, YouTube's founders were among the top six most active viewers of videos on YouTube, having watched nearly 8,000 videos by August 2005. See Viacom SUF ¶ 51. Moreover, only two days before opposition papers were to be filed, Defendants produced non-anonymized YouTube viewing records for certain YouTube employee accounts.*

Although Defendants notably refused to produce any viewing records for YouTube cofounder Jawed Karim beyond October 2005, the newly produced data could show that YouTube's founders and other employees did know of and watch many specific infringing videos. The Viacom Plaintiffs have not yet been able to analyze this data. See Wilkens Decl. ¶ 20.

YOUTUBE'S REPLY: Viacom's response does not controvert the statement. The watch data (which reflects only playback initiations, not full watches, and does not distinguish between personal and work-related viewing) only confirms YouTube's lack of knowledge. [REDACTED]

[REDACTED]

[REDACTED]

Viacom's claim that the watch data could show watches of "infringing" videos is also belied by the deposition testimony of its witnesses: when asked whether videos on YouTube were infringing, they responded uniformly that they simply did not know and could not tell. Schapiro Opp. Ex. 257 (93:20-94:10) (Viacom employee claiming he "could not know" whether videos uploaded by user humangiant were authorized to appear on YouTube); Ex. 258 (36:10-36:18) (Viacom employee claiming she could

not tell whether the content she watched on YouTube was authorized); Schapiro Reply Ex. 138 (86:22-93:7, 93:16-94:11, 99:21-100:12) (Vice President of consumer marketing at MTV did not know which of a long list of MTV shows had been authorized to appear on YouTube, and could not think of any one person who would know, nor did he know about the authorization status of clips uploaded in marketing campaigns in which he was not involved); Schapiro Opp. Ex. 261 (135:6-12) (Viacom executive unable to determine the authorization of content on YouTube); Ex. 262 (84:15-23) (Viacom employee, and content reviewer for AddictingClips, admitting she did not have the information necessary to determine if videos present on AddictingClips were authorized); Schapiro Reply Ex. 139 (238:16-242:14, 243:23-248:25) (MTV marketer admitting that, without speaking to other employees who had been involved in the specific marketing campaign, she could only “guess” as to whether a particular video clip was “leaked” to YouTube at MTV’s direction; and confirming that a long list of MTV content was either authorized to be on YouTube or she was unaware of its authorization status); Schapiro Reply Ex. 132 (95:22-96:3, 259:11-262:2, 265:20-267:15, 303:9-20); Ex. 140 (Viacom executive did not know whether videos he viewed and favorited on YouTube were authorized); Ex. 105 (167:10-169:5) (MTV Counsel unable to determine whether a list of YouTube accounts that were purportedly authorized to upload Viacom content was complete); Ex. 17 (285:7-289:15, 391:14-392:22, 393:7-397:10) (Viacom Vice President of Information and Knowledge Management admitting that merely recognizing Viacom content on a website is not enough to justify sending a takedown notice, and admitting he did not know the authorization status of, nor could he recognize all Paramount, MTVN, BET and Country Music Television content); Ex. 141 (149:9-153:16) (Paramount employee, despite being faced an internal Viacom document referencing the presence of trailer on YouTube in connection with a marketing campaign, could not determine whether that trailer was uploaded to YouTube with Paramount’s permission); Ex. 57; Ex. 92 (54:20-57:9) (Paramount marketer could not be certain whether a trailer on YouTube, purportedly for the Paramount movie “*The Last Kiss*,” was authorized to be on YouTube); Ex. 143 (45:2-47:9) (Viacom employee could not determine whether videos created pursuant to Stephen Colbert’s “Greenscreen Challenge” were authorized to appear on YouTube); Ex. 144 (285:5-286:18, 288:1-290:3) (MTV Chairman and CEO, with more than two decades of experience at MTV, could not determine if certain clips she viewed on YouTube were authorized to be there: “Q: Ms. McGrath, could you, given your vast experience in the television industry, identify which clips are authorized and which clips are not by looking at them? A: No.”); Ex. 145 (308:10-309:22) (President of Entertainment Group at MTV Networks describing

how he had “no idea” whether or not a YouTube clip allegedly containing Viacom content that he linked to from his blog was authorized).

Others proposed complicated analyses that one might engage in to attempt to determine whether content was authorized, most concluding that knowledge of who uploaded the clip and who owns the content is necessary, but not apparent from information present on the YouTube website. Schapiro Reply Ex. 138 (34:23-35:4) (Viacom employee claiming the “best way” to find out all the clips MTV authorized to be on YouTube for promotional purposes would be to “ask all of the individual agencies that [MTV] used”); Ex. 69 (100:17-102:14, 126:11-127:10, 129:3-136:9) (Viacom General Counsel testifying that identifying Viacom content can be difficult, but might be accomplished by looking for a logo or if the reviewer “watched Cross Roads on television the night before, they might well be able to recognize it, and if they've never heard of the show, they might not;” and having difficulty determining whether certain video clips were authorized Viacom content); Ex. 145 (19:15-20:17, 301:4-301:24) (Viacom executive claiming he could only determine if content was authorized if he put the video on YouTube personally or knew his company was involved with it: “I wouldn’t know unless it was my video”); Ex. 67 (87:8-25) (Viacom employee stating that a call to action associated with a video does not necessarily indicate the clip is authorized); Ex. 77 (247:24-249:8, 269:24-271:23) (Viacom executive claiming she would need the assistance of Viacom’s publicity department in determining whether certain clips were authorized and stating she could not determine whether a clip with a CNBC logo was authorized to appear on YouTube); Ex. 146 (26:15-28:3) (Viacom Chairman could not identify whether YouTube search results for “SpongeBob” contained any unauthorized content, and suggesting “someone more familiar with the worldwide distribution of SpongeBob” might be able to answer the question); Ex. 1 (314:3-322:25) (Viacom employee unable to determine the authorization of certain clips, but asserting that the presence of a call to action associated with a YouTube clip, or a high view count for that clip, may indicate the clip is authorized; a username alone is not dispositive); Ex. 17 (285:7-289:15, 506:25-510:1, 541:19-542:23) (Viacom Vice President of Information and Knowledge Management stating it took a collaborative investigation by the “communal Viacom legal community” to determine the authorization of certain videos posted by user bullrun, and concluding that he would need to know more than the metadata associated with a video clip to determine if it was authorized, including “the creator of the asset I think it belongs to and person who uploaded it sitting next to me, too”); Ex. 92 (45:24-46:17) (Paramount marketer admitting that she could not confirm that a clip was authorized without reference to Paramount’s “array of approval processes,” both “internal and external”); Ex. 143 (159:7-21,

