

March 7, 2019

VIA E- MAIL

Kyle B. Fleming, Esq.
RENNER OTTO
1621 Euclid Avenue, Floor 19
Cleveland, OH 44115

Re: *Response to MerchSource LLC's February 7, 2019 Subpoena to YouTube LLC*

Dear Mr. Fleming:

Enclosed please find a sworn declaration from YouTube LLC in response to the February 7, 2019 subpoena from MerchSource LLC in the matters of PGR2018-00019, PGR2018-00020 and IPR2018-00494.

With respect to your question regarding public access generally over time of the two videos that are the subject of the subpoena, I can also confirm that it is my understanding that YouTube does not retain metadata reflecting changes to public status past a certain time period, but YouTube has no metadata information suggesting that the two videos were ever not publicly accessible.

With this, please confirm that YouTube has resolved the February 7, 2019 subpoena. Thank you.

Sincerely,



Michael A. Berta

Enclosure

DECLARATION OF SLAVE JOVANOVSKI

1. I am an employee of YouTube LLC. I make this declaration in response to Notices of Deposition and a subpoena from MerchSource LLC in the matters of PGR2018-00019, PGR2018-00020, and IPR2018-00494. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently thereto.

2. YouTube operates a popular website and related online service that allows people from all over the world to post videos of their choosing and to view videos created and uploaded by other YouTube users. Video creators, who range from amateurs using cell phone cameras to professional filmmakers, can upload videos that they create to the service, and anyone with an Internet connection can view them.

3. The general public may use YouTube's service, both to upload and to watch videos, for free. When a user uploads a video the privacy status of the video can be set to public, private or unlisted. Public videos can be seen by and shared with anyone using YouTube. When a video is uploaded to YouTube, if the uploader sets the video to public, the video may quickly become publicly available to access and view, and publicly searchable (usually within a few minutes), based on, among other things, the video's title, description and tags (keywords). The YouTube servers and system record metadata with the video file about the date on which the video was uploaded to the site and made public (the "Published on" metadata). This is done by YouTube's electronic systems and processes automatically, accurately, in the regular practice of YouTube, and at the time the video is publicly made available. Various parts of this metadata, including the date the video was originally published, is then retained for a period of time in the course of a regularly conducted activity of YouTube.

4. The video titled “Use Google Cardboard without Magnetometer (enabling magnetic ring support to every device)” and available at https://www.youtube.com/watch?v=o_Pk_kipYto was published, publicly searchable and publicly available, on YouTube on May 10, 2015 based on the aforementioned metadata created and maintained by YouTube.

5. This data reflects the date that the video available at https://www.youtube.com/watch?v=o_Pk_kipYto was first made public as recorded in YouTube systems but does not reflect any changes that may have occurred.

6. I hereby certify that the webpage available at https://www.youtube.com/watch?v=o_Pk_kipYto is an accurate record: generated by YouTube’s electronic processes and systems; copied from YouTube’s electronic devices, storage media, and files; and the product of a regularly conducted activity of YouTube.

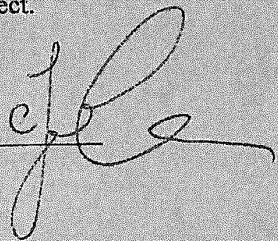
7. The video titled “Google I/O 2014 - Cardboard: VR for Android” and available at <https://www.youtube.com/watch?v=DFog2gMnm44> was uploaded to YouTube on June 26, 2014 and then published, publicly searchable and publicly available, on YouTube on June 27, 2014 based on the aforementioned metadata created and maintained by YouTube.

8. I hereby certify that the webpage available at <https://www.youtube.com/watch?v=DFog2gMnm44> is an accurate record: generated by YouTube’s electronic processes and systems; copied from YouTube’s electronic devices, storage media, and files; and the product of a regularly conducted activity of YouTube.

9. This data reflects the date that the video available at <https://www.youtube.com/watch?v=DFog2gMnm44> was first made public as recorded in YouTube systems but does not reflect any changes that may have occurred.

10. I declare under penalty of perjury that the foregoing is true and correct.

Date: March 4, 2019

Name: SLAVE JONANOVSKI 

1 MICHAEL A. BERTA (SBN 194650)
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8 Attorney for YouTube, LLC

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 MERCHSOURCE, LLC,
12 Petitioner,
13 v.
14 DDC TECHNOLOGY, LLC,
15 Patent Owner.

