

Schapiro Exhibit 43

To: "chris@youtube.com" <chris@youtube.com>
From: "Dean_Garfield@mpaa.org" <Dean_Garfield@mpaa.org>
Cc:
Bcc:
Received Date: 2007-06-07 22:56:46 CST
Subject: RE: Video Fingerprinting Agreemen

Thanks Chris. I appreciate the call. I will take a look at the document and get back to you in the next few days with our thoughts.

-----Original Message-----

From: Chris Maxcy [mailto:chris@youtube.com]
Sent: Thursday, June 07, 2007 2:43 PM
To: Garfield, Dean
Subject: Video Fingerprinting Agreemen

Hi Dean,

It was great catching up with you today. Here is the document that I mentioned (hopefully you will find it as benign ;-). We are looking forward to the opportunity to work with you on our upcoming video fingerprinting test. Please let me know when you are ready to chat further.

Best,

Chris

Chris Maxcy
YouTube
chris@youtube.com


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Schapiro Exhibit 44

To: <chris@youtube.com>
From: <Dean_Garfield@mpaa.org>
CC: <inghelbrecht@google.com>
BCC:
Sent Date: 2007-06-16 01:25:16 GMT
Subject: Re: Video Fingerprinting Test

Hello, i am doing well. I was in your neck of the woods today. I was at a CEOs conference and was supposed to be on a panel with Messr. Drummond. He did not show and took a lot of ribbing for not being there. Anyway, I will check in with our GC on the NDA and get back to you next week. Have a great weekend.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Chris Maxcy <chris@youtube.com>
To: Garfield, Dean
Cc: 'Philip Inghelbrecht' <inghelbrecht@google.com>
Sent: Fri Jun 15 17:13:52 2007
Subject: Video Fingerprinting Test

Hi Dean,

Hope you had a good week. Just checking in to see if you have any thoughts on the fingerprint test agreement? We'd love to get you guys up an running on the test. Look forward to speaking soon.

Best,

Chris

Chris Maxcy
YouTube
chris@youtube.com
[REDACTED]

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Schapiro Exhibit 45

To: Rachel Claflin <rclaflin@youtube.com>
From: Kip Welch <KWelch@movielabs.com>
Cc: Dean_Garfield@mpaa.org <Dean_Garfield@mpaa.org>; Zahavah Levine
[REDACTED]; Steve Weinstein <SWeinstein@movielabs.com>; anna_gunning@mpaa.org
<anna_gunning@mpaa.org>
Bcc:
Received Date: 2007-07-26 23:33:02 GMT
Subject: RE: MPAA/YouTube Content Verification Test Agreement

Thanks, Rachel. Attached is an electronic copy executed by MovieLabs.

Kip

From: rclaflin@google.com [mailto:rclaflin@google.com] On Behalf Of Rachel Claflin
Sent: Thursday, July 26, 2007 4:02 PM
To: Kip Welch
Cc: Dean_Garfield@mpaa.org; Zahavah Levine; Steve Weinstein; anna_gunning@mpaa.org
Subject: MPAA/YouTube Content Verification Test Agreement

Hi Kip,

Attached is a PDF of the signed version of the MPAA/YouTube Content Verification Test Agreement. Dean suggested that you would be able to sign this in Steve Weinstein's absence. Please sign the attached agreement and return to me by either e-mail or fax. Our fax number is [REDACTED]

Kind Regards,

Rachel

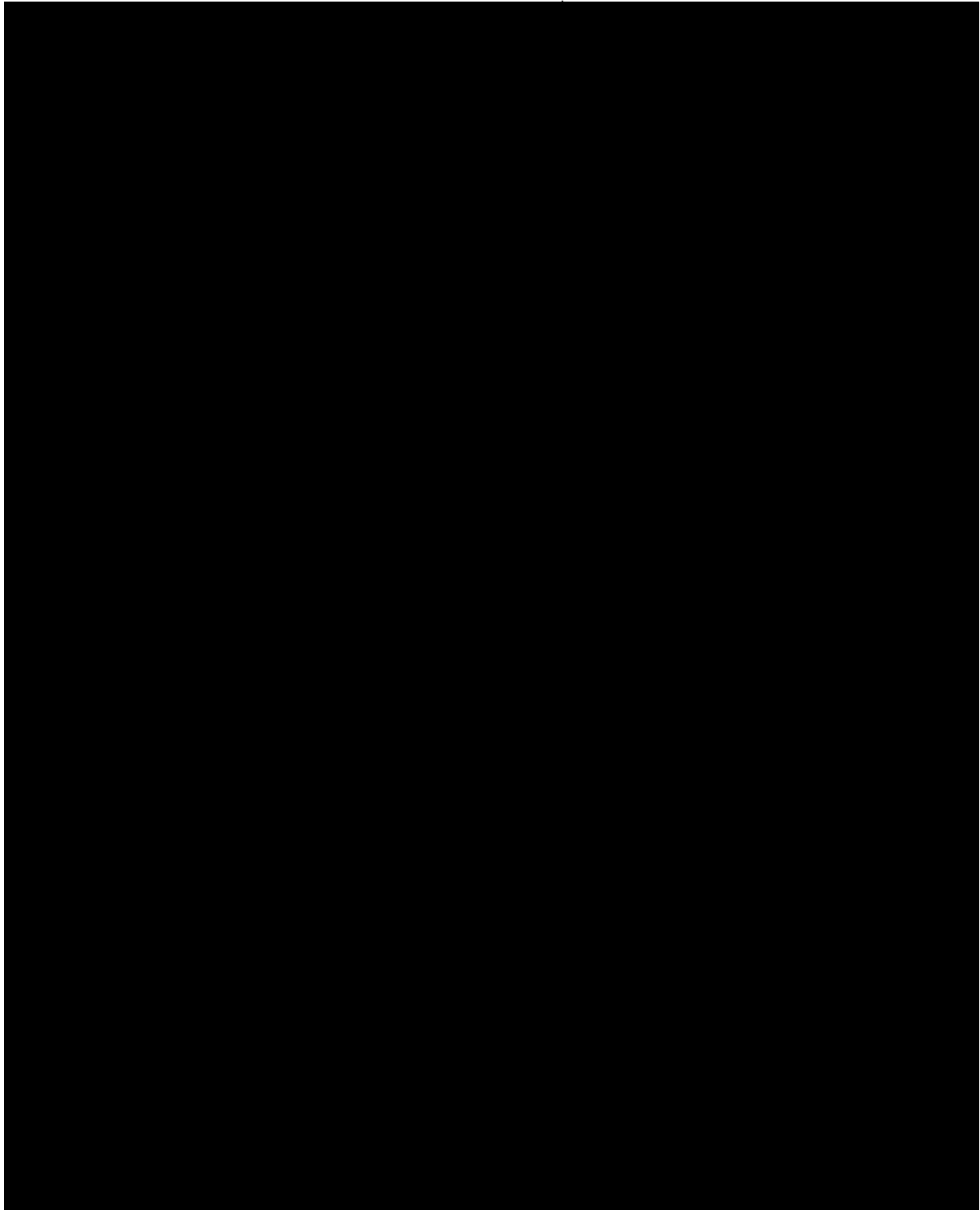
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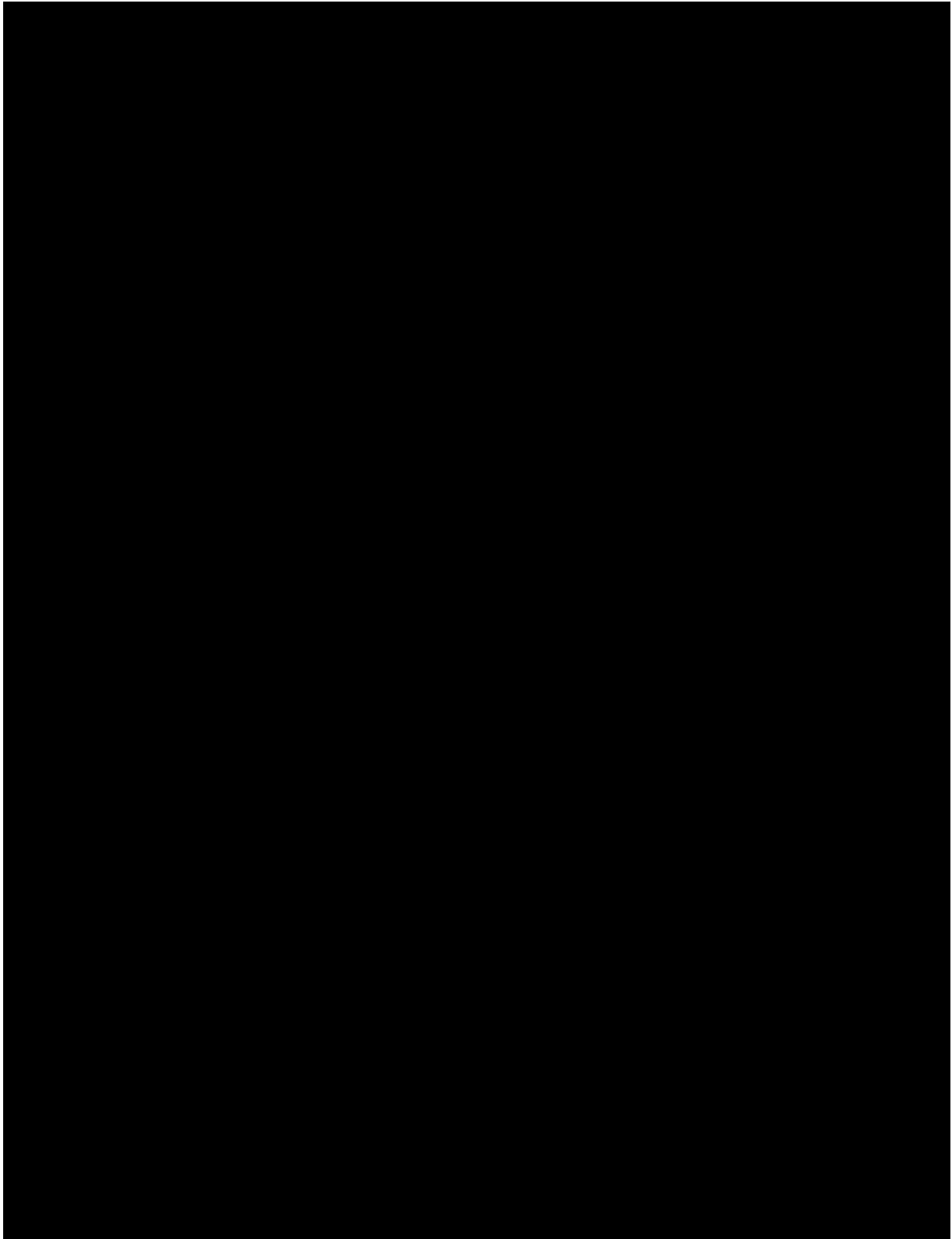
Rachel Claflin
Legal Assistant
YouTube, LLC
1000 Cherry Ave, Suite 2
San Bruno, CA 94066
[REDACTED]

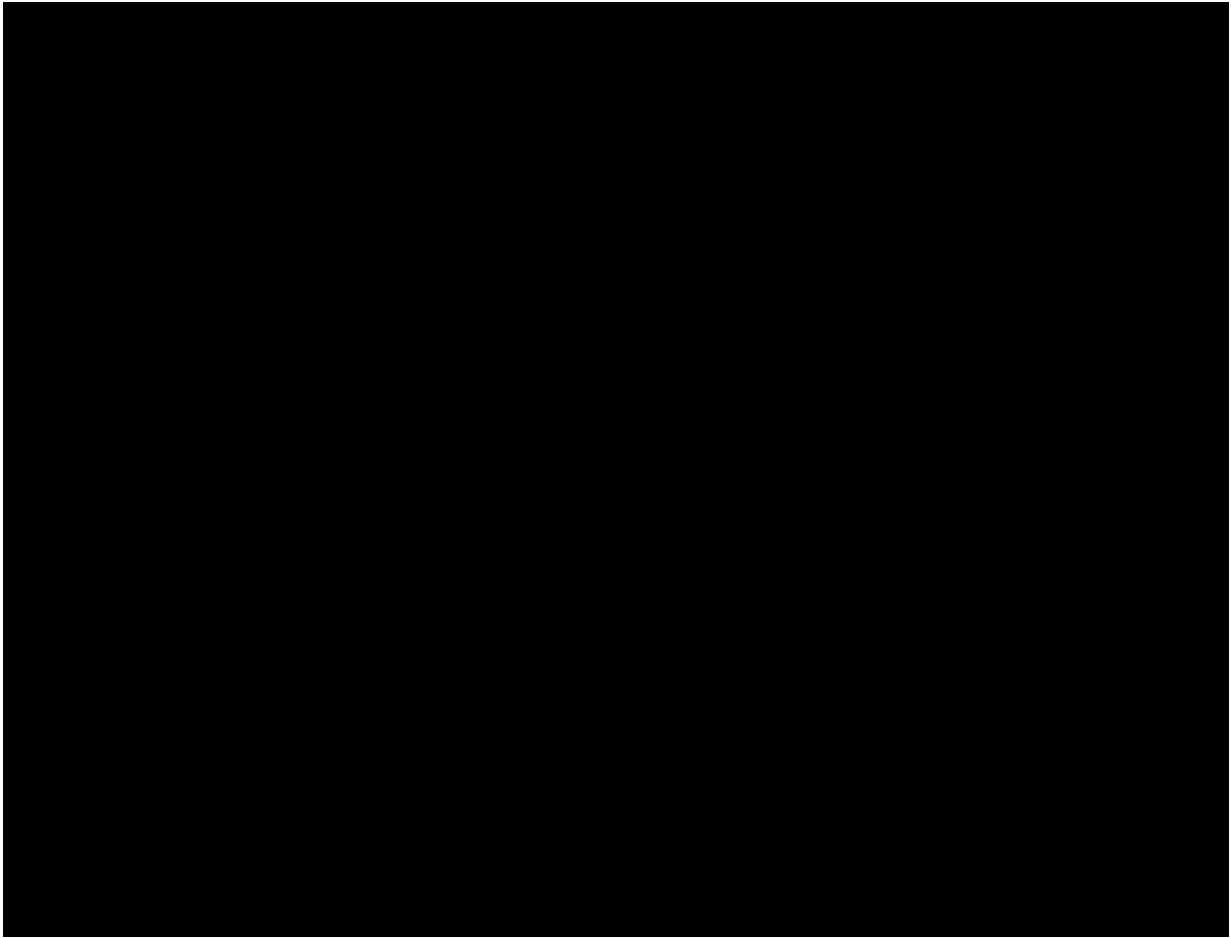
Attachments:

Scann001.pdf

CONTENT VERIFICATION TEST AGREEMENT







Schapiro Exhibit 46

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,)

-vs-)NO. 07-CV-2103

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

Defendants.)

-----)
VIACOM INTERNATIONAL INC., et al.,)

Plaintiffs,)

-vs-)NO. 07-CV-3582

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

Defendants.)

-----)

VIDEOTAPED DEPOSITION OF CHRISTOPHER MAXCY
SAN FRANCISCO, CALIFORNIA
THURSDAY, JANUARY 14, 2010

JOB NO. 18549

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JANUARY 14, 2010

VIDEOTAPED DEPOSITION OF CHRISTOPHER MAXCY,
held at the offices of WILSON, SONSINI,
GOODRICH & ROSATI, One Market Plaza, Spear
Street Tower, Suite 3300, San Francisco,
California, pursuant to notice, before DIANE S.
MARTIN, CSR License No. 6464.

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The Videographer: Stuart Pettigrew

1 11:12:51 You can answer if you can answer.

2 11:12:52 MR. WILKENS: Well, you let him testify about

3 11:12:55 that there were such offers made as a 30(b)(6)

4 11:12:59 witness. It's totally appropriate to continue as a

5 11:13:05 30(b)(6) witness and answer information -- answer

6 11:13:05 questions about the circumstances in which those offers

7 11:13:08 were made.

8 11:13:08 MR. KRAMER: Scott, I didn't instruct him not

9 11:13:10 to answer. I just objected that it's beyond the scope;

10 11:13:12 that it calls for speculation, and it lacks foundation.

11 11:13:14 He can answer the question.

12 11:13:16 THE WITNESS: Can you repeat the question

13 11:13:18 now?

14 11:13:18 BY MR. WILKENS:

15 11:13:18 Q Yes. Okay. Turning first to Viacom, when was

16 11:13:26 Viacom offered audio fingerprinting regardless of

17 11:13:31 whether Viacom would enter into a licensing deal with

18 11:13:35 YouTube?

19 11:13:35 MR. KRAMER: Same objections; beyond the

20 11:13:37 scope.

21 11:13:39 THE WITNESS: I can't recall the exact date in

22 11:13:42 which we first discussed audio identification

23 11:13:46 technologies with Viacom. We obviously, and you have

24 11:13:50 this in your documentation, began discussions with

25 11:13:54 Viacom in 2006.

