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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IO GROUP, INC.,

No. C06-03926 HRL

Plaintiff,

v.

**ORDER ON PARTIES' CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

VEOH NETWORKS, INC.,

[Re: Docket Nos. 77 and 78]

Defendant.

This is a civil action for alleged copyright infringement. Presently before this court are the parties' cross-motions for summary judgment.¹ Plaintiff Io Group, Inc. moves for summary judgment on liability. Defendant Veoh Networks, Inc. seeks judgment that it qualifies for "safe harbor" under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512. Following the motion hearing, the parties were permitted to, and did, file supplemental briefs. Upon consideration of the moving and responding papers, as well as the arguments of counsel, this court now issues its order, focusing first (for reasons to be explained) on defendant's safe harbor defense.

¹ Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, all parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned.

I. BACKGROUND

For purposes of resolving the instant motion, and except as otherwise indicated, the following facts are not materially disputed.²

A. The Parties

Plaintiff Io Group, Inc. (“Io”), doing business as Titan Media, produces, markets and distributes a variety of adult entertainment products, including audiovisual works. It holds and owns a number of registered copyrights for its films.

Defendant Veoh Networks, Inc. (“Veoh”) is a self-described “Internet Television Network,” which provides software and a website (veoh.com) that enables the sharing of user-provided video content over the Internet – from job interviews, to family gatherings, to films by aspiring filmmakers. Since its website launch in February 2006, users have uploaded and shared hundreds of thousands of videos on Veoh. Veoh says that it has received notices of alleged copyright infringement with respect to less than seven percent of those videos. (Dunning Decl. in Opp. to Plaintiff’s MSJ, ¶ 6).

In addition to user-submitted content, users may also access videos from Veoh’s content partners, including Turner, CBS, Us Magazine, Road and Track Magazine, Car and Driver Magazine, and United Talent Agency. (See Scherb Decl. ¶2, Ex. A (Shapiro Depo. at 33:17-19, 37:11-16)). Veoh itself creates and uploads promotional videos to its system. And, in some instances, Veoh’s content partners have given video files to Veoh, in which case Veoh’s employees upload those files on their behalf. (Sperlein Decl. ISO Plaintiff’s MSJ, ¶¶ 2, 4, Ex. A (Papa Depo. at 29:19-30:11); Ex. F (Shapiro Depo. at 36:19-23)). There is no allegation that Veoh employees have submitted and uploaded infringing content to veoh.com; and, the only content in question here is material that was submitted to Veoh by its users.

Once video files are uploaded to Veoh’s system, Veoh’s employees can and do select videos to be featured on the “Featured Videos” portion of Veoh’s website. (See Sperlein Decl. ISO Plaintiff’s MSJ, ¶ 3, Ex. E (Dunning Depo. at 194:17-21)).

² Unless otherwise indicated, all record citations are to the parties’ submissions filed in connection with defendant’s motion for summary judgment.

1 Veoh now offers advertising opportunities and participates in certain Google-sponsored
2 ad programs. (See Papa Decl., ¶ 3; see also Scherb Decl., ¶ 2, Ex. C (Papa Depo. (Vol. 1) at
3 118:17-19)). Additionally, Veoh has implemented a “premium content” program in which users
4 who upload content may choose to charge for viewing the content, and Veoh receives a portion
5 of the proceeds. (See Papa Decl., ¶ 4). However, during the time period encompassed by the
6 complaint, Veoh did not charge users for viewing videos, or impose any membership or
7 subscription fee. Also, there was no advertising on Veoh. (See Papa Decl., ¶ 2).

8 **B. Alleged Infringement**

9 Between June 1, 2006 and June 22, 2006, Io says it discovered that clips from ten of its
10 copyrighted films had been uploaded and viewed on veoh.com without its authorization.
11 Several of the allegedly infringing video files are less than one minute long, and some were less
12 than six seconds in length. (See Scherb Decl. ISO Opp. to Plaintiff’s MSJ, ¶ 2, Ex. D
13 (Plaintiff’s responses to RFA Nos. 65-78)). A couple of files were longer than 20 minutes; and,
14 at oral argument, plaintiff’s counsel clarified that, in some instances, there was a series of six-
15 second clips for a particular work (or, on average, about 20 minutes of clips per movie). He
16 further represented that the longest clip is about 40 minutes long. However, none of the clips
17 contained copyright notices, save for one work that displayed the Titan Media trademark
18 several minutes into the clip. (Ruoff Decl. ISO Plaintiff’s MSJ ¶15, Ex. F at p. 2).

19 When it discovered the presence of the allegedly infringing files, Io did not tell Veoh
20 that it believed its copyrights were being violated. Veoh’s first notice of the claimed
21 infringement was Io’s filing of the instant lawsuit on June 23, 2006. Coincidentally, Veoh had
22 already independently decided that it would no longer permit adult content on veoh.com. By
23 the time this suit was filed, access to all adult content on Veoh’s website – including any
24 content allegedly infringing Io’s copyrights – had been terminated.

25 **C. Veoh’s Policies**

26 Veoh has established Terms of Use and Acceptable Use policies, which are posted on its
27 website. Before users can upload video content to veoh.com, they must register with Veoh and
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1 agree to abide by those policies. During the relevant period of time encompassed by the
2 complaint, Veoh's Terms of Use required users to agree that:

3 any User Material that you make available to the Veoh Service may be made
4 freely available by Veoh through the Veoh Service, including without limitation
5 for download by other users, and that this permission is made and granted in
consideration of your use of the Veoh Service and is nonexclusive, perpetual,
royalty-free, irrevocable and transferable.

6 (Papa Decl. ¶5, Ex. A). The Terms of Use further advised:

7 Veoh shall have no obligation to monitor any User Material. However, Veoh
8 and its agents shall have and do reserve the right to monitor any User Material
9 from time to time for any lawful purpose. Veoh may, without notice to you,
10 remove or block content of any User Material from the Veoh Service, including
disabling access to such User material that you have downloaded through the
Veoh Service. Veoh reserves the right to terminate your use of the Veoh Service
if we determine that you have violated these Terms or the Acceptable Use Policy.

11 Veoh requires all users of the Veoh Service to comply with copyright and
12 other intellectual property laws. Accordingly, you may not publish or make
13 available any User Material that constitutes an infringement of third party
14 intellectual property rights, including rights granted by U.S. copyright law, or
15 that otherwise violates the Acceptable Use Policy. You represent and warrant
16 that you have all rights necessary to publish and distribute any User Material
made available by you through the Veoh Service and that such User Material
conforms to the Acceptable Use Policy. You agree to indemnify and hold
Veoh harmless from and against any liability, claims, losses, demands or
damages arising out of or relating to your violation of these Terms or the
Acceptable Use Policy.

17 As explained above, Veoh does not permit copyright infringing activities on the
18 Veoh Service and reserves the right to terminate access to the Veoh Service, and
19 remove all User Materials posted, by any persons who are found to be repeat
infringers (i.e., persons found to have uploaded copyright infringing User
Material on more than two occasions).

20 (Papa Decl. ¶5, Ex. A).

21 Similarly, Veoh's Acceptable Use Policy advised users that:

22 Veoh respects the rights of copyright owners to control commercial
23 uses of their material, and expects our users to do the same. You are
24 responsible for complying with all federal and state laws applicable to the
content available through the Veoh Services, including copyright laws.

25 Accordingly, Veoh reserves the right to terminate the service account of
26 anyone who it learns is using the Veoh Services in violation of copyright
law.

26 (Papa Decl. ¶ 6, Ex. G).

27 Veoh also reminds users of its policies during the upload process. When a user now
28 begins to upload a video, the system displays a message stating, "Do not upload copyrighted,

1 pornographic, obscene, violent, or any other videos that violate Veoh Publisher Terms and
2 Conditions.” (See Papa Decl. ¶ 8, Ex. I). Veoh says that it gave a substantially similar warning
3 (presumably without the reference to pornographic material) to users during the relevant period
4 encompassed by the complaint. (*Id.*).

5 Veoh has a designated Copyright Agent to receive notification of claimed violations and
6 provides information about how and where to send notices of claimed infringement. (See Papa
7 Decl., Exs. A, C, D, F and G). When Veoh receives notice that a user has uploaded infringing
8 content after a first warning, then the user’s account is terminated, all content provided by that
9 user is disabled (unless the content was also published by another non-terminated user and is
10 not the subject of a DMCA notice), and the user’s email address is blocked so that a new
11 account cannot be opened with that same address. (See Dunning Decl. ¶¶ 10-12; Scherb Decl. ¶
12 2, Ex. C (Papa Depo., Vol.1, 98:3-7)). Veoh also has the ability to disable access to such
13 material on its users’ hard drives (assuming their computers are still connected to the Internet).
14 Additionally, Veoh has adopted means for generating a digital “fingerprint” for each video file,
15 which enables Veoh to terminate access to any other identical files and prevent additional
16 identical files from ever being uploaded by any user. (Dunning Decl. ¶ 13).

