

**No. 09-56777**

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**IN THE 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**

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## **I. INTRODUCTION**

According to Veoh and its *amici*, the balance struck by Congress in the DMCA was that service providers were free to use the copyrighted content of others to build their businesses, and copyright owners were limited to sending endless take down notices on a file-by-file basis. Relying on this “balance,” Veoh and its *amici* then argue that the safe harbor for “storage” effectively immunizes all conduct engaged in by a service provider who provides storage – including the distribution of infringing content – regardless of the service provider’s knowledge of pervasive infringement, or its ability to prevent that infringement. In reaching this result, Veoh and its *amici* ignore the common sense meaning of Section 512(c) and its terms, ignore this Court’s and the Supreme Court’s rules of statutory construction, and rewrite the DMCA and its legislative history into something Congress did not write or intend.

Veoh and its *amici* offer four primary reasons for their radical expansion of the DMCA:

- They suggest that broad immunization of infringing conduct is necessary to provide “certainty” for service providers. This argument wrongly conflates “certainty” with “immunity for all conduct engaged in by service providers.” If Congress intended to immunize all conduct, it could have easily done so. Instead, Congress chose

four narrow safe harbors that immunize only the specific activities identified therein, and then only under certain circumstances. All other infringing conduct remained infringing. That is precisely the certainty that Congress intended.

- They complain that reading the DMCA as written will prevent “legitimate” businesses from operating. There is no proof of this, nor could there be since “legitimate” businesses may continue their lawful operations. It is only their unlawful actions that need to stop. Congress did not approach the internet as an all or nothing proposition. In enacting the DMCA, Congress drew a line between legitimate and illegitimate conduct. It did not seek to provide blanket protection for a “legitimate” business that also engages in illegitimate conduct.
- They claim that imposing liability on Veoh for not avoiding infringement when it was able to will “punish” service providers for belatedly adopting measures to prevent infringement – like filtering technology. This is illogical. Service providers that are infringing can limit their going-forward liability by stopping their infringing conduct. They are not being punished for stopping; they are being punished for starting in the first place. No principle in copyright law



supports the proposition that past copyright infringement is “cleansed” when an infringer ultimately stops copying, distributing, or otherwise infringing.

- Finally, they argue that imposing liability for copyright infringement on the internet will “upend” the internet. If anything has “upended” the internet, it is the proliferation of piracy on sites like Veoh. Internet businesses that pay for content are at a competitive disadvantage to companies that do not pay for content and that give it away for free. The internet has made theft easy, but Congress did not make it legal, and it most certainly did not reject the concept of licensing or purchasing content from copyright holders before exploiting that content for profit.

When compared to the actual language and intent of the DMCA, the arguments advanced by Veoh and its *amici* fail at every level. Congress did not by the DMCA intend to perpetuate a wild west of copyright infringement on the internet. The internet may be new and exciting but, at one time, so were record stores and book stores – yet, no one ever suggested that shoplifting or distributing stolen property was acceptable in the brick and mortar world. The language and legislative history of the DMCA confirm that Congress intended to create narrow exceptions to copyright liability for online activities – like

storage – that would not subject a business to liability in the analog world.

That is all that Congress did. Congress did not strip copyright holders of their exclusive rights on the internet, and it did not sentence copyright holders to an endless game of whack-a-mole simply because the internet was involved. But that is what Veoh and its *amici* ask this Court to do.

## **II. ARGUMENT**

### **A. VEOH’S REPRODUCTION, DISPLAY, AND DISTRIBUTION OF MATERIALS ARE NOT “STORAGE” AND THUS RECEIVE NO PROTECTION UNDER SECTION 512(c)**

Veoh nowhere disputes that it copied videos uploaded by its users that infringed UMG’s copyrights; that it transcoded (and thus copied again) those videos into different file formats to facilitate Veoh’s distribution of them; that it publicly performed works embodied in those videos by streaming them to any person with an internet connection; and that it distributed those videos by allowing any internet user to permanently download them. These acts are not “storage” and not performed “at the direction of a user.” Thus Section 512(c) – which protects infringement that occurs “by reason of storage at the direction of a user” – does not immunize Veoh’s infringing conduct.

1. **The DMCA’s Notice And Takedown Provisions Do Not Require An Expansive Redefinition Of The Term “Storage”**

“Where a statutory term is not defined in the statute, it is appropriate to accord the term its ordinary meaning.” *U.S. v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Veoh’s aforementioned infringing activities do not fit within the ordinary meaning of “storage at the direction of a user” and thus receive no liability limitation under Section 512(c). *See* Appellants’ Brief (“Opening Br.”) at 28-31.

Veoh concedes that its infringing activities do not fit within the ordinary meaning of “storage at the direction of a user.” *See* Brief of Appellee (“Br.”) at 57. But Veoh argues that “Section 512(c)[, which requires an OSP to ‘act[] expeditiously to remove, or disable access to’ infringing material,] presupposes that OSPs will be providing access to the user’s material.” Br. at 57-58. According to Veoh, this Court should ignore the Supreme Court’s principles of statutory construction because the “notice and takedown” provisions require an expansive reading of “storage” – one that covers all of Veoh’s infringing activities, including its reproduction, public performance, and distribution of videos.

Limiting “storage” to its ordinary meaning creates no conflict with the DMCA’s “notice and takedown” provisions. “Web hosting” services perform operations that fit within the ordinary meaning of “storage” and may therefore avail themselves of Section 512(c)’s protections. Opening Br. at 37-38. These businesses make storage resources available to website operators by “hosting” websites on their servers. If an internet user encounters infringing material on a website hosted by one of these businesses, he may bypass the website and send an infringement notice to the web host, who may then disable the infringing material it hosts on behalf of its website customer. In this way, and as applied to entities that actually “store” materials, the “notice and takedown” procedures harmonize with the ordinary meaning of “storage.”

Veoh rejects this argument, stating that “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.” Br. at 60. First, Veoh’s features are not passive, “automatic” features: *Veoh* created a system whereby it receives and reproduces content uploaded by its users, expressly to facilitate its publicly performing and distributing that content to any internet user. Moreover, this distinction *is* meaningful, particularly with respect to application of Section 512(c). A web host stores materials – text, pictures,

documents, etc. – on behalf of its customers. Its function is not content distribution, *i.e.*, “making . . . user uploaded content accessible,” though that may be the function of its customers. Its function is the provision of server space. Hence its activities fit within the ordinary meaning of “storage,” and it can seek immunity from monetary liability for copyright infringement pursuant to Section 512(c). “Storage” is not, however, Veoh’s business. It is not an “intermediary,” like eBay.com or Amazon.com, which never possessed the infringing materials over which they faced suit. *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084-85, 1087 (C.D. Cal. 2001) (“*eBay*”); *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003) (“*Hendrickson*”). Veoh is an internet television network that reproduces, transcodes, streams, and distributes content to viewers – content which it possesses and hosts on *its* servers. Simply put, Veoh is not a web host or intermediary. It is an exhibitor and distributor, and those activities do not fall within the definition of “storage.”<sup>1</sup>

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<sup>1</sup> Veoh suggests that it is indistinguishable from defendant Netcom in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), a case Congress looked favorably upon in passing the DMCA. That is not true: Netcom was “one of the largest providers of Internet access in the United States,” which also stored materials for its customers’ websites. *Id.* at 1366. In other words, Netcom was not a website but an internet service provider in the vein of TimeWarner Cable. Hence it was the type of infrastructure service Congress envisioned when enacting the DMCA (and referenced *Netcom* in so doing). *See* H.R. Rep. No.

