

No. 09-56777

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

**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.**

**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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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants identify as their ultimate parent company, Vivendi, S.A., which is a publicly traded French company on the Paris Stock Exchange.

JURISDICTIONAL STATEMENT

The appeal arises from a judgment of the United States District Court for the Central District of California, entered on November 4, 2009. [Record Excerpt (“RE”) 174.] The judgment arose from a grant of partial summary judgment pursuant to an Order of the Court dated September 11, 2009, granting Defendant’s Motion, and a prior order entered on December 31, 2008, denying Plaintiffs’ Motion for Partial Summary Judgment. [RE 175-219.] The district court had jurisdiction under 28 U.S.C. § 1331, which accords original jurisdiction in a civil action raising a federal question. The order here appealed from is a final judgment under Federal Rule of Civil Procedure 54.

This Court has jurisdiction under 28 U.S.C. § 1291. Appellants filed their Notice of Appeal on November 4, 2009, within thirty days of entry of final judgment. [RE 174, 225-229.] The Notice of Appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED

1. Did the district court err in holding that defendant Veoh Networks, Inc.'s (hereinafter, "Veoh") reproductions of copyrighted works fell within the limitation of liability of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(c),¹ for "infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider"?

2. Did the district court err in holding that Veoh's display on its internet site, through video streaming, of videos embodying copyrighted works fell within the limitation of liability of Section 512(c) for "infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider"?

3. Did the district court err in holding that Veoh's distribution, through downloads, of videos embodying copyrighted works fell within the limitation of liability of Section 512(c) for "infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider"?

¹ Unless otherwise noted herein, statutory references are to the Copyright Act, Title 17, United States Code.

4. Did the district court err in holding, on summary judgment, that Veoh carried its burden in satisfying each of the following elements of Section 512(c) as a matter of law:

(a) Veoh lacked actual knowledge that the material or an activity using the material on Veoh's system or network was infringing;

(b) Veoh was not aware of facts or circumstances from which infringing activity was apparent; and

(c) Veoh does not receive a financial benefit directly attributable to its infringing activity, in a case in which Veoh has the right and ability to control such activity.

STATEMENT OF THE CASE

This appeal presents critical issues concerning copyright law's application to website businesses that aggregate and distribute copyrighted content uploaded by their users without authorization from the copyright owners. These businesses, which include Veoh, encourage and facilitate the uploading of videos by their users to their websites, thereby enabling the websites to amass libraries of tens of thousands of videos, which they then copy, display, and offer for free downloading to anyone in the world. The websites "monetize" this content by selling advertisements on the web pages displaying the videos, including advertising that is often related to the video content displayed. Not surprisingly, the videos in this paradigm are most frequently professionally produced music videos (the content at issue here), television programming, and motion pictures, since these are the works that people most want to see. But neither the user nor the website has permission from the copyright holder to so use this content.

Historically, businesses like Veoh who engaged in the unauthorized mass distribution of copyrighted content were considered pirates and dealt with accordingly – they were found liable for damages and enjoined. The question here is not whether Veoh's operations involved copyright infringement; even the District Court recognized that they did. [RE 221.] Rather, this case poses

the question of whether different rules apply in the internet realm, so that such sites are immune from all financial responsibility for the copyright infringement they commit and from which they profit. The court below, based on a dangerously mistaken and unjustified interpretation of the DMCA, erroneously so held. [RE 175-219.]

This case was brought by certain recorded music and music publishing entities within the Universal Music Group of companies (hereinafter “UMG”). As of September 4, 2007, when UMG filed its complaint for copyright infringement (direct, vicarious, contributory, and inducement), ***thousands and thousands of music videos owned by UMG could be found on Veoh and downloaded for free – all without UMG’s permission.*** [RE 389-557, 2240.]

In its Answer, Veoh raised as its principal defense Section 512(c) of the DMCA, which limits online service providers’ (hereinafter “service provider” or “ISP”) liability for copyright infringement “by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” [RE 2178.] This appeal addresses two orders issued by the District Court on motions for summary judgment by the parties.

The first ruling was issued in response to a motion brought by UMG, which sought partial summary judgment that Veoh was not entitled to DMCA

protection because the activities which gave rise to Veoh's infringement liability – specifically, Veoh's reproduction of videos embodying copyrighted works, its public performance of those videos through online streaming, and its distribution of those videos by offering free, permanent downloads to users of the Veoh service – did not constitute infringement “*by reason of storage at the direction of a user* of material” residing on its network, a threshold requirement to invoke the immunity of Section 512(c). UMG argued that the infringing activities were neither “storage” nor at the “direction of a user.” In an Order dated December 31, 2008, the District Court denied UMG's motion, opining that the phrase “by reason of storage” encompassed much more than “storage” and was not limited to infringement proximately caused by storage. [RE 204-19.]

In May 2009, Veoh filed its own motion for summary judgment contending that its activities qualified for protection under Section 512(c). On September 11, 2009, the Court granted Veoh's motion, finding that as a matter of law there was no genuine dispute of material fact as to whether Veoh had actual or “red flag” knowledge of the infringement on its website as required by subsections 512(c)(1)(A)(i) and (ii), and that Veoh did not have the right and ability to control the infringement on its site as required by subsection

512(c)(1)(B). [RE 175-203.]² Thereafter, the parties entered into a stipulation which permitted entry of final judgment. [RE 1-173.] The Court entered judgment on November 4, 2009. [RE 174.] UMG appeals from this judgment, the related orders denying UMG's motion for partial summary judgment and granting Veoh's motion for summary judgment, and all other related orders.

² The District Court also ruled that no genuine issue of material fact existed as to whether Veoh "adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances" of repeat copyright infringers as provided in subsection 512(i)(1)(A). [RE 199-202.]

FACTS

I. The Basic Facts Of Veoh's Business

Veoh operated what it characterizes as an “internet television network.” [RE 882-83, 2055.] But unlike a traditional television network, Veoh willingly used and distributed unlicensed copyrighted content. Veoh actively encouraged its users to upload videos to Veoh's website. [RE 2055-57.] Veoh then copied those videos by transcoding them into a format that allowed Veoh to display the videos on its internet site. [RE 2034 (¶ 15), 2036 (¶¶ 25, 28), 2092-93 (44:25-45:12), 2095 (48:8-15), 2101-03 (63:13-65:2), 2111-12 (149:9-150:4).] Veoh also made a separate copy of each video for distribution to its millions of users, which Veoh thereafter accomplished by downloading a copy for free to the computer of any users who requested it. [RE 2034 (¶ 14), 2035 (¶¶ 23-24), 2090-91 (40:19-41:25), 2108 (72:10-17), 2109 (73:5-17), 2110 (74:6-13).]

For Veoh, as with any television network (on the internet or otherwise), it was the popular, professionally produced content that attracted viewers. In fact, it is undisputed that Veoh's users frequently and repeatedly uploaded professionally produced and copyrighted videos owned by others to Veoh's service, and Veoh knew it. [RE 797-98 (143:4-144:15), 799 (147:13-24), 1226, 1233-34.] It is also undisputed that, as a result, Veoh's servers hosted, at

one point in time, tens of thousands of copyrighted videos, covered by thousands of sound recording or music publishing copyrights owned or controlled by UMG. [RE 334 (¶ 118), 389-557, 1417 (¶ 6).]

Veoh's business model was quite simple. It used the uploaded content owned by UMG and others to sell advertisements that generated revenue for Veoh – and for no one else. [RE 330 (¶¶ 97, 99), 939 (26:4-26:13), 977 (20:7-18), 1527-31 (¶¶ 25-33), 1590-92 (61:25-62:3, 62:13-16, 76:18-21).] In the case of music videos, unlike other companies, Veoh did not pay license fees to UMG, who spent millions to record the sound recordings and obtain the music copyrights and millions more to produce the music videos. [RE 2163 (¶¶ 11-12), 2325-26 (¶ 18), 2341-55.] Nor did Veoh share its revenue with the artists or songwriters who created the music, or the thousands of employees who relied on the sales of that music to pay their salaries. [RE 2163 (¶ 12).]

II. The Basic Facts Concerning UMG

The Universal Music Group is a collection of the world's largest recorded music and music publishing companies. [RE 2161 (¶ 2).] UMG's record labels include such well-known and legendary names as Decca, Motown, Deutsche Grammophon, Interscope, Geffen, A&M, Island, Def Jam, Universal, Verve, MCA, and Mercury. [*Id.* (¶ 3).] UMG's music publishing companies own or administer over 1.5 million copyrighted musical

compositions. [*Id.* (¶ 4).] UMG's performing artists and songwriters include U2, 50 Cent, Elton John, Stevie Wonder, Sting, Black Eyed Peas, Prince, Paul Simon, Luciano Pavarotti, George Strait, BB King, Justin Timberlake, Eminem, The Beach Boys, Bon Jovi, Sheryl Crow, Dr. Dre, Jay-Z, Diana Krall, Nelly, No Doubt, Mary J. Blige, Shania Twain, Ludacris, and Alanis Morissette, among many others. [RE 2185 (¶ 1).]

For many years, in addition to producing and distributing recorded music in various configurations (*i.e.*, currently compact discs and digital files, formerly LP's and cassettes), UMG has paid to produce music videos of the performances of its recording artists. These videos are covered by two sets of copyrights: one copyright is in the sound recordings played in the video and the other is in the music compositions embodied in the sound recording. [RE 2163-64 (¶¶ 13-17).] Over time, UMG has incurred tens of millions of dollars in production and marketing fees in connection with music videos, and over time, these music videos have become an important source of revenue to UMG, principally through a grant of rights to display these videos on traditional television (through licenses to networks such as MTV and others), over the internet (through licenses to online services such as YouTube and MySpace), and through sales to the iTunes Store. [RE 2325-26 (¶ 18), 2341-55.]

III. Veoh's Infringing Activities

A. Veoh Operates by Making Copies of, Publicly Performing, and Distributing Copies of Copyrighted Material

Veoh operates two interrelated services, an internet website and a client software application (often referred to as "Veoh TV"). [RE 2032 (¶ 1), 2056.] Both services allow viewers to access video content through their computers. [RE 326 (¶ 79), 783 (32:6-8), 2032 (¶ 2), 2056.] As noted, Veoh obtains that content by encouraging its users to upload videos to the Veoh service. [RE 746 (¶ 4), 1977-78 (¶ 3).] What happens next is copyright infringement, pure and simple, as even the District Court recognized. [RE 221 ("(. . . and there is no doubt that some of UMG's copyrights had, in fact, been infringed").]

1. Veoh makes multiple copies of uploaded videos for its own purposes

When a user uploads a video to Veoh's system, Veoh makes multiple copies of the video. [RE 2034-35 (¶¶ 14-15, 18-19).] The process by which Veoh achieves these ends is largely the same for the website and the client software. [RE 2035-36 (¶¶ 22-25).] Users can upload videos to Veoh in a number of different computer formats. [RE 2032 (¶ 7), 2089-90 (39:25-40:4), 2100 (62:11-21).] When a user uploads a video to the Veoh system, Veoh asks the user for specific identifying information about the video, including its title, a description of its contents, a descriptive category (such as music), and keyword "tags" for the video. [RE 2032 (¶ 5), 2035 (¶ 21), 2086-87 (36:11-

37:12), 2106 (69:16-23).] The information and “tags” become part of the video’s “metadata” and are thereafter used by Veoh (not the uploader) to return search results initiated by *other* users of its service. [RE 2032 (¶¶ 5-6).] As part of the uploading process, Veoh also requires that the uploaders provide it with a worldwide license “to use, reproduce, modify, distribute, prepare derivative works of, display, publish, perform and transmit” the videos uploaded by users. [RE 2033-34 (¶ 11), 2065.] Unlike a traditional television network, Veoh makes no effort to determine whether the uploader has any rights to grant.³ Veoh also imposes “Publisher Terms and Conditions” on its users, which grant similar and further licenses to Veoh. [RE 2033 (¶ 9), 2061-64.]

