

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EXPLOROLOGIST LIMITED,)	Civil Action No. 2:07-cv-01848-LP
)	
Plaintiff,)	
)	
v.)	The Honorable
)	Louis H. Pollak
BRIAN SAPIENT a/k/a BRIAN J. CUTLER,)	
)	
)	
Defendant.)	

**EXPERT REPORT OF PROFESSOR LIONEL BENTLY PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 44.1**

I, Professor Lionel Alexander Fiennes Bently, of the Centre for Intellectual Property and Information Law, Faculty of Law, University of Cambridge, 10 West Rd, Cambridge, CB3 9DZ say as follows:

Introduction:

1. I am Herchel Smith Professor of Intellectual Property and Director of the Centre for Intellectual Property and Information Law at the University of Cambridge (a position I have held since October 2004). I am also a Professorial Fellow of Emmanuel College, Cambridge. I am a graduate of Pembroke College Cambridge, where I studied law between 1983 and 1986. I was formerly a Lecturer in Law at Keele University (1987-1990), Research Fellow, Lecturer, Reader and Professor of Law at King's College, London (1991-2004). I have taught intellectual property law to undergraduates since 1989, and to masters students since 1991. I have held visiting fellowships at Murdoch University, Queensland University of Technology, the

University of New South Wales and was in 2007 Visiting Yong Shook Lin Professor at the National University of Singapore. In the spring semester of 2008, I will be a visiting BNL Professor of European law at Columbia University. A true and correct copy of my curriculum vitae is attached hereto as Exhibit A.

2. I am co-author (both with Brad Sherman) of Intellectual Property Law (Oxford, OUP, 2001; 2nd ed, 2004), a leading textbook on intellectual property law of some 1115 pages. The second edition has sold over 7000 copies. I am also co-author of The Making of Modern Intellectual Property Law - The British Experience, 1760-1911 (Cambridge: CUP, 1999) and the author of Between a Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market-Place (London: Institute of Employment Rights, 2002). I am co-editor (with Jennifer Davis and Jane Ginsburg) of Trade Marks and Brands: An Interdisciplinary Critique (Cambridge: CUP, 2008). I am, with Martin Kretschmer, co-director of an Arts and Humanities Research Council-funded resource enhancement project developing a digital resource of primary documents relating to copyright history from five jurisdictions (the US, UK, France, Germany and Italy).

3. I have been asked to provide this report by the Electronic Frontier Foundation, for use in relation to litigation between Explorologist Ltd. and Brian Sapien. I have reviewed a copy of the Amended Complaint filed by Explorologist Ltd. on 23 May 2007 and a Memorandum/Order made by The Honourable Louis H. Pollak and filed on 29 October 2007. I have been asked to provide expert guidance on the matters raised in that Memorandum/Order.

4. I have also seen the Expert Report of Professor Sir Hugh Laddie in connection with this matter, dated December 21, 2007. I have not discussed this case with

Professor Laddie. However, I am familiar with the authorities on which he relies, his reputation and work in the field, and I agree with his reasoning and conclusions. A true and correct copy of that Report is attached hereto as Exhibit B.

5. I have no commercial or other interest in the outcome of this litigation. I have never worked for or advised the Electronic Frontier Foundation in the past.

The Relevant Statutory Framework

6. The relevant legal framework governing copyright law in the United Kingdom is the Copyright, Designs and Patents Act 1988 (as amended). This defines the circumstances in which copyright subsists in a work (chapter 1 of the Act), who owns the copyright in a work, the scope of protection that copyright confers on its owner (chapter 3 of the Act) and exception and limitations on that protection (chapter 4 of the Act).

7. The 'rights of copyright owner' are defined in Chapter II, by reference to two broad notions 'The acts restricted by copyright' and 'secondary infringement'.

8. The acts restricted by copyright are defined in section 16, and further elaborated in sections 17-21. Section 16(1) states:

The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom-

- (a) to copy the work (see section 17);
- (b) to issue copies of the work to the public (see section 18);
- (ba) to rent or lend the work to the public (see section 18A);
- (c) to perform show or play the work in public (see section 19);
- (d) to communicate the work to the public (see section 20);

(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);

and those acts are referred to in this Part as the ‘acts restricted by the copyright.’

9. The restricted act of communication of the work to the public (section

16(1)(d)) is explained in section 20. It states:

(1) The communication to the public of the work is an act restricted by the copyright in –

(a) a literary, dramatic, musical or artistic work,

(b) a sound recording or film, or

(c) a broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include

(a) the broadcasting of the work;

(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.’

