

Contains Material Designated Confidential and Highly Confidential Pursuant to Protective Order

Redacted Pursuant to
Protective Order at
Request of Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

THE FOOTBALL ASSOCIATION PREMIER :
 LEAGUE LIMITED, BOURNE CO. (together :
 with its affiliate MURBO MUSIC PUBLISHING, :
 INC.), CHERRY LANE MUSIC PUBLISHING :
 COMPANY, INC., CAL IV ENTERTAINMENT :
 LLC, ROBERT TUR d/b/a LOS ANGELES :
 NEWS SERVICE, NATIONAL MUSIC :
 PUBLISHERS' ASSOCIATION, THE :
 RODGERS & HAMMERSTEIN :
 ORGANIZATION, STAGE THREE MUSIC :
 (US), INC., EDWARD B. MARKS MUSIC :
 COMPANY, FREDDY BIENSTOCK MUSIC :
 COMPANY d/b/a BIENSTOCK PUBLISHING :
 COMPANY, ALLEY MUSIC CORPORATION, :
 X-RAY DOG MUSIC, INC., FÉDÉRATION :
 FRANÇAISE DE TENNIS, THE MUSIC FORCE :
 LLC, and SIN-DROME RECORDS, LTD. on :
 behalf of themselves and all others similarly :
 situated, :
 :
 Plaintiffs, :
 :
 v. :
 :
 YOUTUBE, INC., YOUTUBE, LLC and :
 GOOGLE, INC., :
 :
 Defendants. :
 ----- X

07 Civ. 3582 (LLS)
(related case no. 07 Civ. 2103 (LLS),
the "Viacom action")

ECF CASE

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
COUNTER-SUMMARY OF FACTS THAT REQUIRE DENIAL OF YOUTUBE’S SUMMARY JUDGMENT MOTION.....	2
A. YouTube’s Success Depended On Infringing “Premium” Content	3
B. YouTube Exercises Pervasive – But Selective – Control Over Its Videos.....	5
C. YouTube Depended On Music Content To Drive Traffic And Knew That It Needed Publishing Clearance For All Music Content	9
D. YouTube Uses The “Track” Option To Evade The Rights Of Independent Publishers.....	11
ARGUMENT.....	14
I. YouTube Cannot Establish It Is Entitled To Its Section 512(c) Affirmative Defense	14
A. YouTube’s Activities Are Not Limited To “Storage At The Direction Of A User”.....	15
B. YouTube Has Actual Knowledge Of Infringing Content Or Is Aware Of Facts And Circumstances From Which Infringing Activity Is Apparent	17
1. Overwhelming evidence shows YouTube’s actual knowledge or awareness of infringements of plaintiffs’ works	17
2. YouTube can and does recognize class plaintiffs’ content.....	20
3. Fair use does not excuse YouTube’s responsibility under § 512(c).....	24
C. YouTube Has The Right And Ability To Control Infringing Activity And Benefited Financially From Infringing Content	25
D. YouTube Did Not Act Expeditiously To Stop The Infringing Activity It Knew Or Was Aware Of.....	30
E. YouTube Has Not Implemented An Appropriate Repeat Infringer Policy	31

F.	YouTube Did Not Timely Comply With The Requirements Of Registering A Designated Agent To Receive Notifications Of Claimed Infringement.....	32
II.	YouTube Is Not Entitled To Summary Judgment On Plaintiffs' Inducement Claims	32
	CONCLUSION	35

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>A&M Records v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001)	14,28
<i>ALS Scan, Inc. v. Remarq Cmty., Inc.</i> , 239 F.3d 619 (4th Cir. 2001)	17, 29
<i>Am. Geophysical Union v. Texaco, Inc.</i> , 60 F.3d 913 (2d Cir. 1994)	24,25
<i>Arista Records LLC v. Usenet.com</i> , 633 F. Supp. 2d 124 (S.D.N.Y. 2009)	27
<i>Byrne v. BBC</i> , 132 F. Supp.2d 229 (S.D.N.Y. 2001)	25
<i>Columbia Pictures Indus., Inc. v. Fung</i> , 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. Dec. 21, 2009).....	15, 32
<i>Corbis Corp. v. Amazon.com, Inc.</i> , 351 F. Supp. 2d 1090 (W.D.Wash. 2004)	14,15,19
<i>Ellison v. Robertson</i> , 357 F.3d 1072 (9th Cir. 2004)	28
<i>In re: Aimster Copyright Litig.</i> , 252 F. Supp. 2d 634 (N.D. Ill. 2002).....	20, 27, 31
<i>Institutform Techns., Inc. v. CAT Contracting, Inc.</i> , 385 F.3d 1360 (Fed. Cir. 2004)	33
<i>Io Group, Inc. v. Veoh Networks, Inc.</i> , 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008).....	14,16
<i>MCA, Inc. v. Wilson</i> , 677 F.2d 180 (2d Cir. 1981)	24
<i>MGM Studios v. Grokster Ltd.</i> , 545 U.S. 913 (2005)	27,33, 34,35
<i>Perfect 10, Inc. v. CCBill</i> , 488 F.3d 1102 (9th Cir. 2007)	28, 31

Perfect 10, Inc. v. Amazon, CV-05-4753,
slip op. at 8 (C.D. Cal. Nov. 4, 2008) 14

Tur v. YouTube,
2007 WL 1893635 (C.D. Cal. June 20, 2007), appeal dismissed, 562 F.3d 1212
(9th Cir. 2009) 14,27

U.S. v. ASCAP,
599 F. Supp. 2d 415 (S.D.N.Y. 2009) 25

UMG Recordings, Inc. v. Veoh Networks, Inc.,
620 F. Supp. 2d 1081 (C.D. Cal. 2008) 16

UMG Recordings, Inc v. Veoh Networks, Inc.,
665 F. Supp. 2d 1099 (C.D. Cal. 2009) 14,15

Veoh Networks, Inc. v. UMG Recordings, Inc.,
522 F. Supp. 2d 1265, 1271 (S.D. Cal. 2007) 14

Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.,
342 F.3d 191 (3d Cir. 2003) 25

STATUTES

17 U.S.C. § 512*passim*

17 U.S.C. § 504(c)(2) 22,24, 26

OTHER AUTHORITIES

3 Nimmer on Copyright § 13.05 [A][1][b]..... 25

H.R. Rep. 105-551 (I)..... 26

^{*}
Nimmer on Copyright § 12B.06[A] 14

Nimmer on Copyright § 17.07[B] 23

Patry on Copyright § 24:7 23

S. Rep. 105-190 24

PRELIMINARY STATEMENT

Defendants' motion rests on the false premise that YouTube functioned throughout the class period as a vast repository of amateur "personal videos" and that the amount of infringing "premium" content – popular music, sports and other television programs – was unimportant to YouTube's success and an unavoidable by-product of hosting user-generated videos.

The record tells another story. YouTube (and Google) knew from the outset that YouTube's value as a business enterprise was fueled by infringing premium content, not "personal videos." Defendants deliberately chose not to remove the infringing content, instead actively exploiting it in order to draw traffic to the site. Defendants' argument that the presence of infringing content was and is insignificant to YouTube's success is disproved by their own studies and by their deliberate and well-documented internal strategy to encourage and exploit that valuable infringing content. Defendants' motion purposely ignores this evidence, which is fatal to the safe harbor defense they seek.

Defendants offer a host of reasons why they would be unable to accurately identify infringing content. None of these are convincing given the record evidence showing that defendants could and did identify class plaintiffs' infringing content on their website, but deliberately chose not to remove it. Defendants feign confusion by claiming that certain plaintiffs surreptitiously used YouTube to promote their own content; but they overlook that class plaintiffs only permitted content to appear on YouTube pursuant to proper licenses for identifiable uses, and that the tools YouTube has had in place for years are *specifically designed* to distinguish between content that is uploaded with authority and user-generated content that lacks any license. Those tools have only been deployed on behalf of favored content "partners" who agree to give up valuable rights. Had the same tools been used to identify class plaintiffs' works, defendants would have had little difficulty in quickly identifying (and removing) the

infringing content. Defendants readily identified such content when it suited their 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 its users' searches for infringing videos. Yet during the class period defendants refused to use those same tools to remove the infringing content from their site, despite offering those tools to preferred content owners willing to license their content to YouTube. For music content, the record shows unequivocally that, quite apart from what its users were posting, YouTube *itself* designed its content management system (and the "track" option embedded therein) to evade the rights of music publishers and to maintain popular, infringing music content on the site knowing full well that it lacked the publishing rights to those songs.

