

8/5/2009 Botha, Roelof



1 UNITED STATES DISTRICT COURT
 2 FOR THE SOUTHERN DISTRICT OF NEW YORK

3
 4 VIACOM INTERNATIONAL, INC., COMEDY)
 5 PARTNERS, COUNTRY MUSIC.)
 6 TELEVISION, INC., PARAMOUNT)
 7 PICTURES CORPORATION, and BLACK)
 8 ENTERTAINMENT TELEVISION, LLC,)
 9)
 10 Plaintiffs,)
 11 vs.) NO. 07-CV-2203
 12)
 13 YOUTUBE, INC., YOUTUBE, LLC,)
 14 and GOOGLE, INC.,)
 15)
 16 Defendants.)

17
 18 THE FOOTBALL ASSOCIATION PREMIER)
 19 LEAGUE LIMITED, BOURNE CO., et al.,)
 20 on behalf of themselves and all)
 21 others similarly situated,)
 22)
 23 Plaintiffs,)
 24 vs.) NO. 07-CV-3582
 25)
 26 YOUTUBE, INC., YOUTUBE, LLC, and)
 27 GOOGLE, INC.,)
 28)
 29 Defendants.)

30 VIDEOTAPED DEPOSITION OF ROELOF BOTHA
 31 MENLO PARK, CALIFORNIA
 32 WEDNESDAY, AUGUST 5, 2009

33 JOB NO. 17298

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2 But largely speaking, the three cofounders of
3 YouTube had individual contributor roles for the bulk
4 of their time at PayPal before they founded --
5 cofounded YouTube. So that was one concern around the
6 team.

7 Another concern was whether or not the site
8 would ever gain a significant audience, gain
9 significant traffic or traction, given the focus on
10 user-generated videos. There was a concern that the
11 market opportunity for the company may be limited.

12 There were concerns around the costs of
13 delivery, given that bandwidth prices at the time were
14 high. They have been decreasing, but they're still
15 relatively high.

16 There were concerns around the costs of
17 storage of videos to be served on the YouTube service,
18 and there were questions around ability to generate
19 advertising revenue with the service.

20 Q Were there concerns or questions raised with
21 respect to potential copyright liability?

22 A I don't recall a specific discussion around
23 the issue of copyright liability, given the company
24 had presented a vision of building a user-generated
25 video service. My own use of the service was

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2 regards to copyrighted matters.

3 Q Now, was this after the financing closed?

4 A I don't recall. As I mentioned before -- I'm
5 sorry, I don't -- because it was such an unusual
6 situation to have the reincorporation and just -- I
7 don't recall the date. Normally, things are a lot
8 smoother.

9 Q Now, tell me what you recall about these
10 discussions in the fourth quarter of 2005 with regards
11 to copyright matters.

12 MR. TANGRI: And I'm just going to caution
13 you at this point that if any of those discussions
14 were with or relayed advice or communications had with
15 lawyers, exclude the substance of any legal
16 communications from your answer as a privileged basis.

17 MR. KRAMER: Join.

18 THE WITNESS: I beg your pardon?

19 MR. KRAMER: I join in that instruction.

20 THE WITNESS: Oh, okay. But it's permissible
21 you can identify a discussion, but not the content?

22 MR. TANGRI: Correct, correct.

23 THE WITNESS: I just want to make sure I
24 understand.

25 MR. TANGRI: You -- you -- yes. If the

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2 answer -- yes, you can identify a discussion and the
3 participants, but not to disclose the substance of the
4 discussion, if the substance was --

5 THE WITNESS: Understood.

6 MR. TANGRI: -- infected with lawyer
7 communications, for want of a better word.

8 THE WITNESS: Understood.

9 So at -- at some point in the fourth quarter
10 of 2005, Chad Hurley and myself met with an attorney
11 at Wilson Sonsini.

12 MS. CUNHA: Q. And who was that attorney?

13 A I believe it's Cathy Kirkman. I can't recall
14 her -- I hope I got her last name correct.

15 Q And what was discussed at that meeting?

16 MR. TANGRI: And at this point, I'm going to
17 instruct you not to answer the question based on
18 attorney-client privilege.

19 MR. KRAMER: Join.

20 THE WITNESS: Understood.

21 MS. CUNHA: Q. And are you going to follow
22 your attorney's advice and not answer the question?

23 A Yes.

24 Q Now, do you know how YouTube came to be
25 represented by Cathy Kirkland and Wilson Sonsini?

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2 A I don't recall the specific connection
3 between -- so at the time that we invested -- or
4 the -- at the time that I first met with the team,
5 they had, I think, self-incorporated. Maybe they'd
6 used, you know, a website or some other service to do
7 their incorporation. They didn't have outside counsel
8 representation, and so we suggested that, as a matter
9 of good sort of standard practice, the company should
10 seek company counsel in the same fashion that we would
11 seek investor counsel when making an investment.

12 And I may have introduced them to a few
13 different law firms. I don't recall specifically
14 whether I was the one to introduce them to Stephen
15 Wells, who ended up being the company's outside
16 corporate counsel.

