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Clerk of Court, U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007Re: *Viacom International, Inc. et al. v. YouTube, Inc. et al.*, No. 10-3270 and
The Football Association Premier League Ltd. et al. v. YouTube, Inc. et al., No. 10-3342
Argued Oct. 18, 2011 (Cabrane, Livingston, Miner)

YouTube respectfully submits this letter brief in response to the Court's October 25, 2011 Order.

I. Plaintiffs Have Not Made The Showing Required To Deprive YouTube Of The Safe Harbor Under The Red-Flag Knowledge Provision.

The Court has asked “whether and how the red-flag knowledge provision would apply under the Defendants’ ‘specific’ knowledge construction of § 512(c)(1)(A).” The answer is straightforward: to disqualify a service provider from the safe harbor for a given instance of infringement, a plaintiff must show that the service provider (a) was actually aware of facts or circumstances (b) from which that particular infringement would have been apparent to a reasonable person, and (c) failed to expeditiously remove the infringing material of which it had such awareness. Summary judgment in this case was appropriate because plaintiffs failed even to attempt to make the showing that the DMCA requires with respect to any of their clips in suit.

A plaintiff bears the burden of proving red-flag awareness.¹ If the plaintiff fails to come forward with sufficient evidence to establish a triable issue of fact, therefore, the service provider is entitled to

¹ See, e.g., *Perfect 10, Inc. v. Amazon.com*, CV-05-4753, slip op. at 8 (C.D. Cal. Nov. 4, 2008) (“it is [plaintiffs’] burden to show that [defendant] had actual knowledge of infringement within the meaning of section 512(c)”); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1110 (C.D. Cal. 2009) (“*UMG II*”) (granting summary judgment where plaintiff “has not provided evidence establishing that [defendant] failed to act

summary judgment on this element of the safe harbor. In assessing whether the plaintiff has met that burden, the reviewing court must bear in mind that Congress deliberately crafted a “high bar for finding ‘red flag’ knowledge.” *UMG II*, 665 F. Supp. 2d at 1111. The test is whether facts and circumstances of which the service provider was aware made the infringing nature of the activity “obvious.” H.R. Rep. 105-551(Part 2), at 57-58 (July 22, 1998). The “common-sense result of this ‘red flag’ test is that [service providers] would not be required to make discriminating judgments about potential copyright infringement.” *Id.* at 58; S. Rep. 105-190, at 49 (May 11, 1998). Instead, the infringing nature of the material must be “apparent from even ‘a brief and casual viewing.’” *Corbis*, 351 F. Supp. 2d at 1108; *see also* 3 NIMMER 12B.04[A][1] (“the flag must be brightly red indeed—and be waving blatantly in the provider’s face”). In short, “if investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags.’” *UMG II*, 665 F. Supp. 2d at 1108; *see also* § 512(m).² The fact that it may not be easy for a plaintiff to show red-flag knowledge thus is integral to the design and operation of section 512(c)—a statute that was specifically intended to protect service providers against liability and to put the primary burden of policing online infringement on copyright holders. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).³

expeditiously whenever it had actual notice of infringement, whether from DMCA notices or other sources of information”); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1109 (W.D. Wash. 2004) (granting summary judgment where plaintiff presented “no evidence from which to infer that Amazon was aware of, but chose to ignore, red flags”).

² There is an important distinction in this regard between the “copyrighted work claimed to have been infringed” (e.g., *South Park*) and the “material is claimed to be infringing” (e.g., a specific video clip). § 512(c)(3)(A)(ii), (iii). The awareness that the DMCA requires for red-flag knowledge is of particular *infringing material*, not particular copyrighted works. A service provider’s awareness that a given work can be found somewhere on its service is not sufficient to create red-flag knowledge. *See, e.g., Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084-85, 1093 (C.D. Cal. 2001) (letter telling eBay that “pirated copies” of the work “Manson” were on its service did not create red-flag knowledge because eBay “did not have actual or constructive knowledge that particular listings were being used by particular sellers to sell pirated copies of ‘Manson’”); *Wolk v. Kodak Imaging Network, Inc.*, No. 10 Civ. 4135, 2011 WL 940056, at *5-6 (S.D.N.Y. Mar. 17, 2011) (past takedown notices insufficient to demonstrate red-flag knowledge that subsequent listings of same works were infringing).

