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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 ROBERT TUR d/b/a LOS ANGELES
12 NEWS SERVICE,
13 Plaintiff,
14 v.
15 YOUTUBE, INC.,
16 Defendant.

CASE NO.: CV 06-4436 FMC
(AJWx)

DECLARATION OF STEVE
CHEN IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY ADJUDICATION
OF DEFENDANT'S FIRST
AFFIRMATIVE DEFENSE OF
DMCA SAFE HARBOR

Date of Hearing: Jan. 29, 2007
Time: 10:00 a.m.
Court: The Honorable
Florence-Marie
Cooper

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DECLARATION OF STEVE CHEN

3007771

Schaffer
EXHIBIT NO. 16
DATE 7-23-08
Y.FENNELLY CSR5495
Dockets Justia.com

1 I, Steve Chen, declare as follows:

2 1. I was a co-founder of YouTube, Inc., which is now YouTube LLC
3 (collectively "YouTube"), and currently serve as the company's Chief Technical
4 Officer. I have personal knowledge of the facts set forth herein and, if called as a
5 witness, I could and would testify competently to them.

6
7 Background on YouTube

8 2. YouTube was founded in February 2005. At the time, the online
9 sharing of personal photographs was quite popular, but there seemed to be no
10 options for those who wished to share personal videos. My co-founders, Chad
11 Hurley, Jawed Karim, and I decided to do something about this problem. Our aim
12 was to create a service that would allow amateur users to share home-video clips
13 simply and easily. The service would operate much like popular photograph-
14 sharing services of the time such as snapfish.com and flickr.com. It would serve as
15 an online repository or host, to which users could upload content that they wanted
16 other users to be able to view. We chose the name "YouTube" to capture the idea
17 that the service was designed for people who wanted to post their personal videos
18 and broadcasts.

19 3. A beta version of YouTube's online service went live in April 2005.
20 Accessible on the World Wide Web at www.youtube.com, the service allows users
21 to upload short video clips to YouTube's computer servers. A user uploads a video
22 clip by visiting YouTube.com, creating an account with us by filing out a
23 registration form, and then selecting a video file to store on YouTube's servers.
24 The content of each clip is entirely user-controlled, and YouTube does not charge
25 users to upload clips.

26 4. When a user uploads a video clip, she assigns a title to the clip and
27 chooses "tags," or keywords, to identify the video so that users searching the
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1 service for particular types of clips can locate it. The choice of title and tags is
2 entirely within the user's discretion. For instance, a surfing video might be tagged
3 with "surfing," "water," and "waves" and be titled "Mike's 30th Birthday." The
4 selection of tags and titles for a clip is entirely up to the user.

5 5. Once a clip is uploaded to YouTube, anyone with Internet access can
6 search the YouTube website for videos of interest by entering a "query" consisting
7 of "keywords" into our search engine. In response to the query, YouTube will
8 show the user a page or pages containing single reduced-size still images
9 ("thumbnails") from each of those clips matching the keywords for which the user
10 searched. A user can then view a particular clip by clicking on its corresponding
11 thumbnail image and visiting the "watch page" for that clip. YouTube does not
12 charge users to view clips.

13 6. We had no idea when we launched the YouTube service just how
14 popular it would become, or how fast it would grow. In the month of May 2005,
15 only 35 video clips were uploaded to the service. In the month of December 2005,
16 237,000 video clips were uploaded to the service. In July 2006, over 2.1 million
17 new video clips were uploaded to the service, and the service was accessed by 23
18 million unique visitors. Today, the service hosts more than ten million clips. An
19 enormous number of these clips are home-made, original videos created by
20 YouTube's users – the type of content YouTube was created to host. As *Time*
21 *Magazine* explained in naming YouTube the "Best Invention of 2006," our users
22 *invented* YouTube by posting home-made footage of all sorts, from stand-up
23 routines, to video diaries, to delivery-room footage, to amateur musical
24 performances, to eyewitness footage from Hurricane Katrina and the Iraq War. A
25 true and correct copy of the *Time* article is attached to this declaration as Exhibit A.

