

# Schapiro Exhibit 267

09:38:33

## UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC., COMEDY )  
 PARTNERS, COUNTRY MUSIC. )  
 TELEVISION, INC., PARAMOUNT )  
 PICTURES CORPORATION, and BLACK )  
 ENTERTAINMENT TELEVISION, LLC, )  
 )  
 Plaintiffs, )  
 )  
 vs. ) NO. 07-CV-2203  
 )  
 YOUTUBE, INC., YOUTUBE, LLC, )  
 and GOOGLE, INC., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )  
 )  
 THE FOOTBALL ASSOCIATION PREMIER )  
 LEAGUE LIMITED, BOURNE CO., et al., )  
 on behalf of themselves and all )  
 others similarly situated, )  
 )  
 Plaintiffs, )  
 vs. ) NO. 07-CV-3582  
 )  
 YOUTUBE, INC., YOUTUBE, LLC, and )  
 GOOGLE, INC., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

HIGHLY CONFIDENTIAL  
 VIDEOTAPED DEPOSITION OF DOUG HERZOG  
 PALO ALTO, CALIFORNIA  
 FRIDAY, JANUARY 16, 2009

JANUARY 16, 2009

9:40 a.m.

HIGHLY CONFIDENTIAL VIDEOTAPED DEPOSITION OF  
DOUG HERZOG, at WILSON SONSINI GOODRICH &  
ROSATI, 601 South California, Palo Alto,  
California pursuant to notice, before me,  
ANDREA M. IGNACIO HOWARD, CLR, CCRR, RPR, CSR  
License No. 9830.

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

FOR THE PLAINTIFFS VIACOM INTERNATIONAL INC.:

JENNER &amp; BLOCK

By: SUSAN J. KOHLMANN, Esq.

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

WILSON SONSINI GOODRICH &amp; ROSATI

By: DAVID H. KRAMER, Esq.

BART E. VOLKMER, Esq.

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ALSO PRESENT:

Michelena Hallie, MTV Networks

Mark Morril, Viacom

Jan Trudell, Videographer.

---oOo---

1 HERZOG

2 17:15:01 sequence of the film on YouTube; do you?

3 17:15:04 MS. KOHLMANN: Objection.

4 17:15:05 THE WITNESS: I don't know.

5 17:15:05 MR. KRAMER: Q. You don't think that's

6 17:15:06 right; do you?

7 17:15:07 A I don't know.

8 17:15:07 MS. KOHLMANN: Objection.

9 17:15:08 MR. KRAMER: Q. Does that appeal to your

10 17:15:09 sense of equity?

11 17:15:10 A It's -- No. It's on YouTube.

12 17:15:11 MS. KOHLMANN: Objection.

13 17:15:11 MR. KRAMER: Right.

14 17:15:12 Q Does that make it -- does that mean that

15 17:15:12 it --

16 17:15:14 A YouTube thinks it's okay to show.

17 17:15:16 Q So you think it's okay to show?

18 17:15:19 A You -- YouTube --

19 17:15:19 MS. KOHLMANN: Objection.

20 17:15:20 THE WITNESS: -- thinks it's okay to show.

21 17:15:21 MR. KRAMER: Q. If YouTube thinks it's okay

22 17:15:24 to show --

23 17:15:24 A You'd have to ask YouTube.

24 17:15:25 Q Well, that's a good question, sir.

25 17:15:26 You can't tell whether it's authorized or

HERZOG

1  
2 17:15:28 not; right?  
3 17:15:29 A I -- I -- I -- I can't -- I --  
4 17:15:29 Q Did you think --  
5 17:15:32 A -- could I tell whether that's authorized?  
6 17:15:33 No, I'm not sure whether I can or I can't, yeah. It's  
7 17:15:36 not my -- it's not my -- I didn't put it up there, and  
8 17:15:39 it's not -- it doesn't belong to anything that I've,  
9 17:15:42 you know, quote, "been involved in the making of,"  
10 17:15:44 like, you know, the MTV Viacom -- the MTV Networks  
11 17:15:47 Viacom content so...  
12 17:15:49 Q What would you need to know what -- in order  
13 17:15:51 to determine whether it was authorized or not?  
14 17:15:53 A I'm not sure.  
15 17:15:53 Q Can you think of some things that would help?  
16 17:15:59 A That would clarify copyright?  
17 17:16:01 No. Only if it pertains to, you know,  
18 17:16:09 something, again, that either I put up there  
19 17:16:10 personally or that I knew my company was involved  
20 17:16:12 with.  
21 17:16:13 Q You couldn't tell otherwise?  
22 17:16:14 A I'm not sure I could.  
23 17:16:15 Q You don't think you could?  
24 17:16:18 A I don't think I could.  
25 17:16:19 MS. KOHLMANN: Objection.