**2. Section 512(a), Not Section 512(c), Protects  
“Transmission” Activities**

Veoh’s *amici* argue that web hosts frequently transmit materials, and thus the above description of web hosting reflects UMG’s “willful[] misunderstand[ing] [of] how these technologies work.” EFF Br. at 13. But to the extent a web host provides more than storage – *e.g.*, it transmits (or makes “accessible,” the phrasing preferred by Veoh and its *amici*) materials to users of its customers’ websites – it can seek safe harbor pursuant to Section 512(a), which applies to “transitory digital network communications,” provided certain conditions are met (*e.g.*, the transmission occurs “without modification of [the material’s] content”). *See* 17 U.S.C. § 512(a).<sup>2</sup> The web host’s “transmission” activities may qualify for protection under Section 512(a), which covers certain “transmi[ssions],” and thus courts need not expand the meaning of “storage” in Section 512(c) to cover non-storage (*e.g.*, transmission) activities. *See* Opening Br. at 38 n.9; *see also* S. Rep. No. 105-190, 1998 WL 239623, \*49 (“hosting a World Wide Web site does not fall within the subsection

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105-551(I), 1998 WL 261605, \*11. “Geocities” – mentioned by Veoh’s *amici* – also offered a different service from Veoh: it “allowed million of users to create their own websites.” Brief of *Amici Curiae* Electronic Frontier Foundation *et al.* (“EFF Br.”) at 15. In other words, Geocities was not a website but a web host.

<sup>2</sup> Neither Veoh nor its *amici* suggest that Veoh – or entities like Veoh – qualify for Section 512(a)’s safe harbor.

([k])(1)(A) definition; providing connectivity for a world wide web site does fall within that definition. The subparagraph (A) definition of service provider is not intended to exclude providers that perform other functions in addition to those set forth in subparagraph (A), including the functions identified in subsection ([k])(1)(B)).<sup>3</sup> Neither Veoh nor its *amici* respond to this point, and thus neither provides a reason for expanding the term “storage” beyond its ordinary meaning. Because that meaning does not encompass Veoh’s aforementioned activities, Veoh is not entitled to Section 512(c)’s liability limitation.

Veoh’s *amici* also note that Section 512(k)’s broad definition of “service provider” includes entities that perform functions other than storage, and that this broad definition supports Veoh’s claim to protection under Section 512(c). *See* eBay Br. at 10. But Section 512(k) defines “service provider” broadly precisely because other provisions narrow the activities (undertaken by

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<sup>3</sup> Other portions of the legislative history – including those cited by Veoh’s *amici*, *see* Brief of *Amici Curiae* eBay Inc. *et al.* (“eBay Br.”) at 6 – confirm that infrastructure providers like web hosts, rather than web sites, are the intended beneficiaries of the DMCA. *See* S. Rep. No. 105-190, 1998 WL 239623 at \*7 (“[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet”). A web host, not a web site, is the sort of entity that would “invest[] in the expansion of the speed and capacity of the internet.”

“service providers”) that qualify for safe harbor (*e.g.*, “linking,” *see* 17 U.S.C. § 512(d)).

Nor does confining Section 512(c) to its natural meaning create “uncertainty for [certain] service providers,” *see, e.g.*, eBay Br. at 4-5, unless “uncertainty” means “liability.” Defining “storage” to mean “storage” – the everyday, commonly understood sense of the term – will alert service providers that activities beyond storage receive no immunity under Section 512(c). That holding will not generate “uncertainty,” but clarity, regarding the reach of “by reason of storage” – a phrase that will thereafter mean what it says.

“Uncertainty” is thus no cause for affirming the District Court’s decision.

**3. The Legislative History Of The DMCA Does Not Support Veoh’s Interpretation Of “Storage”**

The DMCA’s legislative history evinces Congress’s intent to protect entities providing necessary infrastructure services for the internet. Opening Br. at 40-45. UMG’s Opening Brief explained that, in the statute’s legislative history, Congress disclaimed any intent to protect sites “where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display.” *See* S. Rep. No. 105-190, 1998 WL 239623 at \*48.

Veoh denies this point, arguing that “[t]he legislative history confirms that Congress did not intend to limit [the] Section 512(c) safe harbor to mere



electronic storage facilities, but is [sic] intended to protect service providers that host a ‘chatroom, or other forum in which material may be posted at the direction of users.’” Br. at 58 (quoting H.R. Rep. No. 105-551, pt. 2, at 53). Veoh’s citations to the legislative history – here and elsewhere – are ripped from their context – a context that makes clear Congress’s intent to protect web hosts rather than web sites. For example, the House Report referenced above fully states: “New Section 512(c) limits the liability of qualifying service providers for claims of . . . infringement for storage at the direction of a user . . . . Examples of such storage include *providing server space for a user’s web site, for a chatroom . . . .*” H.R. Rep. No. 105-551(II), 1998 WL 414916, \*53 (emphasis added). Veoh omitted the italicized words from its citation because they evince Congress’s intent to limit Section 512(c) to “electronic storage facilities,” *e.g.*, businesses that “provid[e] server space for a user’s web site” (or chatroom) rather than the “user’s web site” itself. This quotation confirms that Veoh does not fall within Section 512(c)’s ambit.

Veoh cites one additional statement from the DMCA’s legislative history in connection with its “storage” argument: that Congress “expect[ed] that websites offering access to user-supplied audio and video material would be eligible for the protections of Section 512(c).” Br. at 59 (citing S. Rep. No. 105-190, 1998 WL 239623 at \*44). The Senate Report says no such thing.

The portion of the report cited by Veoh considers the meaning of “activity” as used in Section 512(c): “The term ‘activity’ is intended to mean activity using the material on the system or network. The Committee intends such activity to refer to wrongful activity that is occurring at the 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.” S. Rep. No. 105-190, 1998 WL 239623 at \*44 (emphasis added). For example, “the activity at an online site offering audio or video may be an unauthorized public performance . . . rather than (or in addition to) the creation of an unauthorized copy of any of these works.” *Id.* Read in full, these statements actually distinguish an “online site” from “the provider’s system or network,” “on” which an online site may reside. They thereby indicate that storage providers – or web hosts – can seek safe harbor under Section 512(c), though the alleged infringing “activity” may technically take place at an online site (like Veoh) it hosts. This portion of the legislative history does not therefore suggest that “online site[s] offering audio or video” are subject to Section 512(c)’s liability limitation. Rather, this legislative history indicates that a web host that provides storage services for those sites can seek safe harbor under Section 512(c). Veoh therefore cites nothing in the

legislative history suggesting that its services are entitled to Section 51(c)'s liability limitation.

