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15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT**  
17 **SAN JOSE DIVISION**

19 VIACOM INTERNATIONAL INC. et al.,  
20 Plaintiffs,  
21 v.  
22 YOUTUBE, INC. et al.,  
23 Defendants.

CASE NO. 08-MC-80211 JF (PVTx)

**OPPOSITION TO BAYTSP'S  
OBJECTION TO JANUARY 14, 2009  
ORDER RE YOUTUBE SUBPOENA**

Judge: Hon. Jeremy Fogel

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1 **INTRODUCTION**

2 In two copyright infringement actions against YouTube and Google (collectively  
3 “YouTube”), pending in the Southern District of New York, plaintiff Viacom and a follow-on  
4 putative class of every copyright holder in the world seek billions of dollars in supposed  
5 damages. One of YouTube’s first acts of discovery in the cases, in September 2007, was to  
6 subpoena Viacom’s agent, BayTSP – a company that Viacom and others employ to identify their  
7 content on services like YouTube, and either request its removal or allow it to remain. On  
8 January 14, 2009, Magistrate Judge Trumbull issued an Order (the “Order”) granting YouTube’s  
9 motion to enforce the BayTSP subpoena in its entirety, ostensibly putting an end to BayTSP’s  
10 sixteen months of delay.

11 BayTSP’s objections to the Order should be denied as BayTSP has not and cannot carry  
12 its burden of showing that the Order is clearly erroneous or contrary to law. This standard for  
13 reviewing a discovery ruling of a Magistrate Judge is purposefully high to avoid the wasteful  
14 second-guessing and re-argument that BayTSP employs. Judge Trumbull carefully evaluated the  
15 record and measured it against the appropriate legal standards guided by extensive briefing and  
16 lengthy oral argument.

17 *First*, Judge Trumbull considered and rejected BayTSP’s argument that documents  
18 relating to its non-Viacom clients were irrelevant: “the court finds that the document[] requests  
19 as they relate to non-Viacom related entities are relevant.” Order 8:8-13. That relevance finding  
20 was amply supported by the record, fully vetted by Judge Trumbull and consistent with the broad  
21 standard of relevance set forth in Rule 26 for discovery in civil cases. It should not be disturbed.

22 *Second*, Judge Trumbull considered and rejected BayTSP’s argument that ordering it to  
23 produce non-Viacom client documents would unduly burden BayTSP: “the court finds that  
24 BayTSP has not established undue burden as it relates to non-Viacom related entities.” Order  
25 10:4-5. That finding likewise should stand. In opposing YouTube’s motion to compel, BayTSP  
26 offered no evidence whatsoever of any burden. Judge Trumbull nevertheless entertained over  
27 two hours of argument from BayTSP. After accounting for the unsubstantiated positions of  
28 BayTSP’s counsel and balancing them against the importance of the requested information,

1 Judge Trumbull rejected BayTSP's burden claims, but afforded BayTSP a means of limiting its  
2 supposed burden through a subsequent meet and confer process. Order at 10:8-15. Far from  
3 being clearly erroneous, Judge Trumbull's ruling was clearly generous to BayTSP given its  
4 failure of proof. As for BayTSP's clients, Judge Trumbull found that the stipulated protective  
5 order in the underlying case -- which already safeguards the information of a dozen or more third  
6 parties -- provides adequate protection: "The court believes that the stipulated protective order,  
7 or subsequent amendments agreed thereto, by and between the parties, including BayTSP, will  
8 protect the interests of its other clients." *Id.* 10:5-7. There is no basis for deeming that  
9 conclusion clearly erroneous.

10 Finally, BayTSP asks this Court to adopt two highly strained "interpretations" of the  
11 unambiguous Order. While BayTSP's interpretations are frivolous, this Court need not consider  
12 them because they are not properly before it. If BayTSP contends that the Order is ambiguous, it  
13 should have sought clarification from Judge Trumbull, rather than asking this court to "interpret"  
14 an Order that it did not issue. BayTSP's not-so-subtle invitation to rewrite the Order falls  
15 outside the Court's review function and should be declined.