Not surprisingly, defendants' motion relies almost entirely on the "notice and takedown" provisions of the DMCA, but their crabbed interpretation of the statute simply reads out the knowledge, awareness and control provisions that exclude defendants from the safe harbor. Defendants' deliberate choice to facilitate and exploit infringing premium content in order to fuel the site's growth places them well outside the purview of the DMCA. To that end, because defendants intended to trade on infringing content as the key to their success, and designed YouTube's content management system to track content known to be unlicensed and infringing, defendants' conduct amounts to an unlawful inducement of infringing activity for which the DMCA safe harbor affords no refuge.

**COUNTER-SUMMARY OF FACTS THAT REQUIRE DENIAL OF YOUTUBE'S
SUMMARY JUDGMENT MOTION**

Defendants' summary of claimed undisputed facts, addressed in detail in the accompanying counterstatement ("CS"), is fundamentally at odds with defendants' own

documents, admissions and testimony in connection with key issues raised by their reliance on Section 512(c).¹ Certain of the evidence ignored by defendants is summarized here.

A. YouTube’s Success Depended On Infringing “Premium” Content

Ignoring the contemporaneous evidence of their intent to profit from infringing premium content, defendants have sought to bolster their fanciful claim that YouTube was built as a kind of public service to provide a “forum for free expression and artistic creation,” by pointing to a manufactured video that they uploaded to the YouTube website the day before filing their summary judgment motion (with the self-promoting title “This is YouTube”) (Def. Mem. 4, 5). They chose not to upload the video where YouTube’s founders admit that from the outset their “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 bidder. CS 6; Class SUF 9; *see also* CP Mem. 3-7. In fact, the founders knew that YouTube’s value as a business proposition depended entirely on its appeal as an advertising medium, 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.” CS 6 (capitalization in original). Co-founder Chad Hurley similarly emphasized that “serious traffic” would allow them to sell YouTube for “big money”. CS 6, 32. The founders — sophisticated entrepreneurs — 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. Class SUF 10, CS 6 (“the truth of the matter is, probably 75-

¹ Defendants also rely on facts, spread through twelve lengthy declarations, that are *not* in defendants’ Statement of Undisputed Facts, and are therefore not cognizable under Local Rule 56.1. *See* CS 178-239; Viacom Counterstatement.

80% of our views come from copyrighted material”).²

YouTube therefore decided to remove as little infringing content as possible, because, as one founder said, “we have to keep in mind that we need to attract traffic.” CS 6. YouTube co-founder Steve Chen rejected Jawed Karim’s suggestion that YouTube remove “obviously copyright infringing stuff,” stating that “i know that if [we] remove all that content. we go from 100,000 views a day down to about 20,000 views or maybe even lower. the copyright infringement stuff.” CS 6, 32. Indeed, Chen wanted to “concentrate all of our efforts in building up [YouTube’s] numbers as aggressively as we can through whatever tactics, however evil,” to realize a potential buy-out of “\$1b or something.” CS 6. Chen effectively conceded to venture capital investors that YouTube had “truckloads” of copyrighted content, while trying to maintain “the perception [...] that we are concerned about this type of material.” *Id.* Thus, from earliest days, YouTube’s founders decided to “ease up” and allow copyrighted content on the site, and joked that they should “save [their] meal money for some lawsuits!” *Id.*

Prior to acquiring YouTube in October 2006, 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.” CS 29. Credit Suisse’s due diligence for Google’s acquisition of YouTube concluded that 60% of content on the site was copyrighted, and only 10% of that content was authorized. CS 7. Google viewed this pervasive copyright infringement as an acceptable business risk in order to obtain the most popular video site on the Internet. *Id.*

² Class Plaintiffs’ Memorandum of Law in support of their Motion for Summary Judgment (“CP Mem.”) describes at length the evidence establishing YouTube’s reliance on infringing premium content to attract viewers to the site. (*See* CP Mem. 7-14.)

Unauthorized premium content remained YouTube's primary driver of traffic after the Google acquisition. For example, in May 2007, YouTube's head of monetization reported that █████ of YouTube searches were directed at music videos, movies, celebrities, and TV programs, and that *only* █████ of videos watched by users consisted of authorized professional content. YouTube calculated in 2007 that music represented █████ of playback queries on the site, and █████ of those queries were for "well-known [music] stars." CS 241. Similarly, YouTube concluded that unlicensed sports content on its website, such as Premier League footage, was "prime content" for advertising opportunities because of the number of viewers it drew to the site, and that it "need[ed] more sports content to monetize." Class SUF 19, 21, 35. YouTube deliberately left other kinds premium entertainment content such as unauthorized "news clip[s] and comedy shows" on the site. CS 32. Whatever collateral social benefit YouTube might present, the record shows that its success as a business was deliberately built on the back of copyrighted content.

B. YouTube Exercises Pervasive – But Selective – Control Over Its Videos

YouTube asserts that it "cannot control what its . . . users post to the [site] each day" and that it has taken "numerous steps to deter users" from uploading copyrighted material. (Def. Mem. 9-10.) In fact, as set out below, the "numerous steps" YouTube describes were either statutory obligations that they could not avoid or perfunctory efforts that did nothing to stem the tide of unauthorized content on the site. YouTube may not control a user's decision to post a video of, say, a child's birthday party, but the record shows that YouTube exercises pervasive control over whether that video ever sees the light of day and uses its systems to identify and extract value from infringing content on the site.

First, YouTube's self-described "extensive efforts" to "help" copyright owners are window dressing which YouTube knew would be easily evaded or ignored by users, such as

posting “reminders” that users should not upload infringing content and imposing a 10-minute limit on video clip duration. (Def. Mem. 9.) When the 10-minute limit was adopted, YouTube founder Karim advised YouTube’s Board of Directors that this measure “probably won’t cut down the actual amount of illegal content uploaded since standard 22-minute episodes can still easily be uploaded in parts, and users will continue to upload the ‘juiciest’ bits of television shows.” CS 57. Karim was prescient – class plaintiffs’ content, such as French Open tennis matches, is frequently uploaded in clearly labeled sequential parts; the “juiciest” bits of Premier League matches are regularly featured on the site; and professional music videos are generally less than 10 minutes long. *Id.* YouTube also knew that its users were repeatedly disregarding YouTube’s “reminders” about infringing content – in fact, YouTube depended on those “reminders” being ignored in order to drive traffic. CS 6, 51-54, 58, 97. Moreover, as shown below, the “CYC” program that is central to YouTube’s monetization efforts depends on users uploading otherwise infringing content that can then be “claimed” by participating content owners. *See* CS 97. YouTube’s other purported “efforts” – such as registering a DMCA agent, acting “expeditiously” to remove infringing content, and terminating the accounts of repeat infringers – are merely descriptive of obligations required by statute that YouTube asserts it met in conclusory fashion (with citations to the self-serving declarations filed with its motion for summary judgment).³ (Def. Mem. 23, 55)

Second, YouTube further asserts that it “makes available various technological measures to help content owners protect their rights.” (Def. Mem. 10.) However, the record shows that while these measures gave YouTube extensive control over whether infringing content appeared on the site, the technology was belatedly and then selectively deployed for favored content

³ As discussed *infra*, YouTube’s compliance with its statutory obligations was entirely inadequate.

owners without regard to class plaintiffs' rights in order to maximize advertising profits. For example, although audio fingerprinting was "well-established" by the time YouTube was founded in early 2005, YouTube admits that it took two years for it to decide to implement an audio fingerprinting system. Def. Mem. 10; CS 94-95, 97-100. Thus, in February 2007, YouTube began employing a third party identification system called Audible Magic that compared the audio portion of every video uploaded to YouTube with audio "reference files" – sometimes referred to as "fingerprints" – from the Audible Magic databases, as a means of identifying specific sound recordings in uploaded videos. Defendants offered this system only to content owners who were willing to sign a deal with YouTube, a sophisticated form of extortion. CS 94-96. Defendants were upfront about the purpose of this policy – YouTube demanded that its content partners "claim" or "track" infringing videos uploaded by users so that it could be linked to advertising, favoring "claim" or "track" over "block." CS 96. These content identifying processes and technologies were denied to content owners, like class plaintiffs, whose sole interest was in removing their infringing content from YouTube, not in becoming YouTube's business partner and bending to its terms for sharing revenues from the exploitation of their works.⁴

Although they initially relied upon Audible Magic, YouTube and Google also developed proprietary fingerprinting tools, which were publicly "launched" in October 2007 but not offered to class plaintiffs until much later, and even then conditioned on onerous and largely non-negotiable terms that required waiver of various rights. CS 97-98. Like Audible Magic, this

⁴ The laudatory comments defendants offer from some content owners, such as NBC and Warner, were made only *after* those entities entered into license deals with YouTube, and *after* YouTube offered to provide them with identification tools (tools not offered to class plaintiffs). NBC in particular has been severely critical of YouTube's behavior toward infringing content on its website and, among other things, filed an amicus brief against YouTube in California. CS 87.

content management system engages in “pre-publication” “screening” of every video “that anyone *attempts to post* on YouTube” and currently compares every video against approximately 3 million reference files. (King Decl. ¶¶ 26-27.) As with the Audible Magic system, if a match is made, the corresponding rights holder may (1) “block” a claimed video (*i.e.*, instruct YouTube to remove it from the site); (2) “monetize” the video (*i.e.* share in revenue from advertising featured on the video watch page, also referred to as “rev share”); or (3) “track” the video. (King Decl. ¶¶ 23-24.) These choices are automatically applied to any matching videos by the content management system. (Def. Mem. 10.) Moreover, “at the request of *certain* rights holders, YouTube has configured Content ID to scan new videos *before they are actually posted*. Thus, if a user attempts to upload a video that results in a match and the relevant rights holder has set a policy of ‘block,’ *the system is designed to prevent that video from ever making its way onto YouTube.*” (King Decl. ¶ 26) (emphasis added). Yet, YouTube demanded that its content partners use these tools to “claim” or “track” content, not “block” it. CS 96.

