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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Redacted Pursuant to
Protective Order at
Request of Defendants

THE FOOTBALL ASSOCIATION
PREMIER LEAGUE LIMITED, BOURNE
CO. (together with its affiliate MURBO
MUSIC PUBLISHING, INC.), CHERRY
LANE MUSIC PUBLISHING
COMPANY, INC., CAL IV
ENTERTAINMENT LLC, ROBERT TUR
d/b/a LOS ANGELES NEWS SERVICE,
NATIONAL MUSIC PUBLISHERS'
ASSOCIATION, THE RODGERS &
HAMMERSTEIN ORGANIZATION,
STAGE THREE MUSIC (US), INC.,
EDWARD B. MARKS MUSIC
COMPANY, FREDDY BIENSTOCK
MUSIC COMPANY d/b/a BIENSTOCK
PUBLISHING COMPANY, ALLEY
MUSIC CORPORATION, X-RAY DOG
MUSIC, INC., FÉDÉRATION
FRANÇAISE DE TENNIS, THE MUSIC
FORCE LLC, and SIN-DROME
RECORDS, LTD. on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No. 07 Civ. 3582 (LLS)

**CLASS PLAINTIFFS'
COUNTERSTATEMENT OF
CONTROVERTED MATERIAL
FACTS IN OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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Pursuant to Fed. R. Civ. P. 56 and Local Civil Rule 56.1, plaintiffs (“class plaintiffs”) submit the following counterstatements, with references to pertinent evidence, specifically controverting the material facts which defendants YouTube, Inc., YouTube LLC and Google, Inc.’s (collectively, “YouTube” or “defendants”) allege, because those alleged facts are either not supported by the evidence YouTube cites, or are contradicted by indisputable evidence which it ignores, or both. As set forth below, class plaintiffs dispute the alleged “facts” in defendants’ Local Rule 56.1 Statement of Material Facts as to Which There is No Genuine Issue to be Tried (“YouTube Statement”), as well as the inferences Defendants would have the Court draw from certain of these alleged facts. In order to reduce the burden on the court, class plaintiffs have also cited back to their moving Statement of Uncontroverted Facts (“Class SUF”), filed on March 5, 2010, where applicable.

Defendants’ motion for summary judgment also raises disputes over alleged facts presented in twelve lengthy fact declarations that Defendants neglected to include in the YouTube Statement as required by Local Rule 56.1. Such alleged facts should not be cognizable by this court given the extra burden placed on class plaintiffs and the court. Nevertheless, out of an abundance of caution, after rebutting the paragraphs in the YouTube Statement, class plaintiffs further identify and address the additional alleged facts presented in those declarations that are not included in the YouTube Statement.

To the extent Class Plaintiffs do not dispute certain of the statements in the YouTube Statement, such positions are taken solely for purposes of class plaintiffs’ motion for summary judgment and without admitting truth, materiality or admissibility at trial.

Purported “facts as to which there is no genuine issue to be tried”	Evidence controverting purported “facts as to which there is no genuine issue to be tried”
<u>Rebuttal to Defendants’ Disputed Claim: The Parties</u>	
<p>1. Plaintiffs in the action, <i>Viacom Int’l, et al. v. YouTube, Inc. et al.</i>, Civil No. 07-CV-2103 (LLS) are Viacom International, Inc. (“Viacom”), Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation, and Black Entertainment Television, Inc.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>2. The putative class plaintiffs in the action <i>The Football Association Premier League Limited, et al. v. YouTube, Inc., et al.</i>, Civil No. 07-CV-3582 (LLS), are Bourne Co. (“Bourne”) and its affiliate Murbo Music Publishing, Inc. (“Murbo”); Cherry Lane Music Publishing Company, Inc. (“Cherry Lane”); Cal IV Entertainment, LLC (“Cal IV”); The Rodgers & Hammerstein Organization (“R&H”); Stage Three Music (US), Inc. (“Stage Three”); Edward B. Marks Music Company, Freddy Bienstock Music Company d/b/a Bienstock Publishing Company and Alley Music Corporation (collectively, “Carlin”); X-Ray Dog Music, Inc. (“X-Ray Dog”); and The Music Force Media Group LLC, The Music Force LLC and Sin-Drome Records, Ltd. (collectively, “Music Force”). Second Am. Class Action Compl. ¶¶ 16, 18-20, 24-30, 33.</p>	<p>The “putative class plaintiffs” listed by Defendants are each individual named plaintiffs and proposed class representatives. We refer the Court to the Motion for Class Certification dated April 9, 2010, Docket Entry No. 209.</p>

<p>3. Defendants are YouTube, Inc., YouTube, LLC, and Google Inc. (collectively, “YouTube”).</p>	<p>Class Plaintiffs do not dispute this assertion.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: The Founding and Launching of YouTube</u></p>	
<p>4. YouTube operates a website located on the Internet at http://www.youtube.com. Decl. of Michael Solomon in Support of Defs.’ Mot. for Summary Judgment (“Solomon Decl.”) ¶ 2.</p>	<p>Class Plaintiffs do not dispute this assertion.</p>
<p>5. YouTube was founded in February 2005 by Chad Hurley, Steve Chen, and Jawed Karim. Decl. of Chad Hurley in Support of Defs.’ Mot. for Summary Judgment (“Hurley Decl.”) ¶ 2.</p>	<p>Class Plaintiffs do not dispute this assertion.</p>
<p>6. The founders created YouTube to provide a platform for users to conveniently share personal videos and to build a community around users posting and viewing such videos. <i>Id.</i> & Exs. 4, 15; Decl. of Andrew H. Schapiro in Support of Defs.’ Mot. for Summary Judgment (“Schapiro Decl.”) Ex. 158.</p>	<p>YouTube’s founders expressed in multiple contemporaneous communications that they created YouTube so it would become a highly-trafficked website that they could sell quickly for a large sum. Although the founders initially discussed rejecting any video unless the video was “about YOU,” the founders abandoned this limitation in order to maximize the financial value of their website. To accomplish this, the founders relied on professionally-produced entertainment content (called “copyrighted” or “premium” content), not “personal videos,” to draw viewers to their site. The founders chose to leave such “obviously infringing” professionally-produced content on their site in order to increase traffic and thereby increase the sale price and profit-potential of their site. Defendants cite to the declaration of YouTube co-founder Chad Hurley, but Mr. Hurley admitted at his deposition that he could not “recall what we were doing at the time” with respect to professional content on the site. Defendants also cite to an email where YouTube’s founders compare themselves to the website flickr, which they later brag has “truckloads” of infringing content.</p> <p>Class SUF ¶¶ 4, 5, 9, 15. Hurley Decl. ¶ 8.</p> <p><u>Desire for Premium/Traffic</u></p> <p>(Tab 14) (“concentrate all of our efforts in building up our numbers as aggressively as we can through whatever tactics, however evil” so that</p>

that in “3 months [they] could sell it with 20m view per day and like 2m users or something... there *is* a potential to get to \$1b or something.) (G00001-00507526)

(Tab 15) (70% of “the most viewed/most discussed [sic]/top favorites/top rated” was copyrighted material.) (G00001-00507535-G00001 -00507540)

(Tab 42) (“we have to keep in mind that we need to attract traffic how much traffic will we get from the personal videos remember the only reason why our traffic surged was due to video of this type [movies and other viral videos]”). (G00001-00660582)

(Tab 44) (After a meeting with potential investor Sequoia, the founders discuss their “dirty little secret”, which was to “sell out quickly.”) (JK0001 0387_MVI_0922)

(Tab 45) (Chen expresses founders’ desire to have commercial content on YouTube that will draw traffic and support advertising.) (JK00005929)

(Tab 251) (“we should use user-generated content to build our audience... “but we should use this audience to show ANY kind of content .. promotional stuff, full-length movies, etc... [since] the content that receives the most views (Top 10 videos) is commercially produced stuff that we are promoting.”) (JK00010174)

(Tab 47) (“if we remove all that content, we go from 100,000 views a day down to about 20,000 views or maybe even lower. the copyright infringement stuff. I mean, we can presumably claim that we don’t know who owns the rights to that video... who don’t we just remove the XXX stuff for now?”) (JK00007416)

(Tab 60) (“Our goal is to use funding to pursue a two-phased approach. First we will further grow our audience and reach to secure our position as the #1 place for personal videos on the internet. Then we will monetize the audience we have acquired by hosting video ads.”) (JK00009871)

(Tab 62) (In 2005, YouTube only removed “obviously copyright infringing stuff” but left available popular content including “music videos, news clip and comedy shows for now.”) (JK00009933)

(Tab 64) (On at least one occasion, one of the founders uploaded a “stolen” video to YouTube) (JK00006I 66)

(Tab 335) (JK00009381-9382)

(Tab 111) (“our policy from acquisition was to grow the user base.”)
(Schmidt Tr. 109:20-21)

(Tab 229) (“75-80% of YouTube’s views come from “copyrighted material”; there is only a “small percentage” of original content present on the site.”) (GOO001-01931843)

(Tab 234) (“we have to target the people who will never upload a video in their life. And those are really valuable because they spend time watching. And if they watch, then it's just like TV, which means lots of value.”) (JK00009383)

(Tab 235) (“save your meal money for some lawsuits... let’s ease up on our strict policies for now. so let’s just leave stuff there if it’s news clips.”) (JK00006057)

(Tab 195) (Goal of CYC was to “to encourage content partners to leave more of their content on the site [to] enable YouTube to generate significant ad revenue.”) (GOO001-00743708-09)

(Tab 198) (“when a user types in a set of keywords “Artist name+song” shouldn’t the official result show up ahead of the pirated content... in what instance can we justify showing a copyrighted version above the official one.”) (GOO001-1531017)

(Tab 46) (having “serious traffic” will allow the [founders] to sell YouTube for “big money.”) (GOO001-01424047-48)

Knowledge of Infringing Content

(Tab 63) (“copyrighted and inappropriate content will find its way onto the site... The actual removal of this content will be in varying degrees... That way, the *perception* is that we are concerned about this type of material and we’re actively monitoring it. [But the] actual removal of this content will be in varying degrees. That way, . . . *you can find truckloads* of . . . copyrighted content . . . [if] you [are] actively searching for it.”) (JK00004749) (emphasis added)

(Tab 61) (“for these mixed videos with music backgrounds, will we get in trouble for them because the music is copyrighted?”) (JK00004969)

(Tab 106) (YouTube chart for tracking entertainment content proactively on the site.) (GOO001-00840004-06)

(Tab 130) (YouTube estimated “the potential value of various sports content to YouTube.”) (GOO001- 0716143)

(Tab 142) (“the fact of the matter is that the majority of the non-professional content has a relatively small number of viewers... whereas the professional here, and remember, professional here just doesn't mean big studios. It also means smaller studios, new entrants, startups who are professional quality, and you can tell a professional quality video from a user-generated one. It is easy enough. You can tell the difference between the two.”) (July 16, 2009 – Fair Disclosure Wire – Q2 2009 Google Earnings Conference Call – Final p. 10)

(Tab 209) (In an August 1, 2005 email to all YouTube employees, YouTube co-founder Chad Hurley stated: “This user is starting to upload tons of ‘Family Guy’ copyrighted clips... I think it's time to start rejecting some of them. Any objections?”)(GOO001-00660588)

(Tab 210) (In 2005, the founders only removed “1) movies 2) TV shows. we should KEEP: 1) news clips 2) comedy clips (Conan, Leno, etc) 3) music videos. In the future, I'd also reject these last three but not yet.”) (GOO001-01424049)

(Tab 261) (“what percentage of the videos on youtube are violating copyright infringement. It’s a lot lower than you think, but in terms of videos that are watched, it is significantly higher”) (GOO001-07169720)

(Tab 231) (In an April 25, 2005 email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley noted the presence of a ‘South Park’ clip on YouTube and questioned whether it should be left on the site because “its [sic] copyrighted material.”) (JK00004704)

(Tab 232) (“we got a complaint from someone that we were violating their user agreement. i *think* it may be because we’re hosting copyrighted content... we should just investigate moving www.youtube.com.”) (JK00005039)

(Tab 233) (“so, a way to avoid the copyright bastards might be to remove the ‘No copyrighted or obscene material’ line and let the users moderate the videos themselves. legally, this will probably be better for us, as we’ll make the case we can review all videos and tell them if they’re concerned they have the tools to do it themselves.”) (JK00005043)

(Tab 237) (“why don't i just put up 20 videos of pornography and obviously copyrighted materials and then link them from the front page. what were you thinking.”) (JK00009595)

	<p>(Tab 238) (YouTube founder recognized that users were uploading unauthorized copyrighted content to the site in spite to the public policy that this was not permitted. He also recognized that “YouTube may be liable for any damages which copyright holders may press.”) (JK00006263-70)</p> <p>(Tab 239)(“if we reject this, we need to reject all the other copyrighted ones.... should we just develop a flagging system for a future push?”; Karim responded: “I say we reject this one, but not the other ones. This one is totally blatant.”) (JK00009668)</p> <p>(Tab 240) (In a September 4, 2005 email to YouTube co- founder Jawed Karim and others at YouTube, a YouTube user stated: “Jawed - You have a lot of people posting Chappelle Show clips and stuff like that. Aren't you guys worried that someone might sue you for copywrite [sic] violation like Napster?”; Karim replied: “ahaha.”) (JK00007423)</p> <p><u>Estimates</u></p> <p>(Tab 192) (Sequoia forwards article with survey results – “more than 90 percent of (users’) favorite material on (video sharing site) YouTube.com Is copyrighted material (from studios”) (SC001246)</p> <p>(Tab 189) (“good news is that fingerprinting works... bad news... top 1000 music videos is probably 700-800 copyrighted”) (GOO001-07169542)</p>
<p>7. The founders named the new company “YouTube” to emphasize their goal that the site become a hub of short, personal videos emphasizing “you.” Hurley Decl. ¶ 7; Schapiro Ex. 162.</p>	<p>The founders’ goal in building the YouTube website was to “sell out quickly.” See CS ¶ 6. The founders privately concluded in contemporaneous communications that viewers were drawn to YouTube watch infringing premium content, and that without such content, they would lose the majority of their audience. In addition to early discussions and analyses of the value of this infringing content undertaken by the founders, later studies during and after the acquisition of YouTube by Google confirmed that YouTube’s audience was drawn to the site to search for premium content (most of which was unlicensed), not “personal videos.” See CS ¶ 25. Correspondence between YouTube and its users, and internal YouTube correspondence about its users, show that YouTube (including the founders) knew that its users were posting and viewing premium content without authorization, and chose to keep that infringing content on the site, in order to maintain or increase “traffic.” Although the founders initially discussed rejecting any video unless the video was “about YOU,” the founders abandoned this limitation in order to maximize the financial value of their website.</p>

Class SUF ¶¶ 4, 5, 9, 11, 13, 15, 19, 23, 26, 27.

User Communications

(Tab 29) (“Many YouTube users admitted to YouTube that they started using YouTube just to watch some of the copyrighted stuff.”)
(GOO001-00951482)

(Tab 85) (A user wrote to copyright@youtube.com that “there are millions of Football goals on YouTube... Here are several copies of the video that other people have uploaded
[http://www.youtube.com/results?search_query=saha+fulham
&search=Search](http://www.youtube.com/results?search_query=saha+fulham&search=Search)”) (GOO001-00707313)

(Tab 213) (Dunton stated that YouTube “didn’t care” that an ipod nano contest winner has posted “copyrighted videos.” (GOO001-00504044-45)

(Tab 214) (User to YouTube: “You guys have TONS of South Park Clips... is mine the only one in violation? You have WWF/WWE Media. WCW Media. Tons of Media that is liable for infringement of copyrights and your site promotes it.”) (GOO001-00558783-84)

(Tab 242) (User to YouTube: “How is it that ‘Family Guy cartoon clips are deleted, [but] ECW, WWE, WCW, clips and other TV clips are free to watch? What is the difference with the copyright?”) (JK00000824)

(Tab 243) (User to YouTube: “I’m a little confused about the rejection of my last and other videos. I have seen other ‘family guy’ videos on here... I also have other vids that are cartoons from TV Funhouse from SNL, that are still active and live. What is the difference?”)
(JK00000836)

Gitterman Decl. at ¶ 4, Ex. 3 (metadata).

Acquisition

(Tab 23) (“I think we should beat YouTube – and all competitors – but not at all costs. A large part of their traffic is from pirated content. When we compare our traffic numbers to theirs, we should acknowledge that we are comparing out ‘legal traffic’ to their mix of traffic from legal and illegal content.”) (GOO001-00496651)

(Tab 108) (Credit Suisse analysis) (CSSU 003565)

(Tab 110) (“This is a company with very little revenue, *growing quickly*

	<p><i>with user adoption, growing much faster than Google Video, which was the product that Google had.... And we ultimately concluded that 1.65 billion included a premium for moving quickly and making sure that we could participate in the user success of YouTube.”</i> (Schmidt Tr. 53:9-24) (emphasis added)</p> <p>(Tab 125) (Acquisition Term Sheet. required indemnification by YouTube to Google... “the representations and warranties related to intellectual property shall survive for three years.”) (SC009725)</p> <p>(Tab 176) (Ullah: “Snowmass video analysis [of YouTube]... Prem/rem ... 63%... Premium/removed- means the content is copyright (either in whole or in substantial part) and removed were links that were taken down.”) (CSSU002686)</p> <p>(Tab 245) (Credit Suisse’s valuation model for YouTube estimated that 60% of the video views on YouTube were of “premium” content.) (CSSU 004071)</p> <p>(Tab 246) (An October 8, 2006 draft of Credit Suisse's presentation defined “[p]remium content [a]s copyrighted content such as movies/TV trailers, music videos, etc.”) (CSSU 003335)</p> <p>(Tab 277) (Q. “if the operator of one of these private sites decides to upload entire movies or television shows onto the private sites, is there any way a content owner can access these private accounts to take down those movies or TV television shows? A. I'm not aware of ways in which they could.”) (Drummond Dep. at 195:13-20)</p> <p>(Tab 278) (Google's due diligence team analyzed a random sample of hundreds of videos provided by YouTube that Google believed to be representative of the types of content on YouTube.) (Duncan 30(b)(6) Dep. at 87:3-91:10)</p> <p>(Tab 279) (Credit Suisse's October 9,2006 presentation to Google’s board of directors estimated that “60% of total video streams on [the YouTube] website are ‘Premium,’ and that “10% of premium content providers allow [YouTube] to monetize their content in 2007E.”) (Kordestani Dep. at 109:24-110:22)</p>
<p>8. The founders chose the slogan “Broadcast Yourself” so that users would “understand what the site is supposed to be when they visit.” Hurley Decl.</p>	<p>Class Plaintiffs dispute that the slogan “Broadcast Yourself” conveys any message at all. To the extent it does convey any message to users, <i>see</i> CS ¶ 9 below.</p>

<p>¶ 7.</p>	
<p>9. YouTube’s message to the public and to its users consistently has been that users should post only videos that they had created themselves or otherwise had the right to post. <i>Id.</i> ¶ 9; Decl. of Zahavah Levine (“Levine Decl.”) ¶¶ 5, 7.</p>	<p>Any public “message” YouTube claims it conveyed to users to comply with copyright laws is contradicted by YouTube’s dependence on and fostering of copyright infringing content on its site. For example, YouTube promoted the presence of unauthorized premium content on its site to potential investors, including Sequoia Capital. YouTube’s founders considered rejecting any video unless the video was “about YOU,” but abandoned this limitation in order to maximize the financial value of their website. YouTube also deliberately depended on users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. Correspondence between YouTube and its users, and internal YouTube correspondence about its users, show that YouTube knew that its users were posting and viewing premium content without authorization, and chose to keep that infringing content on the site, in order to maintain or increase “traffic.” YouTube and its users knew that users could upload infringing content to YouTube with little or no consequence.</p> <p>Class SUF ¶¶ 4, 5, 9, 15. See CS ¶¶ 6-7.</p>
<p>10. On April 23, 2005, YouTube launched the “beta” version of the website, describing itself to the public as “the first online community site that allows members to post and share personal videos.” Hurley Decl. ¶¶ 4-5.</p>	<p>The “beta” version of the YouTube website was publicly-available throughout the world. YouTube knew, early on, that the financial value of the site was driven by the infringing premium content that was uploaded and viewed on the site, not “personal videos.” YouTube deliberately chose, early on, to keep several categories of infringing professionally-prodced videos on the site, in order to draw traffic.</p> <p>See CS ¶¶ 6-7.</p> <p>(Tab 247) (“a beta version went live in April 2005... accessible on the worldwide web at www.youtube.com.”) (Decl of Steve Chen, ¶ 3)</p>
<p>11. In April 2005, YouTube’s founders publicized their new website to the blog “Video Link” as follows: “A site called ‘YouTube’ has just launched. It allows members to post and share personal videos they’ve made. The site aims to become a community of digital video authors and their videos.” Schapiro Ex. 163.</p>	<p>As explained above at CS ¶ 6, YouTube’s “aim” was to build a highly-trafficked website that could be sold quickly for a large sum. YouTube depended on its “members” to upload videos that infringed the copyrights of various national and international premium content owners, including record labels, music publishers, television and movie studios, news providers, and sports leagues, in order to drive traffic to the site and meet the founders’ goal to “sell out quickly.”</p> <p>See CS ¶¶ 6-7.</p>
<p>12. In April 2005, YouTube ran the following advertisement on</p>	<p>In addition to the foregoing at CS ¶¶ 6-7, YouTube compared itself in a communication with Sequoia Capital to the website flickr, a site it</p>

<p>the website “Craigslist”: “YouTube.com is a web-based community based around creative and fun videos. We are seeking folks who possess a dash of technical know-how and a truckload of flare.” <i>Id.</i> Ex. 165.</p>	<p>described in the same communication as having “truckloads” of premium copyrighted content.</p> <p>Class SUF ¶5.</p> <p>(Tab 63) (“copyrighted and inappropriate content will find its way onto the site... The actual removal of this content will be in varying degrees... That way, the <i>perception</i> is that we are concerned about this type of material and we’re actively monitoring it. [But the] actual removal of this content will be in varying degrees. That way, . . . <i>you can find truckloads</i> of . . . copyrighted content . . . [if] you [are] actively searching for it.”) (JK00007479) (emphasis added)</p>
<p>13. In early May 2005, YouTube told the online technical publication <i>The Register</i>: “We just launched a new website, www.YouTube.com, based on the idea of video blogging where members would take clips ranging from the mundane to the fascinating. Our hope is that a community would be built around ‘channels’ such as ‘Sports’, ‘Kids’, ‘Vacations’, ‘Cars’, etc.” <i>Id.</i> Ex. 164.</p>	<p>YouTube’s financial value was based, not on “video blogging,” but on the presence of premium, copyrighted content, a fact it promoted to potential investors in the site. YouTube’s founders considered rejecting any video unless the video was “about YOU,” but abandoned this limitation in order to maximize the financial value of their website.</p> <p><i>See</i> CS ¶¶ 6-7 above.</p> <p>Hurley Decl. ¶¶ 3-5.</p>
<p>14. On December 14, 2005, YouTube officially launched its website. Hurley Decl. ¶ 23.</p>	<p>At around the time of its “official” launch, YouTube had been active for six months and had hosted large quantities of infringing content during that period, with the knowledge and support of its founders. YouTube had experimented with a flagging feature for copyright infringement, but abandoned it after two weeks because it no longer served its business interests of building traffic to encourage a quick sale of the site.</p> <p>Class SUF ¶¶ 4, 5, 7, 9. <i>See</i> CS ¶ 6.</p> <p>(Tab 39) (“we took [the flag] down, because, as stated in the Digital Millennium Copyright Act, we’re only obligated to remove content when contacted directly by the copyright owner.”) (JK00008393)</p> <p>(Tab 43) (September 2005: “can we remove the flagging link for ‘copyrighted’ today?... it’s actually better if we don’t have the link there at all because then the copyright holder is responsible for serving us</p>

	notice of the material and not the users.”) (JK00008043)
<u>Rebuttal to Defendants’ Disputed Claim: How YouTube Works</u>	
<p>15. The YouTube website allows users from around the world to upload videos free of charge to computer servers owned or leased by YouTube. Solomon Decl. ¶ 2.</p>	<p>The YouTube website is a for-profit business which, by virtue of pervasive infringing content available on the site, has attracted a huge audience that is of enormous financial value to Defendants. Users of the YouTube website are presented with advertisements on the home, search, browse and watch pages of the site, all of which generate revenue for YouTube. As described at CS ¶ 16, YouTube also controls what videos are uploaded and watched on its site, when they are watched, and who watches them, in order to maximize potential profits.</p> <p>Decl. of Suzanne Reider ¶¶ 3, 5, 8, 10. Class SUF ¶¶ 4, 9, 15, 33, 35, 36, 37, 38, 40, 41. See CS ¶¶ 49, 160, 164, 170.</p>
<p>16. The process of uploading a video to YouTube is initiated by YouTube’s users. <i>Id.</i> ¶ 2.</p>	<p>From the outset, YouTube has known about and depended on users uploading infringing premium content to its website, because YouTube knows that is the content that drives its traffic and therefore its financial value. See CS ¶¶ 6-7. YouTube also controls what videos get shown on its site, and when and how they are viewed. For example, YouTube prescreens every video uploaded to its site and selectively blocks certain videos on behalf of favored content partners before they are shown to viewers. See CS ¶¶ 88, 94-96. YouTube reviews the videos on its website “24 hours a day, 7 days a week” to selectively remove videos that in its view are “inappropriate.” YouTube runs text-based searches of the videos on its site to selectively find and remove content on behalf of favored content owners. YouTube selectively blocks access to certain videos in certain countries on behalf of favored content owners or for political reasons. See CS ¶ 23. YouTube’s “video response” feature encourages users to upload videos that are similar to the videos already being shown on the YouTube website. YouTube’s “related videos” feature suggests specific videos for YouTube’s audience to watch, including videos of class plaintiffs’ unauthorized content. YouTube’s search function suggests specific searches to its audience, including searches for class plaintiffs’ unauthorized content. YouTube tracks specific songs on its site for business reasons, including class plaintiffs’ unauthorized musical compositions. See CS ¶ 97. Despite YouTube’s control over what gets uploaded to and watched on its site, YouTube chooses not to block or remove unauthorized content, including class plaintiffs’ content, that it knows is being uploaded and viewed. Instead, YouTube controls what gets uploaded to</p>

and watched on its website for the purpose of maximizing its financial value and potential profits. *See CS ¶¶ 160, 164, 167.*

Class SUF ¶¶ 6, 28, 29, 33, 35, 36, 37, 38, 40, 41.

Gitterman Decl. at ¶ 4, Ex. 3. (metadata).

