

**No. 09-56777**

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

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UMG RECORDINGS, INC.; UNIVERSAL MUSIC CORP.; SONGS OF  
UNIVERSAL, INC.; UNIVERSAL-POLYGRAM INTERNATIONAL  
PUBLISHING, INC.; RONDOR MUSIC INTERNATIONAL, INC.;  
UNIVERSAL MUSIC—MGB NA LLC; UNIVERSAL MUSIC—Z TUNES  
LLC; UNIVERSAL MUSIC—MBG MUSIC PUBLISHING LTD.,

Plaintiffs-Appellants

v.

VEOH NETWORKS, INC.,

Defendant-Appellee.

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On Appeal from the United States District Court  
for the Central District of California, Western Division-Los Angeles  
Honorable A. Howard Matz, District Judge  
Case No. CV07-5744-AHM-AJW

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**BRIEF OF APPELLEE  
VEOH NETWORKS, INC.**

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## **STATEMENT OF THE CASE**

With the possibilities afforded by the Internet and the digital age, also come new challenges, particularly with respect to questions of copyright infringement and liability. These very challenges prompted Congress to enact the Digital Millennium Copyright Act (“DMCA”) a decade ago. The DMCA was “designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.” S. Rep. No. 105–190, at 1–2 (1998). In order to strike a balance between the respective interests, the DMCA was 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” and provide “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” *Id.* at 20. Toward that goal, Section 512(c) provides a safe harbor to service providers who promptly remove infringements upon notice and meet other requirements of the subsection.

Although Appellee Veoh Networks, Inc. (“Veoh”) has always satisfied the DMCA’s requirements, Appellants (“UMG”) continue to live and argue in a pre-DMCA world. While Veoh is exactly the type of diligent and responsible online service Congress intended to protect, UMG’s interpretation of the law would, if

applied, wreak havoc on a variety of new media portals like Yahoo!, Google and Facebook.

In advancing its dangerous undermining of the DMCA, UMG challenges the District Court's orders: (1) granting Veoh's Motion for Summary Judgment Re Entitlement to Section 512(c) Safe Harbor ("Veoh's Motion") [RE 175–203]; and (2) denying UMG's Motion for Partial Summary Adjudication Re Veoh's Second Affirmative Defense (17 U.S.C. § 512(c)) ("UMG's Motion"). [RE 204–219.] These decisions—carefully, coherently and correctly crafted by the District Court—came in a case in which Veoh offered to immediately disable any allegedly unauthorized videos, but UMG refused to identify them, claiming it was Veoh's burden to try to figure out what alleged UMG rights might be infringed. When UMG finally identified certain alleged infringements, over a year into the lawsuit, Veoh had already taken down the vast majority of videos through its copyright policies, and immediately disabled the remaining few.

UMG advocates that this Court overturn the District Court's decisions as if the DMCA were never enacted, relying primarily on non-DMCA authorities and ignoring the undeniable challenges that Internet businesses, like Veoh, must confront. UMG's position that the entire burden of policing suspected infringements lies with the online service provider ("OSP") stands in stark contrast to existing precedent and the careful balance established by the DMCA, which

seeks to foster *cooperation* between copyright owners and OSPs. Not only does UMG ignore the realities of this case—where it presented no evidence that Veoh failed to remove a single known infringement—but it also ignores the unworkable situation that OSPs would face if they were required to make determinations about which works might infringe which rights without any cooperation from copyright owners.<sup>1</sup> The District Court’s finding that Veoh is entitled to Section 512(c) should not be disturbed.

UMG also asks this Court to overturn the District Court’s denial of UMG’s Motion based upon UMG’s narrow view that Veoh’s automated features providing access to videos uploaded by users should disqualify Veoh from Section 512(c) safe harbor. UMG argues that even though the videos were indisputably uploaded by users, Veoh’s automatic processing to make the videos accessible to users went beyond mere “storage” and thus the videos are not on Veoh “by reason of storage at the direction of a user.” But the DMCA safe harbor *presumes* access to users will be provided; and, in fact, it requires access for the notification procedures to function. The District Court rejected UMG’s interpretation because “the narrow

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<sup>1</sup> The sad truth of this case is that if UMG had simply sent Veoh take-down notices, Veoh would have disabled access to the material as it always did. UMG’s refusal to cooperate, and choosing instead to file a lawsuit seeking a staggering windfall in statutory damages, is not what Congress envisioned when enacting the DMCA.

construction of the statute that UMG advocates is not the one Congress enacted.”

[RE 215.]

The District Court’s summary judgment decisions should be affirmed in their entirety.

**VEOH’S COUNTERSTATEMENT OF ISSUES PRESENTED**

1. Should the District Court’s holding that Veoh is entitled to § 512(c) safe harbor be overturned despite the undisputed evidence showing that Veoh:
  - a. promptly removed every alleged infringement at issue in this action upon actual notice or discovery;
  - b. was not aware of facts from which infringing activity was apparent; and
  - c. did not have the requisite ability to control the activity within the meaning of the statute, and thus the District Court did not need to resolve the financial benefit prong, and even if it did, Veoh did not obtain a financial benefit “directly attributable” to the allegedly infringing activity?
2. Should the Court overturn the District Court’s sound conclusion, based on the plain language and legislative history of the DMCA, and all relevant authority, that Veoh qualified for § 512(c) safe harbor because the material at issue

resided on Veoh's system "by reason of storage at the direction of a user," contrary to UMG's narrow interpretation?

## **STATEMENT OF THE FACTS**

### **I. Veoh**

Veoh enables viewing and sharing of user generated video content over the Internet—from family gatherings to films by aspiring filmmakers. Veoh has also featured partner content from prominent content owners such as ABC, CBS, ESPN and Viacom. [RE 176–177; 1977(¶ 3).]

Veoh consists of two components: (i) the veoh.com website (first offered in February 2006) where users can share and browse videos, create a user account and profile, and interact with other users; and (ii) an optional software application (first offered in September 2005) which allows uploading and delivery of videos. [RE 206; 1977(¶ 3); 177; 274–275; 1977–1978.]

As of April 2009, Veoh had well over a million videos available for viewing, and users had uploaded more than four million videos to Veoh. [RE 176; 1977; 277–278(¶¶ 3, 14–15).] Veoh does not charge users for using its site or software. [RE 176, n.1; 1978 (¶ 7).] Only 3%–4% of Veoh's video views from users have been in the music category. [SRE 2406(¶ 2); 2409–2416.] Veoh employees do not

review user submitted content before it is available on Veoh, and it would not be feasible to do so. [RE 2013(¶ 9); 281(¶ 18).]

### **A. Uploading Videos to Veoh**

To upload videos to Veoh, a user must first register by providing a user name, email address, and password. [RE 177; 276(¶8); 1978(¶4); 1983–1985.]

The user also provides information about the video that help other users locate it, such as a title of the user's choosing and tags (keywords) to describe the video.<sup>2</sup>

The user also selects pre-set categories that best describe the video, including, for example “Family,” or “Politics.” [RE 177; 1978(¶ 5); 1986–1991<sup>3</sup>.] Veoh's computers automatically receive users' submissions, extract certain metadata, assign each video a “permalink” (which accompanies the display of each video and

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<sup>2</sup> UMG concedes that of the 244,205 videos categorized by users as “music,” only 22,363 were identified by the third party filtering service Veoh implemented, Audible Magic, as possibly unauthorized. [RE 1415(¶ 4).] Of the more than four million videos uploaded to Veoh by users, the 244,205 categorized as music represents barely 6%. The 22,363 identified by Audible Magic as possibly unauthorized are barely 9% of those videos categorized as music, and *barely one half of 1% of the millions of videos uploaded by Veoh's users*. Far from supporting UMG's claim that all videos categorized by users as music were infringing, an extremely small percentage of potentially infringing videos were categorized as music.

<sup>3</sup> UMG argues that Veoh itself tagged videos as “music video[s]” (UMG Br. 19). As support, UMG cites to a spreadsheet containing metadata about videos uploaded to Veoh. [RE 337-338(¶¶ 133-134),746-747(¶ 5).] But the spreadsheet was *automatically* populated to apply a text attribute to images of a video only if a *user* categorized the video as “music.” *Id.* It provides no evidence of knowledge of infringements.

uniquely identifies it), and makes the video available. The content of the videos is unchanged. [RE 1978(¶6).]

### **1. Transcoding**

When Veoh receives a video file from a user to upload, its system automatically converts (transcodes) each video into Flash format using third-party software. [*Id.*; Veoh’s Supplemental Excerpts of Record (“SRE”) 2406(¶ 6); 2441–2443; 2723– 2724:16–20.] Veoh transcodes each video into Flash because the vast majority of Web users have software that can play videos in Flash. [*Id.*; 2406(¶ 6), 2724:16–20.] Through this automated process, Veoh merely selects necessary default values, like frame and bit rate, from a narrow range of parameters set by third-party software. [SRE 2380(¶ 8).] Veoh stores the user’s video file on its system in both Flash format and the original upload format. [SRE 2381(¶ 9).]

### **2. Storage of User Video Files in Chunks**

The original file format copies of user videos that are uploaded to Veoh are stored in 256-kilobyte pieces or “chunks.” [SRE 2407(¶ 10); 2406(¶ 6); 2441–2444, 2725:1–14; 2726:5–13.] Veoh stores the video files in chunks to facilitate distribution of the videos. *Id.* Veoh utilizes a “peer-assisted distribution network” to deliver files when a user requests a file download, which means that some of the file may be delivered from the computers of other Veoh users who have already

downloaded that file. [SRE 2381(¶ 11).] Veoh’s distribution network is different from—and should not be confused with—so called “peer-to-peer” file sharing services, where individual computers utilize peer-to-peer software to communicate directly with other users’ computers to share files, and the company that distributes the software does not retain central control of such files. [SRE 2381 ( ¶ 13).]

Veoh does *not* offer peer-to-peer file sharing services, and was specifically designed so that it could terminate access to videos on its system if it received notice of suspected infringement. [RE 1978–1979; SRE 2387; 2406(¶ 6); 2441–2443; 2727, 210:19:5–16.] Storage of files in chunks is entirely automated, which is not unique to Veoh, but standard for modern operating systems.

[SRE 2381(¶ 12).]

### **3. Streaming/Progressive Downloading**

Once a user uploads a file to Veoh and it is processed and stored on Veoh’s system, Veoh users can view the file through streaming, or by downloading a copy from Veoh’s servers or servers within its content distribution network. [SRE 2381(¶ 14).] Streaming is a technique for transferring data so it is processed as a continuous stream, and the user’s browser can begin display before the entire file is transmitted. *Id.* Veoh’s progressive downloading uses a type of streaming where when a user clicks play, a copy of the video file begins to download into the user’s temporary computer memory, or browser cache. [SRE 2382( ¶ 15).] When a

certain amount of the video has been downloaded, the Veoh media player automatically begins playing the video. [SRE 2406(¶ 6); 2441–2443; 2729:149–150.] How long the file remains in the user’s browser cache depends on the user’s browser’s settings. [SRE 2729 at 151:16– 22.]

#### **4. Downloads**

A user can choose to download a copy of the original video file that was uploaded to and stored on Veoh’s system. [RE 206–207; SRE 2382(¶ 16).] When the user selects download, the software opens and the original content file will automatically begin downloading from Veoh’s distribution network. The downloaded file is then stored on the user’s computer within a Veoh directory, providing Veoh the ability to terminate access to the files. [*Id.*, ¶ 13.]