Defendants also deployed “advanced text search” tools to identify content, again only on behalf of favored content partners or to maximize advertising profits. CS 94. For example, defendants knew that users were drawn to YouTube primarily to search for unauthorized premium content, and that context-sensitive advertisements on their search pages would be lucrative. Defendants therefore used text-based identification tools to target advertisements to users’ searches on the YouTube website, including searches for class plaintiffs’ content. CS 94. The same processes by which defendants targeted subject specific advertising to these infringing videos were used, for certain preferred content owners, as a means to identify and remove infringing content. CS 16, 25. But such processes were not, and still are not, offered to class plaintiffs. Defendants knew what was being searched, and knew that monetizing against

searches for infringing content could put at risk any safe harbor under the DMCA. CS 25, 167, 169. They nonetheless continue to place advertisements next to users' searches for infringing content.

For music publishers, the most significant tool on the YouTube site is the "track" option in the content management system, described benignly by David King, the YouTube manager responsible for the system, as a way for a rights holder to "leave [a video] up on YouTube" and "receive analytics and other information about how [a video] was being viewed." (King Decl. ¶ 7) However, as discussed below, and nowhere explained in YouTube's submissions, the "track" option was specifically developed by YouTube to allow infringing music content to remain on the site where it lacked publishing authority for the underlying song.⁵

C. YouTube Depended On Music Content To Drive Traffic And Knew That It Needed Publishing Clearance For All Music Content

To put YouTube's infringing use of its content management system in context, it is necessary to recognize the centrality of music in its economic model. As noted above, more than two years after the site's launch, music represented the majority of playback queries, all of which were for "well-known [music] stars." CS 25. A confidential internal document produced in May 2007 entitled "Why Music Is Important to YouTube" shows that music was the "most-searched" category on YouTube. *See also* CS 25, 96 ("*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*" (emphasis added)).

⁵ Class plaintiffs focus on the use of the "track" option in their opposition to YouTube's Motion for Summary Judgment, but do not suggest that all of the music content the labels chose to "monetize" was properly licensed from music publishers, and reserve their right to address this issue at a later appropriate time.

Because music content was a major driver of traffic to the site, YouTube sought to turn that content into a source of revenue and early on pursued licensing deals with the major record labels. But the legal use of music involves *two* distinct copyrights: one in the recorded performance of the song (typically owned by a record label), and a second in the underlying musical composition (typically owned or controlled by a musical publisher). Music publisher authorization to use the underlying musical composition embodied in a song is required in the various scenarios where music content is posted to the site – for example, where

- (1) a record label licenses a professional music video to YouTube (“Label Video Content”);
- (2) a bootleg video is posted by an individual user;
- (3) a professional sound recording is used without authorization by an individual user who has added it as a soundtrack to personal or professional video content; and
- (4) an individual user ‘covers’ a song without authorization and posts a video of his/her performance (a “User Cover”).

Following its acquisition by Google, YouTube hired David King in January 2007 to develop a content licensing system for YouTube. CS 241, King Decl. ¶ 2. King – a self-professed expert in music copyright issues who had experience licensing content for an Internet music service – produced a presentation about music licensing issues shortly after he was hired, which made clear that YouTube was fully aware of the need to get publisher license authority not only for Label Video Content, but also for other music content posted by individual users (“User-Generated Content” or “UGC”).⁶ CS 241; King Decl. ¶ 1.⁷ King further advised that

⁶ YouTube’s in-house legal counsel Zahavah Levine had worked for the same Internet music service as King, and knew YouTube needed licenses, including from music publishers, for music content on the site. (Class SUF 24.)

⁷ King noted, for instance, that “[User-Generated Content] with [a] Label Soundtrack” would require a “direct license” from the music publisher and that User Covers would have “no

“[a]pproximately 40% of compositions are represented by more than one publisher, with no maximum number of possible publishers.” CS 241. Accordingly, “[f]or 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%[.]*” *Id.* (emphasis added).

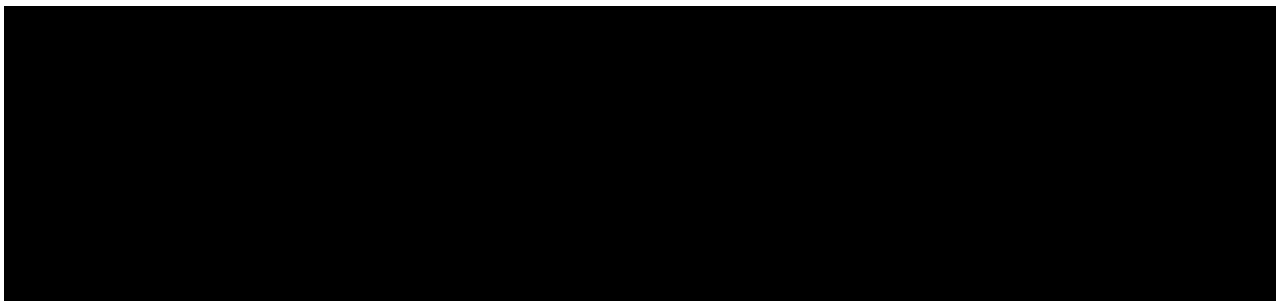
King's proposals to YouTube made plain that a license from the music label would be insufficient as it would not convey the necessary publishing license. As King put it, “We have to differentiate between premium video [i.e. Label Video Content] vs. UGC. [...] for UGC, we are combining licenses from the label with licenses from the publisher. So an update to rev share [. . .], coming from a label, may not be sufficient to monetize the video, if we are still seeking the corresponding publisher.” CS 241; *see also* CS 96. Accordingly, as shown below, defendants proceeded to get “clearance” from major labels and publishers, but ignored independent music publishers because it was not in their business interest.

D. YouTube Uses The “Track” Option To Evade The Rights Of Independent Publishers

YouTube recognized immediately the potential for conflicting directives concerning the use of music if music publishers were given access to its content management system. In March 2007, Yi-Ling Su, a YouTube employee, wrote to David King and raised the problem that “a [record] label could set [the] policy on a song to be ‘rev share’ and then a publisher could upload info about this song and set policy to ‘block’ in which case, the policy for the song will just become ‘block.’” King responded, “Unfortunately, *it only takes one block to screw up everyone else’s rev share . . .*” CS 241 (emphasis added). Since there was no practical way to keep a music publisher from “screw[ing] up” the revenue sharing arrangements between YouTube and its record label partners, at first YouTube simply delayed offering use of its content management participation from the record label . . . as they have no stake in the sound recording” and would “need[] [a] direct license from the publisher” at a “higher rate.” CS 241.

tools for music content, while scrambling to get deals in place with the so-called “major” publishers. CS 241 (“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*” (emphasis added).

Through the spring and summer of 2007, YouTube contracted with “major” publishers that streamlined clearance for most of their catalogs: (e.g., EMI Entertainment World, Inc., Sony/ATV, and Universal Music Publishing). CS 94, 243. Generally, the contracts (i) required



as YouTube knew, these contracts fell far short of acquiring all necessary music publishing rights, because they did not cover any of the musical compositions contained in major (and non-major) label sound recordings that were owned by the “hundreds” of non-major – or “independent” – music publishers.