10. Section 16, sub-section(2) states that:

Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

11. Courts and commentators have provided further guidance on the meaning of many of these statutory concepts. In some cases the concepts have existed in the copyright law of the United Kingdom for some time. For example, the concept of ‘authorisation’ was introduced into the law of the United Kingdom by the Copyright Act 1911. Other concepts were introduced more recently. This is the case with the right to communicate the work to the public, which was introduced into UK law in October 2003 by Statutory Instrument, the Copyright and

Related Rights regulations 2003 (SI 2003/2498), reg 6.

Communication to the Public

12. The only judicial consideration of the new section 20 has been in *Polydor Ltd. v. Brown and others* [2005] EWHC 3191 (Ch). In this case six record companies brought an action for infringement of copyright against a Mr. Bowles. Bowles was using Nutella peer-to-peer software such that more than 400 audio files were accessible from his computer. The record companies sought summary judgment, claiming infringement under section 20 of the Act.

Bowles defended the action on the basis of that he did not know he was doing anything wrong or illegal. Mr. Justice Lawrence Collins granted summary judgment. He said:

7 Connecting a computer to the Internet, where the computer is running P2P software, and in which music files containing copies of the claimant's copyright works are placed in a shared directory, falls within the infringing act.

8 This is a primary act of copyright infringement, and it does not matter whether the person knows, or has reason to believe, that what they are doing is an infringement, because innocence or ignorance is no defence. The mere fact that the files were present and were made available is sufficient for the infringement under s.20 to have been committed.

9 Mr Bowles was an infringer by making the recording available to the public, and authorising the performance of the infringement. Mr Bowles had the Internet account; he admitted using the P2P software and he had control over the computer, and he has never denied that he installed the software on to the computer.

13. *Polydor Ltd v. Brown and Others* [2005] was a very straightforward case: Bowles held reproductions of works on his computer which was evidently in the United Kingdom, he installed the software that rendered these files accessible, and his computer was linked to the Internet through a service provided by NTL, a company based in the United Kingdom with its servers in the United Kingdom. All the acts that cumulatively resulted in the

sound recordings becoming accessible by the public from a place and at a time chosen by it were acts in the United Kingdom that were controlled by Bowles.

14. The question of the precise act (or acts) which constitute act of 'making available' has yet to be judicially considered.

15. Importantly for this case, section 16(1) indicates that the exclusive rights conferred on the copyright owner relate only to the doing of the relevant acts 'in the United Kingdom.' This means that for liability to be incurred the defendant's act must have taken place in the United Kingdom. The fact that a film can be accessed by persons based in the United Kingdom does not mean that the *act* of making available has occurred in the United Kingdom. Almost certainly, that act occurs in the country where the server is located.

16. Support for such an understanding might also be found in the analogous question of the location of the restricted act of 'broadcasting' (since 2003 a subset of the act of communication to the public). Here section 6(4) of the Act clarifies that:

For the purposes of this Part, the place from which a wireless broadcast is made is the place where, under the control and responsibility of the person making the broadcast, the programme-carrying signals are introduced into an uninterrupted chain of communication (including, in the case of a satellite transmission, the chain leading to the satellite and down to earth).

A leading commentary, *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 2005) para. 7-111, p. 442, explains:

These provisions make it clear that in the case of wireless transmissions, what matters for the purposes of infringement is the place from which the signals are first introduced into the chain of communication and not the fact that the signal may not be receivable in the United Kingdom therefore does not affect the broadcaster's potential liability under the 1988 Act if the chain of communication of the signal starts in the United Kingdom. By the

same token, the fact that a broadcast can be received in the United Kingdom does not mean that the restricted act of broadcasting is taking place in the United Kingdom.

Reasoning by analogy the same text concludes (at para. 7-117, p. 445) that, in relation to the making available right,

the place where the apparatus is situated and from where access to the work can be obtained is the place where the restricted act occurs.

17. For these reasons, and those given by Professor Laddie in his expert report, it is my opinion that the act of making available occurs in the country where the server is located from which the film can be accessed by Internet users.

Authorisation

18. There is considerable authority on the concept of authorisation, which appeared in section 1(2) of the Copyright Act 1956 and section 1(2) of the Copyright Act 1911.

19. The leading decision is that of the House of Lords in *CBS v Amstrad* [1988] 1 *Appeal Cases* 1013. The case concerned the manufacture and advertisement of a high-speed, twin, tape-to-tape cassette recorder. The plaintiff record companies alleged that the manufacture and advertising of the equipment amounted, *inter alia*, to 'authorizing' infringement of copyright in sound recordings. The House of Lords dismissed the claim. Lord Templeman, giving the only speech, stated that:

in the context of the Copyright Act 1956 an authorisation means a grant or purported grant, which may be express or implied, of the right to do the act complained of. *Amstrad* conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy.