Email Alert

(Tab 16) (Setting up that tool to send email alerts to content owners “isn’t hard” but YouTube “hate[d]... making it easier for these aholes” – referring to copyright owners.”) (GOO001-00829704)

(Tab 241) (After removing infringing videos, employee observed that it “looks like the users simply uploaded the videos again today” and suggested the implementation of a feature that once a video was rejected, YouTube would “flag the user so that we must review all of their new videos before they go live.”) (JK00008331)

Inappropriate Content

(Tab 106) (YouTube chart for tracking entertainment content proactively on the site.) (GOO001-00840004-06)

(Tab 107) (“Users police YouTube by flagging inappropriate content for review [and] all flagged videos are reviewed by the YouTube Content SQUAD, 24 hours a day, 365 days a year.”) (GOO001-00561577)

(Tab 211) (“army of content reviewers”) (GOO001-02482760)

(Tab 107) (GOO001-00561577) (“24 hours a day, 365 days a year”) (GOO001-00561577)

Manual Screening/Proactive

(Tab 28) (Gillette: “Need help with proactive scans [...] a list of all of the earlier infringement notifications that we have received, and I would like you to cycle through this once a day and search for their content on our site. If you see a lot for any of the content owners, you could also ask whoever is working that day in support to help you to ferret more out.”) (GOO001-00839851)

(Tab 236) (Recognition that YouTube should “flag/highlight any video with a run time >10 minutes, since most of those are copyrighted shows.”) (JK00000382)

(Tab 241) (After removing infringing videos, employee observed that it “looks like the users simply uploaded the videos again today” and suggested the implementation of a feature that once a video was

	<p>rejected, YouTube would “flag the user so that we must review all of their new videos before they go live.”) (JK00008331)</p> <p>(Tab 244) (“[W]e can always approve videos first BEFORE they are shown anywhere, that’s a one-line code change.”) (JK00009130)</p> <p>(Tab 280) (“we could always approve videos first before they are shown anywhere. That’s a one-line code change.”). (Karim Dep. at 119:4-121:24)</p> <p><u>Keyword Searches and Related Videos</u></p> <p>(Tab 13) (February 2007 – “<i>Our CYC tools are now live as well and are only offered to partners who enter into a revenue deal with us... Any content the partner identifies is automatically audio fingerprinted and placed in the Audible Magic database so the entire process gets smarter over time.</i>”) (GOO001-01511226-27)</p> <p>(Tab 307) (“‘Related videos’ on the right hand side of the flash player match one or more of the keywords of the video” on the watch page.”) (GOO001-00243149)</p> <p>(Tab 308) [REDACTED] (GOO001-09684203)</p> <p>(Tab 248) (Screenshot from www.youtube.com displaying “video response” feature)</p> <p><u>Google Search Suggests Additional Terms</u></p> <p>(Tab 102) (Search for “manchester united” suggests “Manchester united v. Chelsea”, “Manchester united v. Portsmouth” and “Manchester united v. Newcastle 2008”) (Reider Ex. 14)</p>
<p>17. A user uploads a video by visiting the YouTube website, creating an account, selecting a video file from the user’s computer or other storage device, and then clicking a button to instruct the YouTube system to upload that video. <i>Id.</i> ¶ 3.</p>	<p>Class Plaintiffs dispute any inference that Defendants do not have control over what videos get uploaded to and watched on the YouTube website.</p> <p><i>See</i> CS ¶ 16; CS ¶¶ 94-96 (availability of fingerprinting tools to content partners).</p> <p><i>See also</i> Decl. of David King ¶¶ 4, 26. Class SUF ¶ 29, 33.</p>
<p>18. YouTube does not control which videos a user chooses to upload to the site. <i>Id.</i> ¶¶ 3, 9.</p>	<p>YouTube does control what videos get uploaded to and watched on its site for the purpose of maximizing its financial value and potential profits. <i>See</i> CS ¶ 16.</p>

	<p>Class SUF ¶ 33.</p>
<p>19. Uploaded video files are automatically processed by YouTube’s computer systems and converted into file formats that are supported by a variety of viewing devices. <i>Id.</i> ¶¶ 6-7.</p>	<p>Class Plaintiffs dispute any inference that defendants do not have control over what videos get uploaded to and watched on the YouTube website, and in what formats and on what media they get viewed. Defendants select what videos get uploaded to and shown on the YouTube website by filtering, promoting or blocking certain videos in order to advance Defendants’ own business interests. <i>See</i> CS ¶¶ 16, 94, 96. Defendants also choose to convert videos into additional file formats in order to distribute those videos to mobile phones and television sets, without the users’ involvement.</p> <p>Class SUF ¶ 33</p> <p>(Tab 228) (“to date the YouTube engineering team has re-encoded approximately 30,000 of the top watched videos on YouTube... we look for the most watched content and prioritize this for re-encoding...into the H.264 format to support our broad Mobile/IPTV efforts.”) (GOO001-00010746)</p> <p>(Tab 303) (In 2007 YouTube “manually selected” videos to “syndicate” to mobile phone providers) (Patterson Tr. 54:9-58:24)</p>
<p>20. The series of events that is triggered by a user’s decision to upload a video to YouTube and ends with the user’s video being made playable on YouTube is fully automated and does not involve the intervention or active involvement of YouTube personnel. <i>Id.</i> ¶ 2.</p>	<p>Defendants interpose themselves in a variety of ways between an upload by the user and the availability of that content on Youtube. Defendants select what videos get uploaded to and shown on the YouTube website by filtering, promoting or blocking certain videos in order to advance Defendants’ own business interests. <i>See</i> CS ¶ 16. Defendants also choose to convert videos into additional file formats in order to distribute those videos to mobile phones and television sets, without the users’ involvement. <i>See</i> CS ¶ 19. When YouTube first entered commercial deals to distribute its content to such third party media platforms, YouTube selected which videos would be distributed. YouTube has also been actively involved in determining what videos get watched on its site by choosing not to remove unauthorized premium content that it knows is on the site, and by refusing to provide copyright protection tools to content owners who refuse to license their content to YouTube.</p> <p>Class SUF ¶¶ 5, 39.</p> <p><i>See also</i> CS ¶ 36 (Screening and manual review); CS ¶¶ 94-96 (Access to CYC and other tools).</p>
<p>21. Anyone with Internet access and standard Internet browsing</p>	<p>YouTube makes its inventory of videos available to “anyone” in order to increase traffic and thereby the value of the site. Defendants</p>

<p>software can view for free the videos that users have stored on YouTube. <i>Id.</i> ¶ 9.</p>	<p>maximize profits from advertising, especially on webpages featuring the results of users’ searches, which are primarily conducted to locate unlicensed premium content. <i>See</i> CS ¶¶ 160, 167. Defendants’ revenue is therefore dependent upon the traffic generated by the availability of those videos. YouTube’s website also provides “for free” Class Plaintiffs’ unauthorized content, which Class Plaintiffs would otherwise license for value. Defendants benefit from offering this content “for free” because defendants know that it builds the audience for their site, which they can then sell to “top advertisers.” <i>See</i> CS ¶ 169.</p> <p>Class SUF ¶¶ 33, 35, 37, 38, 40, 41.</p> <p>(Tab 316) (“We believe that we have not extracted the maximum value from licensees because of the ongoing piracy problems and issues with YouTube, the fact that licensees purchase rights but then find that their rights are being diluted and they actually don’t have exclusivity, as we have tried to grant.”) (Weingarten Tr. 327:23-328:5)</p> <p>(Tab 315) (“Q. Did you have any involvement negotiating the licenses? A. Yes. Q. And what was that involvement? A. Fees.”) (Horan Tr. at 162:24-163:7)</p> <p>(Tab 313) (“Q. Can you explain to me the sources of the revenue that Bourne generates, in the course of its business? A. In the course of its music publishing business, we generate revenue by licensing music out for use.”)(Berrocal Tr. 112:19-23)</p>
<p>22. A user initiates playback of a YouTube video by selecting the video that the user wishes to view on the YouTube service. <i>Id.</i></p>	<p>Class Plaintiffs dispute any inference that Defendants do not have control over what videos get watched on the YouTube website. Defendants select what videos get watched on the YouTube website by filtering, promoting or blocking certain videos in order to advance Defendants’ own business interests. <i>See</i> CS ¶ 16. For example, Defendants’ “related videos” feature encourages users to initiate additional playbacks of certain videos, including videos containing class plaintiffs’ content. Defendants’ search function also suggests specific searches to its users, including searches for class plaintiffs’ unauthorized content.</p> <p><i>See</i> CS ¶ 25.</p> <p><u>Featured Videos</u></p> <p>(Tab 190) (Part of YouTube’s “job” was “making sure we are finding and featuring the best videos in the YouTube universe”) (9-22-06 Blog)</p> <p>(Tab 191) (“anything you see in the box marked "Featured Videos" has been selected by a team of editors who are constantly thinking about</p>

	<p>what might appeal to you, the users, and trying to balance the types of videos and subject matter seen here.”) (11-1-06 YouTube Blog)</p>
<p>23. In response to a playback request, the YouTube system automatically streams a copy of the requested video from one of its video servers to the user’s computer or other viewing device. <i>Id.</i></p>	<p>YouTube does not automatically stream a copy of the requested video in response to a video playback request. For example, YouTube prevents access to videos that have been blocked by one of YouTube’s favored content partners. <i>See</i> CS ¶¶ 94-96. YouTube also selectively blocks access to certain videos in certain countries or regions on behalf of favored content owners or for political reasons. Defendants also employ a team of employees to remove or block videos YouTube considers “inappropriate,” 24 hours a day, 7 days a week. <i>See</i> CS ¶ 16.</p> <p>Class SUF ¶¶ 6, 28, 29</p> <p><u>Geo-Blocking</u> (Tab 204) (“By offering the ability to Geo-filter video, we will gain access to a much larger universe of professional video content. Territorial rights issues and controls related to this has been a major cause limiting the type and amount of video content that professional content providers (studios, networks, labels, etc.) have been able to provide to YouTube so far.”) (GOO001-02523433)</p> <p>(Tab 202) [REDACTED] (GOO001-02250237)</p> <p>(Tab 201) [REDACTED] (G00001-02240616)</p>
<p>24. In almost all cases, YouTube prohibits users from downloading videos from the site, and does not offer that functionality to users. <i>Id.</i> ¶ 10.</p>	<p>YouTube stores a copy of each video viewed by a user in the user’s “Temporary Internet Files” folder on the user’s computer hard drive, which can then be repeatedly accessed or shared without returning to the YouTube website.</p> <p>(Tab 300) (a copy of a video is “cached” or stored after a user accesses the video on the YouTube site) (GOO001-00718495)</p>
<p>25. Users may search the</p>	<p>Defendants’ search function suggests specific searches to its users,</p>

YouTube website for videos by entering a query of terms the user deems relevant into search fields provided on various pages throughout the site. *Id.* ¶ 11.

including searches for class plaintiffs' unauthorized content. YouTube has concluded that users primarily search for professionally-produced premium content on the site, most of which is unlicensed.

Gitterman Decl. at ¶ 4, Ex. 3 (metadata).

(Tab 25) (“Our preliminary analysis indicates that anywhere from ~40% to as high as ~70% of search queries may involve premium terms.... *it seems that premium content/brands are an important element to bringing people into the YT house. My guess is that once they're in, they decide to stay a while.*”) (GOO001-00238624) (emphasis added)

(Tab 4) (“Revenue will be generated from ads primarily on Search pages (40%) ... The most popular queries are for head content -- Music, Movies, TV, Celebrities, and Sports – whose rights holders require negotiated partnerships for us to obtain...”) (GOO001-00375065)

(Tab 22) (“based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, be we haven’t yet licensed the content that they’re looking for.... Of the Top 100 Playback Queries... [REDACTED] (GOO001-02519871)

(Tab 24) (“Top 10K queries... “Searches do reflect popularity pretty well... Fresh content is being searched for consistently... Music, TV Shows, Movies, Celebrities, Sports, etc, are definitely our top categories to attack...”) (GOO001-00986823)

(Tab 41) (Content Lead Discussion – June 26, 2007: “users are searching for lots of things, but primarily for premium content... [REDACTED] (GOO001-01016969)

(Tab 85) (A user wrote to copyright@youtube.com that “there are millions of Football goals on YouTube... Here are several copies of the video that other people have uploaded http://www.youtube.com/results?search_query=saha+fulham&search=Search”)

(Tab 127) (For “soccer”, “football” and “Premier League”, YouTube ran “# searches for the above done on YT daily... # titles with tagged with the above... # titles with the above in the title”) (GOO001-00214966)

<p>algorithm identifies as being responsive to the user’s query, accompanied by a portion of the text the user who uploaded the video provided to describe the video. <i>Id.</i></p>	<p>for class plaintiffs’ unauthorized content. <i>See</i> CS ¶ 167.</p> <p>Class SUF ¶¶ 6, 28, 36, 37, 40, 41.</p> <p><i>See also</i> CS ¶ 94, 96 (CYC features); CS ¶¶ 160, 164 (financial benefit through traffic and advertising).</p> <p><u>Duplicate Videos</u> (Tab 296) (“We should disallow the user for uploading the same video more than once. We should also remove the originals from duplicate videos across all users. However, we should never disallow the same video posted by *different* people.”) (GOO001-2826899)</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: The Quantity and Diversity of Videos Available on YouTube</u></p>	
<p>27. When YouTube officially launched in December 2005, it was receiving approximately 6,000 new video uploads each day, and its users were watching nearly 2.5 million videos each day. Hurley Decl. ¶ 23 & Ex. 28.</p>	<p>Class plaintiffs dispute any inference that defendants did not know what videos had been uploaded and watched on YouTube, or that they did not control what videos were uploaded and watched on YouTube. By December 2005, YouTube’s founders knew that infringing videos were being shown on the YouTube site, and had conducted analyses showing that around 80% of the videos on the site were infringing. <i>See</i> CS ¶¶ 6. Those analyses confirmed that the growth in the number of YouTube’s viewers was principally attributable to infringing premium content on its site, not “personal videos.” <i>Id.</i> Despite the number of videos being uploaded to the site, YouTube was nevertheless able to control what videos got uploaded and watched on the site by, among other things, removing videos it deemed “inappropriate,” and by selectively finding and removing content on behalf of favored content owners.</p> <p>Class SUF ¶¶ 4-6, 28-29.</p> <p><i>See</i> CS ¶16.</p>
<p>28. By February 2006, the number of daily video uploads to YouTube was 25,000. <i>Id.</i></p>	<p>Class plaintiffs dispute any inference that defendants did not know what videos had been uploaded and watched on YouTube, or that they did not control what videos were uploaded and watched on YouTube. By February 2006, YouTube’s founders knew that of infringing videos were being shown on the YouTube site, and had conducted analyses showing that between 60 and 80% of the videos on the site were infringing. Those analyses confirmed that the growth in the number of YouTube’s viewers was principally attributable to infringing premium content on its site, not “personal videos.” Despite the number of videos being uploaded to the site, YouTube was nevertheless able to control what videos got uploaded and watched on the site by, among other</p>

	<p>things, removing videos it deemed “inappropriate,” and by selectively finding and removing content on behalf of favored content owners.</p> <p>Class SUF ¶¶ 5-6, 13. (Tab 15) (70% of “the most viewed/most discussed [sic]/top favorites/top rated” was copyrighted material.)</p> <p>(Tab 215) (January 2006: “youtube is at an advantage b/c they aren’t the target that we are with issues like this [pre-screening]. they are aware of this (I spoke with them on friday) and they plan on exploiting this in order to get more and more traffic.”) (GOO001-03592968)</p>
<p>29. In July 2006, users uploaded to YouTube more than 2.1 million videos to the site, and watched more than 3 billion videos. <i>Id.</i></p>	<p>In addition to CS ¶¶ 27-28, Class Plaintiffs dispute any inference that Defendants did not know what videos had been uploaded and watched on YouTube, or that they did not control what videos were uploaded and watched on YouTube. By July 2006, YouTube had conducted several analyses showing that between 60 and 80% of the videos on the YouTube website were infringing. Those analyses confirmed that the growth in the number of YouTube’s viewers was principally attributable to infringing premium content on its site, not “personal videos.” <i>See CS ¶ 6.</i> By July 2006, high level Google executives concluded that its then-competitor YouTube was a “‘rogue enabler’ of content theft” and a “video Grokster,” and that “YouTube’s business model is completely sustained by pirated content.” (Tab 220) Despite the number of videos being uploaded to the site, YouTube was nevertheless able to control what videos got uploaded and watched on the site by, among other things, removing videos it deemed “inappropriate,” and by selectively finding and removing content on behalf of favored content owners.</p> <p>Class SUF ¶¶ 4, 6, 9. <i>See CS ¶16; CS ¶¶ 94-96.</i></p> <p><u>Google’s Assessment of YouTube</u> (Tab 281) (“youtube is at an advantage b/c they aren’t the target that we are with issues like this [pre-screening]. they are aware of this (I spoke with them on friday) and they plan on exploiting this in order to get more and more traffic.”) (Chane Tr. at 8:18-10:25, 48:10-50:18).</p> <p>(Tab 109) (“Premium Content Owners... perceive You Tube as trafficking mostly illegal content – it’s a Video Grokster.... YouTube is getting more traffic and engagement than Google Video today.... YouTube’s content is all free, and much of it is highly sought after pirated clips.”) (GOO001-00496619-20; GOO001- 004966330)</p>

	<p>(Tab 118) (Google concluded that YouTube was a ‘rogue enabler’ of content theft.”) (GOO001-00502536)</p> <p>(Tab 23) (“I think we should beat YouTube – and all competitors – but not at all costs. A large part of their traffic is from pirated content. When we compare our traffic numbers to theirs, we should acknowledge that we are comparing out ‘legal traffic’ to their mix of traffic from legal and illegal content.”) (GOO001-00496651)</p> <p>(Tab 301) (Anderson to Walker: “I can't believe you're recommending buying YouTube. Besides the ridiculous valuation they think they're entitled to, they're 80% illegal pirated content.”) (GOO001-00482516)</p> <p>(Tab 216) (Google Video was “baffled” by comparisons between YouTube and Google Video because YouTube was “doing little to stem its traffic growth on the back of pirated content,” calling that choice “unsustainable and irresponsible.”) (GOO001-00562962)</p> <p>(Tab 110) (“This is a company with very little revenue, <i>growing quickly with user adoption, growing much faster than Google Video</i>, which was the product that Google had.... And we ultimately concluded that 1.65 billion included a premium for moving quickly and making sure that we could participate in the user success of YouTube.”) (Schmidt Tr. 53:9-24) (emphasis added)</p>
<p>30. By December 2007, users were uploading to YouTube more than 300,000 videos each day and site traffic had reached 800 million daily video views. <i>Id.</i> ¶ 23.</p>	<p>Class Plaintiffs dispute any inference that Defendants did not know what videos had been uploaded and watched on YouTube, or that they did not control what videos were uploaded and watched on YouTube. Defendants knew that the growth of the YouTube website through December 2007 was primarily driven by the unauthorized premium content they offered to viewers. By this date, YouTube had implemented content identification technologies that screened every single video being uploaded to its website and that allowed YouTube and its favored content owners to block, claim or track the videos they wanted to. However, Defendants only offered these technologies to content owners willing to license their content to YouTube. YouTube did so to ensure that content owners would not block or remove the unauthorized premium content that was fuelling YouTube’s traffic growth and therefore its profit potential.</p> <p><i>See</i> CS ¶¶ 27-29. Class SUF ¶¶ 13, 14, 15, 16, 28, 29.</p>

<p>31. By July 2008, uploads to YouTube had reached more than 400,000 videos per day. <i>Id.</i></p>	<p>Class Plaintiffs also dispute any inference that Defendants did not know what videos had been uploaded and watched on YouTube, or that they did not control what videos were uploaded and watched on YouTube.</p> <p><i>See CS ¶ 30.</i></p>
<p>32. More than 500 million videos have been posted to YouTube. Levine Decl. ¶ 26.</p>	<p>Class Plaintiffs dispute the materiality of this assertion. Defendants knew from the outset that it is not the number of videos that create value for the YouTube website, but the extent to which those videos draw users to the site, and create an audience that can then be sold to potential investors or advertisers. <i>See CS ¶ 6.</i> Defendants’ own analyses show that users are drawn to YouTube to view premium content, most of which is unlicensed, and that such premium content made up the biggest proportion of what users were actually watching. <i>See CS ¶ 25.</i> Class Plaintiffs also dispute any inference that Defendants did not know what videos had been posted to and watched on YouTube, or that they did not control what videos were posted to and watched on YouTube. <i>See CS ¶ 16.</i></p> <p>(Tab 62) (In 2005, YouTube only removed “obviously copyright infringing stuff” but left available popular content including “music videos, news clip and comedy shows for now.”) (JK00009933)</p> <p>(Tab 63) (“copyrighted and inappropriate content will find its way onto the site... The actual removal of this content will be in varying degrees... That way, the <i>perception</i> is that we are concerned about this type of material and we’re actively monitoring it. [But the] actual removal of this content will be in varying degrees. That way, . . . <i>you can find truckloads</i> of . . . copyrighted content . . . [if] you [are] actively searching for it.”) (JK00007479) (emphasis added)</p> <p>(Tab 64) (On at least one occasion, one of the founders uploaded a “stolen” video to YouTube) (JK00006I 66)</p> <p>(Tab 45) (Chen expresses founders’ desire to have commercial content on YouTube that will draw traffic and support advertising) (K00005929)</p> <p>(Tab 46) (having “serious traffic” will allow the [founders] to sell YouTube for “big money.”) (GOO001-01424047-48)</p> <p>(Tab 47) (“if we remove all that content, we go from 100,000 views a day down to about 20,000 views or maybe even lower. the copyright infringement stuff. I mean, we can presumably claim that we don’t know who owns the rights to that video... who don’t we just remove the XXX stuff for now?”) (JK0007416)</p> <p>(Tab 15) (70% of “the most viewed/most discussed [sic]/top</p>

favorites/top rated” was copyrighted material.) (GOO001-00507540)

(Tab 42) (“we have to keep in mind that we need to attract traffic how much traffic will we get from the personal videos remember the only reason why our traffic surged was due to video of this type [movies and other viral videos]”). (GOO001-00660582)

(Tab 106) (YouTube chart for tracking entertainment content proactively on the site.) (GOO001-00840004-06)

(Tab 130) (YouTube estimated “the potential value of various sports content to YouTube.”) (GOO001- 00716143)

(Tab 142) (“the fact of the matter is that the majority of the non-professional content has a relatively small number of viewers... whereas the professional here, and remember, professional here just doesn't mean big studios. It also means smaller studios, new entrants, startups who are professional quality, and you can tell a professional quality video from a user-generated one. It is easy enough. You can tell the difference between the two.”) (July 16, 2009 – Fair Disclosure Wire – Q2 2009 Google Earnings Conference Call – Final, p. 10)

(Tab 209) (In an August 1, 2005 email to all YouTube employees, YouTube co-founder Chad Hurley stated: “This user is starting to upload tons of ‘Family Guy’ copyrighted clips... I think it's time to start rejecting some of them. Any objections?”) (GOO001-00660588)

(Tab 210) (In 2005, the founders only removed “1) movies 2) TV shows. we should KEEP: 1) news clips 2) comedy clips (Conan, Leno, etc) 3) music videos. In the future, I'd also reject these last three but not yet.”) (GOO001-01424049)

(Tab 261) (“what percentage of the videos on youtube are violating copyright infringement. It's a lot lower than you think, but in terms of videos that are watched, it is significantly higher”) (GOO001-07169720)

(Tab 231) (In an April 25, 2005 email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley noted the presence of a “South Park” clip on YouTube and questioned whether it should be left on the site because “its [sic] copyrighted material.”) (JK00004704)

(Tab 232) (“we got a complaint from someone that we were violating their user agreement. i *think* it may be because we're hosting copyrighted content... we should just investigate moving www.youtube.com.”) (Karim Ex. 23) (JK00005039)

(Tab 233) (“so, a way to avoid the copyright bastards might be to remove the ‘No copyrighted or obscene material’ line and let the users moderate the videos themselves. legally, this will probably be better for us, as we’ll make the case we can review all videos and tell them if they’re concerned they have the tools to do it themselves.”) (Hurley Ex. 1) (JK00005043)

(Tab 235) (“save your meal money for some lawsuits... let’s ease up on our strict policies for now. so let’s just leave stuff there if it’s news clips.”) (JK00006057)

(Tab 237) (“why don't i just put up 20 videos of pornography and obviously copyrighted materials and then link them from the front page. what were you thinking.”) (JK00009595)

(Tab 238) (YouTube founder recognized that users were uploading unauthorized copyrighted content to the site in spite to the public policy that this was not permitted. He also recognized that “YouTube may be liable for any damages which copyright holders may press.”) (Karim Ex. 46) (JK00006259-70)

(Tab 239) (“if we reject this, we need to reject all the other copyrighted ones.... should we just develop a flagging system for a future push?...I say we reject this one, but not the other ones. This one is totally blatant.”) (JK00009668)

(Tab 240) (In a September 4, 2005 email to YouTube co- founder Jawed Karim and others at YouTube, a YouTube user stated: “Jawed - You have a lot of people posting Chappelle Show clips and stuff like that. Aren't you guys worried that someone might sue you for copywrite [sic] violation like Napster?”; Karim replied: “ahaha.”) (JK00007423)

(Tab 189) (“good news is that fingerprinting works... bad news... top 1000 music videos is probably 700-800 copyrighted”) (GOO001-07169542)

(Tab 206) (“Labels can claim block or track without knowing/entering publisher data. If they wish to set the policy to monetize, they need to either tell us the publisher(s) and percent payout for each; or agree to pay the publisher themselves (Administer publisher payouts”) (GOO001-02609134-35)

(Tab 4) (“Revenue will be generated from ads primarily on Search pages (40%) ... The most popular queries are for head content -- Music, Movies, TV, Celebrities, and Sports – whose rights holders require negotiated partnerships for us to obtain...”) (GOO001-00375065)

Users Search Analyses

(Tab 22) (“based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, be we haven’t yet licensed the content that they’re looking for.... Of the Top 100 Playback Queries... [REDACTED] [REDACTED]) (GOO001-02519871)

(Tab 24) (“Top 10K queries... “Searches do reflect popularity pretty well... Fresh content is being searched for consistently... Music, TV Shows, Movies, Celebrities, Sports, etc, are definitely our top categories to attack...” (GOO001-00986823)

(Tab 25) (“Our preliminary analysis indicates that anywhere from ~40% to as high as ~70% of search queries may involve premium terms.... *it seems that premium content/brands are an important element to bringing people into the YT house. My guess is that once they’re in, they decide to stay a while.*”) (Eun Ex. 27) (GOO001-00238624) (emphasis added)

(Tab 221) (analysis of “value of premium content versus UGC content” led to conclusion that “users are searching for lots of things, but primarily for premium content”) (GOO001-05943951-55)

(Tab 41) (B. Hurley Ex. 18) (GOO001-01016964-86) (Content Lead Discussion – June 26, 2007: “users are searching for lots of things, but primarily for premium content... [REDACTED]) (GOO001-01016969)

(Tab 222) (Based on an analysis of the top search queries: “[REDACTED] fall under entertainment - not surprising... [REDACTED]) (GOO001-01016844)

User Communications

(Tab 85) A user wrote to copyright@youtube.com that “there are millions of Football goals on YouTube... Here are several copies of the video that other people have uploaded http://www.youtube.com/results?search_query=saha+fulham&search=Search”) (GOO001-00707313)

(Tab 127) (For “soccer”, “football” and “Premier League”, YouTube ran “# searches for the above done on YT daily... # titles with tagged with the above... # titles with the above in the title”) (GOO001-00214966)

	<p>(Tab 132) (“Weekly report with top searches of April 25”) (GOO001-01316227-29.0013)</p>
<p>33. Less than 1% of the more than 500 million videos posted to YouTube have been the subject of a DMCA takedown notice or an equivalent takedown request sent to YouTube by a copyright owner. <i>Id.</i></p>	<p>Class Plaintiffs dispute the materiality of this assertion. In addition to the foregoing at CS ¶ 32, the number of DMCA takedown notices is not an accurate reflection of the amount of infringing content on the YouTube website, because Defendants know that there is infringing content on their website that content owners have not located or cannot locate, and Defendants prevent copyright owners from locating all infringing videos. For example, Defendants refused to make industry standard fingerprinting and other identification processes available to all content owners, absent a license from the content owner or other onerous conditions. <i>See</i> CS ¶¶ 94-96. Content owners also cannot search YouTube’s “private” videos, which are not accessible to the public, but which Defendants know contain infringing material. Defendants also refuse to block repeated postings of infringing material subject to takedown notices. Given the number of videos Defendants admit are present on YouTube, Defendants’ refusal to make available all existing tools of copyright protection equally to all content owners has allowed large quantities of copyright infringing videos to remain on the site. <i>See id.</i> Defendants have refused to make these tools available in order to prevent content owners from removing the infringing videos that Defendants knew were drawing users to its site and thereby increasing its profit-making potential. <i>See</i> CS ¶¶ 160, 164, 167.</p> <p><u>Private Videos</u></p> <p>(Tab 223) (“A trend we see is that people upload copyrighted videos to their private videos (which are not reviewed unless flagged), and then they invite large numbers of people to view the video which bypasses our copyright restrictions.”) (GOO001-00827503)</p> <p>(Tab 218) (YouTube employees proactively reviewed private videos uploaded by the 40 users who uploaded the most <i>total</i> videos over a two-day period, and closed 17 of those 22 accounts.) (GOO001-02693808)</p> <p>(Tab 219) (of the “users who uploaded the most private videos over 2 days... 17 out of 40 were full of copyright, 5 were porn.”) (GOO001-05150988)</p> <p>(Tab 230) (Rather than remove a “copyrighted Ed Sullivan show” clip that she uploaded to YouTube, employee stated “maybe I’ll just make it private ;).”) (GOO001-01931806)</p>

	<p><u>Reposts</u> (Tab 241) (After removing infringing videos, employee observed that it “looks like the users simply uploaded the videos again today” and suggested the implementation of a feature that once a video was rejected, YouTube would “flag the user so that we must review all of their new videos before they go live.”) (JK00008331)</p> <p>(Tab 30) (User to YouTube: “I expect that there will be more videos uploaded this evening and into the night. I will continue to use the verification tool to request that you remove the videos that are infringing on our copyrights.”) (GOO001-00041716)</p> <p>(Tab 86) (User to YouTube: “Even if a video of a certain program is deleted, the same content is uploaded, again, over and over. We are very disappointed at how unproductive this process is...”) (GOO001-01918032)</p> <p>(Tab 188) (Display of reposted clips of Class Plaintiffs’ works.)</p>
<p>34. YouTube hosts hundreds of millions of videos that no one has ever alleged to infringe any copyright. <i>Id.</i></p>	<p><i>See</i> CS ¶ 33.</p>
<p>35. At present, more than 24 hours of new video is uploaded to YouTube every minute, or almost four years worth of new video every day. Hurley Decl. ¶ 26.</p>	<p>Class Plaintiffs dispute any inference that Defendants do not or cannot control what videos are uploaded and watched on YouTube. YouTube always had and continues to have the ability to prescreen every video uploaded to its website for copyright infringements, but has chosen to do so only on behalf of favored content partners. <i>See</i> CS ¶¶ 16, 94-96. YouTube is also able to immediately analyze, identify and target advertisements to the content of specific videos, and to the content of users’ searches for specific videos, despite the number of videos being uploaded and viewed on its site every day. <i>See</i> CS ¶¶ 160, 164.</p> <p>Class SUF ¶¶ 6, 8, 28, 29, 31, 33.</p> <p><i>See also</i> VSUF 288-89.</p>
<p>36. YouTube does not manually prescreen or review each of the videos uploaded to the service by its users. Levine Decl. ¶ 26; Hurley Decl. ¶ 18; Decl. of Micah Schaffer in Support of Defs.’ Mot. for Summary Judgment (“Schaffer Decl.”) ¶</p>	<p>Before acquiring YouTube, Google manually prescreened each of the videos uploaded to its Google Video website for copyright infringements. Google’s analyses at the time concluded that YouTube’s success in drawing users was attributable to its lack of pre-screening for infringements, and Google abandoned its pre-screening policy in September 2006 in its final effort to compete with YouTube, before acquiring the site in October 2006. YouTube itself manually screens videos on its website, but only when it serves its business interests.</p>

