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January 12, 2012

Via ECF

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

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

Dear Ms. Wolfe:

Wolk v. Kodak Imaging Network, Inc., 2012 WL 11270 (S.D.N.Y. Jan. 3, 2012) ("*Photobucket*"), cited by YouTube, highlights why no safe harbor is available here.

There was no evidence that Photobucket knew or was aware of infringing activity, apart from 15 DMCA takedown notices, 11 of which were defective. By contrast, the record here is rife with specific knowledge concerning the presence of plaintiffs' works on YouTube, including internal emails discussing quantification of infringements, specific plaintiffs' works, discussions about the need or appropriateness for licenses, valuation of infringing premium content (again, with references to specific plaintiffs' works), and whether YouTube's "tracking systems" should be set to ignore what was plainly unlicensed and infringing content. Class Br. 9-23. YouTube's knowledge that it was infringing specific plaintiff works, afforded by both the above sources and repeated takedown notices for plaintiffs' songs and specific sports programming known to require licenses that YouTube lacked (*e.g.*, French Open games, FA Premier League matches), differs from the *Photobucket* record like day from night.

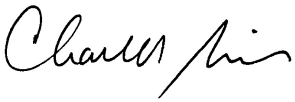
Although the *Photobucket* pro se plaintiff conceded early in the litigation that automated filtering would be impractical to protect her works from infringement, YouTube selectively deployed automated filtering to protect the content of its licensors or to target advertising, while denying such protection to plaintiffs. Class Br. 22-24; Reply 10-11. Content known to be plaintiffs' was easily recognizable (and in fact recognized) by YouTube upon upload. YouTube cannot actively benefit from such systems for the purpose of identifying and monetizing content, including for pinpoint advertising, and then claim that it lacks knowledge or facts from which continuing infringement is evident.

Also unlike *Photobucket*, the record here contains extensive evidence of pervasive control over the infringing activities on the YouTube site and pointed admissions by YouTube and

Google executives (and their advisors) concerning the value of those infringements to the growth and success of YouTube, and direct financial benefit. Class Br. 8-13.

For all of these reasons, *Photobucket* reinforces why, on the extensive factual record before the Court, the safe harbor is out of reach, and certainly not established on summary judgment.

Very truly yours,



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