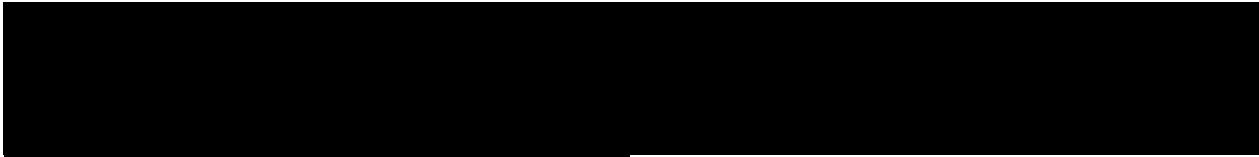
With deals in place with the “major” publishers, YouTube simply chose to ignore the rights of what they deemed “minor” music publishers who apparently were not worth YouTube’s time or trouble. (CS 43; Class SUF 25 (class plaintiff Cherry Lane “was summarily told that YouTube had no interest in Cherry Lane given its small market share”). Instead, YouTube chose to maintain infringing music content on the site by end-running around publisher rights: as early as December 2006, when Audible Magic was first being integrated into the site, YouTube product managers acknowledged that a “track-only [option] *will be used on the publishing right uncleared videos.*” CS 96. (emphasis added).

The record is replete with examples of YouTube's employing the "track" option to evade the rights of publishers who had not entered into a licensing deal with YouTube:

- In February 2008, a full year after the launch of Audible Magic, Universal Music Group ("UMG") wanted to "move forward with audio fingerprinting of all their content," but YouTube knew that UMG could not provide publishing licenses for all of its sound recordings. Kelsey LeBeau, a Strategic Partnerships manager at YouTube, asked how to keep UMG music content on the site where 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.*" CS 96. (emphasis added).
- By March 2008, LeBeau had caught on, and stated in an email that "UMG 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.*" *Id.*
- In February 2008, Kyle Harrison, a Google Product Manager, wrote to David King confirming that "*[l]abels can claim block or track without knowing/entering publisher data.*" *Id.*
- Harrison further explained that if a record label wanted to "monetize" content, it had to "tell YouTube the publisher(s) and percent payout for each; or agree to pay the publisher themselves . . . We 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.*" CS 241. Thus, the system would *automatically* reset to "track" where publishing clearance was missing, allowing YouTube to keep infringing content on the site (and the traffic it drew), while blithely overriding its obligation to obtain publishing rights. *Id.*
- In February 2008 YouTube employee Tony Li emailed David King noting that "YouTube cannot monetize content that does not have publisher data," and encouraging his colleagues to "open[] up our systems to ingest publisher data as well as label data per song, [so that] content on YouTube can then be claimed and monetized." *Id.*⁸ As King well knew, however, YouTube chose not to "ingest" ownership data for the myriad independent publishers who were excluded from YouTube's system while their compositions were maintained and exploited – by design – on the YouTube site.

⁸ Even this suggested restriction against "monetizing" musical works for which YouTube does not have full publishing rights has been discarded. *See* CS 96.

The use of the “track” option to evade publishing rights and to keep infringing content on the YouTube site is also reflected in YouTube’s contracts with record labels. These agreements



Accordingly – whether the “track” option was triggered by an automatic reset because a publisher was not on YouTube’s “approved list,” or by a record label that lacked publishing rights – YouTube’s own content management system was designed to maintain and facilitate infringing content on the YouTube site and provided YouTube with systematized knowledge of that content on a per-song basis.

ARGUMENT

I. YouTube Cannot Establish It Is Entitled To Its Section 512(c) Affirmative Defense

Defendants’ own documents, admissions and testimony preclude the application of the § 512 safe harbor for the following reasons, any one of which is sufficient to deny the defense:⁹

⁹ Defendants’ wrongly assert that it is “plaintiffs’ burden” to show that defendants cannot meet the knowledge or awareness element of § 512(c)(1)(A), or the right and ability to control/financial benefit element of § 512(c)(1)(B). (Def. Mem. 31, 58.) Section 512(c) is an affirmative defense to copyright infringement, and, as such, defendant bears the burden of proving *all* of the elements under § 512(c). *Veoh Networks, Inc. v. UMG Recordings, Inc.*, 522 F. Supp. 2d 1265, 1271 (S.D. Cal. 2007) (“There can be no question that Section 512(c) is usually and most easily applied as an affirmative defense”); *see also* Nimmer on Copyright § 12B.06[A]; *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 n.3 (9th Cir. 2001); *Tur v. YouTube, Inc.*, 2007 WL 1893635 at *2-3 (C.D. Cal. June 20, 2007); H.R. Rep. No. (I) at 26 (a defendant asserting a Section 512 defense “bears the burden of establishing its entitlement.”). Defendants rely on an unpublished decision from the Central District of California to suggest that it is somehow plaintiffs’ burden to show “actual knowledge,” but that case said nothing about departing from the general Ninth Circuit rule imposing the burden to prove affirmative defenses on the defendant (Def. Mem. 31 n.7, citing *Perfect 10, Inc. v. Amazon*, CV-05-4753, slip op. at 8 (C.D. Cal. Nov. 4, 2008)). The remaining cases cited by defendants directly contradict their argument: *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008) and *UMG Recordings, Inc v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1107 n. 11 (C.D. Cal. 2009) (“*UMG IP*”) make no holding about burden-shifting, and simply find that the evidence *put forward by the defendant* was not disputed by the plaintiff; and *Corbis Corp. v.*

Contains Material Designated Confidential and Highly Confidential Pursuant to Protective Order

- A. defendants do not merely store content at the direction of users as required under § 512(c)(1); instead, they operate an entertainment channel that purposely selects content to maximize advertising revenues;
- B. defendants have “actual knowledge” of the infringing content on the YouTube system under § 512(c)(1)(A)(i), and are “aware of facts and circumstances from which the infringing activity is apparent” under § 512(c)(1)(A)(ii). Upon obtaining such knowledge or awareness, defendants do not act expeditiously to remove or disable access to the material under § 512(c)(1)(A)(iii);
- C. defendants have the right and ability to control the infringing activity and receive a financial benefit directly attributable to that activity under § 512(c)(1)(B);
- D. defendants also did not respond expeditiously to remove, or disable access to, infringing material following receipt of a takedown notice pursuant to § 512(c)(1)(C);
- E. YouTube belatedly complied with the requirements of registering a designated agent to receive takedown notices under § 512(c)(2);
- F. defendants have not adopted and implemented an appropriate policy to terminate repeat infringers under § 512(i)(1)(A).

Each of these elements is discussed in turn below.

A. YouTube’s Activities Are Not Limited To “Storage At The Direction Of A User”

The § 512(c) safe harbor only excuses infringement that occurs “by reason of the storage [of material] at the direction of a user.” A defendant that independently engages in infringing acts or does more than simply store infringing material at the direction of the user is not entitled to the § 512(c) safe harbor. *See, e.g., Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661, at *60-61 n.26 (C.D. Cal. Dec. 21, 2009) (safe harbor intended to protect “*passive . . . storage* of infringing materials”) (emphasis added). Where, as here, a defendant is actively involved in the selection, manipulation, and exploitation of infringing material, the DMCA safe harbor is unavailable.

Amazon.com, Inc., 351 F. Supp. 2d 1090, 1106 (W.D. Wash. 2004) explicitly states that defendant “must show” that it meets the elements of § 512(c).

YouTube relies on two California district court cases involving the same defendant (Veoh) for the proposition that “as a matter of law, [its] automated processes for formatting, storing, and streaming videos uploaded by users” fall within § 512(c). (Def. Mem. 28-29, citing *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008) and *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081 (C.D. Cal. 2008) (“*UMG I*”).) But regardless of how these cases may apply to certain automatic functions that transcode video content into a viewable format, they say nothing whatsoever about the active and pervasive control YouTube exercises over whether that content ultimately appears on the site. *UMG I*, 620 F. Supp. 2d at 1083; CS 16, 19. Among other things, YouTube (i) screens every video uploaded to the site; (ii) performs “pre-publication screening” for certain favored content owners; (iii) “blocks” content that preferred content owners do not want on the site; (iv) “monetizes” licensed content by linking it with content-specific advertising; (v) “tracks” infringing music content; (vi) distributes its video inventory to other media, such as mobile phones and television, in exchange for payment and without user direction; (vii) selected the videos that it made available to third party media; (viii) developed sophisticated search tools to help users find the videos they want, including infringing content; and (ix) suggests “related videos” when a user views an unauthorized video of one of class plaintiffs’ works that direct the user to other similar infringing videos. CS 19, 25, 94-96.

These functions stand in stark contrast to the storage-related automatic coding and streaming functions at issue in *Io* and *UMG I*. Indeed, defendants’ liability stems from conduct that has *nothing to do* with the automatic storage of content at a user’s direction, but instead arises from their deliberate decision to capitalize on that content, and to foster and multiply infringing activity through targeted advertising and other profit-maximizing strategies. This

behavior takes YouTube well outside out of the realm of the “passive” or “innocent” service provider that § 512(c) was designed to protect.