17 **D. Uploading Video Content on Veoh.com**

18 **1. User-Submitted Videos**

19 As noted above, users must register with Veoh before they can upload video content to
20 the website. In the registration process, users are required to provide a user name, an email
21 address and a password. (See Dunning Decl., ¶ 4, Ex. A). They may, but are not required to,
22 give their actual names. (See Scherb Decl. ¶ 2, Ex. B (Dunning Depo., 72:2-13)).

23 When users upload a video file to Veoh’s system, they are asked to (a) provide a title
24 and description; (b) enter key words or “tags”; (c) select up to four categories which best
25 describe the video; and (d) select a content rating. (See Dunning Decl. ¶5, Exs. B and C; Ruoff
26 Decl. ISO Plaintiff’s MSJ ¶¶ 24-25, Ex. G). Users then select the video file (from wherever it
27 resides on their computers) and upload it to the Veoh system. (See Scherb Decl., ¶2, Ex., B
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1 (Dunning Depo. at 132:7-11); Sperlein Decl. ISO Plaintiff's MSJ, ¶ 3, Ex. E (Dunning Depo. at
2 40:4-11)).

3 When the Veoh system receives a video submission, its computers first confirm that the
4 submitted file is, in fact, a video file with a compatible "codec" (or compression format).
5 (Sperlein Decl. ISO Plaintiff's MSJ, ¶ 2, Ex. A (Papa Depo. at 12:10-17:21)).³ If the
6 submission is a compatible video file, the Veoh system automatically extracts certain metadata
7 from it (e.g., file format and length), assigns a unique video identification number to it, indexes
8 the user-entered information and stores the information in a database on Veoh's servers. (See
9 Scherb Decl., ¶2, Ex. B (Dunning Depo. at 132:7-133:3; Sperlein Decl. ISO Plaintiff's MSJ, ¶
10 3, Ex. E (Dunning Depo. at 20:14-21:10)). Users can then conduct searches (e.g., by title,
11 description, genre, etc.) of the database in order to find videos they wish to view. (Sperlein
12 Decl. ISO Plaintiff's MSJ, ¶ 3, Ex. E (Dunning Depo. at 22:18-23:18; 28:1-29:1)). The
13 database also automatically indexes video files into a series of lists, such as "Most Recent,"
14 "Top Rated," "Most Popular," "Most Discussed" and "Top Favorite." (Sperlein Decl. ISO
15 Plaintiff's MSJ, ¶ 2, Ex. A (Papa Depo. 39:10-40:9); Ruoff Decl. ISO Plaintiff's MSJ, ¶ 26).

16 2. "Flash" Files⁴ and Screenscaps⁵

17 As part of the uploading process, when Veoh receives a video file from a user, its
18 system also automatically (a) converts each user-submitted video into Flash format; and (b)
19 extracts several still images from each file.

23 ³ Incompatible files are, in effect, rejected. Such files are marked incompatible
24 by Veoh's system and maintained for only a limited time. (Sperlein Decl., ISO Plaintiff's
MSJ, ¶ 2, Ex. A (Papa Depo. at 12:10-24, 124:3-13)).

25 ⁴ Neither side explained precisely what a Flash file is, but this court
26 understands it to be the name of a file format used to transmit videos over the Internet. See
http://en.wikipedia.org/wiki/Flash_format.

27 ⁵ Defendant refers to the still-image screen captures as thumbnails. Plaintiff
28 disputes whether all of the still images are true thumbnails, or reduced-size screenshots. This
court does not find the discrepancy to be material. For present purposes, it will simply refer
to these images as still images or screencaps.

1 **a. Flash Files**

2 Users submit video files in a variety of formats. A “bit-for-bit” equivalent of the user-
3 submitted video resides on Veoh’s servers indefinitely in its original format. (Sperlein Decl.
4 ISO Plaintiff’s MSJ, ¶3, Ex. E (Dunning Depo. at 42:1-11)). If users download Veoh’s “Veoh
5 Client” software, then they may download a copy of the video file in its original format to their
6 computer hard drive. (Id. at 40:1-21).

7 Veoh says that the vast majority of Internet users now have software that can play
8 videos in “Flash” format. So, as part of the uploading process, when the Veoh system receives
9 a user-submitted video, its computers use third-party software to automatically convert each
10 user-submitted video into Flash format. (See Scherb Decl., ¶ 2, Ex. C (Papa Depo., Vol. 1 at
11 124:3-125:12); Sperlein Decl. ISO Plaintiff’s MSJ, ¶3, Ex. E (Dunning Depo. at 47:3-9)). Veoh
12 selects certain parameters (e.g., frame rate, bit rate and frame size) which it says are default
13 values within a range of parameters set by the third party software used in the process. (Scherb
14 Decl. ¶2, Ex. E (Veoh’s Supplemental Responses to Interrogatory No. 6); Dunning Decl. in
15 Opp. to Plaintiff’s MSJ, ¶¶ 3-4). The creation of the Flash files is entirely automated.

16 Before October 2006, and during the period of time encompassed by the complaint,
17 videos that were shorter than ten minutes in length would be converted into Flash format. For
18 videos longer than ten minutes, the Veoh system would create a three-minute Flash preview
19 clip. (Sperlein Decl. ISO Plaintiff’s MSJ, ¶2, Ex. A (Papa Depo. at 129:10-130:18)). Since
20 October 2006, Veoh’s system has converted all video files to Flash format without limitation as
21 to length. (Id.).

22 **b. Screencaps**

23 During the upload process, Veoh’s system also automatically extracts several still
24 images from each file – i.e., 16 full resolution screen captures, or “screencaps,” in the same
25 resolution as the incoming video and 16 lower resolution screencaps. (See Scherb Decl. ¶2, Ex.
26 B (Dunning Depo. at 133:6-14), Ex. D (Papa Depo. at 155:22-24, 159:25-161:18; 166:8-17)).
27 Screencaps in the original video resolution reside on the Veoh system but are not available for
28 users to view or access. (See id., Ex. D (Papa Depo. at 160:21-161:18)).

1 Of the 16 lower-resolution images, one is used to represent the video in a search result.
2 (Scherb Decl., ¶2, Ex. D (Papa Depo. at 166:8-17); Sperlein Decl. ISO Plaintiff’s MSJ ¶3, Ex. E
3 (Dunning Depo. at 133:4-14)). Thus, when users search for videos on Veoh, the search results
4 are shown in a grid, with each result represented by a still image extracted from a video.
5 (Dunning Decl. in Opp. Plaintiff’s MSJ, ¶ 5; Ruoff Decl. ISO Plaintiff’s MSJ ¶ 26, Ex. H).
6 When users click on a specific image on the search results page, they see a “Video Details
7 Page” containing the video and a link called “Video Screenscaps.” (Dunning Decl. in Opp.
8 Plaintiff’s MSJ, ¶ 5; see also Ruoff Decl. ISO Plaintiff’s MSJ ¶ 26, Ex. E). By clicking on the
9 “Video Screenscaps” link, users can see the 16 lower-resolution screenshots from the video.
10 (Dunning Decl. in Opp. to Plaintiff’s MSJ, ¶ 5; Ruoff Decl. ISO Plaintiff’s MSJ, ¶13, Ex. D).
11 Veoh says that the screencaps help users understand what a video likely contains before they
12 download it. However, it acknowledges that the value of the screencaps was diminished by the
13 advent of Flash previews on Veoh. (Sperlein Decl. ISO Plaintiff’s MSJ, ¶2, Ex. A (Papa Depo.
14 at 157:20-159:19)). The creation of the screencaps is entirely automated.

15 3. Post-Publication “Spot Check”

16 Veoh employees occasionally “spot check” videos after publication for compliance with
17 Veoh’s policies and to ensure accuracy in the description and categorization of the content.
18 (See Scherb Decl. ¶2, Ex. B (Dunning Depo. at 136:10-138:22)). For example, Veoh has, on
19 occasion, edited the video description field. And, when adult content was still permitted on
20 veoh.com, Veoh employees sometimes reviewed files to ensure proper ratings on any file
21 containing sexually explicit material and reviewed sexually explicit files to determine whether
22 they should be identified as “gay” or “straight” and added tags as needed. (See Sperlein Decl.
23 ISO Plaintiff’s MSJ ¶2, Ex. A (Papa Depo. at 203:4-15, 244:6-245:17); Sperlein Supplemental
24 Decl. ISO Plaintiff’s MSJ, Ex. A (Papa Depo. at 110:10-111:16)). Additionally, if a “spot
25 check” reveals an instance of blatant copyright infringement, Veoh disables access to such
26 material. For example, Veoh has, in at least one instance, removed videos of a movie known to
27 have been released in only theaters. (Sperlein Decl. ISO Plaintiff’s MSJ ¶2, Ex. A (Papa Depo.
28 at 100:24-101:6)).