#### **B. Veoh’s Policy Prohibiting Pornography**

Veoh prohibits pornographic content. Employees use a “porn tool” to review thumbnails of videos uploaded in the “Sexy” category to disable pornographic content (which is obviously more readily apparent from viewing a thumbnail than whether a video is potentially infringing). [RE 2011(¶ 2); SRE 2406 (¶ 3); 2417–2425:84:21–85, 129–30.] During this process, or any other time, if employees encounter videos they suspect infringe copyright, they report them to Veoh’s Senior Manager of Copyright Compliance, Stacie Simons, for analysis and she disables access as appropriate. [RE 2011(¶¶ 2, 5).]

### **C. Advertising**

Veoh began offering advertising (Veoh's primary revenue source) on its site in mid-2007. [RE 1978(¶ 8); SRE 2406(¶ 2); 2409–2416, 27:12–19.] Veoh never targeted advertising at infringing material, and has never made a profit.

[SRE 2381(¶ 12); RE 177, 27:12–19.]

### **D. Veoh's Policies Prohibiting Infringement**

#### **1. Veoh's Terms of Use ("TOU") and Copyright Policy**

Veoh has zero tolerance for infringing content and its policies have always strictly prohibited the use of its website or software in connection with infringing content. Veoh promptly disables access to such content upon notice and its website has always stated that Veoh does not permit infringing videos and that Veoh reserves the right to terminate repeat infringers. [RE 1977, 1978(¶¶ 9–11); 2011–2012(¶¶ 2–7).] Veoh's TOU state that:

You agree to abide by...all intellectual property laws (such as U.S. copyright laws). Any unauthorized use of the Veoh Service is expressly prohibited.

[RE 2011(¶ 2); 2015–2024.]

Further, Veoh's Copyright Policy states that:

Veoh takes copyright and other intellectual property rights very seriously. It is Veoh's policy to (1) expeditiously block access to or remove content that it believes in good faith may contain material that infringes the copyrights of third parties and (2) remove and discontinue service to repeat offenders.

[RE 2011(¶ 3); 2025–2028.]

To use the software, users must consent to Veoh’s license, and agree not “to infringe the copyrights or other intellectual property rights of others in any way.”

[RE 1979(¶ 10).] Veoh’s software license has always contained the same or a similar condition of use. *Id.*

Veoh strictly enforces its policies prohibiting infringing content. As the District Court noted, Veoh responds promptly to DMCA notices, “often the same day” or “within a day or two” [RE 178; 2011–2012(¶ 4)], and that Veoh “has also investigated less formal complaints of infringements.” [RE 178, 2012(¶ 5).] Veoh errs on the side of disabling videos that might be infringing. *Id.* Veoh has always designated an agent to receive notices of alleged infringement, whose contact information is readily accessible from the website. [RE 1979(¶ 11), 2000–2001; 2011(¶ 3), 2025–2028.]

## **2. Veoh’s Repeat Infringer Policy**

The District Court recognized that “Veoh has implemented a policy for terminating” repeat infringers, and has terminated “thousands” of repeat infringers. [RE 180.]

### 3. The UGC<sup>4</sup> Principles

Veoh has been at the forefront of collaborative efforts with content owners to prevent online infringement. The District Court noted that in 2007, Veoh, alongside major content owners Disney, Viacom, Fox, CBS, and NBC Universal, signed on to “The UGC Principles,” (www.ugcprinciples.com). [RE 209; 1979–1980(¶ 12); 2002–2009.] The UGC Principles provide guidelines to help services like Veoh and content creators work together toward their collective goal of “foster[ing] an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners.” *Id.*

### 4. Veoh’s Technological Safeguards Go Beyond the DMCA

Beyond DMCA requirements, Veoh has implemented additional technological safeguards to prevent infringing material. For example, the District Court noted that since 2006, Veoh’s “hash-filtering” works such that “when Veoh disables access to a video” for alleged infringement, Veoh “automatically disables access to any identical video and blocks any subsequently submitted duplicates.” [RE 179; 1980(¶ 13); SRE 2427–2437.] UMG fails to even mention Veoh’s “hash filtering” in its brief, although this has removed 67,448 videos, even more than the “60,000 videos” that UMG states (UMG Br. 21) were removed when Veoh went

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<sup>4</sup> UGC means “User Generated Content.”

even further to prevent infringement by implementing Audible Magic. [SRE 2718(¶6).]

Implementing additional filtering technology was an extension of Veoh's commitment to preventing copyright infringement. Although Veoh made progress developing its own additional filtering technology,<sup>5</sup> it became more feasible for Veoh to implement a third party service, Audible Magic. [RE 1780–1781(¶ 15), 1980; SRE 2406(¶ 4), 154:19–155:5.] Audible Magic works by matching a video's audio fingerprint against its database of content. *Id.* In mid-2007, months before this lawsuit was filed, Veoh began working with and testing Audible Magic, putting it into production in October 2007. [RE 178, n.5; 179–180; SRE 2406(¶ 4); 2426–2437; 81; 2382(¶15).] Beginning then, if a user attempted to upload a video that matched against Audible Magic's database, the video was cancelled before publication and was never available for viewing on Veoh. [RE 1980–1981(¶ 15); SRE 2406(¶ 4); 2426–2437.] This filtering occurs even if Veoh never received a DMCA notice regarding the video. *Id.* By mid-2008, Veoh ran its entire database of videos against Audible Magic's filter, disabling access to any matching non-partner video. *Id.* Veoh invested significant resources licensing and employing Audible Magic. *Id.*

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<sup>5</sup> The District Court noted that Veoh “began developing another method of filtering potentially infringing content,” for which Veoh filed a patent. [RE 179, 1980; SRE 2406(¶ 40), 2431-2433.]

## II. UMG

### A. UMG Refused To Provide Any Notice of Specific Infringements Despite Repeated Requests

Electing to ignore the DMCA, UMG never notified Veoh of a single infringement before filing suit in September 2007, and did not identify a single infringing video in its Complaint. Promptly after UMG filed suit, Veoh’s counsel wrote to UMG’s counsel and explained that if UMG would identify the videos it contended were infringing, Veoh would promptly disable access to them. [SRE 2406(¶ 5); 2439–2440.] In response, UMG refused to identify any videos and instead insisted that Veoh should be able to figure out on its own which UMG “content” was on its site, and that UMG was not obligated “to identify each instance in which Veoh is displaying unauthorized content.” [SRE 2406(¶ 6); 2441–2443.] Although Veoh again asked UMG to identify any allegedly infringing videos, UMG refused. [SRE 2406(¶ 7); 2445–2446.]<sup>6</sup>

### B. Veoh Disabled The Vast Majority of Alleged Infringements Through Veoh’s Copyright Policies

As the District Court acknowledged, “[o]f the videos eventually identified by UMG, Veoh had already removed the vast majority because they had been

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<sup>6</sup> In response to Veoh’s request to admit that UMG: “never sent a DMCA notice to Veoh,” UMG refused to answer stating that: “Veoh is not entitled to claim protections under 17 U.S.C. §512(c) and thus the request rests upon a false assumption.” [SRE 2407 (¶ 16), 2589.]

identified by the RIAA<sup>7</sup> notices [], by the Audible Magic filter, or by other means.” [RE 181.] The first five alleged infringements that UMG specified in this case were identified for the first time in UMG’s Motion. All five had already been disabled pursuant to Veoh’s copyright policies. [RE 209; SRE 2394(¶ 6).]

In December 2008—more than a year after filing suit (and only after Veoh filed a motion to compel the information)—UMG finally identified a list of videos it claimed were infringing. [SRE 2407(¶ 8); 2448–2489.] UMG first identified 1,591 videos in its December 2008 interrogatory responses, and then supplemented its responses in January 2009 identifying an additional 854 videos. [SRE 2407(¶ 9); 2490–2511.] UMG claimed these 2,445 videos infringed a total of 1,344 of UMG’s federally registered copyrights, and 111 unregistered copyrights. *Id.*<sup>8</sup>

Veoh promptly analyzed the videos identified by UMG to determine whether any were still available on Veoh. *Id.* Of the 1,579 videos remaining in the first batch after excluding duplicates, 1,268 had already been independently disabled by Veoh. *Id.* The remaining 311 videos had already been independently run through the Audible Magic filter, but had not matched. *Id.* Indeed, the District Court noted that “there is evidence that Audible Magic’s system does not succeed at filtering out all forbidden videos” [RE 179] and that the “Audible Magic filter

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<sup>7</sup> “RIAA” stands for Recording Industry Association of America.

<sup>8</sup> UMG did not claim that any of the videos were uploaded by Veoh employees, and Veoh is unaware of any that were. [SRE 2407(¶ 10); 2517(¶ 13).]

had failed to identify as infringing hundreds of these allegedly infringing videos” at issue. [RE 181.] Veoh immediately disabled access to those 311 videos and informed UMG. [RE 1981(¶ 16); SRE 2407(¶ 11); 2523.] Of the second batch of 854 videos identified by UMG, *all* of the videos had already been independently disabled by Veoh. [RE 1981(¶ 17).]

In April 2009, UMG notified Veoh that its prior list of alleged infringements contained numerous errors and that UMG was withdrawing allegations of infringement with respect to at least forty videos. [SRE 2737-2738.] If UMG could not properly identify what it owns, it is impossible to imagine how Veoh could.

Finally, on May 11, 2009, the deadline for fact discovery and more than a year and a half after filing suit, UMG further amended its list of alleged infringements, identifying a new total of 7,756 videos (and withdrawing eight more previously identified videos). [RE 323–324(¶ 73); SRE 2390(¶ 2).] Veoh promptly analyzed the 7,756 videos. *All* had already been taken down by Veoh either due to identification by Audible Magic or pursuant to Veoh’s DMCA policy. [RE 325(¶ 75); SRE 2390(¶ 2).] Thus, far from being the lawless “pirate” in

UMG’s hyperbole, Veoh spent a great deal of time, effort and money complying with the DMCA and keeping unauthorized content off its site.<sup>9</sup>

### C. Veoh Promptly Complied With All RIAA Notices

As the District Court found, the only DMCA notices that UMG has cited regarding content at issue in this case were not from UMG, but from the RIAA.<sup>10</sup> [RE 180.] These notices did “not...mention UMG or assert rights to all works by the artists identified in the videos.” [*Id.*] The notices did not even claim rights to all versions of any particular songs. Instead, the RIAA notices provided links to the allegedly infringing videos, each of which Veoh indisputably and promptly disabled. [RE 321(¶ 71); SRE 2392–2394(¶¶ 4–13).]

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<sup>9</sup> While UMG cites to selected portions of the legislative history in an effort to liken Veoh to “pirate sites” (UMG Br. 45), the history actually notes that an OSP “would not be required to make discriminating judgments” about copyright infringement (as would be required here) and has “no obligation to seek out copyright infringement;” but that red flags may exist where sites are “clearly” and “obviously” a “sophisticated ‘pirate’ director[y]—which refer[s] Internet users to other selected Internet sites...that are obviously infringing because they typically use words such as ‘pirate,’ ‘bootleg.’” S. Rep. No. 105-190, at 48-49.

<sup>10</sup> UMG argues (UMG Br. 55) that the task of “identifying and sending notifications requesting the removal of copyrighted works” resembles the children’s game “Whack-A-Mole.” That game, however, would require UMG to have actually taken a step to “whack” a single act of infringement, which it did not. UMG believes that Veoh should be playing this game without the benefit of knowing which videos UMG wants “whacked,” and without any assistance from UMG. This is not the cooperation Congress envisioned when enacting the DMCA.