20. There can be no liability for authorisation unless the act authorised is itself

an infringement. In *ABKCO Music v Music Collection International Ltd* [1995] *Reports of Patent Cases* 657, 660, Lord Justice Hoffmann (as he then was) observed that:

‘authorising’ is a tort only if the act authorised is an act restricted by the copyright.

This statement was adopted by Mr. Justice Laddie in *Nelson v. Rye* [1996] *Fleet Street Reports* 313, holding that there was no infringing authorisation because there was no act of infringement.

On the basis of these authorities, if You Tube is not infringing by making available the film in the United Kingdom, Sapient cannot be liable for authorisation.

21. Existing case-law indicates that, in certain circumstances, an act of authorisation from outside the UK of infringing acts in the UK can give rise to liability. In *ABKCO Music v Music Collection International Ltd* [1995] *Reports of Patent Cases* 657, the second defendant, Charly, had licensed the first defendant, Music Collection, to make and sell sound recordings of Sam Cooke in the United Kingdom. The second defendant was based in Denmark, and the question arose whether it was liable for authorization even though the act of authorization took place outside of the United Kingdom. The Court of Appeal held that it could.

Lord Hoffmann said:

In my view, the reason why section 16(2) places no limit upon the place of authorisation is that the requirements of territoriality are satisfied by the need for the act authorised to have been done within the United Kingdom.

Lord Justice Neill, who agreed with Lord Hoffmann, said:

It is plain that the ‘doer’ of a restricted act will infringe the copyright if, but only if, he does that act within the United Kingdom. The act, if committed outside the United Kingdom, would not be a restricted act.


I can, however, see no satisfactory basis for placing a similar territorial limitation on the liability of a person who 'authorises another to do' a restricted act. It is to be noted that authorising another to do a restricted act is not itself a restricted act....

I have no doubt that, on its proper construction, an authorisation given outside the United Kingdom to another to do a restricted act in the United Kingdom is an authorisation to which section 16(2) extends. The scope of the tort has a sufficient territorial limitation because the restricted act which is authorised has to be done within the United Kingdom.

22. The circumstances in *ABKCO Music v Music Collection International Ltd* [1995] *Reports of Patent Cases* 657 were, however, quite different from the circumstances in this case. In *ABKCO*, Charly gave a licence to Music Collection to do specified acts in identified territory where the acts licensed would, if done without proper authority, have been a clear infringement of relevant UK (and Irish) copyrights.

23. The House of Lords have given a clear indication that 'authorisation' means the grant or purported grant of *the right* to do an act. As the law conferring rights to control the use of works varies on a territorial basis, it is suggested that there is an implicit limit to the scope of the *ABKCO Music* decision. This limitation is that the parties must have specifically contemplated the doing of an act within the United Kingdom. If the parties contemplated the doing of an act only in the United States, there was no grant or purported grant of the right to do the act in the United Kingdom.

I declare under penalty of perjury that the foregoing is true and correct and that this document was executed in New York, New York on January 11, 2008.

By: 

Professor Lionel Bently

EXHIBIT A

CURRICULUM VITAE

A. PERSONAL

Name: Lionel Alexander Fiennes Bently

Date of Birth: 2 July 1964

Age: 43

Nationality: British Citizen

Work Address:

Centre for Intellectual Property and Information Law,
Faculty of Laws,
University of Cambridge
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B. EDUCATION

1973-82 Stamford School, Stamford, Lincolnshire

1983-86 Pembroke College, Cambridge B.A. (Law)

C EMPLOYMENT

1987-88 Research Assistant, Law Commission

1988-1990 Lecturer in Law, University of Keele

1990-91, Research Fellow, King's College, London

1991- 2000 Lecturer in Law, King's College, London (teaching intellectual property, property)

1998-9 Visiting Senior Research Fellow, Murdoch University

July/August 2000, Visiting Research Fellow, Queensland University of Technology

August-October 2002, Visiting Research Fellow, University of New South Wales

September 2002- 2004 Professor of Law, King's College, London

October 2004- Herchel Smith Professor of Intellectual Property Law, University of Cambridge; Director of Centre of Intellectual Property and Information Law, University of Cambridge; Professorial Fellow, Emmanuel College, Cambridge

August-Sept 2007, Yong Shook Lin Visiting professor, National University of Singapore