17 Q Did you know Ms. Kirkland prior to this time
18 period?

19 A I did not know Ms. Kirk -- Mrs. Kirkland?

20 MR. KRAMER: Kirkman.

21 THE WITNESS: Kirkman.

22 MR. KRAMER: Yes, K-I-R-K-M-A-N.

23 THE WITNESS: Yeah, Kirkman.

24 I did not know Cathy Kirkman before this.

25 MS. CUNHA: Let's mark this as the first

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2 Exhibit.

3 (Document marked Botha Exhibit 1
4 for identification.)

5 MS. CUNHA: And while we're there, let's just
6 mark this as the second exhibit.

7 MR. TANGRI: Thank you.

8 (Document marked Botha Exhibit 2
9 for identification.)

10 MS. CUNHA: Q. Showing you what's been
11 marked as Exhibit 1 and 2, have you had an opportunity
12 to look at those documents?

13 A I have looked at the documents.

14 Q Okay. Do you recognize them?

15 A I do recall these documents.

16 Q And you --

17 A Well, I obviously saw them electronically as
18 e-mails, not these specific printouts, but...

19 Q But you recognize them as printouts of -- of
20 e-mail chains in which you were one of the recipients?

21 A I do recognize.

22 Q And does seeing these two documents refresh
23 your recollection as to when this meeting that you
24 described with Cathy Kirkman took place?

25 MR. KRAMER: Objection to the extent it

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2 mischaracterizes the prior testimony, and it's vague.

3 THE WITNESS: As I mentioned before, I do not
4 recall the specific date of the meeting with Cathy
5 Kirkman, but these e-mails do specify the specific
6 date that was scheduled for a meeting.

7 I don't know whether the meeting actually
8 took place on that date without consulting a calendar.
9 It may have been rescheduled. I do not know.

10 MS. CUNHA: Q. And does seeing these two
11 documents refresh your recollection as to whether or
12 not that meeting took place prior to the closing of
13 Sequoia's investment in YouTube?

14 A Unfortunately, neither of these documents
15 cite the actual closing date of the investment in
16 YouTube, and as such, I cannot conclude whether or not
17 they occurred before or after.

18 Q Now, directing your attention to Exhibit 1,
19 there is an e-mail, the second from the top, from you
20 to Mr. Hurley, dated September 21st, 2005, at
21 2:54 p.m.; do you see that e-mail?

22 A I do see that.

23 Q And do you see you write to Mr. Hurley that,
24 "I will get you the contact information for two
25 different IP strategists, including the attorney at

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2 mischaracterizes his prior testimony.

3 THE WITNESS: Yeah, I think I -- I'll stick
4 to what I said the previous time. I gave a detailed
5 explanation.

6 MS. CUNHA: Q. Now, other than the Nike
7 video, do you recall if any of the other videos that
8 were amongst the most -- the most viewed in this
9 distribution analysis were professionally produced
10 content?

11 MR. TANGRI: Objection; mischaracterizes his
12 prior testimony and vague.

13 THE WITNESS: I recall the Nike video being a
14 professionally produced video, because we went to meet
15 with the people who produced and uploaded that video
16 on YouTube.

17 MS. CUNHA: Q. When did you do that?

18 A I do not recall the specific date, but I
19 believe -- I believe it was at the end of 2005.

20 Q So in 2005, you were aware that companies
21 were creating content for promotional purposes and
22 posting it on the YouTube website; is that fair to
23 say?

24 A It's fair to say that I was aware that Nike
25 had uploaded a video that they wanted to distribute

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2 for promotional purposes for a new shoe.

3 Q Were you aware of any other companies posting
4 promotional content on the YouTube website in the 2005
5 time period?

6 A I do not recall being aware of other
7 companies.

8 Q At some point, did you become aware of other
9 companies posting promotional content on the YouTube
10 website?

11 A At some point, I did become aware of -- of
12 other companies using YouTube for promotional purposes
13 for uploading content.

14 Q And, in fact, early on when Sequoia first
15 decided to invest, was part of the revenue model for
16 YouTube the notion that companies would use the
17 website to post promotional content?

18 A Sorry. Could you repeat the question,
19 please?

20 Q Sure.

21 When Sequoia was deciding to invest in
22 YouTube and was looking at potential revenue models,
23 was part of what Sequoia envisioned for the website in
24 the future was that the site would be used by
25 companies who would post promotional content?

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2 Lazy Sunday gained a lot of popularity and significant
3 video views. Chad Hurley noticed that this was a very
4 popular video and sent a message to Saturday Night
5 Live, or I don't know which specific media company
6 parent to whom he sent the communication, notifying
7 them that this video was on the service.

8 We, YouTube, did not know who the individual
9 was who uploaded the video clip, nor whether that
10 individual had the authority to upload that particular
11 video, but we notified the owners of that show that
12 this clip was available on YouTube and we didn't know
13 if it was authorized and if it was not authorized,
14 that they should please notify the company so that we
15 could take it down in compliance with the company's
16 takedown policies, and the company did not receive any
17 reply for six weeks thereafter.

18 MS. CUNHA: Q. Were you copied on that
19 communication?

20 A I do not believe I was copied on that
21 communication.

22 Q But somebody told you about the
23 communication?

24 A Chad Hurley reported this incident to me,
25 yes.