163:24-165:18) (Viacom employee admitting that he could not know whether Viacom content he viewed on YouTube was authorized without a determination from the legal department); Schapiro Opp. Ex. 269 (147:23-151:2) (BayTSP representative, a Viacom agent, testifying that the username and other information associated with a clip on YouTube is not sufficient to determine whether the clip is authorized: “[t]here is no connection between you [sic] see on YouTube, the person who posted it, and the person who produced it. There is no identifiable link.”).

1.56 Viacom sometimes places material on YouTube openly. Defs. Opening Mem. at p. 40 & n.14 (citing Schapiro Exs. 29 (38:10-21), 30, 31 (26:20-27:10), 24 (22:11-22:20), 32 (151:17-152:20)).

Viacom’s Response: *Uncontroverted that Viacom places material on YouTube openly. Controverted to the extent that “sometimes” is meant to suggest that Viacom uploads clips to YouTube in a manner that conceals their origin from YouTube. See Resp. to Defs. SUF ¶¶ 123-125.*

YOUTUBE’S REPLY: The evidence conclusively demonstrates that Viacom has repeatedly uploaded clips in a manner meant to conceal their origin. *See supra* RVCS ¶ 125.

1.57 Viacom and its agents use accounts that lack any discernable connection to Viacom (such as “MysticalGirl8,” “Demansr,” “tesderiw,” “GossipGirl40,” “Snackboard,” and “Keithhn”). Defs. Opening Mem. at p. 41 (citing Ostrow Decl. ¶ 6; Chan Decl. ¶ 4; Rubin Decl. ¶ 5(a)-(f)).

Viacom’s Response: *Controverted, to the extent it implies that YouTube does not know that such accounts are being used to upload authorized Viacom content. For example, it is undisputed that Viacom informed YouTube the following day that it had uploaded an authorized clip using the account MysticalGirl8. See Kohlmann Ex. 84 (Wahtera Dep.) at 32:8-11. Further controverted to the extent that the asserted fact suggests that numerous clips of Viacom content were uploaded to these accounts. In total, 25 clips were uploaded to the six accounts identified in the asserted fact. See Wilkens Decl. ¶ 19(b). The asserted fact is immaterial to any issues before the Court. Further controverted as Ostrow Decl. ¶ 6 is inadmissible because it contains improper lay opinion testimony and is not based on personal knowledge, and as Chan Decl. ¶ 4 is inadmissible because it is not based on personal knowledge and because there is insufficient evidence to demonstrate its relevance. See Evid. Obj. at 2, 5-6.*

YOUTUBE’S REPLY: Viacom does not dispute that the listed account names lack any discernible connection to Viacom. Rather, Viacom claims,

without support, that anyone and everyone at YouTube must have been aware that material uploaded to those accounts was authorized by Viacom. That is false. Viacom went to great lengths to conceal the origin of such accounts. *See supra* RVCS ¶ 125. Moreover, Viacom ignores that the six accounts cited in this statement were simply *examples* of the numerous accounts that Viacom used for its stealth marketing. There are many more examples that show the extent of marketing by Viacom, both overt and covert. *See* Rubin Reply Decl. ¶¶ 2-6 & Ex. 1, 14, 38, 39. And the Wilkens Declaration does not support the statement that “in total, only 25 clips” were uploaded to those six accounts; instead, Mr. Wilkens declares that there were 140 clips in total uploaded to these accounts. Wilkens Decl. ¶ 19. Mr. Wilkens’s speculation that only 5 of the videos in the “keithhn” account related to Viacom material is without foundation.

1.58 Viacom has deliberately used email addresses that “can’t be traced to [Viacom]” when registering for YouTube accounts. Defs. Opening Mem. at p. 41-42 (citing Schapiro Ex. 46, Rubin Exs. 22 & 26).

Viacom’s Response: *Controverted to the extent that the asserted fact implies that it was Viacom’s general practice to upload clips using such accounts. The cited evidence shows that this practice occurred on one occasion and involved only one clip. Further controverted, to the extent that the asserted fact implies that Viacom’s intent was to conceal the source of the uploads from YouTube, or that YouTube was unaware that the accounts were affiliated with Viacom. In fact, YouTube was well aware of the accounts and the clips uploaded to them. See Resp. to Defs. SUF ¶ 125; see also supra at ¶ 1.57.*

YOUTUBE’S REPLY: Viacom does not genuinely dispute this fact and provides no evidence that controverts it. The evidence demonstrates that when creating YouTube accounts Viacom used email addresses lacking any connection to Viacom on multiple occasions. *See supra* RVCS ¶ 125.

