Viacom International, Inc. et al v. Youtube, Inc. et al Doc. 319 Att. 13

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June 9, 2009

The Honorable Louis L. Stanton
Daniel Patrick Moynihan United States Courthouse
500 Pearl St., Room 2250
New York, New York 10007

Re: *Viacom Int'l Inc., et al. v. YouTube, Inc., et al.*, No. 07-cv-2103 (LLS); *The Football Association Premier League Ltd., et al. v. YouTube, Inc. et al.*, Case No. 07-cv-3582 (LLS)

Dear Judge Stanton:

We write on behalf of Defendants ("YouTube") in response to Viacom's June 4, 2009 letter requesting briefing on two issues: (1) the privileged status of documents exchanged between YouTube and Google during the due diligence period preceding Google's acquisition of YouTube; and (2) disclosure of whether YouTube will be relying on an advice-of-counsel defense. As to the latter issue, YouTube has decided not to assert an advice-of-counsel defense against the closed set of works-in-suit Viacom has identified in this action. The first issue, which Plaintiffs significantly distort, is premature and should not be briefed now, as it has not yet and may not ever result in the withholding of any information.

Plaintiffs' request for briefing on the abstract legal question regarding the circumstances under which a target entity's sharing of privileged materials with an acquiring entity in due diligence waives privilege over the disclosed materials does not implicate any ripe dispute between the parties. Plaintiffs complain about an instruction given at the deposition of Zahavah Levine. But as the deposition transcript attached to Plaintiffs' letter makes clear, Ms. Levine did not refuse to answer a single question based on the instruction she was given; indeed, Plaintiffs never even asked her to do so. Ms. Levine was asked an open-ended question about conversations that she had with Google concerning YouTube's copyright policies. YouTube's counsel instructed her not to answer *only to the extent* that a possible response: (1) concerned communications that took place during a "very, very short period of time" when YouTube had an agreement in principle with Google regarding an acquisition; (2) would "reveal[] substantive communications on which the parties share a common interest prospectively"; *and* (3) related to matters where Google and YouTube "would share responsibility for potential liabilities going forward." Instead of following up with Ms. Levine about whether she could answer the question subject to the instruction or whether communications falling within YouTube's narrowly articulated privilege even took place, Viacom's attorney abandoned the line of questioning entirely without receiving an answer. It simply is not the case, therefore, that YouTube's conditional instruction resulted in the withholding of any information.

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Nor can Plaintiffs point to a single document that YouTube is withholding based on the theory of waiver discussed in their letter. Plaintiffs' explanation for that – that YouTube has allegedly refused to provide a privilege log – is sophistry. The parties have been negotiating about the timing and form of privilege logs since last summer. In February 2009, Plaintiffs committed to providing a proposal to YouTube reflecting the current state of the negotiations. To date, they have failed to provide that proposal, although negotiations are scheduled to continue this week. When privilege logs are ultimately exchanged, Plaintiffs may then assert their waiver theory over specific documents on YouTube's log so that the parties' dispute, if there is one, may be defined tangibly. At that time, YouTube will also be able to ascertain whether Plaintiffs themselves are withholding as privileged documents that *they* received in diligence from the online entities they acquired. In any event, Plaintiffs' speculation that the quantity of documents that YouTube plans to withhold based on this privilege "is likely to be substantial" is baseless and inaccurate. As explained below, YouTube's theory of privilege is quite narrow and the quantity of documents subject to it (if any) would be extremely small.

YouTube has not come close to asserting privilege over all documents it shared with potential acquirers and investors as Plaintiffs suggest; indeed, YouTube has produced thousands of such documents. Instead, YouTube's position is quite narrow: that otherwise privileged communications shared with an acquiring entity remain privileged when they concern matters over which the combined entity would share responsibility for potential liabilities and where the two companies have an agreement in principle regarding the material terms of the proposed acquisition. That position is well supported in the case law. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 309-312 (N.D. Cal. 1987) (privilege over attorney opinion letter was not waived when shared in due diligence). On this record, a ruling on YouTube's privilege non-waiver position is unnecessary because there is nothing to which it would actually apply. Plaintiffs' effort is a request for an advisory opinion, which should be denied.

Respectfully submitted,

Andrew H. Schapiro

cc: All counsel in the *Viacom* and the *Premier League* actions