## 16 **FACTUAL AND PROCEDURAL BACKGROUND**

### 17 **A. YouTube Is the World's Leading Online Video Hosting Website**

18 Since its founding in 2005, YouTube, an online video hosting service, has become a  
19 cultural and social phenomenon. YouTube users create videos and upload them to YouTube's  
20 service where they can be viewed for free by anyone with Internet access. As Judge Trumbull  
21 noted: "YouTube has a global audience of tens of millions of people and is the number one video  
22 site on the Internet." Order 2:12-19.

23 In March 2007, Viacom International, Inc. ("Viacom") filed a complaint against  
24 YouTube in the Southern District of New York. *See Viacom Int'l, Inc. v. YouTube, Inc.*, Case  
25 no. 07-cv-2103 LLS (FMx) (S.D.N.Y. filed Mar. 13, 2007). Viacom's suit claims damages in  
26 excess of *one billion dollars* on the theory that YouTube should be liable for alleged copyright  
27 infringement for video clips uploaded to the service by its users. In May 2007, the Premier  
28 League and Bourne Co. filed a putative class action mirroring the claims in Viacom's suit and

1 seeking damages on behalf of every copyright holder in the world. *See The Football Association*  
2 *Premier League, Ltd. v. YouTube, Inc.*, Case no. 07-cv-3582 LLS (FMx) (S.D.N.Y. filed Nov.  
3 26, 2008).

4 **B. BayTSP, Viacom’s Agent, Is an Internet Monitoring and Enforcement**  
5 **Company**

6 Online services like YouTube that host video clips at the direction of users have a safe  
7 harbor from liability for copyright infringement claims so long as they expeditiously remove or  
8 disable access to materials after receiving proper notice by copyright holders. *See* 17 U.S.C. §  
9 512(c); *Io Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926, 2008 WL 4065872 (N.D. Cal.  
10 Aug. 27, 2008). This notice and take-down protocol accords copyright holders an extra-judicial  
11 process to receive “a rapid response to potential infringement” occurring on online services.  
12 Sen. Rep. No. 105-190, at 21 (1998). However, “[t]he DMCA notification procedures place the  
13 burden of policing copyright infringement - identifying the potentially infringing material and  
14 adequately documenting infringement - squarely on the owners of the copyright.” *See Perfect*  
15 *10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007). Media companies, including  
16 Viacom and certain of the putative Class Plaintiffs, have hired BayTSP as their agent to engage  
17 in this copyright policing under the DMCA.<sup>1</sup>

18 While monitoring YouTube’s website for its clients, BayTSP routinely praised YouTube  
19 for its approach to protecting copyrights and cooperating with content owners and their agents.  
20 *See* Declaration of Caroline E. Wilson (“Wilson Decl.”) ISO YouTube’s Motion to Compel  
21 (Docket No. 3) Exs. 3 (BayTSP thanks YouTube for setting up accounts for its work on behalf of  
22 Viacom), 4 (BayTSP thanks YouTube for quickly responding to its takedown notice), 5 (BayTSP  
23 thanks YouTube for its efforts), 6 (BayTSP thanks YouTube for being patient with its requests).  
24 Although armed with considerable information regarding its clients’ content, BayTSP routinely

25 \_\_\_\_\_  
26 <sup>1</sup> Notably, BayTSP often acts to ensure the continuing presence of content that Viacom and other  
27 clients affirmatively want to remain on the YouTube service. *See* 12/9/2008 Hearing Tr. at  
28 68:17-70:1 (Rakow Decl., Ex. B (filed 1/29/2009)); Wilson Decl., Exs. 7, 8, 9, 12. This common  
practice among content owners of taking down some content under the DMCA and leaving other  
content up makes it all the more impossible for YouTube to determine if a clip is authorized  
merely by looking at it.

1 made mistakes in requesting that YouTube remove clips from its service that either were not  
2 owned by its clients or were on the service with its clients' assent. *See, e.g., id.*, Exs. 9 (BayTSP  
3 took down content uploaded by Viacom), 10 (Viacom takes down someone else's content), 11  
4 (Viacom takes down someone else's content), 12 (mistaken Best Week Ever takedown), 13 (e-  
5 mail entitled "Another Viacom mistake"). BayTSP also monitors on behalf of its clients other  
6 online services that, like YouTube, host user-generated videos, as well as peer-to-peer file  
7 sharing networks. BayTSP's Objection at 1:22-2:3, 3:1-13.

