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VIACOM INTERNATIONAL INC.,	)	
COMEDY PARTNERS,	)	
COUNTRY MUSIC TELEVISION, INC.,	)	
PARAMOUNT PICTURES CORPORATION,	)	
and BLACK ENTERTAINMENT TELEVISION	)	
LLC,	)	
	)	
	)	
Plaintiffs,	)	Case No. 1:07-cv-02103 (LLS)
v.	)	(Related Case No. 1:07-cv-03582 (LLS)
	)	ECF Case
	)	
YOUTUBE INC., YOUTUBE, LLC, and	)	
GOOGLE, INC.,	)	
	)	
Defendants.	)	
	)	
	)	

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## LEGEND

For the purposes of Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense, the following abbreviations shall be used:

"Hohengarten Decl." shall refer to the declaration of William M. Hohengarten, dated March 5, 2010, filed herewith.

"Hohengarten ¶ \_\_\_\_ & Ex. \_\_," shall refer to the paragraphs of the Hohengarten Declaration and the Exhibits attached thereto, respectively. Any Exhibit attached to the Hohengarten Declaration that was produced during the course of this litigation and marked with Bates numbers is identified by its beginning Bates number, followed by a pinpoint citation. Pinpoint citations shall refer to the page number(s), and paragraph or line numbers, of the cited document. In some instances Hohengarten Declaration Exhibits have been manually paginated for ease of the Court's reference. Where used, parentheticals indicate the nature of the item cited – e.g., deposition transcripts ("Dep.") or other declarations ("Decl."). Thus, by way of illustration, "Hohengarten ¶ 7 & Ex. 4, GOO001-00011355, at GOO001-00011356" would refer to Exhibit 4 to the Hohengarten Declaration, which has the beginning Bates number GOO001-00011355, and would refer specifically to the page of that Exhibit marked with Bates number GOO001-00011356. And, "Hohengarten ¶ 366 & Ex. 332 (Eun Dep.) at 200:1-10" would refer to the deposition of Google employee David Eun, which is referenced at Paragraph 366 of and attached as Exhibit 332 to the Hohengarten Declaration.

"Solow Decl." shall refer to the declaration of Warren Solow, a representative of Viacom, dated March 3, 2010, filed herewith. The Solow Declaration is attached as Exhibit 2 to the Hohengarten Declaration.

“SUF ¶” shall refer to specific paragraph numbers in Viacom’s Statement of Undisputed Facts.

Pursuant to Local Civil Rule 56.1, Viacom submits the following Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense.

## **UNDISPUTED FACTS**

### **I. VIACOM’S OWNERSHIP OF THE WORKS IN SUIT**

Undisputed Fact	Evidence
1. Viacom creates and acquires exclusive rights in copyrighted audiovisual works, including motion pictures and television programming.	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶ 2).
2. Viacom distributes its copyrighted television programs and motion pictures through various outlets, including cable and satellite services, movie theaters, home entertainment products (such as DVDs and Blu-Ray discs) and digital platforms.	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶ 3).
3. Viacom owns many of the world’s best known entertainment brands, including Paramount Pictures, MTV, BET, VH1, CMT, Nickelodeon, Comedy Central, and SpikeTV.	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶ 4).
4. Viacom’s thousands of copyrighted works include the following famous movies: <i>Braveheart</i> , <i>Gladiator</i> , <i>The Godfather</i> , <i>Forrest Gump</i> , <i>Raiders of the Lost Ark</i> , <i>Breakfast at Tiffany’s</i> , <i>Top Gun</i> , <i>Grease</i> , <i>Iron Man</i> , and <i>Star Trek</i> .	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶ 5).
5. Viacom’s thousands of copyrighted works include the following famous television shows: <i>The Daily Show with Jon Stewart</i> , <i>The Colbert Report</i> , <i>South Park</i> , <i>Chappelle’s Show</i> , <i>Spongebob Squarepants</i> , <i>The Hills</i> , <i>iCarly</i> , and <i>Dora the Explorer</i> .	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶ 6).
6. Viacom owns or controls the copyrights or exclusive rights under copyright in the	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶¶ 7-14, 17).

3,085 audiovisual works identified in Exhibits A-E to the Solow Decl. filed herewith (“Works in Suit”).	
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## II. INFRINGEMENT OF THE WORKS IN SUIT ON YOUTUBE

Undisputed Fact	Evidence
7. Defendants have reproduced and distributed for viewing, and performed on the YouTube website, 62,637 video clips that infringe the Works in Suit (“Clips in Suit”); the Clips in Suit are identified in Attachment F to the Solow Decl. filed herewith.	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶¶ 16-26).
8. The Clips in Suit were collectively viewed on the YouTube website more than 507 million times.	Hohengarten Decl. ¶ 4.
9. Viacom has not authorized the distribution or reproduction or performance of the Clips in Suit on Defendants’ YouTube.com service.	Hohengarten Decl. ¶ 3 & Ex. 2 (Solow Decl. ¶ 26).

## III. DEFENDANTS’ KNOWLEDGE AND INTENT CONCERNING INFRINGEMENT ON YOUTUBE

### A. The YouTube Founders’ Knowledge and Intent Concerning Infringement on YouTube


Background Facts Regarding the Founding of YouTube, the Founders of YouTube, and Google’s Acquisition of YouTube	
Undisputed Fact	Evidence
10. YouTube was founded in February 2005 by Chad Hurley, Steve Chen, and Jawed Karim.	Hohengarten ¶ 393 & Ex. 356 (January 5, 2007 Declaration of Steve Chen in Support of [YouTube’s] Motion for Summary Adjudication of [YouTube’s] First Affirmative Defense of DMCA Safe Harbor, <i>Robert Tur v. YouTube, Inc.</i> , Case No. CV 06-4436 FMC) (“declaration of Steve Chen dated January 5, 2007”) at ¶ 2.

	Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) at 12:21-13:7.
11. Prior to founding YouTube, Chad Hurley, Steve Chen, and Jawed Karim worked together at the Internet start-up PayPal.	<p>Hohengarten ¶ 222 &amp; Ex. 204, JK00009887, at JK00009890-91.</p> <p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 16:20-17:16).</p> <p>Hohengarten ¶ 402 &amp; Ex. 365.</p> <p>Hohengarten ¶ 347 &amp; Ex. 313 (Karim Dep.) at 8:24-9:14, 16:3-16:23.</p>
12. When eBay acquired PayPal for \$1.5 billion in 2002, PayPal's stockholders, including [REDACTED] Chad Hurley, Steve Chen, and [REDACTED], received substantial profits from the deal.	<p>Hohengarten ¶ 6 &amp; Ex. 3, GOO001-00303096, at GOO001-00303100.</p> <p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 19:11-21:12.</p> <p>Hohengarten ¶ [REDACTED].</p>
13. The YouTube website first became publicly accessible in a "beta" version in April 2005.	<p>Hohengarten ¶ 393 &amp; Ex. 356 (declaration of Steve Chen dated January 5, 2007) at ¶ 3.</p> <p>Hohengarten ¶ 7 &amp; Ex. 4, GOO001-00011355, GOO001-00011357.</p>
14. YouTube publicized the "official launch" of the YouTube website in December 2005.	Hohengarten ¶ 307 & Ex. 279 (YouTube page entitled "YouTube Company History").
15. A December 15, 2005 YouTube press release described YouTube as a "consumer media company" that "deliver[s] entertaining, authentic and informative videos across the Internet."	Hohengarten ¶ 299 & Ex. 271 (YouTube press release dated December 15, 2005).
16. On October 9, 2006, Google announced its agreement with YouTube for Google to acquire YouTube for \$1.65 billion in Google stock.	Hohengarten ¶ 304 & Ex. 276 (Google press release dated October 9, 2006).
17. Google's acquisition of YouTube closed on	Hohengarten ¶ 305 & Ex. 277 (Google

November 13, 2006.	press release dated November 13, 2006).  Hohengarten ¶ 366 & Ex. 332 (Eun Dep.) at 58:3-14.
18. In connection with the acquisition, Google issued an aggregate of 3,217,560 shares, and restricted stock units, options and a warrant exercisable for or convertible into an aggregate of 442,210 shares, of Google Class A common stock.	Hohengarten ¶ 305 & Ex. 277 (Google press release dated November 13, 2006).
19. On November 13, 2006, the closing date of the transaction, Google Class A common stock closed at a price of \$481.03; at that price, the 3,659,770 shares issued and issuable in connection with Google's acquisition of YouTube were worth an aggregate \$1.77 billion.	Hohengarten ¶ 306 & Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).
20. 12.5 percent of the equity issued and issuable pursuant to Google's acquisition of YouTube was placed in escrow to secure indemnification obligations.	Hohengarten ¶ 305 & Ex. 277 (Google press release dated November 13, 2006).
21. As a result of Google's acquisition of YouTube, YouTube co-founder Chad Hurley received Google shares worth approximately \$334 million at the November 13, 2006 closing price.	Hohengarten ¶ 400 & Ex. 363 (Google Inc., S-3ASR Registration Statement dated February 7, 2007)) at 5 (page numbers at bottom center) (showing 694,087 issued to Chad Hurley).  Hohengarten ¶ 306 & Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).  Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) at 22:8-18 (stating that as a result of the sale of YouTube to Google his net worth increased by around \$300 million).
22. As a result of Google's acquisition of YouTube, YouTube co-founder Steve Chen received Google shares worth approximately \$301 million at the November 13, 2006 closing price.	Hohengarten ¶ 400 & Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 5 (page numbers at bottom center) (showing 625,366 issued to Steve Chen).



	Hohengarten ¶ 306 & Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).
23. As a result of Google's acquisition of YouTube, YouTube co-founder Jawed Karim received Google shares worth approximately \$66 million at the November 13, 2006 closing price.	<p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 5 (page numbers at bottom center) (showing 137,443 issued to Jawed Karim).</p> <p>Hohengarten ¶ 306 &amp; Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).</p> <p>Hohengarten ¶ 347 &amp; Ex. 313 (Karim Dep.) at 106:20-107:8 ( [REDACTED] ).</p>
24. As a result of Google's acquisition of YouTube, Sequoia Capital, the largest venture capital investor in YouTube, received Google shares worth approximately \$516 million at the November 13, 2006 closing price.	<p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement dated February 7, 2007)) at 6, 10 (page numbers at bottom center) (showing 941,027 shares issued to Sequoia Capital XI, L.P.; 102,376 shares issued to Sequoia Capital XI Principals Fund; and 29,724 shares issued to Sequoia Technology Partners XI).</p> <p>Hohengarten ¶ 306 &amp; Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).</p>
25. Sequoia Capital invested approximately \$9 million in YouTube in late 2005 and early 2006.	<p>Hohengarten ¶ 329 &amp; Ex. 297, SC008711, at SC008781 (showing that Sequoia Capital invested \$4.99 million in Series B financing).</p> <p>Hohengarten ¶ 328 &amp; Ex. 296, SC008403, at SC008470-71 (showing approximately \$3.4 million invested in cash and over \$100,000 invested as debt conversion in</p>

	<p>Series A financing).</p> <p>Hohengarten ¶ 351 &amp; Ex. 317 (Botha Dep.) at 53:20-54:5; 137:15-24.</p>
<p>26. As a result of Google’s acquisition of YouTube, Artis Capital, another venture capital investor in YouTube, received Google shares worth approximately \$85 million at the November 13, 2006 closing price.</p>	<p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement dated February 7, 2007)) at 5 (page numbers at bottom center) (showing 176,621 shares issued to Artis Capital entities).</p> <p>Hohengarten ¶ 306 &amp; Ex. 278 (screenshot of Google’s finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).</p> 
<p>27. Artis Capital invested approximately \$3 million in YouTube in early 2006.</p>	<p>Hohengarten ¶ 329 &amp; Ex. 297, SC008711, at SC008781-83 (showing that Artis Capital invested \$3 million in Series B financing).</p>
<p>28. “As of December 31, 2006,” Google’s “cash, cash equivalents, and marketable securities were \$11.2 billion.”</p>	<p>Hohengarten ¶ 303 &amp; Ex. 275 (Google Investor Relations page announcing Fourth Quarter and Fiscal Year 2006 Results).</p>

YouTube's Founders' and Other Employees' Knowledge of and Intent to Benefit From Massive Copyright Infringement on YouTube	
Undisputed Fact	Evidence
29. In a February 11, 2005 email to YouTube co-founders Chad Hurley and Steve Chen, with the subject "aiming high," YouTube co-founder Jawed Karim wrote that, in terms of "the number of users and popularity," he wanted to "firmly place [YouTube] among" "napster," "kazaa," and "bittorrent."	Hohengarten ¶ 8 & Ex. 5, GOO001-02757578, at GOO001-02757578.
30. In an April 23, 2005 email to YouTube co-founders Steve Chen and Chad Hurley, YouTube co-founder Jawed Karim wrote: "It's all 'bout da videos, yo. We'll be an excellent acquisition target once we're huge."	Hohengarten ¶ 223 & Ex. 205, JK00009137, at JK00009137.
31. In an April 25, 2005 email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley noted the presence of a "South Park" clip on YouTube and questioned whether it should be left on the site because "its [sic] copyrighted material."	Hohengarten ¶ 224 & Ex. 206, JK00004704, at JK00004704.
32. YouTube's content review manager Heather Gillette testified that early in YouTube's existence "South Park" was "the content that appeared to be most popular and shared at that stage that we suspected could be unauthorized."	Hohengarten ¶ 368 & Ex. 334 (Gillette Dep.) at 7:22-9:20, 46:20-47:24.  Hohengarten ¶ 400 & Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 16 (page numbers at bottom center) (stating Heather Gillette's job title).
33. In a June 15, 2005 email to YouTube co-founders Chad Hurley and YouTube co-founder Jawed Karim, YouTube co-founder Steve Chen stated "we got a complaint from someone that we were violating their user agreement. i *think* it may be because we're hosting copyrighted content. instead of taking it down – i'm not about to take down content because our ISP is giving us shit – we should just investigate moving www.youtube.com."	Hohengarten ¶ 225 & Ex. 207, JK00005039, at JK00005039.

<p>34. In a June 15, 2005 email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founders Chad Hurley stated: “so, a way to avoid the copyright bastards might be to remove the ‘No copyrighted or obscene material’ line and let the users moderate the videos themselves. legally, this will probably be better for us, as we’ll make the case we can review all videos and tell them if they’re concerned they have the tools to do it themselves.”</p>	<p>Hohengarten ¶ 226 &amp; Ex. 208, JK00005043, at JK00005043.</p>
<p>35. In a June 20, 2005 email to YouTube co-founders Chad Hurley and Steve Chen, YouTube co-founder Jawed Karim wrote: “If we want to sign up lots of users who keep coming back, we have to target the people who will never upload a video in their life. And those are really valuable because they spend time watching. And if they watch, then it’s just like TV, which means lots of value.”</p>	<p>Hohengarten ¶ 228 &amp; Ex. 210, JK00009383, at JK00009383.</p>
<p>36. On June 21, 2005, YouTube co-founder Jawed Karim stated in an email to YouTube co-founders Chad Hurley and Steve Chen that “Where our value comes in is USERS. . . . [O]ur buy-out value is positively affected by . . . more Youtube users . . . . The only thing we have control over is users. We must build features that sign up tons of users, and keep them coming back.”</p>	<p>Hohengarten ¶ 227 &amp; Ex. 209, JK00009381, at JK00009381.</p>
<p>37. On July 4, 2005, YouTube co-founder Chad Hurley sent an email to YouTube co-founders Steve Chen and Jawed Karim titled “budlight commercials,” stating “we need to reject these too”; Steve Chen responded by asking to “leave these in a bit longer? another week or two can’t hurt;” Jawed Karim subsequently stated that he “added back all 28 bud videos. stupid . . .,” and Steve Chen replied: “okay first, regardless of the video they upload, people are going to be telling people about the site, therefore making it viral. they’re going to drive traffic. second, it adds more content to the site. third, we’re going to be adding advertisements in the future so this gets them</p>	<p>Hohengarten ¶ 229 &amp; Ex. 211, JK00005928, at JK00005928.  Hohengarten ¶ 230 &amp; Ex. 212, JK00005929, at JK00005929.</p>

used to it. I'm asking for a couple more weeks."	
38. In a July 10, 2005 email to YouTube co-founders Chad Hurley and Steve Chen, YouTube co-founder Jawed Karim reported that he had found a "copyright video" and stated: "Ordinarily I'd say reject it, but I agree with Steve, let's ease up on our strict policies for now. So let's just leave copyrighted stuff there if it's news clips. I still think we should reject some other (C) things tho . . ."; Chad Hurley replied, "ok man, save your meal money for some lawsuits! ;) no really, I guess we'll just see what happens."	Hohengarten ¶ 231 & Ex. 213, JK00006057, at JK00006057.
39. In a July 10, 2005 email to YouTube co-founders Jawed Karim and Steve Chen, YouTube co-founder Chad Hurley wrote: "yup, we need views. I'm a little concerned with the recent supreme court ruling on copyrighted material though."	Hohengarten ¶ 234 & Ex. 216, JK00006055, at JK00006055.
40. In a July 19, 2005 email to YouTube co-founders Chad Hurley and Jawed Karim, YouTube co-founder Steve Chen wrote: "javed, please stop putting stolen videos on the site. We're going to have a tough time defending the fact that we're not liable for the copyrighted material on the site because we didn't put it up when one of the co-founders is blatantly stealing content from other sites and trying to get everyone to see it."	Hohengarten ¶ 235 & Ex. 217, JK00006166, at JK00006166.
41. On July 19, 2005, YouTube co-founder Steve Chen sent an email to YouTube co-founder Jawed Karim, copying YouTube co-founder Chad Hurley, stating "why don't i just put up 20 videos of pornography and obviously copyrighted materials and then link them from the front page. what were you thinking."	Hohengarten ¶ 236 & Ex. 218, JK00009595, at JK00009595.
42. On July 22, 2005, YouTube co-founder Steve Chen forwarded to all YouTube employees a "YouTube Marketing Analysis" stating that "users not only upload their own work, but can potentially upload publicly available	Hohengarten ¶ 239 & Ex. 221, JK00006259, at JK00006266, JK00006268.

