

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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CAPITOL RECORDS, LLC, *et al.*,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, *et al.*,

Defendants.

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CASE NO. 09 CV 10101 (RA)

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EMI BLACKWOOD MUSIC, INC., *et al.*,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, *et al.*,

Defendants.

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CASE NO. 09 CV 10105 (RA)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' (1) MOTION FOR  
RECONSIDERATION PURSUANT TO LOCAL RULE 6.3 AND (2) MOTION  
FOR CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO  
28 U.S.C. § 1292(b)**

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### PRELIMINARY STATEMENT

In its September 18, 2013 Opinion and Order, the Court adopted an unprecedented and flawed approach to the question of “red flag” knowledge under the DMCA’s safe harbor. The Court first equated awareness of presumably copyrighted music in a user-uploaded video with awareness of copyright *infringement*. This incorrect premise of established infringement resulted in a holding that evidence suggesting that a Vimeo employee watched a video containing copyrighted music suffices, without more, to raise a triable issue as to whether Vimeo had “red flag” knowledge of objectively obvious infringement. Under the Court’s approach, summary judgment apparently may be denied in these circumstances without analysis of the actual use of the music in the videos in question. In other words, Vimeo faces a full trial for any user-generated video containing apparently copyrighted music that an employee may come across, notwithstanding the DMCA’s intended protections for service providers.

The Court should reconsider this holding because it has no support in, and indeed is in conflict with, the overall purpose of the DMCA and with that statute’s legislative history, which instructs that a service provider’s mere awareness of copyrighted material on its website *cannot* (without more) give rise to “red flag” knowledge that the use of such material is “obviously” or “blatantly” infringing. That Congressional mandate should be rigorously enforced on summary judgment, else service providers like Vimeo will be put in the impossible position of having to guess at questions of ownership, license, permission, and fair use—questions the copyright holder is doubtless better positioned to answer—and, if they guess wrong, facing a prohibitively expensive trial every time their employees encounter, however fleetingly, copyrighted material. Respecting the burdens Congress allocated in enacting the DMCA is particularly critical where, as here, the copyright holder elected *not* to send a DMCA notice regarding what it now asserts were obvious

infringements. What apparently was not so “obvious” to the copyright holder certainly cannot be “obvious” to the employees of a service provider.

Relatedly, the Court should also reconsider its denial of summary judgment to Vimeo as to the Videos-in-Suit that were either in “Plus” user accounts or “whitelisted” accounts, because there is no evidence in the record that any Vimeo employee ever watched any of those videos. Thus, summary judgment should have been granted as to those videos even under the approach adopted by the Court. Furthermore, the Court should reconsider, or perhaps merely clarify, its holding with respect to whether a triable issue exists on the question of Vimeo’s actual knowledge of infringement because there also is no evidence in the record that anyone at Vimeo subjectively believed that any of the Videos-in-Suit infringed any copyright.

Separately, the Court should certify the Order for interlocutory appeal with respect to its ruling that pre-1972 sound recordings do not qualify for DMCA safe harbor. The ruling clearly presents a controlling question of law, and one as to which there is substantial ground for difference of opinion (Judge Pauley having previously reached the opposite conclusion). Indeed, there is now an intra-District conflict on this question that the Court of Appeals should be afforded the opportunity to resolve promptly. And should Vimeo’s motion for reconsideration of this Court’s treatment of the “red flag” knowledge inquiry be denied, the Court should certify that issue for interlocutory appeal as well, as it too involves a controlling question of law—how to analyze and resolve the question of “red flag” knowledge in the context of a DMCA safe-harbor determination. Resolution of both issues by the Second Circuit now would materially advance the ultimate termination of this litigation by clarifying—and, we submit, substantially reducing—the number of Videos-in-Suit as to which a trial may be necessary.

**ARGUMENT**

**I. THIS COURT SHOULD RECONSIDER THE DENIAL OF VIMEO’S MOTION FOR SUMMARY JUDGMENT AS TO 35 VIDEOS-IN-SUIT WITH WHICH VIMEO EMPLOYEES ALLEGEDLY “INTERACTED.”<sup>1</sup>**

Under Local Rule 6.3, a party moving for reconsideration must set forth “the matters or controlling decisions which counsel believes the Court has overlooked.” *See, e.g., McGinnis v. N.Y. Univ. Med. Ctr.*, 2012 WL 5512173, at \*1-4 (S.D.N.Y. Nov. 14, 2012) (granting reconsideration); *Janes v. Triborough Bridge & Tunnel Auth.*, 889 F. Supp. 2d 462, 464-68 (S.D.N.Y. 2012) (same). That is, the moving party must direct the court to matters it had raised “that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). In *Shrader*, for example, the Second Circuit affirmed an order granting reconsideration where the movant “pointed to numerous statements in [a statute’s] legislative history” that had not been given proper weight by the district court. *Id.* Here, the Court should reconsider its denial of Vimeo’s summary judgment motion as to the 35 Videos-in-Suit uploaded by third-party users, where the sole basis for denial was that there was evidence that Vimeo employees “interacted” in some way with the videos and thus were, at most, aware of them. *See Capitol Records, LLC v. Vimeo, LLC*, 2013 WL 5272932, at \*17 (S.D.N.Y. Sept. 18, 2013) (“Op.”).