26 7. We are continually amazed at the ways people have discovered to use
27 YouTube to distribute their content to the world. By way of example only, we
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1 have received campaign advertisements from countless politicians eager to have
2 their messages reach millions of our users for free. Attached hereto as Exhibit B,
3 is a message from Steve Westly's recent campaign for California Secretary of State
4 regarding his advertisement, which is still available on the service at
5 <http://youtube.com/watch?v=OBU-iRBZhYA>. John Edwards, the Democratic
6 nominee for Vice-President in 2004, recently announced his candidacy for
7 President in 2008 via YouTube, uploading a clip at
8 <http://www.youtube.com/watch?v=1etlZaf6zUw>. Nancy Pelosi, the new Speaker
9 of the U.S. House of Representatives, has her own page on the YouTube service
10 (<http://www.youtube.com/profile?user=NancyPelosi>) through which her office
11 regularly posts messages from Congressional representatives. The White House
12 Office of National Drug Control Policy has posted a dozen anti-drug
13 advertisements to the service (which have been viewed by tens of thousands of
14 users (<http://www.youtube.com/ondcp>). We have also learned that Israeli and
15 Lebanese citizens have regularly posted videos recorded from bomb shelters they
16 had to occupy during the recent hostilities between the countries.
17 (http://www.youtube.com/results?search_query=israel+bomb+shelters and
18 http://www.youtube.com/results?search_query=lebanon+bomb+shelters). And law
19 enforcement officials have repeatedly posted clips to the service seeking the
20 public's help in identifying and locating criminal suspects whose faces can be seen
21 in surveillance videos. The clips at <http://youtube.com/watch?v=TwslagFWKIY>
22 and <http://youtube.com/watch?v=ryyNARnv5MA&mode=related&search=> for
23 example, were recently posted by the Franklin, Massachusetts police department.
24 In my experience, for each remarkable example we actually learn about, there are
25 invariably hundreds more that are available through our service.

26 8. YouTube continues to see and describe itself as "a consumer media
27 company for people to watch and share original videos worldwide through a Web
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1 experience.” Our users control the content that is uploaded in exactly the same
2 way that users of any other online hosting service – such as AOL Video, Yahoo!
3 Video, Shutterfly, Kodak Photo Gallery, Blogger, Geocities, Flickr, Photosite,
4 Microsoft Soapbox and many more – control the content they choose to upload and
5 share with others through such online hosts.

6 9. To complement our user-supplied clips, YouTube has entered into
7 numerous licensing arrangements with major copyright holders through which they
8 too make their content available through YouTube to the world. For example, in
9 October of this year, YouTube and CBS Inc. entered into an agreement under
10 which CBS supplied hundreds of copyrighted news and entertainment clips to the
11 YouTube service. In only a month’s time, the clips had been viewed more than 30
12 million times by our users. According to the President of CBS Interactive in a
13 recent press release attached hereto as Exhibit C:

14 Professional content seeds YouTube and allows an open dialogue
15 between established media players and a new set of viewers. We
16 believe this inflection point is the precursor to many exciting
17 developments as we continue to build bridges rather than construct
18 walls.

19 The Executive Vice President of National Hockey League recently
20 expressed similar views about the league’s new relationship with YouTube
21 in a release attached as Exhibit D:

22 The partnership will enable the NHL to expose YouTube’s vast
23 audience to all of the excitement and drama of the new NHL. What a
24 great way to showcase the talent of our athletes.

25 YouTube has entered into similar licensing arrangements with NBC, VH-1,
26 MTV, as well as various record labels and movie studios all of whom have
27 expressly requested and authorized YouTube to distribute their content.

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1 through our service.

2 How YouTube Combats Copyright Infringement

3 10. As they do with any online service, a few of our users upload content
4 to YouTube's service that they do not have the right to share. From the start,
5 YouTube has respected and sought to protect the intellectual property rights of
6 others. It has taken numerous affirmative steps to prevent the unauthorized
7 uploading and viewing of copyrighted content. By way of example only,
8 YouTube: (1) requires users to agree to terms of use that explicitly prohibit users
9 from submitting copyrighted material that they do not have the right or
10 authorization to post; (2) maintains a "Copyright Tips" page to help users
11 determine if their post might be infringing; (3) reminds users, via three separate
12 messages displayed each time they upload a clip, that they are prohibited from
13 uploading copyrighted content unless they have the right or authorization to do so;
14 (4) prevents users with standard accounts from uploading clips longer than ten
15 minutes, thereby preventing the upload of longer-running copyrighted content such
16 as feature-length films and television shows; (5) has registered an agent pursuant to
17 the Digital Millennium Copyright Act ("DMCA"), and expeditiously removes
18 allegedly infringing materials upon receipt of notification of their existence; and
19 (6) terminates the accounts of users who are suspected of repeatedly infringing and
20 restricts those users' ability to create new ones.