January-April 2008, BNL Visiting Professor of European Law, Columbia University

D. ADMINISTRATION

Faculty Board, Faculty of Law, University of Cambridge (2006-)
Resources Committee, Faculty of Law, University of Cambridge (2005-)
Degree Committee, Faculty of Law, University of Cambridge (2004-)
Lecture List Committee, Faculty of Law, University of Cambridge (2006-)
Director of Studies in Law (Part II and IB), Emmanuel College, 2006-7
Fellowship Committee, Emmanuel College, Cambridge (2005-)
Research Fellowship Committee, Emmanuel College, Cambridge (2005-)
Deputy Head, Examinations Board, School of Law, King's College, London (2003- 4)
Deputy Associate Head, Undergraduate Admissions, School of Law, King's College, London (1999-2002)
College External Affairs Committee, King's College, London (1999-2002)
College Admission Committee, King's College, London (2001-2002)
Equal Opportunities Committee School of Law, King's College, London (1999-2002)
Teaching Committee, School of Law, King's College, London (1999-2002)
Research Committee, School of Law, King's College, London (1992- 1997)
College Library Advisory Committee, King's College, London (1993-1997)

Ph.D Examination: Bankole Sodipo, QMW 1995; Spyros Maniatis, QMW 1999; Ronan Deazley, Queen's Belfast, 2000; V. Golynger, Leicester 2003/2005(resubmission); W. v. Caenegem, University of Cambridge, 2004; Baljit Dhadda, Birkbeck College, London, 2004; Giuseppina D'Agostino, University of Oxford, 2004; Catherine Ng, University of Oxford, 2004; Melissa de Zwart, Monash University, 2005; Christopher Wadlow, University of Cambridge, 2005; Isabella Alexander, University of Cambridge, 2005; Shiva Thambisetty, University of Oxford, 2006; Aura Soininen, Lappeenranta University, Finland, March 2007; Dev Gangjee, University of Oxford, December 2007.

E. DOCTORAL SUPERVISION

Johnson Okpaluba, Music, Technology and Copyright, (University of London, 1994-2000).
Belinda Mills/Isaac, Legal Protection of Brands (University of London, 1997-2000)
Keith Lupton, The History of Patent Privileges (University of London, External, 1998-2000)
Despina Samara, Parallel Importation and the Pharmaceuticals Industry (University of London, 2001-2005)
Sharon Legall, Protection of Traditional Knowledge: The Steel Pan in Trinidad (2004-)
Chikosa Banda, Using Intellectual Property Mechanisms to Promote the Development of Drugs Useful in Developing Countries (2005-)
Eleanor Cooper, History of Artistic Copyright (2006-)
Patrick Masiyakurima, Copyright in unpublished Works (2007-)

F. MISCELLANEOUS

Associate, Australian Centre for Intellectual Property in Agriculture, A.N.U., Canberra

Member, ITER, Sophistication vs. Transparency, International Network (2002-4), organised by University of Nijmegen/University of Amsterdam; Member, Wittem Group on European Copyright Code (2004-)

Member, AHRB Copyright Network, organised by Birkbeck College, London (2003-6)

Series Editor, *Cambridge Studies in Intellectual Property* (CUP)

Editorial Board, *European Intellectual Property Review*

Editorial Board, *Script-ed*, on-line publication, University of Edinburgh

Executive Committee, British Literary and Artistic Copyright Association (2006-)

(responsible for academic programme for ALAI 2009)

Council Member, Intellectual Property Institute (2004-)

Principal Investigator, AHRC Resource Enhancement Project, Primary Materials

Relating to the History of Copyright (1450-1900) in 5 Jurisdictions (with. M.Kretschmer, Bournemouth University) (value: £300,000)

Lecturer, Darwin Lecture Series, Darwin College, University of Cambridge (2007) (on Identity)

Lecturer, Annual Manges Lecture at Columbia University (2007)

SELECTED PUBLICATIONS

Books:

- The Making of Modern Intellectual Property Law (with Brad Sherman)
(Cambridge: Cambridge University Press, 1999)
- Intellectual Property Law (with Brad Sherman) (Oxford, Oxford University Press, 2001) (2nd ed, 2004; 3d. ed, 2008)
- Between a Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market Place (London: Institute for Employment Rights, 2002)
- Performers Rights: Options for Reform to the Interdepartmental Committee of the Australian Government (1996; with Brad Sherman)

Edited Books:

- Trade Marks and Brands: An Interdisciplinary Critique (Cambridge: CUP, 2008, forthcoming) (manuscript submitted) (ed. With Jane C. Ginsburg, Jennifer Davis)
- Intellectual Property in the New Millennium: Essays in Honour of Professor W.R. Cornish (eds. L. Bently & D. Vaver) (Cambridge: CUP, 2004)
- Law and the Senses: Sensational Jurisprudence (Eds. L.Bently & L.Flynn)
(London: Pluto, 1996).
- Intellectual Property and Ethics, Perspectives on Intellectual Property (Vol.IV)
(Eds. L.Bently & S. Maniatis) (London: Sweet & Maxwell, 1998)