#### **D. Veoh's Search Marketing**

Veoh's search engine marketing has nothing to do with its purported knowledge of alleged infringements. The use of the keywords associated with five musical artists (50 Cent, Avril Lavigne, Britney Spears, Justin Timberlake, and Mariah Carey) that UMG claims "are subject to claims of infringement" are also SonyBMG artists whose videos Veoh streamed with SonyBMG's knowledge and consent. [RE 341–347(¶136); 587(¶16); SRE 2904(¶2); 2924(¶2).] UMG suggests that because there was no formal contract with SonyBMG or other record labels, Veoh therefore had no authorized music content from major record labels. Yet even UMG admits that Veoh was authorized to display SonyBMG videos. [RE 237:1–4.] The distinction of whether there was some sort of official document has no bearing on search marketing, but explains why Veoh used the search terms that it did.

Veoh's keyword advertising works as follows: if an individual is searching on Google for a musical artist, using all or a portion of the search terms, Veoh's advertisement might appear on the right side of the screen, and the individual could click on the associated link. [*Id.*] The keywords at issue related to authorized SonyBMG musical artists, and *the associated links directed users to the page on Veoh's website that offered that artist's authorized SonyBMG's videos.* [*Id.*] Thus, the keywords promoted authorized content—not infringing content. Veoh's

use of terms to promote authorized content provides no evidence of “knowledge” of infringing content, or receipt of financial benefit attributable to infringing activity.

The only “evidence” that UMG presented to the District Court to suggest that Veoh was intentionally seeking to use UMG associated terms blatantly misrepresented the deposition testimony of Veoh’s former head of marketing, Jennifer Betka. Ms. Betka testified that she had never seen the search term list at issue, that she was “very unfamiliar with this level of detail against Veoh’s search engine media habits;” was “not close to this;” and stated, “I don’t know this to be Veoh.” [RE 189; 374–376.] The District Court recognized that “UMG misconstrues the deposition testimony. . .of Betka,” and further noted that the “keywords were associated with links to the authorized SonyBMG videos.” [RE 189, n.12.] Thus, UMG presented no evidence whatsoever to create a material factual dispute or “divergent inferences” regarding Veoh’s search engine marketing terms.<sup>11</sup>

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<sup>11</sup> In an attempt to manufacture a material factual dispute, UMG argues that the District Court improperly accepted evidence at the reply stage. But Veoh simply responded to UMG’s argument (and the evidence “misconstrued” by UMG) as to why Veoh’s efforts to promote SonyBMG content could not possibly qualify as knowledge of UMG’s alleged infringements. [RE 189.]

### **E. UMG's Own Agents Uploaded Videos to Veoh**

Although UMG refused to identify who uploaded videos to Veoh on UMG's behalf [SRE 2407(¶12), 2539], Veoh received emails from UMG's agents regarding UMG videos they *themselves* uploaded to Veoh's website. [RE 2013; SRE 2814-2817(Ex. E); 2407(¶¶13, 15); 2552–2558.] This includes videos by the Pussycat Dolls, an artist for which UMG claims rights here, and that was included in one of the RIAA DMCA notices. [RE 190, n.13; SRE 2814 (Ex. E).]<sup>12</sup>

### **III. Prior Summary Judgment Decisions Regarding Veoh**

Veoh was previously found to be entitled to Section 512(c) safe harbor. In 2008, in a case never mentioned by UMG in its opposition to Veoh's Motion

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<sup>12</sup> Although not necessary to the resolution of whether Veoh is entitled to safe harbor, contrary to UMG's suggestions, the majority of the allegedly infringing content identified by UMG was *not* professionally produced music videos. Instead, the allegedly infringing videos (all of which were promptly disabled upon notice or discovery) revealed that only about 28% appeared to be actual commercially-produced music videos like those appearing on MTV. [SRE 2616(¶2); 2715; 2717-2714.] Of the remaining videos, 10% were deadlinks or duplicates, *while 62% were not music videos at all*, but instead consist of content such as Japanese anime, homemade videos of a singing hand puppet, a man doing yoyo tricks, and a child dancing in a hallway. *Id.*

Despite the great breadth and variety of videos that were tagged "music," at the hearing on Veoh's Motion, UMG argued that Veoh should be obligated to review every video that a user categorizes as music (though it remains unclear how such searches by Veoh would reveal whether the videos are infringing):

THE COURT: Every video? Every video tag for music has to be reviewed?

UMG'S COUNSEL: I believe that if you're going to have a system like this, yes, every video needs to be reviewed. [RE 243:24-244:2.]

below, a court granted Veoh's motion for summary judgment regarding

Section 512(c) safe harbor, holding that:

the court does not find that the DMCA was intended to have Veoh shoulder the entire burden of policing third-party copyrights on its website (at the cost of losing its business if it cannot). Rather, the issue is whether Veoh takes appropriate steps to deal with copyright infringement that takes place. The record presented demonstrates that, far from encouraging copyright infringement, Veoh has a strong DMCA policy, takes active steps to limit incidents of infringement on its website and works diligently to keep unauthorized works off its website.

*Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1155 (N.D. Cal. 2008).

#### **IV. The District Court Denies UMG's Motion**

UMG lodged an early effort to disqualify Veoh from Section 512(c) based on the statutory text alone. UMG insisted that Veoh was disqualified as a result of Veoh's automated functions making UGC accessible. In December 2008, the District Court denied UMG's Motion, finding that given the language, design and legislative history of the DMCA, Veoh's interpretation of the DMCA's statutory language "by reason of the storage" was "more persuasive," than UMG's overly narrow interpretation, which would have completely upended the DMCA and, in turn, the Internet. [RE 213.] As the District Court found, "[i]f providing access could trigger liability without the possibility of DMCA immunity, service

providers would be greatly deterred from performing their basic, vital and salutary function—namely, providing access to information and material for the public.”

[RE 215.] The District Court stated that it would be “very difficult” for the DMCA to further its purpose of ensuring “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” if OSPs lost § 512(c) safe harbor “for providing access to works stored at the direction of users.” [RE 216–17.]

The District Court also recognized that the “cooperative process” of the DMCA notice procedure “would be pointless” if OSPs were “precluded from limiting their potential liability merely because their services enabled users to access” works stored at the direction of users. [RE 217.] After all, without “such access copyright owners would find it difficult to locate [] infringing material in order to provide notice in the first place.” [*Id.*] Moreover, Section 512(c)(1) explicitly requires that the OSP expeditiously remove “or disable access to” the material that is claimed to be infringing.

The District Court rejected UMG’s “assumption” that Section 512(c) requires that the allegedly infringing conduct *be* “storage,”<sup>13</sup> given the “broad causal language” of “*by reason of* the storage” which is not limited to the mere act

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<sup>13</sup> Even UMG contradicts its narrow interpretation of “storage” by conceding that “storage on computers...involves *making a copy* of the underlying data...” (UMG Br. 33, emphasis added).

of storage, but requires that the infringing conduct occurs “*as a result of the storage.*” [RE 214.] The allegedly infringing conduct here clearly occurred *by reason of* the storage by Veoh’s users of allegedly infringing content. The District Court concluded that the four software functions that UMG challenged were “narrowly directed toward providing access” and did not disqualify Veoh from Section 512(c). [RE 219.]

#### **V. The District Court Grants Veoh’s Motion**

In September 2009, the District Court granted Veoh’s Motion, finding that the undisputed evidence showed that Veoh’s copyright policies and practices satisfied the requirements of Section 512(c). The District Court found that Veoh: expeditiously removed actual suspected infringements; was not aware of facts or circumstances from which infringing activity was apparent that it did not act upon; was not disqualified from the safe harbor due to an ability to control the infringing activity; and implemented a reasonable repeat infringer policy. [RE 175–203.]

Before issuing its final decision granting Veoh’s Motion, the District Court circulated a tentative ruling, and held a hearing at which it asked UMG whether it had any factual or legal disputes with the proposed decision. [RE 233: 14-22.]

UMG simply had no evidence or argument sufficient to alter the District Court's conclusions.<sup>14</sup>

### **SUMMARY OF ARGUMENT**

In decisions based upon this circuit's precedent, the statute at issue, and a fair reading of the undisputed facts, the District Court found that Veoh was entitled to the safe harbor protections of the DMCA. For its part, both below and in its brief here, UMG attempts to reconstruct a pre-DMCA world, one where DMCA protections and processes are meaningless except for a narrow and illusory set of web "storage" providers. In so doing UMG attempts to argue that all alleged copyright infringement is the same, and should be treated the same whether online or off. Yet this flawed perspective ignores the primary point of the DMCA: there

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<sup>14</sup> At the hearing on Veoh's Motion, the Court questioned UMG's counsel about why UMG failed to cite *Io Group, Inc. v. Veoh Networks, Inc.*—where Veoh was previously found entitled to the Section 512(c) safe harbor—at all in its papers:

UMG'S COUNSEL: Well, I think the *Io* case is actually a decent case for me.

THE COURT: Why didn't you even cite it?

MR. MARENBERG: Well, because I don't like the result and I don't think the analysis on many issues was sound...

[RE 241:12–13.]

In other words, despite the fact that *Io* involved the same defendant and functionality, the same safe harbor and a plaintiff who (like UMG here) refused to cooperate with DMCA procedures, UMG found nothing from the *Io* decision, applicable, distinguishable, or worth citing in its opposition to Veoh's Motion. In its brief, UMG once again fails to meaningfully distinguish the *Io* decision, only citing to it vaguely in one footnote.

is a separate scheme when it comes to online providers. Without it, many important Internet sites would be eviscerated. Under UMG's arrogant interpretation, generalized knowledge of copyright infringement would render OSPs liable notwithstanding safe harbor compliance.

Indeed, Veoh was just the type of service provider Congress sought to protect in enacting the safe harbor. Far from being a profiteering pirate, Veoh was a responsible corporate citizen with an historic and consistent commitment to working with content owners. It promptly and expeditiously removed any unauthorized material upon discovery; it implemented a strong and comprehensive repeat infringer policy; and, it developed and implemented not only its own filtering system, but also employed third party filtering to bolster it. Veoh did everything it could to keep unauthorized content off its site.

UMG argues that Veoh has not met the requirements of Section 512(c), for reasons including: (1) Veoh's general awareness that infringing content would inevitably be uploaded to Veoh by users (in violation of Veoh's policies); (2) Veoh's users categorized certain videos as "music"; and (3) Veoh did not engage in elaborate ongoing investigations to try to ferret out infringements using its own and third party tools. These rationales fly in the face of the DMCA and related case law. Placing the burden of policing infringements entirely on Veoh's shoulders is particularly impractical in cases like this one, where it was undisputed

that UMG's own agents uploaded content to Veoh; where Veoh had authorized music content that overlapped with the same artists claimed by UMG in this action; where most of the videos identified by UMG as infringing were *not* "professional music videos" as UMG suggests, but included family and home videos that no reasonable viewer would attribute to UMG; where UMG had considerable difficulty identifying its own alleged infringements, underscoring the impossible task it expected Veoh to undertake; and given the sheer volume of videos uploaded to Veoh (the overwhelming majority of which were *not infringing*).

Based on the undisputed facts of this case, the District Court properly granted Veoh's Motion, finding that Veoh's copyright policies and practices demonstrated that it was entitled to Section 512(c) safe harbor because Veoh:

- expeditiously removed suspected infringements of which it had actual knowledge [RE 188–191];
- was not aware of facts or circumstances from which infringing activity was apparent that it did not act upon [RE 191–193];
- was not disqualified from the safe harbor due to an ability to control the infringing activity [RE 193–199]; and
- implemented a reasonable repeat infringer policy. [RE 199–202.]<sup>15</sup>

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<sup>15</sup> UMG devotes only a footnote in its brief (UMG Br. 8 n.10) to the District Court's finding that Veoh's repeat infringer policy was reasonable, claiming it limited its argument due to "space constraints." In reality, UMG has nothing to

The Court also properly denied UMG's Motion, which sought to eliminate protection for Veoh based purely on Veoh's automated features providing access to users—access that is provided by nearly every OSP. UMG cites no authority to support its strained interpretation of the DMCA, and has instead resorted to citing wholly irrelevant cases decided under the Clayton Act and Racketeer Influenced and Corrupt Organizations Act (“RICO”) in arguments that it never made at the District Court. [SRE 2926-2954.]

