

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

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

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

<p>Rubin in Support of Defs.’ Mot. for Summary Judgment (“Rubin Decl.”) ¶¶ 7, 16. That total represents less than .02% of the more than 500 million videos ever uploaded to YouTube. Levine Decl. ¶ 26.</p>	<p>exhaustive, of the massive infringement of their works that continues to this day. By denying their content identification processes and technologies to plaintiffs, Defendants have prevented plaintiffs from identifying all of the infringements of their works on the YouTube website. <i>See</i> CS ¶¶ 94-98.</p>
<p>114. The majority of Viacom’s clips in suit are under four minutes long. Rubin Decl. ¶ 15.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>115. Certain of Viacom’s clips in suit are fewer than 10 seconds long. <i>Id.</i></p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>116. The Premier League is suing YouTube over dozens of clips that are under five seconds long, including one that is one second in length. <i>Id.</i> ¶ 16.</p>	<p>Class plaintiffs dispute any inference that the evidence presented by defendants shows more than an insignificant number of clips were “under five seconds long.” The Premier League has asserted more than 775 works in suit that have been infringed in more than 13,000 videos that have appeared on the YouTube website. In total, Premier League has send takedown notices to YouTube for more than 30,000 infringing videos. Although defendants’ attorney Michael Rubin states that, of these thousands of clips, there are “dozens” under five seconds long, defendants identify only three such clips. Moreover, the Premier League’s business involves the licensing of short highlight clips, which are valuable assets apart and in addition to long-form match footage. Defendants considered bidding on a Premier League rights package that would have given them the right to show short clips on their websites, and analyzed the amount of unauthorized Premier League content on the YouTube site in preparation for such a bid, but chose to neither make the bid nor remove the content from their site. The clips-in-suit contain entire songs belonging to class plaintiffs, as well as serial uploads of entire sports matches belonging to class plaintiffs.</p> <p>Class SUF ¶¶ 21-22,</p> <p>(Tab 272) (Listing Premier League infringements) (Weingarten Ex. 10 – Letter from Elizabeth Figueira to Brian Willen on December 2, 2010)</p> <p>(Tab 130) (YouTube estimated “the potential value of various sports content to YouTube.”) (GOO001- 00716143)</p> <p>(Tab 126) (“FAPL + YouTube... Proposed Deal Terms... “Internet Package: FAPL provides individual match highlights... 608 clips per year delivered”... bid level.. aim for \$40mm”) (GOO001-02341606)</p>

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

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

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

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

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

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

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

Rebuttal to Defendants' Disputed Claim: Plaintiffs' Difficulties in Distinguishing Authorized from Unauthorized Content

