

DEAN GARFIELD - HIGHLY CONFIDENTIAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
VIACOM INTERNATIONAL INC., COMEDY:
PARTNERS, COUNTRY MUSIC :
TELEVISION, INC., PARAMOUNT :
PICTURES CORPORATION, and BLACK :
ENTERTAINMENT TELEVISION LLC :
Plaintiffs, :
: :
v. : Case No.
: 07CV-2103
YOUTUBE, INC., YOUTUBE, LLC, :
and GOOGLE, INC., :
: :
Defendants. :
-----X

THE FOOTBALL ASSOCIATION PREMIER :
LEAGUE LIMITED, BOURNE CO., :
et, al., on behalf of themselves :
and all others similarly situated: :
: :
Plaintiffs, :
: Case No.
v. : 07CV-3582
: :
YOUTUBE, INC., YOUTUBE, LLC, :
and GOOGLE, INC., :
: :
Defendants. :
-----X

****HIGHLY CONFIDENTIAL****
Videotaped Deposition of DEAN GARFIELD
Washington, D.C.
Tuesday, November 2, 2009
10:24 a.m.

BY: Okeemah S. Henderson, LSR
JOB NO. 18039

1 A P P E A R A N C E S:
2 FOR THE PLAINTIFFS VIACOM INTERNATIONAL,
3 INC.:

4 STUART J. BASKIN, ESQUIRE
5 SHEARMAN & STERLING, LLP
6 599 Lexington Avenue
7 New York, NY 10022
8 (212) 848-4000

9 FOR THE PLAINTIFFS VIACOM INTERNATIONAL,
10 INC.:

11 MICHAEL B. DESANCTIS, ESQUIRE
12 LUKE C. PLATZER, ESQUIRE
13 JENNER & BLOCK, LLP
14 1099 New York Avenue, NW Suite 900
15 Washington, DC 20001
16 (202) 639-6000

17

18 FOR THE DEFENDANTS YOUTUBE:

19 DAVID H. MCGILL, ESQUIRE
20 MAYER BROWN, LLP
21 1675 Broadway
22 New York, NY 10019
23 (212) 506-2507

24

25 FOR THE DEFENDANTS THE FOOTBALL ASSOCIATION:

26 LAUREN A. MCMILLEN, ESQUIRE
27 BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
28 1285 Avenue of the Americas
29 New York, NY 10019
30 (212) 554-1593

31

32 FOR THE WITNESS, DEAN GARFIELD:

33 KELLY M. KLAUS, ESQUIRE
34 MUNGER TOLLES & OLSEN LLP
35 355 South Grand Avenue, 35th Flr
36 Los Angeles, CA 90071
37 (213) 683-9238

38

39 ALSO PRESENT:

40

41 Conway Barker, Videographer
42 Orit Michiel

43

44

45

DAVID FELDMAN WORLDWIDE, INC.

450 Seventh Avenue - Ste 2803, New York, NY 10123 (212)705-8585

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I-N-D-E-X

Deposition of DEAN GARFIELD

November 2, 2006

EXAMINATION BY:

PAGE:

Mr. Baskin

6

Mr. McGill

58

EXHIBITS

PAGE

1 E-Mail chain dated 4/28/06

14

2 E-Mail chain dated 8/18/06

23

3 E-Mail chain dated 9/25/06

25

4 E-Mail chain dated 10/12/06

31

5 E-Mail chain dated 10/17/06

37

6 E-Mail dated 10/23/06

39

7 E-Mail chain with proposal 11/8/06

41

8 E-Mail dated 1/19/07

47

9 E-Mail chain dated 1/31/07

48

10 E-Mail chain dated 2/27/07

53

11 Article

94

12 Article from Gazette

107

13 The Tech online newsletter

110

14 E-Mail chain dated 10/17/06

120

15 Article

134

1 P-R-O-C-E-E-D-I-N-G-S

2 (10:24 a.m.)

10:23 3 THE VIDEO OPERATOR: This is the
10:23 4 beginning of tape No. 1 in the videotape
10:23 5 deposition of Dean Garfield taken by Mr. Baskin
10:23 6 in the matter of Viacom International
10:23 7 Incorporated, et al versus YouTube,
10:23 8 Incorporated. Case No. 07-CV-2103 and the
10:23 9 Football Association Premier League Limited
10:24 10 Bourne Company, et al. versus YouTube
10:24 11 Incorporated, et al in the United States
10:24 12 District Court for the Southern District of New
10:24 13 York.