As the District Court recognized, the “cooperative process” of the statutory DMCA notification system would be “pointless” if OSPs were rendered ineligible “merely because their services enabled users to access such works.” [RE 217.] Moreover, the District Court noted that “the threat of such liability would create an enormous disincentive to provide access” and thus would, contrary to the DMCA's goals, limit the “variety and quality of services on the Internet”. [RE 217; S. Rep. No. 105–190, at 8.] In fact, UMG's unfounded interpretation would exclude the very services identified by Congress as eligible for Section 512(c) safe harbor protection, such as chatrooms or other forums in which material may be posted at the direction of users. The entire point of such services is to allow users to share

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argue because it presented no evidence to rebut Veoh's showing that Veoh implemented a reasonable repeat infringer policy. As UMG does not identify the repeat infringer policy as an “Issue Presented” on this appeal (UMG Br. 2–3), UMG is clearly not challenging any of the Court's findings regarding Veoh's repeat infringer policy, and therefore Veoh will not further address those findings herein.

content, not to provide mere storage locker services. Quite clearly Congress did not intend to provide safe harbor only to forums where no one could access or view the content in question.

The Court should affirm the granting of Veoh's Motion and affirm the denial of UMG's Motion.

## ARGUMENT

### **I. Summary Judgment Standard**

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) when “the pleadings, the discovery...and any affidavits show that there is no genuine issue as to any material fact...” “[T]he moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co., v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). When the moving party meets its burden, the “opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2). Summary judgment is proper if the opposing party does not present such specific facts. *Id.* The District Court properly decided both summary judgment motions.

## II. The DMCA Was Created To Foster Cooperation And Provide Greater Certainty

“Difficult and controversial questions of copyright liability in the online world prompted Congress to enact Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act (OCILLA).” *Io*, 586 F. Supp. 2d at 1141–1142 (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)). “In order to strike a balance between their respective interests, OCILLA seeks to preserve “strong incentives” for OSPs and copyright owners to “cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” *Id.* at 1142 (quoting S. Rep. No. 105–190, at 20; H.R. Rep. No. 105–551, pt. 2, at 49 (1998)). Congress intended to provide “greater certainty” to OSPs regarding “their legal exposure for infringements that may occur in the course of their activities.” *Ellison*, 357 F.3d at 1076 (quoting S. Rep. No. 105–190, at 20); H.R. Rep. No. 105–551, pt. 2, at 49–50).

Section 512 of the DMCA establishes four safe harbors that “protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement.” H. Rep. No. 105–796, at 73 (1998), *as reprinted in* 1998 U.S.C.C.A.N. 639, 649; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 732, (9th Cir.) *aff’d in part, rev’d in part and remanded by*, 508 F.3d 1146 (9th Cir. 2007)(“We have held that the limitations on liability contained in 17 U.S.C. § 512 protect secondary infringers as well as direct infringers.”). *Id.*

Section 512 shields qualifying OSPs from “all monetary relief,” and “most equitable relief.” *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098–99 (W.D. Wash. 2004). Copyright holders may obtain only the narrowest of injunctions where a safe harbor applies. 17 U.S.C. §512(j). While the safe harbors “do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability,”<sup>16</sup> injunctive relief available once a safe harbor applies is so narrow that an OSP’s assurance that it terminated accounts of infringing users can moot infringement claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007)(“CCBill”); *Corbis*, 351 F. Supp. 2d at 1110–11.

### **III. Section 512(c) of the DMCA**

Section 512(c) states that “[a] service provider shall not be liable for monetary relief...for infringement of copyright *by reason of the storage at the direction of a user* of material that resides on a system or network controlled or operated by or for the OSP, if the OSP:

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<sup>16</sup> UMG asserts that it was undisputed that UMG’s copyrights were infringed in this case, citing, out of context, a statement by the District Court from an order relating to Veoh’s motion for fees—which was not a legal determination regarding infringement. (UMG Br. 4). Because Veoh established that it was entitled to the Section 512(c) safe harbor, it was not necessary to reach Veoh’s additional defenses, including, among others, that UMG’s secondary liability claims are barred because UMG cannot establish direct infringements and that the alleged infringement was not caused by a volitional act attributable to Veoh. [RE 2178–2182.]

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.

Section 512(c) also requires that the OSP “does not receive a financial benefit directly attributable to the infringing activity, *in a case in which the service provider has the right and ability to control such activity;*” and upon notification of claimed infringement as described in Subsection 512(c)(3), “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” 17 U.S.C. § 512(c)(1)(B)–(C)(emphasis added).

UMG alleges that certain videos uploaded to Veoh infringe UMG’s copyrights. Section 512(c) applies where, as here, a plaintiff seeks to hold an OSP “responsible for either (1) infringing ‘material’ stored and displayed” on the OSP’s website or “(2) infringing ‘activity using the material on the [OSP’s computer] system.” *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (“*eBay*”). Particularly, the safe harbor applies to an OSP that allows users to upload content of their choosing. *CoStar Group, Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 701–02 (D. Md. 2001), *aff’d*, 373 F.3d 544 (4th Cir. 2004).

#### **IV. The District Court Properly Held That Veoh Qualified For Safe Harbor Protection**

The District Court found that based on the undisputed facts, Veoh established that it was entitled to Section 512(c) safe harbor. UMG's appeal with respect to the District Court's order granting Veoh's Motion is limited to challenging whether Veoh had actual or apparent knowledge of infringements that it did not act upon, and whether it had the requisite ability to control the infringing activity such that the financial benefit prong becomes applicable. The District Court's findings on each of these issues were proper and should be affirmed.

##### **A. The District Court Correctly Concluded That, Based on the Undisputed Facts, Veoh Satisfied Section 512(c)(1)(A)(iii) By Expeditiously Removing Suspected Infringements**

To determine the proper application of the knowledge elements of the Section 512(c) safe harbor, the District Court relied on the "clear guidance" provided by this Court in *CCBill*. [RE 186.] In *CCBill*, this Court refused to find actual knowledge of infringement where notices identified allegedly infringing pictures and contained links to the materials, but "required CCBill to cobble together adequate notice by searching a spreadsheet for ownership information and then combing through thousands of pages of images to find internet links." [RE 187.] This Court noted in *CCBill* that "[t]he DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the

owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider.” [RE 187; *CCBill* at 1113.] Yet this is exactly the burden UMG seeks to shift here.

This Court also found in *CCBill* that the names of websites, including “illegal.net” and “stolencelebritypictures.com” alone were not “red flags,” and did not show an awareness “of facts or circumstances from which infringing activity is apparent.” [RE 187; *CCBill* at 1111.] As this Court noted, “[w]e do not place the burden of determining whether photographs are actually illegal on a service provider.” [RE 187, *CCBill* at 1114.] Thus, where the OSP must undertake an investigation of “facts and circumstances” to identify infringing content, there are no “red flags” under Section 512(c)(1)(A)(ii). *Id.*; *see also Corbis*, 351 F. Supp. 2d at 1108 (test is not what a “reasonable person would have deduced given all the circumstances” but “whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.”) [citing 3 *Nimmer on Copyright*, § 12B.04[A][1], at 12B–49]; H.R. Rep. No. 105–551, pt. 2, at 53, 57 (“[A] service provider need not monitor its service or affirmatively seek facts indicating infringing activity. . .in order to claim this limitation on liability. . .”)

Consistent with *CCBill*, the District Court noted that the burden is on the copyright holder to provide notice of alleged infringements, and to show that Veoh engaged in willful ignorance of “red flags” sufficient to indicate readily apparent

infringement. [RE 191–193.] Applying this standard, the District Court found that “Veoh has provided substantial evidence that it fulfilled the requirements of Section 512(c)(1)(A)” and that “UMG has provided no material evidence to the contrary.” [RE 187–188.] The undisputed evidence conclusively demonstrated that Veoh always promptly terminated alleged infringing videos of which it became aware, and that the policing obligation should remain on UMG. [RE 187–193.]

Notably, YouTube recently obtained summary judgment on the grounds that it was entitled to Section 512(c) safe harbor. *Viacom International Inc., et al. v. YouTube, Inc., et al.*, 2010 WL 2532404 (S.D.N.Y., June 23, 2010) [SER 2853-2866]. In *YouTube*, like here, it was “uncontroverted” that when the defendant was given notice of suspected infringement, “it removed the material.” *Id.* at \*11. The *YouTube* court, like the District Court here, relied on *CCBill* in holding that general knowledge of infringements on YouTube’s site was “not enough” to remove it from § 512(c) safe harbor. [*Id.* at \*10; RE at 15-20.] As the *YouTube* court recognized, it “makes sense” that the burden of identifying infringing material stays with the copyright owner because “the infringing works in a suit may be a small fraction of millions of works posted by others” and an OSP “cannot by inspection determine whether the use had 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.” *Id.* at \*8-10(citing *Tiffany (NJ) v. eBay, Inc.*, 600 F.3d 93 (2d. Cir. 2010) (affirming dismissal of trademark claim where the defendant had only generalized knowledge of infringements instead of knowledge of “specific instances of actual infringement”).

**1. Veoh Had No Actual Knowledge of Alleged Infringements That Were Not Acted Upon**

UMG presented no evidence that Veoh had actual knowledge of the alleged infringements and failed to act. UMG failed to identify any allegedly infringing videos in this case until well into this litigation. UMG’s “decision to forego the DMCA notice provisions...stripped it of the most powerful evidence of a service provider’s knowledge—actual notice of infringement from the copyright holder.” *Corbis*, 351 F. Supp. 2d at 1107; *see also, Io*, 586 F. Supp. 2d at 1148. When UMG finally identified the videos, the “vast majority” were already disabled [RE 181], and Veoh immediately cancelled the small number of videos still available. [RE 181; 319–320, 1981, 325.] These facts were undisputed. [*Id.*]

UMG argues that because Veoh knew users were uploading videos categorized as music, it had actual knowledge of the alleged infringements because—UMG claims—all such videos are infringing.<sup>17</sup> Of the millions of videos

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<sup>17</sup> So-called “tagging” of videos to which UMG refers was nothing more than Veoh’s system automatically logging metadata when users identified videos in the “music” category, to automatically apply a text attribute to images of a video. [RE 337-338, 1708, 1977.] The District Court noted that while Veoh presented

uploaded to Veoh by users, the 244,205 categorized as music represents barely six percent of the videos on Veoh, and the 22,363 identified by the Audible Magic filter as potentially infringing [RE 1415:23–26] are *barely one half of one percent* of the videos on Veoh. In rejecting UMG’s argument, the District Court noted that if “merely hosting user-contributed material capable of copyright protection were enough to impute actual knowledge to a service provider, the Section 512(c) safe harbor would be a dead letter because vast portions of content on the internet are capable of copyright protection.” [RE 188.]<sup>18</sup>

UMG also claims that Veoh never had a formal “license agreement” with any major music company to display music content and, thus knew that all music content was unauthorized. In fact, it is undisputed that Veoh has an arrangement

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“evidence that the ‘tags’” were “assigned automatically” upon a user categorizing a video in a music category, even if UMG’s claim that Veoh “tagged” certain video files as music videos were true, this “would not show that Veoh had actual knowledge of infringement, for the same reason that merely hosting videos with music cannot be a basis for finding actual knowledge.” [RE 188-189.] The search engine marketing terms UMG cites to as “knowledge” of allegedly infringing content are terms associated with and used to promote legitimate SonyBMG videos. UMG presented no evidence to create a material dispute.

