

TABLE 6
UNAIDED AWARENESS
VIDEO CONTENT INTERNET SITES

Q3.0 Now, I would like you to think about internet sites that offer video content. By this I mean internet sites where individuals can view video or images or listen to audio or podcast content.

Now, thinking about internet sites that offer video content, would you please tell me the names of internet sites that offer video content that you can think of?

Q3.1 What other names of internet sites that offer video content, if any, can you think of?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=200)
1. Lulu	--	---
2. MySpace	28	14.00
3. YouTube	102	51.00
4. Photobucket	--	---
5. Digg	--	---
6. Moho	--	---
7. ABC	27	13.50
8. Yahoo	19	9.50
9. CNN	18	9.00
10. NBC	18	9.00
11. Google	17	8.50
12. Apple	15	7.50
13. FOX	12	6.00
14. CBS	11	5.50
15. ESPN	10	5.00
16. MSN	8	4.00
17. MSNBC	5	2.50
18. MTV	5	2.50
19. Other unaided internet sites ¹⁵	134	67.00
20. None/Don't know	46	23.00

23. Further, when respondents were asked an aided question (i.e., respondents were read a list of names) about video content internet sites they had heard of, six percent (6.00%) of the relevant universe responded that they had heard of

¹⁵ No other single unaided video content internet site accounted for more than 2.0%. See Appendix B.

a video content internet site called LULU but six percent (6.00%) said they had heard of the fictitious internet site by the name of "moho." See Exhibit A, page 33, Table 7. Thus, once there is an adjustment for mismeasurement error, the percent of respondents who had heard of an internet site for video content by the name of LULU is zero percent ($6.00\% - 6.00\% = 0.00\%$).¹⁶

24. Due to a zero result for awareness of the LULU video content internet site the calculation of a +/- variance is not applicable.

TABLE 7
AIDED AWARENESS
VIDEO CONTENT INTERNET SITES

- Q4.0 Now, I am going to read you some additional names that may or may not be internet sites that offer video content. Have you ever heard of INSERT INTERNET SITE NAME(S) NOT MENTIONED IN Q3.0 OR Q3.1 ?
- Q4.1 Now, I am going to read you some names that may or may not be internet sites that offer video content. Have you ever heard of INSERT INTERNET SITE NAMES?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=200)
1. Lulu	12	6.00
2. MySpace	166	83.00
3. YouTube	88	44.00
4. Photobucket	59	29.50
5. Digg	25	12.50
6. Moho	12	6.00

¹⁶ The adjustment for mismeasurement error is accomplished by reducing the percent of affirmative LULU responses in the aided question by the percent of affirmative responses to the fictitious in-treatment control name Moho. In this case, 6.00% of the survey respondents reported in the aided question that they had heard of the video content internet site LULU and, in response to the fictitious control name Moho, 6.00% of the respondents reported that they had heard of the video content internet site Moho. Thus the net level of awareness would be calculated as $6.00\% - 6.00\% = 0.00\%$.

25. Total unaided and aided awareness of internet sites respondents believe to be video content internet sites is shown below. See Exhibit A, page 34, Table 8.

TABLE 8
TOTAL UNAIDED AND AIDED AWARENESS
VIDEO CONTENT INTERNET SITES

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=200)
1. Lulu	12	6.00
2. MySpace	194	97.00
3. YouTube	190	95.00
4. Photobucket	59	29.50
5. Digg	25	12.50
6. Moho	12	6.00
7. ABC	27	13.50
8. Yahoo	19	9.50
9. CNN	18	9.00
10. NBC	18	9.00
11. Google	17	8.50
12. Apple	15	7.50
13. FOX	12	6.00
14. CBS	11	5.50
15. ESPN	10	5.00
16. MSN	8	4.00
17. MSNBC	5	2.50
18. MTV	5	2.50
19. Other unaided internet sites ¹⁷	134	67.00
20. None/Don't know	1	0.50

CONCLUSION

26. It is my considered opinion, based upon my education, background, and professional experience, and based upon my review and analysis of the survey conducted in this matter, that the results of the surveys conducted in this matter clearly support a finding of no likelihood of confusion, based upon the lack of awareness of either the LULU self publishing

¹⁷ No other single unaided video content internet site accounted for more than 2.0%. See Appendix B.

site or the LULU video content site, among the relevant users of potential visitors to Defendant's internet site. Specifically, the survey results evidence that among individuals who would be likely to visit an internet site where you could watch a variety of TV shows, film and TV clips, trailers, and select feature films for free, and decide when and what to watch, this relevant universe is unaware of both the LULU self publishing internet site and the LULU video content internet site. Additionally, it is my opinion that the results of the surveys conducted in this matter would also support a finding that both the LULU self publishing internet site mark and the LULU video content internet site mark are commercially weak marks among potential visitors to Defendant's internet site.

