JENNER&BLOCK

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Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Tel 202-639-6000
www.jenner.com

Chicago
Los Angeles
New York
Washington, DC

VIA ECF

Paul M. Smith
Tel (202) 639-6060
Fax (202) 639-6066
psmith@jenner.com

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 Int'l, Inc., et al. v. YouTube, Inc., et al.*, No. 10-3270 (argued Oct. 18, 2011 (Cabranes, Miner, Livingston))

Dear Ms. Holmes,

Viacom hereby responds to YouTube's December 22 letter concerning *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902 (9th Cir. Dec. 20, 2011).

Confronting materially different facts and arguments, the Ninth Circuit held that the Veoh website was entitled to the §512(c) safe harbor. That decision has little, if any, persuasive value in the instant appeal.

Knowledge: The Ninth Circuit rejected UMG's claim that Veoh's "general knowledge that it hosted *copyrightable* material and that its services *could* be used for infringement" could establish the requisite "aware[ness] of facts and circumstances from which infringing activity is apparent." Slip Op. at 21085 (emphasis added); *see also id.* at 21080, 21090. Viacom has never relied on such "general knowledge," but on extensive evidence, including incriminating internal e-mails unlike anything discussed by the Ninth Circuit, showing YouTube knew of—and, indeed, quantified—rampant infringement on its site, including infringement of specific Viacom works. The Ninth Circuit never addressed how Section 512(m) would apply to a service provider harboring such knowledge. Slip Op. at 21083, 21086.

Moreover, Viacom presented ample evidence that YouTube willfully blinded itself to more specific knowledge of infringement—conduct that the Ninth Circuit recognizes "[o]f course," demonstrates actual knowledge under the DMCA, Slip. Op. at 21092-93. YouTube ignores this aspect of the Ninth Circuit's reasoning.

Control: In importing a subtextual "specific knowledge" requirement into the right and ability to control provision, Slip Op. at 21090-91, the Ninth Circuit committed an error similar to

that of the district court here. But even the Ninth Circuit acknowledged that its construction was intended to define "ability to control" "[i]n practical terms." *Id.* Though it thought control of infringement was "a practical impossibility" for Veoh, it did not address the question whether a service provider like YouTube that already has selectively deployed filtering technology has "the ability to control" infringement. "[I]n practical terms," it does. Viacom Reply Br. at 25-31.

Storage: Assuming user-directed storage includes "access-facilitating processes that automatically occur when a user uploads a video," Slip Op. at 21073, it does not include syndication deals that a service provider strikes with third parties.

Respectfully submitted,

/s/ Paul M. Smith
Paul M. Smith

Counsel for Viacom