<p>11.</p>	<p>These interests include its services to favored content owners, in advance of sales meetings with prospective partners, as part of its analyses of the popularity of certain videos on the site, before featuring videos on its website, before accepting videos into its “User Partner Program,” and in order to remove content it deems “inappropriate,” which includes categories such as pornography, violence and hate speech (but not infringing content). <i>See</i> CS ¶ 16, 49.</p> <p>Class SUF ¶¶ 6, 8, 12, 13, 14, 28, 29</p> <p><u>Google Video</u> (Tab 93) (Google caught “around 10% of all online user uploaded videos during review. Of these approximately 90% is disapproved due to copyright violation, and the rest due to policy (porn, violence, etc.”) (GOO001-00794737)</p> <p>(Tab 78) (“Today – zero tolerance on copyright, violence and hate... enforced with proactive screening before the video goes live... reject mixed use if more than 50% is recognizable copyright”) (GOO001-00496037)</p> <p>(Tab 94) (“Google Video Community Policing Change...“tonight we are planning on changing our process for reviewing videos on Google Video.”) (GOO001-06555098)</p> <p>(Tab 134) (Google to Acquire YouTube for \$1.65 Billion in Stock, Google Press Center, October 9, 2006)</p>
<p>37. YouTube is a platform for aspiring artists and filmmakers. Decl. of Hunter Walk in Support of Defs.’ Mot. for Summary Judgment (“Walk Decl.”) ¶ 16.</p>	<p>Other than the select videos referenced in his declaration, Hunter Walk provides no evidence that there is more than an insignificant percentage of videos from “aspiring artists and filmmakers” on YouTube, and no evidence of the proportion of traffic that such videos drive to YouTube. In fact, YouTube is a “global media platform” that draws users who are searching primarily for premium entertainment content, most of which is unlicensed. <i>See</i> CS ¶ 25. YouTube is a profit-making enterprise, and Defendants know that YouTube’s financial value is derived from the infringing premium content on its site. <i>See also</i> CS ¶¶ 160, 164, 167. Class SUF ¶¶ 3, 15, 16, 19, 23, 26, 35-41.</p> <p>Gitterman Decl. at ¶ 4, Ex. 3 (metadata).</p>
<p>38. YouTube is a source of political information. <i>Id.</i> ¶¶ 6, 8, 9.</p>	<p><i>See</i> CS ¶ 37.</p>
<p>39. Governments and other</p>	<p><i>See</i> CS ¶ 37.</p>

<p>official bodies have established channels on, and posted videos to, YouTube, including the Vatican, the Kremlin, the Queen of England, the United Nations, and the governments of Iraq, Israel, South Korea, and Estonia. Walk Decl. ¶ 8.</p>	
<p>40. Colleges and universities have posted videos to YouTube, including tens of thousands of video-lectures on academic subjects. <i>Id.</i> ¶ 12.</p>	<p><i>See CS ¶ 37.</i></p>
<p>41. Nonprofit organizations have posted videos to YouTube to publicize their causes. <i>Id.</i> ¶¶ 10-11.</p>	<p><i>See CS ¶ 37.</i></p>
<p>42. Law enforcement officials have posted videos to YouTube seeking the public’s help in identifying criminal suspects. <i>Id.</i> ¶ 19.</p>	<p><i>See CS ¶ 37.</i></p>
<p>43. Movie and television studios (including CBS, NBC/Universal, BBC, and Lions Gate), sports leagues (including the NBA and NHL), record labels (including Universal Music Group, Sony, Warner Music Group, and EMI), and music publishers have entered into content partnership arrangements with YouTube. Decl. of Christopher Maxcy in Support of Defs.’ Mot. for Summary Judgment (“Maxcy Decl.”) ¶ 9.</p>	<p>YouTube pursued agreements with select large media companies to serve its business interests, ignoring the rights of other copyright owners, including numerous independent music publishers that were unaffiliated with the major record labels. In order to force the media companies to make deals, YouTube offered certain copyright protection features only if the media companies agreed to license their content to YouTube. <i>See CS ¶¶ 94-96.</i> Rights owners that YouTube was not interested in because of their “small market share,” or that did not show interest in licensing their works to YouTube, were denied these copyright protection tools.</p> <p>Class SUF ¶¶ 25, 28, 29, 31, 32.</p> <p>(Tab 21) (“Potential Target... English Premier League.”) (GOO001-03065458)</p> <p>(Tab 71) (“If they want to use our tools to help them monitor copyright content and claim them, they will have to work with us as a partner.”) (GOO001-01519154) (emphasis added)</p> <p>(Tab 119) (“FAPL Opportunity... Why do the deal?... <i>avoiding possible litigations for copyright infringements...</i> Estimate license fee: between 5 to 10% of the International TV rights (€20 million [sic] over 3 years).”) (GOO001-00922380) (emphasis added)</p>

	<p>(Tab 130) (YouTube estimated “the potential value of various sports content to YouTube.”) (GOO001- 00716143)</p> <p>(Tab 131) (“Premier League” is listed as a Tier 1 content partner, part of “Sporting organizations and clubs with international recognition.”) (GOO001-01655883)</p> <p>(Tab 149) (“should be devoting the entire team’s time to just publishers (and big indies) to try to stem litigation?”) (GOO001-00021120)</p> <p>(Tab 36) (“I made it apparent to Mr. Maxcy that Cherry Lane represented 60,000 copyrights... I was summarily told that YouTube had no interest in Cherry Lane given its small market share.”) (Hauptprich (11/4/08) Tr. 274:24-275:12)</p>
<p>44. Viacom executives and employees have uploaded and watched videos on YouTube. Schapiro Ex. 127 (129:21-130:14), Ex. 128 (79:7-80:3, 81:17-24, 83:12-16, 84:14-18), Ex. 129 (215:25-218:8, 224:2-225:13), Ex. 130 (19:10-14, 55:21-24), Ex. 25 (253:10-19), Ex. 112 (16:19-25).</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>45. Employees of the putative class plaintiffs have uploaded and watched videos on YouTube. Schapiro Ex. 20 (100:12-103:9), Ex. 78 (235:1-238:7), Ex.131.</p>	<p>As Defendants’ exhibits demonstrate, Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that any employee’s use of YouTube was authorized by any Class Plaintiff or was anything other than a purely personal use, or that any such personal use was more than minimal. The activities Defendants rely on for this statement involve the personal viewing (no uploading) by one employee of mostly “cat videos,” and by another, the uploading of videos involving her family or her attendance at a sci-fi/fantasy convention. In neither instance did the activity have anything whatsoever to do with Class Plaintiffs, any of their rights, their works or the job activities of the person involved, and took place entirely during the personal time of the individual.</p>
<p>46. Viacom considered buying YouTube. <i>See</i> Schapiro Ex. 3 (77:7-15).</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>47. Senior executives at Viacom viewed the prospect of</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement</p>

<p>acquiring YouTube as a “transformative acquisition.” <i>Id.</i></p>	<p>of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: YouTube’s Copyright Policies and User Education</u></p>	
<p>48. Beginning with its launch and continuing today, YouTube requires its users to agree to Terms of Service before being permitted to upload a video to the site. Hurley Decl. ¶ 8; Levine Decl. ¶ 6.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. <i>See</i> CS ¶ 49.</p>
<p>49. YouTube’s Terms of Service have always prohibited users from submitting copyrighted material that they are not authorized to upload. Hurley Decl. ¶ 8; Levine Decl. ¶ 6.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. Through Defendants’ own analyses of the content on YouTube, and direct communications with users, Defendants knew that users routinely disregarded the Terms of Service and posted unauthorized premium to the site. <i>See</i> CS ¶ 6-8. YouTube knew that infringing content was so pervasive on the site that it decided it was necessary to manually review all of a users’ videos for copyright infringements before accepting the user into its “User Partner Program.” YouTube and its users also knew that users could upload infringing content to YouTube with little or no consequence. For example, users often boasted in the descriptions and comments accompanying the videos that they were uploading copyright infringing videos. YouTube depended on the infringing content on its site in order to fuel the growth of its audience, from which YouTube derives its financial value. YouTube’s Terms of Use also state that YouTube has “the right to remove content at our sole discretion for any reason whatsoever.” However, Defendants chose not to remove all of the infringing content that they knew was on YouTube. Instead, Defendants selectively removed infringing content from YouTube when it was in their business interest to do so, for example, in advance of sales meetings with prospective partners, or on behalf of favored content partners who had already licensed their content to YouTube.</p> <p>Class SUF ¶¶ 4-6, 22, 28-29.</p> <p>Gitterman Decl. at ¶ 4, Ex. 3 (metadata).</p> <p>(Tab 214) (“I noticed other similar [South Park] videos on the site and so I felt I was not doing anything against the rules.”) (GOO001-00558783)</p> <p>(Tab 47) (“if we remove all that content, we go from 100,000 views a day down to about 20,000 views or maybe even lower. the copyright</p>

infringement stuff. I mean, we can presumably claim that we don't know who owns the rights to that video... who don't we just remove the XXX stuff for now?") (JK00007416)

(Tab 260) (abuse of YouTube's Terms of Use when "a user uploads 'serial uploads' which is basically a piece of long form content that they have broken up into parts and then uploaded segments of onto YouTube to get past our ten minute limit.") (GOO001-00953867)

(Tab 262) ("should we just assume that a user uploading content really owns the content and is agreeing to all the terms of use? so we don't take down anything other than obscene stuff?") (JK00007378)

(Tab 29) ("Many YouTube users admitted to YouTube that they started using YouTube just to watch some of the copyrighted stuff.") (GOO001-00951482)

(Tab 85) (A user wrote to copyright@youtube.com that "there are millions of Football goals on YouTube... Here are several copies of the video that other people have uploaded
[http://www.youtube.com/results?search_query=saha+fulham
&search=Search](http://www.youtube.com/results?search_query=saha+fulham&search=Search)") (GOO001-00707313)

(Tab 213) (Dunton stated that YouTube "didn't care" that an ipod nano contest winner has posted "copyrighted videos.") (GOO001-00504044-45)

(Tab 214) (User to YouTube: "You guys have TONS of South Park Clips... is mine the only one in violation? You have WWF/WWE Media. WCW Media. Tons of Media that is liable for infringement of copyrights and your site promotes it.") (GOO001-00558783-84)

(Tab 242) (User to YouTube: "How is it that 'Family Guy cartoon clips are deleted, [but] ECW, WWE, WCW, clips and other TV clips are free to watch? What is the difference with the copyright?") (JK00000824)

(Tab 243) (User to YouTube: "I'm a little confused about the rejection of my last and other videos. I have seen other 'family guy' videos on here... I also have other vids that are cartoons from TV Funhouse from SNL, that are still active and live. What is the difference?") (JK00000836)

User Partner Program

(Tab 112) ("We are being very proactive at this time and reaching out to users - however, we have to be very cautious and make sure that users in this program know about copyright laws and obey them to the fullest extent possible. That is the tricky part. We provide online

	<p>training, as well as use technology (Video Identification) and some human review.”) (GOO0001-02027618-02027619)</p> <p>(Tab 154) (“Copyright 101 for YouTube Partners,” to “get permission” when “using other people’s property”, with the presentation notes indicating that “ASCAP, BMI and SESAC are excellent resources for identifying the copyright holder for a particular piece of music [sic].”) (GOO001-01027036)</p>
<p>50. Virtually every page of the YouTube website contains a direct link to YouTube’s Terms of Service. <i>Id.</i></p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. <i>See</i> CS ¶ 49.</p>
<p>51. Since October 2006, YouTube has displayed “Community Guidelines” on its site instructing users to “respect copyright” and only to “upload videos that you made or that you are authorized to use.” <i>Id.</i> ¶ 7.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. <i>See</i> CS ¶ 49. In addition, YouTube enforced its “Community Guidelines” by removing content it deemed “inappropriate,” such as pornography and violence, but chose not to remove the infringing content it knew was on the site. YouTube implemented a community flagging feature for copyright infringement, but abandoned the feature after only two weeks because it did not want to take down the videos that were being identified through the feature.</p> <p>Class SUF ¶¶ 5-7.</p> <p>(Tab 63) (“copyrighted and inappropriate content will find its way onto the site... The actual removal of this content will be in varying degrees... That way, the <i>perception</i> is that we are concerned about this type of material and we’re actively monitoring it. [But the] actual removal of this content will be in varying degrees. That way, . . . <i>you can find truckloads</i> of . . . copyrighted content . . . [if] you [are] actively searching for it.”) (emphasis added)</p>
<p>52. Since at least March 2006, each time a user seeks to upload a video, YouTube informs its users, via multiple messages displayed in the upload process, that they are prohibited from uploading copyrighted content unless they have the right or authorization to do so. <i>Id.</i> ¶ 8.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. <i>See</i> CS ¶ 49. Defendants could have removed the infringing content they knew was on YouTube through a variety of tools and processes, but, other than in certain select situations when it was in their business interest to do so, they did not.</p> <p>Class SUF ¶¶ 5-7, 17, 18, 28-29.</p>

<p>53. Since at least March 2006, YouTube has provided a “Copyrights Tips” page that gives users guidance on copyright issues and describes the consequences to users of copyright infringement on the site. <i>Id.</i> ¶¶ 9, 15.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. <i>See</i> CS ¶ 49. Defendants could have removed the infringing content they knew was on YouTube through a variety of tools and processes, but, other than in certain select situations when it was in their business interest to do so, they did not. <i>See</i> CS ¶¶6-13, 52.</p> <p>Class SUF ¶¶ 5-7, 17, 18, 28-29.</p>
<p>54. The Copyrights Tips page links to other pages containing additional information about copyright. <i>Id.</i> ¶ 9.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants did not know about or foster the uploading of infringing content to YouTube. <i>See</i> CS ¶ 49. Defendants could have removed the infringing content they knew was on YouTube through a variety of tools and processes, but, other than in certain select situations when it was in their business interest to do so, they did not. <i>See</i> CS ¶ 16 (Youtube control). Although YouTube offers links to other pages containing “additional information about copyright,” YouTube itself ignores this information, choosing not to get the rights holders’ permission when it knows that unauthorized content is on its site.</p> <p>(Tab 154) (“Copyright 101 for YouTube Partners,” to “get permission” when “using other people’s property”, with the presentation notes indicating that “ASCAP, BMI and SESAC are excellent resources for identifying the copyright holder for a particular piece of music [sic].”) (GOO001-01027036)</p> <p>(Tab 153) (Chastagnol: In the risks I would add: business may not succeed having Music Labels agreeing to provide us with music publisher data... business may not succeed in getting a 3d party (such as Harry Fox) to collaborate with us to clear remaining music publishing rights.”) (GOO001-00980438-39)</p>
<p>55. Since at least March 2006, YouTube has required that users submit a valid and working email address to YouTube before uploading any videos. <i>Id.</i> ¶ 11.</p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants have implemented effective means for identifying users or for preventing them from repeatedly uploading infringing material. YouTube chooses not to collect a user’s name, address or other personally-identifying information, and therefore users can sign up to YouTube as many times as they want using as many different anonymous email addresses as they want. The requirement to submit an email address does not identify uploaders or prevent repeat infringers from using multiple accounts with different email addresses.</p>

	<p>Additionally, anyone in the world can view infringing videos without having to submit any information at all to YouTube.</p> <p>(Tab 249) (Screenshot from www.youtube.com displaying account creation page.)</p>
<p>56. Since at least March 2006, YouTube has verified the accuracy of its users' email addresses to ensure there is a mechanism for warning users of improper use of the YouTube service. <i>Id.</i></p>	<p>Class Plaintiffs dispute this fact to the extent Defendants would have the court infer that Defendants have implemented effective means for identifying users or for preventing them from repeatedly uploading infringing material.</p> <p><i>See CS ¶¶6-13, 53, 55.</i></p>
<p>57. Since March 2006, YouTube has limited the duration of videos uploaded by most users to 10 minutes to prevent users from uploading a video consisting of an entire television show or feature-length film. <i>Id.</i> ¶ 12.</p>	<p>YouTube implemented the ten-minute limitation in order to to prevent visitors from monopolizing bandwidth and because they did not think it would impact the number of viewers. Additionally, at the time the limit was implemented, YouTube knew that while it “reinforce[s] the official line,” “it probably won’t cut down the actual amount of illegal content” because “standard 22-minute episodes can still easily be uploaded in parts, and users will continue to upload the ‘juiciest’ bits of television shows.” In fact, television shows and other long form premium content, such as tennis matches, are labeled by users with detailed information including the name of the work and the number of parts, so viewers can easily find and watch each part in sequence. Defendants knew that users engaged in such “serial uploads” and Defendants could identify such uploads, but chose not to “pro-actively search” for them.</p> <p>Gitterman Decl. at ¶ 5, Ex. 4-14 (Serial uploads of FFT works in suit uploaded in 2007 and 2008)</p> <p>(Tab 282) (“We didn't want people to, quote/unquote, hog bandwidth, and -- at the detriment of other users, and also we found -- or at least I remember that we thought that long videos did not attract many viewers.”) (Lamond Dep. at 76:6-77:10)</p> <p>(Tab 309) (“Although the new 10-minute length restriction [on clips uploaded to YouTube] serves well to reinforce the official line that YouTube is not in the business of hosting full-length television shows, it probably won’t cut down the actual amount of illegal content uploaded since standard 22-minute episodes can still easily be uploaded in parts, and users will continue to upload the ‘juiciest’ bits of television shows”) (JK00000173)</p> <p>(Tab 236) (Recognition that YouTube should “flag/highlight any video with a run time >10 minutes, since most of those are copyrighted shows.”) (JK00000382)</p>

	<p>(Tab 310) (explaining how YouTube could set up a queue to review all videos with “part” or “episode” in the title but questioning whether “it is really worth the admin time”) (GOO001-01859750)</p> <p>(Tab 260) (abuse of YouTube’s Terms of Use when “a user uploads ‘serial uploads’ which is basically a piece of long form content that they have broken up into parts and then uploaded segments of onto YouTube to get past our ten minute limit.”) (GOO001-00953867)</p>
<p>58. YouTube has never instructed users to engage in copyright infringement. Hurley Decl. ¶ 20.</p>	<p>YouTube deliberately depended on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. YouTube’s founders considered rejecting any video unless the video was “about YOU,” but abandoned this limitation in order to maximize the financial value of their site. YouTube promoted the presence of unauthorized premium content on its site to potential investors, including Sequoia Capital and TriplePoint. <i>See</i> CS ¶ 9. YouTube and its users knew that users could upload infringing content to YouTube with little or no consequence. For example, users often boast in the descriptions and comments accompanying the videos that they are uploading copyright infringing videos. YouTube knew that infringing content was so pervasive on the site that it decided it was necessary to manually review all of a users’ videos for copyright infringements before accepting the user into its “User Partner Program.” <i>See</i> CS ¶ 49. Consistent with its intention from the outset, YouTube refused to remove the infringing content it knew was there, and consistently refused to take more than cosmetic steps to prevent infringement: YouTube knew that a ten-minute limit on clips would bolster its “official line” but not reduce infringement (CS ¶ 57); YouTube chose to require uploaders to provide an email address but no other personally-identifying information (CS ¶ 55); YouTube removed videos for “inappropriate” content such as pornography and violence, but not copyright infringement (CS ¶¶ 16, 36); YouTube had tools and processes that it used to identify and remove infringing premium content on its site, but did not make those tools and processes available to content owners unless they agreed to license their content to YouTube. <i>See</i> CS ¶ 36.</p> <p>Class SUF ¶ 5-6, 12, 28-29.</p> <p><i>See also</i> CS ¶¶ 6-7, 53.</p> <p>Gitterman Decl at ¶ 4, Ex. 3.</p> <p>(Tab 154) (“Copyright 101 for YouTube Partners,” to “get permission”</p>

	<p>when “using other people’s property”, with the presentation notes indicating that “ASCAP, BMI and SESAC are excellent resources for identifying the copyright holder for a particular piece of music [sic.]”) (GOO001-01027036)</p>
<p>59. YouTube has never encouraged users to engage in copyright infringement. <i>Id.</i></p>	<p>YouTube desired and encouraged the presence of unauthorized premium content on its site by refusing to remove the infringing content it knew was there, and by consistently refusing to take more than cosmetic steps to prevent infringement. <i>See</i> CS ¶ 58.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: YouTube’s Registration of a DMCA Agent</u></p>	
<p>60. Since September 2005, YouTube has displayed information on its website instructing copyright holders how to provide notice to YouTube’s designated agent of allegedly unauthorized materials uploaded by users. Hurley Decl. ¶ 21; Levine Decl. ¶¶ 15-16.</p>	<p>Class Plaintiffs dispute any inference that the display of this information was timely or that it was or is adequate or effective. YouTube was founded in February 2005 (¶ 5 supra), was publicly-available in April 2005 (¶ 10 supra), and YouTube knew and encouraged copyright infringement on its website during that time period. <i>See</i> CS ¶ 6. YouTube’s policy is to disable only the specific web page or “URL” (which identifies a specific video at a specific location) listed in the notice. CS ¶ 64. YouTube does not remove other instances of the infringing video located elsewhere on its website, nor does it prevent the repeated posting and viewing of the infringing video by the same or other users. <i>See</i> CS ¶ 33.</p> <p>Class SUF ¶¶ 17-18.</p>
<p>61. YouTube formally registered its DMCA agent with the Copyright Office in October 2005. Hurley Decl. ¶ 21.</p>	<p>Class Plaintiffs do not dispute this statement.</p>
<p>62. YouTube’s DMCA agent’s contact information is accessible through YouTube’s “Copyright Infringement Notification” page. Levine Decl. ¶ 15.</p>	<p>YouTube’s policy is to disable only the specific web page or “URL” (which identifies a specific video at a specific location) listed in the notice. YouTube does not remove other instances of the infringing video located elsewhere on its website, nor does it prevent the repeated posting and viewing of the infringing video by the same or other users. CS ¶ 64.</p> <p>Class SUF ¶¶ 17-18.</p>
<p>63. Since at least March 2006, a link to the Copyright Infringement Notification page has been included at the bottom of virtually every page of the</p>	<p>Defendants provide no evidence of when they began to include a link to the “Copyright Infringement Notification page” at the bottom of “virtually every page.” YouTube’s policy is to disable only the specific web page or “URL” (which identifies a specific video at a specific location) listed in the notice. YouTube does not remove other instances</p>

<p>YouTube website. <i>Id.</i></p>	<p>of the infringing video located elsewhere on its website, nor does it prevent the repeated posting and viewing of the infringing video by the same or other users. <i>See</i> CS ¶ 64 below.</p> <p>Class SUF ¶¶ 17-18.</p> <p><i>See</i> CS ¶¶ 6-13, 49, 54, 160, 167.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: DMCA Notice and Takedown Procedure</u></p>	
<p>64. YouTube removes or disables access to allegedly infringing videos whenever it receives a DMCA-compliant takedown notice. <i>Id.</i> ¶ 19; Schaffer Decl. ¶ 10.</p>	<p>YouTube does not “disable access” to “infringing videos” in response to DMCA-compliant takedown notices. YouTube’s policy is to disable only the specific web page or “URL” (which identifies a specific video at a specific location) listed in the notice. YouTube does not remove other instances of the infringing video located elsewhere on its website, nor does it prevent the repeated posting and viewing of the infringing video by the same or other users. YouTube has the tools and processes to do so, but has chosen to use those tools only on behalf of content owners who license their content to YouTube, or only if the content owner agrees to onerous conditions (<i>See</i> CS ¶36 [control/discrimination]). Moreover, YouTube does not always disable access even to the specific URLs identified in a DMCA-compliant takedown notice. YouTube never removed eight URLs infringing Cherry Lane’s copyright despite a notice sent by BayTSP to copyright@youtube.com on October 9, 2008. YouTube also presents no evidence that it removed videos in response to DMCA compliant takedown notices prior to January 2006.</p> <p><i>See</i> CS ¶¶ 94-96.</p> <p>(Tab 193) (BayTSP Notice 21 to copyright@youtube.com dated October 9, 2008) (CH00108978-109031)</p> <p>(Tab 86) (Fuji Television: “Even if a video of a certain program is deleted, the same content is uploaded, again, over and over. We are very disappointed at how unproductive this process is...”) (GOO001-01918032)</p> <p>(Tab 30) (“you can understand our frustration, knowing we shouldn’t have to be spending time taking down content from your website that is infringing our content”) (GOO001-00041716)</p> <p>(Tab 188) (Display of reposted clips of Class Plaintiffs’ works.)</p>
<p>65. YouTube removes almost all videos identified in DMCA</p>	<p>YouTube does not remove from its site “all videos identified” in DMCA notices. <i>See</i> CS ¶ 64. Additionally, in 2006 YouTube failed to</p>

<p>notices within 24 hours of receipt. Levine Decl. ¶ 19.</p>	<p>remove even the specific URLs identified in DMCA notices sent by Premier League’s agent Netresult for nearly four days, and only took action after additional notification from NetResult.</p> <p>(Tab 255) (April 28, 2007 YouTube response to April 27, 2007 second request from NetResult) (PL00025679)</p>
<p>66. For approximately 85% of the DMCA notices it has received, YouTube removes the identified videos within a few minutes. <i>Id.</i></p>	<p>YouTube does not remove from its site all of “the identified videos” in DMCA notices. <i>See</i> CS ¶ 64. Additionally, in 2006 YouTube failed to remove even the specific URLs identified in DMCA notices sent by Premier League’s agent Netresult for four days, and only took action after additional notification from NetResult. <i>See</i> CS ¶ 65. YouTube admits that as of May 2007, removal time using its CVP takedown tool was “8 hours,” and that were submitted to YouTube “outside of business hours.”</p> <p>(Schapiro Ex. 120) (YouTube notices received “outside of business hours it takes about 8 hours.”)</p>
<p>67. YouTube employs a dedicated team throughout the world to process manually-submitted DMCA notices and to assist copyright holders and users with issues arising from the notice process. <i>Id.</i></p>	<p>YouTube does not remove from its site all of the infringing material identified in “manually-submitted DMCA notices.” <i>See</i> CS ¶ 64. YouTube also employed additional tools and processes to identify infringing material to “assist” copyright holders who agreed to license their content to YouTube, or when it otherwise suited YouTube’s business interests. For example, as of February 2007, YouTube made available to content owners who agreed to license their content to YouTube “industry standard” technologies that promised to identify their content with 97% accuracy. (Tab 161) YouTube also set up teams of employees to proactively screen for infringing material at the request of a favored content owner, in conjunction with YouTube’s efforts to promote certain videos or users, or in advance of licensing bids or negotiations undertaken by YouTube.</p> <p>Class SUF ¶¶ 28-29.</p> <p>(Tab 315) (“Has Bourne been harmed by YouTube?[...]A. Any unlicensed use of any Bourne song is a loss of revenue for Bourne.”) (Horan Tr. 162:24-163:7)</p> <p>(Tab 314) (“Q. Mr. Hauprich, are you aware of any benefits that are generally derived from having works appear on YouTube? A. No. I would say YouTube has become the product as opposed to promoting sales of CD's or other means of getting the music. YouTube is the product. No one is going to get out and buy something if they can watch it all day every day for free on their computer.”) (Hauprich Tr. 186:21-187:3; 224:23-225:10)</p>

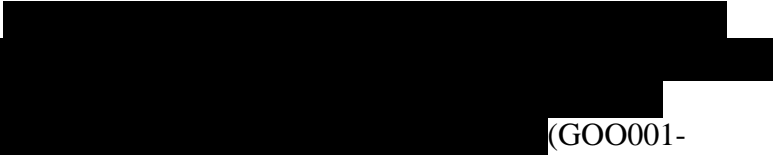
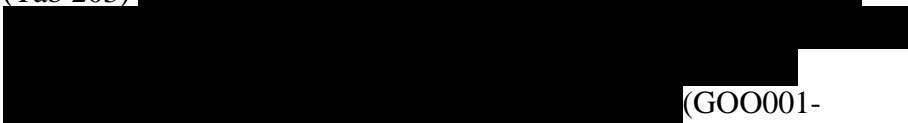
	<p>(Tab 316) (“Did the tool make it easier for Premier League to remove videos from YouTube?[...]A. I would -- wouldn't say it was easier; it was still as cost intensive and time intensive and we still had issues in respect of repost and private videos being shared,[...]Well, I would count reposts of the same video as not being removed and I am aware of instances where videos have been requested to be taken down or submitted to be taken down, and have then reappeared, the same video.”) (Weingarten Tr. 209:25-210:7)</p>
<p>68. On February 2, 2007, Viacom (through its agent, BayTSP) sent DMCA notices requesting that YouTube remove more than 100,000 videos from the service. Levine Decl. ¶ 20; Schaffer Decl. ¶ 14.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>69. YouTube removed virtually all of the videos identified in Viacom’s February 2, 2007 mass takedown notices before the next business day. Levine Decl. ¶ 20; Schaffer Decl. ¶ 14.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>70. YouTube’s responsiveness to DMCA takedown requests has drawn praise from content owners. Levine Decl. ¶ 22; Schapiro Ex. 120.</p>	<p>Defendants provide no evidence that these content owners knew at the time that YouTube: 1) did not make its content identification tools available to all copyright owners equally; 2) had the ability to but chose not to remove from its website other instances of the infringing videos identified in a takedown notice; or 3) had the ability to but chose not to prevent the repeated posting and viewing of the infringing videos identified in a takedown notice. <i>See</i> CS ¶¶ 33; 94-96. In fact, many content owners complained to YouTube about the serious deficiencies in its responses to takedown requests. <i>See also</i> CS ¶87.</p> <p>(Tab 86) (Fuji Television: “Even if a video of a certain program is deleted, the same content is uploaded, again, over and over. We are very disappointed at how unproductive this process is....”) (GOO001-01918032)</p> <p>(Tab 30) (“you can understand our frustration, knowing we shouldn’t have to be spending time taking down content from your website that is infringing our content”) (GOO001-00041716)</p> <p>(Tab 295) (“One account holder, sergeiy24, still has the ENTIRE film in their account with thousands and thousands of views. I do not need to</p>

