

1 IRELL & MANELLA LLP  
 Steven A. Marenberg (101033) (smarenberg@irell.com)  
 2 Elliot Brown (150802) (ebrown@irell.com)  
 Brian D. Ledahl (186579) (bledahl@irell.com)  
 3 Benjamin Glatstein (242034) (bglatstein@irell.com)  
 1800 Avenue of the Stars, Suite 900  
 4 Los Angeles, California 90067-4276  
 Telephone: (310) 277-1010  
 5 Facsimile: (310) 203-7199

6 Attorneys for Plaintiffs

7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA  
 WESTERN DIVISION

UMG RECORDINGS, INC., <i>et al.</i> ,	)	Case No. CV-07-05744 AHM (AJWx)
Plaintiffs,	)	<b>UMG’S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: VEOH’S SECOND AFFIRMATIVE DEFENSE (17 U.S.C. § 512)</b>
vs.	)	
VEOH NETWORKS, INC., <i>et al.</i> ,	)	
Defendants.	)	
	)	
	)	Date: October 20, 2008
	)	Time: 10:00 a.m.
	)	Ctrm: 14
	)	Judge: Hon. A. Howard Matz

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3 I. INTRODUCTION.....	1
4 II. THE DMCA EXCLUDES VEOH’S INFRINGING CONDUCT.....	2
5 A. The Plain Language of the DMCA Excludes Veoh’s	
6 Conduct.....	3
7 1. The Ordinary meaning of the DMCA excludes Veoh.....	4
8 2. The context of Section 512(c) excludes Veoh.....	5
9 3. Veoh’s interpretation would improperly rewrite the	
DMCA.....	6
10 B. The Legislative History Of The DMCA Contradicts	
11 Veoh’s Interpretation.....	7
12 1. The DMCA’s plain meaning makes sense; Veoh’s	
13 interpretation does not.....	8
14 2. The legislative history confirms the plain language	
15 of the DMCA.....	11
16 III. THE ISSUES RAISED BY UMG’S MOTION REMAIN	
17 ISSUES OF FIRST IMPRESSION.....	13
18 A. The <i>Io Group</i> Case Does Not Address The Issues	
19 Presented Here.....	13
20 B. The Other District Court Decisions Relied On By Veoh	
21 Do Not Address The Issues Presented Here.....	17
22 1. <i>Corbis Corp. v. Amazon.com, Inc.</i> .....	17
23 2. <i>Hendrickson v. Amazon.com, Inc.</i> .....	18
24 3. <i>Hendrickson v. eBay, Inc.</i> .....	19
25 4. <i>Costar Group, Inc. v. Loopnet, Inc.</i> .....	20
26 IV. VEOH’S ADDITIONAL ARGUMENTS DO NOT AND	
27 CANNOT FORESTALL PARTIAL SUMMARY JUDGMENT.....	21
28 A. The DMCA Contains No Exception For Automated	
Processing.....	21
B. Veoh Has Not Shown Respect For Copyright.....	23
C. Veoh Is Not Entitled To Summary Judgment.....	24
V. CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b><u>Cases</u></b>	
4 <i>Adams v. Howerton</i> , 673 F.2d 1036 (9th Cir. 1982).....	2
5 <i>Aronsen v. Crown Zellerbach</i> , 662 F.2d 584 (9th Cir. 1981).....	3
7 <i>Bowsher v. Merck &amp; Co.</i> , 460 U.S. 824 (1983) .....	3
8 <i>Christensen v. Comm. I.R.S.</i> , 523 F.3d 957 (9th Cir. 2006).....	3
10 <i>Corbis Corp. v. Amazon.com, Inc.</i> , 351 F. Supp.2d 1090 (W.D. Wa. 2004).....	17, 18, 19
11 <i>CoStar Group, Inc. v. Loopnet, Inc.</i> , 164 F. Supp.2d 688 (D. Md. 2001) .....	20, 21
13 <i>CoStar Group, Inc. v. Loopnet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004).....	16, 20
14 <i>Department of Hous. &amp; Urban Dev. v. Rucker</i> , 535 U.S. 125 (2002) .....	7
16 <i>Ellison v. Robertson</i> , 357 F.3d 1072 (9th Cir. 2004).....	10
17 <i>Hendrickson v. Amazon.com, Inc.</i> , 298 F. Supp.2d 914 (C.D. Cal. 2003).....	18, 19
19 <i>Hendrickson v. eBay, Inc.</i> , 165 F. Supp.2d 1082 (C.D. Cal. 2001).....	19
20 <i>Lamie v. United States Trustee</i> , 540 U.S. 526 (2004) .....	6
22 <i>MAI Systems Corp. v. Peak Computer, Inc.</i> , 991 F.2d 511 (9th Cir. 1993).....	2
23 <i>McCarthy v. Bronson</i> , 500 U.S. 136 (1991) .....	3
25 <i>Muscarello v. United States</i> , 524 U.S. 125 (1998) .....	3
26 <i>Nuclear Info. and Resource Service v. U.S. Dept. of Trans. Res.</i> , 457 F.3d 956 (9th Cir. 2006).....	3
27 <i>On Command Video v. Columbia Pictures</i> , 777 F. Supp. 787 (N.D. Cal. 1991) .....	23

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Page(s)

*Perfect 10, Inc. v. CCBill, LLC*,  
488 F.3d 1102 (9th Cir. 2007)..... 4, 9, 10

*The Cartoon Network LP, LLP v. CSC Holdings, Inc.*,  
536 F.3d 121(2d Cir. 2008)..... 16

*United States v. Daas*,  
198 F.3d 1167 (9th Cir. 1999)..... 2

*United States v. Locke*,  
471 U.S. 84 (1985) ..... 6

*United States v. Missouri Pac. R. Co.*,  
278 U.S. 269 (1929) ..... 7

*United States v. Mohrbacher*,  
182 F.3d 1041 (9th Cir. 1999)..... 2, 3

*United States v. Wenner*,  
351 F.3d 969 (9th Cir. 2003)..... 3, 6

**Statutes**

17 U.S.C. § 101..... 2

17 U.S.C. § 512..... passim

**Other Materials**

*Forget about YouTube: Go To These Sites If You Want Hard Core  
Copyright Infringement*,  
TechCrunch (4/4/2007) ..... 23

*Veoh vs. Copyright Holders: Is a War Brewing?*,  
New York Times (8/9/2007) ..... 23

1 **I. INTRODUCTION**

2 Veoh does not dispute that it makes numerous copies of copyrighted works  
3 uploaded by users, transcodes those copyrighted works into different file formats so  
4 that they can be further distributed by Veoh, publicly performs those works on  
5 demand to anyone in the world with a computer, and distributes copies of those  
6 works for free to anyone who wants a copy. Nor does Veoh dispute that these acts  
7 of reproduction, public performance, and distribution are all exclusive rights of  
8 copyright holders under the Copyright Act. Instead, Veoh argues that it is permitted  
9 to do all this pursuant 17 U.S.C. § 512(c). In making this argument, Veoh ignores  
10 the plain language of that statute, which only limits liability for “storage at the  
11 direction of a user.” Regardless of how Veoh wants to spin its conduct, one thing is  
12 clear: Veoh’s acts of infringement have nothing to do with “storage” and certainly  
13 are not done “at the direction of a user.” The limitation on liability set forth in  
14 Section 512(c) simply does not protect Veoh.

