

10-3342

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and all others similarly situated, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, dba Bienstock Publishing Company, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE, LLC,

Plaintiffs-Appellants,

ROBERT TUR, dba Los Angeles News Service,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Max W. Berger
John C. Browne
BERNSTEIN LITOWTIZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

Charles S. Sims
William M. Hart
Noah Siskind Gitterman
Elizabeth A. Figueira
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. YouTube Is Excluded From The Safe Harbor For Its Deliberate Decisions To Profit From Infringements Of Class Plaintiffs' Works	1
II. YouTube Had Specific Knowledge Or Awareness Of Infringing Material And Deliberately Chose Not To Remove It	4
A. YouTube presents a false dichotomy between “generalized” and “item-specific” knowledge.....	4
B. YouTube has <i>specific</i> knowledge or awareness of infringements, and made <i>deliberate</i> decisions not to act on that knowledge	8
C. The knowledge provisions of § 512(c)(1)(A) do not immunize YouTube’s willful blindness to infringements of class plaintiffs’ works	12
D. The knowledge provisions of § 512(c)(1)(A) do not immunize YouTube’s inducement of infringement of class plaintiffs’ works	15
E. Class plaintiffs did not engage in licensing sufficient to deprive YouTube of disqualifying knowledge	21
III. YouTube Directly Benefitted From And Had Disqualifying Control Over Infringements Of Class Plaintiffs’ Works	24
A. YouTube directly benefitted from infringements	24
B. YouTube can and does control infringements	28
C. A properly instructed jury could find disqualifying control.....	31
IV. YouTube’s Knowledge, Control And Deliberate Actions Are Not Rendered Irrelevant By Section 512(m)	34

TABLE OF CONTENTS

	Page
V. YouTube Is Ineligible For The §512(c) Safe Harbor At The Threshold	36
A. YouTube’s actions reach well past “storage at the direction of a user”	36
B. YouTube did not reasonably implement its infringement policy.....	38
CONCLUSION.....	39

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arista Records LLC v. Doe</i> , 604 F.3d 110 (2d Cir. 2010)	29
<i>Arista Records LLC v. Lime Grp. LLC</i> , 715 F. Supp. 2d 481 (S.D.N.Y. 2010)	12
<i>Columbia Pictures Indus., Inc. v. Fung</i> , 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009)	16
<i>Ellison v. Robertson</i> , 357 F.3d 1072 (9th Cir. 2004)	26
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	25
<i>Gershwin Publishing Corp. v. Columbia Artists Management Inc.</i> , 443 F.2d 1159 (1971)	29
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003)	<i>passim</i>
<i>MGM Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	<i>passim</i>
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007)	38
<i>United States v. Fuller</i> , 627 F.3d 499 (2d Cir. 2010)	35
STATUTES	
17 U.S.C. § 512(c)	<i>passim</i>
17 U.S.C. § 512(c)(1)(A)	<i>passim</i>

TABLE OF AUTHORITIES

17 U.S.C. § 512(c)(1)(B)	<i>passim</i>
17 U.S.C. § 512(c)(1)(C)	5
17 U.S.C. § 512(c)(3)(B)(i)	5, 6
17 U.S.C. § 512(i)(1)(A).....	16, 38
17 U.S.C. §512(m).....	34, 35, 36

LEGISLATIVE MATERIALS

H.R. Rep. 105-551(I) (1998)	30, 35
H.R. Rep. 105-551(II) (1998)	<i>passim</i>
S. Rep. 105-190 (1998).....	24, 35

OTHER AUTHORITIES

Black’s Law Dictionary (6th ed. 1990)	28
3 Melville B. Nimmer and David Nimmer, Nimmer On Copyright, § 12B.06[A].....	28
3 Melville B. Nimmer and David Nimmer, Nimmer On Copyright, § 12B.09[B].....	35
3 Melville B. Nimmer and David Nimmer, Nimmer On Copyright, § 12.11[F]	28
3 Melville B. Nimmer and David Nimmer, Nimmer On Copyright, § 17.07[B].....	22
Patry On Copyright, § 24:7.....	22

I. YouTube Is Excluded From The Safe Harbor For Its Deliberate Decisions To Profit From Infringements Of Class Plaintiffs' Works

By disputing at length the meaning of critical internal communications evidencing their knowledge of widespread infringement and their intent to foster and capitalize on it, YouTube's brief amounts to an unintended yet unavoidable confession that summary judgment was inappropriate. The court below considered none of this evidence of YouTube's culpability, apart from recognizing that YouTube "welcomed" infringements because they increased the value of its website. Instead, the court fashioned a bright-line rule requiring "item specific" knowledge of infringement that, contrary to the plain terms of the §512(c) safe harbor, would provide categorical protection to defendants no matter how egregious their behavior, how pervasive their knowledge or how extensive their benefit from and control over these infringing activities, so long as they respond to takedown notices they eventually receive from copyright owners.

Defendants and their *amici* also claim that it is not just defendants' profit-making infringing enterprise at stake in this case, but the fate of myriad other Internet businesses whose very existence depends on a rule that nothing but a takedown notice ultimately matters. But these other businesses, who advocate YouTube's "notice or nothing" rule, presumably did not

launch their websites by relying on and encouraging the presence of infringing material for the express purpose of capitalizing on the creative expression of others. They should therefore not feel threatened by a safe harbor provision that treats such facts as relevant.

The political messages, how-to videos, product reviews and home movies that defendants claim afford them enormous cultural legitimacy are simply not implicated in this case; the vast majority of infringements in suit are well-known songs or sports match footage that do not, even colorably, constitute a non-infringing use, but have fueled YouTube's growth and prosperity. The significance of these infringements is best measured by the unvarnished contemporaneous assessments made by defendants and their advisors (IIIA352 ¶6; IIA47; IA857; IIA211-214; IA537), not by the entirely unsubstantiated claims defendants promote on appeal about the amount or popularity of non-infringing content on YouTube. Hypothetical risks to such non-infringing content cannot relieve YouTube of its obligations under the statute to mitigate infringement, and do not begin to counter the record evidence of defendants' extensive knowledge of and control over such infringements, conduct that has characterized YouTube from its inception.

It is precisely this evidence that makes *YouTube* culpable in this case, and which distinguishes it from other websites that can truthfully claim to

have no knowledge of, or control over and benefit from, the infringing activities on their sites. With specific knowledge of the prevalence of class plaintiffs' works on YouTube, defendants chose to leave that material on the site, and encourage more of it, in order to attract viewers, knowing full well that the material was unlicensed and infringing. YouTube did so to such an extent that executives of Google, which purchased YouTube for \$1.65 billion in 2006, described YouTube as being "***completely sustained by pirated content.***" (emphasis added) IA527; *see also* IA399; IA540; IA587-588. This case is therefore not about "generalized knowledge," and it is not about the Internet generally – it is about YouTube's specific and deliberate acts to capitalize on and profit from infringements.

