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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SONG FI, INC., :
 :
 Plaintiff, :CR No. 14-283
 :
 v. :
 :
 GOOGLE, INC., et al, :
 :
 Defendants. :

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT JUDGE
Friday, August 1, 2014

APPEARANCES:

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APPEARANCES (Continued):

WILSON, SONSINI, GOODRICH &
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Proceedings reported by machine shorthand, transcript
produced by computer-aided transcription.

P R O C E E D I N G S

1
2 DEPUTY CLERK: Civil Action 14-1283, Song Fi,
3 Inc. v. Google, Inc., et al. For the plaintiff, Ronald
4 Wick and Edward Lyle. For the defense, Michael Rubin.

5 THE COURT: These are the plaintiffs? I
6 guessed. You were sitting on opposite sides of the Court.
7 It was a signal.

8 MR. WICK: Good morning, Your Honor. Ronald
9 Wick for the plaintiff, Song Fi, Inc.

10 THE COURT: Thank you.

11 MR. RUBIN: Michael Rubin of Wilson Sonsini for
12 the defendants, Google and YouTube.

13 MR. LYLE: Edward Lyle for the plaintiff.

14 THE COURT: You are all welcome. I am Judge
15 Rosemary Collyer who received this case and the motions
16 for a temporary restraining order. I think that we have a
17 couple of issues here that need to be addressed, but you
18 should feel free to sit down. Yes, sir?

19 MR. RUBIN: May I raise one preliminary issue?

20 THE COURT: It's helpful if you come to the
21 microphone.

22 MR. RUBIN: It came to my attention yesterday as
23 I was traveling across the country that Mr. Wick's firm,
24 Cozen, represents Google. We are still looking into the
25 capacity of that and trying to learn the details of that.

1 I raised this with Mr. Wick this morning.

2 It would be our preference as a temporary
3 solution to that while we are trying to sort this out and
4 determining whether or not it's something that needs to be
5 raised to the Court's attention that Mr. Wick not
6 participate in the hearing this morning. I suggested that
7 to him this morning when I alerted this to him; it was
8 news to him as well. I believe he's done some
9 investigation, doesn't believe there's a conflict. I've
10 yet to see any facts that would support that. We're still
11 looking into it, and so as not to create a problem down
12 the road or waive our concern, I'd prefer just to --

13 THE COURT: Well, if you make your statement
14 here, I can make a statement that you haven't waived your
15 objection.

16 Yes, sir. What would you contribute to this?

17 MR. WICK: Thank you, Your Honor. Yes, I
18 learned of this issue about 10 or 15 minutes ago. Our
19 firm did its usual conflict check on YouTube and Google.
20 They both cleared our conflict check. Upon hearing this
21 from Mr. Rubin, I did some inquiry this morning with the
22 individual who ran the conflict check who oversees the
23 case and he says that our Cozen O'Connor Public
24 Strategies, our legislative P.C. as opposed to Cozen
25 O'Connor, does or has done some legislative work for

1 Google and/or YouTube; and based on that and based on the
2 nature of the work it was determined that there was no
3 conflict. My colleague was following up further and has
4 not been able to reach the individual who does this work
5 yet, but it's a legislative person, not an attorney. And
6 the determination was made outside of my familiarity that
7 there was no legal conflict.

8 THE COURT: All right. I'm not going -- thank
9 you, sir. I understand both positions, and I'm not going
10 to make a finding or holding on it because neither side
11 has full information before them. But I would note the
12 potential objection of Google and maybe YouTube and the
13 response of the law firm and say we have a TRO here. Why
14 don't we proceed without any waiver and a subsequent
15 objection? How is that?

16 MR. RUBIN: Thank you, Your Honor.

17 THE COURT: You're most welcome, sir.

18 But we do need to at least proceed with this
19 matter, and if you wanted to make an argument, sir, I
20 think the first issue for you to address -- and I'm
21 speaking to Mr. Wick -- the first issue for you to address
22 is the issue of venue. I have read your papers, but there
23 is the inconsistency noted by many courts of attempting to
24 enforce part of the contract while avoiding the
25 consequences of another part of the contract. If you

1 would, please, sir.

2 MR. WICK: Thank you, Your Honor. I read that
3 in their papers as well that they are saying that we can't
4 have it both ways. The argument here is that a portion of
5 the contract is unconscionable. That's not an argument
6 that belongs solely to the defendant in the breach of
7 contract case. The cases that they cite to the contrary
8 are not unconscionability cases. Most of them, in fact,
9 are cases where a third party is trying to accept the
10 benefit of the contract and basically claimed it's not
11 bound by the burdens of nature as opposed to portions that
12 are simply unenforceable.

13 THE COURT: What's unconscionable about it? I
14 mean, this is -- and I appreciate you getting immediately
15 to the point. The issue, I think, is that for the
16 purposes of your client YouTube offered a free service
17 which allowed broad dissemination of the artwork, I'll
18 call it, in question. The photo was quite lovely of the
19 two children but I don't know the music. So I'll call it
20 the artwork. And as a price, if you will, of that free
21 access to a worldwide audience, one has to agree to the
22 terms of the YouTube service agreement.

23 Now, there are two issues here, in my view. One
24 is whether YouTube properly identified the fault or flaw
25 or whatever you want to say, its objection to the handling

1 of whatever, of the posting by your client. That's one
2 issue.

3 But it's a different issue as to whether it's
4 unconscionable for YouTube to say to any user,
5 particularly commercial users, If you want to sue us, you
6 have to come sue us at home. We're a worldwide
7 organization, we're offering a free service, you have to
8 come sue us at home in order to save us money. That's
9 what we're dealing with in terms of the unconscionability.