³ Courts applying this test thus have recognized that even a description of material as “illegal” or “stolen” may not be a red flag, because it “may be an attempt to increase [the] salacious appeal” of the material. *CCBill*, 488

This well established understanding of 512(c)(1)(A)(ii) in no way renders the actual-knowledge provision superfluous or eliminates a service provider’s obligation to respond to genuine “red flags.” Instead, the knowledge provision and the awareness provision establish alternative ways for a plaintiff to show that a service provider was required—without receiving a takedown notice—to “expeditiously” remove “the material” that the plaintiff alleges was infringing (§ 512(c)(1)(A)(iii)). A service provider might have “actual knowledge” even in the absence of facts or circumstances from which that infringement would be apparent to an objective observer. Alternatively, a service provider, even if lacking subjective knowledge that the material was infringing, might have been aware of facts or circumstances that, by any objective measure, made that infringement apparent. H.R. Rep. 105-551, at 53; S. Rep. 105-190, at 44. The awareness provision thus prevents a service provider from claiming that, because it did not actually believe the material was infringing, it had no duty to remove it, even though it was aware of facts that would have made the infringement obvious to a reasonable person.

Every case to have addressed this issue has interpreted the red-flag provision in this way, and rejected plaintiffs’ efforts to deprive service providers of the safe harbor based on generalized awareness that unspecified (or even “rampant”) infringement is occurring on a service. *MP3tunes*, 2011 WL 5104616, at *12-14; *see, e.g., CCBill*, 488 F.3d at 1113; *Wolk*, 2011 WL 940056, at *5; *UMG II*, 665 F. Supp. 2d at 1108; *Io*, 586 F. Supp. 2d at 1148; *Corbis*, 351 F. Supp. 2d at 1108. And for good reason. As we have explained (YouTube Br. 29-44), plaintiffs’ construction: (1) would subsume and render superfluous the DMCA’s “actual knowledge” provision; (2) cannot be squared with the statute’s directive that, upon obtaining the requisite knowledge or awareness, the provider expeditiously remove

F.3d at 1113; *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1149 (N.D. Cal. 2008); *cf. Capitol Records, Inc. v MP3tunes, LLC*, No. 07 Civ. 9931, 2011 WL 5104616, at *13 (S.D.N.Y. Aug. 22, 2011) (rejecting argument that “the terms ‘free,’ ‘mp3,’ or ‘file-sharing’ [are] tantamount to ‘red flag’ knowledge of infringement”). Nor is a general communication from the copyright owner sufficient. 17 U.S.C. § 512(c)(3)(B)(i); H.R. Rep. 105-551, at 54 (“neither actual knowledge nor awareness of a ‘red flag’ may be imputed to a service provider based on information from a copyright owner or its agents that does not comply with the notification provisions of new subsection (c)(3)”).

“*the* material”; (3) rests on a premise (generalized awareness triggers a duty to investigate to seek out possible infringing material) that conflicts with § 512(m)’s declaration that “affirmatively seeking facts indicating infringing activity” is not a condition of safe-harbor eligibility; and (4) treats Congress’s carefully wrought notice-and-takedown regime, which worked so well in this case (YouTube Br. 16-17, 56-58), as if it were a mere afterthought. *See also* Br. for *Amici Curiae* eBay Inc., et al. 10-27.

Plaintiffs’ approach is also contrary to the principles governing liability outside the DMCA. A computer-system operator faces contributory copyright liability only “if it has actual knowledge that *specific* infringing material is available using its system.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (emphasis added). Similarly, under the *Sony* doctrine, the provider of a product or service that is “capable of substantial noninfringing uses” cannot be held liable merely because it has generalized knowledge that its technology could be, or actually was, used to infringe. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439-42 (1984). Given these common-law rules requiring specific knowledge of infringement, it would be anomalous to conclude that the DMCA safe harbor, which is supposed to give service providers additional protection against secondary liability (S. Rep. 105-190, at 40), is lost merely upon generalized awareness of infringement.⁴

Plaintiffs have argued that the phrase “infringing activity” (and the lack of the definite article) in the awareness provision must have been intended to sweep in generalized awareness of unspecified infringement. Viacom Reply Br. 11-12. That is incorrect as a matter of semantics (“activity” can just as readily refer to *specific* activity) and statutory structure (it ignores the directive that, “upon obtaining such knowledge or awareness,” the service provider must expeditiously remove “*the* material”

⁴ Plaintiffs’ approach would also lead to the absurd result that DMCA-eligible service providers such as eBay would have greater protection against trademark-infringement claims than copyright claims, even though there is no statutory safe harbor for trademark liability. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010) (contributory trademark infringement requires specific knowledge of “which particular listings are infringing”).