**4. The Settled Meaning Of “By Reason Of” Excludes Veoh’s Activities**

In its Opening Brief, UMG explained that “by reason of” is a phrase common to multiple federal statutes, with settled meaning in Supreme Court case law. Opening Br. at 33-36. Incorporating that meaning into the DMCA is appropriate because when Congress “use[s] the same words [in different statutes], . . . we can only assume it intended them to have the same meaning that courts had already given them.” *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Veoh and its *amici* never address this principle of statutory construction, and they nowhere dispute that the Supreme Court has defined the phrase “by reason of” to require a showing of proximate cause. *Id.* at 267-68.

Veoh instead distinguishes prior cases interpreting “by reason of” on two bases: (1) the purposes of statutes previously interpreted by the Supreme Court dictate a narrower construction of this phrase than this Court should give the same phrase in the DMCA, and (2) even accepting that “by reason of” requires a showing of proximate causation, Veoh’s infringing activities meet this requirement. These arguments are meritless.

First, Section 512(n) confirms that “by reason of” is amenable to the same narrow interpretation supplied in other contexts. It provides that “[s]ubsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section [512].” 17 U.S.C. § 512(n). Reading “by reason of” broadly, and thus as encompassing “transmission” activities (like distribution), creates redundancy and brings functions addressed in Section 512(a) (which covers certain “transmi[ssion]” activities under certain conditions neither Veoh nor its *amici* suggest are applicable here) into Section 512(c) (which covers “storage”) – a result forbidden by Section 512(n).

Nor are Veoh’s activities “only indirectly connected to UMG’s alleged injury.” Br. at 69; *see also id.* at 68 (“the ‘proximate cause’ of the material appearing on Veoh’s website *is* directly a result of storage at the direction of a user . . . . The allegedly infringing material would not have been made accessible by Veoh *but for* third party users uploading the material . . . .”) (emphasis in original). First, Veoh’s argument mistakes the proximate cause requirement for the “but for” cause requirement, though they are distinct. *See Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010) (“the plaintiff is required to show that a RICO predicate offense ‘not only was a “but for” cause of his injury, but was the proximate cause *as well.*’ . . . [P]roximate cause thus requires ‘some direct relation between the injury asserted and the

injurious conduct alleged’’) (emphasis added). Second, Veoh’s “storage” of materials is not “directly related” to its transcoding those materials into Flash format or publicly performing those materials through streaming. And Veoh’s storage *certainly* is not “directly related” to its distributing those materials through permanent downloads.<sup>4</sup> The “storing” of an item – even in the online context – does not “directly relate” to its transformation and dissemination, which Veoh performed to generate revenue, not to effectuate its user’s desire to “store” materials. UMG explained in its Opening Brief (at 39-40) that this Court adopted the same analysis in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1116-17 (9th Cir. 2007). Veoh cannot therefore seek protection for all of its activities under Section 512(c) – not all of those activities occur “by reason of” storage.

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<sup>4</sup> Veoh’s *amici* accuse UMG of “misleadingly characteriz[ing]” certain activities undertaken by Veoh as “downloads.” EFF Br. at 14-15. Veoh’s *amici* are either ignorant of Veoh’s conduct or being intentionally obtuse. UMG only used the term “download” to describe Veoh’s offering a “download” button that distributed permanent copies of video files to internet users – a “characterization” Veoh adopts as well. Br. at 9. These downloads differ from (for example) Veoh’s temporarily displaying a web page, or streaming a video, to an internet user. UMG suspects that Veoh’s *amici* are being obtuse because even permanent downloads fall outside the implied “display right” they contend exists under Section 512(c).

**5. The Caselaw Cited By Veoh Does Not Compel A Ruling In Its Favor**

Veoh's Answering Brief cites several cases in support of its position but none in which a Court of Appeal adopted its interpretation of Section 512(c). Moreover, the cases Veoh cites are either inapt or unpersuasive.

Veoh argues that *Viacom Int'l Inc. v. YouTube, Inc.*, 2010 WL 2532404 (S.D.N.Y. June 23, 2010) and *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) support this Court's affirming the District Court's decision below. First, UMG knows of no other cases, and certainly no appellate authority, that use Section 512(c) to excuse infringement occurring on the service provider's *own* website. Second, neither decision supports affirming the District Court's decision here. The *Viacom* opinion simply parrots the *Io* decision and the District Court's decision in this action. *Viacom*, 2010 WL 2532404 at \*12. It therefore offers no independent authority, as it was wrongly decided (like the *Io* opinion), for all the reasons identified above and in UMG's Opening Brief. Regardless, Veoh engaged in infringing activities not performed by YouTube, including providing permanent downloads of infringing materials. Br. at 9. Thus, even assuming that streaming materials is necessary for the provision of "access," and somehow covered by the phrase "by reason of storage," distribution by download is not necessary for "access" and not – under any sensible interpretation of the term –

“storage,” a point the *Viacom* court seemed willing to accept. *Viacom*, 2010 WL 2532404 at \*12 (if “defendants’ activities go beyond what can fairly be characterized as meeting the above-described collateral scope of ‘storage’ and allied functions, and present the elements of infringements under existing principles of copyright law, they are not facially protected by § 512(c)”). Of all the services described in Section 512(c) cases cited by Veoh, *none* – not YouTube, not Amazon, not eBay – was deemed protected by section 512(c)’s safe harbor “by reason of” offering permanent downloads of infringing materials.

Though the *Io* court considered whether Section 512(c) reached Veoh’s conduct, it only determined whether Veoh’s transcoding videos and creating thumbnail images from them fell within the safe harbor. *Io*, 586 F. Supp. 2d at 1146-47. It nowhere considered whether Veoh’s streaming and distribution of videos constitute “storage at the direction of a user.” *Id.*

Veoh also cites the lower court and Fourth Circuit decisions in *CoStar Group, Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001), *aff’d*, 373 F.3d 544 (4th Cir. 2004), and the Second Circuit’s decision in *The Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) in support of the District Court’s holding. But the Fourth Circuit never considered whether Section 512(c) covered defendant LoopNet’s infringement;

the district court never ruled that LoopNet was entitled to the DMCA's protection, *see CoStar*, 164 F. Supp. 2d at 717;<sup>5</sup> and the Second Circuit considered no DMCA issues whatsoever.<sup>6</sup>

Nor do the various district court cases cited by Veoh support extending Section 512(c) to cover its services. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wa. 2004) and *Hendrickson* assumed without considering whether the defendants' liability was "by reason of the storage of material at the direction of a user." And though *eBay* considered this issue, it rewrote the statute in doing so: "This section applies where a plaintiff seeks to hold an internet service provider responsible for either (1) infringing 'material' stored and displayed on the service provider's website *or* (2) infringing 'activity using the material on the [service provider's computer] system.'" *eBay*, 165 F. Supp. 2d at 1088 (emphasis in original). Its inclusion of "display" within the ambit of Section 512(c) finds no basis in the statutory text, its

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<sup>5</sup> Though the *CoStar* District Court referenced Section 512(c), it erred just like the District Court did here: it assumed that the defendant's non-storage activities must be subject to the safe harbor, otherwise the "take down" procedures of § 512" would be senseless. UMG explained in section II.A.1 *supra* how the statute's take-down procedures harmonize with the ordinary meaning of "storage."