The §512(c) safe harbor requires that a court consider evidence showing a website's knowledge or awareness of infringing activity (§512(c)(1)(A)) and its direct benefit from and control over infringing activity (§512(c)(1)(B)), as well as threshold questions concerning its conduct going beyond storage-related activities, and the reasonableness of its repeat infringer policy. Defendants' unwarranted invitation to reduce all of §512(c) to a 'notice and takedown' statute, effectively ignoring §512(c)'s subsections as well as a record showing defendants' deliberate and

systematic steps to accumulate and profit from the vast amount of infringing material on their site, should be rejected, and the judgment below reversed.

II. YouTube Had Specific Knowledge Or Awareness Of Infringing Material And Deliberately Chose Not To Remove It

A. YouTube presents a false dichotomy between “generalized” and “item-specific” knowledge

YouTube argues for (and the district court endorsed) a standard for the DMCA’s knowledge and awareness provisions (§§512(c)(1)(A)(i) and (ii)) that requires “knowledge of specific and identifiable infringements of particular individual items,” complaining that otherwise defendants would lose immunity for mere “generalized awareness that unidentified infringements may be somewhere...” YT Br. 29. This distorts class plaintiffs’ arguments, misreads §512(c)(1)(A), and dodges the record evidence of YouTube’s culpable behavior, which encompasses a whole range of deliberate and wrongful actions constituting far more than “generalized awareness.” YouTube knew that class plaintiffs’ works were being infringed on its site, and could and did identify them for business reasons, but it deliberately chose not to remove them (or make tools available to plaintiffs so plaintiffs could remove them) because YouTube wanted to profit from them. Opening Br. 13-19, 20-24. Indeed, this was a central element of its business plan. *Id.* To the extent (if at all) YouTube

disputes these material facts with admissible evidence (rather than rhetoric), that is a matter for trial; there is no statutory justification for rendering these facts categorically irrelevant, as the district court did and as YouTube argues this court should do on this appeal.

Although YouTube conclusorily asserts that its and the district court's interpretation is not so narrow that it makes §512(c)(1)(A) entirely duplicative of the notice and takedown requirement of §512(c)(1)(C) (YT Br. 34-35), YouTube does not provide a single example of disqualifying knowledge or awareness other than a DMCA-qualifying takedown notice. Indeed, YouTube's *amici* dispense with even the pretense that anything other than a takedown notice should amount to disqualifying knowledge. *See, e.g.*, Brief of MP3tunes, at 25 ("the only possible way to police copyright infringement on the Internet is to leave it to the copyright owner to monitor for infringement of their works by using the take-down procedures enacted [...] in the DMCA."); Brief of Intellectual Property and Internet Law Professors, at 25 ("[i]t is the copyright holder, and only the copyright holder" who has information that any particular video is infringing).

Seizing on §512(c)(3)(B)(i), YouTube warns that disqualifying knowledge other than that provided by a valid takedown notice (whatever it

might be) cannot come from the copyright holder (YT Br. 35 n.9).¹ Yet at the same time, YouTube insists that there can be no disqualifying knowledge where “circumstances leave uncertain” any hypothetical questions about the licensing or fair use of any individual clip, questions that “[c]ontent owners are best equipped to determine....” YT Br. 33-34, 39. Acceptance of this approach would necessarily leave §512(c)(1)(A) with no function at all.

YouTube further argues that anything other than item-specific knowledge, meaning “knowledge of specific and identifiable infringements of particular individual items” (YT Br. 29), would be inconsistent with the requirement in §512(c)(1)(A)(iii) to act expeditiously to remove the infringing material once there is knowledge or awareness of it. YT Br. 30. But there is no inconsistency. Although §512(c)(1)(A) does not require YouTube to do something it cannot do, or make YouTube liable for something it does not know about, it does not authorize YouTube to ignore all knowledge other than that coming from item- and location-specific notices. For example, if YouTube knows that Premier League clips are

¹ Section 512(c)(3)(B)(i) says only that a failed “notification from a copyright owner” under §512(c)(3)(A) cannot be converted into disqualifying knowledge or awareness under §512(c)(1)(A). It does not say, as YouTube claims, that no “information from a copyright holder” can ever be considered in applying the knowledge or awareness provisions of §512(c)(1)(A). YT Br. 35 n.9. Moreover, even when YouTube’s users notified it of infringements, YouTube’s policy was to ignore them. IIIA239; IIIA313; VA180; IA283 ¶¶117-118.

unauthorized (it does – IIIA167 ¶22; IIIA239; IIIA251-252) and can locate those clips (it readily can – IIIA256, IIIA247) YouTube must use that **demonstrated** knowledge and ability to prevent those clips from being uploaded or further exploited if it wants the protection of the safe harbor.

Nothing in the statute absolves YouTube of this responsibility simply because it cannot find all of the infringements, or because it might inadvertently block a non-infringing clip in the process of removing thousands of infringing ones. YouTube already blocks lawful speech on its site in a variety of ways (*infra*, note 12). Though it might make YouTube less profitable, requiring that YouTube take the same action to remove obviously infringing professional sports and music content in order to invoke safe harbor protection, as prescribed in the statute, would not imperil YouTube’s functioning, or that of the Internet generally.

YouTube’s argument that the “red flag” provision of §512(c)(1)(A)(ii) does not apply when a service provider has only “generalized information that unspecified infringement is occurring somewhere” (YT Br. 34) is a straw man. Section 512(c)(1)(A)(ii) withholds immunity when, as here, the service provider is “aware of facts or circumstances from which infringing activity is apparent.” When it is apparent to a provider like YouTube that certain clips are infringing (for example, serial uploads of a pirated French

Open match (IIIA318; IIIA385-386, ¶57)) and the provider is in fact targeting and tracking such clips (IIIA295; IIIA298), it must do what it can to take them down if it wants the safe harbor's protections. Opening Br. 36-37. This does not require YouTube to conduct an "investigation" into facts and circumstances (YT Br. 34). It only requires acting on infringements that are "apparent to a reasonable person" (H.R. Rep. 105-551(II) (1998) at 53) and that, as the undisputed facts show, YouTube has a demonstrated ability to locate. Opening Br. 15-16, 20-24.

Nothing in the Senate report on which YouTube relies (*see* YT Br. 32 n.8), or in the two House reports, suggests that YouTube is excused from acting until it has perfectly accurate item- and location-specific knowledge. In fact, the one example in the reports of red flag knowledge is plainly not limited to perfectly accurate, or item- or location-specific, knowledge. *See* H.R. Rep. 105-551(II) at 58 (explaining that red flag knowledge will exist in a case where *entire websites* are "obviously infringing," because the websites use descriptions that "make their illegal purpose obvious").

