

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE FOOTBALL ASSOCIATION PREMIER	:	
LEAGUE LIMITED, BOURNE CO. (together	:	
with its affiliate MURBO MUSIC PUBLISHING,	:	
INC.), CHERRY LANE MUSIC PUBLISHING	:	07 Civ. 3582 (LLS)
COMPANY, INC., CAL IV ENTERTAINMENT	:	(related case no. 07 Civ. 2103 (LLS),
LLC, ROBERT TUR d/b/a LOS ANGELES	:	the "Viacom action")
NEWS SERVICE, NATIONAL MUSIC	:	
PUBLISHERS' ASSOCIATION, THE	:	
RODGERS & HAMMERSTEIN	:	<u>ECF CASE</u>
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		

**REPLY MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT DISMISSING DEFENDANTS' FIRST  
DEFENSE (DMCA SAFE HARBOR DEFENSE)**

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- “Class SJ Br.” refers to the Memorandum of Law in Support of Class Plaintiffs’ Motion for Partial Summary Judgment Dismissing Defendants’ First Defense (DMCA Safe Harbor Defense).
- “Class Opp. Br.” refers to Class Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment.
- “Viacom Opp. Br.” refers to Viacom’s Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment.
- “Def. SJ Br.” refers to the Memorandum of Law in Support of Defendants’ Motion for Summary Judgment.
- “Def Opp. Br.” refers to Defendants’ Opposition to Plaintiffs’ Motions for Partial Summary Judgment.
- “CSUF” refers to Class Plaintiffs’ Statement of Uncontroverted Material Facts in Support of Their Motion for Partial Summary Judgment.
- “CCSUF” refers to Defendants’ Counterstatement to Class Plaintiffs’ Statement of Uncontroverted Material Facts in Support of Their Motion for Partial Summary Judgment.
- “VSUF” refers to Viacom’s Statement of Uncontroverted Material Facts in Support of Their Motion For Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense.
- “CVSUF” refers to YouTube’s Counterstatement to Viacom’s Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense.
- “CCS” refers to Class Plaintiffs’ Counterstatement of Controverted Material Facts in Opposition to Defendants’ Motion for Summary Judgment.
- “Chen Decl.” refers to the Declaration of Steve Chen in Support of Defendants’ Opposition to Plaintiffs’ Motions for Partial Summary Judgment, filed April 30, 2010.
- “Figueira Ex. \_\_\_” refers to the sequential exhibits to the Declaration of Elizabeth Anne Figueira in Support of Class Plaintiffs’ Motion for Partial Summary Judgment, the Declaration of Elizabeth Anne Figueira in Opposition to Defendants’ Motion for Summary Judgment, and the Reply Declaration of Elizabeth Anne Figueira in Support of Class Plaintiffs’ Motion for Partial Summary Judgment.

- “Gitterman Opp. Ex. \_\_\_” refers to the exhibits to the Declaration of Noah Siskind Gitterman in Support of Class Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, filed April 30, 2010.
- “Hohengarten Ex. \_\_\_” refers to the exhibits to the Declaration of William M. Hohengarten in Support of Viacom’s Motion for Partial Summary Judgment.
- “B. Hurley Opp. Decl.” refers to the Declaration of Brent Hurley in Support of Defendants’ Opposition to Plaintiffs’ Motions for Partial Summary Judgment, filed April 30, 2010.
- “Hurley Opening Decl.” refers to the Declaration of Chad Hurley in Support of Defendants’ Motion for Summary Judgment, filed March 5, 2010.
- “King Opening Decl.” refers to the Declaration of David King in Support of Defendants’ Motion for Summary Judgment, filed March 5, 2010.
- “Levine Opening Decl.” refers to the Declaration of Zahavah Levine in Support of Defendants’ Motion for Summary Judgment, files March 5, 2010.
- “Maxcy Opening Decl.” refers to the Declaration of Christopher Maxcy in Support of Defendants’ Motion for Summary Judgment, filed March 5, 2010.
- “Schapiro Opp. Ex. \_\_\_” refers to the exhibits to the Declaration of Andrew Schapiro in Support of Defendants’ Opposition to Plaintiffs’ Motions to Partial Summary Judgment and Defendants’ Objections to Evidence and Motion to Strike Material from Viacom’s Summary Judgment Submissions and Putative Class Plaintiffs’ Rule 56.1 Statement.

## I. Overview

Defendants' after-the-fact attempt to recast their highly incriminating internal communications only highlights the degree to which they fall outside the DMCA safe harbor, and fails to create a genuine issue of material fact. Those communications establish that YouTube (and later, Google) achieved their vast user base by attracting and relying on readily identifiable "premium" content that defendants knew was unauthorized and had the ability to remove. The evidence also proves that defendants took a calculated risk to continue exploiting the value of unauthorized premium content on YouTube, while using the threat of continued infringement to induce licenses from major content owners. Faced with this evidence, defendants urge a highly artificial interpretation of "knowledge" and "awareness" under the DMCA that drains those concepts of meaning or effect. At the same time, they simply ignore the proof that they had specific, particularized knowledge of class plaintiffs' unauthorized content, and pervasive control over that content, which they chose to leave on the site rather than remove. Recognizing that infringing premium content was the "draw" that built their audience, and that they used it to run context-specific advertising on the site, defendants downplay those benefits with a gerrymandered "test" for financial benefit that has no precedent or basis in the law.