1 HERZOG

2 17:16:19 MR. KRAMER: Q. One of the songs on the

3 17:16:22 Songs of the Year CD for 2008 was Down in the Hole by

4 17:16:28 Steve Earle; right?

5 17:16:29 A Yes.

6 17:16:30 Q Okay. What video on the YouTube service did

7 17:16:31 you link to from your blog in connection with that

8 17:16:33 song?

9 17:16:33 A I think a clip from the show.

10 17:16:34 Q Clip from the show The Wire?

11 17:16:36 A The Wire, right. Sorry, The Wire, yes.

12 17:16:39 Q On HBO; right?

13 17:16:40 A Yes.

14 17:16:40 Q Do you have any idea whether HBO authorized

15 17:16:42 that clip from its show The Wire to be on the YouTube

16 17:16:46 service?

17 17:16:46 A None.

18 17:16:46 Q Did you have permission from HBO to provide a

19 17:16:50 link to the clip from the show, The Wire, on YouTube?

20 17:16:54 A I didn't know.

21 17:16:54 Q Do you know who uploaded the clip?

22 17:16:56 A I don't.

23 17:16:57 Q Do you know if that person had authorization

24 17:16:58 to do so?

25 17:17:00 A I don't.

# **Schapiro Exhibit 360**

## UNITED STATES DISTRICT COURT

## SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs.

No. 07-CV-2103

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

Defendants.

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VIDEOTAPED DEPOSITION OF  
JOSHUA DERN  
NEW YORK, NEW YORK  
TUESDAY, NOVEMBER 24, 2009

JOB NO. 18222

## VIDEOTAPED DEPOSITION OF JOSHUA

M. DERN, held at the offices of 1301  
Avenue of the Americas, New York, NY,  
pursuant to notice, before Maureen  
Ratto, Registered Professional Reporter  
and Notary Public of the State of New  
York on November 24, 2009, at 10:45  
a.m.

CASE NO: 18222

## A P P E A R A N C E S

FOR THE PLAINTIFF - Viacom  
International:  
JENNER & BLOCK, LLP  
BY: SUSAN J. KOHLMANN, ESQ.  
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FOR THE DEFENDANTS:  
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BY: BART E. VOLKMER, ESQ.  
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94304  
(650) 565-3508  
bvolkmer@wsgr.com

Also present:  
Manuel Abreu, Videographer

1 from which the user can upload video to  
2 a Flux page?

3 MS. KOHLMANN: Objection as to  
4 form. You can answer.

5 12:48:55 A. You can only upload video from  
6 your own desktop.

7 Q. You can also -- strike that.  
8 Flux user is also given the option of  
9 imbedding content or importing an URL  
10 12:49:10 into his Flux page. Is that right?

11 A. Correct.

12 Q. And when a user chooses to imbed  
13 content Flux displays as a default  
14 YouTube as a source for video content.

15 12:49:33 Is that correct?

16 MS. KOHLMANN: Objection.

17 A. I'm not sure I understand the  
18 question. Can you say it again?

19 Q. When a user of the Flux network  
20 12:49:44 elects to imbed content to his  
21 publisher site, Flux displays YouTube  
22 as the default site to search for video  
23 content. Is that correct?

24 MS. KOHLMANN: Objection.

25 12:50:01 A. I'm sorry. It's -- your question

1 is confusing me. When a user imbeds  
2 content what is displayed is whatever  
3 the content of the source sites imbed.  
4 We don't have any control over that.

5 12:50:21 Q. Sure. When a publisher hits the  
6 upload video button within the Flux  
7 platform he's given three options,  
8 correct?

9 A. Yes.

10 12:50:36 Q. One is upload video, one is  
11 imbed video and one is import video,  
12 right?

13 A. More or less, yes.

14 Q. Is there something imprecise?

15 12:50:52 A. Yes. It's upload video, search  
16 for video and imbed video. The two --  
17 the latter two are both imbeds but the  
18 means of doing it -- one is for user  
19 who knows the actual destination, you  
20 12:51:05 know, knows the permalink for the video  
21 and other thing is a person who don't  
22 know the permalink for the video but  
23 they're both imbeds.

24 Q. The user is searching for videos  
25 12:51:15 in that case, doesn't Flux displays

1 YouTube as the default source for  
2 searching for videos to imbed to the  
3 publisher's Flux page?

4 A. I don't know whether it does now  
5 12:51:27 or not. At some point in time it may  
6 have been the first selection.

