

2008

## YouTube Viewers Become Unwitting Players in Google-Viacom Litigation

Bill Tasch

Follow this and additional works at: <http://lawcommons.luc.edu/pilr>

 Part of the [Business Organizations Law Commons](#), and the [Internet Law Commons](#)

---

### Recommended Citation

Bill Tasch, *YouTube Viewers Become Unwitting Players in Google-Viacom Litigation*, 14 Pub. Interest L. Rptr. 31 (2008).  
Available at: <http://lawcommons.luc.edu/pilr/vol14/iss1/6>

This Feature is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

*FEATURE ARTICLE***YOUTUBE VIEWERS BECOME  
UNWITTING PLAYERS IN  
GOOGLE-VIACOM  
LITIGATION***by* **BILL TASCH**

**T**he blogosphere erupted last summer over a recent discovery ruling in the billion-dollar copyright infringement lawsuit between media giants Google and Viacom. The New York federal judge presiding over the litigation ordered Google to turn over a portion of the data it collects about users of its YouTube website.<sup>1</sup> The controversy centered on the YouTube “Logging

Database,” which records information about each YouTube viewer and the specific video he or she watched.<sup>2</sup>

The court believed the data was sufficiently anonymous, dismissing privacy concerns with the disclosure as “speculative.”<sup>3</sup> However, experts say that the Logging Database contains enough data to personally identify specific individuals and their viewing habits.<sup>4</sup>

The ruling resulted in a public backlash which ultimately drove Google and Viacom to voluntarily exclude the controversial data from the disclosure.<sup>5</sup> Still, a number of legal scholars worry that a failure on the judge’s part to comprehend the technical aspect of his ruling put user privacy at risk, and that similar failures are likely to recur.<sup>6</sup>

The incident highlights the way consumer privacy interests are increasingly clashing with ever more sophisticated marketing techniques being employed across the internet. Today’s major web companies gather incredible amounts of information about their users’ activity.<sup>7</sup> The data is used to target on-screen advertisements of interest to specific users as well as to identify general trends.<sup>8</sup> It is generally understood in the industry that web users are widely oblivious to how data about their activity is recorded, used, or accessed.<sup>9</sup>

Consumer advocates worry the practices devalue traditional notions of privacy.<sup>10</sup> In the context of civil discovery, the concerns become even more prominent – if the typical YouTube viewer is unaware that Google tracks which videos he or she watches, it is even less likely the viewer will contemplate that another party would get a hold of this information through discovery.

### *VIACOM v. YOUTUBE*

In 2006, Google’s growing web empire acquired YouTube, a website which allows users to post digital videos, typically 30 seconds to 5 minutes in length, for public viewing.<sup>11</sup> YouTube is an internet entertainment staple, and enjoys an eminent place as one of the internet’s most popular web sites.<sup>12</sup> Americans viewed YouTube videos more than 5 billion times in July 2008 alone.<sup>13</sup> YouTube’s popularity stems in part from the ease with which users can post their homemade videos online, but this format has also invited copyright infringement via users who post copyright-protected content without permission.<sup>14</sup>

Enter Viacom, the conglomerate behind television networks Comedy Central, Nickelodeon, MTV, VH1, B.E.T., and numerous others.<sup>15</sup> In spring 2007, Viacom and several smaller copyright holders joined in a suit against YouTube and Google, alleging over one billion dollars in damages for copyright infringement that occurred on the site.<sup>16</sup>

Recognizing the sensitive and proprietary nature of the information that would likely be subjected to discovery, the parties agreed to a stipulated confidentiality order strictly limiting the use and disclosure of information turned over in the litigation.<sup>17</sup>

As discovery progressed through the spring and summer of 2008, Viacom brought a motion to compel Google to produce, *inter alia*, the Logging Database for YouTube.<sup>18</sup> Each time a user clicks play on YouTube, the Logging Database records her login identification, the time the video was watched, the internet protocol (IP) address of her computer, and a number that identifies the video requested.<sup>19</sup> Viacom claimed it needed the Logging Database to establish whether and to what extent copyright infringing videos were preferred by YouTube visitors over user-created content not subject to copyright.<sup>20</sup>

Google objected on the grounds that Viacom did not require specific information about users and that disclosure would violate its users' privacy.