1.60 Viacom’s employees have made special trips away from the company’s premises (to places like Kinko’s) to upload videos to YouTube from computers not traceable to Viacom. Defs. Opening Mem. at p. 42 (citing Schapiro Ex. 47 (158:20-22), Schapiro Exs. 48, 49).

Viacom’s Response: *Controverted as well as immaterial. The cited evidence shows only that one Paramount employee, on one occasion, uploaded a video to YouTube from a Kinko’s copy shop. It is undisputed that the Paramount employee did not attempt to hide the origin of the clip*

from YouTube, and that within a few days of the upload, Paramount informed YouTube that the upload was authorized. See Kohlmann Ex. 84 (Wahtera Dep.) at 32:8-11; see also *supra* at ¶ 1.57.

YOUTUBE’S REPLY: Viacom does not dispute that Paramount marketer Megan Wahtera deliberately uploaded a clip from *The Heartbreak Kid* (a Work in Suit) to YouTube from Kinko’s, as opposed to doing so from Viacom, using an anonymous YouTube account name (“mysticalgirl8”) created using a fake email account (“mysticalgirl8@yahoo.com”), so that the clip could not be traced back to Viacom. See RVCS ¶ 125; Rubin Opening Decl. ¶ 5(a)-(f) & Exs. 87, 110, 111; Schapiro Opp. Exs. 48, 49. Whether or not Viacom’s intent was to hide the origins of this video from YouTube, from YouTube’s users or from someone else, the effect was the same: Viacom uploaded a clip that is indistinguishable from countless Clips in Suit from an anonymous YouTube account. See, e.g., Rubin Reply Decl. ¶¶ 8, 10 & Exs. 79, 80, 81.

The evidence shows that Viacom contacted YouTube days after Ms. Wahtera created the account and uploaded the clip from Kinko’s, and only because the adult-nature of the clip had resulted in it being placed behind an “age gate,” thus disrupting Viacom’s promotional plan for the clip. Kohlmann Ex. 60; Kohlmann Ex. 63; Schapiro Reply Ex. 92 (32:8-16; 184:16-190:25). Even then, the evidence shows only that Viacom told *one* YouTube employee that that the video was “*not copyrighted*,” not that the video was “authorized” as Viacom asserts. Kohlmann Ex. 63.

Nor does the evidence support Viacom’s claim about the limited nature of this practice. Given the limited extent of the discovery YouTube was able to take of Viacom’s marketing activities, and Viacom’s facially incomplete discovery response to an interrogatory designed to identify the clips it uploaded to YouTube, Viacom is not in a position to controvert this practice and the evidence it cites does not support its contention. Rubin Reply Decl. ¶¶ 20-26 & Exs. 161, 162, 163, 178, 179. Viacom’s document destruction with respect to its marketing documents also prevented discovery of the full extent of Viacom’s stealth marketing practices. For example, Kristina Tipton, a Paramount marketer who was heavily involved in YouTube uploading and who left Viacom in September 2007 (six months after this lawsuit was filed), was never told to preserve documents. Schapiro Opp. Ex. 378 (184:20-24). She testified that she sent over 20,000 emails while employed at Paramount—yet Viacom produced a total of 6 custodial documents from Ms. Tipton. *Id.* (181:22-18210); Schapiro Opp. Ex. 379; see also Rubin Reply Decl. ¶ 30 & Ex. 72. Todd Apmann, an MTVN marketing employee, likewise never was told to preserve documents, and he deliberately deleted all of his emails when he

left the company in February 2007 – a time when Viacom anticipated filing this lawsuit, which occurred only a month later. Schapiro Opp. Ex. 305 (176:17-20) (Viacom was preparing to file this lawsuit as of November 2006); Schapiro Opp. Ex. 257 (134:3-136:13).

Finally, Ms. Wahtera testified that she only knew of her own actions and could not say one way or the other whether other Viacom employees had gone to similar lengths to hide their connection to Viacom when uploading content to YouTube. Schapiro Reply Ex. 92 (40:13-41:11; 161:15-25).

1.62 Viacom has further obscured the line between authorized and unauthorized clips by broadly releasing various videos featuring its content. These videos are designed to spread virally over the Internet to generate publicity for Viacom’s television shows and movies. When users post these videos, as Viacom hopes that they will, on sites like YouTube, Viacom acknowledges that their presence is authorized. Defs. Opening Mem. at p. 42 (citing Schapiro Ex. 27 (205:17-206:2) & (206:4-20)) (internal citation omitted).

Viacom’s Response: *Controverted as misleading, and in any event immaterial to any issues before the Court. The “broadly releas[ed]” videos Defendants reference are trailers and other carefully selected marketing clips included in the Paramount “Electronic Press Kits” that are prepared for Paramount motion pictures. Kohlmann Ex. 83 (Tipton Dep.) at 16:5-16; see also id. at 28:5-7 (testifying that any distributed clips were approved “through the publicity team, through filmmakers, through the creative team, and through the interactive [team]”); Kohlmann Ex. 84 (Wahtera Dep.) at 101:9-10 (describing “EPK materials” as akin to “trailers”). There is no evidence to suggest that Paramount authorized the online distribution of any clips except these specifically chosen trailers and marketing clips.*

YOUTUBE’S REPLY: Viacom does not raise a genuine dispute with this statement and it is therefore not controverted. Viacom admits that it broadly “authorized the online distribution [of] specifically chosen trailers and marketing clips” of its content. The evidence reflects that whether or not the “marketing clips” are specifically chosen by Viacom, even Viacom finds them indistinguishable from clips it otherwise considers to be infringing. *See* Schapiro Opening Exs. 44, 135, 141, 143, 145, 146, 150; Rubin Opening Exs. 43-45, 49-51, 53, 56-59, 64; Rubin Reply Decl. ¶¶ 2, 8, 10 & Exs. 1, 79, 80, 81.