<sup>6</sup> Both the Second and Fourth Circuits, in *Cartoon Network* and *CoStar* respectively, considered whether, under facts different from those here, a specific reproduction constituted direct infringement by the defendant. *See Cartoon Network*, 536 F.3d at 123; *CoStar*, 373 F.3d at 546.



context, or its legislative history (as set forth above). Moreover, in *Hendrickson* and *eBay*, the defendants never possessed, reproduced, performed, or distributed the allegedly infringing materials; third-parties did. *Hendrickson*, 298 F. Supp. 2d at 918; *eBay*, 165 F. Supp. 2d at 1084-85, 87. Here, Veoh hosted, reproduced, distributed, and displayed the infringing materials – all of which were on Veoh’s servers and available through Veoh’s site. UMG submits that this conduct falls outside the meaning of “storage at the direction of a user.”

Veoh’s efforts to distinguish UMG’s authorities are also unpersuasive. Veoh distinguishes *CCBill* on the ground that offering credit card payment services to access infringing materials “was too far removed to be found ‘by reason of . . . referring or linking users to an online location,’” but that “Veoh’s providing access to material stored at the direction of users is squarely related to the storage itself.” Br. at 65-66. But Veoh nowhere explains how offering permanent downloads of infringing materials (for example) to any person with internet access is related – much less “squarely related” – to a separate user’s “storage” of those materials. Finally, Veoh distinguishes *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008) on the ground that the defendant there “created or developed” “content,” and Veoh did not. Br. at 67-68. But Veoh “created or developed”

content in the same manner as defendant Roommates.com: Roommates.com’s “creation” and “development” of content involved taking user responses to housing-related questions, assembling those responses into a profile, and displaying that profile to other Roommates.com users. *Id.* at 1161-62. Veoh performs the same functions with respect to video: it takes user-provided videos and user-provided descriptions of those videos, assembles those materials, and displays and distributes those materials through its website. Opening Br. at 10-18.

In sum, Veoh offers no persuasive basis for affirming the District Court’s unjustifiably broad interpretation of “storage at the direction of a user.” For the reasons identified above and in UMG’s Opening Brief, this Court should reject that interpretation and confirm that Veoh’s non-storage activities receive no protection under Section 512(c).

**B. GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER VEOH QUALIFIED FOR DMCA PROTECTION, AND THUS THE DISTRICT COURT’S DECISION MUST BE REVERSED**

Even assuming that Veoh’s infringing activities qualify as “storage at the direction of a user,” Veoh must still satisfy the additional requirements set forth in Section 512(c) before earning entitlement to that provision’s liability limitation. According to Veoh and its *amici*, those requirements obligate service providers like Veoh merely to respond to notices of infringement. If

they do, Veoh and its *amici* argue, they qualify for Section 512(c)'s limitation on liability.<sup>7</sup> *See, e.g.*, EFF Br. at 8 (“if the service provider chooses to comply with § 512 procedures, ordinary copyright liability rules will not apply”). This “balance” and “cooperation” between service providers’ and copyright owners’ interests is anything but: it requires copyright owners to send an endless string of takedown notices to an endless series of websites, all of whom may profit from their infringement until they receive such notice. Under Veoh and its *amici*'s understanding of Section 512(c), this massive game of “whack-a-mole” will never end: if Section 512(c) requires websites to do no more than remove specific URLs identified in specific notices of infringement, then they have no incentive to proactively address infringement on their site, which will ensure

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<sup>7</sup> Veoh and its *amici* suggest that the ability to send “takedown notices” represents a “new remed[y]” for copyright owners, conferred on them by the DMCA. *See, e.g.*, EFF Br. at 8; eBay Br. at 9. This suggestion is ridiculous. So long as there was a Copyright Act, a copyright owner could send takedown notices or cease and desist letters, *e.g.*, “remove my copyrighted content from your publication.” So long as there were “service providers,” a copyright owner could send them takedown notices and cease and desist letters too. And most importantly, if a person continued to infringe copyrights after receiving the copyright owner’s letter, he would be liable for infringement. This scenario and the copyright owner’s alleged “remedy” are nothing new, and certainly no “gift” conferred by the DMCA on copyright holders.

that infringing videos continue to populate their service.<sup>8</sup> This in turn will devastate content creators.

The requirements set forth in Section 512(c) create no such regime. That provision disqualifies from its liability limitation service providers with actual knowledge of infringing materials *or* awareness of facts and circumstances indicating infringement if they fail to expeditiously remove such materials. *See* 17 U.S.C. § 512(c)(1)(A). Additionally, service providers who have the right and ability to control infringement from which they receive a direct financial benefit are not entitled to the section's liability limitation. *See id.* at § 512(c)(1)(B). Veoh cannot satisfy these conditions and, at a minimum, failed to prove the absence of any genuine issues of facts with respect to its satisfying these conditions. Thus the District Court's Order on Veoh's Motion for Summary Judgment must be reversed.

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<sup>8</sup> Veoh's *amici* suggest that websites will proactively address infringement on their sites "as part of voluntary commercial arrangements with major content owners," and thus legal requirements to proactively address infringement are unnecessary. EFF Br. at 23. This case proves the opposite. If *amici* were right, Veoh would have implemented filtering long before October 2007. That Veoh implemented filtering only after UMG sued evidences the need for a legal incentive. [RE 860-63 (141:15-144:23), 1980-81 (¶ 15).]

1. **Genuine Issues Of Fact Existed With Respect To Veoh's Knowledge And Awareness Of Infringement**

a. **Section 512(c)(1)(A)(i) Disqualifies Entities With "Actual Knowledge" Of Infringement, Not Specific Knowledge Of Specific Infringements**

UMG's Opening Brief identified ample evidence of Veoh's "actual knowledge" of pervasive infringement. *See* Opening Br. at 18-20. This Court has held that similar evidence confirms the existence of such knowledge. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 and n. 5 (9th Cir. 2001) (document authored by Napster co-founder acknowledging that users were exchanging copyrighted music was evidence of actual knowledge). Thus, at a minimum, UMG's evidence was sufficient to create genuine issues of fact with respect to Veoh's "actual knowledge" of infringement.

