IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FLAVA WORKS, INC.,   )
)   No. 10 C 6517
                    Plaintiff,   )
)   Chicago, Illinois
          v.   )   June 9, 2011
)   10:00 a.m.
MARQUES RONDALE GUNTER, doing   )
business as myVidster.com, et   )
al.,   )
)
                    Defendants.   )

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

APPEARANCES:

For the Plaintiff: HUON LAW FIRM, by
                        MR. MEANITH HUON
                        P.O. Box 441
                        Chicago, Illinois 60690

For the Defendants: NEAL GERBER & EISENBERG, by
                        MR. GREGORY JAMES LEIGHTON
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1   THE CLERK: 10 C 6517, Flava Works versus Gunter,

2 evidentiary hearing continued.

3   THE COURT: Good morning.

4   MR. LEIGHTON: Good morning, Judge.

5   MR. HUON: Good morning.

6   THE COURT: I believe we left off with the completion

7 of the adverse examination of the defendant by the plaintiff.

8 Is that where we were?

9   MR. LEIGHTON: I believe so, your Honor, yes.

10   THE COURT: And so now what are we going to do?

11   MR. LEIGHTON: It's my understanding -- I'm not sure.

12   THE COURT: Has plaintiff rested?

13   MR. HUON: Yes, Judge. I was just going to move my

14 exhibits into evidence.

15   THE COURT: All right. Any problem with any

16 exhibits?

17   MR. LEIGHTON: No, your Honor.

18   THE COURT: They're all received.

19   What we ought to do, I suppose, is to list them by

20 number, but we don't have to take court time for that. Just

21 make a list and hand it to the courtroom deputy, and we'll

22 mark that itself as an exhibit, and that will be the

23 plaintiff's exhibits admitted.

24   MR. HUON: And, Judge, I just wanted to tender

25 two cases. I have already given counsel a copy of the case.

1   The one is Perfect 10 versus Goggle that talks about

2   thumbnails is infringement. And the other one is Batesville

3   versus Funeral Depot, which is a case from the Seventh

4   Circuit, from the district court in the Seventh Circuit that

5   talks about how hyperlinking is infringement.

6   THE COURT: Counsel, will you state your names for

7   the record for the court reporter.

8   MR. HUON: Meanith, M-E-A-N-I-T-H, Huon, H-U-O-N, for

9   the plaintiff, Flava Works.

10   MR. LEIGHTON: I'm Greg Leighton, L-E-I-G-H-T-O-N,

11 for defendant Marques Gunter and also the LLC.

12   THE COURT: All right then. I guess we're at the

13 point now where the defendant puts on its defense.

14   MR. LEIGHTON: Yes, your Honor. We call Marques

15 Gunter.

16   THE COURT: Will you take the stand, please.

17   (Witness sworn.)

18   MARQUES RONDALE GUNTER, DEFENDANT HEREIN, DULY SWORN

19   DIRECT EXAMINATION

20 BY MR. LEIGHTON:

21 Q   Good morning, Mr. Gunter. Could you state your name and

22 spell your last name for the record, please.

23 A   Marques Gunter, last name G-U-N-T-E-R.

24 Q   Mr. Gunter, what's your educational background?

25 A   I have a bachelor's in information technology with a minor

1   in entrepreneurship.

2   Q   Where did you receive that degree from?

3   A   Central Michigan University.

4   Q   What year did you graduate?

5   A   2003.

6   THE COURT: Where is that located?

7   THE WITNESS: Central Michigan University, Mount

8   Pleasant, Michigan.

9   THE COURT: Where is that?

10   THE WITNESS: In the middle of Michigan, right in the

11 middle.

12   THE COURT: Thank you.

13   THE WITNESS: Middle of the glove.

14 BY MR. LEIGHTON:

15 Q   Through your course work at Central Michigan, did you

16 learn how to program computers or design websites?

17 A   Yes. My IT background I learned a little bit about --

18 took a few classes in web development and coding languages. A

19 lot of my skills are self taught, though.

20 Q   So you mentioned being self taught. How did you teach

21 yourself, then, and what skills specifically did you teach

22 yourself?

23 A   I focused on both -- mostly on web technologies, asp.net,

24 scripting language for websites, PHP, HTML, java script.

25 Pretty much to be self taught is I used to take existing work,

1 open source, and you kind of learn by taking other people's

2 works and then modifying them to complete a task. Like a

3 discussion board. You download a open source version of it.

4 You modify it to meet your site's needs. And you learn

5 indirectly through that process.

6 Q   How long have you been doing -- how long have you been

7 programming?

8 A   About 10 years now.

9 Q   What computer languages do you know?

10 A   Computer languages, asp.net, Visual Basic,

11 visualbasic.net, PHP, java script pretty much.

12 Q   How many websites have you designed?

13 A   Around three.

14 Q   What are they?

15 A   SalsaIndy.com, myVidster.com, and I had a personal website

16 just called -- for myself, like a online portfolio,

17 mgunter.com.

18 Q   Okay. Let's talk a little bit about SalsaIndy, LLC. What

19 is SalsaIndy, LLC?

20 A   SalsaIndy is a Latin dance company I started around

21 four years ago. Pretty much we teach Latin dancing, and we

22 host Latin events like salsa socials and Latin parties.

23 Q   Who owns SalsaIndy, LLC?

24 A   Myself.

25 Q   Anyone else?

1   A   No.

2   THE COURT: How is that spelled?

3   THE WITNESS: SalsaIndy is S-A-L-S-A-I-N-D-Y.

4   BY MR. LEIGHTON:

5   Q   What are the business goals of SalsaIndy?

6   A   To teach and spread the joy of Latin dancing in the

7   Indianapolis area.

8   Q   How does SalsaIndy relate to myVidster.com?

9   A   Well, one thing I learned when starting the Latin dance

10 business was trying to figure out how to market it, and so I

11 started posting video clips on my personal YouTube channel to

12 show people what salsa dancing is about.

13   Indianapolis is not as cultured as major cities are,

14 so video is the best way to kind of introduce Latin dancing to

15 them because personally I did not have any idea what salsa was

16 until I ran across it in a Latin club. So what I did was I

17 took videos that I posted on my YouTube channel, and then I

18 started posting them on SalsaIndy. Well, it became a lot of

19 work, so I ended up writing a small script that would take

20 videos from my YouTube channel and then and automatically post

21 them to my SalsaIndy website. And then it got a little more

22 complicated where, well, this other person has other video

23 clips that I would love to share with people who visit my

24 website, so I started basically developing a system that made

25 it easy for me to bookmark and link these videos primarily

1   from YouTube back then to SalsaIndy.

2   And then I realized, I was like, well, I'm building

3   up a system here. Maybe other people will benefit from this

4   because it's saving me a lot of work, and people are, you

5   know, going to my website, they see the salsa video clips, and

6   then, you know, I would assume that's helping me build my

7   business up. And I was like, well, this is -- I spent a lot

8   of time building it. Let me, you know, kind of port it over

9   to its own website and kind of show it off to the world and

10 see if anyone else wants to use it.

11 Q   The end result of that process was myVidster.com?

12 A   Exactly. I thought of the domain name afterwards and then

13 ported the code over there and then made it a multi-user

14 system versus just me using it for my personal use.

15 Q   Did anyone help you create myVidster?

16 A   No. It was a solo project.

17 Q   When did you create myVidster?

18 A   Roughly three years ago.

19 Q   Does myVidster have any other -- do you have any other

20 employees or anyone else who helps you run or maintain the

21 site?

22 A   For myVidster, no, I do not. It's just myself.

23 Q   So what exactly is myVidster designed to allow users to

24 do?

25 A   MyVidster is a social bookmarking site, with its niche is

1   video. Users can link -- I should say bookmark videos from

2   all around the web in personal collections where they keep

3   track of their favorite videos via bookmarks, and also those

4   collections by default are public, so then they can share

5   their video collections with friends or the entire world if

6   they want.

7   Q   What industry do you consider myVidster to be in?

8   A   Well, I would say it's social bookmarking, social network,

9   social bookmarking. It's an open platform. Any groups can

10 join it. Any groups can use it.

11 Q   Is the site a part of the adult film or pornography

12 industry?

13 A   No.

14 Q   Okay. Now, I want to go back. You talked a lot about

15 bookmarking and social bookmarking. When you say

16 "bookmarking," what do you mean by that? What's a bookmark?

17 A   Well, a bookmark is a link. A link is a pointer to a web

18 page or a file either on -- on a website. It can be internal,

19 or it could be another website on the web. A bookmark is just

20 your favorites. You bookmark your favorite links from all

21 around the web, and you bookmark them. You save them

22 somewhere. Like you will save them to your web browser, for

23 example. Those are bookmarks.

24   What myVidster is, is those bookmarks are being

25 stored on the myVidster server. So you have these collection

1   of links, which are videos in myVidster's case, all stored

2   onto myVidster's servers, so basically those bookmarks are

3   links, in my myVidster's case, pointing to other websites

4   around the web.

5   Q   Okay. I just want to ask you about a few other terms that

6   have been used in this case. What's downloading?

7   A   Downloading is when a user retrieves a file from a

8   website.

9   Q   What's uploading?

10   A   When a user posts or sends a file, I guess, to another

11   website as well.

12   Q   Is there a difference between the way myVidster functions

13   and the way peer-to-peer file sharing services such as Nabster

14   and Aimster function?

15   A   The purpose -- the setup for peer-to-peer is where users

16   in the peer-to-peer network, the files that they are sharing

17   are stored on their computers. So basically users are

18   downloading and uploading from each other through this

19   peer-to-peer network.

20   What myVidster is, is it's just a repository of these

21   links and bookmarks. The files themselves are not stored on

22   the users' computers. The files -- the video files are stored

23   on external websites around the web. So the users are not

24   storing copies. They're not uploading or downloading. All

25   they're doing is they're viewing the videos from myVidster,

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1   but they're being hosted on external websites.

2   Q   Okay. Let's talk a little bit about the users now. How

3   many different types of users are there on myVidster?

4   A   MyVidster has general users, and also they have pro users.

5   Q   What's the difference between the two?

6   A   General users can bookmark videos from all around the web

7   in their own personal collections. Pro users have the same

8   benefits as general users, but they also have the ability to

9   create backup copies of their bookmarked videos.

10 Q   How many general users are there roughly?

11 A   A little over 80,000.

12 Q   And how many premium users or pro users are there roughly?

13 A   25, 30.

14 Q   Okay. So how does the payment structure for the users of

15 myVidster work? Do they pay you money? And if so, when?

16 A   General users are free. They do not pay for anything for

17 the service. Pro users, there's a subscription service where

18 they're either paying monthly or yearly for the subscription.

19 Q   And what's the payment structure for advertisers to be

20 able to advertise on myVidster?

21 A   Advertisers, I use networks that I'll sell and manage the

22 advertiser inventory. Like I use Juicy Ads, for example. So

23 advertisers will create an account on Juicy Ads, and those ads

24 will be displayed on myVidster.