(§512(c)(1)(A)(iii) (emphasis added)). It is also refuted by the legislative history, which explains why Congress used the word “activity” and makes clear that it focuses on specific instances of infringement:

[S]ubsection (c)(1)(A) sets forth the applicable knowledge standard. This standard is met either by actual knowledge of infringement or in the absence of such knowledge by awareness of facts or circumstances from which infringing activity is apparent. The term “activity” is intended to mean activity using *the material* on the system or network. The Committee *intends such activity to refer to wrongful activity that is occurring at the site on the provider’s system or network at which the material resides*, regardless of whether copyright infringement is technically deemed to occur at that site or at the location where *the material* is received. For example, the activity at an online site offering audio or video may be unauthorized public performance of *a* musical composition, *a* sound recording, or *an* audio-visual work, rather than (or in addition to) the creation of *an* unauthorized copy of any of these works.

H.R. Rep. 105-551, at 53 (emphases added).⁵

The awareness provision, properly construed, cannot evict YouTube from the safe harbor in this case. It is undisputed that YouTube took down each of plaintiffs’ clips in suit when it received proper notice. SPA:10. Plaintiffs made no effort to show that YouTube knew of facts or circumstances making apparent the infringing nature of any of those clips before they were taken down. The hundreds of thousands of videos uploaded to YouTube each day are stored automatically by YouTube’s computer systems without any human involvement (JA-V:162 (¶6)). Plaintiffs presented no evidence that YouTube was aware that any of the individual clips in suit was even *on* the service, much less evidence that YouTube was actually aware of information that would have required and enabled it to expeditiously remove that clip without receiving a takedown notice. Plaintiffs instead offered evidence showing, at best, general knowledge: a few documents from YouTube’s early days speculating about the percentage of videos that were “copyrighted” (which is not the same thing as infringing), along with

⁵ Nor can plaintiffs’ repeated invocation of “willful blindness” salvage their approach. Not only does the DMCA expressly absolve service providers from investigative duties (§512(m)), it requires that a service provider be able to expeditiously locate and remove the specific infringing material that it learns about, whether from actual knowledge, red-flag awareness, or a takedown notice. Plaintiffs’ version of willful blindness affords service providers no such opportunity, and is incompatible with the statute. *See* YouTube Br. 37-44; YouTube 28(j) Letter dated June 17, 2011.

an informal memo from someone who was not even at YouTube that assumed (incorrectly (YouTube Br. 14 n.3)) that the presence on the site of clips from certain shows was “illegal.” But as Judge Stanton correctly observed, such documents furnish “at most a statistical estimate of the chance any particular posting is infringing—and that is not a ‘red flag’ marking any particular work.” SPA-21.

Plaintiffs’ failure to show knowledge or awareness relating to specific clips in suit is not surprising, especially given (1) the vast number of indisputably non-infringing videos on the service (less than 1% of the videos on the site have ever been the subject of DMCA notices and plaintiffs’ clips in suit constitute less than .002% of the videos posted to YouTube (JA-IV:173 (¶26))); and (2) the innumerable instances in which plaintiffs themselves (often covertly) authorized their copyrighted material to be posted or to remain on YouTube for promotional reasons (YouTube Br. 44-53; Br. for *Amicus Curiae* MP3Tunes, Inc. 14-25). Recognizing plaintiffs’ inability to make the showing required to exclude YouTube from the safe harbor with respect to the videos at issue in this case, Judge Stanton correctly granted summary judgment. That ruling should be affirmed.

II. Reformatting User-Submitted Videos To Make Them Accessible From Third-Party Devices Falls Within The 512(c) Safe Harbor.

The Court has also requested further briefing on plaintiffs’ argument that YouTube’s “syndication” of videos to make them available for viewing from Internet-connected devices other than a personal computer takes YouTube outside the 512(c) safe harbor. Plaintiffs’ argument is contrary to all the case law and would undermine the basic purpose of the DMCA.

“Syndication” is simply a process for allowing the user-uploaded videos stored on YouTube’s system to be accessed over the Internet by means other than a conventional web browser running on a personal computer. Patterson Dep. 16:10-15. People can now connect to the Internet through a broad range of devices, including mobile phones, tablet computers (like the iPad), and Internet-enabled television sets. Those devices can access videos housed on YouTube only if the videos are compatible with the device’s software (which often differs from that used by a standard browser) and if there are

protocols in place allowing the device to communicate with YouTube’s system. JA-VI:631-32 (¶3); JA-V:162-63 (¶¶6-7). To enable its users to view videos from these devices, therefore, YouTube developed what are called “application protocol interfaces” (“APIs”) and made them available to device providers, including Apple, Sony, and Panasonic. JA-VI:631-32 (¶3); SJA-V:1117-18 (¶¶324-327).⁶ When a user plays a video on a supported device, the API allows the device to tell YouTube’s system how to serve the video so that the user can see it. JA-VI:631-32 (¶3). YouTube’s system also translates user-uploaded videos into the various formats required to make them viewable on different devices—just as it reformats videos to make them accessible via a web browser. JA-VI:631-32 (¶3); JA-V:162-63 (¶¶6-8); JA-III:502 (57:2-22); SJA-V:1115-16 (¶320), 1119-20 (¶330). (All formats of a given video are taken down from YouTube’s system in response to a valid DMCA notice, rendering that video unavailable to viewers without regard to what device they may be using. JA-I:825.)