Defendants also resort to empty hyperbole, claiming that holding them responsible for their infringing acts would threaten the existence of socially valuable websites. But none of the examples of allegedly socially redeeming political speech or creative amateur content that defendants now claim is the *raison d'être* of YouTube is at issue in this case. Defendants are ineligible for the DMCA's safe harbor because they knew viewers were drawn to YouTube to watch unauthorized premium content – including class plaintiffs' content – that they had the means to identify and remove, but chose to keep that content on the site to build YouTube's audience and value. The DMCA does not protect such behavior.

## II. Defendants' Parsing Of Their Contemporaneous Admissions Does Not Create Any Disputed Issue Of Material Fact

Defendants' argument that the incriminating emails written at the time by YouTube's founders, and later by Google executives, do not mean what they say is groundless. The damning email conversation between the founders in September 2005 discussing the impact of removing "the copyright infringement stuff" cannot be avoided by means of a declaration that merely denies what it says. *Hohengarten Ex. 215*. Although we were told that Mr. Chen could not sit for an oral deposition for medical reasons, he nonetheless now claims in a declaration that when he wrote "if remove all that content. we go from 100,000 views in a day down to about 20,000 views or maybe even lower," he was referring to "stupidvideos" and not the "copyright infringing stuff" to which he and his co-founders expressly refer in that very email and in the preceding and responding emails. *Id.* Defendants cannot create a genuine dispute through an after-the-fact declaration 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) (claimant's "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)).

Similarly baseless is defendants' claim that a September 7, 2005 email from Mr. Chen to Sequoia Capital director Roelof Botha and Mr. Hurley and Mr. Karim addressing the copyright policies of YouTube has nothing to do with either copyrighted content or YouTube. *Figueira Ex. 63*. Mr. Chen now asserts that he was talking only about "racy" videos and the website Flickr. *Chen Decl.* ¶ 2. But defendants cannot avoid Mr. Chen's admission that YouTube's content



removal policies for “inappropriate *or copyrighted*” content were structured “*similar to*” the Flickr website (which allows users to view photos) in order to create the “perception” of concern, while still leaving “truckloads” of “adult *and copyrighted content*” on the site. Figueira Ex. 63. The email addresses both YouTube and copyrighted content, and is admissible to show improper purpose. *See, e.g., MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 925 (2005) (“StreamCast developed promotional materials to market its service as the best Napster alternative.”).

As Mr. Chen describes in that email, YouTube did in fact remove copyrighted content “in varying degrees.” Figueira Ex. 63. But far from showing its “good faith,” that policy shows just the opposite: that YouTube was capable of controlling infringements on its site *when it wanted to*. Defendants were willing to implement a “lax” policy of removing “whole movies” precisely because, as Mr. Karim explained, “I don’t think our views will decrease at all,” *but they were not willing to remove* “everything else” “including sports, commercials, news, etc.” that was just as blatantly infringing but that they depended on for viewers. CVSUF 54; Figueira Exs. 47; CCS 6, 32. *See also* Figueira Ex. 62 (“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 comdey [sic] shows for now.*”) (emphasis added); Figueira Ex. 210 (“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.*”) (emphasis added).

The significance of Mr. Chen’s January 25, 2006 statement about using tactics “however evil” to build YouTube’s user base is obvious and, together with other communications at the time, demonstrates the founders’ goal to build up an audience as quickly as possible to “sell out quickly.” Figueira Exs. 14, 44 (Video), 49; *see also* CSUF 9; CCS 6-7, 14. The founders, YouTube employees, and Google executives knew that this goal would be met only with

premium content, not “personal videos.” CCS 6; CCSUF 4-5, 15; *see, e.g.*, Figueira Exs. 221 (“users are searching [...] primarily for premium content”) and 229 (“probably 75-80% of our views come from copyrighted material... . Original content... is just such a small percentage”). Google’s CEO Eric Schmidt left no doubt about this when asked in a 2009 earnings call about monetizing the “non-professional” “inventory” on YouTube: “It has not been our focus. It is probably possible to do so, but the fact of the matter is that the majority of the non-professional content has a relatively small number of viewers.” Figueira Ex. 142. Any early statements the founders now point to about the hypothetical value of “personal videos” are conclusively refuted by their undisputed actions; although Mr. Hurley suggested early on that YouTube limit the content of their site to “video [...] about YOU,” defendants made a deliberate decision *not to do so*. Hurley Opening Decl. ¶ 8; Figueira Ex. 15; CCSUF 4-5, 15; CVSUF 95-96, 99, 170.<sup>1</sup>

