

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): _____ Caption [use short title] _____

Motion for: _____

Set forth below precise, complete statement of relief sought:

MOVING PARTY: _____

- Plaintiff Defendant
- Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: _____

MOVING ATTORNEY: _____

[name of attorney, with firm, address, phone number and e-mail]

OPPOSING ATTORNEY: _____

Court-Judge/Agency appealed from: _____

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: _____

Date: _____

Service by: CM/ECF Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

VIACOM INTERNATIONAL, INC., et
al.,

13-1720

*Plaintiffs-
Appellants,*

ECF Case

v.

YOUTUBE, INC., et al,

*Defendants-
Appellees.*

**MEMORANDUM IN SUPPORT OF MOTION OF THE FOOTBALL
ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO., MURBO
MUSIC PUBLISHING, INC., CAL IV ENTERTAINMENT, LLC, X-RAY
DOG MUSIC, INC., AND FÉDÉRATION FRANÇAISE DE TENNIS FOR
LEAVE TO FILE BRIEF OF AMICI CURIAE SUPPORTING
APPELLANTS AND REVERSAL**

The Football Association Premier League Limited, Bourne Co., Murbo Music Publishing, Inc., CAL IV Entertainment, LLC, X-Ray Dog Music, Inc., and Fédération Française de Tennis respectfully request the Court grant them leave to file a brief of amici curiae supporting appellants and reversal. A copy of the proposed brief is attached as Exhibit 1 to the accompanying declaration of Charles S. Sims (“Sims Decl.”). Appellants have consented to this filing and appellees have declined to take a position on the motion. Sims Decl. ¶¶ 2-3.

The movants are copyright owners – sports leagues and independent music creators – who are plaintiffs in a related case, *Football Ass’n Premier League et al. v. YouTube, Inc. et al.*, No. 07-cv-03582 (LLS) (the “Premier League” case). They were parties to an appeal argued jointly with Viacom’s first appeal, which in April 2012 resulted in vacating and reversing the district court’s original grant of summary judgment to YouTube and Google, and remanding for additional fact-finding. *See Viacom Int’l., Inc. v. YouTube, Inc.*, 676 F. 3d 19, 41-42 (2d Cir. 2012). The movants were not parties to the summary judgment proceedings from which this second appeal arises. Because the Premier League case is still before the same district court on many of the same legal issues, the movants have a profound interest in the outcome of this appeal.

Despite differences in the record, the district court’s interpretation of the DMCA safe harbor disqualifiers, including the “control” and “willful blindness”

inquiries, will materially affect amici's case as well as amici's ongoing businesses. Indeed, some of the same copyrighted works (and clips) that were identified as infringing at the outset of amici's case against YouTube are still being infringed by YouTube today, with impunity, as a result of the lower court's extremely narrow reading of those DMCA disqualifiers, contrary to this Circuit's rulings in the first appeal. Although YouTube's history (including its knowledge and intent) set forth in Viacom's brief is much the same for amici and their works; amici submit this brief to highlight for the Court the full breadth of YouTube's conduct that may be pertinent in assessing the application of the § 512(c) safe harbor so the Court's decision may take all such conduct into account. In opining on the scope of these inquiries, we also urge this Circuit to be cognizant of additional aspects of YouTube's control and willful blindness, elucidated in the proposed brief, that have been shown by amici below but are not the focus of the Viacom case, so that future consideration of those matters is not incidentally foreclosed here.

For the foregoing reasons, movants respectfully request that this Court grant their motion for leave to file the proposed brief of amici curiae, attached as Exhibit 1 to the accompanying Declaration of Charles S. Sims.

<p>Dated: August 2, 2013</p>	<p>Respectfully submitted,</p> <hr/> <p>/s/ Charles S. Sims Charles S. Sims Jennifer R. Scullion William Hart</p> <p>PROSKAUER ROSE LLP Eleven Times Square New York, NY 10036 Telephone: (212) 969-3000</p> <p><i>-and-</i></p> <p>Max W. Berger John C. Browne</p> <p>BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP 1285 Avenue of the Americas New York, NY 10019 Telephone: (212) 554-1400 Email: johnb@blbglaw.com <i>Attorneys For Amici Curiae</i></p>
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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

VIACOM INTERNATIONAL, INC., et
al.,

13-1720

*Plaintiffs-
Appellants,*

**DECLARATION OF
CHARLES S. SIMS IN
SUPPORT OF MOTION FOR
LEAVE TO FILE BRIEF OF
AMICI CURIAE**

v.

YOUTUBE, INC., et al,

*Defendants-
Appellees.*

CHARLES S. SIMS deposes and says:

1. I am a partner at the law firm of Proskauer Rose LLP, counsel to amici curiae The Football Association Premier League Limited, Bourne Co., Murbo Music Publishing, Inc., CAL IV Entertainment, LLC, X-Ray Dog Music, Inc., and Fédération Française de Tennis. I am admitted to practice before the United States Court of Appeals for the Second Circuit. The facts stated in this declaration are within my personal knowledge.

2. Plaintiff-Appellant Viacom International, Inc. has consented to this filing.

3. Defendants-Appellees YouTube, Inc. et al have declined to take a position on the motion, advising that they may do so after the motion for leave is filed.