1 11:13:56 I can tell you that we had and I had specific
2 11:14:02 conversations with Viacom about providing audio
3 11:14:06 identification technology to them outside of a
4 11:14:10 partnership agreement in early 2007.
5 11:14:14 BY MR. WILKENS:
6 11:14:14 Q And who did you have those conversations with?
7 11:14:16 MR. KRAMER: Beyond the scope.
8 11:14:18 THE WITNESS: Adam Cahan.
9 11:14:20 BY MR. WILKENS:
10 11:14:20 Q Is it your testimony that you offered to
11 11:14:26 provide -- YouTube offered to provide Viacom with audio
12 11:14:32 fingerprinting technology in early 2007 even if Viacom
13 11:14:40 would not license its content to YouTube?
14 11:14:43 MR. KRAMER: Objection. Beyond the scope.
15 11:14:46 THE WITNESS: That is correct.
16 11:14:47 BY MR. WILKENS:
17 11:14:47 Q And was anybody else present during these --
18 11:14:52 during the conversation you had with Mr. Cahan?
19 11:14:54 MR. KRAMER: Objection. Beyond the scope.
20 11:14:57 THE WITNESS: I don't recall.
21 11:15:00 BY MR. WILKENS:
22 11:15:00 Q Was this during the time period when licensing
23 11:15:03 negotiations were still ongoing between YouTube and
24 11:15:05 Viacom?
25 11:15:06 MR. KRAMER: Objection. Beyond the scope.

1 11:15:08 THE WITNESS: This was during the period of
2 11:15:10 the negotiations, and after negotiations ceased or when
3 11:15:17 negotiations -- after they had ceased and it was clear
4 11:15:20 that there would be no commercial agreement with
5 11:15:22 Viacom.

6 11:15:24 BY MR. WILKENS:

7 11:15:24 Q So just to be clear, the conversation you're
8 11:15:28 testifying about with -- that you had with Mr. Cahan
9 11:15:31 about providing Viacom with audio fingerprinting
10 11:15:35 technology occurred after the negotiations had broken
11 11:15:38 down?

12 11:15:39 MR. KRAMER: Just a second. I'll object on
13 11:15:41 the grounds that it mischaracterizes the prior
14 11:15:44 testimony to the extent it refers to a conversation.

15 11:15:48 THE WITNESS: I think what I said was that we
16 11:15:52 had offered this technology to Mr. Cahan and Viacom
17 11:15:58 during our negotiations, and made them aware of the
18 11:16:02 fact that we were going to be implementing this
19 11:16:04 technology, and after the negotiations ceased, we
20 11:16:12 continued to offer explicitly this technology with no
21 11:16:17 requirement of a commercial agreement.

22 11:16:19 BY MR. WILKENS:

23 11:16:19 Q And did you make this offer to anyone other
24 11:16:26 than Mr. Cahan?

25 11:16:27 MR. KRAMER: Objection. Calls for

1 11:16:28 speculation; it's beyond the scope. "You" is vague.

2 11:16:33 THE WITNESS: No, I didn't. Mr. Cahan was my

3 11:16:36 primary contact at Viacom, and he and I had been

4 11:16:41 negotiating and in direct contact for many months, so

5 11:16:48 he was the appropriate person to make this offer to.

6 11:16:50 BY MR. WILKENS:

7 11:16:50 Q And you can't recall when the conversation

8 11:16:54 took place?

9 11:16:55 MR. KRAMER: Objection. Vague;

10 11:16:56 mischaracterizes the testimony.

11 11:16:58 THE WITNESS: Which conversation?

12 11:16:59 BY MR. WILKENS:

13 11:16:59 Q The conversation you had with him after the

14 11:17:02 negotiations broke down when you testified that you

15 11:17:06 continued to offer Audible Magic fingerprinting

16 11:17:10 technology?

17 11:17:11 MR. KRAMER: Objection. Beyond the scope;

18 11:17:12 mischaracterizes the testimony.

19 11:17:14 THE WITNESS: I recall having a conversation

20 11:17:16 with Mr. Cahan in early February where I reaffirmed our

21 11:17:24 commitment to providing audio identification tools to

22 11:17:28 Viacom even though the negotiations had broken down.

23 11:17:33 BY MR. WILKENS:

24 11:17:33 Q And did you communicate that commitment to

25 11:17:39 Mr. Cahan in writing?

1 11:17:42 MR. KRAMER: Objection. Beyond the scope.

2 11:17:48 THE WITNESS: I don't recall. I believe I may

3 11:18:03 have sent him an e-mail. I know that obviously I spoke

4 11:18:06 with him on the phone numerous times about it, and

5 11:18:06 whether I actually sent him an e-mail or not I can't

6 11:18:06 recall. I think I may have.

7 11:18:14 MR. KRAMER: Scott, when you get to a

8 11:18:16 convenient stopping point, if we could take a break.

9 11:18:19 MR. WILKENS: We can take a break now. That's

10 11:18:21 fine.

11 11:18:22 MR. KRAMER: Okay.

12 11:18:23 THE VIDEOGRAPHER: The time is 11:17. Off the

13 11:18:25 record.

14 11:18:27 (Recess taken.)

15 11:28:24 THE VIDEOGRAPHER: The time is 11:28. On the

16 11:29:11 record.

17 11:29:12 BY MR. WILKENS:

18 11:29:12 Q Mr. Maxcy, do you recall before we took a

19 11:29:16 break that you testified about a general policy at

20 11:29:20 Google and YouTube to make content identification

21 11:29:24 technologies available to all content owners regardless

22 11:29:29 of whether they had a content deal with YouTube?

23 11:29:31 A Yes.

24 11:29:32 Q Is that policy documented anywhere?

25 11:29:36 MR. KRAMER: The term "documented" is vague.

1 11:29:38 THE WITNESS: Can you be more specific about

2 11:29:41 documented?

3 11:29:42 BY MR. WILKENS:

4 11:29:42 Q Are there any physical paper documents or
5 11:29:46 electronic documents that memorialize the policy you
6 11:29:50 testified about?

7 11:29:51 A Yes, I believe so.

8 11:29:57 Q What documents are those?

9 11:29:59 A I recall sometime in early 2007, maybe in the
10 11:30:08 February time frame, a number of e-mails with YouTube
11 11:30:18 executives, myself included, Chad Hurley, co-founder of
12 11:30:26 the company, Omid Kordestani, who at the time was -- I
13 11:30:30 think his title was EVP or SVP of business development
14 11:30:35 at Google, where we discussed the policy to make our
15 11:30:44 content identification system, including audio
16 11:30:50 identification tools, to make those available to all
17 11:30:54 content owners, regardless of commercial partnership.

18 11:30:59 I also recall right around in that same
19 11:31:03 exchange discussing how we had made an offer to Viacom
20 11:31:12 to utilize audio identification technologies, and, in
21 11:31:17 fact, the fact that Viacom would be the very first
22 11:31:22 company to utilize these tools, the audio
23 11:31:28 identification tools more specifically.

24 11:31:34 Q So and with regard to the offer to Viacom you
25 11:31:37 just testified about, was that also captured in an

1 11:31:43 e-mail?

2 11:31:45 A Yes.

3 11:31:49 Q And do you have the e-mails that you just

4 11:31:52 testified about in your possession?

5 11:31:54 MR. KRAMER: Objection. Calls for

6 11:31:55 speculation.

7 11:31:58 THE WITNESS: I'm not sure. I've migrated

8 11:32:02 e-mail systems a number of times, but I do recall the

9 11:32:07 chain of e-mails discussing this policy and that audio

10 11:32:11 identification technology should be available to

11 11:32:14 partners and non-partners alike, that we had made an

12 11:32:20 offer to Viacom in and around the February time frame

13 11:32:25 to Mr. Cahan to utilize these tools, and that we had --

14 11:32:32 that Viacom would actually be the first company to

15 11:32:36 utilize these tools, even ahead of the companies that

16 11:32:42 initially helped us build the system, which is Warner

17 11:32:44 Music Group and a couple of the other record labels.

18 11:32:48 So that's what I recall.

19 11:32:50 BY MR. WILKENS:

20 11:32:50 Q When is the last time you saw these e-mails?

21 11:32:53 MR. KRAMER: Objection. Instruction not to

22 11:32:56 answer to the extent it discloses communications with

23 11:32:59 counsel and counsel's work product.

24 11:33:03 BY MR. WILKENS:

25 11:33:03 Q When is the last time you saw these e-mails?

1 13:06:06 MR. KRAMER: Objection. Beyond the scope;
2 13:06:08 it's asked and answered.
3 13:06:10 THE WITNESS: I think I've answered that
4 13:06:12 already.
5 13:06:12 BY MR. WILKENS:
6 13:06:12 Q And just for clarification is that correct,
7 13:06:16 that it was in February of '07 after negotiations had
8 13:06:20 broken down, was it part of a claim-your-content tool
9 13:06:23 that audio fingerprinting was offered?
10 13:06:26 MR. KRAMER: Objection. Beyond the scope;
11 13:06:29 asked and answered, and the question is vague.
12 13:06:32 THE WITNESS: As I think I've already answered
13 13:06:34 this, that the claim-your-content tool was
14 13:06:39 incorporating audio fingerprinting, and that was part
15 13:06:44 of the offer that we made to Mr. Cahan after the
16 13:06:51 negotiations broke down.
17 13:06:54 MR. WILKENS: Okay. I have -- I'll just note
18 13:06:57 for the record for now I don't have any further
19 13:06:59 questions, pending whether Mr. Kramer has redirect, and
20 13:07:03 I obviously note for the record the various
21 13:07:06 instructions not to answer and the disagreement that we
22 13:07:08 have about the scope of this deposition.
23 13:07:11 But with that I'll turn things over to the
24 13:07:13 class plaintiffs.
25 13:07:15 THE VIDEOGRAPHER: The time is 1:06. Off the

1 13:07:20 record.

2 13:07:20 (Discussion off the record.)

3 13:07:45 THE VIDEOGRAPHER: The time is 1:06. On the

4 13:07:47 record.

5 13:07:48 EXAMINATION

6 13:07:48 BY MR. GALDSTON:

7 13:07:48 Q Mr. Maxcy, I introduced myself this morning,

8 13:07:51 but I'll tell you for your own benefit that I'm

9 13:07:55 Benjamin Galdston and I represent the class plaintiffs

10 13:07:59 in the class action.

11 13:08:00 I just have a few followup questions for you.

12 13:08:03 Sir, between 2006 and the present has YouTube

13 13:08:10 as a matter of policy made any features available to

14 13:08:10 content partners but not to non-content partners, other

15 13:08:12 than the banner testimony you provided?

16 13:08:15 MR. KRAMER: Objection. That covers a

17 13:08:17 tremendous amount of what we covered this morning.

18 13:08:21 You mean putting aside what he testified to

19 13:08:22 previously?

20 13:08:24 MR. GALDSTON: Correct.

21 13:08:26 THE WITNESS: That's a pretty broad question.

22 13:08:29 Do you have specific areas you'd like me to

23 13:08:32 answer?

24 13:08:33 BY MR. GALDSTON:

25 13:08:33 Q I believe the question is answerable in its

1 13:08:35 current form. Is there something in particular about

2 13:08:38 the question that --

3 13:08:39 A I think it's fairly absolute. You're saying

4 13:08:42 any features. I'm just trying to figure out how to

5 13:08:46 help answer that question for your benefit.

6 13:08:50 Is there anything you want me to cover

7 13:08:53 specifically?

8 13:08:53 Q Well, sir, I don't know all of the features

9 13:08:56 that YouTube has offered to content partners or

10 13:08:59 non-content partners between 2006 and the present, so I

11 13:09:02 need to start with this general question, whether there

12 13:09:05 are any features other than the testimony you provided

13 13:09:13 thus far that YouTube provided to content partners that

14 13:09:14 it did not provide to non-content partners as a matter

15 13:09:17 of policy?

16 13:09:19 A I believe my testimony this morning discussed

17 13:09:27 monetization, support, and promotional capabilities.

18 13:09:36 To my knowledge I don't believe there's

19 13:09:42 anything outside of those three categories that we

20 13:09:46 would -- that we have provided, not that I recall. I

21 13:09:50 mean obviously I do a lot of things at YouTube so --

22 13:09:54 Q Sure. Well, between 2006 and the present has

23 13:10:00 YouTube as a matter of policy made any content

24 13:10:02 verification technologies or tools available to content

25 13:10:05 partners that it has not made available to non-content

1 13:10:09 partners?

2 13:10:10 MR. KRAMER: Objection to the question as

3 13:10:11 vague.

4 13:10:15 THE WITNESS: I'm thinking.

5 13:10:30 The policies that we've had in place, as I

6 13:10:33 said, since early on were to provide our content

7 13:10:38 identification technologies to any copyright holder. I

8 13:10:44 also testified to the fact that in 2006 and early 2007

9 13:10:50 we were developing audio fingerprinting technologies

10 13:10:56 using Audible Magic as our partner, but that product

11 13:11:02 took some time to roll out, and we were testing that

12 13:11:06 product with a handful of partners at the time,

13 13:11:10 including Warner Music, who literally were helping us

14 13:11:12 architect that system.

15 13:11:17 We then rolled that out when the system was

16 13:11:19 viable to partners and non-partners alike.

17 13:11:24 BY MR. GALDSTON:

18 13:11:24 Q Okay. So is it fair to say then that between

19 13:11:28 2006 and the present, that to the extent YouTube has

20 13:11:30 had technologies or tools that it considers generally

21 13:11:33 viable, it has made those tools and technologies

22 13:11:38 equally available to partners as to non-partners?

23 13:11:41 MR. KRAMER: Hang on. Can I have that one

24 13:11:42 back, please?

25 13:11:43 (Record read by the court reporter as follows:

1 13:11:43 "Q: So is it fair to say then that between
2 13:11:43 2006 and the present, that to the extent
3 13:11:43 YouTube has had technologies or tools that it
4 13:11:43 considers generally viable, it has made those
5 13:11:43 tools and technologies equally available to
6 13:11:43 partners as to non-partners?")
7 13:12:01 MR. KRAMER: So that question is beyond the
8 13:12:03 scope; it calls for speculation.
9 13:12:07 You can answer the question if you can answer
10 13:12:09 the question.
11 13:12:10 THE WITNESS: So I just -- I just want to make
12 13:12:12 sure I'm clear on which technologies and which tools
13 13:12:15 you're referring to.
14 13:12:17 BY MR. GALDSTON:
15 13:12:17 Q Sure. Let's see if we can be more precise,
16 13:12:21 and I do want to clarify that I'm speaking as a matter
17 13:12:23 of policy, and I want to know whether it's a fair
18 13:12:28 statement that between 2006 to the present to the
19 13:12:32 extent YouTube has had content verification
20 13:12:37 technologies that it deems viable, that as a matter of
21 13:12:40 policy YouTube has made those same technologies equally
22 13:12:44 available to partners as it has to non-content
23 13:12:47 partners?
24 13:12:47 MR. KRAMER: I'll object to the form of the
25 13:12:48 question.

1 13:12:57 THE WITNESS: So it is our general policy, as
2 13:13:00 I've said before, that the tools be available to all
3 13:13:08 copyright holders. Obviously these tools and
4 13:13:09 technologies take time to develop, test and roll out so
5 13:13:15 I'm sure there's been situations as we're testing and
6 13:13:20 rolling out these tools where we're working with
7 13:13:22 partners where we have a formal relationship and
8 13:13:25 they're helping us to build the system, but again, once
9 13:13:30 the system works, we roll it out to everybody.

10 13:13:35 BY MR. GALDSTON:

11 13:13:35 Q Equally?

12 13:13:36 A To my knowledge I believe that is -- that is
13 13:13:40 correct.

14 13:13:41 Q Okay. And when you say it's "our general
15 13:13:43 policy," between 2006 and the present was that general
16 13:13:47 policy memorialized anywhere at YouTube?

17 13:13:50 MR. KRAMER: Asked and answered, I think. And
18 13:13:52 it's beyond the scope, I think, but go ahead.

19 13:13:55 BY MR. GALDSTON:

20 13:13:55 Q Other than the e-mails that you've testified
21 13:13:57 about.

22 13:13:57 A Well, I -- I can tell you that in early 2007
23 13:14:05 there was obviously a lot of conversation back and
24 13:14:12 forth, and late 2006 as well, in 2006, about how we
25 13:14:16 would roll these tools out, and there were some I think

1 13:14:21 various opinions on whether it would be more
2 13:14:23 appropriate and for good reasons to utilize these tools
3 13:14:28 just for partners, reasons for meaning how would you
4 13:14:33 know who this company is, what kind of recourse would
5 13:14:37 you have if the company used these very powerful tools
6 13:14:41 inappropriately?

7 13:14:48 Having said that, there is a lot of debate
8 13:14:48 that occurs at Google. It's the way our culture
9 13:14:49 works. People debate things back and forth.

10 13:14:52 But having said all that, the reality is that
11 13:14:55 the policy was to have these tools available to all
12 13:14:59 partners, and, in fact, I think -- I recall a more
13 13:15:07 specific example of this that may help you in which
14 13:15:14 Eric Schmidt in early 2007 -- the reason why -- I'll
15 13:15:18 tell you why I recall this.

16 13:15:20 In early 2007 Eric Schmidt actually made a
17 13:15:22 public statement about this saying that we would be
18 13:15:26 rolling out audio identification technologies as part
19 13:15:30 of our portfolio of copyright identification tools, and
20 13:15:35 that these technologies were hard to develop so we were
21 13:15:39 working -- working hard to get that to roll out, and
22 13:15:43 that the tools would be available to everybody,
23 13:15:46 partners and non-partners, and the reason why I recall
24 13:15:50 that is because I subsequently got a somewhat nervous
25 13:15:54 or panicked phone call from Vance, and I can never

1 13:16:00 pronounce his last name correctly.

2 13:16:02 Q Ikezoye?

3 13:16:04 A Ikezoye at Audible Magic after Mr. Schmidt

4 13:16:09 made that announcement publicly saying, "Geez, Chris,

5 13:16:12 what's this mean for our relationship and the load that

6 13:16:15 this will place on Audible's systems?"