Defendants also cannot now evade the consequences of their internal studies and estimates quantifying the amount of unlicensed premium material on their site by claiming that these estimates, concluding that as much as 80% of the content on YouTube was “copyrighted,” were simply guesswork. Def. Opp. Br. 14, 93-94. Defendants relied on these estimates to operate their business, and they accordingly are revealing of defendants’ “motive or intent for behavior...[or] notice or knowledge.” *Arista Records LLC v. Lime Group LLC*, 2010 WL 1914816, at \*12 (S.D.N.Y. May 11, 2010); *see also MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 974 (C.D. Cal. 2006). Equally baseless is defendants’ attempt to run away from Credit Suisse’s analysis, which concluded that 60% of the videos on YouTube were “premium”

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<sup>1</sup> Defendants’ aggressive pursuit of licenses from major media further evidences their knowledge that premium content, not amateur personal content, drives the site. Figueira Ex. 72 (listing YouTube’s “Commercial Commitments” including ██████████ to “Movie/TV Industry,” ██████████ to “Music Labels,” ██████████ to “Music Publishers”); Figueira Ex. 131 (Targets for Tier 1 and Tier 2 video content partners (Premier League and FFT are Tier 1)); Figueira Ex. 41.

“copyrighted” videos, *and that Google expected to license only 10% of them.* CVSUF 174. The analysis goes to the core issues for which Credit Suisse was retained – evaluating the fairness of the acquisition price – and shows that Google knew that YouTube’s growth depended on unlicensed copyrighted content. Figueira Exs. 108, 176, 245; CVSUF 170-182.<sup>2</sup> Later analyses, the accuracy of which defendants do not dispute, confirmed that users were drawn to YouTube to search for unlicensed premium content. CCSUF 16; CVSUF 195, 200; Figueira Exs. 24, 66.<sup>3</sup>

Google’s unvarnished view of YouTube as a rogue enabler of pirated content at the time it was attempting to compete with YouTube also clearly evidences Google’s state of mind, including its knowledge of the importance of infringement to the success of YouTube. Trying to avoid that conclusion, defendants claim that the executives responsible for making these statements (who ran the far less successful Google Video site) were excluded from the YouTube acquisition, and that those involved in the acquisition did not see these statements. Def. Opp. Br. 91-92. But, these employee statements are imputed to Google as a matter of law. *Lime Group*, 2010 WL 1914816 at \*11 (“email chains...written in whole or in part by LW employees, during the course of their employment with LW...constitute direct or vicarious admissions by Defendants”). And, those involved in the acquisition saw and repeated the statements. *See, e.g.*, Figueira Ex. 23 (email to CEO Eric Schmidt stating, “a large part of [YouTube’s] traffic is from pirated content [...] we are comparing our ‘legal traffic’ to their mix of traffic from legal and illegal content”); Hohengarten Ex. 64 (email from Google senior vice president Jonathan

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<sup>2</sup> Defendants criticize plaintiffs for not submitting expert statistical evidence about the amount of infringement. Def. Opp. Br. 96. But defendants’ admissions are more than sufficient.

<sup>3</sup> To the extent defendants now claim that identifying such content is difficult, Google’s CEO put that to rest when he told Google investors, “you can tell professional quality video from user-generated one. It is easy enough. You can tell the difference between the two.” Figueira Ex. 142.

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”); Mr. Rosenberg and Mr. Drummond were part of the Executive Management Group involved in the acquisition (Hohengarten Ex. 327 at 16, Hohengarten Ex. 350 at 12); *see also* CVSUF 160ff.

### **III. Defendants’ Knowledge And Awareness Of The Infringing Activities On YouTube**

Nowhere have class plaintiffs (or Viacom plaintiffs) sought to impose any duty to seek out infringing activity about which defendants have no knowledge or awareness. But, as the statute makes clear, once defendants possess such knowledge or awareness – *either* as a result of a formal DMCA notice *or* by other means independent of any such formal notice (*see* 17 U.S.C. § 512(c)(1)(A)(i-ii)) – they have a duty to “check further” and take practicable steps. H. R. Rep. 105-551 (II) at 26.

Thus when YouTube actively searches its site for Premier League match footage to make projections of the value of that footage in advance of a bid for a license, or when its own content identification tools identify and “track” specific content for which it lacks license authority, defendants have actual knowledge of infringing activities on their site. CCSUF 21, 24, 32; CCS 96. *See Lime Group*, 2010 WL 1914816, at \*18 (searches for infringing content by defendant); *Grokster* 454 F. Supp. 2d. at 987. Defendants are also charged with knowledge because they deployed their content identification tools, including text-based searches and fingerprinting, for favored content owners, but refused to deploy those same tools on class plaintiffs’ behalf even though they knew class plaintiffs’ content was being infringed (*see infra*, 15). Defendants’ argument that they are not obligated to do “proactive monitoring” (Def. Opp. Br. 35) misses the mark, because “[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); *see also* H.R. Rep

105-551(II) at 57 (service provider “would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement”). When defendants know certain content is being infringed (as they do with respect to class plaintiffs’ sports, music and professional entertainment content, see Class SJ Br. 8-14, 26), they cannot selectively deploy content identification tools so as to blind themselves to specific instances of those infringements.