Articles and Contributions to Edited Books:

- ‘Law and Identity’ in E. Needham-Green (ed), Identity (Darwin Lecture series)
(Cambridge: CUP) (manuscript with editor)
- ‘From communication to thing: historical aspects of the conceptualisation of trade marks as property’ in G. Dinwoodie & M. Janis, Trademark Law and Theory: A Handbook of Contemporary Research (Cheltenham: Edward Elgar, 2008, forthcoming)
- ‘The Making of Modern Trade Marks Law: The Construction of the Legal Concept of Trade Mark (1860-80)’ in L. Bently, Jane C. Ginsburg, Jennifer Davis (eds.) Trade Marks and Brands: An Interdisciplinary Critique (Cambridge: CUP, 2008, forthcoming) (manuscript submitted to publisher)
- ‘Authorship of Popular Music in UK Copyright Law’ (2008) *Information, Communication and Society* (special issue).
- ‘Copyright, Translations, and Relations Between Britain and India in the nineteenth and early twentieth centuries’ (2007) 82(3) *Chicago-Kent Law Review* 1181-1240
- ‘The Impact of European Geographical Indications on National Rights in Member States’ (2006) 96 *Trademark Reporter* 850-905 (with Brad Sherman)

‘Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia’ (2004) 38 *Loyola Los Angeles Law Review* 71-176

‘Art and the Making of Modern Copyright Law’ in D.McLean & K.Schubert, Dear Images: Art, Copyright and Culture (London: ICA/Ridinghouse, 2002)

‘Great Britain and the Signing of the Berne Convention in 1886’ (with B. Sherman) (2001) 48 *Journal of the Copyright Society of the USA* 311-340

‘Visuality and Textuality in Nineteenth Century Intellectual Property Law’, *Intellectual Property Forum* (Journal of the Intellectual Property Society of Australia and New Zealand) (Issue 29, May 1997) 28-33

‘The UK's Forgotten Utility Model: The Utility Designs Act 1843’ (1997) 3 *Intellectual Property Quarterly* 267-78 (with B.Sherman)

‘Requiem for Registration? Reflections on the History of the The UK Registered Design System’ in A.Firth (ed), Perspectives on Intellectual Property Vol 1: The Prehistory of Intellectual Property Law 1-48 (London: Sweet & Maxwell, 1996)

‘Copyright and the Death of the Author in Law and Literature’ (1994) 57 *Modern Law Review* 973-986

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXPLOROLOGIST LIMITED	}	Civ. No. 2:07-cv-01848-LP
	}	
Plaintiff,	}	
	}	The Honorable
	}	Louis H. Pollak
	}	
	}	
v.	}	
	}	
BRIAN SAPIENT a/k/a BRIAN J. CUTLER	}	
_____	}	

EXPERT REPORT OF
PROFESSOR SIR HUGH LADDIE
PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE
44.1

I, Professor Sir Hugh Ian Lang Laddie Q.C., of 11th Floor, Exchange Tower, 1 Harbour Exchange Square, London, E14 9GE say as follows:

Introduction:

1. I am a graduate of St Catharine's College, Cambridge where I read Natural Sciences and Law. I was called to the Bar of England and Wales in 1969. For over 25 years I practised as a barrister in England specialising in intellectual property law including, copyright law. I was Junior Counsel to HM Treasury in Patent, Design and Trade Mark Matters from 1981 to 1986 which means that I represented the British Government and

the British Patent Office in all areas of Intellectual Property Law litigation. I was appointed a Queens Counsel in 1986. During my time at the Bar, I appeared as Counsel in many copyright cases. In 1992 I was appointed Vice Chairman of the Copyright Tribunal, a statutory body which settles disputes between copyright collecting societies and users of copyright works over the level of royalties the latter should pay. In May 1995 I was appointed as a judge of the High Court of Justice, Chancery Division, for England and Wales. Within that Division, I was assigned to the Patents Court of which latterly I was the senior judge. Although patent and registered design cases have to be assigned to the Patents court, whereas trade mark and copyright cases can be assigned to any judge in the Chancery Division, in practice most trade mark and copyright cases are assigned to judges of the Patents Court. I heard and determined a number of major copyright actions during my time on the Bench. I resigned my judicial post in 2005. Since then I have been engaged as a consultant by Rouse & Co International, a firm of English solicitors specialising in Intellectual Property Law. I was appointed a Visiting Professorial Fellow by Queen Mary, University of London in 2005. In 2006 I was appointed to the Chair in Intellectual Property Law by University College London. I am Vice-President of the Intellectual Property Institute, London.