After the user clicks the “upload” button for a video, the user’s role is done. Veoh then begins its activities, *all of which are done at Veoh’s direction and not at the request, behest, or direction of the user who uploaded the video.* First, Veoh makes a copy of the video on computers it controls called “content servers.” [RE 2034-35 (¶¶ 14, 22), 2090-91 (40:5-41:25), 2107-08 (71:1-3, 72:10-17).] Veoh stores this copy in 256-kilobyte

³ Veoh could not credibly believe, for example, that “earthninja1,” “livingdeadgirl77,” or “shinigami0226” had authority to upload videos – including UMG superstar recording group Fall Out Boy’s “Dance, Dance” and No Doubt’s “Just A Girl” – ultimately identified as infringing. [RE 1240, 2137-38.] Nor could Veoh credibly believe that “Rizadi” – the Veoh user who uploaded videos featuring the songs “My Humps” and

“chunks.” [RE 2034-35 (¶¶ 14, 23).] The specific purpose of this “chunk” copy is to facilitate *Veoh*’s later delivery of copies of the video file by download to other computers. [RE 2035 (¶ 24), 2091 (41:7-14).] Veoh then transcodes the video, which refers to the process of converting a video from one format to another; in this case, Flash format. [RE 2034 (¶ 15), 2036 (¶ 25), 2092-93 (44:25-45:12), 2095 (48:8-15), 2101-03 (63:13-65:2).] Were Veoh simply “storing” the video for the user, it could do so in the format in which the video was uploaded, but creating a Flash file allows *Veoh* to publicly perform the videos on its internet service in a manner accessible by as many of Veoh’s viewers as possible. [RE 2095 (48:16-20).] In transcoding the video, Veoh generates a separate copy of the video [RE 2095 (48:8-15)] and determines all of the parameters used in this transformation [RE 2034 (¶ 16), 2036 (¶ 25), 2092-93 (44:25-45:12), 2095 (48:8-15), 2101-05 (63:17-67:16)].

2. Veoh publicly performs the copies it makes through streaming

Once Veoh has made multiple copies of each uploaded video, it publicly performs the videos by streaming them to anyone who wants to watch them. When a viewer navigates to Veoh’s website, the viewer can search Veoh’s collection of videos through a search tool that accesses the identifying

“Let’s Get It Started” by UMG recording group The Black Eyed Peas – had authority to do so. [RE 1442-43 (lines 31491-92).]

information and tags attached to each video. [RE 2036 (¶¶ 30-31), 2054 (¶ 16), 2149-51.] Veoh provides search results that list videos responsive to the search, alongside thumbnail images for each video. [RE 2036 (¶ 32), 2054 (¶ 16), 2149-51.] The viewer can click on any video in the list, which takes him to a page that streams the video directly from Veoh's website to the viewer. [RE 2036 (¶ 28), 2111-12 (149:9-150:4).]⁴ The viewer's computer then displays the video on its screen.⁵ To aid the Court's understanding of Veoh's operation, attached to this brief as Appendices 1-A and 1-B are copies of screen captures of webpages displayed on Veoh as it streams professionally produced videos from two well-known UMG artists, Bon Jovi and Mary J. Blige. [RE 2140-41.]

3. Veoh distributes the copies it makes with a "download button"

When a viewer accesses a video on the Veoh service as described above, he is taken to an internet page containing the video and information about the

⁴ Veoh either streams the material directly from its own computer servers or directs a Content Delivery Network ("CDN") to transfer the file from its servers. [RE 2036 (¶ 28).] Veoh contracts with a CDN to distribute copies of the material available on Veoh's website from servers located around the world in order to facilitate faster, more efficient delivery.

⁵ To save money on streaming costs, Veoh limited the length (running time) of videos that viewers could view by streaming from Veoh's system. Rather than simply rejecting longer content (which frequently included unauthorized copyrighted material such as feature-length motion pictures), Veoh instead required viewers to download full copies of longer videos onto their own computers in order to watch them. Thus, Veoh made the decision to distribute full copies of longer videos whether the viewer wanted the copy or not. [RE 328 (¶ 89), 789-90 (42:17-43:6).]

video (its metadata), recommendations for other videos that the viewer might like, and advertising content. [RE 2138-39, 2142-43.] Another feature of this page, which Veoh calls a “video details page,” is a button that allows the viewer to download a copy of the video displayed there – *for free*. [RE 2037 (¶ 37), 2116-18 (206:23-208:5), 2121 (212:20-25), 2125-26 (224:21-225:23).] (As noted, screen captures of these webpages are attached to this brief as Appendices 1-A and 1-B.) When the viewer clicks this button, the Veoh system begins a process to transfer a complete copy of the video file to the viewer’s computer drive. [RE 2037-38 (¶¶ 38, 42), 2054 (¶ 17), 2125-26 (224:21-225:23), 2152.] This is where Veoh makes use of the “chunk” copy it made of the uploaded file: it facilitates this delivery. [*Id.*] In some instances, where other viewers have previously downloaded the same video file, Veoh facilitates a “peer-assisted” download. [RE 2037 (¶ 39), 2083 (19:5-16), 2119-20 (210:9-211:2).] In this instance, some of the 256-kilobyte “chunks” of the original file are transferred from the computer of another user who downloaded the video previously; Veoh delivers other “chunks” directly from its own computers. [*Id.*] Veoh software then reassembles the chunks on the downloader’s computer to make the video available for viewing. [RE 2037 (¶ 38), 2125-26 (224:21-225:23).] Veoh’s software entirely controls the transfer of these chunks from different computers, and Veoh does not inform

its viewers (both the new downloader and any previously downloaders of the video) that they are providing part of the download, nor does Veoh ask them for separate permission to participate in such a download. [RE 2038 (¶ 41), 2125 (224:17-20).] Even where Veoh uses this peer-assisted mechanism, Veoh itself delivers between 75% and 100% of the video file downloaded. [RE 2038 (¶ 40), 2123-24 (219:18-220:6).] Similar functionality facilitates downloads in the Veoh client software. [RE 2038 (¶ 43), 2121-22 (212:20-213:3).]

4. Veoh's own data confirm that it reproduced, publicly performed, and distributed UMG's copyrighted content

Veoh maintains a database of information about all videos on its system. [RE 2032 (¶¶ 5-6), 2086-89 (36:11-37:12, 38:23-39:13).] This database contains previously discussed metadata (*e.g.*, video title and content), and it also tracks other information about the videos. [*Id.*] For example, Veoh tracks the number of times that each video has been publicly performed via streaming (*i.e.*, the number of views the video has received) and the number of times that Veoh has distributed each video to a third-party via downloads. [RE 2051 (¶ 8), 2136, 2142-43.]

In connection with the summary judgment proceedings below, UMG identified a sample of copyrighted works owned by UMG that were embodied in videos on the Veoh system. [RE 2051-52 (¶¶ 8-12), 2134-43, 2163-64 (¶¶ 13-17).] Veoh's own data demonstrate that Veoh publicly performed and

distributed (through downloads) each video multiple times. [RE 2051-52 (¶¶ 8-12), 2134-43.] Veoh conceded that it makes the reproductions discussed above for every video that it makes available for streaming and downloading. [RE 2036-37 (¶¶ 28, 37-38).]

B. Throughout Its History, Veoh Operated Its Business to Profit from Content – Including Copyrighted Content

Veoh launched its service in September 2005 with its “client software” application. [RE 326 (¶¶ 77-78).] It did not initially operate a website with video content. [RE 326 (¶ 78), 782-83 (31:25-32:5).] Users could upload videos to the client software as described above, and they could view and download videos through that application. [RE 326-27 (¶¶ 80, 83), 783-85 (32:16-24, 33:22-25, 34:7-11), 788 (40:17-25).] From the beginning, Veoh maintained a catalog of all videos uploaded to its service, which included all metadata associated with those videos and provided by its users. [RE 327 (¶¶ 81-82), 783-84 (32:16-33:21).] Veoh’s business was always modeled on the simple premise of using content to attract viewers and using viewership to attract revenue through advertising. [RE 328 (¶ 90), 759-60 (15:22-16:13), 791-92 (89:17-90:6).] Over time, Veoh adjusted its service offerings, most notably when it began offering videos through a website platform. Throughout its operation, however, Veoh continued to perform the basic functions described above of receiving video content uploaded by users, transforming

and copying that content, and performing and distributing that content. Veoh's overriding plan throughout its operations involved first building an audience by offering as much content as possible, and later seeking to profit from that audience by selling advertising displayed to its viewers. [RE 581 (54:14-22), 759-60 (15:22-16:13), 791-92 (89:17-90:6), 959-60 (43:3-44:22), 1531-32 (¶¶ 34-36), 1623-24 (45:15-25, 46:4-22).]

1. Veoh launched its website video platform in 2006

In early 2006, after the launch of YouTube, Veoh created an internet website platform to make videos available to the public at large. [RE 327 (¶ 84), 786 (37:3-9), 858-59 (137:20-138:2).] Veoh populated its website with videos that users of its client software previously uploaded. [RE 327 (¶ 85), 787 (39:8-17).] Veoh neither sought nor obtained consent or acknowledgement from its users who had uploaded videos when Veoh made the decision to populate its website with such videos. [RE 787-88 (39:18-40:10).]

With its website platform in place, Veoh operated both the client software and website platforms in parallel, offering essentially the same collection of videos. As Veoh grew, so did its collection of video content. Veoh was trying to amass as much content as possible, across as many categories as possible, to attract as many viewers to its site as it could during

the audience-building phase of its business. [RE 759-60 (15:22-16:13), 791-92 (89:17-90:6), 1531-32 (¶¶ 34-36), 1623-24 (45:15-25, 46:4-22).] A Veoh director conceded the obvious when he acknowledged that “content is king.” [RE 581 (54:14-22).] Veoh’s former CEO explained that “[w]e felt and feel today that breadth of content is important. . . . Breadth meaning having enough coverage of categories and sources of content, . . . enough categories and videos that cover the tastes of what consumers are looking for.” [RE 1531-32 (¶¶ 34-36), 1624 (46:4-22).]

Veoh exercised significant editorial control over its service as it developed. Veoh wanted to insure that its mix of content would facilitate the eventual sale of advertising on the site. To that end, Veoh implemented editorial policies excluding certain categories of videos from its service. Most notably, Veoh opted not to host videos containing explicit, adult content. [RE 957.] Veoh implemented this policy by employing multiple full-time employees to monitor videos available on the Veoh service. [RE 924-25 (251:20-252:12), 1233-35, 2011-13 (¶¶ 2, 9).] These employees reviewed videos and removed those that Veoh deemed objectionable, including pornography, which (unlike copyrighted content) is an anathema to advertisers. [*Id.*] ***Although it could have, Veoh did not instruct its employees reviewing and removing objectionable videos to restrict and remove copyrighted***

content.

2. Veoh had extensive knowledge that it was hosting infringing content

Notwithstanding the fact that Veoh declined to screen for copyrighted content as it did for pornography, Veoh always knew that its users were frequently uploading copyrighted material to the Veoh system without permission. Veoh's founder and CEO expressly acknowledged as much. [RE 797-98 (143:4-144:15), 799 (147:13-24), 800-01 (149:13-150:23), 1226-32.] Veoh's employees likewise acknowledged in internal documents that infringement was rampant on its service. [RE 1233-34.] Veoh's knowledge of copyrighted material on its system (including UMG's) was clear and undisputed and included:

- Veoh offered an entire category of "music" videos knowing that recorded music and music compositions were subject to copyright protection and that Veoh had no permission from any major music company to host its content. [RE 369 (75:20-24), 780-81 (27:17-28:11), 807 (201:15-25), 808 (203:1-16), 809 (205:1-23), 813-14 (221:5-222:2), 824-25 (265:20-266:15), 864-65 (258:15-259:24), 946 (174:3-24), 978 (31:2-5), 979-83 (45:21-47:11, 48:23-49:11), 984-87 (52:20-53:9, 54:21-55:2), 1268, 1517.]
- Veoh tagged thousands of videos on its system – including UMG's

content – as “music video[s],” which Veoh used to draw viewers to its website when they used search engines to search the internet for music. [RE 367 (¶ 9), 1535-36 (¶ 44), 1707-08 (Interrogatory No. 15), 1415 (¶ 4), 1436-1498.]