Defendants’ argument that only knowledge specifically tied to individually identified videos at individually identified locations on the YouTube website can ever constitute “knowledge or awareness” of infringing activity under the DMCA is inconsistent with the statute’s design and provisions. The statute nowhere states that “knowledge or awareness” of infringing activity are so limited, or that liability can be based only on knowledge from a takedown notice and not from any other source. Had Congress intended to qualify the knowledge and awareness prongs of subsections 512(c)(1)(A)(i) and (ii) by requiring the sort of information set forth in a takedown notice under subsection 512(c)(3), it would (and should) have done so. *O&G Indus., Inc. v. Nat’l P.R. Passenger Corp.*, 537 F.3d 153, 161 (2d Cir. 2008) (“if Congress intended [a statute] to apply only to [certain] claims, it would have included such qualifying language”); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir. 2003) (“[i]t is not our place as jurists to supply that which is omitted by the legislature”). The common law of contributory liability on which these provisions are based certainly imposes no such limitation, in an Internet environment or otherwise.<sup>4</sup>

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<sup>4</sup> See *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 154 (S.D.N.Y. 2009) (“knowledge of specific infringements is not required to support a finding of contributory infringement.”); *Arista Records, Inc. v. Flea World, Inc.*, 2006 WL 842883, at \*14 (D.N.J. Mar. 31, 2006) (“[d]efendants are incorrect that Plaintiffs are required to prove that Defendants had knowledge of ‘specific infringement(s)’”).

Defendants' argument also overlooks the fact that their "tracking" option for sound recordings that embody unlicensed musical compositions gives them precisely detailed information showing the name of the musical composition and its exact location on the site. Class SJ Br. 29-30; Class Opp. Br. 11-14, 18.<sup>5</sup> When defendants launched their audio fingerprinting tools for the major labels (who had agreed to license their catalogs), defendants knew that the labels could not authorize publishing rights to the musical compositions underlying many of their sound recordings. Yet, instead of taking down works that lacked publishing authority as soon as they were identified by name and location through the fingerprinting system, defendants enabled the "track" option for the songs, thereby allowing them to continue to draw viewers to YouTube. Class Opp. Br. 11-14, 25-26. At the same time, YouTube told small independent publishers that it had no interest in negotiating licenses with them. CCSUF 25.

Defendants contend that, even if their system did identify unlicensed musical works, that does not prove that any of plaintiffs' works in suit were so identified (Def. Opp. Br. 45-46). That is refuted by the record: defendants had at hand fingerprints for over *6 million* songs through the Audible Magic database (Figueira Ex. 267 at ¶ 10; CCS 95), and class plaintiffs' works in suit were in fact identified by defendants' system, since it is undisputed that defendants tied advertising to specific works-in-suit by name and location. Figueira Exs. 35, 113, 183-187; CCSUF 36.<sup>6</sup> YouTube's additional complaint that Audible Magic did not have sufficient information regarding publishers is no excuse, particularly when defendants have proceeded to

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<sup>5</sup> Defendants' text-based content identification tools also specifically identified class plaintiffs' content for profit-making purposes. *See, e.g.*, Figueira Ex. 185 (user search for "Roland Garros" videos results in advertisements from third parties seeking to sell tickets to the tournament); Gitterman Opp. Decl. Ex. 15 (tennis advertisements keyed to unauthorized Roland Garros footage); CCSUF 21-22, 41 (searches for Premier League footage).

<sup>6</sup> Defendants argument also reverses the burden of proof. Class Opp. Br. 14 n. 9.

exploit the songs after their own content identification systems flagged them as unlicensed. *See* Class Opp. Br. 12-13, 25-26.<sup>7</sup> Defendants' argument that "the DMCA obviates the need for service providers to engage in rights clearing," even when defendants know that the musical compositions they are exploiting are unlicensed (Def. Opp. Br. 42), ignores both the DMCA (e.g., § 512(c)(1)(A)(i) or (ii)) and basic copyright law. Once defendants have knowledge or awareness of the infringing activity, or the right and ability to control it coupled with a direct financial benefit, they need to remove it or lose any entitlement to the § 512(c) safe harbor. Nothing in the DMCA suggests that, once on notice, defendants can continue to infringe because they did not receive a takedown notice or because securing the proper licenses might be hard work.<sup>8</sup> That is not the law. *Costello Pub. Co. v. Rotelle*, 670 F.2d 1035, 1043-44 (D.C. Cir. 1981) ("the copyright holder may proceed against any member of the chain of distribution" notwithstanding defendants' claim that a non-party was responsible for the requisite license).

Nor can defendants avoid their knowledge and awareness of infringing activities on the contention that a host of other factors makes it difficult to determine with certainty that an unauthorized clip is ever an infringement. Def. Opp. Br. 35-36. However daunting defendants make those factors appear to be, it is beyond dispute that defendants identified unauthorized postings when it suited their revenue-maximizing purposes (CCSUF 21-22, 36-38, 41), and that out of more than 13,000 infringing clips in issue in this case, *not one* was authorized to be on

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<sup>7</sup> Defendants assert that Audible Magic cannot help them discern "cover" recordings (Def. Opp. Br. 46 n.31). Whether or not true: 1) defendants' knowledge of unlicensed non-cover uses disqualifies them from the safe harbor; and 2) defendants represented to major labels and publishers [REDACTED] (see *Figueira Ex. 322* (EMI Agreement, paras. 1.16 and 1.19)).

