GIBSON DUNN

Gibson, Dunn & Crutcher LLP

1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Theodore B. Olson
Direct: +1 202.955.8668
Fax: +1 202.530.9575
TOlson@gibsondunn.com

August 26, 2011

VIA ECF

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

Re: *Viacom International, 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:

Pursuant to FRAP 28(j), I write to advise the Court of the applicability of its recent decision in *United States v. Ferguson*, No. 08-6211, to the above-captioned cases. In *Ferguson*, the Court reaffirmed that even a criminal statute may be violated "knowingly" if the violator "'was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" Slip op. 31-32 (quoting *United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006)). The Court explicitly invoked the Supreme Court's recent decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 & n.9 (2011), in equating the doctrine of "conscious avoidance" at issue in *Ferguson* to "willful blindness," the doctrine at issue in this case. *Id*. at 31 n.14. And the Court confirmed that "both actual knowledge and conscious avoidance" may be proven through evidence of "[r]ed flags about the legitimacy of a transaction." Slip op. 38.

Appellants have argued that YouTube's knowledge of the rampant infringement taking place on its site is established by its willful blindness to that infringement. *See* Viacom Br. 34-39; Premier League Br. 34-36. *Ferguson* confirms that such conscious avoidance can be demonstrated not only through evidence of affirmative steps to avoid specific knowledge of incriminating facts—present in this record, Viacom Br. 11-14—but also through "red flags about the legitimacy of [] transactions," which permeate this record. See JAII-47 ("probably 75-80% of our views come from copyrighted material"); JAII159-60.

Ferguson also refutes YouTube's primary defense to Viacom's willful-blindness argument, *i.e.*, that Congress intended the awareness prong of the DMCA safe harbor to replace the common law doctrine of willful blindness. *See* YouTube Br. 37-40. The *Ferguson* Court

emphasizes that "conscious avoidance" is merely an alternative means of proving knowledge; the "government need not choose between an 'actual knowledge' and a 'conscious avoidance' theory." Slip op., at 32. In so doing, *Ferguson* precludes YouTube's cramped understanding of the DMCA's knowledge prong as *excluding* willful blindness. *See* YouTube Br. 38.

The Class Appellants have authorized me to say they join this letter.

Very truly yours,

/s/ Theodore B. Olson

Theodore B. Olson