**A. The Court Overlooked the Absence of Evidence of Vimeo’s Actual Knowledge of Infringement.**

In denying summary judgment for these 35 Videos-in-Suit, the Court concluded that “a triable issue exists ... as to whether Vimeo had knowledge or awareness of infringing content” in those videos. (Op. at \*33.) It is unclear whether the “knowledge” referred to includes actual as well

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<sup>1</sup> The Court denied Vimeo’s motion as to 55 of the Videos-in-Suit on the ground that there is evidence that Vimeo employees “interacted” with them. Vimeo does not seek reconsideration of the Court’s decision with respect to the 20 of those 55 videos that (1) contain pre-1972 sound recordings and/or (2) were allegedly uploaded by Vimeo employees. Vimeo does, however, seek interlocutory review on the issue whether pre-1972 sound recordings qualify for the DMCA safe harbor. *See infra* § II.A.

as “red flag” knowledge. If the Court indeed was also referring to “actual” knowledge, it appears to have disregarded the legal standard for establishing such knowledge under the DMCA. A service provider has “actual knowledge” of infringement only when it “subjectively” knows the material at issue is infringing. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012). In other words, proof of actual knowledge requires evidence demonstrating that Vimeo actually believed that the Videos-in-Suit were *infringing*—not that they merely contained copyrighted music. *See UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1109 (C.D. Cal. 2009) (“merely hosting videos with music cannot be a basis for finding actual knowledge”), *aff’d sub nom. UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011), *opinion withdrawn and aff’d on reh’g*, 718 F.3d 1006 (9th Cir. 2013).<sup>2</sup> In *Viacom*, for example, the plaintiffs presented evidence of emails among YouTube’s executives discussing uploaded content that they characterized as “clearly infringing,” “official broadcast footage,” and “blatantly illegal.” 676 F.3d at 34. The Second Circuit did not hold that this evidence established actual knowledge of infringement but instead remanded the case for further proceedings. *Id.*

Here, the record contains *no evidence whatsoever* that Vimeo subjectively believed that any of the Videos-In-Suit were infringing; nor did the Order cite any such evidence. Indeed, the Court concluded that there was no evidence that Vimeo was willfully blind with respect to any infringing material in the Videos-in-Suit. Given that Vimeo lacked even this less direct type of knowledge, it

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<sup>2</sup> To Vimeo’s knowledge, no court has ever held that a service provider obtained actual knowledge of infringing third-party uploads in any manner other than as a result of a valid DMCA notice. And even a valid notice does not always confer actual knowledge of infringement. *See Shelter Capital*, 718 F.3d at 1021 n.12 (“Proper DMCA notice under 17 U.S.C. § 512(c)(3) provides only a claim of infringement, and is not necessarily sufficient by itself to establish actual or ‘red flag’ knowledge.”); *id.*, 667 F.3d at 1041 n.14 (email from user informing service provider that material on website appeared to be infringing and specifying its location held not sufficient to confer actual knowledge because service provider “would have no assurance that a third party who does not hold the copyright in question would know whether the material was infringing”).

performer lacked “actual knowledge” of infringement. Accordingly, Vimeo respectfully submits that this aspect of the Order be reconsidered and modified.

**B. The Court Misapprehended the Governing Legal Standard for Determining “Red Flag” Knowledge.**

Under *Viacom*, “the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘*objectively*’ *obvious* to a reasonable person.” 676 F.3d at 31 (emphasis added). In its Order, the Court held that mere awareness on the part of Vimeo employees that certain Videos-in-Suit contained commercial music is, in and of itself, sufficient to create a genuine issue of material fact as to whether Vimeo had “red flag” knowledge that the use of music in those videos was infringing, regardless of the actual characteristics of the use. (Op. at \*19.) Vimeo respectfully submits that the Court should reconsider this conclusion, as it overlooks and squarely conflicts with Congress’s intent in enacting the DMCA, as clearly expressed in the legislative history of the statute, with respect to the nature and purpose of the “red flag” test. (Vimeo Br. at 20-25.)

**1. The Order Cannot Be Squared with Congressional Intent.**

In drafting the DMCA’s “red flag” provision, Congress recognized the tremendous difficulty service providers face in assessing whether user-posted content infringes copyright. *See, e.g.*, Senate Report 105-190 (“S. Rep.”) at 49 (“The common-sense result of this “red flag” test is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement.”); House Report 105-551 (“H. Rep.”) at 57-58 (similar). Congress thus was careful to make clear that providers *could not* acquire “red flag” knowledge merely in becoming aware of specific content on their websites that might be infringing. As the Senate Report explained:

[A directory provider does not acquire “red flag” knowledge] merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the

***public domain***; if the photograph was still protected by copyright, whether the use was ***licensed***; and if the use was not licensed, whether it was permitted under the ***fair use*** doctrine.

S. Rep. at 48 (emphases added); H. Rep. at 57-58 (similar); *see also* S. Rep. at 49 (“Absent actual knowledge, awareness of infringement as provided in subsection (d) should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances, ***and not simply because the provider viewed an infringing site*** during the course of assembling the directory.”) (emphasis added); H. Rep. at 58 (same). This legislative history alone supports reconsideration and modification of the Order. *See Shrader*, 70 F.3d at 257 (court may reconsider order based on reexamination of legislative history).

The Court’s mode of analysis in its Order runs afoul of the Congressional directive that mere awareness of particular content that is likely copyrighted and thus ***might*** point to an infringing use cannot confer “red flag” knowledge. In the Order, the Court presumed that the use of commercial music in the Videos-in-Suit was *per se* infringing and *ipso facto* could give rise to “red flag” knowledge of infringement upon mere viewing. (*See Op.* at \*18 (“These videos ***unlawfully*** incorporate copyrighted music . . . .”) (emphasis added).) This blanket presumption of infringement not only lacks a factual or legal basis in this case but also improperly shifts the burden of assessing infringement from the copyright holder to the service provider—putting the service provider, contrary to Congressional intent, to the choice of either removing content that ***may or may not*** be infringing or facing a trial whenever it encounters such material.<sup>3</sup>

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<sup>3</sup> While the Court ruled that it “declines to set the bar for a service provider’s acquisition of [“red flag”] knowledge quite so high” by rejecting Defendants’ example of how “red flag” knowledge clearly could be conferred (*Op.* at \*18), the “bar” set by the Court is far too low. Wherever the bar should be set, mere awareness of the presence of copyrighted music in a user-generated video, without more, cannot clear the hurdle set by Congress.