Case Nos.: **PTAB IPR2018-00494**
PTAB PGR2018-00019
PTAB PGR2018-00020

**NON-PARTY YOUTUBE LLC'S
RESPONSES AND OBJECTIONS TO
PETITIONER MERCHSOURCE, LLC'S
SUBPOENA TO TESTIFY AT A
DEPOSITION IN A CIVIL ACTION TO
YOUTUBE, LLC**

RESPONSES AND OBJECTIONS
TO PETITIONER MERCHSOURCE, LLC'S SUBPOENA TO TESTIFY
AT A DEPOSITION IN A CIVIL ACTION TO YOUTUBE, LLC

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, non-party YouTube, LLC (“YouTube”), through its attorneys, responds and objects to Petitioner MerchSource, LLC’s (“MerchSource”) Subpoena to Testify at a Deposition in a Civil Action to YouTube, LLC and accompanying Deposition Topics, dated February 7, 2019.

OBJECTIONS TO SUBPOENA

YouTube asserts each of the following Objections to Petitioner's Subpoena. In addition to these Objections, YouTube may also state specific objections to the Deposition Topics where appropriate. By setting forth such additional specific objections, YouTube does not in any way intend to limit or restrict its Objections to Petitioner's Subpoena. Moreover, to the extent YouTube provides a response to any of Petitioner's Deposition Topics to which YouTube objects, such response shall not constitute a waiver of any Objection to Petitioner's Subpoena or specific objection to a request or topic. The Responses are made solely for the purposes of this action.

1. YouTube objects to the deposition date, time, and location specified in the Subpoena, on the ground that a deposition is an unnecessary expense and burden and where the parties reach agreement that a declaration by YouTube will obviate the need for any deposition.

2. YouTube objects to each and every Deposition Topic to the extent that it attempts to impose any burdens inconsistent with or in addition to a non-party's obligations under the Federal Rules of Civil Procedure, the rules of practice for *inter partes* review proceedings and post-grant review proceedings before the Patent Trial and Appeal Board, any order of the Board, or other applicable law.

3. YouTube objects to each and every Deposition Topic to the extent that it seeks the disclosure of information that is protected from disclosure under, without limitation, the attorney-client privilege, the work product immunity, and/or any other applicable privilege, immunity, statute, regulation, or rule. The inadvertent disclosure of any such information shall not be deemed to be a waiver of any such privilege or immunity.

1 4. YouTube objects to the Deposition Topics to the extent they seek disclosure of
2 information protected by any right of privacy, under confidentiality obligations, or subject to
3 protective orders or other confidentiality agreements entered into by YouTube. YouTube objects
4 to each and every Deposition Topic to the extent it requires YouTube to produce information in
5 violation of a legal or contractual obligation of nondisclosure or confidentiality to a third party.

6 5. YouTube objects to the Subpoena to the extent it seeks information or documents
7 that are already in Petitioner's possession, custody, or control, are publicly available, or are as
8 readily available to Petitioner from either public sources or from parties to the action as they are
9 from YouTube, a non-party. YouTube objects to each and every document request and deposition
10 topic to the extent that it seeks to impose an undue burden on YouTube, which is not a party to the
11 underlying action. YouTube further objects to the Subpoena to the extent it seeks documents or
12 information that is in the possession, custody, or control of a party to the underlying action or
13 equally available from another source (including public sources) that is more convenient, less
14 burdensome, or less expensive than requiring YouTube to produce such documents or
15 information. As a disinterested non-party, YouTube should not be subjected to the burden of
16 searching for and producing such documents or information unless and until all reasonable means
17 of obtaining that information directly from such other sources have been exhausted.

18 6. YouTube objects to the Subpoena to the extent it seeks information, documents, or
19 other materials that are not relevant to any party's claim(s) or defense(s) and/or are not
20 proportional to the needs of this case.

21 7. YouTube objects to the Subpoena to the extent it seeks disclosure of information or
22 production of documents and things containing trade secrets or other confidential, business, or
23 proprietary information. To the extent the Subpoena seeks the disclosure of information or the
24 production of documents containing trade secrets or other confidential, business, or proprietary
25 information, YouTube will provide such information or produce documents containing such
26 information only in accordance with an appropriate confidentiality order.

