

Enclosed is Class Plaintiffs' Counterstatement Of Controverted Material Facts In Opposition To Defendants' Motion For Summary Judgment (docket entry no. 240) with certain additional portions unsealed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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"
Rebuttal to Defendants' Disputed Claim: The Parties	
<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 Sindrome 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.”) (JK.00010174)

(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) (JK000061 66)

(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”) (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, see 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. Ex.</i> 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. Ex.</i> 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>See 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. See 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)

Rebuttal to Defendants’ Disputed Claim: How YouTube Works

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.

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.

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.

16. The process of uploading a video to YouTube is initiated by YouTube’s users. *Id.* ¶ 2.

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

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>

	Class SUF ¶ 33.
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>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>
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>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>
21. Anyone with Internet access and standard Internet browsing	YouTube makes its inventory of videos available to "anyone" in order to increase traffic and thereby the value of the site. Defendants

<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> (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] [REDACTED] [REDACTED] (GOO001-02250237)</p> <p>(Tab 201) [REDACTED] [REDACTED] [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]

[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](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>(Tab 132) (“Weekly report with top searches of April 25”) (GOO001-01316227-29.0013)</p> <p>(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)</p> <p>(Tab 222) (Based on an analysis of the top search queries: █████ fall under entertainment - not surprising... █████ (GOO001-01016844)</p> <p>(Tab 194) (“If so, then █████ Premium) of the Top 100 Content Searches (searches that resulted in a playback) are for premium content?...I’m guessing the vast majority of what was watched was actually NOT uploaded by the copyright holder”) (GOO001-00327194-97)</p> <p>(Tab 162) (“Why Music Is Important to YouTube... █████ █████ ... Music Deal Landscape... Indie Lables [sic] & Publishers (Global)... highly fragmented... No one aggregates > 1% of the market... Total Monetizable Watch Page Revenue: █████) (GOO001-02111938-02111953)</p> <p><u>Google Search Suggests Additional Terms</u> (Tab 102) (Search for “manchester united” suggests “Manchester united v. Chelsea”, “Manchester united v. Portsmouth” and “Manchester united v. Newcastle 2008”)</p> <p><u>Agreements Featuring Search Functions</u> (Tab 161) EMI Music Marketing: Schedule 2(c) – “Text & Tag Searching. For EMI content not identified by Video Hashing or Audio Fingerprinting, YouTube shall on EMI’s behalf, at least once a day, run text-based searches in the User-inputted metadata for videos uploaded to the Video Service to locate matches for titles of EMI Sound Recordings and EMI Videos, or artist names, or other key words designated by EMI and designed to detect Blocked Content (“EMI Keywords”). (GOO001-01907142-7190)</p>
<p>26. In response to the query, the service automatically returns a results page that shows the user a page or pages containing single, reduced-size images of the video clips that the search</p>	<p>In response to a search query, YouTube filters the results in a variety of ways. For example, YouTube removes duplicate videos, as well as results that contain content YouTube considers “inappropriate,” or content that has been blocked on behalf of favored content partners. See CS ¶ 16. YouTube also displays advertisements on the results page that are specifically targeted to users’ searches, including searches</p>

<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>
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Rebuttal to Defendants' Disputed Claim: The Quantity and Diversity of Videos Available on YouTube

<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>
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<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>
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	<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.” See CS ¶ 6. By July 2006, high level Google executives concluded that its then-competitor YouTube was a “rogue enabler” of content theft” and a “vidco 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. See CS ¶16; CS ¶¶ 94-96.</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>See 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 of . . . copyrighted content . . . [if] you [are] actively searching for it.</i>") (JK00007479) (emphasis added)</p> <p>(Tab 64) (On at least one occasion, one of the founders uploaded a "stolen" video to YouTube) (JK00006166)</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)