<p>145. Viacom has sent DMCA takedown notices for videos that Viacom itself uploaded or otherwise authorized to appear on YouTube. Rubin Decl. ¶ 3 & Exs. 42-68 (retracted takedowns); Schaffer Decl. ¶¶ 15-18; Schapiro Exs. 149-150.</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>146. Viacom has sent DMCA takedown notices to YouTube that resulted in the termination of Viacom's own YouTube accounts. Schaffer Decl. ¶¶ 15-16 & Ex. 4; Rubin Decl. ¶ 3 & Exs. 42, 56-67.</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>147. Viacom has requested the takedown of clips that other content owners had authorized to be on YouTube. Schaffer Decl. ¶ 17 & Exs. 5-7.</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>148. Viacom engaged in a "multi-step procedure designed to accurately identify" the clips in suit. Schapiro Decl. Ex. 178.</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>149. Dozens of Viacom's clips in suit were uploaded by Viacom. Rubin Decl. ¶ 9.</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>150. In October 2009, after completing a "quality check" of the clips in suit, Viacom sought to withdraw 241 clips in suit, more than 100 of which Viacom had uploaded to YouTube. Rubin Decl. ¶ 9 & Exs. 119-120.</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>151. On February 26, 2010 Viacom requested dismissal with prejudice of the 241 clips that it had originally</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>sought to withdraw, plus an additional 193 clips, six of which were uploaded by Viacom's marketing agent, WiredSet. Rubin Decl. ¶¶ 12-13 & Exs. 122-123.</p>	
<p>152. Following Viacom's request for dismissal with prejudice of 434 clips on February 26, 2010, there remain clips in suit that Viacom had authorized to appear on YouTube. Rubin Decl. ¶ 14 & Ex. 128.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>
<p>153. The putative class plaintiffs have sent DMCA takedown notices to YouTube that they eventually retracted because of claims by other rights holders. Schapiro Exs. 103 (Response 23), 154, 155 (68:9-72:14), 156 (ST00105023-26), 102 (151:21-154:17).</p>	<p>Out of the <i>tens of thousands</i> of infringing videos that Class Plaintiffs have requested that YouTube remove from its website, there has been only <i>one</i> inadvertent request concerning <i>one</i> specific video. See CS ¶¶ 154-55, below.</p>
<p>154. Cal IV withdrew a DMCA takedown notice it had sent to YouTube after another rights holder filed a counter-notice. <i>Id.</i> Exs. 154, 103 (Response 23), 155 (68:9-72:14).</p>	<p>Defendants focus on five out of more than 300 videos that Cal IV has identified to YouTube as infringing. None of the five videos involve any works-in-suit. Even as to those five, Cal IV did not "withdraw" the takedown notice. As demonstrated by the evidence cited by defendants, in one instance, an independent contractor and Cal IV songwriter, Carey Ott, had uploaded a video containing a Cal IV composition to YouTube without authorization, but subsequently obtained authorization from Cal IV for that specific identifiable usage. On one other occasion, Cal IV, on receipt of a counter-notice from Universal Music with respect to four specific videos, advised Universal that it disagreed with Universal's counter-notice, and sent Universal a copy of its then pending lawsuit against YouTube that was filed in the Middle District of Tennessee on June 6, 2007. Universal submitted no evidence of any right to upload those four specific videos.</p> <p>Gitterman Decl. at ¶ 6 (takedown notices that Cal IV sent to YouTube)</p>
<p>155. Stage Three withdrew a DMCA takedown notice after one of its licensees informed Stage Three that it was authorized to post the clip on YouTube. <i>Id.</i> Exs. 102</p>	<p>Stage Three inadvertently requested the removal of one video out of the 5,185 videos for which it has issued DMCA takedown notices produced in this action.</p> <p>Gitterman Decl. at ¶ 7 (takedown notices that Stage Three sent to YouTube)</p>

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

<p>clips contain content that was copied from one of its musical compositions. <i>Id.</i> Exs. 85 (219:0-220:11), 102 (171:23-172:21), 157.</p>	<p>was retained to assist with broader legal action against the the entities involved in creating the infringing work. Stage Three has readily identified copies of its works in thousands of infringing videos it has asked YouTube to remove from the YouTube website.</p>
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Rebuttal to Defendants' Disputed Claim: YouTube's Revenue Model