<p>content for viewing. Risk area here is copyright as many videos which are uploaded are not the property of the uploader. . . . Although the policy when uploading states that the video must be legit, YouTube may be liable for any damages which copyright holders may press.”</p>	
<p>43. In a July 23, 2005 email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley responded to a YouTube link sent by Jawed Karim by saying: “if we reject this, we need to reject all the other copyrighted ones. . . . should we just develop a flagging system for a future push?”; Karim responded: “I say we reject this one, but not the other ones. This one is totally blatant.”</p>	<p>Hohengarten ¶ 240 &amp; Ex. 222, JK00009668, at JK00009668.</p>
<p>44. In a July 29, 2005 email about competing video websites, YouTube co-founder Steve Chen wrote to YouTube co-founders Chad Hurley and Jawed Karim, “steal it!”, and Chad Hurley responded: “hmm, steal the movies?” Steve Chen replied: “we have to keep in mind that we need to attract traffic. how much traffic will we get from personal videos? remember, the only reason why our traffic surged was due to a video of this type. . . . viral videos will tend to be THOSE type of videos.”</p>	<p>Hohengarten ¶ 241 &amp; Ex. 223, JK00006392, at JK00006392.</p>
<p>45. In an August 1, 2005 email to all YouTube employees, YouTube co-founder Chad Hurley stated: “This user is starting to upload tons of ‘Family Guy’ copyrighted clips... I think it’s time to start rejecting some of them. Any objections?”</p>	<p>Hohengarten ¶ 9 &amp; Ex. 6, GOO001-00660588, at GOO001-00660588.</p>
<p>46. In an August 9, 2005 email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley stated: “we need to start being diligent about rejecting copyrighted/inappropriate content. we are getting serious traffic and attention now, I don’t want this to be killed by a potentially bad experience of a network exec or someone</p>	<p>Hohengarten ¶ 242 &amp; Ex. 224, JK00006689, at JK00006689-90.</p>

<p>visiting us. like there is a cnn clip of the shuttle clip on the site today, if the boys from Turner would come to the site, they might be pissed? these guys are the ones that will buy us for big money, so lets make them happy. we can then roll a lot of this work into a flagging system soon.”</p>	
<p>47. In response to YouTube co-founder Chad Hurley’s August 9, 2005 email (<i>see</i> SUF ¶ 46) YouTube co-founder Steve Chen stated: “but we should just keep that stuff on the site. I really don’t see what will happen. what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he get in touch with cnn legal. 2 weeks later, we get a cease &amp; desist letter. we take the video down”; Chad Hurley replied: I just don’t want to create a bad vibe... and perhaps give the users or the press something bad to write about.”</p>	<p>Hohengarten ¶ 242 &amp; Ex. 224, JK00006689, at JK00006689.</p>
<p>48. On August 10, 2005, YouTube co-founder Jawed Karim responded to YouTube co-founder Chad Hurley (<i>see</i> SUF ¶ [previous para]): “lets remove stuff like movies/tv shows. lets keep short news clips for now. we can become stricter over time, just not overnight. like the CNN space shuttle clip, I like. we can remove it once we’re bigger and better known, but for now that clip is fine.” Steve Chen replied, “sounds good.”</p>	<p>Hohengarten ¶ 242 &amp; Ex. 224 JK00006689, at JK00006689.</p>
<p>49. On August 11, 2005, YouTube co-founders Chad Hurley, Steve Chen, and Jawed Karim met with Sequoia Capital regarding a possible investment by Sequoia Capital in YouTube.</p>	<p>Hohengarten ¶ 243 &amp; Ex. 225, JK00006627, at JK00006627.</p> <p>Hohengarten ¶ 10 &amp; Ex. 7, GOO001-01907664, at GOO001-01907664.</p> <p>Hohengarten ¶ 244 &amp; Ex. 226 at JK00009791.</p>
<p>50. On August 11, 2005, outside Sequoia’s offices in Palo Alto, YouTube co-founder Jawed Karim asked the two other YouTube co-founders, as captured on video, “At what point would we tell them our dirty little secret, which is that we actually just want to sell out</p>	<p>Hohengarten ¶ 261 &amp; Ex. 240, JK00010387_MVI_0922.avi.</p> <p>Hohengarten ¶ 262 &amp; Ex. 241 (true and correct transcript of Hohengarten Ex. 240).</p>

quickly,” and Chad Hurley responded, “we’ll have to erase the file.”	Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) 106:11-108:20.
51. In an August 14, 2005 email YouTube co-founder Jawed Karim reported to the two other YouTube co-founders Chad Hurley and Steve Chen that the three co-founders (using YouTube user names “steve,” “jawed,” and “Chad”) were among the top six most active viewers on YouTube, in terms of number of videos watched.	Hohengarten ¶ 188 & Ex. 185, GOO001-01949763, at GOO001-01949763.  Hohengarten ¶ 258 & Ex. 379, JK00004669, at JK00004669 (making clear that Steve Chen, Jawed Karim, and Chad Hurley used YouTube user names “steve,” “jawed,” and “chad,” respectively).
52. In a September 1, 2005 email to YouTube co-founder Steve Chen and all YouTube employees, YouTube co-founder Jawed Karim stated, “well, we SHOULD take down any: 1) movies 2) TV shows. we should KEEP: 1) news clips 2) comedy clips (Conan, Leno, etc) 3) music videos. In the future, I’d also reject these last three but not yet.”	Hohengarten ¶ 11 & Ex. 8, GOO001-01424049, at GOO001-01424049.
53. On September 2, 2005, in response to an email from YouTube co-founder Chad Hurley reporting that he had taken down clips of the TV show “Family Guy,” YouTube co-founder Steve Chen stated: “should we just assume that a user uploading content really owns the content and is agreeing to all the terms of use? so we don’t take down anything other than obscene stuff?”	Hohengarten ¶ 245 & Ex. 227, JK00007378, at JK00007378.
54. In a September 3, 2005 email to the two other YouTube co-founders with the subject line “copyrighted material!!!”, YouTube co-founder Chad Hurley wrote, “aaahhhhhh, the site is starting to get out of control with copyrighted material... we are becoming another big-boys or stupidvideos.”	Hohengarten ¶ 233 & Ex. 215, JK00007416, at JK00007418.  <i>See also</i> Hohengarten ¶ 259 & Ex. 380, JK00005597, at JK00005597 (“I really want to start rejecting copyrighted material now. . . . We are not another ‘StupidVideos’ or ‘Bittorrent.’”).
55. In a September 3, 2005 email responding to YouTube co-founder Chad Hurley’s concern that “the site is starting to get out of control with copyrighted material” ( <i>see</i> SUF ¶ 54),	Hohengarten ¶ 233 & Ex. 215, JK00007416, at JK00007417-18.



<p>YouTube co-founder Steve Chen stated to the other two YouTube co-founders that, “what’s the difference between big-boys/stupidvideos vs youtube? . . . if you look at the top videos on the site, it’s all from this type of content. in a way, if you remove the potential copyright infringements, wouldn’t you still say these are ‘personal’ videos? if you define ‘personal’ to be videos on your personal hard drive that you want to upload and share with people? anyway, if we do remove that stuff, site traffic and virality will drop to maybe 20% of what it is . . . i’d hate to prematurely attack a problem and end up just losing growth due to it.”</p>	
<p>56. In response (see SUF ¶ 55), YouTube co-founder Jawed Karim wrote: “well I’d just remove the obviously copyright infringing stuff. movies and tv shows, I’d get rid of. . . . we’ll leave music videos, news clips, and clips of comedy shows for now. I think thats a pretty good policy for now, no?”</p>	<p>Hohengarten ¶ 233 &amp; Ex. 215, JK00007416, at JK00007417.</p>
<p>57. In a September 3, 2005 email to the two other YouTube co-founders, YouTube co-founder Steve Chen responded to Jawed Karim’s suggestion that YouTube remove “obviously copyright infringing stuff” (see SUF ¶ 56) by stating that “i know that if [we] remove all that content. we go from 100,000 views a day down to about 20,000 views or maybe even lower. the copyright infringement stuff. i mean, we can presumably claim that we don’t know who owns the rights to that video and by uploading, the user is claiming they own that video. we’re protected by DMCA for that. we’ll take it down if we get a ‘cease and desist’”; Jawed Karim replied: “my suggested policy is really lax though. . . . if we keep that policy I don’t think our views will decrease at all.”</p>	<p>Hohengarten ¶ 233 &amp; Ex. 215, JK00007416, at JK00007416.</p>
<p>58. On September 3, 2005, YouTube co-founder Steve Chen stated in response to YouTube co-founder Jawed Karim’s “really lax” policy (see SUF ¶ 57): “yes, then i agree with you.</p>	<p>Hohengarten ¶ 233 &amp; Ex. 215, JK00007416, at JK00007416.  Hohengarten ¶ 246 &amp; Ex. 228,</p>

take down whole movies, take down entire TV shows, take down XXX stuff. everything else keep including sports, commercials, news, etc. keeping it, we improve video uploads, videos viewed, and user registrations”; Chad Hurley replied: “lets just work in that flagging feature soon . . . then we won’t be liable.”	JK00007420, at JK00007420.
59. In a September 4, 2005 email to YouTube co-founder Jawed Karim and others at YouTube, a YouTube user stated: “Jawed - You have a lot of people posting Chappelle Show clips and stuff like that. Aren’t you guys worried that someone might sue you for copywrite [sic] violation like Napster?”; Karim replied: “ahaha.”	Hohengarten ¶ 247 & Ex. 229, JK00007423, at JK00007423.
60. In a September 7, 2005 email, YouTube co-founder Steve Chen wrote to YouTube co-founders Chad Hurley and Jawed Karim, and Roelof Botha of Sequoia Capital (and later a YouTube board member) that YouTube had “implemented a flagging system so you can flag a video as being inappropriate or copyrighted. That way, the perception is that we are concerned about this type of material and we’re actively monitoring it. The actual removal of this content will be in varying degrees. We may want to keep some of the borderline content on the site but just remove it from the browse/search pages. that way, you can’t find the content easily. Again, similar to Flickr, . . . you can find truckloads of adult and copyrighted content. It’s just that you can’t stumble upon it, you have to be actively searching for it.”	Hohengarten ¶ 248 & Ex. 230, JK00007479, at JK00007479.  Hohengarten ¶ 351 & Ex. 317 (Botha Dep.) at 8:19-9:12 (describing Roelof Botha’s position at Sequoia), 53:16-53:21 (describing Sequoia’s investment in YouTube), 93:19-93:21 (identifying Roelof Botha as a YouTube board member).
61. In a September 8, 2005 email to all YouTube employees with the subject line “committed changes,” YouTube co-founder Steve Chen wrote: “Flagging for Inappropriate/ Copyrighted Content: . . . this is hooked up now.”	Hohengarten ¶ 260 & Ex. 381, JK00007560, at JK00007560.
62. On September 12, 2005, the “Official YouTube Blog” stated: “We are ecstatic to announce the changes we made to the site last	Hohengarten ¶ 298 & Ex. 270 (September 12, 2005 YouTube Blog entry) (emphasis in original).

<p>night. . . . First up, <b>video flagging</b>. At the bottom of the video watch page, you will notice a new section for flagging a video. If you encounter a video that's inappropriate or copyrighted, please use this feature to notify us. We will aggressively monitor these submissions and respond as quickly as we can."</p>	
<p>63. YouTube's community flagging system originally allowed users to flag videos as copyrighted or as otherwise inappropriate, for reasons such as sexual content or violence, by clicking a button at the bottom of the video watch page and selecting the reason for the flagging from a menu of options supplied by YouTube.</p>	<p><i>See supra</i> SUF ¶¶ 61-62.</p> <p>Hohengarten ¶ 368 &amp; Ex. 334 (Gillette Dep.) at 94:12-96:23, 148:17-150:7.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 191:10-192:11.</p>
<p>64. On September 23, 2005, YouTube co-founder Chad Hurley emailed YouTube co-founders Steve Chen and Jawed Karim, stating: "can we remove the flagging link for 'copyrighted' today? we are starting to see complaints for this and basically if we don't remove them we could be held liable for being served a notice. it's actually better if we don't have the link there at all because then the copyright holder is responsible for serving us notice of the material and not the users. anyways, it would be good if we could remove this asap."</p>	<p>Hohengarten ¶ 250 &amp; Ex. 232, JK00008043, at JK00008043.</p>
<p>65. On or shortly after September 23, 2005, YouTube discontinued community flagging for copyright infringement, while retaining community flagging for inappropriate content and other types of terms of use violations.</p>	<p>Hohengarten ¶ 397 &amp; Ex. 360 (Defendants' Amended Responses and Objections to Plaintiffs' First Set of Interrogatories, Interrogatory No. 2 (Set 1)) at 8-9.</p> <p>Hohengarten ¶ 368 &amp; Ex. 334 (Gillette Dep.) at 94:12-97:15; 148:17-150:7 (testifying about the way a user flags a video and the manner in which YouTube's personnel review every flagged video).</p> <p>Hohengarten ¶ 376 &amp; Ex. 342 (Levine Dep.) at 50:21-53:20, 56:17-22.</p>

<p>66. When a YouTube user flags a video, the video is put into a queue for review by a team of YouTube reviewers who make a decision whether to remove the video from YouTube.</p>	<p>Hohengarten ¶ 368 &amp; Ex. 334 (Gillette Dep.) at 42:2-5, 92:14-17, 150:23-151:8.</p> <p>Hohengarten ¶ 376 &amp; Ex. 342 (Levine Dep.) at 51:24-52:6, 56:17-22.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 191:10-192:11.</p> <p>Hohengarten ¶ 12 &amp; Ex. 9, GOO001-05951723, at GOO001-05951725, GOO001-05951729.</p> <p>Hohengarten ¶ 301 &amp; Ex. 273 (October 8, 2006 YouTube Blog post entitled “How Flagging Works”).</p>
<p>67. YouTube employs an “army of content reviewers” who review flagged videos “24 hours a day, 365 days a year.”</p>	<p>Hohengarten ¶ 13 &amp; Ex. 10, GOO001-02482760, at GOO001-02482760 (“army of content reviewers”).</p> <p>Hohengarten ¶ 14 &amp; Ex. 11, GOO001-00561567, at GOO001-00561577 (“24 hours a day, 365 days a year”).</p>
<p>68. YouTube has issued guidelines to content reviewers regarding the approval and rejection of flagged videos.</p>	<p>Hohengarten ¶ 15 &amp; Ex. 12, GOO001-00744094, at GOO001-00744095-152.</p>
<p>69. The February 23, 2007 guidelines issued by YouTube to its content reviewers instructed them regarding the approval and removal of videos that depict children, sexual content, body parts, crude content, and various illegal acts, but not copyright; one of the examples of “PG-13 sexual content” that reviewers were supposed to approve was a clip from the Daily Show.</p>	<p>Hohengarten ¶ 15 &amp; Ex. 12, GOO001-00744094, at GOO001-00744096, GOO001-00744120.</p>
<p>70. Community flagging has expedited removal of pornography and other content YouTube regards as undesirable.</p>	<p>Hohengarten ¶ 12 &amp; Ex. 9, GOO001-05951723, at GOO001-05951728.</p> <p>Hohengarten ¶ 16 &amp; Ex. 13, GOO001-00044974, at GOO001-00044979.</p> <p>Hohengarten ¶ 368 &amp; Ex. 334 (Gillette</p>

	Dep.) at 150:8-18 (testifying that she was “confident” that pornography is typically flagged and removed within the first 100 views).
71. During the two-week period that community flagging for copyright infringement was available on YouTube, users identified and flagged unauthorized copyrighted material that YouTube reviewed and removed.	Hohengarten ¶ 397 & Ex. 360 (Defendants’ Amended Responses and Objections to Plaintiffs’ First Set of Interrogatories, Interrogatory No. 2) at 8-9.
72. Some YouTube employees advocated bringing back community flagging for copyright infringement, but that tool was never reinstated after it was disabled on or about September 23, 2005.	Hohengarten ¶ 17 & Ex. 14, GOO001-07167907, at GOO001-07167907.  Hohengarten ¶ 397 & Ex. 360 (Defendants’ Amended Response and Objections to Plaintiffs’ First Set of Interrogatories, Interrogatory No. 2) at 8-9.
73. YouTube has touted the success of the community flagging system in expediting removal of videos flagged as inappropriate.	Hohengarten ¶ 12 & Ex. 9, GOO001-05951723, at GOO001-05951728.  Hohengarten ¶ 16 & Ex. 13, GOO001-00044974, at GOO001-00044979.  Hohengarten ¶ 368 & Ex. 334 (Gillette Dep.) at 150:8-18.
74. On October 11, 2005, YouTube director of finance Brent Hurley suggested to YouTube co-founders Chad Hurley, Steve Chen, and Jawed Karim: “[i]f we reject a video, flag the user who uploaded it so that anytime they upload a new video, we need to approve it before going live”; YouTube never implemented that suggestion.	Hohengarten ¶ 232 & Ex. 214, JK00000382, at JK00000382.  Hohengarten ¶ 350 & Ex. 316 (B. Hurley Dep.) at 10:9-10:18 (stating Brent Hurley’s title).  <i>See also</i> Hohengarten ¶ 184 & Ex 181, GOO001-00827716, at GOO001-00827716-17 (Roelef Botha of Sequoia Capital asking whether YouTube could “queue[] high risk tags . . . so that they are reviewed before going live?” and YouTube product manager Maryrose Dunton writing to YouTube co-founder Chad Hurley, “I think we can add this fairly easily”).

<p>75. In the same October 11, 2005 email, YouTube director of finance Brent Hurley also suggested that YouTube should build a tool that would automatically flag for review “any video with *hot* tags, such as Family Guy, Angry Kid, etc. (We can add to this *hot* list as needed),” but such a tool was never implemented.</p>	<p>Hohengarten ¶ 232 &amp; Ex. 214, JK00000382, at JK00000382.</p>
<p>76. In an October 11, 2005 email, YouTube director of finance Brent Hurley suggested to YouTube co-founders Chad Hurley, Steve Chen, and Jawed Karim that YouTube should “flag/highlight any video with a run time &gt;10 minutes, since most of those are copyrighted shows.”</p>	<p>Hohengarten ¶ 232 &amp; Ex. 214, JK00000382, at JK00000382.</p>
<p>77. On October 18, 2005, YouTube director of finance Brent Hurley sent an email to YouTube co-founder Steve Chen, Chad Hurley, Jawed Karim and YouTube software engineer Mike Solomon stating: “Yes, I rejected all of the videos that were listed in this email yesterday. Looks like the users simply uploaded the videos again today. **We need to beef up admin. Create a tag watch list, like Family Guy, Baker skateboarding, etc. Also, once we reject a video, flag the user so that we must review all of their new videos before they go live. Otherwise, this will continue to happen. :(”</p>	<p>Hohengarten ¶ 251 &amp; Ex. 233, JK00008331, at JK00008331.</p> <p>Hohengarten ¶ 392 &amp; Ex. 386 at (Solomon Dep.) at 12:5-14:2 (testifying to Solomon’s job description).</p>
<p>78. In a November 8, 2005 email regarding a contest in which an uploading YouTube user would be awarded an iPod Nano, YouTube product manager Maryrose Dunton, the YouTube employee responsible for the user functionality of the YouTube website, asked whether user “Bigjay” was eligible; YouTube interface designer Christina Brodbeck responded, “Cool . . . . However, most of his stuff is copyrighted,” and added, “Does this matter? Probably not, as UCBearcats1125 is almost entirely copyrighted. Heh.”; in response, Maryrose Dunton stated: “Ya . . . I don’t think we care too much if they’ve posted</p>	<p>Hohengarten ¶ 18 &amp; Ex. 15, GOO001-00504044, at GOO001-00504044.</p> <p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 10:23-23:21 (describing Maryrose Dunton’s job responsibilities).</p> <p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement (Feb. 7, 2007)) at 16 (page numbers at bottom center) (stating Christina Brodbeck’s job title).</p>

copyrighted videos.”	
79. As a result of Google’s acquisition of YouTube, YouTube interface designer Christina Brodbeck received Google shares worth \$9.09 million.	<p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement (Feb. 7, 2007)) at 5 (page numbers at bottom center) (showing 18,898 shares issued to Christina Brodbeck).</p> <p>Hohengarten ¶ 306 &amp; Ex. 278 (screenshot of Google’s finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).</p>
80. On November 18, 2005, a YouTube user with the email address “anonymousdude@gmail.com” sent an email to YouTube co-founders Chad Hurley, Steve Chen, and Jawed Karim, YouTube director of finance Brent Hurley, and YouTube engineering manager Cuong Do stating: “How is it that ‘Family Guy’ cartoon clips are deleted, [but] ECW, WWE, WCW, clips and other TV clips are free to watch? What is the difference with the copyright?”	<p>Hohengarten ¶ 252 &amp; Ex. 234, JK00000824, at JK00000824.</p> <p>Hohengarten ¶ 357 &amp; Ex. 323 (Do 30(b)(6) Dep.) at 8:15-9:15 (stating Cuong Do’s title).</p>
81. On Monday, November 21, 2005, a YouTube user with the email address “lvpsganchito@hotmail.com” sent an email to YouTube co-founders Chad Hurley, Steve Chen, Jawed Karim, YouTube director of finance Brent Hurley, and YouTube engineering manager Cuong Do, stating: “I’m a little confused about the rejection of my last and other videos. I have seen other ‘family guy’ videos on here and when I put one on here its against the rules. Please explan. [sic] I also have other vids that are cartoons from TV Funhouse from SNL, that are still active and live. What is the difference?”	Hohengarten ¶ 253 & Ex. 235, JK00000836, at JK00000836.
82. In a November 24, 2005 email, YouTube director of finance Brent Hurley asked all YouTube employees for “help” reviewing videos “over the long weekend,” and instructed them that, “[a]s far as copyright stuff is concerned, be on the look out for	<p>Hohengarten ¶ 19 &amp; Ex. 16, GOO001-00629095, at GOO001-00629095.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 80:18-82:8.</p>

<p>Family Guy, South Park, and full-length anime episodes,” but that “music videos and news programs are fine to approve.”</p>	
<p>83. In a January 2, 2006 email, YouTube co-founder Jawed Karim recommended adding “a very simple feature that temporarily prevents a user from removing a video” because “next time we have another lazy sunday hit, it would hurt us if the user suddenly removed the video, either out of stupidity, or by accident. . . . what if we add a flag to certain videos so that when the owner tries to remove the hugely popular video it just gives some error message and does not remove the video.”</p>	<p>Hohengarten ¶ 20 &amp; Ex. 17, GOO001-00629474, at GOO001-00629474.</p>
<p>84. In a January 3, 2006 instant message exchange between YouTube product manager Maryrose Dunton (IM user name maryrosedunton) and YouTube software engineer Jake McGuire (IM user name oJAKEMo) Dunton stated: “between [a YouTube-MySpace dispute] and the Saturday Night Clips that got put on our site (which also made the Times) we’re now getting close to 7 million views a day.”</p>	<p>Hohengarten ¶ 206 &amp; Ex. 194 GOO001-00507405, at 3 &amp; at GOO001-00507405.</p> <p>Hohengarten ¶ 198 &amp; Ex. 374, GOO001-06010126, at GOO001-06010126 (confirming that oJAKEMo is Jake McGuire’s IM user name).</p> <p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 34:15-18 (testifying that maryrosedunton is Maryrose Dunton’s IM user name).</p> <p>Hohengarten ¶ 356 &amp; Ex. 322 (Do Dep.) at 136:19-137:2 (stating Jake McGuire’s job title).</p>
<p>85. In a January 25, 2006 instant message exchange, YouTube co-founder Steve Chen (IM user name tunawarrior) told his colleague YouTube product manager Maryrose Dunton (IM user name maryrosedunton) that he wanted to “concentrate all of our efforts in building up [YouTube’s] numbers as aggressively as we can through whatever tactics, however evil,” including “user metrics” and “views,” and “then 3 months, sell it with 20m views per day and like 2m users or something . . . I think we can sell for somewhere between \$250m - \$500m . . . in the</p>	<p>Hohengarten ¶ 204 &amp; Ex. 192, GOO001-00507525, at 4-5 &amp; at GOO001-00507526-27.</p> <p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 35:14-15 (confirming that tunawarrior is Steve Chen’s IM user name).</p>



next 3 months . . . and there *is* a potential to get to \$1b or something.”	
86. In late January 2006 email exchange, YouTube co-founder Steve Chen expressed concern about “our most popular videos” being removed from YouTube; YouTube content review manager Heather Gillette responded with an email about “the manual process that we have now in rejecting videos for copyright,” and stated “if a really popular video is about to be rejected there [should be] a pop-up that says, ‘this video has been viewed 20,000 times, are you sure you want to reject?’”	Hohengarten ¶ 21 & Ex. 18, GOO001-00839842, at GOO001-00839843-44.
87. In a February 4, 2006 instant message conversation, YouTube product manager Maryrose Dunton (IM user name maryrosedunton) told YouTube systems administrator Bradley Heilbrun (IM user name nurblieh) that YouTube co-founder Chad Hurley sent her an email “and told me we can’t feature videos or have contest winners with copyrighted songs in them”; Heilbrun responded “man. That’s like half our videos”; Dunton replied “I know.”	Hohengarten ¶ 210 & Ex. 198, GOO001-01931799, at 5 & at GOO001-01931806.  Hohengarten ¶ 363 & Ex. 329 (Dunton Dep.) at 30:23-31:2 (stating Bradley Heilbrun’s job title); 35:16-23 (confirming that nurblieh is Bradley Heilbrun’s IM user name).
88. In a February 4, 2006 instant message conversation, YouTube product manager Maryrose Dunton (IM user name maryrosedunton) told YouTube systems administrator Bradley Heilbrun (IM user name nurblieh) that YouTube director of finance Brent Hurley told her to take down a copyrighted Ed Sullivan show clip that she uploaded to YouTube, and she said “maybe I’ll just make it private ;).”	Hohengarten ¶ 210 & Ex. 198, GOO001-01931799, at 4-5 & at GOO001-01931806.
89. In early February 2006, NBC Universal sent letters to YouTube requesting the removal of the “Lazy Sunday: Chronicles of Narnia” clip from the television show Saturday Night Live.	Hohengarten ¶ 22 & Ex. 19, GOO001-00007027, at GOO001-00007028-29.  Hohengarten ¶ 23 & Ex. 20, GOO001-02403826, at GOO001-02403826-27.
90. YouTube refused to remove the Lazy Sunday clips unless NBC Universal provided specific	Hohengarten ¶ 22 & Ex. 29, GOO001-00007027, at GOO001-00007028-29.