4. Attached as Exhibit 1 is the proposed Brief of Amici Curiae in Support of Appellants and Reversal.

August 2, 2013

/s/ Charles S. Sims
CHARLES S. SIMS

EXHIBIT 1

13-1720-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY MUSIC
TELEVISION, INC., PARAMOUNT PICTURES CORPORATION,
BLACK ENTERTAINMENT TELEVISION LLC,

—against— *Plaintiffs-Appellants,*

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF AMICI CURIAE THE FOOTBALL ASSOCIATION
PREMIER LEAGUE LIMITED, BOURNE CO., MURBO MUSIC
PUBLISHING, INC., CAL IV ENTERTAINMENT LLC, X-RAY DOG
MUSIC, INC., AND FÉDÉRATION FRANÇAISE DE TENNIS,
SUPPORTING APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, none of the amici has a corporate parent or has 10% or more of its stock owned by publicly held corporations.

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INTEREST OF AMICI CURIAE

Amici are copyright owners – sports leagues and independent music creators – who are plaintiffs in a related case, *Football Ass’n Premier League et al. v. YouTube, Inc. et al.*, No. 07-cv-03582 (LLS) (the “Premier League” case). They were parties to an appeal argued jointly with Viacom’s first appeal, which in April 2012 resulted in vacating and reversing the district court’s original grant of summary judgment to YouTube and Google, and remanding for additional fact-finding. *See Viacom Int’l., Inc. v. YouTube, Inc.*, 676 F.3d 19, 41-42 (2d Cir. 2012).¹ Amici were not parties to the summary judgment proceedings from which this second appeal arises. Because the Premier League case is still before the same district court on many of the same legal issues, amici have a profound interest in this appeal.²

Despite differences in the record, the district court’s interpretation of the DMCA safe harbor disqualifiers, including the “control” and “willful blindness”

¹ Because YouTube has not consented at this time, amici seek leave of court to file this brief. No counsel for a party has written this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel, contributed money to fund preparing or submitting this brief.

² YouTube moved for renewed summary judgment against Viacom following the remand from this Circuit’s April 2012 decision, but refused to proceed with summary judgment in amici’s case, insisting that plaintiffs should first seek class certification. The district court agreed (despite amici’s argument that the scope of YouTube’s safe harbor defense should be decided first, an approach this Circuit adopted in *The Authors Guild, Inc. v. Google, Inc.*, No 12-3200-cv, 2013 U.S. App. LEXIS 13389, 2013 WL 3286232 (2d Cir. July 1, 2013)). The district court’s May 15, 2013 denial of amici’s class certification motion will be taken up at the end of the case. Amici have moved for a stay pending the outcome of this appeal.

inquiries, will materially affect amici's case as well as amici's ongoing businesses. Indeed, some of the same copyrighted works (and clips) that were identified as infringing at the outset of amici's case against YouTube are still being infringed by YouTube today, with impunity, as a result of the lower court's extremely narrow reading of those DMCA disqualifiers, contrary to this Circuit's rulings in the first appeal. Although YouTube's history (including its knowledge and intent) set forth in Viacom's brief is much the same for amici and their works; amici submit this brief to highlight for the Court the full breadth of YouTube's conduct that may be pertinent in assessing the application of the § 512(c) safe harbor so the Court's decision may take all such conduct into account.

ARGUMENT

This appeal will decide whether the control and willful blindness safe harbor disqualifiers in the DMCA will be interpreted, as Congress intended, to “preserve [] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment,” H. R. Rep. 105-551(II) at 49 – or as requiring nothing more than compliance with proper takedown notices, and allowing massive, repeated infringement so long as such notices are complied with, notwithstanding that the provider's existing systems can and do identify works and clips known to be infringing, and could electronically exclude them at the threshold.

The district court took the view that service providers need do nothing more than act on knowledge of infringement in the narrowest possible sense –removing the infringing copy only at a specifically identified URL in response to a takedown notice, without any obligation to remove additional infringing copies of that same copyrighted work from all the other URLs to which they may be subsequently uploaded, even when such infringing clips are identified and managed through sophisticated systems that YouTube itself deploys to identify, manage and exploit such content on its site for its own benefit. The district court continued to interpret the control and willful blindness inquiries to apply only in cases where YouTube has actual knowledge of specific infringing URLs – even though the district court was reversed in 2012 for imposing just such a “specific knowledge” requirement on the “control” disqualifier under §512(c)(1)(B), and instructed upon remand to consider “willful blindness” as tantamount to actual knowledge under §512(c)(1)(A). It granted summary judgment against Viacom on that basis, notwithstanding that Viacom’s high-value works of popular culture (e.g., episodes of The Simpsons or The Daily Show) are uploaded repeatedly, and even though Viacom and amici have shown that:

- YouTube’s systems operate to identify those additional copies and profit from them;
- YouTube could use the accumulated takedown notices provided by Viacom (and other providers), and the works thus taken down, to eliminate at the threshold reposts of those same infringed works;

- YouTube admitted to using its systems to do just that in a case in Germany, where the court ultimately ordered that takedown notices be used as the basis to block further infringing uploads of the same work and not just the particular copy at the noticed URL;³
- YouTube’s systems already actively identify, manage and exploit the infringing content on its site; and
- YouTube’s systems for identification and control enable it to electronically aggregate infringing works of popular creators into “channels”⁴ – including infringing clips that have already been identified as such to YouTube – even as YouTube refuses to use that technology to “cooperate to detect and deal with” infringement of those same works.