8 **C. YouTube Subpoenaed Documents from BayTSP and Brought a Successful**  
9 **Motion to Compel**

10 On September 27, 2007, YouTube served BayTSP with a subpoena ("Subpoena")  
11 seeking the production of documents: (1) regarding YouTube, including documents comparing  
12 YouTube with similar online services; (2) regarding BayTSP's relationship with Viacom; (3)  
13 regarding BayTSP's monitoring and content identification processes; (4) sufficient to identify the  
14 entities that have retained BayTSP to monitor the YouTube service; and (5) sufficient to identify  
15 prior litigations in which BayTSP has provided testimony. Order at 6:5-14. BayTSP filed  
16 objections and "the parties met and conferred in numerous efforts to resolve their discovery  
17 dispute." Order at 4:10-11. When BayTSP failed to produce a single document over 14 months,  
18 YouTube filed a motion to compel compliance. The motion papers and accompanying separate  
19 statement described in detail the justification for compelling production on each individual  
20 request for documents in the subpoena and the Court entertained lengthy argument on the  
21 question of relevance. *See* YouTube's Motion to Compel at 10-14 and supporting declarations  
22 of Brandon Baum and Caroline E. Wilson (Docket Nos. 1-3) (filed October 20, 2008);  
23 YouTube's Civil L.R. 37-2 Statement, Baum Decl., Ex. P; YouTube Reply ISO Motion to  
24 Compel (Docket No. 12) (filed November 28, 2008) at 2-4; Hearing Tr. at 69-94.

25 On January 14, 2009, Judge Trumbull granted YouTube's motion to compel in its  
26 entirety and ordered BayTSP to "produce responsive documents related to the Viacom-related  
27 entities no later than March 6, 2009" and to "produce responsive documents related to non-  
28 Viacom related entities no later than July 15, 2009." Order 11:26-12:2. To facilitate BayTSP's



1 production of documents related to non-Viacom clients, the Court ordered BayTSP to “provide  
2 YouTube with a roster of its other clients no later than January 30, 2009.” *Id.* 10:12-13. The  
3 Court further specified that it would be “appropriate for YouTube to reimburse BayTSP for *costs*  
4 of the production of documents for non-Viacom related entities.” (*id.* 10:9-10) (emphasis added).  
5 These provisions rely on an explicit finding that non-Viacom client documents are relevant --  
6 “the court finds that the documents requests as they relate to non-Viacom related entities are  
7 relevant” (Order 8:8-13) -- because they may “show that other clients of the company may have  
8 also instructed BayTSP that certain of their content remain on the YouTube website.” *Id.* 8:2-5.  
9 The Court further found that “BayTSP has not established undue burden as it relates to non-  
10 Viacom related entities.” *Id.* 10:4-5. The Order also recognized, in response to BayTSP’s  
11 argument that production of non-Viacom client documents might harm its business or its clients,  
12 that “the stipulated protective order, or subsequent amendments agreed thereto, by and between  
13 the parties, including BayTSP, will protect the interests of [BayTSP’s] other clients.” *Id.* 10:5-7.

14 On January 29, BayTSP filed its Objection to the Court’s Order. BayTSP, however, did  
15 not seek a stay of its obligations under the Order, and already is in clear violation of the  
16 obligations Judge Trumbull imposed.<sup>2</sup>

## 17 ARGUMENT

### 18 A. The Court May Only Set Aside or Modify Judge Trumbull’s Order if It Is 19 Clearly Erroneous or Contrary to Law

20 Judge Trumbull’s findings of fact should only be modified or set aside if they are “clearly  
21 erroneous.” 18 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Findings of law must be “contrary  
22 to law.” *Id.* “[D]ecisions by the magistrate judge on nondispositive matters are essentially final  
23 decisions of the district court which may be appealed in due course with other issues.” *U.S. v.*  
24 *Abonce-Barrera*, 257 F.3d 959, 968 (9th Cir. 2001). This standard of review guards against  
25 gamesmanship: “it would be fundamentally unfair to permit a litigant to set its case in motion  
26 before the magistrate, wait to see which way the wind was blowing, and-having received an

27 <sup>2</sup> While the Court ordered BayTSP to provide YouTube with a “roster of its other clients” by  
28 “no later than January 30, 2009,” it failed to do so. Order 10:12-13.