URLs for the clips.	Hohengarten ¶ 23 & Ex. 20, GOO001-02403826, at GOO001-02403826-27.
91. On February 14, 2006, YouTube vice president of marketing and programming Kevin Donahue emailed YouTube product manager Maryrose Dunton stating: “I just got off the phone with NBC and I’m trying to get them to let us keep the Lazy Sunday clip on the site. I need to convince them of the promotional value of doing that considering the fact that their legal dept. is having us remove ALL of their stuff. Julie and I are worried that if Lazy Sunday is taken down, then it could be taken as a bad sign by the journalists who are writing about us now and may search for it.”	Hohengarten ¶ 24 & Ex. 21, GOO001-02824049, at GOO001-02824049.  Hohengarten ¶ 359 & Ex. 325 (Donahue Dep.) at 20:23-21:3, 75:11-76:4 (stating Kevin Donahue’s job title).
92. On February 16, 2006, YouTube informed its users in a YouTube Official Blog post titled “Lazy Sunday”: “Hi Tubers! NBC recently contacted YouTube and asked us to remove Saturday Night Live’s ‘Lazy Sunday: Chronicles of Narnia’ video. We know how popular that video is but YouTube respects the rights of copyright holders. You can still watch SNL’s ‘Lazy Sunday’ video for free on NBC’s website”; in the same blog post, YouTube informed its users of “[s]ome good news: we are happy to report that YouTube is now serving up more than 15 million videos streamed per day- that’s nearly 465M videos streamed per month with 20,000 videos being uploaded daily.”	Hohengarten ¶ 300 & Ex. 272 (February 16, 2006 YouTube Blog entry “Lazy Sunday”).
93. In a February 17, 2006 instant message conversation, YouTube systems administrator Bradley Heilbrun (IM user name nurblieh) asked YouTube product manager Maryrose Dunton (IM user name maryrosedunton), “was it me, or was the lawyer thing today a cover-your-ass thing from the company?” Dunton responded, “oh totally . . . did you hear what they were saying? it was really hardcore . . . if we even see copyrighted material on the site, as employees we’re supposed [sic] to report it”; Heilbrun replied, “sure, whatever,” and Dunton said “I guess the fact that I started like	Hohengarten ¶ 209 & Ex. 197, GOO001-00507331, at 2-3 & at GOO001-00507331-32.

5 groups based on copyrighted material probably isn't so great"; in response Heilbrun said "right exactly . . . but it's a cover your ass . . . so the board can say we told maryrose not to do this."	
94. In an instant message exchange between YouTube co-founder Steve Chen (IM user name tunawarrior) and YouTube product manager Maryrose Dunton (maryrosedunton) dated February 28, 2006, Steve Chen stated that, "we're the first mass entertainment thing accessible from the internet," that YouTube was "revolutionizing entertainment," and that "we are bigger than the internet, . . . we should be comparing ourselves to, say, abc/fox/whatever."	Hohengarten ¶ 205 & Ex. 193, GOO001-00507535, at 6-7 & at GOO001-00507538.
95. In the same instant message conversation, YouTube product manager Maryrose Dunton (IM user name maryrosedunton) reported the results of a "little exercise" she performed wherein she "went through all the most viewed/most discussed/top favorites/top rated to try and figure out what percentage is or has copyrighted material. it was over 70%." She added, "what I meant to say is after I found that 70%, I went and flagged it all for review."	Hohengarten ¶ 205 & Ex. 193, GOO001-00507535, at 8 & at GOO001-00507539.
96. When deposed, YouTube product manager Maryrose Dunton confirmed in reference to the February 28, 2006 instant message exchange with YouTube co-founder Steve Chen ( <i>see</i> SUF ¶ 95) that she was being sarcastic and did not actually flag any of the copyrighted videos for review.	Hohengarten ¶ 363 & Ex. 329 (Dunton Dep.) at 84:12-85:9.
97. As a result of Google's acquisition of YouTube, YouTube product manager Maryrose Dunton received Google shares worth \$4.13 million.	Hohengarten ¶ 400 & Ex. 363 (Google Inc., S-3ASR Registration Statement dated February 7, 2007) at 5 (showing 8,590 shares issued to "Mayrose Dunton" [sic]).  Hohengarten ¶ 306 & Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13,

	2006 was \$481.03).
98. A February 2006 YouTube Board Presentation noted that YouTube received 20 million views per day and expressly pointed out the day when the “SNL Narnia clip,” also known as “Lazy Sunday,” was “added” to YouTube.	Hohengarten ¶ 25 & Ex. 22, GOO001-00762174, at GOO001-00762181.
99. A March 2006 YouTube company presentation to potential investor TriplePoint Capital touted the success of the “NBC/SNL ‘Lazy Sunday’ clip” as one example of “Incredible Results with Branded Video” and noted that the clip “[r]eceived 5 million views in about a month.”	Hohengarten ¶ 334 & Ex. 302, TP000479, at TP000490.
100. On March 1, 2006, <i>Newsweek</i> published an article titled “Video Napster?” with the subheading “Only a year old, YouTube has already rocketed past Google and Yahoo to become No. 1 in Web video. But can it survive the fear of a copyright crunch?”; the article discusses the presence on YouTube of infringing content from major media companies.	Hohengarten ¶ 26 & Ex. 23, GOO001-07728393, at GOO001-07728393.
101. In response to the March 1, 2006 <i>Newsweek</i> article, YouTube vice president of marketing and programming Kevin Donahue sent an email asking another YouTube employee to “please go through the newsweek article and work with heather to remove all of the listed copyright infringing video.”	Hohengarten ¶ 27 & Ex. 24, GOO001-00522244, at GOO001-00522244.
102. In an instant message conversation discussing the March 1, 2006 <i>Newsweek</i> article, Bradley Heilbrun (IM user name nurblieh) stated to YouTube product manager Maryrose Dunton (IM user name maryrosedunton) in an instant message: “this affects my chance at being rich, and that upsets me.”	Hohengarten ¶ 207 & Ex. 195, GOO001-01931840, at 3 & at GOO001-01931841.
103. As a result of Google’s acquisition of YouTube, YouTube systems administrator Bradley Heilbrun received Google shares worth \$6.2 million.	Hohengarten ¶ 400 & Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 5 (page numbers at bottom center) (showing 12,885 shares issued to “Bradley Heilburn”

	<p>[sic]).</p> <p>Hohengarten ¶ 306 &amp; Ex. 278 (screenshot of Google’s finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).</p>
104. In a March 1, 2006 instant message conversation with YouTube systems administrator Bradley Heilbrun (IM user name nurblieh), YouTube product manager Maryrose Dunton (IM user name maryrose dunton) said “the truth of the matter is, probably 75-80% of our views come from copyrighted material.” She agreed that YouTube has some “good original content” but “it’s just such a small percentage.”	Hohengarten ¶ 207 & Ex. 195, GOO001-01931840, at 6-7 & at GOO001-01931843.
105. In a March 8, 2006 email, a YouTube employee sent a message to other YouTube employees attaching a screenshot of a search for “dailyshow.”	Hohengarten ¶ 254 & Ex. 236, JK00002261, at JK00002261-62.
106. In a March 14, 2006 email, YouTube engineer Matt Rizzo stated: “this is some ugly javascript so these copyright cop assholes can click through the pages and store what they checked. I hope they die and rot in hell!”	Hohengarten ¶ 28 & Ex. 25, GOO001-05172407, at GOO001-05172407.
107. In a March 15, 2006 instant message conversation YouTube engineer Matt Rizzo (IM user name mattadoor) described copyright owners as “fucking assholes,” asking “just how much time do you guys want to give to these fucking assholes,” and YouTube product manager Maryrose Dunton (IM user name maryrosedunton) responded: “hah. not any time really.”	<p>Hohengarten ¶ 213 &amp; Ex. 201, GOO001-00829681, at 9-10 &amp; at GOO001-00829687.</p> <p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 261:20-261:21 (confirming that mattadoor is Matt Rizzo’s IM user name); 275:13-276:10 (confirming that “fucking assholes” refers to copyright owners).</p> <p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 16 (page numbers at bottom center) (listing Matt Rizzo’s job title).</p>

<p>108. As a result of Google's acquisition of YouTube, YouTube engineer Matt Rizzo received Google shares worth \$3.7 million.</p>	<p>Hohengarten ¶ 400 &amp; Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 6 (page numbers at bottom center) (showing 7,731 shares issued to Matt Rizzo).</p> <p>Hohengarten ¶ 306 &amp; Ex. 278 (screenshot of Google's finance webpage showing that the closing price for Google shares on November 13, 2006 was \$481.03).</p>
<p>109. In a March 22, 2006 memorandum distributed to the members of YouTube's Board of Directors at a board meeting, YouTube co-founder Jawed Karim wrote under the heading "Copyrighted content": "Although the new 10-minute length restriction [on clips uploaded to YouTube] serves well to reinforce the official line that YouTube is not in the business of hosting full-length television shows, it probably won't cut down the actual amount of illegal content uploaded since standard 22-minute episodes can still easily be uploaded in parts, and users will continue to upload the 'juiciest' bits of television shows."</p>	<p>Hohengarten ¶ 255 &amp; Ex. 237, JK00000173, at JK00000173.</p> <p>Hohengarten ¶ 347 &amp; Ex. 313 (Karim Dep.) at 178:18-179:19.</p>
<p>110. In the same March 22, 2006 memorandum, YouTube co-founder Jawed Karim wrote: "As of today episodes and clips of the following well-known shows can still be found: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, Dave Chapelle. This content is an easy target for critics who claim that copyrighted content is entirely responsible for YouTube's popularity. Although YouTube is not legally required to monitor content (as we have explained in the press) and complies with DMCA takedown requests, we would benefit from <i>preemptively</i> removing content that is blatantly illegal and likely to attract criticism. This will help to dispel YouTube's association with Napster (Newsweek: "<u>Is YouTube the Napster of Video?</u>", "<u>Showbiz unsure if YouTube a friend or foe.</u>")"</p>	<p>Hohengarten ¶ 255 &amp; Ex. 237, JK00000173, at JK00000173.</p>
<p>111. At his deposition, YouTube co-founder Jawed</p>	<p>Hohengarten ¶ 347 &amp; Ex. 313 (Karim</p>

Karim stated that he distributed his March 22, 2006 memorandum at a YouTube board meeting.	Dep.) at 178:19-183:4.
112. In March 2006, YouTube considered implementing an automated tool that would search the metadata for each uploaded video to identify potentially infringing clips and send emails to content owners to notify them of the potential infringement so that they could review the video and request its removal.	Hohengarten ¶ 363 & Ex. 329 (Dunton Dep.) at 303:4-305:9, 307:18-308:4.
113. At his deposition, YouTube director of finance Brent Hurley testified that the automated video metadata search tool would have allowed content owners to “define at their direction what . . . keywords that they would like to save as sort of a predefined search,” that the tool would have sent those content owners “emails . . . daily, weekly, monthly . . . at their direction,” and that his ‘vision’ of the tool would have allowed Viacom to search for terms like “Daily Show.”	Hohengarten ¶ 350 & Ex. 316 (B. Hurley Dep.) at 216:21-218:17.  Hohengarten ¶ 29 & Ex. 26, GOO001-00630641, at GOO001-00630641.
114. In a March 11, 2006 instant message exchange, YouTube engineer Matt Rizzo (IM user name mattadoor) told YouTube product manager Maryrose Dunton (IM user name maryrosedunton), that implementing the tool “isn’t hard” and would only “take another day or w/e [weekend] . . . but I still don’t understand why we have to cater to these guys”; Dunton voiced her opposition to the tool, stating “[I] hate this feature. I hate making it easier for these a-holes,” “ok, forget about the email alerts stuff,” and “we’re just trying to cover our asses so we don’t get sued.”	Hohengarten ¶ 214 & Ex. 202, GOO001-00829702, at 4 & at GOO001-00829704.
115. YouTube never implemented the search tool described in SUF ¶ 114.	Hohengarten ¶ 214 & Ex. 202, GOO001-00829702, at 4 & at GOO001-00829704 (“forget about the email alerts stuff.”).
116. In an April 3, 2006 email, a YouTube employee characterized a <i>Fort Worth Star-</i>	Hohengarten ¶ 30 & Ex. 27, GOO001-03060898, at GOO001-03060899.

<p><i>Telegram</i> article as a “great regional piece . . . that really captured the passion of the YouTube user and would have convinced me as her reader to check out the service.” The article described “South Park” and “Daily Show” videos on YouTube.</p>	
<p>117. In a May 14, 2006 email exchange with YouTube’s copyright personnel, a YouTube user whose South Park clip had been taken down wrote: “You guys have TONS of South Park Clips... is mine the only one in violation? You have WWF/WWE Media. WCW Media. Tons of Media that is liable for infringement of copyrights and your site promotes it. Seems odd.”</p>	<p>Hohengarten ¶ 31 &amp; Ex. 28, GOO001-00558783, at GOO001-00558783-84.</p>
<p>118. In a May 14, 2006 email exchange with YouTube’s copyright personnel, a YouTube user responded to YouTube’s claim that it “remove[s] videos when we receive a complaint from a rights holder” by saying: “knowing that you contain a lot of copyrighted [sic] media, why don’t you guys remove it instead of wait around for a complaint? Basically everyone else gets away with it while I am now warned about it. Seems odd again. So what would happen if I report the entire youtube website and it’s content? Would you guys remove your illegal media then?”</p>	<p>Hohengarten ¶ 31 &amp; Ex. 28, GOO001-00558783, at GOO001-00558783-84.</p>
<p>119. In a May 25, 2006 instant message conversation, YouTube product manager Matthew Liu (IM user name coda322) stated: “one of the vids in my playlist got removed . . . for copyright infringement . . . assholes . . . im going [sic] to go hit the customer service lady.”</p>	<p>Hohengarten ¶ 216 &amp; Ex. 376, GOO001-07169708, at 8 &amp; at GOO001-07169713.</p> <p>Hohengarten ¶ 200 &amp; Ex. 278, GOO001-07181365, at GOO001-07181365 (noting that coda322 is Matthew Liu’s AOL account name).</p> <p>Hohengarten ¶ 193 &amp; Ex. 190, GOO001-06525907, at GOO001-06525907 (noting that coda322 is a YouTube account name used by Matthew Liu).</p>



<p>120. In a June 4, 2006 instant message conversation, YouTube product manager Matthew Liu (IM user name coda322) directed a friend to two YouTube profile playlist pages containing content that he recognized as infringing, stating, “go watch some superman . . . dont show other people though . . . it can get taken off”; Liu’s friend asked, “why would it get taken off[?]”; Liu responded, “cuz its copyrighted . . . technically we shouldn’t allow it . . . but we’re not going to take it off until the person that holds the copyright . . . is like . . . you shouldnt have that . . . then we’ll take it off.”</p>	<p>Hohengarten ¶ 217 &amp; Ex. 377, GOO001-07169928, at 2 &amp; at GOO001-07169928.</p>
<p>121. In a June 26, 2006 instant message conversation with an unknown individual, YouTube product manager Matthew Liu responded to the question “what percentage of the videos on youtube are violating copyright infringement” by stating, “its a lot lower than you would think . . . but in terms of . . . percentage of videos that are watched . . . it is significantly higher.”</p>	<p>Hohengarten ¶ 215 &amp; Ex. 203, GOO001-07169720, at 2 &amp; at GOO001-07169720.</p>
<p>122. On June 27, 2006, YouTube co-founders Chad Hurley and Steve Chen, YouTube product manager Maryrose Dunton and YouTube senior software engineer Erik Klein received a <i>Wall Street Journal</i> article about YouTube that stated: “critics say the most-viewed items often involve some type of copyright infringement. On a recent day, top-viewed videos included clips from . . . ‘The Daily Show.’”</p>	<p>Hohengarten ¶ 32 &amp; Ex. 29, GOO001-02761607, at GOO001-02761607.</p> <p>Hohengarten ¶ 33 &amp; Ex. 30, GOO001-00420319, at GOO001-00420321.</p> <p>Hohengarten ¶ 392 &amp; Ex. 386 (Solomon Dep.) at 18:13-18:23 (testifying to Erik Klein’s job title).</p>
<p>123. When a user uploads a video the user may choose whether to make the video public (viewable to any user unless restricted by age or geography) or private (viewable to only the uploading user and users invited by the uploading user).</p>	<p>Hohengarten ¶ 356 &amp; Ex. 322 (Do Dep.) at 172:16-173:8, 180:8-181:4.</p> <p>Hohengarten ¶ 347 &amp; Ex. 313 (Karim Dep.) at 134:3-16.</p> <p>Hohengarten ¶ 368 &amp; Ex. 334 (Gillette Dep.) at 154:8-21.</p> <p>Hohengarten ¶ 385 &amp; Ex. 351 (Schaffer Dep.) at 162:19-24.</p>

124. Private videos are not searchable by a content owner seeking to identify instances of infringement on YouTube.	Hohengarten ¶ 88 & Ex. 85, GOO001-00827503, at GOO001-00827503.  Hohengarten ¶ 57 & Ex. 54, GOO001-02055019, at GOO001-02055019.  Hohengarten ¶ 361 & Ex. 327 (Drummond Dep.) at 195:13-20.
125. YouTube co-founder Chad Hurley testified in deposition that it is possible for a user to serially upload an entire movie as several private videos and that then the “content owner can’t see them.”	Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) at 238:18-239:9.
126. In June 2006 YouTube employees proactively reviewed private videos uploaded by the 40 users who uploaded the most private videos over a two-day period, concluded that 17 of those user accounts contained copyrighted private videos, and consequently closed those 17 accounts.	Hohengarten ¶ 58 & Ex. 55, GOO001-02693804, GOO001-02693808.  Hohengarten ¶ 59 & Ex. 56, GOO001-05150988, at GOO001-05150988.
127. In June 2006 YouTube employees proactively reviewed private videos uploaded by the 40 users who uploaded the most total videos over a two-day period, concluded that 22 of those user accounts contained copyrighted private videos, and closed 17 of those 22 accounts.	Hohengarten ¶ 58 & Ex. 56, GOO001-02693804, at GOO001-02693808.  Hohengarten ¶ 59 & Ex. 56, GOO001-05150988, at GOO001-05150988.
128. In an August 3, 2006 instant message conversation with YouTube engineer Matthew Rizzo (IM user name mattadoor), YouTube product manager Maryrose Dunton (IM user name maryrosedunton) said “so *technically* if you even perform a copyrighted song, it’s considered infringement. but we can leave this up until someone bitches.”	Hohengarten ¶ 208 & Ex. 196, GOO001-07585952, at 2 & at GOO001-07585952.
129. A YouTube board meeting presentation dated August 23, 2006 stated: “YouTube has become the next generation media AND advertising platform.”	Hohengarten ¶ 330 & Ex. 298, SC011742, at SC011760.
130. In an August 24, 2006 email to other YouTube employees, YouTube systems administrator Paul Blair provided a link to a Daily Show	Hohengarten ¶ 35 & Ex. 32, GOO001-03631419, at GOO001-03631419.

clip on YouTube.	Hohengarten ¶ 36 & Ex. 33, GOO001-03406085, at GOO001-03406086 (stating Paul Blair’s job title).
131. YouTube recognized that users might break up a movie or television episode into multiple parts and upload the parts to YouTube, and considered creating a queue for human review of videos close to ten minutes long, but never implemented such a queue.	Hohengarten ¶ 37 & Ex. 34, GOO001-00988969, at GOO001-00988970.  Hohengarten ¶ 368 & Ex. 334 (Gillette Dep.) at 49:23-50:10, 216:2-10, 217:15-19.  Hohengarten ¶ 38 & Ex. 35, GOO001-00953867, at GOO001-00953868.
132. A YouTube list of the “top keyword searches” in the United States for September 19, 2006 listed many Viacom shows and movies, including “south park” ( ), “flavor of love” ( ), “dave chappelle” ( ), “daily show” ( ), “jon stewart” ( searches), “colbert” ( ); “transformers” ( s), and “southpark” ( ).	Hohengarten ¶ 41 & Ex. 38, GOO001-03045959, at GOO001-03045960-63.

