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VIA ECF

Ms. Deborah Holmes
Case Manager, 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 (argued Oct. 18, 2011 (Cabranes, Miner, Livingston))

Dear Ms. Holmes,

Viacom responds to YouTube's January 9 letter concerning *Wolk v. Kodak Imaging Network*, 2012 WL 11270 (S.D.N.Y. Jan. 3, 2012).

In *Wolk*, a pro se artist sued two represented corporate defendants for the infringement of nine of her copyrighted works. Although the limited summary judgment record remains mostly under seal, the case appears to have involved only cursory discovery and legal argument by the pro se plaintiff. Thus, the court's ruling largely adopts its earlier reasoning in denying the plaintiff's preliminary injunction motion, a decision that the parties have already addressed in the merits briefs. *See Wolk*, 2011 WL 940056 (S.D.N.Y. Mar. 17, 2011).

Knowledge or Awareness: Wolk's evidence consisted only of 15 takedown notices, 11 of which were not DMCA-compliant. 2012 WL 11270, at *20. While a takedown notice itself may not demonstrate a provider's awareness of other instances of infringement, Viacom proffered extensive evidence of YouTube's knowledge of infringement independent of Viacom's takedown notices, including incriminating internal emails quantifying the massive infringement and identifying specific pirated Viacom shows. Viacom Reply at 5-6, 23-24. Viacom also proffered evidence of willful blindness, which is absent in *Wolk*. *Id.* at 18-23.

Control: The court's conclusion that Photobucket could not feasibly control infringement, 2012 WL 11270, at *21, was based on the pro se plaintiff's concession at the preliminary injunction stage that "video 'fingerprinting' technology . . . is very burdensome to implement and . . . would not be feasible . . . ." 2011 WL 940056, at *6 n.1. That YouTube selectively deployed digital fingerprinting, by contrast, demonstrates that the technology was a feasible and effective means of controlling infringement for YouTube. Viacom Reply at 25-31.

Financial benefit: Wolk did not contend that her nine copyrighted works acted as a draw to Photobucket users, or that Photobucket profited from advertisements appended to her works. Viacom, however, presented extensive evidence on both points. Viacom Reply at 32-35.

Section 512(m): The court adopted Judge Stanton's reading of this provision without engaging in independent analysis or considering how the provision would apply once a website obtains disqualifying knowledge or awareness of rampant infringement.

Respectfully submitted,

/s/ Paul M. Smith
Paul M. Smith

Counsel for Viacom