21 11. YouTube also offers content owners an electronic tool that enables
22 them to easily identify videos on the service that allegedly contain their content
23 and notify YouTube, under the DMCA, that they wish to have them removed. The
24 tool enables content owners to run text searches and place check marks in boxes
25 next to each of the search results for those videos they contend should be removed.
26 The content owners then just click a button to send their notices and YouTube
27 promptly removes the allegedly infringing clips. We refer to the availability of this
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1 tool as the Content Verification Program, the details of which are available at
2 http://youtube.com/t/copyright_program.

3 12. In addition to these structural and procedural measures, YouTube has
4 deployed various technical measures aimed at preventing users from infringing the
5 copyrights of others. For example, after YouTube receives a notice from a
6 copyright holder requesting removal of specific clips from its service, we create a
7 digital "hash" of the allegedly infringing content that we have been asked to
8 remove. A "hash" is essentially a unique numeric value that is generated by
9 analyzing the attributes of a specific clip. Once we have a hash for a clip that has
10 been removed from the service for alleged copyright infringement, we thereafter
11 prevent any user from uploading a clip with a hash that matches it. There are,
12 however, limits to this technology, as it only detects exact matches. If a user
13 changes the original clip in any way, such as by adding or removing blank frames
14 to it, the hash for the modified clip will not match that of the original, and thus will
15 not be recognized. In a similar fashion, YouTube is currently in the process of
16 implementing state of the art technology that will create an audio fingerprint from
17 clips identified as allegedly infringing, and can thereafter prevent users from
18 uploading any clip containing a matching fingerprint. This filtering technology is
19 cutting edge and more robust than the hashing technology mentioned above.
20 Nonetheless, it may not detect every similar audio file uploaded.

21 13. YouTube has repeatedly received praise from copyright holders for its
22 efforts to prevent and address alleged infringement occurring through the YouTube
23 service. By way of example only:

- 24 • "Thank you for being so darn quick in removing the videos that infringe on
25 our copyrights. You are incredible!!!!" – Ultimate Fighting Championships,
26 or UFC
- 27 • "Thank you always your kind and rapid action against copyright
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1 infringement. (removal of listed videos) I (we) appreciate it very much!"-
2 NHK Japan Broadcasting Corporation

- 3 • "Thank you very much for responding to our request to remove the
4 copyright material so quickly. It is good to see a file-sharing website taking
5 such a responsible approach and hopefully many others will follow your
6 exemplary model." – Token Artists, Australia

7 Copies of these letters are attached to this Declaration as Exhibit E.

8 14. Despite its substantial efforts to prevent copyright infringement by
9 others through its service, YouTube simply does not have the ability to control all
10 of the clips uploaded and accessed through its service. Today, users upload more
11 than 100,000 clips per day, and in October 2006 alone, 23.5 million unique users
12 came to our service to view clips. If a YouTube user chooses to upload a clip that
13 successfully passes through our filters, the clip becomes available for other users to
14 view.

15 15. YouTube does not manually screen videos before they are made
16 available through the service. To do so would be prohibitively expensive (and
17 result in substantial delays) given the volume of user submissions. Moreover, no
18 matter what manual screening process was employed, YouTube could not
19 determine whether a particular user had the right to upload a particular clip. We
20 are in no position to know who the copyright holder is for a particular clip or
21 whether a clip is even subject to copyright protection. For those clips that are
22 copyrighted, we do not know whether the copyright holder is the uploader or has
23 authorized the uploading, whether expressly or impliedly. And YouTube is not in
24 a position to make determinations as to whether an upload is otherwise permitted
25 by any of the various provisions of copyright law, such as the doctrine of fair use.

26 16. The impossibility of this sort of manual screening is highlighted by
27 the numerous examples of major copyright holders and advertisers uploading clips
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1 to the service without notifying us that they have done so. Stories about such
2 “stealth” marketing campaigns are too numerous to mention, but include for
3 example, uploads from BSkyB, Wendy’s Hamburgers, Universal Music, Sony and
4 Nike and many, many more as described in the articles attached hereto as Exhibit
5 F.

