MAYER • BROWN

Mayer Brown LLP
1675 Broadway
New York, New York 10019-5820

Main Tel +1 212 506 2500
Main Fax +1 212 262 1910
www.mayerbrown.com

Andrew H. Schapiro
Direct Tel +1 212 506 2672
Direct Fax +1 212 849 5672
aschapiro@mayerbrown.com

June 17, 2011

Ms. Deborah Holmes
Ms. Kimberly Gay
Case Managers, Clerk's Office
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *Viacom Int'l, Inc., et al. v. YouTube, Inc., et al.*, No. 10-3270; *The Football Ass'n Premier League, et al. v. YouTube, Inc., et al.*, No. 10-3342

Dear Ms. Holmes and Ms. Gay:

YouTube writes in response to Appellants' 28(j) letter dated June 14, 2011. The Supreme Court's decision in *Global-Tech* does not support Appellants' efforts to disqualify YouTube from DMCA protection on the basis of the willful-blindness doctrine.

Global-Tech is a patent case decided under 35 U.S.C. §271(b). It is not a copyright case, and does not address the DMCA in any way. There are important differences between the DMCA and §271(b). While §271(b) is silent about knowledge, the DMCA has express provisions governing knowledge of infringement, including a specific statutory alternative to actual knowledge (§512(c)(1)(A)). The DMCA's knowledge provisions also must be interpreted consistently with another provision (§512(m)), which relieves service providers of any obligation to affirmatively seek facts indicating infringing activity. Section 271(b) has nothing like that. Consequently, the Court's observation in *Global-Tech* (at 12) that it could "see no reason why" a willful-blindness doctrine derived from criminal law should not apply to §271(b) does not extend to the DMCA. There are compelling reasons why an extra-statutory alternative to actual knowledge should not be engrafted onto the carefully calibrated DMCA framework. YouTube Br. 37-40.

But even if *Global-Tech*'s conception of willful blindness did apply, it would make no difference in this case. The DMCA's knowledge provisions still would require a showing as to *particular* infringing material, and generalized knowledge

Dockets.Justia.com

of unspecified infringement still would be insufficient. YouTube Br. 29-34; *cf.* *Global-Tech* Op. 15-16 (assessing defendant's willful blindness as to a particular piece of intellectual property). Moreover, the Supreme Court's standard for willful blindness is demanding. It requires a "subjective belief" not simply of a "known risk," but of a "high probability that a fact exists." *Global-Tech* Op. 13-14. And it requires not merely "deliberate indifference" to the likelihood of infringement, but "active efforts … to avoid knowing about the infringing nature of the activities." *Id.* at 14. The Court explained that this formulation gives "willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* As discussed in our brief, Appellants offer no evidence that would satisfy that rigorous test. YouTube Br. 40-53.

Respectfully submitted,

/s Andrew H. Schapiro
Andrew H. Schapiro

Counsel for Defendants-Appellees