In support of its argument, Google cited the Video Privacy Protection Act of 1988 (VPPA).<sup>21</sup> The VPPA prohibits providers of "video cassette tapes or similar audio visual materials" from disclosing personally identifiable information about the consumer of the material.<sup>22</sup> In the context of discovery, the VPPA requires disclosure of protected material to be made only upon a demonstrated compelling need for the material that cannot be accommodated by any other means.<sup>23</sup> Additionally, the involved consumers must be afforded an opportunity to contest disclosure.<sup>24</sup> Google argued that the VPPA applied to Viacom's request, asserting that the IP addresses and user names listed in the Logging Database were enough to allow a third party to determine the personal identity of the users associated with the individual entries in the database.<sup>25</sup>

District Judge Louis L. Stanton rejected this argument as "speculative," finding that IP addresses and login IDs were not sufficient to personally identify users.<sup>26</sup> Login IDs, according to the judge, were merely anonymous pseudonyms.<sup>27</sup> As for IP addresses, the judge pointed to Google's official policy

blog, where a Google software engineer had earlier argued that IP addresses were not personally identifiable.<sup>28</sup>

The ruling was not a total loss for Google. In the same motion, Viacom sought to discover the proprietary computer code underlying the search functions on the Google and YouTube web sites.<sup>29</sup> Viacom wanted to review the code to investigate whether Google had programmed their search function to prefer infringing video content when returning search results.<sup>30</sup> Judge Stanton did not compel Google to turn over its search code, reasoning that Viacom's claim was too speculative to warrant ordering Google to "place this vital asset in hazard."<sup>31</sup>

#### A FOX GUARDING THE HENHOUSE

The ruling immediately drew ire from privacy groups, legal scholars, and bloggers who found it offensive that Viacom would have access to their viewing records.<sup>32</sup>

A number of prominent scholars took issue with the court's finding the information not to be personally identifiable.<sup>33</sup> They argue that login IDs are not as anonymous as the judge seemed to believe.<sup>34</sup>

Many users choose login IDs that include their first or last name or that otherwise make their identity relatively easy to figure out.<sup>35</sup> Even users with more creative names may use the same pseudonym in conjunction with their real name elsewhere on the web. As Ryan Radia of the Competitive Enterprise Institute points out: "[t]he same LobsterBoy1922 who spends his evenings watching Rick Astley clips on YouTube is probably the same LobsterBoy1922 who often posts using his real name on [a message board elsewhere on the web]."<sup>36</sup>

In addition, IP addresses can very often reveal the user's general location.<sup>37</sup> This information, combined with the right username, would certainly be enough to personally identify many users. For example, it would not be difficult to pinpoint the identity of someone viewing videos under the username BTasch showing an IP address associated with Roselle, Illinois. Thus, Radia says, "analysis of YouTube's viewer logs would likely have made it possible, and

in some cases even trivial, to link online pseudonyms back to real-life individuals.”<sup>38</sup>

Some found it telling that the ruling recognized Google’s proprietary interest in its search code, while dismissing concerns about consumer privacy: “[n]ot for the first time, a court ruling in a copyright-policy case has made privacy rights an afterthought,” wrote the Washington Post’s Rob Pegoraro.<sup>39</sup> “Trade secret wins, privacy loses,” lamented Wendy Seltzer, a law professor at Harvard University.<sup>40</sup>

Lauren Gelman, the Executive Director of the Center for Internet and Society at Stanford Law School, suggests that one reason the court failed to recognize the privacy interests involved was the absence of effective advocacy on behalf of those interests.<sup>41</sup>

Google’s data-collection practices are unprecedented, and for this reason the company often finds itself on the other side of consumer privacy issues.<sup>42</sup> For instance, Google has contended that the IP addresses it collects from visitors to its sites should not be considered personally identifiable under United States or European Union privacy law.<sup>43</sup> That is why Google’s public policy blog, which Judge Stanton quoted in his opinion to contradict Google’s argument, argues that IP addresses are not personally identifiable.<sup>44</sup>