1 Veoh's policies previously stated that all video content was approved by editors; and,
2 the record indicates that Veoh's employees may have watched the first ten videos submitted to
3 veoh.com by users. However, Veoh claims that the policy was never implemented because it
4 was not feasible to do so given the number of user submissions that have since been made. (See
5 Scherb Decl., ¶2, Ex. A (Shapiro Depo. at 10:17-17:10; Ex. B (Dunning Depo. at 129:24-
6 130:15, 138:4-22); Ex. C (Papa Depo., Vol. 1 at 35:6-24)).

7 Io now seeks summary judgment on liability for direct, contributory and vicarious
8 copyright infringement. Veoh contends that it qualifies for "safe harbor" under DMCA, Section
9 512(c).

10 II. LEGAL STANDARD

11 A motion for summary judgment should be granted if there is no genuine issue of
12 material fact and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P.
13 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party bears
14 the initial burden of informing the court of the basis for the motion, and identifying portions of
15 the pleadings, depositions, answers to interrogatories, admissions, or affidavits which
16 demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S.
17 317, 323 (1986). In order to meet its burden, "the moving party must either produce evidence
18 negating an essential element of the nonmoving party's claim or defense or show that the
19 nonmoving party does not have enough evidence of an essential element to carry its ultimate
20 burden of persuasion at trial." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.,
21 210 F.3d 1099, 1102 (9th Cir. 2000).

22 If the moving party meets its initial burden, the burden shifts to the non-moving party to
23 produce evidence supporting its claims or defenses. See FED. R. CIV. P. 56(e)(2); Nissan Fire &
24 Marine Ins. Co., Ltd., 210 F.3d at 1102. The non-moving party may not rest upon mere
25 allegations or denials of the adverse party's evidence, but instead must produce admissible
26 evidence that shows there is a genuine issue of material fact for trial. See FED. R. CIV. P.
27 56(e)(2). A genuine issue of fact is one that could reasonably be resolved in favor of either
28

1 party. A dispute is “material” only if it could affect the outcome of the suit under the governing
2 law. Anderson, 477 U.S. at 248.

3 “When the nonmoving party has the burden of proof at trial, the moving party need only
4 point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”
5 Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Celotex Corp., 477 U.S. at
6 325). Once the moving party meets this burden, the nonmoving party may not rest upon mere
7 allegations or denials, but must present evidence sufficient to demonstrate that there is a
8 genuine issue for trial. Id.

9 III. DISCUSSION

10 Ordinarily, issues concerning liability would be examined before determining whether
11 any safe harbor applies. However, while the DMCA safe harbors do not immunize online
12 service providers from liability, they provide copyright owners with only limited injunctive
13 relief. Under the circumstances presented here, the court finds it appropriate and more efficient
14 to first address Veoh’s motion as to the applicability of the safe harbor under DMCA section
15 512(c). See Corbis Corp. v. Amazon.com, Inc., 351 F. Supp.2d 1090, 1098 (W.D. Wa. 2004)
16 (“[E]ven if [plaintiff’s] copyright infringement claims can bare [sic] fruit, [defendant’s] liability
17 protection ensures that the claims will wither on the vine”); see also CoStar Group, Inc. v.
18 Loopnet, Inc., 164 F. Supp.2d 688, 699 (D. Md. 2001) (“On summary judgment, it is often
19 appropriate for a court to decide issues out of the traditional order because a dispute of fact is
20 only material if it can affect the outcome of proceeding.”).

21 As discussed more fully below, even assuming that plaintiff’s infringement claims pass
22 summary judgment muster, this court concludes that Veoh is eligible for safe harbor protection
23 from damages and, further, that the limited injunctive relief provided under the DMCA is moot.

24 A. The DMCA

25 Enacted in 1998, the DMCA was “designed to facilitate the robust development and
26 world-wide expansion of electronic commerce, communications, research, development, and
27 education in the digital age.” S. Rep. No. 105-190, at 1-2 (1998). “Difficult and controversial
28 questions of copyright liability in the online world prompted Congress to enact Title II of the

1 DMCA, the Online Copyright Infringement Liability Limitation Act (OCILLA).” Ellison v.
2 Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004). In order to strike a balance between their
3 respective interests, OCILLA seeks to “preserve[] strong incentives for service providers and
4 copyright owners to cooperate to detect and deal with copyright infringements that take place in
5 the digital networked environment.” S. Rep. 105-190, at 20 (1998); H.R. Rep. 105-551(II), at
6 49 (1998). “Congress hoped to provide ‘greater certainty to service providers concerning their
7 legal exposure for infringements that may occur in the course of their activities.’” Ellison, 357
8 F.3d at 1076 (quoting S. Rep. 105-190, at 20 (1998); H.R. Rep. 105-551(II), at 49-50 (1998)).

9 OCILLA enables qualifying service providers to limit their liability for claimed
10 copyright infringement under four “safe harbors.” See 17 U.S.C. § 512(a)-(d). “These safe
11 harbors provide protection from liability for: (1) transitory digital network communications; (2)
12 system caching; (3) information residing on systems or networks at the direction of users; and
13 (4) information location tools.” Ellison, 357 F.3d at 1076-77. “These safe harbors limit
14 liability but ‘do not affect the question of ultimate liability under the various doctrines of
15 direct, vicarious, and contributory liability.’” Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102,
16 1109 (9th Cir. 2007) (quoting Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp.2d 1146,
17 1174 (C.D. Cal. 2002)). That is, they protect qualifying service providers from liability for all
18 monetary relief for direct, vicarious and contributory infringement, leaving copyright owners
19 with limited injunctive relief. Corbis Corp., 351 F. Supp.2d at 1098-99. Further, the safe
20 harbor provisions are not exclusive of any other defense an accused infringer might have.
21 CCBill LLC, 488 F.3d at 1109 (“[N]othing in the language of § 512 indicates that the
22 limitation on liability described therein is exclusive.”) (quoting CoStar Group, Inc. v. LoopNet,
23 Inc., 373 F.3d 544, 552 (4th Cir. 2004)). “Far short of adopting enhanced or wholly new
24 standards to evaluate claims of copyright infringement against online service providers,
25 Congress provided that OCILLA’s ‘limitations of liability apply if the provider is found to be
26 liable *under existing principles of law.*’” Ellison, 357 F.3d at 1077 (quoting S. Rep. 105-190,
27 19 (1998)).
28

1 With these principles in mind, the court now considers whether Veoh is entitled to safe
2 harbor with respect to the alleged infringing activity here.

3 **B. DMCA Threshold Requirements**

4 To avail itself of any of the four safe harbors, Veoh must first satisfy certain threshold
5 requirements. That is, it must be a “service provider” (see 17 U.S.C. § 512(k)) and it must
6 adopt, reasonably implement and inform subscribers of a policy providing that it may, in
7 appropriate circumstances, terminate the accounts of repeat infringers. See 17 U.S.C. §
8 512(i)(1)(A); Ellison, 357 F.3d at 1080. Further, the service provider is obliged to
9 accommodate, and must not interfere with, “standard technical measures”⁶ used by copyright
10 owners to identify or protect copyrighted works.” See 17 U.S.C. § 512(i)(1)(B); Ellison, 357
11 F.3d at 1080.

12 Io does not dispute that Veoh is a “service provider” as defined by DMCA Section
13 512(k)(1)(B).⁷ Nor does it dispute that Veoh (a) has adopted and informed account holders of
14 its repeat infringer policy and (b) accommodates, and does not interfere with, “standard
15 technical measures” used to protect copyrighted works. However, Io contends that there is a
16 triable issue whether Veoh implements its repeat infringer policy in a reasonable manner.

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18 _____
19 ⁶ “Standard technical measures” are defined as “technical measures that are
used by copyright owners to identify or protect copyrighted works” and which:

20 (A) have been developed pursuant to a broad consensus of copyright
21 owners and service providers in an open, fair, voluntary, multi-industry
standards process;

22 (B) are available to any person on reasonable and nondiscriminatory
23 terms; and

24 (C) do not impose substantial costs on service providers or substantial
burdens on their systems or networks.