10 MR. WICK: Certainly, Your Honor.

11 THE COURT: Try that.

12 MR. WICK: As the case law sets forth, it's a
13 two-step process. There's procedural unconscionability
14 and there's substantive unconscionability. Procedural
15 unconscionability, I don't think that there's a dispute
16 that this is indeed a contract of adhesion. It's
17 certainly a take-it-or-leave-it form contract. That
18 doesn't in and of itself make it unconscionable. But when
19 you look at the factors that the Courts consider, you
20 know, is this a -- is this a big company, is this a law
21 firm? Is this one of the cases that they cite that was
22 deemed to be a sophisticated buyer, or is this an
23 individual or a small business that's not typically
24 well-versed in contract law? That's a factor we look at
25 here. Here we're looking at a small business that's in

1 the business of music promotion and production.

2 More importantly, alternatives. It's a free
3 service in the sense that it's free to the uploader.
4 Certainly YouTube makes plenty of money off of the
5 service, just not from the individual uploading the video
6 or the business uploading the video. But it is the only
7 game in town. If you are in the business, if you're
8 trying to obtain widespread viewership of your videos, I
9 think it is widely known that there is no realistic
10 alternative to YouTube, and you really can't expect to get
11 much viewership without it.

12 THE COURT: But the consequence of the argument
13 would be that YouTube could use these identical terms in
14 its origin and its growth but that at some point --
15 presumably before your client posted his video and
16 music -- at some point YouTube became so predominant that
17 the very same terms it had used before suddenly became
18 unconscionable.

19 Now, we're talking about, at the moment, venue.
20 We're only talking venue. We're not talking anything else
21 in terms of cost or consequence or whatever, because
22 consequence is an entirely different set of issues. It
23 seems like a hard argument to me to argue that venue is
24 unconscionable. I mean, there's a federal court in, what
25 county?

1 MR. RUBIN: Quite a number of federal courts in
2 Northern California.

3 THE COURT: Right, but in Santa Clara County,
4 there's a federal court in Santa Clara County. If I
5 thought you had to go to a local judge, with no disrespect
6 to local judges -- I'm in federal court, you understand --
7 there's no disrespect, but if it meant that you had to go
8 to a county judge, why, there may be a question here, but
9 there isn't. You can go to federal court in California if
10 you meet their criteria.

11 MR. WICK: That's correct, Your Honor, but that
12 is a -- that is a grossly inconvenient and expensive
13 burden for a small business or an individual such as
14 YouTube.

15 THE COURT: But it's grossly inconvenient and
16 expensive for someone in Afghanistan. I pick Afghanistan
17 because I happened to be reading about it before I came on
18 the bench, I'm sorry. Didn't have to be Afghanistan.
19 England, pick England. Pick the Beatles when they were
20 just starting. Does that mean that because YouTube has
21 become worldwide successful that it used to be able to but
22 can no longer require people who wish to sue YouTube to
23 come to its location?

24 What happens if I agree with you is the point.
25 What happens? I mean, I understand, your client is a

1 small businessman. He's invested his all in this
2 business. He thinks he's been badly treated by YouTube.
3 That goes to the second part of the issue. But if I agree
4 with you, does that open YouTube to having to run all over
5 the world to defend itself and its terms in courts that
6 aren't even U.S. courts?

7 MR. WICK: I can't speak to what happens all
8 over the world, because that would depend on contract laws
9 and other laws elsewhere. In terms of the United States,
10 absolutely I think YouTube is open to defending itself in
11 courts across the country. That's part of being a
12 national company that does business all over -- that's
13 part of corporate America, Your Honor. Companies defend
14 themselves in courts all over the country all the time.
15 That's nothing new, and I'm sure it saves YouTube money if
16 they can have all of their cases defended right in their
17 hometown federal court.

18 But the fact that it saves the defendants money
19 doesn't make the interest any more legitimate, doesn't
20 make the provision any less unconscionable for a company
21 that does business routinely with little people to require
22 them to go all the way out to California no matter where
23 in the world they are and --

24 THE COURT: Really, keep your argument to the
25 U.S.

1 MR. WICK: Anywhere in the U.S. they are.

2 THE COURT: If you go anywhere in the world,
3 you've lost me.

4 MR. WICK: Fair enough, and I shut that down
5 myself. That's fair enough.

6 Anywhere in the country that they've got to deal
7 with the expense of going out to California. I think this
8 is a cost of business as a corporation in America. I
9 mean, I'm trying to imagine if every time anybody in the
10 United States bought a bottle of Coca Cola they pulled out
11 a piece of paper that says By opening this bottle you
12 agree to sue us in Atlanta, Georgia. Companies can't do
13 business that way. You can't expect the customer to do
14 business that way.

15 THE COURT: Well, okay. I mean, that's a really
16 important point that you make. When you open a bottle of
17 Coca Cola, you, of course, have a physical thing. I'm not
18 making more of that than I should. But you do have a
19 physical thing, and you have Coca Cola reaching out to
20 sell that bottle of coke to you in Washington, DC or
21 California, to make the coastline comparison.

22 YouTube is less, I'll say aggressive. It
23 doesn't advertise in the way that Coca Cola does. Oh, buy
24 our Coke, we'll ship our Coke to you, et cetera. YouTube
25 is more passive than that, isn't it, and one takes

1 advantage of it, of its services, of its publicity in the
2 privacy of your own home, in your own office, in your own
3 wherever without -- I mean, people go on YouTube and post,
4 excuse me, really crazy things and you wonder who are
5 those people?

6 MR. WICK: And they don't get taken down, which
7 is another issue.

8 THE COURT: No. That's the second part of the
9 issue.

10 Anyway, so let's pass on from that and go for a
11 moment to the -- you know that I'm troubled about the
12 venue issue. But let's pass on for a moment and talk
13 about the merits of the issue. My concern is -- and I
14 will highlight this for the representative, I'm sorry,
15 Mr. Rubin, forgive me, sir. My concern is that the
16 statement that Google made as to why it took down your
17 client's website was actually inaccurate. Their concern
18 was not a question of community standards or whatever the
19 proper terminology is, forgive me --

20 MR. WICK: Correct.

21 THE COURT: -- for not using the right
22 terminology. Actually I've read this document, okay. I
23 just want you to know this is Document 8-4 filed 7/31/14.
24 It is the terms of service. I think it's connected or
25 attached to the YouTube opposition.