Congress’s guidance is particularly apt here. For example, each of the 35 videos at issue on this motion *at a minimum* presents a colorable issue of fair use. *See* 17 U.S.C. § 107. As is evident from simply watching them, these videos are personal and non-commercial in nature, and in each video, by definition, the music is accompanied by separate, original visual images that transform and add to the musical component. *See* Berkeley Supp. Decl., Ex. 2; *see also* *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (adding new images to copyrighted work is transformative); *Lenz v. Universal Music Corp.*, 2013 WL 271673, at \*6 (N.D. Cal. Jan. 24, 2013) (before sending DMCA takedown notice, copyright holder was required to consider fair use of Prince song “Let’s Go Crazy” in personal YouTube video). And as Congress and other courts have recognized, Vimeo cannot know, upon mere review of any video, whether the music used is in the public domain, licensed, or otherwise uploaded with the permission of (or in a manner that is not objectionable to) the copyright holder.<sup>4</sup> *See* S. Rep. at 48. For example, Vimeo introduced evidence of how *Plaintiffs’ own artists* have Vimeo accounts and post videos with music on Vimeo’s website—including at least one song at issue here. *See, e.g.*, Mellencamp Decl., ¶¶ 11-12 (EMI artists with Vimeo accounts); Anten Decl., ¶¶ 2-3 & Exs. 6, 7, 11 (RFA Responses 34-65), 12 (RFA Responses 34-78); Br. at 24 (Capitol’s own artist, OK Go, uploaded video containing song listed in Schedule A to Complaint).<sup>5</sup> Plaintiffs, not Vimeo, are in the best position to assess infringement and issue notices accordingly.

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<sup>4</sup> The Court overlooked Vimeo’s evidence demonstrating the near-impossibility in determining whether videos posted to Vimeo’s website are, in fact, infringing. *See* Cheah Decl. ¶ 29 & Ex. 7 (examples of counter-notifications submitted to Vimeo in response to its removal of videos pursuant to a DMCA takedown notice where the user was authorized to post the complained of content), ¶¶ 44-45 (difficulty of ascertaining rights to music); *see also* Rose Decl. Ex. 16 (examples of emails from Vimeo users whose videos were mistakenly removed by Vimeo employees, including for use of music).

<sup>5</sup> That some of the videos use songs by the Beatles (or other artists well known to the Court) is irrelevant to the fair use analysis, except in the case of parody or commentary, where fame often weighs in favor of a finding of fair use. *See, e.g., MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, 2004 WL 434404 (S.D.N.Y. Mar. 8, 2004) (“A parody is characterized by an attempt to mimic an original, expressive, and usually famous work.”). In any event, many of the Videos-in-Suit incorporated music by far less well-known  
*(footnote continued)*

That infringement cannot, as a matter of law, be “obvious” or “blatant” from mere inspection of an apparently personal, original video containing commercial music is convincingly illustrated by the email exchange between Vimeo’s founder, Jacob Lodwick, and the Recording Industry Association of America (“RIAA”) concerning the first takedown notice Vimeo ever received. (Cheah Decl. ¶ 45 & Ex. 8.) In that exchange, RIAA *withdrew* its DMCA takedown requests upon being notified that the videos in question were original user videos with the copyrighted songs used as background music. *Id.* If the agents of the copyright holders themselves had sufficient doubts about their claims of infringement to withdraw them, service providers such as Vimeo certainly cannot be charged with “red flag” knowledge that such videos are “obviously” infringing.

## 2. The Order Contradicts the Weight of Judicial Authority.

The Order cannot be reconciled with DMCA jurisprudence recognizing and endorsing the rigorous proof required to raise a triable issue as to “red flag” knowledge. For example, courts have held that “red flag” knowledge *cannot* be attributed to a service provider even where:

- It receives a DMCA notice that, while not fully complying with § 512(c)(3)(A), nonetheless contains a sworn declaration from the rights holder stating that it is the owner of the copyrighted work, that the use is unauthorized, after considering whether the use could be a non-infringing fair use. *See, e.g., Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 733 (S.D.N.Y. 2012).
- It knowingly hosts music videos. *See Shelter Capital*, 667 F.3d at 1038 (granting safe harbor to video-hosting service provider and holding that “merely hosting a category of copyrightable content, such as music videos” is insufficient to demonstrate knowledge under § 512(c)(1)(A)(i)).
- It is aware that it hosts specific content from websites named “illegal.net” and “stolencelebritypics.com.” *See Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007) (granting summary judgment on safe harbor defense and noting “[w]e do not place the burden of determining whether photographs are actually illegal on a service provider”).

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artists, yet summary judgment was denied as to those videos as well.

This Court’s denial of summary judgment because it is possible that Vimeo had “red flag” knowledge where the only evidence of purportedly “obvious” infringement in the record is that Vimeo was aware that the videos in question contained commercial music—without any evidence of whether the material was licensed, objected to, or a fair use—cannot be reconciled with these cases, where equivalent or substantially greater evidence of infringement could not confer “red flag” knowledge as a matter of law.

The only authority cited in support of the Court’s “red flag” analysis, *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013), involved wildly different circumstances. (See Op. at \*19.) First, Fung operated an online platform that was dedicated to file-sharing. *Id.* at 1024-30. As a result, the music being exchanged was, by definition, *entire copyrighted works and nothing more*. There was no colorable claim of fair use, as there is here, as the works were not transformed in any way. Thus, Fung did not have to “make discriminating judgments about potential copyright infringement” to stay on the right side of the DMCA. S. Rep. at 48-49; H. Rep. at 57-58. Second, Fung “urg[ed] his users to both upload and download *particular copyrighted works*.” *Id.* at 1043 (emphasis added). This active inducement of copyright infringement has no parallel in this case; to the contrary, the Court rejected Plaintiffs’ inducement arguments. (Op. at \*27-32.) In short, *Fung* stands for the proposition that “red flag” knowledge may exist where: (1) the uploaded material is comprised only and entirely of copyrighted content for the purpose of file sharing; and (2) the service provider actively solicits and encourages the uploading of those particular copyrighted materials. The facts upon which *Fung* was premised simply are not present here.

