

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

**BRIEF FOR PLAINTIFFS-APPELLANTS
[REDACTED PUBLIC VERSION]**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, none of the appellants has a corporate parent or has 10% or more of its stock owned by publicly held corporations, except as follows:

Alley Music Corporation (“Alley”) is a New York corporation that is wholly owned by Carbert Music Corp. (“Carbert”). The non-voting common stock of Carbert is wholly owned by Carlin Music Corp., a privately held entity.

Cherry Lane Music Publishing Company, Inc. (“Cherry Lane”) is 100% owned by BMG Rights Management (US) LLC, which is ultimately owned by a privately-held joint venture of Bertelsmann AG and KKR.

The Rodgers & Hammerstein Organization (“RHO”) is jointly owned by Imagem C.V., which has a 20 % LLC interest and a 100% economic interest in RHO (via several intermediate companies), and by Corbeau TV Masters BV, which has an 80% LLC interest and a 0% economic interest in RHO.

Stage Three Music (US) Inc. is a 100% subsidiary of Stage Three Music Publishing Ltd., which is a 100% subsidiary of BMG Rights Management (UK) Ltd., which is a 100% subsidiary of BMG Rights Management GmbH, which is ultimately owned by a privately-held joint venture of Bertelsmann AG and KKR.

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JURISDICTION

Pursuant to 28 U.S.C. §§ 1331 and 1338, the district court (Hon. Louis L. Stanton, J.) had subject matter jurisdiction over claims for copyright infringement under 17 U.S.C. §501. A final judgment resolving all the parties' claims was entered on August 10, 2010 (SPA36). Plaintiffs filed a timely notice of appeal on August 12, 2010 (IIIA517). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err in construing 17 U.S.C. §512(c) to mean that if an Internet service provider removes infringements only when takedown notices like those contemplated by §512(c)(1)(C) are issued by content owners, §512(c) immunity is available against all infringement claims regardless of any other facts, including the provider's knowledge or encouragement of infringement, its disregard for red flags of infringement, or its failure to use existing tools to mitigate infringement within its control from which it derives direct financial benefits?

2. Did the district court err in granting summary judgment to defendants against all of plaintiffs' copyright infringement claims on the basis of §512(c), when the record permitted a jury to find, among other things, that defendants:

(a) welcomed, encouraged, and took affirmative steps to cause and profit from substantial copyright-infringing material on its website;

- (b) knew or were aware of infringements of appellants' works on their site;
- (c) had the right and ability to control infringing activities on their site and benefitted financially from them; and
- (d) failed to act expeditiously, including through the use of tools already deployed for revenue-maximizing purposes, to stop the infringing activity?

PRELIMINARY STATEMENT

Congress could have provided a safe harbor from copyright infringement whose availability was conditioned solely on compliance with takedown notices pursuant to 17 U.S.C. §512(c)(1)(C). Had Congress done so, the carefully calibrated text of what is now §512(c)(1)(A) and (B) – which disqualify service providers like YouTube who have actual or constructive knowledge of infringing activity and refuse to stop the activity, or who have the right and ability to control infringing activity from which they directly benefit – would have been entirely unnecessary.

But Congress did not eliminate the traditional bases for copyright infringement to that extent, and the statute that Congress enacted looks very different from the one the district court applied. Ignoring the balance Congress struck, the court below effectively collapsed §512(c) into a single minimal requirement that a service provider respond to takedown notices, regardless of its knowledge of, intent to foster, or control over such infringing activity. This disregards the many fact-specific elements of §512(c) concerning a service provider's knowledge and intent, and the internal operations of its site, which must

be confronted in applying the statute as an affirmative defense. It also distorts §512(c)'s purpose, so that instead of protecting innocent service providers or encouraging them to mitigate infringement, §512(c) immunizes website operators who encourage massive infringement so as to reap the resulting profits (so long as they thereafter comply with specific takedown notices from content owners). By disregarding the legislative intent and the statute's plain meaning, the decision below transforms §512(c) from a safe harbor to a pirate's cove.

The erroneously pared-down statute that the court applied had one evident advantage: it permitted the court to ignore entirely the abundant evidence submitted on the motion concerning defendants' knowledge and awareness of infringement, ability to control it, and financial benefit from it, which at a minimum create fact issues that preclude a finding that YouTube qualifies for the safe harbor. Under the DMCA, that evidence is highly relevant, since immunity depends on precisely those facts. But rather than address the evidence and enforce the statute Congress enacted, the district court's decision facilitates the unlawful strategy YouTube chose early on – to feign ignorance of a vast amount of infringing content within its knowledge and control, and await specific takedown notices before taking any action, so as to reap the benefit of the infringements for as long as possible.

Had the statute been correctly applied and the record not ignored, defendants' motion for safe harbor under §512(c) could not have been granted. YouTube was never the kind of passive provider of storage space that Congress sought to protect. YouTube and Google both knew that YouTube's value as a global media enterprise was driven by its infringing premium content. Yet they deliberately chose not to remove the infringing content of plaintiffs and others, even when they had readily at hand the tools for doing so, instead actively exploiting that content to draw traffic to the site. YouTube used this strategy to gain the pole position in the race to become the dominant site for audiovisual content on the Internet, and the resultant explosive growth generated a massive windfall for YouTube's founders and owners.

Defendants' defensive line below was to offer a host of reasons why they would be unable ever to identify infringing content with 100% certainty. But YouTube's ability to raise hypothetical questions about the provenance of any single video clip on its website is irrelevant in the face of its deliberate efforts to profit from, rather than reduce, the massive infringing activity it was inducing. Defendants could and did identify infringements of plaintiffs' content on YouTube using tools they had in place for years that were specifically designed to identify that content. Yet they chose to deploy those tools only on behalf of favored

content “partners” who agreed to license their content to YouTube on an uneven playing field or give up other valuable rights.

When YouTube and Google did identify class plaintiffs’ content, they did so only when it suited their own business purposes, for example by analyzing infringing clips of Premier League footage to value it for possible licensing purposes, or to target context-specific advertisements to their users’ searches for infringing French Open videos. The record also shows unequivocally that defendants designed their content management system to evade the rights of music publishers and maintain popular, infringing music content on YouTube to attract a huge audience and augment the site’s value.

STATEMENT OF THE CASE

A. Nature of the case and the course of proceedings

Faced with an extraordinary amount of infringement of their works on the YouTube website, and YouTube’s unwillingness – notwithstanding its ability, with tools it was already using for its own purposes – to take action with respect to those infringements in any manner except when presented with a specific notice and takedown request compliant with 17 U.S.C. §512(c)(1)(C), plaintiffs instituted suit in May 2007 for copyright infringement against YouTube and Google, Inc. (“Google”). Google acquired YouTube in October 2006 for \$1.65 billion.

IIIA155, ¶11. (We refer below to YouTube and Google collectively as “YouTube,” unless otherwise noted.)

Plaintiffs, who seek damages and injunctive relief, are the leading football league in the United Kingdom (“Premier League”), described by YouTube as the “world’s biggest and most recognized sporting league,” which owns the copyrights in game footage that YouTube knew was “already proven as key programming” on YouTube’s website, despite being unauthorized (IIIA251); the Fédération Française de Tennis (“FFT”), which owns rights to footage of the Roland Garros tennis tournament, also known as the French Open; independent music publishers and composers that own well-known and valuable musical compositions; and the National Music Publishers’ Association (“NMPA”), the leading trade organization for music publishers, with over 2,500 members.

Plaintiffs (hereafter “class plaintiffs”) sued on behalf of a class of other similarly situated copyright owners, asserting claims of direct and secondary infringement. Viacom International, Inc. and affiliated entities (collectively, “Viacom”) had recently instituted a similar case (“the *Viacom* action”), and the court coordinated discovery in the two actions.

YouTube filed no motion to dismiss, and signaled no intention of an early §512(c) motion, evidently under the belief (shared by class plaintiffs) that §512(c) immunity depended on the pertinent facts and circumstances. YouTube took

approximately 50 depositions (and dozens more of Viacom), and submitted discovery demands to class plaintiffs resulting in the production of over a million pages of documents, over almost three years of discovery.

In March 2010, defendants moved for summary judgment in both actions (submitting a single brief and statement of facts), contending that they were protected by §512(c) against all claims and that plaintiffs' claims for inducement liability should be denied as well. YouTube argued, in part, that since it could always raise theoretical questions about the origin of any particular video clip on its web site, it was protected by §512(c) so long as it complied with specific takedown requests submitted in compliance with §512(c)(3). On YouTube's theory, no other kind of knowledge, awareness or control was sufficiently specific to render the safe harbor unavailable. YouTube deemed evidence of its actions inducing the massive infringement occurring on its site, and its detailed knowledge of and control over such infringing activity, irrelevant as a matter of law.

Class plaintiffs opposed defendants' summary judgment motion on the basis of a 243-paragraph counter-statement of material facts that cited to hundreds of exhibits that, at a minimum, created a factual dispute precluding the grant of YouTube's motion. By order of the court and to minimize duplication, class plaintiffs incorporated evidence submitted by Viacom in their opposition. IA165, Dkt. No. 156. Class plaintiffs and Viacom also separately moved for a

determination that YouTube could not satisfy key elements of §512(c) as a matter of law.