1 MR. WICK: I see you read the small print
2 version too. I believe there was a larger print version.

3 THE COURT: I did. I read the small print
4 version, which forced me to take off my glasses and really
5 study it hard. So you at least know that I paid attention
6 to it.

7 It seems to me that the concept that the
8 content -- there was a problem with the content -- is an
9 incorrect statement of what YouTube's problem was. Your
10 client can't actually defend against or from his statement
11 doesn't actually defend against the possibility that
12 someone -- not the client, someone else -- added numbers
13 of views by cell phone observation too short to actually
14 see the entirety of the video, and so therefore created
15 what I will -- this isn't the right terminology, but what
16 I will call a false count. Maybe that is the right
17 terminology, I don't know. I can't remember. I don't
18 think that's a content issue.

19 MR. WICK: I agree.

20 THE COURT: Now, so the question is -- and I
21 read the cases that Google cited or Google and YouTube
22 cited, as to the expansive nature that the California
23 courts give to the meaning of "content," and I agree it's
24 a contract; and therefore -- because you're suing on that
25 contract, and therefore by its terms the contract should

1 be interpreted by California law to the extent that it's
2 enforceable at all.

3 And therefore to a certain extent those
4 decisions in California are at least informative. They
5 are not persuasive to me at all that they apply to this
6 circumstance. It seems to me that the defamation issue,
7 which is a state court kind of thing, not a federal issue,
8 but the question of defamation is -- or at least
9 commercial injury of some kind is more possible under
10 these facts.

11 I want to tell you I really -- I really did try
12 to pay attention to this case so that we could address it
13 and do something today. I don't want everybody hanging
14 around. You've come from California? Or you're here?

15 MR. RUBIN: I have to talk.

16 THE COURT: Go ahead, sir.

17 MR. WICK: I appreciate that, Your Honor, and I
18 take it from your comments that your concern is on the
19 non-defamation on the breach of contract to the extent
20 that the contract -- as to whether the contract was
21 breached?

22 THE COURT: Well, it's whether or not the
23 statement that Google posted -- I'm sorry, misstatement.
24 My misstatement. The statement that YouTube posted as to
25 why the site was taken or the video was taken down was

1 accurate and if inaccurate, therefore was injurious to
2 your client.

3 MR. WICK: Correct.

4 THE COURT: And I'm not persuaded by the prior
5 case law that the flaw that YouTube found affected content
6 in the way that the message that they left would suggest.
7 And so that misstatement, knowing misstatement, if you
8 will -- it had to be knowing, somebody put it up -- that
9 misstatement might, in fact, be injurious. The question
10 is whether it's a misstatement.

11 MR. WICK: It's absolutely a misstatement, Your
12 Honor. The message is that the content, the video was
13 taken down because the content violated the terms of
14 service; and as Your Honor has pointed out, the reasons
15 that the defendants have cited for taking down the video
16 have absolutely nothing to do with the content.

17 Now, they're saying Oh, but look at the
18 definition of content in our terms of service. Content
19 has this broad definition as this and that. Well, fair
20 enough, but the "this and that" are all things that the
21 customer contributes. The customer does not contribute
22 the view count. And again, this is their contract. And
23 they are asking the Court to read things in the content
24 that aren't part of any customary meaning of the term,
25 aren't mentioned in the contract and aren't things that

1 the customer contributes.

2 But it's a bigger problem than that for a libel
3 claim, Your Honor, because the issue isn't contract
4 interpretation, it's the reasonable viewer. And a
5 reasonable viewer who goes on and follows a link and sees
6 this video has been taken down because its content
7 violated the terms of service isn't going to stop and say
8 Content, you know, I wonder what that means. I'll go look
9 and see if there's a definition of that in YouTube's terms
10 of service. Content and this and that. You know what,
11 let's just do the view count even if it's not mentioned
12 here. They are going to think that there's something bad
13 about that video. As the Court has pointed, out there's
14 some crazy things on the videos that stay up on YouTube,
15 and one has to wonder what gets taken down.

16 THE COURT: If I could say, I agree with you
17 about the reasonable viewer argument except that if the
18 terms of service, even incorporating the community
19 whatever they are, addressed this issue, then I would say
20 your client might be stuck. Whether a reasonable viewer
21 would understand what "content" meant or not, your client,
22 which would have voluntarily agreed to these terms by
23 uploading his video, would be deemed by this acceptance of
24 terms to have agreed.

25 My problem is I don't think that's what good

1 language says in the terms of service. And while the
2 terms of service incorporate the community standards --
3 that's the term -- it doesn't say that. Now, it does say
4 that you can't fiddle faddle. Somebody putting something
5 up can't fiddle with the viewership to present more
6 viewers than are actually humanly possible. It says that.

7 MR. WICK: Correct.

8 THE COURT: So there's not a question in my mind
9 as to whether that might violate the terms of service.
10 But it's not a content issue.

11 MR. WICK: That's correct.

12 THE COURT: I mean, this is, of course, an
13 argument for Mr. Rubin to make and get up and say Judge,
14 you completely misread the contract. So it seems to me
15 that you have a better argument there.

16 Now, the question is whether I have standing --
17 I'm sorry, whether I have jurisdiction to rule on that,
18 and, of course, you're here for a TRO. So we have, first,
19 do I have jurisdiction, which is really a venue issue.
20 Does the contract limit you to California.

21 Two: Is there a likelihood of success on the
22 merits?

23 Three: Is there -- now there are four
24 standards. Let's see. Public interest, irreparable harm
25 and balance of harms.