Veoh disagrees, citing the District Court's use of *CCBill* and arguing that specific knowledge of specific infringements is instead required by subsection 512(c)(1)(A)(i). Br. at 32-34. This claim finds no support in the statute's language, which refers to "actual knowledge," not specific knowledge of specific infringements, or in *CCBill*, which addressed the "notice and takedown" provisions, not the "actual knowledge" subsection. The Court should therefore reject Veoh's argument.

*CCBill* addressed the requirements fixed by the DMCA's notice procedures and how those requirements bear on knowledge gained from

notices of infringement. *CCBill*, 488 F.3d at 1111-13. The DMCA distinguishes between knowledge or awareness obtained from a copyright owner or its agent – which must comply with subsection 512(c)(3)(A) to impart knowledge of infringement – and knowledge or awareness obtained by the service provider itself or from third parties – which need not comply with subsection 512(c)(3)(A) to impart knowledge of infringement.<sup>9</sup> The DMCA’s distinguishing between these different sources of knowledge is sensible. It incentivizes copyright owners to correctly identify the materials they want removed, but it prevents a service provider from willfully ignoring other sources of knowledge that do not comply with the notice and takedown requirements. *CCBill*’s statements regarding “actual knowledge” are therefore irrelevant to judging the sufficiency of knowledge evidence identified by UMG. That evidence is either from third-parties (*i.e.*, not UMG), or from Veoh’s review of its own site, or from notices of infringement (from the RIAA) that comply with subsection 512(c)(3)(A). *CCBill* thus provides no basis for ignoring this evidence.<sup>10</sup>

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<sup>9</sup> Veoh’s *amici* concede this point. *See* EFF Br. at 18.

<sup>10</sup> A decision recently entered in a separate action (by the same District Court) is immaterial for the same reason: it addresses the adequacy of notices sent by a copyright owner. *See Perfect 10, Inc. v. Google, Inc.*, CV 04-9484 AHM (SHx) (C.D. Cal. July 26, 2010).

Though Veoh's *amici* refer to legislative history regarding Section 512(d) to elucidate Section 512(c)'s actual knowledge requirement, *see* eBay Br. at 12, that history is inapt: Section 512(d) addresses knowledge concerning activities on other websites, while Section 512(c) addresses knowledge concerning activities on the service provider's *own* service. It is sensible to impose a lower "knowledge" bar with respect to the service provider's own service, about which he is knowledgeable and for which he is responsible. Moreover, that Congress did not make these same statements regarding Section 512(c)'s knowledge standards supports the inference that they do not apply.

Finally, UMG did not claim that "merely hosting user-contributed material capable of copyright protection" was "enough to impute actual knowledge to a service provider." Br. at 36.<sup>11</sup> UMG contended that Veoh's hosting a music category – a category for which it had no license from any major record label – coupled with additional evidence of knowledge, created a genuine issue of fact with respect to its knowledge of infringement. *See*

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<sup>11</sup> Here and elsewhere in their briefing, Veoh and its *amici* refer to themselves as "legitimate businesses," identify the amount of non-infringing content on their system, and accuse UMG of advancing an interpretation of the DMCA that will harm their "legitimate" businesses. *See, e.g.*, Br. at 35-36; eBay Br. at 25. UMG does not dispute that Veoh and its *amici* conduct legitimate activities in connection with their businesses, but copyright infringement is not one of them. UMG only seeks to hold Veoh liable for its illegitimate activity, not its operations as a business as a whole.

Opening Br. at 18-20. In other words, UMG does not argue that Veoh's awareness that its service was capable of infringing copyrights – standing alone – constitutes “actual knowledge” for purposes of the DMCA. Veoh had concrete knowledge of actual, pervasive infringement, and that knowledge renders it ineligible for the safe harbor. *See, e.g., Columbia Pictures Indus. Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661, \*63 (C.D. Cal. Dec. 21, 2009);<sup>12</sup> *cf. Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 154 (S.D.N.Y. 2009) (“knowledge of specific infringements is not required to support a finding of contributory infringement”).

b. Section 512(c)(1)(A)(ii) Provides A Separate, Lower Standard Than Actual Knowledge

Even assuming that knowledge of actual, pervasive infringement falls short for purposes of subsection 512(c)(1)(A)(i), such knowledge disqualifies service providers from Section 512(c)'s liability limitation under subsection 512(c)(1)(A)(ii). That subsection renders ineligible for the safe harbor service providers with “aware[ness] of facts and circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(1)(A)(ii). A district court in the

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<sup>12</sup> Veoh distinguishes this case based on three alleged factual differences between the *Fung* defendant and Veoh, but those factual difference bear no relation to the holding that awareness that infringing material is available through the defendant's website supports a finding of knowledge under the DMCA. Br. at 39. If Veoh had awareness of infringing material like the *Fung*



Central District recently confirmed that awareness of infringing material available on the defendant's website renders it ineligible for the safe harbor. *Fung*, 2009 U.S. Dist. LEXIS 122661 at \*63. Moreover, the Seventh Circuit has held that “[w]illful blindness is knowledge in copyright law . . . as it is in the law generally.” *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003). Under these authorities, UMG's evidence created, at a minimum, triable issues with respect to its “aware[ness] of facts and circumstances from which infringing activity is apparent.”

Veoh and its *amici* reject this position, arguing that it had no “aware[ness] of facts and circumstances from which infringing activity is apparent” unless it turned a “blind eye” to specific infringements.<sup>13</sup> *See* Br. at

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defendant, they are on equal footing with respect to this specific holding – even if the *Fung* defendant hosted more infringing content than Veoh.

<sup>13</sup> Veoh cites *CCBill* in connection with its arguments regarding “red flag” knowledge. *CCBill* cited just two facts supporting the defendant's awareness of apparent infringement: its providing services to sites called “illegal.net” and “stolencelebritypics.com” and to “password-hacking websites.” *CCBill*, 488 F.3d at 1113-14. UMG cited far more evidence of Veoh's awareness (*see* Opening Br. at 18-23), and this Court's holding in *CCBill* reflected its concern that defendant *CCBill* was unsure whether photographs hosted by third-party sites (*not* by *CCBill*) were “actually illegal or stolen,” or that the “passwords enabled infringement.” *Id.* at 1114. In other words, central to the Court's holding that this evidence did not create “red flag” knowledge was the fact that the alleged infringement was taking place on websites *other than CCBill's* – sites whose licensing arrangements *CCBill* did not and could not know. (The *CCBill* Court never stated, as Veoh suggests, that “where the OSP must undertaken an investigation of ‘facts and

40-42; EFF Br. at 21-22. This position finds no support in the statute’s language, which says nothing of “specific infringements.” Moreover, “actual knowledge” of infringement and “awareness of facts or circumstances” indicating infringement must be different standards. *See* Opening Br. at 53. But Veoh and its *amici* conflate them, as did the District Court. Their proposed standard makes “awareness” of facts or circumstances indicating infringement synonymous with “actual knowledge” of infringement – rendering one provision surplusage in the context of Section 512(c). That was not Congress’s intent.