	<p>tell you how much money this represents in lost receipts at box office and DVD sales... Frankly I'm disgusted at the lack of action on YouTube's behalf.") (GOO001-08260560)</p> <p>(Tab 188) (Display of reposted clips of Class Plaintiffs' works.)</p>
<p>71. Since at least March 2006, when YouTube has removed a video pursuant to a DMCA notice, YouTube has contacted the user who uploaded the video to apprise that user of the allegation in the notice. Levine Decl. ¶ 23.</p>	<p>Class Plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. CS ¶¶ 49, 58. Moreover, Defendants provide no evidence that they apprised their users of copyright infringement allegations in the year YouTube was operating prior to March 2006.</p>
<p>72. Since at least March 2006, when YouTube has removed a video pursuant to a DMCA notice, YouTube has contacted the user who uploaded the video to remind that user of YouTube's policy prohibiting the uploading of unauthorized copyrighted material. <i>Id.</i></p>	<p>Class Plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. CS ¶¶ 49, 58. Moreover, Defendants provide no evidence that they contacted users to remind them of YouTube's copyright policies in the year YouTube was operating prior to March 2006.</p>
<p>73. Since at least March 2006, when YouTube has removed a video pursuant to a DMCA notice, YouTube has contacted the user who uploaded the video to warn that user that repeated acts of copyright infringement will result in the termination of the user's YouTube account. <i>Id.</i></p>	<p>Class Plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. CS ¶¶ 49, 58. Moreover, Defendants provide no evidence that they contacted users to warn them that "repeated acts of copyright infringement would result in the termination" of their accounts in the year YouTube was operating prior to March 2006.</p>
<p>74. Since at least March 2006, when YouTube removes a video pursuant to a DMCA notice, it sends this message to the user who posted the video: Repeat incidents of copyright infringement will result in the deletion of your account and all videos uploaded to that account. In</p>	<p>Class Plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. CS ¶¶ 49, 58. Moreover, Defendants provide no evidence that they contacted users with this message in the year YouTube was operating prior to March 2006.</p>

<p>order to avoid future strikes against your account, please delete any videos to which you do not own the rights, and refrain from uploading additional videos that infringe on the copyrights of others. For more information about YouTube's copyright policy, please read the Copyright Tips guide. Levine Decl. ¶ 23 & Ex. 12.</p>	
<p>75. Since at least March 2006, after an allegedly infringing video is removed from the site, YouTube has posted a notice at the video's prior location on the site stating that the video is no longer available due to a copyright claim. <i>Id.</i> ¶ 24.</p>	<p>Class Plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. CS ¶¶ 49, 58.</p>
<p><u>Rebuttal to Defendants' Disputed Claim: YouTube's Repeat-Infringer Policy</u></p>	
<p>76. Since at least October 2005, YouTube has had a policy for terminating the accounts of repeat infringers, which it has posted on its website. Hurley Decl. ¶ 21; Levine Decl. ¶ 27.</p>	<p>The declarations cited by Defendants provide no evidence that YouTube implemented any policy for terminating repeat infringers prior to March 2006. The Hurley declaration states that they "informed users" that posting infringements "could result in [] termination," but it does not state: 1) how they so informed users; 2) whether a repeat infringer policy was in fact implemented as of October 2005; 3) if one was implemented, what the policy entailed; or 4) how or if information about the policy (if there was any) was conveyed to users. The Levine declaration does not state when a repeat infringer policy was first implemented, other than to say that there was "a policy" "before [she] arrived at the company" in March 2006, and does not explain what the policy was or how it was implemented at that time.</p>
<p>77. Under YouTube's repeat-infringer policy, a "strike" is issued to a user when YouTube receives a takedown notice for material that the user has uploaded. Levine Decl. ¶ 27.</p>	<p>In addition to the foregoing at CS ¶ 76, YouTube does not apply "strikes" consistently, making exceptions for certain parties on a "case-by-case" basis, and only counting one strike for multiple notices of infringement when the notices are submitted within the same two-hour period.</p> <p>(Tab 284) (From YouTube legal counsel: "my understanding that the policy is a case-by-case -- exceptions from the three strikes are determined on a case-by-case basis.") (Levine Tr at 321:6-19)</p>

	<p>(Tab 196) (“Multiple takedowns within the same 2 hours count as one strike.”) (GOO001-01403585)</p> <p>(Tab 197) (CYC was “not currently hooked up” to the repeat infringer function despite there were “block claims getting logged in the database”) (G00001-01521394)</p> <p>(Tab 258) (premium partners were “Protected From Strikeout” so that their accounts never get closed for strikes.) (Schaffer Ex. 11) (GOO001-00519462)</p>
<p>78. When an account receives three strikes, in virtually all cases YouTube terminates that account. <i>Id.</i></p>	<p>In addition to the foregoing at CS ¶ 76, the Levine declaration cited to by Defendants states that “[a]s a general matter,” the “policy has been ‘three strikes and you’re out,’” but does not state when the “three strikes and you’re out” policy was implemented. YouTube also did not apply its “three strikes” policy consistently, making exceptions for certain parties in “limited cases” (for example, on behalf of favored content partners), and only counting one strike for multiple notices of infringement when the notices are submitted within the same two-hour period. Defendants’ “strikes” policy is not reasonably implemented in other ways. For example: 1) YouTube allows users to designate videos as “private,” and knows that content owners are unable to search “private” videos for copyright infringements, thereby allowing repeat infringers to avoid account termination under this policy; and 2) YouTube has tools that can, and do, identify videos that infringe class plaintiffs’ works, but has deliberately denied those tools to class plaintiffs, thereby preventing them from identifying repeated infringements. YouTube itself has not taken down these infringements or issued “strikes” against the users who uploaded these infringements.</p> <p>Decl. of Zahavah Levine at ¶ 29. <i>See</i> CS ¶ 77. <i>See also</i> VSUF ¶¶ 124-27.</p>
<p>79. When YouTube terminates a user’s account, the account can no longer be used for any purpose on the site. Levine Decl. ¶ 30.</p>	<p>In addition to the foregoing at CS ¶¶ 76 and 78, the policy Defendants describe does nothing to prevent such users from opening new accounts with a different email address. Defendants choose not to collect a user’s name, address or other personally-identifying information, and therefore users can sign up to YouTube as many times as they want using as many different anonymous email addresses as they want (CS ¶ 55). In addition, the Levine declaration cited to by defendants states that this account termination policy she describes was “in place” “since my arrival” in March 2006, but provides no evidence of any such policy in the year YouTube was operating prior to that date.</p>
<p>80. When YouTube terminates a</p>	<p><i>See</i> CS ¶ 79.</p>

<p>user’s account, YouTube terminates all other accounts associated with that user’s email address. <i>Id.</i></p>	
<p>81. When YouTube terminates a user’s account, YouTube removes all of the videos uploaded to the site from the terminated account, including videos that were not subject to any DMCA notice. <i>Id.</i></p>	<p><i>See CS ¶ 79.</i></p>
<p>82. When YouTube terminates a user’s account, YouTube seeks to prevent the user from subsequently creating another account by recording and blocking the email address associated with the terminated account. <i>Id.</i></p>	<p><i>See CS ¶ 79.</i></p>
<p>83. YouTube’s Terms of Service set forth YouTube’s repeat-infringer policy. Levine Decl. Exs. 1, 2.</p>	<p>In fact, YouTube’s terms of service from December 2005, cited by defendants at Levine Ex. 2, merely state that YouTube “reserves the right” to terminate access by users who are repeat infringers. It does not describe any policy, let alone a policy like the one described in the above statements. The current terms of service and the terms of service from January 2007 (Levine Ex. 1 and 2, respectively), cited to by defendants, also do not describe any policy other than that accounts of “repeat infringers” will be terminated.</p>
<p>84. YouTube communicates its repeat-infringer policy to its users via its website, including on the “Copyright Tips” page and the “Help” section of the site. <i>Id.</i> ¶ 27.</p>	<p>Class plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. <i>See CS ¶¶ 49, 58. See also CS ¶ 78.</i></p>
<p>85. Users also are notified of YouTube’s repeat-infringer policy when they receive an email notifying them that a video they uploaded to YouTube has been removed due to alleged copyright infringement. <i>Id.</i> ¶ 23 & Ex. 12.</p>	<p>Class plaintiffs dispute any inference that YouTube did not depend on and encouraged users to upload infringing premium content in order to increase traffic and thereby the financial value of the site. <i>See CS ¶¶ 49, 58. See also CS ¶ 78.</i></p>
<p>86. Applying its repeat-infringer policy, YouTube has terminated more than 400,000 (of the more</p>	<p>More repeat infringers would have been terminated had YouTube not denied class plaintiffs the ability to identify repeated infringements of their works. <i>See CS ¶ 78.</i></p>

<p>than 250,000,000) user accounts based at least in part for copyright strikes. <i>Id.</i> ¶ 31.</p>	
<p>87. YouTube has received praise from content owners for its efforts to restrict and address copyright infringement by its users. <i>Id.</i> ¶¶ 32-33.</p>	<p>Defendants cite to statements from NBC, Warner Music Group and the Motion Picture Association of America (“MPAA”). The statements from NBC and Warner are press releases or prepared statements that were distributed just after YouTube made commercial licensing deals with each entity. As part of these deals, YouTube offered tools to both NBC and Warner to identify their infringing content on the YouTube website, including fingerprinting technology, that it denied to other content owners, including class plaintiffs. In fact, Warner used YouTube’s audio fingerprinting system to identify its songs throughout the YouTube website; the same information was denied to independent music publishers, such as class plaintiffs, who owned rights in musical works being infringed on YouTube. Additionally, despite NBC’s agreement with YouTube and its privileged access to YouTube’s content identification systems, it has been highly critical of YouTube’s deliberate decisions not to remove the infringing content it knows is on its site. For example, in February 2007, Jeff Zucker, CEO of NBC Universal, stated that, “YouTube needs to prove that it will implement its filtering technology across its online platform. It’s proven it can do it when it wants to. [...] They have the capability. The question is whether they have the will.” In May 2007, NBC submitted an amicus brief in the <i>Tur v. YouTube</i> litigation in California (06-cv-4436, C.D. Cal.), stating that it “believes” that YouTube “has extensive knowledge of massive infringement on its website, that this infringement is a key driver of its financial success, that it readily can control that infringement, and that it takes wholly inadequate steps to prevent repeat infringement.” Defendants cite only one statement from the MPAA from a March 2006 news article; the MPAA in fact soon became disillusioned with YouTube’s attitude toward infringements on its site. The MPAA tried for months from April 2006 through October 2006 to get YouTube to test fingerprinting technologies, but YouTube refused, in part because “copyrighted content on YouTube was a major lure for their users.” After Google acquired YouTube in November 2006, the MPAA tried again to get Google/YouTube to test a fingerprinting system, but “it became clear that Google/YouTube was willing to filter for companies that had a licensing relationship with Google/YouTube and not for those who did not.”</p> <p>(Tab 203)   (GOO001-02468422)</p> <p>(Tab 207) (Draft Agreement between NBC and YouTube) (GOO001-</p>

05184970)

(Tab 327) (Brief of *Amici Curiae* Viacom International Inc. and NBC Universal in Support of Plaintiff Robert Tur's Opposition to Motion of YouTube, Inc. for Summary Judgment, Case No. CV06-4436 FMC (AJWx), May 4, 2007.)

(Tab 285) ("for those companies who were not and did not develop a licensing agreement with Google, they weren't going to be doing this sort of a pilot initiative or filtering") (Garfield Tr. 28:2-30:3, 53:4-7)

(Tab 285) ("I'm not sure if I had an understanding when I saw it, ultimately I did because we continued to talk and it became clear that Google/YouTube was willing to filter for those who had a licensing relationship with Google/YouTube and not for those who did not.") (Garfield Tr. at 55:8 – 55:13).

(Tab 252) (Joshua Chaffin and Francesco Guerrero, "NBC's Zucker lashes out at YouTube," FT.com, February 6, 2007)

Rebuttal to Defendants’ Disputed Claim: YouTube’s Copyright Enforcement Tools

<p>88. In March 2006, YouTube began using MD-5 hash technology to create a digital “fingerprint” of every video that YouTube removes in response to a DMCA takedown notice. <i>Id.</i> ¶ 25; Decl. of David King (“King Decl.”) ¶4.</p>	<p>The MD-5 hash tool has extremely limited utility because, as designed, it is incapable of preventing a video subject to a DMCA takedown notice from being reposted to YouTube if the reposted clip differs “even one iota” (for example, even by a second), and so cannot be (and is not) used to prevent repeated postings of the infringements that YouTube knew about and/or had the ability to identify. <i>See</i> CS ¶¶ 16, 33. Even this limited technology was not in place from YouTube’s launch to March 2006, a period of nearly a year, notwithstanding YouTube’s knowledge that it was showing large quantities of infringing content. <i>See</i> CS ¶¶ 6-7, 14. Fingerprinting technologies, which were much more effective in identifying repeated infringements and superior to the MD-5 tool, were already well-established by March 2006 and even earlier, but YouTube chose not to implement them. <i>See</i> CS ¶¶ 94-96.</p> <p>Class SUF ¶ 17.</p> <p>(Tab 11) (“Q. And I think you said if you have exactly the same content in another file as the original video file, it would produce the exact same Hash. Is that right? A. That’s right. Q. But if you change the content one iota, it produces a different Hash? A. That’s right.”) (Cuong Do Tr. 134:21-135:2.)</p> <p>(Tab 227) (Presentation explaining that md5 hash only work with identical reposts) (GOO001-00561605)</p> <p>(Tab 287) (“That’s what I was outlining the fundamental limitations of this MD5 hash, that it needed to be the exact same video.”) (B. Hurley Tr. at 209:7-9)</p>
<p>89. The MD-5 technology automatically prevents any user from uploading a video file identical to one that had previously been removed in response to a DMCA takedown notice. Levine Decl. ¶25.</p>	<p><i>See</i> CS ¶ 88.</p>
<p>90. In March 2006, YouTube launched its Content Verification Program (“CVP”). <i>Id.</i> ¶ 18.</p>	<p>CVP used “the standard search program that was available to all other users” and was simply a way to “send automated electronic DMCA notices.” CVP was implemented in part because it would “be a huge help to [YouTube employees]” and could “streamline [YouTube’s] current process and make it more efficient.” CVP did not incorporate</p>

fingerprinting and other tools that YouTube did use or could have used to identify infringing videos on its site, and which it in fact offered to “partners who enter into a revenue deal with us.” *See* CS ¶¶ 94-96. CVP “was still as cost intensive and time intensive” as manual DMCA notices and did not prevent “repost[s] and private videos being shared.”

Class SUF ¶¶ 18, 28, 29.

(Tab 263) (“streamline [YouTube’s] current process and make it more efficient.”) (GOO001-00046064)

(Tab 264) (“be a huge help to [YouTube employees]”) (GOO001-00599550)

(Tab 283) (“Q.... the search program that... was used with the Content Verification Program...was available to all other users A. Yes”) Gillette Tr. 158:8-12)

(Tab 289) (“it allowed content owners to ... search the YouTube website ans send us automated takedown notices”) (Dunton 254:7-10)

(Tab 316) (“it was still as cost intensive and time intensive and we still had issues in respect of repost and private videos being shared”) (Weingarten Dep. 209-210)

Reposts

(Tab 86) (User to YouTube: “Even if a video of a certain program is deleted, the same content is uploaded, again, over and over. We are very disappointed at how unproductive this process is...”) (GOO001-01918032)

(Tab 188) (Display of reposted clips of Class Plaintiffs’ works.)

(Tab 241) (After removing infringing videos, employee observed that it “looks like the users simply uploaded the videos again today” and suggested the implementation of a feature that once a video was rejected, YouTube would “flag the user so that we must review all of their new videos before they go live.”) (JK00008331)

(Tab 30) (User to YouTube: “I expect that there will be more videos uploaded this evening and into the night. I will continue to use the verification tool to request that you remove the videos that are infringing on our copyrights.”) (GOO001-00041716)

Private Videos

(Tab 218) (YouTube employees proactively reviewed private videos uploaded by the 40 users who uploaded the most *total* videos over a two-day period, and closed 17 of those 22 accounts.) (GOO001-02693808)

	<p>(Tab 219) (of the “users who uploaded the most private videos over 2 days... 17 out of 40 were full of copyright, 5 were porn.) (GOO001-05150988)</p> <p>(Tab 223) (“A trend we see is that people upload copyrighted videos to their private videos (which are not reviewed unless flagged), and then they invite large numbers of people to view the video which bypasses our copyright restrictions.”) (GOOO01-00827503)</p> <p>(Tab 230) (Rather than remove a copyrighted “Ed Sullivan show” clip that she uploaded to YouTube, employee stated “maybe I’ll just make it private ;).”) (GOO001-01931806)</p> <p>(Tab 283) When a user uploads a video the user may choose whether to make the video public (viewable to any user unless restricted by age or geography) or private (viewable to only the uploading user and users invited by the uploading user) (Gillette Dep. at 154:8-21)</p>
<p>91. CVP is open to any copyright owner. <i>Id.</i></p>	<p><i>See CS ¶ 90.</i></p>
<p>92. CVP enables copyright owners to locate and flag their videos on YouTube and send DMCA notices electronically. <i>Id.</i></p>	<p><i>See CS ¶ 90.</i></p>
<p>93. More than 3,000 content owners have registered to use CVP. <i>Id.</i> ¶ 18.</p>	<p><i>See CS ¶ 90.</i></p>
<p>94. In February 2007, YouTube launched in beta form its Claim Your Content (“CYC”) system. King Decl. ¶¶ 7-8.</p>	<p>The CYC was fully “live” in February 2007, but was only offered to “partners who enter a revenue deal with [YouTube].” At its launch in February 2007, CYC included an “audio fingerprinting system” and an “advanced text search tool” that could identify content owner’s content and prevent future uploads of that content; these tools were not offered to content owners absent a “revenue deal.” YouTube offered the CYC system (including the “audio fingerprinting” and “advanced text search” tools) only to partners who were willing to license their content to YouTube, because YouTube did not want content owners to use the CYC system to take down infringing content. Instead, YouTube wanted content owners to authorize any infringing content the system identified by “claiming” it and allowing YouTube to run advertisements next to it. <i>See CS ¶ 96.</i> YouTube therefore demanded that content partners agree to use the system to “claim” content, not take it down, before allowing them to use it. While the King</p>

declaration cited by defendants alleges that “YouTube did not charge rights holders to sign up for or to use Audible Magic,” in fact, YouTube required rights holders to “claim” and thereby monetize content in order to generate advertising revenues for YouTube. YouTube refused to offer these tools to content owners who did not license their content to YouTube, although YouTube itself used the tools to identify and track, but not remove, infringing videos on its website when it suited its business interests.

Class SUF ¶¶ 28-29.

See CS ¶ 96.

Availability of Fingerprinting

(Tab 71) (“If they want to use our tools to help them monitor copyright content and claim them, they will have to work with us as a partner.”) (emphasis added) (GOO001-01519154)

(Tab 13) (February 2007 – “*Our CYC tools are now live as well and are only offered to partners who enter into a revenue deal with us... Any content the partner identifies is automatically audio fingerprinted and placed in the Audible Magic database so the entire process gets smarter over time.*”) (GOO001-01511226-27)

(Tab 38) (Q: Did YouTube ever tell that is was non-negotiable? A: Pursuant to their actions of ignoring my letter dated April 23rd until January of 2009, by their failure to negotiate this with me in good faith for more than two years, their performance has certainly told me it is non-negotiable.) (Hauprich (9/24/09) Tr. 107:19-108:3)

(Tab 124) (“So the question is, did YouTube ever tell Premier League that the video fingerprinting technology would only be available to Premier League if Premier League licensed content to YouTube? A: Yes.”) (Oliver Weingarten (12/16/09) Tr. 246:1-247:2)

(Tab 285) (“it became clear that Google/YouTube was willing to filter for companies that had a licensing relationship with Google/YouTube and not for those who did not.”) (Garfield Tr. 55:11-13)

(Tab 298) (business development team “worried” about giving certain content owners access to CYC because “they could use the CYC tool to find potentially infringing content and sue us.”) (GOO001-01399226)

Use of Fingerprinting Technology

(Tab 9) (“(Audible Magic) “suggested we check [fingerprints] against their entire reference database and then have flags for the Warner content (ignore other matches). This is not only a hassle but probably violates DMCA safe

	<p>harbors.”) (GOO001-01676559)</p> <p>(Tab 250) (YouTube tailored Audible Magic know in that there was “content that has not yet been cleared but is in the pipeline to be cleared... UMG, YT, publishers have not been able to clear the entire library.”) (AM 004638)</p> <p>(Tab 68) (“actually we don’t want to turn on fingerprint matching for music partners [in April 2007], because we don’t have clear licenses for them (publisher issue).”) (GOO001-01517864)</p> <p>(Tab 182) (Maxcy: “I thought we weren’t allowing co’s to use UGC as reference material... King: the guidelines are, only give the feature to partners that ask for it (we can toggle the feature off in admin).”) (GOO001-02910519-02910523)</p> <p>(Tab 217) (“private videos get scanned like all the others. That's one of the big advantages of signing up [to CYC], as none of the search tools allow rights owners to get at the private stuff.”) (GOO001-02055019)</p> <p>(Tab 198) (“when a user types in a set of keywords “Artist name+song” shouldn’t the official result show up ahead of the pirated content... in what instance can we justify showing a copyrighted version above the official one”) (GOO001-1531017)</p> <p>(Tab 161) [REDACTED]</p> <p>(Tab 170) ([REDACTED] (GOO001-09684819-850)</p> <p>(Tab 338) (GOO001-00839849)</p>
<p>95. CYC used audio-fingerprinting technology to enable participating rights holders to find videos containing their content that users had uploaded to YouTube. <i>Id.</i> ¶ 7</p>	<p>Disputed, <i>see</i> CS ¶ 94. The Audible Magic audio-fingerprinting technology that YouTube implemented as part of CYC was “well-established” as of February 2007, and could have been easily implemented at any time starting from the date that the YouTube website began operating in April 2005. YouTube ignored for months rights holders’ attempts to get it to implement or at least test available fingerprinting technologies. Even when YouTube decided to start using Audible Magic in February 2007, it chose not to use all of Audible Magic’s databases of reference files to identify infringements on the YouTube website. For example, when the system launched in February 2007, YouTube chose to use only the reference files belonging to the Universal Music Group (a record label with which it had a licensing deal) to identify infringements on</p>

its website, even though it could have immediately used all of Audible Magic's music reference files (covering 6 million songs). YouTube added reference files only to the extent that it made "partnership deals" with major record labels. YouTube chose never to use Audible Magic's database of film and television soundtracks, even though other UGC websites were using it to identify content at the time.

Class SUF ¶¶ 28-29.

(Tab 285) (YouTube did not agree to use fingerprinting technologies between April 2006 and October 2006 in part because "copyrighted content on YouTube was a major lure for their users.") (Garfield Tr. at 28:2-30:3)

(Tab 291) ("Audible Magic iMesh filter... has scaled seamlessly to 5 million lookups per day and easily could scale to meet the needs of any network in use today.") (Ikezoye Tr. 21:4-7)

(Tab 267) (In February 2006: "The Audible Magic technology can easily handle tens of millions of requests a day for identification against a reference database of millions of recordings. The technology currently achieves above 99% correct identification rates; our false positive identification rate is better than 1 in 10,000.") (Declaration of Vance Ikezoye at ¶ 21)

YouTube Use of Audible Magic

(Tab 267) (In February 2006, Audible Magic possessed a "database of fingerprints from approximately 6 million copyrighted songs. This database roughly represents the music available for purchase in North America and consists of music from the four major and over 500 independent music labels.") (Declaration of Vance Ikezoye at ¶10)

(Tab 291) (Audible Magic started its TV and film database in 2006 based on the soundtrack of the video.) (Ikezoye Tr. 38:11-13)

(Tab 268) (Audible Magic has 170 works in its soundtrack database in January 2006 and 892 in February 2007) (Ikezoye Ex. 4 – AM016617)

(Tab 8) (Jim Schrempp of Audible Magic to Chastagnol: "you will remember that the business side of YouTube wanted an extremely cheap – really, really, really cheap – deal from us. They were willing to cut out all kinds of features to get the price lower.") (AM002946)

(Tab 9) ("(Audible Magic) "suggested we check [fingerprints] against their entire reference database and then have flags for the Warner content (ignore other matches). This is not only a hassle but probably violates DMCA safe harbors.") (GOO001-01676559)

	<p>(Tab 51) (“would you be able to populate the live DB but ‘wire-off’ matches for Sony and Universal ? because I’m thinking another strategy would be to populate the DB with Warner+ Sony+Universal. At launch, return matches only on Warner content. Then at some point in time wire-on Universal content, then Sony.... please for now only include Warner catalog.”) (AM001620)</p> <p>(Tab 69) (Jim Schrempp of Audible Magic: “For your application a reference fingerprint should come from an offset of 0 and a duration of 60. You may remember that we had discussed doing a more expensive search of the YT database, but that was decided to be out of scope.”) (GOO001-00981008)</p> <p>(Tab 269) (At “launch” YouTube only matched against Warner content”) (AM001241)</p> <p>(Tab 273) (noting that YouTube’s “[r]eference fingerprint database” was populated only with partner-owned content). (GOO001-01950613)</p> <p>(Tab 292) (“YouTube ran queries against Audible Magic for all uploads to the site during [2007-2009]... Over time, every single YouTube video that is still existent on our servers was queried against the Audible Magic database.” (King 30(b)(6) Tr. at 95:7-97:25)</p>
<p>96. Once CYC found a video, a rights holder could apply one of three YouTube policies in response to a match: (1) “block” (<i>i.e.</i>, instruct YouTube to remove the video from YouTube); (2) “track” (<i>i.e.</i>, leave it up on YouTube and receive reports about the video); or (3) “monetize” (<i>i.e.</i>, leave it up on YouTube and share in advertising revenue). <i>Id.</i> ¶ 7.</p>	<p>In addition to the foregoing at CS ¶¶ 94 and 95, YouTube used – and encouraged its major record label partners with whom it had struck licensing deals to use – the “track” option to identify specific musical works that were being uploaded to the YouTube website but for which YouTube or the labels knew that they lacked the requisite music publishing rights. As early as December 2006, when Audible Magic was first being integrated into the site, YouTube product managers acknowledged that the “track-only [option] <i>will be used on the publishing right uncleared videos.</i>” (Tab 311) (emphasis added). YouTube did this so that the musical works would continue to draw traffic to its website.</p> <p>Class SUF ¶¶ 23-24. See CS ¶105.</p> <p>(Tab 270) (“it would be easier to switch to track where we don’t have publishing. Just because that is the current biz [sic] logic that we do with the other tracks.”) (GOO0001-01998280)</p> <p>(Tab 200) (“UMG started claiming content for which YT has not cleared publishing at the very end of [D]ecember. As a result, we cannot run</p>

ads.... *So we have set the policy for these to Track instead of Monetize.*"
CS ¶ 96. (GOO001-02059252)

(Tab 206) ("[l]abels can claim block or track without knowing/entering publisher data... If the publisher selected by the record label was not "approved" for payment by YouTube, the *"policy will change to track if it was previously set to monetize.*") (GOO001-02609134)

(Tab 273) ("YT generates build list for Audible Magic based on license data - need to have a policy before we want a match... policy gets executed on uploaded video by 'Claim' engine") (GOO001-01950614)

(Tab 66) ("Premium music content is the most watched genre of content on YouTube. Thus, it is imperative that we acquire, and allow content owners to claim, as much content as possible to promote the growth and success of YouTube... In addition, the ingestion of audio files will allow us to match against audio portions of videos, thus giving content owners the ability to claim more content.") (GOO001-01403792)

(Tab 265) ("Our goal is to get CBS to start claiming as much as possible, as soon as possible. We want them to claim this content because we can only monetize content that has been claimed.") (GOO001-02604742)

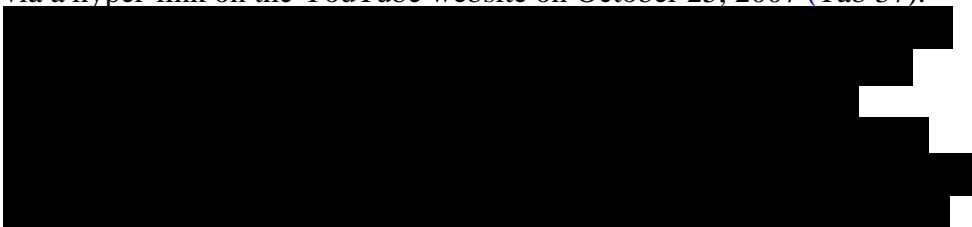
(Tab 195) (Goal of CYC was to "to encourage content partners to leave more of their content on the site [to] enable YouTube to generate significant ad revenue") (GOO001-00743708-09)