B. Statement of the facts presented on summary judgment

1. Defendants welcomed and encouraged infringements in order to increase traffic to their website.

Extensive evidence demonstrated that YouTube was not only aware of substantial infringement by users but, from its inception, wanted to and did attract infringing users; enabled and assisted their infringing activities; chose not to mitigate that infringement; and deliberately capitalized on that infringement to fuel its phenomenal growth. *See, e.g.*, IIIA149, ¶4; IIIA352, ¶¶6-7.¹

YouTube’s founders knew from the start that YouTube’s value as a business proposition depended entirely on advertising, which in turn depended on capturing and maintaining users in high numbers. Co-founder Jawed Karim acknowledged that “[w]here our value comes in is USERS. . . . [O]ur buy-out value is positively affected by . . . more YouTube users.” IIA154 (capitalization in original). Co-founder Chad Hurley similarly emphasized that “serious traffic” would allow them to sell YouTube for “big money.” IIA174. The founders – sophisticated entrepreneurs whose “dirty little secret” was their plan to build up an audience for YouTube as rapidly as possible so they could “sell out quickly” to the highest

¹ By permission (Order November 10), counsel will be submitting to the Clerk, for the panel, disks containing the text of this brief hyperlinked to the cited record evidence, not all of which is in the Joint Appendix.

bidder (IIA191) – were well aware that “personal videos” would never generate the user numbers they needed to attract a buyer, and that infringing “premium” entertainment content was the primary driver of traffic to the site. IIIA352, ¶6; IIA47 (“the truth of the matter is, probably 75-80% of our views come from copyrighted material”); IIIA366-367, ¶25, Tab 41 (“[u]sers are searching for lots of things, but primarily for premium content.”)

YouTube therefore decided to remove as little of the infringing content it knew about as possible, because, as one founder said, “we have to keep in mind that we need to attract traffic. [H]ow much traffic will we get from personal videos?” IIA171. In a key early discussion, the YouTube founders decided to implement a “lax” policy of removing only “whole movies,” “entire TV shows,” and “XXX stuff,” precisely because under that approach, as Karim explained, “I don’t think our views will decrease at all.” IIA159. They were *not* willing to remove “everything else” “including sports, commercials, news, etc.,” because they knew that if they removed that blatantly infringing content, “we go from 100,000 views a day down to about 20,000 views or maybe even lower.” *Id.* YouTube’s “lax” policy was repeated in internal discussions. IA338 (“well, we SHOULD take down any: 1) movies 2) TV shows. we should KEEP: 1) news clips 2) comedy clips (Conan, Leno, etc) 3) music videos. In the future, we'd also reject these last three, but not yet.”); IIA160 (“none of the most favorite videos are

movies or tv shows. we're ok cracking down on this content. we'll leave music videos, news clips, and clips of comedy [sic] shows for now.").

This policy was also repeated to potential investors. Co-founder Steve Chen conceded to one investor that YouTube could create the "perception" of compliance with the law by implementing "a flagging system so you can flag a video as being inappropriate or copyrighted," but that "[t]he actual removal of this content will be in varying degrees." IIA176. Thus, from its earliest days, the lure of "big money" meant that YouTube's founders decided to "ease up" and use stolen copyrighted content as the startup capital for their new venture, joking that they should "save [their] meal money for some lawsuits!" IIA157.

While paying lip service to copyright concerns, YouTube's founders chose to feign ignorance of the rampant infringement on their site on the theory that "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'." IIA159.

Likewise, the copyright "flagging system" Chen mentioned to potential investors was briefly implemented but quickly abandoned (IA270, ¶65), and while YouTube continued to monitor (and still encourages its users to monitor) its content aggressively for pornography and other videos it considers "inappropriate," (IIIA151, ¶6) it decided to leave all premium infringing content on the site absent a

specific takedown notice from a copyright owner. This approach was summed up in an email from Chad Hurley: “as stated in the Digital Millennium Copyright Act, we’re only obligated to remove content when contacted directly by the copyright owner.” VA180; IIIA152, ¶7.

YouTube’s claimed efforts to prevent infringements were merely window dressing. Although YouTube applied an “MD5” hash function to removed videos to prevent the exact same video from being uploaded again, YouTube knew that this did not prevent users from uploading nearly identical copies of the same copyrighted content (which YouTube could also identify and remove with tools at hand, but chose not to). IIIA397, ¶88. And while YouTube instituted a ten minute limitation on uploaded clips in order to give the appearance of addressing infringing activity, its board was told that “[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” (IIA183), since infringing short-form content, including popular music, was still encouraged, and users easily uploaded infringing long-form content in clearly labeled serial parts. IIIA385, ¶57; IIIA318. At the same time, as explained further below, YouTube applied its resources to take advantage of infringing activity: tracking it; studying it for licensing opportunities; associating advertisements with it; and using it to build a huge audience as quickly as it could. *See infra*, 13, 15, 19.

Prior to acquiring YouTube for \$1.65 billion in October 2006 (less than a year and a half after YouTube launched) (IIIA155, ¶11), Google also knew that YouTube’s audience came primarily to view unauthorized professional content, not personal videos. By March 2006, a Google executive criticized YouTube for “doing little to stem its traffic growth on the back of pirated content,” and condemned YouTube’s conduct as “unsustainable and irresponsible.” IA399. These views were presented to and repeated by senior Google executives involved in the YouTube acquisition. *See, e.g.*, IA540 (email to CEO Eric Schmidt stating, “a large part of [YouTube’s] traffic is from pirated content”); IA587-588 (email from Google senior vice president Jonathan Rosenberg stating, “we lost users because YouTube had [NBC’s] content illegally [...] shouldn’t the lesson here be [to] play faster and looser,” and email response to Rosenberg and Google senior vice president David Drummond describing YouTube’s “loose copyright enforcement”). Credit Suisse’s pre-acquisition due diligence on behalf of Google concluded that 60% of content on YouTube was “premium” copyrighted content, and only 10% of that content was authorized. IIA211, 214. Google’s own video site had failed to attract the audience YouTube had, in part because Google Video (unlike YouTube) had screened and removed obviously infringing videos before they were uploaded. IIIA156, ¶12; IA287, ¶¶136-142. But by the fall of 2006,

YouTube's known, pervasive copyright infringement was an acceptable business risk to Google in order to acquire the most popular video site on the Internet.

In addition to the internal and external studies from both before and after the Google acquisition showing that unauthorized premium content was YouTube's primary driver of traffic, news reports about YouTube frequently cited its obvious dependence on infringing material. IA279, ¶100; IA282, ¶116; IA284, ¶122.

YouTube also knew that users were encouraged to continue to upload infringing material due to the sheer amount of it already on the site. *See, e.g.*, a user's complaint to YouTube, after his infringing video was taken down pursuant to a takedown notice sent by the Premier League that, "... there are millions of Football goals on YouTube... Here are several copies of the video that other people have uploaded http://www.youtube.com/results?search_query=saha+fulham&search=Search," IIIA239). YouTube's systems even indexed and categorized videos of class plaintiffs' content that users blatantly described as infringing. IIIA312-316.

2. YouTube specifically knew that sports plaintiffs' content was being infringed on its website and chose not to take it down

From the outset, YouTube made the decision to keep unauthorized sports content on its site because it drew viewers. IIA159 ("take down XXX stuff. everything else keep including sports, commercials, news, etc."). YouTube knew,

for example, that it exploited large quantities of content owned by the Premier League, which it understood was the “world’s biggest and most recognized sporting league.” IIIA251. YouTube knew this, not only by reason of the thousands of takedown notices it received from the League beginning in October 2006, and not only because users of the site readily pointed YouTube to the “millions of Football goals on YouTube” by a simple search query, but because *defendants themselves* ran searches to collect evidence of Premier League’s popularity on their site to “run some commercial models to gauge [sic] value based on video usage.” IIIA256.

YouTube evaluated a possible proposal to bid for the rights to Premier League’s soccer footage in February 2007. Patrick Walker, director of video partnerships for Google and YouTube, requested that colleagues calculate the number of daily searches on YouTube for the keywords “soccer,” “football,” and “Premier League,” as well as the number of videos with those words in the title or as part of a descriptive tag that is associated with each video on YouTube.

IIIA256. According to these analyses, Premier League content was “already proven as key programming based on GV [Google Video] and YT [YouTube] popular videos/usage.” IIIA251. YouTube “decided not to make a bid for these rights,” but then did not remove the infringing videos, thereby getting the benefit without paying for a license. IIIA167, ¶22.

Even before then, Walker demonstrated that he knew how to identify and remove infringing Premier League content through simple queries when it suited his employer's interests. Walker directed employees to remove videos from Google Video containing footage of the Premier League's top clubs in advance of a meeting where broadcasters of those club's matches would be present. IIIA167, ¶22. Despite this knowledge of and ability to identify and remove infringing content in order to better position themselves in negotiating licenses with content owners, defendants made no meaningful effort to prevent the ongoing infringing activity on YouTube – Walker disingenuously told the Premier League that “you are the only one that knows which clips are the ones that might be unauthorized, and you must follow procedures for its removal through the DMCA process.” IIIA162-163, ¶17, Tab 121.