<sup>18</sup> *See also Corbis*, 351 F. Supp. 2d at 1108 (“The issue is not whether Amazon had a general awareness that a particular type of item may be easily infringed. The issue is whether Amazon actually knew that specific...vendors were selling items that infringed Corbis copyrights.”) Although UMG argues that *Napster* supported its general awareness argument, the District Court noted that *Napster*: (1) did not make any statement about general awareness; (2) was dealing the separate safe harbor of 512(d); and (3) was dealing with a system where over 87% of the content was alleged to be infringing. [RE 192, n.15.]

with SonyBMG, one of the four major record labels, which permits Veoh to display music videos. [RE 230–272, SRE 2966 (¶ 2); 2924 (¶ 2). Indeed, hundreds of thousands of SonyBMG music videos have been streamed on Veoh since Veoh began this arrangement. [*Id.*]<sup>19</sup> UMG is also well aware that Veoh has an agreement with MTVN.<sup>20</sup>

UMG argues that certain emails show Veoh’s actual knowledge of infringements. These emails simply confirm Veoh’s prompt removal of suspected infringements. [RE 336(¶ 125); 1225; SRE 2395(¶ 3).] UMG claims, by citing to one portion of an email chain, that a Veoh investor was informed of infringing movies (not music videos) on Veoh. [RE 1236.] UMG ignores the investor’s response, which stated: “I assure you, I know nothing about this, but definitely tell them to take it down.” *Id.* [RE 336(¶ 126).] UMG also omits Veoh’s response that the videos were immediately taken down. [RE 345–346(¶14).] UMG also

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<sup>19</sup> Moreover, there are many videos on Veoh categorized as music that would not require a license from a major music company, including certain home videos, and videos by artists, their agents or independent producers/directors. [RE 357, 1535, 1702, 756, 1372]. In fact, UMG’s own artists upload music to Veoh without having entered licensing arrangements beyond agreeing to abide by Veoh’s TOU. [SRE 2394-2395(¶14); 2397-2404; 2924(¶ 2); 2966(¶ 4).]

<sup>20</sup> MTVN stands for “Music Television Network.” UMG’s counsel acknowledged Veoh’s agreement with MTV Networks, a division of Viacom International, Inc. [SRE 2997(¶ 29) and Exh. D, p. 27.]

cites to third party news articles and communications<sup>21</sup> concerning generalized knowledge about some unspecified infringing content on Veoh, none of which was alleged to notify Veoh of the infringing content at issue here. None of these communications raise a material factual dispute regarding Veoh's actual knowledge of infringements and failure to act, and instead show that Veoh responds immediately to disable alleged infringements when it becomes aware of them in full compliance with Section 512(c)(1)(A)(iii).

UMG also argues that it identified "copyrighted music" in its complaint, yet UMG did not identify a single allegedly infringing video file in its complaint, and repeatedly refused to do so despite Veoh's multiple requests.<sup>22</sup> UMG insisted that Veoh should be able to figure out which UMG "content" was on its site, while UMG itself was unable to properly identify its own content. [SRE 2442–2443, 2737-2738.]

UMG also argues that Veoh had knowledge of infringements because the RIAA sent notices to Veoh identifying allegedly infringing videos. None of those

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<sup>21</sup> Veoh also objected to these exhibits based on numerous grounds, including lack of foundation and hearsay.

<sup>22</sup> UMG ignores the requirements for identifying alleged infringements. Specifically, Section 512(c)(3)(A)(iii) requires that the copyright claimant provide: "[i]dentification of the material that is claimed to be infringing...and that is to be removed or access to which is to be disabled, and information *reasonably sufficient to permit the service provider to locate the material.*" (emphasis added). In other words, UMG was required to identify the permalink where the material resided so that Veoh could locate it.

notices referenced UMG. The RIAA notices state, for example, that “[t]hese files offer video recordings...by the artists known as Nelly Furtado, Timbaland, Pussycat Dolls. . .” [RE 1041.]<sup>23</sup> Thus, these notices did not provide Veoh with “actual knowledge” of anything other than the specific URLs for files identified in the notices, which were indisputably promptly removed. [RE 334-335(¶ 119).] If UMG had notified Veoh of the infringements alleged in this case, Veoh would have similarly removed them.

Finally, UMG cites *Columbia Pictures Indus. Inc. v. Fung*, No. 06 CV 5578, 2009 U.S. Dist. LEXIS 122661, at \*63 (C.D. Cal. Dec. 21, 2009) as holding that “awareness that infringing material was available on the defendant’s website was sufficient to support a finding of knowledge under the DMCA.” (UMG Br. 52.) But the defendant in *Fung*: (1) hosted a “peer-to-peer” file-sharing site (unlike Veoh’s system that retains the ability to delete files) that was found to *promote* infringing activity; (2) presented *no evidence* that it had a meaningful copyright policy; and (3) over 90% of the content was infringing according to unrebutted evidence. *Fung* presents facts a far cry from those here, where there is *no* evidence that Veoh “promoted” infringing activity; where Veoh’s copyright policies are comprehensive and undisputed; and where, even construing the evidence most

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<sup>23</sup> In fact, the Pussycat Dolls uploaded videos to Veoh, and a search on that term would have returned videos specifically authorized by the Pussycat Dolls. [SRE 2794, 2814-2821(¶11).]

favorably to UMG, only between 5%–10% of the content uploaded to Veoh was identified as potentially unauthorized, and an even smaller fraction when considering the videos classified by users as “music.” [RE 192, n.15; 278–280; SRE 2415:3–15.]

**2. Veoh Was Not Aware of Facts Or Circumstances From Which Infringing Activity Was Apparent**

Lacking evidence that Veoh had actual knowledge of infringements and failed to act pursuant to Section 512(c)(1)(A) and (C), UMG argues that Veoh was aware of “red flags” of infringing activity pursuant to Section 512(c)(1)(A)(ii), and failed to act. Apparent knowledge for purposes of Section 512(c)(1)(A)(ii) requires evidence that a service provider turned a “blind eye” to red flags of obvious infringement. *Corbis*, 351 F. Supp. 2d at 1108. “The question is not ‘what a reasonable person would have deduced given all the circumstances.’ *Id.* (citing 3 *Nimmer on Copyright*, § 12B.04[A][1], at 12B–49.) Instead, the question is ‘whether the service provider deliberately proceeded in the face of blatant factors of which it was aware’.” *Id.* Veoh clearly did not turn a “blind eye” to any allegedly infringing content, and UMG failed to offer evidence of awareness of facts or circumstances from which infringing activity would be apparent. None of the purported evidence cited by UMG, even viewed in the light most favorable to UMG, or in its “totality” as UMG proposes, comes close to establishing actual or constructive knowledge of the alleged infringements.

UMG cites to newspaper articles, and other various communications, which only show that Veoh employees and investors were generally aware there is infringing material on the Internet, including on Veoh. But if general knowledge that infringing material is on the Internet, or that users sometimes upload infringing material to a site, was sufficient to disqualify a company from DMCA safe harbor, there would be no safe harbor. Unauthorized copyrighted material may exist on every site where third parties are permitted to post content. General knowledge recognizing this reality is insufficient to constitute notice of specific infringements, and is instead the predicate for Veoh to devote the significant efforts and resources that it has to prevent and disable suspected infringements. The undisputed facts establish that a small portion of the material uploaded to Veoh may have been infringing, but that whenever Veoh became aware of it, it immediately took the material down. None of the examples cited by UMG provides evidence that Veoh turned a blind eye to red flags of obvious infringement.<sup>24</sup> To the contrary, they

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<sup>24</sup> For example, UMG cites deposition testimony of Veoh's founder, Dmitry Shapiro, who acknowledged that "sometimes material belonging to someone else ends up on the Internet," including on Veoh, and that a week after Veoh's debut, unauthorized material had been uploaded. [RE 801:1-5, 12-16.] UMG also cites to Veoh's users communications (reacting to their own content being disabled due to Veoh's copyright policies) citing vaguely to other infringing content. [RE 1237-1241.] None of these examples provide evidence of red flags of any particular infringements, and do not indicate that Veoh turned a blind eye to obvious infringements.

illustrate that Veoh took any infringing videos down as soon as it became aware of them.

UMG also argues that knowledge should be imputed to Veoh based upon “tools” available from “third parties” that Veoh “could have used” to “identify copyrighted music on its site.” (UMG Br. 63.) UMG ignores Veoh’s 2006 implementation of hash filtering, and downplays Veoh’s implementation of Audible Magic against all new uploads in October 2007, and within months, against its entire backlog of videos. UMG argues that Veoh’s timing in implementing Audible Magic is evidence that Veoh somehow engaged in willful blindness of infringement. Yet as the District Court found:

UMG has not established that the DMCA imposes an obligation on a service provider to implement filtering technology at all, let alone technology from the copyrighted holder’s preferred vendor or on the copyright holder’s desired timeline.

[RE 192–193.]

The District Court further noted that it was “undisputed that Veoh did take steps to implement filtering technology before it implemented the Audible Magic system that UMG prefers, by using ‘hash’ filtering and by attempting to develop its own filtering software.” [RE 193.] Veoh’s implementation of filtering technology is evidence of its strong commitment to keep infringements off of its site, not that it engaged in willful blindness to infringing activity that should disqualify it from

safe harbor. The DMCA imposes no obligation upon an OSP to monitor its service or affirmatively seek facts indicating infringing activity, and courts have concluded that an OSP does not lose eligibility for safe harbor solely for engaging in monitoring programs. [RE 192–193]; *eBay*, 165 F. Supp. 2d at 1094. It would be ludicrous if Veoh’s own efforts to do UMG’s job for it could disqualify it from safe harbor. Moreover, this Court’s decision in *CCBill* makes clear that “[n]otice that fails to substantially comply with §512(c)(3) cannot be deemed to impart” so-called red flag awareness pursuant to Section 512(c)(1)(A)(ii). *CCBill*, 488 F.3d at 1114. “Notification” by Audible Magic does not comply with Section 512(c)(3), and cannot be deemed to impart red flag knowledge of infringements. [RE 190.]

UMG also argues that Veoh should be able to ferret out infringements by consulting various third party resources and undertaking affirmative investigations despite UMG’s failure to do so. According to UMG, Veoh’s failure to conduct searches with tools from Veoh and third parties amounted to willful blindness to infringement. (UMG Br. 21-22.)<sup>25</sup> It is unclear how Veoh would have conducted such searches, on which artists’ names and specific titles, or how this would have

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<sup>25</sup> For example, UMG cites to the fact that Veoh developed technology that allowed it to recommend videos to users (UMG Br. 22)—but ignores that this technology worked *automatically*. This technology strictly analyzes user behavior; the content of the video is irrelevant. [SRE 2824 (¶ 8).]

identified the infringing videos alleged in this case.<sup>26</sup> In any event, the DMCA does not require OSPs to engage in investigations to attempt to identify potentially infringing material; it requires that copyright claimants provide notice of specific infringements. *See* 17 U.S.C. § 512(c)(3)(A)(iii); *CCBill*, 488 F.3d at 1114; *see also Corbis*, 351 F. Supp. 2d at 1108.