Moreover, the process Viacom describes is does not occur in the controlled environment that it suggests. Rather, it seizes upon promotion opportunities as they present themselves, even using content uploaded by ordinary users. Paramount has instructed its agent BayTSP to “turn a blind eye” to a video that compiled Paramount “TV spots and trailers” because “its actually good,” and explained that other seemingly unauthorized clips were simply re-postings from Viacom’s Electronic Press Kit for the movie Transformers. Schapiro Reply Ex. 23; *see also* Rubin Opening Ex. 28 (“we will assume audiences will tape the trailer *on their own* and post it on YouTube – we will NOT issue take-down notices”) (emphasis added). BayTSP was also instructed to refrain from taking down “anything reposted by another account that matches something” posted by an approved Paramount account. Schapiro Opening Ex. 63. Viacom’s claims about the limits of the evidence should also be rejected. *See supra* RVSCS ¶ 160.

1.63 Viacom itself was confused when selecting its clips in suit, many of which turned out to be identical to Viacom’s authorized promotional videos. Defs. Opening Mem. at p. 43 (citing Rubin Decl. ¶ 17).

Viacom’s Response: *The evidence submitted by Defendants supports only the claim that 100 clips in suit closely resemble trailers and other marketing videos that Viacom authorized to appear on various websites as part of its marketing strategy. The fact that Viacom authorized a trailer to appear on one website does not mean that Viacom authorized the trailer to appear on YouTube.*

Further controverted because is Rubin Decl. ¶ 17 inadmissible as irrelevant. See Evid. Obj. at 7.

YOUTUBE’S REPLY: Viacom’s admission that 100 Clips in Suit “closely resemble trailers and other marketing videos that Viacom authorized to appear on various websites” is not correct. A review of the clips shows that the “marketing videos” and the Clips in Suit are actually indistinguishable from one another. *See* Rubin Opening Decl. Exs. 131-310. And considering that Viacom has asserted that “every one of [its] clips in suit was a straight steal” of its content, that means that Viacom’s promotional content is literally no different from some of the content over which it suing YouTube. Viacom Opp. 62. Viacom’s claim that Viacom’s authorization for a clip to appear on one website does not mean that Viacom authorized the trailer to appear on YouTube is not consistent with its own admissions: as Viacom’s in-house lawyer stated, Viacom “does feed clips of our programs on to the internet as a marketing strategy, so it

is quite probable that those clips will appear in the P2P realm. Since these are essentially authorized distributions, we would have to develop a mechanism to filter them out of our targets.” Schapiro Reply Ex. 135. Viacom considered the clips it “feeds on to the internet” to be “authorized distributions” wherever they are found, even on P2P networks. See Schapiro Reply Ex. 147 (Viacom marketer reporting that “Viral clips for *The Andy Milonakis Show* has ‘spread’ online to sites including . . . YouTube”).

1.64 YouTube knew that the promotional activities of which it was aware were just the tip of the iceberg, and that Viacom and a wide variety of major media companies were extensively using the service for promotional purposes without telling YouTube (or anyone else) what they were doing. Defs. Opening Mem. at p. 43 (citing Schaffer Decl. ¶ 6; Maxcy Decl. ¶¶ 3-7; Schapiro Ex. 53; Botha Decl. ¶¶ 11-12).

Viacom’s Response: *Controverted. With respect to Viacom’s marketing practices, the evidence shows that YouTube was aware of the overwhelming majority of Viacom clips authorized to appear on YouTube. See Wilkens Decl. ¶ 19; Resp. to Defs. SUF ¶¶ 123-125. With respect both to Viacom’s practices and those of other “major media companies,” this alleged fact is unsupported by admissible evidence. Despite the voluminous discovery in this case from Viacom and third parties, and despite their own analysis of the data that they maintain for every YouTube account and every YouTube video, Defendants have cited no evidence to support their “tip of the iceberg” claim, or to support the claim that they have been unaware of the authorized uploading activities of Viacom and other major media companies. See Resp. to Defs. SUF ¶¶ 123-125. Further controverted because some of the cited evidence is inadmissible. See Evid. Obj. at 1, 3, 9-12.*

YOUTUBE’S REPLY: Viacom’s response does not raise a genuine issue as to this statement. Viacom itself could not keep track of its extensive stealth marketing activity, mistakenly issuing numerous takedown notices for videos it had authorized, and even *suing* YouTube on more than a hundred authorized videos. See RVCS ¶¶ 125-127. Viacom also ignores the stealth clips that Viacom never brought to YouTube’s attention even in a collateral, non-copyright-related context (e.g., GossipGirl40, Demansr). *Id.* And Viacom ignores that the parties agreed to narrow limits on discovery in this case, such that YouTube had no ability to obtain documents from, or depose, the vast majority of Viacom’s marketing personnel. Rubin Reply Decl. ¶ 16-26. And Viacom disregarded its document preservation obligations in this case, failing to

retain the electronic documents of other marketing personnel from whom YouTube did seek discovery. *See supra* ¶ 1.60. The full scope of Viacom’s massive uploads to YouTube will likely never be known; what YouTube has found so far through litigation discovery is certainly the tip of the iceberg.