1 8. YouTube objects to the Subpoena to the extent it calls for the production of
2 documents and things not relevant to the issues of law and fact in this action and/or not reasonably
3 calculated to lead to the discovery of admissible evidence.

4 9. YouTube objects to the Subpoena to the extent it is vague, ambiguous, overbroad,
5 oppressive, harassing, unduly burdensome, improper, and/or to the extent there exists more
6 practical methods of obtaining the information Petitioner seeks.

7 10. YouTube objects to the Subpoena to the extent the Deposition Topics are
8 duplicative and/or cumulative.

9 11. YouTube objects to the Subpoena to the extent the Deposition Topics are not
10 properly addressed to YouTube and should instead be addressed to other non-parties.

11 12. YouTube objects to the Subpoena to the extent it contains erroneous or inaccurate
12 assumptions or purported statements of fact.

13 13. YouTube reserves the right to amend, modify, and supplement these responses as
14 appropriate.

15 14. Each and every Objection to the Petitioner's Subpoena shall be deemed to be
16 incorporated in full into each of the individual responses set forth below. Any specific objections
17 to a document request or deposition topic are made in addition to the Objections to the Petitioner's
18 Subpoena, not as a replacement for them.

19 15. YouTube objects to each and every deposition topic to the extent that they contain
20 no definitions of terms.

21 16. YouTube objects to the time and place set by the Subpoena for the deposition. The
22 time and place of the requested deposition was selected unilaterally, without consulting with
23 YouTube about the availability of its witness(es) or its counsel. To the extent YouTube produces
24 a witness to provide deposition testimony in response to the Subpoena, YouTube shall do so at a
25 mutually agreeable time and place. YouTube further objects to the Subpoena on the basis that it
26 seeks a deposition on February 19, 2019, which is less than 30 days from the date of the
27 Subpoena.
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1 **SPECIFIC OBJECTIONS AND RESPONSES**

2 **DEPOSITION TOPIC NO. 1:**

3 For each of Tech# and Google I/O, the circumstances surrounding the creation, recording
4 and maintenance by YouTube of the “Published on” date (the “Published Date”) shown on the
5 video’s associated web page, including but not limited to (i) the time at which the Published Date is
6 determined (ii) the time at which the Published Date is recorded (iii) the person or persons, if any,
7 or electronic process responsible for determining and recording the Published Date; (iv) whether
8 recording the Published Date is a regular practice of YouTube; (v) whether keeping a record of the
9 Published Date is a regularly conducted activity of YouTube; (vi) the API resource, property, and
10 other unique identifier that represents the Published Date; and (vii) whether the Published Date
11 generated by YouTube electronic process and systems produce an accurate result.

12 **OBJECTIONS AND RESPONSE TO DEPOSITION TOPIC NO. 1:**

13 YouTube incorporates its Objections to Petitioner’s Subpoena as if stated fully herein.
14 YouTube objects to this Topic on the ground it is overly broad, unduly burdensome, oppressive,
15 and/or irrelevant to the subject matter of this action. YouTube further objects to this Topic on the
16 ground it is not proportional to the needs of the case. YouTube objects to this Topic on the basis
17 that “circumstances surrounding the creation, recording and maintenance,” “the time at which the
18 Published Date is determined,” “the time at which the Published Date is recorded,” “API resource,
19 property, and other unique identifier,” and “produce an accurate result” are vague and ambiguous.
20 YouTube objects to this Topic to the extent that it is seeking deposition testimony to authenticate
21 records produced by YouTube. Such testimony is unnecessary and unduly burdensome as records
22 can be authenticated by a Certificate of Authenticity. YouTube objects to this Topic on the grounds
23 that it is unduly burdensome and unreasonable to the extent it requires YouTube produce a witness
24 to provide deposition testimony on subject matters and information that could be obtained from
25 another source, such as documents and other non-testimonial sources of information.

26 Subject to these objections, YouTube responds that it is available to meet and confer with
27 MerchSource regarding the provision of a written declaration regarding information available from
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1 reasonably accessible sources concerning the information requested by this topic from YouTube.
2 YouTube will not produce a witness to testify at the deposition scheduled for February 19, 2019.