25   Pretty much what the advertisers are doing is they're

1 paying for impressions and clicks on their banners. So that's

2 what they're paying for, and then, you know, myVidster gets a

3 cut of that.

4 Q   So is the payment structure for either users or

5 advertisers affected by whether or not users have or do not

6 have access to infringing materials on myVidster?

7 A   I would say not. I've never had any feedback from users

8 complaining about any type of content not being available. I

9 have not received any feedback from my users based on those

10 regards.

11 Q   Have you ever specifically targeted or directed your

12 advertisements on myVidster to individuals interested or who

13 might be interested in infringing content?

14 A   No, I have not.

15 Q   Have you ever specifically targeted or directed any of

16 your blog posts to individuals who might be interested in

17 obtaining infringing content?

18 A   No.

19 Q   Is there any indication or evidence that users have

20 subscribed to myVidster or canceled their accounts of

21 myVidster based on the availability of allegedly infringing

22 content?

23 A   No.

24 Q   Okay. Let's talk a little more about the general users.

25 When a general user finds a video on the Internet that he

1   wants to share or bookmark, how does he ultimately post that

2   link or bookmark onto myVidster?

3   A   When a user finds a video on the web that they want to

4   keep track of, they will create a bookmark. What myVidster

5   does in that process is user will submit the link to

6   myVidster. MyVidster will then crawl that web page looking

7   for some information. It will look for the title of the

8   video, possibly a description, any keywords, also the embed,

9   which is just a link to the video which it uses, and myVidster

10   will also create a thumbnail of the video if one is not

11   already available.

12   Q   Okay. At any point during that process is a copy of the

13   video file itself ever created?

14   A   No. No copy of the video is made during the bookmarking

15   process.

16   Q   So when a user creates a link to a particular video, can

17   you tell whether that user knows if the video is infringing

18   someone else's copyrights?

19   A   I would assume not. I just take it from my perspective.

20   If I'm browsing the web and I find something that I like and I

21   want to save to my favorites, I personally do not go through

22   that thought process every time I come across a video on the

23   web, so I would assume that my users probably are thinking the

24   same.

25   Q   Can you tell? Can you tell whether the user knows it's

1   infringing or not?

2   A   No, I cannot.

3   MR. LEIGHTON: All right. Mr. Gunter, I'm going to

4   hand you what's previously been marked as Defense Exhibit 1.

5   If your Honor has our notebook from the last time.

6   THE COURT: I do.

7   MR. LEIGHTON: The first exhibit if you'd like to

8   follow along.

9   BY MR. LEIGHTON:

10   Q   Do you recognize that document?

11   A   Yes, I do.

12   Q   What is it?

13   A   It is -- this is a video bookmark page on myVidster.

14   Q   So is that a true and correct copy of screen shots from

15   the myVidster website?

16   A   Yes, it is.

17   Q   Are pages like this created and kept in the ordinary

18   course of myVidster's business?

19   A   Yes.

20   MR. LEIGHTON: Your Honor, at this time I guess I'd

21   like to move it into evidence, or I can wait to the end to --

22   THE COURT: Why don't we do the same way we did with

23   the plaintiff's.

24   MR. LEIGHTON: That works.

25   THE COURT: Go ahead.

1   BY MR. LEIGHTON:

2   Q   So, for instance, the first page of this exhibit, are

3   these --

4   I guess I should ask you are all of these exhibits a

5   reflection of the result of the process we were just talking

6   about where myVidster crawls a particular third-party website

7   to create a link to the video?

8   A   Yes, correct. These are video -- these are bookmark

9   pages. Each page here is through the process of bookmarking a

10 video to myVidster.

11 Q   Okay. I want to walk you through some of the information

12 here. So what -- do you see where it says bookmark date?

13 A   Yes.

14 Q   What does that mean?

15 A   That is the date the user bookmarked the video.

16 Q   Okay. Do you see posted by?

17 A   That is the user who bookmarked the video, the user name.

18 Q   Okay. And then there's source link. What does source

19 link mean?

20 A   Source link is the location where the user has bookmarked

21 the video.

22 Q   Is it always accurate?

23 A   It's accurate in regards of that's where they bookmarked

24 it, but when you say the word "source," is it the true source

25 of the video file where the video file was located? No, it is

1 not always the case.

2 Q   Why not?

3 A   Pretty much what myVidster is doing is user finds a video

4 somewhere. They bookmark it. All I'm recording is that link,

5 that URL of the location where they bookmarked it at.

6   THE COURT: Do you have an extra copy of the defense

7 notebook?

8 BY MR. LEIGHTON:

9 Q   Okay. So now I want to refer your attention actually to

10 the third page of the exhibit if I could. And do you see

11 where the -- under source link on the third page it says

12 www.myVidster.com?

13 A   Yes.

14 Q   Does that mean that a copy of this particular video, this

15 page, is actually stored on the myVidster servers?

16 A   No. This is a situation where a user has bookmarked

17 another user's bookmark, which sounds a little weird, but

18 basically they're browsing through that user's video

19 collection, his collection of bookmarks. They find something

20 they like, and then they went ahead and they bookmarked it

21 from his collection.

22   The source link I can actually tell from this one

23 because the video player has a watermark. This one is -- for

24 example, the true source link of this one would be

25 xvideos.com.

1   Q   Okay. Let's walk through some of the other information.

2   Underneath -- I'm sorry -- yeah, underneath there a little bit

3   of the way down it says embed. What does that mean?

4   A   Embed is the link to the video. Basically it's a way for

5   you to display a video that is not hosted on your website. It

6   can be hosted -- that is hosted elsewhere. So this does the

7   embed code, and that's why you can see the video. It is the

8   embed code that is being used to display that video. I kind

9   of -- you kind of view it as a link to a video from another

10   website that is playable.

11   Q   Will the embed code always correctly show the true source

12   of the video?

13   A   Yes, it will.

14   Q   Okay. Underneath embed it says URL. What's URL?

15   A   That is the link to the user's bookmark. So if they want

16   to share that bookmark with someone else, they will send them

17   that URL that is right there.

18   Q   So, now, the video is displayed sort of in the upper left

19   quadrant of the page here. So a user from this page can click

20   and that video will play, correct?

21   A   Correct.

22   Q   So if the video is playing from the myVidster website,

23   does that mean that a copy of the video is on the myVidster

24   server?

25   A   No, no. The video is being streamed from that external

1 website.

2 Q   I'm actually going to refer back. I'm going to hand you

3 Plaintiff's Exhibit No. 8.

4   And I'm sorry, I don't have copies of this for

5 everyone right now.

6   I believe plaintiff's counsel had asked you questions

7 about that and had asked you about the movies that appear on

8 there, and I just want to ask you the same question about

9 those.

10   You know, there's one that's Star Trek and another

11 that's Crank 2. Just because those movies are posted and

12 appear on your myVidster page, does it mean that those movies

13 are actually on your servers?

14 A   No. These videos are bookmarks, and they're being hosted

15 on external websites.

16 Q   And when you created those bookmarks, could you tell

17 whether or not the videos that you were linking to were

18 infringing someone else's copyrights?

19 A   No. I would not have an idea.

20 Q   Okay. Now, let's go back briefly and discuss the other

21 type of users, the premium users.

22   THE COURT: Excuse me just a minute. I have another

23 group of exhibits here not in a notebook. Are these

24 plaintiff's exhibits?

25   MR. LEIGHTON: Are they handwritten on the corner?

1   THE COURT: Yes.

2   MR. LEIGHTON: Yeah, I believe those are plaintiff's

3   exhibits.

4   THE COURT: Okay. Thank you.

5   BY MR. LEIGHTON:

6   Q   Okay. So let's go back and talk about the premium users

7   now. I believe you said there's about 25 or 30 of them, and

8   the difference is that they can back up the videos that they

9   link to.

10   How many videos can a premium user store on

11   myVidster's servers?

12   A   They can only store one unique copy of a video, and

13   they're limited to their storage quota.

14   Q   How many copies of a particular video can they store?

15   A   One. And that's actually across the board. MyVidster

16   will only store one unique copy. So if you have two premium

17   users backing up the same video, there's only one copy ever

18   being stored on myVidster's servers. MyVidster does not

19   create duplicates of videos.

20   Q   Do you take any steps to monitor or gain knowledge of the

21   specific videos that users link to or back up on myVidster?

22   A   No.

23   Q   Do you prescreen any content posted or stored by users to

24   myVidster?

25   A   No.

1 Q   Do you provide any kind of advice regarding what content

2 users should or should not post on myVidster?

3 A   No.

4 Q   Do you edit any of the videos that are posted or stored by

5 users on myVidster?

6 A   No.

7 Q   Does myVidster have a DMCA policy?

8 A   Yes.

9 Q   What is it?

10 A   I have it posted on the website.

11 Q   I will hand you -- I'm actually going to hand you two

12 exhibits. I'm going to hand you what have been previously

13 marked as Defense Exhibit 2 and Defense Exhibit 3.

14   Let's start with Defense Exhibit 2. This is going to

15 back us up just slightly, but do you recognize that document?

16 A   Yes, I do.

17 Q   What is it?

18 A   It's my registration for the Digital Safe Harbor.

19 Q   This is a form you filed with the copyright office,

20 correct?

21 A   Correct. I had my previous lawyer file this for me.

22 Q   Okay. And this is a true and accurate copy of that

23 filing?

24 A   Yes, it is.

25 Q   Okay. Let's move on to Defense Exhibit 3. Do you

1   recognize that document, or those documents, I should say?

2   A   Yes, I do.

3   Q   What are they?

4   A   These are my DMCA policies that I posted on myVidster and

5   also my terms of service, which is also posted on myVidster.

6   Q   Are these true and accurate copies of those two things?

7   A   Yes, it is.

8   Q   Are these things records that are created and kept in the

9   ordinary course of myVidster's business?

10   A   Yes.

11   Q   So the first page, I believe -- I'm sorry. The first page

12   sets forth your DMCA policy, correct?

13   Would you please read the first paragraph of that

14   policy for the Court.

15   A   "MyVidster respects the intellectual property of others."

16   THE COURT: Let's not do that. That's a lot of

17   reading. Just let me read it to myself, and then you can ask

18   questions about it.

19   MR. LEIGHTON: Sounds fair.

20   (Brief pause.)

21   THE COURT: Okay.

22   BY MR. LEIGHTON:

23   Q   Have you actually implemented this policy?

24   A   Yes, I have.

25   Q   Do you always follow this policy?

1   A   Yes.

2   Q   Is there any aspect of the myVidster website that would

3   prevent a copyright owner from collecting information from

4   myVidster that would be necessary to include in a DMCA

5   takedown notice?

6   A   No. All information is available for a copyright owner to

7   file a notice, collect the information needed to file a

8   notice.

9   Q   How many DMCA notices has the plaintiff sent you?

10   A   Approximately 300.

11   Oh, I'm sorry. Number-wise. I'm thinking about

12   takedowns.

13   In the twenties.

14   Q   When was the first one sent?

15   A   Early last year, probably March.

16   Q   Each time you received a DMCA notice from the plaintiff,

17   did you remove all video links identified in each notice?