15 Though this case presents a simple question of statutory interpretation, Veoh  
16 fails to follow the clear rules set forth by the Supreme Court and the Ninth Circuit  
17 for interpreting statutes. In fact, Veoh’s contentions ignore – and, in some cases,  
18 rewrite – the actual language of the DMCA. Likewise, Veoh’s arguments  
19 mischaracterize, by using incomplete and selectively misleading quotations, the  
20 legislative history of the DMCA. The legislative history supports UMG’s  
21 interpretation, not Veoh’s. Still further, Veoh argues that various decisions have  
22 already held that the DMCA protects conduct like Veoh’s. But none of these  
23 decisions either controls here or so holds.

24 Finally, Veoh retreats to empty rhetoric, suggesting that its business  
25 represents the “democratization of television,” as if such hyperbole could excuse  
26 copyright infringement. Nothing in the DMCA – not its text nor its legislative  
27 history – remotely suggests that Congress intended to permit firms such as Veoh to  
28 use copyrighted content on the Internet without the requisite licenses, while

1 externalizing the costs of operating an illegal business onto the victims of this  
2 infringing business model. The DMCA gives Veoh no protection for its business  
3 model, much less its reproduction, public performance, and distribution of UMG’s  
4 copyrighted works.

## 5 **II. THE DMCA EXCLUDES VEOH’S INFRINGING CONDUCT**

6 There is no dispute here regarding the material facts. Veoh concedes that it  
7 reproduces works uploaded to its system into a Flash-format file; that it reproduces  
8 works uploaded to its system into a “chunk” copy to facilitate later distribution; that  
9 it streams a copy of works uploaded to its system to viewers on the internet; and that  
10 it distributes copies of works to viewers via its download function.<sup>1</sup> All of these acts  
11 are done at the direction of Veoh, and no one else. And, none of these acts have  
12 anything to do with “storage at the direction of a user,” as they must for Section  
13 512(c) of the DMCA to apply. They all have to do with putting content in a  
14 commercially distributable form and then distributing that content. These acts give  
15 rise to Veoh’s infringement liability.

16 To avoid liability, Veoh engages in a tortured analysis of Section 512(c),  
17 which not only ignores its plain language and meaning – but effectively rewrites it.  
18 Veoh violates every rule of statutory construction, starting with the most basic one,  
19 which is to “discern the intent of Congress in enacting a particular statute,” by  
20 looking “to the plain language of the statute.” *United States v. Daas*, 198 F.3d 1167,  
21 1174 (9th Cir. 1999) (*citing Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir.  
22 1982) and *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)). Only  
23 where a plain meaning cannot be ascertained is resort to legislative history  
24  
25

---

26 <sup>1</sup> Veoh disputes that its downloads are “permanent.” This is far from  
27 sufficient to create a disputed issue of fact; its downloads are unquestionably “fixed  
28 in a tangible medium of expression” on the computer of each viewer that downloads  
a copy. 17 U.S.C. § 101; *see also MAI Systems Corp. v. Peak Computer, Inc.*, 991  
F.2d 511, 517-19 (9th Cir. 1993). Thus, Veoh unquestionably distributes copies of  
copyrighted videos.

1 appropriate. *See Nuclear Info. and Resource Service v. U.S. Dept. of Trans. Res.*,  
2 457 F.3d 956, 960 (9th Cir. 2006).

3 Here, the plain language of the statute clearly excludes Veoh’s conduct from  
4 protection and it is unnecessary and inappropriate to resort to the legislative history.  
5 But even if the legislative history is considered, it too confirms that Veoh’s conduct  
6 is not protected by the DMCA.

7 **A. The Plain Language of the DMCA Excludes Veoh’s Conduct**

8 The plain language of section 512(c) provides protection only for  
9 “infringement of copyright by reason of the storage at the direction of a user.” The  
10 Ninth Circuit recognizes three core principles to follow in assessing the meaning of  
11 a statute. First, “[w]here a statutory term is not defined in the statute, it is  
12 appropriate to accord the term its ordinary meaning.” *Mohrbacher*, 182 F.3d at  
13 1048 (internal quotations and citation omitted). Unless there is an indication that  
14 Congress intended some specific legal meaning, the Court may look to sources such  
15 as dictionaries for a definition. *See Muscarello v. United States*, 524 U.S. 125, 128  
16 (1998). Second, the Court should “look to the particular statutory language at issue,  
17 as well as the language and design of the statute as a whole.” *McCarthy v. Bronson*,  
18 500 U.S. 136, 139 (1991); *see also Christensen v. Comm. I.R.S.*, 523 F.3d 957, 960  
19 (9th Cir. 2008) (same principle). Finally, a court should not rewrite a statute either  
20 by removing language or adding language. *See United States v. Wenner*, 351 F.3d  
21 969, 975 (9th Cir. 2003) (“[A] statute should not be construed so as to render any of  
22 its provisions mere surplusage.”); *see also Bowsher v. Merck & Co.*, 460 U.S. 824,  
23 833 (1983) (restating “the settled principle of statutory construction that we must  
24 give effect . . . to every word of the statute”) (citations omitted)(emphasis added);  
25 *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981) (“[A] court should  
26 not add language to an unambiguous statute absent a manifest error in drafting or  
27 unresolvable inconsistency.”) (citations omitted). Each of these three guiding  
28 principles confirms that Veoh’s conduct is not protected by the DMCA.

1                   **1. The Ordinary meaning of the DMCA excludes Veoh**

2                   Veoh does not dispute the ordinary meaning of “storage” that UMG provided  
3 in its opening brief. UMG Opening Mem. (Docket No. 133), at 13. Veoh contests  
4 neither the accuracy nor applicability of this definition. See Veoh Statement of  
5 Genuine Issues (Docket No. 149), at ¶¶ 55-56 (listing definitions as  
6 “UNDISPUTED”). Veoh never explains how its reproduction, public performance,  
7 and distribution of copyrighted works – the reason for its infringement liability –  
8 constitute “storage.” It cannot. These are not acts of reserving or putting away  
9 material as contemplated by the plain meaning of the word “storage.” This simple  
10 concession should end the inquiry.

11                   Rather than dispute the ordinary meaning of “storage” within the DMCA,  
12 Veoh tries to suggest that the phrase “infringement of copyright by reason of the  
13 storage at the direction of a user” is “broad causal language. Veoh Opp’n at 12.  
14 This argument suggests that as long as something Veoh does could be called  
15 storage, its other acts “caused” by that storage would also be immunized. In other  
16 words, Veoh contends that if anything it does falls within the limitation on liability  
17 of Section 512(c), then everything it does is categorically protected. However, the  
18 Ninth Circuit has expressly rejected such a view. See *Perfect 10, Inc. v. CCBill*  
19 *LLC*, 488 F.3d 1102, 1116-17 (9th Cir. 2007) (recognizing that the “by reason of”  
20 language used in the DMCA limits the reach of the “safe harbor” protections to the  
21 specifically listed conduct such that other “functions would remain outside of the  
22 safe harbor”).<sup>2</sup> The actual language of Section 512(c) provides only a limitation on  
23 liability that arises “by reason of the storage,” not all acts further caused by storage.

24                   But even if this language were “causal” as Veoh suggests, Veoh never  
25 explains how any storage it might perform somehow “causes” Veoh to make

26                   <sup>2</sup> Veoh argues that the *Fair Housing Council* and *Atlantic Recording* cases  
27 discussed by UMG in the moving papers (at 18-19) are irrelevant. Veoh misses the  
28 point. These cases confirm (like the Ninth Circuit’s *CCBill* decision) that a  
limitation on liability for certain acts does not confer blanket immunity on the actor  
for other, unprotected, actions.