<sup>8</sup> Defendants also ignore that YouTube obtained the requisite licenses directly from a number of major music publishers, as well as through foreign rights societies in countries like the U.K. and Germany, when it was in its interest to do so. *Maxcy Opening Decl.* ¶ 9; *Figueira Exs.* 163, 165.

YouTube by a co-owner or subpublisher or by anyone else. CCS 136-144, 156. Defendants also cite no evidence that any class plaintiff ever uploaded a work-in-suit to YouTube; no evidence that any class plaintiff “allowed” unauthorized content to remain on YouTube; no evidence that any class plaintiff ever “conceal[ed] the fact that [a] video was uploaded with the authorization of the content owner”; and no support other than their own inadmissible speculations that such a practice, if it happened at all, was “frequent.” CCSUF 4; CCS 206, 208.<sup>9</sup> If the parade of doubts and cavils that defendants press means what they say, then defendants could *never* have knowledge or awareness of any infringement, and no further duties to take infringements down, absent a formal takedown notice. Def. Opp. Br. 32-33. That may be the statute defendants believe preferable, but it is not how the DMCA is written. Knowledge or awareness need not be perfect for defendants to be charged with the duty to use available tools to avoid infringement. *See e.g.*, H. R. Rep 105-551(II) at 26 (“[o]nce one becomes aware of such information, however, one may have an obligation to check further.”).

Defendants do not even respond adequately to takedown notices. CSUF 18; Class SJ Br. 29 (citing *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619 (4th Cir. 2001)). Defendants argue that *ALS Scan* is distinguishable because the defendant there did nothing in response to a takedown notice. But, like YouTube, the defendant in *ALS Scan* agreed to remove only “individual infringing items” if specifically identified in a notice. *ALS Scan*, 239 F.3d at 621. The court rejected this policy, finding that a notice is sufficient to trigger the defendant’s duty to locate and remove infringing material even if *no* infringements are identified with that level of specificity. *Id.* at 624. YouTube thus cannot shirk its responsibility under the statute by

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<sup>9</sup> If defendants had made available their content identification tools equally to class plaintiffs, instead of using them to induce licenses, there would not have been even a hypothetical question about what was or was not authorized.



responding to notices only by removing those videos that a content owner individually identifies: “the requirements [for a notice] are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.” *Id.* at 625. When a class plaintiff goes so far as to provide the name of a work *and* a specific example of a video on the YouTube site containing an infringing copy of that work, defendants have more than “reasonably sufficient” information to locate (at the very least) other copies of the work already on their site. § 512(c)(3)(A)(iii).<sup>10</sup> Certainly, they must refrain from benefiting financially from such works, such as through advertising. *Figueira Ex. 185*; *CCSUF 41*.

#### **IV. Defendants’ Control Extends Far Beyond Their Ability To Remove Content**

Defendants’ “right and ability to control” infringing content on the YouTube site extends beyond “an ability to block or remove access to materials posted on its website,” and is evident by more than just their decision to implement and then discontinue community flagging for copyright infringement.<sup>11</sup> *Def. Opp. Br. 48-53*. The degree of control over infringing activity exercised by defendants also exceeds that discussed in the California district court cases on which they rely, e.g., *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1114 (C.D. Cal. 2009) (“*UMG II*”). *See Class SJ Br. 26-30*. Unlike *UMG II*, but consistent with *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177 (C.D. Cal. 2002), which

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<sup>10</sup> Defendants admit that “most of the clips in suit” were subject to takedown notices. *Def. SJ Br. 32 n.9*.

<sup>11</sup> The fact that defendants received communications from users about infringements not only through their aborted community flagging feature (*VSUF 71*) but through direct email communications as well as comments and descriptions attached to specific videos also establishes defendants’ awareness of infringing activity. *CSUF 7*; *CCS 7*; *Gitterman Opp. Ex. 3*. *See Lime Group*, 2010 WL 1914816, at \*17, where Judge Wood ruled that the defendant’s awareness of infringing activity was evidenced in part by informal user communications about infringements.

*UMG II* cites with approval, defendants here “prescreen” content, remove “identical” videos from users’ searches, and give advice to users. CCSUF 6, 24, 39.

Although *UMG II* did not impose a duty to adopt fingerprinting technologies, here defendants’ control is evidenced by the tools *they already use to monetize* content on the site, but refused to make available, absent concessions, to mitigate infringements, including:

- the use of fingerprinting to identify and “track” unlicensed musical compositions so that they remain on YouTube (Class SJ Br. 19, 27);
- the use of text-based searches to find content for favored content partners, and to make contextual associations between unauthorized content and advertising, but their decision not to use the same capabilities to mitigate infringement of class plaintiffs’ works (Class SJ Br. 18, 29-30; *see also infra*, 17-18);<sup>12</sup> and
- the screening out of infringing content on certain third party media platforms to which they syndicated YouTube’s content in exchange for a monthly fee (for example, Verizon Wireless mobile phones) but not on the main website. Hohengarten Ex. 167 at Exs. B, D.