1 MR. WICK: Balance of harms.

2 THE COURT: Thank you. I knew them. I'd get
3 there. All right. The irreparable harm argument -- I'm
4 going to move on, because, you see, I'm trying not to
5 waste people's time. The irreparable harm argument seems
6 to me that YouTube responds. It's only money, and money
7 can be collected later. And what is your response to
8 that?

9 MR. WICK: The response to that is, first of
10 all, it's not only money. While the defendants
11 characterize this as simply it's just a loss of some
12 business opportunities, what the defendants have done is
13 placed a stain on this business. Song Fi's business is
14 promotion and publicity, and it has been branded as at
15 best a cheater that manipulates view counts and as at
16 worst a purveyor of content that, use your imagine,
17 violates the community guidelines.

18 This isn't simply a couple of lost
19 opportunities. Song Fi cannot go forward with this, and
20 Song Fi has tried to do so. There's a complaint about how
21 we waited too long. And quite, frankly, Song Fi has made
22 efforts to mitigate its damages; it's tried other routes
23 rather than dragging this into court in order to save its
24 business. It can't get funding. It's got bills that it
25 cannot pay and creditors knocking on the door. The entire

1 momentum that this company built up largely on the
2 strength of the Love You video has been shut down because
3 everybody that they approached to do business with either
4 knows or has -- or quickly finds out that there's, that
5 there's this video that's taken down and this message
6 about violative content put up.

7 THE COURT: But nobody goes to actually look at
8 the video itself to see that that's not true?

9 MR. WICK: Well, the video itself has been taken
10 down.

11 THE COURT: Well, I thought YouTube put it back
12 up and then your clients or somebody marked it as Private
13 so it can't be seen. But it is -- it was somewhere, it
14 just had a different URL.

15 MR. WICK: As I understand, that opportunity was
16 offered -- if I can ask.

17 THE COURT: Yes, please. Is the video viewable
18 now?

19 MR. WICK: No.

20 THE COURT: No, it's not viewable, but the
21 statement -- I'm only going on what you said in briefs --
22 but the statement made by YouTube is that We just moved
23 it. We had this video, it was here -- where arguably the
24 count was right or wrong -- and then we moved it over here
25 and it was still visible over there if you just gave

1 people the new URL. Is that the right term, "URL"?

2 MR. WICK: That's right.

3 THE COURT: I think so. And then it was marked
4 "Private," presumably by your client so that nobody could
5 see it.

6 MR. WICK: The problem, Your Honor, yes, my
7 client can show the video to whoever it wants to show it
8 to and they can see that the video was perfectly innocuous
9 and it's two kids and all of that. But that link is still
10 there, that reputation is still there. And what, you
11 know, what our client --

12 THE COURT: So if I went on to YouTube and put
13 in "Love You," "Love You," blah-blah, I would come up with
14 a link to something that said this was taken down?

15 MR. WICK: No, you would not. But if you had
16 been forwarded a link prior to its being taken down, which
17 thousands of people were, and that link was then forwarded
18 to you, look at this cool video and you clicked on it, you
19 would get that message.

20 THE COURT: I see, okay. Okay.

21 MR. WICK: It's not only money, it's the entire
22 reputation of the business. And, frankly, even if it were
23 only money, even the cases that the defendants cite
24 recognize that economic loss can be irreparable loss if it
25 threatens the survival of the business. This isn't *Mylan*

1 *Laboratories* and some of the other cases that they cited.
2 This is a small business that really propelled itself
3 largely on the wild success of this video. And it is in
4 very great danger right now.

5 THE COURT: All right. What about the
6 comparative harms?

7 MR. WICK: I think the harm to the defendants
8 here is zero. It cost them nothing to maintain the video
9 and restore the view count.

10 THE COURT: Well, okay. So the cost issue is
11 nothing, but the defendant says Wait, wait, wait. We have
12 First Amendment rights. And it would be improper for the
13 Court to order YouTube to actually post something that
14 YouTube honestly believes violates the terms of service.

15 MR. WICK: I believe the reliance on the First
16 Amendment is misplaced, Your Honor. They are a
17 third-party neutral host of content provided by third
18 parties. They are not -- they are not the speaker here.
19 Song Fi is the speaker. Section 32 of the Communications
20 Act says they are not liable for the content. They are
21 not deemed to be the speaker of that content. I don't
22 think there's a free speech issue with respect to being
23 required to reinstate a video.

24 THE COURT: Well, but they're the speaker in the
25 way that a newspaper or let me say more specifically to my

1 experience the Metro might be required to put up
2 advertisements that are inimitable, unpalatable to Metro.
3 And the question -- Metro is a bad example because it's
4 public. Let me go back to something that's private like a
5 newspaper.

6 The newspaper is somebody wants to pay the
7 newspaper for an ad -- I can't remember what the ad was.
8 None of you people was here at that time. It's what
9 happens when your law clerks change, you know? It was an
10 ad against, against Muslims. It was quite vociferous.
11 Can you remember what it said, Chawnie? Never mind.
12 Anyway, it was quite aggressive in its statement and
13 Metro, I required Metro to put it on the buses because
14 Metro is a public corporation. The Washington Post could
15 of course, could say no. You're the speaker, that is the
16 person who wants to place it, we're the vehicle and we
17 refuse to be the vehicle and we have a right to do that as
18 a business, as a First Amendment right.

19 So why is that not -- forgive me for wandering
20 off, why is that not true for YouTube?

21 MR. WICK: Because a newspaper is not just a
22 neutral host of content. I understand the argument and
23 the Supreme Court, they cite *Miami Herald v. Tormillo* and
24 that's true. I don't think this is a *Miami Herald v.*
25 *Tormillo* situation. If we're talking about Google or

1 YouTube being required to accept an advertisement on its
2 site, that's very different. By their business they are
3 neutral hosts. They are recognized to not be the speaker
4 of that content.