The lower court’s interpretations of the control and willful blindness inquiries should be rejected and its grant of summary judgment against Viacom should be vacated. In doing so, we also urge this Court to be cognizant of additional aspects of YouTube’s control and willful blindness, elucidated herein, that have been shown by amici below but are not the focus of the Viacom case, so that future consideration of those matters is not incidentally foreclosed here.

I. THE DISTRICT COURT ONCE AGAIN WRONGLY IMPORTED A KNOWLEDGE REQUIREMENT INTO THE “CONTROL” TEST AND LIMITED “CONTROL” TO URL-SPECIFIC INDUCEMENT, CONTRARY TO THE SECOND CIRCUIT’S APRIL 2012 DECISION

Despite this Circuit’s April 2012 holding that the element of “specific knowledge” has no place in an evaluation of the DMCA “control” disqualifier under 17 U.S.C. §512(c)(1)(B) (*Viacom*, 676 F.3d at 36, 38), and its reversal of the

³ *Gesellschaft für musikalische Aufführungs, etc. (GEMA) v. YouTube LLC*, Case No. 310 O 461/10, Landgericht (Regional Court) Hamburg Apr. 20, 2012.

⁴ See *infra* note 13.

district court, the lower court on remand nonetheless reintroduced “actual knowledge or awareness of [...] specific and identifiable instances of infringement” as “the first and most important determination” in assessing control. SPA-85.⁵ From this erroneous starting point, the lower court’s analysis of “control” proceeded to require such a high level of involvement in specific infringing activity – a showing that the service provider “influence[d] or participate[d] in the infringement” (SPA-86.) – as to once again neuter the “control” prong.

In its April 2012 opinion this Circuit rejected any one specific test for what “something more than the ability to remove or block access” to content might mean in the context of a service provider’s “right and ability to control” infringing activity under §512(c)(1)(B). Instead, this Circuit mandated a “fact-based inquiry” into whether YouTube engaged in “something more.” *Viacom*, 767 F.3d at 36. The opinion mentioned two “examples” of cases where the facts could rise to the level of “something more” – *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002) and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) – and summarized them by explaining that “[b]oth of these examples involve a service provider exerting substantial influence on the activities of users, without necessarily – or even frequently – acquiring knowledge of specific infringing activity.” *Viacom*, 767 F.3d at 38.

⁵ References to “SPA” identify the page number of the Special Appendix filed in the present appeal at Docket No. 36.

The district court reduced this entire analysis to an unduly narrow test, requiring that, “to forfeit [the safe harbor], the provider must influence or participate in the infringement.” SPA-86. In doing so, the Court combined a number of errors: it wrongly boxed the “something more” inquiry into a narrow analysis focused on posting specific infringements; it gave short shrift to the *Cybernet* factors, none of which involve “influencing” or “participating” in specific infringements; it disregarded this Circuit’s observation that *Cybernet* and *Grokster* both involve service providers having a “substantial influence on the activities of users,” instead warping it into a requirement that the service provider “influence... the infringement”; and it ignored this Circuit’s explanation that *Cybernet* and *Grokster* merely provided examples of what the “something more” inquiry “might” mean, *Viacom*, 676 F.3d at 38, and did not delimit the contours of control or adopt any single test. SPA-86.

The district court’s overly narrow test for control appears to have been premised on its view, expressed at the start of its discussion of the §512(c)(1)(B) control disqualifier, that this Circuit’s “first and most important determination” was that “the DMCA requires” showing knowledge of “specific and identifiable instances of infringement before disqualifying a service provider from the safe harbor.” SPA-85 (citation removed). This Circuit never so concluded – indeed, it expressly rejected that view. *Viacom*, 676 F. 3d at 36, 38.

The lower court's substitution of an "influence or participate in the infringement" test for the "something more" inquiry actually mandated by this Circuit caused it to disregard most of the relevant evidence presented by the Viacom plaintiffs. A properly considered, fact-based inquiry into control, including "something more," would take account of all the facts cited by Viacom regarding YouTube's identification, management and exploitation of the content on its website. Software-based processes that precisely identify, monetize, and match content with advertisers and thereby control content without "influence[ing] or participat[ing]" in specific infringements are directly relevant to the issue of "right and ability to control," and can establish the "something more" required by this court. Viacom Br. 37-41.

For example, *Cybernet*, cited as illustrative in this Circuit's 2012 decision, cites no evidence that the defendant participated in or influenced infringements on any specific website (other than by benefitting when infringements drew visitors to the sites in its network). *Perfect 10 v. Cybernet*, 213 F. Supp. 2d at 1171-72. Instead, the defendant service provider, which ran a service that confirmed the ages of and took payments from users of a network of adult websites (see *id.* at 1158-60), was found to have engaged in "something more" where it:

1. prescreened the websites in its network (*id.* at 1182);
2. gave websites "extensive advice" and prohibited the proliferation of identical websites (*id.*);

3. “attempt[ed] to control the quality of the ‘product’ it presents to consumers” (*id.* at 1170);
4. instituted a “monitoring program” by which “participating websites receive detailed instructions regard[ing] issues of layout, appearance, and content” (*id.* at 1173); and
5. forbade certain types of images and checked images “to make sure that celebrity images do not oversaturate the content found within the sites that make up” Cybernet’s network (*id.*).