1.65 YouTube routinely received takedown requests that were subsequently withdrawn after the media companies who sent them realized that their notices had been targeted to content that they themselves had uploaded or authorized. Defs. Opening Mem. at p. 44 (citing Rubin Decl. ¶ 4 & Exs. 69-83).

Viacom’s Response: *Controverted as to “routinely.” Defendants claim that YouTube has removed 4.7 million videos pursuant to takedown requests, see Levine Decl. ¶ 26, and the evidence Defendants cite shows fewer than a hundred mistaken takedowns of authorized content. Even if the number of mistakes was 50 times what Defendants have demonstrated, that would still represent only one tenth of one percent of the total takedowns of infringing material content owners have submitted to YouTube. Given the massive scale of infringement on the YouTube site and the problem content owners face in dealing with a site that refuses to take down infringing content unless it is identified specifically by URL, some mistakes are all but inevitable. Also controverted because Rubin Decl. ¶ 4 and Exs. 69-83 are inadmissible as hearsay. See Evid. Obj. at 7.*

YOUTUBE’S REPLY: Viacom’s response does not raise a genuine dispute with this statement and it is therefore not controverted. Viacom instead takes semantic issue with the word “routinely.” In so doing, Viacom suggests that the evidence YouTube cited was comprehensive when YouTube expressly stated that it was merely a “selection of documents” showing instances in which companies (including Viacom) sent YouTube takedown notices for videos they had uploaded or authorized to appear on the YouTube website. *See* Rubin Opening Decl. ¶¶ 3-4 & Exs. 42-83. Viacom ignores testimony from YouTube employees that shows the regularity of these occurrences. *See, e.g.,* Schaffer Opening Decl. ¶¶ 7-9, 15-16 (“I regularly encountered situations where marketing departments or marketing agencies would upload content to YouTube on behalf of content owners and then representatives from the legal departments of those content owners mistakenly would request the removal of that very content.”).

Contrary to Viacom’s assertion, the mistaken takedowns that Viacom characterizes as “all but inevitable” arise not due to any action or inaction on YouTube’s part, but rather by virtue of the confusion generated by the

promotional and marketing activities engaged in by companies like Viacom:

- Viacom marketer Fanscape to YouTube: “This is the second time in as many months that our channels have been disabled. I do understand that YouTube is not to blame for these disruptions and instead it [sic] more systemic of what occurs in big companies like our clients where one department isn’t aware of what another department is doing” Rubin Opening Decl. Ex. 64.
- CBS to YouTube in email entitled “URGENT Request to Reinstate User due to Mistake in Notice of Infringement”: “Our Notices of Infringement were prepared without the knowledge that these videos were uploaded by Electric Artists, an agency acting on behalf of CBS, which has user account TXCANY.” *Id.* Ex. 70.
- Warner Brothers to YouTube: “Can you please reinstate the YouTube account warnerbrosonline? I believe we sent a notice to YouTube regarding warnerbrosonline and we would like to retract the notice.” *Id.* Ex. 74.
- Roadrunner Records to YouTube in email entitled “Accidental Takedown Notice”: “We accidentally sent notice for a video one of our bands has on their own account”, and asking if YouTube could “please reinstate it?” *Id.* Ex. 75.
- Concord Music Group to YouTube in email entitled “Would like reinstatement of an account ‘GregBass’”: “[W]e directed our Independent Online Marketing Company Special Ops Media Group [sic] post the video under their account ‘GregBass.’ This morning I have learned that their account was deactivated due to their posting this video. PLEASE reinstate their account ‘GregBass.’” *Id.* Ex. 77.
- JibJab Media to YouTube: “I have a bit of an embarrassing situation that I hope you can help us resolve. Due to lack of internal communication, our very own Operations Department filed copyright complaints against the video content in our very own YouTube channel (<http://youtube.com/jibjab>).” *Id.* Ex. 81.

- SONY BMG to YouTube: “We did it yet again! We issued a take-down on a video that was living in one of our channels.” *Id.* Ex. 82.

1.66 [T]he former President of MTV candidly explained: “While we were issuing takedown notices against some of the content, there was other content which we were allowing to continue to be on YouTube.” Defs. Opening Mem. at p. 45 (citing Schapiro Ex. 4 (194:8-11)).

Viacom’s Response: Controverted. Viacom temporarily abstained from sending takedown notices for some infringing content while negotiating with YouTube regarding a potential licensing deal and compensation for past copyright infringement, but sent those notices when negotiations broke down. Viacom never authorized YouTube to display that infringing content. See Resp. to Defs. SUF ¶ 128.

YOUTUBE’S REPLY: *See supra* RVCS ¶¶ 128, 135.

1.67 Viacom’s executives felt “very strongly that [they didn’t] want to stop the colbert and daily clips” on YouTube. Defs. Opening Mem. at p. 46 (citing Schapiro Ex. 58 (VIA01676948)).

Viacom’s Response: Uncontroverted that the one cited document, an email exchange between two Comedy Central executives, includes the quoted language. Controverted insofar as the alleged fact misleadingly suggests this was the view of Viacom as a whole. It is undisputed that Viacom did not authorize YouTube to display user uploaded clips from The Daily Show and The Colbert Report. See Resp. to Defs. SUF ¶ 128.