<p>160. YouTube is a free service. Hurley Decl. ¶ 2.</p>	<p>The YouTube website is a profit-maximizing enterprise which, by virtue of pervasive infringing content available on the site, has attracted a huge audience that is of enormous financial value to Defendants. Defendants generate profits by selling this audience to "top advertisers." Defendants "primarily" generate revenue from advertisements they run on search pages. Defendants know that users use the search pages to search for premium content, most of which is unlicensed. To maximize revenue, Defendants use their text-based content identification tools to target advertisements to the content of users' searches, including searches for class plaintiffs' unauthorized works. For example, when a user searches for French Open clips, YouTube displays ads for French Open travel packages.</p> <p>Decl. of Suzanne Reider at ¶¶ 3, 5, 8, 10. See CS ¶¶ 6-9, 25, 167 (ads are tied to keywords).</p> <p>(Tab 22) ("based in particular on the recent analysis... done on query stream data... is that Chad's initial conclusion [that 'users... don't want to watch professionally produced content'] is not correct. This data suggests that our users do want to watch professional content, be we haven't yet licensed the content that they're looking for.... Of the Top 100 Playback Queries... Music = 53.35% ... Non -Music Premium = 26.22% Of 'Premium' content queries: ... Sports = 7.85... News = 7.24%") (GOO001-02519871)</p> <p>(Tab 4) ("Revenue will be generated from ads primarily on Search pages (40%)" (GOO001-00375061-65)</p> <p>(Tab 79) ("From a monetization perspective the largest opportunity for revenue resides on the YouTube Search pages.") (GOO001-01295802)</p> <p>(Tab 80) (Hoffner: "This means BOTH monetizable via partners and user unmonetizable. (There is a third bucket down below we need to attack aggressively as well). We need this to get more inventory so that the search numbers continue to go up (concept of unlimited choice rings through here) and more watch pages occur.") (GOO001-00237661)</p> <p>(Tab 99) ("Benefits" to YouTube's advertisers included ability to "target placements on Search pages by selecting from among YouTube's hundreds of content categories, triggered by relevant user keyword queries")</p>
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	<p>(Tab 100) (GOO001-00907818-19) (“we believe search will be stronger than watch.” Rates “will change as content gets claimed AND we program the user experience better/more and strive to create more inventory around premium content.”)</p> <p>(Tab 151) (“as attractive as potential for display and other ads are for watch pages on YT, ads on search results can be significantly more lucrative” and YouTube retains “100% of search results”) (GOO001-00798356)</p> <p>(Tab 159) (YouTube created a “taxonomy and automated classification of search query terms and videos” in order to facilitate “ads targeting for monetization”) (GOO001-01644803)</p> <p>(Tab 168) (Walk: “If Partner Monetization is the focus should we work less on monetizing the site for ourselves (search page monetization) and focus those efforts on making money for partners? Take that 300x250 slot and put it below the promoted videos?”) (GOO001-02737286)</p> <p>(Tab 169) (Early on, YouTube Chen was eager “to do something quick to monetize that search results page in the mean time but not at all excluding future opportunities to further segment and target.”) (GOO001-02816986)</p> <p>(Tab 174) (YouTube placed a “very high priority in monetizing YT search pages” using a technological mechanism that will “have a keyword to vertical mapping system to bucket search queries into marketable categories that advertisers can purchase.”) (GOO001-07165570)</p> <p>(Tab 224) (Advertising on search pages earns the most revenue) (GOO001-02338170)</p> <p>(Tab 225) (For 2007-2009, YouTube predicted revenue of total 3-year revenue of “almost \$1.1 BN (\$878MM for search results and \$200MM for partner / CYC content). (GOO001-02439050)</p> <p>(Tab 306) (“we tell advertisers that if you want to buy against music content, you can buy against music content”) (Reider Tr. 199:24-200:12)</p> <p>(Tab 247) (Declaration of Steve Chen at ¶ 19)</p>
<p>161. YouTube does not charge a subscription fee and does not charge users to upload or to view video clips. <i>Id.</i></p>	<p>Defendants dispute the materiality of this statement. <i>See</i> CS ¶ 160.</p>
<p>162. YouTube generates</p>	<p>The profits YouTube reaps from advertising depend on its ability to draw</p>

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

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

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

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

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

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

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

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

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

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

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

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

<p>168. None of YouTube's advertising offerings in any way favors videos that may not have been authorized to appear on YouTube over authorized videos. <i>Id.</i> ¶ 11.</p>	<p>Disputed, <i>see</i> CS ¶ 167. Class SUF ¶¶ 16, 36-38.</p>
<p>169. Most of the nation's top 100 advertisers purchase advertising on YouTube. <i>Id.</i> ¶ 4.</p>	<p>Class Plaintiffs dispute any inference that YouTube's ability to sell its audience to "top 100 advertisers" legitimizes its business practices in any way. From the outset, YouTube built up an audience that it knew was drawn to its site by the infringing premium content it offered. <i>See</i> CS ¶¶ 6-7. Having built a lucrative audience through the drawing power of infringing content – including class plaintiffs' content – YouTube is now able to sell this audience to "top... advertisers." In January 2007 YouTube decided not to sell advertisements on video watch pages unless it had specifically licensed the video from the relevant rights owners, because YouTube knew that much of its video inventory was unauthorized. Despite this stated policy, advertisements can still be found on watch pages. Defendants' primarily generate revenue by selling advertisements on its search pages. These advertisements are targeted to infringing content, including class plaintiffs' content.</p> <p><i>See</i> CS ¶ 167.</p> <p>Gitterman Decl. at ¶ 9.</p> <p>(Tab 12) ("for legal reasons [...] all ads/monetization on the watch pages for user generated content will need to come down. This will have a tremendous impact on inventory.") (GOO001-02656593)</p>
<p>170. Large media companies run advertisements on YouTube. <i>Id.</i> ¶ 2.</p>	<p>Class Plaintiffs dispute any inference that YouTube's ability to sell its audience to "large media companies" legitimizes its business practices in any way. <i>See</i> CS ¶¶ 169.</p>
<p>171. Viacom has spent more than one million dollars advertising on YouTube. <i>Id.</i> ¶ 4.</p>	<p>Class plaintiffs dispute that the statement is relevant or material to this action. Class plaintiffs further refer the court to the Counter Statement of Facts submitted by the Viacom plaintiffs in the <i>Viacom</i> action.</p>