## B. Google’s Knowledge and Intent Concerning Infringement on YouTube

Google’s Knowledge of Infringement on YouTube Prior to Acquiring It	
Undisputed Fact	Evidence
133. Before acquiring YouTube, Google had its own Internet video site, Google Video, which allowed users to upload videos.	Hohengarten ¶ 366 & Ex. 332 (Eun Dep.) at 57:3-58:2.  Hohengarten ¶ 381 & Ex. 347 (P. Walker Dep.) at 240:6-240:14.
134. Until September 2006, Google Video employees reviewed each video uploaded to the Google Video site for copyright infringement and other terms of use violations before allowing the video to be displayed to users of the site.	Hohengarten ¶ 366 & Ex. 332 (Eun Dep.) at 118:19-121:25, 130:3-130:17.  Hohengarten ¶ 42 & Ex. 39, GOO001-00794737, at GOO001-00794742-43 (attachment).  Hohengarten ¶ 194 & Ex. 191,

	<p>GOO001-00923210, at GOO001-00923210.</p> <p>Hohengarten ¶ 381 &amp; Ex. 347 (P. Walker Dep.) at 69:6-75:7.</p> <p>Hohengarten ¶ 380 &amp; Ex. 346 (Narasimhan Dep.) at 13:25-16:8, 51:16-53:6.</p> <p>Hohengarten ¶ 44 &amp; Ex. 41, GOO001-03114019, at GOO001-03114019.</p> <p>Hohengarten ¶ 46 &amp; Ex. 43, GOO001-06555098, at GOO001-06555098.</p>
135. Until September 2006, all videos uploaded to the Google Video website were placed in a “video approval bin, essentially a video review queue,” and were reviewed by a Google employee before being made available for viewing on the Google Video website.	<p>Hohengarten ¶ 380 &amp; Ex. 346 (Narasimhan Dep.) at 12:5-16:8.</p>
136. Each video uploaded to Google Video and placed in the video review queue was reviewed by a Google employee for copyright infringement, porn, violence, and other reasons.	<p>Hohengarten ¶ 366 &amp; Ex. 332 (Eun Dep.) at 68:15-71:8, 130:1-130:17.</p> <p>Hohengarten ¶ 194 &amp; Ex. 191, GOO001-00923210, at GOO001-00923210.</p> <p>Hohengarten ¶ 380 &amp; Ex. 346 (Narasimhan Dep.) at 41:16-22, 50:9-53:6.</p> <p>Hohengarten ¶ 44 &amp; Ex. 41, GOO001-03114019, at GOO001-03114019.</p>
137. In a June 26, 2006 email titled “illegal uploads,” Google vice president of content partnerships David Eun asked Google Video content review manager Bhanu Narasimhan, who was in charge of the team reviewing videos in the video review queue: “In the swirl of discussions around copyright enforcement policies, can you tell me how	<p>Hohengarten ¶ 42 &amp; Ex. 39, GOO001-00794737, at GOO001-00794737.</p> <p>Hohengarten ¶ 380 &amp; Ex. 346 (Narasimhan Dep.) at 8:12-10:5 (stating Bhanu Narasimhan’s job title), 10:24-11:3, 148:2-148:8, 152:5-152:20.</p>

many illegal videos we catch each week on average and what types/kinds/categories they fall into? How do they correspond to the stuff that gets uploaded to YouTube?"; Ms. Narasimhan responded: "We catch around 10% of all online user uploaded videos during review. Of these approximately 90% is disapproved due to copyright violation, and the rest due to policy (porn, violence, etc.)."	Hohengarten ¶ 366 & Ex. 332 (Eun Dep.) at 25:7-25:19 (stating David Eun's job title).
138. Google Video stopped proactively reviewing for copyright infringement on or about September 1, 2006.	Hohengarten ¶ 45 & Ex. 42, GOO001-00802317, at GOO001-00802317.  Hohengarten ¶ 380 & Ex. 346 (Narasimhan Dep.) at 13:25-16:8.  Hohengarten ¶ 46 & Ex. 43, GOO001-06555098, at GOO001-06555098.
139. Google Video also used keyword searching for terms such as "Daily Show," "Jon Stewart," "Dave Chappelle," and "Comedy Central" to locate videos that infringed Viacom's and others' copyrights.	Hohengarten ¶ 47 & Ex. 44, GOO001-00990640, at GOO001-00990641.
140. In a January 15, 2006 email Google executive Peter Chane responded to a colleague who emailed him a link to a YouTube video by saying: "google video doesn't have this one b/c we have a zero tolerance policy for copyrighted content."	Hohengarten ¶ 48 & Ex. 45, GOO001-03592968, at GOO001-03592968.  Hohengarten ¶ 353 & Ex. 319 (Chane Dep.) at 8:18-10:25 (stating Peter Chane's job title).
141. In the same January 15, 2006 email, Google executive Peter Chane continued, in reference to a discussion he had with YouTube co-founder Chad Hurley and another YouTube executive Chris Maxcy: "youtube is at an advantage b/c they aren't the target that we are with issues like this. they are aware of this (I spoke with them on friday) and they plan on exploiting this in order to get more and more traffic."	Hohengarten ¶ 48 & Ex. 45, GOO001-03592968, at GOO001-03592968.  Hohengarten ¶ 353 & Ex. 319 (Chane Dep.) at 8:18-10:25, 48:10-50:18.
142. In a February 7, 2006 email Google executive Peter Chane wrote to several Google colleagues: "my concern with youtube is their inclusion of clearly copyrighted content in	Hohengarten ¶ 49 & Ex. 46, GOO001-03594244, at GOO001-03594244.

<p>their index. if you query for SNL or Jon Stewart you'll see what I'm talking about. . . . if they were to be a part of google I assume we'd impose our zero tolerance policy with respect to copyright infringement which would significantly reduce their index size and traffic."</p>	
<p>143. In a February 7, 2006 email Google executive Peter Chane wrote to several Google colleagues: "my concern about youtube is their dependence upon copyrighted content for traffic."</p>	<p>Hohengarten ¶ 50 &amp; Ex. 47, GOO001-05084213, at GOO001-05084213.</p>
<p>144. On March 4, 2006 Google executive Patrick Walker emailed Google Video Product Manager Hunter Walk, the business product manager of Google Video, that he was "baffled" by comparisons between YouTube and Google Video because YouTube was "doing little to stem its traffic growth on the back of pirated content," calling that choice "unsustainable and irresponsible."</p>	<p>Hohengarten ¶ 51 &amp; Ex. 48, GOO001-00562962, at GOO001-00562962.</p> <p>Hohengarten ¶ 381 &amp; Ex. 347 (P. Walker Dep.) at 144:15-145:10 (testifying to Hunter Walk's job title).</p> <p>Hohengarten ¶ 366 &amp; Ex. 332 (Eun Dep.) at 166:20-167:12 (testifying to Hunter Walk's job title).</p>
<p>145. On April 27, 2006, Google executive Peter Chane sent an email to the Video Team at Google forwarding the statement by Peter Chernin, then CEO of Fox Entertainment, about YouTube: "Exciting as it shows the potential pent up demand. we did a survey and more than 80 percent of video on this site is copyrighted content"; Google Video business product manager Ethan Anderson replied, "Holy cow."</p>	<p>Hohengarten ¶ 52 &amp; Ex. 49, GOO001-00566289, at GOO001-00566289.</p>
<p>146. By May 2006 YouTube had far surpassed Google Video in terms of number of users, number of playbacks, and number of videos.</p>	<p>Hohengarten ¶ 53 &amp; Ex. 50, GOO001-00495746, at GOO001-00495746 (Eric Schmidt stating: "My primary concern is that . . . we are behind Youtube.").</p> <p>Hohengarten ¶ 54 &amp; Ex. 51, GOO001-00496021, at GOO001-00496024.</p> <p>Hohengarten ¶ 55 &amp; Ex. 52, GOO001-00496614, at GOO001-00496633.</p>

<p>147. In May 2006, Google held a Google Product Strategy (or “GPS”) meeting attended by top executives, including Google CEO Eric Schmidt; the meeting focused on Google Video.</p>	<p>Hohengarten ¶ 384 &amp; Ex. 350 (Rosenberg Dep.) at 50:15-51:7.</p> <p>Hohengarten ¶ 56 &amp; Ex. 53 GOO001-01495915, at GOO001-01495915.</p> <p>Hohengarten ¶ 348 &amp; Ex. 314 (Schmidt Dep.) at 76:20-78:10.</p> <p>Hohengarten ¶ 353 &amp; Ex. 319 (Chane Dep.) at 114:22-115:6.</p>
<p>148. An early May 2006 draft information sheet about YouTube created for Google co-founder Larry Page discussed YouTube’s “Fast-start history” and stated that YouTube’s “[l]ack of focus on copyright violation (especially early on) created Napster-type adoption increases: ‘good content’ available for free without delay.”</p>	<p>Hohengarten ¶ 60 &amp; Ex. 57 GOO001-04430721, at GOO001-04430722.002.</p> <p>Hohengarten ¶ 349 &amp; Ex. 315 (Page Dep.) at 10:22-10:24 (testifying to Larry Page’s job title).</p>
<p>149. In a May 2, 2006, email to Google executive Susan Wojcicki, Google vice president of content partnerships David Eun stated that he “ran into Peter and he had this idea to ‘beat YouTube’ by calling quits on our copyright compliance standards”; in his deposition Eun identified “Peter” as Google executive Peter Chane.</p>	<p>Hohengarten ¶ 53 &amp; Ex. 50, GOO001-00495746, at GOO001-00495746.</p> <p>Hohengarten ¶ 366 &amp; Ex. 332 (Eun Dep.) 115:8-116:5, 201:2-201:9 (testifying to Susan Wojcicki’s job description).</p> <p>Hohengarten ¶ 353 &amp; Ex. 319 (Chane Dep.) at 9:5-10:4.</p> <p>Hohengarten ¶ 366 &amp; Ex. 332 (Eun Dep.) at 201:2-201:9.</p>
<p>150. A May 3, 2006 Google Video document stated: “Why is YouTube the Key Competitor? Not all traffic is created equal. Traffic is high but content is mostly illegal content (copyright infringing but not porn); how would comparable usage stats look for consumption of just legal content?”</p>	<p>Hohengarten ¶ 61 &amp; Ex. 58, GOO001-02361246, at GOO001-02361247.</p>
<p>151. A May 5, 2006 draft presentation from Google vice president of content partnerships David Eun for the GPS meeting summarized the “Views of Premium Content Owners On</p>	<p>Hohengarten ¶ 62 &amp; Ex. 59, GOO001-00496065, at GOO001-00496086.</p>

YouTube” and stated: “YouTube is perceived as trafficking mostly illegal content -- ‘it’s a video Grokster.’”	
152. A May 9, 2006 Google Video presentation titled “Content Acquisition Strategy Update” stated that “YouTube’s business model is completely sustained by pirated content,” and recommended that “we should beat YouTube by improving features and user experience, not being a ‘rogue enabler’ of content theft.”	Hohengarten ¶ 63 & Ex. 60, GOO001-00502665, at GOO001-00502674, GOO001-00502684.
153. In a May 10, 2006 email to Google executive Patrick Walker, Google Video business product manager Ethan Anderson stated: “I can’t believe you’re recommending buying YouTube. . . . they’re 80% illegal pirated content”	Hohengarten ¶ 64 & Ex. 61, GOO001-00482516, at GOO001-00482516.  Hohengarten ¶ 381 & Ex. 347 (P. Walker Dep.) at 87:6-87:12 (testifying to Ethan Anderson’s job title).
154. A May 11, 2006 draft presentation for the GPS titled “Google Video” by Google executive Peter Chane stated that YouTube had more daily video uploads and daily video views than Google Video.	Hohengarten ¶ 54 & Ex. 51, GOO001-00496021, at GOO001-00496024, GOO001-00496031.
155. The same May 11, 2006 draft presentation stated that “YouTube is growing” in part because of its “Liberal copyright policy,” including “No proactive screening; reactive DMCA only,” making “YouTube better for users.”	Hohengarten ¶ 54 & Ex. 51, GOO001-00496021, at GOO001-00496031.
156. The same May 11, 2006 draft presentation included a “Copyright policy parity analysis” stating that on YouTube, “Partial works [are] accepted[;] CSPAN, Family Guy, John Stewart, NBA clips, music videos posted on the site[;] <b>YouTUBE gets content when it’s hot</b> (Lazy Sunday, Stephen Colbert, Lakers wins at the buzzer)”; and stating with respect to Google Video that it “[t]akes us too long to acquire content directly from the rights holder.”	Hohengarten ¶ 54 & Ex. 51, GOO001-00496021, at GOO001-00496035 (emphasis in original).
157. In a May 11, 2006 document titled “Video GPS content pages FINAL,” sent to Google	Hohengarten ¶ 55 & Ex 52, GOO001-00496614, at GOO001-00496627,



<p>executive Peter Chane, Google vice president of content partnerships David Eun, and others for integration into the material prepared for the GPS, the Google Video team stated: “Premium Content Owners . . . (mainly) perceive YouTube as trafficking mostly illegal content -- ‘it’s a video Grokster’”; “we should beat YouTube by improving features and user experience, not being a ‘rogue enabler’ of content theft”; “YouTube’s content is all free, and much of it is highly sought after pirated clips”; and “YouTube’s business model is completely sustained by pirated content. They are at the mercy of companies not responding with DMCA requests.”</p>	<p>GOO001-00496633, GOO001-00496637.</p>
<p>158. In a May 12, 2006 email to Google CEO Eric Schmidt and Google senior vice president Omid Kordestani, Google vice president David Eun stated that “the Video team” at Google “has focused on two questions . . . 1) how we ‘beat YouTube’ in the short term; and 2) how we win over time”; and that “there was heated debate about whether we should relax enforcement of our copyright policies in an effort to stimulate traffic growth, despite the inevitable damage it would cause to relationships with content owners. I think we should beat YouTube . . . -- but not at all costs.”</p>	<p>Hohengarten ¶ 65 &amp; Ex. 62, GOO001-00496651, at GOO001-00496651.</p> <p>Hohengarten ¶ 375 &amp; Ex. 341 (Kordestani Dep.) at 20:14-21:7 (testifying to Omid Kordestani’s job title).</p>
<p>159. In the same May 12, 2006 email, Google vice president of content partnerships David Eun stated, regarding YouTube, that a “large part of their traffic is from pirated content. When we compare our traffic numbers to theirs, we should acknowledge that we are comparing our ‘legal traffic’ to their mix of traffic from legal and illegal content. One senior media executive told me they are monitoring YouTube very closely and referred to them as a ‘Video Grokster.’”</p>	<p>Hohengarten ¶ 65 &amp; Ex. 62, GOO001-00496651, at GOO001-496652.</p>
<p>160. In a June 2, 2006 instant message conversation, Google vice president of content partnerships David Eun (IM user</p>	<p>Hohengarten ¶ 211 &amp; Ex. 199, GOO001-02363217, at 2 at &amp; at GOO001-02363217.</p>

<p>name deun@google.com) told another Google executive Patrick Walker (IM user name pwalker@google.com) that although Eun and Google co-founder Sergey Brin opposed relaxing Google Video's copyright policies, Google's CEO Eric Schmidt supported the change.</p>	<p>Hohengarten ¶ 352 &amp; Ex. 318 (Brin Dep.) at 7:15-7:17 (testifying to Sergey Brin's job title).</p> <p><i>See also</i> Hohengarten ¶ 67 &amp; Ex. 64, GOO001-00563430, at GOO001-00563431 (“Shouldn’t the lesson here be [t]o play faster and looser and be aggressive until either a court says [“]no” or a deal gets struck. I don’t think there can be an in [b]etween”).</p>
<p>161. On June 8, 2006, Google senior vice president Jonathan Rosenberg, Google Senior Vice President of Product Management, emailed Google CEO Eric Schmidt and Google co-founders Larry Page and Sergey Brin a Google Video presentation that stated the following: “Pressure premium content providers to change their model towards free[;] Adopt ‘or else’ stance re prosecution of copyright infringement elsewhere[;] Set up ‘play first, deal later’ around ‘hot content.’” The presentation also stated that “[w]e may be able to coax or force access to viral premium content,” noting that Google Video could “<b>Threaten</b> a change in copyright policy” and “use threat to get deal sign-up.”</p>	<p>Hohengarten ¶ 66 &amp; Ex. 63, GOO001-00791569, at GOO001-00791575, GOO001-00791594 (emphasis in original).</p> <p>Hohengarten ¶ 384 &amp; Ex. 350 (Rosenberg Dep.) at 12:9-12:18 (testifying to Jonathan Rosenberg’s position).</p>
<p>162. In a June 28, 2006 email to numerous other Google executives, Google vice president of content partnerships David Eun stated: “as Sergey pointed out at our last GPS, is changing policy [t]o increase traffic knowing beforehand that we’ll profit from illegal [d]ownloads how we want to conduct business? Is this Googley?”</p>	<p>Hohengarten ¶ 67 &amp; Ex. 64, GOO001-00563430, at GOO001-00563430.</p>
<p>163. In his deposition, Google vice president of content partnerships David Eun identified the “Sergey” referred to in his June 28, 2006 email (<i>see</i> SUF ¶ 162) as Google founder Sergey Brin.</p>	<p>Hohengarten ¶ 366 &amp; Ex. 332 (Eun Dep.) at 170:4-8.</p>
<p>164. On June 17, 2006, Google Video business product manager Ethan Anderson sent</p>	<p>Hohengarten ¶ 68 &amp; Ex. 65, GOO001-00563469, at GOO001-00563469.</p>

<p>Google executive Patrick Walker an email listing the “Top 10 reasons why we shouldn’t stop screening for copyright violations,” including: “1. It crosses the threshold of Don’t be Evil to facilitate distribution of other people’s intellectual property, and possibly even allowing monetization of it by somebody who doesn’t own the copyright”; “2. Just growing any traffic is a bad idea. This policy will drive us to build a giant index of pseudo porn, lady punches, and copyrighted material . . .”; “3. We should be able to win on features, a better [user interface] technology, advertising relationships - not just policy. It’s a cop out to resort to dist-rob-ution”; and “7. It makes it more difficult to do content deals with you have an index of pirated material.”</p>	<p><i>See also</i> Hohengarten ¶ 317 &amp; Ex. 387 (Google Investor Relations page entitled “Google Code of Conduct”) (“The Google Code of Conduct is one of the ways we put ‘Don’t be evil’ into practice.”).</p>
<p>165. On September 24, 2006, less than three weeks before Google announced its acquisition of YouTube, a Google employee sent an email that included a link to a Daily Show video that had been uploaded to YouTube, stating: “Good old YouTube - copyright, schmoppyright.”</p>	<p>Hohengarten ¶ 69 &amp; Ex. 66, GOO001-00792297, at GOO001-00792297.</p>

Google’s Knowledge and Intent Concerning Infringement on YouTube Through Pre-Acquisition Due Diligence	
Undisputed Fact	Evidence
<p>166. Prior to Google’s announcement of its acquisition of YouTube on October 9, 2006, a team of Google employees performed due diligence relating to the proposed acquisition of YouTube.</p>	<p>Hohengarten ¶ 361 &amp; Ex. 327 (Drummond Dep.) at 23:5-26:8.</p>
<p>167. Google hired Credit Suisse to perform a valuation of YouTube and to render a fairness opinion regarding the proposed \$1.65 billion purchase price.</p>	<p>Hohengarten ¶ 362 &amp; Ex. 328 (Duncan 30(b)(6) Dep.) at 60:16-68:25.</p> <p>Hohengarten ¶ 321 &amp; Ex. 290, CSSU 002845 at, CSSU 002847.</p>
<p>168. Google’s due diligence team analyzed a</p>	<p>Hohengarten ¶ 322 &amp; Ex. 291 CSSU</p>

random sample of hundreds of videos provided by YouTube that Google believed to be representative of the types of content on YouTube.	002686, at CSSU 002686.  Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep.) at 87:3-91:8.
169. This random sample of YouTube videos was given to the Google due diligence team by YouTube co-founder Steve Chen.	Hohengarten ¶ 70 & Ex. 67, GOO001-04736644, at GOO001-04736644.
170. Google's analysis of the random sample of YouTube videos determined that 63% of the videos on YouTube were "Premium/removed," meaning that the content was "copyright (either in whole or substantial part)" or "removed [and] taken down."	Hohengarten ¶ 322 & Ex. 291 CSSU 002686, at CSSU 002686.  Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep.) at 89:4-7, 95:18-98:19.
171. Storm Duncan, managing director of Credit Suisse and part of Google's YouTube acquisition due diligence team, wrote in hand-written notes that "60% is premium," which he defined as "Professionally Produced" and categorized as "Legitimate" and "Illegitimate."	Hohengarten ¶ 320 & Ex. 289, CSSU 001863, at CSSU 001957.  Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep.) at 199:24-200:5, 207:25-210:13.
172. Credit Suisse used Google's analysis of YouTube videos as an input to its valuation of YouTube.	Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep.) at 90:23-91:4.
173. Credit Suisse's valuation model for YouTube estimated that 60% of the video views on YouTube were of "premium" content.	Hohengarten ¶ 323 & Ex. 292, CSSU 004069, at CSSU 004071.
174. Credit Suisse's valuation model for YouTube estimated that in 2007, only 10% of the video views of premium content would be of content that was authorized to be on YouTube.	Hohengarten ¶ 323 & Ex. 292, CSSU 004069, at CSSU 004071.
175. Credit Suisse prepared a presentation regarding its valuation of YouTube and presented it to Google's board of directors on October 9, 2006, before the board voted to acquire YouTube.	Hohengarten ¶ 324 & Ex. 293, CSSU 003560, at CSSU 003561-86.  Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep.) at 117:11-119:15.  Hohengarten ¶ 361 & Ex. 327 (Drummond Dep.) at 15:20-16:2.