1 multiple reproductions of a file (into a Flash-format file *and* into a “chunk” copy to  
2 facilitate distribution). Veoh never explains how storage “causes” Veoh to publicly  
3 perform the video contained in that file and it certainly never explains how any  
4 storage “causes” Veoh to transfer additional copies to the computers of any viewer  
5 who presses a download button. Storage does not cause Veoh to take these other  
6 actions. Veoh takes these additional actions to do something else – operate an  
7 internet TV network that exploits the intellectual property of others to allow Veoh to  
8 profit from the sale of advertising.

9 **2. The context of Section 512(c) excludes Veoh**

10 The DMCA creates a three-step process to determine an entity’s eligibility for  
11 one of its limitations on liability. First, it must show that it is a “service provider”  
12 within the definitions set forth in the statute. Second, it must show that its  
13 infringement liability is “by reason of” engaging in one of the acts specifically  
14 identified in subsections (a) through (d). Third, it must show that none of the other  
15 tests in the relevant subsection disqualify it from protection (*e.g.*, Section  
16 512(c)(1)(A-C)).

17 Veoh tries to eliminate all meaning from the middle step (*i.e.* demonstrating  
18 that its liability arises “by reason of the storage at the direction of a user”). Instead,  
19 Veoh argues that merely because it falls within the definition of a “service provider”  
20 under Section 512(k), this presupposes that its activities must fall within the  
21 limitation on liability of Section 512(c). An accused “service provider” must still  
22 show that its infringement arises by reason of one of the specified activities set forth  
23 in Sections 512(a-d). Veoh’s argument contradicts the express structure created by  
24 Congress. If Congress intended any entity that qualified as a service provider was  
25 presumptively entitled to protection, there would have been no need for the specific  
26 identification of potentially protected activities in the DMCA.

27  
28

1                   3.     **Veoh’s interpretation would improperly rewrite the DMCA**

2             A court should not rewrite the language of a statute in interpreting it. Thus,  
3     “a statute should not be construed so as to render any of its provisions mere  
4     surplusage.” *Wenner*, 351 F.3d at 975. Likewise, a statute should not be construed  
5     to add additional provisions not included by Congress. *See Lamie v. United States*  
6     *Trustee*, 540 U.S. 526, 538 (2004) (“Our unwillingness to soften the import of  
7     Congress’ chosen words even if we believe the words lead to a harsh outcome is  
8     longstanding. It results from ‘deference to the supremacy of the Legislature, as well  
9     as recognition that Congressmen typically vote on the language of a bill.’”) (quoting  
10    *United States v. Locke*, 471 U.S. 84, 95 (1985)). Veoh’s asserted interpretation of  
11    the DMCA violates both principles.

12            Veoh argues that if an entity qualifies as a “service provider,” then that  
13    entity’s activities are presumptively within the scope of protection of one of the  
14    DMCA “safe harbors” unless subsequently excluded, for example by actual  
15    knowledge of infringement. *See, e.g.*, 17 U.S.C. § 512(c)(1)(A)(i). Veoh would  
16    effectively eliminate the language found in Section 512(c)(1) providing that the  
17    limitation on liability is available only for particular conduct. Under Veoh’s  
18    interpretation, Section 512(c)(1) would be rewritten as follows:

19            “A service provider shall not be liable for monetary relief, or; except  
20            as provided in subsection (j), for injunctive or other equitable relief,  
21            for infringement of copyright ~~by reason of the storage at the direction~~  
22            ~~of a user of material that resides on a system or network controlled or~~  
23            ~~operated by or for the service provider~~, if the service provider- . . .”

24    Obviously, such an interpretation cannot stand.

25            Veoh also offers an alternative argument that the storage of material  
26    “presupposes” (Opp’n, at 13) a purported right to display and distribute the material  
27    to others. This argument would also effectively rewrite the statute by adding  
28    language to the statute which Congress did not include, this time as follows:

1 “A service provider shall not be liable for monetary relief, or; except  
2 as provided in subsection (j), for injunctive or other equitable relief,  
3 for infringement of copyright by reason of the storage at the direction  
4 of a user, or reproduction, or public performance, or distribution of  
5 material that resides on a system or network controlled or operated by  
6 or for the service provider, if the service provider-”

7 Again, such an interpretation cannot stand.

8 Both of Veoh’s alternatives are inconsistent with the actual language enacted  
9 by Congress, which must be given effect by this Court. Veoh’s activities which give  
10 rise to its infringement liability are not storage. Thus, Veoh’s copyright  
11 infringement is not “by reason of the storage at the direction of a user.” Section  
12 512(c) as written by Congress does not provide a limitation on liability for the  
13 activities giving rise to Veoh’s infringement liability here.<sup>3</sup> Veoh’s arguments  
14 amount to nothing more than an improper effort to rewrite the statute.

15 **B. The Legislative History Of The DMCA Contradicts Veoh’s**  
16 **Interpretation**

17 Unless a statute is ambiguous or nonsensical, courts should look only to the  
18 plain language to interpret the text. *See Department of Hous. & Urban Dev. v.*  
19 *Rucker*, 535 U.S. 125, 132 (2002) (“[R]eference to legislative history is  
20 inappropriate when the text of the statute is unambiguous.”); *United States v.*  
21 *Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929) (“[W]here the language of an  
22 enactment is clear, and construction according to its terms does not lead to absurd or  
23 impracticable consequences, the words employed are to be taken as the final  
24 expression of the meaning intended.”). Veoh makes no argument that the plain  
25 language is ambiguous. Veoh merely argues that UMG’s interpretation would  
26 render the statute nonsensical or inconsistent. Veoh is wrong and resort to the

27 <sup>3</sup> Veoh’s argument that the DMCA limitation on liability is purportedly  
28 “meant to cover more than mere electronic storage lockers” (Opp’n, at 13) implicitly  
concedes that Veoh’s infringing activities go well beyond storage.

1 legislative history is inappropriate. Regardless, the legislative history confirms the  
2 plain meaning of the DMCA – that it does not protect Veoh’s infringing activities.

3 **1. The DMCA’s plain meaning makes sense; Veoh’s**  
4 **interpretation does not**

5 The plain language of Section 512(c) is neither ambiguous nor nonsensical.  
6 Although Veoh suggests that construing Section 512(c) narrowly would render it  
7 illusory, Veoh does not show that the statute would never protect any service  
8 provider, only that it would not protect Veoh – hardly a reason to ignore the plain  
9 language.

10 Veoh tries to bootstrap itself into the DMCA’s protections by arguing for an  
11 implicit right to display infringing content, citing Section 512(c)(1)(C) involving  
12 notices of infringement sent to service providers. Veoh argues that this provision  
13 implies that a service provider is permitted to publicly perform and distribute  
14 material because otherwise there would be no possibility that copyright holders  
15 would know of infringing material about which to send a notice. In making this  
16 argument, Veoh tries to conflate the notice provision – which can be sent for any  
17 type of infringement – with the provision that limits monetary relief for only one  
18 type of infringement – storage. ***The fact that a notice of infringement can be sent***  
19 ***for infringements beyond storage (e.g., distribution) does not mean that Congress***  
20 ***intended to limit liability for all forms of infringement.*** Veoh cannot use the notice  
21 provision to expand the limit of liability provision. But that is precisely what Veoh  
22 is trying to do – and it relies on several false assumptions in doing so.