Although YouTube claimed a similar inability to identify match footage of the French Open (“Roland Garros”) – all of which YouTube knows is unauthorized – YouTube sells advertisements for “Roland Garros” tickets directly adjacent to users' searches for infringing Roland Garros videos (it also sold advertisements for sports-related products next to searches for Premier League matches). IIIA241, 244, 247, 295, 298. And while YouTube knew that users easily sidestepped the ten-minute clip limitation by uploading content “in parts,” it allowed users to upload entire Roland Garros matches in clearly labeled and identified serial parts.

IIIA318. YouTube even sold advertising for tennis-related products that it deliberately ran next to, and overlaid on top of, infringing video of Roland Garros match footage, which was clearly identified as containing Roland Garros footage.

IIIA320. YouTube therefore had the tools to identify content very specifically when it suited its profit-making purposes – but these tools were refused to content owners, such as FFT, who did not want their material exploited on YouTube.

Infra, 21-22.

3. YouTube specifically knew that music plaintiffs’ content was being infringed on its website and chose not to take it down

Music was the “most-searched” category on YouTube, according to a 2007 internal analysis. IIIA258. YouTube recognized the need to maintain popular professional music content on its site, given its importance to the site’s growth:

Premium music content is the most watched genre of content on YouTube. Thus, it is imperative that we acquire, and allow content owners to claim, as much content as possible to promote the growth and success of YouTube. IIIA225.

Although its founders recognized the potential liability for their unlicensed use of music, they were not “too concerned.” Co-founder Chen asked: “for these mixed videos with music backgrounds, will we get in trouble for them because the music is copyrighted?” IIIA150-151, ¶5, Tab 61. Co-founder Hurley replied: “I won’t be too concerned for now... but it might be a problem down the road for public videos.” *Id.* Co-founder Karim similarly observed that “we’ll leave music videos,

news clips and comdey [sic] shows for now.” IIA160. “[F]or now” became forever.

YouTube’s conduct with respect to music publishers was particularly egregious. YouTube knew that videos incorporating music required separate licenses for the artist’s sound recording (rights to which are typically held by the record label) and for the songwriter’s musical composition (typically held by a music publisher). IIIA233; IIIA506-507 (“For music content, we need the following information before we can consider our license complete: Sound recording license from label [and] composition licenses from publishers totaling 100%”). Although YouTube obtained licenses for both sets of rights in various countries abroad, in the U.S. it deliberately ignored smaller music publishers (including class plaintiffs) because of the time, effort and cost involved, and instead chose to make deals with only a handful of prominent major record labels and publishers. IIIA380, ¶43; IIIA514 (“Music Pub [sic] rights not cleared yet. Blocking us from turning on audio fp [fingerprinting] on music content. Need deals with 5 major publishers asap. And then there will still be hundreds of minor publishers”); IIIA379-380, ¶43, Tab 36 (class plaintiff music publisher Cherry Lane “was summarily told that YouTube had no interest in Cherry Lane given its small market share”). This left YouTube with a set of music licenses that

expressly covered *only* the sound recordings for a huge number of songs, while YouTube ignored its responsibility to obtain the corresponding publishing rights.

In early 2007, YouTube implemented an audio-fingerprinting system to permit its content “partners” (the larger companies it made deals with) to identify and “claim” their content so YouTube could run advertisements next to it.

IIIA399, ¶94. Called “Claim Your Content,” or “CYC,” the system at first relied upon a database of reference files for copyrighted sound recordings and other works maintained by a third-party provider called Audible Magic. IIIA401, ¶95; IA322, ¶282. As users uploaded videos, they were automatically compared against Audible Magic’s reference files to identify the specific songs belonging to YouTube’s major label partners. IA817; IA324, ¶294.

Despite YouTube’s actual knowledge that “we don’t have clear licenses from them (publisher issue)” (IIIA227), YouTube encouraged its major label music partners to use CYC in an effort to wring more profit from videos with music content. YouTube provided the major labels with three options for sound recordings identified as theirs through YouTube’s audio-fingerprint screening process: (1) they could “monetize” songs for which they purportedly could provide both their own sound recording rights and the publishing rights; (2) they could “block” songs for which they held inadequate rights and have them removed by YouTube; or (3) they could “track” songs for which they could not convey

adequate music publishing rights, keeping them on the site without purporting to grant a license. IIIA403, ¶96.

But YouTube discouraged partners from “blocking” songs, and designed the “track” option *precisely to enable specific songs for which YouTube lacked the publishing rights to remain on the site* as a draw for users, knowingly violating the rights of publishers who did not have licensing deals with YouTube (emphases added below):

- In February 2008, Kelsey LeBeau, a Strategic Partnerships manager at YouTube, asked how to keep one major label’s music content on the site where independent publisher clearance was lacking, and was advised, “*it would be easier to switch to track where we don’t have publishing. Just because that is the current biz [sic] logic that we do with the other tracks.*” IIIA495.
- By March 2008, LeBeau had caught on to YouTube’s approach to unlicensed music, stating in an email that a major label “started claiming content for which YT has not cleared publishing at the very end of [D]ecember. As a result, we cannot run ads.... *So we have set the policy for these to Track instead of Monetize.*” IIIA477.
- In February 2008, Kyle Harrison, a Google Product Manager, wrote that “[l]abels can claim block or track without knowing/entering publisher data.” IIIA483.
- Harrison further explained that if a record label wanted to “monetize” content, it had to “tell YouTube the publisher(s)” because “[w]e only payout if the publisher is cleared by us (i.e. on our list of approved publishers).” If the publisher selected by the record label was not “approved” for payment by YouTube, the “*policy will change to track if it was previously set to monetize. Id.*”

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III A275.

Thus, by design, YouTube’s content identification system was set up to systematically identify specific songs for which YouTube knew it did not have the publishing rights. Rather than blocking such songs, as copyright law obligated it to do, YouTube established a default “track” option to facilitate their ongoing unlawful exploitation. IIIA403, ¶96; IIIA495 (CYC can “track” music content “where we don’t have 100% publishing”).

4. YouTube has and uses tools to identify its content, which it deploys to increase revenue but not to take down infringements

At the end of 2006, “for legal reasons,” YouTube decided to stop running advertisements on all of its “watch pages” – the page where a user actually plays back a video – and began to run watch page advertisements only for videos it had purportedly licensed. IIIA188, ¶36; IA311, ¶¶248-250. *See* IIIA320 for an example of a watch page.² To help it identify specific licensed videos for advertisements, YouTube encouraged its content partners to use the CYC system, including Audible Magic’s digital fingerprinting system, to identify and “claim”

² YouTube’s decision, apparently motivated by liability concerns, also took advantage of its marketing intelligence that advertising on the search pages (where users search for videos they want to watch) was more effective in reaching users, because it targeted subject-specific advertising to the specific content – including infringing content – for which users were searching. *See* IIIA193, ¶40; IIIA424, ¶167.

specific videos for advertising. *See* IIIA403-404, ¶96, Tab 195 (“Goal of [CYC] is to encourage content partners to leave more of their content on the site... [to] enable YouTube to generate significant ad revenue”); IIIA492 [REDACTED]

[REDACTED] In addition to film and television show soundtracks, the Audible Magic database was capable of identifying over six million songs – effectively representing “the music available for purchase in North America.” IIIA401-402, ¶95, Tab 267.³

But rather than using this system to mitigate infringing content, YouTube had Audible Magic create a smaller database that contained reference fingerprints *only* for content belonging to its “partners,” precisely to blind itself to specific knowledge of copyrights controlled by non-partners. IIIA400-401 (Audible Magic “suggested we check [fingerprints] against their entire reference database and then have flags for the [licensed] Warner content (ignore other matches); [t]his is not only a hassle but probably violates DMCA safe harbors.”). Even so, by virtue of the “track option” for major labels (whose content YouTube placed in the

³ YouTube also had the ability to submit new video content to be fingerprinted for the Audible Magic database, but this service was offered only to its favored partners. IA818 (“Any content the partner identifies is automatically audio fingerprinted and placed in the Audible Magic database so the entire process gets smarter over time.”).

specially abridged Audible Magic database), CYC nonetheless systematically identified specific songs for which publishing rights were lacking.

YouTube not only refused to use its content identification tool to remove unlicensed content it knew was driving viewers, but also refused to let content owners without a license agreement use it to identify their own unauthorized content. IIIA228 (“[i]f they want to use our tools to help them monitor copyright content and claim them, they will have to work with us as a partner”); IA817: (“[o]ur CYC tools are now live as well and are only offered to partners who enter into a revenue deal with us”); IIA787 (“[t]he [CYC] tool was purpose built for partners and does not address the needs of non-partners”); IIIA497 (business development team “worried” about giving certain content owners access to CYC because “they could use the CYC tool to find potentially infringing content and sue us”); IIA650 (“for those companies who were not and did not develop a licensing arrangement with Google, they weren’t going to be doing... filtering”); IIIA399-400, ¶94, Tab 124 (“...did YouTube ever tell Premier League that the video fingerprinting technology would only be available to Premier League if Premier League licensed content to YouTube? A: Yes.”).