176. Credit Suisse's October 9, 2006 presentation to Google's board of directors estimated that "60% of total video streams on [the YouTube] website are 'Premium,'" and that "10% of premium content providers allow [YouTube] to monetize their content in 2007E."	Hohengarten ¶ 324 & Ex. 293 CSSU 003560, at CSSU 003570.  Hohengarten ¶ 375 & Ex. 341 (Kordestani Dep. at 109:24-110:22).  Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep. at 158:13-159:1).
177. An October 8, 2006 draft of Credit Suisse's presentation defined "[p]remium content [a]s copyrighted content such as movies/TV trailers, music videos, etc."	Hohengarten ¶ 325 & Ex. 294 CSSU 003326, at CSSU 003335.
178. The October 9, 2006 Credit Suisse presentation emphasized the "tremendous growth" in YouTube's userbase and its "loyal global following."	Hohengarten ¶ 324 & Ex. 293 CSSU 003560, at CSSU 003569 (emphasizing YouTube's "tremendous growth" and "loyal global following").
179. The October 9, 2006 Credit Suisse presentation projected that there would be 126 billion views of YouTube watch page views in 2007, and more than 154 billion views of YouTube home and search results pages in 2007.	Hohengarten ¶ 324 & Ex. 293 CSSU 003560, at CSSU 003570 (45% of 280 billion; 55% of 280 billion).
180. In the October 9, 2006 presentation, Credit Suisse advised Google's board that the base case financial value of YouTube was \$2.7 billion, derived from Google's ability to monetize YouTube's user base in the future.	Hohengarten ¶ 324 & Ex. 293 CSSU 003560, at CSSU 003573.
181. The October 9, 2006 presentation informed Google's board that "60% of total video streams on yellow [their code name for the YouTube website] are 'Premium.'"	Hohengarten ¶ 324 & Ex. 293 CSSU 003560, at CSSU 003570; <i>see also id.</i> at CSSU 003569 (listing "[u]ncertain legal issues" under "[i]ssues for [c]onsideration").  Hohengarten ¶ 362 & Ex. 328 (Duncan 30(b)(6) Dep.) at 24:22-25:16 (confirming that "Yellow" was the code name for YouTube and "green" was the code name for Google).
182. In the October 9, 2006 presentation Credit Suisse advised Google's board that Credit	Hohengarten ¶ 324 & Ex. 293, CSSU

Suisse’s valuation “[a]ssumes 10% premium content providers allow [YouTube] to monetize their content in [fiscal year 2007].”	003560, at CSSU 003570.
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YouTube’s Agreement to Indemnify Google For Copyright Infringement Liability	
Undisputed Fact	Evidence
183. On October 4, Google sent YouTube a term sheet offering to buy YouTube for \$1.65 billion in Google stock; in the term sheet, Google proposed that YouTube and its stockholders “indemnify and hold Google harmless for any losses and liabilities (including legal fees) relating to copyright lawsuits filed against the Company or Google” for up to 12.5% of the purchase price, which was to be held in escrow.	Hohengarten ¶ 326 & Ex. 295 CSSU 002982, at CSSU 002985-86.
184. During negotiations, YouTube pushed for a smaller escrow amount.	Hohengarten ¶ 388 & Ex. 354 (Yu Dep.) at 107:4-108:3.
185. The October 9, 2006 Google/YouTube merger agreement included indemnification and escrow provisions providing that 12.5 percent of the consideration Google paid for YouTube would be held in escrow to satisfy legal claims made against YouTube and Google, including copyright infringement claims.	Hohengarten ¶ 335 & Ex. 303, TP000055, at TP000079-80 (¶ 2.9).  Hohengarten ¶ 348 & Ex. 314 (Schmidt Dep.) at 65:10-65:23 (testifying that he is “aware of what I’m going to call a holdback . . . that . . . includes areas of copyright” and that the Google board of directors discussed the “holdback” around the time of the acquisition).
186. In April 2007, Defendants executed an amendment to the Google/YouTube merger agreement to correct a “scrivener’s error”; the correction increased the proportion of the escrowed merger consideration that could be used to cover copyright infringement claims brought against Defendants in connection with the YouTube website.	Hohengarten ¶ 331 & Ex. 299, SC 010022, at SC 010023.  Hohengarten ¶ 361 & Ex. 327 (Drummond Dep.) at 89:7-92:6.  Hohengarten ¶ 333 & Ex. 301, AC007823, at AC007824.

Defendants' Knowledge and Intent Concerning Infringement on YouTube After Google Acquired YouTube	
Undisputed Fact	Evidence
187. The press release issued by Google announcing the acquisition of YouTube stated: "With Google's technology, advertiser relationships and global reach, YouTube will continue to build on its success as one of the world's most popular services for video entertainment."	Hohengarten ¶ 71 & Ex 68, GOO001-03548410, at GOO001-03548410.
188. A September 14, 2007 email from Google vice president of content partnerships David Eun to Google sales director Suzie Reider, YouTube's Chief Marketing Officer, Eun stated: "If we think back to last Nov. you are chad [Hurley], your head is spinning and Eric Schmidt, CEO of the most powerful company in the world tells you your only focus is to grow playbacks to 1B/day. . . . that's what you do."	Hohengarten ¶ 72 & Ex. 69, GOO001-02021241, at GOO001-02021241.  Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) at 254:11-255:22.  Hohengarten ¶ 382 & Ex. 348 (Reider Dep.) at 8:24-12:24.
189. Google did not apply Google Video's earlier policy of proactively reviewing for copyright infringement to YouTube; instead, Google adopted YouTube's policy of allowing substantially all infringing video to remain freely available on YouTube until a copyright owner could detect it and send a takedown notice.	Hohengarten ¶ 393 & Ex. 356 at ¶¶ 14-15 (Declaration of Steve Chen dated January 5, 2007).  Hohengarten ¶ 385 & Ex. 351 (Schaffer Dep.) at 183:7-184:3.  Hohengarten ¶ 74 & Ex. 71, GOO001-01271624, at GOO001-01271624.  <i>See also</i> Hohengarten ¶ 88 & Ex. 85 GOO001-00827503, at GOO001-00827503 ("[T]he general YT policy has shifted to be, 'Never police anything proactively, all content reviews should be reactive.'").
190. In an October 13, 2006 email to other Google employees, Google Video Product Manager Hunter Walk provided a link to a Colbert Report clip on YouTube.	Hohengarten ¶ 75 & Ex. 72 GOO001-03383629, at GOO001-03383629.

191. In a March 9, 2007 email to YouTube employees, a Google employee provided a link to a “Funny south park” video on YouTube.	Hohengarten ¶ 76 & Ex. 73, GOO001-01364485, at GOO001-01364485.
192. In a March 15, 2007 instant message conversation YouTube product manager Virginia Wang (IM user name missveeandchip) discussed her attempts to find videos on YouTube to put in a “cute video” category and stated that “it was hard to find anything i thought was vote worthy . . . that we could use . . . since so much of it involves copywritten stuff.” In an email the same day, Wang stated, “we’re running into issues finding enough videos because they have so many copyright violations.”	<p>Hohengarten ¶ 212 &amp; Ex. 200, GOO001-07738864, at 2-3 &amp; at GOO001-07738864.</p> <p>Hohengarten ¶ 199 &amp; Ex. 375, GOO001-06669529, at GOO001-06669529 (noting that missveeandchip is Virginia Wang’s IM user name).</p> <p>Hohengarten ¶ 77 &amp; Ex. 74, GOO001-07155101, at GOO001-07155101.</p> <p>Hohengarten ¶ 378 &amp; Ex. 344 (Liu Dep.) at 60:6-61:8 (testifying to Virginia Wang’s job description).</p>
193. In a March 23, 2007 email to other Google employees, a Google employee provided a link to a Daily Show clip on YouTube.	Hohengarten ¶ 78 & Ex. 75, GOO001-00217336, at GOO001-00217336.
194. In an April 2, 2007 email, Google employee Matthew Arnold wrote to two other Google employees (Crosby Freeman and Hugh Moore), highlighting a “Daily Show” clip on YouTube.	Hohengarten ¶ 80 & Ex. 77, GOO001-05154818, at GOO001-05154818.
195. A draft May 2007 presentation prepared by Shashi Seth, YouTube’s head of monetization, and distributed to Google vice president of content partnerships David Eun, YouTube co-founder Chad Hurley, and others, reported that █████ of YouTube searches are directed toward music videos, movies, celebrities, and TV programs, but that only █████ of videos watched by users consisted of authorized professional content. The same presentation stated that “[u]sers are searching for lots of things, but primarily for premium content.”	<p>Hohengarten ¶ 81 &amp; Ex. 78, GOO001-05943950, at GOO001-05943951-55.</p> <p>Hohengarten ¶ 387 &amp; Ex. 353 (Seth Dep.) at 15:15-17:2 (testifying to Shashi Seth’s job title), 157:13-24.</p> <p><i>See also</i> Hohengarten ¶ 82 &amp; Ex. 79, GOO001-01016844, at GOO001-01016844 (statement from YouTube head of monetization Shashi Seth that based on an analysis of the top search queries on YouTube, “█████ fall under entertainment - not surprising.”).</p> <p><i>See also</i> Hohengarten ¶ 83 &amp; Ex. 80,</p>



	<p>GOO001-00225766, at GOO001-00225767 (analysis by Google executive Alex Ellerson of the top 100 search queries, determining that approximately [REDACTED] of the queries were for premium content, and that of the queries for premium content, [REDACTED] of those were for “Entertainment TV.”).</p>
<p>196. An analysis by Google in May 2007 showed that while the average YouTube video was viewed 110 times, videos that had been removed for copyright infringement were viewed an average of 765 times.</p>	<p>Hohengarten ¶ 84 &amp; Ex. 81, GOO001-02414976, at GOO001-02414980.</p> <p>Hohengarten ¶ 85 &amp; Ex. 82, GOO001-03241189, at GOO001-03241189; <i>see also id.</i> at GOO001-03241191 (showing that premium content is selected by users as “favorite” content an average of [REDACTED] times per video, while original user-generated content is selected as “favorite” an average of only [REDACTED] times).</p> <p>Hohengarten ¶ 387 &amp; Ex. 353 (Seth Dep.) at 143:17-144:23, 146:12-150:18.</p>
<p>197. In a June 13, 2007 email, YouTube head of monetization Shashi Seth stated that based on his review of the top 10,000 search queries on YouTube: “[C]onsistent with my earlier findings, music video (being searched mostly by artist names . . .) are being searched a lot, as are TV shows, . . . and celebrities. . . . Going down the list of 10k [search terms], it seems that the queries do reflect the popularity of the artists, songs, celebrities . . . Music, TV Shows, Movies, Celebrities, Sports, etc. are definitely our top categories to attack;” Mr. Seth further stated that “Searches do reflect popularity pretty well.”</p>	<p>Hohengarten ¶ 86 &amp; Ex. 83, GOO001-00747816, at GOO001-00747816.</p> <p>Hohengarten ¶ 387 &amp; Ex. 353 (Seth Dep.) at 103:12-20.</p>
<p>198. A June 2007 “YouTube Profile Study” showed that [REDACTED] of all YouTube users and [REDACTED] of users who visit YouTube daily watch “television shows” on YouTube.</p>	<p>Hohengarten ¶ 87 &amp; Ex. 84, GOO001-02201131, at GOO001-02201132.0002 (study index stating that Table 31 is about the “Kind of Video” users “Typically</p>

	Watch”), GOO001-02201132.0061 (Table 31 page containing percentage totals for YouTube users generally); GOO001-02201132.0062 (Table 31 page containing percentage totals for users who visit YouTube with varying frequencies).
199. In a July 18, 2007 email YouTube employee Julie Havens wrote: “A trend we see is that people upload copyrighted videos to their private videos (which are not reviewed unless flagged), and then invite large numbers of people to view the video which bypasses our copyright restrictions.”	Hohengarten ¶ 88 & Ex. 85, GOO001-00827503, at GOO001-00827503.
200. A February 19, 2008 Google presentation titled “EMG Deal Review -- YouTube & South Park Studios” stated that based on YouTube search “query data,” there was “proven interest on YouTube” for clips of South Park; the presentation further stated that South Park was [REDACTED]	Hohengarten ¶ 89 & Ex. 86, GOO001-01998134, at GOO001-01998136.
201. In March 2008, YouTube co-founder Chad Hurley sent an email to Google executives Susan Wojcicki and Google Video Product Manager Hunter Walk stating that “three weeks ago Eric shifted his thinking on YouTube’s focus. So, since that time we have rapidly been redirecting our efforts from user growth to monetization.”	Hohengarten ¶ 73 & Ex. 70, GOO001-01395950, at GOO001-01395950.  Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) at 253:18-254:5.
202. A YouTube user survey from April 2008 showed that [REDACTED] of users watch music videos on YouTube, [REDACTED] of users surveyed watch comedy on YouTube, [REDACTED] of users surveyed watch “Full length TV programs” on YouTube, and [REDACTED] of users watch “Full length movie[s]” on YouTube.	Hohengarten ¶ 90 & Ex. 87, GOO001-00829227, at GOO001-00829229.0002.

Defendants' Knowledge and Intent Concerning Infringement on YouTube Through Licensing Negotiations with Viacom	
Undisputed Fact	Evidence
203. From November 2006 until February 2007, Viacom negotiated with Google over a possible "content partnership" agreement under which Viacom would license some of its copyrighted works to appear on YouTube.	<p>Hohengarten ¶ 348 &amp; Ex. 314 (Schmidt Dep.) at 173:22-174:23.</p> <p>Hohengarten ¶ 91 &amp; Ex. 88, GOO001-00797774, at GOO001-00797774.</p> <p>Hohengarten ¶ 195 &amp; Ex. 371, GOO001-01529251, at GOO001-01529251.</p> <p>Hohengarten ¶ 201 &amp; Ex. 382, GOO001-08050272, at GOO001-08050272.</p>
204. During the negotiations, Viacom made clear that without such a license, the appearance of Viacom works on YouTube was unauthorized.	Hohengarten ¶ 270 & Ex. 244, VIA01475465, at VIA01475465-76.
205. Viacom also insisted on compensation for past infringement of its works as part of any license.	Hohengarten ¶ 92 & Ex. 89, GOO001-05942431, at GOO001-05942431.
206. Google offered a package that it valued at more than \$ [REDACTED] for a content license from Viacom.	Hohengarten ¶ 93 & Ex. 90, GOO001-02057400, at GOO001-02057400.
207. Google's offer and term sheet included an explicit guarantee that Google would use digital fingerprinting technology to prescreen all uploads to YouTube and block any videos from Viacom works not licensed under the agreement.	<p>Hohengarten ¶ 271 &amp; Ex. 245, VIA00727696, at VIA00727696.</p> <p>Hohengarten ¶ 94 &amp; Ex. 91, GOO001-00984825, at GOO001-00984837.</p>
208. Ultimately negotiations broke down and Defendants never obtained a license from Viacom.	Hohengarten ¶ 270 & Ex. 244, VIA01475465, at VIA01475465-76.
209. After the parties' license negotiations ended in impasse, Viacom's General Counsel, Michael Fricklas, wrote Google on	Hohengarten ¶ 270 & Ex. 244, VIA01475465, at VIA01475465-76.

February 2, 2007, pressing Defendants to use fingerprinting technology to prevent infringement of Viacom's works, and offering to have Viacom technology experts cooperate with Defendants as needed to that end.	
210. On February 2, 2007, Viacom issued a request to YouTube to remove over 100,000 videos from the YouTube website.	Hohengarten ¶ 270 & Ex. 244, VIA01475465, at VIA01475465.
211. On February 2, 2007, after Viacom requested that Defendants remove over 100,000 videos from the YouTube website, Chris Maxcy stated that he would provide Viacom with access to a new search tool that was "still in alpha" to assist Viacom in taking down content from the YouTube website.	Hohengarten ¶ 192 & Ex. 189, GOO001-00746412, at GOO001-00746412.
212. On February 2, 2007, Maxcy agreed to speak to a technical team at Viacom about the new takedown tool by phone on February 5, 2007.	Hohengarten ¶ 273 & Ex. 383, VIA17716283, at VIA17716284-85.
213. On February 5, 2007, Maxcy cancelled the scheduled conference call with Viacom's technical team and informed Adam Cahan that Defendants would not provide Viacom with access to the new takedown tool without a content partnership deal.	Hohengarten ¶ 273 & Ex. 383, VIA17716283, at VIA17716283.
214. On February 6, 2007, instead of providing Viacom with access to the new takedown tool, Maxcy provided Viacom with access to YouTube's Content Verification Program, a system that had been in place for nearly a year and allowed content owners to check boxes to designate individual videos for take down.	<p>Hohengarten ¶ 95 &amp; Ex. 92, GOO001-00746418, at GOO001-00746418.</p> <p>Hohengarten ¶ 96 &amp; Ex. 93, GOO001-00751570, at GOO001-00751570.</p> <p>Hohengarten ¶ 97 &amp; Ex. 94, GOO001-00869300, at GOO001-00869300.</p> <p><i>See also</i> Hohengarten ¶ 394 &amp; Ex. 357 (Declaration of Zahavah Levine dated January 5, 2007) at ¶ 14.</p> <p><i>See also</i> Hohengarten ¶ 309 &amp; Ex. 281 (YouTube page entitled "Content</p>

	<p>Verification Program”).</p> <p><i>See also</i> Hohengarten ¶ 310 &amp; Ex. 282 (YouTube “Copyright Infringement Notification” page linked to from YouTube “Content Verification Program” page as “instructions” for submitting “removal requests” through YouTube’s Content Verification Program).</p>
<p>215. The Content Verification Program is separate from Google’s audio and video fingerprinting tools and does not include access to those tools.</p>	<p>Hohengarten ¶ 394 &amp; Ex. 357 (Declaration of Zahavah Levine dated January 5, 2007) at ¶ 14 (“We have even created a content verification program . . . that enables content owners to search for their content on the site. The tool allows content owners to easily notify us that they wish specific content to be removed simply by checking a box.”).</p> <p>Hohengarten ¶ 318 &amp; Ex. 388 (YouTube page entitled “YouTube Content ID System”) (distinguishing “content verification program” from “audio ID” and “video ID”).</p> <p>Hohengarten ¶ 309 &amp; Ex. 281 (YouTube page entitled “Content Verification Program”) (describing content verification program).</p> <p>Hohengarten ¶ 147 &amp; Ex. 144 GOO001-01511226, at GOO001-01511226.</p>
<p>216. In a February 15, 2007 email, Google vice president of content partnerships David Eun stated that YouTube’s “CYC tools,” including an “Audio fingerprinting system whereby the content partner can send ‘reference fingerprints’ to Audible Magic’s database,” “are now live as well and are only offered to partners who enter into a</p>	<p>Hohengarten ¶ 147 &amp; Ex. 144, GOO001-01511226, at GOO001-01511226.</p>

revenue deal with us.”	
217. In a February 16, 2007 email, Google Vice President and General Counsel Kent Walker informed Viacom General Counsel Michael Fricklas and NBC General Counsel Rick Cotton that although YouTube was responding to takedown notices and had implemented “automated filtering” in the form of “a unique hash” that “block[s] any attempt to re-upload [] identical video files,” YouTube had agreed to provide “audio fingerprinting technology services” only to a “handful of partners,” and would not provide audio fingerprinting to Viacom or NBC.	<p>Hohengarten ¶ 201 &amp; Ex. 382, GOO001-08050272, GOO001-08050272.</p> <p>Hohengarten ¶ 371 &amp; Ex. 337 (K. Walker Dep.) at 8:2-9:23 (testifying to Kent Walker’s job title).</p>
218. Instead of agreeing to provide Viacom and NBC with audio fingerprinting, Walker instead offered to speak with Viacom and NBC about possibly providing them with access to a “metadata search tool” that enables users to “define search terms via XML feeds and automatically and regularly receive search results matching the defined search terms.”	Hohengarten ¶ 201 & Ex. 382, GOO001-08050272, at GOO001-08050272.
219. On June 28, 2007 Donald Verrilli, then a partner at Jenner & Block, counsel for Viacom, sent a letter to Mark Ouweleen of Bartlit Beck Herman Palenchar & Scott LLP and David Kramer of Wilson Sonsini Goodrich & Rosati, counsel for Defendants. The letter highlighted ongoing infringement on YouTube of many Viacom works, reiterated that Viacom had not authorized the upload of these works to YouTube, and demanded their removal.	Hohengarten ¶ 406 & Ex. 369 (2007-06-28 Verrilli to Ouweleen and Kramer) at 1-2.
220. On June 29, 2007 Mark Ouweleen responded to Donald Verrilli’s June 28, 2007 letter. In his response Ouweleen represented that YouTube would not use a list of Viacom works to locate future infringing videos on YouTube and stated:	Hohengarten ¶ 407 & Ex. 370 (2007-06-29 Ouweleen to Verrilli) at 1-2.