This outside interest, Gelman says, gives reason to doubt that Google was putting forth its best arguments to defend the privacy of IP addresses.<sup>45</sup> She suggests that Google might have sought to avoid a “win” in the *Viacom* discovery dispute that could wind up hindering it in later, more important legal battles.<sup>46</sup>

In any case, even if Google did make a good-faith effort to defend user privacy, its attempt struck the court as self-interested posturing.<sup>47</sup> In this way, Google proved to be a less-than-ideal conduit for bringing the privacy implications of the ruling before the court.<sup>48</sup>

Still, despite quarrels with the court’s reasoning, some commentators insisted that privacy concerns were being overblown. Intellectual property lawyer R. David Donoghue assured readers of his blog that there is no reason for them to worry about their privacy, as all discovered information was still covered by the Stipulated Confidentiality Order.<sup>49</sup>

Jeff Sanders, a New York attorney specializing in media and technology, told a reporter that the “ruling doesn’t raise genuine policy issues,” since it “does not allow user information to be disclosed in any manner other than that which Google collects itself.”<sup>50</sup> Sanders explained that the confidentiality order ensures limited disclosure to trustworthy parties.<sup>51</sup> If anything, Sanders says, YouTube users should be fearful of hackers gaining unauthorized access to Google’s data.<sup>52</sup>

The debate raging on the internet largely tempered when, less than two weeks after the ruling, Viacom agreed to accept the Logging Database with login IDs and IP addresses randomized.<sup>53</sup> This took care of the immediate fears, but did little to comfort those who were looking for a judicial victory that would establish a different precedent.<sup>54</sup>

A “DANGEROUS ASSEMBLY OF FACTS?”<sup>55</sup>

The message sent by the court’s ruling was the most disturbing part of the episode for many. The decision failed to mandate any protective order over the data, highlighting the larger privacy issues associated with the increasingly pervasive data collection practices being used by the largest internet companies.<sup>56</sup>

According to David Sohn of the Center for Democracy and Technology, the decision has the potential to produce a “chilling effect,” causing individuals to think twice about how they browse the internet for fear that data recording their activity could be turned over to any third party that chooses to bring legal action against the host website.<sup>57</sup> “Information about what videos individuals choose to watch can be very sensitive from a privacy perspective,”<sup>58</sup> a concern he argues Congress recognized when it passed the VPPA.<sup>59</sup>

Professor Seltzer worries that the discovery order “is just the first of a wave, as more litigants recognize the data gold mines that online service providers have been gathering.”<sup>60</sup>

Today’s large internet companies gather massive sets of information about their users for marketing purposes.<sup>61</sup> Anything the user inputs to a website, including search terms and clicked links, can be collected and stored for later ad-targeting and market research.<sup>62</sup>

A typical visit to Google's website, for example, might include checking a Google email account, viewing a few news stories, and searching for a recipe. Whether the user is aware or not, during such a visit Google's marketing software is quietly recording the contents of the user's email, which news links the user clicked, and what the user searched for.<sup>63</sup> The software crunches the data and throws up ads on the website calculated to match the user's interests.<sup>64</sup>

The amount of information gathered through these and similar processes is staggering; internet research firm ComScore estimates that the five web destinations run by Yahoo, Google, Microsoft, AOL, and MySpace now collect at least 336 billion pieces of information combined about their users, per month.<sup>65</sup> The Logging Database at issue in the *Viacom* ruling was 12 terabytes in size.<sup>66</sup> This is 20 percent more information than the entire print collection of the Library of Congress.<sup>67</sup>

As Seltzer explains, these sets of data are all potential targets for discovery: "search terms, blog readership and posting habits, video viewing, and browsing might all 'lead to the discovery of admissible evidence.'"<sup>68</sup>

As the *Viacom* case suggests, there remain major questions about the extent to which courts should, when confronted with a discovery request for such information, balance privacy concerns against the traditionally-recognized interest in broad discovery. As online tracking techniques advance, the issue will only become more salient.