- Veoh purchased numerous “search terms” covering popular music content in connection with its “search engine marketing,” which was intended by Veoh to facilitate having its website appear in response to internet searches for such content. Some terms Veoh purchased specifically referred to UMG-owned content. [RE 374-76 (111:20-113:4), 389-90 (Interrogatory No. 25), 393 (90-91) (50 Cent, “In Da Club”), 395 (148-50, 158-84) (Avril Lavigne, “Complicated,” “Girlfriend”), 399 (348-53) (Britney Spears, “Baby One More Time”), 407 (760-66) (Justin Timberlake, “Sexy Back”), 414 (1076-77), 587 (Interrogatory No. 16), 596 (50 Cent search terms), 604-05 (Avril Lavigne search terms), 613-14 (Britney Spears search terms), 665 (Justin Timberlake search terms), 1537 (¶ 47).]
- Veoh’s owners and executives identified infringing videos to Veoh on multiple occasions. [RE 804-06 (191:16-192:11, 193:3-23), 1225, 1236.]
- Veoh received email and letter notices from both its users and

copyright holders, identifying thousands of videos on its service that were infringing copyrights. [RE 917-18 (208:13-209:12), 1011-58, 1124-1224, 1237-1241, 1407-09.]

- Major media outlets wrote stories about the widespread infringement on Veoh, with the *New York Times* labeling Veoh “a haven for pirated content.” [RE 801-02 (150:24-151:15), 1242-45, 1247-59.]
- Content owners refused to do business with Veoh, citing its extensive copyright infringement. [RE 988 (138:7-20), 989 (140:4-25), 1246.]
- Veoh monitored usage of its site and reported to *UMG* that: “Perhaps most importantly, today, [Veoh’s] number one category of searched and viewed content is Music” despite lacking a license from *any* of the “major US labels.” [RE 1517-19.]

In addition to its affirmative knowledge of infringement, Veoh willfully ignored readily available information indicating the rampant infringement on its services. Instances of Veoh’s willful blindness include:

- Veoh waited until late 2007 to begin implementing readily available commercial filtering technology to identify copyrighted material, even though that technology was available before Veoh began operations. [RE 860-63 (141:15-144:23), 887-89 (25:22-26:3, 26:9-27:9), 902-903 (121:6-122:15), 1121-1123, 1980-81 (¶ 15).]

- When Veoh finally implemented filtering technology, it ran its filter only on newly uploaded videos. Veoh waited months to run that technology over the thousands of videos already in its collection. [RE 333-34 (¶¶ 115-17), 772-73 (102:20-103:7).] ***When Veoh finally ran the filter over its collection, it removed more than 60,000 videos.*** [RE 334 (¶ 118), 1417 (¶ 6).] Had this filter been in place when Veoh launched its service, few, if any, of these videos could have been successfully uploaded on to Veoh's website or server.
- During their daily review of videos available through their service, Veoh's employees deliberately ignored obvious indicia of copyright infringement displayed on those videos (such as song titles, copyright holders, and similar information found in music videos copied from popular sources like MTV). [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 deliberately ignored its massive index of data, including the identifying information and tags that it insisted each uploader provide so that videos on its system could be searched for and located easily. [RE 907 (23:2-4), 921 (235:11-236:10), 1811-15 (¶¶ 11-23).]
- Veoh ignored tools that *it* created to help users find videos, such as

recommendation software that identified videos users might like based on past viewing habits. [RE 393-94 (94-98, 100, 107) (UMG's copyrighted works), 793-94 (94:13-95:22), 930-34 (278:17-279:11, 280:22-282:22), 950-51 (recommending UMG's copyrighted works), 1269 (recommending UMG's copyrighted works), 1287 (984-85).] These tools could not only identify additional instances of infringing content, but Veoh actually used these tools to recommend the infringing content to its user base.

Despite these sources of information, Veoh continued to populate its website with infringing content and did not act expeditiously, and in many cases, not at all, to remove it. Instead, Veoh stood steadfast by its position that it would only remove copyrighted material if identified specifically in a notice of infringement. Even then, Veoh would only remove the video associated with a particular URL and bit-for-bit copies of that same video.⁶ If the same content was posted elsewhere on the site, Veoh would not remove the other copies of the video, nor would Veoh do anything to prevent non-bit-for-bit copies of the removed video from being re-posted minutes after it was taken

⁶ In other words, if three different Veoh users each uploaded a copy of the music video "In Da Club" by UMG recording artist 50 Cent, and those copies differed in insignificant respects (*e.g.*, copy two had one additional second of silence at the video's end than copy one, and copy three included a short introduction created by the Veoh user who uploaded it), Veoh would not remove copies of the video not identified in a notice of infringement. Such copies are not "bit-for-bit" copies. [RE 1810-11 (¶¶ 7-10).]

down.

3. Veoh sold advertising to profit from the copyrighted content on its service

In early 2007, Veoh implemented the second phase of its business plan – turning the massive audience that it had built into a revenue stream – by displaying advertising on its system. [RE 939 (26:4-13), 977 (20:7-18).] This advertising took multiple forms, including display advertising (banners or boxes on internet pages), advertisements that played before a requested video (much like television commercials), and advertisements shown over a portion of the screen displaying a video (or “overlay” advertising). [RE 330 (¶ 97), 1527-29 (¶¶ 25-19), 1590-91 (61:25-62:3, 62:13-16), 1592 (76:18-21).] Veoh undertook to display this advertising in as many places on its service as possible. [RE 941-42 (75:24-76:6).] The more advertisements Veoh could display, the more money it could collect. [RE 330 (¶ 99), 940 (30:20-25), 1529-31 (¶¶ 30-33).] Further, the more traffic – or viewers – Veoh could capture, the more advertising it could display. [RE 944 (161:25-162:25), 1531-32 (¶¶ 34-36).] The record evidence shows that Veoh displayed paid advertising along with UMG’s copyrighted content. [RE 1528 (¶ 27), 1530 (¶ 31), 2134-2141.]

SUMMARY OF ARGUMENT

UMG contends that those who operate internet businesses that display and distribute copyrighted content must either obtain appropriate licenses to do so, or be held accountable for the copyright infringement that they commit, just as any non-internet business would be held responsible. Veoh contends that different rules apply on the internet, specifically, that Congress upended copyright law with the 1998 enactment of the DMCA, and that under the DMCA, its only responsibility is to remove specific files that copyright holders identify to Veoh in infringement notices. Under Veoh's reading of the DMCA, content companies like UMG bear the Herculean – nay, impossible – task of continuously monitoring for infringement the thousands of ever-changing websites exploiting their content. Veoh contends that unless it receives a notice about a specific file, it has no obligation to avoid copyright infringement and is immune from monetary liability under section 512(c) of the DMCA, regardless of whether it knows of infringement or profits therefrom.

The issues presented here have far-reaching consequences, and no Court of Appeals has yet considered them. Veoh is just one of many user-uploaded content sites. And, although this case involves the music videos of UMG, the principals at issue here apply to almost any intellectual property capable of being digitized and uploaded on the internet, from motion pictures, to recorded

telecasts of sporting events such as football or baseball games, to television dramas and comedy series. The industry is evolving so that the more responsible internet businesses obtain copyright licenses and compensate copyright holders who invested money, time, and effort to create the content consumed over the internet. Unless reversed, the decision of the District Court places these responsible sites at a commercial disadvantage and threatens to perpetuate the “Wild West” disregard of intellectual property rights that characterized the early years of the internet, when companies like Napster and Grokster facilitated their users’ copyright infringement.

Properly construed, the DMCA provides no protection for Veoh for several reasons. First, Veoh’s copyright infringement liability is not by reason of the “*storage*” of material at the direction of a user but instead arises from *Veoh’s* further and separate acts of reproducing, displaying, publicly performing, and distributing via downloads the material that is uploaded by its users. The District Court erred in holding to the contrary when it denied UMG’s motion for partial summary judgment.

Second, even assuming Veoh’s activities meet the threshold qualification for protection under Section 512(c), the District Court erred in granting Veoh’s motion for summary judgment that it satisfied the remaining elements of the “safe harbor.” Specifically, the District Court erred when it held that there

were no genuine issues of fact that Veoh lacked actual knowledge of the infringement on its service and awareness of any facts and circumstances from which infringing activity was apparent. Further, the court below improperly found no genuine issues of fact existed as to whether Veoh obtained direct financial benefits from the infringement on its service when it had the right and ability to control such activity, including through the display of paid advertising driven by infringing content.

The District Court's summary judgment rulings turn copyright law on its head in the context of the internet. If they are not reversed, activities that clearly give rise to liability in any other context would be permitted on the internet. The District Court's opinion absolves Veoh of responsibility for conduct as, or arguably more, egregious than that which led to liability for prior services such as Napster, Grokster, or Kazaa. Napster, Grokster, and Kazaa offered indices that helped their users find infringing content and obtain it from other users. But they never stored the infringing files themselves nor directly engaged in the distribution of infringing content, as Veoh does. Moreover, the District Court's opinion upends the careful balance of interests between service providers and copyright holders that Congress sought to establish in the DMCA. Under the law as construed by the District Court, it is the responsibility of every copyright holder to constantly monitor and notify

Veoh and all of the other internet sites that massively infringe copyrights and profit from such infringement – otherwise these sites can display infringing material with abandon. In the wake of the District Court’s opinion, businesses like Veoh will rationally eschew licenses from content companies and avoid implementing effective measures on their websites that can stop or limit infringement.

For all of these reasons, the District Court’s rulings must be reversed.

ARGUMENT

I. Standard Of Review

Review of a summary judgment ruling under Rule 56 of the Federal Rules of Civil Procedure is *de novo*. *Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000, 1002 (9th Cir. 2004); *Leever v. Carson City*, 360 F.3d 1014, 1017 (9th Cir. 2004). The Court must view the evidence presented in the light most favorable to the non-moving party (here UMG) and determine whether there are any issues of material fact. *Id.* Thus, the Court must not determine the credibility of evidence or resolve disputes in contradictory evidence. To the contrary, such disputes constitute issues of material fact that require denial of a motion for summary judgment.

This Court must also determine whether the District Court correctly applied the relevant substantive law. *Id.* Here, the District Court interpreted

sections of the Copyright Act, specifically 17 U.S.C. § 512. This Court need not afford any deference to the District Court's statutory interpretation.

Instead, this Court reviews the district court's interpretation of the Copyright Act *de novo*. *Id.*; see also *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

II. Veoh's Infringing Activities Do Not Qualify For Protection Under Section 512(c)(1) Because They Do Not Constitute Infringement "By Reason Of Storage At The Direction Of A User"

Section 512(c)(1) of the DMCA sets forth four so-called "safe harbors" from monetary liability for the following potentially infringing activities: "Transitory Digital Network Communications" (§ 512(a)), "System Caching" (§ 512(b)), "Information Residing on Systems or Networks at Direction of Users" (§ 512(c)), and "Information Location Tools" (§ 512(d)). These safe harbors are discrete and not intended to be collectively exhaustive of all activities on the internet. Infringing conduct that does not fall within a specified category is not entitled to protection. Moreover, the DMCA expressly provides that qualifying for protection for one activity does not confer protection for other activities, which must be evaluated separately. 17 U.S.C. § 512(n). Finally, the safe harbors only provide a limitation on liability for infringement which occurs "by reason of" a specified activity. 17 U.S.C. § 512(a)-(d).

Here, Veoh claimed immunity from monetary liability for copyright infringement by invoking Section 512(c)(1), which provides that “[a] service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, *for infringement of copyright by reason of the storage at the direction of a user* of material that resides on a system or network controlled or operated by or for the service provider” (Emphasis added.) Veoh contended, and the District Court found, that this provision applied to all of Veoh’s infringing conduct.

