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September 2, 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:

We write in response to appellants' August 26, 2011 letter discussing *United States v. Ferguson*. *Ferguson* reiterates the standard for giving a conscious-avoidance instruction in a criminal case. It neither adds to nor deviates from longstanding Second Circuit law to which YouTube has taken no exception, so appellants' election to submit a 28(j) letter discussing the decision is puzzling.

In any event, *Ferguson's* fact-specific holding that a conscious-avoidance instruction was proper in light of a series of specific "red flags" regarding the transactions at issue (slip op. 32-33) has no application here and does not remotely call into question Judge Stanton's summary-judgment ruling. As explained in our brief, there is no basis in the DMCA (or precedent) for importing a broad willful blindness rule into the statute's carefully balanced framework. YouTube Br. 37-40. The DMCA deliberately supplants common-law notions of willful blindness, and appropriately so given the difficulties that service providers like YouTube would have divining whether particular material is or is not authorized. (That difficulty was recognized by Judge Stanton below (SPA-19) and more recently by Judge Pauley in *Capitol Records v. MP3tunes*, 07-cv-9931, slip op. at 17.)

The summary-judgment record in this case illustrates the wisdom of the DMCA's approach. As we have shown, YouTube is full of indisputably non-infringing material, including countless non-infringing videos containing appellants' content. YouTube Br. 9-11, 63-66, 88-89. Indeed, even appellants and their lawyers

have had persistent difficulties determining which YouTube videos they themselves posted, authorized, or intentionally left up. *Id.* at 44-53, 66-69.

Finally, the conscious-avoidance doctrine discussed in *Ferguson* would not help appellants even if it did apply here. As recently made clear both by the Supreme Court in *Global-Tech v. SEB*, 131 S. Ct. 2060, 2070-71 (2011), and by this Court, common-law willful blindness requires proof that a provider made "active efforts" to ignore a very significant risk that *specific* material was infringing. *Tiffany v. eBay*, 576 F. Supp. 2d 463, 515, *aff'd* 600 F.3d 93 (2d Cir. 2010). *Ferguson* does not purport to alter that requirement, and appellants cannot come close to meeting it here. YouTube Br. 40-43.

Respectfully submitted,

/s Andrew H. Schapiro
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