7 13:16:18 So I don't know any other better way to

8 13:16:21 describe it except having our CEO publicly state that

9 13:16:25 this is our policy and this would be our practice.

10 13:16:28 Q Okay. And I appreciate the information, but

11 13:16:30 my question is a little more specific, and I want to be

12 13:16:33 precise.

13 13:16:33 Other than the public expression that you

14 13:16:38 referred to where Mr. Schmidt made some discussion and

15 13:16:46 your prior testimony, is there a document at YouTube

16 13:16:48 that memorializes the general policy that you've

17 13:16:50 testified about?

18 13:16:52 MR. KRAMER: I'll object as beyond the scope.

19 13:16:54 You can answer. Calls for speculation as

20 13:17:00 well.

21 13:17:00 THE WITNESS: Yeah, I think -- I can't point

22 13:17:02 to a specific document. I can tell you that the

23 13:17:07 individuals responsible for setting that policy were

24 13:17:13 myself, David Eun, Zahavah Levine, and obviously we

25 13:17:20 communicated that to Mr. Schmidt, or I should say

1 13:17:24 Dr. Schmidt.

2 13:17:26 MR. KRAMER: You should.

3 13:17:26 THE WITNESS: I should because he may read

4 13:17:28 this, and so I apologize, Dr. Schmidt -- and

5 13:17:32 Mr. Kordestani.

6 13:17:34 So we communicated that, but we were the body

7 13:17:37 responsible for developing and implementing that

8 13:17:41 policy. So I don't know whether there was a more

9 13:17:47 formal --

10 13:17:49 BY MR. GALDSTON:

11 13:17:49 Q That's helpful.

12 13:17:51 As a member of the body responsible for

13 13:17:54 developing and formalizing the policy, can you tell me

14 13:17:57 whether there is any memorialization or document

15 13:18:01 specifically expressing that policy?

16 13:18:04 A I --

17 13:18:04 MR. KRAMER: Objection. Beyond the scope;

18 13:18:07 calls for speculation.

19 13:18:08 You can answer.

20 13:18:10 MR. GALDSTON: I disagree with that. He just

21 13:18:12 testified he was a member of the body that was

22 13:18:14 responsible for developing and implementing the

23 13:18:16 policy. So who better to ask?

24 13:18:19 MR. KRAMER: It's someone else who was a

25 13:18:21 participant in that group that sends an e-mail saying

Schapiro Exhibit 47

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,)

vs.)

NO. 07-CV-2103)

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

Defendants.)

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

Plaintiffs,)

vs.)

NO. 07-CV-3582)

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

Defendants.)

-----)
VIDEOTAPED DEPOSITION OF MATTHEW LIU
SAN FRANCISCO, CALIFORNIA
FRIDAY, NOVEMBER 13, 2009

JOB NO. 17826

NOVEMBER 13, 2009

9:05 a.m.

VIDEOTAPED DEPOSITION OF MATTHEW LIU,
SHEARMAN & STERLING, 525 Market Street,
San Francisco, California, pursuant to notice,
before ANDREA M. IGNACIO HOWARD, CLR, CCRR, RPR,
CSR License No. 9830.

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A P P E A R A N C E S :

FOR THE PLAINTIFFS VIACOM INTERNATIONAL INC.:

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A P P E A R A N C E S (Continued.)

FOR THE DEFENDANTS YOUTUBE, INC., YOUTUBE, LLC and
GOOGLE, INC.:

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ALSO PRESENT:

ADAM L. BAREA, Litigation Counsel, Google

KELLY TRUELOVE, Consultant

KEN REESER, Videographer.

---oOo---

1 LIU, MATTHEW

2 10:20:20 projects in the Santa Monica office.

3 10:20:23 Q Okay. Do you know why it's called Fat Cat?

4 10:20:26 A I do not know.

5 10:20:27 Q Okay. Can you look to the portion of the

6 10:20:35 e-mail that starts "On 7/31/07, Matthew Liu wrote."

7 10:20:41 Do you see that?

8 10:20:41 A I do see that.

9 10:20:42 Q In the first paragraph, you say, "As you

10 10:20:45 know, [REDACTED]"

11 10:20:48 Why is that?

12 10:20:50 MR. MANCINI: Objection; document speaks for

13 10:20:51 itself.

14 10:20:52 THE WITNESS: Yeah, at this time in August of

15 10:20:57 2007, [REDACTED]

16 10:20:57 [REDACTED].

17 10:21:05 MS. MAGUIRE: Q. What kind of opportunity?

18 10:21:07 A We saw it as an [REDACTED]

19 10:21:10 [REDACTED].

20 10:21:12 Q Okay. Going down a few lines, what does it

21 10:21:27 mean that, quote, "improving targeting (and

22 10:21:35 consequently performance)"?

23 10:21:37 MR. MANCINI: Sorry. Where is that?

24 10:21:39 MS. MAGUIRE: It's -- it's the second

25 10:21:41 sentence that begins "Now that we are very close to

1 LIU, MATTHEW

2 10:21:43 having functional units in Doubleclick."

3 10:21:43 MR. MANCINI: Oh, in the middle of that

4 10:21:44 sentence?

5 10:21:45 MS. MAGUIRE: Uh-huh.

6 10:21:46 Then it says "the brunt of future work will

7 10:21:50 be in improving targeting (and consequently

8 10:21:53 performance) to make the PVA a more viable unit."

9 10:21:57 Q What does that mean, that "improving

10 10:21:59 targeting (and consequently performance) will make the

11 10:22:02 PVA a more viable unit"?

12 10:22:05 MR. MANCINI: Objection; document speaks for

13 10:22:07 itself.

14 10:22:07 THE WITNESS: Yeah, I -- what -- what is the

15 10:22:15 part you're asking about? Is it targeting or --

16 10:22:17 MS. MAGUIRE: I'm -- I'm just not -- I don't

17 10:22:18 understand what that means.

18 10:22:19 Q What does -- why would improving targeting --

19 10:22:23 how does improving targeting improve performance?

20 10:22:26 MR. MANCINI: Objection to form.

21 10:22:27 THE WITNESS: So let me rephrase that better.

22 10:22:29 What we're saying is -- what I meant by this

23 10:22:44 or what I believe I meant by this statement at this

24 10:22:47 time is that advertisers would target verticals, and

25 10:22:54 if those verticals were -- if keywords were -- if

LIU, MATTHEW

1
2 10:23:00 search queries, excuse me, were mapped to those
3 10:23:07 verticals at a higher quality, again, a technical
4 10:23:10 term, then we would -- sorry. Not we. That's -- then
5 10:23:16 the ad server that was serving these ads on behalf of
6 10:23:24 advertisers that were targeting these verticals and
7 10:23:28 working with YouTube would be delivered to pages where
8 10:23:39 the search query was more relevant -- again, an
9 10:23:44 industry term -- relevant is a way to describe --
10 10:23:49 relevance speaks for itself.

11 10:23:50 So the search PVAs would be delivered to
12 10:23:55 pages where the search queries -- sorry. I'm going
13 10:24:00 back and forth -- would be delivered to pages that
14 10:24:05 were more relevant; and if they were more relevant,
15 10:24:10 users would be more inclined to click on the unit and
16 10:24:15 watch the video, and I believe that's what we were
17 10:24:17 talking about when we said "performance."

18 10:24:17 MS. MAGUIRE: Okay.

19 10:24:24 Q What do you mean by "make the PVA a more
20 10:24:27 viable unit"?

21 10:24:31 A I don't actually remember what I meant by
22 10:24:34 that.

23 10:24:46 Q See the next sentence that says "That
24 10:24:49 translates directly to more buys and more \$"?

25 10:24:54 A Yes, I see that.

1 LIU, MATTHEW

2 10:24:55 Q Does that mean that translates to more money?

3 10:24:58 MR. MANCINI: Objection; document speaks for

4 10:24:59 itself.

5 10:25:05 THE WITNESS: Yeah, a dollar sign means money

6 10:25:06 in this case.

7 10:25:07 MS. MAGUIRE: Thank you.

8 10:25:07 Q Why does improving targeting, which we talked

9 10:25:10 about earlier, improving targeting and consequently

10 10:25:15 performance, translates directly to more buys and more

11 10:25:15 money?

12 10:25:15 MR. MANCINI: Objection; lacks foundation.

13 10:25:17 Objection to form.

14 10:25:19 THE WITNESS: Yeah, so that's not exactly how

15 10:25:20 I would phrase that again.

16 10:25:21 MS. MAGUIRE: Okay.

17 10:25:23 THE WITNESS: This is kind of an

18 10:25:24 oversimplification what we've said here.

19 10:25:24 MS. MAGUIRE: Okay.

20 10:25:27 THE WITNESS: But there's a variety of

21 10:25:29 reasons why advertisers use different publishers of

22 10:25:36 YouTube, which YouTube is one publisher. Other

23 10:25:39 examples are MySpace or Facebook or any other blog

24 10:25:42 sites, but advertisers have certain objectives and

25 10:25:46 many different advertisers have different objectives,

1 LIU, MATTHEW

2 12:05:56 it.

3 12:05:56 MS. MAGUIRE: Q. How would you describe it?

4 12:06:06 A How would I describe --

5 12:06:09 Q How does the -- I guess how do the economics

6 12:06:14 of this work? The -- an advertiser wishing to

7 12:06:20 purchase a PVA slot, what do they pay for?

8 12:06:27 MR. MANCINI: Objection; compound question.

9 12:06:29 Objection to form. Objection; it calls for

10 12:06:31 speculation.

11 12:06:39 THE WITNESS: Yeah, I'm not sure what you

12 12:06:43 mean by "economic model" and what you mean by what

13 12:06:45 they pay for?

14 12:06:53 MS. MAGUIRE: Q. When an advertiser targets

15 12:06:55 a vertical, do they pay for a vertical?

16 12:06:59 MR. MANCINI: Objection to form. Objection;

17 12:07:01 calls for speculation.

18 12:07:03 THE WITNESS: I'm not exactly sure what you

19 12:07:05 mean by the question, but an advertiser does not pay

20 12:07:08 for verticals. Verticals are a targeting criteria.

21 12:07:18 Advertisers, in the case of the search PVA,

22 12:07:21 pay for showing impressions of their search PVA.

23 12:07:28 MS. MAGUIRE: I see.

24 12:07:29 Q So are the impressions tied to the verticals?

25 12:07:38 MR. MANCINI: Objection to form.

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LIU, MATTHEW

12:07:39 THE WITNESS: I'm not sure what you mean by
12:07:41 that.

12:07:41 MS. MAGUIRE: Q. Is it correct that an
12:07:46 advertiser -- am I correctly stating what you just
12:07:51 told me, that an advertiser selects verticals that
12:07:53 they wish to target their ads against? Is that
12:07:56 accurate?

12:07:57 MR. MANCINI: Objection; mischaracterizes
12:07:58 testimony. Objection to form.

12:08:00 THE WITNESS: The way I would state it is
12:08:03 that an advertiser pays to show impressions of their
12:08:10 search PVA. There's a price associated with that.

12:08:17 They can choose [REDACTED]
12:08:25 [REDACTED]
12:08:28 [REDACTED]
12:08:36 [REDACTED]

12:08:42 MS. MAGUIRE: Okay.

12:08:53 Q And an advertiser can choose to target --
12:08:56 they can choose their targeting criteria to include

12:08:59 [REDACTED]
12:09:03 [REDACTED]? Just picking a number.

12:09:04 MR. MANCINI: Objection to form.

12:09:05 THE WITNESS: An advertiser can [REDACTED]
12:09:10 [REDACTED]

1 LIU, MATTHEW

2 12:09:17 MS. MAGUIRE: Okay.

3 12:09:17 THE WITNESS: And the advertiser can also

4 12:09:23 target other things as well, like geography,

5 12:09:26 demographics.

6 12:09:27 MS. MAGUIRE: Sure.

7 12:09:28 Q Is it more expensive to target multiple

8 12:09:30 criteria, or is it all based on the impression?

9 12:09:34 MR. MANCINI: Objection; lacks foundation.

10 12:09:35 Objection to form.

11 12:09:36 THE WITNESS: That's not how I would describe

12 12:09:37 it, but we did have a pricing structure. If it was

13 12:09:43 untargeted, it would be one price. I don't remember

14 12:09:46 what that price is. If you wanted to use vertical

15 12:09:52 targeting, there would be different prices if it was

16 12:09:55 first level vertical, second level vertical, third

17 12:09:59 level vertical, and there were also different prices

18 12:10:01 if you wanted to do demographic and geographic

19 12:10:05 targeting.

20 12:10:06 MS. MAGUIRE: Okay.

21 12:10:07 Q You mentioned demographic targeting a few

22 12:10:10 times. Have you heard of a tool called Ginsu?

23 12:10:14 A I have heard of the term called Ginsu.

24 12:10:18 Q What is Ginsu?

25 12:10:20 A I actually never worked on Ginsu and don't

1 LIU, MATTHEW

2 13:20:09 Q What is keyword targeting?

3 13:20:11 MR. WILLEN: Objection to the form.

4 13:20:14 MS. MAGUIRE: Q. How does a person using

5 13:20:16 Promoted Video target the keywords?

6 13:20:23 A So --

7 13:20:24 MR. WILLEN: Objection; calls for

8 13:20:24 speculation.

9 13:20:25 THE WITNESS: I -- I wouldn't -- okay.

10 13:20:33 An advertiser may decide that there are

11 13:20:40 keywords he or she is interested in showing the

12 13:20:45 Promoted Videos against.

13 13:20:47 On YouTube's search results and/or other

14 13:20:58 parts of the site, and the advertising systems,

15 13:21:09 take -- oh, this is going to be really -- can you

16 13:21:12 clarify the question?

17 13:21:13 Keyword targeting, again, is a trade term

18 13:21:16 that's -- I need a little bit more context to answer

19 13:21:20 this question.

20 13:21:55 MS. MAGUIRE: Okay. Okay.

21 13:21:58 Q Mr. Liu, you identified keyword targeting as

22 13:22:01 one of the types of targeting that's available on

23 13:22:04 promoted videos.

24 13:22:05 A Yes, that's correct.

25 13:22:06 Q I'm just asking what that means, what that

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LIU, MATTHEW

13:22:08 is.

13:22:11 MR. WILLEN: Objection to the form; compound.

13:22:16 THE WITNESS: So let me clarify a little bit.

13:22:25 So Promoted Videos allows advertisers to

13:22:28 specify keywords that they're interested in having

13:22:35 their promoted videos show up against.

13:22:37 MS. MAGUIRE: Okay.

13:22:38 THE WITNESS: The -- there's no guarantee

13:22:43 that -- first off, there's many locations that take in

13:22:48 these inputs, and there's also no guarantee that those

13:22:55 Promoted Videos will ever show on any of those

13:22:58 locations, but it's a criteria that the advertiser is

13:23:01 basically expressing that on YouTube's search pages, I

13:23:08 would like the opportunity to show my Promoted Videos

13:23:12 and/or on other parts of YouTube, I would like my

13:23:20 Promoted Videos to show when the keywords I've

13:23:27 targeted are related to the content of those pages.

13:23:31 MS. MAGUIRE: Okay. Okay.

13:23:35 Q And this is distinct from a vertical

13:23:37 targeting which we were discussing earlier in the

13:23:39 context of PVAs?

13:23:43 MR. WILLEN: Objection to the form.

13:23:44 THE WITNESS: This is a completely different

13:23:47 technical term than --

1 LIU, MATTHEW

2 13:23:48 MS. MAGUIRE: Okay.

3 13:23:48 THE WITNESS: -- vertical targeting.

4 13:23:49 MS. MAGUIRE: Okay.

5 13:23:50 Q Are advertisers limited in any way as to what

6 13:23:54 keywords they can select?

7 13:23:56 MR. WILLEN: Objection to the form; calls for

8 13:24:01 speculation; vague.

9 13:24:02 THE WITNESS: Can you be more specific with

10 13:24:03 that question?

11 13:24:04 MS. MAGUIRE: Can an advertiser buy any

12 13:24:07 keyword they want?

13 13:24:11 THE WITNESS: An advertiser --

14 13:24:13 MR. WILLEN: Objection to the form.

15 13:24:13 THE WITNESS: -- an advertiser can never buy

16 13:24:15 a keyword.

17 13:24:16 MS. MAGUIRE: Okay.

18 13:24:16 Q What's -- what's -- how should I -- how

19 13:24:20 should I say it?

20 13:24:22 A How should I say what? Like what are you

21 13:24:24 asking me?

22 13:24:25 Q If it's incorrect to say an advertiser buys a

23 13:24:28 keyword, what is it that they're doing instead of

24 13:24:30 buying a keyword?

25 13:24:31 MR. WILLEN: Objection to the form.

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LIU, MATTHEW

13:24:32 THE WITNESS: An advertiser does a lot of
13:24:34 things when working with us on Promoted Videos.
13:24:37 Again, they are targeting -- they're selecting
13:24:40 keywords that are interesting to them.

13:24:43 MS. MAGUIRE: Okay.

13:24:43 THE WITNESS: And they are -- they're
13:24:49 basically saying that when a search page, let's say,
13:24:55 has that keyword show up, they would like the
13:24:59 opportunity for the ad to -- or sorry -- the Promoted
13:25:03 Video to potentially show up on that page.

13:25:05 MS. MAGUIRE: Okay.