1 unfavorable recommendation-shift gears before the district judge.” *U.S. v. Howell*, 231 F.3d  
2 615, 622 (9th Cir. 2000).

3 Discovery orders issued by Magistrate Judges are final and are not stayed merely by  
4 filing an objection: “the filing of objections to a ruling by a magistrate judge on a nondispositive  
5 matter does not automatically stay operation of the order.” *Keithley v. Homestore.com, Inc.*,  
6 2008 WL 4298203, at \*1 (N.D. Cal., Sep. 18, 2008). A contrary result, “would not only  
7 encourage the filing of frivolous appeals, but would grind the magistrate [judge] system to [a]  
8 halt.” *Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 124 F.R.D. 75, 79 (S.D.N.Y.  
9 1989); *accord, e.g.*, 7 (Part 2) James W. Moore et al., MOORE’S FEDERAL PRACTICE ¶  
10 72.03[6.-12] at 72-53 to -54 (2d ed. 1991) (“A magistrate’s order will not determine anything if  
11 it can be automatically stayed by filing an objection. Indeed, such an interpretation would  
12 essentially reduce the magistrate’s order to the status of a recommendation where an objection is  
13 raised.”).

14 Moreover, in considering an objection to a Magistrate Judge’s order, the Court should not  
15 go beyond the evidence and arguments presented to the Magistrate Judge:

16 This Court’s function, on a motion for review of a magistrate  
17 judge’s discovery orders, is not to decide what decision this Court  
18 would have reached on its own, nor to determine what is the best  
19 possible result considering all available evidence. It is to decide  
20 whether the Magistrate Judge, based on the evidence and  
21 information before him, rendered a decision that was clearly  
22 erroneous or contrary to law[.]

20 *Paramount Pictures Corporation, v. Replay TV*, 2002 WL 32151632, at \*1 (C.D. Cal. May 30,  
21 2002); *see also Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 638 (9th Cir.  
22 1988) (“We do not believe that the Magistrates Act was intended to give litigants an opportunity  
23 to run one version of their case past the magistrate, then another past the district court.”).

24 **B. BayTSP’s Objection Should be Overruled Because the Order was Not**  
25 **Clearly Erroneous or Contrary to Law**

26 BayTSP has shown no clear error of fact and no clearly erroneous determinations of law,  
27 and thus its objection should be overruled.

1           While difficult to decipher, BayTSP seems to take issue with Judge Trumbull’s ruling  
2 that documents related to BayTSP’s non-Viacom clients are relevant to the claims and defenses  
3 in the underlying case. *See* Order 8:12-13. That holding, however, was manifestly appropriate  
4 as “the documents pertaining to the non-Viacom related entities were relevant to show that other  
5 clients of the company may have also instructed BayTSP that certain of their content remain on  
6 the YouTube website.” *Id.* 8:2-5. The parties extensively briefed the issue of whether BayTSP’s  
7 non-Viacom documents were relevant. *See* BayTSP’s Opposition to YouTube’s Motion to  
8 Compel (“Opp’n,” Docket No. 9) at 3:7-25; YouTube’s Reply ISO Motion to Compel (“Reply,”  
9 Docket No. 12) 3:10-26; YouTube’s Civil L.R. 37-2 Statement, Baum Decl, Ex. P (Docket No.  
10 2) at 1, 3, 5, 7-8, 11-12. Accordingly, BayTSP’s claim that “[o]nly at the hearing on YouTube’s  
11 motion to compel was there any real discussion of the purported relevance of communications  
12 and documents concerning BayTSP’s non-party clients” is false. Objection 8:5-6. Regardless,  
13 there is no conceivable ground on which this Court could conclude that Judge Trumbull’s  
14 thoughtful relevance determination was clearly erroneous. Judge Trumbull heard from both  
15 sides and concluded that YouTube’s arguments were more persuasive. BayTSP asks this Court  
16 to substitute its own judgment for the Magistrate Judge’s and come to a different conclusion on  
17 relevance. The standard of review prohibits such a *de novo* evaluation.