23 First, Veoh wrongly assumes that all “service providers” within the definition  
24 of Section 512(k) are operators of internet websites (like Veoh.com) that display  
25 material on the internet that may be viewed by people accessing the website. In  
26 fact, Section 512(k) defines “service provider” as “a provider of online services or  
27 network access, or the operator of facilities therefore.” 17 U.S.C. § 512(k)(1)(B).  
28

1 This definition encompasses entities that simply provide web *hosting* services.<sup>4</sup>  
2 These businesses provide servers (storage space) and connections that may be  
3 utilized by businesses that want to operate a website but not invest in all of the  
4 infrastructure hardware necessary for such an enterprise. *See, e.g., Perfect 10, Inc.*  
5 *v. CCBill LLC*, 488 F.3d 1102, 1117-18 (9th Cir. 2007) (explaining that defendant  
6 “CWIE provides web hosting and related Internet connectivity services to the  
7 owners of various websites”).<sup>5</sup> Such entities might host many different web sites.  
8 In the context of web-hosting businesses, the web-host is a “service provider” within  
9 the meaning of the DMCA, and the operator of the website is the “user” who stores  
10 material on the web-host’s system or network.

11 Veoh further incorrectly assumes that an internet service provider inherently  
12 must be able to display the material that is “stor[ed] at the direction of a user” so  
13 copyright holders can send the infringement notices contemplated by the statute.<sup>6</sup>  
14 Veoh ignores the distinction between web hosts and website operators. Section  
15 512(c) of the DMCA contemplates that a website hosted by a web-hosting service  
16 provider might be engaging in infringing behavior, such as through the display or  
17 performance of copyrighted material on a user’s website. Under such  
18 circumstances, the DMCA (and specifically Section 512(c)(1)(C)) contemplates that

19 <sup>4</sup> The inclusion of such service providers is also explicitly set forth in the  
20 legislative history. *See* S. Rep. 105-190, at 54-55 (*available at* 1998 WL 239623,  
21 \*54-55) (“This definition includes, for example, services such as providing Internet  
22 access, e-mail, chat room and web page hosting services.”).

22 <sup>5</sup> *See generally* [http://en.wikipedia.org/wiki/Web\\_hosting](http://en.wikipedia.org/wiki/Web_hosting).

23 <sup>6</sup> Veoh’s opposition spends significant time arguing that the DMCA’s  
24 protection for “storage” of material implicitly confers a right to “provid[e] access to  
25 the material.” *See, e.g.,* Opp’n at 11. Beyond being contrary to both the DMCA’s  
26 plain language and legislative history, this argument could not possibly forestall  
27 summary judgment here. The activities that are the subject of this motion are still in  
28 no manner undertaken at “the direction of a user”, and are wholly unnecessary to  
merely providing “access” to the material. For example, all of Veoh’s activities at  
issue here, including *offering to the entire world* downloads and progressive streams  
of UMG’s content, far exceed what even Veoh contends is necessary to provide  
“access.” Instead, these activities are undertaken to implement Veoh’s business  
purpose of profiting from the exploitation of copyrighted works for which it has no  
license. Thus, Veoh’s activities still exceed the scope of DMCA protection, even  
under Veoh’s incorrect construction of the DMCA.

1 the web-hosting provider should take action when it receives notice of such  
2 infringing conduct from a copyright holder. This scheme does not require, as Veoh  
3 suggests, that the website be permitted to display material (much less publicly  
4 perform it or distribute copies of it to others). Instead, the DMCA contemplates that  
5 the “user” (the website operator) might display or perform copyrighted material  
6 without permission, but that the “service provider” (the web host) would take action  
7 upon receipt of notice of such infringement.

8 Other provisions of the DMCA are more sensible, not less (as Veoh contends)  
9 when Section 512(c) is correctly interpreted to limit liability only for infringement  
10 actually arising from storage, rather than multiple acts of reproduction, performance,  
11 and distribution. For example, Section 512(c)(1)(B) provides that the limitation on  
12 liability is only available where the service provider “does not receive a financial  
13 benefit directly attributable to the infringing activity, in a case in which the service  
14 provider has the right and ability to control such activity.” The Ninth Circuit holds  
15 that analysis of “financial benefit” parallels the traditional vicarious liability  
16 analysis, where, for example increased traffic from infringement constitutes a direct  
17 financial benefit. *See CCBill LLC*, 488 F.3d at 1117-18 (“the relevant inquiry is  
18 ‘whether the infringing activity constitutes a draw for subscribers’”) (quoting  
19 *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). Website operators  
20 almost invariably benefit from increased traffic (certainly they do when they sell  
21 advertising). Thus, under Veoh’s assumptions, service providers could rarely, if  
22 ever, suggest that the financial benefit prong was not satisfied. Web-hosting service  
23 providers, in contrast, often charge a flat fee for their “webhosting and related  
24 Internet connectivity services.” *Id.* at 1108 (describing defendant CWIE’s  
25 business).<sup>7</sup> Thus, contrary to Veoh’s arguments, the DMCA’s structure makes more  
26

---

27 <sup>7</sup> The Ninth Circuit noted in *Perfect 10* that the legislative history of the  
28 DMCA expressly contemplated that “receiving a one-time set-up fee and flat,  
periodic payments for service from a person engaging in infringing activities would

1 sense, not less, when construed according to its plain language.

2           **2. The legislative history confirms the plain language of the**  
3           **DMCA**

4           Even if resort to the legislative history of the DMCA were necessary, that  
5 legislative history confirms that Section 512(c) provides no protection for Veoh’s  
6 infringing conduct. Veoh selectively quotes from the legislative history, obscuring  
7 and mischaracterizing its true meaning. Veoh principally relies on a single sentence  
8 in the House of Representatives Report stating that “Examples of such storage  
9 include *providing server space* for a user’s web site, for a chatroom, or other forum  
10 in which material may be posted at the direction of users.” H.R. Rep. 105-551(II),  
11 at p. 53 (*available at* 1998 WL 414916, at \*53) (emphasis added). Rather than  
12 consider the entire sentence, Veoh repeatedly asserts that the legislative history of  
13 the DMCA states that Section 512(c) should limit liability for the operation of a  
14 chatroom. In context, however, the actual legislative history refers to “*providing*  
15 *server space . . . for a chatroom.*” That is, the storage is web-hosting (providing  
16 server space), not website operation (running the chatroom itself). Tellingly, Veoh  
17 never quotes the explicit reference to operation of a website even though that is what  
18 Veoh actually does. Veoh carefully avoids Congress’s reference to “providing  
19 server space for a user’s web site” because the legislative history refers to the  
20 operator of a web site as a “*user*” and not as a “*service provider.*” The legislative  
21 history contemplates that “storage at the direction of a user” under Section 512(c)  
22 refers to web hosting a user’s web site, not reproducing, publicly performing, and  
23 distributing copyrighted works through a website operated by the putative service  
24 provider. Thus, the legislative history fits perfectly with UMG’s understanding of  
25 the statute, but is directly at odds with Veoh’s.

26           Veoh also references a passage in the Senate Report and suggests that this  
27 passage somehow shows that a service provider has a right to reproduce, display,

28 not constitute receiving a ‘financial benefit directly attributable to the infringing  
activity.’” *Id.* at 1118 (quoting H.R. Rep. 105-551(II) at 54 (1998)).

