
Discovery in Court Proceedings of YouTube's Logging Database: Viacom Inc v YouTube Inc and Google Inc (United States District Court, 1 July 2008)

that could salvage the business case (and participant relationships) before burning them with litigation. They ensure that escalation procedures are efficient and effective in meetings between participants' management, and in sensible and commercially orientated attempts to negotiate a resolution using a mediator with subject matter expertise (who can maximise the chances of finding a durable solution that delivers the business case and preserves relationships). At this stage options worth exploring, after meetings between senior management of all parties, include mediation, neutral evaluation, mini trial, expert determination and conciliation.

All have their pros and cons but, importantly, they all share the benefits of ADR that are lost in litigation: fairness, process efficiency, cost, speed, confidentiality and relationship preservation.

Organisations need to develop both a dispute avoidance policy *and* a dispute resolution policy. Whilst some have a dispute resolution policy, almost none have a dispute avoidance policy. This is remarkable given that intercepting disputes before they can develop offers massive savings in time and effort and, of course, cash-sapping wheel spinning.

Often the engagement of a neutral expert in the early stages of a project will ensure that the contract deliverable is the business case, that the board has early warning if a project is departing from spec, and that every opportunity to salvage the business case is taken before resort to arbitration or litigation.

Furthermore, when strategic objectives and competitive advantage are involved, the confidentiality that applies in ADR processes offers the ability to deal with disputes without jeopardising the competitive edge of the underlying strategy.

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Introduction

On 1 July 2008 YouTube Inc ("YouTube") and Google Inc ("Google"), which owns YouTube, were ordered by a judge in the United States¹ to produce to Viacom Inc ("Viacom") its logging database for all views of videos on YouTube's website including views via all embedded links on third-party websites.² The logging database includes the unique log-in identification (user name), date and time of each view and the IP address of the viewer. The ruling immediately provoked widespread public debate.

Background

In March 2007 Viacom and other producers of videos, films, music, television programs and the like commenced proceedings against YouTube and Google seeking US\$1b for breach of copyright. Viacom's³ claim referred to the ready copying and distribution of and access to digital copyright works over broadband, wireless and other networks. Viacom complained that although YouTube was ostensibly a site where user-generated content could be shared YouTube authorised users to download copyright works without

authorisation from the owner of the copyright. Viacom alleged that YouTube was vicariously liable for copyright infringement by its users. Viacom claimed that it suffered irreparable harm and that it was entitled to a permanent injunction and damages. YouTube and Google relied on the Safe Harbour provisions of the Digital Millennium Copyright Act and contended that the impugned videos might be used pursuant to express or implied licences granted by Viacom, the doctrine of fair use, the doctrine of copyright abuse, substantial non-infringing use as well as numerous equitable defences

(estoppel, waiver, laches and unclean hands).

Viacom's application for access to the logging database was interlocutory. It argued that the information in YouTube's database was needed so that Viacom could compare the attractiveness of non-infringing and user-generated content with the attractiveness of content claimed by Viacom to infringe copyright. That comparison was relevant to Viacom's claim that YouTube was vicariously liable for the actions of its users and to YouTube's defence of substantial non-infringing use.

Logging Database

YouTube said that the viewing and video uploading habits of individuals could be ascertained from a user's login ID and IP address. The judge found that concerns for users' privacy was speculative because, without more, an IP address could not identify specific individuals. YouTube was required to provide the logging database to Viacom.

The logging database comprised each user's viewing and uploading records together with the date and time of each view and upload.

Other Access sought by Viacom

Viacom asked to see the computer code used by YouTube to operate its site and to monitor the activities of users; Viacom also wished to view the search code. Viacom said that code would provide evidence that YouTube had enabled users to find infringing material. The search code was the product of 1000 person-years of work. Access was denied because of the enormous commercial value in the code and that access was sought merely to allay speculation.⁴

Viacom also sought access to the code of a newly-invented video ID program used by YouTube to enable searches for infringing videos. Viacom said it needed that code to determine whether YouTube was doing all it could to stop infringement. The judge found this was also speculative and denied access. Viacom was granted access to all removed (and, presumably, previously infringing) videos.

Observations

The judge held that concerns that provision of IP addresses might identify individuals to be speculative. If evidence had demonstrated otherwise privacy concerns could be allayed by partly or fully obscuring IP addresses (unless of course the IP address itself was a relevant fact in issue).

There is no general right to privacy in Australia.⁵ Information can be protected by the Courts pursuant to their power to control their own processes; the confidentiality of information contained in a database such as the logging database in a case such as the present might, if the content of an uploaded video, a user ID or some other thing allowed a connection to be drawn between an IP address (or the videos themselves) and an individual, ground an application for an appropriate safeguard. It is conceivable that third party interests in confidential information would make intervention in proceedings permissible where the parties do not themselves propose safeguards and the third party interest is not trivial. In the circumstances here, information was collected by YouTube; it would be an interesting question whether users had any rights in that information.

The American fair use doctrine is yet to be considered by the Court in this proceeding. The diverse

range of derivative and copy works uploaded to YouTube (ranging from partial copies of musical works as incidental background and the incorporation of very small slices of preexisting works, to parody, to "mashups" consisting of numerous small slices of preexisting works, through to the uploading of entire untouched copies) will comprise a finely graduated range of uses in what must be the perfect circumstance for a detailed consideration of the fair use doctrine. Australian law does not include a fair use defence. However, apart from making interesting reading the many facets likely to be explored in this case will provide useful and interesting analysis which may find some application in Australia in the context of the more limited defences of fair dealing.⁶

Post script

On 14 July 2008 Viacom and YouTube agreed to substitute a correlative unique value for IP addresses, the effect of which will be to keep IP addresses confidential.⁷

¹ Stanton J, United States District Court for the Southern District for New York.

² The decision and other docket documents are posted at <http://www.news.justia.com/cases/featured/new-york/nysdce/1:2007cv02103/302164/>.

³ Viacom Inc was one of a number of plaintiffs.

⁴ Keywords may be used to locate content.

⁵ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

⁶ *Copyright Act* 1968 (Cth), ss 41, 41A, 42, 103A, 103AA, 103B, 103C.

⁷ A copy of the agreement is available at http://64.233.179.110/blog_resources/google_youtube_viacom.pdf.