Thus, by early 2007, YouTube had implemented a content identification system that could (and did) identify infringing recordings of class plaintiffs’ copyrighted songs throughout its website, but *refused to let class plaintiffs use it* –

precisely because YouTube did not want the content taken down. IIIA356, Tab 189 (“good news is that fingerprinting works... bad news... top 1000 music videos is probably 700-800 copyrighted.”); IIA634 (YouTube told the Vice President of the Motion Picture Association of America that it did not agree to use fingerprinting technologies in part because “copyrighted content on YouTube was a major lure for their users”).

YouTube’s CYC system could also have created digital fingerprints from the thousands of videos identified in DMCA-compliant takedown notices submitted by the Premier League, FFT and class plaintiff music publishers, and used those fingerprints in its screening process to prevent other copies of the copyrighted works in those videos from appearing on the site. IA817. But YouTube only offered that option to partners who agreed to license their content to YouTube. IIIA401, Tab 182 (Maxcy: “I thought we weren’t allowing co’s to use [taken-down videos] as reference material...” King: “only give the feature to partners that ask for it (we can toggle the feature off in admin)”). Even after YouTube announced in the fall of 2007 – after this litigation began – that its own video fingerprinting system, developed in-house, would ostensibly be made available to all content owners, it did not respond to class plaintiffs’ queries about the system for months, and then still insisted that class plaintiffs give up valuable rights in order to access it. IIIA405, ¶98.

In addition to digital fingerprinting tools, YouTube uses text-based searches to identify content for favored content partners and to make contextual associations between unauthorized content and advertising – but not to mitigate infringement of class plaintiffs’ works. Text-based searching relies on the descriptions, titles (e.g., “French Open 2009”) and other information that users must submit with each video they upload – called metadata. IIIA185, ¶33. The metadata are indexed and processed by YouTube for easy searching. *Id.*; IIIA459, ¶232. The metadata are reliable – for example, metadata clearly identify the serial parts of an entire French Open match, or the titles and composers of songs. IIIA318. In some cases, metadata expressly identify videos of class plaintiffs’ works as infringements. IIIA313 (“I do not own this video or its copyrights”). YouTube chose not to use these metadata to identify class plaintiffs’ content for removal – even though YouTube expressly promised to use “advanced text search[es]” to identify content for its “partners,” and regularly matched advertisements to users’ searches for, or to specific videos of, class plaintiffs’ content. IIIA399, ¶94; IIIA421, ¶160; IIIA241, 320.

C. The disposition below

The district court (Stanton, J.) denied class plaintiffs’ request for oral argument, and granted YouTube’s summary judgment motions in a single double-captioned opinion issued less than three weeks after the motions were fully

submitted. The court's opinion did not mention the class plaintiffs at all, did not address arguments in their memoranda of law, and did not acknowledge the existence of any of the declarations, statements of undisputed facts, and hundreds of exhibits that class plaintiffs submitted in opposition to YouTube's motion and in support of their own motion. SPA4. This evidence established that YouTube was disqualified from safe harbor protection on a number of grounds, and that at the very least that there were myriad disputed issues of fact that precluded the grant of summary judgment in YouTube's favor.

The court held YouTube was protected by §512(c) against all claims of infringement, notwithstanding its recognition that "a jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website" because it was "attractive to users." SPA9. It read §512(c) to afford categorical immunity absent "knowledge of specific and identifiable infringements of particular individual items." SPA18. Neither the most express encouragement to foster infringements, nor the most detailed and comprehensive control over infringing videos, is sufficient, in Judge Stanton's view, to preclude §512(c) immunity.

The court did not mention the evidence that YouTube had knowledge of infringing activity involving class plaintiffs' works and exercised pervasive control over it for its own business purposes, and it took no account of the evidence

showing YouTube's and Google's intent to capitalize on and encourage infringements, apparently concluding that such evidence had no place in a safe harbor analysis. It also paid no attention to the evidence of various content identification tools that YouTube used exclusively for profit-maximizing purposes, and selectively deployed in an effort to avoid removing the infringing content that attracted views and increased the site's value.

The court dismissed the motion for class certification as moot, and entered final judgment shortly thereafter. Dkt. No. 327 (IA195); SPA36. This court has ordered that the appeals in this and the *Viacom* action be heard in tandem, and a single joint appendix has been filed in both appeals.

SUMMARY OF ARGUMENT

The §512(c) safe harbor contains three separate primary disqualifiers: where the service provider has knowledge or awareness of infringing activity and does not expeditiously remove the infringements (§512(c)(1)(A)); where the service provider has control over infringing activity from which it directly benefits (§512(c)(1)(B)); and where the service provider fails to respond to specific takedown notices from content owners (§512(c)(1)(C)). Contrary to the statute's text, structure and purpose, the court held that a service provider would only be disqualified under the first two provisions if it had "knowledge of specific and identifiable infringements of particular individual items," thereby rendering those

two provisions redundant of §512(c)(1)(C), and foregoing the inquiry required by §512(c) so as to immunize wrongful behavior that Congress did not mean to protect.

The court ignored evidence of YouTube’s culpable knowledge under §512(c)(1)(A), including inducement, willful blindness, and constructive (or “red flag”) knowledge of infringing activity involving class plaintiffs’ works, as well as “specific” knowledge that should have met even the court’s wrong standard. The court ignored evidence that YouTube had control over class plaintiffs’ works under §512(c)(1)(B), including “item-specific” control, at the same time it was directly benefitting from them. The court also ignored plaintiffs’ arguments and evidence that YouTube did not reasonably implement a repeat infringer policy as required by §512(i), and that class plaintiffs’ claims do not relate to YouTube’s “storage” of material “at the direction of a user,” the threshold requirement of §512(c). The evidence and arguments show that YouTube cannot be entitled to the §512(c) safe harbor as a matter of law, even under the court’s mangled interpretation.

ARGUMENT

Decisions to grant or deny summary judgment are reviewed de novo. *Zurich Am. Ins. Co. v. ABM Indus.*, 397 F.3d 158, 164 (2d Cir. 2005). “Summary judgment is appropriate ‘if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and

that the movant is entitled to a judgment as a matter of law.” *Beyer v. County of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (citations omitted). “A court reviewing a motion for summary judgment must ‘construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.’” *Id.* (citations omitted). This standard applies to all of the issues addressed below. Here, the court’s apparent default of its obligation to review class plaintiffs’ submissions in assessing whether an issue of disputed fact requires denial of defendants’ motion – let alone to “construe the facts in the light most favorable to” class plaintiffs – should prompt this court to review the record and arguments with added care and attention.

I. THE GRANT OF SUMMARY JUDGMENT TO YOUTUBE ON SECTION 512 GROUNDS WAS ERROR

Section 512(c) affords an affirmative defense to copyright infringement claims, on which providers like YouTube bear the burden of proof. *See, e.g., ALS Scan, Inc. v. Remarq Cmty., Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) (defendant “must demonstrate that it has met all” the requirements of Section 512(c)); H.R. Rep. 105-551(I) (1998) at 26 (“[t]he exemption and limitations provided [by the safe harbor statute] are affirmative defenses...,” and a defendant asserting such a defense “bears the burden of establishing its entitlement”).⁴ As the moving party

⁴ YouTube is in any event bound on the point by collateral estoppel. *Tur v. YouTube, Inc.*, No. CV064436, 2007 WL 1893635 at *2-3 (C.D. Cal. June 20,

with the ultimate burden of proof, YouTube’s motion for summary judgment required it to present undisputed facts establishing the existence of each required element of its defense. *See, e.g., Giannullo v. City of New York*, 322 F.3d 139, 141 (2d Cir. 2003) (“the non-movant is not required to rebut an insufficient showing”).

The §512(c) affirmative defense is available to YouTube if and only if, in addition to responding to takedown notices under §512(c)(1)(C), it establishes each of the following fact-specific elements (among others):

- YouTube lacked “actual knowledge that the material or an activity using the material on the system or network [was] infringing” was “unaware of facts or circumstances from which infringing activity [was] apparent,” and “upon obtaining such knowledge or awareness, act[ed] expeditiously to remove, or disable access to, the material” (the “knowledge or awareness” disqualifier, see §512(c)(1)(A));
- YouTube lacked either “the right or ability to control such activity” if it received a “financial benefit directly attributable to the infringing activity” (the “control and benefit” disqualifier, see §512(c)(1)(B));
- YouTube reasonably implemented its repeat infringer policy (the “repeat infringer” disqualifier, see §512(i)(1)(A)); and
- the infringements complained of occurred solely by reason of YouTube’s storage of material at the direction of users and not otherwise (the “storage” disqualifier, see §512(c)(1)).

Because YouTube failed to demonstrate that there was no genuine issue of fact as to each of these elements, its motion should not have been granted.

A. YouTube has “knowledge” or “awareness” of its infringements of

2007) (“YouTube must prove” that it meets all of the §512(c) elements), *appeal dismissed*, 562 F.3d 1212 (9th Cir. 2009).

class plaintiffs' content

The court adopted a cramped reading of the “knowledge or awareness” disqualifier of §512(c)(1)(A) that renders it superfluous to the separate and additional requirement to take down specific infringing videos when notified by a content owner, thereby affording far broader immunity than Congress intended. The court erred in ignoring the knowledge-related evidence that YouTube encouraged infringing activity on its site for financial gain; willfully blinded itself (at minimum) to infringing material on the YouTube website; and knew about and deliberately ignored “red flags” of infringement. Even on the court’s unsupported reading of the statute, it wrongly ignored the evidence establishing that YouTube had “item-specific” knowledge or awareness of infringements of class plaintiffs’ works, and did not act expeditiously to remove those infringements.