B. YouTube Has Actual Knowledge Of Infringing Content Or Is Aware Of Facts And Circumstances From Which Infringing Activity Is Apparent

Defendants’ motion ignores all of the evidence presented in class plaintiffs’ opening brief establishing actual knowledge and “red flags” of infringements of class plaintiffs’ works, and defendants’ ability to easily identify and remove such infringements. Defendants’ disregard for these facts and myopic view of the law reduces § 512(c) to a “notice and takedown” scheme that effectively reads the “knowledge or awareness” elements out of the statute.

1. Overwhelming evidence shows YouTube’s actual knowledge or awareness of infringements of plaintiffs’ works

Nowhere does defendants’ motion address the evidence of their pervasive knowledge and awareness of the ongoing infringements of class plaintiffs’ works that began with YouTube’s founding, and was at the very core of YouTube’s efforts to increase its audience for a “quick” sale and, later, to maximize profits. The evidence shows that defendants:

- decided at the outset, to exploit the vast amount of infringing material considered essential to creating an audience and generating advertising income. CS 6, 7, 16, 32, 160, 167.
- produced internal analyses of infringing content that showed the content’s popularity, and projections of possible income that might result from obtaining licenses to use that content. CS 25, 116, 167; Class SUF 15-16, 19-27.
- created a content management system to identify and “monetize” infringing content for revenue-generating purposes, but refused to deploy the system to mitigate infringement. CS 94-100.
- in the case of music content, specifically designed a content management system to maintain music content on the site that lacked publisher clearance. CS 239-241.

“The DMCA’s protection of an innocent service provider disappears *at the moment the service provider loses its innocence, i.e.,* at the moment it becomes aware that a third party is using its system to infringe.” *ALS Scan, Inc. v. Remarq Cmty., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001)

(emphasis added.) YouTube never had any innocence to lose – defendants were not only aware that its users were “using [the] system to infringe” but YouTube *itself* engaged in infringing acts by purposely designing a content management system to permit infringing music content to be “tracked” and remain on the site. The facts at CS 7, 49, 96 are more than sufficient to defeat defendants’ claim that they bear no responsibility for infringing content on their site.

Rather than confront this evidence, defendants contend, wrongly, that based on the “text and structure” of the DMCA, they cannot be imputed with knowledge unless class plaintiffs can show that they “failed to expeditiously remove a *particular* clip in suit that it knew to be infringing” so that YouTube would “know[] with specificity what [it] must remove.” (Def. Mem. 32 (emphasis in original). Even assuming, *arguendo*, that this is the law (and, fully discussed in class plaintiffs’ opening brief, it is not), YouTube designed its content management system such that every time a music video is “tracked,” YouTube is effectively served with notice that the *particular* musical composition in that video is unlicensed – either because the license could not be passed through by the record label or because YouTube itself lacked a direct license from the publisher. *Supra* at 11-14. Indeed, YouTube’s contracts with the major record labels *define* “tracked” content as *unlicensed*, and contemporaneous documents show, unequivocally, that YouTube created the “track” option to allow music content lacking publishing clearance to remain live on the site. CS 96. If YouTube is still wondering “what it must remove,” it can start for class plaintiffs with every “tracked” musical work on the site.

Similarly, when YouTube wanted to locate and quantify infringing content on the site to assess the value of the rights being infringed, it did just that, but then took no steps to remove that content. CS 116; Class SUF 21 (quantifying Premier League content on YouTube). The same tools it uses to target ads to users on search pages can be used to remove infringing content,

but defendants choose not to do so. CS 25, 167. For example, a video that combines footage from FFT's tennis matches with music from class plaintiff X-Ray Dog's works in suit is exploited by YouTube in combination with advertising for tennis-related and other products. The description associated with this video, which enables defendants to apply context-specific advertising, includes the terms: "Roland Garros" and "X Ray Dog." CS 169. Defendants use that meta-data for profit making purposes, but choose not to use it to remove plainly infringing content, even though other content owners willing to license their content to YouTube enjoyed the benefit of such tools. CS 16, 25, 94-96, 167.

YouTube further argues that it cannot be imputed with "red flag" awareness under the DMCA unless the circumstances establishing infringement were "blatant." (Def. Mem. 32, 35, citing *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D.Wash. 2004)) But YouTube's conduct goes much further than turning a "blind eye" to obvious infringement sufficient to deny them access to the safe harbor. *Corbis*, 351 F. Supp. 2d at 1108. By identifying and quantifying infringements for business purposes, including market projections of the value of specific infringing content owned by one or more class plaintiffs; tying advertising to that content through the targeted use of metadata; and "tracking" that content knowing that the necessary rights in the case of music have not been licensed, YouTube has *actual knowledge* of the infringements CS 6, 7, 25, 116, 167. At a minimum, the system effectively generates automated "red flags" of copyright infringement that, by YouTube's design, are "blatant" and "obvious" and that are sufficient to remove defendants from the DMCA safe harbor.¹⁰

¹⁰ *Corbis* also held that a user's use of "bootleg" or slang terms" indicating content is infringing amounts to a "red flag" under the DMCA. 351 F. Supp. 2d at 1108. There is equally abundant indicia here that the content at issue is unauthorized. CS 49 (*see* Gitterman Decl. Ex. 3).

Defendants also argue that because they do not “proactively monitor” the videos on the YouTube website, they could never be “actually aware” of the infringements of class plaintiffs’ works. (Def. Mem. 34.) But YouTube admits that it *prescreens every video* and performs “proactive monitoring” for favored content owners. *See* CS 94-96; *see also* CS 16. Defendants also leveraged their knowledge of ongoing infringements of class plaintiffs’ works to analyze the frequency, popularity and viewership of class plaintiffs’ content in order to strengthen their position in licensing negotiations, and to encourage the monetization of professional content. *See* CS 116 (defendants identified but did not remove Premier League videos prior to considering whether to bid on a license for Premier League content, that defendants valued in the tens of millions of dollars).

This is not a case where class plaintiffs are citing duties beyond defendants’ present capabilities to search or monitor their systems for infringement. Instead, it is a case *where defendants selectively use existing measures for their own financial benefit*, but not to avert harm to others. Defendants’ operation is far more egregious than the one Judge Posner condemned in *Aimster*, where the design of an Internet-based “file-sharing” system that deliberately concealed information about infringing activities was itself held to be evidence of knowledge sufficient to satisfy a contributory copyright infringement liability standard. *In re: Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 650-51 (N.D. Ill. 2002), *aff’d*, 334 F. 3d 643 (7th Cir. 2003) (discussing willful blindness as basis for knowledge).

2. YouTube can and does recognize class plaintiffs’ content

Defendants seemingly claim that to constitute a “red flag,” a person reviewing the video would have to “discern immediately” that the content is infringing, and since the possibility always exists that the content is either authorized or fair use, it would be impossible for YouTube to determine whether any given video is infringing. This argument reads the knowledge element

right out of the statute (and would immunize any defendant from copyright liability absent a takedown notice). That is not how the DMCA is framed. *Supra* at 15.

First, the notion that a *person* reviewing a video would have to immediately discern that it is infringing in order for the video to constitute a red flag completely ignores that YouTube is a *website*, with “robust” proprietary content management system that includes millions of reference files and which is owned by Google, a company whose professed mandate is to “organize the world’s information.” CS 94-100. This system was specifically built with the capacity to identify infringing content, and YouTube’s founders and top executives had no difficulty identifying class plaintiffs’ content when it served their business purposes. CS 16, 25, 94-96. Defendants’ use of these tools for favored content owners proves that they could have used them to readily identify class plaintiffs’ content. They chose not to make them available to class plaintiffs because they did not want content owners using the tools to take down videos that create and expand YouTube’s audience. CS 94-96. That YouTube’s *computer* systems can readily identify infringing content prevents defendants from hiding behind the notion that a *human* might be unsure about whether a video is infringing.

Second, defendants cite to a handful of clips-in-suit that they claim are unrecognizable as class plaintiffs’ works. (Def. Mem. 38 n.13.) Yet in almost all of those clips, the work infringed is identified in the title or other descriptive information accompanying the video, and would be easily identified by a text-based search of the type YouTube offered to favored content owners (and also used to target advertisements to plaintiffs’ content). CS 239 (For example, defendants state that the video at Schapiro Ex. 192 “supposedly contain[s] excerpt from ‘American Beauty Theme’; in fact, the video is described as “Theme of American Beauty.” Defendants state that the video at Schapiro Ex. 192 is “supposedly from a different Premier League match”; in fact,

the video's title identifies the match as "west ham v middlesborough - 3-0"). Nor does anything in the DMCA or copyright law suggest that defendants should be excused from using tools that were readily at hand to identify infringements because those tools would not have been 100% effective. Copyright law deals with uncertainty not by immunizing infringement, but by adjusting remedies. *See* 17 U.S.C. 504(c)(2) (reduced damages where "the infringer was not aware and had no reason to believe that his or her acts constituted an infringement"). Defendants exaggerate the record and provide no evidence that class plaintiffs' had "persistent" difficulties in identifying infringements of their works on YouTube. CS 154-55.