Defendants assert that the safe harbor cannot be “conditioned” on a duty to police their site for infringement. Def. Opp. Br. 50. But even if that were true (and it is not, at least for infringements about which defendants are already aware, *see supra*, 6-10), the argument misses the point – defendants already “police” their site by pinpoint control over their inventory of audiovisual content so they can profit from it. Once defendants choose to engage in this level of control over their content for profit, the DMCA obligates them to use those same tools to avoid profiting from *infringements* – an obligation defendants have sought to avoid precisely because of the admitted value of that content to the site.

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<sup>12</sup> YouTube’s claim that its text-based tools are limited to primitive searches that could potentially yield false positives is refuted by defendants’ ability to make sophisticated connections between content and advertising. *See, e.g.*, Figueira Ex. 185 (search for “Roland Garros” results in advertisements from third parties seeking to sell tickets to the French Tennis tournament). Defendants regarded text-based identification tools as “industry standard” at least as early as March 2007. [REDACTED]

## V. Defendants' "Test" For Financial Benefit Has No Basis In Law

Defendants' argument that "direct financial benefit" does not have its accepted common law meaning under the DMCA has already been rejected by the 9th Circuit, and is at odds with the legislative history of the DMCA. Class Opp. Br. 28-29. All that need be proved is that the infringing activity is a "draw" for users, something defendants' own admissions establish.

*Ellison v. Robertson*, 357 F.3d 1072, 1078-1079 (9th Cir. 2004) (citing, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-264 (9th Cir. 1996)); *see, e.g.*, Figueira Ex. 22 (recommending that [REDACTED]); Figueira Ex. 189 ("good news is that fingerprinting works [...] bad news [...] the top 1000 music videos is probably 700-800 copyrighted").

Ignoring the case law and the plain statutory language, defendants argue that the DMCA rejected the "draw" test for financial benefit, and that the meaning of direct financial benefit under the DMCA is limited to certain examples set out in the House Report. Def. Opp. Br. 54. But as defendants acknowledge elsewhere in their brief with respect to another section of the House Report, "nothing in this legislative history suggests that these examples were meant to be exhaustive." *Id.* at 28, n.11. And the examples they cite – that there is no direct financial benefit where "the infringer makes the same kind of payment as non-infringing users" such as "one-time set up fees" or fees based on "connect time" to the service – simply have no application to a "global media platform" like YouTube, which does not charge users a fee but instead derives revenues from advertising. CSUF 35-38, 40; Class Opp. Br. 28-30.<sup>13</sup>

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<sup>13</sup> Defendants assert that the "draw" test "cannot be squared" with the examples in the House Report. Def. Opp. Br. 54. But there is no inconsistency. The House Report suggests that in the absence of some link between the benefit and the infringing content, such as a differential payment from infringers, the direct financial benefit test is not met. However, where no payments are made by users (whether infringers or not), the case law shows that the causal

YouTube contends that the “draw” test would disqualify “any revenue model that a legitimate service provider” might use. Def. Opp. Br. 55. But this ignores that § 512(c)(1)(B) has two components: service providers are ineligible for the safe harbor only if they derive a financial benefit from the infringing activity *and* have control over it. It also ignores that here, users are not merely coming to a site that just happens to have some infringing content on it – defendants’ own analyses show that users are primarily drawn to YouTube precisely *because* there is infringing content on it. Figueira Ex. 4 (“[t]he most popular queries are for [...] Music, Movies, TV, Celebrities, and Sports”); Figueira Ex. 62 (“we’ll leave music videos, news clips, and clips of comedy [sic] shows for now.”) Defendants here have also tied advertising to specific infringing videos. CSUF 41; CCS 164; Figueira Exs. 35, 113.

## VI. Inducement

Although class plaintiffs have not sought summary judgment on their inducement claims, proof that defendants induced infringement is fatal to safe harbor protection under the DMCA. Viacom Opp. Br. 23. There should be no genuine dispute about the applicable legal standard: offering 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.” *Grokster*, 545 U.S. at 937 (emphasis added).<sup>14</sup> In remarkably similar circumstances, the court in *Lime Group* granted summary judgment finding inducement liability, where defendants in that case, as here:

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relationship can be established in other ways. *Fonovisa*, 76 F.3d at 263 (the financial benefit need not be tied directly to sales of infringing goods); *Lime Group*, 2010 WL 1914816, at \*24, citing *Flea World*, 2006 WL 842883, at \*12 (financial benefit “may also be established by evidence showing that users are attracted to a defendants’ product because it enables infringement, and that use of the product for infringement financially benefits the defendant.”).

<sup>14</sup> On remand, the district court rejected defendants’ argument that it could not be liable without proof that it undertook overt acts to promote infringement by users, such as instructing users how to infringe. *See Grokster*, 454 F. Supp. 2d. at 984-985.