1. The district court erroneously required that knowledge or awareness be highly “item-specific”

YouTube argued below, and the court held, that YouTube could only be disqualified under the “knowledge or awareness” element if YouTube’s knowledge was “item-specific”— meaning, “knowledge of specific and identifiable infringements of particular individual items.” SPA28, 18. But this is not the only kind of disqualifying knowledge, and the provision for disqualification on awareness “of *circumstances* from which *infringing activity* is apparently” refutes the court’s specificity requirement. The separate provisions distinguishing

compliance with specific notices from content owners (§512(c)(1)(C)) from other forms of knowledge or awareness absent a takedown notice (§512(c)(1)(A)) establish just the opposite.

a. The “item-specific” requirement renders §512(c)(1)(A) meaningless

Section 512(c)(1)(A)(i) disqualifies a service provider that has “actual knowledge that the material or an activity using the material is infringing,” and §512(c)(1)(A)(ii) goes even further, disqualifying a service provider that is “aware” of “facts or circumstances from which infringing activity is apparent.”⁵ Both provisions confirm that Congress rendered disqualifying a service provider’s “knowledge” or “aware[ness]” of “*infringing activity*” on a website, the latter phrase making clear that disqualification did not require knowledge of a specific work. By separating “actual knowledge” from “aware[ness] of facts or circumstances” and focusing on “*infringing activity*” generally, Congress denied immunity where “*infringing activity* would have been apparent to a reasonable person operating under the same or similar circumstances” – not only where there was “item-specific” knowledge of particular works. H.R. Rep. 105-551(II) (1998) at 53. These dual provisions help effectuate Congress’s goal of granting immunity only to “innocent,” “passive” service providers “who can prove they do not have

⁵ The House report accompanying the DMCA describes § 512(c)(1)(A)(ii) as a “‘red flag’ test.” H.R. Rep. 105-551(II) at 53.

actual or constructive knowledge of the infringement, as defined under any of the three prongs of 17 U.S.C. §512(c)(1).” *ALS Scan, Inc.*, 239 F.3d at 625.

By interpreting the “knowledge or awareness” element in §512(c)(1)(A) to require “item-specific” knowledge, the court inserted words not present in the statute or its legislative history, and rendered the “knowledge or awareness” provision effectively duplicative of §512(c)(1)(C), which requires that service providers remove infringing videos when specifically notified of them by content owners. The court thereby ignored a “cardinal principle of statutory construction that [courts] must ‘give effect, if possible, to every clause and word of a statute’” (*Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted)), and that courts should be particularly careful when adding language that the legislature did not put in the statute. *Harris v. C.I.R.*, 178 F.2d 861, 864 (2d Cir. 1950) (“[i]t is always a dangerous business to fill in the text of a statute from its purposes”), *rev’d on other issues*, 340 U.S. 106 (1950). The court never explained how the level of specificity it requires could co-exist with the constructive knowledge language of §512(c)(1)(A)(ii), and offered no examples of “item-specific” knowledge that would satisfy the standard it imposed, other than takedown notices. *See* SPA18-19. Refusing to acknowledge class plaintiffs’ evidence of YouTube’s actual and constructive knowledge, the only evidence that the court appeared to deem relevant, repeating it twice for emphasis, was that “when [YouTube] received

specific notice that a particular item infringed a copyright, they swiftly removed it.” SPA10, 26.

The text and structure of §512(c) confirm that the “knowledge or awareness” element is not exclusively focused, as the court held, on “knowledge of specific and identifiable infringements of particular individual items,” and that it imposes a responsibility separate from that in §512(c)(1)(C). The House report carefully treated the various provisions of §512(c) as independent disqualifiers (*see* H.R. Rep. 105-551(II) at 54, discussing §§512(c)(1)(A), (c)(1)(B), and (c)(1)(C) separately, and noting that “copyright owners are not obligated to give notification of claimed infringement [under §512(c)(1)(C)] in order to enforce their rights”), as have courts. *See, e.g., ALS Scan*, 239 F.3d at 623, 625. The court’s reading, which inserts the words “item-specific” into §512(c)(1)(A) and renders the provision superfluous, is wrong.

b. The “item-specific” requirement protects guilty service providers

The district court’s “item-specific” standard turns the safe harbor into a pirate’s haven for those, like YouTube, who have culpable knowledge of infringing activity but choose not to act on that knowledge (except to exploit it) so as to continue profiting from the activity. In addition to ignoring any “actual knowledge” other than that provided by a takedown notice under §512(c)(1)(C), the court’s “item-specific” limitation immunizes at least three other kinds of wrongful

knowledge-based behavior that Congress did not intend to protect (all of which YouTube engaged in): 1) willful blindness to infringing activity; 2) ignoring “red flags” that an objectively reasonable person would recognize as signaling infringing content; and 3) deliberately welcoming and encouraging infringements so as to profit from them.

First, the court entirely ignored class plaintiffs’ arguments and the authority establishing that “[w]illful blindness is knowledge, in copyright law... as it is in the law generally.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (citations omitted). *Tiffany (NJ) Inc. v. eBay, Inc.*, on which the court heavily relied, expressly cautioned in the trademark context that a “service provider is not [...] permitted willful blindness. When it has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of the particular infringing transactions by looking the other way.” *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 109-110 (2d Cir. 2010), *cert. denied*, 2010 WL 3416635 (Nov. 29, 2010).⁶ This court has reached the same conclusion in the copyright context, citing *Aimster* for the proposition that “[w]illful blindness is knowledge.” *See Arista Records LLC v. Doe*, 604 F.3d 110, 118 (2d Cir. 2010). *Aimster* is particularly instructive because there, as here, the service provider

⁶ *Tiffany* arose not on summary judgment but on appeal after a week-long trial. 600 F.3d at 96.

deliberately structured its system to shield itself from knowledge of specific infringements (and to avoid having to take responsibility for those infringements), and the court held that such willful blindness is sufficient knowledge for purposes of contributory liability **and** is preclusive of the DMCA safe harbors. *In re Aimster*, 334 F.3d at 650, 655.

The legislative history, text, and purpose of the DMCA make clear that willful blindness is disqualifying under the “knowledge or awareness” element in §512(c)(1)(A). The House committee report explained that under the “knowledge or awareness” element a service provider “would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.” H.R. Rep. 105-551(II) at 57. The text of §512(c)(1)(A) – turning on whether a service provider is “aware of facts or circumstances from which infringing activity is apparent” – plainly disqualifies from the safe harbor a defendant who deliberately blinds itself to specific infringing activity that it knows is occurring. The statutory goal to protect innocent service providers whose “level of participation in and knowledge of the infringement are low” (*see* H.R. Rep. 105-551(I) at 25) would be disserved if the statute immunized website owners who deliberately shield themselves from specific infringements that they know are occurring on a massive scale on their websites, precisely in order to avoid responsibility for those infringements (and the evidence here shows that YouTube did just that; *supra*, 21-22). That is why other

courts have agreed that §512(c) cannot be read “to endorse business practices that would encourage content providers to turn a blind eye to the source of massive copyright infringement while continuing to knowingly profit.” *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177 (C.D. Cal. 2002); *see also In re Aimster*, 334 F.3d at 655 (DMCA safe harbors precluded where defendant deliberately “disabled itself from doing anything to prevent infringement”).

Second, Congress’s intent that “red flag” knowledge would disqualify service providers from the safe harbor is incompatible with the court’s “item-specific” requirement. Contrary to the court’s view (SPA16) that the House report suggests that “red flag” knowledge must be highly work-specific, the “red flags” described in the report merely establish knowledge that a particular website hosts infringing material, not “knowledge of specific and identifiable infringements of particular individual items” on those websites. Among other things, the committee report explains that websites may be “obviously infringing” because of descriptions they use “to make their illegal purpose obvious,” and that if a website is “obviously pirate, *then seeing it may be all that is needed for the service provider to encounter a ‘red flag’*,” and therefore be disqualified from safe harbor protection if it links to the site. H.R. Rep. 105-551(II) at 57-58.⁷ Even though a service

⁷ The record contains exactly that kind of evidence (*supra*, 24), as well as other evidence of “obvious” infringing activity. *Supra*, 14-16.

provider need not conduct an “investigation” into whether any specific video is infringing, it cannot simply sit back in the face of “infringing activity” that “would have been apparent to a reasonable person” under the circumstances. H.R. Rep. 105-551(II) at 54. Here, the infringing activity was **admittedly** apparent to YouTube’s founders and Google senior executives among many others. They **knew** the infringing activity was the source of YouTube’s success, and they **implemented** systems to maintain that status quo. *Supra*, 8, 20.

Third, the court’s error in imposing an “item specific” requirement is made plain by considering *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), which holds that a defendant who operates a service “with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement,” is liable for the resulting acts of infringements of third parties. *Id.* at 936-37. *Grokster* held that it “was error” to have required evidence of “specific knowledge of infringement,” even though the service at issue had non-infringing uses, because liability on inducement principles based “on purposeful, culpable expression and conduct... does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.* at 934, 937. Courts have since applied this doctrine to service providers that have promoted or encouraged online infringements in both DMCA and non-DMCA contexts. *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578, 2009 WL

6355911, at *18 (C.D. Cal. Dec. 21, 2009) (service providers who induce infringement are not protected by safe harbors); *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 508 (S.D.N.Y. 2010) (provider of file-sharing software liable for inducement).