10:24 14 This deposition is being held at Jenner &
10:24 15 Block, LLP, 1099 New York Avenue, Northwest
10:24 16 Washington, D.C. on November 2nd, 2009. The
10:24 17 time is approximately 10:24. The Court
10:24 18 Reporter is Okeemah Henderson. The video
10:24 19 camera operator is Conway Barker, both on
10:24 20 behalf of David Feldman Worldwide. Will
10:24 21 counsel please identify yourselves and state
10:24 22 whom you represent.

10:24 23 MR. BASKIN: I am Stuart Baskin of
10:24 24 Shearman & Sterling, and I am counsel for
10:24 25 Viacom in this litigation.

DAVID FELDMAN WORLDWIDE, INC.

450 Seventh Avenue - Ste 2803, New York, NY 10123 (212)705-8585

10:24 1 MR. PLATZER: Luke Platzer of Jenner
10:24 2 & Block, also counsel for Viacom in this
10:24 3 litigation.

10:24 4 MS. MCMILLEN: Lauren McMillen of
10:24 5 Bernstein Litowitz Berger & Grossmann, counsel
10:24 6 for the Football Association Premier League
10:25 7 Limited and other class plaintiffs in this
10:25 8 litigation.

10:25 9 MR. DESANCTIS: Michael DeSanctis of
10:25 10 Jenner & Block with the Viacom plaintiffs.

10:25 11 MR. MCGILL: David McGill from Mayer
10:25 12 Brown, here on behalf of YouTube and Google.

10:25 13 MR. KLAUS: Kelly Klaus from Munger
10:25 14 Tolles & Olsen appearing on behalf of the
10:25 15 witness, and with me is Orit Michiel of the
10:25 16 Motion Picture Association of America.

10:25 17 THE VIDEO OPERATOR: Would you please
10:25 18 swear in the witness.

19 Whereupon,

20 DEAN GARFIELD,
21 called as a witness, having been first duly
22 sworn to tell the truth, the whole truth, and
23 nothing but the truth, was examined and
24 testified as follows:

25

11:34 1 31st or not. The dates are fuzzy.

11:34 2 BY MR. BASKIN:

11:35 3 Q. Well, first and maybe I'll be able
11:35 4 to pin it a little better for you in a second
11:35 5 with yet another document, but why don't you
11:35 6 tell the ladies and gentlemen of the jury in
11:35 7 your own words, Mr. Garfield, what it was that
11:35 8 the Google/YouTube representatives told you was
11:35 9 their response to the November proposal and the
11:35 10 discussions that had ensued between you and
11:35 11 Google and YouTube up to January 31st, 2007.

11:35 12 MR. MCGILL: Objection. Lacks
11:35 13 foundation.

11:35 14 A. I think Philip was as was Kelly
11:35 15 actually focused on business development and
11:35 16 Philip in particular seemed to be very focused
11:35 17 on, more focused on the business side of
11:35 18 things, and so up until his introduction into
11:35 19 the discussions, much of the conversation was
11:36 20 about how do we effectuate content recognition
11:36 21 and filtering of Google and YouTube.

11:36 22 Once he became involved in the
11:36 23 conversation it took a turn to a greater
11:36 24 emphasis on strategic partnership and business
11:36 25 relationship with the studios and how to

11:36 1 advance that and at some point, again I don't
11:36 2 remember the exact dates, it was conveyed to me
11:36 3 that fingerprinting was progressing within
11:36 4 Google but the heavy emphasis would be on not
11:36 5 moving forward with the pilot but making sure
11:36 6 that it was being deployed for their strategic
11:36 7 business partners and those who they had a
11:36 8 licensing relationship with. I don't remember
11:36 9 the exact date when that was conveyed but at
11:36 10 some point in early 2007.

11:36 11 BY MR. BASKIN:

11:36 12 Q. Do you recall whether the Google
11:37 13 representative Mr. Inghelbrecht or whomever it
11:37 14 was communicated to you that their position had
11:37 15 changed from where it was prior to the new
11:37 16 year?

11:37 17 MR. MCGILL: Objection. Leading.

11:37 18 A. Yes. Prior to the new year as
11:37 19 reflected in all the previous documents, my
11:37 20 expectations certainly and I was lead to
11:37 21 believe by the communication was that they were
11:37 22 going to integrate a filtering process and we
11:37 23 were going to launch the pilot. Post the new
11:37 24 year it was clear we were not because they told
11:37 25 me we were not going to move forward with the

11:37 1 pilot and their filtering processes would be
11:37 2 used for their business partners and those who
11:37 3 established a licensing relationship with
11:37 4 Google/YouTube but not with the studios
11:37 5 generally.