These practices fit comfortably within section 512(c). Every relevant decision has held that the safe harbor protects against infringement claims targeting “software functions” undertaken “for the purpose of facilitating access to user-stored material.” *UMG Recordings, Inc. v. Veoh Networks*, 620 F. Supp. 2d 1081, 1088 (C.D. Cal. 2008) (“*UMG I*”); *see also Io*, 586 F. Supp. 2d at 1146-48; *Wolk*, 2011 WL 940056, at *3. That follows from the DMCA’s text, legislative history, and purpose. *YouTube Br.* 79-81. “[A]s the language makes clear, the statute extends to functions other than mere storage.” *UMG I*, 620 F. Supp. 2d at 1089. The DMCA presupposes that a service covered by 512(c) will make user-submitted material accessible to third parties and allows providers to modify such material as needed to carry out their functions. *Io*, 586 F. Supp. 2d at 1147; § 512(k)(1). That is consistent with Congress’s intent to “facilitate the robust development and world-wide expansion of electronic commerce.” S. Rep.

⁶ APIs are not specific to YouTube (JA-VI:631-32 (¶3); they are widely used by online service providers to make user-submitted material on their systems more accessible to third-parties, including through mobile devices. *See, e.g.*, Facebook API, available at <http://developers.facebook.com/docs/reference/api/>; Vimeo API, available at <http://vimeo.com/api>; Yelp API, available at http://www.yelp.com/developers/getting_started; Scribd API, available at http://www.scribd.com/developers/api?method_name=OpenPlatform.

105-190, at 1-2. “It is very difficult to see how the DMCA could achieve these goals if service providers otherwise eligible for limited liability under § 512(c) were exposed to liability for providing access to works stored at the direction of users.” *UMG I*, 620 F. Supp 2d at 1090.

Syndication gives users alternative ways to view videos that are stored on YouTube’s system. JA-VI:631-32 (¶3); District Court (“D.C.”) Dkt. No. 309 (Schapiro Opp. Ex. 325, 36:24-37:17). By formatting users’ videos so that they can be viewed from its servers using various third-party devices, YouTube has “simply established a system whereby software automatically processes user-submitted content and recasts it in a format that is readily accessible to its users.” *Io*, 586 F. Supp. 2d at 1148. That is exactly what section 512(c) protects. Plaintiffs’ suggestion that these processes fall outside the safe harbor because they allow user-uploaded videos to be accessed via mobile devices (and other new hardware) is belied by the case law and common sense. The service provider in *UMG I* made its videos accessible through devices other than a standard web browser and converted videos into new formats to make them playable on portable devices—yet the safe harbor still applied. 620 F. Supp. 2d at 1083-84.

In fact, the processes that YouTube uses to make videos accessible through mobile devices (putting videos into the appropriate format and “streaming” them in automated response to user’s playback requests) are functionally equivalent to those used to make YouTube videos accessible via a web browser. JA-V:162-64 (¶¶6-10); JA-VI:631-32 (¶¶2-3). There can be no serious question that those functions are covered by section 512(c) when they are used to support a browser, *Io*, 586 F. Supp. 2d at 1146-48, and it would make no sense to exclude YouTube from safe-harbor protection merely because it also allows users to view materials stored on its system through Internet-enabled devices other than a personal computer.⁷ Such a ruling would have devastating practical consequences. It

⁷ Plaintiffs have suggested that the encoding of videos into the formats that make them compatible with mobile devices occurs without any direction from users. Class Reply Br. 37. But it is a false premise that each step of a function covered by section 512(c) must occur based on a specific user request. That was precisely the argument rejected in *Io*. 586 F. Supp. 2d at 1146-47. What matters is whether the software function is “directed toward

would undermine the legitimate expectations of countless online services that use the same processes to make user-submitted content accessible via mobile devices and third-party websites. *Supra* n.6. Service providers would be frozen in time, unable to make their services compatible with a new generation of hardware, lest they lose DMCA protection by trying to keep pace with technological change. That result is contrary to the purpose of the safe harbors, which were intended to ensure that “the variety and quality of services on the Internet will continue to expand.” S. Rep. 105-190, at 8; *see UMG I*, 620 F. Supp. 2d at 1089 (“If providing access could trigger liability without the possibility of DMCA immunity, service providers would be greatly deterred from performing their basic, vital and salutary function—namely, providing access to information and material for the public.”).