2. I have lectured extensively on intellectual property law, including copyright law, both in the United Kingdom and abroad. I have undertaken judicial training programmes on behalf of WIPO and the European Union for judges from the Caribbean, the Middle East, India, Eastern Europe and China. I was the Assistant Editor in Chief of *The Annual of Industrial Property Law* from 1975-1979 and the UK Correspondent for the *European Law Review* from 1978-1983. I am also a co-author of *The Modern Law of*

Copyright and Designs, the third edition of which was published by Butterworths in 2000.

3. I have been asked provide this report by Google Inc. for use in relation to litigation between Explorologist Limited and Brian Sapient currently taking place in the United States District Court for the Eastern District of Pennsylvania. I have been shown a copy of a Memorandum/Order made by The Honorable Louis H Pollak and filed on 29 October 2007. As I understand it, the judge has allowed the parties to file expert evidence on the issue of whether, as a matter of United Kingdom law, it can be an infringement of British copyright for a party to authorise another to carry out an activity, where that activity takes place outside the United Kingdom. I have also been shown a copy of the Plaintiff's Amended Complaint dated 23 May, 2007.
4. I have no commercial or other interest in Google or the outcome of this litigation. I have never worked for or advised Google in the past. I understand that Rouse & Co International has acted for Google mainly in relation to international trade mark registration and enforcement. I have never been involved in that work or consulted in relation to it.
5. For many decades, copyright in the United Kingdom has been an entirely statutory creation. The current legislation is the Copyright, Designs and Patents Act 1988 as amended (hereinafter the "Act"). It is this Act which defines when and under what circumstances copyright comes into existence, the term and ownership of copyright and those acts which constitute infringement of the rights. Although, because of our adherence to a number of international Treaties, it is possible for foreign authors to

obtain full copyright protection in the United Kingdom, the Act is concerned only with the creation of copyright within the United Kingdom.

6. The basic structure of this legislation is quite simple. Chapter I of the Act, which covers sections 1 to 15, is concerned with the subsistence, ownership and duration of copyright. Section 1(1) provides that “copyright is a property right which subsists in accordance with this Part [of the Act]” in various types of work, including films.

7. The nature of that property right is indicated by s. 2(1) which is in the following terms:

“The owner of the copyright in a work of any description has the exclusive right to do the acts specified in Chapter II as the acts restricted by the copyright in a work of that description.”

8. Thus, since the legislation defines the existence and limits on the rights bestowed on the copyright owner, the exclusive rights are only those specified in Chapter II of the Act.

9. Chapter II of the Act, which covers sections 16 to 27, sets out the rights of the copyright owner. It is these sections which determine what activities constitute infringements of the statutory rights created by the Act. In particular, section 16 can be split into two parts; section 16(1) stipulates what kinds of dealings with a copyright work will be treated as infringements if not licensed and section 16(2) stipulates who can be held responsible for those infringing dealings. These two subsections are in the following terms:

“16 The acts restricted by copyright in a work

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom –

(a) to copy the work (see section 17);

(b) to issue copies of the work to the public (see section 18);

(ba) to rent or lend the work to the public (see section 19);

(c) to perform, show or play the work in public (see section 19);

(d) to communicate the work to the public (see section 20);

(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21)

and those acts are referred to in this Part as the “acts restricted by the copyright”.

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.”

10. It can be seen that section 16(1) is consistent with section 1(1). The latter only creates rights within the United Kingdom and the former says that only dealings within the United Kingdom can constitute infringements of those rights. Section 16(2) then indicates who can be held responsible for those infringements. This covers not only the primary actor but also anyone who “authorises” the primary actor. Whatever the scope

of the concept of “authorising”¹, no one can be liable under this head unless what is authorised is itself an infringement. Thus a finding of infringement through authorisation is dependent upon there being a finding that the person who was authorised committed an infringement of United Kingdom copyright by performing, in the United Kingdom, one of the activities set out in section 16(1).