Third, the fact that certain class plaintiffs *licensed* a particular work to appear on YouTube as part of a consensual licensing agreement in which appropriate licenses fees were paid did not prevent YouTube from sorting between licensed and unlicensed material on its website. (Def. Mem 49-51.) The Premier League, FFT and Tur *never* authorized their works-in-suit to be used on YouTube, and none of class plaintiffs' clips-in-suit in this case were authorized to appear on YouTube. CS 141-43. When any of plaintiffs' works were licensed to appear on YouTube, it was as part of a specifically identifiable online promotion or advertisement, unlike the vast majority of music infringements, which are recognizable songs played as a soundtrack to user-generated content, and which could not reasonably be considered to be authorized. CS 136-40. It was only because defendants did not make their fingerprinting and other content identification processes available to class plaintiffs at the same time those tools were offered to other preferred content owners that defendants can even pretend to make this argument. And even without affording class plaintiffs access to those tools, YouTube itself "tracks" unlicensed musical compositions by song, title and location on the YouTube site using its content management system. *Supra* at 11.

Fourth, YouTube attempts to hide behind purportedly “[c]omplex licensing and co-ownership arrangements” making it “near-impossibl[e]” to determine whether a particular video is authorized. But of the 900 works identified by the class plaintiffs as “works in suit,” only six are co-owned, and not one of those six has been the subject of a claim that it was authorized by a purported co-owner of the song. CS 144. Although U.S. law permits unilateral licensing by one co-owner *within the United States* in certain circumstances (Def. Mem. 49), that is not the law in most other countries of the world, where the joinder of *all* co-owners is required for a license. *See Nimmer on Copyright* § 17.07[B] (“in foreign jurisdictions... the consent of all of the joint owners is required in order to validate a license.”); *see also Patry on Copyright* § 24:7. Thus, any co-owner that had licensed a work for appearance on YouTube – which automatically makes videos available worldwide – would necessarily have obtained the consent of one of the class plaintiff music publishers.¹¹ Additionally, YouTube’s content management system was well-equipped to take complex licensing and ownership arrangements into account, but only when it suited YouTube. For example, it is beyond dispute that YouTube’s system was deployed to accommodate the rights of the “major” publishers. But YouTube simply chose to ignore other publisher rights because YouTube thought them too small to matter. *Supra* at 12; CS 241.

YouTube cannot play ostrich and assert that it is immune from any knowledge or awareness by raising hypothetical doubts about certain works’ authorization or ownership. The three cases defendants rely on for this conclusion, *Corbis* and *UMG II* and *CCBill*, do not

¹¹ Defendants also attempt to defeat the music infringement claims by pointing to the well-established practice of using subpublishers in various foreign territories, claiming that a foreign subpublisher *might* license a work for appearance on YouTube without the knowledge or consent of one of the class plaintiff music publishers (Def. Mem. 69), thus impairing YouTube’s ability to discern infringing and non-infringing content. But defendants cannot point to *one* instance where a clip asserted to be infringing here was, in fact, licensed to appear on YouTube by a subpublisher acting on behalf of one of the class plaintiffs without the knowledge or approval of the relevant Class Plaintiff. CS 156.

support the broad proposition for which defendants cite them, and are easily distinguishable. *See* Viacom Opp. Mem. at 31-32 and *supra* at n.10. Requiring “perfect knowledge” is entirely inconsistent with the legislative history and plain meaning of the statute, and would limit § 512(c) to a takedown notice scheme, even though that section goes much farther. The statutory standard is consistent with copyright law, *see* H.R. Rep. 105-551 (Part 2), at 53; S. Rep. 105-190, at 44). The fact finder must take into account all of the circumstances known or apparent to defendants at the time, which includes all the above evidence that defendants’ motion blithely ignores.

3. Fair use does not excuse YouTube’s responsibility under § 512(c)

YouTube’s argument about “debatable” fair or de minimis use claims with respect to certain videos (YouTube identifies no more than 15 claimed “debatable” videos out of 13,000 (Def. Mem. 53)) is not a basis for defendants to relieve themselves of any responsibility for the far more voluminous and obvious infringements that they know about, or are or could easily be identified to them through their own revenue-maximizing tools. Some of the examples defendants offer for the proposition that they cannot discern infringing and non-infringing content actually show the opposite: *Compare, e.g.*, video using Sound of Music film footage and song “My Favorite Things” but incorporating dirty lyrics, which defendants argue is a fair use (Def. Mem. 54, citing *Schapiro Ex. 200*), with *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981), where the Second Circuit rejected the fair use defense raised by the composers of a song which substituted dirty lyrics for “Boogie Woogie Bugle Boy of Company B.” 677 F.2d at 182.

The occasional “close question” raised by an alleged de minimis or “fair use” of copyrighted material may bear on the amount of statutory damages (*see* 17 U.S.C. § 504(c)(2)) but does not entitle them to DMCA protection categorically. The fair use inquiry looks not just to present harm to an existing market, but to harm threatening potential markets. *Am.*

Geophysical Union v. Texaco, Inc., 60 F.3d 913, 926-27 (2d Cir. 1994). Here, the harm to existing and potential markets is real, since providing “free” copies of songs users would otherwise pay to obtain in authorized form, or clips of key match footage which sports leagues like Premier League license for significant fees, harms plaintiffs’ markets to license those works. As the Third Circuit held in connection with denying a fair use defense for the alleged promotional use of film clips, a valuable market for licensing excerpts of longer works is harmed even where the excerpt does not convey the “heart of the work.” *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 202-03 (3d Cir. 2003). Here, where entire songs and valuable clip rights (which can and do capture key moments) are being infringed, an established market is being supplanted by defendants’ activity. *See id.*; *see also, e.g., U.S. v. ASCAP*, 599 F. Supp. 2d 415 (S.D.N.Y. 2009) (denying fair use, holding AT&T’s use of 10-30 second “previews” of songs on its website and mobile applications superseded the original making it likely to cause cognizable market harm); *Byrne v. BBC*, 132 F. Supp. 2d 229, 235-36 (S.D.N.Y. 2001) (rejecting defendant broadcasting company’s fair use defense for reproduction of entire copyrighted song during a news report). *See generally* 3 Nimmer at 13.05 [A][1][b]. In any event, if there were any doubt, the DMCA itself provides the appropriate mechanism by permitting the user who considers the upload to constitute a permissible fair use to challenge any takedown on that basis. That material will then be restored unless the complaining copyright owner files suit within 10 days. 17 U.S.C. § 512(g)(2)(C).

C. YouTube Has The Right And Ability To Control Infringing Activity And Benefited Financially From Infringing Content

Defendants’ ability to identify, track and manage the content uploaded to the YouTube site shows that defendants have “the right and ability to control the infringing activity on its system” necessary to disqualify them from the § 512 safe harbor. This statutory provision, based

on common law standards for vicarious liability, looks not just to formal indicia of control evidenced by contractual provisions, but “all relevant aspects of the relationship” between YouTube and its users, and would necessarily include the various processes and tools by which YouTube controls content on its site for profit-making purposes. *See* H.R. Rep. 105-551 (I) at 26. As early as the fall of 2006, YouTube implemented a variety of screening measures, such as fingerprinting technology and text-based filtering for favored content owners, tools that YouTube itself characterized as “industry standard.” CS 94. These tools were central to YouTube’s ability to manage the site for revenue-generating purposes, and included the commitment to identify potentially infringing content with an extremely high rate of accuracy (over 95%), to enable its content partners to “track” and “monetize” otherwise infringing content by “claiming” that content as their own, and garnering a share of advertising or other revenue associated with such “claimed” content on the site. CS 96. Every single video uploaded to YouTube is “pre-screened” by the YouTube content management system prior to “publication” for viewing and matched against a library of reference files. *Supra* at 7-8. When a “match” occurs, the system automatically “blocks,” “monetizes” or “tracks” the content (as designated by a rights holder and effectuated by YouTube itself), and these “policies” determine whether or not the video will ultimately be available for viewing. *Supra* at 9-11.