18   A   Yes, I have.

19   Q   How long did it take, roughly?

20   A   Within 24 hours.

21   Q   I'm now going to hand you what's previously been marked as

22   Defense Exhibit 4.

23   MR. HUON: My only objection is I asked counsel for a

24   copy of that notebook that he's already tendered to you. I

25   asked in person three times. I e-mailed him three or four

1   times. And I asked him about it this morning. His response

2   was that he would give me copies of what he's showing the

3   witness as he's going along.

4   If he had given me this when I asked for it, it would

5   have given me more time to cross examine Mr. Gunter.

6   MR. LEIGHTON: Your Honor, I didn't get three weeks

7   to review his evidence.

8   THE COURT: That's not the issue. Why didn't you

9   give him this? This isn't a tit for tat situation. It's a

10   question of expediting the proceeding. Why didn't you give

11   this to him?

12   MR. LEIGHTON: Well, he never asked for it

13   specifically. He asked for our notebook, and it was our

14   understanding that the court was in recess and we would simply

15   offer up our evidence to them as we entered it.

16   THE COURT: Well, as a practical matter, looking at

17   the bulk of this particular exhibit, how can counsel possibly

18   cross examine effectively on this being presented with it for

19   the first time this morning? The answer is he can't.

20   All right. Go ahead. We'll do the best we can.

21   MR. HUON: Thank you, Judge.

22   BY MR. LEIGHTON:

23   Q   Okay. I'm going to start over.

24   What is this document?

25   A   This is a document that I created. It's a -- pretty much

1   a data dump from myVidster's database. Basically the data

2   that I've dumped revolves around any -- from any takedown

3   notices from Flava Works.

4   Q   Okay. And is this a record that's kept and maintained in

5   the ordinary course of myVidster's business?

6   A   Yes.

7   Q   Walk us through the columns on the spread sheets. The

8   first, starting at the left-hand side, says master I.D. What

9   does master I.D. mean?

10 A   It's just a unique identifier which is represented by the

11 embed code. So it's just a way to make it -- make that video

12 unique in myVidster's database. So if it's collected multiple

13 times, you'd use that master I.D. code to say five people have

14 bookmarked this video.

15 Q   And the next column says last updated. What does that

16 mean?

17 A   That's when a user has updated the information on that

18 video bookmark. Let's just say they changed the name of the

19 title. If they've changed the name of the title, the last

20 updated field would be updated as to that time stamp.

21 Q   So on these first few here when it says 000 across, what

22 does that indicate?

23 A   It has never been updated. It has been bookmarked and

24 entered in the database, but the user has not updated it.

25   And also if they're early, early entries, this

1 functionality was added a little bit later, so it can fall

2 under one or two scenarios. Either it's an old bookmark or

3 the user has never updated the bookmark.

4 Q   Okay. So what's title?

5 A   The title the user gave to the bookmark.

6 Q   What's source URL?

7 A   Source URL is the location where the user has bookmarked

8 the video.

9 Q   So that's the third party website where the video actually

10 resides, right?

11 A   Well, it's really the location. It's not -- the source

12 URL is just the location of where the user has bookmarked the

13 video. So, once again, it falls in that scenario. It could

14 be the source site where he bookmarked it. It could be

15 another user's bookmark on myVidster. It could be a video

16 posted on a blog. It's just the location where the user has

17 bookmarked the video.

18 Q   What's embedded URL?

19 A   That is the embed code of the video which is used to play

20 the video on myVidster.

21 Q   What's CC owner?

22 A   That is the copyright -- that's the copyright owner who

23 sent the takedown request.

24 Q   And then the last two are DMCA notice date and removal

25 date, correct?

1   A   Yes.   Those are the dates -- the DMCA notice date is the

2   date when I received the takedown notice, and the removal date

3   is when I disabled the link on myVidster.

4   Q   So then this chart, then, is a representation of all links

5   of the plaintiff's content that you've removed from myVidster

6   since they started sending you DMCA notices?

7   A   That is correct.

8   Q   Now, every time the plaintiff sent you a DMCA notice did

9   you remove all of the backup videos that were identified in

10   each notice that were stored on myVidster's servers?

11   A   Yes.

12   Q   How long did that take?

13   A   Within 24 hours.

14   Q   Okay.   I'm going to hand you what's been previously marked

15   as Defense Exhibit 5.

16   What is this document?

17   A   This is a list of videos that have been taken down from

18   myVidster in regards to a takedown notice, or Flava Works'

19   takedown notices.

20   Q   And is this, again, a record that's kept and maintained in

21   the ordinary course in myVidster's business?

22   A   Yes.

23   Q   So let's walk through the columns here.

24   The first says posted by. What does that mean?

25   A   That is the myVidster user who had created the backup

1   copy.

2   Q   And what is backup URL?

3   A   Just the URL location or the location of the video file

4   itself.

5   Q   Source -- is source URL on this chart the same as source

6   URL on the previous chart?

7   A   Correct. That is the bookmarked location.

8   Q   And posted, what does that mean?

9   A   The date the bookmark was created.

10   Q   I'm sorry. Are these bookmarks, or is this the date of

11   the bookmark or --

12   A   This is the -- the posted date is the bookmark date

13   because basically the process is they'll bookmark the video

14   and they'll later on create a backup copy, so those dates

15   could actually differ when the copy was actually generated.

16   Q   Okay. And you removed all --

17   How many are there total on this chart?

18   A   I think ten or twelve.

19   Q   I count 11?

20   A   11, yeah.

21   Q   And you removed all 11 of these videos, correct?

22   A   Yes, I have.

23   Q   So there have been a total of 12 of plaintiff's videos

24   that were stored or removed from myVidster's servers total,

25   correct?

1   A   Correct.

2   Q   How many links were removed? How many entries were there

3   on the previous chart?

4   A   The previous chart, just the bookmarks from removal,

5   approximately around 300 have been removed.

6   Q   Okay. Now, every time you received a notice from the

7   plaintiffs, did you remove the user accounts that were

8   identified by them as "repeat infringers"?

9   A   No, I did not.

10   Q   Why not?

11   A   Well, what I consider is when a user goes and creates a

12   bookmark from a video on the web, I do not consider that an

13   infringement. I do not know if they know that they're

14   infringing on someone's -- on copyright rights or whatever, so

15   I don't consider them an infringer, let alone a repeat

16   infringer.

17   Q   Let's unpack that a little bit.

18   So when a user creates a bookmark, are they making a

19   copy?

20   A   No.

21   THE COURT: Let me ask a question. In your

22   experience, what percentage of these adult porn videos are not

23   copyrighted?

24   THE WITNESS: Well, I would assume that they're all

25   copyrighted. Whether or not they're infringing on someone's

1   copyright is -- I do not know.

2   THE COURT: Okay. Give me an example of how one

3   could post a copyrighted video without infringing.

4   THE WITNESS: Xvideos.com provides embeds,

5   pornhub.com. There's a lot of adult websites that -- adult

6   websites, for example. Basically the adult websites have

7   modelled themselves after YouTube. YouTube became famous

8   because they allowed other websites to embed on theirs. So

9   Pornhub, XVideos, they all allow users to embed their videos

10 on other websites.

11   THE COURT: And is that with the consent of the

12 copyright holder?

13   THE WITNESS: As someone who's posting it as a

14 myVidster user or just a person on the website, we do not know

15 in regards on whether or not they're infringing or infringing

16 on copyrighted contents. We assume that the website

17 themselves are policing that, you know, because websites can

18 disable the embedding on certain videos. I've seen that where

19 some videos are embedable and some videos are not. So I would

20 assume if they're not embedable, that means it's restricted to

21 that website for whatever reason.

22 BY MR. LEIGHTON:

23 Q   So I'm going to repose to you the question I'd asked,

24 which was when one of your users creates a link or a bookmark,

25 is there a copy created?

1   A   No, no copy is created of that video.

2   Q   And can you tell from what you can see in myVidster when

3   they create that link whether or not that video is restricted

4   by the copyright owner of that video?

5   A   No.

6   THE COURT: When you receive one of these notices

7   from the plaintiff, do you investigate the truth of the

8   allegation of infringement before you take action?

9   THE WITNESS: No. What I do is if I receive a

10 notice, I just remove all the links. After I remove all the

11 links, I will do an investigation on the websites to see if

12 the websites are -- if I feel that they look legit. I mean,

13 if they're well-known adult websites, for example, then that's

14 cool. But if they're a site hosted in some foreign country, I

15 will probably do a deeper investigation.

16   But when they send me a notice, my first reaction is

17 remove the links.

18   THE COURT: Which means that you presume that there's

19 been a copyright violation.

20   THE WITNESS: I just follow DMCA, which requires me

21 to presume unless a counter-notification is sent, yes.

22   MR. LEIGHTON: Your Honor, if I might interject, you

23 know, under the DMCA, the DMCA in fact says don't presume,

24 simply remove, and there's a counter-notice procedure for

25 someone. So it's his job as the ISP just to simply remove.

1   THE COURT: Not to question, but to remove.

2   THE WITNESS: I don't question it. I always remove.

3 That is correct.

4   THE COURT: Thank you for pointing that out.

5 BY MR. LEIGHTON:

6 Q   Does myVidster have a repeat infringer policy?

7 A   Yes.

8 Q   What is it?

9   And at this point I'll refer everyone's attention

10 back to Defense Exhibit 3, the second page.

11 A   MyVidster's repeat infringer policy is if a user is using

12 myVidster to distribute video content, copyrighted content

13 that is not available publicly, will be what I'll consider a

14 repeat infringer. Basically if the user is using myVidster as

15 a way and means to distribute content that is not publicly

16 available. If it's not on a public website available and if

17 they're using myVidster as a way to get that material out,

18 that would cause me to, you know, investigate and see if

19 they're an infringer and then see if they're a repeat

20 infringer.

21 Q   And let's talk about that. What is it about the public

22 availability that would give you pause? If something is not

23 publicly available, why does that perhaps indicate that there

24 might be an infringement going on?

25 A   If it's not publicly available, in my mind, is that a

1 copyright owner -- it's harder for them to investigate

2 something that's not publicly available. If they find a video

3 that is on myVidster that's hosted by Pornhub, that copyright

4 owner can, of course, have me remove the link, and then he'd

5 go to Pornhub and say, hey, this user on your website is

6 posting these videos, go ahead and investigate or remove them,

7 or however they want to proceed.

8   Now, if it's a password protected website, for

9 example, and those videos are stored there, myself or the

10 copyright owner, we cannot really investigate the source in

11 that regards. So that's why I kind of took the high road

12 route is so that if I can't investigate, I know that the

13 copyright owner can't investigate, so I'm going to be the

14 first line of defense to stop that.

15 Q   So it's some indicia that there might actually be

16 infringement going on?

17 A   Possibly. You don't know, but, you know, it's enough to

18 warrant an investigation.

19 Q   Have you ever taken any action against any myVidster users

20 under your repeat infringer policy?