On each of UMG's points, the factual record is clear, and undisputed: UMG failed to present any evidence that Veoh had either actual or "red flag" knowledge of any of the alleged infringements and failed to act. Whenever Veoh became aware of potential infringements, it promptly took them down.

**3. Veoh Acted Expeditiously Upon Obtaining Knowledge or Awareness**

The undisputed facts also established that when UMG finally identified the alleged infringements, Veoh immediately cancelled the few files that were still available. [RE 181.] As discussed above, the undisputed facts also established that Veoh promptly terminated videos as it became aware they may be infringing, including through RIAA notices.

**B. The District Court Correctly Concluded That Veoh Did Not Have the Ability to Control the Infringing Activity**

The District Court relied on "numerous provisions in the DMCA" which it found "make clear that the Section 512(c) safe harbor applies *only* to service

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<sup>26</sup> Moreover, UMG has never claimed rights in *all* works by any artists, and even misidentified its own works. [SRE 2737-2738.]

providers that have substantial control over users’ access to material on their systems.” [RE 194 (emphasis in original).] Indeed, Section 512(c) provides that upon notification from a copyright holder of alleged infringement, the service provider must “respond[] expeditiously to *remove, or disable access to*, the material that is claimed to be infringing . . .” 17 U.S.C. § 512(c)(1)(C) (emphasis added).<sup>27</sup> In other words, an OSP must have the capacity to remove material to be eligible for the safe harbor. “Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA.” *eBay*, 165 F. Supp. 2d at 1093–94. If UMG’s interpretation is correct—that Veoh’s “ability to remove” material should disqualify it from the safe harbor (UMG Br. 67)—the District Court noted “an odd ‘catch-22’” would be created, requiring OSPs to remove content but finding them liable if they did. [RE 194.]

The District Court also rejected UMG’s argument that Veoh’s “right and ability” to implement filtering software, either “standing alone or even along with Veoh’s ability to control users’ access” was sufficient to disqualify Veoh from Section 512(c) safe harbor, given the language of Section 512(m) that provides: “[n]othing in this section shall be construed to condition the applicability of

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<sup>27</sup> Similarly, the DMCA elsewhere requires OSPs to adopt and reasonably implement “a policy that provides for the *termination* in appropriate circumstances” of “repeat infringers.” 17 U.S.C. § 512(i)(1)(A)(emphasis added).

subsections (a) through (d) on. . .a service provider monitoring its service or affirmatively seeking facts indicating infringing activity. . .”<sup>28</sup> [RE 194.] As the

District Court explained:

[i]f courts were to find that the availability of superior filtering systems or the ability to search for potentially infringing files establishes—without more—that a service provider has ‘the right and ability to control’ infringement, that would effectively require service providers to adopt specific filtering technology and perform regular searches. That, in turn, would impermissibly condition the applicability of Section 512(c) on ‘a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.’<sup>29</sup>

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<sup>28</sup> UMG argues (UMG Br. 71–73) that Congress intended section 512(m) to protect only the privacy rights of users. The District Court addressed this argument by noting that:

the application of subsection (m) is not limited to Congress’s concern for privacy. It is well settled that the application of a statute is determined primarily by the text of the statute, and the text in subsection (m) could hardly be more straightforward.

[RE 195, n.17.]

The District Court also noted that “portions of the legislative history actually support the applicability of subsection (m) even when privacy is not an issue raised by the parties.” (citing S. Rep. 105-190, at 41) (“Subsection (c)(1)(A)(ii) can best be described as a ‘red flag’ test. As stated in subsection [(m)], a service provider need not monitor its service or affirmatively seek facts indicating infringing activity...in order to claim this limitation on liability”). [*Id.*]

<sup>29</sup> The District Court found that “Section 512(m) also precludes UMG’s suggestion that the Court should bifurcate the trial to determine liability before and after Veoh

[RE 195.]

Thus, the District Court held that the “applicability of the Section 512(c) safe harbor does not turn on when Veoh implemented the filtering system that UMG prefers.” [RE 179, n.6.]

UMG attempts to distinguish “conditioning” Veoh’s entitlement to Section 512(c) safe harbor on monitoring—which is expressly prohibited by Section 512(m)—from “evidencing” the ability to control infringement. While UMG concedes in advancing this argument that an OSP does *not* have an affirmative obligation to investigate for infringements, UMG argues that because its preferred third party filtering technology (Audible Magic) was available earlier than Veoh implemented it, that somehow “evidences” Veoh’s ability to control the infringements.

UMG’s semantic ploy cannot practically be applied without flouting the explicit language of Section 512(m).<sup>30</sup> The mere availability of Audible Magic cannot “evidence” Veoh’s ability to control infringements without conditioning the applicability of safe harbor on Veoh implementing filtering in UMG’s chosen

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implemented the Audible Magic filter, because it makes clear that the safe harbors’ limits on liability do not turn on whether a service provider monitors its service.” [RE 195, n.18.]

<sup>30</sup> UMG quotes a law review article by Jane Ginsberg, which states that Section 512(m) should not entitle an OSP “to remain militantly ignorant” of infringement. (UMG Br. 73). The record conclusively establishes that Veoh’s strong copyright policies and practices exceeded its legal obligations in combating infringement.

fashion. The fact that Veoh undisputedly did implement Audible Magic, in addition to its already existent hash-filtering, makes UMG's suggestion even more dangerous: it effectively seeks to punish Veoh for taking added precautions in seeking to combat infringement because Veoh did not implement UMG's chosen filtering on UMG's preferred (and impractical) timetable. Contrary to UMG's argument, the District Court did not "create a 'right and ability to control'" standard that was "incapable of satisfaction;" the District Court relied on the plain language of the statute in refusing to condition Veoh's right to safe harbor on UMG's "evidence" that its preferred filtering system was available, and properly refused to punish Veoh for implementing that filtering.

Several other courts that have analyzed Section 512(c)(1)(B) have reached similar conclusions. In *Hendrickson v. eBay, Inc.*, the court rejected the plaintiff's argument that eBay had the "right and ability to control" because it had removed listings for infringing items in the past. The *eBay* court also held that eBay's limited monitoring of its website for apparent infringements did not constitute the "ability to control," because "the legislative history shows that Congress did not intend for companies such as eBay to be penalized when they engage in voluntary efforts to combat piracy over the Internet." *eBay*, 165 F. Supp. 2d at 1094.<sup>31</sup>

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<sup>31</sup> As the District Court noted, "Congress specifically instructed that [t]his legislation is not intended to discourage the service provider from monitoring its service for infringing material. Courts should not conclude that the service

The District Court rejected UMG's attempt to distinguish *eBay* on the grounds that eBay "merely publicized but did not possess the infringing material, and had no ready mechanism to identify such material," finding Veoh's possession of the videos "irrelevant" "given the requirements of Section 512(c)" which apply to OSPs that "host material stored at the direction of a user." [RE 196.] As the District Court also acknowledged, eBay did have one of the "ready mechanisms" that UMG asserts is available to Veoh: the ability to search for potentially infringing material. *See eBay*, 165 F. Supp. 2d at 1085 (describing program that allowed searches for potentially infringing items). [RE 196.] Thus, the same taken by the *eBay* court approach is proper here.

The District Court also relied on *Ellison v. Robertson*, which further clarified *eBay*, noting that in order for OSPs that do receive a financial benefit directly attributable to the infringing activity to qualify for the safe harbor, they are required by 512(c)(1)(C) to delete or block access to infringing material. The court refused to accept that Congress would create:

a confusing, self-contradictory catch-22 situation that pits 512(c)(1)(B) and 512(c)(1)(C) directly at odds with one another, particularly when there is a much simpler explanation: the DMCA requires more than the mere ability to delete and block access to infringing material after that material has been posted in order for the [O]SP

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provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program. H. Conf. Report 105-796 at 73 (Oct. 8, 1998)." [RE 196, n.19.]

to be said to have ‘the right and ability to control such activity.’

189 F. Supp. 2d 1051, 1061 (C.D. Cal. 2001) (Cooper, J.), *aff’d in part and rev’d in part on different grounds*, 357 F.3d 1072, 1079 n.10 (9th Cir. 2004) [RE 196–197].

Courts have found that for an OSP to be found to have the requisite “ability to control” to expose it to liability, the service provider must exercise a “greater level of control than the threshold level that is required simply to qualify for the Section 512(c) safe harbor.” [RE 197.] In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002), the court noted that “closing the safe harbor based on the mere ability to exclude users from the system is inconsistent with the statutory scheme.” Accordingly, the *Cybernet* court applied a separate standard for the “ability to control” in the context of Section 512(c) than it applied in evaluating the plaintiff’s claim for common law vicarious infringement, because “Section 512 is meant to encourage some level of copyright enforcement activity by service providers, not to punish it.” *Id.* at 1173–74, 1181.

UMG’s application of the statutory “ability to control” element relies not on cases deciding Section 512(c), but solely on cases that construe the ability to control element of the common law doctrine of vicarious liability. [RE 197–198.] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007); *A&M Records, Inc.*

*v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *aff'd after remand*, 284 F.3d 1091 (2002). The District Court rejected UMG's argument that two *Napster* principles trumped the explicit language and design of the DMCA, namely that (1) the ability to block infringers' access is evidence of the ability to control; and (2) to avoid vicarious liability, the OSP must exercise the right to police to its fullest extent. *Napster*, 239 F.3d at 1023. [RE 198.] The District Court found that the DMCA confirms a separate analysis from *Napster* is required given that what constitutes "control" under *Napster* would render the statutory phrase "ability to control" redundant, because the "'ability to block infringers' access for any reason whatsoever" is a prerequisite to satisfying the requirements of Section 512(i)(1)(A). [RE 198.] The District Court also found that the *Napster* requirement that the ability to police must be exercised to the fullest extent would "run afoul of Section 512(m)" which states that nothing in Section 512 shall be construed to condition the safe harbors on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity. . ." [RE 194–195.]

To support its argument that the ability to control standard codifies the common law vicarious liability standard, UMG relies on an early House Committee report—from a much different version of the DMCA than was ultimately adopted. Thus, the District Court considered UMG's reliance on H.R.

Rep. No. 105–551, pt. 1, at 26 “far from dispositive.” *Compare* H.R. Rep. No. 105–551, pt. 1, at 8–10 (1998) *with* 17 U.S.C. § 512(c). [RE 198.] The District Court noted that “neither the later report by the House Committee on Commerce nor the report by the Senate Judiciary Committee expresses an intent to adopt a common law standard.” [RE 198.] Instead, the District Court noted that the Senate report reflected an intention to depart from the common law, and to “create” “safe harbors” for “certain common activities” of OSPs.<sup>32</sup> [RE 199.]

The District Court noted in its decision that UMG relied on *CCBill* to support its interpretation that the “right and ability to control” standard is identical to the common law. But *CCBill* considered that the terminology “financial benefit directly attributable to” should be interpreted consistent with the similarly-worded common law standard for vicarious liability. 488 F.3d at 1117; [RE 199.] This Court based “[i]ts conclusion. . .on the well-established rule of construction that where Congress uses terms that have accumulated settled meaning under common law, a court must infer, *unless the statute otherwise dictates*, that Congress means to incorporate the established meaning of these terms. *Id.* (citing *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1004 n.4 (9th Cir. 2004)) (emphasis

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<sup>32</sup> Specifically, the Senate report states that “[r]ather than embarking upon a wholesale clarification of these doctrines of [contributory and vicarious liability], the Committee decided to leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers . . .” S. Rep No. 105-190, at 19. [RE 198-199.]

added).” [RE 199.] The District Court’s conclusion is consistent with *CCBill*: the DMCA may not dictate a departure from the common law with respect to “financial benefit,” but with respect to “ability to control,” both Section (m) and the requirements of the ability to disable access to material and terminate repeat infringers require departure from the common law. [RE 199.]