(Tab 167) [REDACTED]
[REDACTED] (GOO001-02250888)

(Tab 266) [REDACTED]
[REDACTED] (GOO001-01877085)

(Tab 100) ("we believe search will be stronger than watch." Rates "will change as content gets claimed AND we program the user experience better/more and strive to create more inventory around premium content.") (GOO001-00907818-19)

(Tab 199) ("does it makes sense to share the tool with UMG and EMI (label) with the understanding that they can only claim official label produced videos where they already have the rights?") (GOO001-02052928)

<p>97. In January 2007, YouTube began full-scale development of a video-based identification technology called “Video ID.” King Decl. ¶17.</p>	<p>Google had already started development of a proprietary video identification technology “well before” January 2007, and “ignore[d]” other available video identification technologies in order to create a product that it could better limit and control so as to avoid the harm that best available technology would impose on it. <i>See</i> CS ¶ 100. David King explained that, “our position has been that we first want to have a pilot with [G]oogle video fingerprinting” and that by “remaining ignorant of the intricacies of industry solutions,” [Defendants could] “proceed untainted by others IP.”</p> <p>(Tab 7) (With fingerprinting, “the current approach is to only use AM as little as possible and proceed with building our own database at the same time. This would require us either getting all the source files (preferred) or distributing fingerprinting tools which content providers use.”) (GOO001-00174229)</p> <p>(Tab 66) (YouTube concluded that while Audible Magic allowed YouTube to conduct audio matching of content, “<i>it is vital that YouTube develop its own audio matching service, along with the requisite reference database.</i>”) (GOO001-01403792)</p> <p>(Tab 74) (King: “our position has been that we first want to have a pilot with [G]oogle video fingerprinting” and that by “remaining ignorant of the intricacies of industry solutions,” [Defendants could] “proceed untainted by others IP.”) (GOO001-02191925)</p> <p>(Tab 77) (King stated that “I think our video identification platform is a -- is a platform that we’re proud of, and we have considered making it available to third-party websites.”)</p>
<p>98. YouTube officially launched Video ID in October 2007. <i>Id.</i> ¶ 18.</p>	<p>Defendants stated at the first court conference in this case that their video-fingerprinting system would be “up, running and effective” in September 2007. Even when YouTube finally announced the system was being “launched” on October 15, 2007, it was not made available to content owners at that time (other than those who had made deals with YouTube). And YouTube still imposes on content owners wishing to make use of the technology onerous and largely non-negotiable terms that require waiver of various rights (Tab 38). For example, Keith Hauprich, general counsel of plaintiff Cherry Lane, attempted to “sign-up” for the Video ID technology via a hyper-link on the YouTube website on October 25, 2007 (Tab 37).</p> 

	<p>c [REDACTED] (Tab 33). Hauprich wrote YouTube on April 23, 2008 expressing his concerns about these provisions (Tab 34). YouTube responded nine months later, on January 16, 2009, but still insisted on the onerous terms in its standard contract (Tab 312). Despite Cherry Lane’s attempts to negotiate, YouTube still insists on many of these terms as a condition for accessing the technology (Tab 38).</p> <p>Class SUF ¶¶ 28-29.</p> <p>(Tab 298) (business development team “worried” about giving certain content owners access to CYC because “they could use the CYC tool to find potentially infringing content and sue us.”) (GOO001-01399226)</p>
<p>99. Between January and October 2007, YouTube had between 15 and 20 engineers and other technical personnel working full or part time on Video ID. <i>Id.</i> ¶ 17.</p>	<p>In fact, this project took only ten months and a miniscule percentage of Google’s workforce and resources to complete (in 2007, Google’s workforce grew from 10,674 to 16,805, and at the end of the year it had \$14.2 billion of cash, cash equivalents and marketable securities on hand). Defendants ignored existing third-party fingerprinting technologies for strategic business reasons, and refused to make their CYC tool available to content owners who did not want to license their content to YouTube.</p> <p>(Tab 290) (Google, Inc., United States Securities and Exchange Commission, Form 10-K, 2007)</p> <p>Class SUF ¶¶ 28-29. See CS ¶¶ 94-96.</p>
<p>100. Video ID was the first video-based content identification technology to be deployed on any website dedicated to user-submitted content. <i>Id.</i> ¶ 19; Schapiro Ex. 169 (287:16-288:4).</p>	<p>The David King declaration cited to by defendants provides no basis for his opinion that YouTube was “the first video-based content identification technology to be deployed on any website dedicated to user-submitted content.” In fact, well before defendants’ announcement of the launch of Video ID, a number of third party video fingerprinting providers approached defendants with their own technology. However, defendants refused to test this technology in order to focus on developing their own proprietary system “untainted by others IP.” One of the companies that approached defendants, called Vobile, announced the implementation of a video fingerprinting technology for “one of the largest and most popular video sharing websites in China” in May 2007, months before YouTube announced the launch of its “Video ID” and many months more before YouTube even offered Video ID to class plaintiffs. Fingerprinting and content detection technologies are hardly new. One of Google’s co-founders, Sergey Brin, co-authored a paper on “Copy Detection Systems for Digital Documents” as far back as 1994.</p>

	<p>(Tab 328) (December 2006: “the current plans are roughly for Audible Magic for now and the in-house Google fingerprinting technology going forward. some of these external inbounds (Gracenotes, Aurix, MAGIX Tunesat, Contributor ... are being handled as matter of courtesy”)</p> <p>(Tab 292) (King testifies that YouTube rejected other third-party fingerprinting vendor) (King 1/13/10 Tr.150-155)</p> <p>(Tab 325) (“The PM/Eng team at YT currently working on copyright detection stuff has been advised by legal to stay out of these conversations [with Guba] in order to prevent IP contamination (since we’re going to launch some of our own stuff) (GOO001-0078065)</p> <p>(Tab 74) (King: “our position has been that we first want to have a pilot with [G]oogle video fingerprinting” and that by “remaining ignorant of the intricacies of industry solutions,” [Defendants could] “proceed untainted by others IP.”) (GOO001-02191925)</p> <p>(Tab 259) (“Copy Detection Systems for Digital Documents”, October 31, 1994).</p> <p>(Tab 325) (Re Guba: “they have some copyright detection technology they’ve developed [and] claim this is the only filtering technology approved by the MPAA for video-sharing sites.”) (GOO001-00078065)</p> <p>(Tab 326) (Vobile Announces Landmark Deployment of VideoDNA – Content Identification and Management System, May 1, 2007)</p>
<p>101. In April 2008, YouTube supplemented Video ID by launching an audio-based content identification technology called Audio ID. <i>Id.</i> ¶ 20.</p>	<p>The Audible Magic audio-fingerprinting technology could have easily been implemented at any time starting from the date that the YouTube website began operating in April 2005. <i>See</i> CS ¶ 95. Other third party audio-fingerprinting technologies were also well-established long before April 2008. <i>See</i> CS ¶ 100.</p> <p>Class SUF ¶¶ 28-29.</p>
<p>102. YouTube makes Video ID and Audio ID (collectively, “Content ID”) available to content owners to allow them to identify their content on the YouTube website. <i>Id.</i></p>	<p>YouTube did not and still does not make these technologies available equally to all content owners. <i>See</i> CS ¶ 94-96, 98.</p> <p>Class SUF ¶¶ 28-29.</p>
<p>103. Content ID works by identifying videos on YouTube that match</p>	<p>YouTube refused to use reference files in Audible Magic’s databases to identify infringing content unless the content owner agreed to make a deal with YouTube. <i>See</i> CS ¶ 95. YouTube did not and still does not make</p>

<p>reference files supplied by participating rights holders. <i>Id.</i> ¶ 23.</p>	<p>Content ID available equally to all content owners. <i>See</i> CS ¶¶ 94-96, 98. Class SUF ¶¶ 28-29.</p>
<p>104. As of December 2009, right holders had supplied YouTube with approximately 3 million reference files for Content ID. <i>Id.</i></p>	<p>In 2006, YouTube could have used the 6 million reference files in Audible Magic’s commercial music databases to identify and remove infringing musical works on its website, but chose not to. (Tab 267) (In February 2006, Audible Magic possessed a “database of fingerprints from approximately 6 million copyrighted songs” representing “the music available for purchase in North America and consists of music from the four major and over 500 independent music labels.”) (Declaration of Vance Ikezoye at ¶10)</p>
<p>105. If Content ID identifies a video as matching one of those reference files, the rights holder can block/remove the video, allow the video to appear and share any revenue generated from advertising shown alongside it, or allow the video to appear with no monetization. <i>Id.</i> ¶ 24.</p>	<p>Defendants’ content identification systems identify specific musical works that are uploaded to the YouTube website and “allow the video to appear with no monetization,” even though Defendants know they do not have the publishing rights to the work. Defendants choose not to remove such works from their website so they can continue to draw traffic. <i>See</i> CS ¶ 96. Class SUF ¶ 24.</p>
<p>106. Since its launch in October 2007, every video that a user has attempted to post to YouTube has been screened using Content ID. <i>Id.</i> ¶ 26.</p>	<p>Despite screening every single video that is uploaded to its website, Defendants have refused to remove or block infringing content that has been subject to DMCA takedown notices or that they otherwise know is infringing. <i>See</i> CS ¶¶ 94-96. (Tab 20) (“We will *not* generate ref fingerprint upon claiming by partner of UGC > video thru desc search. The reason we will no longer allow this feature [is] because we are going to open up CYC to non-partners who we do not think [we] can trust to review the content carefully enough. CYC should have the [same] level of functionality for partners and non-partners.”) (GOO001-02875707) (Tab 292) (King testifies that YouTube does not add DMCA takedown notices to its fingerprinting database) (King 1/13/2010 Tr. 84-86, 175)</p>
<p>107. Content ID scans the back catalogue of videos posted on YouTube. <i>Id.</i> ¶ 27.</p>	<p>YouTube does not take action with regard to the back catalogue of videos that contain Class Plaintiffs’ copyrighted content despite the ability of Content ID to identify individual works, including sound recordings, and match them to an ownership database compiled by Defendants. <i>See</i> CS ¶¶ 98, 105.</p>
<p>108. YouTube currently has a</p>	<p>Class plaintiffs’ dispute the materiality of this statement.</p>

<p>team of 40 technical staff working on Content ID. <i>Id.</i> ¶ 28.</p>	
<p>109. YouTube has always made Content ID available to rights holders free of charge. <i>Id.</i> ¶ 22.</p>	<p>YouTube did not and still does not make these technologies available equally to all content owners. See CS ¶ 94-96, 98. YouTube implemented its content identification systems in response to pressure from content owners, including this lawsuit, and in order to further monetize its site.</p> <p>Class SUF ¶¶ 28-29.</p> <p>(Tab 271) (“YouTube was attacked all spring by Viacom and NBC for being slow to launch Content ID. [...] Our lawyer told the Viacom court this summer that we’d be doing a public launch in September (which we clarified to “the fall”).) (GOO001-06033753)</p>
<p>110. More than 1,000 content owners worldwide use Content ID. <i>Id.</i> ¶ 21.</p>	<p>YouTube did not and still does not make these technologies available equally to all content owners. See CS ¶¶ 94-96, 98.</p> <p>Class SUF ¶¶ 28-29.</p>
<p>111. Viacom participated in the pre-launch testing of Video ID in mid-2007. <i>Id.</i> ¶¶ 18, 29; Schapiro Ex. 171.</p>	<p>In fact, in mid-2007, YouTube refused to make its various content identification technologies, including its “audio fingerprinting” and “advanced text search” tools, available to content owners who did not want to license their content to YouTube. YouTube nevertheless used these tools to identify and track, but not remove, infringing videos on its website. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p> <p>See CS ¶¶ 94-96. Class SUF ¶¶ 28-29.</p>
<p>112. Viacom signed up to use Video ID in February 2008. King Decl. ¶ 29.</p>	<p>In fact, as of February 2008, YouTube did not make Video ID available equally to all content owners. See CS ¶ 98. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: Plaintiffs’ Clips in Suit</u></p>	
<p>113. Plaintiffs collectively have identified approximately 79,000 video clips that they allege to be infringing on the YouTube service (“clips in suit”).</p>	<p>Class Plaintiffs’ dispute any inference that unauthorized premium content, including plaintiffs’ content, is not the primary draw of viewers to the YouTube website. See CS ¶ 6-7. Defendants know that the value of videos to YouTube is their ability to draw viewers, not the number of them shown on the site. Plaintiffs’ “clips-in-suit” have been viewed more than ____ million times. Moreover, the “clips in suit” are illustrative, and not</p>

<p>Decl. of Michael Rubin in Support of Defs.’ Mot. for Summary Judgment (“Rubin Decl.”) ¶¶ 7, 16. That total represents less than .02% of the more than 500 million videos ever uploaded to YouTube. Levine Decl. ¶ 26.</p>	<p>exhaustive, of the massive infringement of their works that continues to this day. By denying their content identification processes and technologies to plaintiffs, Defendants have prevented plaintiffs from identifying all of the infringements of their works on the YouTube website. See CS ¶¶ 94-98.</p>
<p>114. The majority of Viacom’s clips in suit are under four minutes long. Rubin Decl. ¶ 15.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>115. Certain of Viacom’s clips in suit are fewer than 10 seconds long. <i>Id.</i></p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>116. The Premier League is suing YouTube over dozens of clips that are under five seconds long, including one that is one second in length. <i>Id.</i> ¶ 16.</p>	<p>Class plaintiffs dispute any inference that the evidence presented by defendants shows more than an insignificant number of clips were “under five seconds long.” The Premier League has asserted more than 775 works in suit that have been infringed in more than 13,000 videos that have appeared on the YouTube website. In total, Premier League has send takedown notices to YouTube for more than 30,000 infringing videos. Although defendants’ attorney Michael Rubin states that, of these thousands of clips, there are “dozens” under five seconds long, defendants identify only three such clips. Moreover, the Premier League’s business involves the licensing of short highlight clips, which are valuable assets apart and in addition to long-form match footage. Defendants considered bidding on a Premier League rights package that would have given them the right to show short clips on their websites, and analyzed the amount of unauthorized Premier League content on the YouTube site in preparation for such a bid, but chose to neither make the bid nor remove the content from their site. The clips-in-suit contain entire songs belonging to class plaintiffs, as well as serial uploads of entire sports matches belonging to class plaintiffs.</p> <p>Class SUF ¶¶ 21-22,</p> <p>(Tab 272) (Listing Premier League infringements) (Weingarten Ex. 10 – Letter from Elizabeth Figueira to Brian Willen on December 2, 2010)</p> <p>(Tab 130) (YouTube estimated “the potential value of various sports content to YouTube.”) (GOO001- 00716143)</p> <p>(Tab 126) ([REDACTED]) (GOO001-02341606)</p>

	<p>(Tab 127) (For “soccer”, “football” and “Premier League”, YouTube ran “# searches for the above done on YT daily... # titles with tagged with the above... # titles with the above in the title”) (GOO001-00214966)</p> <p>(Tab 119) (“FAPL Opportunity... Why do the deal?... <i>avoiding possible litigations for copyright infringements</i>... Proposed deal terms... Estimate license fee: between 5 to 10% of the International TV rights (€20 million [sic] over 3 years).”) (GOO001-00922380) (emphasis added)</p> <p>(Tab 123) (YouTube “decided not to make a bid for these rights.”) (P. Walker Tr. 227:10-228:14)</p> <p>Gitterman Decl. Ex. 4 (FFT serial uploads)</p>
<p>117. Most of the clips in suit were the subject of DMCA takedown notices. Schapiro Exs. 18 (141:10-19; 148:8-18), 17 (186:9-187:7).</p>	<p>Defendants chose to wait for DMCA notices rather than remove infringements of Class Plaintiffs’ content that they knew about, were aware of, or had the ability to control.</p> <p>Class SUF ¶17 See CS ¶¶ 15-20, 64.</p>
<p>118. Some of the putative class plaintiffs’ clips in suit were never the subject of any takedown request prior to being identified as alleged infringements in this case. Schapiro Exs. 20 (94:19-95:6), 21 (26:15-21), 22 (Response 35).</p>	<p>All of class plaintiffs’ “clips-in-suit” were identified either in DMCA takedown notices, or in the Complaints in this action, which referenced the infringing material with specificity. Moreover, defendants denied class plaintiffs’ access to fingerprinting and other tools that YouTube employs to protect content for its favored partners.</p> <p>See CS ¶¶ 16, 94-96.</p>
<p>119. Viacom’s clips in suit were identified from a pool of videos removed pursuant to DMCA takedown notices sent by Viacom. Schapiro Ex. 18 (148:8-18).</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>120. All of the clips in suit have been removed from the YouTube website. Levine Decl. ¶ 21.</p>	<p>Controverted, insofar as YouTube has refused or failed to remove other instances of the infringing material in Class Plaintiffs’ “clips-in-suit” located elsewhere on its website, and has failed to prevent the repeated posting and viewing of the infringing material by the same or other users. See CS ¶ 64. By denying their content identification processes and technologies to plaintiffs, defendants have prevented plaintiffs from</p>

	identifying all of the infringements of their works on the YouTube website. <i>See</i> CS ¶¶ 94-96.
<u>Rebuttal to Defendants’ Disputed Claim: Viacom’s Use of YouTube for Marketing Purposes</u>	
121. Within months of YouTube’s launch, major media companies, including Viacom, used YouTube to promote their content by uploading clips of their movies and television shows to the service. Decl. of Arthur Chan (“Chan Decl.”) ¶¶4, 5, 9; Decl. of Daniel Ostrow (“Ostrow Decl.”) ¶¶2, 4, 5, 6; Schaffer Decl. ¶ 5; Decl. of Rubin Decl. ¶ 2 & Exs. 1-41.	Class plaintiffs dispute that the statement is relevant or material to this action, and dispute any inference that defendants did not have the ability distinguish infringing from non-infringing uses. Mr. Rubin cites to only a single example of an alleged “promotional use” by a class plaintiff. This licensed use involved a brand partner of Cherry Lane, Professional Bull Riders, showing a video of its theme song “Move” on its official branded YouTube channel. This was a readily identifiable authorized use of the composition, which was fully commissioned and licensed. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action. (Tab 274) (Discussion of use of “Move” as a Fox commercial) (CH00107156)
122. Viacom has allowed Viacom content uploaded by other users to remain on YouTube. Schapiro Exs. 4 (194:8-11), 51 (VIA 11787096).	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
123. Viacom has uploaded to YouTube thousands of videos to market and promote hundreds of its movies and/or television shows, including many that are works in suit. Rubin Decl. ¶¶ 2, 14, 18 & Exs. 3-31.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
124. Viacom has used marketing agents to upload its content to YouTube. Schapiro Exs. 35-44, 45 (28:6-7); Chan. Decl. ¶¶ 3-5; Ostrow Decl. ¶5.	Class plaintiffs dispute that the statement is relevant or material to this action. Defendants cite no evidence that class plaintiffs have “used marketing agents to upload [their] content” to YouTube. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
125. Viacom has taken steps to conceal that it was the source of certain videos that it uploaded to YouTube for marketing purposes. Chan Decl. ¶¶4, 5, 9; Ostrow Decl.	Class plaintiffs dispute that the statement is relevant or material to this action. Defendants cite no evidence that class plaintiffs have “taken steps to conceal that [they were] the source of certain videos” uploaded to YouTube. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.

<p>¶¶2, 4, 5, 6; Schapiro Exs. 33, 34, 46, 47 (158:20-22), 48, 49, 50; Rubin Decl. ¶ 5(a)-(f) & Exs. 4, 14, 15, 19, 22, 26.</p>	
<p>126. Other media companies have taken steps to conceal that they were the source of certain videos that they uploaded to YouTube for marketing purposes. Ostrow Decl. ¶ 6; <i>see also</i> Chan Decl. ¶¶ 3, 4, 9, 10; Rubin Decl. ¶ 2 & Exs. 2, 32-41; Schapiro Ex. 28 (GOO001-05161257-58).</p>	<p>Defendants present no evidence that Class Plaintiffs took “steps to conceal that they were the source” of any videos on YouTube. Had Defendants made available to Class Plaintiffs the same content identification tools that they made available to favored partners, Class Plaintiffs could have easily determined the “source” of the material identified by those tools, to the extent Defendants had any doubts. <i>See</i> CS ¶¶ 94-96. Moreover, the documents Defendants’ cite do not show that “media companies have taken steps to conceal” <i>from YouTube</i> that they were authorizing the upload of clips to YouTube; in fact, a number of them show the opposite. <i>See, e.g.</i>, Rubin Ex. 34 (GOO001-09595002) (NBC Universal writes to YouTube: “In order to avoid any confusion or misunderstanding, I wanted to make sure you are aware that NBC is permitting YouTube to host this content”).</p>
<p>127. YouTube was aware of promotional activities occurring on its service. Schaffer Decl. ¶¶ 7-8; Botha Decl. ¶¶ 11-12; Maxcy Decl. ¶¶ 3-7; Schapiro Ex. 53; Rubin Decl. ¶ 1, Exs. 2, 32-41.</p>	<p>Disputed, <i>see</i> CS ¶ 126.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: Viacom’s “Leave-Up” Practices for Viacom Content Uploaded to YouTube</u></p>	
<p>128. Viacom has knowingly left up on YouTube thousands of clips containing its content. Schapiro Exs. 57, 62, 75, 76.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>129. YouTube gave instructions to its agent, BayTSP, about which clips to take down from YouTube and which clips to leave up on YouTube. <i>Id.</i> Exs. 11 (115:6-118:1), 54 (BAYTSP 001093412), 55 (BAYTSP 003724704), 56 (214:25-215:6), 57 (BAYTSP 001125605-08), 59, 60, 63-64, 65 (BAYTSP 003718201).</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>130. Viacom did not share with</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this</p>

<p>YouTube the takedown instructions it provided to BayTSP. <i>Id.</i> Ex. 11 (118:10-19).</p>	<p>action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>131. Through at least October 2006, Viacom had an internal policy of declining to issue takedown notices for user-submitted clips on YouTube containing MTV Networks (“MTVN”) content that were less than five minutes long. <i>Id.</i> Exs. 59, 60.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>132. In October 2006, Viacom told BayTSP to leave up on YouTube any clips containing MTVN content that were shorter than 2.5 minutes in length, regardless of who had posted them. <i>Id.</i> Ex. 54.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>133. Later in October 2006, Viacom told BayTSP that all videos containing MTVN content should be left up on YouTube unless the videos were “full episodes.” <i>Id.</i> Exs. 55 (BAYTSP 003724704), 56 (214:25-215:6).</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>134. Viacom instructed BayTSP to leave up on YouTube “full episodes” of certain of its programs (some of which are works in suit). <i>Id.</i> Exs. 11 (115:6-118:1), Ex. 57 (BAYTSP 001125605-08).</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>135. Viacom has stated publicly that it was choosing to allow some of its content to remain on YouTube. <i>Id.</i> Ex. 77.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: The Putative Class Plaintiffs’ Authorized Uses and Complex Ownership Issues</u></p>	
<p>136. The putative class plaintiffs have licensed their content to appear on YouTube, including Rodgers</p>	<p>None of class plaintiffs’ clips in suit were authorized to appear on YouTube. The Premier League, FFT and Robert Tur have not licensed any works-in-suit to appear on YouTube. With respect to the remaining class plaintiffs, all of whom have rights in musical works, as demonstrated below</p>

<p>& Hammerstein (“R&H”), which has issued numerous licenses that allow licensees to post R&H musical compositions on the Internet (including on YouTube). <i>Id.</i> Exs. 22 (Responses 26-29), 78 (132:24-135:13), 79 (29:22-30:22, 31:6-32:12).</p>	<p>for each of the Statements Nos. 137 through 141, the terms of their licenses were restricted in each case to certain websites, territories, and/or for a certain duration and thereby precluded use of the work on YouTube, or, in any limited instance where a Class Plaintiff did grant a license that permitted a party to upload a work to YouTube, that license, by its express terms, necessarily limited the licensed use specifically to, <i>inter alia</i>, use in conjunction with a particular video, and did not grant the licensee or any other party (including YouTube) the right to exploit the work on its own or in conjunction with any other material. Accordingly, all such licensed uses were readily identifiable (and the plaintiff received appropriate remuneration). Class Plaintiffs dispute any inference that defendants would have had difficulty in identifying the voluminous infringements of musical works at issue in this case because of the existence of any such licensed use. In many cases, the video itself, its title, its description, or user comments accompanying the video identify it as an obvious infringement. Moreover, had Defendants made available to Class Plaintiffs the same content identification tools that they made available to favored partners, Class Plaintiffs could have easily determined the “source” of the material identified by those tools, to the extent Defendants had any doubts.</p> <p>Class SUF ¶¶ 28-29, 33. <i>See</i> CS ¶ 35 Gitterman Decl. Ex. 3 (metadata evidence; also cite videos that show simply an album cover.)</p>
<p>137. Cal IV has licensed its musical compositions, including certain works that the clips in suit are alleged to have infringed (“works in suit”), for general dissemination on the Internet. <i>Id.</i> Ex. 81.</p>	<p>None of Cal IV’s clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, the specific use granted in the Cal IV license cited to by Defendants is subject to a substantial fee of \$25,000 (Schapiro Ex. 81), and is limited to a use only in conjunction with specific video images (i.e., the motion picture or the motion picture trailer).</p>
<p>138. Cal IV has authorized certain of its works in suit to appear on YouTube for promotional purposes. <i>Id.</i> Ex. 82.</p>	<p>In fact, the document cited by Defendants shows that the <i>licensee</i> claimed the use was for “promotional purposes,” not Cal IV, and that, despite the licensee’s claim, Cal IV required a license agreement “specific to each use,” and required that “the URL of each video” that was being licensed “be listed in the license agreement.” Cal IV also warned the licensee that any other use of the song would be infringing. Cal IV thus had complete control over the exact uses or uses being licensed. Despite these efforts to protect the value of its content, Cal IV’s works continued to be infringed on YouTube.</p>
<p>139. Stage Three has issued</p>	<p>None of Stage Three’s clips in suit were authorized to appear on YouTube.</p>

<p>licenses allowing its musical compositions, including works in suit, to appear on YouTube. <i>Id.</i> Ex. 83 (Response 17, 19).</p>	<p>Moreover, in addition to the foregoing in CS ¶ 136, any licenses allowing other uses of any Stage Three content on YouTube require that the use be “in combination with certain specified footage and in exchange for the payment of a license fee,” and be subject to additional restrictions such as duration and territory. Accordingly, each such use was readily identifiable and was properly paid for, as demonstrated by the evidence cited by defendants.</p>
<p>140. Cherry Lane has authorized its musical compositions, including works in suit, to be posted to YouTube. <i>Id.</i> Exs. 86 (Response 17), 87.</p>	<p>None of Cherry Lane’s clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, any licenses allowing other uses of Cherry Lane content on the internet limit such uses in a variety of ways that make them readily identifiable, including through the payment of a fee, limitations on the use to certain websites, limitations on duration and territory, and contextual limitations, for example as part of a specific contest or promotion or in combination with specific video footage, as demonstrated by the evidence cited by defendants.</p>
<p>141. Tur, Bourne, Carlin, and X-RAY DOG have licensed third parties to put their content, including works in suit, on YouTube. <i>Id.</i> Exs. 88; 89 (Responses 16-18), 90 (Responses 17, 19), 91 (Responses 17, 19), 92 (124:7-125:5), 93.</p>	<p>None of Tur’s works-in-suit have been licensed for use on YouTube. The license agreement cited by Defendants provides that Tur’s copyrighted work “can not be taken from the broadcast program identified above and used in any other... media presentation,” thus preventing its use on YouTube. (Schapiro Ex. 88). None of Bourne’s, Carlin’s, or X-Ray Dog’s clips in suit were authorized to appear on YouTube. Moreover, in addition to the foregoing in CS ¶ 136, any licenses allowing other uses of any Bourne, Carlin, or X-Ray Dog content on YouTube limit such uses in ways that make them readily identifiable, including that the uses be in combination with certain specified footage and in exchange for the payment of a license fee, as demonstrated by the evidence cited by defendants.</p>
<p>142. FFT and Music Force have posted their content on YouTube or authorized others to do so. <i>Id.</i> Exs. 94 (188:5-197:24), 95-97, 98 (Responses 30, 40, 41, 44), 99.</p>	<p>FFT has never authorized the posting of any FFT content on YouTube. Defendants cite no evidence that any of FFT’s works-in-suit, nor any French Open match footage, has ever been posted by anyone at FFT to YouTube (with or without authorization). None of Music Force’s works-in-suit have ever been uploaded to YouTube by any Music Force employee (with or without authorization), and on the few occasions where Music Force content not relating to Music Force’s works-in-suit was uploaded, the employees who uploaded the videos were acting without authorization.</p> <p>(Tab 299) (Grach 9/4/08 Tr. 302-303) (Tab 329) (Grach 12/3/09 Tr. 187-188) (Tab 324) (Marx. (11/3/2009) Tr. 142:12-143;25)</p>

<p>143. Certain of the soccer clubs that are members of and have ownership interests in the Premier League have created official YouTube “channels” to which they have uploaded videos, including footage of matches. <i>Id.</i> Exs. 17 (276:9-297:7, 100, 101).</p>	<p>The individual Premier League soccer clubs do not have the right to upload match footage to YouTube. The documents cited by defendants confirm this fact. In one of the documents cited, the Club acknowledges that “while the Deed of Licence does not prevent the Club from operating a YouTube channel, it does restrict the extent to which certain content (namely Footage, Archive Footage, Sound Materials and Stills, as defined in the Deed of Licence) may be included in such a website.” Schapiro Ex. 100. The Deed of Licence, also cited by defendants, is an instrument by which the League licenses the Clubs to use Premier League footage in limited instances. <i>See</i> Section 3 of Tabs 253-254, 256-257. Contrary to defendants’ assertions, it is not evidence of any Club’s ownership of such match footage, and in the limited instance where a Club (rather than the League itself) produces a League match program, the Club assigns all such rights to the League, <i>see</i> 2.2. Moreover, by the terms of the previous and current Deeds of Licence, the Club is prohibited from making available web-based services featuring Match Footage except pursuant to the express provisions of Deed of Licence, and cannot in any circumstance make available such services apart from on its UK Club Website and International Club Website, which excludes third party websites such as YouTube.</p> <p>(Tab 253) Deed of Licence (2007-2010) (PL00189901-PL00189959)(Tab 254) Deed of Licence (2004-2007) (PL00001153-1206)</p> <p>(Tabs 256-257) (Club signature pages for Aston Villa)</p>
<p>144. Certain of the putative class plaintiffs’ content, including certain of their works in suit, are co-owned by other parties. <i>Id.</i> Exs. 83 (Response 68), 98 (Response 25), 103 (Response 33), 104 (48:16-49:12).</p>	<p>Class plaintiffs dispute the materiality of this assertion. Of the 900 works in suit, there are only six works that have co-owners. Even with respect to those six works, the co-owner does not have authority to license to YouTube without the knowledge and/or approval of the particular class plaintiff. For example, in the case of The Music Force, although two works in suit are co-owned, The Music Force is the exclusive administrator and thus controls licensing for the co-owners’ share. (Tab 305) In the case of Cal IV and Stage Three, as indicated in the Memorandum of Law in Opposition at 23, no worldwide license, inherent in the nature of a geographically unrestricted upload to YouTube, can be unilaterally issued by a co-owner, given that most countries require joinder of all owners for such licensing. This applies with particular force to Stage Three, where the country of origin for ownership of three of the co-owned works is the U.K., which requires joinder of all co-owners for such a license.</p> <p>(Tab 305) (Distribution and Administration Agreement with The Music Force Media Group LLC dated January 1, 2004)</p>

<u>Rebuttal to Defendants’ Disputed Claim: Plaintiffs’ Difficulties in Distinguishing Authorized from Unauthorized Content</u>	
145. Viacom has sent DMCA takedown notices for videos that Viacom itself uploaded or otherwise authorized to appear on YouTube. Rubin Decl. ¶ 3 & Exs. 42-68 (retracted takedowns); Schaffer Decl. ¶¶ 15-18; Schapiro Exs. 149-150.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
146. Viacom has sent DMCA takedown notices to YouTube that resulted in the termination of Viacom’s own YouTube accounts. Schaffer Decl. ¶¶ 15-16 & Ex. 4; Rubin Decl. ¶ 3 & Exs. 42, 56-67.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
147. Viacom has requested the takedown of clips that other content owners had authorized to be on YouTube. Schaffer Decl. ¶ 17 & Exs. 5-7.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
148. Viacom engaged in a “multi-step procedure designed to accurately identify” the clips in suit. Schapiro Decl. Ex. 178.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
149. Dozens of Viacom’s clips in suit were uploaded by Viacom. Rubin Decl. ¶ 9.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
150. In October 2009, after completing a “quality check” of the clips in suit, Viacom sought to withdraw 241 clips in suit, more than 100 of which Viacom had uploaded to YouTube. Rubin Decl. ¶ 9 & Exs. 119-120.	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
151. On February 26, 2010 Viacom requested dismissal with prejudice of the 241 clips that it had originally	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.