That conclusion was erroneous. UMG identified several of Veoh’s activities as giving rise to its liability for copyright infringement that do not remotely constitute “storage at the direction of a user.” Indeed, Veoh’s infringement arose from:

- Reproduction of copyrighted video files uploaded by its users. In the ordinary course of its business, Veoh created multiple copies of videos which had nothing to do with the creation of a copy in order to store data: it reproduced video files uploaded by users by transcoding them into Flash format, which enabled Veoh to display and stream the videos over the internet, and it separately created 256-kilobyte “chunk” copies of videos, which Veoh retained on its computers for use in downloading copies to any user of its site. [See pp. 14-15 *supra*.] Both actions violate

UMG's exclusive reproduction rights in the underlying copyrighted works embodied in the videos. *See* 17 U.S.C. § 106(1).

- Public performance of the copyrighted videos uploaded by its users.

Veoh publicly performed the videos by streaming them over the internet to anyone who wanted to view them [*see* pp. 15-16 *supra*], which constitutes an unauthorized public performance of the copyrighted works embodied in the videos, in violation of UMG's exclusive rights. *See* 17 U.S.C. § 106(4) (musical composition) and 106(6) (sound recording); *Bonneville Intern. Corp. v. Peters*, 347 F.3d 485, 489 n. 7 (3d Cir. 2003) (streaming of copyrighted sound recordings over the internet requires a license).

- Distribution of copyrighted videos uploaded by its users to anyone with internet access.

Veoh provided download copies of videos to anyone who clicked on the download button located on the Veoh.com webpage used to display the same video. [*See* pp. 16-18 *supra*.] This activity violates UMG's exclusive distribution rights. *See* 17 U.S.C. § 106(3); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001) (the "download and upload [of] copyrighted music . . . constitute[s] direct infringement of plaintiffs' musical compositions, [and sound] recordings") (internal citation omitted).

Veoh's liability from each of these activities is not from infringement by reason of "storage," much less storage at the direction of a user. Veoh conceded as much before the District Court. [RE 214.] Nonetheless, the District Court ruled that each of the aforementioned activities was immunized by Section 512(c)'s safe harbor for "infringement of copyright by reason of the storage at the direction of a user of material" The District Court held that Section 512(c) could not be read so literally and reasoned that since Veoh's infringing acts were somehow "attributable to" Veoh's storage, Veoh was entitled to invoke the immunity. [RE 215.]

The district court's analysis contradicts the plain meaning of the statute, its legislative history, and a well-settled line of precedents narrowly construing identical "by reason of" language in other federal statutes. It must therefore be reversed.

A. Veoh's Infringing Activities Are Not Within the Plain Meaning of "Infringement of Copyright by Reason of the Storage at the Direction of a User"

The purpose of statutory construction is to "discern the intent of Congress in enacting a particular statute" by looking "to the plain language of the statute." *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) (citing *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982) and *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)). "Where a statutory term is

not defined in the statute, it is appropriate to accord the term its ordinary meaning.” *Mohrbacher*, 182 F.3d at 1048 (internal quotations and citation omitted). The District Court’s analysis violates both principles.

1. The ordinary meaning of “infringement of copyright by reason of the storage at the direction of a user” is limited to storage itself

The meaning of the relevant statutory language of § 512(c)(1) – “infringement of copyright by reason of the storage at the direction of a user, of material [residing on the service provider’s system]” – is a question of first impression at the appellate level.⁷ UMG submits that the ordinary meaning of this language is self-evident and should control, and that Veoh’s infringement, which arises by reason of its *own* decisions to *copy, publicly perform, and distribute* UMG’s protected works, does not constitute “infringement of copyright by reason of the *storage* at the direction of a user” (emphasis added).

Storage is a straight-forward term. It is defined as “[t]he act of storing goods.” [RE 2146.] In turn, to “store” means “1. To reserve or put away for future use. 2. To fill, supply, or stock. 3. To deposit or receive in a storehouse

⁷ Other than the lower court here, the only district court to consider this issue was in *Io Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS 65915 (N.D. Cal., Aug. 27, 2008). Though the *Io* court considered whether the storage “safe harbor” applied, the only infringing conduct at issue there was the creation of flash-format files and still images which Veoh used as “thumbnails” for videos. Based on limited discovery, the *Io* court concluded that Section 512(c) was not limited to acts of storage but improperly relied upon the definition of “service provider” in Section 512(k) as the basis for deciding what constituted “storage” under Section 512(c).

or warehouse.” [*Id.*] Typically storage is completed by moving a physical object to some location, such as a warehouse, for safe keeping. On a computer, storing information requires recording data on some media, like a computer hard drive or server. Storage on computers (unlike on physical objects) involves making a copy of the underlying data, rather than moving a physical object like a book or a DVD. Whether on a computer or in the physical world, nothing in the ordinary definition of “storage” encompasses additional acts of reproduction, public performances of the stored material, or distribution of the stored material. There is no evidence in the language or legislative history of Section 512(c) that Congress intended to deviate from this straightforward understanding.

2. Veoh’s infringement is not “by reason of” storage because storage is not the proximate cause of Veoh’s infringement

Veoh argued, and the District Court agreed, that the statutory language “infringement of copyright *by reason of* the storage at the direction of a user” requires only that the specific infringing acts be generally connected with the storage of material, even if the infringing acts are not themselves storage. The District Court reached this conclusion by holding that the phrase “by reason of storage” encompassed not only the act of storage but all actions “attributable to” storage since these acts were necessary to facilitate outside access to the

stored material. [RE 215.] The “attributable to” language that the District Court relied on is nowhere to be found in Section 512(c) and conflicts with established and settled precedents analyzing and construing what “by reason of” means.

The phrase “by reason of” is not unique to the DMCA. It is a phrase that Congress has used many times in other federal statutes. For example, the phrase “by reason of” appears in the Racketeer Influenced and Corrupt Practices Act (“RICO”), 18 U.S.C. § 1964(c),⁸ and the Supreme Court has ruled on the proper interpretation of “by reason of” in several cases construing that statute. In each instance, when construing the exact same language, the Supreme Court flat out rejected the expansive interpretation advocated by Veoh and adopted by the District Court. In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992), the Supreme Court held that “by reason of” is narrow language not amenable to broad construction. Noting that the same language also appears in Section 4 of the Clayton Act (15 U.S.C. § 15), the Court held that “by reason of” requires a showing of proximate cause. *Holmes*, 503 U.S. at 267-68 (“Thus, we held that a plaintiff’s right to sue under § 4 required a showing that the defendant’s violation not only was a

⁸ “Any person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court” (emphasis added).

‘but for’ cause of his injury, but was the proximate cause as well.”). The Supreme Court held that “[w]e may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act’s § 4.” *Id.* at 268 (internal citations omitted). The Court also stated that “[Congress] used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.” *Id.*

The same principle and reasoning applies to the use of “by reason of” in Section 512(c). Applying *Holmes*, this Court must likewise presume that Congress, when enacting the DMCA, understood its prior usage and the courts’ narrow interpretation of the phrase. Thus, in the DMCA, as in the Clayton Act and the RICO statute, “by reason of” must require that the copyright infringement at issue be proximately caused by “storage at the direction of a user.” For purposes of Section 512(c)’s limitation on liability, it is insufficient that the infringement “be the result of” or be “something that can be attributed to” storage in the “broad causal” sense, as the District Court held. [RE 214-15.]

Simply put, Veoh’s storage of material is not the proximate cause of its copyright infringement. Veoh’s liability is proximately caused by its

deliberate, discrete, and subsequent acts of reproducing, publicly performing, and distributing videos containing copyrighted material *after* the material is stored in its system.⁹ Under no analysis is storage of copyrighted material the proximate cause of distribution of that material. Thus the District Court erred in finding that Veoh's infringement was "by reason of" the storage of material.

3. The District Court erred in ruling that the statutory context of Section 512(c) required protection of more than storage

When construing a statute, a court should "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *see also Christensen v. Comm. I.R.S.*, 523 F.3d 957, 960 (9th Cir. 2008) (same principle). The District Court purported to apply this principle when it rejected the "narrow construction of the statute UMG advocates" and concluded that other provisions of the DMCA would make no sense if the protection of

⁹The Supreme Court has repeatedly held parties to a stringent standard of causation to find an injury to be "by reason of" an alleged violation. For example, in 2006, the Supreme Court considered a RICO claim where the alleged violation was a failure to pay taxes. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). The defendant, by not paying taxes, was able to sell products at lower cost than plaintiff and thus injure plaintiff's business. The Supreme Court held that the connection between the conduct and the injury was not direct enough for the injury to be "by reason of" the violation. *Id.* at 460-61. The Court succinctly stated that the "by reason of" language required that "the alleged violation le[ad] directly to the plaintiff's injuries." *Id.* at 461; *see also Hemi Group LLC v. City of New York*, ___ U.S. ___, 130 S. Ct. 983 (2010) (city's loss of cigarette tax revenues from citizens was not "by reason of" failure of out-of-state online seller to properly report its sales to city residents).

Section 512(c) were limited to acts of infringement proximately caused by storage. [RE 214-16.] In particular, the District Court pointed to the so-called “notice and takedown” procedures set forth in Section 512(c)(3). [RE 215-16.] These procedures require online service providers to comply with take-down notices from copyright holders as a prerequisite for claiming protection under Section 512(c). The District Court suggested that this procedure would be “pointless” unless Veoh were permitted to publicly perform and distribute copyrighted works, in addition to storing such materials. [RE 217.] That conclusion is wrong and rests on a misunderstanding of the DMCA.

A proper construction of the phrase “by reason of” is easily harmonized with the notice and takedown provisions of the DMCA. Specifically, for service providers who offer a different type of service than Veoh, often referred to as “web hosting,” the notice and takedown provisions of the DMCA make perfect sense. These ISPs make storage resources available to web site operators, *i.e.*, they “host” the website on the hosting provider’s servers. Technically, because of the manner in which computers store information, the discrete act of storing the material displayed by the website operator itself constitutes an act of reproduction of that material by the web hosting ISP. When copyright holders discover that a hosted website is displaying infringing material, they may send take-down notices, pursuant to the DMCA, to the web

hosting service provider, who can then disable the material or the offending website. In Section 512(c), Congress desired to immunize these web hosts, whose liability would otherwise result from the act of storage, so long as they met the other elements of Section 512(c). Thus, the provider need not be engaged in the display or distribution of copyrighted material¹⁰ to take advantage of Section 512(c)'s "safe harbor." It is more than mere coincidence that this scenario was the one at issue in *Religious Technology Center v. Netcom On-line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), which Congress had in mind when it enacted the DMCA. H.R. REP. No. 105-551(I), 1998 WL 261605, *11.

The District Court ignored this scenario, where the DMCA's storage provisions work in harmony with the notice and takedown provisions. It reasoned that because the notice and takedown provisions might not make sense in Veoh's case, the statute needed to be more broadly construed. This reasoning is circular: just because Veoh operates a content distribution business, which might not qualify for the immunity of Section 512(c) as properly construed, does not mean that 512(c) must be broadly construed so as to encompass Veoh's activities. Nothing in the DMCA suggests that all

¹⁰ The website, not the webhost, would display the materials. To the extent the web host is distributing copyrighted materials, it could seek safe harbor under 17 U.S.C. § 512(a) for that activity.

activities of all service providers are protected. Had Congress wanted to do this, it could have very easily enacted a statute that immunized more than the four discrete passive activities that it believed were entitled to immunity.