25 17 U.S.C. § 512(i)(2)(A)-(C).

26 ⁷ DMCA Section 512 contains two definitions of the term “service provider.”
27 See 17 U.S.C. § 512(k). Because Veoh’s motion is based only on its claimed eligibility for
safe harbor under Section 512(c), the broader definition under Section 512(k)(1)(B) applies.
28 Under that provision, “the term ‘service provider’ means a provider of online services or
network access, or the operator of facilities therefor, and includes an entity described in
subparagraph (A).” 17 U.S.C. § 512(k)(1)(B).

1 The DMCA does not say what “reasonably implemented” means. Nonetheless, the
2 Ninth Circuit has held that “a service provider ‘implements’ a policy if it has a working
3 notification system, a procedure for dealing with DMCA-compliant notifications, and if it does
4 not actively prevent copyright owners from collecting information needed to issue such
5 notifications.” CCBill LLC, 488 F.3d at 1109. “The statute permits service providers to
6 implement a variety of procedures, but an implementation is reasonable if, under ‘appropriate
7 circumstances,’ the service provider terminates users who repeatedly or blatantly infringe
8 copyright.” Id.

9 As discussed above, Veoh’s evidence indicates that it has a working notification system
10 and a procedure for dealing with copyright infringement notices:

- 11 • Since at least April 2006, and at all times encompassed by the complaint, Veoh’s
12 policies have identified its designated Copyright Agent to receive notification of
13 claimed violations and provide information about how and where to send notices
14 of claimed infringement. (See Papa Decl., Exs. A, C, D, F and G).
- 15 • Veoh often responds to infringement notices the same day they are received, or
16 at most, within a few days. (Dunning Decl. ¶ 9).
- 17 • When Veoh receives notice that a user has uploaded infringing content after a
18 first warning, then the account is terminated, *all* content provided by that user is
19 disabled (unless the content was also published by another non-terminated user
20 and is not the subject of a DMCA notice), and the user’s email address is
21 blocked so that a new account cannot be opened with that same address. (See
22 Dunning Decl. ¶¶ 10-12; Scherb Decl. ¶ 2, Ex. C (Papa Depo., Vol.1, 98:3-7).
- 23 • Veoh has adopted means for generating a “hash,” or digital “fingerprint,” for
24 each video file. This technology essentially enables Veoh to terminate access to
25 any other identical files and prevent additional identical files from *ever* being
26 uploaded by *any* user. (Dunning Decl. ¶ 13).

27 Veoh asserts that, since its website was launched, it has terminated 1,096 users for
28 repeat copyright violations. (Id., ¶ 12). Plaintiff has presented no evidence to the contrary; and,

1 there is no suggestion in the record before the court that Veoh actively prevents copyright
2 owners from collecting information needed to issue notification of claimed copyright violations.

3 Io nevertheless contends that Veoh's policy fails because it does not prevent repeat
4 infringers from reappearing on Veoh under a pseudonym and a different email address. At one
5 time, Veoh apparently attempted to verify a user's email address by sending a confirming email
6 message before allowing that user to upload video files to veoh.com. However, Veoh says that
7 practice was discontinued as "an error-prone process." (See Scherb Decl., ¶ 2, Ex. B (Dunning
8 Depo., 72:14-23)). Io agrees that Veoh is not obliged to locate repeat infringers, but argues that
9 there is no way for Veoh to discover if a disingenuous user has, in fact, reappeared with a new
10 account. Here, Io points out that its vice president, Keith Ruoff, was able to obtain a new Veoh
11 account using the pseudonym "FauxUser99" and the email address "FauxUser01@yahoo.com"
12 – an address which he says he acquired from Yahoo! using the pseudonym "John Doe." (Ruoff
13 Decl., ¶7). In essence, Io contends that Veoh fails to reasonably track repeat infringers and that
14 its repeat infringer policy is tantamount to no policy at all. This court disagrees.

15 With respect to the reasonableness of a service provider's implementation, the Ninth
16 Circuit has explained:

17 A service provider reasonably implements its repeat infringer policy
18 if it terminates users "when appropriate." See *Corbis*, 351 F. Supp.2d at 1104.
19 Section 512(i) itself does not clarify when it is "appropriate" for service
20 providers to act. It only requires that a service provider terminate users who
21 are "repeat infringers."

22 *To identify and terminate repeat infringers, a service provider need
23 not affirmatively police its users for evidence of repeat infringement.*
24 Section 512(c) states that "[a] service provider shall not be liable for monetary
25 relief" if it does not know of infringement. A service provider is also not liable
26 under § 512(c) if it acts "expeditiously to remove, or disable access to, the
27 material" when it (1) has actual knowledge, (2) is aware of facts or circumstances
28 from which infringing activity is apparent, or (3) has received notification of
claimed infringement meeting the requirements of § 512(c)(3). Were we to
require service providers to terminate users under circumstances other than
those specified in § 512(c), § 512(c)'s grant of immunity would be meaningless.
This interpretation of the statute is supported by legislative history. See H.R.
Rep., at 61 (Section 512(i) is not intended "to undermine the . . . knowledge
standard of [§ 512](c).").

27 Id. at 1111 (citing H.R. Rep., at 61 (1998) (emphasis added)).

1 Moreover, the hypothetical possibility that a rogue user might reappear under a different
2 user name and identity does not raise a genuine fact issue as to the implementation of Veoh's
3 policy. In Corbis, plaintiff alleged that Amazon failed to reasonably implement its repeat
4 infringer policy because it did not prevent a prior infringer from reappearing on one of
5 Amazon's retail platforms under different names. Observing that the DMCA requires
6 reasonable, not perfect, policies, the court held that "[t]he mere fact that [the repeat infringer]
7 appeared on zShops under a different user name and identity does not, by itself, create a
8 legitimate question of fact regarding the procedural implementation of Amazon's termination
9 policy." 351 F. Supp.2d at 1104. There, plaintiff presented no evidence that Amazon
10 intentionally allowed the repeat infringer to open new accounts. Nor did plaintiff suggest that a
11 more effective and reasonable means of denying the repeat infringer's access could have been
12 implemented by Amazon. Id. at 1103-04.

13 Here, Io has presented no evidence that a repeat infringer has, in fact, established a new
14 account under false pretenses, much less that Veoh has intentionally allowed that to happen. Its
15 supposition about the hypothetical possibility that a repeat infringer may have done so is not
16 evidence. There is no indication that Mr. Ruoff is a repeat infringer who should have been
17 blocked; and, the fact that he was able to open a second account does not give rise to a genuine
18 issue of material fact as to the reasonableness of Veoh's implementation.

19 Citing to an unpublished decision from this district, A&M Records, Inc. v. Napster, Inc.,
20 No. C99-05183, 2000 WL 573136, (N.D. Cal., May 12, 2000), Io contends that, in order to
21 satisfy section 512(i), Veoh must be required to track users by their actual names or by Internet
22 Protocol ("IP") addresses. That decision is readily distinguishable. There, the court found a
23 triable issue as to whether Napster reasonably implemented its repeat infringer policy because
24 plaintiff submitted evidence that Napster was not only capable of blocking IP addresses, but had
25 in fact done so for certain users. See id. at *9-10.

26 Here, Io has presented no evidence suggesting that tracking (or verifying) users' actual
27 identity or that blocking their IP addresses is a more effective reasonable means of
28 implementation. There is no material dispute that, while IP addresses identify a particular

1 computer connected to the Internet, they do not distinguish between users (e.g., family
2 members) who may share the same computer. See generally Columbia Ins. Co. v.
3 Seescandy.Com, 185 F.R.D. 573, 575 (N.D. Cal. 1999) (IP addresses “are a series of numbers
4 that are used to specify the address of a particular *machine* connected to the Internet.”)
5 (emphasis added).⁸

6 More to the point, section 512(i) does not require service providers to track users in a
7 particular way to or affirmatively police users for evidence of repeat infringement. See CCBill,
8 488 F.3d at 1109-10. Instead, “[a] policy is unreasonable only if the service provider failed to
9 respond when it had knowledge of the infringement.” Id. at 1113. Here, the uncontroverted
10 evidence shows that Veoh (a) has a working notification system, (b) has a procedure for dealing
11 with DMCA-compliant notifications, and (c) does not actively prevent copyright owners from
12 collecting information necessary to issue such notices. Plaintiff says that defendant does not
13 qualify for safe harbor because it does not track infringers. However, Veoh does track content
14 that has been identified as infringing and permanently blocks that content from ever being
15 uploaded by any user.