YOUTUBE’S REPLY: *See supra* RVCS ¶¶ 128, 135. Viacom’s affirmative decision to leave clips of *The Daily Show* and *The Colbert Report* on YouTube for promotional purposes and for other reasons demonstrates Viacom’s authorization.

1.68 The former President of MTV testified that Viacom did not want to take down “clips from Jon Stewart and Stephen Colbert” because “we were concerned that Jon Stewart and Stephen Colbert believed that their presence on YouTube was important for their ratings as well as for their relationship with their audience.” Defs. Opening Mem. at p. 46 (citing Schapiro Ex. 4 (199:22-201:2)).

Viacom’s Response: Controverted. First, the cited evidence is inadmissible as it is not based on personal knowledge. See Evid. Obj. at 1. Second, the

purported fact is misleading insofar as Viacom did send takedown notices for content from The Daily Show and The Colbert Report during the fall of 2006, the period at issue in Mr. Wolf's testimony, and temporarily abstained from sending takedown notices for other infringing content while negotiating with Defendants regarding a licensing deal and compensation for past copyright infringement. See Resp. to Defs. SUF ¶ 128.

YOUTUBE'S REPLY: *See supra* RVCS ¶¶ 128, 135.

- 1.69** Accordingly, through at least October 2006, Viacom had a specific internal policy of declining to issue takedown notices for clips of [The Daily Show and The Colbert Report] that were less than five minutes long. Defs. Opening Mem. at p. 46 (citing Schapiro Exs. 59, 60).

Viacom's Response: *Controverted to the extent that the asserted fact is intended to imply that during the pendency of the parties licensing negotiations in October 2006, Viacom authorized infringing content to appear on YouTube. See Resp. to Defs. SUF ¶¶ 128, 129-133. Immaterial as to any issues before the Court.*

YOUTUBE'S REPLY: *See supra* RVCS ¶¶ 128-135.

- 1.70** Viacom later adjusted that rule and confidentially instructed its agent BayTSP to leave up all clips of these shows shorter than three minutes. Defs. Opening Mem. at p. 46 (citing Schapiro Exs. 59, 60).

Viacom's Response: *Controverted and immaterial to any issue before the Court. See Resp. to Defs. SUF ¶ 129.*

YOUTUBE'S REPLY: *See supra* RVCS ¶¶ 128-135.

- 1.77** A number of the plaintiffs have signed up for YouTube's automated takedown tool and have used it for years to secure the removal of videos containing their content. Defs. Opening Mem. at p. 56 n.25 (citing Schapiro Exs. 17 (205:25-210:23), 105, 106, 107 (94:13-95:11), 108 (80:22-83:16, 84:8-16, 109).

Viacom's Response: *Controverted to the extent that the asserted fact implies that the CVP tool assists copyright owners in locating infringing clips on YouTube, or that the CVP tool is an adequate means to prevent copyright infringement. See Resp. to Defs. SUF ¶ 92. Indeed, when YouTube offered CVP to Viacom in February 2007, YouTube at the same*

time refused to use digital fingerprinting technology to prevent infringement of Viacom's works absent a licensing deal. See, e.g., Viacom SUF ¶¶ 211, 214-217.

YOUTUBE'S REPLY: Viacom's response does not raise a genuine dispute with this statement and it is therefore not controverted. Viacom's contention that YouTube conditioned access to its digital fingerprinting technology on a licensing deal is not supported by the evidence. See CVSUF ¶¶ 211, 214-217. And Viacom's claim that YouTube did not offer Viacom the CVP tool until February 2007 is simply false. See RVSCS ¶ 1.33 (demonstrating that YouTube offered its CVP tool to Viacom in April 2006 and that Viacom began to widely adopt the tool beginning in June 2006).

1.95 YouTube was in no way intended or designed to lure users of any "pirate" service or to encourage any of its own users to infringe. Defs. Opening Mem. at p. 85 (citing Hurley Decl. ¶¶ 11, 16-22, 24-25).

Viacom's Response: Controverted. Defendants in their earliest communications showed a desire that their site be as big, in terms of usage, as some of the most popular infringing services—"napster," "kazaa," and "bittorrent"—and implemented that plan by turning a blind eye to rampant infringement and removing infringing videos only after receiving DMCA notices from content owners. See Viacom SUF ¶¶ 29-132. That Defendants intended to build their service based on infringement, but may not have intended to lure users of a particular infringing service, is immaterial.

YOUTUBE'S REPLY: Viacom does not genuinely dispute, and therefore admits, the fact that "YouTube was in no way intended or designed to lure users of any 'pirate' service or to encourage any of its own users to infringe." And Viacom's admission is clear from its revised characterization of Hohengarten Exhibit 5. In its opening brief, Viacom cited that exhibit for the proposition that YouTube was consciously trying "to attract users by emulating notorious pirate services like 'napster,' 'kazaa,' and 'bittorrent.'" Viacom Br. 5. The exhibit says nothing of the kind. Jawed Karim actually wrote that "I want an innovation that, at least in the number of users and popularity, would firmly place us among a list like this: ebay paypal bittorrent napster friendster etrade yahoo google winamp kazaa winzip icq jasc paintshop pro match.com [and] wikipedia." Hohengarten Ex. 5. Viacom now abandons its "pirate emulation" theory and states that YouTube did not "intend[] to lure users of a particular infringing service."