5 Now, they certainly, you know, if something is
6 obscene and aggressive and outrageous, they can refuse to
7 post it. Contractually they do. But simply based on
8 something like a view count, that's not a content issue;
9 and again, Internet websites such as YouTube are a
10 different creature under the Communications Decency Act.

11 THE COURT: Okay. But let's go back to the
12 issue of the view count. The terms of service, no matter
13 how described by YouTube, which goes to the defamation
14 issue, the terms of service clearly say that you can't
15 play with the view count. Very important. YouTube says
16 We think they played with the view count because -- and
17 they described view count very carefully in terms of the
18 time it would take a human person to actually view the
19 whatever is displayed, whatever is posted. And their
20 report is that they had -- that this video had many views
21 which were of extraordinary short duration. Hardly at
22 all, which means nobody was actually watching the video.
23 Which would be a violation of that part of the terms of
24 service.

25 Now, even if incorrectly stated and therefore

1 damaging -- which is a different issue -- wouldn't the
2 manipulation of the count -- that is, the viewing count --
3 be a violation of the terms of service which would by
4 itself warrant, if they said the right thing, warrant
5 YouTube from saying no more service to you?

6 MR. WICK: If Song Fi had done that, absolutely,
7 Your Honor.

8 THE COURT: Well, no. If you had done it, yes.
9 I appreciate that.

10 MR. WICK: Yes.

11 THE COURT: But your client can't actually swear
12 that its agent didn't do that.

13 MR. WICK: It can. It is, you know, I believe
14 it's made inquiry of its agent. Its agent can swear that
15 it oversees its agents, nothing has certainly been done
16 under its direction. Yes, we can call the agent and do
17 all of that. But, frankly, they've produced virtually no
18 evidence that was this was done. They've got an affidavit
19 from a tech person that says there was some short
20 durations, and they say this is consistent with what we
21 have.

22 Short durations, you know, if you watch my
23 11-year-old son on YouTube, he'll go through about 50
24 YouTube videos in two minutes. It's not an automated view
25 count. People watch them and they turn them off. We have

1 nothing except their surmise that this may have happened,
2 and based on that they have taken this down and put this
3 stain on this business.

4 THE COURT: The stain on the business is a
5 different issue. And I don't know if I have full
6 jurisdiction to decide, but it seems to me that you've got
7 a stronger argument there than you have on whether or not
8 YouTube had reason to believe whether that's -- I mean, I
9 suppose you can further engage them on that issue, but
10 whether you can get a TRO on that issue seems to me to be
11 very difficult.

12 MR. WICK: Well, the terms of service, Your
13 Honor, entitle them to take the video down if Song Fi
14 commits the breach. Not if they have reason to believe
15 that Song Fi committed the breach.

16 THE COURT: Now, wait. Of course you're right.
17 But how else would they make a determination? I mean,
18 this is a computer Internet business. They make the
19 determination by viewing what happens on the Internet,
20 right? I mean, how else would they decide? Should they
21 have written a letter and said -- or an email may be
22 better -- that said What have you been doing?

23 MR. WICK: Well, there is such a thing as
24 process, Your Honor, and if you're going to accuse
25 somebody of breaching a contract you give them this kind

1 of notice: We've discovered this, give yourself a chance
2 to explain yourselves before making a determination and
3 reaching a conclusion like that and cutting them off.

4 THE COURT: But the contract doesn't require
5 that. The contract says we have the right to do this, and
6 this is the cost of doing business with us.

7 MR. WICK: Well, the contract gives them the
8 right to do it if it was breached. Now, yes we can have a
9 dispute before Court as to whether the contract was
10 breached. That strikes me as a less efficient way of
11 doing it than perhaps setting something up on their own.
12 But if that's how they choose to do it, that's fine. But
13 they have not demonstrated that the contract was breached.
14 All they've got is this affidavit from this tech person,
15 they've done no investigation of it.

16 Quite frankly, we've been trying for three
17 months to get an explanation out of them, and we didn't
18 get one until yesterday what they were relying on, and we
19 saw it and it wasn't much. They claim that they can, and
20 their sole discretion when they think it's been the view
21 count has been artificially inflated. Contract gives them
22 no such ability to do that. That goes back to their
23 overbroad definition of content, because they do have the
24 discretion to decide if something is indecent or obscene
25 or too long or something like that. That goes to the

1 content. It doesn't go to the view count has been
2 artificially enhanced. Implicit in that disagreement is
3 if you don't, you're not going to have a problem with
4 them.

5 Now, we've had the video taken down based on
6 nothing except this Well, this looks a little strange to
7 us. And that's not their obligation under the agreement,
8 Your Honor.

9 THE COURT: Okay. Let me hear from YouTube,
10 Google. Whichever. Whomever. I had no idea that Google
11 owned YouTube. Do you see how outrageously backward I am?

12 MR. RUBIN: Bought them in 2006.

13 THE COURT: Thank you. That's very kind of you.

14 MR. RUBIN: Happy to help. There's a lot I can
15 say, there's a lot to respond to.

16 THE COURT: Yes. Start with venue.

17 MR. RUBIN: Where would you like me to start?

18 THE COURT: Start with venue and then as I did
19 with -- thank you, ma'am -- as I did before. How did you
20 find this?

21 DEPUTY CLERK: On my computer.

22 THE COURT: The Israel -- I'm sorry. Let me
23 just clarify the record. The case that was involved that
24 I spoke about before is-- this is the complaint. I don't
25 know what the number is. No, I do. 12-1564, and the

1 advertisement said, "In any war between the civilized man
2 and the savage, support the civilized man. Support
3 Israel, defeat Jihad."

4 Okay. I'm sorry, sir. I was clarifying the
5 record. Please.

6 MR. RUBIN: We view the venue issue as fairly
7 straightforward and pretty simple and one that we would
8 anticipate presenting to the Court in a more leisurely
9 fashion on a regular notice motion unless it's summarily
10 resolved today.