18           BayTSP’s burden arguments were also appropriately considered and rejected by Judge  
19 Trumbull. As an initial matter, BayTSP utterly failed to substantiate any supposed burden from  
20 producing non-Viacom documents when opposing YouTube’s motion. *See* (Hemminger Decl.  
21 ISO BayTSP’s Opp’n to YouTube Mot. to Compel (filed November 18, 2008)) (Docket No. 10).  
22 That fact alone precludes an argument that Judge Trumbull committed clear error when finding  
23 that the subpoena would not cause BayTSP undue burden. Regardless, even though BayTSP did  
24 not offer any competent evidence of burden, the Order is infused with accommodations to  
25 ameliorate any hypothetical burden that BayTSP might face when producing documents related  
26 to non-Viacom clients. *See* Order at 10:8-15 (ruling that YouTube is to reimburse BayTSP for  
27 “costs of production” of non-Viacom documents and suggesting a meet and confer on the scope  
28 of the production).

1 Ignoring the dispositive evidentiary deficiency, BayTSP simply reargues that “the scope  
2 of the requests unduly burdens its business and will likely have a chilling effect on its other  
3 customers who have come to believe that their business dealings with BayTSP would remain  
4 confidential.” Objection at 9:19-21. The Magistrate Judge considered and rejected BayTSP’s  
5 “chilling effect” argument, finding instead that “BayTSP has not established undue burden as it  
6 relates to non-Viacom related entities.” *Id.* 10:4-5. BayTSP cannot plausibly claim that Judge  
7 Trumbull committed clear error by considering and rejecting its argument given that: (i) the  
8 protective order shields documents from disclosure outside of the main litigation; and (ii)  
9 BayTSP failed to put in any competent evidence from which the Court could have concluded that  
10 BayTSP actually faced a “chilling effect.” In fact, even if BayTSP had made an exemplary  
11 showing regarding an alleged “chilling effect,” Judge Trumbull would have acted well within her  
12 discretion in concluding that YouTube’s need for the documents at issue (in a case where  
13 plaintiffs seek billions of dollars in damages) outweighed any harm that allegedly would have  
14 befallen BayTSP.

15 Finally, Judge Trumbull properly rejected BayTSP’s argument that its *clients*, now  
16 misleadingly termed “fourth parties,” would somehow be unfairly burdened if they were obliged  
17 to intervene to protect their interests. Judge Trumbull wisely ruled that BayTSP’s clients “may  
18 independently move for a protective order pursuant to Rule 26(c)” if they wish to prevent their  
19 documents from being disclosed. *Id.* 10:3-4. BayTSP does not and cannot explain how this  
20 protocol amounts to clear error. Indeed, it reflects the opposite: Judge Trumbull understood that  
21 third parties might wish to be heard and did not foreclose that possibility, demonstrating, again,  
22 the care that Judge Trumbull took to ensure that all stakeholders’ interests were protected.

23 While BayTSP now hypothesizes as to a number of supposed burdens on its clients --  
24 including a “great deal of time and effort” to review documents and “tremendous” amounts of  
25 privilege review -- BayTSP failed to present evidence to the Magistrate Judge regarding any  
26 actual burden on its clients, by affidavit or otherwise. The Court should ignore BayTSP’s  
27 hypothetical parade of horrors, manufactured by its counsel after the fact.