11. As far as I can find, there is no reported case in which a litigant has argued that the Act covers activities carried on outside the jurisdiction of the UK courts. However the issue was considered by the Court of Appeal in the course of its decision in *ABKCO Music & Records Inc. v Music Collection International Limited* [1995] R.P.C. 657. In that case the issue in dispute was whether the Act covered authorisation outside the jurisdiction of acts of infringement within it. The analysis of the legislation included the following: per Lord Justice Hoffmann²:

“There is a striking contrast between section 16(1) which limits the acts restricted by the copyright to acts done in the United Kingdom, and section 16(2) which contains no territorial limit on where the doing of those acts may be authorised. Mr. Miller³ however relied upon the general principle that, in the absence of express words or plain implication, United Kingdom statutes do not apply to the acts of foreigners outside the United Kingdom, see: *Clark*

¹ The leading authority on this is the decision of our House of Lords in *CBS Songs Limited v Amstrad Consumer Electronics Plc* [1988] RPC 567 which gives a rather narrow scope to this type of liability. In that case the following explanation of what is encompassed by authorising was cited with approval: “an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.”

² Now Lord Hoffmann.

³ Counsel for the Second Defendant who was arguing that both the act of infringement and authorising had to take place in the United Kingdom.

(Inspector of Taxes) v. Oceanic Contractors Inc. [1983] 2 A.C. 130, especially per Lord Scarman at pages 144 to 145. ...

In my view, the reason why section 16(2) places no limit upon the place of authorisation is that the requirements of territoriality are satisfied by the need for the act authorised to have been done within the United Kingdom." (emphasis added)

12. Similarly, Lord Justice Neill put the matter as follows:

"Chapter II of the 1988 Act is concerned with the rights of a copyright owner. Section 16(1) confers on the owner of the copyright in a work the exclusive right to do certain acts in relation to that work in the United Kingdom. These acts, which are set out in paragraphs (a) to (e) in section 16(1) and are more particularly described in sections 17 to 21, are referred to in Part I of the 1988 Act as "acts restricted by the copyright". Sections 22 to 26 of the 1988 Act contain provisions relating to secondary infringements of the copyright in a work.

It is clear that the rights conferred by section 16(1) are rights which protect the copyright only insofar as they are exercised in the United Kingdom. "Acts restricted by the copyright", if done without the licence of the owner of the copyright, constitute infringements. These infringements are confined within the same geographical limits as the owner's exclusive rights.

I turn therefore to section 16(2) which is in these terms:

“Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.”

It is plain that the “doer” of a restricted act will infringe the copyright if, but only if, he does that act within the United Kingdom. The act, if committed outside the United Kingdom, would not be a restricted act.

I can, however, see no satisfactory basis for placing a similar territorial limitation on the liability of a person who “authorises another to do” a restricted act. It is to be noted that authorising another to do a restricted act is not itself a restricted act.” (emphasis added)

13. It follows from this that if the primary acts of which the plaintiff complains took place outside the United Kingdom there cannot be infringement of British copyright. Alleging authorisation makes no difference to this. It is not an infringement to authorise a non-infringing activity.
14. Up to this point I have only commented on the point raised specifically by Judge Pollak on page 3 of his Memorandum/Order. However consideration of the Plaintiff’s Amended Complaint highlights problems with the claims made.
15. In paragraph 4 of the Amended Complaint, the Plaintiff makes it clear that its claim is brought under United Kingdom copyright law. The acts of alleged infringement are those set out in paragraphs 10 and 11 of that document. In paragraph 10 it is alleged (i) that the Defendant did “digitally up-load upon the website of the domain name

www.youtube.com” certain images from the film in which United Kingdom copyright is said to exist and (ii) that such images were downloaded by member of the United Kingdom public. The first of these activities must have occurred wherever the YouTube server was located, that is to say, outside the United Kingdom. Up-loading was an action for which the Defendant was responsible. The second allegation appears to be concerned with actions by members of the United Kingdom public.

16. As I understand it, Paragraph 11 of the Amended Complaint then identifies which particular types of infringement of United Kingdom copyright are alleged to have been committed. First it is said that the Defendant has infringed by “making a copy of the film”. This would fall within section 16(1)(a) of the Act. This clearly is a reference to the digital up-load onto the YouTube site referred to in paragraph 10 of the Amended Complaint. When the Defendant up-loaded to that site he caused a copy of the material to be created on the server. However that was done wherever the YouTube server is located. Since that is outside the United Kingdom, for the reasons set out above it cannot constitute an infringement of United Kingdom copyright.

17. The second type of infringement alleged is said to be “causing the Film, in so far as it consists of visual images, to be seen and heard in public within the United Kingdom”. In fact there is no such form of infringement under our law and I assume that what is meant to be covered is “communicating the work to the public”, as dealt with by section 16(1)(d) of the Act. The latter cross-refers to section 20 which, insofar as material, provides:

“20 Infringement by communication to the public

(1) The communication to the public of the work is an act restricted by the copyright in -

(b) a ... film ..