Defendants claim that the law does not require a provider “to adopt specific filtering technology and perform regular searches for infringing material.” (Def. Mem. 61-62, citing *UMG II*.) But no court has held that the steps and functionality *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 right and ability to control infringing content on its site. Indeed, such a position would amend the statute and erase the distinctions Congress made in

§ 504(c)(2). Notably, in their discussion of the “control” element (at 27-28), defendants neglect even to mention YouTube’s content management system. Yet in prior litigation the court held that YouTube would have “the right and ability to control” for purposes of the DMCA if the record showed that YouTube had the “technical capabilities needed to detect and prescreen allegedly infringing video[s].” *Tur v. YouTube*, 2007 WL 1893635, at *3. That language aptly describes YouTube’s systems, which according to YouTube provide it with the right and ability to prevent infringing content from “ever making its way onto YouTube.” (King Decl. ¶ 26.)

Defendants also suggest that the vast amount of material on YouTube would make any manual scanning of their site impossible, but YouTube does just that, “24 hours a day, 365 days a year” to remove inventory that it determines to be “inappropriate.” CS 16. YouTube relies on “Community Flagging” to help identify such “inappropriate content,” but decided after a brief period to eliminate that function for copyright infringements. Class SUF 7. In addition to community flagging, YouTube use text-based searches to undertake manual review for favored clients (“please just continue to scan the site for American Idol clips”), and has offered such tools to content partners willing to make deals. CS 94-96. The record demonstrates that defendants had no real difficulty in distinguishing between infringing and non-infringing material when they chose to do so. The manner in which defendants deliberately chose to deploy these systems is not evidence of defendants’ lack of control over the infringing activities at issue, but compelling proof of their intention to benefit from those infringements despite having the ability to control them. *See MGM Studios v. Grokster Ltd.*, 545 U.S. 913, 939 (2005) (failure to develop filtering tools evidence of intentional facilitation of infringement); *Aimster*, 252 F. Supp. 2d at 651 (deliberate system architecture evidence of unlawful intent); *Arista Records LLC v. Usenet.com*, 633 F. Supp. 2d 124, 153 (S.D.N.Y. 2009) (“[d]efendants’ failure to exercise their

clear ability to filter and limit infringement under such circumstances is strong circumstantial evidence of their intent to foster copyright infringement by their users”).

YouTube has the right and ability to control infringing activity, and receives “a financial benefit directly attributable to the infringing activity.” 17 U.S.C. § 512(c)(1)(B). 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 omitted)), and that “[t]here is no requirement that the draw be substantial.” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (quotation omitted). *See, e.g., Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1117 (9th Cir. 2007) (“the relevant inquiry is whether the infringing activity constitutes a draw for subscribers”) (quotation omitted).

YouTube repeatedly recognized that class plaintiffs’ unauthorized material was an important draw for viewers and increased YouTube’s value, thus constituting a direct financial benefit to YouTube. CS 160-67. YouTube also displays advertising in conjunction with infringing clips in a variety of locations, and routinely targets and displays content-specific advertising in conjunction with users’ searches for works owned by class plaintiffs. CS 167, 169. Projections of the value of sports content, such as Premier League’s soccer match clips, pointed to a growing dependence on the presence of that content. CS 116. The appeal of music on the site remained constant and users continually used the site to watch, listen to, and enjoy musical works. The catalogs of independent publishers, which contain some of the most popular songs in the world, could only increase that draw. *Supra* at 9. YouTube did not want to block such appealing content, even when it knew that particular songs were not licensed (hence the implementation of the “track” option). Maintaining music content on the site helped to keep YouTube’s viewership numbers robust, which in turn helped to sell advertising space on the site.

In the face of this evidence, defendants concoct a test for “direct financial benefit” which affords the safe harbor if YouTube “runs a legitimate business” and its revenue from infringing activity is not “different, in kind or degree” from revenue derived from non-infringing activity. (Def. Mem. 75.) No court has adopted such a test, and courts applying the DMCA’s “direct financial benefit” standard have held that it is the same as the similarly-worded common law standard. Viacom Mem. 55-56.

YouTube claims that the legislative history of the DMCA contains examples of the kinds of activities that would not qualify as a “direct financial benefit,” such as “where the infringer makes the same kind of payment as non-infringing users of the provider’s service.” But this *example* (one of many, all of which are consistent with the common law standard) has no application to a business like YouTube (or indeed to any internet business that relies on advertising as its main revenue source), which receives *no* payments from users *or* infringers, but receives advertising profits when viewers visit its site to watch the infringing videos it offers to the public. Defendants’ decision to monetize infringing content has nothing to do with the DMCA’s goal of protecting only “innocent” service providers. *ALS Scan*, 39 F.3d at 625.

Similarly, YouTube’s “legitimate business” requirement would protect a service so long as some material it hosts does not infringe. If that were the standard, no site would be accountable for infringing material within its control, and from which it draws undisputed direct financial benefits, so long as it also offers some non-infringing material.¹² That is not the structure or

¹² Even under its own “test” for direct financial benefit, YouTube fails. The advertisements on YouTube’s search pages are specifically targeted to users’ searches for unauthorized content – including class plaintiffs’ content – and are thereby targeted to the unauthorized content that is drawing the user. CS 164. Advertisements on *watch pages* of infringing videos are also specifically targeted to the infringing work. CS *id.* YouTube’s revenue from infringements is therefore “different in... degree” – when a user searches the YouTube website for unauthorized French Open clips, and YouTube serves up ads selling French Open tickets to that user,

the plain meaning of the statute. The specter that defendants conjure – that by applying the plain common law meaning any site offering user-generated content would be at risk if it depends on advertising for its revenue – does not exist, given the additional statutory requirement that the service have the right and ability to control the infringing activity, and given the particular facts of this case showing defendants’ intent, from the outset, to derive huge economic value from the presence of infringing material on the site.

YouTube argues that its “legitimate uses” are “vast” (Def. Mem. 74), but never quantifies the number of “authorized” videos or “legitimate uses” it claims to offer to the public. Any such analysis would necessarily need to consider not just the number of *views* of such videos (as opposed to the number of videos), but the search queries users conduct, because the value of the videos to YouTube is their ability to draw viewers. CS 25. The majority of YouTube’s advertising revenues have come from advertisements targeted to users’ searches for unlicensed premium content. CS 25, 167. That is far more than what is needed to establish its “direct financial benefit” from the infringing activity at issue, and certainly to defeat YouTube’s summary judgment motion.

D. YouTube Did Not Act Expeditiously To Stop The Infringing Activity It Knew Or Was Aware Of

Contrary to defendants assertion that they “responded expeditiously” as required by § 512(c)(1)(A)(iii) when they received notice of plaintiffs’ infringements, the undisputed evidence above shows that defendants did nothing to remove infringements of class plaintiffs’ works they knew or were aware of, choosing instead to wait for formal notice. CS 64-65; Class

YouTube is deriving *more* money from those ads because they are targeted to the very content – class plaintiffs’ unauthorized material – that YouTube knows its users are looking for. CS 167; Class SUF 41. YouTube could easily block such advertisements and the videos they targeted. CS 16.

SUF 17-18. Even when defendants received formal notifications from class plaintiffs, they did not “respond expeditiously” to remove the identified infringing material from the YouTube website. CS 64-67. The statute requires that takedown notices provide only “information reasonably sufficient to permit the service provider to locate the [infringing] material.” § 512(c)(3)(A)(iii). By identifying the infringed work and infringing instances of the work on YouTube, plaintiffs’ notices provided more than enough information to identify and locate the material where it resided on the website. But except for parties acceding to the terms it demanded, YouTube chose not to turn on their fingerprinting and text-based search tools to identify additional instances of the infringing material or prevent its repeated posting on the site.¹³ CS 33, 94. Instead, the CYC system that YouTube implemented requires a steady flow of unauthorized and infringing uploads, in order for content partners to “claim” that content, or where a content partner had no right to do so, to “track” it, which for class plaintiffs by definition meant it was unlicensed and infringing.

E. YouTube Has Not Implemented An Appropriate Repeat Infringer Policy

By refusing to turn on their fingerprinting and text-based search tools to identify repeated infringements of class plaintiff’s works on the YouTube website – tools which they instead used to profit from infringements – defendants failed to reasonably implement a repeat infringer policy under § 512(i)(1)(A). “[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 Aimster*, 252 F. Supp. 2d at 659 (“[a]dopting a repeat infringer policy and then purposely eviscerating any hope that such a policy could ever be carried out is not an ‘implementation’ as required by § 512(i).”). YouTube

¹³ Defendants admit that the “hashing” tool they did employ was ineffective in preventing even the slightest variation in the same material being reposted. CS 88.

deliberately denied information to class plaintiffs showing the repeated infringements of their works that YouTube's tools could, and in fact were, identifying, thereby encouraging such repeated infringements and preventing plaintiffs from being able to effectively control them. CS 16, 33. Defendants also present no evidence of a repeat infringer policy prior to March 2006.