Veoh also argues that “if general knowledge that infringing material is on the Internet, or that users sometimes uploading infringing material to a site, was sufficient to disqualify a company from DMCA safe harbor, there would be no safe harbor.” Br. at 41. Veoh misunderstands or misstates UMG’s position. UMG never advanced this argument. Rather, Veoh’s concrete awareness of actual, pervasive infringement on its own website renders it ineligible for the safe harbor, pursuant to subsection 512(c)(1)(A)(i).

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circumstances’ to identify infringing content, there are no ‘red flags . . . .’” Br. at 33.) Here, Veoh *knew* it had no license to host music content from any of the major record labels, and it received multiple notices of infringement from the RIAA, the trade organization of the music industry, identifying thousands of infringing music videos. Opening Br. at 20. Veoh cannot argue, then, that, it justifiably believed it had authority to host the content infringed here.

c. There Were Genuine Issues Of Disputed Facts Regarding Veoh's Knowledge And Awareness Of Infringement

UMG's set forth considerable evidence of Veoh's knowledge of infringement, including Veoh's receipt of infringement notices from the RIAA identifying scores and scores of infringing music videos, its receipt of emails from its users and other third parties identifying infringing materials, its purchase of "search terms" covering popular music content, its reputation as a "haven for pirated content," and its analysis of its own site, through which it determined that Veoh's "number one category of searched and viewed content [was] Music."<sup>14</sup> Opening Br. at 18-20. UMG's Opening Brief also identified evidence of Veoh's awareness of apparent infringement, including its failure to implement filtering technology, which identifies and prevents copyright infringement and was available before Veoh began its operations; its failure, after belatedly implementing that technology, to use it to identify infringing videos uploaded before its implementation; its failure to use employees reviewing Veoh's service to remove copyright infringing videos; and its failure

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<sup>14</sup> That the percentage of music videos "represent[ed] barely six percent of the videos on Veoh" is therefore immaterial. Br. at 36. Music was – by Veoh's own admission – its "number one category of searched and viewed content." That Veoh's own executive made this statement confirms that Veoh was reviewing and monitoring the music content on its site. Moreover, the fact that Veoh copied and distributed many non-infringing, non-music videos is

to use data it collected and tools it created – both of which confirmed the presence of and were capable of locating infringing material – to prevent copyright infringement. *See* Opening Br. at 21-22.

Veoh’s Brief identifies “facts” that supposedly refute any claim that Veoh had “actual knowledge” or “awareness” of infringement. For example, Veoh argues that it justifiably believed its “music” category to contain licensed content from SonyBMG and thus had no cause to believe that its music content was infringing copyrights. *See* Br. at 36-37. This argument fails for at least two reasons. First, Veoh had no permission to host SonyBMG’s content. Though Veoh posted links (or “embeds”) to videos hosted by SonyBMG on SonyBMG’s own website, Veoh admitted to having no license from SonyBMG to *host* such content. [RE 979-83 (45:21-47:11, 48:23-49:11).] It thus had no cause for believing that SonyBMG videos hosted in its “music” category – *i.e.*, videos files on Veoh’s computers rather than links to such videos – were authorized for display and distribution by the copyright owner.<sup>15</sup> Second, the

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irrelevant to this action, in which UMG has targeted only Veoh’s copyright infringement, not its legitimate business activities.

<sup>15</sup> Whether Veoh had an agreement with “MTVN” is likewise immaterial. Br. at 37. Veoh has never suggested or introduced any evidence that this agreement authorized Veoh to host music content. It did not introduce this agreement into the record, and its reference to the agreement in its Supplemental Excerpts of Record is a statement by UMG’s counsel (in a letter)

evidence of Veoh's "arrangement" with SonyBMG and the inferences to be drawn from it were conflicting, and thus the District Court erred in concluding that this evidence supported a finding that Veoh lacked actual knowledge of infringement. *See Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

The District Court likewise erred when it concluded that the "search engine marketing terms" purchased by Veoh were "associated with and used to promote legitimate SonyBMG videos." Br. at 36 n.17. Veoh presented this evidence in its reply papers, and thus UMG had no opportunity to respond to this evidence. It was therefore error for the District Court to consider it. *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (S.D. Cal. 1999) (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)). Regardless, in its opposition papers, UMG presented evidence that it owned rights in the materials referenced in these terms, and thus Veoh was not authorized to host those materials. *See* Opening Br. at 60.<sup>16</sup> The District Court could not properly resolve this factual dispute on summary judgment.

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asking that Veoh identify information incidental to that agreement. [SRE 2997 (¶ 29), 3001.]

<sup>16</sup> For example, UMG presented evidence that it owned rights to the songs "In Da Club" and "Candy Shop" by UMG artist 50-Cent. [RE 393 (90-91, 94).] Veoh presented no evidence in this Court or the District Court that SonyBMG held rights to that song that justified Veoh's knowing promotion of this clearly infringing content.

Veoh also suggests that UMG's "own artists upload music to Veoh without having entered licensing arrangements beyond agreeing to abide by Veoh's TOU[.]" and thus Veoh lacked knowledge that videos on its site were infringing. Br. at 37 n.19. This is not true. First, UMG's artists have no authority to upload UMG's copyrighted materials to Veoh or any other site. Second, there is no evidence that UMG's artists uploaded materials to Veoh. Veoh cites one email from an individual named "Say Street Ratt Promo," without any evidence whatsoever that this person is affiliated with UMG or that the video referenced in this email is subject to a claim of infringement by UMG. [SRE 2397.] The other three emails referenced by Veoh [SRE 2980-84] make no mention of Veoh whatsoever, and one was authored in 2005 [SRE 2980-81], before Veoh even had a website [RE 327 (¶ 84), 786 (37:3-9), 858-59 (137:20-138:2)]. Veoh's reference to the uploading of Pussycat Dolls materials is likewise misplaced.<sup>17</sup> Br. at 20. The videos referenced in the

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<sup>17</sup> Shannon Moore, the artist referenced in the second email chain cited by Veoh, is not a UMG artist (and thus not an artist over which UMG asserted any claims of infringement) but instead an artist distributed by UMG at the direction of her independent record label, Water Music Records (which the email confirms, SRE 2873-75).