6 17. Just as YouTube cannot manually pre-screen content, there is no
7 technology that YouTube could deploy that could identify all of the copyrighted
8 material in existence and screen every clip a user seeks to upload for the presence
9 of such material. Even if such screening technology were possible, YouTube
10 would again have no way to determine whether the user seeking to share the
11 particular clip had the right to do so.

12 18. Given the practical limitations we face, YouTube does what is
13 reasonable: we contractually require the uploader to represent that he or she has the
14 rights to make a clip available to others, we repeatedly warn users about the
15 consequences of unauthorized uploads including in the upload process, we make it
16 as easy as possible for copyright holders to notify us, and we implement those
17 technological filters that are available to us. Beyond this, YouTube relies on
18 copyright holders to notify it of the presence of unauthorized, allegedly infringing
19 material that is accessible through our service. Once we are notified of the
20 existence and location of allegedly infringing material, YouTube acts promptly to
21 block access to or remove it from its service.

22 Advertising that Appears on YouTube

23 19. As noted, YouTube does not charge users a fee either for uploading or
24 viewing clips. Rather, YouTube earns revenue through the display of banner
25 advertising on pages throughout our website. At various times, ads have appeared,
26 for example, on our homepage, on pages displaying thumbnail images of clips
27 responsive to users’ search queries, on pages displaying the most popular (or
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1 highest rated) clips for the day, and on "watch pages" (i.e. the pages at which users
2 view individual clips).

3 20. The banner advertising that YouTube displays is virtually never
4 targeted to the content of a specific clip. That is, the ads shown to users of the
5 service, including on the pages at which users may view clips, are selected without
6 regard to the clip appearing on that page. There are rare exceptions to this
7 approach, where an advertiser wishes to show an ad in connection with a clip that
8 the advertiser itself has supplied (Nike, for example, once displayed an
9 advertisement on YouTube that was targeted to a clip Nike itself posted of a
10 Brazilian soccer star making a miraculous play). But except for such unusual
11 circumstances, the ads that YouTube shows (and has shown in the past) are not in
12 any way tied to the content of the clip available for viewing on the page where an
13 ad appears. Put differently, for purposes of displaying advertising, YouTube treats
14 all clips as equal.

15 21. YouTube has utilized at least two different types of banner
16 advertisements in its existence. The substantial majority of the advertisements
17 shown on YouTube have been Cost-Per-Click ("CPC") ads. With a CPC ad, an
18 advertiser pays nothing for having its advertisement displayed to users. Instead,
19 the advertiser pays only if a user demonstrates his or her interest in the matter
20 being advertised by taking the step of "clicking" on the ad when it is displayed.

21 22. To the extent we display a CPC advertisement on a "watch page," a
22 user can certainly view their selected clip without clicking on the ad, and thus can
23 view the clip without generating any revenue for us. By the same token, a user can
24 click on the ad at any time while the clip is playing, long after the clip has played,
25 or if the clip fails entirely to play, which could happen for any number of reasons
26 (e.g., the user's browser was not configured properly, there was some technical
27 failure on our site, there was a problem with the user's service provider). Our
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1 revenue, if any, from a particular advertisement is independent not only from the
2 content of a particular clip, but from the actual viewing of the clip as well.

3 23. YouTube has also occasionally used another type of advertising under
4 which advertisers pay YouTube each time their ad is shown, whether or not the
5 user clicks on the ad. Each showing of the ad is referred to as an "impression."
6 Like our CPC ads, these "CPM" (for cost-per-mille or cost per thousand
7 impressions) ads can be shown on pages throughout the site.

8 24. As with CPC ads, YouTube's revenue from CPM ads is independent
9 from both the content of a particular clip, and the viewing of that clip. To the
10 extent CPM ads are shown on watch pages, the ad is displayed not because the user
11 has selected a particular clip, but simply because the user has requested to visit
12 *some* page within our web site. It is quite possible that the user would have seen
13 the same ad regardless of what clip the user requested, or if the user requested to
14 visit the YouTube homepage instead of viewing a clip at all. In addition, even on
15 watch pages, CPM ads are displayed whether a clip actually loads, whether it is
16 actually viewed and whether the user stops the clip immediately or at any point
17 thereafter.

18 I declare under penalty of perjury under the laws of the United States of
19 America that the foregoing is true and correct and that this declaration is executed
20 the 5th day of January, 2007, at San Bruno, California.

21
22 
23 _____
24 Steve Chen

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