In short, just as section 512(c) covers “the conversion of uploaded files into Flash format” and allows service providers to offer users “technically different means of accessing uploaded videos” (*UMG I*, 620 F. Supp. 2d at 1092), it covers the reformatting of user-submitted videos to make them accessible from YouTube’s system through devices such as mobile phones. That is just another one of the software functions directed toward facilitating access to materials stored at the direction of users to which the safe harbor has consistently been held to apply.

Plaintiffs have claimed that this settled understanding of the statute is somehow inapplicable here because of an agreement that YouTube entered into with Verizon Wireless at the start of its syndication effort. *Viacom Br. 52*; *Viacom Reply Br. 35*. In the early stages of that agreement, YouTube manually selected a small number of user-uploaded videos (approximately 2,000 in all) to be made available through Verizon mobile devices. *JA-III:500-01 (55:15-56:1)*; *D.C. Dkt. No. 309 (Schapiro Opp. Ex. 325, 38:25-39:6)*. The selected videos were delivered to Verizon, rather than being made accessible

providing access to material stored at the direction of users.” *UMG I*, 620 F. Supp. 2d at 1092. In any event, users *do* consent to the steps YouTube takes to make videos more accessible. They agree to Terms of Service that expressly license the uploaded video to YouTube and authorize YouTube to reformat the video as needed to make it viewable on third-party platforms. Since October 2007, moreover, users have had the specific option to prevent their videos from being made playable on mobile devices. *SJA-V:1115-16, 1119-20 (¶¶320, 330)*.

from YouTube’s system. *Id.* (37:20-38:17).⁸ But those facts are totally irrelevant to this case: despite plaintiffs’ exhaustive discovery efforts, there is no evidence that any of their clips in suit were among the videos manually provided to Verizon. SJA-I:242 (¶329). Thus, even if the actions taken in connection with the Verizon agreement fell outside 512(c), that would provide no basis for depriving YouTube of the safe harbor.⁹ This Court should not render an advisory opinion on whether section 512(c) applies to conduct that had no bearing on any of the alleged infringements actually at issue here.

* * *

While plaintiffs might wish that the DMCA placed the burden of policing online infringement on service providers, Congress decided otherwise. In this case, plaintiffs failed to show that even one of their clips in suit remained on YouTube after YouTube had knowledge or awareness that it was infringing. To the contrary, each of those clips (including the many videos that plaintiffs had actually authorized to be on YouTube) was taken down as soon as plaintiffs asked YouTube to do so. For the reasons above, and those in our principal brief, the decision below should be affirmed.

Respectfully submitted,

/s Andrew H. Schapiro
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⁸ That approach was soon abandoned, and Verizon devices began accessing YouTube videos in the same automated way as other mobile operators. JA-III:500-02 (55:23-57:22).

⁹ There is one aspect of the Verizon story that is noteworthy—but not in a way that helps plaintiffs or bears on their “storage” argument. Viacom has said that the videos manually provided to Verizon consisted solely of videos that had been “Featured Videos” on YouTube. SJA-V:1119 (¶329). It is undisputed that only two of plaintiffs’ clips in suit were ever featured on YouTube and that both clips were authorized to be on YouTube at the time they were featured. SJA-V:1119-21 (¶¶329, 332). (One was from a cartoon called “Lil’ Bush,” which the show’s creators uploaded to YouTube as part of a marketing campaign undertaken with Viacom’s knowledge. Schapiro Opp. Exs. 326-327 (D.C. Dkt. No. 309). The second was a promotional video for comedy group “Human Giant” posted with the group’s authorization as part of another viral marketing campaign. Schapiro Opp. Ex. 331 (D.C. Dkt. No. 309). It was featured because the group’s agent asked YouTube to feature it. JA-V:239-40 (¶¶2-3).) Thus, while these clips are irrelevant to the storage issue—as there is no evidence that they (or any other clips in suit) were among those given to Verizon—the undisputed story behind them (SJA-I:244-45 (¶332)) underscores the difficulties service providers face in determining whether a given video is infringing, the wisdom of Congress’s decision to put the burden on copyright holders to identify infringing material, and the importance of limiting the DMCA’s knowledge and awareness provisions to specific instances of infringing activity.