Other courts have recognized that a service provider’s existing ability to screen and filter content is highly relevant to the “right and ability to control” inquiry. *See, e.g., Tur v. YouTube, Inc.*, 2007 U.S. Dist. LEXIS 50254, at *9 (C.D. Cal. June 20, 2007) (control prong “presupposes some antecedent ability to limit or filter copyrighted material”); *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1036, 1046 (9th Cir. 2013) (failure to use filtering a factor in assessing control).

The district court disregarded relevant evidence put forward by Viacom showing that YouTube acts in similar ways, for example by pre-screening and filtering every video for advertising and other business purposes;⁶ manually screening huge numbers of videos for adherence to “community guidelines”;⁷ and enforcing quality standards by seeding the site early on with “premium” videos, including infringing materials. Viacom Br. 5-9, 14-15. Viacom’s evidence went considerably beyond *Cybernet*, and established that YouTube has in fact used its

⁶ *See* “Content ID Claim Basics” available at <https://www.youtube.com/yt/copyright/content-id-disputes.html> (last accessed August 1, 2013).

⁷ *See* “YouTube Community Guidelines,” available at http://www.youtube.com/t/community_guidelines (last accessed August 1, 2013).

filtering and management systems to encourage infringement on its site. Viacom Br. 31-32. The lower court's decision appeared to view these facts as irrelevant, even though the Circuit directed a fact-based inquiry, and even though similar facts were relevant in the *Cybernet* case.

As shown in Point II below, and as alleged in amici's case, YouTube has continued to leverage its pervasive control over user activities and its continuing exploitation of high-value copyrighted works (including those owned by songwriters and sports leagues) by, among other things, broadening its exploitation of user reposts of known infringements, creating and flogging its own "channels" under the names of the plaintiffs and/or their programming (including infringements it knows about), and tracking and choosing to monetize musical compositions its systems specifically identify, knowing full well that it does so without having obtained the requisite licenses.

The district court's disregard of this kind of evidence is inconsistent not only with *Cybernet*, but also with the inducement test outlined in *Grokster*, the other illustrative case cited in the April 2012 decision. Inducement can be shown through "affirmative steps taken to foster infringement" even where there is no evidence of "actual knowledge of specific acts of infringement." *Grokster*, 545 U.S. at 927, 937; *see also Viacom*, 676 F.3d at 38. But the lower court limited its inquiry only to whether YouTube participated in the posting of specific infringing

clips to prominent locations on its site. SPA-92. It refused to consider YouTube's intent in how it set up its content identification systems and how it has applied these systems to encourage infringement broadly across its site (*see* SPA-91.) – factors that other courts have recognized as relevant to the *Grokster* inducement analysis.⁸ This exceedingly narrow approach is inconsistent with *Cybernet*, *Grokster*, and this Circuit's holding that disqualifying control does not require knowledge of specific infringements. *Viacom*, 676 F.3d at 38.

The district court's approach also makes no sense within the factual context of this case, where the evidence shows that YouTube exercises pervasive control over a vast quantity of content, including infringements, through a combination of manual and software-based processes. The evidence shows that YouTube's founders created a site to foster uploads of popular, high-value content and (as described in the district court's original opinion) "welcomed" such infringing content, including Viacom's shows, Premier League and other sports content, and music, which YouTube knew was infringing. This mix was maintained and encouraged through YouTube's use of sophisticated systems to identify, manage and exploit such content, including through targeted ad matching, channel aggregation and music management software. *Viacom Br.* 36 & n.13, 40; Brief for

⁸ *See, e.g., Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 514 (S.D.N.Y. 2010) ("selective filtering further demonstrates [defendant's] knowledge of infringement-mitigating technologies and the company's intentional decision not to employ any such technologies in a way that meaningfully deters [defendant's] users' infringing activities.").

Plaintiffs-Appellants 15-16, 20 & n.2, 42, *Football Ass'n Premier League et al. v. YouTube, Inc. et al.*, 676 F. 3d 19 (2d Cir. 2012) (No. 10-3342-cv) (ECF No. 66) (*hereinafter* "Premier League Br."). YouTube chose to wait until it received a takedown notice for an infringing clip, rather than block infringing clips within its control, in order to keep such unlicensed, high-value content on its site for as long as possible. Viacom Br. 7-9. A test of "right and ability to control" that focuses only on whether YouTube participated in the posting of specific infringing clips to specific URLs allows YouTube to hide behind its size, the sophistication of its content management systems, and the vastness of the infringements it successfully welcomed to increase viewers and advertising revenue. That approach effectively renders the control disqualifier meaningless.

This Court should therefore reject the district court's holding that control can be established only by proof that a service provider influenced or participated in the uploading of specific infringing clips. Instead, as the Circuit has already ruled in this case, the DMCA mandates a fact-based inquiry that properly accounts for YouTube's varied and pervasive use of content management systems to exploit unauthorized content in order to draw viewers. On the record presented by Viacom, YouTube's summary judgment motion should have been denied.