B. YouTube has *specific* knowledge or awareness of infringements, and made *deliberate* decisions not to act on that knowledge

The record below, which YouTube now attempts to paper over, evidences far more than "generalized awareness." For example, YouTube

ran searches for Premier League content on its website in order to evaluate the content in deciding whether to bid for a license, but kept the content on the site when it decided not to make the bid. IIIA167, ¶22. YouTube located, and targeted advertisements to, clips of French Open (“Roland Garros”) match footage and users’ searches for that footage (IIIA295; IIIA298; IIIA320), even after learning that match footage was unauthorized to be on YouTube (IIIA416, ¶142). YouTube’s users told it that they “do not own” videos of class plaintiffs’ works, and identified “millions” of infringing clips of Premier League matches, which YouTube left up. IIIA313; IIIA239; IIIA162 ¶17; IIIA388 ¶64. And YouTube’s music “tracking” system was designed specifically to identify songs owned by class plaintiffs and to discourage YouTube’s content partners, who had no license to exploit those songs, from removing them. Opening Br. 16-20. This goes far beyond “generalized awareness” – it constitutes culpable conduct that Congress excluded from any safe harbor.

Notwithstanding YouTube’s assertion (YT Br. 56) that its policy of tracking plaintiffs’ specific songs simply shows its “lack of knowledge,” YouTube’s knowledge that it required both recording and publishing licenses in order to exploit music content on its site is confirmed, among other things, by the facts that it secured nationwide publishing licenses

outside the United States, for example, from GEMA in Germany and MCPS-PRS in the United Kingdom (*see* IIIA182 ¶31), and from the major U.S. publishers. IVA180 ¶9. However, to save money, time and effort within the United States, YouTube deliberately ignored independent music publishers, choosing instead to identify and track their songs without paying for the rights. Opening Br. 17-18; IIIA379-380 ¶43 Tab 36; IIIA514.

This is not mere “lack of knowledge,” but deliberate conduct meant to profit from content whose infringing nature was “apparent” to YouTube. YouTube cynically suggests that because its system did not “tell YouTube who owns the relevant composition rights,” it did not have actionable knowledge. YT Br. 55. But YouTube does not have to know who the owner is to know that it is using the material – professional, commercial music uploaded by individual Internet users – without the owner’s permission. *See, e.g.*, IIIA356 Tab 189 (“good news is that fingerprinting works... bad news... top 1000 music videos is probably 700-800 copyrighted.”).

YouTube asserts that its tracking policy did not discourage major record labels from removing unauthorized content. YT Br. 55 n.20. Not so. The very goal of YouTube’s identification technology was “to encourage content partners to leave more of their content on the site” so YouTube could “generate significant ad revenue based on that content.” IIIA403-404

¶96 Tab 195. YouTube set up its tracking system precisely so that the *default* was “track,” not “block,” thus leaving the content uploaded even when it was evident that neither YouTube nor the label had a publishing license. Opening. Br. 19. YouTube’s tracking system did not “protect[] publishers’ interests,” as YouTube outrageously claims (YT Br. 55), but only YouTube’s interest in continuing to attract audiences using highly popular but unlicensed content. IIIA225; IIIA258; IIA160 (“we’ll leave music videos”); IIIA227 (“we don’t have clear licenses from them (publisher issue)”).

YouTube further asserts (YT Br. 56) that there is no evidence that plaintiffs’ individual “clips-in-suit” were tracked. But the evidence shows that class plaintiffs’ works-in-suit were not only tracked – YouTube went so far as to run song-specific advertisements against certain clips of plaintiffs’ musical works. *See, e.g.*, IIIA326-347 (screenshots of infringements of class plaintiffs’ works-in-suit with YouTube links to the specific song on iTunes or Amazon.com). Additionally, since Audible Magic’s databases contained fingerprints representing “the songs available for purchase in North America,” YouTube’s identification technologies necessarily could identify *any* commercial recordings of plaintiffs’ songs. IIIA401-402, ¶95, Tab 267.

As discussed in the next section, the point is not that YouTube must adopt any specific filtering strategy or technology, but that it cannot ignore content identification that results from its own use of these technologies for profit-making purposes. The selective use of such technology has been held in other cases to constitute evidence of a deliberate intent to foster infringement, precisely what YouTube was doing here. *Arista Records LLC v. Lime Grp. LLC*, 715 F. Supp. 2d 481, 514 (S.D.N.Y. 2010) (“selective filtering further demonstrates [defendant’s] knowledge of infringement-mitigating technologies and the company’s intentional decision not to employ any such technologies in a way that meaningfully deters [defendant’s] users’ infringing activities”). In any event, none of this could have been properly resolved against plaintiffs on summary judgment.

C. The knowledge provisions of § 512(c)(1)(A) do not immunize YouTube’s willful blindness to infringements of class plaintiffs’ works

YouTube’s assertion (YT Br. 39) that the treatment of willful blindness as knowledge is an “extra-statutory” rule parts company with the basic principle that “[w]illful blindness *is* knowledge, in copyright law.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (emphasis added). Section 512(c)(1)(A) reflects that principle, denying a safe harbor when infringements are “readily apparent to a reasonable person.” H.R. Rep.

105-551(II) at 53. Thus a service provider “would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.” *Id.* at 58; *Aimster*, 334 F.3d at 655 (DMCA safe harbors precluded where defendant deliberately “disabled itself from doing anything to prevent infringement”). This does not mean that YouTube must “review every video” or conduct an “open-ended investigation” into each clip on its site (YT Br. 37, 38), but it does mean that YouTube cannot set up systems that identify infringing videos and then deliberately ignore the results in favor of continued exploitation of those properties (Opening Br. 34-36).

After arguing that willful blindness has no place in a DMCA knowledge inquiry, YouTube proposes that “willful blindness requires proof that a service provider ‘purposefully contrived’ to ignore a very significant risk that specific material was infringing.” YT Br. 45 (citing *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 515 (S.D.N.Y. 2008), *aff’d*, 600 F.3d 93 (2d Cir. 2010) *cert. denied*, 131 S. Ct. 647 (2010)). Yet that is **exactly** what this record shows: YouTube knew that there was a massive amount of copyright infringement on its site (Opening Br. 8-13), specifically including infringements of class plaintiffs’ works (*id.* 13-18); YouTube used tools to identify this content (*id.* 20-24), including class plaintiffs’ content (*id.*), and run ads against it or track it so it would continue to draw viewers (*id.* 19;

IIIA295; IIIA298; IIIA320; IIIA251; IIIA326-347); but YouTube refused to make these tools available to plaintiffs unless they agreed to license their content to YouTube (Opening Br. 22). Far from presenting a theoretical question about “the way [YouTube] deployed” its technology (YT Br. 42, 43), the record reveals YouTube’s deliberate decision to continue identifying, tracking and exploiting clips on its site in spite of its knowledge of infringements, and preventing content owners from using that information to remove the infringements.

The extent to which YouTube now disputes these material facts (YT Br. 40-44, 70-73) only highlights how improper it was to grant summary judgment to YouTube. Nor does defendants’ feeble claim (*id.* 71) that there are no direct written communications from YouTube establishing that it withheld these tools from plaintiffs justify the result below. First, the record shows such written statements. IIIA492; IIA673-674. Second, YouTube’s culpable conduct was also undertaken in oral communications, and is documented by admissible testimony (IIIA399-400 ¶¶94 Tab 124; IIA649-650; IIIA379-380 ¶¶43 Tab 36), and YouTube’s own internal communications (Opening Br. 22).