1 perform, and distribute material. Once again, however, Veoh’s selective quotations  
2 are misleading at best. The passage that Veoh carefully excerpted does not even  
3 suggest that service providers should have a right to reproduce, display, perform, or  
4 distribute copyrighted material. It merely confirms that such acts are infringing and  
5 contemplates that notice may be sent to the service provider hosting such infringing  
6 websites.<sup>8</sup> Thus, as with the House Report, the Senate Report contemplates that the  
7 limitation on liability for storage will apply to those providing server space for web  
8 sites operated by others.

9 The legislative history further confirms that the DMCA’s limitations on  
10 liability were intended primarily for infrastructure service providers, not those who  
11 reproduce, display, publicly perform, and distribute content. For example, in the  
12 Senate Report, the Committee stated:

13 “In the ordinary course of their operations service providers must  
14 engage in all kinds of acts that expose them to potential copyright  
15 infringement liability. For example, service providers must make  
16 innumerable electronic copies by simply transmitting information  
17 over the Internet. Certain electronic copies are made to speed up the  
18 delivery of information to users. Other electronic copies are made in  
19 order to host World Wide Web sites. Many service providers engage  
20 in directing users to sites in response to inquiries by users or they  
21

22 <sup>8</sup> The full passage Veoh excerpts reads: “Subsection (c)(1)(A) sets forth the  
23 applicable knowledge standard. This standard is met either by actual knowledge of  
24 infringement or in the absence of such knowledge by awareness of facts or  
25 circumstances from which infringing activity is apparent. The term ‘activity’ is  
26 intended to mean activity using the material on the system or network. The  
27 Committee intends such activity to refer to wrongful activity that is occurring at the  
28 site on the provider’s system or network at which the material resides, regardless of  
whether copyright infringement is technically deemed to occur at that site or at the  
location where the material is received. For example, the activity at an online site  
offering audio or video may be unauthorized public performance of a musical  
composition, a sound recording, or an audio-visual work, rather than (or in addition  
to) the creation of an unauthorized copy of any of these works.” S. Rep. 105-190, at  
p. 44 (available at 1998 WL 239623, at \*44) (emphasis added).



1 volunteer sites that users may find attractive. Some of these sites  
2 might contain infringing material.

3 S. Rep. 105-190, at 8 (*available at* 1998 WL 239623, at \*8).

4 All of the copying referenced in describing the purpose for the DMCA’s  
5 limitations on liability addresses infrastructure activities such as transmission,  
6 hosting, etc. There is no suggestion that the focus of these protections was those  
7 who were operating the World Wide Web sites themselves. Indeed, websites like  
8 Veoh, or YouTube, or MySpace (often referred to as “web 2.0 sites”) did not even  
9 exist in 1998 when the DMCA was enacted. Certainly, nothing in the legislative  
10 history suggests that a website operator (like Veoh) that makes multiple  
11 reproductions of works, publicly performs those works, and distributes copies of  
12 those works is entitled to protection under the DMCA.

13 **III. THE ISSUES RAISED BY UMG’S MOTION REMAIN ISSUES OF**  
14 **FIRST IMPRESSION**

15 Veoh argues Magistrate Judge Lloyd fully considered the issues raised by  
16 UMG in the *Io Group* case and that the same issues have also been resolved by other  
17 Courts. Veoh cites no case from the Ninth Circuit, or indeed any Courts of Appeals  
18 to have considered whether Section 512(c) provides a limitation on liability for the  
19 kind of reproduction, public performance, and distribution of copyrighted works  
20 engaged in by Veoh. Moreover, none of the district court cases that Veoh cites have  
21 addressed the issues raised in this motion.

22 **A. The *Io Group* Case Does Not Address The Issues Presented Here**

23 Veoh spends much of its opposition arguing that Magistrate Judge Lloyd  
24 already considered the issues presented here in the *Io Group* case. Veoh is simply  
25 wrong. As UMG explained in its moving papers, Magistrate Judge Lloyd never  
26 considered reproduction of copyrighted works through creation of a “chunk” copy in  
27 order to facilitate distribution; public performance of copyrighted works through  
28 “streaming” to viewers; or distribution of copyrighted works through the

1 downloading of copies of the works to viewers' computers.<sup>9</sup> Indeed, even the  
2 passages of the *Io Group* decision that Veoh quotes discuss the "uploading" of  
3 videos, while never addressing Veoh's public performance and distribution of works  
4 or explaining how such activities could constitute "storage at the direction of a  
5 user." Veoh implicitly concedes that these infringing activities were not the subject  
6 of the decision in *Io Group*, arguing instead that they are "likewise automated  
7 functions whereby a user's content is made accessible to other users." Veoh Opp'n,  
8 at 17. Had Magistrate Judge Lloyd actually considered these issues, Veoh would  
9 not be straining to argue that they were decided by implication or analogy.

10 Veoh also argues that Magistrate Judge Lloyd properly relied on the two  
11 different definitions of "service provider" found in Section 512(k). Magistrate  
12 Judge Lloyd, according to Veoh, concluded that any activity that would not  
13 disqualify an entity from being a "service provider" should also permit that entity to  
14 invoke the limitation on liability under Section 512(c). This reasoning is backwards  
15 and would expand Congress's language of "storage at the direction of a user" far  
16 beyond any fair interpretation.

17 Not only did Magistrate Judge Lloyd incorrectly expand Section 512(c) to  
18 cover activities other than storage, but Magistrate Judge Lloyd's factual assumptions  
19 about the two different definitions of "service provider" were also incorrect. He  
20 relied on the fact that Section 512(k)(1)(A) defines a "service provider" as an entity  
21 offering transmission or connections "without modification of the content of the  
22 material as sent or received." Because the definition of service provider found in  
23  
24

---

25 <sup>9</sup> Veoh's characterization of the *Io Group* decision as "precedent" is also  
26 incorrect. The unpublished decision of a Magistrate Judge in another district which  
27 does not consider the actual issues presented in this case is neither precedent nor  
28 even persuasive authority. Even more so given that Magistrate Judge Lloyd refused  
to accept or consider amicus briefs based on Veoh's assertion that the *Io Group* case  
presented "unusual" facts. *See* Ledahl Decl. (Dkt. #137), Ex. S at p. 4.

1 Section 512(k)(1)(B)<sup>10</sup> does not contain this language, Magistrate Judge Lloyd  
2 assumed that “modification of content” is an activity that falls within the limitation  
3 on liability of Section 512(c). This would rewrite Section 512(c)(1) to add the  
4 words “or modification of content” after the statutory language “storage at the  
5 direction of a user.” Importing additional protections into Section 512(c), based on  
6 erroneous assumptions, is not a proper statutory interpretation.

7 Magistrate Judge Lloyd appears to equate “modification to the content” with  
8 Veoh’s reproduction of a work to create a Flash-format copy of the file uploaded to  
9 Veoh’s system.<sup>11</sup> However, the language does not refer to modification of the form,  
10 but to actual modification of the content. Indeed, the legislative history of the  
11 DMCA indicates that altering the form, but not the content of material does not  
12 constitute a “modification to the content” which could exclude an entity from the  
13 definition of “service provider” in Section 512(k)(1)(A). *See* H.R. Rep. 105-551(II)  
14 at 63 (1998) (“An entity is not disqualified from being a ‘service provider’ because  
15 it alters the form of the material, so long as it does not alter the content of the  
16 material.”). Magistrate Judge Lloyd was, therefore, incorrect to assume that  
17 reproducing a file into a different form (*e.g.*, a Flash-format file) would necessarily  
18 disqualify an entity from being a “service provider” under Section 512(k)(1)(A).  
19 Because this fundamental assumption was wrong, all of the further reasoning that  
20 flowed from it was similarly wrong. Thus, not only was Magistrate Judge Lloyd’s  
21 reasoning – which protects additional acts under Section 512(c) not included by  
22 Congress – incorrect, but Magistrate Judge Lloyd also relied on a false premise to  
23 reach this conclusion. This further undermines the validity of his analysis.