---

## NOTES

1 *Viacom Int'l Inc. v. YouTube Inc.*, Nos. 07 Civ. 2103(LLS), 07 Civ. 3582(LLS), 2008 WL 2627388, at \*5 (S.D.N.Y. July 2, 2008).

2 Anick Jesdanum, *YouTube, Viacom Agree to Mask Viewer Data*, BOSTON GLOBE, Jul. 15, 2008, available at [http://www.boston.com/business/technology/articles/2008/07/15/youtube\\_viacom\\_agree\\_to\\_mask\\_viewer\\_data](http://www.boston.com/business/technology/articles/2008/07/15/youtube_viacom_agree_to_mask_viewer_data).

3 *Viacom*, 2008 WL 2627388, at \*5.

4 Wendy Seltzer, *Privacy Falls into YouTube's Tar Pit*, July 4, 2008, <http://wendy.seltzer.org/blog/archives/2008/07/04/privacy-falls-into-youtubes-data-tar-pit.html> (Harvard Law professor's posting criticizing *Viacom* decision); Matt Hartley, *YouTube Told to Hand Over Users' Data*, GLOBE AND MAIL, Jul. 3, 2008, available at <http://www.theglobeandmail.com/servlet/story/RT-GAM.20080703.wgoogle04/BNStory/Technology/home> (quoting George Washington University law professor Orin Kerr); Posting of Dan Slater to The Wall Street Journal Law Blog, *The*

*End of Internet Privacy? A Look [at] the Viacom-Google Order*, <http://blogs.wsj.com/law/2008/07/07/the-end-of-internet-privacy-a-look-the-viacom-google-order/> (July 7, 2008, 09:18 EST) (quoting Columbia law professor Tim Wu); Day to Day, (National Public Radio broadcast July 4, 2007) (host Madeleine Brand interviewing University of Southern California law professor Jennifer Urban).

5 Jesdanum, *supra* note 2.

6 Seltzer, *supra* note 4; Hartley, *supra* note 4; Slater, *supra* note 4; Day to Day, *supra* note 4.

7 Louise Story, *To Aim Ads, Web is Keeping Closer Eye on You*, N.Y. TIMES, Mar. 10, 2008, available at <http://www.nytimes.com/2008/03/10/technology/10privacy.html?pagewanted=1>.

8 *Id.*

9 *Id.*; See also Candice L. Kline, Comment, *Security Theater and Database-Driven Information Markets: A Case for an Omnibus U.S. Data Privacy Statute*, 39 U. TOL. L. REV. 443, 444 (2008) (explaining that collections of consumer data have become a commercial commodity, largely unbeknownst to the general public who are its subject.)

10 *Id.*

11 Press Release, Google, Google to Acquire YouTube for \$1.65 Billion in Stock (Oct. 9, 2006), available at [http://www.google.com/press/pressrel/google\\_youtube.html](http://www.google.com/press/pressrel/google_youtube.html).

12 *Viacom*, 2008 WL 2627388, at \*1.

13 Press Release, comScore, YouTube Draws 5 Billion U.S. Online Video Views in July 2008 (Sept. 10, 2008), available at <http://www.comscore.com/press/release.asp?press=2444>.

14 Google has designed software specifically for the purpose of preventing copyrighted works from being displayed or uploaded to YouTube. See Help Center: YouTube Copyright Policy: Video Identification Tool, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=83766> (last visited Nov. 20, 2008).

15 See Media Networks, <http://www.viacom.com/ourbrands/medianetworks/Pages/default.aspx> (last visited Nov. 20, 2008).

16 Complaint for Declaratory and Injunctive Relief and Damages, *Viacom Int'l v. Youtube*, No. 107CV02103 (S.D.N.Y. Mar. 13, 2007); *Viacom*, 2008 WL 2627388, at \*1.