3 **DEPOSITION TOPIC NO. 2:**

4 For each of Tech# and Google I/O, the video's privacy status (i.e., the video's public
5 availability) from date it was uploaded through July 16, 2015.

6 **OBJECTIONS AND RESPONSE TO DEPOSITION TOPIC NO. 2:**

7 YouTube incorporates its Objections to Petitioner's Subpoena as if stated fully herein.
8 YouTube objects to this Topic on the ground that it is overly broad, unduly burdensome,
9 oppressive, and/or irrelevant to the subject matter of this action. YouTube further objects to this
10 Topic on the ground it is not proportional to the needs of the case. YouTube objects to this Topic
11 on the basis that "privacy status," "public availability," "uploaded" are vague and ambiguous.
12 YouTube objects to this Topic to the extent that it is seeking deposition testimony to authenticate
13 records produced by YouTube. Such testimony is unnecessary and unduly burdensome as records
14 can be authenticated by a Certificate of Authenticity. YouTube objects to this Topic on the grounds
15 that it is unduly burdensome and unreasonable to the extent it requires YouTube produce a witness
16 to provide deposition testimony on subject matters and information that could be obtained from
17 another source, such as documents and other non-testimonial sources of information.

18 Subject to these objections, YouTube responds that it is available to meet and confer with
19 MerchSource regarding the provision of a written declaration regarding information available from
20 reasonably accessible sources concerning the information requested by this topic from YouTube.
21 YouTube will not produce a witness to testify at the deposition scheduled for February 19, 2019.

22 **DEPOSITION TOPIC NO. 3:**

23 YouTube's knowledge of any dates and/or times when Tech# was not publicly accessible for
24 viewing on or after May 10, 2015.

25 **OBJECTIONS AND RESPONSE TO DEPOSITION TOPIC NO. 3:**

26 YouTube incorporates its Objections to Petitioner's Subpoena as if stated fully herein.
27 YouTube objects to this Topic on the ground that it is overly broad, unduly burdensome,
28 oppressive, and/or irrelevant to the subject matter of this action. YouTube further objects to this

1 Topic on the ground that it is not relevant to any party's claim or defense and proportional to the
2 needs of the case. YouTube objects to this Topic on the basis that "knowledge of" and "publicly
3 accessible for viewing" are vague and ambiguous. YouTube objects to this Topic to the extent that
4 it is seeking deposition testimony to authenticate records produced by YouTube. Such testimony is
5 unnecessary and unduly burdensome as records can be authenticated by a Certificate of
6 Authenticity. YouTube objects to this Topic on the grounds that it is unduly burdensome and
7 unreasonable to the extent it requires YouTube produce a witness to provide deposition testimony
8 on subject matters and information that could be obtained from another source, such as documents
9 and other non-testimonial sources of information.

10 Subject to these objections, YouTube responds that it is available to meet and confer with
11 MerchSource regarding the provision of a written declaration regarding information available from
12 reasonably accessible sources concerning the information requested by this topic from YouTube.
13 YouTube will not produce a witness to testify at the deposition scheduled for February 19, 2019.

14 **DEPOSITION TOPIC NO. 4:**

15 YouTube's knowledge of any dates and/or times when Google I/O was not publicly
16 accessible for viewing on or after June 27, 2014.

17 **OBJECTIONS AND RESPONSE TO DEPOSITION TOPIC NO. 4:**

18 YouTube incorporates its Objections to Petitioner's Subpoena as if stated fully herein.
19 YouTube objects to this Topic on the ground it is overly broad, unduly burdensome, oppressive,
20 and/or irrelevant to the subject matter of this action. YouTube further objects to this Topic on the
21 ground it is not relevant to any party's claim or defense and proportional to the needs of the case.
22 YouTube objects to this Topic on the basis that "knowledge of" and "publicly accessible for
23 viewing" are vague and ambiguous. YouTube objects to this Topic to the extent that it is seeking
24 deposition testimony to authenticate records produced by YouTube. Such testimony is unnecessary
25 and unduly burdensome as records can be authenticated by a Certificate of Authenticity. YouTube
26 objects to this Topic on the grounds that it is unduly burdensome and unreasonable to the extent it
27 requires YouTube produce a witness to provide deposition testimony on subject matters and
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1 information that could be obtained from another source, such as documents and other non-
2 testimonial sources of information.