11 This Court shouldn't be hearing the TRO or the
12 case at all. The parties agreed prior to upload of the
13 video that any dispute arising from the use of the service
14 would be litigated in Santa Clara County, California.
15 It's very clear. That agreement has been enforced
16 multiple times. Agreements like that are enforced all the
17 time. And free services online often have terms like that
18 because the savings from not having to send lawyers around
19 the world or around the country to distant locations from
20 off in the bay area enable them in part to provide their
21 services for free. And that's a fair bargain.

22 THE COURT: And I think that my questions to
23 opposing counsel suggest that I followed that argument.
24 But how do you respond to the argument from the plaintiff
25 that YouTube at least is doing national business in the

1 United States in every state and that unlike other
2 businesses in the United States it can't be surprised if
3 it's, quote, hauled into court in Washington, DC or
4 Alabama or Maine, even if it would prefer to go to Court
5 in California where it lives? Other corporations have to
6 face litigation in foreign venues, and YouTube should as
7 well, particularly dealing with this small business people
8 in this instance, that YouTube often hosts.

9 MR. RUBIN: I think Counsel used the phrase
10 "doing business with the little people."

11 THE COURT: Right.

12 MR. RUBIN: It is -- it would be ironic and I
13 guess the Court noted that by achieving a level of success
14 where it offered a free service to billions of people
15 around the world it then lost the right to be able to have
16 litigation directed to its home state. The fact of the
17 contract, the existence of the contract is the controlling
18 issue here. YouTube doesn't take issue with the fact that
19 if it entered into a business arrangement outside the use
20 of its service, outside the context of that contract, the
21 circumstances of that arrangement would govern any
22 disputes arising out of there.

23 If the parties agreed to a venue somewhere else,
24 then that other venue provision would govern. If the
25 parties didn't agree to venue anywhere, well, then the

1 facts of the case would dictate what about that case would
2 be heard.

3 But here the facts of the case are actually
4 quite simple and the contract that the parties entered
5 into, that the uploader of the video agreed to before
6 uploading and had notice of and clicked a box at a point
7 where they had choice to go anywhere else and do so or to
8 not use the service at all obligated them if they had any
9 dispute to bring it in Santa Clara County, California.

10 THE COURT: What about the argument that YouTube
11 is the only game in town? You have said in your papers
12 No, no, there are other places one could put up a video on
13 the Internet. Individual website is a good example that
14 you gave, but for purposes of broad, even worldwide view
15 of the video, the argument is YouTube has been so
16 successful it sort of is the only place one can go to
17 succeed.

18 MR. RUBIN: I find that argument hard to respond
19 to because it's, frankly, pretty absurd. There are
20 countless websites one can upload their videos to. As
21 counsel for YouTube, yeah, I don't have a long list of
22 them in front of me. I will tell you I visited that
23 Wikipedia case. It goes on and on and on and on, and
24 there are -- and you can, of course, host your own server
25 and display your own video to the world.

1 If this is an issue of this company needing a
2 place to host a video so it can then distribute the link
3 to that video, which is what's been described, their harm
4 is the existence of a URL out there in the world. They
5 could have put the URL on their own system and they could
6 have created a system that tracked the view counts, that
7 allowed for comments, that allowed for likes. They choose
8 to take advantage of YouTube's system for that. And they
9 agreed in the course of that to agree to YouTube's terms
10 of service, which included a prohibition on fraudulent
11 view count manipulation and an agreement that if there was
12 a dispute about anything, we would sort it out in
13 California.

14 THE COURT: So let's move to the fraudulent view
15 count issue. I'm having a very hard time even with the
16 cases that you cited out of California courts finding that
17 fraudulent view count is a content issue. Whether content
18 is only what the plaintiff says, that is what the person
19 or entity posts or has a broader interpretation, it
20 doesn't seem to me that it has anything to do with the
21 view count. And the view count is covered specifically in
22 other parts of the contract. So how does YouTube say,
23 Well, the fact that we put something up and said there was
24 a problem with the content here and if you go and you read
25 the community --

1 MR. RUBIN: Guidelines.

2 THE COURT: Thank you. The community
3 guidelines, that would tell you the problem with the
4 content is something is really unattractive such as
5 pornography, et cetera. If the problem was, as YouTube
6 now says, an alleged breach of the terms of service, why
7 can't YouTube say that?

8 MR. RUBIN: With respect to -- that is what
9 YouTube said. The notice in place of the video is that it
10 was removed "Because its content violated YouTube's terms
11 of service."

12 THE COURT: No. Content did not. Do you see
13 the problem --

14 MR. RUBIN: I understand. Let me get to that
15 point if I can, Your Honor. But it wasn't -- it did not
16 say that the content violated YouTube's community
17 guidelines.

18 THE COURT: I appreciate, you're correct.

19 MR. RUBIN: Which is a very significant point.
20 If it said that, perhaps there would be, perhaps there
21 would be a hook here. It didn't say that. It said that
22 the content violated YouTube's terms of service. And this
23 is a phrase that's used broadly. In Section 2A of the
24 small font version of the agreement that you were
25 referring to earlier --

1 THE COURT: I even have that highlighted.

2 MR. RUBIN: As do I. That definitely includes
3 the view count. Content includes the text, software,
4 scripts, graphics, photos, sounds, music, videos,
5 audio-visual combinations, interactive materials and other
6 materials that you may view on, have access through and
7 contribute to the service. Everything associated in the
8 video is included in that, which is precisely what the
9 *Louis* Court found.

10 THE COURT: And I know what the *Louis* Court
11 found, and I have great respect for the judge of that
12 case. But when it says "other materials you may view on,
13 you may access through or you may contribute," seems to me
14 that that suggests that that "you" is the person posting
15 something. And the question is whether here "you" is
16 sufficient to mean also you can't violate another part of
17 this terms of agreement somewhere else entirely. Let's
18 see. Hold on.