<p>“If in the future someone posts a video Paramount claims to infringe a copyright on one of those movies, and Paramount would like it removed, Paramount can use the Content Verification Program tools or send a DMCA takedown notice.” The letter did not offer Viacom access to any digital fingerprinting technology or any YouTube-provided tool other than the Content Verification Program tool.</p>	
<p>221. On February 20, 2008, Google executed an agreement with Viacom under which Google was, for the first time, obligated to implement digital fingerprinting to protect against infringement of Viacom’s copyrighted works on YouTube.</p>	<p>Hohengarten ¶ 98 &amp; Ex. 95, GOO001-02244041, at GOO001-02244041.</p>
<p>222. Defendants did not implement digital fingerprinting to prevent the infringement of Viacom’s copyrighted works on the YouTube website until May 2008.</p>	<p>Hohengarten ¶ 3 &amp; Ex. 2 (Solow Decl. ¶¶ 29).</p>

Defendants’ Knowledge and Intent Concerning Infringement on YouTube Through Discussions with the Motion Picture Association of America	
Undisputed Fact	Evidence
<p>223. Beginning in April 2006, the Motion Picture Association of America (“MPAA”), an organization that advocates for all movie studios, including Paramount Pictures Corporation, engaged in negotiations with YouTube in order to obtain YouTube’s cooperation in preventing infringement of the copyrighted works of the MPAA’s members, including Paramount.</p>	<p>Hohengarten ¶ 367 &amp; Ex. 333 (Garfield Dep.) at 14:14-15:4, 15:10-12 (“there was a lot of copyrighted content on the site that was owned or controlled by the motion picture studios”).</p> <p>Hohengarten ¶ 383 &amp; Ex. 349 (Robinson Dep.) at 23:12-24:10 (testifying that the MPAA represents movie studios, including Paramount).</p>
<p>224. The MPAA was represented in the negotiations by its Executive Vice President and Chief Strategic Officer.</p>	<p>Hohengarten ¶ 367 &amp; Ex. 333 (Garfield Dep.) at 13:16-15:4.</p>
<p>225. The negotiations between the MPAA and YouTube were about encouraging YouTube</p>	<p>Hohengarten ¶ 367 &amp; Ex. 333 (Garfield Dep.) at 14:19-15:4 (“The discussion</p>

to remove infringing content belonging to MPAA members, and “relatedly integrating filtering software that would address that copyrighted content.”	was about encouraging YouTube to do two things: deal with the content that we identified on the site that was copyrighted, infringement content from the motion picture studios; and two, and relatedly integrating filtering software that would address that copyrighted content”).
226. After months of discussions, YouTube informed the MPAA that it refused to work with the MPAA to utilize or even test digital fingerprinting and filtering technologies because the rampant piracy on YouTube was acting as a “major lure” for YouTube’s users, drawing them to the site.	Hohengarten ¶ 367 & Ex. 333 (Garfield Dep.) at 28:2-30:3, 53:4-7 (“for those companies who were not and did not develop a licensing agreement with Google, they weren’t going to be doing this sort of a pilot initiative or filtering”).
227. After Google’s acquisition of YouTube was announced, on October 13, 2006, the MPAA sent a written proposal to Defendants calling for cooperation and testing of filtering technologies, including the technology of a company called Audible Magic; the MPAA agreed to pay for the test.	Hohengarten ¶ 341 & Ex. 307, MPAA012777, at MPAA012777.  Hohengarten ¶ 367 & Ex. 333 (Garfield Dep.) at 32:15-34:2.
228. On November 9, 2006, the MPAA transmitted another written proposal to Defendants calling for cooperation and testing of filtering technologies, including Audible Magic technology; the MPAA again agreed to pay for the test.	Hohengarten ¶ 342 & Ex. 308, MPAA012806, at MPAA012806.  Hohengarten ¶ 367 & Ex. 333 (Garfield Dep.) at 41:14-46:25.
229. Google did not respond to the MPAA’s proposal until early 2007, when Google rejected cooperation with the MPAA and its member studios, and rejected the deployment of filtering to prevent the uploading of the studios’ works in the absence of the studios executing a licensing and revenue sharing agreements with Google.	Hohengarten ¶ 367 & Ex. 333 (Garfield Dep.) at 52:7-53:7.



#### IV. DEFENDANTS' DIRECT FINANCIAL BENEFIT FROM INFRINGEMENT

Building Up YouTube's User Base Through the Popularity of Infringing Content	
Undisputed Fact	Evidence
230. A draft 2007 strategy document from Google's company wide monetization team noted that "pornographic and copyright infringed content" were "among the primary drivers of YouTube traffic"; the document further noted that "[b]y developing and [sic] audience following the users first, YouTube has created advertiser and monetization value."	Hohengarten ¶ 107 & Ex. 104, GOO001-00330654, at GOO001-00330658.
231. In a draft July 2006 presentation, YouTube co-founder Chad Hurley stated that YouTube "provide[s] the best experience on the Internet for both user-generated and professional content," and he described YouTube's growth in terms of the growth in the number of videos being watched every day, the number of unique users on YouTube, and the "amount of time each of the 20M users spends daily on YouTube."	Hohengarten ¶ 108 & Ex. 105, GOO001-05164894, at GOO001-05164894.
232. Wendy Chang, a Google finance manager, stated in her deposition that "Advertisers want eyeballs. . . . so you can't make money from the advertisers unless you have the users, and you're only going to have -- have users if you have the right content."	Hohengarten ¶ 354 & Ex. 320 (Chang Dep.) at 7:18-10:3 (testifying to Wendy Chang's job title), 134:3-7.
233. In notes from a meeting that occurred on October 12, 2006, Google executive Susan Wojcicki stated: "Interesting lesson from YouTube and Google Print, we always need to be able to rely on DMCA . . . Focus on the users and get the traffic. . . . Be comprehensive: index everything . . . YouTube as well--opt out, DMCA afterward for takedown . . . Then you have audience, and monetization will follow."	Hohengarten ¶ 109 & Ex. 106, GOO001-00330681, at GOO001-00330682.
234. In her deposition, Google finance manager Wendy Chang agreed with the statement	Hohengarten Decl. ¶ 354 & Ex. 320 (Chang Dep.) at 138:15-139:12.

that “Then you have an audience and monetization will follow,” adding that the three core elements of YouTube’s business model are “the audience, the content, and the monetization.”	
235. By October 2006, when Google’s board of directors approved the acquisition of YouTube, the number of video views per month on YouTube had grown to 180 million.	Hohengarten ¶ 324 & Ex. 293, CSSU 003560, at CSSU 003565-66.

Monetizing YouTube’s User Base Through Advertising	
Undisputed Fact	Evidence
236. In his deposition, YouTube director of finance Brent Hurley stated that YouTube’s “primary” business model was an advertising based business model and that the goal of such a business model is: “you get traffic, people come to you, the site, and then you can insert ads onto those pages and -- and earn revenue from those ads.”	Hohengarten ¶ 350 & Ex. 316 (B. Hurley Dep.) at 53:4-56:4.
237. As a result of Google’s acquisition of YouTube, YouTube director of finance Brent Hurley received Google shares worth approximately \$10.74 million.	Hohengarten ¶ 400 & Ex. 363 (Google Inc., S-3ASR Registration Statement (February 7, 2007)) at 5 (page numbers at bottom center) (showing 22,334 shares issued to Brent Hurley).  Hohengarten ¶ 306 & Ex. 278 (screenshot of Google’s finance webpage showing that the high price for Google shares on November 13, 2006 was \$481.03).
238. In a January 5, 2007 declaration, YouTube co-founder Steve Chen stated that “YouTube earns revenue through the display of banner advertising on pages throughout our website. At various times, ads have appeared, for example, on our homepage, on pages displaying thumbnail images of clips responsive to users’ search	Hohengarten ¶ 393 & Ex. 356 (Declaration of Steve Chen dated January 5, 2007) at ¶ 19.

queries, on pages displaying the most popular (or highest rated) clips for the day, and on ‘watch pages.’”	
239. In December 2005, YouTube began earning advertising revenue from banner advertisements displayed across the YouTube website.	<p>Hohengarten ¶ 110 &amp; Ex. 107, GOO001-00633965, at GOO001-00633965.</p> <p>Hohengarten ¶ 111 &amp; Ex. 108, GOO001-05920388, at GOO001-05920388-89.</p>
240. Google’s 2007 Annual Report stated “We recognize as revenue the fees charged advertisers each time an ad is displayed on the YouTube site.”	Hohengarten ¶ 315 & Ex. 287 (Google 2007 Annual Report) at 40.
241. From early 2006 until January 2007, advertisements appeared on the “watch page” on YouTube for substantially all videos.	<p>Hohengarten ¶ 382 &amp; Ex. 348 (Reider Dep.) at 50:23-53:5; 54:24-25.</p> <p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 226:5-14.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 151:1-23.</p> <p>Hohengarten ¶ 112 &amp; Ex. 109, GOO001-00763354, at GOO001-00763364-76.</p> <p>Hohengarten ¶ 387 &amp; Ex. 353 (Seth Dep.) at 25:18-26:15.</p> <p>Hohengarten ¶ 111 &amp; Ex. 108, GOO001-05920388, at GOO001-05920388-89.</p> <p>Hohengarten ¶ 398 &amp; Ex. 361 (Defendants’ Responses and Objections to Plaintiffs’ Second Set of Interrogatories, Interrogatory No. 1) at 7.</p>
242. The “watch page” is the page on the YouTube website where a user views a video.	Hohengarten ¶ 346 & Ex. 312 (C. Hurley Dep.) at 113:25-114:6.

243. In an October 7, 2006 email from YouTube director of finance Brent Hurley to Google executive Sean Dempsey and Credit Suisse managing director Storm Duncan, Brent Hurley stated “Yes, we are running ROS ads on both the search, watch and browse pages.”	<p>Hohengarten ¶ 113 &amp; Ex. 110, GOO001-00658376, at GOO001-00658376.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 155:21-157:16.</p> <p>Hohengarten ¶ 362 &amp; Ex. 328 (Duncan 30(b)(6) Dep.) at 10:18-11:10 (testifying to Storm Duncan’s job title).</p>
244. A “run of site” advertisement on YouTube is an advertisement the placement of which is not guaranteed to the advertiser, and which YouTube can place anywhere on YouTube at YouTube’s discretion.	Hohengarten ¶ 382 & Ex. 348 (Reider Dep.) at 282:20-283:5.
245. Credit Suisse’s October 9, 2006 presentation to Google’s board of directors stated that YouTube watch pages constituted “45% of total page views,” that “run of site ads” ran on YouTube’s search and watch pages, and that “sponsored advertising” ran on YouTube’s home page.	Hohengarten ¶ 324 & Ex. 293, CSSU 003560, at CSSU 003570.
246. Credit Suisse’s October 9, 2006 presentation to Google’s board of directors estimated that in 2007 there would be approximately 126 billion YouTube watch page views in 2007.	Hohengarten ¶ 324 & Ex. 293, CSSU 003560, at CSSU 003570 (estimating 280 billion total page views, 45% from watch pages).
247. Prior to January 2007, when a viewer watched an infringing clip taken from Viacom’s hit program “South Park,” an advertisement appeared next to the video and YouTube earned revenue from that advertising.	Hohengarten ¶ 284 & Ex. 256, VIA14375466, at VIA14375466.
248. In January 2007, YouTube stopped advertising on substantially all watch pages.	Hohengarten ¶ 398 & Ex. 361 (Defendants’ Responses and Objections to Plaintiffs’ Second Set of Interrogatories, Interrogatory No. 1) at 7 (“[A]dvertisements . . . on watch pages associated with user-uploaded video clips . . . ceased to appear on or about January 1, 2007”).

	<i>See also infra</i> SUF ¶ 250
249. From January 2007 forward, YouTube has advertised only on those watch pages displaying content belonging to one of YouTube’s “content partners.”	<p>Hohengarten ¶ 398 &amp; Ex. 361 (Defendants’ Responses and Objections to Plaintiffs’ Second Set of Interrogatories, Interrogatory No. 1) at 7 (“[A]dvertisements . . . on watch pages associated with user-uploaded video clips . . . ceased to appear on or about January 1, 2007”).</p> <p>Hohengarten ¶ 382 &amp; Ex. 348 (Reider Dep.) at 50:23-54:25.</p> <p><i>See infra</i> SUF ¶ 250.</p>
250. A November 30, 2006 email from Google sales director Suzie Reider to Google advertising executive Tim Armstrong stated, “A major decision in the works that you should be aware of -- for legal reasons (that I don’t fully understand what has changed, and our GC will be back in SF on Monday to articulate) all ads/monetization on the watch pages for user generated content will need to come down. This will have a tremendous impact on inventory.”	Hohengarten ¶ 114 & Ex. 111, GOO001-02656593, at GOO001-02656593.
251. During the period when YouTube was advertising on substantially all watch pages, advertisements regularly appeared on watch pages for Viacom’s content, including works in suit in this action.	<p>Hohengarten ¶ 284 &amp; Ex. 256, VIA14375466, at VIA14375466.</p> <p>Hohengarten ¶ 276 &amp; Ex. 248, VIA14375471, at VIA14375471.</p> <p>Hohengarten ¶ 277 &amp; Ex. 249, VIA14375444, at VIA14375444.</p> <p>Hohengarten ¶ 278 &amp; Ex. 250, VIA14375526, at VIA14375526.</p> <p>Hohengarten ¶ 279 &amp; Ex. 251, VIA14375557, at VIA14375557.</p> <p>Hohengarten ¶ 280 &amp; Ex. 252, VIA14375446, at VIA14375446.</p>
252. Before and after January 2007, Defendants sold ads appearing on the YouTube	<i>See supra</i> SUF ¶ 238.

homepage.	<p>Hohengarten ¶ 366 &amp; Ex. 332 (Eun Dep.) at 315:14-316:14.</p> <p>Hohengarten ¶ 112 &amp; Ex. 109 GOO001-00763354, at GOO001-00763364-76 (chart of advertising revenue listing advertisements by site page, referring to “home right” as the right side of YouTube’s home page).</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 154:25-155:4.</p> <p>Hohengarten ¶ 354 &amp; Ex. 320 (Chang Dep.) at 185:17-185:25.</p> <p>Hohengarten ¶ 375 &amp; Ex. 341 (Kordestani Dep.) at 174:14-175:12.</p> <p>Hohengarten ¶ 115 &amp; Ex. 112, GOO001-02338150, at GOO001-02338170.</p>
253. The home page on YouTube is the page that first appears when a user accesses www.youtube.com over the Internet.	Hohengarten ¶ 379 & Ex. 345 (Maxcy Dep.) at 43:9-11.
254. Before and after January 2007, Defendants sold ads that appear on YouTube search results pages.	<p>Hohengarten ¶ 354 &amp; Ex. 320 (Chang Dep.) at 185:5-186:10.</p> <p>Hohengarten ¶ 376 &amp; Ex. 342 (Levine Dep.) at 271:11-18.</p> <p>Hohengarten ¶ 111 &amp; Ex. 108, GOO001-05920388, at GOO001-05920388-89.</p> <p>Hohengarten ¶ 115 &amp; Ex. 112, GOO001-02338150, at GOO001-02338170.</p>
255. Search results pages on YouTube are the pages where YouTube displays results of user searches using YouTube’s search function.	<p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 114:23-115:8.</p> <p>Hohengarten ¶ 313 &amp; Ex. 285 (screenshot of search results pages).</p>

	Hohengarten ¶ 393 & Ex. 356 (Declaration of Steve Chen dated January 5, 2007) at ¶ 5.
256. Advertisements on YouTube search results pages were the largest revenue source for YouTube in 2007.	Hohengarten ¶ 116 & Ex. 113, GOO001-02439050, at GOO001-02439050-53.  Hohengarten ¶ 117 & Ex. 114, GOO001-00255239, at GOO001-00255240.  Hohengarten ¶ 118 & Ex. 115, GOO001-00237661, at GOO001-00237662.
257. A YouTube monetization planning document from May 2007 prepared for Google CEO Eric Schmidt states: “From a monetization perspective, the largest opportunity for revenue resides on the YouTube search pages.”	Hohengarten ¶ 119 & Ex. 116, GOO001-01295801, at GOO001-01295802.
258. YouTube enables advertisers to target their advertisements on YouTube’s search pages to the search terms entered by a YouTube user.	Hohengarten ¶ 376 & Ex. 342 (Levine Dep.) at 273:15-274:25.  Hohengarten ¶ 314 & Ex. 286.  Hohengarten ¶ 382 & Ex. 348 (Reider Dep.) at 199:24-200:12.  Hohengarten ¶ 378 & Ex. 344 (Liu Dep.) at 24:3-26:17.
259. When a YouTube user searches YouTube for Viacom content, YouTube displays advertising next to the search results for that content.	Hohengarten ¶ 378 & Ex. 344 (Liu Dep.) at 24:3-26:17; 181:16-182:20; 185:24-186:7.  Hohengarten ¶ 287 & Ex. 259, VIA14375204, at VIA14375204.  Hohengarten ¶ 313 & Ex. 285, at 3, 7, 9.  Hohengarten ¶ 288 & Ex. 260,

	<p>VIA14375664, at VIA14375664.</p> <p>Hohengarten ¶ 289 &amp; Ex. 261, VIA14375611, at VIA14375611.</p> <p>Hohengarten ¶ 290 &amp; Ex. 262, VIA14375671, at VIA14375671.</p> <p>Hohengarten ¶ 291 &amp; Ex. 263, VIA14375620, at VIA14375620.</p> <p>Hohengarten ¶ 292 &amp; Ex. 264, VIA14375635, at VIA14375635.</p> <p>Hohengarten ¶ 293 &amp; Ex. 265, VIA14375638, at VIA14375638.</p>
260. Before and after January 2007, Defendants also sold advertisements on the browse pages of the YouTube website.	<p>Hohengarten ¶ 393 &amp; Ex. 356 (Declaration of Steve Chen dated January 5, 2007) at ¶ 19.</p> <p>Hohengarten ¶ 112 &amp; Ex. 109, GOO001-00763354, at GOO001-00763364.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 152:21-152:24.</p> <p>Hohengarten ¶ 113 &amp; Ex. 110, GOO001-00658376, at GOO001-00658376.</p>
261. The browse pages on YouTube are the pages where YouTube suggests videos for users to watch, including “Most Viewed,” “Top Favorites,” “Most Discussed,” “Recent Videos,” and “Top Rated.”	<p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 79:5-10.</p> <p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 115:19-116:9.</p>
262. Before and after January 2007, YouTube has also sold advertising on the video upload page, the page where users upload videos to YouTube.	<p>Hohengarten ¶ 115 &amp; Ex. 112, GOO001-02338150, at GOO001-02338182.</p> <p>Hohengarten ¶ 120 &amp; Ex. 117, GOO001-08030008, at GOO001-08030009.</p>



263. A “house advertisement” on YouTube is an advertisement that appears on a YouTube page, promotes some other aspect of YouTube, and directs the user to the corresponding YouTube page.	Hohengarten ¶ 182 & Ex. 179, GOO001-02034326, at GOO001-02034326.
264. Even after YouTube decided to limit its use of advertisements on watch pages, YouTube placed “house advertisements” on watch pages, without limiting these advertisements to watch pages of authorized content.	Hohengarten ¶ 182 & Ex. 179, GOO001-02034326, at GOO001-02034326.  Hohengarten ¶ 183 & Ex. 180, GOO001-06811230, at GOO001-06811230.
265. House advertisements have appeared on watch pages of Viacom-owned content that was uploaded without Viacom’s consent, including as recently as September 14, 2009.	Hohengarten ¶ 286 & Ex. 258 (screenshot, taken September 14, 2009, of YouTube watch page titled “Kanye West shifts on Taylor Swift - 2009 VMA’s” showing a house advertisement in the upper right corner).  Hohengarten ¶ 378 & Ex. 344 (Liu Dep.) at 177:25-179:2 (testifying that Liu Dep. Ex. 11 appears to be a YouTube watch page and that the box in the upper right corner containing the text “Gundam 00” appears to be a house ad for YouTube.com/shows).
266. From 2006 until today, if a user went to YouTube looking for clips that infringe Viacom’s copyrights in popular shows such as “South Park,” “The Daily Show With Jon Stewart,” or “The Colbert Report,” either via YouTube’s home page, search results page, or browse page, YouTube earned revenue from the ads served to that user on those pages.	<i>See supra</i> SUF ¶¶ 238-241, 247, 251, 252, 254, 256-261, 265.