- received communications from users drawing their attention to infringement;
- were the subject of numerous mainstream news articles about the widespread infringing activities on their website; and
- performed internal studies and tests to search for infringing content on their system, which the court concluded gave rise to a “particularly forceful” inference of intent to promote copyright infringement.

*Lime Group*, 2010 WL 1914816 at \*17-18. Compare CCS 7 (communications from users about infringements); VSUF 100-101 (news articles about infringements on YouTube)); CSUF 16; CCS 25 (analyses of amount of unlicensed “premium” and “copyrighted” content on YouTube).

Defendants here did not just fail to develop and implement appropriate filtering tools – they *did* deploy filtering tools that they used every day for profit-maximizing purposes in a manner designed to encourage, rather than mitigate infringement, by, among other things, (a) opting to treat unlicensed musical compositions as “tracked” rather than “blocked”; (b) failing to utilize search tools offered to preferred content owners to mitigate known infringements; and (c) refusing to provide content owners unwilling to license their content to YouTube with content identification tools. CCS 94-96; CSUF 28-29; *see also infra*, 12. Judge Wood condemned similar “selective filtering” in *Lime Group*, concluding that such practices further demonstrate “the company’s intentional decision not to employ any such technologies in a way that meaningfully deters LimeWire users’ infringing activities.” *See Lime Group*, 2010 WL 1914816, at \*20. That court also condemned a failure to implement readily available filtering technologies, including audio fingerprinting (such as Audible Magic, which YouTube did not implement for class plaintiffs unwilling to license their content) and keyword filtering (which YouTube provided to favored content owners and used, more widely, for the purposes of contextual advertising, but not to ameliorate infringement). *Id.* Like the defendants here, the defendants in *Lime Group* chose (for their own financial advantage) not to deploy those

technologies on a widespread basis, because to do so would have diminished the amount of infringing content available to users, and adversely affected the size and value of the user base. *Id.* at \*20-21; CSUF 5-8; 28-29.

It is beyond dispute that the various advertising and other revenue models for YouTube's success depended on attracting a massive audience that, in the words of one Google executive, "unequivocally" had an "enormous demand for premium content" that YouTube had not licensed. Figueira Ex. 21. This evidence also supports a finding that defendants intended to induce infringement. *Grokster*, 545 U.S. at 940. The court in *Lime Group* regarded the posting of electronic warnings and the requirement of a "statement of intent" that the user was not going "to use LimeWire for copyright infringement" as largely meaningless. *Id.* at \*20. Similarly, YouTube plainly knew that its window dressing did not deter infringement – *see, e.g.*, Figueira Ex. 47 ("I mean we can presumably claim that we don't know who owns the rights to that video [...] we'll take it down if we get cease and desist"); Figueira Ex. 309 ("[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") – and designed its system to encourage the posting of infringing premium content that YouTube hoped would then be "claimed" by content owners. Figueira Ex. 265 ("Our goal is to get CBS to start claiming as much as possible, as soon as possible. We want them to claim this content because we can only monetize content that has been claimed."); Ex. 266 ( [REDACTED] [REDACTED] ); Figueira Ex. 298 ("can we allow them to get access to the CYC reporting tools but not the CYC claim tool [...] if they are not actively signed up for CYC they could use the CYC tool to find potentially infringing content and sue us.").

## **VII. Defendants' After-The-Fact Denial That They Conditioned Content Identification Tools On Licensing Cannot Defeat Summary Judgment**

In the face of evidence from multiple witnesses and defendants' own internal communications that infringement mitigating tools were made available only to those content owners willing to license their content to YouTube, defendants now assert that their "policy" was to make these tools available to everyone. Def. Opp. Br. 68-71. But defendants do not point to a single contemporaneous document establishing or reflecting any such policy.<sup>15</sup> Whatever defendants now say their "policy" was, their practice was to condition tools on a license, a fact established by contemporaneous, unambiguous internal and external communications (CSUF 28-29; CVSUF 213-217, 225-229) and by YouTube's licensing deals containing express provisions to provide content identification tools, including audio fingerprinting and text-based searches. CCS 94-96, 243. If there was any doubt given this record, a March 2007 email from David King, entirely contradicting defendants' new-found position, sets out the "bottom line" on the distribution of the CYC tool, which incorporated Audible Magic's fingerprinting program: "CYC only for non-music partners, and CVP for everyone else."<sup>16</sup> Mr. King goes on:

The [CYC] tool was purpose built for partners and does not address the needs of non-partners. In particular, it is built around the idea of creating claims which then drive royalty reporting, and as claims require metadata to make reporting happen, the process is more effort than the streamlined CVP process. Figueira Ex. 339, GOO001-06519634-35.

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<sup>15</sup> Despite having months to answer the question, defendants are still able to point to only four entities that, they claim, used the CYC system only to block content. Schapiro Opp. Ex. 133 at King (1/13/10) Tr. 51:14-53:15; King Opening Decl. ¶ 10. But they provide no information as to when these entities were given access to the tool or under what conditions. And even as to those four, at least one had agreed to license its content, another threatened to sue YouTube, and a third was in negotiations for a license deal with Google and YouTube. See CCS 188.