### **3. The Order Puts Service Providers in an Untenable Position.**

The Court’s Order not only departs from precedent and Congressional intent, but also creates a perverse incentive for service providers: under the logic of the Order, the only way for a service provider to avoid a *trial* on DMCA safe harbor is to instruct its employees *to never view any content*

*posted to its website*, including for the purpose of ridding the site of unauthorized or infringing content. But Congress specifically warned that “[t]he knowledge or awareness standard should not be applied in a manner which would create a disincentive to the development of directories which involve human intervention.” S. Rep. at 48-49. Further, if the service provider’s staff nonetheless watches a video containing recognizable music, the service provider must decide between removing the video or risking a copyright trial. Given the relative burdens, most service providers will opt for the former, raising the specter of chilling protected speech. This too runs afoul of Congress’s intent in enacting the DMCA. *Id.* at 8 (“In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.... [B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”). The safe harbor provisions of the DMCA were designed to *protect* legitimate service providers from copyright liability—not expose them to it.

C. **Summary Judgment Should Have Been Decided Based upon an Individualized Evaluation of Each Video-in-Suit.**

The Order dictates that if (1) a video contains copyrighted music, and (2) it appears that a Vimeo employee may have “interacted” with the video in some way, then (3) a trial must be held to determine whether Vimeo had “red flag” knowledge that the use of the music in that video was obviously infringing. Accordingly, the Court denied safe harbor as to all 35 of the relevant Videos-in-Suit, regardless of the nature of Vimeo’s alleged awareness of the video or, more importantly, the particular manner in which the music was used in each video. Vimeo respectfully submits that, in so ruling, the Court overlooked its obligation, under the DMCA as confirmed by *Viacom*, to evaluate the question of “red flag” knowledge in the context of each specific alleged infringement. *See Viacom*, 676 F.3d at 31 (“the red flag provision turns on whether the provider was subjectively

aware of facts that would have made the *specific infringement* ‘objectively’ obvious to a reasonable person”) (emphasis added). This is *Plaintiffs’* burden, for which they must present evidence. *See Viacom*, 2013 WL 1689071, at \*3 (S.D.N.Y. Apr. 18, 2013) (“the burden of showing that YouTube knew or was aware of specific infringements ... cannot be shifted to YouTube to disprove”).

It is axiomatic that infringement cannot be “objectively obvious” to a reasonable person if the use of the copyrighted material in question is—or might reasonably be—a non-infringing fair use. *See* 17 U.S.C. § 107 (“a fair use ... is not an infringement of copyright”). Stated another way, where a colorable claim of fair use exists, merely watching an original video that contains copyrighted music, without more, cannot as a matter of law yield evidence of infringement that is sufficiently “conspicuous and obvious” to qualify as a “red flag.” This conclusion not only is compelled by the fact that fair use by definition is not copyright infringement, but also is in accord with the DMCA’s legislative history, which states that a service provider shall not “be required to make discriminating judgments about potential copyright infringement” in order to be eligible for safe harbor. S. Rep. at 49. And it follows from this conclusion that summary judgment may not be denied in these circumstances unless, upon viewing the video in question, the Court concludes that a reasonable jury could find, based only upon watching that video, that the use of copyrighted material in question was *obviously* infringing and thereby conferred upon Vimeo “red flag” knowledge of infringement.

The individualized inquiry that is called for by *Viacom* is not limited to the question of fair use. To assess whether the use of music in a video was obviously infringing, the Court must ask at least the following questions as to each of the 35 relevant videos:

- (1) Upon mere viewing, should Vimeo have known the music used in the video was copyrighted and not in the public domain?
- (2) Should Vimeo have known the music used in the video was not owned by the person who uploaded the video (whose identity Vimeo might not even know)?

- (3) Should Vimeo have known the music used in the video was not licensed to the person who uploaded the video?
- (4) Should Vimeo have known the use of music in the video was not otherwise sanctioned by the copyright holder (such as in the case of so-called “stealth marketing,” where the rights holder deliberately acquiesces in the apparently unauthorized use of its copyrighted material by others)?
- (5) Should Vimeo have known that the use of music in the video was not a fair use under copyright law?

The answers to these questions will, of course, vary depending upon the nature of the video (e.g., personal versus commercial), how the music is used in the video, the extent to which the video adds to, comments on, or otherwise enhances the music (suggesting a transformative purpose), and whether and the extent to which the market for the music is harmed by the video, among many other considerations. *See Cariou*, 714 F.3d at 710-11 (holding that 25 paintings-in-suit incorporating plaintiff’s copyrighted photographs were non-infringing fair uses as a matter of law, while five other paintings presented “closer” questions and requiring remand to district court for re-analysis). Only if all of these questions are answered in the affirmative could the alleged infringement at issue be sufficiently “blatant” and “obvious” to raise a triable issue of fact as to “red flag” knowledge. And in conducting this analysis, the Court must bear in mind that service providers cannot be required to make discriminating judgments about copyright infringement in order to obtain safe harbor. *See S. Rep.* at 49 (“The common-sense result of this ‘red flag’ test is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement.”).

Here, however, it appears that the Court did not individually assess the particular use of music in any of the 35 videos at issue on this motion. Vimeo submits that a conclusion that a triable issue of material fact as to the obviousness of the alleged infringement exists as to *every* such video may not be reached without such an individualized assessment and respectfully requests that the Court, on reconsideration, conduct a video-by-video analysis incorporating the inquiries above.

**D. There Is No Evidence Suggesting that Vimeo Employees Watched 15 of the 35 Videos at Issue.**

Finally, the Court’s denial of summary judgment as to the 35 videos at issue here was premised upon the assumption that a Vimeo employee “interacted” in some way with each one of them. (Op. at \*19.) Of course, for such “interaction” to have any significance in the “red flag” knowledge inquiry, it must entail having *actually watched* all or at least part of each video in question. However, in applying this assumption to all 35 videos, the Court overlooked that as to 15 of them, there is no evidence in the record that any Vimeo employees in fact watched those videos.

*First*, the Court overlooked the fact that Plaintiffs’ only “evidence” of Vimeo’s purported “red flag” knowledge for 10 of the videos at issue is that they were uploaded by Vimeo “Plus” users.<sup>6</sup> Plaintiffs’ contention that *all* videos in all Plus user accounts (*i.e.*, hundreds of thousands of videos) are watched by Vimeo staff is unsupported by the record—and is wholly implausible on its face, given that Plus users upload approximately 40% of all the videos on Vimeo’s website. *See* Supp. Pile Decl. ¶ 23. Just as it is a physical impossibility for a few dozen employees to personally view the 43,000 videos uploaded to Vimeo each day (*see* Op. at \*26), it is likewise impossible for those same employees to view 40% of those 43,000 videos. Further, Vimeo’s Vice President of Technology testified that the “Plus Users” Mod Tool was not used to review videos. *See* Supp. Pile Decl. ¶ 18. Vimeo’s evidence on this point was undisputed.

