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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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3 THE FOOTBALL ASSOCIATION
3 PREMIER LEAGUE LIMITED,
4 et al.,

4
5 Plaintiffs,

6 v.

07 Civ. 3582 (LLS)

6
7 YOUTUBE, INC., et al.,

Conference

8 Defendants.

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9 -----x

9
10 New York, N.Y.
10 August 1, 2008
11 3:45 p.m.

11 Before:

12 HON. LOUIS L. STANTON

13 District Judge

14
15 APPEARANCES

16
17 PROSKAUER ROSE LLP
18 Attorneys for class plaintiffs
18 LOUIS M. SOLOMON, ESQ.

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19 BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP
20 Attorneys for class plaintiffs
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1 (Case called)
2 THE COURT: Good afternoon. Welcome back. Mr.
3 Solomon?
4 MR. SOLOMON: Good afternoon, your Honor. Louis
5 Solomon. If your Honor has our papers, I will be relatively
6 brief.
7 We believe that there are two issues this afternoon.
8 One we left with the last time we were here, and that is
9 whether the documents, the ten documents that we now have that
10 have been down-designated from highly confidential -- they were
11 all highly confidential -- to confidential can be used in the
12 Ninth Circuit appeal, and for that we need them down-designated
13 to nothing.
14 The first question, which I'll take up second, is is
15 there any confidential information in there and have the
16 defendants here, who have the burden of proof, satisfied their
17 showing, their burden, that there is a particularized,
18 concrete, serious injury that would flow from the disclosure of
19 those documents?
20 Another issue has been raised which I would address
21 briefly, and is that in the papers filed by the defendants, is
22 that somehow the protective order in this case has waived our
23 right to seek application of Rule 26. Defendants take the
24 position that the sole province for the Court now is to decide
25 whether paragraph 1 of the confidentiality order applies.

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1 were all designated as highly confidential. It's completely
2 inappropriate for them to have been designated like that.

3 Now that they have gone down to confidential, we have
4 the right under our protective order to ask them to
5 de-designate them. They have refused. And under the
6 protective order we have the right to come and ask your Honor
7 to de-designate them, to find that they are not entitled to be
8 classified as they have classified them.

9 I can understand why Mr. Shapiro doesn't want to
10 address that issue, but that is the burden of the application
11 that we have made. We have done what they have not done and
12 for each and every document showed how they don't carry their
13 burden of proof. Thank you.

14 MR. SHAPIRO: Your Honor, I just want to address a few
15 things. First of all, it's my understanding -- it's true I'm
16 not counsel in Tur -- that Mr. Tur did seek to take
17 depositions. He did not promulgate a single document request.
18 If I'm wrong, I'm sure I'll be corrected. But he didn't ask
19 for documents. Now he is saying, I've got some documents that
20 I'd like the Court to see.

21 One thing I'd like to make very clear is that under
22 the protective order as written, a document that is designated
23 confidential can be used for almost any purpose in this
24 litigation, pretty much anything except going into the public
25 domain. Then there was what your Honor saw as a close call,

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1 the issue of using it in a case that the other side argued is
2 related, is arguably related at some level of generality. Of
3 course it is.

4 So the fact that these documents are designated as
5 confidential places very little burden on either party. They
6 can be shared with in-house lawyers. They can be shared with
7 outside lawyers. They can be shared with experts. They can be
8 submitted to the Court here. They can be used in litigation
9 here.

10 So confidential as negotiated by the parties is a
11 pretty low standard. We would think it would be a significant
12 step to remove even that designation from the documents.

13 THE COURT: Then why should they be sealed in the
14 Ninth Circuit?

15 MR. SHAPIRO: We believe they are covered by the
16 protective order.

17 THE COURT: They are treated as confidential, but, as
18 you have just said, under one of the paragraphs in the
19 confidentiality order they can be used in pretrial proceedings
20 here.

21 MR. SHAPIRO: Yes.

22 THE COURT: Why couldn't they in this case -- I don't
23 mean in this case -- in this instance be used equally in the
24 Ninth Circuit without being specially sealed?

25 MR. SHAPIRO: They would be sealed here, your Honor.

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1 negotiated definition of confidential documents in paragraph 1,
2 and it wouldn't be unduly burdensome for them to seek to seal
3 it in the Ninth Circuit.

4 THE COURT: Thank you, gentlemen.

5 MR. SOLOMON: Thank you, Judge.

6 THE COURT: I think the matter has been fully
7 ventilated. I think that it is a situation where the
8 distinction between dicta and holdings is useful to observe.
9 For the purposes of this case, what you need is a holding. I
10 think that the embellishment of the holding by dicta might do
11 much more harm than good.

12 I've read all your papers; I've read the documents and
13 the analysis offered by the plaintiffs, which is not countered
14 by any similar analysis on the part of the defendants; and I've
15 listened carefully to and appreciated your oral arguments.

16 The language of paragraph 19, which Mr. Shapiro just
17 read into the record, I will repeat briefly but with a slightly
18 different emphasis. There is no admission, and any admission
19 is disavowed by that paragraph, that any particular information
20 is or is not a highly confidential matter within the
21 contemplation of the law.

22 That is a distinction between the law's standard and
23 what Mr. Shapiro describes as a standard contained in the first
24 three lines of paragraph 1 of the protective order, which
25 covers any documents, things, or information that is not

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1 generally known and that the producing party would not normally
2 reveal to third parties or would require them to keep
3 confidential.

4 That standard, that the producing party would normally
5 not reveal it to third parties, is insufficient to be binding
6 under the law, and that distinction is made at paragraph 19.

7 Paragraph 23 naturally -- I think even if not written
8 in, it would exist -- gives the court the authority under the
9 order itself to alter in specific cases the treatment
10 tentatively accorded by the parties.

11 With that background, I'm going to move directly to
12 what should be done in this case with these documents in the
13 belief that further dicta will do more harm than good.

14 The plaintiffs may return to the Ninth Circuit and
15 move that the record be supplemented by these ten documents and
16 ask that they be kept under seal if it is satisfactory to the
17 Ninth Circuit to keep them under seal. If the latter request
18 is denied, they may amend their motion or whatever procedure is
19 proper in the Ninth Circuit to ask that they be filed and
20 received not under seal but as part of the record, without
21 returning here for further permission to do that.

22 That ruling underscores the ad hoc nature of this
23 determination and it is a proper determination on its own
24 merits.

25 Now, you have also, I think, to discuss --

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