UMG ignores the structure and language of the DMCA in steadfastly insisting that there is no difference between the meaning of ability to control within the context of the DMCA, and the common law standard for vicarious liability. As the District Court explained in rejecting UMG’s interpretation, “the problem is that the mere ability to control by monitoring and terminating cannot constitute the necessary control for purposes of establishing compliance with the DMCA, otherwise, it negates the purpose of the DMCA.” [RE 239:23–240:2.] UMG’s proposed interpretation would create a “catch-22” and create a “contradictory” and “confusing” statutory scheme. As the District Court concluded: “[t]he text of the statute and the case law on this element of the safe harbor compel the Court to conclude that Veoh did not have the requisite ‘right and ability to control.’” [RE 194.] The District Court’s analysis regarding the ability to control in the context of 512(c) is proper and should stand.

**C. A Financial Benefit Was Not Present and Was Not Necessary to Determination**

Because financial benefit is only considered in a case where Veoh does have the requisite ability to control the infringing activity, there was no need for the District Court to consider the financial benefit prong. 17 U.S.C. § 512(c)(1)(B). But even if this Court concludes that Veoh did somehow have the ability to control the infringing content, and thus considers the financial benefit inquiry proper, Veoh still qualifies for the Section 512(c) safe harbor because Veoh did not receive a financial benefit “directly attributable” to the allegedly infringing content. 17 U.S.C. § 512(c)(1)(B).

UMG asserts that Veoh received a financial benefit directly attributable to the alleged infringements because advertising is Veoh’s primary means of revenue. UMG offered no evidence that Veoh ever used infringing material to promote its service. To the contrary, Veoh has always prohibited infringing material and promptly removed it when it became aware of it. The undisputed facts also establish that Veoh never targeted advertising at infringing material.<sup>33</sup> The advertising a user sees is determined by geographical data about the user and their viewing habits, and not tied to the content of any video.<sup>34</sup> None of the evidence

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<sup>33</sup> Veoh offers three types of advertising: display advertising (e.g. banner advertising), pre-roll advertising, and overlay advertising. [RE 330(¶ 97).]

<sup>34</sup> [SRE 2406(¶ 3), 2972 (Ex. B), 61:14–62, 71:23–25, 75:4–17, 76:21–25; 77.]

submitted by UMG supports a conclusion that Veoh offered pre-roll advertising in connection with UMG's content, and UMG offers no examples of that ever happening. The materials state only that Veoh provides banner advertising in connection with all video details pages. [RE 1528;<sup>35</sup> 2134–2141.]

The House and Senate reports state that “a service provider conducting a legitimate business” would not be considered to receive a “financial benefit directly attributable to the infringing activity,” where the infringer makes the same payment to the service as a non-infringing user of the service. S. Rep. No. 105–190, at 44; H.R. Rep. No. 105–551, pt. 2, at 54. Veoh does not receive a payment from either infringing or non-infringing users. *See CoStar*, 164 F. Supp. 2d at 695, 705 (finding no financial benefit for purposes of Section 512(c) for service supported by advertising that did not charge users any payment). Indirect payments Veoh may receive from advertising not targeted at any particular content are not “a financial benefit directly attributable to the infringing activity.” S. Rep. No. 105–190, at 44; H.R. Rep. No. 105–551, pt. 2, at 54.

Tellingly, UMG does not cite a single case discussing the financial benefit prong for purposes of Section 512(c). Courts that have analyzed the financial

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<sup>35</sup> Regarding Veoh's advertising, UMG submits opinions from its alleged expert, Edelman, which Veoh objected to at summary judgment as improper and irrelevant. The District Court found that it need not reach Veoh's objections in light of its analysis. [RE 179, n.6.] To the extent this Court considers this evidence as pertinent to any relevant issues, Veoh renews its objections. [SRE 3003-3042.]

benefit prong for purposes of Section 512(c) as part of their holdings have required a more direct connection. *See CoStar*, 164 F. Supp. 2d at 695, 705; *see, e.g.*, 3 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright*, 12B.04[A][2][b] at 12B 55–57 (2008) (discussing legislative history and *CoStar* and submitting that despite Ninth Circuit *dictum* in *CCBill* regarding arguably broader common law standard for vicarious liability, Section 512(c)’s requirement that financial benefit be “direct” should be taken literally.)

To accept UMG’s argument would mean that any OSP supported by advertising would receive a disqualifying financial benefit whenever a user uploaded infringing material to its site. In any event, given the small percentage of videos on Veoh categorized as music, the even smaller percentage of those that were identified by Audible Magic as potentially unauthorized, the small percentage of Veoh’s video views in the music category [SRE 2415:3–11], and Veoh’s prompt removal of all suspected infringements, there was no evidence that Veoh received a financial benefit directly attributable to the allegedly infringing content.

#### **V. The Court Should Affirm the District Court’s Denial of UMG’s Motion**

UMG moved to disqualify Veoh from the Section 512(c) safe harbor, arguing that the content at issue was not “stored” on Veoh “by reason of the storage at the direction of a user” given Veoh’s automated functions making UGC accessible. The District Court correctly held that the language, design, and

legislative history of the DMCA support Veoh's interpretation that it should not be disqualified from Section 512(c) safe harbor for making UGC accessible.

**A. The Statutory Text and Design Supports the District Court's Holding**

Section 512(c) provides safe harbor for qualifying OSPs "for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider..." 17 U.S.C. § 512(c)(1). A "service provider," under Section 512(c) is "a provider of online services or network access, or the operator of facilities therefor..." 17 U.S.C. § 512(k)(1)(B). UMG does not dispute that Veoh satisfies this definition and does not contest that the allegedly infringing material at issue was uploaded and stored at the direction of users. Instead, UMG argues that certain functions performed by Veoh's software remove Veoh from safe harbor and that Section 512(c) should be interpreted to provide an OSP safe harbor only for the storage, and not for enabling others to access that material. The statutory text belies UMG's interpretation; nothing indicates that Congress intended to limit the safe harbor only to an OSP's storage function. To the contrary, the "by reason of the storage" language is itself broad causal language meant to cover more than mere electronic storage lockers.

This interpretation is confirmed by the remainder of the subsection. Section 512(c) *presupposes* that OSPs will be providing access to the user's material. One

of the requirements for an OSP's entitlement to the safe harbor is that once it obtains knowledge that material is infringing, it "*acts expeditiously to remove, or disable access to, the material.*" 17 U.S.C. §512(c)(1)(A)(iii)(emphasis added). This provision makes no sense if merely providing access to the material made the OSP ineligible for the safe harbor in the first place. Similarly, the notice and take down provisions of Section 512(c)(1)(C) make no sense if material was stored in a manner in which no one (including copyright owners) could locate the material. As the District Court noted in its opinion: "[t]he 'safe harbor' would in fact be full of treacherous shoals if the copyright owner still could recover damages because the service provider remained liable for having provided access to the stored material that had been removed." [RE 216.]

**B. The Legislative History Supports The District Court's Holding**

The legislative history confirms that Congress did not intend to limit Section 512(c) safe harbor to mere electronic storage facilities, but is intended to protect service providers that host a "chatroom, or other forum in which material may be posted at the direction of users." H.R. Rep. No. 105-551, pt. 2, at 53. In contrast, material is excluded from the safe harbor if it "resides on the system or network operated by or for the service provider through its own acts or decisions and not at the direction of a user. . . ." *Id.* UMG does not argue that Veoh has engaged in any

acts or decisions that would contribute in any way to, or is otherwise responsible for, the creation or selection of the allegedly infringing content at issue.

The legislative history also specifically confirms Congress' expectation that websites offering access to user-supplied *audio* and *video* material would be eligible for the protections of Section 512(c). *See* S. Rep. No. 105–190, at 44 (identifying “the activity at an online site offering audio or video” as within ambit of § 512(c)). Sites offering audio and video necessarily have to engage in some automated processing to make material accessible because users post material to share it with others.

Congress enacted the Section 512(c) safe harbor to ensure that “the variety and quality of services on the Internet will continue to expand.” *Id.* at 8. UMG's exceedingly narrow construction with the section only applying to a single type of service—passive storage repositories—contradicts Congressional intent and the objectives of the DMCA. *See, e.g., Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193, 207 (2005) (refusing to construe a safe harbor in the Patent Act so narrowly as to render it illusory). Indeed, rather than address the fact that the text of Section 512(c) and the legislative history specifically contemplate that the service provider would provide access to its users' content, UMG relies upon narrow definitions of the terms “storage” and “reside” to parse their meaning apart from their meaning in the statute. Of course, the terms cannot be properly

interpreted divorced from their context within the statute's text. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990).

Further, nothing in the language or legislative history of the DMCA indicates that an OSP becomes ineligible for Section 512(c) safe harbor merely because it automatically processes a user's content into a format that is widely accessible. To the contrary, as detailed above, Congress specifically contemplated that qualifying OSPs would provide such functions.<sup>36</sup>

UMG argues that Veoh is a "different type of service" than "web hosting" and thus Veoh should be disqualified from the safe harbor because it is not merely making storage resources available to web site operators, but is a "content distribution business." (UMG Br. 38.) While Veoh does have its own programming, and partner content, none of that content is at issue in this case. Instead, UMG alleges infringements based on content selected and uploaded by third parties. UMG makes no meaningful distinction between services like Veoh and those acting solely as "web-hosts" given that the only technical distinction it can point to is Veoh's automated features making the user uploaded content accessible.

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<sup>36</sup> As the District Court also noted, a different subsection of § 512(c) requires that OSPs "act expeditiously to remove, or disable *access to*" allegedly infringing content. 17 U.S.C. § 512(c)(1)(A). [RE 215 n.7.]

### C. Caselaw Supports The District Court's Holding

Other courts have held that § 512(c) shields OSPs from liability for providing access to infringing material stored at the direction of users and for activity using the material. *See YouTube*, 2010 WL 2532404 (S.D.N.Y. 2010) (YouTube entitled to Section 512(c) safe harbor and its providing access to content uploaded by users “do[es] not cost the service provider its safe harbor”); *eBay*, 165 F. Supp. 2d at 1088 (Section 512(c) shields website operator from liability for infringing activity using the material); *see also Io*, 586 F. Supp. 2d at 1148 (“[i]nasmuch as [the automated functions] [are] a means of facilitating user access to material on its website, this court finds that Veoh does not lose safe harbor through the automated creation of these files.”)

Consistent with the District Court's holding, *Io Group* held that Veoh was not “disqualified from Section 512(c)'s safe harbor because of *automated functions* [*i.e.*, creation of Flash files] *that facilitate access* to user-submitted content on its website.” *Id.* at 1147 (emphasis added). Like UMG here, the plaintiff in *Io Group* failed to provide Veoh with notice of infringement prior to filing suit, and argued that Veoh was not entitled to Section 512(c) safe harbor as a result of automated functions that made user submitted content accessible. *Id.* The *Io* court specifically rejected the plaintiff's argument that video files on Veoh were not made available by Veoh “at the direction of a user,” because Veoh converted each

user-submitted video so that such videos were accessible by viewers. As the court explained:

Veoh has simply established a system whereby software automatically processes user-submitted content and recasts it in a format that is readily accessible to its users ...But Veoh does not itself actively participate or supervise the uploading of files...[v]ideo files are uploaded through an automated process which is initiated entirely at the volition of Veoh's users.