<p>sought to withdraw, plus an additional 193 clips, six of which were uploaded by Viacom’s marketing agent, WiredSet. Rubin Decl. ¶¶ 12-13 & Exs. 122-123.</p>	
<p>152. Following Viacom’s request for dismissal with prejudice of 434 clips on February 26, 2010, there remain clips in suit that Viacom had authorized to appear on YouTube. Rubin Decl. ¶ 14 & Ex. 128.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>153. The putative class plaintiffs have sent DMCA takedown notices to YouTube that they eventually retracted because of claims by other rights holders. Schapiro Exs. 103 (Response 23), 154, 155 (68:9-72:14), 156 (ST00105023-26), 102 (151:21-154:17).</p>	<p>Out of the <i>tens of thousands</i> of infringing videos that Class Plaintiffs have requested that YouTube remove from its website, there has been only <i>one</i> inadvertent request concerning <i>one</i> specific video. See CS ¶¶ 154-55, below.</p>
<p>154. Cal IV withdrew a DMCA takedown notice it had sent to YouTube after another rights holder filed a counter-notice. <i>Id.</i> Exs. 154, 103 (Response 23), 155 (68:9-72:14).</p>	<p>Defendants focus on five out of more than 300 videos that Cal IV has identified to YouTube as infringing. None of the five videos involve any works-in-suit. Even as to those five, Cal IV did not “withdraw” the takedown notice. As demonstrated by the evidence cited by defendants, in one instance, an independent contractor and Cal IV songwriter, Carey Ott, had uploaded a video containing a Cal IV composition to YouTube without authorization, but subsequently obtained authorization from Cal IV for that specific identifiable usage. On one other occasion, Cal IV, on receipt of a counternotice from Universal Music with respect to four specific videos, advised Universal that it disagreed with Universal’s counter-notice, and sent Universal a copy of its then pending lawsuit against YouTube that was filed in the Middle District of Tennessee on June 6, 2007. Universal submitted no evidence of any right to upload those four specific videos.</p> <p>Gitterman Decl. at ¶ 6 (takedown notices that Cal IV sent to YouTube)</p>
<p>155. Stage Three withdrew a DMCA takedown notice after one of its licensees informed Stage Three that it was authorized to post the clip on YouTube. <i>Id.</i> Exs. 102</p>	<p>Stage Three inadvertently requested the removal of one video out of the 5,185 videos for which it has issued DMCA takedown notices produced in this action.</p> <p>Gitterman Decl. at ¶ 7 (takedown notices that Stage Three sent to YouTube)</p>

<p>(151:21-154:17), 156.</p>	
<p>156. Certain of the putative class plaintiffs rely on a global network of sub-publishers to license their content. <i>Id.</i> Exs. 79 (100:7-15), 92 (150:13-22, 102 (61:25-63:22), 152 (20:15-22), 117 (153:15-154:10).</p>	<p>There is no evidence that any clip in issue in this case was licensed by a subpublisher, let alone without the knowledge of one of the class plaintiff music publishers. In fact, the vast majority of publishers require prior approval from their subpublishers for licenses of the type that would permit exploitation in conjunction with visual matter, including on the Internet, or are informed of such licensing by their subpublishers as a matter of course. To the extent there is any issue, had the tools that defendants provided to its preferred partners been deployed to identify class plaintiffs’ works, defendants would have had no difficulty in quickly identifying (and removing) the infringing content.</p> <p><i>See. e.g.</i> (Tab 331) Bourne Company (Tab 332) Cherry Lane Music Publishing Company, Inc. (Tab 334) The Music Force LLC (Tab 333) Rodgers & Hammerstein (Tab 330) Stage Three Music (US), Inc. (Tab 208) X-Ray Dog Music, Inc.</p> <p>Declaration of Daniel Hill, Cal IV Entertainment, LLC Declaration of Robert Bienstock, Carlin America</p>
<p>157. Plaintiff X-RAY DOG could not immediately determine whether a clip posted to YouTube that contained its content was or was not authorized to be there. <i>Id.</i> Ex. 92 (158:11-160:7)</p>	<p>X-RAY Dog’s sub-publishers are required to notify X-Ray Dog when they license one of X-Ray Dog’s works.</p> <p>(Tab 208) (X-Ray Dog Music, Inc. Publisher License)</p>
<p>158. Plaintiff R&H could not immediately determine whether a clip posted to YouTube that contained its content was or was not authorized to be there. <i>Id.</i> Ex. 79 (13:23-18:20; 114:3-14).</p>	<p>RHO quickly determined that the clip at issue was <i>not</i> licensed to appear on YouTube. Once RHO determined that the party uploading RHO’s work had a license to use the work on television but not the Internet, RHO subsequently decided to issue a license covering Internet uses. Had defendants made available the tools that they provided to their preferred partners been deployed to identify class plaintiffs’ works, defendants would have had no difficulty in quickly identifying (and removing) the infringing content.</p>
<p>159. Plaintiff Stage Three has retained professional musicologists to determine whether certain YouTube</p>	<p>Class Plaintiffs dispute the materiality of this assertion. In each of the two cases cited by Defendants, Stage Three retained a musicologist to determine if a work was an improper “sound-alike” of a Stage Three work; the issue “was not about it being up on YouTube.” In both cases, the musicologist</p>

<p>clips contain content that was copied from one of its musical compositions. <i>Id.</i> Exs. 85 (219:0-220:11), 102 (171:23-172:21), 157.</p>	<p>was retained to assist with broader legal action against the the entities nvolved in creating the infringing work. Stage Three has readily identified copies of its works in thousands of infringing videos it has asked YouTube to remove from the YouTube website.</p>
<p><u>Rebuttal to Defendants’ Disputed Claim: YouTube’s Revenue Model</u></p>	
<p>160. YouTube is a free service. Hurley Decl. ¶ 2.</p>	<p>The YouTube website is a profit-maximizing enterprise which, by virtue of pervasive infringing content available on the site, has attracted a huge audience that is of enormous financial value to Defendants. Defendants generate profits by selling this audience to “top advertisers.” Defendants “primarily” generate revenue from advertisements they run on search pages. Defendants know that users use the search pages to search for premium content, most of which is unlicensed. To maximize revenue, Defendants use their text-based content identification tools to target advertisements to the content of users’ searches, including searches for class plaintiffs’ unauthorized works. For example, when a user searches for French Open clips, YouTube displays ads for French Open travel packages.</p> <p>Decl. of Suzanne Reider at ¶¶ 3, 5, 8, 10. See CS ¶¶ 6-9, 25, 167 (ads are tied to keywords).</p> <p>(Tab 22) (“based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, be we haven’t yet licensed the content that they’re looking for.... Of the Top 100 Playback Queries... Music = 53.35% ... Non –Music Premium = 26.22% Of ‘Premium’ content queries: ... Sports = 7.85... News = 7.24%”) (GOO001-02519871)</p> <p>(Tab 4) (“Revenue will be generated from ads primarily on Search pages (40%)”) (GOO001-00375061-65)</p> <p>(Tab 79) (“From a monetization perspective the largest opportunity for revenue resides on the YouTube Search pages.”) (GOO001-01295802)</p> <p>(Tab 80) (Hoffner: “This means BOTH monetizable via partners and user unmonetizable. (There is a third bucket down below we need to attack aggressively as well). We need this to get more inventory so that the search numbers continue to go up (concept of unlimited choice rings through here) and more watch pages occur.”) (GOO001-00237661)</p> <p>(Tab 99) (“Benefits” to YouTube’s advertisers included ability to”target placements on Search pages by selecting from among YouTube’s hundreds of content categories, triggered by relevant user keyword queries”)</p>

	<p>(Tab 100) (GOO001-00907818-19) (“we believe search will be stronger than watch.” Rates “will change as content gets claimed AND we program the user experience better/more and strive to create more inventory around premium content.”)</p> <p>(Tab 151) (“as attractive as potential for display and other ads are for watch pages on YT, ads on search results can be significantly more lucrative” and YouTube retains “100% of search results”) (GOO001-00798356)</p> <p>(Tab 159) (YouTube created a “taxonomy and automated classification of search query terms and videos” in order to facilitate “ads targeting for monetization”) (GOO001-01644803)</p> <p>(Tab 168) (Walk: “If Partner Monetization is the focus should we work less on monetizing the site for ourselves (search page monetization) and focus those efforts on making money for partners? Take that 300x250 slot and put it below the promoted videos?”) (GOO001-02737286)</p> <p>(Tab 169) (Early on, YouTube Chen was eager “to do something quick to monetize that search results page in the mean time but not at all excluding future opportunities to further segment and target.”) (GOO001-02816986)</p> <p>(Tab 174) (YouTube placed a “very high priority in monetizing YT search pages” using a technological mechanism that will “have a keyword to vertical mapping system to bucket search queries into marketable categories that advertisers can purchase.”) (GOO001-07165570)</p> <p>(Tab 224) (Advertising on search pages earns the most revenue) (GOO001-02338170)</p> <p>(Tab 225) (For 2007-2009, YouTube predicted revenue of total 3-year revenue of “almost \$1.1 BN (\$878MM for search results and \$200MM for partner / CYC content). (GOO001-02439050)</p> <p>(Tab 306) (“we tell advertisers that if you want to buy against music content, you can buy against music content”) (Reider Tr. 199:24-200:12)</p> <p>(Tab 247) (Declaration of Steve Chen at ¶ 19)</p>
<p>161. YouTube does not charge a subscription fee and does not charge users to upload or to view video clips. <i>Id.</i></p>	<p>Defendants dispute the materiality of this statement. <i>See</i> CS ¶ 160.</p>
<p>162. YouTube generates</p>	<p>The profits YouTube reaps from advertising depend on its ability to draw</p>

<p>revenue from advertising. Reider Decl. ¶ 5.</p>	<p>large numbers of viewers to its website. YouTube knows that premium content, most of which is unlicensed, is the biggest draw to its site.</p>
<p>163. YouTube’s advertising offerings are consistent with prevailing industry standards. Reider Decl. ¶ 12.</p>	<p>Defendants cite no evidence that defines any “industry” they consider themselves to be a part of. Defendants also cite no evidence of any “prevailing... standards.” Rather, they recite types of advertisements that they and other website owners make use of (“CPC and CPM ads, as well as in-video ads and overlays”). Defendants cite no evidence that any of these other websites specifically target their advertisements to unauthorized content, like defendants do. Defendants also cite no evidence that any of these other websites know, are aware of, and have the ability to control infringements on their websites, yet choose not to remove those infringements in order to draw traffic and boost potential advertising revenues, like defendants do.</p> <p><i>See CS ¶¶ 6-9, 29.</i></p>
<p>164. Between 2006 and 2009, YouTube entered into thousands of direct partnership agreements that provide for YouTube to run advertising against videos claimed by those owners and to share the revenue from that advertising. Maxcy Decl. ¶ 9-10.</p>	<p>Under the terms of the “partnership” deals cited to by defendants, defendants offered to its partners content-identification tools, including audio-fingerprinting and advanced text search tools, that they did not offer to content owners unwilling to license their content to YouTube. YouTube offered these content identification tools to favored partners on the condition that the partners use those tools to “claim” content uploaded by users so YouTube could run advertisements against it. YouTube and its partners also claim, and run advertisements next to, material that infringes class plaintiffs’ works. For example, YouTube uses its content identification tools to identify specific sound recordings in a video and to run advertisements based on the identified song, even when it has not obtained the required publishing rights for the song. <i>See CS ¶¶ 94-96.</i> YouTube also identifies specific sound recordings in a video and runs advertisements based on the identified song, even though the underlying video footage is infringing. YouTube also uses its content identification tools to identify the content of specific infringing videos on its site, and chooses to run advertisements targeted to that infringing content.</p> <p>Class SUF ¶¶ 22, 25, 28-29.</p> <p>Gitterman Decl. at ¶¶ 8-9; Gitterman Decl. Ex. 15 (showing tennis ads next to a video tagged “Roland Garros”, and also listing XRD songs).</p>
<p>165. YouTube’s revenue-sharing deals generated approximately ████████ of YouTube’s overall revenue between 2007 and 2009.</p>	<p>Defendants “primarily” generate revenue from advertisements they run on search pages. <i>See CS ¶ 160.</i></p> <p>Class SUF ¶¶ 36-38. <i>See CS ¶¶ 6-9.</i></p>

<p>Reider Decl. ¶ 5.</p>	
<p>166. Most of YouTube’s other revenue comes from advertisements that run on the YouTube homepage and on the pages that list the results of users’ search queries. <i>Id.</i> ¶ 5.</p>	<p>Defendants “primarily” generate revenue from advertisements they run on search pages.</p> <p>Class SUF 33, 36-38 <i>See</i> CS ¶ 160.</p>
<p>167. YouTube does not seek to earn revenue from users’ potentially infringing activities. <i>Id.</i> ¶ 11.</p>	<p>YouTube’s advertising offerings are focused on deriving maximum revenues from infringing content. YouTube knows that targeted or content-specific advertisements on its search pages are more valuable than advertisements elsewhere on its site. YouTube knows that its users primarily use its search pages to search for unauthorized premium content. YouTube sells advertisements on its search pages that are specifically targeted to users’ searches for that unauthorized content – including class plaintiffs’ content. Advertisements on watch pages of infringing videos are also targeted to class plaintiffs’ infringing content, and are more lucrative because they are so targeted. <i>See</i> CS ¶ 160, 164.</p> <p>Class SUF ¶ 37 (premium content); SUF ¶¶15-16, 36, 38 (definition of premium content) SUF ¶ 41 (advertisements)</p> <p>(Tab 1) (Category-Based Sales Approach – Targeting... Music... Sports) (GOO001-00906837)</p> <p>(Tab 54) (“All videos the -- metadata for all videos is indexed [including] title of the video, the description of the video, the tags provided by the users... Portions -- part -- comments that we find relevant to the video.”) (Kacholia Tr. 24:3-26:8)</p> <p>(Tab 81) (YouTube executive confirms that “AdSense for content automatically crawls the content” of websites and “delivers text and image ads that are relevant to your audience and your site content.”) (Kordestani Tr. 68:21-69:14)</p> <p>(Tab 99) (“Benefits” to YouTube’s advertisers included ability to “target placements on Search pages by selecting from among YouTube’s hundreds of content categories, triggered by relevant user keyword queries”) (C. Maxcy Tr. 233:21-234:3)</p> <p>(Tab 120) (YouTube used AdSense, which is “an advertising system where text ads, currently text ads, might appear against certain types of content.”)</p>

(P. Walker Tr. 200:8-22)

(Tab 159) (YouTube created a “taxonomy and automated classification of search query terms and videos” in order to facilitate “ads targeting for monetization”) (GOO001-01644803)

(Tab 173) (“Keyword / Bucket” listing various terms connected with the Class Plaintiffs) (GOO001-06238828-06239753)

(Tab 174) (YouTube placed a “very high priority in monetizing YT search pages” using a technological mechanism that will “have a keyword to vertical mapping system to bucket search queries into marketable categories that advertisers can purchase.”) (GOO001-07165570)

(Tab 179) (“there are certain DMCA limitations which don’t allow us to monetize against certain keywords (e.g., if we find out South Park is heavily searched, we wouldn’t necessarily be able to monetize that keyword in search)”). (G00001-01332719-01332722)

(Tab 180) (“A new ad tag (e.g. you.results/blacklistterm) will be used so that the frequency of blacklisted terms can be tracked.”) (GOO001-07220441)

(Tab 181) (“YouTube will take the search query and ping the CAT2 vertical server to return an ad vertical (e.g. ‘nba’ query maps to Sports/Basketball’ vertical”) (GOO001-06510250-06510252)

(Tab 226) (“Search represents 50% all YT PVs... Represents largest component for monetization this year... Classify search term as content vertical, allows vertical targeting in the search ads... Content verticals vs. keyword targeting since advertisers are looking for branding not direct response... Allows targeting by vertical, demographic, geography, time of day, to some extent keyword targeting if it’s a brand keyword”) (GOO001-00255239-42)

(Tab 293) (YouTube displays partner videos in the “related videos” section for infringing clips) (C. Hurley Tr. 173:25-174:23)

(Tab 294) (“Q. What is a ‘vertical’? A. Vertical, once again, is a very specific technical term. In this case, we defined it as a – a category of search queries that have been classified. Q. What is a search query? What do you mean by that? A. A search query is an industry term that, again, there’s a very specific definition, but my definition is a – it’s the string of keywords, one or more keywords that a user enters into a search bar.”) (Liu Tr. 24:3-26:17)

<p>168. None of YouTube’s advertising offerings in any way favors videos that may not have been authorized to appear on YouTube over authorized videos. <i>Id.</i> ¶ 11.</p>	<p>Disputed, <i>see</i> CS ¶ 167. Class SUF ¶¶ 16, 36-38.</p>
<p>169. Most of the nation’s top 100 advertisers purchase advertising on YouTube. <i>Id.</i> ¶ 4.</p>	<p>Class Plaintiffs dispute any inference that YouTube’s ability to sell its audience to “top 100 advertisers” legitimizes its business practices in any way. From the outset, YouTube built up an audience that it knew was drawn to its site by the infringing premium content it offered. <i>See</i> CS ¶¶6-7. Having built a lucrative audience through the drawing power of infringing content – including class plaintiffs’ content – YouTube is now able to sell this audience to “top... advertisers.” In January 2007 YouTube decided not to sell advertisements on video watch pages unless it had specifically licensed the video from the relevant rights owners, because YouTube knew that much of its video inventory was unauthorized. Despite this stated policy, advertisements can still be found on watch pages. Defendants’ primarily generate revenue by selling advertisements on its search pages. These advertisements are targeted to infringing content, including class plaintiffs’ content.</p> <p><i>See</i> CS ¶167.</p> <p>Gitterman Decl. at ¶ 9.</p> <p>(Tab 12) (“for legal reasons [...] all ads/monetization on the watch pages for user generated content will need to come down. This will have a tremendous impact on inventory.”) (GOO001-02656593)</p>

<p>170. Large media companies run advertisements on YouTube. <i>Id.</i> ¶2.</p>	<p>Class Plaintiffs dispute any inference that YouTube’s ability to sell its audience to “large media companies” legitimizes its business practices in any way. <i>See</i> CS ¶¶ 169.</p>
<p>171. Viacom has spent more than one million dollars advertising on YouTube. <i>Id.</i> ¶ 4.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>

<p>Class Plaintiffs respond below to certain statements and assertions made in Defendants’ fact declarations or Memorandum of Law, and not included or referenced in their Rule 56.1 Statement. The leftmost column continues the paragraph numbering system of the preceding counterstatements, the middle column excerpts statements from defendants’ declarations or Memorandum of Law (citing to the relevant paragraph or page number), and the rightmost column cites to evidence controverting the statements.</p>		
	<p>Declaration of Chad Hurley</p>	<p>Evidence controverting Declaration of Chad Hurley</p>
172.	<p>3. At first, we envisioned that users would post homemade videos with a dating focus, like hotornot.com, except with users posting videos of themselves instead of pictures. See Ex. 1 hereto, a true and correct copy of a February 22, 2005 email from Jawed to Steve and me.</p>	<p>See CS ¶¶ 6-8.</p>
173.	<p>10. One user who saw our ads wrote us to say how much she appreciated the YouTube service. The user told us that her son-in-law was serving in Iraq, and her daughter was using YouTube to share videos of the couple's baby with him while he was overseas. I thought this was a great example of what YouTube was all about, and the types of videos that we wanted to see on the site. See Ex. 11 hereto, a true and correct copy of a July 18, 2005 email string among me, Steve, and Jawed where I wrote "this is exactly what I'm targeting, people that will add videos (video bloggers, people looking for free video hosting, etc.) so it's not really to generate traffic just good active users." (ellipsis in original).</p>	<p>Class plaintiffs dispute any inference that the goal of Mr. Hurley or his co-founders was “not really to generate traffic.” The expressly stated goal of YouTube’s founders was to drive “traffic” to their website so they could “sell out quickly.” See CS ¶¶ 6-8 (Chen: “we have to keep in mind that we need to attract traffic. how much traffic will we get from personal videos?”). YouTube and Google management had the goal to increase traffic to the YouTube website so as to increase its financial value and profit-making potential. <i>Id.</i></p> <p>Class SUF ¶ 14.</p>
174.	<p>11. Although we wanted YouTube to offer a wide range of videos and promote free speech, we did not want videos with pornography or unauthorized copyrighted material on the site. See Ex. 12 hereto, a true and</p>	<p>Defendants exercised control over the YouTube website by screening for and removing pornography. However, defendants chose not to remove unauthorized copyrighted material, because they knew that’s what users were drawn to the site to see and search for.</p>

	<p>correct copy of a April 28, 2005 email from Steve to Jawed and me (“As long as there’s no nudity or copyrighted materials, we should NOT be removing videos because it doesn’t meet any personal preferences.”). Steve felt that “it would be cool” if we could give users reasons for rejecting their videos; “there are three [reasons] I can think of right now: -duplicate video-inappropriate content-copyrighted material.” <i>See</i> Ex. 13 hereto, a true and correct copy of a June 29, 2005 email from Steve to Jawed and me.</p>	<p><i>See</i> CS ¶¶ 16, 25.</p>
<p>175.</p>	<p>12. In July 2005, Steve and I had an exchange about a popular video site called filecabi.net that was similar to stupidvideos.com and big-boys.com in that they were all focused on hosting silly or prank-oriented videos. In that exchange, I described our vision for what we hoped YouTube would become, and what it in fact did become: "I would really like to build something more valuable and more useful ... actually build something that people will talk about and changes the way people use video on the internet." Steve replied: "another thing, still a fundamental difference between us and most of those other sites. we do have a community and it's ALL user generated content." <i>See</i> Ex. 14 hereto, true and correct copy of an email string between me and Steve dated July 29,2005 (ellipsis in original).</p>	<p><i>See</i> CS ¶¶ 6-7.</p>
<p>176.</p>	<p>13. In August 2005, we put together a presentation outline for Sequoia Capital, a prominent venture capital firm that expressed interest in funding our company. In that presentation outline, we described our “Company</p>	<p>Class plaintiffs dispute any inference that YouTube did not promote the presence of unauthorized premium content on its site or communicate that strategy, i.e., to attract and capitalize on infringing premium content, to potential investors, including Sequoia Capital.</p>

	<p>Purpose" as follows: <i>"To become the primary outlet of user-generated video content on the Internet, and to allow anyone to upload, share, and browse this content."</i> See Ex. 15 hereto, a true and correct copy of the Sequoia Capital presentation outline dated August 21,2005 (emphasis in original).</p>	<p>CS ¶¶ 6-7.</p>
177.	<p>14. That same month, when my brother Brent Hurley signed on as an employee of YouTube, he sent us an email describing the site as he found it at the time: "I think the 'slices of life' content our users provide is so unique. YouTube is reality TV at its best and most pure form. The database of content already collected amazes me." See Ex. 16, a true and correct copy of an email string among Brent Hurley, me, and other YouTube employees dated August 7,2005.</p>	<p>Class plaintiffs dispute any inference that YouTube's financial value was not driven by the presence of premium entertainment content on the website, and that YouTube did not encourage or depend on its users uploading and viewing infringing premium content. YouTube repeatedly acknowledged that amateur personal videos did not drive traffic or value.</p> <p>See CS ¶¶ 6-7, 16, 22, 58.</p>
178.	<p>15. As the YouTube site began to get more uploads in the summer of 2005, we started to come across situations where we encountered videos uploaded by users that were potentially unauthorized. For example, in one instance, I saw a video that looked like a network television show. Steve, Jawed and I are not lawyers. As a small start-up working out of my garage during early and mid-2005, we did not have lawyers to advise us on copyright issues. But we viewed the posting of potentially unauthorized material as a problem, and we agreed that we wanted to put a stop to it. See Ex. 17 hereto, a true and correct copy of a June 26, 2005 email thread among Steve, Jawed and me.</p>	<p>Disputed. Mr. Hurley and his co-founders were sophisticated entrepreneurs who expressly acknowledged the value of infringing premium content and depended on that content so they could increase traffic to their website and "sell out quickly."</p> <p>CS ¶¶ 6-7; Class SUF ¶ 10.</p>
179.	<p>16. As a founder with a significant stake in the company, the last thing I wanted was for it be seen as or to</p>	<p>Disputed. YouTube (including Mr. Hurley) promoted the presence of unauthorized premium content on its site and communicated its strategy</p>

	<p>become a haven for infringing or illegal content. The options we envisioned for YouTube were the standard evolutionary paths for a startup: an initial public offering, or acquisition by another company. We all believed that those options would not be available to us if our business was based or dependent upon illegitimate activities.</p>	<p>to potential investors, including Sequoia Capital and TriplePoint. YouTube’s objective was to create the perception they were addressing content owners’ concerns, when in fact they knew they were profiting from infringing content.</p> <p><i>See CS ¶¶ 6-7, 9.</i></p>
<p>180.</p>	<p>17. To make sure that is not how the site developed, when we started seeing an uptick in the number of videos uploaded to the site, we adopted a screening process to remove videos that we guessed were unauthorized copyrighted content, and told users that such content was unwelcome. <i>See</i> attached hereto, true and correct copies of emails among Steve, Jawed, and me in July and August 2005: Ex. 18 (“[I] just unapproved and rejected the britney toxic music video.”); Ex. 19 (“this guy has a ton of music videos that need to be removed.”); Ex. 20 (noting that user uploaded clips from a Hong Kong movie and concluding “I think we should reject all that [stuff].”); Ex. 21 (adding videos for review because “this is blatant copyrighted stuff”). As I put it in response to an inquiry from a user about why a video was rejected: “Yes, I believe this was a music video, right? So, it was rejected because it was copyrighted material. We are trying to build a community of real user-generated content and moving forward we are going to be more proactive about screening videos upfront.” <i>See</i> Ex. 22 hereto, a true and correct copy of an email I wrote dated July 3, 2005.</p>	<p>Disputed to the extent Mr. Hurley claims that they did not want their website to show infringing material. <i>See</i> CS ¶¶ 6-7. In fact, YouTube’s founders could identify infringing content on their website site, but suggested removing it only “in varying degrees” so as to create “the perception” of addressing the concerns of content owners while at the same time not reducing traffic to the site. Later, YouTube selectively screened and removed infringing material, but only on behalf of favored content owners and built various tracking and monetization systems that identified infringing content but chose not to use those systems to remove it.</p> <p><i>See</i> CS ¶¶ 16, 94-96.</p>
<p>181.</p>	<p>19. In the meantime, we were devising strategies to encourage users</p>	<p>Class plaintiffs dispute any inference that YouTube did not knowingly depend on the</p>