13:25:06 THE WITNESS: That's the primary example.
13:25:07 There's other examples of other pages
13:25:09 where -- where the systems are taking the advertiser
13:25:16 input as to what keywords they're interested in and
13:25:18 seeing if there is a -- if those Promoted Videos are
13:25:27 relevant, and that's a trade term that I can go into
13:25:31 more detail if you want me to, to those other pages.

13:25:33 The advertiser never buys a keyword. They
13:25:36 target keywords that they're interested in. There's a
13:25:39 distinction there.

13:25:39 MS. MAGUIRE: Okay. Okay. I understand
13:25:42 that.

13:25:43 Q You say if the Promoted Videos are relevant,

1 LIU, MATTHEW

2 13:25:46 that's a trade word that you can go into.

3 13:25:48 Can you go into that, please?

4 13:25:50 MR. WILLEN: Objection to the form.

5 13:25:52 THE WITNESS: So in the world of advertising,

6 13:25:58 "relevant" has very specific meanings, but what I'm

7 13:26:05 trying to describe is that on that page, there is some

8 13:26:14 sort of page content, and the Promoted Video, the

9 13:26:20 content of that Promoted Video is relevant, and using

10 13:26:29 more layman's terms, this is not a technical

11 13:26:32 definition, somewhat related to the content on that

12 13:26:35 page.

13 13:26:37 MS. MAGUIRE: Q. Did you say the Promoted

14 13:26:44 Video is, in layman's terms, related to the content on

15 13:26:46 the page? Is that where the link is?

16 13:26:50 MR. WILLEN: Hold on.

17 13:26:53 Objection to the extent it mischaracterizes

18 13:26:55 the prior testimony.

19 13:26:56 THE WITNESS: Are you asking to clarify --

20 13:26:59 what -- what are you asking?

21 13:27:01 MS. MAGUIRE: Q. Yeah, I'm asking if that's

22 13:27:01 inaccurate; is that what -- is that what you said?

23 13:27:02 Did you say that the Promoted Video is rel --

24 13:27:08 related in layman's terms to the content of the page?

25 13:27:14 A Let me add a little more detail.

1 LIU, MATTHEW

2 13:27:18 What I mean by that -- "related" is still not
3 13:27:20 the best word.

4 13:27:21 The -- a more accurate way of describing this
5 13:27:28 is that the Google Ad systems look at the content of
6 13:27:34 the page where we may potentially be showing Promoted
7 13:27:39 Videos.

8 13:27:40 MS. MAGUIRE: Okay.

9 13:27:40 THE WITNESS: It has some understanding of
10 13:27:42 what that content might be.

11 13:27:44 MS. MAGUIRE: Okay.

12 13:27:45 THE WITNESS: It also understands what
13 13:27:49 keywords and/or placement the advertiser has chosen as
14 13:27:53 targets, and from there the ad systems have certain
15 13:27:59 determinations as to whether or not the Promoted Video
16 13:28:02 should show on that page based on what the ad system
17 13:28:12 algorithmically thinks relevant, and relevant being
18 13:28:17 what I described as related. It's really a very
19 13:28:18 complex set of criteria that's within the ad systems.

20 13:28:21 MS. MAGUIRE: Okay. I think I understand
21 13:28:23 that.

22 13:28:24 Q The keywords, is -- is there a menu of
23 13:28:26 keywords that people choose from, or are they -- do --
24 13:28:28 does a user spes -- an advertiser, excuse me, specify
25 13:28:34 any keyword they think of?

1 LIU, MATTHEW

2 13:28:36 MR. WILLEN: Objection to the form; vague as

3 13:28:38 to time; among other things it's vague as to.

4 13:28:40 THE WITNESS: Yeah.

5 13:28:41 You mean today?

6 13:28:42 MS. MAGUIRE: Yeah.

7 13:28:43 THE WITNESS: Advertisers -- advertisers come

8 13:28:49 up with the keywords that they're interested in

9 13:28:52 targeting.

10 13:28:53 MS. MAGUIRE: Q. Themselves?

11 13:28:58 A Advertisers come up with it themselves.

12 13:29:00 There are cases where they work with Google teams --

13 13:29:04 Q Okay.

14 13:29:04 A -- to help -- help determine what those

15 13:29:10 keyword lists are and whether or not the --

16 13:29:15 ultimately, though, the advertiser is making the

17 13:29:17 decision as to what keywords to target.

18 13:29:37 Q Can an advertiser choose any word? So can --

19 13:29:50 let me think about how to ask this.

20 13:29:56 Does the keyword have to be somehow related

21 13:29:59 to the video that I'm trying to promote in laymen's

22 13:30:02 terms using the word "related"?

23 13:30:06 MR. WILLEN: Objection to the form; vague.

24 13:30:10 THE WITNESS: What do you mean by "related to

25 13:30:20 the video"?

Schapiro Exhibit 48

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ATTORNEYS EYES ONLY

VIACOM INTERNATIONAL INC., COMEDY)
 PARTNERS, COUNTRY MUSIC)
 TELEVISION, INC., PARAMOUNT)
 PICTURES CORPORATION, and BLACK)
 ENTERTAINMENT TELEVISION, LLC,)
 Plaintiffs,)
 vs.) Case No 1:07CV02103
 YOUTUBE, INC., YOUTUBE, LLC,)
 and GOOGLE, INC.,)
 Defendants.)
 _____)
 THE FOOTBALL ASSOCIATION PREMIER)
 LEAGUE LIMITED, BOURNE CO., et al.)
 on behalf of themselves and all)
 others similarly situated,)
 Plaintiffs,)
 vs.) Case No. 07CV03582
 YOUTUBE, INC., YOUTUBE LLC, and)
 GOOGLE, INC.,)
 Defendants.)
 _____)

Deposition of VARUN KACHOLIA

Palo Alto, California

Friday, January 8, 2010

JOB NO. 18544

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January 8, 2010

9:35 a.m.

VIDEOTAPED DEPOSITION OF VARUN KACHOLIA,
held at the offices of Wilson Sonsini Goodrich
& Rosati, 601 South California Avenue, Palo Alto,
California, pursuant to Notice before Peppina Rayna
Thompson, Certified Shorthand Reporter of the State
of California.

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A P P E A R A N C E S .

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ALSO PRESENT:

WILLIAM TRUELOVE
ARMANDO CARRASCO, Videographer

1 16:00:00 MR. GALDSTON: (Nods head)

2 Q So there's --

3 A They do not consult each other. They work in
4 parallel.

5 Q Very good, that's helpful.

6 Similarly, on the right-hand side occasionally
7 you see advertisements that are returned in response to
8 a query. And I'd ask the same question: Is there some
9 functional connection between the search functionality
10 and the advertising that's returned?

11 A It's -- do you mean advertising which is not
12 Promoted Videos?

13 Q Correct.

14 A What kind of advertising?

15 16:00:00 Q Well, I can show you an example if that would
16 be helpful.

17 A Sure.

18 Q Okay.

19 MR. RUBIN: Again, this is beyond the scope of
20 the deposition.

21 MR. GALDSTON: Sir, I'll hand you what's been
22 previously marked in the deposition of Susie Ryder
23 Exhibit 13.

24 (Plaintiffs' Exhibit 15 marked for
25 identification)

1 16:00:00 MR. GALDSTON: If you would just take a moment
2 to look at that, I will represent to you that my
3 questions will only concern the advertisement on the
4 right-hand side.

5 MR. RUBIN: Are you done with 14?

6 MR. GALDSTON: I am done with 14, right.

7 MR. RUBIN: And 4?

8 MR. GALDSTON: Correct.

9 THE WITNESS: Sir, what is your question here?

10 MR. GALDSTON:

11 Q It's really the same question that I was asking
12 about the promoted videos.

13 When the user inputs a term, in this case
14 English Premier League 2008, is there functional
15 16:00:00 connection between the search engine technology and the
16 functionality that displays advertising on the
17 right-hand side?

18 MR. RUBIN: Objection, vague, outside the scope
19 of the deposition. I'm going to allow the witness to
20 answer to establish that.

21 THE WITNESS: Okay. Our advertising system is
22 a completely separate system.

23 MR. GALDSTON: Okay.

24 THE WITNESS: It runs independent of search.
25 And search runs independent to advertising.

1 16:00:00 MR. GALDSTON: Okay. What I'm trying to
2 understand is if within the search functionality is
3 there a component when a user inputs a term like
4 "English Premier League 2008" where the search
5 functionality says let's go capture some promoted videos
6 that are relevant or responsive to these search terms
7 and put them on the right-hand side margin of the
8 screen.

9 MR. RUBIN: Objection, asked and answered with
10 respect to prior exhibit. The witness testified that
11 that was not the case, and I'm not going to allow him to
12 answer that question again.

13 It's well outside the scope of the deposition.
14 Mr. Kacholia is here to testify about selecting and
15 16:00:00 ranking videos in response to search queries. He's
16 testified --

17 MR. GALDSTON: Michael, it's really a
18 foundational question.

19 MR. RUBIN: Let me finish.

20 MR. GALDSTON: If there's no foundations to be
21 laid, it's beyond the scope. I'm just getting a yes or
22 no.

23 MR. RUBIN: Let me finish the objection.

24 He's testified with respect to a prior exhibit
25 that you are now were visiting that the other system is

1 16:00:00 separate, and he just testified that this system is
2 separate.

3 MR. GALDSTON: Okay.

4 MR. RUBIN: Okay. He already -- he already --
5 you already established -- you already
6 established that the foundation didn't exist and you
7 have gone further.

8 MR. GALDSTON: I don't believe I have. But I'd
9 like the witness to answer the question as opposed to
10 your testimony.

11 MR. RUBIN: He did. He already did and you are
12 asking the question again.

13 MR. GALDSTON: No, it's a different question.

14 THE WITNESS: You have asked the same question
15 16:00:00 five times now. You know, You can ask her to repeat the
16 same thing for you.

17 MR. GALDSTON: Indulge me on this one last
18 question, and we'll put the document away.

19 THE WITNESS: Sure. Please ask it again.

20 MR. GALDSTON: Sure.

21 Q When a user inputs a search term like "English
22 Premier League 2008" does the search functionality have
23 any functionality that determines whether, for example,
24 a promoted video is displayed on the right-hand side
25 versus an advertisement?

1 16:00:00 MR. RUBIN: Objection, vague, calls for
2 speculation, outside the scope of the deposition.
3 THE WITNESS: Search functionality is
4 independent to promoted videos or any ads shown on the
5 right. It does not know what promoted videos will be
6 shown, neither the promoter videos knows what searches
7 are.
8 MR. GALDSTON: Thank you, that's very helpful.
9 You may put that document away.
10 THE WITNESS: Am I revisiting?
11 MR. GALDSTON: I'm sorry?
12 THE WITNESS: That's okay.
13 MR. GALDSTON: I will not revisit the question
14 again.
15 16:00:00 Okay. I have two more documents to show you.
16 Looks like three.
17 MR. RUBIN: 16, so rare that I'm the one
18 getting it right.
19 MR. GALDSTON: I'll represent to you, counsel,
20 this blank 14 is a printout of the YouTube web page I
21 created yesterday where I went on the YouTube website
22 and typed into the search panel English space p-r-e.
23 MR. RUBIN: I will repeat my objections to the
24 printout of the YouTube website or the alleged printouts
25 to the YouTube website that have appeared in a number of

1 16:00:00 the exhibits today that have lacked sufficient
2 foundation. And this one, like some of the earlier
3 ones, have indicia of inauthenticity with, for example,
4 this box of auto completes that are askew from the
5 search box.

6 MR. GALDSTON: Sir, out of respect for your
7 time and patience, I'll let you know that I am only
8 going to ask questions about the Suggested Search box on
9 this documents. So --

10 THE WITNESS: I'd like to look at the document.

11 (Discussion off the record)

12 MR. GALDSTON: Let's mark it with that
13 clarified.

14 (Plaintiffs' Exhibit 16 marked for

15 16:00:00 identification)

16 (Discussion off the record)

17 MR. GALDSTON:

18 Q Sir, let me know when you're ready to go on
19 this document.

20 A I am done.

21 Q So in this Suggested Search there are series of
22 phrases that are returned in response to my query,
23 English, quote -- or, sorry, "English space p-r-e".

24 Is it fair to say, then, that this first phrase
25 that's returned "English Premier League Highlights

Schapiro Exhibit 49



Upload, tag and share your videos worldwide!

[Sign Up](#) | [Log In](#) | [Help](#)[Home](#)[Videos](#)[Channels](#)[Upload](#)[Invite Friends](#)

Help

Q: How can I share my videos and link to them from my website?

A: [How to share and link to your videos](#)

Q: What kind of videos can I upload?

A: You may upload any kind of personal video that you'd like to share with the world. We don't allow any nudity and your video must be appropriate for all audiences.

However, this still leaves a lot of room for creativity!! Do you own a [dog](#) or a [cat](#)? Have you gone on vacationing in [Mexico](#)? Do you live in [The Netherlands](#)?

These are just some examples of the videos that our users are uploading. In the end, you know yourself best. What would *you* like to capture on video?

Q: How long can my video be?

A: There is no time limit on your video, but the video file you upload must be less than 100 MB in size.

Q: What video file formats can I upload?

A: YouTube accepts video files from most digital cameras and from cell phones in the .AVI, .MOV, and .MPG file formats.

Q: How can I improve my videos?

A: We encourage you to edit your videos with software such as [Windows MovieMaker](#) (included with every Windows installation), or [Apple iMovie](#). Using these programs you can easily edit your videos, add soundtracks, etc.

Q: Do I retain copyrights and other legal rights to my videos?

A: Yes. You retain all rights to your content. YouTube assumes no copyright to your material.

Q: What is your policy on copyright infringement?

A: YouTube respects the rights of copyright holders and publishers and is only accepting video uploads from persons who hold all necessary rights to the uploaded material. Our policy is to respond to any notices of alleged infringement that comply with the Digital Millennium Copyright Act (DMCA). 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.

Q: How do I report copyright infringement?

A: If you believe that someone else has uploaded your copyrighted content without your permission, we encourage you to contact that person in order to resolve any differences with them directly. You can also contact our support team using this [form](#) for instructions on how to submit a copyright infringement notice to YouTube.

Q: What if I have been falsely accused of copyright infringement?

A: We'll let you know if we receive a copyright complaint about any of your video content that is hosted on YouTube. We'll give you the opportunity to respond appropriately.

Q: What are you doing to prevent content that violates your policies from appearing in YouTube?

A: We do a preliminary review on uploaded videos through both a manual and automated process. Although we try our best to detect and remove videos that violate our policy guidelines, our review process is primarily focused on removing adult content or obvious copyright violations, and is not bulletproof. However, we encourage our viewers to notify us when they discover policy violations or copyright issues -- we have a process for reviewing reported policy violations, and respond to reported copyright violations under the Digital Millennium Copyright Act.

Contact YouTube

If you have any account or video issues, please contact us [here](#). Also, if you have any ideas or suggestions to make our service better, please don't hesitate to drop us a line.