21 A   Yes. One user by the name Tailor Made, I sent him a

22 warning. He fell under the situation where there were several

23 videos that were pulled down due to the notices sent by Flava

24 Works, and when investigating, they were -- a lot of the

25 videos were posted from another social networking website, but

1 it was password protected, so once you try to investigate to

2 see where the source is, it says you must log in with a user

3 name and password.

4 Q   Okay. I'm going to hand you what's been previously marked

5 as Defense Exhibit 6. What is this document?

6 A   This is a document I sent to the user, which is the Tailor

7 Made user. I sent him a warning about his bookmarking

8 activity.

9 Q   Okay. And is this a record that's kept and maintained in

10 the ordinary course of myVidster's business?

11 A   Yes.

12 Q   So I believe you testified that this is the e-mail that

13 you sent to him under your repeat infringer policy warning

14 him. Did you take any further action other than this e-mail?

15 A   No.

16 Q   Why not?

17 A   After this e-mail was sent, the user has had no activity.

18 He has done no future bookmarking. He actually stopped

19 bookmarking, you know, before this date, so there was no

20 future bookmarking after it, so there's no repeat infringing

21 done by this user.

22 Q   Let's talk a little bit about your monetization of the

23 site. How does myVidster make money?

24 A   MyVidster makes money through its pro service, through its

25 subscription model, and through ad revenue.

1   Q   And about how much revenue does myVidster bring in per

2   month?

3   A   Around 2,000.

4   Q   So that's $24,000 a year roughly?

5   A   Yes.

6   Q   Is any of that $24,000 a year directly attributable to the

7   plaintiff's content?

8   A   No.

9   Q   Would your revenue change if the plaintiff's content was

10   no longer available on the site?

11   A   No, it would not.

12   Q   Okay. Now let's talk a little bit about all the things

13   you've sort of done as you've interacted with the plaintiff

14   throughout the course of the past 18 months.

15   Did you ever inform the plaintiff about your repeat

16   infringer policy?

17   A   Yes, I have.

18   Q   When was that?

19   A   Early fall last year.

20   Q   And how did you inform them?

21   A   By e-mail.

22   Q   During your time communicating with the plaintiff, have

23   you taken any steps to mitigate the posting of the plaintiff's

24   content of myVidster?

25   A   Yes. My strategy is always about stopping at the source.

1 So one thing I did was I informed them on how to find the

2 source of the videos. I think at first his e-mail

3 communications kind of hinted to that he thought all content

4 was hosted on myVidster, so I informed him about you can look

5 at -- use the embed code, you can use the source URL. It may

6 not always be right, but it's easy. What's a little bit

7 harder is looking at the embed code.

8   Also what I've done is I blocked websites that were

9 suspicious, mostly the password protected websites. So

10 basically if a user tries to go to a website that -- bookmark

11 from a website that I have blocked, myVidster would not allow

12 those bookmarks to be created. I think I've done that to

13 around three websites that were password protected, because I

14 knew if I didn't do that, it would just be an endless chase

15 between they'll go to the password protected site, they'll

16 keep reposting it. If that's a true source of a lot of the

17 content, which I couldn't confirm because I can't see it, this

18 was just one way for me to help combat that.

19   Also he want -- Flava Works started to request

20 removal of the thumbnails as well, so I added that into my

21 process as to automatically remove the thumbnails from the

22 bookmarks that he's requested to take down.

23   Then also if Flava Works deemed any other websites as

24 suspicious, I would investigate and possibly block that as

25 well.

1   Q   I'm going to hand you what's previously been marked as

2   Defense Exhibit 7.

3   Do you recognize this document?

4   A   Yes.

5   Q   What is it?

6   A   An e-mail from support at Flava Works.

7   Q   Okay. It's actually a few pages. Take a look, and if you

8   can tell us sort of more generally what it is.

9   A   If I recall correctly, this is when Flava Works was

10   mistaking the source URL, which stated on these bookmarks as

11   myVidster, I think, was stated in here.

12   Q   I don't -- I'm just asking what they are.

13   A   Oh. My apology. It's a DMCA notice with --

14   Q   With e-mails.

15   A   -- e-mails being exchanged back and forth.

16   Q   Are these records that are created and kept in the

17   ordinary course of myVidster's business?

18   A   Yes.

19   Q   Okay. Now, if we could, let's direct your attention to

20   the bottom of Page 11, and we're going to walk over onto

21   page -- top of Page 12.

22   The bottom of Page 11 is just the header of an e-mail

23   that says Thursday, December 9, 2010; am I correct?

24   A   Yes. I'm on the same page.

25   Q   On the top of Page 12 in the body of that e-mail, what are

1   you telling the plaintiff in this e-mail?

2   A   On Page 11?

3   Q   On Page 12.

4   A   Oh, Page 12, okay.

5   Okay. This reply has two things, where I've updated

6   my script to remove the thumbnails as well. Once in a while

7   he wouldn't request all the thumbnails, but I would assume

8   that he wanted them all removed. Like he will include some

9   thumbnails in some links, so I just went ahead and updated my

10   scripts to save him the work on removing the thumbnails

11   because he wanted them removed.

12   And then also he was complaining about these videos

13   being hosted on myVidster, and I was correcting him, showing

14   him that, well, this is the bookmark link, but the source --

15   your source URL is it'sallgay.com, and the other one is

16   neebrew101 (phonetic). So this is just me trying to

17   articulate to Flava Works that, no, these videos are not being

18   hosted on myVidster but on external websites. I don't mind

19   removing the links, but you keep saying upload. You keep

20   saying copies are being stored. So I was just trying to

21   articulate because he keeps using that same verbiage in all

22   these e-mails he sends to me.

23   Q   I'm going to hand you what's previously been marked as

24   Defense Exhibit 8.

25   Do you recognize this document?

1   A   Yes, I do.

2   Q   What is it?

3   A   An e-mail stream between me and Philip.

4   Q   Is this -- again, are these records kept and maintained in

5   the ordinary course of myVidster's business?

6   A   Yes, it is.

7   Q   Okay. If I could refer your attention to Page 4. It's

8   actually a carryover of the e-mail that begins on the bottom

9   of Page 3.

10   What are you telling the plaintiff in this e-mail?

11   A   Pretty much like I said, the top line, "To help battle

12   this, I have banned these sites from future bookmarking."

13   This is when I have banned the bookmarking from these three

14   websites that were -- these were password protected websites,

15   so I went ahead and I went ahead and blocked them so that

16   users would not continue to bookmark.

17   I don't know if all the content was infringing or

18   not, but I just wanted to play it safe because there was a

19   good amount to justify the action.

20   Q   All right. And also in the same e-mail did you offer to

21   block other sites like this as they were discovered in the

22   future?

23   A   Yes.

24   Q   I'm going to hand you what's been previously marked as

25   Defense Exhibit 9.

1   What is this document?

2   A   A DMCA notice that Flava Works sent to me.

3   Q   Does it also have a subsequent e-mail exchange in it?

4   A   Yes, it does.

5   Q   And, again, are these records that are kept and maintained

6   in the ordinary course of myVidster's business?

7   A   Yes.

8   Q   I would direct your attention to Page 9, please. On

9   Page 9 there's an e-mail exchange between you and

10   Mr. Bleicher, the plaintiffs. What's the nature of exchange?

11   A   Two things. One, I was informing him that links were

12   removed, and then also some statements on repeat infringers

13   because he was inquiring about that.

14   Q   And you asked him to provide data regarding repeat

15   infringers, right?

16   A   That's correct. In this e-mail I asked him -- because he

17   keeps labeling these users as repeat infringers, so I asked

18   him, well, please provide data on why these users are repeat

19   infringers. I wanted to know how he interpreted what a repeat

20   infringer is.

21   Q   And did he ever provide such data?

22   A   He never replied back after that.

23   Well, he did reply back. He said he didn't have to

24   or something in regards to that, so yeah.

25   Q   Have you taken any steps on myVidster to streamline the

1   removal of duplicate bookmarks or repeat bookmarks?

2   A   Yes. What I've done in my scripts is, because it's just a

3   bookmark, one person or a hundred people could bookmark the

4   same video from another website, and what I've done is my

5   scripts will search for those duplicates to make it a lot

6   easier. Because if there's a hundred bookmarks to one video,

7   I know a content owner would -- if they wanted to remove from

8   myVidster, it will be a painful process. So myVidster will

9   crawl through its database to find all duplicates and remove

10   those that are related to the notice.

11   Q   I'm going to hand you what's been previously marked as

12   Defense Exhibit 10.

13   What's this document?

14   A   This is a really early e-mail from -- to Flava Works.

15   This is after I have, I think, one of their first DMCA

16   notices, and I was trying to inform them on how to find the

17   source of the video. Because I remember reading this DMCA

18   notice, and it gave me the impression that they're thinking

19   that I'm hosting all this content. So my reply back to them

20   was how to show them these are just bookmarks, this is how you

21   determine the source to get rid of the source.

22   Q   And, again, just a follow-up: Is this a record that's

23   kept and maintained in the normal course of Flava Works'

24   business?

25   I'm sorry. MyVidster.

1   A   MyVidster, yes.

2   Q   All right. I'm handing you what's been previously marked

3   as Defense Exhibit 11. What's this document?

4   A   This is an e-mail from Philip saying that there's -- there

5   are links that are still active on myVidster.

6   Q   And were they?

7   A   I'm trying to look for my reply. My apologies. I receive

8   so many of these.

9   I don't know if this is the situation where I missed

10 two and then I removed them right after he sent me the notice

11 or another reason.

12 Q   Well, I'm going to direct your attention to Page 2.

13 A   Excuse me. I'm trying to speed read. My apologies.

14 Q   Page 2, I believe, if you read that, is once again you're

15 showing him where the embed codes --

16 A   Right.

17 Q   -- are showing that the source is not actually located on

18 myVidster?

19 A   Okay, yeah, because he's inquiring that they're -- sorry

20 about that. He says also these two links are hosted on

21 myVidster.

22   I'm getting confused with another e-mail.

23   Basically, yeah, because he says also these two links

24 hosted on myVidster. I went ahead and I was like, sorry,

25 they're not hosted by myVidster, and I provided the embed

1   code, and I bolded the website, which is gaywatch.com was

2   where the videos were being hosted.

3   So this e-mail was just me once again trying to

4   inform Flava Works on these videos are not hosted on myVidster

5   because pretty much that's the common theme on all these

6   e-mails is that they're hosted on myVidster, they're uploaded

7   on myVidster, which is all incorrect. So this e-mail is

8   another example of me trying to inform Flava Works here's the

9   embed code, it's on gaywatch.com, it's not being hosted on

10   myVidster.

11   Q   I'm going to hand you what's previously been marked as

12   Defense Exhibit 12. What is this document?

13   A   An e-mail exchange between me and Philip.

14   Q   And is it kept in the ordinary course of myVidster's

15   business?

16   A   Yes.

17   Q   Okay. And what's the subject matter here of this

18   exchange?

19   A   This is an example where I would assume that there's a

20   video that I pulled down, which is like the video I.D.

21   1571517, and then it reappeared, so this is a situation where

22   another user has bookmarked the video, so there's two bookmark

23   copies, or it was removed and then rebookmarked from another

24   user. So I was trying to inform him here's the source URL.