The record also contradicts YouTube’s claim that it developed “Claim Your Content” or its later “Content ID” tools in order to “help” copyright

owners. YT Br. 43; 73. It developed and launched those tools because it wanted to identify videos for content-specific advertisements. Opening Br. 20-21. That is why YouTube refused to let plaintiffs use the tools unless they agreed to license their content or give up other valuable rights.

YouTube's further claim that plaintiffs "weren't using Audible Magic" to protect their content at that time (YT Br. 71) is an odd and irrelevant assertion. YouTube *refused* to let plaintiffs use the tool on YouTube's website. Opening Br. 22; IIIA399-400 ¶94. Although Audible Magic already had a database that could identify the commercial recordings of plaintiffs' songs (IIIA401-402 ¶95 Tab 267), and was equipped to fingerprint YouTube clips that were subject to plaintiffs' takedown notices in order to prevent repostings of the same content (IA817-818), YouTube would turn on that feature only for partners willing to license their content (*id.*; IIIA401 Tab 182).

D. The knowledge provisions of § 512(c)(1)(A) do not immunize YouTube's inducement of infringement of class plaintiffs' works

Effectively abandoning the lower court's indefensible holding that inducement considerations are entirely foreign to a DMCA safe harbor analysis, YouTube instead primarily argues that the record evidence cannot support a finding of inducement liability here. But disputes over defendants'

intent, or the extent to which their efforts resulted in acts of infringement, are not issues for the court to resolve on summary judgment.²

YouTube’s claim that “no court has ever held a DMCA-compliant service liable for inducement” (YT Br. 82) misses the point, since a party that induces infringement cannot qualify for safe harbor treatment:

“inducement liability and the Digital Millennium Copyright Act safe harbors are inherently contradictory.” *Columbia Pictures Indus., Inc. v. Fung*, 2009 WL 6355911, at *18 (C.D. Cal. Dec. 21, 2009) (appeal pending, argument scheduled for May 6, 2011). As Judge Posner held in *Aimster*, 334 F.3d at 655, the common element of the safe harbors “is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’ 17 U.S.C. § 512(i)(1)(A).” That is why the legislative history cautions that the title containing the safe harbors “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringement that takes place in the digital networked environment.” H.R. Rep. 105-551(II) at 49.

² The court below did not, as YouTube claims, hold that YouTube’s welcoming of infringement was “the most” a jury could find. YT Br. 85; SPA 9. And YouTube’s complaint that the court did not point to any evidence in drawing this conclusion is telling – the decision below should be overturned in part because the court chose to ignore almost the entirety of the evidentiary record presented by plaintiffs. Opening Br. 24-26.

The point is not that *Grokster* “altered” the DMCA safe harbor (YT Br. 35), but that the safe harbor was never meant to immunize websites like YouTube acting with deliberate unlawful purpose to induce infringements, a basis of liability that pre-dates *Grokster*. See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005). *Grokster* makes clear that an “item-specific” knowledge requirement is incompatible with inducement liability. *Id.* at 934 (no showing of “knowledge of specific unlawful uses”). YouTube’s and the district court’s construction of the statute upsets the careful balance Congress struck and would necessarily turn the safe harbor into a pirate’s cove for willful inducers, so long as they respond to takedown notices. Opening Br. 37-38. YouTube’s contention that “computer system operators” are subject to a “specific knowledge” standard even for inducement liability (YT Br. 36 n.10) is also contradicted by the holding that *Grokster*, which merely distributed software, was liable based on its “unlawful objective,” despite the absence of evidence of “knowledge of specific unlawful uses.” *Grokster*, 545 U.S. at 940, 934.

Defendants argue at length, on the facts, that there was no proof of explicit message to users overtly encouraging them to infringe. YT Br. 86-87. But the law focuses on unlawful purpose (along with acts clearly promoting it, addressed below), not messages *per se*:

Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant's own statements that *his unlawful purpose disqualifies him from claiming protection* (and incidentally to point to actual violators likely to be found among those who hear or read the message). Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that *active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed.*

Grokster, 545 U.S. at 938 (emphasis added). YouTube's unlawful objective and purposeful conduct aimed at promoting its site as a place to upload and access high-value copyright infringing content is amply evidenced. *See Grokster*, 545 U.S. at 937-38; Opening Br. 8-13, 20-24, 43.

Defendants now quarrel over the meaning of their incriminating internal discussions about building YouTube's audience through infringement (*compare* Opening Br. 8-13 *with* YT Br. 11-15).³ But they do so fruitlessly, since they can only dispute, not expunge, the evidence of the steps they took to ensure that users would upload and access infringing content on their site. YouTube:

³ For example, YouTube claims that a document shows co-founders Chen and Karim encouraging each other to remove infringing TV shows and movies. YT Br. 12. But the document makes plain that Chen and Karim wish to remove "whole movies" and "entire TV shows," because such lengthy clips are not popular. In the same document, they decide to *keep* "music videos" and "sports" clips on the site (which they also know are infringing), precisely because those are popular. IIA159-160; *see also* IIIA385 ¶57 Tab 282.

- quantified the value of so-called “premium” unlicensed content on YouTube (III A225; III A251; IIA211-214; III A366-367 ¶¶25 Tab 41; III A356 ¶¶6 Tab 189);
- deliberately decided to “keep” infringing sports and music clips on the site (IIA159; IIA160; III A150-151 ¶¶5 Tab 61; IA338);
- refused to provide content identification tools to plaintiffs absent a license for plaintiffs’ content (documents cited at Opening Br. 22);
- knew that users would be encouraged to upload infringements by seeing other infringements on the site (III A239; IA283, ¶¶117-118; IA334, ¶¶334-335; III A313; III A381, ¶ 49);
- identified unlicensed content for business reasons but did not remove it (III A256; III A295; III A298; III A320);
- structured content identification tools to encourage “partners” to “track” rather than remove specific unlicensed songs (documents cited at Opening Br.18-20); and
- knew that the 10-minute limit on clips would not prevent infringing activity (IIA183; III A318).⁴

⁴ Defendants’ self-serving litany of steps taken to purportedly stop infringement is belied by internal communications recognizing those measures were half-hearted and ineffective. *See, e.g.*, IIA183 (“[a]lthough the new 10-minute length restriction serves well to reinforce the official line [...] it probably won’t cut down the actual amount of illegal content uploaded”); III A403-404 ¶¶96 Tab 195 (“Goal” of CYC is to “enable YouTube to generate significant ad revenue”); IIA159 (“we can presumably claim that we don’t know who owns the rights to that video and by uploading, the user is claiming they own that video. [W]e’re protected by the DMCA for that. We’ll take it down if we get a ‘cease and desist’”); *see also* III A385-386 ¶¶57. The 10-minute clip limit also does nothing to prevent infringing short-form content including class plaintiffs’ popular musical works and sports highlight clips.

These material facts, merely disputed by YouTube, demonstrate knowledge and intent constituting inducement as well as disqualification from the protections of §512(c).