17 Stipulated Pre-Trial Protective Order at 2-15, *Viacom Int'l Inc. v. YouTube Inc.*, Nos. 07-CV-2103, 07-CV-3582, (S.D.N.Y. Aug. 9, 2007).

18 *Viacom*, 2008 WL 2627388, at \*1.

19 *Id.* at \*4.

20 *Id.*

21 Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2006).

22 § 2710(a)(4); § 2710(b) (2006).

23 § 2710(b)(2)(F).

24 § 2710(b)(2)(F).

25 *Viacom*, 2008 WL 2627388, at \*5.

26 *Id.* at \*5.

27 *Id.*

28 *Id.*; See Posting of Alma Whitten to The Google Public Policy Blog, *Are IP addresses personal?*, <http://googlepublicpolicy.blogspot.com/2008/02/are-ip-addresses-personal.html> (Feb. 22, 2008).

29 *Viacom*, 2008 WL 2627388, at \*2.

30 *Id.*

31 *Id.* at \*3.

32 Caroline McCarthy, *Source: Protective Order will Keep Viacom Out of Sensitive YouTube User Data*, CNET.COM, July 3, 2008, [http://news.cnet.com/8301-1023\\_3-9983631-93.html](http://news.cnet.com/8301-1023_3-9983631-93.html) (“[e]arly reactions to the news ranged from outrage to hysteria”); Posting of Kurt Opsahl to The

Electronic Frontier Foundation Deeplinks Blog, *Court Ruling Will Expose Viewing Habits of YouTube Users*, <http://www.eff.org/deeplinks/2008/07/court-ruling-will-expose-viewing-habits-youtube-us> (July 2, 2008)(articulating Electronic Frontier Foundation's disapproval of the court's ruling); Posting of David Sohn to the Center for Democracy and Technology Blog, *Court Orders Google to Turn Over YouTube User Data*, <http://blog.cdt.org/2008/07/03/court-orders-google-to-turn-over-youtube-user-data> (July 3, 2008); Seltzer, *supra* note 4; Hartley, *supra* note 4; Slater, *supra* note 4; *Day to Day*, *supra* note 4.

33 E-Mail from Ryan Radia, Information Policy Analyst, Competitive Enterprise Institute, to Author (Nov. 10, 2008, 14:56 CST) (on file with author); David Robinson, *Viacom, YouTube, and the Dangerous Assembly of Facts*, July 8, 2008, <http://freedom-to-tinker.com/blog/dgr/viacom-youtube-and-dangerous-assembly-facts#comments>; Seltzer, *supra* note 4; Don Clark, Jessica E. Vascellaro, & Jamie Heller, *Court Order for Viewer Data on YouTube Stirs Privacy Concerns*, July 5, 2008, <http://online.wsj.com/article/SB121513168832628285.html> (quoting Professor Seltzer: "this is the wrong legal conclusion from the facts"); Doug Tygar, *YouTube Privacy Imbroglia Redux*, July 5, 2008, <http://tygar.blogspot.com/2008/07/youtube-privacy-imbroglia-redux.html> (Berkeley computer science professor); Hartley, *supra* note 4 (quoting George Washington University law professor Orin Kerr).

34 See McCarthy, *supra* note 32; Opsahl, *supra* note 32; Sohn, *supra* note 32; Seltzer, *supra* note 4; Hartley, *supra* note 4; Slater, *supra* note 4; *Day to Day*, *supra* note 4.

35 *Id.*

36 Posting of Ryan Radia to The Tech Liberation Blog, *Google vs. Google*, <http://techliberation.com/2008/07/08/google-vs-google> (July 7, 2008).

37 See IP Address Location, <http://www.ipaddresslocation.org> (last visited Nov. 20, 2008) (a web site that will, if possible, display the location associated with your network or internet service provider's IP address.)

38 Ryan Radia, *supra* note 32.

39 Rob Pegoraro, *Court invites Viacom to Violate YouTube Viewers' Privacy*, WASHINGTON POST, July 7, 2008, [http://blog.washingtonpost.com/fasterforward/2008/07/court\\_invites\\_viacom\\_to\\_violat\\_1.html](http://blog.washingtonpost.com/fasterforward/2008/07/court_invites_viacom_to_violat_1.html).