Separate from the undisputed fact at issue, Viacom makes argumentative statements alleging that YouTube “turn[ed] a blind eye to rampant infringement and remov[ed] infringing videos only after receiving DMCA notices from content owners.” That is false. In the early days of its operations, YouTube manually reviewed uploads and removed ones that looked suspect on copyright grounds. Hurley Opening Decl. ¶ 17. After installing a DMCA notice-and-takedown regime in the fall of 2005, YouTube removed *millions* of videos for copyright reasons that were never the subject of DMCA takedown notices. See Schapiro Opp. Ex. 90 (Defs.’ Am. Resp. to First Set of Interrog.); see also *id.* Ex. 93 (228:6-232:3). Viacom even sent takedown notices for videos that YouTube had already unilaterally removed on copyright grounds. See RVCS ¶ 58. In addition, over 1,000 content owners worldwide, including Viacom, use YouTube’s Content ID technology to manage their content on YouTube. King Opening Decl. ¶ 21. Those content owners may automatically “block” any of their content from appearing on YouTube if they do not want it there. *Id.* ¶ 24.

1.105 [P]laintiffs’ own analyses of YouTube suggest that it consists overwhelmingly of user-generated material and videos appearing pursuant to YouTube’s license agreements with its array of content partners. Defs. Opening Mem. at p. 90 n.42 (citing Schapiro Exs. 167 (VIA00316621), 168 (VIA00857223), 180 (¶ 16)).

Viacom’s Response: *Controverted, but immaterial. It is undisputed that Defendants’ own analyses of the volume of infringing content on YouTube put the figure between 54% and 80%. See Viacom SUF ¶¶ 55, 95, 104, 153, 170, 171, 173, 174, 176, 181. The documents cited by Defendants do not create a material dispute on this point. Schapiro Ex. 167 was a presentation prepared in August 2006, stating nearly all of YouTube’s “top 100 viewed clips of all time” were user-generated. Id. at VIA00316621. Because YouTube screened its “most viewed” page to remove infringing clips, see Hohengarten Ex. 128, GOO001-01535521, Hohengarten Ex. 198, GOO001-01931799, at 5 & at GOO001-01931806, this quote does not in any way quantify the volume of infringement on YouTube. Furthermore, Schapiro Ex. 168 says nothing about the quantity of infringement or non-infringement on YouTube. Schapiro Ex. 180 is Robert Tur’s complaint against YouTube; the cited paragraph says that “substantial use of YouTube’s website was and is made by users uploading their own homemade videos,” but it also says that “consumers viewed, millions of times, copyrighted material from major television networks, e.g., NBC, Fox, and cable networks.”*

YOUTUBE’S REPLY: Viacom does not genuinely dispute that “plaintiffs’ own analyses of YouTube suggest that it consists overwhelmingly of user-generated material and videos appearing pursuant to YouTube’s license agreements with its array of content partners.” Schapiro Opening Ex. 167 is a Viacom presentation stating that “[o]f YouTube’s Top 100 viewed clips of all time, nearly ALL are user-generated.” *Id.* (VIA00316621). Viacom claims that presentation “does not in any way quantify the volume of infringement on YouTube” because “YouTube screened its ‘most viewed’ page to remove infringing clips.” Even if it were true, that fact does not help Viacom. If YouTube were removing potentially unauthorized videos from its “most watched” pages, that would send a powerful message to users about the purpose of the service. But Viacom has not proven that fact. See **Hohengarten Ex. 128** (YouTube employee Heather Gillette stating that YouTube “pro-actively screen[s] any videos and/or users that we are highlighting on our ‘honors’ pages (most watched, most subscribed, most discussed, etc.)” in response to a question about how YouTube finds and removes “illegal or inappropriate content” such as “porn, hate, drugs”); **Hohengarten Ex. 198** (chat about not featuring videos with music in the background).

Schapiro Opening Ex. 168 describes a presentation in which Viacom’s “best minds” concluded that YouTube would be a “**transformative acquisition** for MTV Networks/Viacom (price pending) that would enable our company to tap the leader in viral video audience experiencing explosive growth . . . we can help **YouTube become the category-killer for online video search, sharing, and community.**” Schapiro Ex. 168 (VIA00857222). Viacom did not reference copyright concerns when listing “Potential Risks” associated with a potential YouTube acquisition. *Id.* (VIA00857226-27). Viacom would not have made these statements if it believed that YouTube contained a high percentage of unauthorized content.

Schapiro Opening Ex. 180 is a judicial admission from plaintiff Robert Tur stating that “substantial use of YouTube’s website was and is made by users uploading their own homemade videos.” Another statement in Tur’s Complaint that “consumers viewed, millions of times, copyrighted material from major television networks, *e.g.*, NBC, Fox, and cable networks” is an unproven allegation, not a binding judicial admission. Regardless, that allegation does not conflict with the statement that “substantial use of YouTube’s website was and is made by users uploading their own homemade videos.” First, the “millions” of views that Tur attributes to content from “major television networks” is insignificant when compared with total number of views YouTube videos were receiving at the time of the allegation. See C. Hurley Opp. Decl. ¶ 7

(average *daily* views for YouTube in January 2007 was approximately 252 million). Second, as we have described in detail in our briefs, content from “major television networks” on YouTube may be authorized in various ways, including by individually negotiated partnership agreements, uploads by employees and marketing agents, decisions by television networks to “leave up” user-submitted videos containing their content, and under the doctrine of fair use. YouTube Br. 6-8, 15-16, 39-55, 63-70.