V. **DEFENDANTS' RIGHT AND ABILITY TO CONTROL INFRINGEMENT**

YouTube's Terms of Use, Termination of Users, and Removal of Videos	
Undisputed Fact	Evidence
267. YouTube's Terms of Use have always given YouTube sole discretion to remove any video from YouTube for any reason and to terminate any YouTube user account for any reason.	<p>Hohengarten ¶ 121 &amp; Ex. 118, GOO001-00421229, at GOO001-00421231 (YouTube Terms of Use, dated February 3, 2006 per metadata).</p> <p>Hohengarten ¶ 122 &amp; Ex. 119, GOO001-02826891, at GOO001-02826893 (YouTube Terms of Use, dated March 14, 2006 per metadata).</p> <p>Hohengarten ¶ 123 &amp; Ex. 120, GOO001-00824855, at GOO001-00824857 (YouTube Terms of Use, dated July 26, 2006 per metadata).</p> <p>Hohengarten ¶ 124 &amp; Ex. 121, GOO001-02829970, at GOO001-02829972 (YouTube Terms of Use, dated August 18, 2006 per metadata).</p> <p>Hohengarten ¶ 196 &amp; Ex. 372 GOO001-02316969, at GOO001-02316970 (YouTube Terms of Use, dated November 20, 2006).</p> <p>Hohengarten ¶ 394 &amp; Ex. 357 (Declaration of Zahavah Levine dated January 5, 2007) at Ex. A ¶ 5.C.</p> <p>Hohengarten ¶ 127 &amp; Ex. 124, GOO001-07056597, at GOO001-07056600 (YouTube Terms of Use, dated February 26, 2007 per metadata).</p> <p>Hohengarten ¶ 128 &amp; Ex. 125, GOO001-01232697, at GOO001-01232700 (YouTube Terms of Use, dated June 19, 2007 per metadata).</p>
268. In her deposition, YouTube content review manager Heather Gillette testified that "The	Hohengarten ¶ 368 & Ex. 334 (Gillette Dep.) at 110:25-111:3.

terms of use states specifically that we have the right to remove content at our sole discretion for any reason whatsoever.”	
269. Until late November 2005, just before YouTube’s official launch, YouTube employees reviewed thumbnail images for every video uploaded to YouTube and removed videos that violated YouTube’s terms of use, including for reasons of violence, pornography, and copyright infringement.	<p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 66:17-67:3, 137:7-12, 164:3-12.</p> <p>Hohengarten ¶ 19 &amp; Ex. 16, GOO001-00629095, at GOO001-00629095.</p>
270. After November 2005, YouTube employees stopped reviewing thumbnails of every video uploaded to YouTube.	Hohengarten ¶ 350 & Ex. 316 (B. Hurley Dep.) at 66:17-67:3, 164:9-12.
271. On November 24, 2005, YouTube director of finance Brent Hurley instructed YouTube employees to look for and remove some infringing material, such as clips of “Family Guy, South Park, and full-length anime episodes.”	<p>Hohengarten ¶ 19 &amp; Ex. 16, GOO001-00629095, at GOO001-00629095.</p> <p>Hohengarten ¶ 350 &amp; Ex. 316 (B. Hurley Dep.) at 81:5-82:2.</p>
272. Sporadically during 2005 and 2006, YouTube employees proactively searched the YouTube site for infringing clips belonging to certain content owners and removed thousands of such clips.	<p>Hohengarten ¶ 129 &amp; Ex. 126, GOO001-02768034, at GOO001-02768034.</p> <p>Hohengarten ¶ 368 &amp; Ex. 334 (Gillette Dep.) at 46:20-47:17, 54:2-63:23, 72:24-73:7.</p> <p>Hohengarten ¶ 130 &amp; Ex. 127, GOO001-01027757, at GOO001-01027766.</p> <p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 163:5-14.</p> <p>Hohengarten ¶ 376 &amp; Ex. 342 (Levine Dep.) at 211:19-212:5.</p> <p>Hohengarten ¶ 385 &amp; Ex. 351 (Schaffer Dep.) at 97:25-100:13, 104:25-106:6.</p>
273. When it was in YouTube’s interest to do so, YouTube personnel manually screened	Hohengarten ¶ 132 & Ex. 129, GOO001-04431787, at GOO001-

<p>narrow subsets of YouTube videos to ensure that they did not infringe copyright.</p>	<p>04431787 (describing the “YouTube Director” program).</p> <p>Hohengarten ¶ 133 &amp; Ex. 130, GOO001-00509640, at GOO001-00509640 (showing that YouTube has proactively reviewed videos uploaded to Director Accounts for copyright infringement).</p> <p>Hohengarten ¶ 134 &amp; Ex. 131, GOO001-00222797, at GOO001-00222797 (same).</p> <p>Hohengarten ¶ 135 &amp; Ex. 132, GOO001-02754251, at GOO001-02754251 (describing the “User Partner Program”).</p> <p>Hohengarten ¶ 79 &amp; Ex. 76, GOO001-03037036, at GOO001-03037043-44 (March 2007 Monetization Strategy presentation noting that the User Partner Program used “fingerprinting and manual-review” to “[e]nsure that only original content can be monetized.”).</p> <p>Hohengarten ¶ 136 &amp; Ex. 133, GOO001-02027618, at GOO001-02027618.</p> <p>Hohengarten ¶ 185 &amp; Ex. 182, GOO001-02866493, at GOO001-02866501, GOO001-02866503 (YouTube presentation about the User Partner Program noting that in considering applicants for the program YouTube employees should “[l]ook for TV watermarks and other indicators,” and determine whether the user has videos “that are in a prohibited category”).</p> <p>Hohengarten ¶ 187 &amp; Ex. 184, GOO001-06361166, at GOO001-06361173, GOO001-06361175.</p>
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	<p>Hohengarten ¶ 387 &amp; Ex. 353 (Seth Dep.) at 17:17-24:11, 34:4-35:12, 54:11-56:21, 61:2-18, 68:5-11 (describing several aspects of the User Partner Program, including human review).</p> <p>Hohengarten ¶ 131 &amp; Ex. 128, GOO001-01535521, at GOO001-01535521 (content review manager Heather Gillette stating: “we pro-actively screen any videos and/or users that we are highlighting on our ‘honors’ pages (most watched, most subscribed, most discussed, etc.) and remove, or restrict these videos/users such that they won’t be on the site at all, or they won’t be highlighted if we deem the video as needing to be restricted.”).</p>
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YouTube’s Ineffective “Hash Based Identification” Technology	
Undisputed Fact	Evidence
274. YouTube employed a technology called hash-based identification to prevent a user from uploading a video clip to YouTube that is exactly identical in every respect to a video clips that YouTube had previously removed pursuant to a takedown notice.	Hohengarten ¶ 393 & Ex. 356 (Declaration of Steve Chen dated January 5, 2007) at ¶ 12.
275. Hash-based identification cannot prevent re-upload of the same infringing content to YouTube if the second video clip differs in even the slightest degree (e.g., in length or resolution) from the first clip that was removed.	<p>Hohengarten ¶ 393 &amp; Ex. 356 (Declaration of Steve Chen dated January 5, 2007) at ¶ 12.</p> <p>Hohengarten ¶ 355 &amp; Ex. 321 (Chastagnol Dep.) at 56:2-22.</p> <p>Hohengarten ¶ 376 &amp; Ex. 342 (Levine Dep.) at 254:24-255:11.</p>
276. And even this minimal protection against infringement generally was triggered only if	Hohengarten ¶ 385 & Ex. 351 (Schaffer Dep.) at 132:17-20.

a copyright owner first sent a takedown notice.	Hohengarten ¶ 137 & Ex. 134 GOO001-00561601, at GOO001-00561605.
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YouTube's Ability to Use Keyword Searching to Root Out Infringement	
Undisputed Fact	Evidence
277. YouTube has always had the ability to find infringing clips after they are made available for viewing on the YouTube website by searching for keywords associated with copyrighted content.	<i>See</i> SUF <i>infra</i> ¶¶ 278, 280, 300, 302, 305; <i>supra</i> ¶¶ 112, 113, 139,
278. Viacom and other copyright owners use keyword searching to find videos that infringe their copyrights on YouTube in order to send takedown notices.	Hohengarten ¶ 369 & Ex. 335 (Housley Dep.) at 36:22-37:8.  Hohengarten ¶ 3 & Ex. 2 (Solow Decl. ¶ 2).
279. However, until mid-2008, copyright holders such as Viacom could search for infringing videos on YouTube only after YouTube made the videos publicly searchable, resulting in inevitable delay before the copyright holders can search for and find the infringing content and then send a takedown notice.	Hohengarten ¶ 136 & Ex. 133 (YouTube Help page entitled "Solve a Problem: Video not in search").  Hohengarten ¶ 138 & Ex. 135, GOO001-08643428, at GOO001-08643428.
280. YouTube has always had the ability to apply keyword searching or filtering (human or automated) to identify and block infringing videos before they are made available for viewing on YouTube.	Hohengarten ¶ 347 & Ex. 313 (Karim Dep.) at 119:4-121:24 (testifying that YouTube could have reviewed videos before they were made publicly viewable, that it would have been a very simple change to do so, and that it was very likely that they did do so for some time).  Hohengarten ¶ 256 & Ex. 238, JK00009130, at JK00009130 ("[W]e can always approve videos first BEFORE they are shown anywhere, that's a one-line code change.").

YouTube's Refusal to Employ Digital Fingerprinting to Stop Infringement	
Undisputed Fact	Evidence
281. A digital fingerprint is a software-generated digital identifier of the content in the audio and/or video track of an audio-visual work.	<p>Hohengarten ¶ 140 &amp; Ex. 136, GOO001-02493069, at GOO001-02493070-71.</p> <p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 15:15-16:11.</p> <p>Hohengarten ¶ 395 &amp; Ex. 358, at ¶¶ 3-4.</p> <p>Hohengarten ¶ 396 &amp; Ex. 359, at ¶¶ 4-5.</p>
282. Digital fingerprinting service providers such as Audible Magic maintain reference databases of the digital fingerprints of copyrighted works.	<p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 23:13-19.</p>
283. When a video is uploaded to a website such as YouTube, digital fingerprinting technology can take the digital fingerprint of the uploaded video and compare it to reference databases of fingerprints of copyrighted works to determine whether there is a match.	<p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 15:15-16:11.</p> <p>Hohengarten ¶ 395 &amp; Ex. 358, at ¶¶ 10-12 .</p> <p>Hohengarten ¶ 396 &amp; Ex. 359, at ¶¶ 4-6, 10, 15.</p> <p>Hohengarten ¶ 355 &amp; Ex. 321 (Chastagnol Dep.) at 88:18-25.</p> <p>Hohengarten ¶ 399 &amp; Ex. 362 (July 27, 2007 Status Conference Transcript) at 17:2-5 (“[A]ny video that gets uploaded basically gets filtered through the fingerprint database, and like the AFIS that the FBI has, and if there’s a hit, then within minutes the computer knows that and pulls it down.”).</p>

284.If there is a fingerprint match -- indicating that the audio and/or video track of the uploaded video matches a copyrighted work in whole or in part -- then a website such as YouTube can automatically discard the upload or take another action, such as flagging the video for review by an employee.	Hohengarten ¶ 395 & Ex. 358, at ¶ 11.  Hohengarten ¶ 396 & Ex. 359, at ¶¶ 15-19.
285.Computers can readily accomplish this fingerprint matching function so that infringing videos never go live on the site.	Hohengarten ¶ 395 & Ex. 358, at ¶ 11.  Hohengarten ¶ 396 & Ex. 359, at ¶¶ 11-12.
286.Audible Magic began providing audio fingerprinting to clients in 2004.	Hohengarten ¶ 370 & Ex. 336 (Ikezoye Dep.) at 11:15-19, 109:14-25.
287.Audible Magic could have deployed its audio fingerprinting services on YouTube as early as February 2005, when YouTube was founded, and April 2005, when the YouTube website was launched in beta form.	Hohengarten ¶ 370 & Ex. 336 (Ikezoye Dep.) at 109:22-110:22.
288.By February 2006, Audible Magic was conducting over five million fingerprint match requests, or “look ups,” a day and could easily have handled tens of millions of such requests.	Hohengarten ¶ 396 & Ex. 359, at ¶ 21.  Hohengarten ¶ 370 & Ex. 336 (Ikezoye Dep.) at 21:21-22:7.
289.At no time in YouTube’s history have anywhere close to five million videos been uploaded to YouTube in a single day.	Hohengarten ¶ 324 & Ex. 293 CSSU 003560, at CSSU 003561, CSSU 003565 (“Current number of videos uploaded daily: 100,000”).  Hohengarten ¶ 140 & Ex. 137, GOO001-02930251, at GOO001-02930256 (stating that in March 2008 YouTube had “400,000+ uploads per day”).
290.Between 2006 and mid-2009, Audible Magic had approximately 30 website customers, including video sites MySpace, Grouper, and Microsoft Soapbox, who deployed Audible Magic’s fingerprinting technology to identify and block	Hohengarten ¶ 370 & Ex. 336 (Ikezoye Dep.) at 13:5-14:13.  Hohengarten ¶ 383 & Ex. 349 (Robinson Dep.) at 61:13-62:7.



<p>unauthorized audio or audiovisual content on their respective sites.</p>	<p>Hohengarten ¶ 343 &amp; Ex. 309, MPAA0011721, at MPAA0011721.</p> <p>Hohengarten ¶ 143 &amp; Ex. 140, GOO001-09612201, at GOO001-09612201.</p>
<p>291. Starting early in 2006, copyright owners urged YouTube to use fingerprinting technology, such as Audible Magic, to stop infringement.</p>	<p>Hohengarten ¶ 367 &amp; Ex. 333 (Garfield Dep.) at 14:1-28:12.</p> <p>Hohengarten ¶ 337 &amp; Ex. 304, AM 002090, at AM 002091.</p>
<p>292. On October 5, 2006, YouTube and Audible Magic signed an agreement for Audible Magic to provide audio fingerprinting services to YouTube.</p>	<p>Hohengarten ¶ 144 &amp; Ex. 141, GOO001-03427120, at GOO001-03427120.</p>
<p>293. YouTube did not begin using Audible Magic's audio fingerprinting service until February 2007.</p>	<p>Hohengarten ¶ 142 &amp; Ex. 139, GOO001-01950611, at GOO001-01950611.</p> <p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 57:6-16.</p> <p>Hohengarten ¶ 145 &amp; Ex. 142, GOO001-02867502, at GOO001-02867502 ("Audible Magic - Audio Fingerprinting . . . Platform went live 2/14").</p>
<p>294. From 2007 through the end of 2009, YouTube used Audible Magic to check every video uploaded to the YouTube site, but only against a limited set of audio and audiovisual works specified by YouTube.</p>	<p>Hohengarten ¶ 374 &amp; Ex. 340 (King 30(b)(6) Dep.) at 96:22-97:3.</p> <p><i>See</i> SUF <i>infra</i> ¶¶ 295-298.</p>
<p>295. Audible Magic was capable of identifying millions of copyrighted works, but YouTube directed Audible Magic to limit its searches to identifying only specific content belonging to content owners who had agreed to licensing and revenue sharing deals with YouTube.</p>	<p><i>See</i> SUF <i>infra</i> ¶¶ 296-298.</p> <p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 33:4-9, 48:18-22.</p> <p>Hohengarten ¶ 141 &amp; Ex. 138, GOO001-02604786, at GOO001-02604789-90.</p>

	<p>Hohengarten ¶ 144 &amp; Ex. 141, GOO001-03427120, at GOO001-03427122, GOO001-03427124 (final agreement between YouTube and Audible Magic for Audible Magic’s audio fingerprinting services, defining “Copyrighted Content Database” as consisting “solely of the materials pertaining to those Content Owners <i>designated by [YouTube]</i>” (emphasis added)).</p> <p>Hohengarten ¶ 146 &amp; Ex. 143, GOO001-02493328, at GOO001-02493328-29.</p> <p>Hohengarten ¶ 355 &amp; Ex. 321 (Chastagnol Dep.) at 182:19-186:19.</p> <p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 64:15-66:6, 79:4-16, 80:15-81:16, 93:20-94:9.</p> <p>Hohengarten ¶ 146 &amp; Ex. 143, GOO001-02493328, at GOO001-02493328-29.</p> <p>Hohengarten ¶ 355 &amp; Ex. 321 (Chastagnol Dep.) at 182:19-186:19.</p> <p>Hohengarten ¶ 338 &amp; Ex. 305, AM001241, at AM001241-42.</p>
<p>296. YouTube also used Audible Magic to create fingerprints of audio and audiovisual works belonging to content owners who had agreed to licensing and revenue sharing deals with YouTube, and then to search for those works on the YouTube site, but YouTube did not use this ability to fingerprint or search for content owned by Viacom.</p>	<p>Hohengarten ¶ 339 &amp; Ex. 306, AM000917, at AM000917.</p> <p>Hohengarten ¶ 370 &amp; Ex. 336 (Ikezoye Dep.) at 65:20-66:14.</p> <p>Hohengarten ¶ 374 &amp; Ex. 340 (King 30(b)(6) Dep.) at 47:16-50:14.</p> <p>Hohengarten ¶ 338 &amp; Ex. 305, GOO001-01511226, at GOO001-01511226.</p>

	<p>Hohengarten ¶ 142 &amp; Ex. 139, GOO001-01950611, at GOO001-01950613 (noting that YouTube’s “[r]eference fingerprint database” was populated only with partner-owned content).</p> <p>Hohengarten ¶ 361 &amp; Ex. 327 (Drummond Dep.) at 158:12-17, 159:13-160:18 (testifying that YouTube would have been willing to use audio fingerprinting on Viacom’s behalf if Viacom was willing to “work with us,” defined as “provide [YouTube] with [Viacom] content”).</p> <p>Hohengarten ¶ 137 &amp; Ex. 134, GOO001-00561601, at GOO001-00561607-08, GOO001-00561612-15.</p> <p>Hohengarten ¶ 148 &amp; Ex. 145, GOO001-02506828, at GOO001-02506828.0003, GOO001-02506828.0005.</p> <p>Hohengarten ¶ 149 &amp; Ex. 146, GOO001-01202238, at GOO001-01202240-41.</p> <p>Hohengarten ¶ 375 &amp; Ex. 341 (Kordestani Dep.) at 244:13-23.</p> <p>Hohengarten ¶ 348 &amp; Ex. 314 (Schmidt Dep.) at 156:3-24.</p> <p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 271:17-288:15.</p>
297. YouTube used Audible Magic to block taken-down videos from being re-uploaded to the site, but only on behalf of some content owners who had entered agreements with YouTube, and not on behalf of content owners who had not, such as Viacom.	<p>Hohengarten ¶ 374 &amp; Ex. 340 (King 30(b)(6) Dep.) at 67:10-68:15, 70:22-78:3, 84:21-88:23, 89:20-90:9, 95:7-95:25.</p>