“Pussycat Dolls” email are not music videos and not subject to UMG’s claims (Veoh introduces no evidence otherwise). [SRE 2814, 2552-58, 2873-75.]<sup>18</sup>

Nor does UMG’s evidence “ignore Veoh’s 2006 implementation of hash filtering” or “downplay Veoh’s implementation of Audible Magic against all new uploads in October 2007, and within [8-9, [RE 333-34 (¶¶ 115-17), 772-73 (102:20-103:7)]] months, against its entire backlog of videos.” Br. at 42. For one, even supposing that UMG ignored these items, that would be irrelevant to Veoh’s liability: Veoh’s belated implementation of filtering technology does not immunize its prior infringement. When Veoh committed copyright infringement, it became liable for that infringement. An infringer’s past infringement is not “cured” when he ultimately stops copying, distributing, or otherwise infringing. No principle in copyright law supports this argument. Nor do measures taken by an infringer to avoid future liability erase its past

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<sup>18</sup> Veoh also argues that UMG’s removal of certain videos from its infringement list during the litigation revealed that list to contain “numerous errors,” and that UMG’s removals confirm the impossibility of Veoh identifying what infringes copyright. Br. at 15-16. But UMG removed just 29 videos drawn from a list of over 7,500 videos infringed by Veoh. [SRE 2737-90.] Veoh also argues that its infringement was less objectionable because “62%” of videos identified by UMG were not “music videos” but instead “Japanese anime” and other material set to UMG’s copyrighted music. Br. at 20 n.12. (Veoh cites motion *in limine* papers in support of this argument, which, of course, were not before the District Court on summary judgment.) Veoh nowhere explains why infringing two entities’ copyrights – the anime owner’s copyright and UMG’s copyright – is less objectionable than infringing one.

liability – in copyright law or civil law generally. Veoh cites no authority to the contrary. Second, UMG identified Veoh’s hash filtering in its Opening Brief when it stated that Veoh only removed “bit-for-bit” copies of infringing videos, Opening Br. at 22-23 – and that such filtering is highly ineffective. [RE 1810-11 (¶¶ 7-10).] And third, UMG did not “downplay” Veoh’s implementation of Audible Magic – if anything, Veoh’s implementation of Audible Magic reveals that the “doom and gloom” predicted by Veoh in the event the Court sides with UMG is unfounded. Veoh’s belated implementation of Audible Magic confirms that (1) implementing such technology was feasible and did not create an “unworkable situation,” and that (2) had Veoh implemented this technology when it was available, and when its competitors implemented such technology, Veoh could have prevented a significant amount of infringement. [RE 333-34 (¶¶ 115-18), 772-73 (102:20-103:7), 1417 (¶ 6).] The Court should not absolve Veoh of liability for its infringement because it ultimately took steps to mend its ways.

The District Court’s finding that “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” misses the point. Br. at 42. UMG explained that “[w]illful blindness is knowledge in copyright law . . .



as it is in the law generally.” *See Aimster*, 334 F.3d at 650. To fail to implement filtering, human or digital, to avoid discovering infringement on one’s own site, is to be willfully blind to the infringement it prevents – just as defendant *Aimster* was willfully blind to infringement it refused to address on its service. Thus knowledge or awareness of infringement *Veoh* could have gained through filtering, but willfully ignored by refusing to filter, is knowledge or awareness of infringing materials under subsection 512(c)(1)(A).<sup>19</sup>

*Veoh* counters that the “DMCA imposes no obligation upon an OSP to monitor its service or affirmatively seek facts indicating infringing activity.” *Br.* at 43. But this statement ignores relevant legislative history, which provides: “[o]nce one becomes aware of [] information [indicating infringement] one may have an obligation to check further. H.R. Rep. No. 105-551(I), 1998 WL 261605 at \*26. UMG’s evidence confirms that *Veoh* was “aware of such information,” and that it needed to “check further.”

Because *Veoh* offers no persuasive legal or factual basis for affirming the District Court’s decision with respect to *Veoh*’s “knowledge” or

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<sup>19</sup> It is false that “‘notification’ by Audible Magic . . . cannot be deemed to impart red flag knowledge of infringements” because it “does not comply with Section 512(c)(3).” *Br.* at 43. As *Veoh*’s *amici* admit, Section 512(c)(3) only applies to notice that comes from a copyright owner, not a third-party. *See EFF Br.* at 18. Audible Magic is a third-party.

“aware[ness] of facts or circumstances” indicating infringement, it must be reversed.

2. **Veoh Did Not Expeditiously Remove Infringing Material After Obtaining Knowledge Or Awareness Thereof**

The above facts confirm that Veoh had actual knowledge of infringing activity and/or was aware of facts or circumstances from which infringing activity was apparent. These facts disqualified Veoh from protection under Section 512(c) unless Veoh could show that, upon obtaining knowledge or awareness, it acted expeditiously to remove or disable access to the material. 17 U.S.C. § 512(c)(1)(A)(iii). It did no such thing. In support of its argument otherwise, all Veoh points to are its removing videos at the specific URLs identified in the RIAA’s notices of infringement, and its removing videos at the specific URLs identified by UMG over the course of this litigation (in many cases, 2 or 3 years after such videos were posted). Br. at 44. It ignores the admission by Veoh employees that, when confronted by obviously infringing videos, they would not disable them. [RE 815 (225:10-23), 816-17 (233:10-234:3), 818-19 (235:16-236:4), 820-23 (237:22-238:4, 238:23-240:21), 924-25 (251:20-252:24), 950-51, 1269, 1371.] Veoh likewise ignores its belated implementation of filtering technology, which resulted in Veoh’s publicly performing and distributing infringing materials that it could have easily

removed. [RE 860-63 (141:15-144:23), 887-89 (25:22-26:3, 26:9-27:9), 902-03 (121:6-122:15), 1121-23, 1980-81 (¶ 15).] The evidence confirms that Veoh did not disable access to infringing materials after obtaining knowledge or awareness thereof.

3. **The Standard For Vicarious Liability Governs The Court's Application Of "Receiv[ing] A Financial Benefit Directly Attributable To" Infringement Which Veoh Had "The Right And Ability To Control"**

Veoh is not entitled to Section 512(c)'s liability limitation if it "receive[d] a financial benefit directly attributable to the infringing activity, in a case in which [it] ha[d] the right and ability to control such activity." 17 U.S.C. § 512(c)(1)(B). In its Opening Brief, UMG explained that this language tracks the standard for vicarious liability, and thus courts should interpret it consistently with that standard. Opening Br. at 67-68. Veoh and its *amici* reject this position, argue that these conditions should receive a different interpretation, and state that this Court's holding otherwise in *CCBill* was wrong. *See, e.g.*, eBay Br. at 23-24.<sup>20</sup> Not so. The House Report confirms the appropriateness of using the common law vicarious liability standard to interpret subsection 512(c)(1)(B), *see* H.R. Rep. No. 105-551(I), 1998 WL 261605 at \*25-26 ("The financial benefit standard in subparagraph (B) is

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<sup>20</sup> Even the *Io* decision accepts that Section 512(c)(1)(B) tracks the standard for vicarious liability. *Io*, 586 F. Supp. 2d at 1150.

intended to codify and clarify the direct financial benefit element of vicarious liability . . . . The ‘right and ability to control’ language in Subparagraph (B) codifies the second element of vicarious liability’),<sup>21</sup> and this Court correctly adopted that approach in *CCBill*, 488 F.3d at 1117. Nor does the Senate Report indicate anything to the contrary: it 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, 1998 WL 239623 at \*17 (emphasis added). In other words, Congress decided not to alter or clarify courts’ interpretations of “right and ability to control” or “direct financial benefit,” which indicates its intent to have those interpretations inform courts’ construction of the DMCA. For these reasons, the standards set forth in *A&M Records, Inc. v. Napster, Inc.*, *Perfect 10, Inc. v. Amazon.com*, and *Ellison v. Robertson* control for purposes of the DMCA. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (“[t]he ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the

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<sup>21</sup> Like the District Court, Veoh and its *amici* attempt to discredit these statements because the House Report – cited favorably elsewhere by Veoh’s *amici*, eBay Br. at 24 – addresses an early version of the DMCA. But this statutory language referenced in the House Report did not change, and thus Congress’s statements remain relevant.

right and ability to supervise”); *Perfect 10, Inc. v. Amazon.com*, 487 F.3d 701, 730 (9th Cir. 2007) (defendant “exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so”); *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (direct financial benefit exists where there is a “causal relationship between the infringing activity and any financial benefit a defendant reaps”).