25   It's allgay.com. Get it removed there because another user

1   can rebookmark it a week later, a day later. I will keep

2   removing these bookmarks for you, but this is the source of

3   the video content. People are just posting links to

4   myVidster. If it gets reposted, my apologies. But you have

5   to remove the source in order to stop the rebookmarking of it.

6   And that's my assumption. I have to review that

7   other URL in this e-mail to confirm, but that's what I'll

8   assume if that claim is true, if it's the same video.

9   Q   Okay. So just to follow up on that a little bit, even

10   though it's the same movie that's linked to in both the links

11   that he provided you, that doesn't necessarily mean that it's

12   the same link or that one notice would necessarily mean that

13   you would flag the other one for removal, correct?

14   A   No, no. You wouldn't know unless you visually inspect the

15   video itself.

16   An easy example, there could be -- that page could

17   have multiple videos on it, so a person could bookmark video

18   A. The next person can bookmark video B. That video could

19   change on that page. It needs to be visually inspected that

20   if it's the same video or not.

21   Q   Okay. Do you have -- does myVidster have any filtering

22   technology in place?

23   A   Yes.

24   Q   What is it?

25   A   MyVidster will flag videos as adult. When users create a

1   bookmark, they either -- the bookmark is either public,

2   accessible to the world; they can set it to private where they

3   can only access it; or they can set adult, which is publicly

4   available to the world but protected under filters. So if

5   you're visiting my website, you do not see adult content

6   unless you proactively turn off the filter and agree that

7   you're at least 18 years of age.

8   So but basically the filters -- I digress. The

9   filters is for -- to make it easier for the users who are

10 collecting adult content, it will automatically flag it so

11 they don't have to make the conscious act of clicking the

12 adult option box. It will do it for them.

13 Q   Do you filter by keywords?

14 A   Yes.

15 Q   What keywords do you filter for?

16 A   Keywords that I deem that are adult content. And then

17 also domain names I use as keywords. Like it'sallgay.com or

18 Pornhub will trigger the adult filter.

19 Q   Based on those filters, do you have any filtering in place

20 that actually blocks or automatically removes content from

21 myVidster?

22 A   No, I do not.

23 Q   And why not?

24 A   Pretty much in regards of like if, I guess if a copyright

25 owner would want to block certain keywords, I guess, of their

1 trademarks, there's no way -- I mean, you get false positives.

2 I mean, it will remove videos that possibly or it will

3 possibly not be of their content. So to me that's why I've

4 never considered, you know, employing such mechanisms.

5 Q   So let's talk about when you say false positives, what

6 does that mean?

7 A   A keyword is just a keyword. The problem is basically you

8 don't have access to the file. MyVidster is just collecting

9 the link. All myVidster has to analyze is a title,

10 description and some keywords. It doesn't know -- it can't

11 analyze the content in the video. So the video can be

12 anything. It could be a dog riding a skateboard, but it could

13 have the word thug boy in it for some random reason, and

14 that -- is that video Thug Boy? Not in that scenario. That's

15 a false positive. You will flag that video or do something to

16 it which would be incorrect.

17 Q   Okay. And let me back up just a little bit and ask about

18 keywords. Who creates the keywords for a particular video?

19 A   Users. Basically myVidster will suggest keywords, but it

20 doesn't audit those keywords. Or the users create their own

21 keywords or use myVidster's suggestions. It's just an easier

22 way to find their video later on.

23 Q   Do you have an understanding of what digital

24 fingerprinting is?

25 A   I have a rough idea of it. It's just, I guess, some

1   unique -- a unique identifier for a video or a file.

2   Q   Okay. When you say "unique identifier," what do you mean?

3   A   Typically -- I mean, I'm not too sure about digital

4   fingerprints, but I would assume it's just an I.D. number that

5   will uniquely identify that video by kind of, I guess,

6   analyzing the content of the video and saying its I.D. number

7   is 1, 2, 3, 4, A, B, C, whatever, and that's one way to

8   uniquely identify a video from another video.

9   Q   Is a digital fingerprinting system burdensome to implement

10 on a website?

11 A   I would not know how to do it. It's something that I

12 would assume is a new technology. I mean, I would assume so.

13 I mean, and also you would have to have access to the video as

14 well.

15 Q   So if you don't have access to the video, you can't even

16 implement digital fingerprinting?

17 A   No. You would be stopped right there without having

18 physical access of the files.

19 Q   I'm going to hand you what's been previously marked as

20 Defense Exhibit 13.

21   Do you recognize this document?

22 A   Yes. This is terms of service from the YouTube website.

23 Q   If I could direct your attention to Page 3.

24   THE COURT: Which exhibit is this?

25   MR. LEIGHTON: I'm sorry.

1   THE COURT: Which exhibit number?

2   MR. LEIGHTON: 13.

3   THE COURT: 13.

4   MR. LEIGHTON: I'm sorry, your Honor. It's not in

5   your book.

6   BY MR. LEIGHTON:

7   Q   I'm referring everyone's attention to Page 3 towards the

8   bottom where it says No. 7, Account Termination Policy, letter

9   A. Could you just simply read that for the Court there.

10   A   Which letter?

11   Q   Letter A.

12   A   Letter A: "YouTube will determine a user's access to the

13   service if under appropriate circumstances the user is termed

14   to be a repeat infringer."

15   Q   And based on your understanding, is that YouTube's repeat

16   infringer policy?

17   A   Yes.

18   MR. LEIGHTON: Your Honor, if I may, I'd just like a

19   moment to confer with my co-counsel.

20   MR. HUON: I'm sorry. What line was that?

21   MR. LEIGHTON: It's Page 3, 7 A.

22   Thank you, Mr. Gunter. I don't have any further

23   questions at this time.

24   THE COURT: Cross examine.

25   CROSS EXAMINATION

1   BY MR. HUON:

2   Q   Good afternoon, Mr. Gunter.

3   A   Good afternoon.

4   Q   Let's just work backwards from the line of questioning.

5   The last question was you were shown YouTube's terms of

6   services.

7   A   Yes.

8   Q   Exhibit 13, Pages 1 through six pages, six pages long.

9   This is their terms of service, right?

10 A   Yes, it is.

11 Q   And Exhibit No. 7, 16 for the plaintiff, Exhibit No. 16,

12 this is your term of service?

13 A   Correct.

14 Q   One paragraph?

15 A   Um-hum.

16 Q   Let's go to digital fingerprinting.

17   Are you aware that YouTube has had digital

18 fingerprinting since 2006?

19 A   No.

20 Q   Are you aware that you can get free available software for

21 digital fingerprinting from the Free Speech Coalition?

22 A   No.

23 Q   Are you aware that most major adult websites have free

24 digital fingerprinting programs?

25 A   I'm not an adult website, but no.

1 Q   Let's go to the filter technology. You had been shown

2 Defense Exhibit No. 12 where you had an e-mail exchange with

3 Mr. Bleicher about this re-uploading of Raw Thugs. Do you see

4 that?

5 A   Okay.

6 Q   If you had filtered the word "raw thugs," that would have

7 prevented this video from being re-uploaded, right?

8 A   Yeah. Any video including "raw thugs" would be blocked

9 with this filter.

10 Q   Now, you're telling us today that you can actually filter

11 by domain names, right?

12 A   Correct.

13 Q   Previously at your deposition you had told us that you

14 could only filter by the word adult or nonadult; isn't that

15 correct?

16 A   Well, it's flagged as adult by the domain name. The

17 domain name is the keyword in the embed code. So I scan the

18 embed code. If it was hosted at pornhub.com, the word

19 "pornhub" is in the embed code. That's my keyword that I'm

20 scanning for. That's my definition of when I block by domain,

21 or not block, but flag as adult, is by the domain name in the

22 embed code.

23 Q   You gave a deposition on April 29th, 2011; is that

24 correct?

25 A   Yes.

1   Q   Were you asked this question, and did you give these

2   answers at Page 25, lines 15 through 17?

3   "Question: So the filter has simply characterized

4   the video as to whether it's adult or not adult?

5   "Answer: Correct.

6   "Question: The filters don't block users from

7   posting the videos?

8   "Answer: Correct. The filter does not block."

9   Were you asked those questions, and did you give

10   those answers?

11   A   Yes.

12   Q   Let's go to Exhibit No. 8 for the defense, Page 4. There

13   was this e-mail exchange between you and Mr. Bleicher back in

14   October of 2010. It's Defense Exhibit No. 8, Page 4.

15   A   Okay.

16   Q   You write back to Mr. Bleicher and you told him that to

17   prevent anymore of these problems, you decided to block the

18   website GROU.PS; isn't that correct?

19   A   Yes. Those group sites, yes.

20   Q   And you told him that back in October of 2010, right?

21   A   Correct.

22   Q   I want you to look at Defense Exhibit No. 4, Page 19,

23   which was produced to us today, this spread sheet.

24   A   Um-hum.

25   Q   Now, if you'd go to the middle of that page, do you see

1   where there's an embedded URL identifying the source of the

2   video as GROU.PS?

3   A   Yes.

4   Which line item?

5   Q   In the middle.

6   A   Yes, GROUPS, yes.

7   Q   And do you see that the date of this notice was December

8   of 2010?

9   A   Yes.

10   Q   So in October of 2010 you told Mr. Bleicher that you would

11   block any access to GROU.PS, correct?

12   A   Yes.

13   Q   And then in December of 2010 your own spread sheet

14   indicates that videos were still being posted from that

15   website; isn't that correct?

16   A   That is correct. And if you --

17   Q   So in October of --

18   THE COURT: Excuse me. He hadn't finished.

19   MR. HUON: I'm sorry.

20   THE WITNESS: If you read below, it says here:

21   "There is content posted in myVidster from these sites, which

22   can be removed by DMCA notice, but no future bookmarking from

23   these sites can be done."

24   That example right there is an old bookmark. If you

25   look at the posted date, the posted date should be earlier

1 than the blocked date. Well, actually -- yes, it would be

2 unless it's a bookmark of a bookmark, which would -- well,

3 basically it would be if a user was to bookmark from those

4 domain names after that date, myVidster will block it. But if

5 it's already existing in myVidster beforehand, it's still

6 there.

7 BY MR. HUON:

8 Q   Well, I'm looking at a removal date of December 16, 2010,

9 correct?

10 A   Okay.

11 Q   So you removed the video from this site in December

12 of 2010, correct?

13 A   Yes.

14 Q   Back in October you said that you had blocked access to

15 this site, correct?

16 A   I blocked all future bookmarking from those websites.

17 Q   But you told us earlier that when you get a DMCA notice

18 you remove videos immediately, correct?

19 A   I do, yes.

20 Q   So then you hadn't removed this video when you had gotten

21 the DMCA notice back in October, correct?

22 A   From this one right here, let's see here, I got the notice

23 on December 15th, 2010. I removed it on December 16th, 2010,

24 a one-day difference between the two.

25 Q   Let me ask you this and we'll move on to the next

1 question.

