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Via ECF

Catherine O'Hagan Wolfe
Clerk, United States Court of Appeals for the Second Circuit
U.S. Courthouse
500 Pearl Street
New York, NY 10007

Re: *The Football Association et al. v. Youtube, Inc.*, No. 10-3342 cv

Dear Ms. Wolfe:

We write in response to the appellees' letter dated Friday August 26, bring to the Court's attention Judge Pauley's recent decision in Capitol Records, Inc. v. MP3TUNES, LLC, No. 07-9931 (August 22, 2011). With respect to the scope of 17 U. S. C. § 512(c), Judge Pauley's opinion in MP3Tunes simply follows Judge Stanton's analysis in this case, which has been addressed at length in the appellants' briefs and those of their supporting *amici curiae*. For all the reasons set forth in those briefs, which need not be repeated here, Judge Stanton's analysis of 17 USC 512(c) is incorrect.

But insofar as it addressed the facts before it, the MP3Tunes ruling is instructive in other ways, supporting reversal here, that appellees fail to mention.

Judge Pauley's decision rested in large part on the fact that there was "no evidence that MP3tunes executives or employees had firsthand knowledge that [content on their site was] unauthorized. " Slip Op. at 11. Here, by contrast, the record demonstrates knowledge on the part of YouTube and Google executives about the infringing nature of the content on which the YouTube site depended, and indeed that YouTube not only knew of such content, but positively sought to attract and retain it. As Judge Stanton found, YouTube, 'welcomed' those infringements as a means to attract users. SPA 9; Brief for Plaintiffs-Appellants filed December 3, 2010 ("Appellants' Br. ") at 8-12.

In addition, Judge Pauley found it significant that the users of the MP3TUNES service did not upload content there, but copied it from a wide variety of third party sites, and therefore lacked knowledge that the content they were copying was infringing. Slip Op. at 10. By contrast, the record in this case is replete with examples of users posting content to You Tube with unmistakable notice that it was unauthorized and infringing. Appellants' Br. at 24.

Finally, Judge Pauley relied heavily on the absence of evidence that MP3tunes blinded itself to infringing activity occurring on the site. Slip Op. at 11. You Tube, by contrast, created tracking tools which identified infringing content, such as musical compositions for which appellees here lacked any license, but nonetheless chose to exploit, rather than block that content, knowing full well of its infringing nature. Appellants' Br. at 18-20.

In short, with respect to scope of § 512(c), the legal analysis in *Capitol Records* adds nothing, but its assessment of the kinds of facts that would disentitle an internet service to the § 512(c) defense shows why the decision below cannot stand.

Very truly yours,

Charles S. Sims

cc: Counsel for Defendants-Appellees
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