28

1           C.     BayTSP's Non-Viacom Documents Are Relevant to Plaintiffs' Claims and  
2                     YouTube's Defenses

3           Even if the Court were to consider the Magistrate Judge's relevance determinations *de*  
4 *novo*, it would reach the same conclusion: BayTSP's non-Viacom documents are plainly relevant  
5 to Plaintiffs' claims and YouTube's defenses. *First*, YouTube is protected from liability under  
6 the safe harbor of Section 512(c) of the DMCA. However, an online service can lose safe harbor  
7 protection if it fails to remove materials when it is "aware of facts or circumstances from which  
8 infringing activity is apparent." 17 U.S.C. § 512(c)(1)(A)(ii). In this litigation, Viacom has  
9 argued that YouTube should be able to tell by looking at a particular video clip whether or not it  
10 infringes someone else's copyright, thus imparting knowledge triggering a removal obligation.  
11 BayTSP's non-Viacom documents will show that many professionally-produced clips on  
12 YouTube are there with the authorization of BayTSP's customers, even though that fact is  
13 impossible to discern from a review. For example, BayTSP's media company customers instruct  
14 it to take down certain clips and to leave up others for promotional purposes (often ones that  
15 have been uploaded surreptitiously by the media companies themselves). Regardless of which  
16 BayTSP client is responsible, the widespread use of selective removals and tactical placements  
17 gives the lie to Viacom's position that a service like YouTube can determine, simply by looking  
18 at a video clip, whether or not the copyright owner has authorized its presence on YouTube.

19           *Second*, BayTSP's documents regarding clients other than Viacom are relevant because  
20 they will establish the seemingly obvious, but contested, defense that the YouTube service has  
21 substantial non-infringing uses. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S.  
22 417, 456 (1984) (setting forth substantial non-infringing use defense to claims of secondary  
23 copyright infringement). It is beyond dispute, and Viacom has conceded, that to the extent non-  
24 Viacom entities have instructed BayTSP to allow certain clips to remain on YouTube, those clips  
25 would be authorized, and therefore non-infringing. Evidence of non-infringing use -- no matter  
26 whether the clips are owned by a Plaintiff in this action or another entity -- is relevant to  
27 YouTube's *Sony* defense. Accordingly, YouTube is entitled to the production of non-Viacom  
28 documents for this reason as well. *See also* YouTube's Reply ISO Motion to Compel (Docket  
No. 12) at 3 (setting forth numerous relevance grounds for the requested documents).

1           **D. The District Court Should Not Provide an Advisory Interpretation of the**  
2           **Magistrate Judge’s Order**

3           Beyond its misguided objections, BayTSP disregards well-settled procedure in asking  
4           this Court to resolve purported ambiguities in the Magistrate Judge’s Order. An objection is not  
5           the proper procedural vehicle for seeking interpretation or clarification: “the district judge may  
6           modify or set aside *only* those portions of the magistrate judge’s order that are clearly erroneous  
7           or contrary to law.” *Bryant v. Mattel, Inc.*, 573 F.Supp.2d 1254, 1274 (C.D. Cal. 2007)  
8           (emphasis added). While BayTSP seeks an interpretation of certain provisions of the Order, it  
9           does not argue that those provisions are either clearly erroneous or contrary to law. Accordingly,  
10          the proper procedural vehicle for its request is a motion for clarification to Magistrate Judge  
11          Trumbull under Fed. R. Civ. P. 60(a). *See Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182  
12          F.3d 1096, 1105-06 (9th Cir. 1999). Having failed to move for clarification before the  
13          Magistrate Judge, BayTSP’s request from this Court for an advisory ruling interpreting Judge  
14          Trumbull’s Order is properly rejected.

15          Even setting aside the procedural impropriety of BayTSP’s arguments, its positions are  
16          without merit. BayTSP seeks to have YouTube pay its attorneys’ fees for the production of non-  
17          Viacom client documents. Judge Trumbull ordered nothing of the sort. The Order merely  
18          requires YouTube to “reimburse BayTSP for *costs* of the production of documents for non-  
19          Viacom related entities.” Order 10:9-10 (emphasis added). BayTSP offers no support for its  
20          novel argument that the “costs of the production of documents” actually means attorneys’ fees,  
21          and its position has no basis in the law. *See, e.g., Fleischmann Distilling Corp. v. Maier Brewing*  
22          *Co.*, 386 U.S. 714, 720 (1967) (“the statutory definition of the term ‘costs’ [under 28 U.S.C.  
23          1920] does not include attorney’s fees”).