---

24 \_\_\_\_\_  
25 <sup>10</sup> An entity may only qualify for the protections of Section 512(a) if it is a  
26 service provider as defined in Section 512(k)(1)(A). Entities may qualify for the  
27 protections of Sections 512(b-d) if they are service providers as defined in Section  
28 512(k)(1)(B).

<sup>11</sup> Magistrate Judge Lloyd never considered Veoh’s further reproduction of  
files to make a “chunk” copy in order to facilitate Veoh’s distribution of works via  
download.

1           Ultimately, Veoh argues that Magistrate Judge Lloyd ruled that “[h]ad  
2 Congress intended to include a limitation as to a service provider’s modification of  
3 user-submitted information [**with respect to those eligible for Section 512(c) safe**  
4 **harbor**], it would have said so expressly and unambiguously.” Veoh Opp’n, at 18-  
5 19 (quoting *Io Group*, slip op. at 19) (brackets in Veoh Opp’n, emphasis added).  
6 Veoh fails to acknowledge that Congress *did* include an express and unambiguous  
7 limitation as to a servicer provider’s modification of user-submitted information.  
8 That limitation is found in Section 512(c)(1) which provides that a limitation on  
9 liability is available *only* for “infringement by reason of storage at the direction of a  
10 user of material.” Veoh desperately seeks to avoid this precise language because it  
11 does not describe the activities which give rise to Veoh’s liability. Moreover, even  
12 if Magistrate Judge Lloyd correctly found that reproduction of a file into a Flash-  
13 format file was “modification” and that such “modification” was within the  
14 protections of Section 512(c), this would still not provide any protection for Veoh’s  
15 public performance and distribution of copyrighted works – issues Magistrate Judge  
16 Lloyd did not even address. Certainly Veoh cannot suggest that these are acts of  
17 “modification” of the content.

18           Veoh also defends Magistrate Judge Lloyd’s reliance on the *Cartoon Network*  
19 and *CoStar* cases. Because neither the Second Circuit in *Cartoon Network*, nor the  
20 Fourth Circuit in *CoStar* even purport to rule on any issue under the DMCA, Veoh’s  
21 arguments are unavailing. *See The Cartoon Network LP, LLP v. CSC Holdings,*  
22 *Inc.*, 536 F.3d 121(2d Cir. 2008) (analyzing issues of direct infringement); *CoStar*  
23 *Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004) (same). Instead, both of  
24 these cases address whether, under very different facts than those presented here, a  
25 specific reproduction constitutes direct infringement by the defendant. That  
26 question is not before the Court here. Neither case even purports to consider what  
27 activity constitutes “storage at the direction of a user.”

28

1           **B. The Other District Court Decisions Relied On By Veoh Do Not**  
2           **Address The Issues Presented Here**

3           Veoh cites four district court decisions to support its contention that “courts  
4 routinely apply section 512(c) to service providers that provide access to user-  
5 supplied material.” None of these cases actually addresses the questions presented  
6 here or supports Veoh’s broad characterization.

7           **1. Corbis Corp. v. Amazon.com, Inc.**

8           *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp.2d 1090 (W.D. Wa. 2004)  
9 analyzed, in part, whether Amazon.com was entitled to DMCA protection in  
10 connection with a service called zShops in which Amazon provided space on its  
11 internet platform in which other merchants could construct their own internet retail  
12 sites. *Id.* at 1094 (“To sell on zShops, a vendor creates a web page on the zShops  
13 platform that includes information regarding the product being sold.”). Corbis  
14 contended that one or more vendors sold copyrighted Corbis images through their  
15 zShops web sites. *Id.* at 1097.<sup>12</sup> These allegations differ sharply from the issues  
16 presented in this case.

17           Additionally, in analyzing the DMCA issues in the *Corbis* case, the Court  
18 inexplicably skips the inquiry into whether the asserted liability is “by reason of the  
19 storage of material at the direction of a user” under Section 512(c)(1). Specifically,  
20 in *Corbis*, the Court correctly begins by analyzing the threshold question of whether  
21 Amazon is a “service provider.” *Id.* at 1099. After analyzing this question, the  
22 Court recites that Section 512(c) protects a service provider from liability for

---

23  
24           <sup>12</sup> Corbis further contended that two of their images were improperly  
25 displayed in a banner advertisement displayed on another website owned and  
26 operated by Amazon – IMDb.com. *Id.* Notably, Amazon did not even argue that  
27 the DMCA protected it for the images displayed on the IMDb site, so the court  
28 entered summary judgment against Amazon on the issue of DMCA protection for  
the Amazon-operated web site IMDb. *Id.* at 1110, n. 11. Thus the only DMCA  
issue considered in the *Corbis* case involved a zShops web site, hosted by Amazon –  
highly distinct from the facts present in this case where the infringement takes place  
on Veoh’s own web site and through its own client software product.

1 “infringement of copyright by reason of the storage at the direction of a user . . .”  
2 The Court offers no analysis however, of whether Amazon’s alleged liability is for  
3 such infringement “by reason of the storage at the direction of a user.” The Court  
4 skips this analysis to proceed directly to the three additional requirements of Section  
5 512(c)(1)(A-C), just as Veoh asks this Court to do. It is unclear from the Court’s  
6 opinion whether the parties did not contest that the alleged liability arose by reason  
7 of the storage at the direction of a user . . .” or if the Court simply failed to perform  
8 the necessary analysis. In any event, a case that did not analyze or consider the  
9 question presented here provides no guidance for this Court’s decision.

10 Veoh suggests that UMG’s interpretation of the DMCA would require that  
11 this case be decided differently. This argument is a red herring. First, since the case  
12 is from another district court, there is no requirement that this Court follow its  
13 rulings. More importantly, however, Veoh is simply wrong. UMG expresses no  
14 opinion on whether the very different facts of the *Corbis* case could support a  
15 DMCA defense for Amazon. UMG notes, however, that the court’s description of  
16 Amazon’s zShops business as involving hosting third-party websites hews much  
17 more closely to the intended focus of the DMCA than Veoh’s conduct at issue here.

18 **2. Hendrickson v. Amazon.com, Inc.**

19 Next, Veoh relies on the district court decision in *Hendrickson v.*  
20 *Amazon.com, Inc.*, 298 F. Supp.2d 914 (C.D. Cal. 2003). In this case, Amazon’s  
21 alleged liability arose from carrying advertisements for the sale of infringing DVDs  
22 by a third party on Amazon’s internet site. *Id.* at 914-15. Amazon carried an  
23 advertisement for these DVDs, placed by the seller, but did not itself display,  
24 perform, or reproduce any copyrighted work through its website. *Id.* at 918 (“Here,  
25 the infringing activity is the sale of the unauthorized work, not the posting of the  
26 listing.”). Thus, unlike Veoh, Amazon’s alleged liability did not arise from its  
27 reproduction, public performance, or distribution of a copyrighted work.