11:37 6 BY MR. BASKIN:

11:38 7 Q. The jury may not understand what you
11:38 8 mean or what they meant by the fact that the
11:38 9 technology, the filtering technology would be
11:38 10 reserved for their business or licensing
11:38 11 partners. Can you explain to the ladies and
11:38 12 gentlemen of the jury what that means, sir?
11:38 13 What was meant by licensing and business
11:38 14 partners?

11:38 15 A. The way I interpreted it was we were
11:38 16 having a conversation earlier about the white
11:38 17 list and the blacklist and filtering and
11:38 18 filtering out. The studios developed, marketed
11:38 19 movies, television shows, they then make a
11:38 20 decision on partners with whom they're going to
11:38 21 exploit those copyrighted works, so market and
11:38 22 distribute those copyrighted works.

11:39 23 So Google essentially conveyed that they
11:39 24 would work on getting authorization from the
11:39 25 studios and licenses from the studios and

DAVID FELDMAN WORLDWIDE, INC.

450 Seventh Avenue - Ste 2803, New York, NY 10123 (212)705-8585

11:39 1 others and those who would license, they would
11:39 2 then in the context of that licensing
11:39 3 arrangement work in integrate filtering. But
11:39 4 for those companies who were not and did not
11:39 5 develop a licensing arrangement with Google,
11:39 6 they weren't going to be doing this sort of a
11:39 7 pilot initiative or filtering.

11:39 8 MR. BASKIN: I think we have to break
11:39 9 for the tape. Shall we break for the tape now?

11:39 10 THE VIDEO OPERATOR: This is the end
11:39 11 of tape 1. Off the record at 11:39.

11:49 12 This is the beginning of tape 2 in the
11:49 13 deposition of Mr. Garfield. On the record at
11:49 14 11:49.

11:49 15 BY MR. BASKIN:

11:50 16 Q. Sir, again to help you with the
11:50 17 dates a little bit. Let me show you what we
11:50 18 will mark as Garfield Exhibit 10.
11:50 19 (Garfield Deposition Exhibit No. 10 was marked
11:51 20 for identification.)

11:51 21 A. Okay. I have read it.

11:51 22 BY MR. BASKIN:

11:51 23 Q. Sir, first, again can you identify
11:51 24 for us Garfield Exhibit 10 as consisting of an
11:51 25 E-mail chain in which you were a participant

11:51 1 towards February 22nd, 2007?

11:51 2 A. Yes, I was.

11:51 3 Q. Now, you will see in this E-mail

11:51 4 chain apparently the top two E-mails

11:52 5 Mr. Inghelbrecht E-mailed to you a answer to a

11:52 6 question that you raised with him following

11:52 7 apparently your listening to a radio program;

11:52 8 is that correct?

11:52 9 A. Yes.

11:52 10 Q. Just so the ladies and gentlemen of

11:52 11 the jury know since they've heard many initials

11:52 12 today, different organizations, NPR is National

11:52 13 Public Radio; is that correct?

11:52 14 A. That's correct, which I listen to a

11:52 15 lot.

11:52 16 Q. Your query was whether Google and

11:52 17 YouTube had decided to make its content

11:52 18 recognition technology available to everyone

11:52 19 and the answer was given by Mr. Inghelbrecht

11:52 20 that "I didn't hear this but our recognition

11:53 21 technology and overall concept of claim your

11:53 22 content is live and available to everyone who

11:53 23 works with us." Do you see that, Mr. Garfield?

11:53 24 MR. MCGILL: Objection to the

11:53 25 characterization of the document.

11:53 1 A. Yes.

11:53 2 BY MR. BASKIN:

11:53 3 Q. From your discussions with
11:53 4 Mr. Inghelbrecht, what did you understand
11:53 5 everyone who works with us meant, Mr. Garfield?

11:53 6 MR. MCGILL: Objection. Calls for
11:53 7 speculation.

11:53 8 A. I'm not sure if I had an
11:53 9 understanding when I saw it, ultimately I did
11:53 10 because we continued to talk and it became
11:53 11 clear that Google/YouTube was willing to filter
11:53 12 for those who had a licensing relationship with
11:53 13 Google/YouTube and not for those who did not.

11:53 14 Just to clarify one thing about the
11:53 15 document, which is further down the page where
11:53 16 I say "Hello, here it is. The study is ongoing
11:53 17 if you agree to filter, we will send the
11:53 18 evaluation." And then Philip says, "You crack
11:54 19 me up. Thanks Dean." The point I was making
11:54 20 wasn't actually a joke, it was the results of
11:54 21 the content recognition filtering was available
11:54 22 to everyone who participated in the process and
11:54 23 that was a part of the NDA.

11:54 24 It wasn't intended to suggest anything
11:54 25 else other than if they participated find and

11:54 1 NDA, they could get the materials.

