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June 14, 2011

VIA ECF

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 International, Inc. et al. v. YouTube, Inc. et al.*, No. 10-3270
The Football Ass'n Premier League et al. v. YouTube, Inc. et al., No. 10-3342

Dear Ms. Holmes:

Pursuant to FRAP 28(j), I write to notify the Court of the Supreme Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, No. 10-6 (U.S. May 31, 2011), which is relevant to Viacom's argument that YouTube's willful blindness to the infringing character of videos on YouTube is sufficient to demonstrate YouTube's knowledge of infringement. *See* Viacom Br. 34-39; Premier League Br. 34-36.

In *Global-Tech*, the Court held that 35 U.S.C. § 271(b), which prohibits active inducement of patent infringement, requires knowledge that the induced acts constitute patent infringement. Slip Op. 10. Despite the absence of any discussion of willful blindness in the statute, the Court rejected the defendant's argument that willful blindness was insufficient to demonstrate knowledge. Given "the long history of willful blindness and its wide acceptance in the Federal Judiciary," the Court "c[ould] see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement." *Id.* at 12.

The Court held that for a defendant to be adjudged willfully blind "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id*. at 13. "Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* at 14.

Global-Tech refutes YouTube's suggestion that the doctrine of willful blindness cannot apply to the knowledge requirements under the DMCA because the doctrine is "extra-

statutory." YT Br. 39. It also refutes YouTube's argument that recognizing that willful blindness is knowledge would impose on all service providers a broad affirmative obligation to "seek[] facts indicating infringing activity." *Id*. at 42. Under *Global-Tech*, since the record on summary judgment amply warrants a finding that YouTube knew there was a high probability that videos were infringing and took deliberate steps to avoid confirming the infringing character of the videos, summary judgment for YouTube was plainly error.

The Class Appellants have authorized me to say they join this letter.

Very truly yours,

/s/ Theodore B. Olson

Theodore B. Olson