In fact, it is the District Court's interpretation of Section 512(c) that does not harmonize with the remainder of the DMCA, specifically, Section 512(n). Section 512(n) provides that the limitations on liability created by subsections 512(a)-(d) are descriptive of separate functions, and qualification for one does not immunize or protect conduct associated with another. *See also A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, *4-6 (N.D. Cal. May 12, 2000) (recognizing that the separate subsections describe separate functions, and any limitation on liability for an activity described in one subsection cannot protect other activity addressed by a different subsection). The District Court used one activity – “storage” – to immunize other activities. This is precisely the approach eschewed by the express language of Section 512(n), and an approach rejected by this Court. In *Perfect 10 v. CCBill*, 488 F.3d 1102 (9th Cir. 2007) (“*CCBill*”), the defendant service provider operated a linking and payment service. Consumers using CCBill's on-line service could make a credit card payment to CCBill, which then offered the consumer access to a large number of websites, many of which were infringing copyrights. To decide whether CCBill was entitled to the DMCA's safe harbor, the Court

noted the threshold issue: whether the basis for CCBill's liability was "by reason of" one of the four core activities set forth in the DMCA (*i.e.*, Section 512(d)(1)'s "referring or linking users to an online location" through a hyperlink once payment was made). *CCBill*, 488 F.3d at 1116.

The Court concluded that the plaintiff's claim was not for infringement "by reason of" the hyperlink. Instead, the plaintiff's action was predicated on "infringement through CCBill's performance of *other business services for the[] websites*" (*id.* at 1117 (emphasis added)), which included CCBill's providing automated on-line accounting mechanisms. "Even if the hyperlink provided by CCBill could be viewed as an 'information location tool,' *the majority of CCBill's functions* would remain outside the safe harbors. . . . [And] [e]ven if CCBill's provision of a hyperlink is immune under § 512(n), CCBill does not receive blanket immunity *for its other services*." *Id.* at 1116-17 (emphasis added); *see also Fair Housing Counsel of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (holding that a website "may be immune from liability [under the Communications Decency Act] for some of the content it displays to the public but be subject to liability for other content").

B. The District Court’s Analysis of the DMCA’s Legislative History Is Flawed: the Legislative History Demonstrates that “Infringement of Copyright by Reason of the Storage at the Direction of a User” Is to Be Narrowly Construed

The legislative history of a statute should only be consulted when the plain meaning of the statute is ambiguous or cannot be ascertained. In this instance, the plain meaning of “infringement of copyright by reason of storage at the direction of a user” can be ascertained, and the Court need not and should not resort to the legislative history for interpretation. *See, e.g., Nuclear Info. and Resource Svc. v. U.S. Dept. of Trans. Res.*, 457 F.3d 956, 960 (9th Cir. 2006).¹¹ But if resort to the legislative history is made, it reveals that that the District Court erred in interpreting the DMCA.

The District Court presupposed that the DMCA’s legislative history reflected an endorsement of the unimpeded growth of the internet, as opposed to a balance between copyright interests and technology. For example, the District Court stated that it interpreted the DMCA to ensure that service providers were not deterred “from performing their basic, vital and salutary function – namely, providing access to information and material for the

¹¹ *See also Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”); *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929) (“[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”).

public.” [RE 215.] But this supposed purpose appears nowhere in either the statutory text or the legislative history.

Rather, Congress identified a narrower purpose in enacting the DMCA. Congress noted that “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the internet without reasonable assurance that they will be protected against massive piracy.” S. REP. No. 105-190, 1998 WL 239623, *8. Balanced against this purpose, Congress stated that, “[a]t the same time, without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the internet.” *Id.*

Congress explained how it would strike this balance to protect those innocent actors whose technical infringement arose from providing necessary infrastructure services: “[f]or example, service providers must make innumerable electronic copies by simply transmitting information over the internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users, or they volunteer sites that users may find attractive. Some of these sites might contain infringing material.” *Id.* These

statements make clear that Congress did not seek to protect all activities by any entity that fit the definition of an online service provider. Congress identified narrow classes of infrastructure activities to be protected. With respect to the storage “safe harbor” that became Section 512(c), Congress repeatedly described the relevant storage activities as limited: “[e]xamples of such storage include providing server space for a user’s web site, for a chatroom, or other forum in which material may be posted at the direction of users.” S. REP. No. 105-190, at *43.

In its report on an early version of the DMCA, the House of Representatives explained that “the bill essentially codifies the result in the leading and most thoughtful judicial decision to date: *Religious Technology Center v. Netcom On-line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).” H.R. REP. No. 105-551(I), 1998 WL 261605, *11. In the *Netcom* case, the District Court held that a web-hosting service provider (as distinct from a website operator like Veoh) was not liable for direct copyright infringement where users posted materials to a Usenet site which were then automatically transmitted by the protocols for such sites. *Netcom*, 907 F. Supp. at 1372-73.

Congress explained that it did not mean to provide protection for service providers that control and distribute content on their services for their own

purposes. Specifically, in the Senate Report, the committee wrote that “[i]nformation that resides on the system or network operated by or for the service provider through its own acts or decisions and not at the direction of a user does not fall within the liability limitation of subsection (c).” S. REP. No. 105-190, at *43. Veoh operates a service where Veoh makes decisions about the content displayed – precisely the activity that Congress expressly sought *not* to protect. For example, Veoh decided that pornographic content would not be displayed on its service and implemented this editorial decision through multiple means, including the use of full-time employees to review videos uploaded to the site and to remove any deemed inappropriate. [RE 924-25 (251:20-252:12), 957, 1233-35, 2011-13 (¶¶ 2, 9).] Veoh also made other decisions to direct whether or not content would be stored on its site. When Veoh began operations, it did not operate a website at all. [RE 326 (¶ 78), 782-83 (31:25-32:5).] Veoh’s service was solely a client application allowing users to upload videos. [RE 326 (¶¶ 77-78).] By definition, users who uploaded videos initially could not have directed that they be stored, displayed, performed, or distributed from a Veoh website – no such site existed. When Veoh later launched its website, it populated the site with all of the content previously uploaded to its different, client-based service. [RE 327 (¶ 85), 787 (39:8-17).] Users did not direct such movement of the material to a new

medium for distribution; that was Veoh's decision. Indeed, Veoh did not even consult users who uploaded videos about this additional copying and distribution. [RE 787-88 (39:18-40:10).]

Congress's provision of a limitation on liability only for specific activities necessary to the infrastructure of the internet is evident across the various subsections of Section 512. For example, in Section 512(a), Congress protected telephone companies that provide the connectivity and transmission necessary for the internet to function, though their operations might technically reproduce copyrighted works in the act of transmission. Congress made clear that it was seeking only to protect those acting as a "conduit," not those having some control or interest in what material is transmitted. S. REP. No. 105-190, *41-42.

Finally, narrowly construing the DMCA's limitation on liability for infringement by reason of storage is consistent with Congress's goal of not bestowing protection to those responsible for infringement. As noted previously, Congress distinguished service providers who merely store materials for others from those who store materials as a consequence of their own acts or decisions. *See* S. REP No. 105-190, *43. Congress expressly did not intend to protect sites "where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public

display.” *See id.* at *48. In fact, Congress referred to such sites as “pirate” sites. *Id.* Congress noted that a service provider offering information location tools or linking (as contemplated by Section 512(d)) to a site that was clearly such a “pirate” site when viewed by the linking provider, would constitute the type of actual or red-flag knowledge that would make the linking provider ineligible for a limitation on liability. If Congress wanted to make clear that merely linking to such a site was excluded from protection under the DMCA, it is absurd to suggest that Congress intended to protect the actual operation of such a “pirate” site from copyright liability.

C. The Decision Below Improperly Creates a Divide Between Copyright Protection for Online and Offline Infringement

This Court has acknowledged that “[t]he DMCA did not simply rewrite copyright law for the on-line world.” *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004) (quoting *Ellison v. Robertson*, 189 F. Supp.2d 1051, 1061 (C.D. Ca. 2002)); *see also* Kozinski and Goldfoot, *A Declaration of the Dependence of Cyberspace*, 32 Colum. J.L. & Arts 365 (2009) (arguing that the internet does not require special legal doctrines different than those for the “brick and mortar” world). Rather, in the DMCA, Congress sought to limit the exposure resulting from performing a function that would not create copyright liability in the analog context but creates technical infringement liability in the online context due to the nature of computer technology and the internet. *See*

S. REP 105-190, 1998 WL 239623, *2, 8. By focusing on activities that might constitute copyright infringement which occurred by reason of storage, transitory network communications, system caching, or other acts that were necessary to the internet as a whole, Congress did not purport to protect additional conduct, which separately could create liability, that might be undertaken with stored or transmitted material. Thus, for example, service providers otherwise engaged in protected activity (*e.g.*, transmitting material), lose protection of the DMCA if they go beyond the necessary tasks to provide such services (for example, by attaching advertising to alter the material being transmitted). *See* 17 U.S.C. § 512(a)(5).

Those activities of Veoh complained of by UMG (*e.g.*, distributing permanent copies of copyrighted works via digital downloads) are not infringing merely because a computer is involved but because of considered business decisions by Veoh to pursue revenue by exploiting others' copyrighted works – without permission. For example, Veoh does not merely make a copy of UMG's works when it stores an uploaded video on its servers. It makes multiple reproductions of copyrighted video files: first when it transcodes uploaded files into Flash format, which facilitates higher quality public performance through streaming, and then again when it makes a “chunk” copy of the video file, which facilitates Veoh's distribution of the file

to its users. These activities, engaged in for commercial reasons by Veoh, are neither dictated by the direction of its users nor inherent in the storage of material.

Finally, Veoh distributes copies of videos by downloading full copies to viewers' computers. Such distribution is surely not inherent in storage or something that happens as a result of storage. Instead, Veoh copies the material submitted by users and distributes those copies to anyone and everyone who requests them. As with public performance, such distribution would give rise to liability in the analog world – there is nothing special about computers or the internet that creates liability where none would otherwise exist. Indeed, computers and the internet make such illicit distribution easier to perpetrate and more difficult to prevent.

III. The District Court Independently Erred When It Held That No Genuine Issue Of Material Fact Existed As To Whether Veoh Satisfied The Remaining Elements Of The “Safe Harbor” Of Section 512(c)

Even if the District Court's interpretation of “infringement of copyright by reason of the storage at the direction of a user” is affirmed, the District Court's ruling, on summary judgment, that Veoh qualified for the safe harbor protections of Section 512(c) still must be reversed for several independent

reasons.¹² First, the District Court erred in concluding, as a matter of law, that Veoh lacked either actual knowledge of infringing activity on its site or an awareness of facts and circumstances from which infringement was apparent – either of which disqualify it from immunity under subsection 512(c)(1)(A). Second, the District Court erred in holding, as a matter of law, that Veoh “does not receive a financial benefit directly attributable to the infringing activity, in a case in which [it] has the right and ability to control such activity” – an element which would divest Veoh from the protection of the 512(c) safe harbor under subsection 512(c)(1)(B). In both instances, the District Court misconstrued the statute and disregarded evidence sufficient to create genuine issues of fact that precluded summary judgment.

A. Genuine Issues of Fact Precluded Summary Judgment That Veoh Qualified as a Matter of Law for the 512(c) “Safe Harbor” Because Veoh Had Either Knowledge of Infringement or an Awareness of Facts and Circumstances From Which Infringing Activity Was Apparent Under Subsections 512(c)(1)(A)(i) and (ii)

Section 512(c)(1)(A) of the DMCA specifies that a service provider qualifies for immunity from monetary relief only if the service provider:

¹² Due to space constraints, in this brief UMG focuses on errors in the District Court’s ruling concerning subsections 512(c)(1)(A) and (B). The District Court also erred in holding that no genuine issues of fact existed as to whether Veoh satisfied the requirements of subsection 512(c)(1)(C) relating to the expeditious removal of infringing works. UMG also presented extensive evidence to the District Court that Veoh failed to reasonably implement a repeat infringer policy. The District Court’s construction of the statute and its selective consideration of the evidence warrant reversal on these issues too.

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

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

The decision below unduly restricts the circumstances in which a service provider can be deemed to have actual knowledge of infringement, and, perhaps more egregiously, eviscerates the scope of subsection (c)(1)(A)(ii) by setting a standard for “red flag” awareness that leaves no space whatsoever between “awareness” and “actual knowledge.”