28

1           Additionally, like the *Corbis* decision, in analyzing the DMCA, Judge Hatter  
2 did not analyze whether the infringement at issue was “by reason of the storage at  
3 the direction of a user of material.” Indeed, the Court stated, “Because Amazon  
4 qualifies as an ISP [Internet Service Provider] under the DMCA, it is entitled to the  
5 safe harbor affirmative defense against a claim of vicarious copyright infringement  
6 if it establishes the following three elements: . . .” *Id.* at 916. The court proceeded  
7 to recite the provisions of Section 512(c)(1)(A-C), but never considered the  
8 language of Section 512(c)(1) in any form. Thus, this case provides no guidance for  
9 the questions presented here.

10                           **3.     Hendrickson v. eBay, Inc.**

11           Veoh also relies upon the district court decision in *Hendrickson v. eBay, Inc.*,  
12 165 F. Supp.2d 1082 (C.D. Cal. 2001). As with Hendrickson’s case against  
13 Amazon, the case against eBay involved carrying a listing advertising a third-party’s  
14 sale of infringing DVDs. *Id.* at 1084-85. As with the Amazon case, nothing  
15 actually displayed on eBay’s website infringed plaintiff’s copyright. *Id.* at 1087  
16 (“Plaintiff does not allege that the advertisements that sellers posted on eBay’s  
17 website violate his copyright in ‘Manson.’”). Thus, as with the previous case, and  
18 unlike Veoh, the infringement liability had nothing to do with the reproduction,  
19 public performance, or distribution of copyrighted works via the defendant’s  
20 website or client software.

21           While the district court in the *eBay* case did purport to analyze whether  
22 eBay’s allegedly infringing conduct fell within the category of conduct for which a  
23 limitation on liability was available, the Court improperly rewrote the statutory  
24 language in several respects, stating that “This section applies where a plaintiff  
25 seeks to hold an Internet service provider responsible for either (1) infringing  
26 ‘material’ stored and displayed on the service provider’s website *or* (2) infringing  
27 ‘activity using the material on the [service provider’s computer] system.” *Id.* at  
28 1088 (italics in original). Notably, Judge Kelleher cited a separate statutory

1 requirement, Section 512(c)(1)(A)(i), in purporting to describe the language of  
2 section 512(c)(1). After extensively rewriting the actual statute, the court  
3 effectively changed “storage at the direction of a user of material” to storage *and*  
4 *display on the service provider’s website or infringing activity using the material.*  
5 This rewriting of the statute is supported neither by the plain meaning of “storage at  
6 the direction of a user,” nor by the legislative history. Instead, the court’s  
7 interpretation violates the canon of statutory interpretation that additional provisions  
8 or language may not be imported into an act of Congress. *See* Section II.A, *supra*.

9 **4. CoStar Group, Inc. v. Loopnet, Inc.**

10 Finally, Veoh relies upon the district court decision in *CoStar Group, Inc. v.*  
11 *Loopnet, Inc.*, 164 F. Supp.2d 688 (D. Md. 2001). Veoh’s reliance on this district  
12 court decision is particularly perplexing since the case was subsequently appealed to  
13 the Fourth Circuit which did not even consider the DMCA issues discussed by the  
14 district court. *See CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir.  
15 2004). Moreover, the district court did not actually rule that LoopNet was entitled  
16 to protection under the DMCA. *CoStar*, 164 F. Supp.2d at 717 (“both motions  
17 concerning the safe harbor defense of the DMCA will be denied”). Thus, the Court  
18 entered no rulings that could be considered even persuasive precedent on the  
19 application of the DMCA.

20 While the court purported to analyze some of the DMCA issues, its discussion  
21 of “storage at the direction of a user” falls prey to the same logical error that Veoh  
22 asks this Court to make. The *CoStar* court incorrectly assumes that anyone who  
23 displays material is entitled to rely on a notice and take-down policy as a basis to  
24 avoid liability and therefore must be included in the 512(c) limitation on liability.  
25 This analysis puts the cart before the horse. If the infringing activity is not “storage  
26 at the direction of a user” then there is no need to consider whether the defendant  
27 could have effectuated a notice and takedown procedure – the defendant was never  
28 entitled to rely on such a procedure. Only if the service provider’s liability is by



1 reason of “storage at the direction of a user” is any consideration of applicable  
2 notice provisions appropriate. The fact that an entity has a notice and take-down  
3 procedure cannot transform its infringing activities into “storage at the direction of a  
4 user.” *CoStar* offers no guidance for this Court’s decision here.

5 **IV. VEOH’S ADDITIONAL ARGUMENTS DO NOT AND CANNOT**  
6 **FORESTALL PARTIAL SUMMARY JUDGMENT**

7 **A. The DMCA Contains No Exception For Automated Processing**

8 Veoh’s opposition repeatedly invokes the mantra that it merely “automatically  
9 processes and allows users to view and download videos that users have uploaded to  
10 its system.” *See, e.g.,* Opp’n, at 14:20-25; 15:10-13; 17:15-18; 22:20-21. Veoh  
11 suggests that because some of its processes are automated, it is therefore somehow  
12 absolved of liability. Yet Section 512(c) provides a clear limitation on liability for  
13 certain conduct (“storage at the direction of user,”) and nothing in Section 512(c)  
14 provides a limitation on liability for automatically processing material, much less for  
15 allowing internet viewers to view and download copyrighted videos. Indeed,  
16 elsewhere in the DMCA, Congress expressly provided a limitation on liability for  
17 certain very narrowly-defined categories of automated processing. *See* 17 U.S.C.  
18 § 512(b)(1)(C) (providing a limitation on liability for intermediate and temporary  
19 storage (*i.e.*, caching) where “the storage is carried out through an automatic  
20 technical process . . .”). When Congress wanted to describe a limitation on liability  
21 for automated processing, it knew precisely how to do so.<sup>13</sup> Congress specifically  
22 did not use such language in Section 512(c).

23 Moreover, Veoh’s characterization of its infringement as mere “automated  
24 processing” is also factually misleading. Veoh intentionally designed its computer  
25 system to perform certain functions. As set forth in UMG’s opening brief, Veoh  
26 makes all of the decisions about how to handle material uploaded by its users. Veoh  
27 seems to argue that as long as it creates a machine, robot, computer program, or

28 <sup>13</sup> Of course Veoh does not attempt to invoke Section 512(b)’s limitation on liability because it cannot meet the various requirements.

1 other automated process to perform the actual acts of reproduction, public  
2 performance, and distribution of copyrighted works on its behalf, it can have no  
3 responsibility for the resulting copyright infringement. This reasoning is patently  
4 absurd. Veoh chooses to make multiple reproductions of video files uploaded by its  
5 users, including at least a reproduction into a Flash-format file, and a reproduction  
6 into a “chunk” copy. Veoh chooses to publicly perform videos that are uploaded by  
7 its users by streaming them from Veoh’s computers to the computers of viewers on  
8 the internet. Veoh chooses to distribute full copies of videos that are uploaded by its  
9 users to the computers of other viewers through its download function. These are all  
10 volitional acts by Veoh. The mere fact that Veoh chooses to implement its own  
11 decisions through a computer system does not absolve it of liability.