II. THE DISTRICT COURT WRONGLY REFUSED TO CONSIDER EVIDENCE OF YOUTUBE'S USE OF CONTENT IDENTIFICATION SYSTEMS TO "WELCOME" INFRINGEMENT

A. This Circuit's April 2012 Opinion Does Not Forbid Consideration of YouTube's Own Content Identification and Management Systems

The lower court's refusal to consider YouTube's electronic identification and management of content, including infringing content, stems in part from its erroneous conclusion that the April 2012 decision forbade such consideration, with respect to both the control and the willful blindness inquiries under the DMCA safe harbor. *See* SPA-82 n.3, SPA-91. The district court derived this idea from this Circuit's statement that, "YouTube cannot be excluded from the safe harbor by dint of a decision to restrict access to its proprietary search mechanisms." *Viacom*, 676 F.3d at 41. This statement in turn flowed from this Circuit's conclusion that §512(m) "disclaims any affirmative monitoring requirement." *Id.*

But this "by dint of" statement only addressed the narrow question, put forward by amici in the original appeal, whether YouTube's discriminatory refusal to provide content management tools to content owners who refused to license their content to YouTube, without more, disqualified defendants from the safe harbor under §512(i) for failing to implement a proper repeat infringer policy. *Id.* at 40-41; *see also* Premier League Br. at 55-56. The April 2012 opinion does not hold, or even suggest, that YouTube's use of its software-based content

identification and management systems is irrelevant to either of the factual inquiries required by the control or willful blindness analyses, alone or in combination with other facts.

Case law (including that cited in the April 2012 decision) treats the existence of prescreening and filtering systems as relevant to both control and willful blindness. *See Perfect 10 v. Cybernet*, 213 F. Supp. 2d at 1173, 1182 (“prescreen[ing]” and “monitoring” relevant to control inquiry); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (automated system that encrypted the identity of content, including infringing material, relevant to willful blindness inquiry); *see also Fung*, 710 F.3d at 1036, 1046. There would be little sense in constructing a rule in which content identification and filtering would be relevant to control or willful blindness only if performed manually, without regard to system-wide technologies that identify and manage content on YouTube for profit. Considering these mechanisms relevant to control and willful blindness is also consistent with this Circuit’s admonition that the willful blindness inquiry requires “explicit fact-finding” and that the question of control is a “fact-based inquiry.” *Viacom*, 676 F. 3d at 35 n.10, 36.

Nor does it make sense to require a showing of “something more than the ability to remove or block” content as a component of “control,” and then ignore existing functionality that under any sensible standard supplies that “something

more” in spades. This Circuit held that the DMCA required "something more" than the mere ability to block or remove an infringement, which would have satisfied the very low standard at common law. But nothing in this Circuit’s 2012 decision, prior case law, or the DMCA’s text or legislative history suggests that the DMCA control test must ignore an ISP’s system-wide content control and management. The willful blindness inquiry likewise has a long history in the case law, and courts in the past have taken account of deliberate ignorance on a system-wide basis. *In re Aimster Copyright Litig.*, 334 F.3d 643, 650; *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1020 & n.5 (9th Cir. 2001).

The record that Viacom presented in opposition to YouTube’s motion would easily permit a jury to find that YouTube made a deliberate decision not to use its content identification and management systems to remove infringing copies of Viacom’s (and amici’s) content, even though (1) YouTube specifically knew that infringing copies of Viacom’s television shows and movies (as well as amici’s sports and music content) were prevalent on the site and indeed were central to YouTube’s business plan, and that (2) YouTube was already using these same systems to screen content for profit-making purposes and could easily have blocked most if not all of Viacom’s (and amici’s) infringements at the threshold had it chosen to do so. This behavior should be sufficient to disqualify YouTube from the safe harbor.

B. The District Court’s Approach Appears to Exclude Two Categories of Evidence That Are Particularly Pertinent to Control and Willful Blindness

Any decision by this Court about control and willful blindness should also be crafted to take account of – and not exclude – evidence that an ISP has, but fails to use for infringement reduction purposes, systems that (1) deliberately track and monetize music at specific URLs, despite knowing that it lacks a necessary copyright license to do so, or (2) deliberately allow the repeated reposting of infringing clips already known to be infringing either by reason of its content management systems or DMCA-compliant takedown notices. These additional modes of control and examples of willful blindness are important not because a decision on such issues is necessary on Viacom’s appeal, but so that any decision in Viacom’s appeal can be framed to take account of – and not rule out in further cases, including amici’s – the variety of modes of control and willful blindness that may be shown.

1. The District Court’s Approach Appears to Disregard That YouTube Tracks and Monetizes Infringing Music at Specific URLs

YouTube uses its content identification and management software to identify all commercially available music ingested into its systems *by title, track and recording*. At the same time, YouTube knows that much of this content is infringing as to specifically identifiable infringing clips. Although it obtained

sound recording licenses and *some* musical composition licenses from the major record labels, a large number of the musical compositions it ingests into its content identification and management systems are controlled by independent publishers, like amici, from whom YouTube deliberately chose not to obtain the necessary music publishing licenses. YouTube could have set up its systems to block those specific unlicensed songs from being uploaded to its site, but it chose not to do so. Premier League Br. 18-20.