[What's New](#) | [About Us](#) | [Help](#) | [Developers](#) NEW | [Terms of Use](#) | [Privacy Policy](#)

Copyright © 2005 YouTube, LLC™ | [RSS](#)

Schapiro Exhibit 50

```

<?php
// -----
// NOTE: only include the line below for Top-Level
// pages, such as Home, My Videos, My Profile, etc.,
// not on pages that are included by other pages!
$YOUTUBE_FILE = basename($_SERVER['PHP_SELF'], '.php');

include_once("../src/init.php");

include_once("../src/UT_User.php");

include_once("../src/User.php");

include_once("include_header.php");

$login_user = new User;
$SESSION_USER = new UT_User;
if ($login_user->user_get_session($SESSION_USER) == FALSE)
    unset($SESSION_USER);

if (!isset($SESSION_USER))
{
    $session_username = "YOUR_USERNAME";
}
else
{
    $session_username = $SESSION_USER->username[0];
}

// -----
?>

<div class="tableSubTitle">Help</div>

<span class="highlight">Q: How can I share my videos and link to them from my website?</span>

<br><br>A: <a href="sharing.php">How to share and link to your videos</a>
<br/>
<br/>

<span class="highlight">Q: What kind of videos can I upload?</span>

<br><br>A: You may upload any kind of personal video that you'd like to share with the world. We don't allow
any nudity and your video must be appropriate for all audiences.
<br/>
<br/>
However, this still leaves a lot of room for creativity!! Do you own a <a href="results.php?search=dog">dog</a>
or a <a href="results.php?search=cat">cat</a>? Have you gone on vacationing in <a
href="results.php?search=mexico">Mexico</a>? Do you live in <a href="results.php?search=netherlands">The
Netherlands</a>?
<br/>
<br/>
These are just some examples of the videos that our users are uploading. In the end, you know yourself best.
What would <i>you</i> like to capture on video?

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Q: How long can my video be?

A: There is no time limit on your video, but the video file you upload must be less than 100 MB in size.

Q: What video file formats can I upload?

A: YouTube accepts video files from most digital cameras and from cell phones in the .AVI, .MOV, and .MPG file formats.

Q: How can I improve my videos?

A: We encourage you to edit your videos with software such as Windows MovieMaker (included with every Windows installation), or Apple iMovie. Using these programs you can easily edit your videos, add soundtracks, etc.

Q: Do I retain copyrights and other legal rights to my videos?

A: Yes. You retain all rights to your content. YouTube assumes no copyright to your material.

Q: What is your policy on copyright infringement?

A: YouTube respects the rights of copyright holders and publishers and is only accepting video uploads from persons who hold all necessary rights to the uploaded material. Our policy is to respond to any notices of alleged infringement that comply with the Digital Millennium Copyright Act (DMCA). 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.

Q: How do I report copyright infringement?

A: If you believe that someone else has uploaded your copyrighted content without your permission, we encourage you to contact that person in order to resolve any differences with them directly. You can also contact our support team using this form for instructions on how to submit a copyright infringement notice to YouTube.

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A: We'll let you know if we receive a copyright complaint about any of your video content that is hosted on YouTube. We'll give you the opportunity to respond appropriately.

Q: What are you doing to prevent content that violates your policies from appearing in YouTube?

A: We do a preliminary review on uploaded videos through both a manual and automated process. Although we try our best to detect and remove videos that violate our policy guidelines, our review process is primarily focused on removing adult content or obvious copyright violations, and is not bulletproof. However, we encourage our viewers to notify us when they discover policy violations or copyright issues -- we have a process for reviewing reported policy violations, and respond to reported copyright violations under the Digital Millennium Copyright Act.

Contact YouTube

If you have any account or video issues, please contact us here.

Also, if you have any ideas or suggestions to make our service better, please don't hesitate to drop us a line.

<?php include_once("include_footer.php"); ?>

Schapiro Exhibit 51



Upload, tag and share your videos worldwide!

[Sign Up](#) | [Log In](#) | [Help](#)[Home](#)[Videos](#)[Channels](#)[Friends](#)[Upload](#)

Terms of Use

1. Your Acceptance

BY USING AND/OR VISITING THIS WEBSITE (collectively, including all Content available through the YouTube.com domain name, the "YouTube Website", or "Website"), YOU SIGNIFY YOUR ASSENT TO BOTH THESE TERMS AND CONDITIONS (the "Terms of Service") AND THE TERMS AND CONDITIONS OF YOUTUBE'S PRIVACY POLICY, WHICH ARE PUBLISHED AT www.YouTube.com/privacy.php, AND WHICH ARE INCORPORATED HEREIN BY REFERENCE. If you do not agree to any of these terms, please do not use the YouTube Website.

2. YouTube Website

These Terms of Service apply to all users of the YouTube Website, including users who are also contributors of video content, information and other materials or services on the Website. The YouTube Website may contain links to third party websites that are not owned or controlled by YouTube. YouTube has no control over, and assumes no responsibility for, the content, privacy policies, or practices of any third party websites. In addition, YouTube will not and cannot censor or edit the content of any third-party site. By using the Website, you expressly relieve YouTube from any and all liability arising from your use of any third-party website. Accordingly, we encourage you to be aware when you leave the YouTube Website, and to read the terms and conditions and privacy policy of each other website that you visit.

3. Website Access

A. YouTube hereby grants you permission to use the Website as set forth in this Terms of Service, provided that: (i) your use of the Website as permitted is solely for your personal, noncommercial use; (ii) you will not copy or any part of the Website in any medium without YouTube's prior written authorization; (iii) you will not alter or modify any part of the Website other than as may be reasonably necessary to use the Website for its intended purpose; and (iv) you will otherwise comply with the terms and conditions of these Terms of Service.

B. In order to access some features of the Website, you will have to create an account. You may never use another's account without permission. When creating your account, you must provide accurate and complete information. You are solely responsible for the activity that occurs on your account, and you must keep your account password secure. You must notify YouTube immediately of any breach of security or unauthorized use of your account. Although YouTube will not be liable for your losses caused by any unauthorized use of your account, you may be liable for the losses of YouTube or others due to such unauthorized use.

C. You agree not to use or launch any automated system, including without limitation "robots," "spiders," "offline readers," etc that accesses the Website in a manner that sends more request messages to the YouTube servers in a given period of time than a human can reasonably produce in the same period by using a convention on-line web browser. Notwithstanding the foregoing, YouTube grants the operators of public search engines permission to use spiders to copy materials from the site for the sole purpose of creating publicly available searchable indices of the materials, but not caches or archives of such materials. YouTube reserves the right to revoke these exceptions either generally or in specific cases.

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The content on the YouTube Website, including without limitation the text, software, scripts, graphics, photos, sounds, music, videos, interactive features and the like ("Content") and the trademarks, service marks and logos contained therein ("Marks"), are owned by or licensed to YouTube, subject to copyright and other intellectual property rights under United States and foreign laws, and international conventions. Content on the Website is provided to you AS IS for your information and personal use only, and may not be used, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners. YouTube reserves all rights not expressly granted in and to the Website and the Content. You agree not to engage in the use, copying, or distribution of any of the Content other than expressly permitted herein, including any use, copying or distribution of User Submissions of third parties obtained through the Website for any commercial purposes. If you download or print a copy of the Content for personal use, you must retain all copyright and other proprietary notices contained therein. You agree not to circumvent, disable or otherwise interfere with security related features of the YouTube Website or features that prevent or restrict use or copying of any Content or enforce limitations on use of the YouTube Website or the Content therein.

5. User Submissions

A. The YouTube Website may now or in the future permit the submission of videos or other communications submitted by you and other users ("User Submissions"), and the hosting, sharing and/or publishing of such User Submissions. You understand that whether or not such User Submissions are published, YouTube does not guarantee any confidentiality with respect to any submissions.

B. You shall be solely responsible for your own User Submissions and the consequences of posting or publishing them. In connection with User Submissions, you affirm, represent and/or warrant that: (i) you own, or have the necessary licenses, rights, consents, and permissions to use and authorize YouTube to use, all patent, trademark, trade secret, copyright or other proprietary rights in and to any and all User Submissions to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service; and (ii) you have the written consent, release, and/or permission of each and every identifiable individual person in the User Submission to use the name or likeness of each and every such identifiable individual person to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service. For clarity, you shall retain all of your ownership rights in your User Submissions. However, by submitting the User Submissions to YouTube, you hereby grant YouTube a worldwide, non-exclusive, fully paid-up, royalty-free, irrevocable, perpetual, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, perform and otherwise exploit the User Submissions in connection with the YouTube Website and YouTube's (and its successor's) business, including without limitation for promoting and redistributing part or all of the YouTube Website (and derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the YouTube Website a non-exclusive license to access your User Submissions through the Website, and to use, reproduce, distribute, prepare derivative works of, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service,

C. In connection with User Submissions, you further agree that you will not: (i) submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein; (ii) publish falsehoods or misrepresentations that could damage YouTube or any third party; (iii) submit material that is unlawful, obscene, defamatory, libelous, threatening, pornographic, harassing, hateful, racially or ethnically offensive or encourages conduct that would be considered a criminal offense, give rise to civil

liability, violate any law or is otherwise inappropriate; (iv) post advertisements or solicitations of business; (v) impersonate another person. YouTube does not endorse any User Submission or any opinion, recommendation or advice expressed therein, and YouTube expressly disclaims any and all liability in connection with User Submissions. If notified by a user or a content owner of a User Submission that allegedly does not conform to this Agreement, YouTube may investigate the allegation and determine in good faith and in its sole discretion whether to remove the User Submission, which it reserves the right to do at any time. For clarity, 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.

D. In particular, if you are a copyright owner or an agent thereof, and believe that any User Submission infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act ("DMCA") by providing our Copyright Agent with the following information in writing: (a) the electronic or physical signature of the owner of the copyright or the person authorized to act on the owner's behalf; (b) identification of the copyrighted work(s) that you claim has been infringed; (c) identification of the specific User Submission(s) alleged to be infringing, including information reasonably sufficient to permit YouTube to identify and locate the material on the YouTube Website; (d) information reasonably sufficient to permit YouTube to contact you, such as your name, address, telephone number, and email address; (e) a statement by you that you have a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; and (f) a statement, made under penalty of perjury, that the above information in your notification is accurate and that you are the copyright owner or are authorized to act on the copyright owner's behalf. YouTube's designated Copyright Agent to receive notifications of claimed infringement is: [copyright@youtube.com] For clarity, only DMCA notices should go to the Copyright Agent; any other feedback, comments, requests for technical support and other communications should be directed to YouTube customer service through <http://www.youtube.com/contact.php>. You acknowledge that if you fail to comply with all of the requirements of this Section 5(D), your DMCA notice may not be valid.

E. You understand that when using the YouTube Website you will be exposed to User Submissions from a variety of sources, and that YouTube is not responsible for the accuracy, usefulness, safety, or intellectual property rights of or relating to such User Submissions. You further understand and acknowledge that you may be exposed to User Submissions that are inaccurate, offensive, indecent or objectionable, and you agree to waive, and hereby do waive, any legal or equitable rights or remedies you have or may have against YouTube with respect thereto, and agree to indemnify and hold YouTube, its Owners/Operators, affiliates, and/or licensors, harmless to the fullest extent allowed by law regarding all matters related to your use of the site.

F. YouTube permits you to link to Your own User Submissions hosted on the website or User Submissions of other third parties available on the Website, for personal, non-commercial purposes only. In addition, YouTube provides an "Embeddable Player" feature, in which you can incorporate certain User Submissions on your own personal, non-commercial websites, provided that you include a prominent link back to the YouTube website on the pages containing the Embeddable Player. You understand that the User Submissions, whether or not linked or embedded into other web sites, are provided to You only on an as-available basis, and YouTube does not guarantee that their availability will be uninterrupted or bug free. YouTube reserves the right to discontinue any aspect to the YouTube Website at any time, including discontinue any linked or embedded Content either generally or in specific cases.

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8. Indemnity

You agree to defend, indemnify and hold harmless YouTube, its parent corporation, officers, directors, employees and agents, from and against any and all claims, damages, obligations, losses, liabilities, costs or debt, and expenses (including but not limited to attorney's fees) arising from: (i) your use of and access to the YouTube Website; (ii) your violation of any term of this Agreement; (iii) your violation of any third party right, including

without limitation any copyright, property, or privacy right; or (iv) any claim that one of your User Submissions caused damage to a third party. This defense and indemnification obligation will survive this Agreement and your use of the YouTube Website.


9. Ability to Accept Terms of Service

You affirm that you are either more than 18 years of age or, an emancipated minor or, possess legal parental or guardian consent, and are fully able and competent to enter into the terms, conditions, obligations, affirmations, representations and warranties set forth in these Terms of Service, and to abide by and comply with these Terms of Service. In any case, you affirm that you are over the age of 13, as the YouTube Website is not intended for children under 13.

10. General

You agree that: (i) the YouTube Website shall be deemed solely based in California; and (ii) the YouTube Website shall be deemed a passive website that does not give rise to personal jurisdiction over YouTube, either specific or general, in jurisdictions other than California. This Agreement shall be governed by the internal substantive laws of the State of California, without respect to its conflict of laws principles. Any claim or dispute between you and YouTube that arises in whole or in part from the YouTube Website shall be decided exclusively by a court of competent jurisdiction located in San Mateo County, California. This Agreement, together with the Privacy Policy at <http://www.YouTube.com/privacy.php> and any other legal notices published by YouTube on the Website, shall constitute the entire agreement between you and YouTube concerning the YouTube Website. If any provision of this Agreement is deemed invalid by a court of competent jurisdiction, the invalidity of such provision shall not affect the validity of the remaining provisions of this Agreement, which shall remain in full force and effect. No waiver of any term of this Agreement shall be deemed a further or continuing waiver of such term or any other term, and YouTube's failure to assert any right or provision under this Agreement shall not constitute a waiver of such right or provision. YouTube reserves the right to amend this Agreement at any time and without notice, and it is your responsibility to review the Agreement for any changes. Your use of the YouTube Website following any amendment of this Agreement will signify your assent to and acceptance of its revised terms

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Schapiro Exhibit 52

Hollister, Jesse

From: yourfriends@atom.com
Sent: Tuesday, September 05, 2006 5:41 PM
To: akspellicy@yahoo.com.au
Subject: Addicting Clips Content Removal [Copyright] (KMM519159I21263L0KM)

Attachments: Counter-Notification of Infringement.doc



Counter-Notificatio
n of Infrig...

RE: I Closed My Eyes

<http://www.addictingclips.com/Clip.aspx?key=A0F0D4934C9D1068>

Hello,

As a passive conduit, we cannot monitor user clips, but we respond to breaches of our Terms of Service when we learn of such behavior.

It was brought to our attention that your content violated our Terms of Service. It was therefore removed from the Addicting Clips web site.

If you believe that the content was removed in error, and specifically was not infringing on the copyright of another, and you want to put the materials back on the Addicting Clips website, you must provide us with a formal Counter-Notification of Infringement. Please be advised that we are obligated by the terms of the Digital Millennium Copyright Act (DMCA) of 1998 to disclose the information you supply in this form to the original notifier. This Counter-Notification is both embedded in this email and attached for your convenience.

Please note that under Section 512(f) of the Copyright Act, any person who knowingly materially misrepresents that material or activity was removed or disabled by mistake or misidentification may be subject to liability. Please also be advised that we enforce a policy that provides for the termination in appropriate circumstances of subscribers who are repeat infringers.

Counter-Notification of Infringement

I hereby certify under penalty of perjury that I am the owner or am authorized to act on behalf of the owner of the intellectual property rights. I have a good faith belief that material identified below was removed by mistake. Please promptly restore the material described below.

Description of the Material Removed:
Previous Location of the Material Removed:
Date:

I can be contacted at:

Name:
Title:
Company or Organization:

Street Address:
City:
State:
Zip:
Telephone:
Facsimile:
Email:

I certify under penalty of perjury the truth of the above information.
I hereby consent to the jurisdiction of the federal court in which I reside and that I will accept service of process from the original notifier.

Signature:

Regards,

User Abuse Manager, Addicting Clips
Atom Entertainment, Inc.

Schapiro Exhibit 53

From: yourfriends@atom.com
Date: Tue, 12 Dec 2006 11:02:30 -0800 (PST)
To: <jomar25_82@yahoo.com>
Subject: Addicting Clips Content Removal [Copyright] (KMM624305I21263L0KM)

RE: Nothing in this World
<http://www.addictingclips.com/Clip.aspx?key=9891F6525E0CD841>

Hello,

As a passive conduit, we cannot monitor user clips, but we respond to breaches of our Terms of Service when we learn of such behavior.