	(Tab 132) (“Weekly report with top searches of April 25”) (GOO001-01316227-29.0013)
<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>See 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. See 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. See CS ¶¶ 160, 164.</p> <p>Class SUF ¶¶ 6, 8, 28, 29, 31, 33.</p> <p>See also 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>
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).	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.
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.	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.
46. Viacom considered buying YouTube. <i>See</i> Schapiro Ex. 3 (77:7-15).	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.
47. Senior executives at Viacom viewed the prospect of	Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement

<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") (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>

	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)
59. YouTube has never encouraged users to engage in copyright infringement. <i>Id.</i>	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.
<u>Rebuttal to Defendants’ Disputed Claim: YouTube’s Registration of a DMCA Agent</u>	
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.	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. Class SUF ¶¶ 17-18.
61. YouTube formally registered its DMCA agent with the Copyright Office in October 2005. Hurley Decl. ¶ 21.	Class Plaintiffs do not dispute this statement.
62. YouTube’s DMCA agent’s contact information is accessible through YouTube’s “Copyright Infringement Notification” page. Levine Decl. ¶ 15.	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. Class SUF ¶¶ 17-18.
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	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>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>Rebuttal to Defendants' Disputed Claim: YouTube's Repeat-Infringer Policy</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> <div data-bbox="594 1608 1474 1801" style="background-color: black; width: 100%; height: 100%;"></div> <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

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. *Id.* ¶ 25; Decl. of David King ("King Decl.") ¶4.

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. *See* 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. *See* 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. *See* CS ¶¶ 94-96.

Class SUF ¶ 17.

(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.)

(Tab 227) (Presentation explaining that md5 hash only work with identical reposts) (GOO001-00561605)

(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)

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.

See CS ¶ 88.

90. In March 2006, YouTube launched its Content Verification Program ("CVP"). *Id.* ¶ 18.

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

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 and 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.”) (GOO001-00827503)</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>See CS ¶ 90.</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>See CS ¶ 90.</p>
<p>93. More than 3,000 content owners have registered to use CVP. <i>Id.</i> ¶ 18.</p>	<p>See CS ¶ 90.</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. See CS ¶ 96. 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.) (Hauptich (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) (EMI Music Marketing - Schedule 2: providing for “audio fingerprinting” and “text-based searches in the User-inputted metadata”).</p> <p>(Tab 170) (SonyATV (2(a): providing for “a content identification and filtering solution at least as good as the industry standard solution” including “[a]udio fingerprinting” and “text-based searches”) (GOO001-09684819-850)</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)

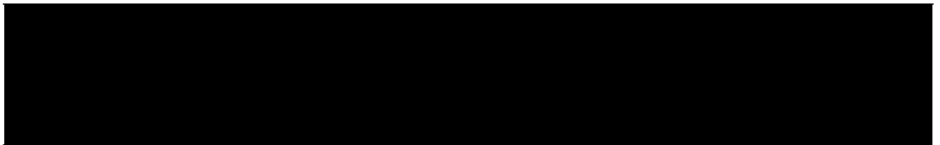
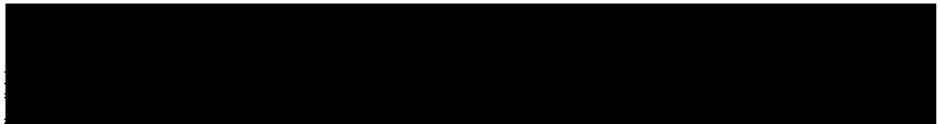
(Tab 206) ("[I]labels can claim block or track without knowing/entering publisher data... If the publisher selected by the record label was not "approved" for payment by YouTube, the *"policy will change to track if it was previously set to monetize.*") (GOO001-02609134)

(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 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). On February 20, 2008, four months later, he received a pro forma contract from YouTube that he was told he needed to sign in order to access the technology (Tab 33). The contract provided for a \$50,000 limit on Defendants' liability, required Cherry Lane to waive various legal rights against Defendants, limited Cherry Lane's ability to make use of third-party fingerprinting technologies, and required Cherry Lane to submit complete</p>

	<p>copies of its works to YouTube without any opportunity to have those copies returned (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>