40 Seltzer, *supra* note 4.

41 Podcast: *Lawyer 2 Lawyer: Privacy and Piracy: Viacom v. YouTube*, (produced by Legal Talk Network July 24, 2008) available at <http://legaltalknetwork.com/modules.php?name=News&file=article&sid=296> (recording of discussion hosted by attorneys J. Craig Williams and Bob Ambrogi with Stanford law professor Lauren Gelman and intellectual property attorney Kevin Thompson).

42 *Id.*; Thomas Claburn, *Google's Turn as 'Privacy Defender' in Viacom Suit Only Partly Credible*, INFORMATIONWEEK, July 7, 2008.

43 Posting of Alma Whitten to The Google Public Policy Blog, *Are IP addresses personal?*, <http://googlepublicpolicy.blogspot.com/2008/02/are-ip-addresses-personal.html> (Feb. 22, 2008).

44 *Id.*

45 Podcast, *supra* note 40.

46 *Id.*

47 See *Viacom*, 2008 WL 2627388, at \*5 (S.D.N.Y. July 2, 2008), (citing the Google Policy Blog's argument that IP addresses are not personal to dismiss Google's lawyers' argument that disclosure of IP addresses threatened user privacy).

48 Ryan Radia, *supra* note 36.

- 49 R. David Donoghue, *Google Ordered to Produce YouTube Information*, July 10, 2008, <http://www.chicagoplitigation.com/2008/07/articles/discovery/google-ordered-to-produce-youtube-information/index.html>.
- 50 Daisy Whitney, *An Attorney's POV on the YouTube-Viacom Ruling*, TVWEEK, July 8, 2008, [http://www.tvweek.com/blogs/trial-and-error/2008/07/an\\_attorneys\\_pov\\_on\\_the\\_youtub.php](http://www.tvweek.com/blogs/trial-and-error/2008/07/an_attorneys_pov_on_the_youtub.php).
- 51 *Id.*
- 52 *Id.*
- 53 Jesdanum, *supra* note 2.
- 54 Podcast, *supra* note 40.
- 55 Robinson, *supra* note 32.
- 56 Seltzer, *supra* note 4.
- 57 Telephone Interview with David Sohn, Senior Policy Counsel and Director of the Project on Intellectual Property and Technology, Center for Democracy and Technology, in Wash., D.C. (Oct. 31, 2008).
- 58 Posting of David Sohn to the Center for Democracy and Technology Blog, *Court Orders Google to Turn Over YouTube User Data*, <http://blog.cdt.org/2008/07/03/court-orders-google-to-turn-over-youtube-user-data> (July 3, 2008).
- 59 Telephone Interview with David Sohn, Senior Policy Counsel and Director of the Project on Intellectual Property and Technology, Center for Democracy and Technology, in Wash., D.C. (Oct. 31, 2008).
- 60 Seltzer, *supra* note 4.
- 61 Story, *supra* note 6.
- 62 *Id.*
- 63 More on Gmail and privacy, [http://mail.google.com/mail/help/about\\_privacy.html](http://mail.google.com/mail/help/about_privacy.html) (last visited Dec. 3, 2008); Privacy Center, <http://www.google.com/intl/en/privacypolicy.html> (last visited Dec. 3, 2008).
- 64 *Id.* Appropriately enough, viewing this article online required this author to register for a free login name by providing his email, gender, year of birth, zip code, country of residence, household income, job title, industry, and company size. The author declined to sign up for the optional marketing emails.
- 65 *Id.*
- 66 *Google must divulge YouTube log*, BBC, July 3, 2008, <http://news.bbc.co.uk/2/hi/technology/7488009.stm>.
- 67 SCHOOL OF INFORMATION MANAGEMENT AND SYSTEMS, UNIVERSITY OF CALIFORNIA AT BERKELEY, HOW MUCH INFORMATION? 2003 4 (2003), [http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable\\_report.pdf](http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf).
- 68 Seltzer, *supra* note 4.