The court below took a different course – not condemning inducement, and immunizing it no matter how egregious. Discussing *Grokster*-type behavior, the court cursorily concluded that because “it is uncontroverted that when YouTube was given the notices [of infringement], it removed the material,” YouTube was protected by the safe harbor. SPA25-26. Thus, under Judge Stanton’s view of §512(c), had the badly behaving defendants in *Grokster* and *Lime Group* hosted infringing content on a website like YouTube instead of having merely distributed file-sharing software (and thus in Judge Stanton’s view been nominally eligible for §512(c) protection), then so long as they complied with takedown notices they would have been free to continue inducing and profiting from rampant infringing activity, simply because they lacked “specific knowledge of infringement.” *Grokster*, 545 U.S. at 934. But there is no evidence that Congress immunized such harmful behavior when it enacted §512(c) – the plain meaning of the statute’s language and its legislative history are inconsistent with a single, categorical “item-specific” knowledge requirement. The better view, in accord with statutory text and purpose, is that “inducement liability and the Digital Millennium

Copyright Act safe harbors are inherently contradictory. Inducement liability is based on active bad faith conduct aimed at promoting infringement; the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business.” *Fung*, 2009 WL 6355911, at *18.

c. Neither the district court nor YouTube provide any compelling reason to import an “item-specific” requirement

The district court opined that the “critical question” in analyzing the statute was whether “general awareness that there are infringements” is sufficient to disqualify a service provider, or whether a showing of “knowledge of specific and identifiable infringements of individual items” is required. SPA10. This false dichotomy ignores the statutory text and structure, and the many other kinds of knowledge recognized in copyright law and discussed above – inducement, willful blindness, and red flag knowledge, among others – that evidence far more culpability than a “general awareness that there are infringements.” The court below never explains why a statute meant to protect only innocent service providers should be construed to disregard such knowledge. The court’s view that the “general” versus “specific” dichotomy resolved the case is also inconsistent with the evidence before it (which it did not acknowledge) showing all manner of culpable knowledge on YouTube’s part, including knowledge of specific infringements of class plaintiffs’ works.

Additionally, the conclusion that “[m]ere knowledge of prevalence of [infringing] activity in general is not enough” because copyright law is “devoted to protection of distinctive individual works, not of libraries” (SPA18), cannot be reconciled with the law that an inducer’s liability does not depend on work-specific knowledge. *See, e.g., Grokster*, 545 U.S. at 940 n.13 (“[i]nducement liability goes beyond” “encouraging a particular consumer to infringe a copyright...”). Nothing in §512(c) or copyright law categorically immunizes badly behaving service providers simply because they manage to shield themselves from knowledge of individual works at specific URLs (website addresses).

YouTube argued below, and the court appears to have agreed, that because it can raise hypothetical questions with respect to any specific video clip on the YouTube website as to “whether the use has been licensed by the owner, or whether its posting is a ‘fair use’ of the material, or even whether its copyright owner or licensee objects to its posting” (SPA19), YouTube can *only* be held responsible for those specific clips for which each of these questions is definitively answered – apparently only through receipt of a notice from a content owner identifying a specific infringing video at a specific location on YouTube. But §512(c) simply does not demand absolute certainty about each piece of content before disqualifying service providers for “actual knowledge” of “infringing activity” or “aware[ness] of facts or circumstances from which infringing activity is

apparent.” It makes defendants like YouTube responsible when they welcome infringement for profit, or blind themselves to specific knowledge of infringements, or when the infringing activity is obvious. *See, e.g., Fung*, 2009 WL 6355911, at *18 (inducement); *In re Aimster*, 334 F.3d at 650 (willful blindness); H.R. Rep. 105-551(II) at 57 (red flags). The evidence of YouTube’s culpable knowledge and encouragement of infringing activity (*supra*, 8-19), some of it highly specific and all of it affording YouTube clear notice that copyrights were being infringed, is determinative of whether it is deserving of protection under the safe harbor, and the decision to ignore such evidence categorically was wrong.

2. Substantial evidence of culpable “knowledge or awareness” barred summary judgment for YouTube

Under any proper construction of §512(c)(1)(A) – and even under the district court’s erroneous “item-specific” construction – the evidence submitted more than sufficed to create, at a minimum, a fact issue on the “knowledge or awareness” disqualifiers.

First, the evidence canvassed above (*supra*, at 8-19) establishes that YouTube had actual knowledge or awareness of infringing activity involving class plaintiffs’ works, and thousands of other works like them, yet did nothing.

YouTube knew from its own analyses, third party analyses, and communications from users that obviously infringing premium content was vital to its success.

Supra, 8-13. More specifically, YouTube knew, from the same sources, that it

depended on obviously infringing sports and music content for a large part of its audience. *Supra*, 13-20. YouTube had specific knowledge of specific infringements of plaintiffs' works. YouTube searched for specific unauthorized Premier League videos on its site in order to evaluate their worth to YouTube. *Supra*, 14. YouTube identified and deliberately tracked specific songs on its site owned by plaintiff music publishers (despite knowing it needed, but did not have, the requisite publishing licenses). *Supra*, 16-20. YouTube indexed and categorized videos expressly identified as FFT's and Premier League's works, when they knew such works should not be on the site, and targeted advertisements to those videos and to users' searches for those videos. *Supra*, 15-16. YouTube indexed and categorized class plaintiffs' videos accompanied by express statements that "I do not own this video or its copyrights." *Supra*, 24. It was YouTube's policy to keep all of these specific infringements they knew about on the site *unless* they received a takedown notice from the owner. *Supra*, 10-11.

Second, the evidence (*supra*, at 20-24) establishes that YouTube willfully blinded itself to the infringements of plaintiffs' works. YouTube implemented content identification tools to further monetize its site, but only offered the tools to content owners willing to license their content to YouTube. *Supra*, 21-23. YouTube also operated its tools internally to try to shield itself from specific knowledge of infringements and avoid responsibility under the DMCA – for

example, it did not make use of the full library of reference files available from Audible Magic in screening user uploads, because those files would have identified additional unlicensed copyrighted content. *Supra*, 21.

Third, the evidence (*supra*, at 8-13) demonstrates that YouTube welcomed and encouraged infringements, not only generally, but of sports and music content owned by class plaintiffs specifically, because YouTube identified, analyzed and tracked that content, recognizing how vital its presence was in attracting users and increasing its audience. *See supra* at 13, 16. The record shows YouTube's deliberate efforts to ensure that infringing material would remain on the site to build up its audience, and thus the kind of culpable "knowledge" or "awareness" that is sufficient to disqualify under §512(c)(1)(A). In *Grokster* and *Lime Group*, similar evidence was enough to show "purposeful, culpable expression and conduct" and an "unlawful objective" (*Grokster*, 545 U.S. at 937), and in view of it, the grant of summary judgment to YouTube at a minimum should be reversed. *See, e.g., Grokster*, 545 U.S. at 939 (even absent direct messages to users or specific knowledge, defendant was liable for inducement because it modeled its service on another well-known infringement-inducing service, refused to "develop filtering tools or other mechanisms to diminish the infringing activity," and depended on infringements for its business model); *Lime Group*, 715 F. Supp. 2d at 511, 514 (evidence that defendant performed internal studies to search for

infringing content on their system and engaged in “selective filtering” were, respectively, “particularly forceful” and “strong” indicators of intent to promote copyright infringement).

The court’s conclusion that such evidence had a “strained” application to a website like YouTube is wrong. SPA24-25. First, the court uncritically accepted YouTube’s argument that *Grokster*-type liability does not apply because YouTube is not a website “solely” devoted to infringement. SPA25 (emphasis added). That argument is refuted by *Grokster* itself, which reversed the Ninth Circuit by holding that a software device maker can be accountable for the infringing activities of users even though the software had “substantial lawful use[s].” *Grokster*, 545 U.S. at 934.

Second, purported distinction of inducement cases, including *Grokster* and *Lime Group*, on the basis that they involved “software products that allowed computer-to-computer exchanges of infringing material,” unlike the YouTube website at issue here, just confirms that inducement principles are critical to a meaningful DMCA safe harbor analysis. Unlike the defendants in those cases, which allowed only “computer-to-computer exchanges” without any intervention by the defendant, YouTube itself hosts, screens and exploits infringing content on its own website, and has pervasive control over that content. IIIA361, ¶16. It deploys tools for favored content owners that specifically identify infringing works

in order to monetize them, and Google’s world-class computer searching ability easily enables it to identify and remove content (*e.g.*, Premier League and French Open game footage) that it knows is infringing. *Supra*, 24. YouTube thus has considerably *more* control over the infringements it facilitates than the distributors of the peer-to-peer software at issue in *Grokster* and *Lime Group*. It makes no sense (and there is no basis in *Grokster* or any other case law to find) that YouTube would be protected from liability under the safe harbor for engaging in the same wrongful conduct because it hosts and exploits the infringing activity on its own website, rather than offering peer-to-peer software products.