16 Accordingly, the court finds that Veoh has presented evidence that it satisfies the
17 threshold requirements to qualify for safe harbor under the DMCA. Plaintiff has not presented
18 evidence raising a genuine issue of material fact as to whether Veoh implements its repeat
19 infringer policy in a reasonable manner.

20 The court now turns to the question whether Veoh qualifies for safe harbor under
21 Section 512(c).

22 **C. DMCA Section 512(c) Safe Harbor**

23 DMCA Section 512(c) limits a service provider’s liability “for infringement of copyright
24 by reason of the storage at the direction of a user of material that resides on a system or network
25 controlled or operated by or for the service provider.” 17 U.S.C. § 512(c). A service provider
26

27
28 ⁸ The court takes judicial notice of the Wikipedia definition of “IP address” as
subject to reasonable dispute.

1 that meets the threshold conditions of Section 512(i) then qualifies for safe harbor under Section
2 512(c) if it:

3 (A)(i) does not have actual knowledge that the material or an activity using
4 the material on the system or network is infringing;

5 (ii) in the absence of such actual knowledge, is not aware of facts or
6 circumstances from which infringing activity is apparent; or

7 (iii) upon obtaining such knowledge or awareness, acts expeditiously to
8 remove, or disable access to, the material;

9 (B) does not receive a financial benefit directly attributable to the infringing
10 activity, in a case in which the service provider has the right and ability to
11 control such activity; and

12 (C) upon notification of claimed infringement as described in paragraph (3),
13 responds expeditiously to remove, or disable access to, the material that is
14 claimed to be infringing or to be the subject of infringing activity.

15 17 U.S.C. § 512(c)(1)(A)-(C).⁹ In essence, a service provider is eligible for safe harbor under
16 section 512(c) if it (1) does not know of infringement; or (2) acts expeditiously to remove or
17 disable access to the material when it (a) has actual knowledge, (b) is aware of facts or
18 circumstances from which infringing activity is apparent, or (c) has received DMCA-compliant
19 notice; and (3) either does not have the right and ability to control the infringing activity, or – if
20 it does – that it does not receive a financial benefit directly attributable to the infringing activity.

21 According to plaintiff, Veoh does not qualify for safe harbor under Section 512(c)
22 because (a) the materials in question were not stored on Veoh’s system at the direction of a
23 user; (b) Veoh was aware of apparent infringing activity; and (c) Veoh has the right and ability
24 to control the infringing activity and obtains a direct financial benefit from such activities. The
25 court will address each of these contentions in turn.

26 **1. “At the Direction of a User”**

27 As stated above, section 512(c) provides safe harbor “for infringement of a copyright by
28 reason of the storage at the direction of a user of material” residing on a service provider’s
system or network. 17 U.S.C. § 512(c)(1). The legislative history indicates that such storage

⁹ Additionally, Section 512(c)(2) requires service providers to designate an agent to receive notification of alleged copyright violations. As noted above, there is no dispute that Veoh has done so.

1 includes, by way of example, “providing server space for a user’s web site, for a chatroom, or
2 other forum in which material may be posted at the direction of users.” H.R. Rep. 105-551 (II),
3 at 53 (1998)). Excluded from Section 512(c)’s safe harbor is “material ‘that resides on the
4 system or network operated by or for the service provider through its own acts or decisions and
5 not at the direction of a user.’” CoStar Group, Inc., 164 F. Supp.2d at 701 (quoting H.R. Rep.
6 105-551 (II), at 53 (1998)).

7 Plaintiff contends that the Flash files and screencaps created during the publication
8 process are not stored on Veoh’s system “at the direction of a user,” but by Veoh’s own acts and
9 decisions. Here, it asserts that users do not themselves create or possess the Flash and still-
10 image files when they upload videos to Veoh’s system. It further contends that, by agreeing
11 that Veoh may make their videos freely available on its website, users never instruct or direct
12 Veoh to create these files, except in the broadest possible sense. Io argues that Section 512(c)
13 was not intended to protect the creation (automated or not) of these files because Veoh uses
14 them as a means of distribution (e.g., by indexing content and organizing them into lists), and
15 not just storage.

16 Defendant does not deny that, using third-party software, its system creates the Flash
17 and still-image files from user-submitted content. Nonetheless, Veoh maintains that these files
18 are the result of an automated encoding process initiated entirely at the volition of users when
19 they upload video files. Veoh maintains that it falls within the Section 512(c) safe harbor
20 because the Flash and still-image files are used to facilitate access to content submitted to its
21 website.

22 There is no apparent dispute as to the material facts – only as to the conclusions to be
23 drawn from them. Essentially, the issue is whether Veoh is disqualified from Section 512(c)’s
24 safe harbor because of automated functions that facilitate access to user-submitted content on its
25 website. In the context of Veoh’s business, this appears to be a matter of first impression.
26 Based on the record presented, this court concludes that Veoh is not disqualified from Section
27 512(c) safe harbor on this basis.
28

1 To begin, the structure and language of OCILLA indicate that service providers seeking
2 safe harbor under Section 512(c) are not limited to merely storing material. The statute itself is
3 structured in a way that distinguishes between so-called “conduit only” functions under Section
4 512(a) and those functions addressed by Section 512(c) (and other subsections as well). See 17
5 U.S.C. § 512(n) (“Subsections (a), (b), (c), and (d) describe separate and distinct functions for
6 purposes of applying this section.”). Perhaps most notably, OCILLA contains two definitions
7 of “service provider.” 17 U.S.C. § 512(k). The narrower definition, which pertains only to
8 service providers falling under Section 512(a), “means an entity offering the transmission,
9 routing, or providing of connections for digital online communications, between or among
10 points specified by a user, of material of the user’s choosing, *without modification to the*
11 *content of the material* as sent or received.” Id., § 512(k)(1)(A) (emphasis added).

12 By contrast, no such limitation as to the modification of material is included in the
13 broader definition of “service provider,” which the parties agree applies to Veoh. Instead, “the
14 term ‘service provider’ means a provider of online services or network access, or the operator of
15 facilities therefor, and includes an entity described in subparagraph (A).” 17 U.S.C. §
16 512(k)(1)(B). Had Congress intended to include a limitation as to a service provider’s
17 modification of user-submitted information, it would have said so expressly and
18 unambiguously.

19 Moreover, caselaw also supports the conclusion that Veoh is not precluded from safe
20 harbor under Section 512(c) by virtue of its automated processing of user-submitted content. In
21 at least one case, a service provider was not precluded from safe harbor even when its
22 employees engaged in some review of submitted materials before posting them to defendant’s
23 website. In CoStar Group, Inc. v. LoopNet, Inc., the defendant offered a service that enabled
24 subscribers to upload real estate photos to a folder on the defendant’s system. 164 F. Supp.2d
25 688 (D. Md. 2001). Defendant’s employees briefly reviewed the submitted photos and posted
26 to the website only those that met defendant’s criteria – that is, any photos that did not depict
27 real estate or which obviously were copyrighted by a third-party would not be posted. The
28 court held that defendant nonetheless satisfied the requirement that material be stored at the

1 direction of a user. In essence, it concluded that the photos were uploaded, in the first instance,
2 at the volition of users and that defendant's employees simply performed a "gateway" function
3 that furthered the goals of the DMCA. Id. at 702.

4 Here, Veoh has simply established a system whereby software automatically processes
5 user-submitted content and recasts it in a format that is readily accessible to its users. Veoh pre-
6 selects the software parameters for the process from a range of default values set by the third-
7 party software. (See Dunning Decl. ISO Defendant's Opp. to Plaintiff's MSJ, ¶¶ 3-4). But
8 Veoh does not itself actively participate or supervise the uploading of files. Nor does it preview
9 or select the files before the upload is completed. Instead, video files are uploaded through an
10 automated process which is initiated entirely at the volition of Veoh's users. See The Cartoon
11 Network LP, LLP v. CSC Holdings, Inc., — F.3d —, Nos. 07-1480-cv(L), 07-1511-cv(CON),
12 2008 WL 2952614 at *9 (2d Cir., Aug. 4, 2008) ("In determining who actually 'makes' a copy,
13 a significant difference exists between making a request to a human employee, who then
14 volitionally operates the copying system to make the copy, and issuing a command directly to a
15 system, which automatically engages in no volitional conduct."). Inasmuch as this is a means
16 of facilitating user access to material on its website, this court finds that Veoh does not lose safe
17 harbor through the automated creation of these files. "[O]ne of the stated purposes of [the
18 DMCA] was to 'facilitate the robust development and worldwide expansion of electronic
19 commerce, communications, research, development, and education in the digital age.'" Perfect
20 10, Inc. v. VISA Int'l Service Ass'n, 494 F.3d 788, 794 n.2 (9th Cir. 2007) (quoting S. Rep.
21 105-190, at 1-2 (1998)).