*Second*, the Court overlooked the fact that Plaintiffs’ only evidence that Vimeo watched five of the videos at issue is that they were automatically marked as “whitelisted” when a Vimeo staff

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<sup>6</sup> These 10 videos have the following Vimeo identification numbers: 453078, 1232042, 1500344, 1821954, 1987691, 2358834, 3300782, 3992468, 4838120, and 6643350. *See* Frackman Decl. ¶ 8 & Ex. 21; Capitol Cmplt. at Schedule B.

member “whitelisted” the user’s *entire* account.<sup>7</sup> See Supp. Pile Decl. ¶ 9 (“[o]f the 18 Videos-in-Suit that Plaintiffs identify as having been whitelisted, 14 were whitelisted as a result of the user’s entire account being whitelisted”); *id.* ¶ 7 (“When an account is whitelisted, Vimeo staff generally do not watch the videos, but make a judgment call based upon the account. ... As a result, the fact that a video has been whitelisted does not necessarily mean that Vimeo staff watched all or part of it.”). Thus, there is no evidence in the record that any of these five videos, which were automatically marked “whitelisted” merely because the user’s account was marked “whitelisted” by Vimeo staff, was actually watched by a Vimeo employee. Even when viewed in the light most favorable to Plaintiffs, the evidence shows only that Vimeo was aware of a whitelisted user’s *account*, and is silent on whether the video itself was actually watched by a Vimeo employee. See, e.g., *Casciani v. Nesbitt*, 392 F. App’x 887, 888 (2d Cir. 2010) (summary order) (“[T]he court is not required to draw *all* inferences in the nonmovant’s favor, but only all *reasonable* inferences. A party may not avoid summary judgment with ‘assertions that are conclusory or based on speculation.’”) (citing *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008)). Given this complete lack of evidence that Vimeo staff ever watched these videos, no reasonable jury could conclude that Vimeo had “red flag” knowledge with respect to these 15 videos.

## **II. THE COURT SHOULD CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(B).**

This Court should certify the Order for interlocutory appeal so that the Second Circuit may consider two controlling questions of law that the Order presents:

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<sup>7</sup> These five videos have the following Vimeo identification numbers: 1283346, 2727772, 2820329, 3012923 and 3170624. See Berkeley Decl. ¶ 38 & Ex. 34; Supp. Pile Decl. ¶ 9; Frackman Decl. Exs. 18-20; Capitol Cmplt. at Schedule B.

- (1) Are the DMCA's safe-harbor provisions applicable to sound recordings fixed prior to February 15, 1972?
- (2) Does a service provider's mere *viewing* of a user-generated video containing third party copyrighted music automatically give rise to a triable issue of fact as to the service provider's knowledge of infringement under the DMCA?

Interlocutory review is warranted for both issues because each (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) as to which "an immediate appeal ... may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Interlocutory review is particularly warranted here because each issue raises legal questions of significant consequence that have not yet been addressed by the Second Circuit. As the Second Circuit recently noted: "When a ruling satisfies these [§ 1292(b)] criteria and 'involves a new legal question or is of special consequence,' then the district court 'should not hesitate to certify an interlocutory appeal.'" *Balintulo v. Daimler AG*, 2013 WL 4437057, at \*5 (2d Cir. Aug. 21, 2013) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)).

**A. The Court Should Certify the Question Whether the DMCA Safe Harbors Apply to Sound Recordings Fixed Prior to February 15, 1972.**

**1. Whether the DMCA Safe Harbors Apply to Pre-1972 Sound Recordings Is a Controlling Question of Law.**

A question of law may be controlling in a wide range of circumstances, including where its resolution "may importantly affect the conduct of an action." *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (Friendly, J.); *see also S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000) (question is controlling where "reversal ... could significantly affect the conduct of the action"). The resolution of an issue "need not necessarily terminate an action in order to be 'controlling.'" *Klinghoffer v. S.N.C. Achille Lauro Ed Altri – Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990); *see also* 16 Charles A. Wright & Arthur Miller, *FEDERAL PRACTICE & PROCEDURE* § 3930 (3d ed. 2012) ("a question is controlling,

even though its disposition might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants”). Additionally, the Court should consider whether resolution of the issue “has precedential value.” *Credit Bancorp*, 103 F. Supp. 2d at 227; *see also Klinghoffer*, 921 F.2d at 24 (“the impact that an appeal will have on other cases is a factor” in determining whether a question is controlling).

This Court held, as a matter of law, that the DMCA safe harbors do not apply to sound recordings fixed prior to February 15, 1972. (*See Op.* at \*33.) This is a controlling question of law.

*First*, whether the DMCA safe harbors apply to pre-1972 sound recordings is undoubtedly a question of law—it presents an issue of pure statutory interpretation “that can be resolved quickly and cleanly without reference to the record.” *In re Bernard L. Madoff Inv. Secs. LLC*, 2012 WL 5511952, at \*2 (S.D.N.Y. Nov. 14, 2012) (quotation marks and citation omitted); *see also In re Worldcom, Inc.*, 2003 WL 21498904, at \*10 (S.D.N.Y. June 30, 2003) (question of law is one “that the reviewing court ‘could decide quickly and cleanly without having to study the record’”) (quoting *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676-77 (7th Cir. 2000)).