Fourth, even when YouTube received takedown notices from class plaintiffs, it did not “respond[] expeditiously” to remove the identified infringing material as required by §512(c)(1)(C). YouTube’s policy was to take down only the specific videos at the specific URLs identified in a takedown notice. IIIA162, ¶17. But the statute requires that takedown notices provide only “information reasonably sufficient to permit the service provider to locate the [infringing] material,” not URL-specific data showing each infringing instance across YouTube’s vast site. §512(c)(3)(A)(iii). By identifying the infringed work *and* certain infringing instances of the work on YouTube, class plaintiffs’ notices provided more than enough information for YouTube to identify and locate the material wherever it resided on its website. *See* IIIA388, ¶64. But except for “partners” acceding to the

terms it demanded, YouTube chose not to use its fingerprinting and “advanced text search” tools to identify additional instances of the infringing material or prevent its repeated posting on the site. IIIA399, ¶94.

B. YouTube has the ability to control infringements of class plaintiffs’ content from which it directly benefits

In a single sentence with no reasoning or citation to authority, the court rendered the “control and benefit” disqualifier in §512(c)(1)(B) a nullity by holding that the provision is triggered only if the service provider has “item-specific” “knowledge” of the infringing activity within its ability to control.

SPA28 The importation of a culpable knowledge component into the “control and benefit” prong is contrary to the text, purpose, and common law background of the statute, and prevailing law. The court compounded its error by ignoring the evidence of YouTube’s control over infringing activities involving class plaintiffs’ works that satisfies the proper standard and even the “item-specific” knowledge requirement it mistakenly imposed. Although the court did not confront the issue, YouTube also enjoys direct financial benefits from this infringing activity and is therefore disqualified from the safe harbor by §512(c)(1)(B).

1. The district court wrongly imported an “item-specific” “knowledge” requirement into the “control and benefit” prong of §512(c)

After wrongly importing an “item-specific” requirement into the “knowledge or awareness” disqualifier, the court imposed the exact same

knowledge requirement on the separate “control and benefit” disqualifier. Holding that a service provider is disqualified only for “item specific” knowledge under *both* §512(c)(1)(A) and (B) makes these separate provisions (each with entirely different language and common law origins) redundant. The court’s holding makes even less sense given the internal structure of §512(c)(1)(B), which disqualifies a service provider only if it has both “control” over infringements *and* a “benefit” from the infringements. If “control” was meant to mirror the knowledge standard from §512(c)(1)(A), there would have been no point in requiring the additional showing of “benefit,” since the §512(c)(1)(A) disqualifier would already have been triggered.

“Control and benefit” contains no culpable knowledge requirement, let alone an “item-specific” one. The text and legislative history show that the “control and benefit” disqualifier is grounded in common law concepts of vicarious liability, which contain no knowledge element. Under longstanding copyright principles, a service provider is vicariously liable if it “possess[es] the right and ability to supervise the infringing conduct and ‘an obvious and direct financial interest’ in the exploitation of copyrighted materials.” 3 Nimmer on Copyright § 12.04[A][2] (2010) (citation omitted). “Knowledge” is not an element of vicarious liability at common law. Nimmer § 12.04[A][2] (“[n]otably lacking from the foregoing two elements [of vicarious liability] is knowledge: lack of knowledge that the primary

actor is actually engaged in infringing conduct is not a defense under these circumstances”); *Arista Records, LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 156 (S.D.N.Y. 2009) (“vicarious liability is premised wholly on direct financial benefit and the right and ability to control infringement; it does not include an element of knowledge or intent on the part of the vicarious infringer”); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (“[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of the copyrighted materials – even in the absence of knowledge that the copyright monopoly is being impaired . . . the purposes of the copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation”) (citation omitted).

Section 512(c)(1)(B) is patterned squarely on the vicarious liability standard, excluding service providers from the safe harbor if they “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” The House report on a preliminary version of the bill (cited by the district court) confirms that the “‘right and ability to control’ language [of the “control and benefit” prong] codifies the second element of vicarious liability.” H.R. Rep. 105-551(I) at 26.²

² The language of the “control and benefit” prong in this preliminary version of the bill is substantially the same as that which was eventually enacted, *compare* the H.R. Rep. 105-551(I) – “...does not receive a financial benefit directly attributable

Where Congress uses language that has a clear meaning under common law, it is presumed to incorporate the common law interpretation, unless it makes the intent to diverge from that interpretation clear. *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (in the context of §512(c), citing the “well-established rule of construction that where Congress uses terms that have accumulated settled meaning under common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms”) (citation omitted). The text of §512(c)(1)(B) makes neither mention nor suggestion of “knowledge” (“item-specific” or otherwise). Neither House report provides that §512(c)(1)(B) depends on knowledge, and importing a knowledge standard would make §512(c)(1)(B) internally inconsistent and redundant of §512(c)(1)(A).

This is consistent with how other courts have interpreted the relationship between §512(c)(1)(B) and §512(c)(1)(A). *See, e.g., ALS Scan*, 239 F.3d at 623 (“to qualify for [§512(c)] safe harbor protection, the Internet service provider must demonstrate that it has met all three of the safe harbor requirements, and a showing

to the infringing activity, if the provider has the right and ability to control such activity” – with that in the enacted bill – “...does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” *See also Costar Group, Inc. v. Loop Net, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (listing differences between H.R. Rep. 105-551(I) and H.R. Rep. 105-551(II), none of which relate to the “knowledge” or “control and benefit” prong).

under the first prong – the lack of actual or constructive knowledge – is prior to and separate from the showing that must be made under the second and third prongs.”); *CCBill LLC*, 488 F.3d at 1117 (finding that defendant lacked knowledge or awareness under §512(c)(1)(A), and then addressing the “remaining question” of whether defendant was disqualified from the safe harbor because it received a direct financial benefit from the infringing activity while having the right and ability to control the infringing activity). That a service provider can exercise control without knowledge makes sense: even without advance knowledge of infringements (although YouTube has that here), YouTube had the ability to identify infringing content through fingerprinting or text-based search tools it already deployed, and to disable that content until it obtained a proper license.

2. YouTube had the right and ability to control infringements of class plaintiffs’ works, even under the erroneous standard proposed by the court

Had the court interpreted the “control and benefit” prong correctly, it would have held that the undisputed evidence disqualified YouTube from the safe harbor and, at the very least, that there was sufficient evidence to create a factual dispute requiring denial of YouTube’s motion. Courts have found that the “control and benefit” prong applies where service providers:

- give detailed instructions regarding issues of appearance, can prescreen and block content, and prohibit links to identical content (*Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002) and *UMG Recordings v. VEOH Networks, Inc.*, 665

F. Supp. 2d 1099, 1114 (C.D. Cal. 2009) (citing *Cybernet* with approval)); or

- have an “antecedent ability to limit or filter copyrighted material” (*Tur v. YouTube*, 2007 WL 1893635, at *3); or
- are actively involved in the listing, bidding, sale and delivery of infringing items offered for sale on their websites (*Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C. D. Cal. 2001)); or
- have the right or ability to control vendor sales on their site, preview products prior to listing on their website, edit product descriptions, suggest prices, or otherwise involve themselves in vendor sales on their website (*Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wa. 2004)).

Evidence of all these factors – including that YouTube employs tools that are able to identify class plaintiffs’ content, suggest “related videos” infringing class plaintiffs’ content, and tie advertisements to class plaintiffs’ content – was presented below, but ignored. *See, e.g.*, IIIA361, ¶16; IIIA320. For example, YouTube’s audio fingerprinting system (which was only offered to content owners willing to license their content to YouTube) can and does identify specific recordings of class plaintiffs’ copyrighted songs with over 99% accuracy before they are displayed on the site, and can keep them off the site if YouTube so chooses. IIIA401-402, ¶95, Tab 267. This shows a degree of control sufficient to meet even the court’s erroneous “item-specific” knowledge requirement.

The evidence distinguishes this case from *UMG Recordings v. VEOH Networks, Inc.*, 665 F. Supp. 2d 1099, 1114 (C.D. Cal. 2009) (“*UMG II*”), upon which defendants relied heavily below. There, the court determined that the safe

harbor did not “require service providers to adopt specific filtering technology and perform regular searches.” *Id.* at 1113. But no case, including *Veoh*, has held that the tools *that a particular site already has in place and routinely uses as a central part of its business* should be ignored in determining whether a service provider has the ability to control infringements on its site from which it directly benefits. *Veoh* also held that “something more” than the mere ability to block users’ access to the site was required to trigger the “control and benefit” disqualifier, citing *Cybernet* for the proposition that this can be met where “the service provider pre-screened sites before it allowed them to even use its age verification services, gave sites extensive advice, prohibited the proliferation of identical sites, and exercised control in a variety of other ways.” *UMG (II)*, 665 F. Supp. 2d at 1114 (citing *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002)). Unlike in *Veoh*, the evidence here shows that YouTube engaged in equivalent activities, and more. IIIA361, ¶16; IIIA368, ¶26.