QUALIFICATIONS

27. I hold a Bachelor's Degree in Advertising (B.A.) from San Jose State University, a Master's Degree in Business Administration (M.B.A.) from the University of Southern California, and a Doctoral Degree in Business Administration (D.B.A.) from the University of Southern California.

28. During my twenty-five year academic appointment, my teaching responsibilities included both graduate and undergraduate level courses in a variety of subject areas. My teaching responsibilities included courses in marketing (e.g., marketing, marketing management, advertising, promotion, consumer behavior, and marketing research) and management (e.g., principles of management; business policy and strategy; business policies, operations, and organizations; and integrated analysis).

29. I am a member of the American Marketing Association (AMA), the American Academy of Advertising (AAA), the American Association of Public Opinion Research (AAPOR), the Council of American Survey Research Organizations (CASRO), and the International Trademark Association (INTA).

30. As a partner with Ford Bubala & Associates, I have been retained by a variety of firms engaged in the consumer product, industrial product, and service sectors of the economy to provide marketing consulting and research services. Approximately one-half of Ford Bubala & Associates' consultancies in which I have participated have involved the design and execution of marketing research surveys.

31. During the past thirty-two years, I have been retained in a number of litigation-related consultancies involving intellectual property matters, including matters before federal and state courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and the International Trade Commission. I have designed and executed surveys relating to intellectual property matters, including false advertising, trademark, patent, and other related matters. I am familiar with the accepted principles of survey research, as well as the tests for trustworthiness of properly conducted surveys or polls.¹⁸

32. During the past twenty-seven years, I have addressed a variety of groups on the subject of surveys or polls and their use in the measurement of the state of mind of consumers, with respect to Lanham Act matters. Specifically, I have spoken at meetings of the American Bar Association, the

¹⁸ Supra note 2.

American Intellectual Property Law Association, the American Marketing Association, the International Trademark Association, the Marketing Research Association, the Intellectual Property Law Institute of Canada, and the Practising Law Institute.

33. I have also written on the subject of the design and execution of litigation-related surveys in intellectual property matters. Attached hereto as Exhibit B is a list of papers I have written since 1987.

34. Since 1998 I have served as a member of the Editorial Board of The Trademark Reporter, the scholarly legal journal on the subject of trademarks, published by the International Trademark Association.

35. I have been qualified and accepted as an expert in marketing and marketing research in more than fifty (50) trials before federal and state courts and administrative government agencies.

36. Attached hereto as Exhibit C is a list of cases in which I have provided trial and/or deposition testimony since 1992.

37. Attached hereto as Exhibit D is a copy of my professional history, describing my qualifications and professional background.

MATERIALS CONSIDERED

38. Complaint; Affidavit of Robert Young; Plaintiff's Memorandum of Law in Support of Motion for Expedited Discovery; Notice of Deposition of Defendant Hulu Tech, Inc.; Plaintiff Lulu Enterprises, Inc.'s First set of Interrogatories and Requests for Production of Documents to Defendant Hulu Tech, Inc.; Plaintiff's

Motion for Preliminary Injunction; Plaintiff's Motion for Temporary Restraining Order; Plaintiff Lulu Enterprises, Inc.'s First Set of Interrogatories and Requests for Production of Documents to Defendant N-F Newsite, LLC; Notice of Deposition of Defendant N-F Newsite, LLC; Plaintiff's Motion for Expedited Discovery; Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction; Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order; and Answer of Defendant Hulu, LLC.

COMPENSATION

39. Ford Bubala & Associates' fees for this engagement consist of billable time and expenses. Standard time is billed at the rate of \$450.00 per hour for the services of a Partner and \$200.00 per hour for the services of a Research Associate. Deposition and trial time are billed at the rate of \$600.00 per hour plus expenses.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of October, 2007, in Huntington Beach, California.


Dr. Gerald L. Ford