2 A   Um-hum.

3 Q   What lie is correct? Did you lie to Mr. Bleicher in

4 October that you had blocked the site, or are you lying

5 earlier when you said that you removed content?

6   MR. LEIGHTON: Objection, Your Honor.

7   THE COURT: Sustained. It's argumentative.

8   THE WITNESS: Oh, I'm not lying. I'm being

9 completely honest. As I stated before, no future bookmarking

10 from these sites can be done, so a user will have to go to

11 that website to bookmark a video, which myVidster will block.

12 BY MR. HUON:

13 Q   Let's just keep moving along.

14   You had mentioned -- on Defense Exhibit No. 5 you had

15 mentioned these are all the videos that had been backed up; is

16 that right?

17 A   Exhibit No. 5 is the backup videos that I have removed

18 under Flava Works' notices.

19 Q   Now, let's take a look at your spread sheet on Defendant's

20 Exhibit No. 4, Page 30.

21   On Page 30 of Defense Exhibit No. 4 just about one,

22 two, three, four lines from the bottom do you see where there

23 is a video where the source is myVidster under the embedded

24 URL?

25 A   Page 30?

1 Q   Yes.

2 A   Under the column source URL?

3 Q   Under embedded URL, the video source is myVidster?

4 A   Got it.

5 Q   That means that this video is on the myVidster server?

6 A   Yes. That is a backup copy.

7 Q   Right.

8   And that wasn't listed on Defense Exhibit No. 5?

9 A   This is an old copy. This is a much more recent date.

10 This is February 15, 2011. I remember this copy was created

11 much earlier than that.

12 Q   Okay. So let me ask you this question and I'll move

13 along. So which one is the truth, Exhibit No. 4 or Exhibit

14 No. 5?

15   MR. LEIGHTON: Same objection, Your Honor.

16   THE WITNESS: They're both true.

17   THE COURT: Overruled.

18   THE WITNESS: It's just the date when it was created.

19 They're true when the date of -- the date these files were

20 created they were true. They are true I should say.

21 BY MR. HUON:

22 Q   Now, the other thing is on this massive spread sheet

23 marked as Defense Exhibit No. 4, you don't identify the user,

24 right?

25 A   No. You wouldn't have to in this situation because

1 multiple users in a lot of cases -- this is the reason why.

2 Multiple users can collect the same video, so if I gave you a

3 full list, this thing would be hundreds of pages long because

4 multiple people can bookmark the same video. So to make it

5 more condensed, I just put down the video link.

6 Q   Well, if you have something that's hundreds of pages long,

7 wouldn't that indicate to you that there are repeat infringers

8 that are posting copyrighted materials over and over on the

9 website, maybe that's why it's hundreds of pages long?

10 A   No, no. When a user bookmarks their favorite videos on

11 the web, how am I supposed to determine if they are

12 intentionally trying to infringe on someone's copyrights.

13 Q   Well, let's back up. This document is fifty pages long,

14 and there's a lot of information on here, right?

15 A   Yes.

16 Q   You created five or six different categories, right?

17 A   Okay. Yes.

18 Q   Wouldn't it be helpful as you're collecting this data to

19 include a category that puts down the name of the user that

20 posted the material so you can track to see which one pops up

21 more than once as a repeat infringer?

22 A   They're not repeat infringers.

23 Q   But would it be helpful to have a column for the name of

24 the user that posted all this material? Would that be

25 helpful?

1   A   Not for me.

2   Q   That wouldn't tell you whether or not the person has

3   posted multiple videos on your website?

4   A   All my users have posted many videos onto their

5   collections.

6   Q   You had mentioned that you bring in $24,000 a year from

7   the website and that none of Flava Works is related to that

8   $24,000, none of Flava Works' materials?

9   A   Correct.

10 Q   Don't you consider the fact that you have users who are

11 posting Flava Works' content that it's creating traffic and a

12 draw to your website?

13 A   Well, out of these bookmarks there's roughly 300.

14 MyVidster has over, last I checked, over 1.2 million bookmarks

15 on myVidster's servers. And, for example, if I was pulling

16 content that users really wanted, most social networks,

17 including myVidster, the user community is very vocal, so I

18 have no e-mails from users complaining like, oh, I'm not going

19 to use your website because you've pulled so and so's

20 material. I've not received any complaints from that. So

21 from what information that was presented to me, I would assume

22 not.

23 Q   Well, you also haven't disabled any repeat infringers,

24 right?

25 A   I don't have any repeat infringers.

1   Q   Right.

2   In all these years you haven't found a single repeat

3   infringer, correct?

4   A   There's one that I sent a warning to that was an

5   infringer, but he was not a repeat.

6   Q   But you never removed him? You didn't disable his

7   account?

8   A   He never had any future activity since the warning, and

9   from my policy I have to warn them first; and then if they

10   repeatedly ignore my warnings, continue the same actions, then

11   I would be banning their account.

12   Q   Is the reason why you haven't received any complaints from

13   any of your users is because no one has been prevented from

14   posting or reposting copyrighted videos?

15   A   Repeat the question.

16   Q   Is the reason why you have not received any complaints

17   from your users is because the rampant copyright infringement

18   is still ongoing?

19   MR. LEIGHTON: Objection, Your Honor. Calls for

20   speculation.

21   BY THE WITNESS:

22   A   I can't get into the minds of my users' heads.

23   BY MR. HUON:

24   Q   Now, you had mentioned that you had only sent a warning to

25   one infringer named Tailor Made, right?

1   A   I sent a warning to Tailor Made.

2   Q   And no one else?

3   A   Correct.

4   Q   On Defense Exhibit No. 5 do you see where Jasmine, the

5   user name, appears twice?

6   A   Correct.

7   Q   You never sent him a warning?

8   A   No.

9   Q   Because he only posted videos twice?

10   A   There's only been two backup copies that have been removed

11   due to notices, DMCA notices.

12   Q   You indicated that you don't have a duty to investigate a

13   repeat infringer?

14   A   If I determine if somebody is an infringer, I will

15   investigate.

16   Q   But in order for you to determine somebody is an

17   infringer -- let's back up about your views on copyright laws.

18   If a video is publicly accessible, you don't

19   investigate that, right?

20   A   No.

21   Q   So if a video --

22   THE COURT: Excuse me. "Is that right," "no," that

23   means that's wrong. Just ask the question, and don't follow

24   up with "is that right," because it just creates confusion.

25   MR. HUON: Sure.

1   BY MR. HUON:

2   Q   If a video is publicly accessible on the Internet, do you

3   investigate that particular video?

4   A   No.

5   Q   And your view is if a copyrighted video is available

6   publicly on the Internet, because it's publicly available, you

7   don't make a determination as to whether or not it's

8   copyrighted or not, right?

9   A   I don't make any determination on the content that is

10 posted on myVidster that is publicly available.

11 Q   Well, most of the Internet is free, isn't it?

12 A   I would assume so. I mean, that's the beautiful part

13 about it.

14 Q   Where would you ever find a copyrighted video on the

15 Internet that wasn't publicly accessible?

16 A   Some content is publicly accessible; some content is

17 privately. You have one or the other.

18 Q   And it's your view that if there is a copyrighted video

19 and the person reposts that copyrighted video, do you have an

20 understanding as to whether or not that's copyright

21 infringement?

22 A   Well, give you an example. Hulu.com, H-U-L-U, has

23 full-length movies that are sanctioned to be embedded on any

24 website, so when a user posts anything, if it's allowed --

25 it's allowed. It is sanctioned on many websites. YouTube has

1   documentaries. Google Video has documentaries that are

2   allowed and sanctioned. So to make the assumption that

3   everything that is posted online that is copyrighted is an

4   infringement once a user has bookmarked it I would say is

5   completely wrong.

6   Q   But you don't know the agreement between Hulu and the

7   content providers?

8   A   Correct. I do not.

9   Q   So if there's a copyrighted video of Flava that's on

10   xtube.com, you don't know what the agreement is between Flava

11   and that website, correct?

12   A   Correct. I do not.

13   Q   You don't know if they pay Flava some sort of residual fee

14   or something to have that video on there?

15   A   Correct. I do not know.

16   Q   And if that video is copyrighted, it's your view that if

17   that video is reposted, it's not a violation of the copyright

18   infringement simply because it's available publicly?

19   A   My perception is I follow the DMCA where I have -- I let

20   the content owners determine on what is not -- what is

21   infringing on their rights. I do not make that a

22   determination on any bookmarks on myVidster. It's the -- when

23   the content owner contacts me, I remove the links. I am not

24   going -- I do not have the ability and I'm not going to judge

25   the five thousand plus bookmarks that flow through my servers

1   every day to determine on -- if each bookmark is, for one,

2   copyright and, for two, if it's infringing on that user's

3   copyrights. I let the content owners make that determination.

4   Q   Aren't you essentially leaving it up to other websites

5   like Hulu or X-Tube to police your website by doing that?

6   A   I police my website through the DMCA.

7   Q   You had mentioned that when you receive a DMCA notice you

8   remove the videos immediately?

9   A   Yes.

10 Q   How long does it normally take you to remove the video?

11 A   Within 24 hours.

12 Q   Now, what's been marked already as Plaintiff's Group

13 Exhibit No. 2, it's about 10 or 20 pages of screen shots of

14 videos, these videos are still on your website today, aren't

15 they?

16 A   Which exhibit?

17 Q   Plaintiff's Group Exhibit No. 2.

18 A   One moment, please.

19   MR. LEIGHTON: I don't think he has it up there.

20   THE WITNESS: Thank you.

21   Repeat the question, please.

22 BY MR. HUON:

23 Q   Those videos that are marked as Plaintiff's Group Exhibit

24 No. 2, those 20 pages or so of screen shots, all those videos

25 are still on your website today, aren't they?

1   A   I removed all links provided in all DMCA notices from

2   Flava Works.

3   Q   Well, I asked my client to search for those videos while

4   you were testifying, and it's still on your website.

5   A   I remove all links. If the links are provided in an

6   e-mail notification, those links have been removed from

7   myVidster.

8   Q   Isn't the whole backup feature of myVidster to allow a

9   user to retain a copy of that video if the original link is

10 removed?

11 A   The purpose of the backup is for them to save a copy of

12 the video onto myVidster servers.

13 Q   Right. So that when the original link is removed, your

14 user still has a copy?

15 A   Yes. If the original source is deleted, myVidster's copy

16 is maintained.

17 Q   So if somebody puts up a copyrighted video on Hulu and

18 somebody reposts it on myVidster but Hulu takes it down, the

19 person who backs it up on myVidster still has a backup copy of

20 that copyrighted video; is that correct?

21 A   MyVidster cannot backup from Hulu.

22 Q   Let me --

23 A   If it's compatible, the copy will remain on myVidster's

24 servers.

25 Q   The premium users, the John Does 1 through 26 in this

1   lawsuit, are they all premium users?

2   A   No.

3   Q   Have you determined which ones are and which ones aren't?

4   A   None of them -- none of them -- from the ones listed in

5   the complaint, none of them are premium users, to my

6   knowledge.

7   Q   Wasn't there a time when you gave free backup storage to

8   people?