Nor does the extent of allegedly *non*-infringing material have any bearing on defendants' infringement-inducing activities or disqualifying knowledge. *See Grokster*, 545 U.S. at 934 (evidence of substantial non-infringing use no bar to inducement culpability). In any event, YouTube – which has the burden of proof on its affirmative safe harbor defense (and on its summary judgment motion) – never cites to (and never offers) any quantification of the amount of non-infringing material on its site or what proportion of views such material attracts. Instead, YouTube cites only a few dozen self-selected clips and channels (YT Br. 88-89), numbers which pale in comparison to: 1) defendants' own contemporaneous estimates that unlicensed professional content served as the primary draw for its audience (*supra* 19; Opening Br. 8-13; IIA47; IA857; IA537); and 2) the thousands of clips-in-suit specifically identified in this case (IIIA410, ¶116; YT Br. 92).⁵

⁵ Defendants deride the characterization of YouTube as a “pirate site” (YT Br. 11), but high level Google executives used that characterization at the time of the acquisition. *See, e.g.*, IA540 (pre-acquisition email from Google vice-president David Eun to Google CEO Eric Schmidt stating, “a large part of [YouTube’s] traffic is from pirated content”).

E. Class plaintiffs did not engage in licensing sufficient to deprive YouTube of disqualifying knowledge

YouTube argues that the fact that certain class plaintiffs may have licensed certain works for use on YouTube renders it impossible for YouTube ever to have disqualifying knowledge or awareness. This is not the law. Opening Br. 39-41.

The argument is also factually baseless. YouTube attempts to paint class plaintiffs with the same brush as the Viacom plaintiffs. However, in contrast to YouTube's accusations against Viacom, class plaintiffs did not covertly post their own works to YouTube or engage in "stealth" marketing of their works; class plaintiffs did not "leave up" infringing clips on YouTube's website; and class plaintiffs never authorized any of their clips-in-suit to be on YouTube. YT Br. 44-48, 50-53; IIIA414 ¶¶136-144.

YouTube cites evidence that a few of the hundreds of works-in-suit in this case were licensed to be on YouTube, and complains that "[p]laintiffs did not inform YouTube of the details of their licensing and coownership arrangements." YT Br. 49. But YouTube ignores the evidence that it rebuffed plaintiffs when they tried to do just that (IIIA379-380 ¶43 Tab 36 (Cherry Lane "was summarily told that YouTube had no interest in Cherry Lane given its small market share")), and refused to let plaintiffs use the tools that it was already using to identify plaintiffs' specific works (Opening

Br. 22).⁶ Class plaintiffs’ sports footage is not licensed for use on YouTube. IIIA414 ¶136. Moreover, when class plaintiffs’ musical works were licensed to appear on YouTube, it was as part of a specifically identifiable online promotion or advertisement, unlike the vast majority of music infringements, which are recognizable songs played as a soundtrack to user-generated content, and which could not reasonably be assumed to be licensed. IIIA414 ¶136-144.

Although YouTube claims that the music publisher plaintiffs had “difficulties” determining if specific clips were licensed (YT Br. 69), the documents that YouTube cites mainly show that plaintiffs sometimes checked their licensing databases.⁷ There is no evidence that plaintiffs had

⁶ YouTube also tries to make hay of the fact that a small number of music works-in-suit had co-owners. YT Br. 49, 69. Although U.S. law permits unilateral licensing by one co-owner within the United States in certain circumstances, that is not the law in most other countries, where “the consent of all of the joint owners is required in order to validate a license.” *See Nimmer on Copyright* §17.07[B]; *see also Patry on Copyright* §24:7. Thus, any co-owner wishing to license a work for appearance on YouTube – which automatically makes videos available worldwide – would need to obtain the consent of one of the class plaintiff music publishers. Absent such consent, the work would not be properly licensed to appear on YouTube.

⁷ YouTube’s citation to evidence that one class plaintiff hired a musicologist is a red herring. YT Br. 69. In those cases the issue was whether one musical work was an improper “sound-alike” of another; it had nothing to do with whether the plaintiff’s works were licensed to be on YouTube. And, it has nothing to do with YouTube’s responsibility to remove *obvious* infringements, including those it was *already identifying* with ease. IIIA420-421 ¶159; *supra* 9-12.

trouble identifying the clips-in-suit as infringements. And out of the thousands and thousands of class plaintiffs’ takedown requests identified in this case, YouTube points to evidence that only *one* was mistakenly issued.⁸

More fundamentally, YouTube knew that massive infringement was occurring on its website, was able to (and did) identify clips of class plaintiffs’ specific works, and knew these clips were unauthorized – either because YouTube was told they were unauthorized by users and copyright owners (*see, e.g.*, IIIA381-382 ¶49; IIIA416 ¶142; IIIA399-400 ¶94 Tab 124), YouTube declined to secure a license to authorize specific works to be on its site (*see, e.g.*, IIIA379-380 ¶43 Tab 36; IIIA167 ¶22), or because it was blatantly obvious that YouTube’s individual uploaders did not pay for a license to freely share class plaintiffs’ professional content (*see, e.g.*, IIIA313; IIIA318). In this context, YouTube was obligated to remove the obvious infringements, or at the very least not hide the output of its identification tools from plaintiffs, if it wanted safe harbor protection.

⁸ YouTube claims that “various” takedown notices were sent for clips that were authorized. YT Br. 69. In fact, only one was. In the other two cases YouTube cites, the plaintiff decided to authorize the clips to remain on the site, despite the fact that they were posted without a proper license. *Id.*; IIIA419 ¶¶153-155.

III. YouTube Directly Benefitted From And Had Disqualifying Control Over Infringements Of Class Plaintiffs' Works

YouTube's argument with respect to the benefit and control prong of §512(c)(1)(B) (YT Br. 58-77) is also wrong on the law and wrong on the facts. As the structure of §512(c)(1)(B) indicates, a financial benefit directly attributable to infringing activity is the principal disqualifier in this provision, conditioned on the proviso that even those who enjoy directly attributable financial benefits will retain the safe harbor if they lack the right and ability to control the infringing activity. The arguments of various *amici*, and the holdings of various federal courts in California – that Congress could not have meant to close the safe harbor to service providers merely because they have some right and ability to control infringement – misreads the statute. A service provider's right and ability to control is not independently disqualifying. Only when the service provider is receiving a direct financial benefit from the infringing activity, "in a case in which the service provider has the right and ability to control such activity," will the service provider be excluded. *See generally* S. Rep. 105-190, at 44. That is the case here.

A. YouTube directly benefitted from infringements

Even the Ninth Circuit cases that defendants favor elsewhere in their brief hold that "direct financial benefit" in §512(c)(1)(B) should be assessed in light of its common law meaning. Opening Br. 53-54. YouTube's own

internal communications admit that it draws users to its site through the presence of infringing material, including class plaintiffs' material. Opening Br. 8-20. There is no genuine dispute that YouTube enjoys a direct financial benefit from the infringing activities at issue. Opening Br. 54.