	<p>to post authorized material. For example, in the upload process, we added spaces for users to provide the date and place at which they recorded the video they were uploading. We intended that to signal to users that the site was constructed for personal videos that they themselves had recorded. See Ex. 23 hereto, a true and correct copy of a June 26, 2005 email string among Jawed, Steve, Mike Solomon and me.</p>	<p>presence of infringing premium content to increase its financial value and profit-making potential. Mr. Hurley provides no evidence that they required users to “provide the date and place at which they recorded the video.” The founders in fact decided to allow and encourage videos that were not “personal videos” in order to maintain or increase their traffic.</p> <p><i>See CS ¶¶ 6-7. Hurley ¶¶ 3-5</i></p>
<p>182.</p>	<p>22. As shown by a description of YouTube that I drafted in October 2005, our plan for the site continued to center on personal, user-generated video clips. It had nothing to do with encouraging or capitalizing on copyright infringement: YouTube is a new service that allows people to easily upload, tag, and share personal video clips. Digital cameras with video recording capability are quickly becoming a commodity consumer technology. As people continue to record more video clips, YouTube will fill the need of quickly distributing their content worldwide. See Ex. 27 hereto, a true and correct copy of an October 26, 2005 email that I sent to my brother, which encloses this description.</p>	<p>Disputed. From the start of YouTube to this day, Defendants knew that premium entertainment content was what drove the financial value of the site.</p> <p><i>See CS ¶¶ 6-7, 16, 25.</i></p>
<p>183.</p>	<p>24. During this period of rapid growth, we continued to go out of our way to respect the copyrights of content owners. For example, when a "Saturday Night Live" skit entitled "Lazy Sunday" was uploaded to YouTube in December 2005 and drew an enormous amount of views from users, I reached out to NBC to determine whether the video was authorized to be on YouTube. <i>See</i> Ex. 30 hereto, a true and correct copy of the email that I sent to NBC.</p>	<p>Class plaintiffs dispute that defendants went “out of [their] way to respect the copyrights of content owners.” YouTube could readily identify the content on its website but only did so when it served its business interests.</p> <p><i>See CS ¶ 63-66, 94-96.</i></p>

<p>184.</p>	<p>25. Although I contacted NBC on December 28, 2005, YouTube did not hear back about NBC's position regarding the video until February 3, 2006, when I received a letter from NBC thanking us for opening a dialogue and asking that YouTube remove the Lazy Sunday video from our website. <i>See</i> Ex. 31 hereto, a true and correct copy of NBC's response to me.</p>	<p>Class plaintiffs dispute any inference that YouTube was genuinely concerned with protecting content owners' rights. YouTube contacted NBC because they wanted to make money off of NBC's premium videos, "thousands" of which were on the YouTube website without authorization. YouTube offered content identification tools to NBC that it did not offer to other content owners because NBC was willing to license its content to YouTube for YouTube to monetize. Despite YouTube's efforts, NBC was highly critical of YouTube's unwillingness to remove from its website the infringing content it knew was being uploaded and viewed and on which it depended (CEO of NBC: "YouTube needs to prove that it will implement its filtering technology across its online platform. It's proven it can do it when it wants to. [...] They have the capability. The question is whether they have the will.")</p>
<p>185.</p>	<p>27. Not only have the volume and range of videos uploaded to YouTube exceeded our expectations, but our community of users has too. YouTube users don't just post videos to YouTube and watch videos on YouTube, they interact with one another <i>through</i> YouTube. They form friendships, ask each other questions, invite responses, find organ donors, participate in contests, rally in support of one another, and challenge each other. Our users have used YouTube to create a new model for how individuals, companies, organizations and governments communicate. Its development has been both astonishing and humbling, and it has come without us ever seeking to grow the site or earn revenue from any unauthorized use of copyrighted material.</p>	<p>Disputed, see CS ¶¶ 6-7. Class plaintiffs object to this conclusory statement, for which Mr. Hurley provides no basis as to how users "interact with one another <i>through</i> YouTube." Communications by and between users show that YouTube knew they were using the website to infringe.</p>

	<p>instead to embrace the promotional opportunities that YouTube provided by allowing the videos they claimed to appear or remain on the service.</p>	<p>YouTube, the dates that they signed up to use CYC, and, if they did use it “solely to block videos” as Mr. King claims, how frequently or for how long they were allowed to use the system. One of the entities, [REDACTED], has an official branded Youtube channel with videos that have been up on the site for over 3 years. Therefore, it has not been “solely” blocking its videos for at least that amount of time. [REDACTED] sued YouTube for copyright infringement in France (Mr. King presents no evidence concerning whether they were offered CYC in response to litigation pressure). [REDACTED] was offered access to CYC as part of a broad potential “business arrangement” with both Google and YouTube.</p> <p>(Tab 275) ([REDACTED] term sheet); (Tab 302) ([REDACTED] sues YouTube”: report, April 16, 2008)</p> <p>(Tab 304) (Screenshot from www.youtube.com – [REDACTED] channel)</p>
<p>189.</p>	<p>11. Although the audio-based content-identification technology that Audible Magic provided was useful, particularly in helping the owners of sound recordings identify their content, it had certain limitations in reliably matching against certain kinds of <i>video-based</i> content. For example, most television programs and motion pictures include embedded music that is owned by someone other than the entity that owns the TV program or motion picture itself. Particularly because YouTube had entered into carefully negotiated agreements with most of the major record labels to allow their sound recordings to appear on YouTube, using audio-based content identification to identify television programs and movies was likely to</p>	<p>Disputed. YouTube had long recognized the need to deal with conflicting claims to the same content and had mechanisms in place to deal with such claims on behalf of favored content partners.</p> <p><i>See CS ¶¶ 94-96.</i></p>

	<p>lead to conflicting claims for the same piece of content. For example, the television show "CSI" uses the song "Who Are You" by The Who in its opening credits. An audio-based content identification system will not reliably be able to distinguish a video clip of the opening credits of CSI from a music video of "Who Are You" (or clip from a movie using the same song). Based on our experience with Audible Magic, we found that audio-only matching for video content resulted in confusion and inaccuracy.</p>	
<p>190.</p>	<p>12. In addition, many audio-visual works have a variable soundtrack, which can minimize the utility of audio-based content identification. Sporting events, for example, are often broadcast in different languages and with different commentators. And the background "stadium sounds" for many different sporting events (things like crowd noise and whistles, for example) are often quite similar and difficult to distinguish from each other. Audio-based content identification technology therefore would often be unreliable for identifying such works.</p>	<p>Mr. King’s opinion regarding the technical capabilities “audio-based content identification technology” is inadmissible opinion evidence. Moreover, Mr. King fails to address a variety of other technologies that were extant and available to YouTube, but which YouTube, for various reasons including its desire to develop a proprietary technology that it could own and control, ignored. See CS ¶¶ 6, 16. Class plaintiffs also dispute any inference that YouTube did not already have, and use, tools that could and did identify class plaintiffs’ infringing content.</p> <p>See CS ¶¶ 94-96.</p>
<p>191.</p>	<p>13. For these reasons, it was my belief (and the belief expressed to me by others on my team) that the most effective and reliable content identification technology for a video website like ours would be <i>video-based</i> content identification (sometimes called “video fingerprinting”). Video-based content identification works much like audio fingerprinting, with the important difference that the former uses the <i>video</i> channel of the probe file in identifying potential matches. By</p>	<p>Class plaintiffs dispute any inference that YouTube did not already have, and use, tools that could and did identify class plaintiffs’ infringing content.</p> <p>See CS ¶ 95.</p>

	<p>looking at the video channel, rather than just the audio channel, video-based content identification solves some of the key problems with using audio fingerprinting to try to identify audio-visual content such as television shows and movies.</p>	
192.	<p>14. From the very start of my tenure at Google, I saw video-based content identification as a meaningful new way for YouTube to further help rights holders find videos on YouTube that might contain their content. I also viewed the development of video-based content identification as an exciting technical challenge that would lead the way for other user-generated content websites, none of which had implemented such technology. Accordingly, in January 2007, almost immediately after I began working at Google, I made the decision that YouTube should build a video-based content identification tool to supplement (and ultimately supplant) our use of Audible Magic. It was expressed to me that the decision to build that technology-which we came to call "Video ID"-had the full support and encouragement of Google and YouTube management, including Eric Schmidt (the CEO of Google) and Chad Hurley (the CEO of YouTube).</p>	<p>Defendants decided to build their own video fingerprinting system and ignored available third party systems in order to develop their own tool that could exploit.</p> <p><i>See CS ¶¶ 6, 97-100.</i></p>
193.	<p>16. There were several reasons why YouTube decided to develop its own content-identification technology, as opposed to relying on technology from an external vendor. <i>First</i>, at that time there was no commercially available video-based content identification technology for use on websites like YouTube. Although</p>	<p><i>See CS ¶ 97.</i></p>

	<p>there were a few companies that were testing early versions of such technology, none of them had a product that had actually been commercially deployed on any website. Nor were we confident that any of these third-party vendors was or would soon be in a position to offer video-based content identification technology that could reliably and efficiently operate on a site that handles the volume of video uploads to YouTube. As of early 2007, YouTube's scale of operations dwarfed that of any other video website, and that scale posed a significant technical and operational challenge to any content identification system. There was nothing available on the market, or even on the horizon, that seemed up to that challenge. <i>Second</i>, as I mentioned above, before its acquisition of YouTube, Google had already done significant work on video-identification technology, which we believed could be adapted to YouTube's needs without requiring us to build a product from scratch. That led us to believe that we could develop our own video-based content identification system more quickly and effectively than could any third party. <i>Third</i>, by building the technology ourselves, we could design it specifically to run on YouTube's systems.</p>	
	<p>Declaration of Zahavah Levine</p>	<p>Evidence Controverting Declaration of Zahavah Levine</p>
<p>194.</p>	<p>3. In February 2006, I was contacted by Chris Maxcy at YouTube and asked to consider joining the company as its first in-house lawyer and its general</p>	<p>Disputed to the extent, Ms. Levine's statement contradicts communications among Hurley, Chen and Botha acknowledging their website's dependence on infringing content to fuel their desire</p>

	<p>counsel. Given my existing working relationships with some of the largest copyright holders in the world, I naturally inquired about YouTube's views regarding copyright protection during the interview process. The company's founders Chad Hurley and Steve Chen, and a board member, Roelof Botha, explained YouTube's philosophy on this issue. They each strongly impressed upon me that neither they nor YouTube had any interest in growing the company or profiting by virtue of the presence of materials on the service that infringed others' copyrights. Each assured me that I would be given substantial resources and broad discretion to enable the company and copyright holders to combat the unauthorized uploading of videos to the YouTube service, and that they supported those efforts.</p>	<p>for more traffic. CS ¶¶ 6-7. Ms. Levine was intimately familiar with the rights involved in exploitation of music on the Internet.</p>
<p>195.</p>	<p>4. Since joining YouTube in March 2006, I have spent the considerable majority of my time - thousands upon thousand of hours - working with the company's executives, engineers, business development teams, product designers and staff as well as countless partners and users to minimize the incidence of unauthorized copyrighted material on the service, while ensuring that YouTube remained a vibrant platform for users around the world to share their own videos. During my tenure, YouTube and its parent company Google, have invested many millions of dollars on technologies and teams of employees directed to that end.</p>	<p>Disputed to the extent YouTube has encouraged and depended on infringing content for its growth.</p> <p><i>See CS ¶¶ 6-7.</i></p>

<p>196.</p>	<p>10. YouTube also dedicates an area of the “Help” section of its website to providing users and content owners alike with information about copyright issues and YouTube's approach regarding copyrighted material. A true and correct copy of this "Help" page http://www.google.com/support/youtube/bin/topic.py?topic=10554 is attached hereto as Exhibit 8.</p>	<p>Class plaintiffs dispute any inference that defendants thought that the “Help” section of the website prevented its users from uploading and viewing infringing material.</p>
<p>197.</p>	<p>13. YouTube has also sought to assist copyright owners in preventing infringement on the site by complying with the requirements and procedures of 17 U.S.C. §512 of the Digital Millennium Copyright Act ("DMCA").</p>	<p>Defendants fail to comply with the requirements of 17 U.S.C. §512. See class plaintiff’s accompanying memorandum of law.</p>
<p>198.</p>	<p>14. YouTube has designated an agent pursuant to the requirements of the DMCA, and has provided that agent's contact information to the Copyright Office. YouTube's agent is available to receive notifications of alleged copyright infringement on the site, and can be contacted at: DMCA Complaints, YouTube, Inc., 901 Cherry Ave., Second Floor, San Bruno, CA 94066, Fax: (650) 872-8513, Email: copyright@youtube.com.</p>	<p>YouTube has not always had a DMCA agent registered with the copyright office.</p> <p><i>See CS ¶ 61.</i></p>
<p>199.</p>	<p>17. Our goal is to make it very easy for copyright owners to inform us of alleged copyright infringement on our site. In addition to processing DMCA notices received by postal mail, email or fax, YouTube has developed an online form that walks content owners step-by-step through the process of sending us a DMCA notice. A true and correct copy of the</p>	<p>Disputed, <i>see CS ¶ 64-65.</i></p>

	<p>form is attached hereto as Exhibit 10 and is accessible at http://www.youtube.com/copyright/complaint form.</p>	
200.	<p>28. YouTube tracks notices and issues strikes to users in automated fashion. While "three strikes" describes the basic rule in place, YouTube's policy allows us to take account of circumstances in determining which of our users are actually "repeat infringers" whose accounts should be terminated. For example, where a user formally contests a claim of infringement using the counter-notice process set forth in Section 512(g) of the DMCA, that claim is not counted as a strike against the user. Further, from experience, YouTube has learned that some of its users are unfamiliar with copyright law, and are surprised when a content owner takes issue with a video they have uploaded. To help educate these users and to give them an opportunity to correct their behavior before suffering the loss of their account, YouTube assesses a single strike per notice, including in circumstances where a DMCA notice identifies more than one allegedly infringing video from the same user. After receiving notice and an explanation that a strike has been assessed, users routinely inform us that they have modified their behavior.</p>	<p>Class plaintiffs dispute Ms. Levine's characterization of YouTube's users' familiarity with copyright law. YouTube and its users know that they are infringing content. <i>See</i> CS ¶¶ 6-7. Class Plaintiffs also dispute Ms. Levine's characterization of what should qualify as a "repeat infringer" since a user that has uploaded hundreds of pirated copies is not considered a "repeat infringer" by YouTube.</p> <p><i>See</i> CS ¶¶ 77.</p>
201.	<p>29. YouTube has also found it necessary on occasion to afford additional protections to users who are potential targets of improper or mistaken DMCA notices. For example, in the midst of the 2008 presidential race, we received a letter from Senator McCain's campaign (a</p>	<p>Class plaintiffs dispute any inference that the takedown notices referred to in the quote from Senator McCain's campaign were "overreaching." Ms. Levine presents no admissible evidence that any YouTube user has ever been a "target" of improper DMCA notices.</p>

	<p>copy of which is attached as Exhibit 13) complaining about a rash of improper DMCA notices:</p> <p>By providing a platform for political candidates and the American public to post, view, share, discuss, comment on, mash-up, re-mix, and argue over campaign-related videos, YouTube has played a prominent and overwhelmingly positive role in the 2008 election.</p> <p>* * *</p> <p>We write, however, to alert you to a problem that has already chilled this free and uninhibited discourse ... overreaching copyright claims have resulted in the removal of non-infringing campaign videos from YouTube, thus silencing political speech. Numerous times during the course of the campaign, our advertisements or web videos have been the subject of DMCA takedown notices regarding uses that are clearly privileged under the fair use doctrine. . . . Despite the complete lack of merit in these copyright claims, YouTube has removed our videos immediately upon receipt of takedown notices. This is both unfortunate and</p>	
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	unnecessary.	
	Declaration of Chris Maxcy	Evidence Controverting Declaration of Chris Maxcy
202.	2. During my tenure at YouTube, I watched the site become enormously popular in a very short period of time. As YouTube's popularity grew, content owners increasingly began to express interest in partnering with YouTube to make their content available through the YouTube service. In late 2005 and early 2006, YouTube was inundated with requests from a wide variety of companies for partnership agreements. But at that time YouTube was still a small and relatively new company with only ten employees, and we did not have the capacity to negotiate deals with all of these companies as quickly as the requests came in.	YouTube specifically targeted major media companies and sports leagues because it knew that users came to its website to view the premium entertainment content owned by those entities. YouTube tried to force these companies to make deals by offering to give them content identification tools to control the proliferation of infringements of their works on YouTube on the condition that they license their content to YouTube, like some of the class plaintiffs, were simply dismissed because of their small market share. <i>See</i> CS ¶¶ 43, 94-96.
	Declaration of Suzanne Reider	Evidence Controverting Declaration of Suzanne Reider
203.	3. YouTube's precise advertising opportunities have changed somewhat over the years to keep pace with the dynamic nature of Internet advertising. In general, however, there have been three primary advertising products that YouTube has made available to advertisers during my time at the company. <i>First</i> , we sell an advertisement on the YouTube homepage	Disputed, <i>see</i> CS ¶ 160, 164, 167. Until January 2007, YouTube displayed advertisements on all watch pages, including watch pages showing videos that infringe class plaintiffs' content. Youtube still displays advertisements on videos that infringe class plaintiffs' content. For example, YouTube shows tennis advertisements next to videos that show unauthorized footage of French Open matches. YouTube also displays advertisements for sound recordings on watch pages, even when it has not licensed the

	<p>(www.youtube.com). which we call the "homepage ad." This ad, which can take several different creative forms, is sold to a single advertiser for a 24-hour period. <i>Second</i>, YouTube allows advertisers to purchase advertising on the pages of the YouTube website where the results of users' search queries are displayed. We refer to these pages as "search-results pages." <i>Third</i>, YouTube allows advertising to be displayed on pages where users can watch videos that have been uploaded or affirmatively claimed by one of YouTube's many "content partners" (content owners who have entered into written agreements with YouTube beyond the terms of service to allow their content to appear on YouTube and have advertising displayed against it). We call these pages "partner-watch pages."</p>	<p>publishing rights to the sound recording or the rights to the video content. <i>See</i> CS ¶¶ 169.</p>
204.	<p>9. As for the advertising that appears on partner-watch pages, such advertising will only appear when YouTube has entered into a written agreement with a content partner, and the content partner has affirmatively indicated that it wants advertisements to run in conjunction with videos that the partner has posted or claimed. YouTube is frequently introducing new advertising concepts on partner watch pages, working in close collaboration with content partners and advertisers. As one of many such examples, last year, at the request of a content partner (Universal Music Group), American Express sponsored the live-streaming on YouTube of a concert that Alicia Keys gave to benefit her AIDS foundation.</p>	<p>Disputed, <i>see</i> CS ¶ 203.</p>
205.	<p>10. There was a period prior to January 2007 when YouTube allowed ads be displayed on video-watch</p>	<p>Disputed, because at that time YouTube knew that the popularity of its site was being driven by the presence of infringing premium content. <i>See</i></p>

	<p>pages more broadly. But we had no reason to believe that any given watch page where an advertisement might have appeared was displaying a video that was not properly authorized to be on YouTube. During that period, moreover, YouTube would have received the same rates for watch-page ads regardless of what videos those ads appeared next to.</p>	<p>CS ¶¶ 6, 16. YouTube still displays advertisements on the watch pages of infringing videos.</p> <p>Gitterman Decl. Ex. 15-16.</p>
	<p>Declaration of Micah Schaffer</p>	<p>Evidence Controverting Declaration of Micah Schaffer</p>
<p>206.</p>	<p>2. Almost immediately upon starting work at YouTube, I became aware of companies using YouTube for marketing purposes. For example, in January 2006, I viewed a clip on YouTube that Nike had uploaded for promotional purposes to the account "Nikesoccer" featuring the soccer player Ronaldinho. I discussed this clip with other employees at YouTube, including the founders, and there was a general awareness at the company that this type of corporate marketing was taking place on YouTube. Indeed, at one point in its history, the Nike Ronaldinho clip was the most watched video on YouTube. I learned later that Nike had also uploaded the exact same clip to YouTube using the account "JoeB" to make it appear as if that version of the clip had been uploaded to YouTube by an ordinary user unaffiliated with Nike. <i>See</i> http://www.youtube.com/watch?v=KNwLn85I75Y. I also learned from press accounts in the fall of 2006 that Nike acknowledged that the company posts videos to websites like YouTube using usernames unconnected with the company to appeal to younger audiences.</p>	<p>Class plaintiffs dispute any inference that YouTube was not aware that Nike authorized the video referenced in this statement, or that any other companies were uploading authorized videos for promotional purposes without YouTube's express knowledge. In fact, YouTube met with Nike about the video referenced in this statement. Class Plaintiffs also dispute the materiality of this statement. Defendants present no evidence that any class plaintiff uploaded or authorized the upload of any of their works so as "to make it appear as if that version of the clip had been uploaded to YouTube by an ordinary user."</p> <p>(Tab 205) (Botha Tr. 106-07)</p>

<p>207.</p>	<p>3. During my employment at YouTube, I experienced many instances in which YouTube became aware of the presence of content on the service that looked like it was professionally produced, but did not know whether the rights holder had uploaded that content or was allowing that content to remain on YouTube for promotional reasons. The appearance on YouTube of a short, satirical music video called "Lazy Sunday" in December 2005 and early 2006 illustrates this point. I had intimate knowledge of the "Lazy Sunday" video because I was responsible for the website of the comedy group, The Lonely Island, whose members created it. I knew that the video had aired on NBC's Saturday Night Live, but when I first saw it on YouTube, on December 18, 2005, I did not know whether NBC was allowing user uploaded versions of Lazy Sunday to remain on YouTube for promotional purposes. Based on my involvement with The Lonely Island and conversations with a member there, I believed that the writers and producers of Saturday Night Live thought that the presence of "Lazy Sunday" on Internet video websites like YouTube was providing marketing benefits for the show.</p>	<p>Class plaintiffs dispute this statement because Mr. Schaffer's "belief" about what "the writers and producers of Saturday Night Live thought" is immaterial and inadmissible. In fact, NBC requested that the "Lazy Sunday" clip, as well as "thousands" of other clips, be removed from the YouTube website.</p> <p>Declaration of Chad Hurley Hurley, Ex. 31 (Letter from NBC Universal to Chad Hurley, February 3, 2006).</p>
<p>208.</p>	<p>6. Given my extensive experience reviewing videos on the YouTube website during the course of my employment, it was and is my belief that these instances where YouTube learned about promotional uses by major media companies were only the tip of the iceberg of the overall marketing taking place on YouTube. In many cases, I strongly suspected</p>	<p>Defendants present no evidence that "these instances where YouTube learned about promotional uses" ever involved a class plaintiff. Defendants also present no admissible evidence to support the claim that "these instances" "were only the tip of the iceberg." Mr. Schaffer provides no basis for this professed "belief," no basis for his "belief" that "major content owners were acquiescing to their content appearing on YouTube," and no reasons why he "strongly</p>

	<p>that content that appeared to be professionally produced had in fact been uploaded by the rights holder or with the rights holder's permission for marketing purposes. In other cases, I believed that major content owners were acquiescing to their content appearing on YouTube because of the promotional benefit that those clips provided. That belief was informed, in part, by the routine practice of major media companies selectively removing some of their content from YouTube, while apparently letting other content remain active.</p>	<p>suspect[s]" that content "had in fact been uploaded by the rights holder." Mr. Schaffer provides no quantification of such instances, and does not explain how he knew such instances even occurred. Mr. Schaffer also provides no basis for his claim that it was "the routine practice of major media companies [to] selectively remove[e] some of their content from YouTube, while apparently letting other content remain active." In fact, because YouTube denied its content identification tools to content owners, content owners were unable to identify all of the infringing instances of their content on YouTube.</p> <p><i>See CS ¶¶ 94-96.</i></p>
209.	<p>9. This pattern of self-inflicted infringement claims repeated itself often and was well known to the YouTube employees working in the SQUAD department. If lawyers from major media companies were making mistakes about the allegedly infringing status of clips on YouTube despite their superior knowledge of the content at issue and the corporate policies of their clients, it seemed inconceivable to us that YouTube employees could make reliable determinations about the authorization status of clips on YouTube merely because they appeared to be professionally produced.</p>	<p>Class plaintiffs dispute the materiality of this statement. Defendants present no evidence that class plaintiffs engaged in a "pattern of self-inflicted infringement claims."</p>
210.	<p>12. We conducted this spot checking because we had every interest in working with rights owners and no interest in hosting unauthorized content. However, proactive review was problematic for several reasons. First, it did not scale given the increasingly large number of videos being uploaded to YouTube at the time. Second, we quickly learned that proactive removal of content was not</p>	<p>Disputed, <i>see CS ¶¶ 16, 94-96.</i></p>

	<p>very effective. We sometimes removed content that was not, in fact, owned by the media companies on whose behalf we were conducting proactive monitoring.</p>	
<p>211.</p>	<p>13. Our proactive review and removal of content related to American Idol stands out as having led to a number of false positives. We then faced complaints from upset users whose content had been removed without cause. On another occasion in August 2006, YouTube received a DMCA take-down notice from Lucasfilm that contained a request to remove a specific video along with a vaguely-worded statement asking YouTube generally to remove content related to Star Wars movies. In response, we engaged in the proactive review and removal of 1029 videos. We then heard back from Lucasfilm that some of the content we removed had been authorized, as the company generally permits its fans to "remix" and create mash-ups of its content. Lucasfilm asked that we restore all of the videos that we had proactively removed on its behalf and tell our users that the removals had taken place based on a "misunderstanding" instead of because of Lucasfilms' take-down notice. We complied with that request. Attached hereto as Exhibits 2, 3 are true and correct copies of email messages between representatives from Lucasfilm and me reflecting this incident. These experiences taught us that the rights holders themselves were in a much better position to make determinations about the authorization status of videos appearing on YouTube, and we strived to offer them tools that would assist them in doing so.</p>	<p>Rights holders are not "in a much better position" to remove their content from the YouTube website, because unlike YouTube itself, they have no way of preventing the content from being shown on the web site in the first place, and YouTube has denied them the content identification tools that would in fact allow them to identify and remove or block their content from the site. <i>See CS ¶¶ 16, 33, 94-96.</i> In fact, YouTube counted on these obstacles as a means to keep infringing content on the site for as long as possible. <i>See CS ¶¶ 6, 25.</i></p>

	Declaration of Hunter Walk	Evidence Controverting Declaration of Hunter Walk
212.	2. YouTube is a site where users are able to upload and broadcast videos about themselves: their ideas, their talents, their message. YouTube's name intentionally reflects that goal by emphasizing "you" - <i>i.e.</i> , your own, original videos. Its longtime slogan, "Broadcast Yourself," is still prominently featured on the service and reinforces that message.	Disputed, <i>see</i> CS ¶ 6-7.
213.	3. The videos available for viewing on YouTube are uploaded by YouTube's millions of users, who range from the families posting their home movies to the largest movie and television studios posting clips for promotional purposes.	Class plaintiffs dispute any inference that YouTube does not control what gets uploaded and viewed on its website. <i>See</i> CS ¶ 16.
214.	4. These hundreds of millions of videos that users have posted to YouTube are staggeringly diverse. They are in every language imaginable, covering virtually every facet of the human experience. They come in from all around the globe, and even from outer space. Some are created using sophisticated video technology; others are created using crude cell phone video cameras. While some of those videos are submitted by the numerous media companies, large and small, that have negotiated licensing deals with YouTube, many more are submitted by ordinary people.	Class plaintiffs dispute any inference that YouTube does not control what gets uploaded and viewed on its website. <i>See</i> CS ¶ 16. Class plaintiffs also dispute any inference that YouTube's financial value does not derive from the presence of the premium entertainment content on the site, most of which is unlicensed. <i>See</i> CS ¶ 160, 164, 167.
215.	5. I have set forth in this declaration a sampling of the kinds of videos that can be found on YouTube. But any attempt to capture the full scope of the kinds of videos available on YouTube in words necessarily fails. It	Disputed. Defendants present no evidence that the cherry-picked selection of videos attached to Mr. Walk's declaration is in any way a meaningful or relevant "sample," let alone a statistically appropriate one. Mr. Walk also provides no basis for, or any evidence supporting, his claim that