9   A   I did -- when I created the backup service, I did a --

10   during the Beta period, the test period, I gave all the users

11   five hundred megabytes to play with for around 30 days, and

12   then after that I removed their quota so they were not able to

13   bookmark or backup copy any future material.

14   Q   And you testified that you did that in spring of 2010?

15   A   Yes.

16   Q   And that you did that for about 30 days?

17   A   Correct.

18   Q   I don't have this in front of me, but one of the defense

19   exhibits that was shown to you today had an e-mail that

20   indicated that that free service was still available in

21   September of 2010.

22   A   I have to see that e-mail.

23   Q   Was it -- was it -- could it have been more than 30 days?

24   A   No. It was around 30 days for the Beta period.

25   Q   Okay. I found it.

1   Take a look at Defense Exhibit No. 1, Page 3. Now,

2   you just testified that that free service was only available

3   in the spring of 2010 for 30 days. Do you remember that?

4   A   Exhibit 1 you said?

5   Q   No. I'm just going back to your testimony.

6   Yes, Exhibit 1, Page 3, Defense Exhibit 1, Page 3.

7   A   Okay.

8   Q   You had just testified that that free service, that free

9   backup service that you gave to everyone, was only available

10 in the spring of 2010.

11 A   Correct.

12 Q   And it was only available for 30 days, correct?

13 A   Correct.

14 Q   This screen shot that your counsel produced is dated

15 September 22nd, 2010.

16 A   Yes.

17 Q   Do you see that?

18 A   Um-hum.

19 Q   At the very top of that screen shot it says, "We have

20 upgraded everyone's backup storage to five hundred megabytes

21 for free." Do you see that?

22 A   Correct.

23 Q   So as of the fall of 2010 this free backup service was

24 still available?

25 A   That's an announcement that stays there forever until they

1   click the remove button. Sadly enough, announcements don't

2   have an expiration date, so every time I post an announcement

3   on myVidster, it will stay there indefinitely until they click

4   the remove button.

5   So, for example, you're probably logged in. Flava

6   Works is probably logged in. They've never clicked the remove

7   button. So that announcement was posted earlier in the

8   spring, and they just -- that user, I would assume Flava

9   Works, never clicked the remove button.

10   Q   So let me ask you this: Which one -- and then I'll move

11   one. Which one is the lie, your testimony today or this

12   screen shot?

13   A   There is no lie. I'm sorry. There's no lie. That's just

14   a technical thing right there.

15   Q   You say that when you advertise you don't target

16   copyrighted works, correct?

17   A   Correct.

18   Q   When I examined you earlier, I showed you a page from the

19   advertisers that you used. Do you recall that, from Juicy

20   Ads?

21   A   Okay, my -- the Juicy Ads page for myVidster.

22   Q   And I asked you this question before, that if you go to

23   the URL link in that Juicy ad, that's a copyrighted --

24   copyrighted material that's linked to that. Are you aware of

25   that?

1   A   No. What Juicy Ads does is that they post sample links.

2   That's all through an automated system on Juicy Ads. Those

3   links are not controlled by me.

4   Q   But you put the ad in, right?

5   A   I have the account, and the account -- I created my zone

6   or I set up my website with the account, and that page is

7   created after you set up the account.

8   Q   Oh. So you set up the ad yourself?

9   A   No, no. You create an account as a publisher, and then

10   Juicy Ads will then create that page for you, and they'll

11   crawl your website for a screen shot of the home page, and

12   then they'll take links from your web page that are displaying

13   their ads.

14   Q   And are you aware that the random screen shot that they

15   selected from your website is a link to copyrighted material?

16   A   I don't know.

17   Q   Did you investigate that?

18   A   I never looked at it.

19   Q   Do you think that encourages people to target copyright

20   infringement material?

21   A   I don't know.

22   Q   And then you had already testified that you have your own

23   favorite page that you set up as an example for others to

24   follow, right?

25   A   Where?

1 Q   The one with the Star Trek movie.

2 A   That's not referenced anywhere on my blog or my website to

3 go to this page. That is my personal collection of links.

4 Q   But when I asked you last time as to why it was there, you

5 testified that you may not even have seen the movie, that it

6 was just there as an example?

7 A   Right, right.

8 Q   Do you think that when you use as an example a copyrighted

9 material that that encourages other people to follow your

10 example?

11 A   Again, that's -- we've got millions of bookmarks,

12 thousands of collections. That is just my collection of many.

13 It is not highlighted as, hey, look at my collection or look

14 at these videos, look what you can do. That is just my

15 personal collection. And for that instance, those are just me

16 testing the bookmarking functionality on other websites.

17 Q   The thumbnails that were on myVidster, those were copies

18 made by myVidster, aren't they, the thumbnails?

19 A   MyVidster takes a screen shot of the video player to

20 create a thumbnail.

21 Q   Right. Those images reside on myVidster's server, right?

22 A   Thumbnail resides on myVidster servers.

23 Q   Okay. And are you aware that the screen shots of those

24 thumbnails are -- of copyrighted material is copyright

25 infringement?

1   A   I would assume not. I would assume that would fall under

2   fair use, just like you sampling a song for, you know, ten or

3   20 seconds.

4   Q   Going on to Defense Exhibit No. 2, this designation of

5   agent to receive the DMCA notice, this was done after the

6   lawsuit, wasn't it?

7   A   I don't think so. No, no, no. Digital Safe Harbor was

8   created long before the lawsuit was filed and before I was

9   served.

10   Q   The designation of the agent is September 27, 2010, right?

11   A   September, October. I was served in October, wasn't I?

12   Correct? I thought I was served in October, because I was on

13   vacation when I got served. Thank you for that.

14   Q   Well, wasn't this received October 8, 2010?

15   A   Say that again.

16   Q   Wasn't this document received October 8, 2010, by the

17   copyright office?

18   A   I'll have to see that.

19   MR. LEIGHTON: I'll interject for the record the

20   lawsuit was filed October 12th of 2010. He was served

21   sometime in late October. That was filed in late September,

22   and it was received by the copyright office October 8th.

23   BY MR. HUON:

24   Q   You had testified that myVidster was set up to advertise

25   SalsaIndy dancing; isn't that correct?

1 A   MyVidster was inspired through my activities through

2 SalsaIndy.

3 Q   You testified earlier today that myVidster was used to

4 advertise the dancing that was being done at SalsaIndy, right?

5 A   Say that again.

6 Q   You said that myVidster was set up so that you could

7 advertise the dancing that was being done at SalsaIndy?

8 A   MyVidster was created after the fact where I was building

9 a system to post my bookmarks to SalsaIndy, but then I ported

10 it over to myVidster, and then I made it a multi-user system

11 afterwards.

12   It's still used today, yes. MyVidster does have -- I

13 do have a SalsaIndy video collection on myVidster that I use

14 to promote SalsaIndy as of today.

15 Q   Isn't it correct that SalsaIndy was your first website and

16 that the funds from SalsaIndy was used to create myVidster?

17 A   Created websites before, but, yes, SalsaIndy has funded

18 the start-up of myVidster.

19 Q   Now, the other thing that you testified to today is that

20 you said that you're not related to the adult industry, right?

21 A   Correct. I'm not involved in the adult industry.

22 Q   At your deposition were you asked these questions, and did

23 you give these answers, Page 17, lines 17 to 20?

24   "Question: What percent is gay adult?

25   "Answer: I do not now. Like I say, I do not know.

1   I would say out of that adult content, majority would be gay

2   related."

3   Were you asked that question, and did you give that

4   answer?

5   A   Yes.

6   Q   Now, you also talked about bookmarking today. A person

7   can make a copy of a video on myVidster through the backup

8   service, right?

9   A   If they have the backup service, they can create a copy.

10   Q   And earlier you -- moving along, earlier you testified

11   about peer-to-peer technology. Do you remember that?

12   A   Yes.

13   Q   Isn't it correct that you have no familiarity with

14   peer-to- peer websites like Aimster or LimeWire?

15   A   I'm not familiar with the Aimster or LimeWire, but I'm

16   familiar with the name peer-to-peer and the technology behind

17   peer-to-peer. So if a website uses it, then I have a rough

18   idea of its core setup. But as for what Aimster does in

19   detail, what makes them different from Nabster, all that

20   stuff, I just don't use those applications, but I do know the

21   technology behind them.

22   Q   Going back to Defense Exhibit No. 1, Page 3, the source

23   link on this is myVidster, isn't it?

24   A   Number three?

25   Q   Yes.

1   A   One minute.

2   Q   The source link for that video is myVidster. It says

3   myVidster, doesn't it?

4   A   My Exhibit 3 is different.

5   MR. LEIGHTON: Exhibit 1, Page 3.

6   MR. HUON: I'm sorry. Exhibit 1, Page 3.

7   THE WITNESS: Okay. Okay. Exhibit 1, Page 3.

8   BY MR. HUON:

9   Q   The location for that video says myVidster, doesn't it?

10   A   Source link states myVidster, correct.

11   Q   Now, moving along, you said that you don't help people to

12   infringe on copyrights; isn't that correct?

13   A   Correct, yes.

14   Q   I've already asked you about this. I won't dwell too much

15   on it. It's Exhibit No. 6 of the plaintiff. It's your asking

16   for Beta testers on your blog. Do you see that, where you're

17   looking for Beta testers?

18   A   Exhibit 6?

19   Q   Plaintiff's Exhibit No. 6.

20   A   Okay.

21   Q   Do you see where you're looking for Beta testers?

22   A   Correct, yes.

23   Q   And the blog talks about a feature on Fire Fox that allows

24   myVidster to access videos that are private and protected. Do

25   you see that as well?

1   A   Yes.

2   Q   And you're looking for Beta testers to help you do that,

3   right?

4   A   Yes.

5   MR. HUON: I don't have any other questions of this

6   witness at this time, Judge. Thank you.

7   MR. LEIGHTON: Just have a few.

8   THE COURT: Redirect.

9   MR. LEIGHTON: Few small items to take care of on

10   redirect.

11   REDIRECT EXAMINATION

12   BY MR. LEIGHTON:

13   Q   All right, Mr. Gunter. Opposing counsel was asking you at

14   some length about this. He was referring to the chart and the

15   e-mail where you had blocked the password protected sites in

16   October, and then they pointed to an entry in the chart where

17   in December that a link from one of those websites had been

18   removed. I just want to clarify the reason for that was is

19   because that link was posted prior to October, correct, when

20   you blocked the site?

21   A   That is correct. That is a scenario where the bookmarks

22   already reside before the block was in place.

23   Q   And then you just simply didn't receive a DMCA notice

24   until December 16th, and so that's why it took until December

25   for that link to come down?

1   A   Exactly. The DMCA notice was the only way to trigger the

2   removal of that video.

3   Q   Okay.

4   A   Or bookmark, I should say.

5   Q   Opposing counsel was asking you why you hadn't put user

6   names on Exhibit 4, which is the chart of links that were

7   removed, and you had stated because it would be hundreds of

8   pages long because there would be so many, and he said, well,

9   isn't that evidence that there's repeat infringement going on,

10 and I don't want to put words in his mouth, but isn't that

11 evidence to you, then, that there would be a lot of

12 infringement.

