

## quinn emanuel

51 Madison Avenue, 22nd Floor, New York, New York 10010-1601 | TEL: (212) 849-7000 FAX: (212) 849-7100

ANDREW H. SCHAPIRO  
(212) 849-7164

andrewschapiro@quinnemanuel.com

December 22, 2011

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

### quinn emanuel urquhart & sullivan, llp

LOS ANGELES | 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543 | TEL (213) 443-3000 FAX (213) 443-3100  
SAN FRANCISCO | 50 California Street, 22nd Floor, San Francisco, California 94111-4788 | TEL (415) 875-6600 FAX (415) 875-6700  
SILICON VALLEY | 555 Twin Dolphin Drive, 5th Floor, Redwood Shores, California 94065-2139 | TEL (650) 801-5000 FAX (650) 801-5100  
CHICAGO | 500 W. Madison Street, Suite 2450, Chicago, Illinois 60661-2510 | TEL (312) 705-7400 FAX (312) 705-7401  
WASHINGTON, DC | 1299 Pennsylvania Avenue NW, Suite 825, Washington, District of Columbia 20004-2400 | TEL (202) 538-8000 FAX (202) 538-8100  
LONDON | 16 Old Bailey, London EC4M 7EG, United Kingdom | TEL +44(0) 20 7653 2000 FAX +44(0) 20 7653 2100  
TOKYO | NBF Hibiya Building, 25F, 1-1-7, Uchisaiwai-cho, Chiyoda-ku, Tokyo 100-0011, Japan | TEL +81 3 5510 1711 FAX +81 3 5510 1712  
MANNHEIM | Erzbergerstraße 5, 68165 Mannheim, Germany | TEL +49(0) 621 43298 6000 FAX +49(0) 621 43298 6100  
MOSCOW | Voentorg Building, 3rd Floor, 10 Vozdvizhenka Street, Moscow 125009, Russia | TEL +7 495 797 3666 FAX +7 495 797 3667

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  
Andrew H. Schapiro

*Counsel for YouTube*