Although YouTube argued below that it has no affirmative duty to police or monitor its site, YouTube *already* “polices” its site through pinpoint control over its inventory of audiovisual content for profit. The statute does not allow YouTube to ignore the results of this control; indeed, Congress emphasized that the safe harbor, “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the

digital networked environment.” H.R. Rep. 105-551(II) at 49. Once YouTube chooses to exercise detailed control over content to increase its revenues, the DMCA affords it no immunity if it elects not to use that control to *mitigate infringements from which it directly benefits* – an obligation YouTube has tried to duck precisely because of the financial benefits of that content.

YouTube also argued below that it cannot “control” infringing activity because (absent a specific takedown notice) it can never be 100% certain whether any particular video on its site is an infringement. But that approach would render §512(c)(1)(B) a nullity. The statute provides that, if a profit-making business like YouTube can control infringing activity from which it is choosing to financially benefit, it is eligible for immunity only if it exercises that control to alleviate the infringement. Here, evidence shows that YouTube chose not to use readily available tools at hand. In the face of this record, the court could not properly decide, as a matter of law, that YouTube lacked the right or ability to control the infringing activity.

3. YouTube receives a direct financial benefit from infringements of class plaintiffs’ works that it controls

The Ninth Circuit held in *CCBill* that for purposes of §512(c)(1)(B), “‘direct financial benefit’ should be interpreted consistent with the similarly-worded common law standard for vicarious copyright liability.” 488 F.3d at 1117. Courts have repeatedly held that the requisite “[f]inancial benefit exists where the

availability of infringing material acts as a draw for customers,” (*A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (quotation marks omitted)), and that “[t]here is no requirement that the draw be ‘substantial’.” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (citation omitted). *See also Lime Group*, 715 F. Supp. 2d at 519 (financial benefit established where defendant “has profited from its ability to attract infringing users, including through increased advertising revenue”); *Nimmer*, §12B.04[A][2]. This standard is met here. YouTube has repeatedly confirmed that its popularity and the success of its business (including its sale to Google for \$1.65 billion) depended on its infringing content, including content owned by class plaintiffs. *Supra*, 8-13.

Although the court below never reached this issue given its improper imposition of an “item-specific” knowledge requirement, Judge Stanton wondered “whether revenues from advertising, applied equally to space regardless of whether its contents are or are not infringing, are ‘directly attributable to’ infringements.” SPA28-29. But if the court had considered the evidence (which it made no mention of), it would have realized the question is misplaced, since the financial benefits YouTube received were received because infringing content, including that of class plaintiffs’, was the main attraction for YouTube’s viewers. YouTube knew that its financial value depended on the drawing power of its infringing content. *Supra*, 8-10. Google knew that the price it paid for YouTube was based

on an audience built through the exploitation of infringing activity. *Supra*, 12-13. Even though “[t]here is no requirement that the draw be ‘substantial’,” here it was. *Supra*, 9, 12-13. That YouTube placed advertisements next to both infringing and non-infringing content is irrelevant – the infringements were primarily responsible for creating the audience that watched those advertisements. YouTube could easily have mitigated the infringements it knew were drawing this audience – say, by excluding videos that expressly describe themselves as Roland Garros match footage – but it chose not to, so the content would continue to be a draw. IIIA320; IIIA298.

C. By refusing to give class plaintiffs the tools to identify repeat infringers, YouTube did not reasonably implement a repeat infringer policy

To qualify for any of the safe harbors under 17 U.S.C. §512, a service provider must have “adopted and reasonably implemented” a policy for terminating “repeat infringers.” 17 U.S.C. 512(i)(1)(A). But, “a repeat infringer policy is not implemented under §512(i)(1)(A) if the service provider prevents copyright holders from providing DMCA-compliant notifications.” *CCBill*, 488 F.3d at 1110; *see also In re Aimster*, 334 F.3d at 655 (defendant did not discourage repeat infringers when it encrypted its systems so as to “disable[] itself from doing anything to prevent infringement.”).

Just like the defendant in *Aimster*, YouTube deliberately set up its identification tools to try to avoid identifying infringements of class plaintiffs' works. *Supra* 21. YouTube thereby encouraged repeat infringements of class plaintiffs' works and prevented class plaintiffs from being able effectively to control them. *Supra* 21-24. The court completely ignored this behavior, which necessarily excludes YouTube from the safe harbor. Defendants also present no evidence of a repeat infringer policy prior to March 2006, thus, they are in any case excluded from the safe harbor for any infringing activity before that date. IIIA392, ¶76.

D. YouTube's liability for infringement does not arise from storage of videos "at the direction of a user"

The §512(c) safe harbor only excuses infringement that occurs "by reason of the storage at the direction of a user of material" on the service provider's system. §512(c)(1). The court held that protected activities include functions "allied" to "storage," such as "means of facilitating user access to material on its website." SPA28. But the court failed to acknowledge or address evidence showing that the activities for which YouTube is liable go far beyond providing "storage" or "access" to videos or any "allied" functions directed by users.

YouTube is not, and was never intended to be, a storage service, but a "global media platform" with a huge, valuable audience. IIIA148, ¶3. To become such an enterprise, YouTube engaged in specific acts involving class plaintiffs' content that were not directed by users but instead directed by YouTube's interest

in gaining viewers and profit. For example, YouTube’s “related videos” function directs viewers to videos that are similar to the one they are watching, and, when a user watches an infringing video of class plaintiffs’ works, the user is usually directed to similar infringing videos on YouTube’s website. IA334, ¶¶334-335; *see* examples of class plaintiff infringements accompanied by related videos showing the same content at IIIA320-346. YouTube entered into lucrative deals to “syndicate” its entire inventory of videos to mobile phones and television, without input from the users who uploaded the videos (which included class plaintiffs’ infringements). IIIA191, ¶39; IIIA364, ¶19. As discussed above, YouTube also deliberately fostered and maintained infringements on its site in order to build up its audience as quickly as possible. This conduct goes well beyond storage and access – like a traditional media company, YouTube pushed its audience to watch content it otherwise would not have, yet here the content it pushed was blatantly infringing.

YouTube’s liability – its disqualification from §512(c) immunity – arises from its deliberate efforts to capitalize on class plaintiffs’ infringing content, and to multiply infringing activity by refusing to remove infringements it knew about, denying class plaintiffs’ the tools to remove infringements, and using those tools to profit from advertising aimed at infringing activity. These deliberate acts are well outside the storage-related functions that §512(c) was designed to protect. *See*,

e.g., *Fung*, 2009 WL 6355911, at *16 n.26 (§512(c) not applicable because plaintiffs' claims "are premised on active inducement... not passive transmission or storage of infringing materials."). Longstanding copyright liability doctrines of contributory, vicarious and inducement liability apply to these acts, but since they have nothing to do with "storage" of material "at the direction of a user," YouTube cannot seek protection for them under §512(c).

II. THE DENIAL OF PLAINTIFFS' SUMMARY JUDGMENT MOTION WAS ERROR

The very evidence the court ignored in improperly granting YouTube's motion should also have disqualified YouTube from safe harbor status as a matter of law. Under a correct reading of the statute, the record below shows beyond genuine dispute that YouTube is disqualified from the safe harbor. Partial summary judgment should therefore have been granted in class plaintiffs' favor.

In opposition to class plaintiffs' motion, YouTube submitted declarations denying that the repeated references in its own documents to "copyrighted content" or "copyright infringement stuff" meant that its officers or employees had recognized infringing content, and disputed the accuracy of its own internal estimates about the amount of such content. These arguments merely reprise YouTube's erroneous view that there can be no culpable knowledge of infringing activity absent absolute certainty about the provenance of each video, and they should therefore be rejected. *See* 40, *supra*.

Further, in the face of uncontroverted evidence that YouTube employed tools that had the ability to, and did, identify infringements of class plaintiffs' works (*supra*, 13, 16), YouTube speciously argued that it never denied these tools to class plaintiffs. Yet multiple, unambiguous contemporaneous documents, and testimony from plaintiffs and third parties, confirm that this is unquestionably what it did. *See* 22, *supra*. No contemporaneous documents support YouTube's denial. Defendants cannot create a genuine dispute through after-the-fact declarations purporting to contradict a prior statement's plain meaning. *Jeffreys v. City of New York*, 426 F.3d 549, 551 (2d Cir. 2005) (granting summary judgment where "no reasonable jury could have credited" the non-movant's contradictory testimony); *U.S. v. U.S. Currency*, 2007 WL 2713367, at *15 (E.D.N.Y. Sept. 13, 2007) ("denials and contradictory explanations cannot create a genuine issue of material fact... [claimant's] version of events is undeniably contradicted by the record and cannot be accepted...," *citing* *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

YouTube's own contemporaneous statements show beyond genuine dispute that it knew about infringing activity involving class plaintiffs' works, deliberately intended to richly benefit from that infringing activity, employed tools that had the ability to and did identify and track class plaintiffs' works in order to profit from them, and denied class plaintiffs access to those same tools to mitigate the infringing activity. *See supra*, 13, 16, 20. The court not only improperly granted

summary judgment to YouTube based on the wrong legal standards and in the face of compelling evidence that should have precluded safe harbor status; it should have granted class plaintiffs' motion that YouTube was not entitled to §512(c) immunity as a matter of law.

CONCLUSION

Accordingly, the judgment below should be reversed, YouTube's summary judgment motion should be denied, and partial summary judgment should be entered for class plaintiffs.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: 12/3/2010

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