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 30, 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:

I write in response to Andrew Schapiro's August 26 letter discussing an interlocutory order of the district court in *Capitol Records, Inc. v. MP3tunes*, 07-cv-9931 (S.D.N.Y. Aug. 22, 2011).

YouTube suggests that *MP3tunes* "confirms YouTube's approach to the DMCA safe harbors" (Ltr. 1) because it cites the decision below in this case for the proposition that service providers that are "aware[] of rampant infringement" nevertheless are entitled to the safe harbor unless they possess specific knowledge that content of particular web pages is infringing. Slip op. 16. One just as easily could say that *MP3tunes* repeats the errors the district court made here.

Even still, the district court in *MP3tunes* highlights several distinguishing facts that lead inexorably to the conclusion that, even if MP3tunes is entitled to the protection of the DMCA safe harbor, YouTube is not.

At the threshold, while *MP3tunes* involved storage "lockers" for digital music files, the copyright infringement alleged by Viacom and the Class Plaintiffs involves much more than user-directed storage, including YouTube's unauthorized licensing of the plaintiffs' copyrights to third parties. Viacom Br. 49-54.

And while MP3tunes claimed it gained no financial benefit directly attributable to infringement because it had no advertising and its users stored infringing music sideloaded from the Internet for free, YouTube's financial benefit is directly tied to advertising and the quantity of page views, 75%-80% of which, according to YouTube, were of infringing

material. Viacom Br. 10, 47-49. Indeed, for a period of time YouTube appended advertisements directly to infringing videos. *Id*. at 48.

Finally, while the *MP3tunes* court concluded that its record largely lacked evidence of "specific 'red flag' knowledge [of infringement] with respect to any particular link," (slip op. 18), that court did not confront evidence of willful blindness comparable to that present in the *YouTube* record. Despite knowing that up to 80% of its views were of infringing material, YouTube shut down avenues that easily could have allowed it to confirm that its most popular videos infringed. Viacom Br. 11-14, 34-39. As this Court recently confirmed in *Ferguson*, that type of conscious avoidance is equivalent to actual knowledge.

Very truly yours,

/s/ Theodore B. Olson

Theodore B. Olson