*Io*, at 1148 (citing *The Cartoon Network LP, LLP v. CSC Holdings, Inc.* 536 F.3d 121, 131(2d Cir.2008)) (“significant difference” between human employee volitionally operating copying system, and issuing command directly to automated system that engages in no volitional conduct.) *Id.* Likewise, the District Court here, after considering the statutory language, design and legislative history of the DMCA, rejected UMG's narrow interpretation of Section 512(c), finding that the broad causal language of “*by reason of storage at the direction of a user*” [RE 215 (emphasis in original)] encompassed those videos uploaded by users because Veoh's automated software functions were “directed toward facilitating access to materials stored at the direction of users.” [RE 213.]

Similarly, in *YouTube*, the court refused to find that the “replication, transmittal and display of videos on YouTube” removed the defendant YouTube from Section 512(c) safe harbor because the plaintiffs' argument, like UMG's

argument here, “confines the word ‘storage’ too narrowly to meet the statute’s purpose.” 2010 WL 2532404 at \*12.

Additional cases distinguish an OSP’s automated functions from volitional conduct. In *CoStar*, the plaintiff sought to hold the defendant OSP liable for displaying, distributing and copying allegedly infringing photographs on its real estate site. 164 F. Supp. 2d at 692. The defendant allowed users to automatically post photographs, which users could view through automatic upload and download functions. *Id.* at 695. The court found that the safe harbor applied even where the defendant engaged in review functions before the photographs were uploaded. *Id.* at 701–702. The *CoStar* court rejected the plaintiff’s attempt to disqualify the defendant from the safe harbor as a result of its cursory screening process because the photographs were “uploaded at the volition of the user and are subject, not to a review and selection process, but to a mere screening to assess whether they are commercial property and to catch any obvious infringements. . . [a]lthough humans are involved rather than mere technology, they serve only as a gateway and are not involved in a selection process.” *Id.* at 702.

The Fourth Circuit affirmed judgment for *CoStar* finding that the defendant had not engaged in any infringing conduct for “passively storing material at the direction of users in order to make that material available to other users upon their request.” *CoStar*, 373 F.3d at 555–557. As explained in *CoStar*, “[a]s to direct

infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another.” *Id.* at 554 (§ 512(c) protects an OSP that “lacks scienter about a copyright violation by a user.”). *Id.* at 552.

In *Cartoon Network*, the Second Circuit reversed a decision enjoining the defendant cable company’s plans to release a new DVR-like service, rejecting the lower court’s holding that the service would directly infringe copyrights. The plaintiff argued that the defendant should be liable for direct copyright infringement because the “RS-DVR would directly infringe” their reproduction and public performance rights. *Cartoon Network*, 536 F.3d at 124. In reversing the lower court, the court found key that the defendant lacked “volitional conduct” in making copies. *Id.* at 124, 131. Significantly, the *Cartoon Network* decision explicitly notes that operating an internet service involves far less discretion than the defendant in *Cartoon Network*, but still refused to find the defendant directly liable for copyright infringement. *Id.* at 132.

Like the “automated” nature of the RS-DVR in *Cartoon Network* that eliminated the necessary volitional component to subject the defendant to direct liability, Veoh’s automated functions confirm that Veoh did not engage in volitional conduct with respect to the alleged infringements; the material was stored at the direction of Veoh’s users.

The District Court noted that *Io Group's* application of Section 512(c) to automated functions that facilitate access to UGC is consistent with a number of additional cases. [RE 218] (citing *Corbis*, 351 F. Supp. 2d at 1094, 1110) (Section 512(c) applies to “any copyright infringement” by vendors who created websites where defendant did not actively participate in or supervise uploading of images or preview images); *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003) (Section 512(c) applies to defendant for sale of infringing goods on its website by third parties); *eBay*, 165 F. Supp. 2d at 1087–88 (Section 512(c) shields defendant OSP from liability for third parties’ sale and distribution of infringing material on its site because § 512(c) applies to material “stored and displayed on the service provider’s website”) (quoting 17 U.S.C. § 512(c)(1)(A)(i)).) [RE 218.] UMG has cited no case holding that § 512(c) does not apply to software functions like those at issue here.

UMG relies on *CCBill* to argue that the Ninth Circuit has rejected the view that “if anything [Veoh] does falls within the limitation on liability of Section 512(c), then everything it does is categorically protected.” In response, the District Court noted that it did “not understand Veoh to be taking this extreme position, and it is certainly not the view of this Court.” [RE 218–219.] The District Court explained that *CCBill* addressed Section 512(d)—not 512(c), and the service *CCBill* provided allowed consumers to use credit cards to pay for subscriptions,

which was too far removed to be found “by reason of. . .referring or linking users to an online location.” [RE 219.] Conversely, Veoh’s providing access to material stored at the direction of users is squarely related to the storage itself. [*Id.*]

To support its argument that Veoh is not entitled to Section 512(c) safe harbor because it is not a “web host only making storage services available,” UMG cites *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (“*Netcom*”) as the case “Congress had in mind when enacting the DMCA.” In *Netcom*, the defendant—a conduit in providing internet access to material (“necessary to having a working system for transmitting...postings to and from the Internet...”)—was not liable as a direct infringer where the defendant “created a copy” of the plaintiff’s works. *Id.* at 1368. The *Netcom* court refused to extend liability to service providers who “do no more than operate or implement a system that is essential if [Internet] messages are to be widely distributed.” *Id.* 1369–1370. As the *Netcom* court explained, to qualify for the exemption under Section 111 of the Copyright Act the “carrier must not have any direct or indirect control over the content or selection of the primary transmission.” *Netcom*, at 1370, n.12.

While UMG argues that unlike Veoh, Netcom served purely “hosting” functions, UMG ignores the similarities between the defendant in *Netcom* and Veoh—*neither Veoh nor Netcom were responsible for or capable of controlling*

*the content selected and uploaded by third parties.* UMG strains to attribute some “decision-making” to Veoh that would create a direct connection between Veoh and the infringing content—citing Veoh’s decision to prohibit pornography, launch its website, and allow videos of certain length for efficiency. But none of those “decisions” were to upload allegedly infringing content. UMG’s misleading attempt to distinguish Veoh from OSPs providing infrastructure misses the point of the safe harbor—which seeks to protect OSPs, like Veoh, who played only a passive role in facilitating access to UGC. In short, UMG has presented no meaningful distinction between Veoh and OSPs intended to be covered by the DMCA.

**D. UMG Fails to Cite Relevant Authority To Support Its Novel Interpretation**

Contrary to the classic rules of statutory construction applied by the District Court, UMG asks this Court to look outside the context of the DMCA. For example, UMG relies on *Fair Housing Council of San Fernando Valley v. Roomates.com LLC*, 521 F.3d 1157 (9th Cir. 2008), which analyzes safe harbor protection under the Communications Decency Act. The court noted that where a website operator “passively displays content” created by third parties it is only a service provider, but is a content provider when it creates or develops content. *Id.* at 1162. Thus, this case sets forth the unremarkable position that for content a website operator created or developed, it is a content provider for purposes of CDA

immunity not at issue in this case. Unlike the defendant in *Fair Housing*, Veoh did not create or develop the content at issue here.

UMG further presents a newly-minted but similarly flawed argument that the Court should look to cases decided under the Clayton Act and RICO to interpret what “by reason of” means under the DMCA. UMG cites *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267–68 (1992), where the court interpreted the language “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ...” *Id.* at 267. The *Holmes* court noted that some directness is required for “Clayton Act causation” because less direct injuries complicate ascertaining damages and apportionment. *Id.* at 269. These considerations do not remotely relate to the context of the phrase “by reason of” here.

Moreover, the “proximate cause” of the material appearing on Veoh’s website *is* directly a result of storage at the direction of a user, notwithstanding the fact that Veoh (without volition or knowledge that the material was allegedly infringing) makes that material accessible. The allegedly infringing material would not have been made accessible by Veoh *but for* third party users uploading the material; and the *content* of the videos remains unchanged after Veoh recasts only the form of the videos through its automated features.

UMG also cites *Anza v. Ideal Steep Supply Corp.*, 547 U.S. 451 (2006) (UMG Br. 36 n.8). *Anza* interpreted a RICO provision that makes claims available to “[a]ny person injured in his business or property by reason of a violation” of RICO where the alleged violation was the proximate cause of the injury. The plaintiff in *Anza* sought recovery for competitive injury after the defendant competitor violated tax laws. The court found that because other means existed to regulate tax violators, the scope of RICO should not be expanded to claims where the plaintiff’s alleged injury is only indirectly connected to the alleged misconduct. 547 U.S. at 460. Here, Veoh is only indirectly connected to UMG’s alleged injury. The direct causal connection of UMG’s injury is the user storing the allegedly infringing material, which Veoh would not have unknowingly made available if the users had not violated Veoh’s policies and uploaded the material.

Finally, UMG cites *Hemi Group, LLC v. City of New York*, \_\_\_U.S. \_\_\_, 130 S. Ct. 983 (2010), where the Court rejected the City’s “attenuated” RICO theory that fraud was committed by retailers selling cigarettes without submitting certain information to the State, preventing the City from seeking taxes for those sales. *Id.* at 985. As the court noted, the City’s theory relied on separate actions by separate parties, and sought to expand RICO liability to situations where the defendant’s fraud on the third party (the State) made it easier for a fourth party (the taxpayer) to harm the plaintiff (the City). *Id.*

Unlike the Clayton Act and RICO cases where courts sought to construe “by reason of” within the statutory context, refusing to expand liability where the defendant was only indirectly responsible for the alleged harm, Veoh is not seeking to expand liability to those not responsible for the alleged harm but is instead seeking a narrow defense. Like the plaintiffs in the Clayton Act and RICO cases, UMG’s overreaching claims seek to hold Veoh responsible for its indirect role in allegedly damaging UMG.

The District Court interpreted “by reason of” in harmony with the statute, design, history and cases decided under the DMCA. UMG omits from its analysis that the allegedly infringing material resided on Veoh’s system *because a third party user uploaded the material*. Veoh’s automated features rendering material accessible do not disqualify Veoh from Section 512(c) safe harbor.

### **CONCLUSION**

In 1997, Bill Clinton was starting his second term, the United Kingdom still controlled Hong Kong, and google.com was a newly registered website (while Google had yet to be incorporated). The Internet, reached through dial-up companies like AOL, was still evolving from its academic and technical foundations to the commercial and informational destination it is today. And, of course, the DMCA did not exist. It is to this world that UMG wants to return, one where it can assert hyperbolic accusations of piracy without regard to the truth or

the law. Veoh, for its part, is exactly the type of company and good actor that the DMCA was meant to encourage and protect. The District Court recognized in Veoh what Congress imagined in 1998: a company committed to exploring new media with an equal commitment to cooperating in protecting content. The District Court's decisions should be affirmed.

Dated: July 19, 2010

Respectfully submitted,

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellee respectfully requests oral argument.

**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Veoh identifies *UMG Recordings, Inc. et al. v. Shelter Capital Partners, LLC, et al*, Case No. 09-55902, and Veoh's related appeal in this case related to its attorneys' fees and costs, Case No. 10-55732.

**CORPORATE DISCLOSURE STATEMENT**

This statement is made pursuant to Federal Rule of Appellate Procedure 26(1) and 28(a)(1). The following persons and entities have an interest, financial or otherwise, in the outcome of this litigation:

Goldman Sachs Group, Inc.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), and the Court's June 3, 2010 Order extending the word limit to 17,000 words (Dkt. No. 625), I certify that this brief is proportionately spaced with one inch margins on all four corners, using Microsoft Word 2007 in 14-point font size and Times New Roman font style, with a total of 16,921 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(6).

Dated: July 19, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 19, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document, by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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