298. Even after Defendants began using Audible Magic fingerprinting on YouTube, they refused requests by copyright owners to use that technology to prevent infringement of any copyright owner's copyrights unless the owner first granted YouTube a content license and revenue sharing deal.	<p>Hohengarten ¶ 201 &amp; Ex. 382 GOO001-08050272, at GOO001-08050272.</p> <p>Hohengarten ¶ 348 &amp; Ex. 315 (Schmidt Dep.) at 156:3-24.</p> <p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 271:17-288:15.</p>
299. In a September 2006 licensing and revenue-sharing agreement, YouTube offered to use digital fingerprinting to prevent the infringement of copyrighted works owned by Warner Music Inc.	<p>Hohengarten ¶ 191 &amp; Ex. 188, GOO001-09684752, at GOO001-09684765-66, GOO001-09684803-05.</p> <p>Hohengarten ¶ 40 &amp; Ex. 37, GOO001-01627276, at GOO001-01627276.</p>
300. In a September 2006 licensing and revenue-sharing agreement, YouTube offered to use metadata tag searching to prevent the infringement of copyrighted works owned by Warner Music Inc.	<p>Hohengarten ¶ 191 &amp; Ex. 188, GOO001-09684752, at GOO001-09684805-06.</p>
301. In an October 2006 licensing and revenue-sharing agreement, YouTube offered to use fingerprinting to prevent the infringement of copyrighted works owned by CBS Digital Media.	<p>Hohengarten ¶ 190 &amp; Ex. 187, GOO001-09684647, at GOO001-09684660-61.</p> <p>Hohengarten ¶ 151 &amp; Ex. 148, GOO001-01870875, at GOO001-01870876.</p>
302. In an October 2006 licensing and revenue-sharing agreement, YouTube offered to use metadata tag searching to prevent the infringement of copyrighted works owned by CBS Digital Media.	<p>Hohengarten ¶ 190 &amp; Ex. 187, GOO001-09684647, at GOO001-09684660.</p>
303. In negotiations for a licensing and revenue-sharing agreement YouTube offered to use fingerprinting to prevent the infringement of copyrighted works owned by Turner Broadcasting Inc. in October 2006.	<p>Hohengarten ¶ 152 &amp; Ex. 149, GOO001-02826036, at GOO001-02826039.</p>
304. In an October 2006 Memorandum of Understanding, YouTube offered to use fingerprinting to prevent the infringement	<p>Hohengarten ¶ 189 &amp; Ex. 186, GOO001-09684681, at GOO001-09684705-08.</p>

of copyrighted works owned by Sony BMG Music Entertainment.	Hohengarten ¶ 151 & Ex. 148 GOO001-01870875, at GOO001-01870879.
305. In an October 2006 Memorandum of Understanding, YouTube offered to use metadata tag searching to prevent the infringement of copyrighted works owned by Sony BMG Music Entertainment.	Hohengarten ¶ 189 & Ex. 186, GOO001-09684681, at GOO001-09684705, GOO001-09684709.
306. In negotiations for a licensing and revenue-sharing agreement YouTube offered to use fingerprinting to prevent the infringement of copyrighted works owned by The Walt Disney Company in December 2006.	Hohengarten ¶ 197 & Ex. 373, GOO001-02502815, at GOO001-02502819 (deal framework between YouTube and The Walt Disney Company agreeing to provide audio fingerprinting services).
307. In negotiations for licensing and revenue-sharing agreements YouTube offered to use fingerprinting for Viacom in July 2006 and for Viacom's MTV Networks in February 2007.	Hohengarten ¶ 271 & Ex. 245, VIA00727695, at VIA00727696.  Hohengarten ¶ 94 & Ex. 91, GOO001-00984825, at GOO001-00984837.
308. In negotiations for a licensing and revenue-sharing agreement YouTube offered to use fingerprinting to prevent the infringement of copyrighted works owned by NBC Universal in February 2007.	Hohengarten ¶ 155 & Ex. 152, GOO0001-02874326, at GOO0001-02874326.
309. In negotiations for a licensing and revenue-sharing agreement YouTube offered to use fingerprinting to prevent the infringement of copyrighted works owned by EMI in March 2007.	Hohengarten ¶ 156 & Ex. 153, GOO001-02240369, at GOO001-02240369.  Hohengarten ¶ 157 & Ex. 154, GOO001-02524911, at GOO001-02525000.
310. In negotiations for a licensing and revenue-sharing agreement YouTube offered to use fingerprinting to prevent the infringement of copyrighted works owned by Universal Music in June 2007.	Hohengarten ¶ 181 & Ex. 178, GOO001-06147947, at GOO001-06147947 (draft agreement between YouTube and Universal Music Group Recordings, Inc. dated October 6, 2006).  Hohengarten ¶ 151 & Ex. 148,

	<p>GOO001-01870875, at GOO001-01870882.</p> <p><i>See also</i> Hohengarten ¶ 158 &amp; Ex. 155, GOO001-02241782, at GOO001-02241782 (amending October 6, 2006 agreement).</p>
311. The October 5, 2006 agreement between Audible Magic and YouTube required YouTube to pay Audible Magic \$200,000 in service fees for 2007 and \$300,000 in service fees for 2008.	Hohengarten ¶ 144 & Ex. 141, GOO001-03427120, at GOO001-03427122, GOO001-03427126.
312. The cost to YouTube of using Audible Magic's entire reference database of fingerprints of film and TV works would have been approximately twice the amount that Audible Magic was charging YouTube each month under the October 5, 2006 contract.	Hohengarten ¶ 370 & Ex. 336 (Ikezoye Dep.) at 105:21-106:3.
313. Google developed its own audio fingerprinting tool as early as November 2006, but did not start using it on the YouTube site to prevent infringement of any copyrighted content until approximately February 2008.	<p>Hohengarten ¶ 151 &amp; Ex. 156, GOO001-02354601, at GOO001-02354601.</p> <p>Hohengarten ¶ 160 &amp; Ex. 157, GOO001-09612078, at GOO001-09612078.</p> <p>Hohengarten ¶ 373 &amp; Ex. 339 (King Dep.) at 125:15-126:10.</p>
314. At the first status conference before this Court in July 2007, Defendants' counsel announced for the first time that Defendants would implement their own proprietary video fingerprinting technology and would make it available to all copyright holders, not just those who had agreed to licensing deals with Defendants.	Hohengarten ¶ 399 & Ex. 362 (July 27, 2007 Status Conference Transcript) at 15:15-17:7.

**VI. DEFENDANTS' CONDUCT AS DIRECT INFRINGEMENT AND AS BEYOND STORAGE AT THE DIRECTION OF A USER**

Defendants' Copying and Transcoding of Videos Uploaded to YouTube	
Undisputed Fact	Evidence
315. When a user submits a video for upload, YouTube makes one or more exact copies of the video in its original file format (i.e., the format in which it is uploaded by the user).	Hohengarten ¶ 356 & Ex. 322 (Do Dep.) at 19:21-20:6.
316. YouTube makes one or more additional copies of every video during the upload process in a different encoding scheme and different file format called Flash.	Hohengarten ¶ 357 & Ex. 323 (Do 30(b)(6) Dep.) at 85:18-86:10.  Hohengarten ¶ 356 & Ex. 322 (Do Dep.) at 19:21-20:6.
317. Making copies of a video in a different encoding scheme is called "transcoding."	Hohengarten ¶ 356 & Ex. 322 (Do Dep.) at 17:4-15.
318. In a July 11, 2006 email, YouTube product manager Matthew Liu states that all YouTube videos are transcoded for delivery in Flash format.	Hohengarten ¶ 161 & Ex. 158, GOO001-05175716, at GOO001-05175716.
319. Via delivery in the Flash format of videos to users, YouTube ensures that its videos are viewable over the Internet to most users.	Hohengarten ¶ 257 & Ex. 239, JK00008859, at JK00008859 ("Want to convert uploaded AVIs to Flash movies, so it displays nicely everywhere").  Hohengarten ¶ 222 & Ex. 204, JK00009887, at JK00009887.  Hohengarten ¶ 356 & Ex. 322 (Do Dep.) at 18:2-6.  Hohengarten ¶ 162 & Ex. 159, GOO001-00889264, at GOO001-00889266.
320. The uploading user does not have any choice whether YouTube transcodes the video, or instead stores the video in the	Hohengarten ¶ 356 & Ex. 322 (Do Dep.) at 25:14-27:18.  <i>See infra</i> SUF ¶ 321.

original format chosen by the user.	
321. YouTube engineering manager Cuong Do stated in his deposition, “[t]he system performed . . . the replication as a course of its normal operation, . . . uninstructed by the user.”	Hohengarten ¶ 356 & Ex. 322 (Do Dep.) at 27:16-18.
322. In the past, “for particularly popular videos that are watched very frequently” on YouTube, YouTube sen[t] “a replica” of the video “to a third-party content distribution partner to facilitate timely streaming to all users.” Currently, YouTube uses some of Google’s own services to perform that function.	Hohengarten ¶ 191 & Ex. 188, GOO001-09684752, at GOO001-09684711-12.  Hohengarten ¶ 357 & Ex. 323 (Do 30(b)(6) Dep.) at 90:16-92:1.
323. YouTube performs videos by streaming them to users’ computers. As part of that process, YouTube also distributes a complete and durable copy of a video to the computer of any user who views it.	Hohengarten ¶ 186 & Ex. 183 GOO001-00718495, at GOO001-00718495.  Hohengarten ¶ 408.
324. YouTube has contracts with Apple to distribute videos over iPhones and AppleTV devices.	Hohengarten ¶ 163 & Ex. 160, GOO001-09684557, at GOO001-09684557-79 (Product Integration Agreement between YouTube Inc. and Apple Inc.).  Hohengarten ¶ 164 & Ex. 161, GOO001-02276277, at GOO001-02276277 (“Apple / YouTube Partnership Revenue Opportunity”).  Hohengarten ¶ 165 & Ex. 162, GOO001-07726987, at GOO001-07726987 (May 30, 2007 compilation of press coverage of the Apple deal).
325. YouTube has a contract with Sony to distribute YouTube videos over Sony devices.	Hohengarten ¶ 166 & Ex. 163, GOO001-02243231, at GOO001-02243231 (Product Integration Agreement between Sony Electronics, Inc. and Google Inc.).
326. YouTube has a contract with Panasonic to distribute YouTube videos over Panasonic	Hohengarten ¶ 168 & Ex. 165, GOO001-02242506, at GOO001-



devices.	02242506-23 (Product Integration Agreement between Google Inc. and Panasonic Consumer Electronics Company, Division of Panasonic Corporation of North America).
327. YouTube has a contract with TiVo to distribute YouTube videos over TiVo devices.	Hohengarten ¶ 169 & Ex. 166, GOO001-02242907, at GOO001-02242907-24 (Product Integration Agreement between Google Inc. and TiVo Inc.).
328. YouTube has contracts with major cellular telephone companies including AT&T, Verizon Wireless, and Vodafone.	<p>Hohengarten ¶ 170 &amp; Ex. 167, GOO001-02392607, at GOO001-02392607-43 (Content Agreement between YouTube, Inc. and Celco Partnership d/b/a Verizon Wireless).</p> <p>Hohengarten ¶ 171 &amp; Ex. 168, GOO001-06176212, at GOO001-06176212-24 (YouTube Integration Agreement between Google Ireland Limited and Vodafone Group Services Limited).</p> <p>Hohengarten ¶ 172 &amp; Ex. 169, GOO001-06176368, at GOO001-06176368-86 (agreement between Google and AT&amp;T Mobility LLC).</p> <p>Hohengarten ¶ 173 &amp; Ex. 170, GOO001-02552363, at GOO001-02552363 (press releases for YouTube deals with Verizon Wireless, Vodafone, and Nokia).</p>
329. As part of YouTube's agreement with Verizon Wireless, YouTube provided Verizon with copies of the YouTube videos that Verizon wished to make available on its mobile devices, which consisted solely of videos YouTube had selected for prominent placement as featured videos on YouTube.	<p>Hohengarten ¶ 379 &amp; Ex. 345 (Maxcy Dep.) at 219:21-222:13.</p> <p>Hohengarten ¶ 391 &amp; Ex. 385 (Patterson Dep.) at 37:20-38:7.</p> <p><i>See also infra</i> SUF ¶ 331.</p>
330. In 2007, without any request from the	Hohengarten ¶ 356 & Ex. 322 (Do

uploading users, Defendants created copies of all previously uploaded videos in two formats other than Flash so that the videos could be viewed on additional platforms, including Apple devices and non-Apple mobile phones.	<p>Dep.) at Tr. 215:21-217:25.</p> <p>Hohengarten ¶ 379 &amp; Ex. 345 (Maxcy Dep.) at 215:25-218:13.</p> <p>Hohengarten ¶ 174 &amp; Ex. 171, GOO001-00010746, at GOO001-00010746.</p> <p>Hohengarten ¶ 391 &amp; Ex. 385 (Patterson Dep.) at 57:18-62:22.</p>
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Defendants' Use of Features to Make YouTube an Entertainment Site	
Undisputed Fact	Evidence
331. YouTube employs “editors” to scour the YouTube site for interesting videos that YouTube on its own initiative then “features” with conspicuous positioning on its home page.	<p>Hohengarten ¶ 363 &amp; Ex. 329 (Dunton Dep.) at 29:23-30:6, 94:14-100:4 (testifying that she selected videos to feature on YouTube’s home page, to highlight “relevance” and “entertaining content” to users).</p> <p>Hohengarten ¶ 359 &amp; Ex. 325 (Donahue Dep.) at 140:11-25 (testifying that Donahue, Chen, and Dunton selected featured videos to appear on YouTube’s homepage).</p>
332. Some of the videos identified by Viacom as infringing Viacom’s copyrights were selected and promoted by YouTube employees as featured videos.	Hohengarten ¶ 398 & Ex. 361 (Defendants’ Responses and Objections to Plaintiffs’ Second Set of Interrogatories, Interrogatory No. 4) at 10 (identifying two clips in suit that were promoted or featured by YouTube).
333. YouTube gives prominent placement to videos that are most viewed, most frequently tagged as “favorites” by users, or currently being watched on the site.	<p>Hohengarten ¶ 312 &amp; Ex. 284 (screenshot of youtube.com website showing prominent placement of “videos being watched right now”).</p> <p>Hohengarten ¶ 356 &amp; Ex. 322 (Do. Dep.) at 112:22-118:20, 121:24-123:16.</p>

<p>334. YouTube uses an algorithm that it designed to identify videos that are “related” to a video that a user watches, and links to videos identified by that tool appear both in a box on the right-hand side of the watch page of the video to which they are related (the “related videos” box) and also within the video player after the video that the user watches ends.</p>	<p>Hohengarten ¶ 346 &amp; Ex. 312 (C. Hurley Dep.) at 173:25-174:23.</p> <p>Hohengarten ¶ 175 &amp; Ex. 172, GOO001-00243149, at GOO001-00243149.</p> <p>Hohengarten ¶ 282 &amp; Ex. 254, VIA14375701, at VIA14375701 (screenshot of conclusion of South Park clip showing other “related” South Park clips).</p> <p>Hohengarten ¶ 176 &amp; Ex. 173, GOO001-09684201, at GOO001-09684202-05.</p>
<p>335. When a user views an infringing clip from a major media company like Viacom on a YouTube watch page, YouTube’s related videos tool likely will direct the user to other similar infringing videos.</p>	<p>Hohengarten ¶ 280 &amp; Ex. 252, VIA14375446, at VIA14375446.</p> <p>Hohengarten ¶ 281 &amp; Ex. 253 VIA14375721, at VIA14375721</p> <p>Hohengarten ¶ 282 &amp; Ex. 254, VIA14375701, at VIA14375701.</p> <p>Hohengarten ¶ 283 &amp; Ex. 255, VIA14375674, at VIA14375674.</p> <p>Hohengarten ¶ 284 &amp; Ex. 256, VIA14375466, at VIA14375466.</p> <p>Hohengarten ¶ 285 &amp; Ex. 257, VIA14375535, at VIA14375535.</p>
<p>336. [REDACTED] of all video views on YouTube come from use of the related videos tool.</p>	<p>Hohengarten ¶ 176 &amp; Ex. 173, GOO001-09684201, at GOO001-09684205.</p>
<p>337. YouTube indexes and categories videos using information supplied by the uploading user and provides a search function so that viewers can find videos using search terms.</p>	<p>Hohengarten ¶ 393 &amp; Ex. 356 (Declaration of Steve Chen dated January 5, 2007) at ¶¶, 4,5.</p> <p>Defendants’ Answer at ¶ 31.</p> <p>Hohengarten ¶ 177 &amp; Ex. 174,</p>

	<p>GOO001-02338330, at GOO001-02338330, GOO001-02338340-42 .</p> <p>Hohengarten ¶ 357 &amp; Ex. 323 (Do 30(b)(6) Dep.) at 104:1-17, 105:11-19, 111:12-20.</p> <p>Hohengarten ¶ 401 &amp; Ex. 364 (deposition “cheat sheet” prepared by Do listing data YouTube maintains regarding videos).</p> <p>Hohengarten ¶ 378 &amp; Ex. 344 (Liu Dep.) at 62:21-63:8, 63:22-64:23.</p>
338. As a user types search terms into YouTube’s search field, YouTube suggests additional search terms to “help [YouTube users] more quickly find the videos [they’re] looking for.”	<p>Hohengarten ¶ 378 &amp; Ex. 344 (Liu Dep.) at 183:4-9.</p> <p>Hohengarten ¶ 302 &amp; Ex. 274.</p>
339. YouTube’s suggested search terms assist users in locating infringing works by providing variations of the complete name or content owner of a copyrighted work even though the user has not typed the work’s or owner’s full name.	<p>Hohengarten ¶ 294 &amp; Ex. 266, VIA14375228, at VIA14375228.</p> <p>Hohengarten ¶ 295 &amp; Ex. 267, VIA14375363, at VIA14375363.</p> <p>Hohengarten ¶ 296 &amp; Ex. 268, VIA14375413, at VIA14375413.</p> <p>Hohengarten ¶ 297 &amp; Ex. 269, VIA14375207, at VIA14375207.</p>
340. YouTube also provides many different ways for users to browse through the site.	<p><i>See supra</i> SUF ¶¶ 261, 334.</p>
341. When YouTube first instituted “categories” for videos in September 2005, YouTube employees reviewed and categorized the videos that had been previously uploaded to YouTube, without any input from the users who had uploaded those videos.	<p>Hohengarten ¶ 178 &amp; Ex. 175, GOO001-01177848, at GOO001-01177848.</p> <p>Hohengarten ¶ 298 &amp; Ex. 270 (September 12, 2005 YouTube Blog entry).</p>
342. Once YouTube had instituted “categories” for videos, YouTube thereafter required users who uploaded videos to choose a	<p>Hohengarten ¶ 357 &amp; Ex. 323 (Do 30(b)(6) Dep.) at 117:14-20.</p>

“category” for the video, such as “Entertainment” or “Comedy.”	
343. YouTube makes and stores four “thumbnails” from each uploaded video without any input from or opportunity to opt out for the uploading user.	<p>Hohengarten ¶ 357 &amp; Ex. 323 (Do 30(b)(6) Dep.) at 97:20-98:25.</p> <p>Hohengarten ¶ 356 &amp; Ex. 322 (Do Dep.) at 38:8-20.</p> <p>Defendants’ Answer at ¶ 31.</p>
344. Defendants display the “thumbnail images” of uploaded videos at various places on the YouTube site, including on search results pages.	<p>Hohengarten ¶ 179 &amp; Ex. 176, GOO001-00508644, at GOO001-00508646.</p> <p>Hohengarten ¶ 354 &amp; Ex. 320 (Chang Dep.) at 187:2-18.</p>
345. YouTube requires uploading users to accept Terms of Service providing that the user “grant[s] YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform” each uploaded video.	<i>See supra</i> SUF ¶ 267.
346. YouTube also requires a user to warrant that he or she owns the copyright for the videos a user uploads, or has permission from the copyright owner to upload the videos.	<i>See supra</i> SUF ¶ 267.
347. In seeking content partnership licenses from content owners, Defendants demanded a release for their prior infringing activities “arising out of or in connection with, the unauthorized reformatting, duplication, distribution, hosting, performance, transmission or exhibition of” the content owners’ intellectual property.	<p>Hohengarten ¶ 156 &amp; Ex. 153, GOO001-02240369, at GOO001-02240393 (agreement with EMI Music Marketing).</p> <p>Hohengarten ¶ 180 &amp; Ex. 177, GOO001-09531942, at GOO001-09531954 (agreement with Universal Music Group with similar language).</p> <p>Hohengarten ¶ 181 &amp; Ex. 178, GOO001-06147947, at GOO001-06147947 (draft UMG agreement showing that YouTube inserted similar language).</p>

Respectfully submitted,

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