13   I just want to clarify what each one of those entries

14 in that chart means. Each one of those entries is a link and

15 only a link, correct?

16 A   Yes. Yes.

17 Q   Which means that there's no copy of the video that was

18 ever created?

19 A   That's correct. That list right there are all video

20 bookmarks. Those are just links to other video websites

21 across the web.

22 Q   So by virtue of someone linking to something and not

23 creating a copy, there's no copyright infringement there,

24 correct?

25 A   My assumption is correct. No copyright infringement.

1 They're just bookmarking their favorite videos.

2 Q   I just want to now briefly ask you the dichotomy of the

3 public side of the Internet versus the private side of the

4 Internet. You know, obviously -- I guess I'll just pose this

5 question to you: Are there things available publicly on the

6 Internet that are copyrighted material and yet the rights

7 owner freely allows its distribution?

8 A   Yes, all the time. From my perspective, content owners,

9 their mission is to get their content out to the entire world

10 to promote themselves and, you know, to get their name out

11 there.

12 Q   So when you see something that's available on the

13 Internet, that's actually available that's not password

14 protected or otherwise, you know, locked down or quarantined,

15 can you make any determination whether or not the rights owner

16 is allowing the distribution of that content?

17 A   As a user browsing the web as myself, I don't make a

18 determination on whether or not I'm infringing if I'm watching

19 a video posted on a website or if I bookmark it. I don't make

20 that assumption. I would assume that my users don't have that

21 ability to determine that as well unless it's in big, bold

22 print surrounding the video or something like that.

23   MR. LEIGHTON: I have no further questions at this

24 time.

25   THE COURT: Any recross?

1   MR. HUON: Just have two questions.

2   RECROSS EXAMINATION

3 BY MR. HUON:

4 Q   I just want to be sure we're all on the same page. Your

5 view of copyright law is if it's publicly available, you don't

6 make a determination as to whether or not it's copyrighted.

7 We can agree on that, right?

8 A   My view of copyright law is as a web master, I follow the

9 DMCA where I take down links when a copyright owner is --

10 that's what I view --

11 Q   My question, though, is if you come across a video after

12 you get the DMCA and that video is available publicly, you

13 don't make a determination as to whether or not that is

14 copyrighted?

15 A   I make no determination.

16 Q   Right.

17   Then the second thing I want to make sure that we're

18 on the same page is --

19   THE COURT: Before you leave that subject, but you

20 take it down?

21   THE WITNESS: Yes, yes. I make no determination, but

22 I remove the links.

23 BY MR. HUON:

24 Q   And then how long does it take you to remove the links?

25 A   Within 24 hours.

1   Q   And then the second thing, but the thumbnails are not

2   removed, though?

3   A   Thumbnails are now removed. Before, before that -- the

4   e-mail that we addressed in our defense, that's -- when that

5   point it was automatically being removed. Before that Flava

6   Works would provide me the link, URL to the thumbnail; and if

7   he provides me the link to the thumbnail, I would remove that

8   in the DMCA notice.

9   Q   When did you start removing the thumbnails?

10 A   Automatically or just in general?

11 Q   Automatically.

12 A   Automatically would be after the e-mail, the e-mail date.

13 Q   Month and year?

14 A   I'm sorry. It's the e-mail.

15 Q   But before then the thumbnails were not removed?

16 A   They were only removed if Flava Works provided the link to

17 the thumbnail. If they provided the link to the thumbnail, I

18 would remove it. But if they did not provide the link to the

19 thumbnails, the thumbnails would reside on myVidster.

20 Q   And it doesn't prevent another person from re-uploading

21 the same video again?

22 A   Users do not upload to myVidster.

23 Q   It wouldn't prevent someone from reposting the same videos

24 again?

25 A   In what scenario? If it gets removed?

1   Q   Yes.

2   A   If a video is being hosted on pornhub.com and it gets

3   bookmarked on myVidster and then it's removed and then those

4   links are removed through a DMCA notice, users could later on

5   rebookmark that if it's still live on the source site. That's

6   why a lot of my e-mails were please investigate these source

7   sites to get them removed so they don't get rebookmarked into

8   myVidster.

9   Q   And if a user makes a backup copy of the video and then

10   the videos are removed but that backup copy gets shared

11   around, another user can rebookmark or repost the same video,

12   right?

13   A   People can make bookmarks of backup copies, but it's still

14   just one copy on the server. They're just bookmarking it

15   again.

16   Q   Right. But that backup copy can be shared, and once it's

17   shared in the stream of commerce, another user can repost that

18   video again to myVidster, right?

19   A   Yeah. They can rebookmark it to their personal

20   collection.

21   Q   Because myVidster doesn't have that technology or that

22   feature that YouTube does that prevents the uploading or the

23   reposting or the rebookmarking of the same video; isn't that

24   correct?

25   A   Or scenarios where a video -- we have around 11 or 12

1   copies, backup copies removed through the DMCA notices, I have

2   not received a scenario where I've gotten a future notice of a

3   same bookmark or a same video getting re-backed up. If I get

4   to that situation where backup copies -- they keep re-backing

5   up something that's infringing or that a notice has been sent

6   to, I'll definitely add that functionality. But right now,

7   out of those 12, they've all been unique videos, so I haven't

8   ran into the scenario technically of the same video getting

9   bookmarked more -- nothing's more than once.

10 Q   Well, you just went through a bunch of e-mails with

11 Mr. Bleicher that your counsel handed you where you're

12 discussing the reposting of the same videos. Don't you

13 remember that?

14 A   The backup copies or just the bookmarks, the video links?

15 Which one are you referring to?

16 Q   Whether you call it a backup or whether you call it a

17 bookmark or whether you call it an eight track tape, it's the

18 same video, isn't it?

19 A   I have to stand correct -- I have to correct you somewhat.

20 It depends on the location of where the video is stored. If

21 it's a bookmark or a link, it's stored on external websites,

22 which is the majority of the takedown notices. Only a handful

23 are backup copies.

24 Q   And then I just handed you those 20 pages marked as

25 Plaintiff's Group Exhibit No. 2 where the same videos of the

1   repeat infringers are still on your website; isn't that

2   correct?

3   A   I removed all links provided in DMCA notices. As for this

4   list, I remove all links. That's all I can say. I mean, I

5   don't know. I have to verify. I have to take a look at this

6   to verify if I have received the DMCA notice and if the video

7   is actually still live, bookmark still live. But from my

8   perspective, whenever Flava Works or any copyright owner sends

9   me a notice, I immediately remove those links. So for this

10   list, you know, I need to confer that if this link right here

11   in a DMCA notice that I was sent, and then I can see if it was

12   removed.

13   Q   And myVidster doesn't have that digital fingerprint

14   feature like YouTube where it scans the video to see whether

15   or not it's been copyrighted, correct?

16   A   What myVidster does for its backup functionality, it

17   creates a hash tag for all backup copies, which is a unique

18   identifier. It's accurate where it can detect multiple

19   copies, you know, of the same. If two premium users back up

20   the same copy, myVidster will only store one.

21   Digital fingerprinting I would assume will probably

22   be a little more accurate. Mine can probably mess up and

23   assume the same video and whatever, but pretty much myVidster

24   can determine a unique backup copy. It may not be

25   sophisticated, but it can.

Gunter - recross

1   Q   What do you call that technology that myVidster has?

2   A   Hash file.

3   Q   Hash file.

4   Didn't you testify earlier that -- let me back up.

5   That hash file is similar to digital fingerprinting?

6   A   I don't know digital fingerprinting technology. I've

7 never looked into it, so I don't know how they do it versus

8 how I do it when I store backup copies.

9   Q   Because you never looked into it, right?

10   A   Correct.

11   Q   And you testified earlier that it would be burdensome,

12 right?

13   A   Any new technology of that regards is going to be

14 burdensome. Thumbnail generation is burdensome. Any

15 technology that you have to install into a system that's

16 already been integrated, no matter how big or how small, is

17 going to be burdensome.

18   And then also it would not work because myVidster,

19 when it comes to the bookmarks, do not have access to the

20 files when they're bookmarks. The backup copies it would have

21 access, but I already have a method to determine uniqueness of

22 the video.

23   Q   How burdensome would it be to go to the website for the

24 Free Speech Coalition of America and get a free software you

25 can download? How burdensome would that be?

Gunter - recross

1   A   Getting the software is the easy part. Installing it is
2   another situation.
3   Are you a developer?
4   Q   No. I'm a lawyer --
5   A   Okay.
6   Q   -- asking questions.
7   A   Sorry. My apologies. Go ahead.
8   Q   The other thing is that regardless of whether you want to
9   use the word bookmark, posting, uploading, downloading, your
10 button says download. That's what it says, right?
11 A   Where at?
12 Q   On the screen. On that screen shot it says download.
13 A   Please refer to me an exhibit, please, so the judge can
14 know what we're looking at or --
15 Q   Exhibit No. 1, Defense Exhibit No. 1 -- or Plaintiff's
16 Exhibit No. 1. Do you see where it says download underneath
17 that video?
18 A   Okay. Got it.
19   All right. Download. Exhibit 1, page -- oh, sorry.
20 It doesn't matter. Page 1, Exhibit 1?
21 Q   Right.
22   So whether or not you use the word --
23 A   Actually that one doesn't have a download link. Are we
24 looking at the same?
25   (Document tendered to the witness.)

Gunter - recross

1 BY MR. HUON:

2 Q   It says download on that button, doesn't it?

3 A   Yes.

4 Q   So whether or not you tell people that they're bookmarking

5 or posting, whatever, you're representing to your users that

6 they're downloading the video; isn't that correct?

7 A   No, no. It's just a download link.

8 Q   It's just a button that says download, but you're not

9 downloading?

10 A   Well, in that situation that is the actual URL to the

11 video hosted on the other website.

12 Q   My last question is this. I asked you earlier about your

13 views on copyrighting. My last question is this. You've

14 already told us your views on copying. When you get a notice

15 about a repeat infringer, isn't it correct that you when you

16 determine that that video is publicly available, your

17 investigation ends there? Isn't that correct?

18 A   Are you talking about when, for example, Flava Works gave

19 me an allegation of a repeat infringer?

20 Q   When Flava Works gives you an allegation that John Doe is

21 a repeat infringer, once you determine that that video that

22 John Doe allegedly posted is from a publicly available

23 website, your investigation ends there; isn't that correct?

24 A   Correct.

25   MR. HUON: Okay. Thank you.

1   THE COURT: All right. Thank you, sir. You may

2   stand down.

3   Any further evidence from the defendant?

4   MR. LEIGHTON: No, your Honor.

5   THE COURT: Any rebuttal evidence from the plaintiff?

6   MR. HUON: No, Judge.

7   THE COURT: All right. Then I think we'll recess,

8   how about till 12:45, and I'll hear final arguments. Okay?

9   All right. 12:45.

10   (Said hearing was recessed from 12:00 p.m. until

11   12:45 p.m.)

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