7 Q. Were you responsible for the  
8 design choice of YouTube to be the  
9 first selection when users search for  
10 12:51:45 video to imbed into their Flux page?

11 MS. KOHLMANN: Objection.  
12 Misstates the record. You can answer.

13 A. I don't know that it was a  
14 choice as much as YouTube had provided  
15 12:51:55 an API and other people hadn't, so I'm  
16 not sure that there was a specific  
17 choice to put YouTube first.

18 Q. Well, YouTube was one of the  
19 selections in a drop down menu when  
20 12:52:13 using the Flux platform was searching  
21 for video, right?

22 A. Yes.

23 MS. KOHLMANN: Objection. You  
24 can answer.

25 12:52:18 Q. And that was displayed based on

1 code that was written by someone,  
2 correct?

3 MS. KOHLMANN: Objection to  
4 form. You can answer.

5 12:52:26 A. Sure.

6 Q. And the individual who wrote  
7 that code made a specific design choice  
8 to include YouTube as a source from  
9 which a Flux user could search for  
10 12:52:40 video content, right?

11 A. Sure.

12 Q. My question is were you  
13 responsible for that coding design  
14 choice?

15 12:52:50 MS. KOHLMANN: Objection. You  
16 can answer.

17 A. I'm saying I don't remember us  
18 ever having a specific discussion on  
19 which one to put first. I think that if  
20 12:52:58 anything it might have been the order  
21 that the developer did it in. But there  
22 was never any discussion over let's put  
23 this one over this one or anything like  
24 that.

25 12:53:07 Q. But there was a discussion about

1                   whether or not YouTube should be  
2                   included at all in the sources from  
3                   which a user could imbed content to his  
4                   Flux page, correct?

5       12:53:18                   MS. KOHLMANN:  Objection. You  
6                   can answer.

7                   A.       It was always assumed that -- I  
8                   don't think there was any discussion  
9                   about should we not. It was just there  
10       12:53:36                  was never -- there was never a point in  
11                   time that we were discussing not doing  
12                   that.

13                  Q.       Why was it a given that YouTube  
14                   would be used as a source for searching  
15       12:53:49                  for video content to imbed to Flux  
16                   pages?

17                  MS. KOHLMANN:  Objection as to  
18                   form. You can answer.

19                  A.       Because it was one of the  
20       12:53:56                  leading video sharing sites. Can we  
21                   take a break for one second? I need to  
22                   ask you --

23                  MS. KOHLMANN:  Sure.

24                  VIDEOGRAPHER:  Time is 12:53  
25       12:54:10                  p.m. Going off the record.

1 (Whereupon, a lunch recess is  
2 taken.)

3 VIDEOGRAPHER: Time is 1:36 p.m.  
4 We're back on the record.

5 13:36:58 Q. Good afternoon, Mr. Dern. Before  
6 the break we were discussing Flux's  
7 decision to use YouTube as a source  
8 from which its users could search for  
9 video content to imbed to its -- to  
10 13:37:18 their user pages and you had mentioned  
11 that there was a YouTube API that Flux  
12 employed. What was that API?

13 A. The search API.

14 Q. And that came from YouTube?

15 13:37:31 A. Correct.

16 Q. And how did Flux gain access to  
17 that API?

18 A. I believe API is publicly  
19 available. I'm not sure what you're  
20 13:37:45 asking.

21 Q. Did Flux have conversations with  
22 anyone at YouTube about using YouTube  
23 API?

24 A. Not to my knowledge.

25 13:38:01 MR. VOLKMER: I'll mark Exhibit

1 10.

2 (Dern-10, internet interface is  
3 received and marked for  
4 identification.)

5 13:38:20 Q. Exhibit 10 is a printout from  
6 the internet that I made a couple days  
7 ago. It shows user interface on the  
8 Flux network when a user clicks on the  
9 upload user. Does that look familiar to  
10 13:38:42 you?

11 MS. KOHLMANN: I'll object to  
12 you using this document but I'll allow  
13 you to answer questions.

14 A. Yes. It -- it looks like the  
15 13:38:50 interface more or less.

16 Q. And the step one of the upload  
17 videos page says that a user can search  
18 YouTube and more, upload from computer  
19 and import from URL. Is that right?

20 13:39:13 A. Correct.

21 Q. And I think we discussed this  
22 earlier but the title of this user page  
23 is upload videos but when a user  
24 selects "search YouTube and more" or  
25 13:39:28 "import from URL", those functions are