12         Veoh tries to suggest that these are all acts performed “at the direction of its  
13 users.” First, this would only matter if these acts constituted storage, which they do  
14 not – “storage” and “at the direction its users” being independent requirements  
15 under Section 512(c). Additionally, however, these acts are performed at *Veoh’s*  
16 direction, not its users’, so that Veoh can implement a system to perform and  
17 distribute video content to viewers. Its ability to perform and distribute such content  
18 permits Veoh to sell advertising and to seek to profit from its activities. Veoh’s  
19 revenues do not come from users paying a fee for Veoh to store videos – quite the  
20 contrary, users who store videos pay nothing. *See* SUF, ¶ 3 (materially undisputed).  
21 Instead, Veoh uses the content uploaded by its users (for which Veoh pays nothing)  
22 to sell advertising. This system only works because Veoh makes the decision to  
23 take the material uploaded by users and reproduce it, publicly perform it, and  
24 distribute it. Nothing requires Veoh to undertake these acts except its own profit  
25 motive.

26         Veoh also seems to suggest that if its activity is “automated,” it cannot  
27 constitute infringement. The question of whether Veoh’s conduct constitutes direct  
28 infringement is not presented by this motion and is reserved for another day. Thus,

1 Veoh's arguments have no bearing on the issues before the Court. While UMG will  
2 not address them at length here, UMG briefly notes that Veoh is also incorrect in its  
3 assertions. One who implements his infringement by a machine is still an infringer.  
4 *See, e.g., On Command Video v. Columbia Pictures*, 777 F. Supp. 787, 790 (N.D.  
5 Cal. 1991) (analyzing an automated system for delivering movies to hotel rooms,  
6 and concluding that the system creator "'publicly performs' defendants' movies").

7 **B. Veoh Has Not Shown Respect For Copyright**

8 Veoh devotes significant space in its opposition to attempting to characterize  
9 itself as a great respecter of copyright.<sup>14</sup> Obviously, even if true, such a fact would  
10 have no bearing on the issue presented in this motion. Moreover, and in any event,  
11 Veoh's suggestions of respect for copyright are patently false. Veoh has been  
12 frequently recognized as one of the most egregious harbors of copyright piracy on  
13 the internet, including by *The New York Times*.<sup>15</sup> Similarly, Veoh's claim to be "at  
14 the forefront of collaborative inter-industry efforts alongside content owners to  
15 prevent infringement" is pure fiction. As set forth in UMG's moving papers, Veoh  
16 refused to implement filtering technology, such as that provided by Audible Magic,  
17 until long after it had already built a business on the back of UMG's content.<sup>16</sup>

18 \_\_\_\_\_  
19 <sup>14</sup> Veoh also implies that UMG cares little for its own copyrights, as  
20 evidenced by its failure to send DMCA notices. The opposite is true. UMG has  
21 been at the forefront of copyright protection. Moreover, UMG is not obliged to  
22 police Veoh's site in a endless game of "whack a mole," nor is Veoh entitled to  
23 purposely turn a blind eye to the rampant infringement it is facilitating, inducing,  
24 and profiting from.

25 <sup>15</sup> *Veoh vs. Copyright Holders: Is a War Brewing?*, New York Times  
26 (8/9/2007); *Forget about YouTube: Go To These Sites If You Want Hard Core*  
27 *Copyright Infringement*, TechCrunch (4/4/2007), available at  
28 <http://www.techcrunch.com/2007/04/04/forget-youtube-go-to-these-sites-if-you-want-hard-core-copyright-infringing-content/>.

29 <sup>16</sup> Veoh provides this Court with the same misleading description of its  
30 previously-implemented "hash filtering" technology it offered to Magistrate Judge  
31 Lloyd. *See* Veoh Opp'n, at 7. This is not a "fingerprinting" technology as Veoh  
32 suggests. Indeed, as conceded by Veoh in deposition, this technology is capable  
33 *only* of recognizing exactly identical files. Glatstein Decl. in Support of Reply, Ex.

1 Veoh only began scanning the collection of videos on its website in June, 2008, after  
2 this lawsuit was filed, even though Grouper (now called Crackle) and MySpace had  
3 done so in November 2006 and February 2007, respectively.<sup>17</sup> Glatstein Decl., Ex.  
4 A (Papa Depo.), at 103.

5 In truth, Veoh seeks to operate its business by turning a blind eye to rampant  
6 copyright infringement while collecting advertising dollars driven by viewers'  
7 interest in precisely that infringing content. Veoh not only argues it should be able  
8 to make its living from such a model, but that true content owners, like UMG should  
9 be forced to expend their own resources to pursue the Sisyphean task of a never-  
10 ending chase after each instance of infringement on Veoh and every other site on the  
11 internet. This would simply externalize the true cost of operating Veoh's business  
12 onto the shoulders of the victims of rampant copyright infringement. Such a system  
13 is neither respectful of copyright, nor consistent with the DMCA.

14 **C. Veoh Is Not Entitled To Summary Judgment**

15 Veoh also suggests that although it has filed no motion, it should be granted  
16 summary judgment, rather than UMG. Even if the Court were to disagree with  
17 UMG regarding the merits of this motion, Veoh has not demonstrated its own  
18 entitlement to summary judgment that it is entitled to the protections of Section  
19 512(c). This motion addresses only one specific issue under the DMCA, whether  
20 Veoh's infringement is by reason of the storage at the direction of a user of  
21

---

22 A (Papa Depo.), at 50:1-51:7. It does not recognize the underlying content in the  
23 file (as Audible Magic's technology does). If two different users attempted to  
24 upload the same video that each had independently recorded from an MTV  
25 broadcast, for example, those two files would have entirely different hash values.  
26 *Id.* at 50:21-51:7. Likewise, if a user edited a previously rejected video to remove a  
fraction of a second from the video, the newly edited video would have an entirely  
different hash value than the previously rejected video and would be accepted  
without a true "fingerprinting" filter. *Id.* at 50:25-51:7.

27 <sup>17</sup> See <http://www.audiblemagic.com/news/press-releases/pr-2006-11-16.asp>  
28 (Grouper); <http://www.audiblemagic.com/news/press-releases/pr-2007-02-12.asp>  
(MySpace)..

1 material . . . .” Because it is not, Veoh cannot obtain protection under the DMCA.  
2 Even if this were not so, Veoh has an affirmative burden of demonstrating its  
3 entitlement to DMCA protection, including demonstrating that it has an effective  
4 policy for terminating repeat infringers (17 U.S.C. § 512(i)); demonstrating that it  
5 lacked actual knowledge of infringement (17 U.S.C. § 512(c)(1)(A)(i));  
6 demonstrating that it is not aware of facts or circumstances from which infringing  
7 activity is apparent (17 U.S.C. § 512(c)(1)(A)(ii)); does not receive a financial  
8 benefit directly attributable to the infringing activity where it has the right and  
9 ability to control such activity (17 U.S.C. § 512(c)(1)(B)); and acts expeditiously to  
10 remove material identified as infringing (17 U.S.C. § 512(c)(1)(C)). All of these  
11 issues are beyond the scope of this motion and, in any event, Veoh has not  
12 demonstrated any of these elements. Indeed, Veoh continues to conceal and  
13 withhold evidence directly relevant to these issues, including numerous categories  
14 of documents which are the subject of a motion to compel which is currently *sub*  
15 *judice* before Magistrate Judge Wistrich. Veoh’s contention that it has any claim on  
16 summary judgment is entirely without merit.

17 **V. CONCLUSION**

18 Based on its moving papers and the foregoing, partial summary judgment  
19 should be entered in UMG’s favor.

20 Dated: October 10, 2008

IRELL & MANELLA LLP  
Steven A. Marenberg  
Elliot Brown  
Brian Ledahl  
Benjamin Glatstein

21  
22  
23  
24  
25 By:   
Steven A. Marenberg

26  
27 Attorneys for Plaintiffs

28