Arguing against these holdings, YouTube relies heavily on a statement from the House and Senate reports that, "a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities" would not meet the financial benefit test under §512(c)(1)(B). YT Br. 74-75. YouTube asserts that this shows that Congress meant to "reject" the common-law "draw" test. *Id.* But that statement from the House and Senate reports was meant to provide *examples* of direct financial benefit, not an exclusive list, and it is not inconsistent with the common law. The examples it provides simply do not address cases where service providers rely on infringements to "enhance the attractiveness" of their service, which was the basis for finding common law direct financial benefit in the *Fonovisa* case that YouTube cites. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996). Likewise, they do not address businesses like YouTube, which receive *no* payments from infringing uploaders or viewers, but instead rely on infringing content to draw an audience that they can then sell to advertisers.

YouTube further distorts the legislative history by omitting the sentence that immediately follows the passage that it quotes (YT Br. 74-75): “[512(c)(1)(B)] would however, include any such fees *where the value of the service lies in providing access to infringing material.*” H.R. Rep. 105-55(II) at 54 (emphasis added). That was the case in *Fonovisa*, and is the case here. The value of YouTube’s service from the outset was deliberately built on providing popular infringing material. That material garnered YouTube’s audience, generated the advertising revenues, and ultimately accounted for the \$1.65 billion that Google paid for YouTube in 2006. Opening Br. 8-13.

That YouTube may have run advertisements against some non-infringing content (as well as against infringements of plaintiffs’ high-value, audience-attracting content) does not automatically entitle it to a safe harbor, especially where a jury could find that YouTube *deliberately* relied on infringements as an essential draw for its audience. These facts go well *beyond* the common law test, which lacks an intent requirement, and pursuant to which “there is no requirement that the draw be ‘substantial’.” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (citation omitted).

YouTube’s assertion that as long as it has a “legitimate business model” it survives the direct financial benefit test (YT Br. 76) simply assumes a conclusion, and ignores all of the evidence that YouTube’s model

was precisely to capitalize on and directly benefit from high-value, unlicensed content from plaintiffs and comparable copyright owners. YouTube’s additional assertions that it only ran advertisements on “watch pages” “claimed” by its content partners, and that most of its revenue came from its home page and pages showing the results of users’ searches for videos, are also immaterial. YT Br. 76. YouTube’s own studies show that users were primarily searching for unlicensed premium content – including class plaintiffs’ unauthorized content.⁹ IIIA366-367 ¶25. YouTube even ran advertisements directly targeted to users’ searches for class plaintiffs’ specific content, *and* on watch pages with infringing videos of class plaintiffs’ content. IIIA241- 247, 295-306; 320; 326-347. Holding YouTube liable on these specific facts would not mean that all advertising-supported user-generated content sites are automatically excluded from the safe harbor, as YouTube and its *amici* claim. YT Br. 77. It would mean only that they are excluded if they behave like YouTube – deliberately relying on infringements to draw their audiences and generate their advertising revenues.

⁹ YouTube’s studies also showed that content-specific advertising targeted to users’ searches for premium videos was more lucrative than other advertisements. *See* Opening Br. 20 n.2.

B. YouTube can and does control infringements

Defendants' contention (YT Br. 58) that plaintiffs failed to carry their burden of proof as to YouTube's control over the infringing activities at issue is meritless. Like any other affirmative defense, the burden of establishing a §512(c) defense is on the defendant who is profiting from the infringing material, not the plaintiff whose work has been copied and distributed by the defendant. Opening Br. 28-29; *see also* Nimmer on Copyright §12.11[F] ("the defendant bears the burden of proof as to all affirmative defenses") and §12B.06[A] (referring to the "four affirmative defenses" in §§512(a), (b), (c) and (d)). Here, Google has not even attempted to shoulder its burden to prove beyond genuine dispute that it lacked the "right and ability to control" the infringing activity taking place with respect to plaintiffs' copyrighted works. For this reason alone, summary judgment for YouTube was error.

YouTube never proposes a standard for the "control" disqualifier, resting content simply to attack various points plaintiffs make.¹⁰ But no

¹⁰ YouTube off-handedly suggests that "control" must be limited to situations where YouTube has authority over the *individuals* who are uploading infringements, for example, through a principal/agent relationship. YT Br. 60. YouTube relies entirely on a definition of control, in an outdated edition of Black's Law Dictionary (6th ed. 1990), as "the ability to exercise a restraining or directing influence over *something*." *Id.* (emphasis added). But the statute tells us what this "something" is – it is the

decision (other than the one below) has ever held that *knowledge* is an element of the “control” standard. Likewise, the phrase “infringing activity” is frequently used to refer to infringement generally, without item- or location-specificity.¹¹ The lower court’s inexplicable conclusion that the “right and ability to control” “infringing activity” requires proof of item- and location-specific knowledge is not only inconsistent with the plain meaning of the statute, but would also render superfluous the knowledge or awareness prong of the safe harbor. Opening Br. 46-47, 49-50.

Section 512(c)(1)(B) could hardly be clearer, and is plainly drawn directly from this Court’s influential decision in *Gershwin Publishing Corp. v. Columbia Artists Management Inc.*, 443 F.2d 1159, 1162-63 (1971). *Gershwin* held Columbia Artists Management responsible for infringement occurring at a community concert in Port Washington at which its artists performed, since it “was in a position to police the infringing conduct... and... derived substantial financial benefit from the actions of the primary

“infringing activity” on YouTube’s website from which YouTube is directly benefitting, not the persons doing the uploading or viewing. §512(c)(1)(B).

¹¹ See, e.g., *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 (2005) (“this evidence of unlawful objective is given added significance by MGM’s showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity”); *Arista Records LLC v. Doe*, 604 F.3d 110, 122 (2d Cir. 2010) (referring to “infringing activity” broadly, not with item-specificity).

infringers.” Congress’s similar decision to deny a safe harbor to those who “receive a financial benefit directly attributable to the infringing activity” so long as the defendant “has the right and ability to control” the infringing activity – a standard of liability that was persuasive to a distinguished panel including Judge Friendly – is hardly irrational, or deserving of the wholesale distortion it has received in various cases from California.

YouTube’s main objection is that the DMCA safe harbor could not have been intended to restate vicarious liability principles. YT Br. 58-59. But that is exactly the intent reflected in the House report that accompanied the first version of the legislation, which contained an almost identical control and benefit provision: “[t]he ‘right and ability to control’ language in Subparagraph (B) codifies the second element of vicarious liability.” H.R. Rep. 105-551(I) at 23. There is nothing inconsistent in Congress creating a statutory “safe harbor” by reference to then-existing common law standards, while letting the common law continue to evolve on its own.

In any event, defendants’ observation that “regardless of how the DMCA’s control test is applied,” it “at a minimum requires that the service provider have the practical ability to have prevented the alleged infringing activity at issue” raises no disagreement from class plaintiffs. YouTube in fact has that practical ability. *Compare* YT Br. 61 *with* Opening Br. 50-53.

