

INTRODUCTION

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

I. Declaration of Chad Hurley.

Inadmissible Testimony	Grounds for Inadmissibility
(Entire declaration)	<p><u>Sham Affidavit Rule.</u> Chad Hurley was deposed and claimed lack of memory 206 times over the course of 140 pages of the deposition transcript), regarding many of the key documents at issue on summary judgment, and the matters addressed in his declaration. Hohengarten Ex. 312 at 177-317. Accordingly, his declaration is legally entitled to no weight in this Circuit. <i>E.g., Perma Research & Dev. Co. v. Singer Co.</i>, 410 F.2d 572, 578 (2d Cir. 1969). <i>See</i> Viacom Reply Mem. at 13 n.7.</p>
Hurley Ex. I	<p><u>Hearsay.</u> This online news report about what a third-party website reporting company reported about YouTube’s site traffic following Viacom’s takedown is being introduced to prove the truth of the matter asserted. <i>See</i> C. Hurley Opp. Decl. ¶ 7 (offering exhibit to prove YouTube’s traffic). The third-party reporting is hearsay and the article reporting</p>

	upon it is double hearsay.
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II. Declaration of Steve Chen.

Inadmissible Testimony	Grounds for Inadmissibility
(Entire declaration)	<p><u>Fed. R. Civ. P. 56(e)(1)</u>. Chen’s declaration should be disregarded on summary judgment because he is not available to be cross-examined at trial. A declaration is admissible on summary judgment only if the declarant could testify to the facts asserted in the declaration at trial. <i>See Patterson v. County of Oneida</i>, 375 F.3d 206, 219 (2d Cir. 2004) (citing Fed R. Civ. P. 56(e)). And at trial, a witness “must testify under oath, be personally present at the trial, and be subject to cross-examination.” <i>United States v. Detrich</i>, 865 F.2d 17, 20 (2d Cir. 1988). [REDACTED]</p> <p>[REDACTED]</p> <p>Wilkens Reply Decl. Ex. 14; <i>e.g.</i>, <i>Horvath v. Deutsche Lufthansa, AG</i>, No. 02 Civ. 3269, 2004 WL 241671, at *3 (S.D.N.Y. Feb. 9, 2004). Because Chen cannot be cross-examined, his declaration is inadmissible. <i>See Viacom Reply Mem.</i> at 13 n.7.</p>

III. Declaration of David King.

Inadmissible Testimony	Grounds for Inadmissibility
2. In early 2007, Audible Magic’s primary application was identifying sound recordings; the technology was untested at identifying audiovisual content such as clips from television shows and movies.	<u>Personal Knowledge</u> . Mr. King’s familiarity is with how Defendants implemented Audible Magic’s technology. He lacks foundation to testify about how and when third parties had tested or implemented it.

IV. Declaration of Chris Maxcy.

Inadmissible Testimony	Grounds for Inadmissibility
3. ... To my knowledge, YouTube was the first user-generated content site to license Audible Magic’s technology.	<u>Personal Knowledge</u> . Mr. Maxcy lacks foundation to testify as to the details of Audible Magic’s commercial relationships

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	with third parties, many of which are confidential and would not be known to Mr. Maxcy as the employee of one of Audible Magic’s customers.
5. Audible Magic had never before been deployed on a user-submitted content website.	<u>Personal Knowledge.</u> Mr. Maxcy lacks foundation to testify as to the details of Audible Magic’s commercial relationships with third parties, many of which are confidential and would not be known to Mr. Maxcy as an employee of one of Audible Magic’s customers.

V. Declaration of Andrew Schapiro.

Inadmissible Testimony	Grounds for Inadmissibility
Schapiro Ex. 84	<u>Hearsay.</u> The unsworn, out-of-court statement in this document that Chen and Hurley “complained” to Karim is inadmissible hearsay to prove the truth of the matter asserted, i.e. that Chen and Hurley “complained” to Karim.
Schapiro Ex. 98	<u>Hearsay.</u> The unsworn, out-of-court complaints by YouTube users about the removals of their videos are hearsay insofar as offered to prove the truth of the matters asserted in the complaints, i.e. that the removals of their videos had been erroneous and that their videos had not contained the copyrighted material complained of. The unsworn, out-of-court internal YouTube email is also double hearsay to prove that such complaints were in fact made to YouTube following the removals.
Schapiro Ex. 100	<u>Hearsay.</u> The unsworn, out-of-court complaints by YouTube users about the removals of their videos are hearsay insofar as offered to prove the truth of the matters asserted in the complaints, i.e. that the removals of their videos had been erroneous.
Schapiro Ex. 105	<u>Hearsay.</u> The unsworn, out-of-court news article attributing statements regarding the DMCA to a Viacom representative is hearsay to prove the truth of the matter asserted by the

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	article, i.e. that Mr. Salmi had made the statement attributed to him.
Schapiro Ex. 175	<u>Hearsay</u> . The unsworn, out-of-court news article attributing statements regarding YouTube to a Viacom representative is hearsay to prove the truth of the matter asserted by the article, i.e. that Mr. Dauman had made the statement attributed to him.
Schapiro Ex. 279	<u>Hearsay</u> . The unsworn, out-of-court news article attributing statements regarding YouTube to a Viacom representative is hearsay to prove the truth of the matter asserted by the article, i.e. that Ms. McGrath had made the statement attributed to her. Ms. McGrath testified that she had no recollection of making the statement attributed to her. <i>See</i> Kohlmann Ex. 78 (McGrath Dep.) at 256:2-13.
Schapiro Ex. 289	<u>Hearsay</u> . The unsworn, out-of-court news article is hearsay to prove the truth of the matters asserted therein.
Schapiro Ex. 303	<u>Relevance</u> . The screenshot of a portion of the YouTube website is dated April 29, 2010. It is not relevant for purposes for which Defendants cite it, that YouTube restricts private video sharing to 25 people, for dates prior to the date on which the printout was generated. <i>See</i> Defendants' Counterstatement at 96.
Schapiro Ex. 316	<u>Hearsay</u> . The unsworn, out-of-court statements in a third party's counternotification are hearsay to prove that Viacom lacked rights sufficient to issue the relevant takedown notice.
Schapiro Ex. 376	<u>Hearsay</u> . Defendants' counsel's claim in this email exchange that the MPAA had "refus[ed] to produce discovery" on the noticed 30(b)(6) topic is hearsay.

CONCLUSION


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

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