3 Subject to these objections, YouTube responds that it is available to meet and confer with
4 MerchSource regarding the provision of a written declaration regarding information available from
5 reasonably accessible sources concerning the information requested by this topic from YouTube.
6 YouTube will not produce a witness to testify at the deposition scheduled for February 19, 2019.

7 **DEPOSITION TOPIC NO. 5:**

8 YouTube's knowledge regarding when and how Tech# was indexed by YouTube or
9 otherwise publicly discoverable by a search function provided by YouTube or its affiliates,
10 including Google's video search function.

11 **OBJECTIONS AND RESPONSE TO DEPOSITION TOPIC NO. 5:**

12 YouTube incorporates its Objections to Petitioner's Subpoena as if stated fully herein.
13 YouTube objects to this Topic on the ground it is overly broad, unduly burdensome, oppressive,
14 and/or irrelevant to the subject matter of this action. YouTube further objects to this Topic on the
15 ground it is not relevant to any party's claim or defense and proportional to the needs of the case.
16 YouTube objects to this Topic on the basis that "knowledge regarding," "how Tech# was indexed
17 by," "publicly discoverable by," and "search function provided by" are vague and ambiguous.
18 YouTube objects to this Topic to the extent that it is seeking deposition testimony to authenticate
19 records produced by YouTube. Such testimony is unnecessary and unduly burdensome as records
20 can be authenticated by a Certificate of Authenticity. YouTube objects to this Topic on the grounds
21 that it is unduly burdensome and unreasonable to the extent it requires YouTube produce a witness
22 to provide deposition testimony on subject matters and information that could be obtained from
23 another source, such as documents and other non-testimonial sources of information.

24 Subject to these objections, YouTube responds that it is available to meet and confer with
25 MerchSource regarding the provision of a written declaration regarding information available from
26 reasonably accessible sources concerning the information requested by this topic from YouTube.
27 YouTube will not produce a witness to testify at the deposition scheduled for February 19, 2019.
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1 **DEPOSITION TOPIC NO. 6:**

2 YouTube's knowledge regarding when and how Google I/O was indexed by YouTube or
3 otherwise publicly discoverable by a search function provided by YouTube or its affiliates.

4 **OBJECTIONS AND RESPONSE TO DEPOSITION TOPIC NO. 6:**

5 YouTube incorporates its Objections to Petitioner's Subpoena as if stated fully herein.
6 YouTube objects to this Topic on the ground it is overly broad, unduly burdensome, oppressive,
7 and/or irrelevant to the subject matter of this action. YouTube further objects to this Topic on the
8 ground it is not relevant to any party's claim or defense and proportional to the needs of the case.
9 YouTube objects to this Topic on the basis that "knowledge regarding," "how Google I/O was
10 indexed by," "publicly discoverable by," and "search function provided by" are vague and
11 ambiguous. YouTube objects to this Topic to the extent that it is seeking deposition testimony to
12 authenticate records produced by YouTube. Such testimony is unnecessary and unduly burdensome
13 as records can be authenticated by a Certificate of Authenticity. YouTube objects to this Topic on
14 the grounds that it is unduly burdensome and unreasonable to the extent it requires YouTube
15 produce a witness to provide deposition testimony on subject matters and information that could be
16 obtained from another source, such as documents and other non-testimonial sources of information.

17 Subject to these objections, YouTube responds that it is available to meet and confer with
18 MerchSource regarding the provision of a written declaration regarding information available from
19 reasonably accessible sources concerning the information requested by this topic from YouTube.
20 YouTube will not produce a witness to testify at the deposition scheduled for February 19, 2019.

21
22 Dated: February 19, 2019

ARNOLD & PORTER KAYE SCHOLER LLP

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24
25 By: /s/ Michael A. Berta
26 Michael A. Berta
27 Attorney for YouTube, LLC
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I hereby certify that on February 19, 2019, the above NON-PARTY YOUTUBE LLC'S RESPONSES AND OBJECTIONS TO PETITIONER MERCHSOURCE, LLC'S SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION TO YOUTUBE, LLC was served on the parties as listed below by e-mail:

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Attorneys for DDC Technology, LLC

Executed on February 19, 2019, in San Francisco, California. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Michael A. Berta

Michael A. Berta