As class plaintiffs demonstrated in their Opening Brief (at 51-52), YouTube's conduct goes well beyond the "something more" standard promoted by the district court cases on which YouTube relies.

C. A properly instructed jury could find disqualifying control

Having held that "right and ability to control" matters only as to specific individual clips for which YouTube had 100%-certain knowledge from a takedown notice, the district court failed to address the evidence plaintiffs submitted to prove the requisite right and ability to control.

Construing "control" to have its plain, unambiguous meaning, YouTube's attempt to deny its right and ability to control is perplexing, particularly on summary judgment. YouTube's own Community Guidelines, which advise of YouTube's right and ability to restrict a wide range of lawful but disfavored content, refute any notion that YouTube lacks "the right and ability to control" as used in § 512(c)(1)(B).¹² YouTube has at least

¹² See www.youtube.com/t/community_guidelines (Dkt No. 178, at p. 30), which assert YouTube's right and ability to control videos containing a wide range of content, including "pornography or sexually explicit content" and "bad stuff like animal abuse, drug abuse, under-age drinking and smoking... gross-out videos of accidents, dead bodies, or similar things intended to shock or disgust... speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation... predatory behavior... invading privacy, revealing other people's personal information," and "large amounts of untargeted, unwanted or repetitive content, including comments and private messages... *We Enforce These Guidelines... YouTube staff review flagged videos 24 hours*

that same “ability” to control video of Premier League matches, French Open tournament play, or recordings of Rodgers and Hammerstein productions, all of which were (and despite numerous takedown notices still are) broadly available on YouTube, through multiple uploads.¹³ In fact, YouTube did control such videos when it suited its business purposes. Opening Br. 15 (explaining how YouTube removed infringing content in advance of license negotiations).

YouTube’s opposition to this line of argument (YT Br. 39, 63-69) – insisting that it cannot know *for certain* that any given video it could flag would be infringing (or not fair use or otherwise licensed), even with respect to organizations like the plaintiffs that have patiently and with great forbearance submitted many thousands of DMCA-compliant notices – is an excuse masquerading as a rebuttal. The statute does not refer to the “right and ability to perfectly control.” Nothing in the DMCA says that Google and

a day, seven days a week to determine whether they violate our Community Guidelines. When they do, we remove them.” (Emphasis added.)

¹³ For example, entering “South Pacific Lincoln Center” on the YouTube search box on April 26 resulted in the entire production in 12 eponymously identified parts. Entering “Roland Garros 2010 final” produced that match in 14 parts, and numerous other versions as well. Entering “premier league highlights 2010” produced official footage of numerous games, which YouTube has repeatedly been told is either subject to the Premiere League’s copyright or otherwise in violation of the Premier League’s rights. IIIA388 ¶64 Tab 188; IIIA410 ¶116; Opening Br. 14-15.

YouTube, which have chosen to exercise control so as to avert the perceived harms from categories of videos they apparently judge are undesirable (*supra*, note 12), could not, or should not, exercise that same kind of control in the service of averting enormous harm to copyright owners.

To the contrary, the legislative history underlying §512(c) repeatedly emphasizes the balance struck by the statute: protection for service providers while “preserv[ing] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringement” H.R. Rep. 105-551(II) at 49. The record makes plain – and certainly permits a jury to find – that YouTube has resolutely refused, other than by compliance with takedown notices, to “eliminate or at least reduce substantially the infringing uses.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (holding that copyright law imposes precisely that duty on service providers). Nor can anyone have the slightest doubt that Google’s abilities to use its algorithms and software to identify likely infringement of materials owned by the plaintiffs (and similar entities in the putative class) are extraordinary and more than adequate to eliminate a huge amount of infringement on which YouTube is capitalizing. *See generally* Opening Br. 8-24.

Notwithstanding the above, YouTube has no response to plaintiffs' showing that even on the standard of the district court cases on which YouTube relies, which insist upon "something more" than the control standard under the common law, a jury could find control. *Compare* Opening Br. 50-53 *with* YT Br. 60-61. Nor has it explained why, having used content identification tools to find Premier League and Fédération Française de Tennis content in order to run ads against it (IIIA241- 247, 295-300; 320), and to track and run ads against plaintiff music publishers' content (IIIA326-347), YouTube should not be expected to use the same tools to remove what it has repeatedly been told is infringing content, when: 1) having already been removed subject to takedown notices, the same content pops up at different URLs, like whack-a-mole, thus giving YouTube "some antecedent awareness of the individual materials or activities alleged to be infringing" (YT Br. 60; *see also* IIIA388 ¶64 Tab 188); and 2) YouTube is deliberately and directly profiting from this infringing material (*supra*, 24-27).

IV. YouTube's Knowledge, Control And Deliberate Actions Are Not Rendered Irrelevant By Section 512(m)

Citing 17 U.S.C. §512(m), YouTube and some of its *amici* argue that the inquiry into whether YouTube willfully blinded itself to infringement and infringing activity on its site, or had the right and ability to control that

infringement or infringing activity, cannot take into account knowledge it had from the monitoring it did undertake, or its decision not to employ monitoring tools it used for revenue-maximizing purposes for infringement-reducing ones. YT Br. 38-39, 62. That argument misreads §512(m) in multiple respects.

Section 512(m), as its title suggests, was intended to ensure “Protection of Privacy,” not to address what constitutes or is pertinent to a service provider’s red flag knowledge, or right and ability to control.¹⁴ A proper construction of § 512(m) should take that into account. Nimmer on Copyright, §12B.09[B] at n. 33; *United States v. Fuller*, 627 F.3d 499, 505 n.2 (2d Cir. 2010) (“the title of a section of a statute... may nevertheless be useful in guiding our interpretation.”). Section 512(m) was aimed at ensuring that safe harbors would not require service providers to invade the privacy of college students and other users by “seeking facts indicating [their] infringing activity.” Stretching it to say that the facts detailed in our opening brief at 20-24, and *supra* at 19, do not preclude the safe harbor is stretching §512(m) several bridges too far. Here, those facts demonstrated that YouTube used tools to find and measure infringements for profit-

¹⁴ What is now §512(m) is essentially identical to the provision addressed in all the pertinent House and Senate Reports, and has carried that same title from the first of those reports. *See* H.R. Rep. No. 105-551 Part I, at 36; H.R. Rep. 105-551 Part 2, at 17; S. Rep. 105-190, at 55.

maximizing or license-negotiation purposes but declined to use those same tools for infringement reduction purposes. YouTube already:

- searches for plaintiffs’ content on its site in order to gain leverage in license negotiations, then leaves plaintiffs’ content on the site when it declines to bid for the license (IIIA251-252, 256; IIIA167 ¶22);
- locates and runs advertisements directly targeted to plaintiffs’ content (IIIA241- 247, 295-300; 320); and
- tracks plaintiffs’ specific songs with the deliberate policy to keep them on the site and attract views (IIIA403 ¶96; IIIA326-347).

There is no privacy-protection purpose imaginable in disregarding monitoring that YouTube is *already* undertaking (or of the kind that it is already undertaking). Nothing in §512(m) requires or permits that YouTube be allowed to have it both ways.

