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1 UNITED STATES DISTRICT COURT
 1 SOUTHERN DISTRICT OF NEW YORK
 2 -----x
 3 THE FOOTBALL ASSOCIATION
 3 PREMIER LEAGUE, BOURNE CO,
 4 (together with its affiliate
 4 MURBO MUSIC PUBLISHING, INC.,
 5 CHERRY LANE MUSIC PUBLISHING
 5 CO., INC., CAL IV
 6 ENTERTAINMENT, LLC, ROBERT TUR
 6 d/b/a LOS ANGELES NEWS
 7 SERVICE, NATIONAL MUSIC
 7 PUBLISHERS ASSOCIATION, THE
 8 RODGERS & HAMMERSTEIN
 8 ORGANIZATION, STAGE THREE
 9 MUSIC (US), INC., EDWARD B.
 9 MARKS MUSIC COMPANY, FREDDY
 10 BEINSTOCK MUSIC COMPANY d/b/a
 10 BIENSTOCK PUBLISHING COMPANY,
 11 ALLEY MUSIC CORPORATION, X-RAY
 11 DOG MUSIC, INC., FEDERATION
 12 FRANCAISE DE TENNIS, THE
 12 SCOTTISH PREMIER LEAGUE
 13 LIMITED, THE MUSIC FORCE MEDIA
 13 GROUP, LLC, THE MUSIC FORCE,
 14 LLC, and SINDROME RECORDS,
 14 LTD., on behalf of themselves
 15 and all others similarly
 15 situated,

Plaintiffs,

v.

07 CV 3582 (LLS)

18 YOUTUBE, INC., YOUTUBE, LLC
18 and GOOGLE, INC.,

Defendants.

19 -----x

New York, N.Y.

21 July 15, 2008
22 3:10 p.m.

22 Before:

24 HON. LOUIS L. STANTON,

District Judge

24 SOUTHERN DISTRICT REPORTERS, P.C.
25 (212) 805-0300

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APPEARANCES

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1 (In open court; case called)
2 THE DEPUTY CLERK: The Football Association v.
3 YouTube. Is plaintiff ready?
4 MR. SOLOMON: Yes.
5 THE COURT: Defendants ready?
6 MR. SCHAPIRO: Yes.
7 THE COURT: You may be seated.
8 MR. SCHAPIRO: Your Honor, paragraph 14 of the
9 protective order that governs the exchange of confidential and
10 highly confidential documents in this case states in part, I'm
11 reading from the final sentence of paragraph 14 of the
12 protective order says: "In particular, neither confidential
13 nor highly confidential, nor any copies and/or extracts thereof
14 nor anything derived therefrom shall be disclosed in any way to
15 any person, attorney, government agency, or expert for use in
16 any other litigation or contemplated litigation or for any
17 other purpose extraneous to this litigation."
18 By the way, paragraph 14 from which I read
19 specifically identifies the case numbers and names, the docket
20 numbers and names of the cases before your Honor here in the
21 Southern District as being the cases at issue.
22 THE COURT: Mr. Schapiro, if you get a reversal in the
23 Ninth Circuit and they say, surely, the district court should
24 have entered summary judgment for the defendants, what are you
25 going to do with that judgment?

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1 in a case where we give them notice in advance, I think we
2 ought to be found to have complied with the order or, at a
3 minimum, find some way to allow us to file our motion in the
4 Ninth Circuit. Thank you, Judge.

5 THE COURT: Thank you, counsel. I am prepared to rule
6 on these matters, and it seems to me that the ruling should
7 start where the arguments close, which is with the last
8 sentence of paragraph 14 of the protective order. "In
9 particular, neither confidential nor highly confidential, nor
10 any copies and/or extracts thereof nor anything derived
11 therefrom shall be disclosed in any way to any person,
12 attorney, government agency, or expert, for use in any other
13 litigation or contemplated litigation or for any other purpose
14 extraneous to this litigation."

15 Now, that hints at the central underlying question on
16 this application, which is whether the Tur case in the Ninth
17 Circuit is effectively this case, so that disclosure to
18 Mr. Pizzulli for him to use in the Ninth Circuit was
19 permissible under paragraph 2a of the protective order, which
20 permits disclosure to "outside counsel retained by a party for
21 representation in this case." And then the language goes on.

22 Now, the parties and the claims in the Tur case
23 include -- I'm sorry, in this case include the parties and the
24 claims in the Tur case, but the two cases are separate. They
25 were separately commenced in separate jurisdictions. The Tur

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1 case was discontinued for the purpose of gaining efficiency of
2 combining the litigation of its claims here. There is a
3 proceeding in the Ninth Circuit in the Tur case which is not a
4 proceeding in this case, and, of course, a judgment rendered in
5 the appeal of the Tur case may have res judicata or estoppel
6 effect here in this case, but that is true of judgments
7 rendered in other courts in separate cases all the time.

8 This case is meticulously defined in paragraph 14 of
9 the protective order, and it does not include the Tur action in
10 the Ninth Circuit. So, Mr. Pizzulli's retainer in the Tur
11 action is not of itself a retainer in this action, nor does
12 anything of record in this action indicate that he has been
13 retained or could be retained in this action. Neither his name
14 nor his firm appear as signatories to the protective order. In
15 that order, Tur is represented by Proskauer Rose and Bernstein
16 Litowitz. Mr. Pizzulli has not filed a notice of appearance
17 nor sought to appear pro hac vice in this action.