It was brought to our attention that your content violated our Terms of Service. It was therefore removed from the Addicting Clips web site.

If you believe that the content was removed in error, and specifically was not infringing on the copyright of another, and you want to put the materials back on the Addicting Clips website, you must provide us with a formal Counter-Notification of Infringement. Please be advised that we are obligated by the terms of the Digital Millennium Copyright Act (DMCA) of 1998 to disclose the information you supply in this form to the original notifier. This Counter-Notification is both embedded in this email and attached for your convenience.

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Description of the Material Removed:
Previous Location of the Material Removed:
Date:

I can be contacted at:

Name:
Title:
Company or Organization:
Street Address:
City:
State:
Zip:
Telephone:
Facsimile:

Email:

I certify under penalty of perjury the truth of the above information.
I hereby consent to the jurisdiction of the federal court in which I
reside and that I will accept service of process from the original
notifier.

Signature:

Regards,

User Abuse Manager, Addicting Clips
Atom Entertainment, Inc.

List of attachments:

Counter-Notification of Infringement.doc

Schapiro Exhibit 54

For Opinion See [125 S.Ct. 2764](#) , [125 S.Ct. 1605](#) , [125 S.Ct. 686](#)

Supreme Court of the United States.
METRO-GOLDWYN-MAYER STUDIOS, INC., et al., Petitioners,

v.

GROKSTER, LTD, et al.

No. 04-480.

Tuesday, March 29, 2005

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Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

Oral Argument

Appearances: [DONALD B. VERRILLI, JR.](#), ESQ., Washington, D.C.; on behalf of the Petitioners. [PAUL D. CLEMENT](#), ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioners. [RICHARD G. TARANTO](#), ESQ., Washington, D.C.; on behalf of the Respondents.

*3 PROCEEDINGS

[10:13 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 04-480, MGM Studios versus Grokster, Limited.

Mr. Verrilli.

[ORAL ARGUMENT OF DONALD B. VERRILLI, JR., ON BEHALF OF PETITIONERS](#)

MR. VERRILLI: Mr. Chief Justice, and may it please the Court:

Copyright infringement is the only commercially *4 significant use of the Grokster and StreamCast services, and that is no accident. Respondents deliberately set out to capture a clientele of known infringers to stock their services with infringing content, they intentionally and directly promote the infringing use of the service, they support infringing use of the service, and they directly --

JUSTICE STEVENS: May I just interrupt for the one--you said "the only significant use." There's a footnote in the red brief that says the figure is some 2.6 billion legitimate uses.

MR. VERRILLI: Yeah. Yes, Your Honor. I--

JUSTICE STEVENS: Is that correct, or incorrect?

MR. VERRILLI: Well, I think it's an absolutely incorrect assertion of reality, and perhaps I could delve into it and explain why.

The evidence in this case, which was presented at summary judgement, showed that 90 percent of the material on the services was either definitely or very likely to be infringing.

*5 JUSTICE STEVENS: Now, was there a finding of 90 percent?

MR. VERRILLI: Well, this was submitted on summary judgement, Your Honor, and we lost summary judgement, so the evidence has got to be construed in the light most favorable to us. And the Ninth Circuit decided the case on the assumption, we'd submit, of 90 percent.

But with respect to that 10 percent, what happened, and we submit is completely wrong, is that the Ninth Circuit drew the inference, because it wasn't shown by our expert study, which, by the way, is the only empirical analysis in the case, to be infringing, that the Court could assume that it was noninfringing and then extrapolate from that to a number along the lines of the number that Your Honor suggested. And I think that that's completely illegitimate analysis, factually, and, besides, that number is big only because the overall activity is so big. The scale of the whole thing is mind-boggling. If there are that many noninfringing uses--

JUSTICE STEVENS: It goes to the--

*6 MR. VERRILLI: --imagine how many infringing--

JUSTICE STEVENS: --accuracy of your statement that there is no other significant legitimate use.

MR. VERRILLI: I don't think there--I think it's quite accurate on the summary-judgement record, and certainly drawing the inferences in our favor, as we must here on summary--on this summary-judgement record, that there is commercially significant noninfringing use.

JUSTICE GINSBURG: But there could be. There could be, both with respect to material in the public domain and with respect to people who authorize the transmission.

MR. VERRILLI: I don't think, in the context of this record in this case and the business model of these Defendants, Grokster and StreamCast, that that is true, Justice Ginsburg. I don't think that's right. I think what Grokster and StreamCast are arguing is that this Court's decision in Sony stands for the proposition that their massive actual infringement is-- gets a free pass, a perpetual free pass, so long as they can speculate that there are nonin-

fringing uses out there, such as public- domain uses and authorized uses. We don't think that that -- that Sony stands for any such proposition.

*7 We also want to point out that that doesn't help them--that proposition doesn't help them with respect to one very significant part of this case, and that's the fact that they intentionally built a network of infringing users, and they actively encouraged and assisted infringement.

Now, even if there are commercially significant noninfringing uses, and we submit there most definitely aren't under Sony, but even if there are, that's no defense to a contributory infringement claim based on intentional building up of an infringing business and active encouragement and assistance of infringement, and it can't be; because, otherwise, then the fact that they had commercially significant noninfringing uses, again, would be just a free pass to actively promote infringing uses; not merely to support them, but to promote them. And so--

JUSTICE SOUTER: Your argument, I take it, would be the same if the proportions were reversed. Your argument with respect to--your current argument with *8 respect to infringing use would be the same if only 10 percent--if it were assumed that only 10 percent of the use were illegitimate and infringing. Is that correct?

MR. VERRILLI: The active-encouragement aspect of our argument would be the same, certainly.

JUSTICE SOUTER: That's right.

MR. VERRILLI: They don't get a--they don't get a free pass to encourage any infringement.

JUSTICE O'CONNOR: Is that the same as active inducement--

MR. VERRILLI: Yes. I think there's--

JUSTICE O'CONNOR: --as that term--

MR. VERRILLI: --there's a lot of--

JUSTICE O'CONNOR: --is used?

MR. VERRILLI: Yes, Justice O'Connor, there's a lot of lingo floating around in this case--inducement, active encouragement and assistance.

JUSTICE O'CONNOR: If we should think that the Respondents are not liable for the type of contributory infringement dealt with in Sony, could this Court reach *9 the question of active inducement on this record?

MR. VERRILLI: Yes, very definitely. I think-- I think the Court, of course, should find that there's contributory liability under the Sony theory--

JUSTICE O'CONNOR: I know you do, but--

MR. VERRILLI: --but with respect to--

JUSTICE O'CONNOR: --I just said--

MR. VERRILLI: --that theory--

JUSTICE O'CONNOR: --could you--

MR. VERRILLI: Yes.

JUSTICE O'CONNOR: --assume, for a moment, that we didn't; could we, nonetheless, address the active inducement--

MR. VERRILLI: Yes--

JUSTICE O'CONNOR: --question?

MR. VERRILLI: --Justice O'Connor, and let me explain why. The District Court in this case issued a partial final judgement, under Rule 54(b), granting the Respondent's summary-judgement motions. Now, we argued for contributory liability on two theories in the District *10 Court and in the Ninth Circuit. We argued that there was a lack of commercially significant noninfringing use under Sony, and we've argued the inducement or active-encouragement theory. We argued that both theories entitle us to relief against the current operations of the service, entitled us to damages, and entitled us to injunctive relief to eliminate the harmful ongoing infringing consequences of this intentionally built-up infringement machine.

The District Court granted summary judgement against us and gave a clean bill of health, gave absolution, essentially, to the current versions of the services. The only thing that was left to us, as the Ninth Circuit and the District Court--and the District Court, both, understood the law, is that we can go back and try to show that, with respect to specific past acts of infringement, if we can show that they occurred at a time when we had given them notice that they were about to occur, and that we had the power to--and they had the power to stop them at the moment we gave them the notice, *11 that we can get damages for those specific things, and those specific things only. That's all that's left in this case. And I think it's quite clear, from the Rule 54(b) certification order of the District Court that it was only damages with the past services and the past acts--

JUSTICE KENNEDY: It's not clear--it's not clear to me from your brief, focusing on the contributory aspect of it, not--and not the inducement part of it-- it's not clear to me from your brief what your test is. What do we tell the trier of fact, that if there is a substantial part of the use which is noninfringement, any part?

MR. VERRILLI: Here's what I--here's where I think the test--

JUSTICE KENNEDY: Leaving aside the inducement.

MR. VERRILLI: Right. Here's what I--here's what we think the test is on the-- what we'll call the Sony aspect of the case, that it's--the question here is -- Sony poses to us--is really a touchstone kind of question, not a numerical kind of question. The question *12 under Sony is whether this is a business that is substantially unrelated to infringement. In other words, are they building their business on supporting legitimate activity, or, instead, are they building their business supporting infringing activity?

JUSTICE KENNEDY: Well, then we just throw this to the birds on the trier of fact in every case--

MR. VERRILLI: No, I think--

JUSTICE KENNEDY: Well, how do we know--

MR. VERRILLI: And that's where you start. That's the touchstone. Now, the numbers, the relative proportions of use, are relevant. In a case like Sony itself, certainly, where the majority use was noninfringing, that's a legitimate business; you don't need to go further. In a case like this one, where, taking the record at summary judgment in our favor, as it must be, and the Ninth Circuit's assumption that you've got 90 percent infringing use, billions and billions of acts of infringing use, and minuscule actual noninfringing use, it seems to us it's just--

JUSTICE BREYER: You're not saying--now you're using different tests. Your test is "substantial." All *13 right, on your test, are we sure, if you were the counsel to Mr. Carlson, that you recommend going ahead with the Xerox machine? Are you sure, if you were the counsel to the creator of the VCR, that you could recommend, given the use, copying movies, that we should ever have a VCR? Are you sure that you could recommend to the iPod inventor that he could go ahead and have an iPod, or, for that matter, Gutenberg, the press? I mean, you see the problem.

MR. VERRILLI: Yeah, I think my answer to--

JUSTICE BREYER: What's the answer?

MR. VERRILLI: --those questions are: yes, yes, yes, and yes.

[Laughter.]

JUSTICE BREYER: Because in each case--for all I know, the monks had a fit when Gutenberg made his press --

[Laughter.]

JUSTICE BREYER: --but the problem, of course, is that it could well be, in each of those instances, that *14 there will be vast numbers of infringing uses that are foreseeable.

MR. VERRILLI: I disagree with that, Your Honor. Certainly not--I don't think there's any empirical evidence to suggest, with respect to any of the things that Your Honor just identified--and let me pick out the iPod as one, because it's the most current example, I guess. From the moment that device was introduced, it was obvious that there were very significant lawful commercial uses for it. And let me clarify something I think is unclear from the amicus briefs. The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod. There is a very, very significant lawful commercial use for that device, going forward.

And, remember, I--what our test--our test is not "substantial." Our test is that it's a--it's a-- when it's a vast-majority use, like here, it's a clear *15 case of--

JUSTICE SCALIA: How do you--how do you know, going in, Mr. Verrilli? I mean, I'm about to start the business. How much time do you give me to bring up the lawful use to the level where it will outweigh the unlawful use? I have to know, going in.

MR. VERRILLI: Well, I--

JUSTICE SCALIA: And it's one thing to sit back and, you know, calculate with this ongoing business, it's 90 percent/10 percent. But I'm a new inventor, and I'm-- you know--

MR. VERRILLI: I think the weight--

JUSTICE SCALIA: --I'm going to get sued right away. I know I'm going to get sued right away, before I have a chance to build up a business.

MR. VERRILLI: I don't think that's right, Your Honor, and here's why. To--it's not just the absence of commercially significant noninfringing uses that demonstrates contributory infringement. I mean, you have to demonstrate that you're making a material contribution, *16 with knowledge that you're doing so. The inventor, at the outset, is not in that position. They're not making a contribution with knowledge that they're doing so. Do they have absolute certainty? No, they don't have absolute certainty.

JUSTICE KENNEDY: Well, I don't quite understand the--I take it, inventors are profit-motive-driven, and if they know that something they're working on is going to have copyright experience, you--copyright problems, you can't just say, "Oh, well, the inventor's going to invent anyway."

MR. VERRILLI: Well, I--but the problem--

JUSTICE KENNEDY: Or did I misunderstand your--

MR. VERRILLI: No, I--I think that you have-- to show contribution, you should have--you have to be making a material contribution, with knowledge that you're doing so. And so--

JUSTICE SCALIA: But the inventor of Xerox does that. I mean, he puts out the machine. He knows some-- he knows a lot of people are going to use it to Xerox *17 books.

MR. VERRILLI: I don't think that's right, Justice Scalia. I don't think there's anywhere close to a showing--I don't think there could be anywhere close to a showing that you've got the vast majority of use from-- for infringement from the time that the device comes out. I just don't think that's--

JUSTICE SOUTER: Well, let's go--

MR. VERRILLI: --realistic.

JUSTICE SOUTER: --let's go from Xerox back to your iPod. How is that clear in the iPod case? I may not understand what people are doing out there, but it's certainly not clear to me. I know perfectly well I could go out and buy a CD and put it on my iPod, but I also know perfectly well that if I can get the music on the iPod without buying the CD, that's what I'm going to do. And I think it's reasonable to suppose that everybody else would guess that. So why, in the iPod, do you not have this Damoclean sword?

MR. VERRILLI: Well, because I don't actually think that there is evidence that you've got overwhelming infringing use. I just think that's--it's not a--it's not a--

*18 JUSTICE SOUTER: Well, there's never evidence at the time the guy is sitting in the garage figuring out whether to invent the iPod or not. I mean, that's--

MR. VERRILLI: I think when you get to the--

JUSTICE SOUTER: --the concern.

MR. VERRILLI: --I think when you have vast- majority infringing use, they should be on the hook. Now, I don't think--

JUSTICE SOUTER: Okay, but you're--

MR. VERRILLI: --you have that problem--

JUSTICE SOUTER: No, but you're--

MR. VERRILLI: --with the iPod, and--

JUSTICE SOUTER: --you're not answering-- you're not answering the question. The question is, How do we know in advance, on your test, anything that would give the inventor, or, more exactly, the developer, the confidence to go ahead? As was said a minute ago, he knows he's going to be sued immediately. There isn't a product performance out there, as there is in this case. So, on your substantiality theory, why isn't it a foregone *19 conclusion in the iPod that the iPod loser--or developer is going to lose his shirt?

MR. VERRILLI: Well, first of all, I don't--I think it's just counterfactual to think that there is going to be overwhelming infringing use of the iPod in the way that there indisputably is here. Second, to the extent you get the closer cases, it is our position, as I gather it is the position of the United States, that you look at--to see what kind of business model the Defendant is operating under. Is it a--is it--are they marketing it for legitimate purposes? Are they taking reasonable steps to prevent infringement? If they are, then they--then they're not liable. Third--

JUSTICE SCALIA: That's your second argument, I think. I thought you were going to just stick with the-- with the first one. I mean, that's an inducement argument.

JUSTICE SOUTER: Yeah, that's inducement.

MR. VERRILLI: No, I don't think it is an inducement argument, because it doesn't go all the way to *20 requiring us to show, as we can show here, that they've got intent. But I do think that the issue is, you know, really--in the real world, you know, it isn't the case that these guys have gotten immediately sued. That's just not right. And the--and the reality is that what happens is what happens here. There's perfectly valid uses--

JUSTICE KENNEDY: But it is the case under the test you're submitting to us.

MR. VERRILLI: No, I don't think that's right, Justice Kennedy. If there's vast-majority infringing use, and you continue to operate your business with the knowledge that there's vast-majority infringing use, then you've got liability. Now, of course, we do have all the additional inducement facts here, but we've also got those facts. And in the real world--

JUSTICE O'CONNOR: Well, are you dealing with active inducement as just a theoretical add-on, or is that a satisfactory way to resolve this case?

MR. VERRILLI: I think that it is a--I think *21 --

JUSTICE O'CONNOR: I don't understand--

MR. VERRILLI: Neither, is the answer.

JUSTICE O'CONNOR: --your pitch.

MR. VERRILLI: Neither, is the answer. It is a basis for resolving this case, but not to the exclusion of getting the law right on Sony.

JUSTICE GINSBURG: But you couldn't get summary judgement. Your reply brief said, "This case is so clear that we should get summary judgement." If inducement is the theory--you have just said, you have to show intent --

MR. VERRILLI: Yes.

JUSTICE GINSBURG: --so you could not--

MR. VERRILLI: We--

JUSTICE GINSBURG: --you'd have to go to trial.

MR. VERRILLI: We agree with that. We think, in a situation where the vast majority of the use is infringing and there isn't any evidence of a legitimate business plan, on the Sony part of the case we would be *22 entitled to summary judgement. We agree with you, Your Honor, that with respect to--

JUSTICE GINSBURG: Sony itself had a trial--

MR. VERRILLI: That's right.

JUSTICE GINSBURG: --a full trial.

MR. VERRILLI: It came after the trial, that's right. But the--a key point I think I want to make here is that this is not about this technology. What happens in the real world is that inventors come up with technology. Some people use it for lawful purposes and valid purposes, as some people use this technology for; some people abuse the technology to run business that-- businesses that are devoted to expropriating the value of copyrights. That's exactly what's going on in this case.

If I could reserve the balance of my time, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Verrilli.

Mr. Clement, we'll hear from you.

ORAL ARGUMENT OF PAUL D. CLEMENT FOR UNITED STATES, AS AMICUS CURIAE, SUPPORTING PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The decision below allows companies, like Respondents, to build a business model out of copyright infringement without fear of secondary liability. As long as they avoid obtaining actual knowledge that a particular customer is about to infringe a particular copyright, they are free to operate a system that involves massive copyright infringement with full knowledge that the draw of the entire system for customers and advertisers alike is the unlawful copying. No matter much how much of that system--

JUSTICE O'CONNOR: Well, what do you think Sony allowed? It talked about-- if it's, what, capable of substantial noninfringing use, it's okay?

MR. CLEMENT: That's right, Justice O'Connor. And then I think the Court explained and elaborated that the test is whether or not there are commercially significant noninfringing uses. And I would say what the Ninth Circuit did in this case is basically adopt the test of mere theoretical capability for noninfringing use, plus *24 maybe some anecdotal evidence.

JUSTICE KENNEDY: And what--and your test is whether there's a substantial use that's lawful?