*Second*, resolution of this issue would “importantly affect the conduct” of the litigation. *In re Duplan*, 591 F.2d at 148 n.11. Not only could it automatically remove eight of the remaining Videos-in-Suit from the action,<sup>8</sup> but it would also provide guidance as to the conduct of the rest of the lawsuit. Plaintiffs have indicated their intention to amend their Complaints to add **126 additional videos** that allegedly include pre-1972 sound recordings. If DMCA safe harbor does not apply to these additional videos, then whether they infringe copyright, and whether Vimeo is responsible for any such infringement, may well have to be determined by a jury trial. Because each video is

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<sup>8</sup> The Court granted Vimeo summary judgment on 144 Videos-in-Suit because there was no evidence that Vimeo knew of their existence on its website, except as to any videos in that group that contain pre-1972 sound recordings. (*Op.* at \*33.) There are eight such videos.

unique, contains different music, and uses such music in different ways, the relevant evidence—including on the issue of fair use—will be different for each video. *See Cariou*, 714 F.3d at 710-11. Discovery will involve hundreds of depositions, and trial will involve hundreds of witnesses. On the other hand, if the DMCA safe harbor does apply, the likelihood of summary adjudication increases dramatically—certainly with respect to videos of which Vimeo was not even aware.

*Third*, this question presents an issue of important precedential value for many other cases. *See Klinghoffer*, 921 F.2d at 24; *Credit Bancorp*, 103 F. Supp. 2d at 227. Plaintiffs and other music rights-holders have filed multiple lawsuits in this District and the state courts within this District alleging that service providers and other online entities have infringed their copyrights in pre-1972 sound recordings. There is no indication that the lawsuits will stop.<sup>9</sup> A ruling from the Second Circuit that a service provider’s compliance with the DMCA’s safe-harbor provisions insulates it from such claims of infringement will provide important guidance to copyright holders and service providers alike. *See Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 30 (S.D.N.Y. 1992) (“The shared interests of large research corporations and the publishing community would be importantly served by an immediate appeal, clarifying these [copyright] questions.”).

**2. There Is Actual and Substantial Disagreement among District Courts as to Whether the DMCA Safe Harbors Apply to Pre-1972 Sound Recordings.**

A “substantial ground for difference of opinion [exists] when the authority on a point of law is in conflict, or when there is a ‘relative lack of authority on the precise question.’” *In re Fosamax*

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<sup>9</sup> *See, e.g., Capitol Records, LLC v. ReDigi Inc.*, 2013 WL 1286134, at \*12 n.8 (S.D.N.Y. Mar. 30, 2013); *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 640-42 (S.D.N.Y. 2011); *Arista Records LLC v. Lime Group LLC*, 2011 WL 1641978, at \*1 n.2 (S.D.N.Y. Apr. 29, 2011); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 694 (S.D.N.Y. 2009); *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F. Supp. 2d 349, 368 (S.D.N.Y. 2009); *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, 2007 WL 136186, at \*1 (S.D.N.Y. Jan. 19, 2007); *Arista Records, Inc. v. MP3Board, Inc.*, 2002 WL 1997918, at \*12 (S.D.N.Y. Aug. 29, 2002); *see also, e.g., Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 (C.D. Cal. 2010).

*Prods. Liab. Litig.*, 2011 WL 2566074, at \*5 (S.D.N.Y. June 29, 2011) (quoting *In re Prudential Lines, Inc.*, 1995 WL 79575, at \*1 (S.D.N.Y. Feb. 22, 1995)). Here, substantial grounds exist for disagreement with the Court’s holding on this point because: (1) the Court’s holding has given rise to a direct conflict on this issue in this District; and (2) the Second Circuit has yet to provide any guidance on this question.

**First**, as this Court acknowledged, Judge Pauley reached the opposite conclusion. (Op. at \*33 n.21.) In *MP3tunes*, Judge Pauley reasoned:

Reading section 301 in context and looking to the architecture of the Copyright Act as a whole, this Court concludes that there is no conflict between section 301 and the DMCA’s safe harbors for infringement of pre-1972 recordings. . . . Read in context, section 301(c) is an anti-preemption provision ensuring that the grant of federal copyright protection did not interfere with common law or state rights established prior to 1972. But section 301(c) does not prohibit all subsequent regulation of pre-1972 recordings. . . . Limiting the DMCA to recordings after 1972, while excluding recordings before 1972, would spawn legal uncertainty and subject otherwise innocent internet service providers to liability for the acts of third parties. After all, it is not always evident (let alone discernable) whether a song was recorded before or after 1972. The plain meaning of the DMCA’s safe harbors, read in light of their purpose, covers both state and federal copyright claims. Thus, the DMCA applies to sound recordings fixed prior to February 15, 1972.

821 F. Supp. 2d at 640-42. In the wake of this Court’s Order, there is now a direct intra-District conflict on this issue—a conflict that can be resolved only by the Second Circuit. Even if this Court is “confident of the ruling” it has made, Judge Pauley’s considered opinion demonstrates that “there is substantial ground for difference of opinion” on the issue. *Certain Underwriters at Lloyds of London v. Ill. Nat’l Ins. Co.*, 2013 WL 310383, at \*1 (S.D.N.Y. Jan. 25, 2013) (Preska, C.J.) (certifying order); *see also Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 2952929, at \*8 (S.D.N.Y. July 18, 2012) (same). Judge Pauley agrees that substantial ground for a difference of opinion exists. *MP3tunes*, 2012 WL 242827, at \*2 (S.D.N.Y. Jan. 9, 2012).

**Second**, the intra-District conflict is in no way mitigated by the fact that a few other courts have addressed the issue. In *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 948 N.Y.S.2d 881, 887 (N.Y. Sup. Ct. 2012), the trial court held that “the safe harbor provision codified by section 512(c)(1) of the DMCA is applicable to Pre-1972 Recordings.” The First Department reversed the trial court. 964 N.Y.S.2d 106 (N.Y. 1st Dep’t 2013). While this further demonstrates disagreement on the issue, state-court decisions interpreting **federal** legislation, such as the Copyright Act, are accorded minimal weight by federal courts. *See, e.g., Ex parte Worcester County Nat’l Bank of Worcester*, 279 U.S. 347, 359 (1929) (“when the question arises as to what is the proper interpretation and construction of federal legislation, this court adopts its own view” rather than that of a state court).<sup>10</sup> Similarly, while “the Copyright Office published a report concluding that the DMCA safe harbors do not apply to pre-1972 records” (Op. at \*33), “the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight.” *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946-47 (2d Cir. 1975) (footnotes omitted); *see also Elektra Entm’t Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 242 n.7 (S.D.N.Y. 2008) (opinion of Registrar of Copyright Office should not influence court’s interpretation of Copyright Act provision). Because the only other federal court to rule on the issue sits in this District and reached the opposite conclusion, certification is warranted.