Class Plaintiffs respond below to certain statements and assertions made in Defendants' fact declarations or Memorandum of Law, and not included or referenced in their Rule 56.1 Statement. The leftmost column continues the paragraph numbering system of the preceding counterstatements, the middle column excerpts statements from defendants' declarations or Memorandum of Law (citing to the relevant paragraph or page number), and the rightmost column cites to evidence controverting the statements.

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

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

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

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

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

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

	Declaration of David King	Evidence controverting Declaration of David King
186.	6. At the time that YouTube licensed Audible Magic's technology, Audible Magic had strong support from the music industry, particularly major record labels such as Warner Music Group and Universal Music Group. It is my understanding that Audible Magic's technology was developed primarily to help those record labels identify their sound recordings on the Internet. Based on my conversations with Audible Magic, I understood that, as of late 2006 and early 2007, virtually all of the reference files that Audible Magic was maintaining in its database were from sound recordings owned by major record labels.	Disputed, except to the extent Audible Magic was already an industry standard and provided infringementg mitigating tools that were available even before YouTube was founded., see CS ¶¶ 97-98. Audible Magic had a database of film and television soundtracks by the time YouTube decided to use Audible magic in 2007. YouTube chose not to use that database to identify content on its site. YouTube also chose to use only reference files of those song recordings belonging to labels who agreed to license their content to YouTube. Mr. King admits in ¶ 10 of his declaration that television and sports league record holders used Audible Magic to identify their content.
187.	9. Rights holders using Audible Magic on YouTube were free to apply whatever usage policy they wished in the event of a match. YouTube's policy was to make CYC (including Audible Magic) open to all rights holders who wanted to use it, regardless of whether the rights holder was doing so in order to block its content from appearing on YouTube or to claim videos for the purpose of monetization.	See CS ¶¶ 94-96. YouTube offered CYC only to content owners who agreed to license their content to YouTube, and demanded that those rights owners use the tool to "claim" content, not block it.
188.	10. There were multiple rights holders that used Audible Magic solely to block videos. [REDACTED] [REDACTED] [REDACTED] [REDACTED] But most rights holders who used CYC chose	Mr. King's statement is controverted by extensive contemporaneous evidence showing that it was defendants' policy to allow content owners to use CYC only if they licensed their content to YouTube. See CS ¶¶ 94-96. Defendants' documents also show that they demanded that content owners use the CYC system to "claim" content, not remove it. <i>Id.</i> Mr. King also presents no evidence concerning whether these four entities in fact did license their content to

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

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

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

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

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

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

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

copy of which is attached as Exhibit 13) complaining about a rash of improper DMCA notices:

By providing a platform for political candidates and the American public to post, view, share, discuss, comment on, mash-up, re-mix, and argue over campaign-related videos, YouTube has played a prominent and overwhelmingly positive role in the 2008 election.

* * *

We write, however, to alert you to a problem that has already chilled this free and uninhibited discourse ... overreaching copyright claims have resulted in the removal of non-infringing campaign videos from YouTube, thus silencing political speech. Numerous times during the course of the campaign, our advertisements or web videos have been the subject of DMCA takedown notices regarding uses that are clearly privileged under the fair use doctrine. . . . Despite the complete lack of merit in these copyright claims, YouTube has removed our videos immediately upon receipt of takedown notices. This is both unfortunate and

