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Ms. Deborah Holmes
Ms. Kimberly Gay
Case Managers, Clerk's Office
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

**Re: *Viacom Int'l, Inc., et al. v. YouTube, Inc., et al.*, No. 10-3270;
The Football Ass'n Premier League, et al. v. YouTube, Inc. et al., No.
10-3342 (argued Oct 18, 2011 (Cabranes, Miner, Livingston))**

Dear Ms. Holmes & Ms. Gay:

YouTube writes to notify the Court of the Ninth Circuit's decision in *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 09-55902 (9th Cir. Dec. 20, 2011), affirming a summary-judgment ruling that Veoh, a video-hosting service similar to YouTube, is protected by the §512(c) safe harbor.

Shelter Capital is directly on point here, addressing the proper application of the DMCA's provisions regarding (1) knowledge, (2) control, and (3) storage. On each, the court adopted YouTube's understanding of the statute, while rejecting the arguments that appellants have presented. The Ninth Circuit:

- Refuted plaintiffs' argument that the DMCA's knowledge/awareness provisions are triggered by "general knowledge," holding instead that the statute requires "specific knowledge of particular infringing activity" (Op. at

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21081-85). *Cf.* YouTube Br. 29-35; YouTube Supp. Br. 1-5.

- Found that Veoh was entitled to summary judgment because there was no evidence of any specific material it knew was infringing but failed to remove (Op. at 21085-88). YouTube Supp. Br. at 5-6.
- Reaffirmed that the DMCA does not “impose investigative duties on service providers” and rejected plaintiffs’ argument that—in addition to removing videos identified in takedown notices—“Veoh should have taken the initiative to use search and indexing tools to locate and remove from its website any other content by the artists identified in the notices” (Op. at 21082-86). YouTube Br. 63-66; Class Br. 45-46; Viacom Reply 14.
- Rejected plaintiffs’ argument that the DMCA’s “control” provision codifies common-law vicarious liability and adopted Judge Stanton’s holding that a “service provider must be aware of specific infringing material to have the ability to control that infringing activity” (Op. at 21089-97). YouTube Br. 58-61.
- Held that the “storage” provision is not limited to services that merely store videos, but instead “encompasses the access-facilitating processes that automatically occur when a user uploads a video”—including those that make videos playable on “portable devices” (Op. at 21065, 21072-80). YouTube Br. 77-81; YouTube Supp. Br. 7-9.

The Ninth Circuit’s ruling thus continues the unbroken line of cases rejecting copyright owners’ efforts to rewrite the DMCA and confirms that the decision below must be affirmed.

Respectfully submitted,

/s Andrew H. Schapiro
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Counsel for YouTube