19 MR. RUBIN: 4H I believe is the other
20 relevant --

21 THE COURT: 4H the other one, yeah, yeah, you're
22 right. You agree not to launch any automated system,
23 et cetera. Well, the argument is they didn't. But if
24 they violated 4H, it seems to me that that's not content.
25 Content is defined in Section 2.

1 MR. RUBIN: But if I may, Your Honor, it
2 actually affects the content. Right. Here is what
3 fraudulent view count gaming does. I'm not sure if the
4 Court is familiar with the YouTube website or watches
5 YouTube occasionally. You look at a video.

6 THE COURT: Right.

7 MR. RUBIN: It has a view count next to it.
8 That constitutes materials you may view on YouTube. The
9 materials there in that sentence in 2A is not limited to
10 videos you may view on YouTube. It's materials you may
11 view when you visit the site. And that includes the view
12 count next to the video.

13 THE COURT: And who is the "you"?

14 MR. RUBIN: You, this is informing all users,
15 this would inform the plaintiff in this case as well.

16 THE COURT: Well, but the point is -- let me ask
17 you this.

18 MR. RUBIN: Sure.

19 THE COURT: I put up my video, and the entire
20 world laughs hysterically at a judge pretending to have
21 anything that's worth watching on YouTube and everybody is
22 laughing so hard it, quote, goes viral and before you know
23 it there's just a billion views, okay. I had nothing to
24 do with that. A friend put it up. But never mind. I had
25 nothing to do with it. Am I responsible for the number if

1 I had nothing to do with it? I didn't have anything to do
2 with all those people who looked at this video. Yes, I
3 can see the number, they can see the number, my law clerk
4 can see the number, you can see the number. It keeps
5 changing. But why am I responsible for that number?

6 MR. RUBIN: I'm not sure the Court -- I'm not
7 sure that's the right angle.

8 THE COURT: It's 4H that makes me responsible
9 for the number, not 2A.

10 MR. RUBIN: 7B, sorry to respond that way, 7B is
11 a separate provision in this contract as well.

12 THE COURT: Yeah, I noted 7 as well.

13 MR. RUBIN: YouTube may at any time without
14 prior notice and in its sole discretion remove such
15 content and terminate a user's account. Which is not what
16 it did here, of course. It moved content and didn't
17 terminate the account. It re-uploaded it.

18 THE COURT: And I understand that fact.

19 MR. RUBIN: Which is significant and I'd like to
20 get to.

21 THE COURT: Yes. No, I understand that fact.
22 Okay. Let me say what I think the problem is.

23 MR. RUBIN: Sure.

24 THE COURT: And I personally think you should
25 take this back to your client and your client should

1 rewrite this contract. I don't think that 2A addresses
2 anything but content. And I don't think unless you can --
3 I don't think content of a video, content that a user puts
4 on YouTube is a counter which YouTube itself puts on. The
5 counter is a YouTube thing. It's not the user's. I have
6 nothing to do with it no matter how many times I view the
7 same video. It's YouTube's counter, not mine. Even if
8 I'm malintentioned, there is, you know, I don't affect
9 that counter. It's not my counter. It's your counter,
10 your client's counter.

11 I think you have a major problem with your
12 contract. But I have to say I don't think venue is here.
13 I think that part of your contract is pretty clear. I
14 think that if you ever got to the merits on whether or not
15 the -- whether or not the statement that there was a
16 content violation when, in fact, it was an alleged
17 violation of 4H and not 2A, had you ever got to the merits
18 of that, at least here -- I'm only one judge; there are
19 400 and some odd of us -- but if you got to the merits
20 here, I would say you have a problem. I would advise your
21 client of that. There are judges who might agree with me.
22 I think, I think there's a problem.

23 But I don't think I have jurisdiction. I think
24 the parties have agreed to do this in Santa Clara County.
25 I'm sensitive to the small business problems here, but I

1 think that the contract is not a contract of adhesion in
2 that regard. It's one voluntarily accepted. It may be
3 because of the success of YouTube that one would say, as
4 the plaintiff does, it's almost involuntary. YouTube
5 doesn't have a monopoly in the sense of U.S. antitrust
6 law. So success is not wrong. It's to be applauded in
7 this country. And unless, unless there's another argument
8 by Mr. Lyle about venue, the content is so clear about
9 that subject that I really think I have no option but to
10 transfer the case to California.

11 MR. WICK: Your Honor, may I be heard on one
12 more?

13 THE COURT: Yes, of course.

14 MR. WICK: I just wanted to say --

15 THE COURT: Yes. I will, of course, let you
16 have one more thing, but if I could just point out while
17 I'm talking and then you can respond to it all. It's
18 Paragraph 14 of the service agreement, terms of service
19 that I'm really talking about. And one thing that it says
20 is that service shall be deemed a passive website that
21 does not give rise to personal jurisdiction over YouTube
22 in jurisdictions other than California. I find that one,
23 I think that's more arguable in this circumstance. But it
24 does say these terms of service shall be governed by the
25 internal substantive laws of the State of California

1 without respect to its conflict of laws principles.

2 The plaintiff has not addressed that, but it
3 seems to me that I am bound by that. That doesn't mean
4 that I'm bound by a decision of a District Court or a
5 state court with which I disagree, you understand. But
6 I'm certainly bound by the law of this State of
7 California. And then the very next sentence, if plaintiff
8 agrees that they are bound by that, that is the internal
9 substantive laws of the State of California, then how does
10 the plaintiff avoid the next steps, which is any claim or
11 dispute between you and YouTube that arises in whole or in
12 part from the service shall be decided exclusively by a
13 court of competent jurisdiction in Santa Clara County,
14 California. That's your argument, is it not?