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include-

(b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”

18. The difference between “causing the film to be seen and heard” as referred to in the Amended Complaint and “making available to the public” in the Act is significant. The wording used by the Plaintiff suggests that the Defendant has caused something to happen in the United Kingdom. But what the Act proscribes is the act of “making available to the public”. We know from section 16(1) that that activity must take place in the United Kingdom. Although, so far as I am aware, there is no decided authority on the point in United Kingdom, I think it is clear that “making available to the public” refers to activity which exposes the copyright material to access by members of the public. It is not necessary for the copyright owner to wait until a member of the public somewhere has taken advantage of the opportunity presented to him. All that is necessary is to show that the material is available. If this is so, then that is something which happens when the material is placed on the server, not when it is accessed. It is something which, in this case, occurred outside the United Kingdom. Once again, for reasons set out above, it cannot be an infringement of United Kingdom copyright. If

that is so, then once again authorisation of such non-infringing activity cannot itself be an act of infringement under the Act.

19. It seems to me that the difficulties created by inviting the District Court to enforce United Kingdom copyright law are to be seen elsewhere in the Amended Complaint. As has been pointed out above, in the United Kingdom copyright is entirely a creation of statute. Not only does the Act define what copyrights exist, their scope and term but it also defines what remedies are available for their infringement. The latter topic is covered in Chapter VI of the Act which covers sections 96 to 115. It is to be noticed that in the Amended Complaint the Plaintiff seeks treble damages and punitive damages yet no such damages are available under our Act.

Date: December 21, 2007

London, England



Professor Sir Hugh Laddie

EXHIBIT 2

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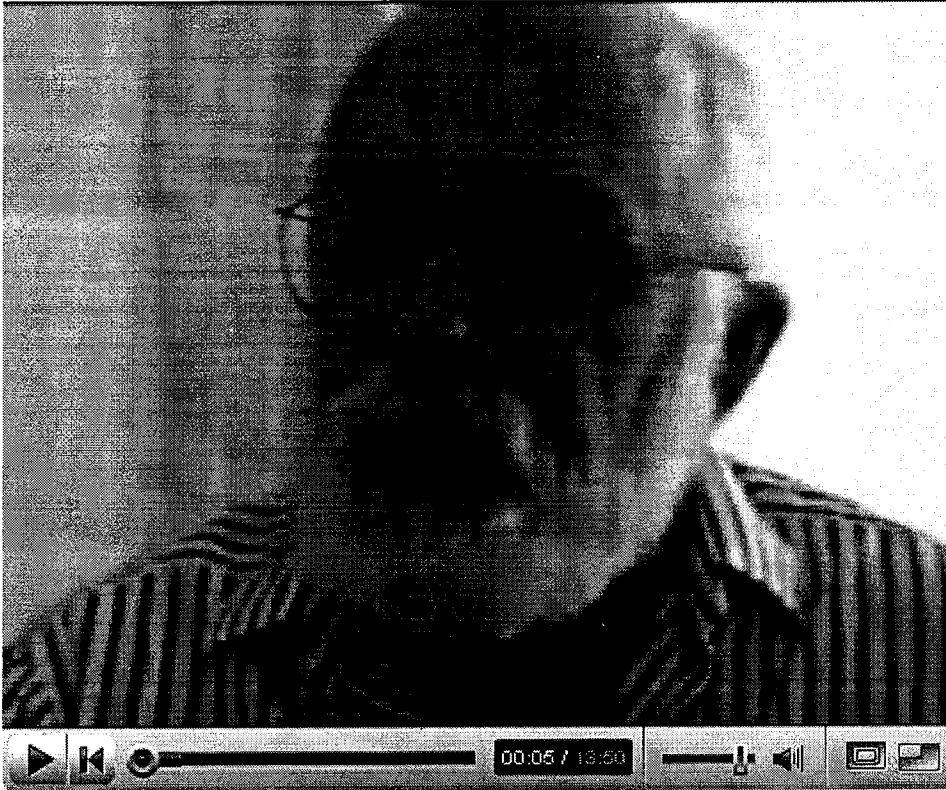
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EXHIBIT 3

California Business Portal

Secretary of State DEBRA BOWEN

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YOUTUBE, INC.		
Number: C2785845	Date Filed: 10/14/2005	Status: surrender
Jurisdiction: DELAWARE		
Address		
1000 CHERRY AVE		
SAN BRUNO, CA 94066		
Agent for Service of Process		
CORPORATION SERVICE COMPANY WHICH WILL DO BUSINESS IN CALIFORNIA AS CSC - LAWYERS INCORPORATING SERVICE		
PO BOX 526036		
SACRAMENTO, CA 95852		

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