1. The District Court improperly construed the knowledge requirement to render it meaningless

In construing the knowledge elements of Section 512(c), the District Court stripped the statutory language of all meaning. In fact, the District Court’s opinion never specifies what constitutes actual knowledge within the scope of Section 512(c)(1)(A)(i) and nowhere identifies what standard it is relying on. It merely characterized certain evidence presented by UMG as insufficient as a matter of law. For example, the District Court dismissed as insufficient to create a triable fact of actual knowledge evidence of Veoh’s acknowledgement that it knew it was hosting on its servers thousands of infringing videos, including an entire category of content – music – for which it had no license from *any* major music company. [RE 188.] The District

Court issued this holding notwithstanding the fact that this Circuit specifically identified comparable admissions as evidence of actual knowledge in *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).¹³

The District Court reasoned that such evidence fell short of proof of actual knowledge, relying not on any holding from this Circuit or any other construing section 512(c)(1)(A), but on this Court's broad statement in the *CCBill* case – made with respect to a separate subsection of the DMCA (*i.e.*, that defining what constituted a sufficient “take down” notice under Section 512(c)(3)) – that “[t]he DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of the copyright.” *Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1113 (9th Cir. 2007). But this Court's observations made in the context of evaluating the sufficiency of admittedly incomplete notices of infringement in *CCBill* is inapposite to prescribing what evidence constitutes a service provider's own

¹³ One of the more curious observations of the District Court was that even if Veoh's “founders, employees, and investors knew that widespread infringement was occurring on the Veoh system,” that would not constitute knowledge that precludes a limitation on liability because “[n]o doubt it is common knowledge that most websites that allow users to contribute material contain infringing items.” [RE 191-92.] Under the District Court's logic, the more ubiquitous the infringement is, the more it may be ignored.

awareness of infringing activity on its servers. Much less is it a basis for restricting the otherwise clear language of subsection (c)(1)(A)(i) regarding knowledge that “material or an activity using the material on the system or network is infringing.”¹⁴

Other than to characterize the requirement of Section 512(c)(1)(A)(ii) as “a high bar” [RE 191], the District Court likewise did not define what constitutes an “aware[ness] of facts or circumstances from which infringing activity is apparent,” otherwise known as “red flag” knowledge. *See* S. REP. 105-190, *44. Instead, aside from improperly selectively parsing some of the evidence submitted by UMG (*see* pp. 69-70 *infra*), the District Court’s approach to construing the statute was to observe what could not constitute “red flag” knowledge as a matter of law. Specifically, the closest the District Court came to articulating a standard was its reference to the *CCBill* opinion

¹⁴ As it cited no other precedent from this Circuit or any other in its discussion of the actual knowledge requirement, the District Court implicitly recognized that few courts have meaningfully analyzed the issues presented here. The small handful of district courts to consider issues arising under the DMCA have not provided meaningful analysis of the circumstances presented here, which involve the application of the DMCA’s knowledge requirements to the actual operator of an internet site displaying and distributing infringing material on its *own system*. For example, in *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004), the only other precedent cited by the District Court’s opinion, the court considered similar claims about a third party offering copyrighted photographs for sale through the Amazon system. The infringing content was not displayed or distributed on the defendants’ own internet site. Likewise, in *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001), and *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003), the court considered the application of the DMCA to allegations of infringing conduct where the defendants did not actually host or distribute the copyrighted work on

that: “*CCBill* teaches that if investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags.’” [RE 187.] Again, advertent to *CCBill* but citing no specific language to this effect from that opinion, the District Court went on to say that “that the burden is on the copyright holder to provide notice of allegedly infringing material, and that it takes willful ignorance of readily apparent infringement to find a ‘red flag.’” [*Id.*] This “willful ignorance of readily apparent infringement” test finds no support in the text of the DMCA or in any decision construing that statute. Another District Court decision in the Central District has already suggested that this standard is inconsistent with the language and intent of the DMCA. *See Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661, *63 (C.D. Cal. Dec. 21, 2009) (referring to this test as “stringent” and holding that awareness that infringing material was available on the defendant’s website was sufficient to support a finding of knowledge under the DMCA). Moreover, the District Court’s approach here goes so far as to contradict the clear statement by the Seventh Circuit 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).

their own systems. None of these cases provides meaningful insight for purposes of

The District Court’s interpretation is impossibly narrow. It eviscerates any distinction between subsections (c)(1)(A)(i) and (ii) and thereby strips all meaning from the latter provision. By including subsection (A)(ii), Congress clearly contemplated that something less than actual knowledge of infringement is sufficient to trigger an obligation to remove material or face monetary liability. But if “red flag” “facts and circumstances” are those that require no “investigation” [RE 187], it is difficult if not impossible to conceive of *any* “red flag” facts or circumstances that do not also qualify as “actual knowledge” of infringement—despite the fact that subsections 512(c)(1)(A)(i) and 512(c)(1)(A)(ii) create separate standards. Notably, the District Court’s standard, to the extent it had one, is flatly inconsistent with Congress’ intent when it enacted the DMCA. Congress expressly stated that while a service provider may not be obliged to search for suspicious information in the first instance, “[o]nce one becomes aware of such information [] one may have an obligation to check further.” H.R. REP. No. 105-551(I), *26.

The District Court appears to have reached its erroneous interpretation of Section 512(c)(1)(A)’s knowledge requirement backwards; to wit, by assuming that the DMCA was intended to protect the kind of service offered by Veoh and by crediting broad precatory language from the statute’s legislative history

resolving the issues presented here.

over the specific language of the statute. The District Court assumes that infringement-riddled websites like Veoh were the intended beneficiaries of the limitation on liability by stating that if such awareness were sufficient, “the DMCA safe harbor would not serve its purpose of ‘facilitat[ing] the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.’” [RE 192.] Of course, the District Court cited no evidence for its *ipse dixit* fact-finding that allowing Veoh to massively infringe copyrights is somehow good for the development of the internet. These claims are often stated without support. To the contrary, a recent analysis demonstrates that the enforcement of copyrights (and other intellectual property rights) does not stifle innovation but leads to responsible innovation that does not serve solely to make illegal activity easier. *See generally*, Peter. S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 Colum. J.L. & Arts 375 (2009).¹⁵

¹⁵ Additionally, any suggestion that imposition of responsibility for copyright infringement will somehow prevent technological development ignores the fact that such requirements already exist in many other countries. *See* Ginsburg, *Separating the Sony Sheep From The Grokster Goats: Reckoning The Future Business Plans Of Copyright-Dependent Technology Entrepreneurs*, 50 Ariz. L. Rev. 577, 602-608 (2008). In this article, Professor Ginsburg discusses multiple decisions in European Union countries holding websites similar to Veoh (including MySpace, DailyMotion, and Google Video) accountable for copyright infringement under European rules analogous to the DMCA. Given the international nature of the internet, website operators like Veoh already must undertake the kind of steps that Veoh and the District Court incorrectly suggest would cripple the internet.

The District Court's cramped conclusion that nothing short of receiving take-down notifications is sufficient to confer actual or red-flag knowledge on an otherwise infringing service provider creates extreme, unworkable, and illogical consequences for the growth of the internet, or at least the expansion of legitimate activity using intellectual property on the web. Under the District Court's view, UMG, and indeed any other owner of rights in a catalog of copyrighted works, must incur the enormous expense of constantly monitoring Veoh's internet site to identify infringing content and request its removal in order to protect their property. And the task is not limited to monitoring Veoh alone. Rather, it is geometrically larger since thousands of comparable websites must also be monitored. The task is ultimately Sisyphean; because Veoh's site, like others', is dynamic and changes day-to-day or hour-to-hour as users upload more material, the task of identifying and sending notifications requesting the removal of copyrighted works would amount to an unending version the children's game of "Whack-A-Mole."

The allocation of the financial burdens and incentives of such a regime is also perverse. In the "knowledge" regime posited by the District Court, UMG and other copyright holders would incur the enormous expenses of endlessly policing the infringing websites without receiving any compensation for the display and distribution of their works. Conversely, Veoh (or any comparable

site), so long as it remained only generally aware that its site was displaying and distributing hundreds or thousands of copyrighted works of others, could reap financial benefits from its use of these copyrighted works by contemporaneously displaying paid advertising on the web pages that display those works. UMG respectfully submits that Congress did not intend to so nonsensically allocate the costs and benefits of policing and profiting from the use of copyrighted works on the internet.

2. UMG presented evidence of Veoh's knowledge to preclude summary judgment

Not only was the District Court's construction of the meaning of Section 512(c)(1)(A)(i) and (ii) erroneous, so too was its approach to examining the evidence presented in the context of a summary judgment motion. Under any fair interpretation of the statute, or even the District Court's equation of "red flag" knowledge with "willful ignorance," UMG presented sufficient evidence to raise a genuine issue of material fact precluding summary judgment of Veoh's eligibility for the safe harbor under the 512(c)(1)(A).

Viewed in the light most favorable to UMG, as required under prevailing summary judgment standards (*see Hunt v. Cromartie*, 526 U.S. 541, 552 (1999)), UMG's proof demonstrated far more than knowledge that "most websites that allow users to contribute material contain infringing items," as the District Court blithely commented. [RE 192.] Rather, UMG's proof

showed that Veoh was aware that its site was a haven generally for copyrighted works uploaded by Veoh's users; that Veoh was aware that its servers hosted a massive, unauthorized library of copyrighted music, and in particular, music videos, for which Veoh had no license from any recorded music company (for the sound recording copyrights) or any music publishing company (that might have authorized the hosting of compositions); and that Veoh was even aware that its servers hosted UMG's own copyrighted works. [*See pp. 22-26 supra.*]

Beyond that, UMG's evidence also showed that Veoh had the ability to identify copyrighted works on its system, using either its own tools and resources, or tools available from the day it launched its service that can specifically identify for it thousands of individual infringing videos hosted on its servers. [*See pp. 24-26 supra.*] Veoh chose not to employ these resources so as to remain willfully ignorant of specific instances of infringement, all in furtherance of its stated position that it was only obliged to take down infringing works if it received formal take-down notifications specifically identifying them.

More specifically, UMG submitted the following evidence: From the time its site debuted on the web, Veoh's executives acknowledged that its service hosted infringing content. [RE 797-98 (143:4-144:15), 799 (147:13-24), 800-01 (149:13-150:23), 804-06 (191:16-192:11, 193:3-23), 1225, 1226-

32.] In an interview one week after Veoh’s “official debut,” its founder and chief executive, Dmitry Shapiro, admitted that Veoh was already hosting numerous infringing videos. [RE 1226-32.] UMG submitted evidence that other Veoh employees were well aware that the site was riddled with infringing material. One wrote an email speculating that “unauthorized full length movies, full length TV episodes, and music videos” were “a majority of Veoh content?” [RE 1233-34.] She was advised by Veoh’s Director of Channel Production: “You are correct.” [*Id.*]¹⁶

Major media outlets reported on Veoh’s extensive piracy. The *New York Times* labeled Veoh “among the least aggressive video sharing sites in fighting copyrighted content” and “a haven for pirated content.” [RE 1242-45.] NBC Universal refused to do business with Veoh, stating to Veoh that it was “among the worst in violating copyrights and abetting piracy.” [RE 988 (138:7-20), 989 (140:4-25), 1246.] Even Veoh’s users sent emails to Veoh advising it of the obvious truth that: “You know what, many videos are still on Veoh just because no one reports them. . . . Can’t you see that they upload all without

¹⁶ Veoh’s owners – members of its board of directors – also knew of the infringement perpetrated on Veoh. The Chief Executive of The Walt Disney Company wrote to Veoh owner and board member Michael Eisner (and the former Chief Executive of The Walt Disney Company), stating that “i’m told there are hundreds of disney-owned videos available and i am watching the entit [sic] cinderella III right now! lost is up, episodes from the disney channel . . . you name it! . . . this is egregious!” [RE 1236.] Another media executive wrote Eisner to note that he had viewed a full copy of a feature motion picture on Veoh and to caution Veoh to “be careful.” [RE 1407-09]

copyrights? Or do you just pretend that you see nothing?” [RE 1237-38.]