22 2. Actual Knowledge of Infringing Activity

23 It is undisputed that, before it filed the instant action, plaintiff provided no notice to
24 Veoh of any claimed copyright infringement. Thus, there is no question on the record presented
25 that Veoh lacked actual knowledge of the alleged infringing activity at issue. See 17 U.S.C. §
26 512(c)(1)(A) and (C); see also Corbis Corp., 351 F. Supp.2d at 1107 ("[Plaintiff's] decision to
27 forego the DMCA notice provisions . . . stripped it of the most powerful evidence of a service
28

1 provider's knowledge – actual notice of infringement from the copyright holder.”) (citation
2 omitted).

3 **3. Apparent Infringing Activity**

4 Nonetheless, Io contends that Veoh was aware of several signs of apparent infringing
5 activity. Under this so-called “red flag” test, a service provider may lose safe harbor “if it fails
6 to take action with regard to infringing material when it is ‘aware of facts or circumstances from
7 which infringing activity is apparent.’” CCBill, 488 F.3d at 1114 (quoting 17 U.S.C. §
8 512(c)(1)(A)(ii)). In determining whether a service provider has such awareness, “the question
9 is not ‘what a reasonable person would have deduced given all the circumstances.’” Corbis
10 Corp., 351 F. Supp.2d at 1108 (quoting 3 Nimmer on Copyright, § 12B.04[A][1], at 12B-49).
11 “Instead the question is whether the service provider deliberately proceeded in the face of
12 blatant factors of which it was aware.” Id. In other words, “apparent knowledge requires
13 evidence that a service provider ‘turned a blind eye to ‘red flags’ of obvious infringement.’” Id.
14 (quoting H.R.Rep. No. 105-551, pt. 2, at 57).

15 Io argues that there were several “red flags” of obvious infringement here. Io says that,
16 under 17 U.S.C. § 205(c), its copyright registrations provided constructive knowledge as to its
17 ownership of the works. Additionally, plaintiff says that it was obvious that the works in
18 question were professionally created and, further, that one of them contained Io's trademark.
19 (*See* Ruoff Decl. ISO Plaintiff's MSJ, ¶¶ 15-16, Ex. F). In any event, Io maintains that the
20 absence of labels required under 18 U.S.C. § 2257(f)(4) was a “red flag” that the uploading user
21 did not have authority to submit the content in question.

22 However, none of the allegedly infringing video files uploaded by Veoh's users
23 contained Io's copyright notices. (*See* Scherb Decl., ¶ 2, Ex. J (Io's response to RFA No. 58);
24 Ex. G (Ruoff Depo., 55:13-16, 56:19-57:13)). Although one of the works did contain plaintiff's
25 trademark several minutes into the clip, there is no evidence from which it can be inferred that
26 Veoh was aware of, but chose to ignore, it. Nor is this court convinced that the professionally
27 created nature of submitted content constitutes a per se “red flag” of infringement sufficient to
28 impute the requisite level of knowledge or awareness to Veoh. Indeed, with the video

1 equipment available to the general public today, there may be little, if any, distinction between
2 “professional” and amateur productions.

3 Similarly unavailing are Io’s arguments as to the sexually explicit nature of the works
4 themselves.¹⁰ Io nevertheless contends that the absence of labels on the material in question
5 under 18 U.S.C. § 2257 was a “red flag” of apparent copyright infringement. In essence, the
6 statute to which Io refers – section 2257 of the Child Protection and Obscenity Enforcement Act
7 of 1988 – requires producers of sexually explicit material to maintain certain records as to the
8 performers depicted and to label each such work with a statement indicating where those
9 records are located. See 18 U.S.C. § 2257(a) and (f). There is some indication in the record
10 that Veoh generally was aware of this law. (See Sperlein Decl. ISO Plaintiff’s MSJ, ¶2, Ex. A
11 (Papa Depo. at 195:19-196:3; Suppl. Sperlein Decl., Ex. D (Styn Depo. at 45:1-48:13)). Io
12 argues that Veoh therefore should have known that no legitimate producer of sexually explicit
13 material would have omitted the requisite labels on the video clips in question.

14 Viewing the evidence in the light most favorable to plaintiff, it has, at best, raised a fact
15 question as to whether Veoh was aware that federal labeling laws might have been violated.
16 However, the matter before this court does not concern whether there was a violation of those
17 laws. Under the circumstances presented here, the absence of required labels does not give rise
18 to a genuine issue of material fact as to whether Veoh had the requisite level of knowledge or
19 awareness that plaintiff’s copyrights were being violated. Even “[w]hen a website traffics in
20 pictures that are titillating by nature” and describes them as “illegal” or “stolen,” “[w]e do not
21 place the burden of determining whether photographs are actually illegal on a service provider.”
22 CCBill, 488 F.3d at 1114.

23
24
25
26 ¹⁰ Plaintiff claims that the user profile page for one of the users who submitted
27 its works to Veoh indicates that the user was a 17-year old – i.e., someone who was not
28 legally permitted to view Io’s works, much less upload them to defendant’s system. (See
Ruoff Decl. ISO Plaintiff’s MSJ ¶ 21). Plaintiff did not raise this argument in support of its
opposition to Veoh’s motion as to the DMCA safe harbor. At any rate, there is no evidence
to suggest that Veoh was aware of, but chose to ignore, this circumstance.

1 **4. Acts Expeditiously to Remove or Disable Access to Material**

2 Even assuming Veoh had sufficient knowledge or awareness of the allegedly infringing
3 activity in question, Veoh would not lose safe harbor protection if it acted expeditiously to
4 remove, or disable access to, the material. See 17 U.S.C. §§ 512(c)(1)(A)(iii) and 512(c)(1)(C);
5 see also Corbis Corp., 351 F. Supp.2d at 1108. The instant action presents a somewhat unusual
6 situation in that Veoh independently removed all adult content from its website before it
7 received notice of any claimed copyright violations.

8 Nevertheless, undisputed evidence submitted by Veoh shows that when it receives
9 DMCA-compliant notice of copyright infringement, it responds and removes noticed content as
10 necessary on the same day the notice is received (or within a few days thereafter). (Dunning
11 Decl. ¶ 9).

12 In addition to responding to DMCA notices, Veoh says that it also promptly investigates
13 other complaints about content on its website. Here, Veoh points out that its website has a
14 “Flag It!” feature that enables users to bring certain content to Veoh’s attention by “flagging” it
15 – that is, selecting from a set list of reasons (e.g., misrated content, sexually explicit content,
16 obscene content, etc.). (Id., Ex. E). Plaintiff argues that Veoh has willfully blinded itself to
17 facts suggesting infringement because the list of reasons on the “Flag It!” feature no longer
18 contains a choice for “appears to contain copyrighted material.” Yet, the “Flag It!” feature
19 itself contains a notice, prominently displayed at the top of the “Flag It!” dialog box, directing
20 copyright owners to a link with instructions for submitting a copyright infringement notice to
21 Veoh. (Id.).

22 In sum, there is no evidence raising a genuine issue of material fact that Veoh was aware
23 of, but deliberately chose to ignore, “red flags” of infringement or that Veoh fails to act
24 expeditiously to remove or disable access to infringing material upon obtaining knowledge or
25 awareness of infringing activity.

26 **5. Right and Ability to Control Infringing Activity**

27 A service provider nonetheless loses the protection of Section 512(c)’s safe harbor
28 where it (a) has the right and ability to control the infringing activity and (b) receives a financial

1 benefit directly attributable to such activity. 17 U.S.C. § 512(c)(1)(B). “Both elements must be
2 met for the safe harbor to be denied.” Corbis Corp., 351 F. Supp.2d at 1109. These
3 requirements grew out of the common law standard for vicarious liability, and the Ninth Circuit
4 has indicated that these elements under the DMCA are to be interpreted consistently with
5 common law. See CCBill, 488 F.3d at 1117 (“[W]e hold that ‘direct financial benefit’ should
6 be interpreted consistent with the similarly-worded common law standard for vicarious
7 copyright liability.”). For present purposes, even assuming (without deciding) that Veoh
8 received a direct financial benefit from the alleged infringing activity, this court finds that
9 defendant does not have the right and ability to control such activity.