	<p>is much like trying to describe the human experience. And for every remarkable example we actually know about, there are invariably thousands more like it that are available through our service.</p>	<p>“there are invariably thousands more like it that are available through our service.”</p>
<p>216.</p>	<p>13. In addition to posting lectures, many colleges and universities are also using YouTube to connect with prospective students. For example, Yale University recently uploaded an admissions video titled, "That's Why I Chose Yale", a musical spoof of the popular "High School Musical" movies. <i>See</i> http://www.youtube.com/watch?v=tGn3-RW8Ajk. Likewise, prospective students are using YouTube videos to supplement their college applications. Tufts University has even added an option to its application process inviting students to post a short video about themselves to YouTube. Attached as Exhibit 2 is an article that appeared on NewYorkTimes.com on February 23, 2010, titled <i>To Impress, Tufts Prospects Turn to YouTube</i>. <i>See also</i> http://www.youtube.com/watch?v=SGJMoYcM8yY (example of student admissions video submission to Tufts).</p>	<p>Disputed. Other than the cherry-picked videos referenced in his declaration, Mr. Walk provides no evidence that other similar videos have been uploaded to YouTube, no evidence that, even if there are more such videos, they represent more than a miniscule proportion of the videos on YouTube, and no evidence of the proportion of traffic that such videos drive to YouTube.</p>
<p>217.</p>	<p>14. YouTube users have also invented yet another way to educate the YouTube community: by posting a treasure trove of "how-to" videos that provide other users with instructions on how to accomplish just about anything, from baking a chocolate cake, to fixing a leaky faucet, to traveling on a budget, to creating your own website. <i>See, e.g.,</i> http://www.youtube.com/watch?v=7jRE3xRm8Vk (How to Travel Cheaply); http://www.youtube.com/watch?v=Ph</p>	<p>Disputed. Other than the cherry-picked videos referenced in his declaration, Mr. Walk provides no evidence that other similar videos have been uploaded to YouTube, no evidence that, even if there are more such videos, they represent more than a miniscule proportion of the videos on YouTube, and no evidence of the proportion of traffic that such videos drive to YouTube.</p>

	<p>jw9dzHU-O (How to Fix a Leaky Faucet); http://www.youtube.com/watch?v=msTLasQFhrc (How to Make Chocolate Cake); http://www.youtube.com/watch?v=pTHc5wB-u8w (How to Create Your Own Website).</p>	
<p>218.</p>	<p>15. Perhaps one of the most exciting outgrowths of this "how to" phenomenon is the YouTube Reporters' Center, a channel on YouTube dedicated to citizens interested in reporting the news and events happening around them. The YouTube Reporters' Center features how-to videos from some of the industry's most respected journalists and media experts, including Katie Couric of the CBS Evening News, Bob Woodward of the Washington Post, Scott Simon of NPR, and Tavis Smiley of PBS. <i>See</i> http://www.youtube.com/user/reporterscenter (YouTube Reporters' Center Channel).</p>	<p>Disputed. Other than the cherry-picked videos referenced in his declaration, Mr. Walk provides no evidence that other similar videos have been uploaded to YouTube, no evidence that, even if there are more such videos, they represent more than a miniscule proportion of the videos on YouTube, and no evidence of the proportion of traffic that such videos drive to YouTube.</p>

<p>219.</p>	<p>17. Major movie and televisions studios, sports leagues, news organizations and other companies have also embraced the YouTube service. These organizations use YouTube for a myriad of purposes, including:</p> <p>Advertising - both overtly and covertly - by companies like Ray Ban, American Express and E*Trade... .</p>	<p>Class plaintiffs dispute that any of the videos referenced by Mr. Walk were uploaded “covertly.” All of the videos cite or provide links to their sponsors in the titles or descriptions of the videos. Additionally, defendants present no evidence that YouTube did not know these videos were authorized to be uploaded by their owners.</p>
<p>220.</p>	<p>18. Celebrities from media moguls to musicians to athletes have used YouTube to promote both themselves and the causes they believe in... .</p>	<p>Class plaintiffs dispute the materiality of this statement. Class plaintiffs dispute any inference that YouTube did not know these videos were authorized. All of the cited videos are on official YouTube branded “channels.”</p>
<p>221.</p>	<p>20. With all of the transformative, professional, informational and educational uses of YouTube, many videos feature ordinary users simply sharing pieces of their lives from the mundane to the extraordinary, from the silly to the profound. With each of these videos, whether they are viewed 50 times or 50 million times, YouTube users have the opportunity to share their talents, ideas and creativity and to connect with the global community. Some of the videos posted by YouTube's users include... .</p>	<p>Disputed. Other than the cherry-picked videos referenced in his declaration, Mr. Walk provides no evidence that other similar videos have been uploaded to YouTube, no evidence that, even if there are more such videos, they represent more than a miniscule proportion of the videos on YouTube, and no evidence of the proportion of traffic that such videos drive to YouTube.</p>
	<p>Declaration of Roelof Botha</p>	<p>Evidence Controverting Declaration of Roelof Botha</p>
<p>222.</p>	<p>3. Based on my initial experiences</p>	<p>YouTube promoted the presence of unauthorized</p>

	<p>with the YouTube service and the way that the service described itself to users, it was my understanding that the service was designed and intended for this sort of sharing of “user-generated content.” At the time, services that facilitated the sharing of other forms of user-generated content were already well known and successful. For example, services like Flickr, Shutterfly and Webshots and a host of others allowed users to easily share photographs with one another. Services like Blogger allowed ordinary users to express their views in writing on any topic and publish those thoughts to the world. I saw YouTube as a next step in the evolution of user-generated content services, one that would allow ordinary users to express themselves to the world through the medium of video. I felt that the growth potential for such a platform was enormous given the rapid spread of personal video cameras and the growing availability of broadband Internet connectivity to ordinary consumers.</p>	<p>premium content on its site to Mr. Botha. See CS ¶ 6-7, 9. In an email to Mr. Botha, YouTube drew similarities between itself and the website Flickr, stating that “copyrighted and inappropriate content will find its way onto the site... The actual removal of this content will be in varying degrees... That way, the <i>perception</i> is that we are concerned about this type of material and we’re actively monitoring it. [But the] actual removal of this content will be in varying degrees.” (emphasis added) (Tab 63)</p>
<p>223.</p>	<p>5. In at least two separate meetings in or about August or September 2005, the YouTube founders described their vision of the service to me and certain Sequoia partners. In those meetings, the founders emphasized that their aim was to develop a platform to be used for the sharing of user-generated content online. Attached hereto as Exhibit 1 is a true and correct copy of the presentation that the YouTube founders presented to me and certain partners at Sequoia regarding their vision for the service in September 2005. In describing the company’s purpose, the founders stated: “The</p>	<p>The founders’ goal was to increase traffic as fast as possible in order to “sell out quickly.” CS ¶ 6. The founders and Mr. Botha knew that their traffic depended on infringing professionally-produced content. Sequoia itself expressed concern, prior to its investment, that the site might not “ever gain a significant audience, gain significant traffic or traction, given the focus on user-generated videos” (Botha dep. at 32). In April 2006, Chad Hurley emailed an article to Mr. Botha noting that according to the article author, a survey of YouTube’s most popular videos were 90% copyright protected professionally produced content (Tab 192). In June 2006, Botha wrote that it was “it was critical to provider consumers with... professionally-produced content on the YouTube</p>

	<p>company’s goal is to become the primary outlet of user generated video content on the Internet, and to allow anyone to upload, share, and browse this content.” Their presentation to us went on to explain the reasons why they believed a service like YouTube was then poised for significant growth: “Digital video recording technology is for the first time cheap enough to massproduce and integrate into existing consumer products, such as digital photo cameras and cell phones, giving anyone the ability to create video content anytime, anywhere. As a result, user-generated video content will explode.”</p>	<p>platform” Tab 286 (Bates SC 009405); Tab 282 (Lamond Tr. at 107:21-109:2; 111:11-112:20). In fact, YouTube deliberately gained its audience through premium entertainment content on its site, not “user-generated video.” See CS ¶ 223.</p>
224.	<p>6. At no time during our pre-investment meetings with the YouTube founders did any of the founders express any interest in profiting from the sharing of unauthorized copyrighted material through the service or in having the service grow by virtue of the presence of such content. Indeed, the founders did not merely say that user-generated content was their focus, they offered that focus as the rationale for Sequoia to expect the company to grow, and as a means of differentiating YouTube from other online video services in existence at the time.</p>	<p>Disputed, see CS ¶ 223. Class plaintiffs also dispute this statement because Mr. Botha refused to testify at his deposition concerning a pre-investment meeting where copyright issues were discussed. Accordingly, Mr. Botha cannot now testify to statements that were made during pre-investment meetings about copyrighted material on the site.</p>
225.	<p>7. Following our meetings with the YouTube founders, I prepared an investment memorandum for the Sequoia partnership summarizing what the founders had communicated to us in our meetings and providing a recommendation that Sequoia invest in YouTube. A true and correct copy of the investment memorandum I prepared is attached hereto as Exhibit 2. I led off my memorandum by</p>	<p>Disputed, see CS ¶ [REDACTED]. Mr. Botha highlighted in other memoranda the “critical” need for YouTube to show “professionally-produced content.” The fact that YouTube depended on large amounts of unauthorized premium content on the YouTube site was also communicated to Mr. Botha. See CS ¶¶ 6-7.</p>

	<p>recounting the company’s objective of becoming the “primary outlet of user generated video content on the Internet” and throughout the memorandum I highlighted statements from the founders about how such original user content was the engine that would drive the service.</p>	
226.	<p>8. Following my recommendation, Sequoia offered and YouTube accepted an investment in the company in the fourth quarter of 2005. Attached hereto as Exhibit 3 is a true and correct copy of the press release YouTube subsequently issued announcing Sequoia’s investment. In that release, on behalf of Sequoia, I reiterated our vision of the YouTube service which mirrored that expressed to me repeatedly by the company’s founders: “We are very excited to be involved with YouTube at a time when consumers are poised to benefit from all the consumer electronics available. The demand for user-generated content continues to grow exponentially.” “We've already seen user-generated content blossom in text through blogging, in photographs through services like Flickr and Shutterfly, and in audio through podcasting. YouTube is pioneering the next wave to become Internet's premier video service.”</p>	<p>Class plaintiffs dispute that the quoted prepared statement “reiterated our vision of the YouTube service” or “mirrored that expressed to me repeatedly by the company’s founders.”</p> <p>See CS ¶¶ 6-7.</p>
227.	<p>10. After Sequoia’s initial investment, YouTube experienced extraordinary and rapid growth. As I had witnessed firsthand, the service made it simple for the average person to upload a video they wanted others to see. The service was just as intuitive and accessible for potential audiences. Within just a few months,</p>	<p>Class disputed dispute any inference that YouTube was a “destination” for users looking for user-generated content. YouTube was primarily a destination for users looking for premium entertainment content.</p> <p>See CS ¶¶ 25.</p>

	<p>as online video consumption soared, YouTube became the online destination of choice for anyone looking to share their videos, and correspondingly, the online destination of choice for those interested in watching those videos.</p>	
<p>228.</p>	<p>13. YouTube did not know who held the copyright in the Lazy Sunday clip, who had uploaded it to YouTube, whether that person had advance approval from the copyright holder to upload it, whether the copyright holder subsequently approved of the presence of the clip on YouTube even if the copyright holder had not done so in advance, or even whether such approval was required. But in light of the attention the clip had garnered, the company’s CEO, Chad Hurley, wrote to NBC Universal asking whether NBC was aware of the clip and whether NBC wanted it to remain on the service or wanted YouTube to immediately remove it. For five weeks, YouTube heard nothing at all from NBC, and with NBC’s knowledge, the Lazy Sunday video remained accessible on the YouTube service, continuing to generate large numbers of user views as well as national press attention.</p>	<p>Mr. Botha and YouTube did know who owned the rights to the “Lazy Sunday” clip. As Mr. Botha testified at his deposition, YouTube “notified the owners of that show” – NBC – that the clip was on their site. Soon after NBC formally demanded that it be taken down, along with “thousands” of other clips. YouTube later offered content identification tools to NBC in exchange for NBC licensing its content to YouTube and agreeing to use those tools to “claim” and not “block” its content from the site.</p> <p>(Tab 205)(Botha Tr. 153) See CS ¶¶ 94-96</p>
<p>229.</p>	<p>14. The Nike and Lazy Sunday experiences and many others like them helped shape my thinking about how YouTube should handle the presence on the service of potentially unauthorized copyrighted materials. Throughout my tenure on YouTube’s board, this was one of the principal issues the company grappled with. From the start, YouTube recognized that in an environment in which users could upload content of their choosing to the service, some users</p>	<p>YouTube had the ability to determine what content on its website was infringing and what was not. In fact, YouTube exercised that ability, but only on behalf of favored content owners. Mr. Botha presents no evidence for his conclusion that YouTube did not have such an ability. The “policy measures” outlined by Mr. Botha were ones that YouTube (and Mr. Botha) knew were ineffective, or were only offered to favored content partners.</p> <p>See CS ¶¶ 16, 33, 94-96.</p>

	<p>would disregard the company’s prohibitions and desires and upload material to the service that they did not have the right to share. The company recognized, however, that it had no practical ability to make determinations regarding whether each of the tens of thousands of clips being uploaded to the service every day had been uploaded or approved by the copyright holder or was otherwise authorized by law. Accordingly, the company discussed and supported a host of innovations and policy measures aimed at reducing the incidence of unauthorized copyrighted material on the service. These included, among many others: (1) the institution of a ten minute time limit for the length of videos that could be uploaded to the service to prevent users from uploading full-length television episodes or films; (2) development of an easy-to-use interface through which content owners could identify what they claimed to be their content on the service and request that YouTube remove it at the touch of a button; and (3) fingerprinting technology that would block any user from uploading to the service a file that had previously been removed from the service based on allegations of copyright infringement. Later, the company selected and implemented a more robust, audio fingerprinting technology to assist content owners in locating videos on the service and allow them to determine whether they wanted those videos to remain.</p>	
<p>230.</p>	<p>15. During my association with the company, management and the board worked hard to strike the appropriate balance between preserving the ability of users to express themselves</p>	<p>Disputed, <i>see</i> CS ¶¶ 16, 33, 25, 160, 164, 167.</p>

	<p>freely through the YouTube service while at the same time enabling content owners to detect and address what they perceived to be the unauthorized use of their material. At no time, however, based on my observations and participation in the strategic and policy decisions the company made, did the company desire to profit from unauthorized copyrighted material on the service or to have the service used as a platform for the sharing of unauthorized copyrighted content.</p>	
<p>231.</p>	<p>16. I felt very strongly as a member of YouTube’s board of directors that, legal issues aside, the company should not encourage, and that it should explicitly discourage, the sharing of unauthorized copyrighted material. I believed that the presence of such content on the service undermined YouTube’s business objectives by alienating copyright holders, including major media companies, with whom YouTube had reached or wanted to reach advertising and content syndication deals. Moreover, from my perspective as a major investor in the company, I believed that if the company did not demonstrate its respect for copyright law, the service would be unattractive as an acquisition target and/or unable to sell its stock to the public. For these and related reasons, throughout my association with YouTube, the company actively cooperated with copyright holders to reduce the incidence of unauthorized copyrighted material on the service</p>	<p>To become a lucrative acquisition target, YouTube knew that it needed to increase traffic and attract a huge audience, and it knew that its traffic depended on the unauthorized premium content that its users came to the site to see. <i>See</i> CS ¶ 25. And despite Google’s view that YouTube’s “business model was completely sustained by pirated content,” Google decided it was an acceptable risk given the value of the huge audience YouTube had created based on that content.</p> <p><i>See</i> CS¶ 29.</p>
	<p>Declaration of Michael Solomon</p>	<p>Evidence Contraverting Declaration of Michael Solomon</p>

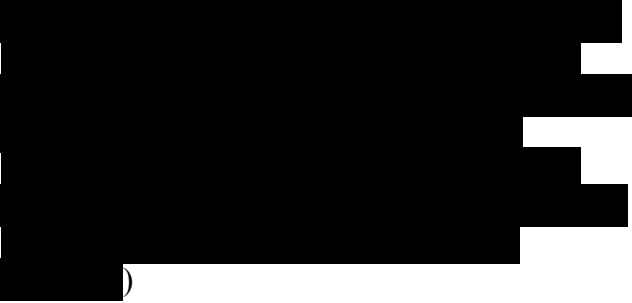
<p>232.</p>	<p>4. When a user uploads a video, the user also provides a title of his own making for the video and chooses "tags," or keywords, that the user believes describe the video. For instance, a surfing video might be tagged with "surfing," "water," and "waves," and be titled "Sarah's 30th Birthday." Like the title the user provides for the video, the choice of tags is completely up to the user. Similarly, the user selects a category from the broad selection of categories presented by the YouTube system that the user believes fits the uploaded video. The selection of category is entirely within the user's discretion.</p>	<p>Defendants use these different metadata fields [REDACTED] to control what gets watched on the site. All of these fields are indexed in YouTube's search algorithm, which uses them to match future user queries to produce the most relevant results. YouTube also runs its own "advanced text search" tools to identify content using these indexed metadata fields. In addition, videos uploaded by content partners are marked as partner videos by YouTube.</p> <p>(Tab 288) (Kacholia Tr. at 57:1-58:14; 180:16-181:17)</p> <p>See CS ¶ 94.</p>
	<p>Michael H. Rubin Declaration</p>	<p>Evidence controverting Michael H. Rubin Declaration</p>
<p>233.</p>	<p>4. Attached hereto as Exhibit 69 is a table that I prepared identifying a selection of documents produced in discovery by the parties and third parties showing instances in which various companies sent to YouTube takedown notices for videos they had uploaded or authorized to appear on the YouTube site, including cases that resulted in the suspension or termination of their YouTube accounts. True and correct copies of the documents identified in that table are attached hereto as Exhibits 70-83. The information contained in the table is drawn from the underlying exhibits.</p>	<p>Class plaintiffs dispute any inference that there were more than an insignificant number of "instances in which various companies sent to YouTube takedown notices for videos they had uploaded or authorized to appear on the YouTube site." Defendants here cite to 14 purported examples of such instances, but admit that 4.7 million videos were removed from the YouTube website pursuant to takedown notices alone. Declaration of Zahavah Levine, ¶ 26. These only account for the works or infringements for which Defendants received a formal notice from the copyright claimant, not all the other videos that it knew were infringing, even in the absence of such a notice.</p> <p>See CS ¶¶ 33, 94-96.</p>
<p>234.</p>	<p>8. Viacom employee Michael Housley submitted a declaration in the Viacom action in early 2008 attesting to the time-consuming, multi-step, multireview process that Viacom used to identify its Clips in Suit. A true and correct copy of the February 28, 2008</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>

	<p>Declaration of Michael Housley is attached hereto as Exhibit 118.</p>	
<p>235.</p>	<p>17. In response to YouTube’s Request for Production No. 140, which sought “one copy of each video file used in connection with the promotion or marketing of any work in suit,” Viacom agreed to produce the requested files with two exceptions: they would not produce (i) promo videos shorter than 30 seconds or (ii) multiple versions of promo videos where the only difference was the “call to action.” Attached hereto as Exhibit 130 is a true and correct copy of Viacom’s Amended Responses and Objections to YouTube’s Fourth Set of Requests for Production. Viacom ultimately produced a number of DVDs that they told me contain promo videos. I reviewed many of the promo videos on those DVDs and compared them to certain of the Viacom Clips in Suit. Based on this analysis, I have determined that many of Viacom’s Clips in Suit are indistinguishable from the promo videos it produced. Attached hereto as Exhibit 131 is a chart showing a sample of more than one hundred Clips in Suit that appear indistinguishable from promo videos that Viacom produced. Exhibits 132A through 176B constitute the promo videos identified on Exhibit 131, while Exhibits 177A to 310B constitute the Clips in Suit identified on Exhibit 131. The “A” version is the original file format and the “B” version is a copy of the same file converted to the MPEG file format. For the promo videos, the Version A files were produced by Viacom in this action; for the matching YouTube videos, the Version A files are versions of the “Flash” (or “.flv”)</p>	<p>Class plaintiffs dispute that the “analysis” purportedly conducted by Mr. Rubin is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>

	files, as stored on YouTube’s servers (see Declaration of Michael Solomon, submitted concurrently, at ¶ 12, which explains the manner in which those videos were obtained from YouTube’s servers).	
236.	18. I have reviewed documents and testimony that cumulatively reference thousands of clips authorized by Viacom to be posted on YouTube. This includes, inter alia, whitelists provided by Viacom to BayTSP; DMCA counternotices from Viacom and its marketing agents sent to YouTube after Viacom mistakenly took down its own authorized videos; reports from Viacom’s marketing agents, such as ICED Media, Fanscape, and Wiredset, detailing their uploads to YouTube; email correspondence among members of Viacom’s various marketing departments; and the accounts on the YouTube website of the usernames that Viacom admitted in response to Requests for Admission were used by Viacom for its authorized uploads.	Mr. Rubin fails to cite any of the “documents and testimony” that he purportedly “reviewed,” and Class plaintiffs dispute that Mr. Rubin’s “review” of unspecified material is admissible evidence or relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.
	Certain Statements in Defendants’ Memorandum of Law	Evidence Controverting Certain Statements in Defendants’ Memorandum of Law
237.	Def. Mem. at p. 5: Although it only scratches the surface, a short video called “This Is YouTube,” which can be found at http://www.youtube.com/watch?v=ojqWcILQOxk and is also attached\ to this brief, provides a useful introduction to the array of creative and inspiring material found on YouTube. <i>See</i> Schapiro Ex. 2.	This video was self-servingly created and uploaded by YouTube to the YouTube website on March 4, 2010, the day before defendants’ summary judgment motions were due. Class plaintiffs dispute any inference that this cherry-picked video is representative of the content on YouTube, or that it is representative of the content that primarily draws viewers to the YouTube website. (Tab 276) (Screenshot from www.youtube.com - “This is YouTube”)

238.	Def. Mem. at pp. 37 and n.12: The melodies and lyrics of many of the putative class plaintiffs’ musical compositions—and the video footage that plaintiff Tur has put at issue likewise would not be readily recognizable to YouTube.	With respect to the titles of works cited by defendants, class plaintiffs dispute any inference that YouTube was without information to identify the videos on its website that infringed those works, and note that, in addition to the video and audio content, the titles, descriptions and other metadata associated with the videos make plain that the videos were likely infringing of class plaintiffs’ premium copyrighted content (for example, by identifying the song and the artist or composer). The metadata for YouTube videos that infringe the works cited by defendants is attached as Gitterman Decl., Ex. 1.
239.	Def. Mem. at pp. 38 and n.13: Plaintiffs cannot seriously contend that it would have been apparent to any reasonable service provider “from a brief and casual viewing” of short clips from works like these that they misappropriated plaintiffs’ copyrighted content.	With respect to the videos cited by defendants, containing certain of class plaintiffs’ “clips in suit,” class plaintiffs dispute any inference that YouTube was without information or reason to believe that these were what they appeared to be, and note that, in addition to the video and audio content, the titles, descriptions and other metadata associated with the videos made plain that they were likely infringing of class plaintiffs’ premium copyrighted content (for example, by identifying the song and the artist or composer, or the sports match being played). The metadata for the videos cited by defendants are attached as Gitterman Decl., Ex. 2. Class plaintiffs also note that defendants misdescribe Schapiro Ex. Ex. 193A/193B (Def. Mem. n. 13). In fact, as the description for the video makes plain, the video contains the song “I’m confessin’” performed by Lizz Wright. The publishing rights to that song are owned by plaintiff Bourne Company. <i>Id.</i> at 2, cell D5.
Additional Statement of Material Facts		
	Class plaintiffs' additional material fact	Evidence
240.	More than two years after YouTube’s launch, music represented the majority of playback queries, all of	<i>See</i> CS ¶ 25. <i>See also</i> Statement 241, below.

	<p>which were for established and well-known music stars. In May 2007, music was the most-searched category on YouTube.</p>	
241.	<p>Legal use of music involves two distinct copyrights, one in the sound recording and a second in the underlying musical composition. Music publisher authorization to use the underlying musical composition embodied in a song is required in virtually every scenario where music content is posted to the site. YouTube was aware of the need to obtain publisher licenses for all music content posted on the site, including by individual users, and that such publisher licenses might be required from multiple publishers for a single sound recording.</p>	<p><i>See</i> Tabs 66, 72, 157, 170, 194, 200, 206, 270, 311, 317-322.</p> <p>See also, Class SUF ¶ 24.</p> <p>(Tab 320) (King Tr. 6:25-7:2) (King started in January 2007)</p> <p>(Tab 317) (GOO001-01401528)</p> <p>(Tab 318) (“For music content, we need the following information before we can consider our license complete: Sound recording license from label. Composition licenses from publishers totalling 100%) (GOO001-01517877-78)</p> <p>(Tab 199) (“we have been delaying sharing the CYC tool with music partners until the publisher deals are in place. However does it makes sense to share the tool with UPAG and EMI label with the understanding that they can only claim official label produced videos where they already have the rights.”)</p> <p>(Tab 336) (GOO001-02081141.0007)</p> <p>(Tab 337) (GOO001-00947673)</p>
242.	<p>David King proposed building content management tools that would allow copyright owners to have insight into what was happening with their content on YouTube, however YouTube recognized the potential for conflicting directives from record labels and music publishers, and did not want to remove videos from the site in the event the owner of a sound recording claimed user-generated content, but did not have music publisher authorization.</p>	<p>Tab 157 (GOO001-01179621); Tab 72 (GOO001-01905261)</p>

<p>243.</p>	<p>YouTube delayed offering use of its content management tools until it had deals in place with large music publishers. During 2007, YouTube entered into licensing relationships with publishers EMI Entertainment World, Inc., Sony/ATV, and Universal Music Publishing. These publisher licensing deals required the music publisher to enter into agreements allowing the record label to pass through licensing rights from the publisher to YouTube for content produced by the record label. The publisher licensing deals also authorized YouTube to use such publisher's compositions when included in user-generated content.</p>	<p><i>See</i> Statement 241 above. <i>See also</i>, (Tab 161) (EMI Music Marketing - ) (Tab 322) (GOO001-09595431) (Tab 323) GOO001-09595472) (Tab 321 (GOO001-09684720) (UMPG Agreement)</p>
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Dated: New York, New York
May 7, 2010

Respectfully submitted,



Charles S. Sims
William M. Hart
Noah Siskind Gitterman
Elizabeth Anne Figueira
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
Telephone: (212) 969-3000
Email: csims@proskauer.com
-and-

Max W. Berger
John C. Browne
BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Email: mwb@blbglaw.com
*Attorneys For The Football Association
Premier League Limited, Bourne Co., Murbo
Music Publishing, Inc., Cherry Lane Music
Publishing Company, Inc., Robert Tur d/b/a
Los Angeles News Service, X-Ray Dog Music,
Inc., and Fédération Française de Tennis and
Proposed Class Counsel For The Prospective
Class*

Louis M. Solomon
Hal S. Shaftel
Cadwalader, Wickersham & Taft LLP
One World Financial Center
New York, NY 10281
Email: louis.solomon@cwt.com
*Attorneys For The Football Association
Premier League Limited*

Daniel Girard
Aaron Sheanin
Christina Connolly Sharp
GIRARD GIBBS LLP

601 California Street, 14th Floor
San Francisco, CA 94108

-and-

Gerald E. Martin
Laurel Johnston
BARRETT JOHNSTON & PARSLEY
217 Second Avenue North
Nashville, TN 37201

-and-

Kevin Doherty
BURR & FORMAN LLP
700 Two American Center
3102 West End Avenue
Nashville, TN 37203
Attorneys for Cal IV Entertainment LLC

David S. Stellings
Annika K. Martin
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10017-2024
Tel. (212) 355-9500
Fax. (212) 355-9592

-and-

Jacqueline Charlesworth
James E. Hough
MORRISON & FOERSTER
1290 Avenue of the Americas
New York, New York 10104
Phone (212) 468-8158
Facsimile (212) 468-7900
*Attorneys for the National Music Publishers'
Association, Rodgers & Hammerstein
Organization, Stage Three Music (US), Inc.,
Edward B. Marks Music Company, Freddy
Bienstock Music Company d/b/a Bienstock
Publishing Company, and Alley Music
Corporation*

Christopher Lovell
Christopher M. McGrath
LOVELL STEWART HALEBIAN LLP
61 Broadway, Suite 501
New York, New York 10110
Telephone: (212) 608-1900

Facsimile: (212) 719-4677

-and-

Jeffrey L. Graubart

LAW OFFICES OF JEFFREY L.

GRAUBART

350 West Colorado Boulevard, Suite 200

Pasadena, California 91105-1855

Telephone: (626) 304-2800

Facsimile: (626) 304-2807

-and-

Steve D'Onofrio

5335 Wisconsin Avenue, N.W. Suite 950

Washington, D.C. 20015

Telephone: (202) 686-2872

Facsimile: (202) 686-2875

*Attorneys for The Music Force Media Group
LLC, The Music Force LLC, and Sin-Drome
Records, Ltd.*

TO:

Andrew H. Schapiro, Esq.
A. John P. Mancini, Esq.
Matthew D. Ingber, Esq.
MAYER BROWN LLP
1675 Broadway
New York, NY 10019-5820
Telephone (212) 506 2500
Facsimile (212) 262 1910

David H. Kramer, Esq.
Michael H Rubin, Esq.
Bart E. Volkmer, Esq.
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304
Telephone (650) 493 9300
Facsimile (650) 493-6811

Attorneys for Defendants