Another wrote to Veoh that “as I have been surfing your website I have come across **PLENTY OF COPYRIGHT INFRINGEMENT** [sic] **MATERIAL**,” and proceeded to point out examples. [RE 1239 (emphasis in original).]

Veoh’s awareness of rampant infringement was not limited to copyrighted works generally. The proof was that Veoh knew it was hosting and distributing thousands of copyrighted works that both its users and Veoh itself identified as music – UMG’s business – as to which Veoh lacked permission from any major recorded music or music publishing company to host and distribute. [RE 369 (75:20-24), 807 (201:15-25), 808 (203:1-16), 809 (205:1-23), 813-14 (221:5-222:2), 946 (174:3-24), 978 (31:2-5), 979-83 (45:21-47:11, 48:23-49:11), 984-87 (52:20-53:9, 54:21-55:2), 1268.]¹⁷

Veoh not only knew that it hosted a category of music, but it affirmatively applied a “tag” to thousands of videos on its service, identifying each as a “music video” in order to make Veoh.com webpages appear in response to Google searches for music videos. [RE 367 (¶ 9), 1415-16 (¶ 4),

¹⁷ The District Court erroneously suggested that Veoh had some permission from Sony Music to host its content. This was false and unsupported by the record. While Veoh posted on its website what were essentially links (embeds) to videos on a Sony Music site, Veoh admitted that it had no license from Sony to host any of its content on the Veoh system. [RE 979-83 (45:21-47:11, 48:23-49:11).] In making this finding the District Court improperly overstepped its obligation to accept the evidence of the non-moving party (UMG) as true. *See Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

1456-98, 1535-36 (¶¶ 43-45), 1707-08 (Interrogatory No. 15).] And perhaps there was no better evidence that Veoh knew it was hosting the copyrighted music of established recording artists – whose works Veoh knew were covered by copyrights and not authorized by any license – than Veoh’s specifically purchasing search terms through the Google AdWords program using the artists’ names and the titles of their works. [RE 374-76 (111:20-113:4), 389-90 (Interrogatory No. 25), 393 (90-91) (50 Cent, “In Da Club”), 395 (148-50, 158-84) (Avril Lavigne, “Complicated,” “Girlfriend”), 399 (348-53) (Britney Spears, “Baby One More Time”), 407 (760-66) (Justin Timberlake, “Sexy Back”), 414 (1076-77), 587 (Interrogatory No. 16), 596 (50 Cent search terms), 604-05 (Avril Lavigne search terms), 613-14 (Britney Spears search terms), 665 (Justin Timberlake search terms), 1537 (¶ 47).] These artists included UMG’s artists. For example, Veoh purchased the search term to “50 cent candy shop music video,” to draw users to its site – something that *only* made sense if Veoh knew that its site was hosting either videos by the UMG recording artist “50 cent” or his “Candy Shop” music video, or both.¹⁸ [*Id.*]

¹⁸ In its summary judgment reply papers, Veoh disputed the import of this evidence, suggesting that it believed it might have had permission to host such videos. UMG, of course, had no opportunity to respond to such reply evidence, and it was error for the District Court to consider it. *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (S.D. Cal. 1999) (“It is well accepted that raising of new issues and submission of new facts in a reply brief is improper.”) (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)). Further, in crediting Veoh’s Reply assertions, the District Court improperly resolved a disputed fact issue in Veoh’s favor on summary judgment. At a minimum, the facts as

UMG also submitted ample proof demonstrating directly Veoh's willful blindness, or proof from which such blindness could reasonably be inferred. For example, UMG submitted evidence of multiple professional music videos on Veoh's service that were copied from MTV or other broadcast television and still bore the copyright notice and indicia at the beginning of the video – including the name of the artist, the name of the song, the name of the record label, and copyright information. [RE 950-51, 1269, 1371, 2137, 2140-41; *see also* Appendices 1-A and 1-B.] Veoh completely ignored such information in allowing the videos on its site. Instead, its founder and CEO testified that he would not remove such videos from Veoh's service. [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 chose to ignore obvious indicia of copyright infringement because it sought to profit from such infringement.

Veoh also deliberately ignored its massive index of information about the videos on its service and deliberately chose not to use for itself tools it created to help users find music videos. Specifically, Veoh collected extensive information about each of the videos on its service so that they could be

presented would support competing inferences about Veoh's knowledge of hosting infringing content. Even if the underlying facts were undisputed, summary judgment was

categorized and so that users could more effectively search for the content that they desired. [RE 2032 (¶¶ 5-6).] To this end, for each video, Veoh collected information including a title for the video, keywords, a category, and other information. [RE 761 (36:11-20), 770-71 (69:16-70:2), 2032 (¶ 5).]¹⁹ Veoh developed sophisticated tools for users to search its collection of videos to find particular content, and even tools to recommend additional videos to users based on videos they had already accessed. [RE 393-94 (94-98, 100, 107) (UMG's copyrighted works), 793-94 (94:13-95:22), 907 (23:2-4), 921 (235:11-236:10), 930-34 (278:17-279:11, 280:22-282:22), 950-51 (recommending UMG's copyrighted works), 1269 (recommending UMG's copyrighted works), 1287 (984-85), 1811-15 (¶¶ 11-23).] Thus, if a user had searched for a copyrighted music video from one UMG artist, Veoh's tools could suggest other related videos, including other infringing videos. [*Id.*] Veoh chose, however, to ignore all of this information and all of these tools in order to avoid finding evidence of infringement on its service.

not appropriate because those facts could support divergent inferences. *See Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985).

¹⁹ Notably, other online services, such as Napster and Grokster, have been held to have been aware of copyright infringement, both by this Court and by the Supreme Court, even though they possessed far less available information about infringement than Veoh. Napster and Grokster provided only directories of files – the files themselves resided on the computers of individual users, and were transferred solely between those users. *Napster*, 239 F.3d at 1011-12; *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-21 (2005). Veoh, by contrast hosts all of the videos on its own computers and servers.

There was still more evidence of willful blindness. As early as June 22, 2006, Veoh received take down notices from the RIAA on behalf of UMG and other music companies that identified hundreds, indeed thousands, of web pages on its site displaying copyrighted music videos of UMG and others. [RE 1001-56.] Veoh trumpets the fact that upon receiving these notices, it took down the specifically identified videos. But even if this were true, Veoh knew that its service was a dynamic and growing one. The content of its site was changing day-by-day as users uploaded more videos. Aware from its receipt of a take-down notice that its site was permeated with hundreds of music videos by UMG's artists such as Rihanna, U2, Eminem, 50 Cent, and others, Veoh never used the indexing information and search tools it created to review its site for videos from these same artists on June 22, 2006, or any other date thereafter.

Moreover, there were tools available from third parties in the marketplace that Veoh could have used from the day it launched its service in 2006 to help it identify the specific copyrighted music on its site and cleanse it of infringement. One such product, a digital filter know as Audible Magic [RE 1815-27 (¶¶ 24-29)], was not used by Veoh until years after Veoh's launch. [RE 860-63 (141:15-144:23), 887-89 (25:22-26:3, 26:9-27:9), 1121-1123,

[RE 2034-35 (¶¶ 14, 22).] It has access not only to the listing of videos, but to every video

1980-81 (¶ 15).] And even after Veoh licensed and deployed it in October 2007 to inhibit users from uploading copyrighted music videos to its site, Veoh intentionally delayed running this filter over its existing library of works until June 2008, specifically to avoid the discovery of copyrighted material. [RE 333-34 (¶¶ 115-17), 772-73 (102:20-103:7).] This delay resulted in the unauthorized display and distribution of thousands of infringing videos, hundreds of thousands of times. [RE 334 (¶ 118), 1417 (¶ 6).] When it finally ran the filter, Veoh removed more than 60,000 unauthorized videos – all of which were on display and available for distribution during the lengthy delay. [Id.] The District Court held that “it takes willful ignorance of readily apparent infringement to find a ‘red flag.’” [RE 187.] Even were this the correct standard (it is not), UMG’s evidence demonstrated more than a genuine issue of fact on this issue.

The District Court’s opinion reflects an approach to reviewing UMG’s proof that is improper. On several occasions, the District Court purported to examine and evaluate, one-by-one, some (but not all) of these facts. In doing so, it appropriated to itself the fact-finding mission of the trier-of-fact, something it was not entitled to do on summary judgment.²⁰ Moreover, never

file as well. [RE 2032 (¶¶ 5-6), 2034-35 (¶¶ 14, 22).]

²⁰ For example, the District Court acknowledged that Veoh purchased the titles of UMG-owned music as search terms from search engines such as Google. [RE 189.] The

did the District Court consider this evidence as a whole, in its totality, to determine whether it amounted to “circumstances from which infringing activity is apparent,” as required by section 512(c)(1)(A)(ii).

The record evidence relating to Veoh’s knowledge – actual or “red flag” – of infringing activity precludes summary judgment for Veoh. Indeed, the evidence supports a finding of actual knowledge under Section 512(c)(1)(A)(i). At a minimum, however, a reasonable trier of fact could conclude that the accumulation of such information constitutes an “awareness of facts and circumstances from which infringing activity is apparent” under Section 512(c)(1)(A)(ii). Hence the District Court’s order granting summary judgment must be reversed.

B. UMG Presented Sufficient Evidence of Veoh’s Receiving a Direct Financial Benefit from Infringement It Had the Right and Ability to Control to Preclude Summary Judgment

A service provider is not entitled to Section 512(c)’s limitation on liability where it receives a “financial benefit directly attributable to infringing activity, in a case in which [it] has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B). In construing this provision, the District

District Court then stated that “Veoh, however, presented rebuttal evidence that the five artists referred to in the search terms UMG identified in the SGI are Sony BMG artists whose videos Veoh streams with SonyBMG’s consent.” [*Id.*] Not only was the District Court taken in by Veoh’s purported explanation (which in fact is no excuse at all), it simply resolved, improperly, an evidentiary dispute in favor of the moving party, not the party opposing summary judgment.

Court created a standard that has no support in the DMCA or in case law. Moreover, the District court erred when it disregarded the substantial evidence produced by UMG that, at a minimum, was more than sufficient to raise a genuine issue of material fact.

1. UMG introduced evidence of Veoh’s “right and ability to control” infringing activity

Since *Napster*, “[t]he ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).²¹ Thus a 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.” *Perfect 10, Inc. v. Amazon.com*, 487 F.3d 701, 730 (9th Cir. 2007). For example, Napster’s “ability to locate infringing material listed on its search indices[] and [its] right to terminate users’ access to the system” confirmed its right and ability to control infringement. *Napster*, 239 F.3d at 1024. Notably, this Circuit has held that this “reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.” *Id.* at 1023.

²¹ Courts use “right and ability to supervise” and “right and ability to control” interchangeably. See, e.g., *Perfect 10, Inc. v. Visa Int’l. Svc. Ass’n.*, 494 F.3d 788, 805 (9th Cir. 2007) (“For vicarious liability to attach, however, the defendant must have the right and ability to supervise and control the infringement . . .”).

The District Court agreed that Veoh had *this* right and ability. [RE 193-94.] It acknowledged that the infringing material resided on Veoh’s system; that Veoh could have identified such material by filtering or otherwise searching its system; and that Veoh had the ability to remove such material. [*Id.*] In deposition, Veoh too acknowledged that it had the right and ability to control infringement on its service. [RE 776 (289:8-17).]

But despite these concessions, the District Court held that Veoh did not have the “right and ability to control infringement” on its system for purposes of the DMCA. It held that the standard articulated in *Napster* and other Ninth Circuit precedent does not control for purposes of Section 512(c)(1)(B); that the DMCA requires “something more” than the Ninth Circuit’s standard; and that UMG’s evidence was therefore insufficient to create a triable issue of material fact on Veoh’s “right and ability” to control infringement. The District Court’s holding was error and should be reversed.