10 As formulated by the Supreme Court, one “infringes vicariously by profiting from direct
11 infringement while declining to exercise a right to stop or limit it.” Metro-Goldwyn-Mayer
12 Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930, 125 S. Ct. 2764, 2766 (2005). “Thus, under
13 Grokster, a defendant exercises control over a direct infringer when he has both a legal right to
14 stop or limit the directly infringing conduct, as well as the practical ability to do so.” Perfect
15 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007).

16 Plaintiff contends that elements of the requisite “right and ability to control” are present
17 here because Veoh has established and enforced policies that prohibit users from engaging in a
18 host of illegal and other conduct on its website – namely, policies which prohibit users from (a)
19 violating the intellectual property rights of others, (b) making unsolicited offers, sending ads,
20 proposals or junk mail, (c) impersonating other people, (d) misrepresenting sources of material,
21 (e) harassing, abusing, defaming, threatening or defrauding others, (f) linking to password
22 protected areas and (g) spidering material. (See Papa Decl. ¶¶ 5-6, Exs. A-H; Ruoff Decl. ISO
23 Plaintiff’s MSJ ¶ 9, Exs. B and C). Plaintiff emphasizes that Veoh exercises the right to police
24 its system by conducting occasional “spot checks” of video files for compliance and that Veoh
25 has enforced its policies by removing content and terminating offending accounts.

26 However, the plain language of section 512(c) indicates that the pertinent inquiry is not
27 whether Veoh has the right and ability to control it *system*, but rather, whether it has the right
28

1 and ability to control the *infringing activity*. Under the facts and circumstances presented here,
2 the two are not one and the same.

3 To begin, the statute presupposes a service provider's control of its system or network.
4 See 17 U.S.C. § 512(c)(1) (applying safe harbor to "material that resides on a system or network
5 *controlled or operated* by or for the service provider.") (emphasis added). The safe harbor will
6 be closed only to those service providers who, among other things, have the "right and ability to
7 control" the "*infringing activity*." 17 U.S.C. § 512(c)(1)(B) (emphasis added).

8 Moreover, courts have held that the right and ability to control infringing activity, as the
9 concept is used in the DMCA, cannot simply mean the ability of a service provider to block or
10 remove access to materials posted on its website or stored on its system. See Corbis Corp., 351
11 F. Supp.2d at 1110; CoStar Group, Inc., 164 F. Supp.2d at 704; Hendrikson v. eBay, Inc., 165
12 F. Supp.2d 1082, 1093-94 (C.D. Cal. 2001). Indeed, a contrary holding would render the
13 DMCA internally inconsistent:

14 The DMCA specifically requires a service provider to remove or
15 block access to materials posted on its system when it receives notice
16 of claimed infringement. The DMCA also provides that the limitations
17 on liability *only* apply to a service provider that has adopted and
18 reasonably implemented . . . a policy that provides for the termination
19 in appropriate circumstances of [users] of the service provider's
20 system or network who are repeat infringers. Congress could not have
21 intended for courts to hold that a service provider loses immunity under
22 the safe harbor provision of the DMCA because it engages in acts that
23 are specifically required by the DMCA.

24 Hendrickson, 165 F. Supp.2d at 1093-94 (internal quotes and citations omitted). Borrowing
25 from patent infringement cases involving the intent requirement for contributory liability of
26 trademark licensors, one court has concluded that, instead, "something more" is required.
27 Cybernet Ventures, Inc., 213 F. Supp.2d at 1181-82.

28 Precisely what constitutes the requisite right and ability to control in the present context
is somewhat hard to define, although this court is not without some guidance. At least one court
has observed that the requisite "right and ability to control" "presupposes some antecedent
ability to limit or filter copyrighted material." Tur v. YouTube, Inc., No. CV064436, 2007 WL
1893635 at *3 (C.D. Cal., June 20, 2007).

1 Such a conclusion does not appear to be inconsistent with precedent set in Fonovisa, Inc.
2 v. Cherry Hill Auction, Inc., 76 F.3d 259 (9th Cir. 1996) and A&M Records, Inc. v. Napster,
3 Inc., 239 F.3d 1004 (9th Cir. 2001). In Fonovisa, the plaintiff owned copyrights and trademarks
4 in certain music recordings. It claimed that the defendant, a swap meet proprietor, was liable
5 for third-party vendors' sales of infringing counterfeit recordings. Sufficient elements of
6 control were found where defendant had the right to terminate vendors for any reason, promoted
7 the swap meet, and controlled customers' access to the swap meet area. Id. at 262. Notably,
8 there was no dispute that the defendant was aware that vendors were selling counterfeit
9 recordings in violation of plaintiff's copyrights and trademarks. Indeed, it was alleged that the
10 County Sheriff previously seized thousands of counterfeit recordings from the swap meet and
11 notified the defendant that infringing sales continued. Id. at 261. The defendant evidently
12 agreed to provide the Sheriff with information about each vendor, but did not do so. Id. at 264.
13 In essence, the swap meet proprietor and the infringing vendors "were engaged in a mutual
14 enterprise of infringement." See VISA Int'l Services Ass'n, 494 F.3d at 798.

15 Fonovisa was extended to the online context in A&M Records, Inc. v. Napster, Inc., 239
16 F.3d 1004 (9th Cir. 2001). Napster concerned the Internet service infamous for its software that
17 facilitated the transmission of copyrighted music between and among its users free of charge.
18 The court stated that "[t]he ability to block infringers' access to a particular environment for
19 any reason whatsoever is evidence of the right and ability to supervise." Id. at 1023 (citing
20 Fonovisa, 76 F.3d at 262). However, the court went on to explain that "[t]o escape imposition
21 of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning
22 a blind eye to *detectable* acts of infringement for the sake of profit gives rise to liability." Id.
23 (emphasis added). There, plaintiffs were successful in establishing a likelihood of success on
24 the merits where Napster controlled access to its system, reserved the right to terminate user
25 accounts for any reason and had the ability to locate infringing material listed on its search
26 indices, but nonetheless failed to police its system to prevent the exchange of copyrighted
27 material Id. at 1023-24.
28

1 More recently in the electronic commerce context, other businesses have been found not
2 to have the requisite right and ability to control infringing activity. For example, in
3 Amazon.com, Inc., Google was found not to have the right and ability to control the infringing
4 activity of third-party websites where Google did not have contractual relationships with the
5 third-party websites and lacked the practical ability to police their activities. 508 F.3d at 1173-
6 75. In VISA Int'l Service Ass'n, plaintiff alleged that Visa was secondarily liable for copyright
7 infringement because its credit card payment services facilitated the purchase of infringing
8 material online. Affirming the dismissal of those claims, the Ninth Circuit concluded that Visa
9 lacked the ability to block access to the Internet or to particular websites and had no role in the
10 alleged infringing activity. 494 F.3d at 802-05. Although Visa could exert financial pressure
11 by blocking access to its payment systems, the court concluded that “[f]or vicarious liability to
12 attach . . . the defendant must have the right and ability to *supervise* and *control* the
13 infringement, not just affect it, and Defendants do not have this right or ability.” Id. at 805.

14 By contrast, an on-line age verification service was found to have the requisite
15 “something more” than the mere ability to remove or block access to its website where it
16 prescreened websites within its network, gave those websites extensive advice, and prohibited
17 the proliferation of identical sites within its network. Cybernet Ventures, Inc., 213 F. Supp.2d
18 at 1181-82.

19 In the instant case, plaintiff maintains that Veoh has precisely the kind of control found
20 in Napster and goes even further than the defendant in Cybernet Ventures. It points out that
21 Veoh operates a closed system network requiring user registration, maintains a central index of
22 video files on its servers, reserves the right to terminate user accounts for any reason, has the
23 ability to remove infringing material from its website, and can even disable access to such
24 material on its users’ hard drives (assuming their computers are still connected to the Internet).
25 It argues that the requisite control is further evidenced by the creation of the Flash and still-
26 image files, the indexing of those files, Veoh’s ability to feature certain videos on portions of its
27 website, and by the fact that users are required to agree that Veoh shall have the irrevocable and
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1 perpetual right to distribute submitted material freely on its website. (Papa Decl. ¶5, Exs. A and
2 E).

3 However, Veoh is distinct from Napster in at least one significant respect. Napster
4 existed solely to provide the site and facilities for copyright infringement, and its control over
5 its system was directly intertwined with its ability to control infringing activity. See Napster,
6 239 F.3d at 1020 n.5; see also VISA Int’l Service Ass’n, 494 F.3d at 799 n.10 (“In fact, as
7 virtually every interested college student knew – and as the program’s creator expressly
8 admitted – the *sole purpose* of the Napster program was to provide a forum for easy copyright
9 infringement.”).