15 MR. RUBIN: We have quite a few others, but that
16 is the essential argument. Plaintiff may argue that the
17 dispute doesn't arise from the service. It plainly does
18 in our view. I don't know --

19 THE COURT: I don't think it arises from the
20 content. To that extent I think Plaintiff is right that
21 YouTube's objection that there's something wrong with the
22 content is incorrect and perhaps cause damage. I'm not
23 making that decision. I do think it was incorrect under
24 the terms of the contract. That doesn't give me
25 jurisdiction. That's my reaction. Okay. So you're

1 winning so far. So I think you should sit down.

2 MR. RUBIN: Good advice. Thank you.

3 THE COURT: That's my reaction. When you're
4 winning, you sit down.

5 MR. WICK: Okay. I'll try to change the advice
6 on that.

7 THE COURT: Mr. Lyle, it's your chance.

8 MR. WICK: Yes. I'm Mr. Wick, he's Mr. Lyle.

9 THE COURT: I'm sorry, Mr. Lyle, forgive me,
10 sir.

11 MR. WICK: People confuse us all the time.

12 THE COURT: Mr. Wick, I should be more
13 respectful to Mr. Lyle than I have been. Go ahead,
14 Mr. Wick.

15 MR. WICK: I would like to raise the point which
16 we did raise in our briefs but did not address this.
17 Suits arising out of the YouTube service under the
18 contract even as written are to be brought in Santa Clara
19 County, and we've made our argument as to why we believe
20 that's an unconscionable provision. There are tort claims
21 in this case, in particular a defamation claim, a libel
22 claim.

23 THE COURT: Yes.

24 MR. WICK: And it's one thing to agree with a
25 gun to your head or not, it's one thing to agree that a

1 lawsuit arising out of the contract is going to be brought
2 in Santa Clara County. It's another thing to agree that
3 it's something that you can't possibly foresee, a
4 defamatory message being placed on the website about you
5 long after the service has been withheld to require that
6 to be brought in a foreign jurisdiction as well. I think
7 that that needs to be considered very differently from the
8 lawsuit on the contract.

9 THE COURT: I would think -- I mean, I think the
10 argument is a really smart lawyer argument. It's a really
11 smart lawyer argument. The problem I have with it is that
12 the defamation claim which I see, I mean, I see exactly
13 why your client is making the claim -- I'm not ruling on
14 it -- I see exactly why your client is making the claim,
15 that arises directly from the issue of whether it was, in
16 fact, a violation of the terms of service.

17 Now, I can opine here that I think that YouTube
18 has, if I will, misread its own contract. It applies
19 Section 2 as if it were Section 4H. It's really not. But
20 I don't -- it's really not my decision ultimately to make.
21 And if another judge who has full venue and jurisdiction
22 agrees with my analysis of the contract, then you have a
23 defamation claim. If somebody doesn't agree with my
24 interpretation of the contract, your defamation claim is
25 much harder to advance.

1 MR. WICK: My concern, Your Honor, is how -- how
2 far that logic would be stretched. Respectfully I don't
3 think that the statement that there was a problem with the
4 content of the video does arise out of the alleged
5 violation of the terms of service. They are claiming --
6 it's totally different.

7 THE COURT: I agree with you on that point, but
8 that is a question of contract interpretation, and the
9 issue of contract interpretation between a user of the
10 service and YouTube I think is committed in the first
11 instance to Santa Clara County, California. If another
12 judge agrees with you and agrees with my reading of the
13 contract, then you have, as I said, a live argument as to
14 whether it was in addition to being a breach of contract
15 to post the notice that was posted also defamatory for
16 which -- I mean, I don't have any evidence but this is
17 only a TRO. So we're operating in that context.
18 Ultimately they are so close that you need to prove the
19 first in order to prove the second, and I don't think I
20 have jurisdiction over the first.

21 And so therefore I don't know how I could
22 possibly move to the second. There would be -- what's the
23 term? I can't come up with it. It would be an
24 embarrassment to have me interpret this contract here as
25 meaning X and so therefore your defamation claim, I don't

1 have jurisdiction over the contract but I can approve the
2 defamation claim when a judge who has jurisdiction over
3 the contract interpreted it otherwise.

4 MR. WICK: But if I cannot persuade you here
5 today that the form selection clause doesn't bar this
6 court from hearing the case, I would request that we at
7 least have the opportunity to fully brief a motion to
8 transfer on this because we've, frankly, we've just
9 received their position on this yesterday and I think the
10 issue --

11 THE COURT: Well, okay. That's fair. That's
12 fair, sir.

13 MR. RUBIN: I'm not sure it's fair, Your Honor.
14 Yesterday --

15 THE COURT: I know. I heard your objection.
16 And I read -- wait. I read your objection and I thought
17 Do you really think that I can't read this contract? But
18 I actually could. It's okay. I will agree with you, sir.
19 How much time do you need to file an opposition to the
20 Court's proposal that the case be transferred to the
21 Northern District of California?

22 MR. WICK: We would request ten days, Your
23 Honor.

24 THE COURT: Ten days. Hold on. We tend to
25 operate in periods of seven these days. The Court used to

1 operate in odd numbers, but now we use sevens because then
2 we always know it's a business day. So I would give you
3 until the 15th of August, which is two weeks.

4 MR. WICK: Thank you, Your Honor.

5 THE COURT: It's a little more than ten days,
6 and then Mr. Rubin, how about a response from you on the
7 29th of August?

8 MR. RUBIN: Sounds very reasonable, Your Honor.

9 THE COURT: All right. Thank you. All right.
10 But the Court will deny the motion for a temporary
11 restraining order and retain the motion for a preliminary
12 injunction awaiting briefing on the venue question. All
13 right?

14 MR. WICK: Thank you, Your Honor.

15 THE COURT: Thank you. Thank you, everybody.
16 Nice to meet you, Mr. Rubin. Nice to meet you gentlemen.
17 Thank you.

18 (Proceedings adjourned at 11:17 a.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

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I, Barbara DeVico, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

8-6-14

SIGNATURE OF COURT REPORTER

DATE