V. YouTube Is Ineligible For The §512(c) Safe Harbor At The Threshold

A. YouTube’s actions reach well past “storage at the direction of a user”

Predicting dire consequences if the district court’s ruling is overturned, YouTube asserts that class plaintiffs are wrong to make the “radical” argument that §512(c) protects only “passive providers of storage” and not those that provide access to stored content uploaded by users. YT Br. 79. But class plaintiffs do not make that argument. *Compare* YT Br. 77,

79 *with* Opening Br. 56-58. Class plaintiffs argue that YouTube’s actions went well beyond *both* passive storage *and* the provision of access to plaintiffs’ copyrighted works on its website. *Id.*

For example, YouTube asserts that its provision of videos to mobile phones is merely one way of “facilitating access” to user-stored materials. YT Br. 81 n.34. But YouTube’s actions went beyond that. YouTube syndicated its inventory of videos to other media platforms (for a fee) without any direction from the users who were ostensibly “storing” them on YouTube. IIIA500; IA331-332 ¶¶324-330.

YouTube’s claim (YT Br. 80) that its “related videos” function is also merely an aspect of “facilitating access” turns “facilitating access” into a meaningless phrase. YouTube’s related videos feature (IA334 ¶¶334-335) *promotes* videos to viewers that those viewers otherwise would not have watched – and specifically promotes infringements of class plaintiffs’ works. For example, when a viewer watches a video containing a musical work owned by class plaintiffs, YouTube suggests other videos for the viewer to watch that contain the exact same infringing material. IIIA320-346. This is content promotion, not “access” to stored content.

More fundamentally, YouTube’s “related videos” function highlights the fact that many of the actions in this case for which YouTube may be held

liable arise from its deliberate efforts to capitalize on class plaintiffs' infringing content. *Supra*, 19; Opening Br. 43. These deliberate acts, not directed by users, go well beyond the storage-related functions that §512(c) was designed to protect. YouTube's liability here arises not only from its technical functions – including converting videos into new formats and streaming them on request to its viewers (YT Br. 80) – but from increasingly acting like a television broadcaster, and inducing third party uploaders and viewers to engage in infringing activity involving high-value infringing content, so as to maximize viewer eyeballs and hence advertising revenue.

B. YouTube did not reasonably implement its infringement policy

By denying its content identification tools to class plaintiffs, YouTube deliberately prevented them from locating infringements on its website, and accordingly cannot be held to have “reasonably implemented” a repeat infringer policy. Opening Br. 55-56. YouTube professes to be perplexed by this argument. YT Br. 28. But the courts have been very clear: “a repeat infringer policy is not implemented under §512(i)(1)(A) if the service provider prevents copyright holders from providing DMCA-compliant notifications.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1110 (9th Cir. 2007); *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (the common element of the safe harbors “is that the service provider

must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers’”) (emphasis added). Here, YouTube not only failed to do what it reasonably could have, but also deliberately chose to prevent class plaintiffs from removing their infringements by denying them the very tools that YouTube was using to track and exploit those infringements. This behavior excludes YouTube from the safe harbor. Any disputes about these facts are for a jury to decide at trial, not a court on summary judgment.

CONCLUSION

For the reasons above and in our opening brief, the judgment below should be reversed.

April 28, 2011

Respectfully submitted,

/s/ Charles S. Sims

Charles S. Sims

William M. Hart

Noah Siskind Gitterman

Elizabeth A. Figueira

PROSKAUER ROSE LLP

Eleven Times Square

New York, NY 10036

Telephone: (212) 969-3000

*Lead Counsel of Record for
Plaintiffs-Appellants*

Max W. Berger
John C. Browne
BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Email: johnb@blbglaw.com
*Attorneys For The Football
Association Premier League
Limited, Bourne Co., Murbo
Music Publishing, Inc., Cherry
Lane Music Publishing Company,
Inc., X-Ray Dog Music, Inc., and
Fédération Française de Tennis*

Louis M. Solomon
Hal S. Shaftel
CADWALADER,
WICKERSHAM & TAFT, LLP
One World Financial Center
New York, NY 10281
Telephone: (212) 504-6680
louis.solomon@cwt.com
*Attorneys For The Football
Association Premier League
Limited*

David S. Stellings
Annika K. Martin
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10017-2024
Tel. (212) 355-9500
Fax. (212) 355-9592
*Attorneys for the National Music
Publishers' Association, Rodgers
& Hammerstein Organization,*

*Stage Three Music (US), Inc.,
Edward B. Marks Music
Company, Freddy Bienstock
Music Company d/b/a Bienstock
Publishing Company, and Alley
Music Corporation*

Daniel Girard
Christina Connolly Sharp
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108

-and-

David Garrison
BARRETT JOHNSTON &
PARSLEY
217 Second Avenue North
Nashville, TN 37201

-and-

Kevin Doherty
BURR & FORMAN LLP
700 Two American Center
3102 West End Avenue
Nashville, TN 37203
*Attorneys for Cal IV
Entertainment LLC*

Christopher Lovell
Christopher M. McGrath
LOVELL STEWART
HALEBIAN LLP
61 Broadway, Suite 501
New York, New York 10110
Telephone: (212) 608-1900
Facsimile: (212) 719-4677

-and-

Jeffrey L. Graubart
LAW OFFICES OF JEFFREY L.
GRAUBART

350 West Colorado Boulevard
Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

-and-

Steve D'Onofrio
5335 Wisconsin Avenue, N.W.
Suite 950
Washington, D.C. 20015
Telephone: (202) 686-2872
Facsimile: (202) 686-2875
*Attorneys for The Music Force
Media Group LLC, The Music
Force LLC, and Sin-Drome
Records, Ltd.*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), and with this court's April 19, 2011 order granting plaintiffs-appellants' motion for leave to file an oversized reply brief of 9,000 words, because this brief contains 8,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

April 28, 2011

/s/ Charles S. Sims

Charles S. Sims

Lead Counsel of Record for Plaintiffs-Appellants

CERTIFICATE OF SERVICE & CM/ECF FILING

10-3342 The Football Association v. YouTube, Inc.

I hereby certify that I caused the foregoing Reply Brief for Plaintiffs-Appellants to be served on all counsel via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

Susan J. Kohlmann
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Stuart J. Baskin
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Theodore B. Olson
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Andrew H. Schapiro
A. John P. Mancini
Brian M. Willen
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

David H. Kramer
Michael H. Rubin
Bart E. Volkmer
WILSON SONSINI GOODRICH
& ROSATI P.C.
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Attorneys for Defendants-Appellees

*Attorneys for Plaintiffs-Appellants
(10-3270)*

I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Reply Brief for Plaintiffs-Appellants were sent to the Clerk's Office By Hand Delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 28th day of April 2011.

Notary Public:

/s/ Nadia R. Oswald-Hamid

Sworn to me this

April 28, 2011

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings County
Commission Expires November 10, 2011

/s/ Samantha Collins

SAMANTHA COLLINS

Record Press, Inc.

229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949