Instead, it decided to use its content identification technologies to monitor (or “track”) those songs and in some cases run content-specific advertisements against them. YouTube knows that the exploitation of the musical compositions in those specifically identified videos is unlicensed – but made a deliberate decision to allow the exploitation of this known infringing content on the YouTube site, rather than hinder growth of the site by blocking it. Premier League Br. at 18-22.

This is paradigmatic “willful blindness” of specific infringing clips within the meaning of this Circuit’s April 2012 decision, as well as evidence of pinpoint “control” over infringing activity. Ignoring such evidence of control and willful blindness because it involves YouTube’s use of “its own identification tools” (SPA-82 n.3.) would be a gross misapplication of the statute that Congress enacted.

2. The District Court's Approach Allows the Same Infringing Clips to be Reposted Over and Over Again

A large number of the infringements complained of by Viacom and amici are “reposts,” i.e. clips of works that have already been taken down at specified URLs pursuant to takedown notices (or the equivalent automated takedown tool offered by YouTube), but which were quickly (and usually repeatedly) reposted to YouTube at different URLs, after the initial takedown. That is particularly true of the highly popular works of copyright owners like Viacom, The Premier League, and the Fédération Française de Tennis, as well as popular songs owned by amici. Although YouTube claims that it employs a so-called “hash” to block identical repostings of clips that were the subject of previous takedown notices, YouTube knew that the hash would not block virtually identical copies of the same clips. Premier League Br. at 11. Thus, numerous “clips in suit” have and continue to be reposted to YouTube, and many of the “clips in suit” remain on YouTube today, albeit at different URLs than those where they first appeared. Complaint ¶ 62, *Football Ass’n Premier League et al. v. YouTube, Inc. et al.*, No. 07-cv-3582 (LLS) (S.D.N.Y. May 4, 2007) (ECF No. 1).

Any construction of “control” or willful blindness that forces copyright owners into an endless, costly, and entirely ineffective game of “whack-a-mole,” where the same infringements are reposted to the same website again and again and again, no matter how many individual notices are sent, and are readily within

the embrace of the software identification and management systems that the ISP already employs, is not what Congress enacted. If a service provider's obligation is merely to take down infringing copies at a particular noticed location without any obligation to block further infringing copies of the same work, where the ISP's own internal systems readily enable it to do so, and where, as in this case, the ISP intended to "welcome" infringement to its site, the "safe harbor" is turned into a "pirate's cove" and the "control" and "willful blindness" inquiries are rendered meaningless. The district court's approach assumes that Viacom's concern, and that of the various DMCA disqualifiers, is only to remove a particular infringing copy of, say, a clip from *The Simpsons*, at a particular URL, rather than a particular infringed episode that may be uploaded to hundreds or thousands of YouTube URLs (and reposted repeatedly, despite a barrage of takedown notices).

YouTube already screens all clips uploaded to its site, and has the ability to filter all of the infringements identified in takedown notices and block reposts of those infringements, using the same filtering mechanisms it already uses to identify and manage its content for monetization purposes.⁹ The extent to which this

⁹ YouTube eventually made this function available to some content owners. This was the genesis of amici's original complaint about the discriminatory availability of content identification tools, which, the evidence showed, YouTube only made available initially to those content owners willing to license their content to YouTube. *See* Second Amended Complaint ¶ 96, *Football Ass'n Premier League et al. v. YouTube, Inc. et al.*, No. 07-cv-3582 (LLS) (S.D.N.Y. Nov. 26, 2008) (ECF No. 106). However, even after YouTube purported to make those tools available without conditioning them on a "content license," such tools were not readily available to content owners who wished to use them only to block rather than monetize

technology is readily deployed by YouTube to block reposts was revealed by a recent copyright infringement decision against YouTube in Germany, which, ***relying on admissions by YouTube*** regarding its system capabilities (including YouTube's unilateral decision in that case to filter infringements identified in takedown notices), ordered YouTube to use its filtering tools to block reposts once it has received notice of infringement with respect to particular content. *See supra* note 3. A working definition of control and willful blindness should take account of YouTube's refusal to block reposts of infringements using software systems that already identify and manage that content for profit-making purposes. That refusal amounts to willful blindness to specific instances of infringement, and evinces "something more" than the mere ability to remove content, on a record that in this case shows a deliberate intent to keep known infringing content on the site for as long as possible.¹⁰ *Viacom Br.* at 8-9. The Court's approach to control and willful blindness should discourage, not reward, YouTube's choice to put its head (and its capabilities) in the sand, and to ignore, rather than block, the reposts it knows are happening, using systems already in service on its site for monetization purposes.

content; and even then, such tools were made available only under onerous conditions. *Premier League Br.* at 18-23.

¹⁰ The evidence in the *Premier League* case will show that YouTube has received thousands of notices from amici identifying infringing clips at specific URLs on its site, that YouTube knows reposts of those same clips are highly likely to occur, and that YouTube already employs systems that screen and could block those specific reposts.