10 Here, by contrast, Veoh’s right and ability to control its system does not equate to the
11 right and ability to control infringing activity. Unlike Napster, there is no suggestion that Veoh
12 aims to encourage copyright infringement on its system. And, there is no evidence that Veoh
13 can control what content users choose to upload before it is uploaded. Plaintiff suggests that
14 Veoh should be required to prescreen every submission before it is published. However, Veoh
15 has submitted evidence indicating that it has received hundreds of thousands of video files from
16 users. (Dunning Decl. in Opp. to Plaintiff’s MSJ, ¶ 6). Plaintiff has presented no evidence to
17 refute those numbers; and, this court finds that no reasonable juror could conclude that a
18 comprehensive review of every file would be feasible.

19 Even if such a review were feasible, there is no assurance that Veoh could have
20 accurately identified the infringing content in question. True, Veoh maintains a central index of
21 videos on its servers. However, unlike Napster (whose index was comprised entirely of pirated
22 material), Veoh’s ability to control its index does not equate to an ability to identify and
23 terminate *infringing* videos. For the most part, the files in question did not bear titles
24 resembling plaintiff’s works; and, Io did not provide Veoh with its titles to search. (See Ruoff
25 Decl. ISO Plaintiff’s MSJ, ¶¶ 13-14 and Exhs. D & E). The record suggests that, upon review
26 of the files, Io itself was not able to readily identify which of its works allegedly were infringed.
27 It initially alleged copyright violations as to eight films. (See Complaint, ¶22). However, in the
28

1 course of discovery, it dropped one of those films and added three others. (See Scherb Decl. ¶
2 3, Ex. I).

3 Perhaps most importantly, there is no indication that Veoh has failed to police its system
4 to the fullest extent permitted by its architecture. See Napster, 239 F.3d at 1024 (stating that the
5 “reserved ‘right and ability’ to police is cabined by the system’s current architecture.”).
6 Plaintiff has presented no evidence raising a genuine issue of material fact as to Veoh’s
7 enforcement of its terms of use, including through the termination of access to allegedly
8 infringing material and the termination of user accounts for policy violations. As discussed
9 above, the record presented shows that Veoh has taken down blatantly infringing content,
10 promptly responds to infringement notices, terminates infringing content on its system and its
11 users’ hard drives (and prevents that same content from being uploaded again), and terminates
12 the accounts of repeat offenders. (See Dunning Decl. ¶¶ 10-13; Scherb Decl. Ex. C (Papa Depo.,
13 Vol.1, 98:3-7). Once content has been identified as infringing, Veoh’s digital fingerprint
14 technology also prevents the same infringing content from ever being uploaded again. All of
15 this indicates that Veoh has taken steps to reduce, not foster, the incidence of copyright
16 infringement on its website.

17 Plaintiff nevertheless argues that Veoh should have changed its business operations to
18 prevent infringing activity from occurring on its site. Specifically, it contends that Veoh should
19 have verified the source of all incoming videos by obtaining and confirming the names and
20 addresses of the submitting user, the producer, as well as the submitting user’s authority to
21 upload a given file. It further asserts that California Penal Code § 653w¹¹ and 18 U.S.C. § 2257
22 (the federal labeling law discussed above) require as much and that the allegedly infringing
23 conduct in question should have been readily apparent in view of the requirements of those
24 statutes. Alternatively, plaintiff contends that, if Veoh cannot prevent infringement on its site
25 given the current volume of its business, then Veoh should be required to either hire more
26 employees or to decrease its operations and limit its business to a manageable number of users

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28 ¹¹ Briefly stated, California Penal Code section 653w prohibits the knowing possession of a “physical embodiment” of an audiovisual work that does not identify the manufacturer and author. Cal. Pen. Code § 653w(a).

1 (whatever that number might be). Its not-so-subtle suggestion is that, if Veoh cannot prevent
2 infringement from ever occurring, then it should not be allowed to exist.

3 The issue here is not Veoh's compliance with California Penal Code § 653w and 18
4 U.S.C. § 2257. Nor is the issue whether Veoh should have been aware of that certain content
5 was infringing. Rather the question is whether Veoh declined to exercise a right to stop it.
6 Declining to change business operations is not the same as declining to exercise a right and
7 ability to control infringing activity. See Amazon.com, Inc., 508 F.3d at 1175. Moreover, as
8 discussed above, the DMCA does not require service providers to deal with infringers in a
9 particular way. See CCBill, 488 F.3d at 1109 (“[T]he DMCA permits service providers to
10 implement a variety of procedures” to deal with repeat infringers). Here, there is no genuine
11 issue of material fact that Veoh actively enforces its user policy and acts expeditiously to
12 remove, or disable access to infringing material. Further, plaintiff's suggestion that Veoh must
13 be required to reduce or limit its business operations is contrary to one of the stated goals of the
14 DMCA. The DMCA was intended to facilitate the growth of electronic commerce, not squelch
15 it. S. Rep. No. 105-190, at 1-2 (105th Congress, 2d Session 1998).

16 In sum, Io has not raised a genuine issue of material fact that Veoh had the right and
17 ability to control the alleged infringing activity on veoh.com. This court finds that there is no
18 triable fact issue as to whether Veoh qualifies for safe harbor under section 512(c) with respect
19 to the alleged infringing activity in question.

20 While the DMCA's safe harbors do not immunize qualified service providers from
21 liability, “[t]hey do . . . protect eligible service providers from all monetary and most equitable
22 relief that may arise from copyright liability.” See Corbis Corp., 351 F. Supp.2d at 1098-99.
23 Because the court finds that, under the particular facts presented here, Veoh qualifies for safe
24 harbor under Section 512(c), the only relief available to plaintiff is the limited injunctive relief
25 under Section 512(j).¹² In this case, before it ever received notice of any claimed infringement,
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27 ¹² OCILLA Section 512(j) provides in relevant part:

28 With respect to conduct other than that which qualifies for the limitation
on remedies set forth in subsection (a), the court may grant injunctive relief

1 Veoh independently removed all adult content, including video files of plaintiff's works, and it
 2 no longer allows such material on veoh.com. Thus, any injunctive relief to which Io would be
 3 entitled is moot. Because an opinion as to Veoh's liability for copyright infringement would be
 4 merely advisory, this court does not reach the issues raised in plaintiff's motion for summary
 5 judgment.

6 IV. CONCLUSION

7 The ever expanding realm of the Internet provides many new ways for people to connect
 8 with one another. This court appreciates that these new opportunities also present new
 9 challenges to the protection of copyright in the online world; and, the decision rendered here is
 10 confined to the particular combination of facts in this case and is not intended to push the
 11 bounds of the safe harbor so wide that less than scrupulous service providers may claim its
 12 protection. Nevertheless, the court does not find that the DMCA was intended to have Veoh
 13 shoulder the entire burden of policing third-party copyrights on its website (at the cost of losing
 14 its business if it cannot). Rather, the issue is whether Veoh takes appropriate steps to deal with
 15 copyright infringement that takes place. The record presented demonstrates that, far from
 16 encouraging copyright infringement, Veoh has a strong DMCA policy, takes active steps to
 17 limit incidents of infringement on its website and works diligently to keep unauthorized works

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 20 with respect to a service provider only in one or mor of the following forms:

21 (i) An order restraining the service provider from providing access
 22 to infringing material or activity residing at a particular online site on the
 provider's system or network.

23 (ii) An order restraining the service provider from providing access
 24 to a subscriber or account holder of the service provider's system or network
 25 who is engaging in infringing activity and is identified in the order, by
 terminating the accounts of the subscriber or account holder that are specified
 in the order.

26 (iii) Such other injunctive relief as the court may consider necessary
 27 to prevent or restrain infringement of copyrighted material specified in the
 28 order of the court at a particular online location, if such relief is the least
 burdensome to the service provider among the forms of relief comparably
 effective for that purpose.

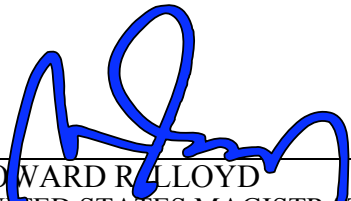
17 U.S.C. § 512(j)(1)(A).

1 off its website. In sum, Veoh has met its burden in establishing its entitlement to safe harbor for
2 the alleged infringements here.

3 **V. ORDER**

4 Based on the foregoing, IT IS ORDERED THAT defendant's motion for summary
5 judgment is GRANTED. The court does not reach the liability issues raised in plaintiff's
6 summary judgment motion.

7 Dated: August 27, 2008

8 
9 _____
10 HOWARD R. LLOYD
11 UNITED STATES MAGISTRATE JUDGE

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