Viacom also claims that YouTube’s “own analyses of the volume of infringing content on YouTube put the figure between 54% and 80%.” That is not true. The empirical evidence shows that plaintiffs collectively have made infringement allegations with respect to *two hundredths of one percent* of the videos uploaded to YouTube. YouTube Br. 90. And less than *one percent* of the videos on YouTube have been subject to infringement allegations under the DMCA (or through equivalent takedown requests by copyright holders). *Id.* at 91. Viacom’s cited evidence is not to the contrary. See CVSUF ¶¶ 55, 95, 104, 153, 170, 171, 173, 174, 176, 181; YouTube Opp. 89-97.

1.111. In the site’s first months, YouTube’s twenty-something founders grappled with how best to address situations where it seemed that users had uploaded videos in violation of YouTube’s rules. Defs. Opening Mem. at p. 95 (citing Hurley Decl. ¶¶ 15-18).

Viacom’s Response: *Controverted. Defendants’ internal communications make unambiguous their intent to grow the site by turning a blind eye to rampant infringement. See, e.g., Viacom SUF ¶¶ 29-132.*

YOUTUBE’S REPLY: Viacom’s response does not controvert this statement. Moreover, YouTube’s founders were far more conservative in their approach to copyright issues than were Plaintiffs’ senior executives. Schapiro Reply Ex. 148 (VIA 00200735) [REDACTED]

[REDACTED] Ex. 132 (225:22-226:23) (Viacom Executive Vice President recorded performance of Amy Winehouse in concert and uploaded footage to YouTube); Ex. 149 (MTV Chairman getting copies made of NBC’s Saturday Night Live show onto DVDs, along with particular clip she found on YouTube); *see also* Ex. 150 (103:25-106:25) (In-house counsel for plaintiff Carlin Music describing how she uploaded a clip from the television show The View to YouTube without authorization from the copyright holder); Ex. 145 (293:11-295:22) (President of Viacom’s MTVN

Entertainment division annually sent other Viacom executives CDs filled with music that he copied from his own collection, believing his initial purchase of the music entitled him to make and distribute dozens of copies).

After filing this lawsuit, Viacom belatedly realized that its own online services (like iFilm and Atom Films/Addicting Clips) operated no differently than YouTube, and had to make changes to conform to the “stronger than the DMCA’ filtering requirements” it thereafter decided to advocate. Schapiro Reply Ex. 151. As Viacom personnel realized, “it will be very difficult to build a thriving community if we need to monitor every uploaded clip and link for IP issues and are more hard-line than any other site on the web.” *Id.*; see also *id.* Ex. 152 (“we have pulled WAY back on what content is allowed on the site post YouTube lawsuit”). When press commentators noted the irony of Viacom suing YouTube even though it operated Atom Films and iFilm no differently from YouTube, Viacom acknowledged: “Clearly other people are noticing the youtube/ifilm conundrum that’s been created.” *Id.* Ex. 153.

1.114 Quickly realizing that those approaches were flawed, and having secured financial backing from investors, YouTube consulted with outside counsel, installed a formal DMCA program, and brought in an in-house lawyer with a background in copyright law.

Viacom’s Response: *Controverted. Other than self-serving testimony in this litigation, there is no documentary evidence whatsoever in the record to suggest that anybody at YouTube believed that community flagging for copyright infringement was “flawed,” or that any of the numerous approaches considered but never implemented (see Viacom SUF ¶¶ 75-77, 112-115) would have been flawed in practice. Rather, the documentary evidence shows conclusively that community flagging was shut down to avoid putting YouTube on “notice,” see Hohengarten Ex. 232, JK00008043, and that other measures never were taken because YouTube employees “hate[d] making it easier for these a-holes” -- referring to copyright owners - - and were “just trying to cover our asses so we don’t get sued.” Hohengarten Ex. 202, GOO001-00829702, at 4 & at GOO001-00829704.*

Further controverted because Levine ¶¶ 3 and 13 are inadmissible. See Evid. Obj. at 14-15.

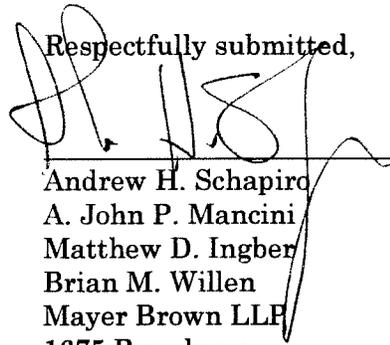
YOUTUBE’S REPLY: The evidence demonstrates that community flagging for copyright was discontinued in September 2005 “when YouTube concluded that users were not in a position to correctly distinguish between authorized and potentially unauthorized material on

the YouTube service, and in light of concerns that users would use the functionality as a means of censorship, to seek removal of content that they found undesirable, regardless of whether it was authorized to be on the service.” See Schapiro Opp. Ex. 90 (Defs.’ Am. Resp. to First Set of Interrog., Resp. to Interrog. No. 2); see also Hurley Opening Decl. ¶ 20. YouTube replaced the user copyright flag with a feature that allowed copyright owners to flag videos and send DMCA takedown notices for those containing their content. Levine Opp. Decl. ¶ 10.

Viacom’s statement that certain features were “never implemented” is false. By March 2006, YouTube had launched a “Subscribe to Tags” feature that allowed users to receive “alerts” of videos uploaded to YouTube matching specified tags. See CVSUF ¶¶ 75-77, 112-115.

Dated: June 14, 2010
New York, New York

Respectfully submitted,



Andrew H. Schapiro
A. John P. Mancini
Matthew D. Ingber
Brian M. Willen
Mayer Brown LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

David H. Kramer
Maura L. Rees
Michael H. Rubin
Bart E. Volkmer
Wilson Sonsini Goodrich & Rosati P
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300

Attorneys for Defendants