The DMCA was not intended to excuse and insulate YouTube's failure to act in this situation. In fact, §512(c)(3)(B)(i) expressly permits takedown notices to be "considered under paragraph [512(c)](1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent."¹¹ Yet the district court misread this Circuit's "by dint of" statement to bar consideration of any facts regarding YouTube's use of its own identification systems, a reading which renders YouTube's deliberate ignorance of reposts irrelevant to the safe harbor analysis and gives no recourse to content owners faced with mass-scale repeated infringements.¹² *See Football Ass'n Premier League et al. v. YouTube, Inc. et al.*, No. 07-cv-3582 (LLS), 2013 U.S. Dist. LEXIS 69401 (S.D.N.Y. May 15, 2013). Congress enacted the DMCA not as a way to pacify content owners by giving them something "to do" no matter how ineffective, but in the belief that content owners and ISPs, working together,

¹¹ Neither the statute nor the legislative history require that the notice identify a URL. *See* §512(c)(3)(A)(iii); H.R. Rep. 105-551 (II) at 55. Congress recognized that some additional steps might have to be taken by the ISP to "cooperate to detect and deal with copyright infringement . . .". H.R. Rep. 105-551 (II) at 49; S. Rep. No. 105-190 at 44 (1998) (ISP obligations for expeditious action depend on "factual circumstances and technical parameters").

¹² In the *Premier League* case, YouTube has also argued that a repost of a "clip in suit" at a different URL is not a "clip in suit," and that its continued exploitation of the very same infringing material (not just a different infringement of the same work, but virtually the same clip that has already been identified as an infringement, albeit at a different URL) is not before the court, and would require a new lawsuit to remedy. This view makes a mockery of any effort to stem the tide of even those infringements that already have been identified to YouTube, and would render any relief sought largely meaningless. It also emphasizes the importance of considering YouTube's existing technologies already in use for profit-making purposes in deciding whether YouTube has disqualifying control or willful blindness.

could reduce repeated infringement of popular works. H. R. Rep. 105-551(II) at 49.

C. Section 512(m) Does Not Bar Consideration of YouTube’s Use of Its Own Content Identification and Management Systems

The district court’s misapprehension of this Circuit’s “by dint of” ruling (which had addressed discriminatory availability of content management tools only in the context of §512(i)) led to its overbroad reading of §512(m). Taking into account YouTube’s existing software-based content identification and management systems to control and manipulate music content (including specific infringing songs for which it already knows it lacks the requisite licenses), to match ads to specific content, and to aggregate and collect content into “channels” which are then heavily promoted, is not the equivalent of imposing an “affirmative duty” on YouTube to search out or monitor infringements. *Viacom*, 676 F.3d at 35.

YouTube is *already* identifying and managing such infringing content to profit from it as part of its business. Taking these same systems into account in inquiring into YouTube’s control over and willful blindness to such infringements merely acknowledges that YouTube is deliberately ignoring the capabilities and output of systems it has already pressed into service to manage and monetize content on its site.

The district court’s blinkered view of what YouTube activities are relevant invites YouTube to profit from and expand its infringing activities with impunity.

This ignores Congress's intent to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringement that takes place in the digital networked environment." H. R. Rep. 105-551(II) at 49; *see also Aimster*, 334 F.3d at 655 ("[t]he common element of [the DMCA's] safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service" for infringement) (emphasis added).

The result of the district court's approach can already be seen: YouTube has started to aggregate its content into unauthorized "channels" that YouTube itself has generated, featuring prominent advertising space which YouTube sells to third parties and that are explicitly labeled as containing amici's content, including channels dedicated to The Premier League, the French Open, and X-Ray Dog, among others.¹³ Within these unauthorized but official-looking channels are a considerable number of infringements, including previously identified "clips in suit" that continue to be reposted to YouTube. This is one more manifestation of YouTube's control over and willful blindness to infringing activity that ought to be

¹³ An FAQ on the YouTube website explains that to create these channels, "YouTube algorithmically identifies a topic to have a significant presence on the site," "collect[s] trending and popular videos by topic," assesses the "quality of the set of videos in that channel [to meet] some thresholds," uses video metadata such as "title and description" to create the channels, and provides additional "context about [the content of the channel] from Wikipedia or other sources." *See* "Channels auto generated by YouTube," *available at* <https://support.google.com/youtube/answer/2579942?hl=en> (last accessed August 1, 2013).

taken into account in a fact-based DMCA safe harbor inquiry, but which the district court's reading of the statute directs it to ignore.

Ensuring that YouTube's use of its own screening systems is a part of the DMCA safe harbor inquiry would not penalize YouTube (or other ISPs) for developing systems to identify and manage user-uploaded content. It would mean only that ISPs like YouTube cannot use such content management systems to maximize the monetary value of their sites without also using them to reduce *known* infringement harming copyright owners. Taking account of such systems imposes no statutorily impermissible duty to "affirmatively monitor" the infringing material, but would preclude YouTube from keeping known infringing content on its site until it receives yet another takedown notice (for the same work, but at a different URL, even though YouTube could have removed the work automatically at the threshold), thereby affording the effective cooperation that Congress expected.