**Third**, the Second Circuit has not yet considered whether the DMCA safe harbors apply to pre-1972 sound recordings. Because the issue is “one of first impression” (Op. at \*33 n.21 (quoting *MP3tunes*, 821 F. Supp. 2d at 640)), immediate review is all the more warranted.

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<sup>10</sup> The defendant in *UMG Recordings* has filed a motion seeking leave to file an appeal to the New York Court of Appeals. *See* Index No. 100152/10, Motion No. 3024 (N.Y. 1st Dep’t June 28, 2013). An immediate ruling from the Second Circuit on whether the DMCA safe harbors apply to pre-1972 sound recordings would provide valuable guidance to the Court of Appeals on the interpretation of this federal law.

### 3. An Immediate Appeal Would Materially Advance the Termination of the Litigation.

An immediate appeal may materially advance the termination of the litigation if a ruling from the appellate court could avoid litigation of numerous claims that would necessitate a long and complex trial.<sup>11</sup> In *American Geophysical Union*, for example, then-District Judge Leval noted:

If Texaco is not permitted to take an appeal from this court's ruling, the parties and the court will be obliged to face voluminous unnecessary litigation of the claims of 84 plaintiffs, including innumerable technical defenses. As to thousands of allegedly copyrighted articles and letters, the parties would be required to discover and litigate thousands of discrete questions involving authorship, government or university employment of authors, assignment, and consent. Discovery and trial of these issues would consume vast amounts of expense and time for the parties. Trial could occupy the court for many months. It appears highly likely that all of this expense and litigation would be wasted; it would probably never occur if the Court of Appeals permitted immediate interlocutory appeal of the district court's findings on the issue of fair use.

802 F. Supp. at 29. The same reasoning applies here. As discussed above, if the DMCA safe harbor is held to apply to pre-1972 recordings, eight videos will be eliminated from the litigation, and, more importantly, an enormous amount of discovery and trial time will be avoided with respect to the many additional videos that Plaintiffs apparently intend to inject into this case. This plainly would “substantially accelerat[e] the disposition of the litigation.” *In re Duplan*, 591 F.2d at 148 n.11 (quotation marks omitted). *See also Gulino v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 907 F. Supp. 2d 492, 527 (S.D.N.Y. 2012) (certification warranted where “the case is poised to enter a protracted remedial phase”); *McClatchey v. Assoc. Press*, 2007 WL 1720080, at \*2 (W.D. Pa. June 8, 2007) (certifying copyright order reducing, but not eliminating, issues to be considered by jury

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<sup>11</sup> “[T]he question of whether there is a controlling issue of law is distinct from the question of whether certification would materially advance the ultimate termination of litigation, [but] in practice the two questions are closely connected.” *Credit Bancorp*, 103 F. Supp. 2d at 227.

because “[a] trial under the circumstances would not be an efficient use of resources for the parties or the Court”).<sup>12</sup>

**B. The Court Should Certify the Question Whether a Service Provider’s Mere Viewing of a User-Generated Video Containing Third-Party Copyrighted Music Necessitates a Trial on the Issue of Knowledge of Infringement under the DMCA.**

In the event that the Court declines to reconsider its denial of summary judgment as to 35 of the Videos-in-Suit based solely on evidence suggesting that Vimeo employees may have seen those videos, the Court should also certify the question whether evidence of a service provider’s mere *viewing* of a user-generated video containing a third party’s copyrighted music can give rise, without more, to a triable issue as to whether the service provider had actual or “red flag” knowledge of infringement under the DMCA.<sup>13</sup>

**1. Whether a Service Provider’s Mere Awareness of Copyrighted Material Automatically Defeats Summary Judgment under the DMCA Is a Controlling Question of Law.**

The issue of whether a service provider’s mere awareness of the presence of copyrighted content automatically defeats summary judgment is a “controlling” question of law under § 1292(b).

*First*, whether a service provider’s mere viewing, without more, of a user-generated video containing copyrighted music always gives rise to a triable issue of fact as to the service provider’s

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<sup>12</sup> While Judge Pauley did not certify this issue in *MP3tunes*, his decision is readily distinguishable on multiple grounds. First, when Judge Pauley declined to certify, no other court had yet issued a conflicting decision on the issue. Second, Judge Pauley noted that “the Second Circuit would need to wade into the voluminous factual record ... in order to resolve” the various other issues requested for certification. 2012 WL 242827, at \*1. No such wading is necessary here. Third, it was the *plaintiffs* in *MP3tunes* who sought certification—and so reversal would have *increased* the number of claims and “set the stage” for a second round of summary judgment motions. *Id.* Here, however, reversal would *decrease* the number of claims before the Court (and jury), and would eliminate a substantial number of Plaintiffs’ claims as a matter of law, sparing the Court additional summary judgment motions and a jury from unnecessary trial time.

<sup>13</sup> Vimeo’s arguments in support of interlocutory review of this issue largely mirror those presented in its motion for reconsideration. *See supra* § I. Vimeo respectfully refers the Court to those arguments, and provides below additional analysis pertaining to certification.

“knowledge” under the DMCA is a pure question of law. In its Order, the Court acknowledged that it was determining the proper legal standard to apply to the issue of knowledge of infringement under the DMCA. (*See Op.* at \*18 (“The Court declines to set the bar for a service provider’s acquisition of such knowledge quite so high.”).) As the Court stated:

The Court is nonetheless unprepared to hold *as a matter of law* that a service provider may disclaim knowledge of infringing material under any circumstance short of an employee’s awareness that the uploader has no legal defense for his or her otherwise infringing conduct.