	unnecessary.	
	Declaration of Chris Marcy	Evidence Contravening Declaration of Chris Marcy
202.	2. During my tenure at YouTube, I watched the site become enormously popular in a very short period of time. As YouTube's popularity grew, content owners increasingly began to express interest in partnering with YouTube to make their content available through the YouTube service. In late 2005 and early 2006, YouTube was inundated with requests from a wide variety of companies for partnership agreements. But at that time YouTube was still a small and relatively new company with only ten employees, and we did not have the capacity to negotiate deals with all of these companies as quickly as the requests came in.	YouTube specifically targeted major media companies and sports leagues because it knew that users came to its website to view the premium entertainment content owned by those entities. YouTube tried to force these companies to make deals by offering to give them content identification tools to control the proliferation of infringements of their works on YouTube on the condition that they license their content to YouTube, like some of the class plaintiffs, were simply dismissed because of their small market share. See CS ¶¶ 43, 94-96.
	Declaration of Suzanne Reider	Evidence Contravening Declaration of Suzanne Reider
203.	3. YouTube's precise advertising opportunities have changed somewhat over the years to keep pace with the dynamic nature of Internet advertising. In general, however, there have been three primary advertising products that YouTube has made available to advertisers during my time at the company. <i>First</i> , we sell an advertisement on the YouTube homepage	Disputed, see CS ¶ 160, 164, 167. Until January 2007, YouTube displayed advertisements on all watch pages, including watch pages showing videos that infringe class plaintiffs' content. Youtube still displays advertisements on videos that infringe class plaintiffs' content. For example, YouTube shows tennis advertisements next to videos that show unauthorized footage of French Open matches. YouTube also displays advertisements for sound recordings on watch pages, even when it has not licensed the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

	which were for established and well-known music stars. In May 2007, music was the most-searched category on YouTube.	
241.	<p>Legal use of music involves two distinct copyrights, one in the sound recording and a second in the underlying musical composition. Music publisher authorization to use the underlying musical composition embodied in a song is required in virtually every scenario where music content is posted to the site. YouTube was aware of the need to obtain publisher licenses for all music content posted on the site, including by individual users, and that such publisher licenses might be required from multiple publishers for a single sound recording.</p>	<p>See Tabs 66, 72, 157, 170, 194, 200, 206, 270, 311, 317-322.</p> <p>See also, Class SUF ¶ 24.</p> <p>(Tab 320) (King Tr. 6:25-7:2) (King started in January 2007)</p> <p>(Tab 317) (GOO001-01401528)</p> <p>(Tab 318) (“For music content, we need the following information before we can consider our license complete: Sound recording license from label. Composition licenses from publishers totalling 100%) (GOO001-01517877-78)</p> <p>(Tab 199) (“we have been delaying sharing the CYC tool with music partners until the publisher deals are in place. However does it makes sense to share the tool with UPAG and EMI label with the understanding that they can only claim official label produced videos where they already have the rights.”)</p>
242.	David King proposed building content management tools that would allow copyright owners to have insight into what was happening with their content on YouTube, however YouTube recognized the potential for conflicting directives from record labels and music publishers, and did not want to remove videos from the site in the event the owner of a sound recording claimed user-generated content, but did not have music publisher authorization.	<p>(Tab 157) (GOO001-01179621)</p> <p>(Tab 72) (GOO001-01905261)</p>
243.	YouTube delayed offering use of its content management tools until it had	<p>See Statement 241 above.</p> <p>See also, (Tab 161) (EMI Music Marketing -</p>

	<p>deals in place with large music publishers. During 2007, YouTube entered into licensing relationships with publishers EMI Entertainment World, Inc., Sony/ATV, and Universal Music Publishing. These publisher licensing deals required the music publisher to enter into agreements allowing the record label to pass through licensing rights from the publisher to YouTube for content produced by the record label. The publisher licensing deals also authorized YouTube to use such publisher's compositions when included in user-generated content.</p>	<p>Schedule 2: providing for "audio fingerprinting" and "text-based searches in the User-inputted metadata"); SonyATV (GOO001-09684819-850) (Tab 170) (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")</p> <p>(Tab 322) (GOO001-09595431) (Tab 323) GOO001-09595472) (Tab 321 (GOO001-09684720) (UMPG Agreement)</p>
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Respectfully submitted,

Charles S. Sims

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

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

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

Daniel Girard
Aaron Sheanin
Christina Connolly Sharp
GIRARD GIBBS LLP

Facsimile: (212) 719-4677

-and-

Jeffrey L. Graubart

LAW OFFICES OF JEFFREY L.
GRAUBART

350 West Colorado Boulevard, Suite 200

Pasadena, California 91105-1855

Telephone: (626) 304-2800

Facsimile: (626) 304-2807

-and-

Steve D'Onofrio

5335 Wisconsin Avenue, N.W. Suite 950

Washington, D.C. 20015

Telephone: (202) 686-2872

Facsimile: (202) 686-2875

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

TO:

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

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

Attorneys for Defendants