18 From a check of the records this morning, he does not
19 appear to be a member of either the New York State bar or the
20 bar of this court. Under the circumstances, Mr. Solomon's
21 statement in his July 15 letter to this Court that I quote
22 "Francis Pizzulli is acting as co-counsel for Tur in this
23 action" and "has been expressly retained for this action" seems
24 to be too cavalier a view of the words in paragraph 2a
25 "retained for representation in this case."

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1 The better view is that expressed in Mr. Schapiro's
2 July 14 letter to the Court where he says at page 2: "The
3 protective order is clear about the set of attorneys entitled
4 to receive material designated as confidential. Outside
5 counsel retained by a party for representation in this case"
6 quoting the protective order.
7 Mr. Pizzulli represents Mr. Tur in the Ninth Circuit,
8 but he is not counsel in the cases pending before this Court.
9 He is, therefore, not covered by the protective order. Then he
10 starts another paragraph. "Class plaintiffs suggested in
11 communications over the weekend that Mr. Pizzulli should be
12 considered counsel in this case because, according to class
13 counsel, Mr. Pizzulli is advising Mr. Tur about this case.
14 That reading of the protective order is unsustainable. It
15 would allow the several firms of record in this case to share
16 information with any non-record counsel they want on the theory
17 that those lawyers' views might be helpful. The parties' most
18 sensitive information could be circulating at dozens of firms.
19 Some of those firms, like Mr. Pizzulli's, might have other
20 active cases against one or more parties in this litigation."
21 I think that expresses the better view of this situation.
22 Now, Mr. Schapiro goes further and concludes that:
23 "The disclosure of the documents to Mr. Pizzulli is a breach of
24 the protective order, plain and simple."
25 I do not think that the question is plain or simple,

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1 but I agree it was a breach of the protective order. It
2 follows that Mr. Solomon's view expressed in his July 14 letter
3 to the Court that the protective order allows the appeal in the
4 Ninth Circuit to be treated as part of this case is also wrong.
5 Thus, filing the documents in the Court of Appeals for the
6 Ninth Circuit was in breach of the protective order. The fact
7 that plaintiffs disclosed their proposed finding in advance
8 showing the documents intended to be used and received no
9 objection on grounds of confidentiality, until much later in
10 the story, weighs heavily in the plaintiff's favor. It would
11 be a complete answer if they had made clear that the documents
12 had been designated as confidential under the protective order
13 and asked for and sent under that order.

14 I do not have nor seek the power to tell the Court of
15 Appeals for the Ninth Circuit what materials they may admit to
16 be filed in the matters before them, and I am reluctant to tell
17 the parties to that appeal how to conduct it in that court.

18 I do authorize and direct counsel in this case to
19 inform the Court of Appeals for the Ninth Circuit that I have
20 ruled that disclosure of the documents to Mr. Pizzulli and
21 filed them with the Court of Appeals for the Ninth Circuit were
22 both in breach of the protective order.

23 I think that disposes of that part of the application.

24 I'm prepared to hear the parties and rule on the
25 question of de-designation of the documents if you want to

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1 proceed with that. Otherwise, I'll await the completion of
2 whatever other proceedings there are in that respect to going
3 forward under the protective order.

4 MR. SCHAPIRO: Just to clarify, your Honor, before we
5 get --

6 MR. SOLOMON: No, I wasn't going there. Judge, with
7 all due respect, we apologize. We thought that what we were
8 doing was appropriate, and we will re-double our efforts to
9 make sure that it doesn't happen again. If your Honor's order
10 of July 1st was an issue of confidentiality, we spent the last
11 two weeks negotiating a stipulation sensitive to the Google
12 view of confidentiality, and on behalf of my firm, I apologize.

13 I will point out to the Court that in the covering
14 e-mail from Mr. Gitterman which asks -- sent the documents, we
15 did ask them to let us know whether you consent to our motion
16 and seek to file the documents under seal, and it was our
17 effort to disclose to them that these were confidential
18 documents, as were all the documents --

19 THE COURT: I read that language, of course, Mr.
20 Solomon, and to my mind it does not advise the recipient of the
21 communication that his side had already designated these
22 documents pursuant to the protective order or asked their
23 express consent that the provisions of the protective order be
24 waived in that respect.

25 MR. SOLOMON: The documents themselves do say that,
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1 Judge, but we are fully admonished and wish to apologize again.

2 THE COURT: As both sides have recognized frequently,
3 these are matters of moment and consequence, and, in many
4 cases, of high sensitivity, and one must construe the
5 protective order accordingly and be very leery about unilateral
6 constructions in the parties's own favor being relied on
7 without clearing with the other side.

8 MR. SCHAPIRO: Your Honor, just one other thing.
9 Paragraph 16 of the protective order which deals with
10 inadvertent disclosure --

11 THE COURT: Yes.

12 MR. SCHAPIRO: -- details some procedures that should
13 be followed, and we would ask that those be followed. Meaning,
14 we would just like to know in the form described in paragraph
15 16, or any other form that the Court directs, with whom, if
16 anyone, Mr. Pizzulli shared the documents --

17 THE COURT: I would be loathe to embark on those
18 procedures without having first some sense of what makes these
19 documents so confidential.

20 MR. COFFEY: If I may, your Honor, I was actually
21 going to suggest that it would be unnecessary to embark on the
22 course suggested by Mr. Schapiro if at the end of the day your
23 Honor were to conclude, as I think there's ample basis to
24 conclude, that these documents should not be confidential. We
25 are not talking about source code. We're not talking about

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