F. YouTube Did Not Timely Comply With The Requirements Of Registering A Designated Agent To Receive Notifications Of Claimed Infringement

Defendants admit that they did not designate an agent to receive notifications of claimed infringement by identifying the agent to the U.S. Copyright Office, as required by § 512(c)(2)(A) and (B), prior to October 21, 2005, and therefore pursuant to that provision they have no entitlement, as a matter of law, to any safe harbor protection under § 512(c) for any infringing acts occurring prior to that date.

II. YouTube Is Not Entitled To Summary Judgment On Plaintiffs' Inducement Claims

YouTube's liability for inducement of infringement under *Grokster* also necessarily eliminates any safe harbor under the DMCA, since "inducement liability and the [DMCA] 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." *Columbia Pictures Indus. V. Fung*, 2009 U.S. Dist. LEXIS 122661, at *67-68 (C.D. Cal. Dec. 21, 2009). The same facts that prevent YouTube from defeating plaintiffs' inducement claim on summary judgment also defeat its DMCA safe harbor defense.

Compelling and extensive evidence – about which defendants are inexplicably silent – shows that YouTube's founders intended to exploit copyright infringing content on a massive scale from the outset, to quickly build a huge audience attracted to the unauthorized presence of sports, entertainment and music content, in order to sell the site for big money. CS 6-7, 29.

YouTube's founders joked about getting sued, and early emails that survive from that period unequivocally demonstrate their willingness to take a calculated risk of infringement liability given the enormous payoff they expected and received. CS 6. Their plan, from the outset, was to build traffic through infringing clips to achieve market dominance, and use that leverage to obtain licenses to exploit the same content they were infringing, giving copyright owners no alternative but to make a deal or face unremitting infringement. CS 6, 7, 29. YouTube designed a content management system that facilitates copyright infringement and depends on users uploading infringing clips for the music labels and other content partners to then "claim" them for advertising (while YouTube discourages takedowns). CS 96. It is difficult to imagine a clearer cut case of "facilitating" infringement than the development and implementation of tools specifically designed to maintain infringing content on the YouTube site. The evidence shows defendants "acted with a purpose to cause copyright violations," and is a paradigm of copyright inducement liability. *MGM Studios v. Grokster Ltd.*, 545 U.S. 913, 938 (2005).

Defendants protest that they did not expressly solicit users to upload infringing material. YT Br. 85-86. But that is not the standard. In holding Grokster liable *despite the fact that there was no evidence that Grokster sent messages to users*, the Supreme Court held that evidence of solicitation is "the preeminent but not the only way of showing that active steps were taken," and further that "clear expression *or other affirmative steps*" is sufficient to show inducement. *Grokster*, 545 U.S. at 937-38 (emphasis added). *See also Insituform Techns., Inc. v. CAT Contracting, Inc.*, 385 F.3d 1360, 1377-78 (Fed. Cir. 2004). Here, the evidence goes beyond "mere knowledge" and shows that defendants acted with purpose by intentionally facilitating and refusing to remove infringements in order to increase the value of their site, thus encouraging

users to continue to upload, and view, infringing videos with impunity. CS 6-7, 16. Users of the site understood this, often bragging about their copyright violations. CS 7.

Defendants also contend that, unlike Grokster, YouTube is “filled with non-infringing materials.” Def. Mem. 89. This is not only irrelevant (the Supreme Court reversed in *Grokster* precisely because of this issue), but defendants never attempt to quantify this claim, nor could they given their own internal statements and analyses showing that infringing content, including class plaintiffs’ content, was the primary driver of YouTube’s popularity, and its potential and actual earnings.¹⁴ In this sense, YouTube’s revenue model is exactly the same as Grokster’s: it depends on “high-volume use, which the record shows is infringing.” *Grokster*, 545 U.S. at 940. Nothing in *Grokster* suggests that evidence of inducement must be limited to the specific infringements for which damages are being claimed. *Id.* at n.13 (“[i]nducement liability goes beyond” “encouraging a particular consumer to infringe a copyright”).

Defendants also insist that they cannot be liable for inducement because they “protect the interests of copyright holders” (Def. Mem. 91), but the “protections” they developed were either cosmetic changes that did nothing to reduce the amount of infringements on the site, or, if they were effective in identifying content, were denied to plaintiffs and instead used by defendants to profit from infringing activity. CS 94-96.

Defendants have created and distributed a system that fosters infringement, including features that identify and track infringing content, and distribution of such a system “can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe,” which, as the record shows, YouTube most certainly did.

¹⁴ The Walk declaration cherry picks certain public service or political campaign videos with no attempt at quantification. YouTube’s statements about the number of “legitimate” videos on the site are irrelevant given the far broader viewership of infringing videos and the admissions that users *came* to the site to search for unauthorized premium content. CS 212-21; 6.

Grokster, 545 U.S. at 940 n. 13. YouTube intentionally used infringing content to build as big an audience as it could as quickly as it could, an audience that defendants are now selling to “top advertisers” (and which Google thought was worth over \$1.7 billion in 2006).

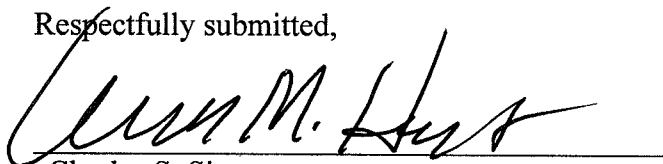
Although defendants claim that the YouTube site was conceived as a “hub of short, personal videos” (Def. Mem. 85), even if that was ever a genuine goal of its founders it was quickly abandoned (by them, by YouTube, and by Google) when it became clear that the only way they could profit from a “quick” sale and maximize their advertising revenues was by building up an audience through the draw of infringing content. CS 6, 25.¹⁵

CONCLUSION

For all the foregoing reasons, defendants’ motion for summary judgment should be denied, and class plaintiffs’ motion for partial summary judgment should be granted.

Dated: New York, New York
April 30, 2010

Respectfully submitted,



Charles S. Sims
William M. Hart
Noah Siskind Gitterman
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
Telephone: (212) 969-3000
Email: csims@proskauer.com

-and-

Max W. Berger
John C. Browne
BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
1285 Avenue of the Americas

¹⁵ None of the relief sought in this case will affect non-infringing uses of the YouTube website.

New York, NY 10019
Telephone: (212) 554-1400
Email: johnb@blbglaw.com
*Attorneys For The Football Association
Premier League Limited, Bourne Co., Murbo
Music Publishing, Inc., Cherry Lane Music
Publishing Company, Inc., Robert Tur d/b/a
Los Angeles News Service, X-Ray Dog Music,
Inc., and Fédération Française de Tennis and
Proposed Class Counsel For The Prospective
Class*

Louis M. Solomon
Hal S. Shaftel
CADWALADER, WICKERSHAM & TAFT,
LLP
One World Financial Center
New York, NY 10281
Telephone: (212) 504-6680
louis.solomon@cwt.com
*Attorneys For The Football Association
Premier League Limited*

Daniel Girard
Aaron Sheanin
Christina Connolly Sharp
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108

-and-

Gerald E. Martin
Laurel Johnston
BARRETT JOHNSTON & PARSLEY
217 Second Avenue North
Nashville, TN 37201

-and-

Kevin Doherty
BURR & FORMAN LLP
700 Two American Center
3102 West End Avenue
Nashville, TN 37203
Attorneys for Cal IV Entertainment LLC

David S. Stellings
Annika K. Martin
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10017-2024
Tel. (212) 355-9500
Fax. (212) 355-9592

-and-

Jacqueline Charlesworth
James E. Hough
MORRISON & FOERSTER
1290 Avenue of the Americas
New York, New York 10104
Phone (212) 468-8158
Facsimile (212) 468-7900
*Attorneys for the National Music Publishers'
Association, Rodgers & Hammerstein
Organization, Stage Three Music (US), Inc.,
Edward B. Marks Music Company, Freddy
Bienstock Music Company d/b/a Bienstock
Publishing Company, and Alley Music
Corporation*

Christopher Lovell
Christopher M. McGrath
LOVELL STEWART HALEBIAN LLP
61 Broadway, Suite 501
New York, New York 10110
Telephone: (212) 608-1900
Facsimile: (212) 719-4677

-and-

Jeffrey L. Graubart
LAW OFFICES OF JEFFREY L.
GRAUBART
350 West Colorado Boulevard, Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

-and-

Steve D'Onofrio
5335 Wisconsin Avenue, N.W. Suite 950
Washington, D.C. 20015
Telephone: (202) 686-2872
Facsimile: (202) 686-2875
*Attorneys for The Music Force Media Group
LLC, The Music Force LLC, and Sin-Drome
Records, Ltd.*