24          *Second*, BayTSP relies on the Court’s “summary” of the document requests -- rather than  
25          the document requests themselves -- in a misguided attempt to limit the Court’s Order to  
26          documents pertaining to monitoring of YouTube and to exclude documents related to BayTSP’s  
27          operations with respect to websites that operate just like YouTube. The Order, which granted  
28          defendants’ motion to compel without any limitation, cannot bear this reading. Order 11:25. It

1 merely, for ease of reference, groups YouTube’s document requests into four “general categories  
2 of documents” as follows:

- 3 (1) All documents and communications concerning YouTube,  
4 including those reflecting use of YouTube by BayTSP and its  
5 clients, monitoring of YouTube by BayTSP and its clients,  
6 and comparisons of the responsiveness of YouTube to other  
7 online services (*Document Request Nos. 1, 3, 4, 5, 8, 13*);
- 8 (2) All documents and communications regarding BayTSP’s  
9 relationship with Viacom, including documents regarding  
10 copyrights Viacom claims to own and the litigations in New  
11 York (*Document Request Nos. 6, 9*);
- 12 (3) All documents and communications regarding the nature of  
13 BayTSP’s monitoring and identification processes, its training  
14 of monitors, and its effectiveness or lack thereof with respect  
15 to identification of allegedly infringing materials online  
16 (*Document Request Nos. 2, 7, 10*); and
- 17 (4) All documents sufficient to identify the entities that have  
18 retained BayTSP to monitor the YouTube service, and  
19 documents sufficient to identify prior litigations in which  
20 BayTSP has provided testimony (*Document Request Nos. 11,  
21 12*).

22 Order 6:4-14 (emphasis added). Those are precisely the same groupings that YouTube supplied  
23 for ease of reference in its motion to compel. *See* YouTube’s Motion to Compel at 7. Ignoring  
24 their plain language, BayTSP suggests that the requests underlying categories 1 and 4 are limited  
25 to documents regarding YouTube. But neither YouTube in proposing these groupings, nor the  
26 Court in granting YouTube’s motion in full, ever applied such a limitation. Indeed, each  
27 category contains document requests that are not plausibly limited in this fashion. For example,  
28 category 1 includes Document Request 8, which specifically applies to “any website, network or  
other location, including *but not limited to* [www.youtube.com](http://www.youtube.com).” (emphasis added). Category 1  
also expressly includes, both in the actual requests and the summary, documents comparing  
YouTube to other online services. Similarly, both the incorporated requests and the summary  
language of category 4 call for the production of documents sufficient to identify “any civil  
action” in which BayTSP has given testimony -- again, these requests are plainly not limited in  
the manner BayTSP urges. In the underlying action, YouTube seeks to demonstrate that its  
compliance with the DMCA far exceeds that of similar websites, and expressly advanced that

1 rationale as justification for seeking the documents covered by specific requests. BayTSP's  
2 phantom limitations would foreclose that line of argument, which Judge Trumbull found  
3 meritorious.

4 Even more mystifying are BayTSP's arguments with regard to Document Request No. 5.  
5 BayTSP invokes a "tentative ruling" as well as "the realities of the scope of the Complaint" in an  
6 impenetrable argument purporting to limit in some unexplained way the relief granted by the  
7 Court. Objection 16:5-11. BayTSP never explains, because it cannot, how such vague  
8 propositions, not reflected in the final Order, could possibly supersede the Order itself.  
9 Whatever is to be made of BayTSP's unsupported attempt to limit the Court's Order, it is clear  
10 that the Order compels BayTSP to "produce responsive documents related to the Viacom-related  
11 entities no later than March 6, 2009" and to "produce responsive documents related to non-  
12 Viacom related entities no later than July 15, 2009." Order 11:26-12:2 (emphasis added).  
13 "Responsive" means responsive to YouTube's document requests, as written, and BayTSP's  
14 attempt to argue otherwise should be disregarded.

15 **CONCLUSION**

16 For the reasons cited herein, BayTSP's objection should be overruled.

17  
18 February 20, 2009

Respectfully submitted,

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