Because the District Court ignored these standards and applied its own, and because genuine issues of fact exist with respect to these conditions – and Veoh has not persuasively shown otherwise – the District Court’s decision must be reversed.

a. Crediting Evidence Of Veoh’s Right And Ability To Control Infringement Does Not Run Afoul Of Section 512(m)

Veoh’s Answering Brief mischaracterizes UMG’s “right and ability to control” arguments. UMG did not argue “that Veoh’s ‘ability to remove’ material[, standing alone,] should disqualify it from the safe harbor.” Br. at 45; *see also id.* at 48-49. Rather, UMG argued, in accordance with *Napster* and *Amazon.com*, that the “right and ability to control” element also requires that a service provider be capable of detecting infringement (*see* Opening Br. at 69), and thus the requirement does not create “an odd ‘catch-22,’” whereby Veoh

cannot seek the limitation on liability based simply on its ability to remove content (or users) from its system. Instead, Veoh cannot seek the limitation on liability because (1) it had the ability to remove infringing content from its system, *and* (2) it had myriad tools for detecting infringement, including, for example, automated filtering technology, its index of metadata, or human searching for copyrighted material.<sup>22</sup> *See* Opening Br. at 20-23. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002) – cited by Veoh – confirms that facts like these evidence an ability to control infringement. There, the court ruled that it was “highly unlikely that Cybernet may avail itself of the DMCA safe harbor provisions” based in part on Cybernet “prescreen[ing] [of] sites” for which it offers age verification services. *Id.* at 1181-82. Veoh “prescreened” videos, using both filtering technology and employees charged with removing pornographic content. [RE 924-25 (251:20-252:12), 1233-35, 2011-13 (¶¶ 2, 9).] *See also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 (2005) (holding that “unlawful objective” was evidenced by “neither company[’s] attempt[ing] to develop filtering tools or other mechanisms to diminish the

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<sup>22</sup> Veoh claims that such review “would not be feasible.” Br. at 6. At a minimum, the feasibility of human review is a factual issue, and UMG introduced evidence of its feasibility – namely, that a site like Veoh performs just such a review. [RE 868.]

infringing activity using their software. . . . [W]e think this evidence underscores Grokster’s and StreamCast’s intentional facilitation of their users’ infringement”).

Veoh objects to UMG’s claim that its ability to use “automated filtering technology” evidences its ability to control infringement. Br. at 47. It argues that “[t]he 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 fashion.” *Id.* (citing Section 512(m)).<sup>23</sup> UMG addressed this argument in its Opening Brief, and Veoh failed to rebut it: Consistent with Section 512(m), courts need not condition the statute’s liability limitations on monitoring. Service providers can qualify for the statute’s safe harbor without monitoring by, for example, foregoing a direct financial benefit from infringing activity. Opening Br. at 74. Nor does Veoh indicate what facts could, under the District Court’s reading of Sections 512(c) and 512(m), evidence a “right and ability to control infringement.” *See* Opening Br. at 73. Veoh’s failure to counter – let alone address – these arguments confirms the wrongness of the District Court’s ruling that no genuine issues of fact exist with respect to Veoh’s right and ability to control infringement.

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<sup>23</sup> Notably, Veoh never made this argument to the District Court.

b. Veoh's Earning Revenue From Each Act Of Infringement Constitutes A Benefit Directly Attributable To Its Infringing Activity

As with UMG's "right and ability to control" argument, so too with its "direct financial benefit" argument: Veoh deliberately mischaracterizes UMG's position. UMG does not "assert[] that Veoh received a financial benefit directly attributable to the alleged infringement because advertising is Veoh's primary means of revenue." Br. at 54. UMG introduced evidence unequivocally confirming that Veoh displayed advertising alongside UMG's copyrighted content, and that Veoh generated revenue from each infringement of that content. Opening Br. at 23-24. Veoh nowhere disputes this fact. Veoh instead argues that these payments are "[i]ndirect" with respect to the infringing activity. Br. at 55.

Veoh's argument ignores on-point precedent from this Court, which states that "[t]he essential aspect of the 'direct financial benefit' inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps." *Ellison*, 357 F.3d at 1079.<sup>24</sup> Veoh's benefit easily falls within this test. As UMG's internet advertising expert

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<sup>24</sup> Veoh cites *CoStar*, 164 F. Supp. 2d at 695, as "finding no financial benefit for purposes of Section 512(c)" where the defendant was "supported by advertising" but "did not charge users any payment." Br. at 55. But the *CoStar* court never analyzed alleged advertising payments received by



testified, “Veoh’s use of advertising makes it particularly easy to associate specific revenues with specific video content. . . . With [cost per impression, or “CPM”] advertising payments, Veoh’s ad revenue is proportional to the number of times a video is viewed. As a result, Veoh’s revenue from a given video can be determined by multiplying a CPM price by the number of times the video has been viewed. This is a straightforward and robust method to estimate revenues . . . .” [RE 1539 (¶ 51).]

Nor does “accept[ing] UMG’s argument . . . mean that any OSP supported by advertising would receive a disqualifying financial benefit whenever a user uploaded infringing material to its site.” Br. at 56. Veoh could, for example, only show advertising alongside its “featured partner content.” Br. at 5. Regardless, Veoh’s assertion is striking in its dismissiveness of intellectual property rights. Veoh’s position, stated more bluntly, is that it and other alleged service providers should be free to generate revenue from infringing material until someone demands that they stop. That is not the law. *See Napster*, 239 F.3d at 1026 (“Although even a narrow injunction may so fully eviscerate Napster, Inc. as to destroy its user base . . .

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LoopNet in connection with the direct financial benefit inquiry, *see id.* at 704-05, which may explain why Veoh never quotes the opinion.

the business interests of an infringer do not trump a rights holder's entitlement to copyright protection").

### **III. CONCLUSION**

For the reasons set forth above, this Court should reverse the District Court's summary judgment orders.

Dated: August 16, 2010

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. Proc. 32(a)(7)(C), and Appellants' concurrently filed Motion to File an Oversized Brief, I certify that the foregoing reply brief contains 9,996 words, excluding parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point font size and Times New Roman font style.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 16, 2010, 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.

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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