MR. CLEMENT: Well, I think the way we would try to articulate it is that if the way that the business model of the particular Defendant is set up is that they are not involved in a business substantially unrelated from copyright infringement, that there should be liability in that situation. And I think in an extreme case like this, where over 90 percent of the business-- and I think Mr. Verrilli correctly describes that it's not a minimum of 90 percent; it's over 90 percent--because the only evidence on the other side is anecdotal evidence that there are such things as public-domain works.

CHIEF JUSTICE REHNQUIST: Where did the 90 percent figure come from? I know we have to accept it because it's summary judgement, but where did it come from?

MR. CLEMENT: It came from a study by Petitioners' experts of the actual operation of the *25 system. And what they did is, they identified about 75 percent of the works as clearly infringing works, another 15 percent of the works were identified as very likely infringing works, then there were 10 percent they just couldn't tell anything about.

JUSTICE BREYER: I thought it was just limited to music.

MR. CLEMENT: Well, I think the--it's not-- the system is not limited to music.

JUSTICE BREYER: I know, but I thought the study was about music.

MR. CLEMENT: I'm not sure about that, but--

JUSTICE BREYER: Well, I thought--I mean, you know, we've had 90 briefs in this, and some briefs tear it apart, and others support it, but we also have briefs from the ACLU saying you could put whole libraries within this system.

MR. CLEMENT: Well--

JUSTICE BREYER: The question I wanted to ask you is, given that concern, that there are, conceptually *26 anyway, really excellent uses of this thing, does deliberate--what is the word?

MR. CLEMENT: Actual inducement?

JUSTICE BREYER: Yes. Because what you are worried about, it seemed to me that the actual inducement would take care of. And if you sent it back and said, "Let's have a trial on actual inducement." If this really is the extreme case you're talking about, why wouldn't the Petitioners here be bound to win that trial?

MR. CLEMENT: Well, based on our review of the record--and we haven't been able to see the entire record--I

agree with you, the Petitioners ought to be able to win this case on an active-inducement ground, and that's a narrow way to decide the case. I do think, though, this Court might have to say something about the Sony issue before it reached that issue. And if it did feel compelled to do that, I think it would be a mistake to sanction the Ninth Circuit's reading of Sony, because, you're right, there's a theoretical possibility that public-domain works can be exchanged on this system, but *27 it's also true that this system doesn't have much of a comparative advantage for trading in public-domain works.

JUSTICE O'CONNOR: Well, you got interrupted a bit. Tell us, in the simplest way you can, what test you think Sony stands for and how the Ninth got it wrong, if you believe it.

MR. CLEMENT: Justice O'Connor, it stands for-- the test is whether or not there are commercially significant noninfringing uses. The Ninth Circuit got it wrong because it thought that test was satisfied by a combination of two things: being able to point out that there were such things as public-domain works or authorized sharing of the Wilco album, for example, and anecdotal evidence that you could actually do that.

Now, if that were the right reading of Sony, with respect, I would suggest that footnote 23 of this Court's Sony decision would have been the sum total of the Court's analysis, because in that footnote the Court observed that there were broadcasts of public-domain works.

*28 JUSTICE KENNEDY: Suppose the owner of the instrumentality, the program, thinks that there's going to be a vast area of lawful use, and he knows that there's going to be some abuse at the--in the short term, but he does everything he can to discourage that. He says, "This is a two--P2P is going to revolutionize the way we talk to each other, there's things in the public domain. Please don't use this for copyright." But he knows that there's going to be some infringement, let's say, but it'll be 50 percent of the use, in the short term. Can he use the program?

MR. CLEMENT: If it's 50 percent infringement in the short run? We think, absolutely, yes.

JUSTICE KENNEDY: Yes, that he can--

MR. CLEMENT: He can--

JUSTICE KENNEDY: --use the program.

MR. CLEMENT: --use the program. I mean, as we suggest, if you're at a 50-50--I mean, if you're anywhere below 50 percent, we think that there should be no liability under the Sony standard. If you're above that level and there's sufficient evidence that you're really targeting infringing uses, then I think maybe there *29 would be liability. But in the hypothetical you suggest, there would clearly not be liability in that situation.

What we would like to suggest, though, is there ought to be enough room for-- under the Sony test, before you reach actual inducement, to capture somebody where they've clearly set out, as a business model, to deal with the infringing uses. And the only thing they point to are the theoretical possibility, anecdotal evidence, that it could be used for public-domain works.

JUSTICE GINSBURG: If there's more, they could bring it out at trial, could they not? The difference between your position and Mr. Verrilli, I take it, is that you think there should be not summary judgement for the Petitioners, but a trial.

MR. CLEMENT: I think that's a fair point, Justice Ginsburg. We're operating in something of a disadvantage, because we haven't seen the entirety of the record. Based on the record that I've seen, I think there's a close case, unless perhaps once this Court clarifies the legal standard, Respondents put on additional evidence. I think this is a close case, where *30 you actually could grant summary judgment in favor of the Petitioners. But certainly we have no objection to having a trial on the Sony issue in this case. What we object to is the Ninth Circuit rule, which, in every case, is going to obviate the need for a trial, based on a showing that there are such things as public-domain works.

JUSTICE SCALIA: The inducement--the inducement point doesn't get you very far. Presumably a successor to Grokster, or whatever this outfit is called, could simply come in and not induce anybody but say, you know, "We're setting up the same system," know very well what people are going to use it for, but not induce them. And that would presumably be okay.

MR. CLEMENT: I think that's potentially right --

JUSTICE SCALIA: Which is why you need--

MR. CLEMENT: --Justice Scalia--

JUSTICE SCALIA: --the Sony--

MR. CLEMENT: --and that's why I think it's important to preserve a role for the Sony test. And, *31 again, this Court, in Sony, could have adopted a simple theoretical-capability test, but this Court, instead, adopted a test that required there to be shown some commercially significant use for the-- noninfringing use. And even in the patent context, where I think the test is, and should be, more demanding, even in that context, cases like Fromberg, which we cite at page 19 of our brief, show that there is an analysis to make sure that the suggested theoretical noninfringing use is, in fact, a practical use of the item.

JUSTICE SCALIA: Will you give a company ten years to establish that?

MR. CLEMENT: Well, I don't think--

JUSTICE SCALIA: I mean, what I worry about is the suit that just comes right out of the box, as soon as the company starts up. Will you give the company a couple of years to show that it's developing a commercial use?

MR. CLEMENT: Well, Justice Scalia, we have concerns about that, as well. I don't know that we would give them ten years of, sort of, free space to do as-- *32 facilitate as much copyright infringement as possible. I think what we would say is that when you're--when a suit targets a nascent technology at the very beginning, there ought to be a lot of leeway, not just for observed noninfringing uses, but for the capacity of noninfringing uses.

I don't think, in fairness, that's what you have before you in this case, because this is a case where the peer-to-peer technology was out there, it was employed in a particular way, with a centralized server, in a way that was actually--had a lot of users involved in it, and they were users of the old Napster system, that had a distinct character. They were using that system for infringing copyrighted musical works. And then these individuals come along and seek to capitalize on that market. That is their business plan from day one. And it's not some newfangled idea. The only newfangled idea here is that if you give something of value away for free by ignoring the copyright laws, you're likely to draw consumers to your site, and you're likely to attract *33 advertisers. But that cannot be the kind of innovation that we want to further through development of secondary liability into the

copyright laws.

JUSTICE SOUTER: Mr. Clement, in one way this presents an easy case for answering Justice Scalia's question, but what about a case in which there isn't the Napster example to start with? Should there be some kind of flexible rightness doctrine in response to suits, as Justice Scalia put it, against the inventor or developer right out of the box?

MR. CLEMENT: Well, whether you call it a flexible rightness doctrine or you develop the doctrine in a way that is very forgiving--

JUSTICE SOUTER: Congress of laches.

MR. CLEMENT: --a brand-new technology.

JUSTICE SOUTER: Congress of laches.

MR. CLEMENT: Right. I mean, I think--the way I would style it is to develop a substantive standard that's very forgiving of brand-new technologies and allows people to point to, in those situations, capabilities for *34 future uses. I do think that--

JUSTICE SOUTER: How would you express the-- how would you express that, that substantive standard that anticipates, just as you suggested we do?

MR. CLEMENT: Well, I was just trying to articulate it, which is to say that this Court has talked about the capacity for noninfringing uses. I think, with a mature product like this, it's fair to point to how it's actually used in the marketplace.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clement.

MR. CLEMENT: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Taranto, we'll hear from you.

ORAL ARGUMENT OF RICHARD G. TARANTO ON BEHALF OF RESPONDENTS

MR. TARANTO: Thank you, Mr. Chief Justice, and may it please the Court:

Because Respondent's software products are tools of autonomous communications that have large and growing legitimate uses, their distribution is protected under the clear Sony rule. That rule should be adhered to by this Court, because copyright does not generally step into the *35 role of product control, because doing so would cause overkill. The Sony rule safeguards legitimate uses by protecting the product and--

JUSTICE O'CONNOR: Yeah, but active inducement is a doctrine that's been employed to curb the intentional encouragement of noninfringing uses, isn't it?

MR. TARANTO: Not in copyright law, it hasn't, but that's not my primary point. My primary point is that it is critical, it is jurisdictionally critical, to separate two separate acts, distributing the product and any of the past acts that the Petitioners allege constituted encouragement, their synonym for "inducement," which were explicitly outside the District Court ruling that was certified for interlocutory appeal.

Questions about past acts not inherent in the distribution of our product--

JUSTICE SCALIA: But they are inherent. They are inherent. I mean, the point is that those ASDACS are what have developed your client's current clientele.

MR. TARANTO: No, I don't think so, Justice *36 Scalia. The Petitioners-- this is what I think is key or usable about the past acts. They claim that there is an intent, as part of the current distribution of the product, to profit from increased use, including generically known infringing use, a point on which the District Court and the Court of Appeals assumed to be the case. Beyond that, the question whether there were encouraging acts, any kind of promotional activity that says, "We ask you to, and urge you to, use this product for infringement," that is not here, because that was explicitly part of the past activities, removed from the District Court decision. And when the Petitioners sought interlocutory appeal, they said, expressly, these were "distinct and severable," in their terms--that's a quote --

JUSTICE SOUTER: But I don't--

MR. TARANTO: --from the past.

JUSTICE SOUTER: --understand how you can separate the past from the present in that fashion. One, I suppose, could say, "Well, I'm going to make inducing *37 remarks Monday through Thursday, and I'm going to stop, Thursday night." The sales of the product on Friday are still going to be sales which are the result of the inducing remarks Monday through Wednesday. And you're asking, in effect--you're asking us--to ignore Monday through Thursday.

MR. TARANTO: No, I'm not. Let me try to be clear. There is a theory, not present here, along exactly those lines, which Petitioners are entitled to argue, back in the District Court, without a remand, because that issue remains in the District Court. It is a theory that says, "You started your business with illegitimate acts, your current business is a causal consequence of that." I will say, there is not one bit of evidence that the Petitioners introduced, in resisting summary judgement, in support of that theory. It is, in fact, a highly implausible theory, for reasons that the District Court can explain, because users of software like this switch readily. There is no plausible lock-in effect to this software. People go from Kazaa to Grokster to eDonkey to *38 BitTorrent week by week. That was--that is an available theory. You would--

JUSTICE SOUTER: Then why was current--why was inducement, as a current theory of recovery, even the subject of summary judgement? It seems to me that to make it a summary judgement is implausible to a non worldly degree.

MR. TARANTO: I'm not entirely--

JUSTICE SOUTER: I mean, I thought you were saying that, so far as the inducement theory of recovery is concerned--

MR. TARANTO: Yes.

JUSTICE SOUTER: --the only summary judgement that was granted was with respect to current acts of inducement, the way the company is acting now, not the way the company was acting last year. And my question is-- if that is correct, then I don't see how summary judgement could even intelligibly have been considered.

MR. TARANTO: I think--because as the Petitioners insisted when they pressed for interlocutory *39 appeal, they said these were distinct and severable, because, as Justice Scalia referred to before, the important question, on a going-forward basis, is whether the current set of activities--this software, given how it operates, being generally distributed--is a vendor's -- the distributor of that software-- secondarily liable because somebody else, tomorrow, can do exactly the same thing, without the baggage of any--

JUSTICE KENNEDY: Well, I don't want to get us too far off the track on this question, but it just seems to me that what you've done before bears on what you know, or have reason to know, on an ongoing basis.

MR. TARANTO: I agree with that, Justice Kennedy, but there's no dispute about that. This case was decided on the assumption, which we are not contesting here, that the Respondents here knew that there would be widespread infringing use of a product that they were putting out, and, what's more, that they intended to profit from maximum use of the product, which necessarily would include infringing use, which they had no ability to separate from noninfringing use.

*40 JUSTICE KENNEDY: Well, then why don't you tell us what's wrong with the Government's test and with the Petitioner's test, the substantial-use part of it?

MR. TARANTO: Well, I'm not entirely--I think there are several tests, and I'm not sure I followed them all here. We think it is critical that the Court adhere, for innovation protection, to the very clear Sony rule.

JUSTICE GINSBURG: That, Mr. Taranto, is something I find very puzzling. There is a statement-- one could take it as clear--"capable of substantial noninfringing use." That would be very clear, I agree. But Sony goes on for 13 more pages. If the standard were all that clear, it would have stopped there. And usually when you're interpreting a document, one rule is, you read on, and if you read on, you find we need not give precise content to the question of how much use is commercially significant. That doesn't sound very clear to me. Or if you then read back, as a careful reader would, then you find the statement that the primary use of the Sony machine for most owners was time-shifting, a use that the Court found either authorized or fair, and, hence, noninfringing.

*41 So I don't think you can take from what is a rather long opinion, and isolate one sentence, and say, "Aha, we have a clear rule."

MR. TARANTO: Well, that sentence, Justice Ginsburg, is expressly stated to be the rule of law that is being applied. And then the Court went on to apply it to say, there are two things that satisfy the test. The primary thing, of course, is what takes up most of those 13 pages, the question whether in-home time-shifting is fair use, a question that was of considerable interest to tens of millions of individuals throughout the United States. But the Court, in fact, didn't rely only on that; it said, "In addition, there was this roughly 7 to 9 percent use of authorized time-shifting." It wouldn't have had to even talk about that if the primary use, you know, was the entirety of--

JUSTICE SCALIA: Mr. Verrilli, I hope you won't waste a lot of your time on this point. This Court is certainly not going to decide this case on the basis of stare decisis, you know, whatever else is true.

*42 MR. TARANTO: Well, I will--let me urge that there is, in fact, considerable weight to stare decisis, because there are major technological industries that have relied on the rule that derives from patent law that there is no, kind of, predominant-use kind of meaning to Sony rule. In the patent context from which this came, all there has to be, in Professor Chisum's words, is, uses that are not farfetched, illusory, uneconomical for the user. And the

inquiry there is, Is this a product whose -- where the same features that are alleged to cause the infringement are also, in some nontrivial way, used for noninfringement?

JUSTICE BREYER: What is--what is the answer to Justice Kennedy's question? I took it, whether--for the last 21 years, industry throughout America has taken the standard as being approximately whether it is capable of substantial-- commercially significant substantial noninfringing uses.

MR. TARANTO: Yes.

JUSTICE BREYER: I--and the country seems to *43 have survived that standard. There is innovation. There are problems in the music industry, but it thrives, and so forth. So there is an argument for just following it, because it's what it is. But suppose it's totally open. Why should that be the right test, instead of some other test, like substantial use, et cetera?

MR. TARANTO: I--because I--

JUSTICE BREYER: That, I think, was the question, and I'm very interested in your answer.

MR. TARANTO: Right. Because I think any alternative is worse. A focus on intent to profit means that virtually every business which requires money and has the least bit of sensible forward-looking thinking about what the usage is going to be will be subject to litigation, arguing about their knowing that a substantial amount of the value of the product was going to be based on infringement.

JUSTICE KENNEDY: But--

MR. TARANTO: Every--

JUSTICE KENNEDY: --but what you have--what *44 you want to do is to say that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product.

MR. TARANTO: I--well--

JUSTICE KENNEDY: And I--just from an economic standpoint and a legal standpoint, that sounds wrong to me.

MR. TARANTO: Well, I'm not entirely sure about that formulation. Sony clearly sold many more tapes because of the illicit activity of Library. Sony presumably sold more machines, maybe even priced them higher, because there was a group of people who wanted the machine for the illicit activity. The Apple iPod, in the 60 gigabit version, holds 15,000 songs. That's--

JUSTICE KENNEDY: So you think that--

MR. TARANTO: --a thousand CDs.

JUSTICE KENNEDY: --unlawfully expropriated property can be a legitimate part of the startup capital.

MR. TARANTO: No, I--what I think is that, as a matter of general judicially formulated secondary *45 copyright liability law, there is no better policy balance that the Court can strike, and that only Congress can make the judgements about what the industry-wide facts are. And I--let me pause there a minute--there are no in-

dustry-wide facts in this record. Every citation in the Petitioner's brief about the magnitude of harm to the industry is extra-record citation. There are 26 billion --

JUSTICE GINSBURG: Then perhaps there should be a trial so it would all come out.

MR. TARANTO: Petitioners--it's not just that they didn't have it in their brief, they did not submit any evidence in response to the summary-judgement motion that said the rule of Sony should be applied here because the magnitude of the injury to the recording industry or in-- someday in the future, to the movie industry, is at zero--