<sup>16</sup> CVP was simply a quicker way to send a takedown notice. See Levine Opening Decl. 17-18.

Worse, as these emails suggest, even for content owners willing to license their material to YouTube, YouTube threatened to withhold their content identification tools unless the content owners agreed to use the tools to “claim” material, not take it down. CSUF 28-29; CCS 96.<sup>17</sup>

Ultimately, it is unnecessary for the Court to even reach this issue, since it is undisputed that the most basic infringement ameliorating tool, text-based searches, were performed only for favored content partners. CSUF 28; *see also Lime Group*, 2010 WL 1914816 at \*20 (failure to use keyword-based filter to mitigate infringements supports summary judgment that defendant induced infringement).<sup>18</sup> Likewise, defendants’ filtering mechanisms for major record labels and music publishers flagged unlicensed musical compositions owned by the independent music publishers included in the class, but defendants deliberately chose to “track” (and hence continue to exploit) that content, rather than block it. Class SJ Br. 12-13; Class Opp. Br. 11-14.<sup>19</sup>

#### **VIII. Defendants’ Activities Go Beyond Both “Storage” And “Facilitating Access”**

Defendants’ arguments about the meaning of “storage” in § 512(c), and the case law they rely on, focus on certain “automatic” functions to facilitate user access to YouTube videos but do not seriously address defendants’ active control and monetization of infringing content. This

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<sup>17</sup> That some plaintiffs did not provide Audible Magic with reference files in advance is irrelevant. First, it would make no sense to do so when YouTube was not making the tool available. Second, whether a plaintiff has submitted reference files for copyrighted works “does not create a genuine issue of fact as to whether [defendant] has taken meaningful steps to mitigate users’ infringement.” *Lime Group*, 2010 WL 1914816, at \*30 n.31.

<sup>18</sup> Defendants claim that “[t]he ability to receive automatic updates on videos posted to YouTube with particular tags was a function that YouTube also later packaged as part of its copyright protection system specifically for content owners” (B. Hurley Opp. Decl. 4), but they do not say when it was offered or to which content owners. [REDACTED]

[REDACTED] Figueira Ex. 161 (EMI Agrmt., Schedule 2(1)(c)).

<sup>19</sup> Defendants also do not dispute that after announcing the launch of their proprietary content ID fingerprinting system, they did not respond to inquiries about the system for months, and then conditioned access on onerous non-negotiable conditions. Figueira Exs. 33, 34, 37, 38.



includes defendants' consummation of third party "Product Integration" agreements to deliver selected YouTube "inventory" to third party platforms, such as television and mobile phones, with defendants in some cases retaining as much as [REDACTED] of the revenue generated through advertising on these platforms. *See, e.g.*, Hohengarten Ex. 165 at section 2.6 ([REDACTED])

[REDACTED]

[REDACTED]

. *See also* VSUF 324-328.

Defendants chose which videos initially appeared on these third party platforms (Figueira Ex. 228 ("we look for the most watched content and prioritize this for re-encoding...into the H.264 format to support our broad Mobile/IPTV efforts.")), and took additional steps, mandated

[REDACTED]

(Verizon agreement); *see also* Hohengarten Ex. 165, at § 9.1 (Panasonic agreement).

Defendants cannot seriously maintain that YouTube's selection and syndication of video content to mobile phone and television platforms at YouTube's own initiative in order to reap additional advertising or other revenues is "storage at the direction of a user," even if that language were misconstrued to mean "facilitating access to user-stored content" (as defendants contend it should be). Although defendants gave users an option to disallow their videos from appearing on mobile phones (but not television) after October 2007 (after these litigations began), that only underscores the extent to which defendants' active marketing, selection and management of the video "inventory" on YouTube is neither "storage" nor "facilitating access" at the user's direction. These activities also go way beyond the kinds of automated functions addressed in the case law defendants cite.

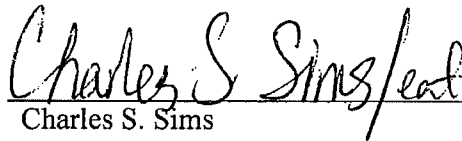
Defendants' argument that their "ad placement and search" activities are "irrelevant to the Section 512(c) analysis because they are not functions on which plaintiffs' infringement claims are based" (Def. Opp. Br. 30, fn 13), is misdirection. By providing a website that defendants know is used to search "primarily" for unlicensed premium content (indeed, it is how YouTube achieved its unprecedented growth and domination) (Figueira Ex. 41; CVSUF 195), and by tying advertisements both to users' searches for class plaintiffs' unauthorized content and directly to the infringing videos themselves (CCSUF 41), defendants are "active participants in the process of copyright infringement." *Arista Records, LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148-149 (S.D.N.Y. 2009). These activities, in turn, depend on a degree of control over the commercial exploitation of infringing content (see 11-12, *supra*) that belies any contention that defendants are merely storing that content at the direction of users.

**IX. Conclusion**

Class plaintiffs' motion for partial summary judgment should be granted.

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