11:54 2 Q. I think we ought to break that down
11:54 3 a little bit then for the jury because again,
11:54 4 there's some initials flying and they may not
11:54 5 be familiar with it. Basically I think you
11:54 6 told us earlier that the MPAA was conducting an
11:54 7 RFP, request for information?

11:54 8 A. Correct.

11:54 9 Q. From various fingerprinting
11:54 10 companies; is that correct?

11:54 11 A. That is correct.

11:54 12 Q. And by this E-mail, you were
11:54 13 advising Mr. Inghelbrecht that if Google would
11:55 14 filter, you would provide him with the results
11:55 15 of the studies; is that correct, sir?

11:55 16 MR. MCGILL: Objection.
11:55 17 Characterization.

11:55 18 A. Largely correct in that if they
11:55 19 participated and filtered and participated in
11:55 20 the RFI, that like all the RFI participants
11:55 21 around content recognition, they would get the
11:55 22 results.

11:55 23 BY MR. BASKIN:

11:55 24 Q. And that was his reference to you
11:55 25 crack me up, correct?

02:16 1 BY MR. MCGILL:

02:16 2 Q. It's a fairly important development,
02:16 3 wouldn't you say?

02:16 4 MR. BASKIN: Objection. Vague and
02:16 5 ambiguous.

02:16 6 A. I don't know if it's important but I
02:16 7 do know that it stood out in my mind because it
02:16 8 was a rather brazen thing to say, that
02:17 9 copyrighted content was the lure and so you
02:17 10 weren't going to do anything about it.

02:17 11 Q. How did you react to the statement?
02:17 12 Do you recall that?

02:17 13 MR. KLAUS: You mean when he was on
02:17 14 the phone call?

02:17 15 A. I don't recall how I reacted. I do
02:17 16 recall that I was disappointed that and
02:17 17 surprised. I was also disappointed that we
02:17 18 spent six months going back and forth on a
02:17 19 pilot and then it didn't happen.

02:17 20 BY MR. MCGILL:

02:17 21 Q. Did you express any of your
02:17 22 disappointments in a letter or E-mail
02:17 23 memorializing this conversation?

02:17 24 MR. BASKIN: To whom?

02:17 25 MR. KLAUS: To whom?

02:29 1 period of time and Google's conclusions about
02:29 2 what was feasible for YouTube/Google was not
02:29 3 something I thought --

02:30 4 Q. Since you mentioned Google, I just
02:30 5 want to clarify the timeline again. I thought
02:30 6 this conversation may have occurred in or
02:30 7 around April, 2006 is that accurate?

02:30 8 MR. KLAUS: Object.

02:30 9 MR. MCGILL: Which would be
02:30 10 preacquisition?

02:30 11 MR. KLAUS: I think that
02:30 12 mischaracterizes his testimony.

02:30 13 A. Yes. My testimony I think is that I
02:30 14 don't recall the exact time period and I don't
02:30 15 recall whether it was pre or post. So my use
02:30 16 of Google/YouTube is just today's terminology
02:30 17 and what we had switched to in this depo and
02:30 18 not because I knew whether it was pre or post
02:30 19 acquisition.

02:30 20 BY MR. MCGILL:

02:30 21 Q. Because I believe the individuals
02:30 22 you were discussing in relation to that
02:30 23 specific point were Steve Chen, Chris Maxcy,
02:30 24 Zahavah Levine and Kelly Laing and those all
02:30 25 being YouTube employees I thought I would try

02:30 1 and clarify with you whether or not that
02:30 2 conversation helped refresh your recollection
02:30 3 as to when the conversation occurred
02:30 4 preacquisition or post acquisition?

02:30 5 MR. KLAUS: I would just object. My
02:31 6 recollection was that Mr. Garfield had said
02:31 7 Mr. Chen and Ms. Levine and perhaps Mr. Maxcy.
02:31 8 I don't recall whether it's Mr. or Mrs. Liang,
02:31 9 I don't recall Kelly Liang being involved. So
02:31 10 I think it mischaracterizes his testimony but
02:31 11 you should answer his question.

02:31 12 A. Correct. Those were the three
02:31 13 people I recall. I don't recall if Kelly were
02:31 14 on the phone. I also don't recall the exact
02:31 15 timing and whether it were pre or post
02:31 16 acquisition.

02:31 17 BY MR. MCGILL:

02:31 18 Q. Well, notwithstanding this comment
02:31 19 you continued to engage YouTube in a dialogue
02:31 20 about fingerprinting testing; is that right?

02:31 21 A. Yes.

02:31 22 Q. In fact, those conversations
02:31 23 continued up to and including June, 2007; is
02:31 24 that right?

02:31 25 A. Yes. In or about June, 2007 and