III. THE DISTRICT COURT WRONGLY LIMITED WILLFUL BLINDNESS TO CASES WHERE THE SERVICE PROVIDER HAD ACTUAL KNOWLEDGE OF SPECIFIC INFRINGING URLS

This Circuit directed "explicit fact-finding" into whether YouTube made a "deliberate effort to avoid guilty knowledge" of specific infringements. *Viacom*, 676 F. 3d at 35 & n.10. Instead of engaging in this inquiry, the district court concluded that willful blindness could not be shown where "the specific locations

of infringements are not supplied.” SPA-82. It then added that it would disregard evidence of YouTube’s ability to identify the locations of the infringements, because YouTube “had no duty to do so.” SPA-82 n.3. As with the district court’s discussion of control, this approach wrongly throws up new barriers to safe harbor disqualification and arbitrarily excludes relevant evidence. It turns §512(m) into the most important element of §512, trumping every other provision, including those that aim at the balance and cooperation that Congress sought to achieve. The court’s formulation of willful blindness (to apply only to clips that YouTube specifically knew about) is no different than actual knowledge, rendering the concept of willful blindness superfluous, and disregarding the standard articulated by the Circuit in 2012: namely whether a deliberate effort was made to avoid guilty knowledge.

By rejecting evidence in cases where the service provider was not “supplied” with the locations of infringements and evidence showing the capabilities of YouTube’s screening systems, the district court’s standard protects defendants who willfully blind themselves to the exact location of infringements, even when they know with high probability that specific works are being infringed on their website, and *even when their systems are, in fact, screening or identifying those infringements*. This Circuit embraced no such view of the willful blindness doctrine. The cases it cited suggest just the opposite. For example, in *Aimster*, 334

F.3d at 646, on which this Circuit relied, the defendant knew users were swapping infringing music, but encouraged them to encrypt their files so that the defendant would not be able to identify the specific songs being traded on its systems. Judge Posner found this “a deliberate effort to avoid guilty knowledge.” *Id.* at 650. Yet the district court’s standard would have immunized Aimster because Aimster’s encryption methods left it without knowledge of the location of any specific clip-in-suit. As this Circuit’s citation to *Aimster* makes clear, the willful blindness doctrine encompasses a defendant’s deliberate efforts to blind itself to the URL locations of infringements using its own content management software.¹⁴

Although YouTube may not have been, in the district court’s formulation, “supplied” with the URL locations of reposted infringements in the physical or manual sense, it has been alerted that those works are infringing, and its content screening and management systems in fact have that precise information, including the location of the infringement on the YouTube site. All YouTube has to do is act on it. In Viacom’s and amici’s cases, YouTube had even more specific knowledge of infringements – it knew that specific Viacom shows were being infringed because its founders saw the infringements; it knew that Premier League footage

¹⁴ *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010), also relied on by this Circuit in its April 2012 opinion, similarly holds that willful blindness may be found where the service provider has “reason to suspect that users of its service” were infringing the plaintiff’s copyrights, but “shield[s] itself from learning of the particular infringing transactions by looking the other way.” *Tiffany*, 600 F.3d at 109; *see also* Viacom Br. 50.

was being infringed because top executives saw it, and asked employees to take some of it down to gain leverage in a business meeting with sports teams; it knew that French Open footage was being infringed because it was told so, and because it matched ads to some of the footage; it knew that music content was being infringed because it identified each song but refused to get licenses from independent publishers. Viacom Br. 10-12; Premier League Br. at 13-17; *Viacom*, 676 F.3d at 33. YouTube decided not to act on this knowledge, because it wanted those clips to draw viewers. Viacom Br. 5-8.

As explained in the previous section, taking these activities into account in a proper willful blindness inquiry does not violate §512(m) because it imposes no affirmative duty to monitor for infringements. It simply makes service providers responsible for knowing the results of the systems they already use to screen, manage and exploit their content, including infringements, consistent with the DMCA.

The underlying theme of the district court's first summary judgment decision, which this Circuit reversed and remanded in April 2012, is made even more plain in the current decision now on appeal: an ISP has no duties at all save for complying with takedown notices at particular noticed URLs, regardless of how it uses its systems to control or willfully blind itself to pervasive infringement of identified clips. The notice and takedown regime thus becomes the sole remedy

under the DMCA even for large-scale, repeated infringements of popular works, and even where takedown notices for those same infringing works and clips have been sent repeatedly, without effect, to an ISP intent on using this very strategy to attract and maintain known infringing content on its site for as long as possible. In reaching this outcome, the lower court has qualified “control” by knowledge (twice), and has rendered “willful blindness” virtually meaningless unless it can be shown that a service provider was “supplied” with the URL-location of a specific clip.

The district court’s belief that the DMCA’s notice and takedown regime is “entirely workable” (SPA-79.) given the foregoing is not only unwarranted but ignores and misapplies the other DMCA disqualifiers. It is in precisely the circumstances evidenced in Viacom’s and amici’s cases that these other DMCA disqualifiers must be properly engaged through an open, thoughtful, fact-based inquiry, taking into account the full record before the court, including evidence of appellees’ intent and the pervasive control they exert over the infringing activities at issue, to restore the balance that Congress intended. The district court has (now twice) failed to do that, leaving YouTube free to encourage repeated postings of the same infringing clips and unlicensed music on its site regardless of the means it already employs to identify, manage, and exploit that very infringing content,

thereby turning the notice and takedown process into an expensive, absolutely pointless, and entirely unworkable game.

CONCLUSION

The district court's decision granting summary judgment to YouTube should be vacated, and the narrow tests it erroneously constructed and applied in the face of this Circuit's April 2012 decision should be rejected. In resolving Viacom's appeal, this Court should be cognizant of the additional considerations, not the focus of the Viacom case, that have been shown by amici to embody YouTube's systematic willful blindness to and control over massive, ongoing infringing activity.

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,867 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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