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August 26, 2011

Ms. Deborah Holmes
Ms. Kimberly Gay
Case Managers, 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; *The Football Ass'n Premier League, et al. v. YouTube, Inc., et al.*, No. 10-3342

Dear Ms. Holmes and Ms. Gay:

Pursuant to FRAP 28(j), YouTube writes to notify the Court of the recent decision in *Capitol Records, Inc. v. MP3tunes*, 07-cv-9931 (S.D.N.Y. Aug. 22, 2011) (attached), which, with one narrow exception, held that an online service allowing users to store music files in personal storage “lockers” was protected by the DMCA.

The court in *MP3tunes* made several rulings that confirm YouTube's approach to the DMCA safe harbors. First, it held that while service providers “must take down the specific infringing material identified” in a takedown notice, they “are not required to search for and take down other material that may infringe the identified copyrighted work.” Slip op. 14. Thus, as discussed on pages 56-58 of YouTube's brief, the DMCA does not require service providers to respond to takedown notices by conducting “a burdensome investigation in order to determine whether songs in its users' accounts were unauthorized copies.” *Id.* at 15-16.

Second, Judge Pauley—like Judge Stanton in this case—held that the DMCA's knowledge provisions “describe knowledge of specific and identifiable infringements of particular items.” *Id.* at 16 (quoting *Viacom v. YouTube*, 718 F.Supp.2d 514, 523 (S.D.N.Y. 2010)). The *MP3tunes* court also agreed that “if investigation is required to determine whether material is infringement, then those facts and circumstances are not ‘red flags.’” *Id.* at 17. And it found that plaintiffs could not make a “red flag” showing in part because their own online marketing activities left defendants' users and executives with “no way of knowing for sure

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whether free songs on the internet are unauthorized.” *Id.* Those rulings support pages 29-34 and 44-53 of YouTube’s brief.

Finally, *MP3tunes* supports the understanding of the DMCA’s control-plus-financial-benefit provisions set out at pages 58-61 and 74-75 of YouTube’s brief. The court held that defendants lacked a financial benefit because “infringing and non-infringing users of Sideload.com paid precisely the same or nothing at all, for locker services.” *MP3tunes*, slip op. 19. And it ruled that MP3tunes did not have the ability to control the infringing activity because it “does not participate” in users’ decisions about what songs to store in their lockers. *Id.*

Respectfully submitted,

/s Andrew H. Schapiro
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Counsel for YouTube