(*Id.* at \*19 (emphasis added).) While Vimeo respectfully disagrees with the Court’s articulation of Vimeo’s proffered standard, *see supra* § I, upon appellate review Vimeo would ask the Second Circuit to hold that mere awareness of the presence of third-party copyrighted music in a user-generated video cannot, as a matter of law, defeat a service provider’s motion for summary judgment on the DMCA safe harbor. Much like the issue involving pre-1972 sound recordings, this is a question of statutory interpretation, informed by the text and legislative history of the DMCA and other courts’ interpretations of that statute. This issue as well may be resolved by the Second Circuit “quickly and cleanly without having to study the record.” *Worldcom*, 2003 WL 21498904, at \*10.<sup>14</sup>

*Second*, resolution of this issue would “importantly affect the conduct” of the litigation. *In re Duplan*, 591 F.2d at 148 n.11. Reversal on this point would likely be case-dispositive as to any videos that Vimeo employees merely allegedly watched—a total of 35 videos of the remaining Videos-in-Suit—as well as potentially hundreds of additional videos, should Plaintiffs amend the schedules to their Complaints. Reversal thus would avoid a great deal of discovery and trial time, as

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<sup>14</sup> To be clear, Vimeo would ask the Second Circuit to assume, for the purposes of interlocutory appeal only, that Vimeo had actually viewed all of the videos with which it “interacted,” and would argue that such awareness, without more, cannot defeat a motion for summary judgment as to its lack of actual or “red flag” knowledge under the DMCA. Thus, the Second Circuit’s review of the factual record in this case would be unnecessary.

the Court’s examination of the 35 videos to determine whether they could reasonably confer upon Vimeo “red flag” knowledge of obvious infringement would likely result in a grant of summary judgment, just as the Court already has ruled that 144 Videos-in-Suit are protected by safe harbor as a matter of law. (Op. at \*20.)

*Third*, this question raises issues of important precedential value. See *Klinghoffer*, 921 F.2d at 24; *Credit Bancorp*, 103 F. Supp. 2d at 227. As social media and other interactive web-based businesses grow, it will become increasingly important for service providers to have clear guidance as to their legal responsibilities and the availability of the DMCA safe harbor. Given that no other court has ruled that a service provider’s mere awareness of the presence of copyrighted music in a user-generated video must defeat a motion for summary judgment under the DMCA, both service providers and copyright holders “would be importantly served by an immediate appeal.” *Am. Geophysical Union*, 802 F. Supp. at 30.

**2. There Is Actual and Substantial Disagreement among Courts as to Whether a Service Provider’s Mere Awareness of Copyrighted Material Automatically Defeats Summary Judgment under the DMCA.**

There is clearly “substantial ground for difference of opinion” with the Court’s ruling on this issue. As the Order acknowledges, “courts have observed[] that a service provider may not be able to determine whether a particular work is infringing solely by the act of viewing it.” (Op. at \*19 (citing *Shelter Capital*, 718 F.3d at 1021; *CCBill*, 488 F.3d at 114; *Viacom*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010); *MP3tunes*, 821 F. Supp. 2d at 644).) Particularly noteworthy is Judge Stanton’s opinion in *Viacom*:

[T]he infringing works in suit may be a small fraction of millions of works posted by others on the service’s platform, *whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a “fair use” of the material, or even whether its copyright owner or licensee objects to its posting*. The DMCA is explicit: it shall not be construed to condition “safe harbor” protection on “a service provider monitoring its service or affirmatively seeking facts

indicating infringing activity ....” *Id.* § 512(m)(1); *see* Senate Report at 44, House Report at 53.

718 F. Supp. 2d at 524 (emphasis added); *see also Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1149 (N.D. Cal. 2008).

The circumstances here are no different—Vimeo, like YouTube, cannot reasonably determine whether the use of particular music in a particular video is licensed or a fair use based only upon “inspection.” *Id.* It is therefore anomalous to automatically deny summary judgment on the issue of knowledge of infringement simply because there is evidence of such inspection. The legislative history of the DMCA also recognizes that mere inspection, without more, does not give rise to knowledge of infringement. *See supra* § I.B.1. Thus, even if this Court is confident in its ruling, it should nonetheless recognize the existence of a valid opposing position. *See, e.g., Am. Geophysical Union*, 802 F. Supp. at 29 (“Although it is my belief that the Court of Appeals will affirm my ruling, I must acknowledge that the area of fair use is one which spawns enormous differences of opinion.”).

### **3. An Immediate Appeal Would Materially Advance the Termination of the Litigation.**

For all of the reasons discussed above, *see supra* § II.A.3, an immediate appeal “may materially advance the ultimate termination of the litigation.” In particular, an immediate appeal could result in, among other things, a dramatic reduction in the number of videos in this case as to which a trial may be required and a concomitant reduction in the amount of time and resources that the parties and the Court would have to devote to discovery, briefing, and trial.

### **III. THIS COURT SHOULD STAY THE PROCEEDINGS PENDING APPELLATE CONSIDERATION OF A PETITION FOR INTERLOCUTORY APPEAL.**

For the same reasons articulated above, Vimeo also respectfully requests that, should the Court decide to certify its Order for interlocutory appeal, the Court stay proceedings pending

appellate determination of Vimeo's petition and any subsequent appeal on the merits. Under § 1292(b), an application for certification will stay district court proceedings if "the district judge or the Court of Appeals or a judge thereof shall so order." District courts routinely stay actions pending appellate review of § 1292(b) motions. *See, e.g., Geron v. Robinson & Cole LLP*, 476 B.R. 732, 746 (S.D.N.Y. 2012) (Pauley, J.) (granting § 1292(b) certification and staying proceedings pending appellate resolution).

Staying the proceedings here would strongly benefit judicial economy. Under the current schedule, discovery requests are to be exchanged no later than December 17, 2013, with all fact discovery to be completed by mid-February 2014. (*See* Doc. 24 at ¶ 5b.) Adherence to that schedule would require enormous expenditures of resources by both the parties and the Court—expenditures that could be largely wasted were appellate review to be granted. Further, Plaintiffs would suffer no prejudice from a stay, as all of the Videos-in-Suit were expeditiously removed from the Vimeo website years ago upon receipt of Plaintiffs' original and proposed amended schedules.

### **CONCLUSION**

For the foregoing reasons, Defendants' motions for reconsideration and certification for interlocutory appeal should be granted.

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New York, New York

Respectfully submitted,

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