Congress intended Section 512(c)(1)(B) to track the elements of vicarious liability under long-standing copyright principles. *See* H.R. REP. 105-551(I) at *25-26 (“The financial benefit standard in subparagraph (B) is 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.”).²² This Court affirmed Congress’s intent when it held that “‘direct financial benefit’ should be interpreted consistent with the similarly-worded common law standard for vicarious copyright liability.” *CCBill*, 488 F.3d at 1117. This interpretation accords with the “well established rule of construction that where Congress uses terms that have accumulated settled meaning under common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.” *Id.* (quoting *Rossi v. Motion Picture Ass’n of Am. Inc.* 391 F.3d 1000, 1004 n.4 (9th Cir. 2004)). As with “direct financial benefit,” so too with “right and ability to control:” the term has “accumulated settled meaning under common law,” and courts should infer that Congress meant to incorporate that meaning in the DMCA. The House Report and *CCBill* therefore confirm that the standard for “right and ability to control” under vicarious liability and the DMCA are the same, and thus *Napster* and other relevant Ninth Circuit case law control for purposes of Section 512(c)(1)(B).

The District Court disagreed. It cited three reasons for departing from this Circuit’s precedent (and in particular, departing from *CCBill*, which it

²² The District Court discounted this legislative history because it addresses an early version of the DMCA. [RE 198.] This was error. The statutory language addressed in this

embraced elsewhere in its analysis) and requiring “something more” for purposes of the DMCA. First, it suggested that adopting the *Napster* test would render the phrase “right and ability to control” redundant “because the ‘ability to block infringers’ access for any reason whatsoever’ is already a prerequisite of satisfying the requirements of section 512(i)(1)(A).” [RE 198.] But UMG did not “urge” the District Court to construe “right and ability to control” as requiring nothing more than “block[ing] infringers’ access [to the service] for any reason whatsoever,” nor is that the *Napster* test. [*Id.*] Rather, UMG noted – in accordance with *Napster* and *Amazon.com* – that “right and ability to control” also requires that a service provider be capable of detecting infringement, which is not an element of section 512(i)(1)(A) and thus not redundant. UMG then identified the myriad tools Veoh had to detect infringement, including, for example, automated filtering technology and its index of metadata, or, for that matter, human searching for copyrighted material, as Veoh did for pornographic files on its site. [*See pp. 24-26 supra.*]

Second, the District Court suggested that adopting the vicarious liability standard for Section 512(c)(1)(B) would disqualify most otherwise eligible service providers from the Section’s limitation on liability. According to the District Court, service providers often have the “ability to block infringers’

portion of the House Report did not change, and hence Congress’s statements remain

access to” their system “for any reason whatsoever,” *Napster*, 239 F.3d at 1023, and could not therefore seek protection under the DMCA if *Napster* controlled. [RE 194.] This analysis ignores the subsection’s companion requirement: that a service provider forgo any direct financial benefit from infringing activity before claiming the limitation on liability. *See* 17 U.S.C. 512(c)(1)(B). If it does, the service provider may still qualify for safe harbor under Section 512(c)—even if it has the right and ability to control infringement. Subsection 512(c)(1)(B)’s dual requirements reveal Congress’s intent to withhold the liability limitation from those reaping financial benefits from infringement. Businesses deriving revenue from infringement do not deserve unqualified protection. Rather, to avoid infringement liability, businesses that receive a direct financial benefit from infringement “must . . . exercise[]” their “reserved right to police . . . to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.” *Napster*, 239 F.3d at 1023. This, of course, makes perfect sense.

The DMCA’s legislative history also confirms that this was Congress’s intent. The congressional reports primarily clarify what amounts to a direct financial benefit (*e.g.*, money that accrues with each act of infringement) and what does not (*e.g.*, a flat fee for server space). *See, e.g.*, S. REP. No. 105-190,

relevant.

*44-45. The reports do not similarly detail what amounts to an ability to control infringement and what does not. This focus confirms Congress’s view that whether a service provider derives a direct financial benefit from infringement is the touchstone for determining conformity with subsection 512(c)(1)(B). The “right and ability to control” requirement obligates a service provider to “exercise its right to police to the fullest extent” when it derives a financial benefit from infringement. The District Court’s reading encourages service providers to structure their system in a manner that avoids detection of infringement—allowing them to profit from it without fear of liability. That was not Congress’s objective.

The District Court offered one additional reason for departing from the vicarious liability standard: to wit, certain language in Section 512(m). [RE 194-95.] Titled “Protection of Privacy,” Section 512(m) provides that “[n]othing in this section shall be construed to condition the applicability of subsections (a) through (d) on – (1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i)” According to the District Court, Section 512(m) relieves the service provider of any obligation to affirmatively address infringing activity. [RE 194-95, 198.] The District Court suggested that any such effort –

including the use of filtering technology – amounts to “monitoring” and is thus not required by the DMCA. [RE 194-95.]²³

The District Court’s reading of Section 512(m) is inconsistent with the provision’s purpose. The title of this provision (“Protection of Privacy”) and related legislative history indicate that Congress intended Section 512(m) to provide that web hosts and similar services need not monitor websites or other content belonging to third parties using their service – and thus violate their privacy – to avoid liability under the DMCA. *See Almendarez-Torres v. U.S.*, 523 U.S. 224, 234 (1998) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute”) (internal citation omitted); *U.S. v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (“Titles are also an appropriate source from which to discern legislative intent”); S. Rep. 105-190, 1998 WL 239623, *55 (“[Then] Subsection (l)-Protection of privacy.-Subsection (l) is designed to protect the privacy of Internet users. This subsection makes clear that the applicability of subsections (a) through (d) is no way conditioned on a service provider: (1) monitoring its

²³ In reaching this conclusion, the District Court relied on the lower court’s analysis in *Ellison v. Robertson*—which this Court did not adopt on appeal. [RE 196-97.] Further, this holding conflicts with the District Court’s approval of *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, which determined that a service provider had the right and ability to control infringement by virtue of its “pre-screen[ing] sites before . . . allow[ing] them to even use its age verification services” and “prohibit[ing] the proliferation of identical sites.” [RE 197.] These activities qualify as “monitoring” under the District Court’s understanding of Section 512(m), though the District Court nowhere acknowledges this inconsistency.

service . . . or (2) . . . removing or disabling access to material if such conduct is prohibited by law, *such as the Electronic Communications Privacy Act*) (emphasis added).

Moreover, the District Court's reading of Section 512(m) negates Section 512(c)(1)(B). Any exercise of a service provider's "right and ability to control infringement" will amount to monitoring and thus run afoul of the District Court's understanding of Section 512(m). Hence no service provider will have the "right and ability to control infringement." No other court has used Section 512(m) to negate a whole provision of the DMCA, and at least one distinguished commentator has warned against doing so. *See Ginsburg, Separating the Sony Sheep From The Grokster Goats: Reckoning The Future Business Plans Of Copyright-Dependent Technology Entrepreneurs*, 50 Ariz. L. Rev. 577, 598 (2008) ("§ 512(m)'s dispensation of service providers from 'affirmatively seeking facts indicating infringing activity,' should not entitle the service provider to remain militantly ignorant"); *see also Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 877 (1991) (expressing "'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'" (quoting *Pa. Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990))).

Nor does the DMCA require that courts read Section 512(m) to swallow subsection 512(c)(1)(B), as the District Court did. In accordance 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. For example, a service provider that charges a flat fee for web hosting – a fee keyed solely to the amount of server space used – does not obtain a direct financial benefit from infringing conduct. It could therefore qualify for the Section's limitation on liability without monitoring—assuming it satisfies the Section's other requirements (*e.g.*, it expeditiously removes infringing material of which it is aware).

Put differently, the District Court's analysis of Section 512(m) improperly conflates “condition” with “evidence.” The ability to identify infringing content and failure to do so can *evidence* a service provider's “right and ability to control infringement” without *conditioning* Section 512(c)'s protection on monitoring. The ability to use automated filtering technology may, for example, evidence a service provider's right and ability to control infringement, but use of such technology is not a “condition” of Section 512(c)'s applicability. As set forth above, a service provider can forgo using such technology and still qualify for Section 512(c)'s liability limitation if it does not derive a direct financial benefit from infringing activity. When the

District Court ignored the distinction between *conditioning* Section 512(c) on monitoring, and considering filtering (for example) *as evidence of* a service provider's right and ability to control infringement, it rendered Section 512(c)(1)(B) a dead letter. If the ability to affirmatively identify and remove infringing material from a service cannot amount to a "right and ability to control" that infringement, then the language is meaningless. The District Court has created a test incapable of satisfaction.

The District Court's reading of Section 512(m) similarly guts subsections 512(c)(1)(A)(ii) and (iii), which require a service provider to investigate infringing activity made apparent from surrounding facts and circumstances. Under the District Court's understanding of Section 512(m), such investigation would amount to monitoring. Again, the DMCA does not require this reading. Section 512(m) refers to "*affirmatively* seeking facts indicating infringing activity." Hence a service provider may not – in the absence of a suggestion or suspicion of infringement – have an *affirmative* obligation to investigate. But Congress stated clearly that suspicions or awareness of infringement triggers a duty to investigate. H.R. REP. No. 105-551(I), *26 ("[o]nce one becomes aware of such information [] one may have an obligation to check further"). UMG presented ample evidence of such suspicions or awareness by Veoh. [See pp. 22-24 *supra*.]

The District Court created a “right and ability to control” standard incapable of satisfaction. It then used that standard to dismiss UMG’s evidence as insufficient to create a triable issue of material fact. This was error: Section 512(c)’s “right and ability to control” element tracks vicarious liability’s same standard, and UMG presented evidence sufficient to create a triable issue on Veoh’s failure to meet that standard. Holding otherwise, as the District Court did, will guarantee that infringement occurs without redress, and that content holders will be wary about making digital content available. That was not Congress’s goal in enacting the DMCA.

2. UMG introduced evidence of Veoh’s “direct financial benefit” from infringing activity

A direct financial benefit exists where there is a “causal relationship between the infringing activity and any financial benefit a defendant reaps regardless of *how substantial* the benefit is in proportion to a defendant’s overall profits.” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (emphasis in original). Veoh did not and could not meaningfully dispute its direct financial benefit from infringing activity, nor did the District Court reach this issue. [RE 175-203.] Veoh sells advertising alongside infringing videos. [RE 330 (¶ 97), 2134-41.] In connection with each advertisement, an advertiser pays Veoh an amount tied to the number of views of the accompanying video. [RE 1522-24 (¶¶ 8-15), 1527-32 (¶¶ 25-36).] The more

times Veoh displays and performs the infringing video, the more revenue it collects. [*Id.*; *see also* RE 330 (¶ 99).] Hence Veoh earned revenue from displaying content, including infringing content. The more infringing content Veoh displayed, and the more people to whom Veoh displayed it, the more money Veoh made. This evidence was sufficient to create a triable issue of material fact of Veoh's direct financial benefit from infringing activity.

IV. Conclusion

For all of the reasons set forth above, the District Court's orders denying UMG's motion for partial summary judgment and granting Veoh's motion for summary judgment should be reversed.

Dated: April 20, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, and as set forth in Appellant's concurrently filed Motion to Exceed the Type-Volume Limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that an enlargement of this brief's size is warranted under Ninth Circuit Rule 32-2. I further certify that the attached opening brief is proportionally spaced, has a typeface of 14 points or more, and contains 18,320 words.

Dated: April 20, 2010

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, UMG identifies *UMG Recordings, Inc. et al. v. Shelter Capital Partners, LLC, et al.*, Case No. 09-55902, as a related case pending in this Court. That case “arise[s] out of the same or consolidated cases in the district court.” See Circuit Rule 28-2.6(a).

ADDENDUM RE: 17 U.S.C. § 512(c)

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)

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

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

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

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

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to,

the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.— The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the

designated agent of a service provider that includes substantially the following:

- (i)** A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii)** Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii)** Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv)** Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v)** A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)

(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

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I hereby certify that on April 20, 2009, 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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A handwritten signature in black ink, appearing to be 'CRB', written over a horizontal line.

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