JUSTICE GINSBURG: Well, they weren't concentrating on the damage to them, they were concentrating on the facilitation of copying that was provided. And you don't question that this service does facilitate copying.

MR. TARANTO: As does the personal computer and *46 the modem and the Internet service provider and the Microsoft operating system. There's-- everything in the chain that makes this work is absolutely essential to facilitating the copying. The question is which pieces, if any, and under what standard, get singled out for a judicially fashioned secondary copyright liability doctrine.

JUSTICE GINSBURG: Well, you said--I think you were saying--this is something for Congress to solve; it's not for the Court. But the Court is now faced with two apparently conflicting decisions: Aimster, in the Seventh Circuit, the Ninth Circuit decision. And if you're just looking at this in the abstract, you might say, "Well, it's--isn't it odd that Napster goes one way in the Ninth Circuit, and this case goes another way?"

MR. TARANTO: Let me suggest why that's not odd and why the cases are not just different, but critically different. Napster rests--never mind the exact words of the opinion--Napster involves something more than distribution of a product. Napster, the company, was *47 sending out, in response to requests, "Where is this filed," an answer, the information, "The file is here." Every time it sent out that information, if it had been told by Mr. Verrilli's client, "That file may not be shared," it was, with specific knowledge to that file, giving assistance. That is a classic contributory infringement case based on specific knowledge of infringement. And the reason--

JUSTICE SOUTER: Why isn't this a classic willful-ignorance case?

MR. TARANTO: Because willful ignorance is about having possession of information and refusing to look at it. This--that does not occur here. This tool of autonomous communication is one in which there is no Mother-may-I system, no chaperone, no information provided to us at the time that there is any regress. When I ask for a file from you, there is no information that goes back to StreamCast or to Grokster--

JUSTICE SOUTER: Sure, but I thought willful ignorance was basically a certainty of what was going on *48 without empirically verifying it, so as to, sort of, maintain the guise of one's hands over one's eyes. And it seems to me, if that's what it is, that's what we've got.

MR. TARANTO: No, I don't think so, I think, on either account. My understanding of where in the law willful ignorance has bite is when you do have the information right in front of you, and you refuse to look at it. And, what's more, the change of system to an autonomous communication tool, where there is no intermediary, which is what all of their filtering systems would require, getting permission in advance, the change of tool is not just some way of blinding oneself to the information.

JUSTICE SCALIA: Yeah, I think it would also include disabling yourself from looking at it. And so, I think it's an important part of your case, that you didn't adopt this new system of decentralizing the file so that it's in the

computers, out there, solely in order to get around Napster.

MR. TARANTO: Right. And I think that the *49 summary-judgement record on this is-- it, I mean, doesn't leave any real room for dispute. Seeking--

JUSTICE BREYER: Well, wait. In respect to that -- I mean, is it open? If you win on the question of the standard, is it open, or would we have to remand it for them to argue, in light of the history, in light of what they do now, they, your client, with knowledge of infringement, actively encouraged users to infringe copyright using their--using the Grokster technology, and, indeed, knowingly would include willful blindness?

MR. TARANTO: I think--

JUSTICE BREYER: Because--as I had gotten that from one of these amicus briefs, you know, that's their standard--they say a willful--of willful, deliberate inducement. And that, it seems to me, important that they be able to argue that. Now, can they argue it, in your opinion, if we do nothing but affirm the Ninth Circuit?

MR. TARANTO: I think that they can certainly argue, with an affirmance by this Court, that all of the past acts, to use the District Court's term, constitute a *50 basis for a--inducement liability. There would be some legal questions about whether there is such a thing as inducement liability, but they get to argue that. No remand is required for that.

The record in this case establishes that one reason for going to the decentralized system, without a central index and a third-party intermediary, was to-- was a reaction to the Ninth Circuit's Napster decision that said, "That's a legal problem." But it is also, I think, beyond genuine dispute, for summary-judgement proposes, that there were other reasons. You don't have to have the servers to maintain. When StreamCast, in particular, was running a Napster-like system, the so-called openNap system, it had ten servers, and quickly maxed out and started crashing, and immediately concluded -- I think this is at page 789 or--and 798 of the joint appendix--we would have had to start doubling, tripling, quadrupling the number of services, and we didn't have--

JUSTICE STEVENS: Mr. Taranto--

MR. TARANTO: --the money to do it.

*51 JUSTICE STEVENS: --can I ask--I'm still a little puzzled about the posture of the case.

MR. TARANTO: Yes.

JUSTICE STEVENS: Because I read the District Court opinion. I think he said-- the judge said that both parties agreed that there were no disputed issues of fact that would preclude the entry of summary judgement in either way, no disputed issues relative to whether to grant relief. And I--it's on page 24a of the cert petition. And I understand you to be saying that leaving everything alone, affirming would allow the case to go forward with your adversaries seeking damages on an active-inducement theory. Am I correct?

MR. TARANTO: Yes. I think--all I read this, page 24a, to say is that both sides filed for summary judgement, so each one, of course, thought that there was -- that it was entitled to summary judgement. Each--

JUSTICE STEVENS: But it says, "Both parties believe there are no disputed issues of fact material to Defendant's liability."

MR. TARANTO: I think that's just because each side filed summary judgement. Each side filed extensive --

*52 JUSTICE STEVENS: So then your answer to my question is that, yes, if we affirm, as a possibility, they could continue to seek damages on an active-inducement theory.

MR. TARANTO: Yes, absolutely. And there are-- there are affirmative defenses that are not even part of this motion that, of course, would, by themselves, preclude summary judgement in their favor.

JUSTICE STEVENS: And then one other--

JUSTICE GINSBURG: I thought--

JUSTICE STEVENS: --question I had. Does the record contain their proposed form of injunction that they requested?

MR. TARANTO: I don't think it does, beyond the statement at the end of their summary-judgement pleading that asked for a very general injunction, "Stop the Defendants from infringing." I'm not aware of anything more specific.

Let me comment a bit on what the record says about the substantial legitimate uses. This is not a *53 question of--

JUSTICE GINSBURG: Mr. Taranto, before you go back to that, I wanted to be clear on what you were saying would be left over for trial.

MR. TARANTO: Yes.

JUSTICE GINSBURG: Because, as I read your briefing, it was, "Well, they can argue about some bad things that Grokster was doing in the past, but this decision says: henceforth, what we're doing is okay. The case zeroed in on now and the future, and the only thing that was left open was something that was over and gone could get damages for it." But I thought that this judgement gave you an okay, a green light, from now on.

MR. TARANTO: I--my view that--I mean, this was not talked about in these terms. I believe it ought to be open to the Petitioners, not only to prove that past acts were, themselves, illegal, but that the causal consequence of those past acts should somehow reach forward into the current acts.

JUSTICE SOUTER: Then what is the point of the *54 current summary judgement?

MR. TARANTO: The point of the current summary judgement is that there is--the forward-looking character of the activities taking place, starting in September 2002 on forward, has been held, by itself, not to be a basis for--

JUSTICE SOUTER: So you're saying the summary judgement simply, in effect, says, "They're not doing anything wrong now, but we have left open the question, not merely of what they have done wrong in the past, but whether what they did wrong in the past can carry forward into the future"?

MR. TARANTO: As I say, it wasn't stated in those terms, but, yes, I think that--

JUSTICE SOUTER: That's bizarre.

MR. TARANTO: Well, I don't think so, because--

[Laughter.]

MR. TARANTO: --because the important question is, to the Petitioners, the entire recording and movie industry, Is this set of activities, which you and I, *55 tomorrow, can start engaging in, one that they can stop? There are literally a handful--on page 7 and 8 of their brief--

JUSTICE SOUTER: So you're saying--what it really says is, "There's nothing to enjoin, but there may very well be something to recover for,"--

MR. TARANTO: Yes.

JUSTICE SOUTER: --"even as to future activity."

MR. TARANTO: Yes, exactly right. And they would, of course, have had to make the very implausible assertion, in a business in which there is no plausible lock-in, that somehow a set of isolated events--e-mails -- a handful of e-mails out of literally, between the two companies, 1700 a day, that might have said, "Why don't you load some music out"?--are somehow the causal--the cause of what is going on today.

Let me say a few words about what the record says about legitimate activities. Altnet is a company-- this is at 1169 and -70 of the joint appendix--they say *56 that they have distributed, on peer-to-peer systems, hundreds of thousands of authorized songs, and, they say, millions of pieces of--of video games, leading to sales. This is not a trivial number. JIVE, at page 67 to 68, speaks about 250,000 peer-to-peer downloads of a music video. The Internet archive, which is talked about in the record, and as you now look at what they are on their Website, now lists some several hundred musical artists with 20,000 recordings which are being put out there for peer-to-peer distribution. The Creative Commons is licensing all kinds of things for authorized public distribution. There are musical bands--

JUSTICE SCALIA: Because, I gather, that some artists don't make money from the records, but make money from the popularity that draws fans to their concerts.

MR. TARANTO: My understanding-- JUSTICE SCALIA: So they're willing to give away the records for free.

MR. TARANTO: --my understanding is "some" is a great understatement, yes.

The bands talked about at 159 and 160 to '70 of the joint appendix, which have authorized their live *57 concert recordings to be traded among-- on--to be traded. The GigAmerica business is in the business of compiling--this is at 323 of the joint appendix--of compiling musical recordings and other things for authorized distribution. The world of music distribution and video distribution and movie-trailer distribution and, in small instances now, text distribution, but growing, is changing and making use of this extremely innovative, low- cost tool. The great innovation of this tool of communication--

CHIEF JUSTICE REHNQUIST: Mr. Taranto?

MR. TARANTO: Yes.

CHIEF JUSTICE REHNQUIST: In your motion for summary judgement, did you ask that the Plaintiff's claim

be dismissed?

MR. TARANTO: Well, we asked for judgement, in our favor on their claim, that our current activities constituted a basis for secondary liability. I'm not sure if word "dismiss" was--

CHIEF JUSTICE REHNQUIST: Were there other claims? You said "on their claim." Were--did they make *58 other claims?

MR. TARANTO: They had a generic claim about secondary copyright liability. We made the motion--or, actually, StreamCast made a motion that said, "Let's carve this piece out and talk just about whether the set of current activities supports secondary liability." The other side eventually agreed that that was distinct and severable from their claim of secondary liability as to past acts and as to past versions of the software, which has--which has changed.

JUSTICE GINSBURG: Where does one find that?

CHIEF JUSTICE REHNQUIST: (Inaudible)

MR. TARANTO: Yes, the motion--well, it--the simplest place, I guess, is in the June 2003 District Court ruling, which is in the Joint Appendix and attached to the brief in opposition, ruled on the Petitioner's motion for an interlocutory appeal under 1292.

JUSTICE GINSBURG: But the motion itself is not there to take it through the opinion of the Court?

MR. TARANTO: No, the motion is not--is not in *59 the joint appendix. The-- most of the motions--in fact, both of our summary-judgement motions and their summary-judgement motion, are in the joint excerpts of record in the Ninth Circuit, can be found in--

CHIEF JUSTICE REHNQUIST: The text on--

MR. TARANTO: --30 volumes.

CHIEF JUSTICE REHNQUIST: --the text, on pages 23a and 24a, gives the impression that the District Court is disposing of the entire case.

MR. TARANTO: That--it may give that impression on those pages. Later, the Court explains that it's ruling only on the current versions of the software. And then in the June 2003 order, the Court was explicit in saying, "If I haven't been clear enough, let me amend my June--my April order," which is what you were just reading from, "to make explicit the limitation." And we quote that in our brief.

The great virtue of peer-to-peer decentralized software is that it doesn't require anybody to put stuff onto a server and then bear the cost of bandwidth, of *60 being charged by the Internet service provider when a million people suddenly want it. It automatically scales. It--the more people who want it, the more people will have it, because it will be out there on a million computers. That is an inherent distributional economy, together with the autonomy of the user, rather than having a kind of Mother-may-I system, with having to check every communication through some third party to say, "Am I authorized to make this communication," that are the virtues of this system and that make it clearly capable of growing the already large hundreds of thousands, even millions, of uses that this--that these pieces of software already enable people to do.

One final--final word. We're not disputing that there are, in an industry-wide way, a set of important policy issues here, though there's nothing in the record about what self-help measures--digital-rights management, encryption, other things--there's nothing in the record what--about that. There's nothing in the record about what kinds of real industry harm is being *61 done by this. Right? This is all citations to Websites in their brief. These are classic questions of predictive judgement, industry-wide judgements that Congress should make to decide whether there is a problem in need of solution, and what solutions ought to be considered, whether changing the rule would have a overriding bad effect on other industries. And--

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taranto.

Mr. Verrilli, you have four minutes remaining.

REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR., ON BEHALF OF PETITIONERS

MR. VERRILLI: Thank you, Mr. Chief Justice. I'd like to start by clarifying the inducement issue, and then explain why inducement is not enough, and then have a word, if I might, about the reality of this case.

The reason, Justice Souter, you find it bizarre is because a shell game is going on here. What the Respondent's position--excuse me--the Respondent's *62 position here is that we can sue for specific infringements that we can show were induced by these specific acts, such as e-mail support. Our position on inducement is that we are entitled to injunctive relief against the continued operation of this gigantic infringement machine, which was built by the inducement.

Now, I think that the Respondents have quite clearly said that they're-- they don't think any injunctive relief is available, going forward. But we're entitled, under Section 502 of the Copyright Act, to effective relief, not merely a--relief, judgement relief, that says, "Go and sin no more," but relief that undoes the consequences of this inducement, of this massive effort to build a gigantic engine of infringement. And that is why they're just wrong about that.

And you certainly can't affirm the Ninth Circuit and allow us to go forward with anything like that here, because the Ninth Circuit said the only thing we can sue for--the only thing we can sue for--is a situation in which we can show that we had knowledge of specific acts of infringement at a time when we could stop those specific acts of infringement. So there's just no way to affirm and let that go forward.

*63 Now, why is infringement--why is inducement not enough? It's not enough because, as Justice Scalia suggested, these companies already operate in the shadows, and a ruling here, which would be, I submit, a significant cutback of the Sony rule, that inducement is the only available ground of liability, would just need them to paper over--you know, we do have some paper evidence here, a paper trail here, but that'll just--they just won't exist next time. And it's just--it's just not enough.

And I submit that Sony was quite clear on this. Sony said that the staple article-of-commerce doctrine, not copyright law, generally, and not secondary liability, generally, but the staple article-of-commerce doctrine, the noninducement part of the analysis, has got to strike an effective balance--a real balance that provides effective protection of copyright, as well as protecting unrelated lines of commerce.

Now, their rule is a rule of immunity. It's a free pass. It says, all you've got to do is speculate *64 about noninfringing use, and you can continue with infringement, ad infinitum. And that's not a rule that protects innova-

tion; that's a rule that destroys innovation. It certainly destroys the innovation that the creators of the copyright law is supposed to protect, and that's supposed to be the effective protection part of the balance that Sony said this law is supposed to strike.

It also--it also deters legitimate technological innovation moving towards legitimate means of distributing this--of distributing, in a digital format, music and movies through the kinds of companies that filed amicus briefs and that are trying to do this legitimately. They are inevitably and invariably undercut by the kinds of businesses that Respondents and the others run, so it deters innovation; it doesn't move it forward.

And, beyond that, Justice Kennedy, as you suggested, it isn't just that they get to use our copyrighted--the value of our copyrighted materials as the seed capital, that's the whole business. That is the whole business. And that's the reality here, and that's *65 the problem. They can talk about the hundreds of thousands, or maybe even millions, of uses, but the reality is that there are 2.6 billion downloads, unlawfully, every month. So what they're talking about as lawful is a tiny, teeny little fraction of what's really going on here.

And the problem with the rule which they say is a clear rule, but it obviously isn't in Sony, because Sony said, "strike a balance." And the problem with that rule, Your Honor, is that it gives them a perpetual license to keep going forward with billions and billions of unlawful downloads a month. They never have to do anything to try to bring their conduct into conformity with law. They're not in the position of that inventor that you identified, Justice Scalia, who has to, sort of, think through, "What am I doing?" They're just in a position where they have every economic incentive in the world to maximize the number of infringing uses, because they make more money when they do so.

Now, and with respect to the reality of this *66 situation, let me just say--and I must beg to differ, Justice Breyer, with the suggestion that this industry is thriving. What the--the facts are that we have lost-- the recording industry has lost 25 percent of its revenue since the onslaught of these services. And that's particularly critical, because, remember, this is really -- the recording business, in particular, is really a venture-capital business. Most of the records we put out don't make money. A few make a lot of money. Well, what do you think's getting traded on Grokster and StreamCast and the rest of them? It's the few that make all the money. So they're draining all of the money out of the system that we use to find new artists and--

CHIEF JUSTICE REHNQUIST: Thank you--

MR. VERRILLI: --foster development.

CHIEF JUSTICE REHNQUIST: --Mr. Verrilli.

Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:14 a.m., the case in thereabove-entitled matter was submitted.)

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.

2005 WL 832356 (U.S.) (Oral Argument)

END OF DOCUMENT

Schapiro Exhibit 55

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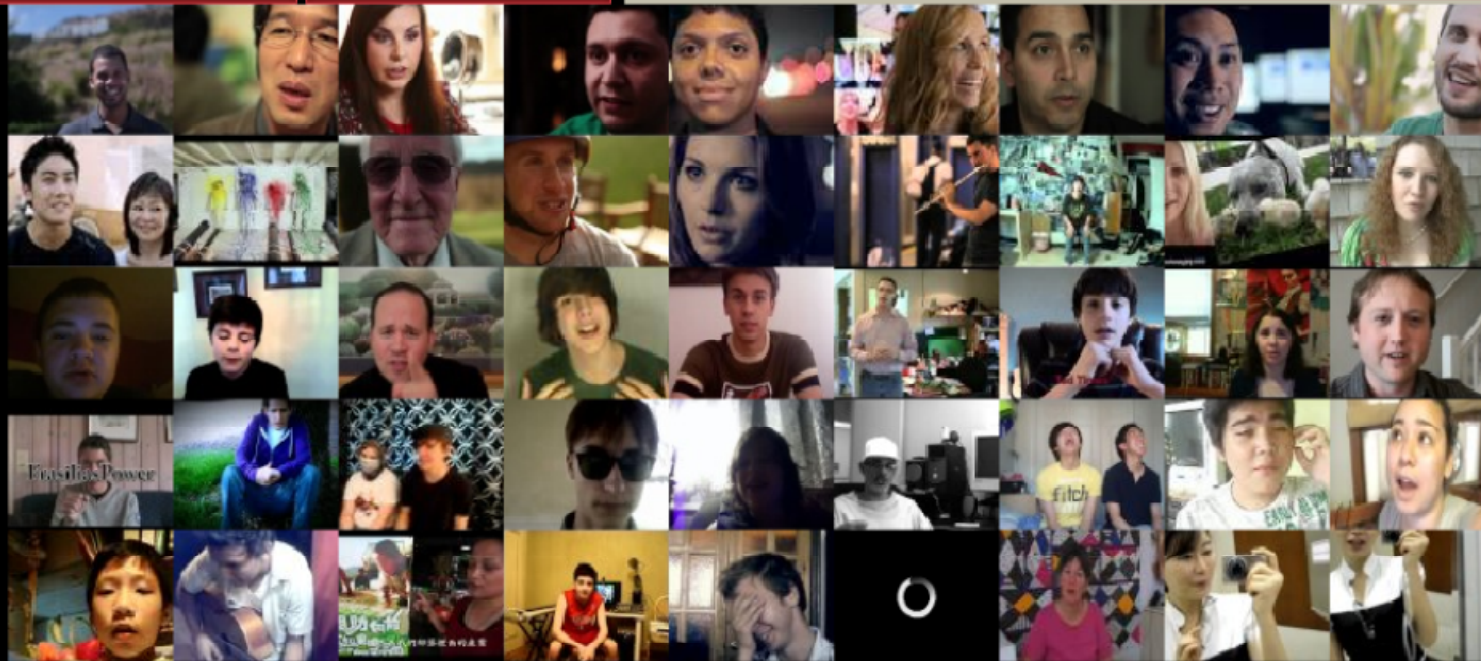
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