

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FLAVA WORKS, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 10-cv-06517
)	
MARQUES RONDALE GUNTER)	The Hon. John F. Grady
dba MYVIDSTER.COM, et al.,)	
)	Magistrate Judge Michael T. Mason
Defendants.)	

**DEFENDANT VOXEL DOT NET, INC.’S STATEMENT OF UNDISPUTED MATERIAL
FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendant VOXEL DOT NET, INC. (“Voxel”) and, pursuant to Local Rule 56.1(a), respectfully submits in support of its Motion for Summary Judgment its Statement of Undisputed Material Facts to which there is no genuine dispute.

I. DESCRIPTION OF PARTIES

A. Plaintiff

1. Plaintiff FLAVA WORKS, INC. (“Flava Works”) is a corporation incorporated in the State of Florida with its principal place of business at 2610 N. Miami Ave., Miami, Florida 33127, and with a business address in the State of Illinois at 933 W. Irving Park Rd., Ste. C, Chicago, Illinois 60613. Compl. ¶ 3.

B. Defendants

2. Defendant Voxel is a web hosting and technology company. Aff. of Matthew Toback ¶ 5 (Ex. A). Voxel serves over 1,000 clients, ranging from startups to international clients some of which make up the Fortune 5000. Id. Voxel is a

corporation incorporated in the State of Delaware with its principal place of business at 29 Broadway, New York, New York 10006. Id.

3. Defendant Marques Rondale Gunter (“Gunter”) resides in the State of Indiana at 735 Lexington Avenue, Apt. 26, Indianapolis, Indiana 46203 and in the State of Michigan at 21022 Reimanville Avenue, Ferndale, Michigan 48220. Def. Gunter and Def. SalsaIndy, LLC’s Ans. to 3d Am. Compl. ¶ 4. (Doc. No. 58).

4. Defendant Gunter registered the domain name myvidster.com in or around 2006. <http://www.networksolutions.com/whois-search/myvidster.com> (last visited January 11, 2012). Defendant Gunter continues to be the registrant of the domain name myvidster.com. Id.

5. myVidster is the website located at the domain name myvidster.com that “is a social video bookmarking and backup service that lets you collect, share and search your videos.” <http://www.myvidster.com/> (last visited January 11, 2012).

6. Defendant Gunter created, owns, and operates the website MyVidster. Def. Gunter and Def. SalsaIndy, LLC’s Countercl. ¶ 1. (Doc. No. 58).

7. Defendant SalsaIndy, LLC (“SalsaIndy”) is a Limited Liability Company registered in the State of Indiana with a principal business address at 735 Lexington Ave, Unit 26, Indianapolis, Indiana 46203. SalsaIndy, LLC, Secretary of State – Business Division, https://secure.in.gov/sos/online_corps/view_details.aspx?guid=5E13424B-173E-48AA-909D-0544808CB482 (last visited on Jan. 6, 2012). (**Ex. B**).

8. Defendant Gunter is the registered agent for Defendant SalsaIndy. SalsaIndy, LLC, Secretary of State – Business Division,

https://secure.in.gov/sos/online_corps/view_details.aspx?guid=5E13424B-173E-48AA-909D-0544808CB482 (click the first “Go” icon.) (last visited on Jan. 6, 2012). (**Ex. B**).

9. Defendant Gunter, the website myVidster, and Defendant SalsaIndy are hereinafter referred to as the “myVidster Defendants.”

II. JURISDICTION AND VENUE IS PROPER

10. As the Plaintiff has filed claims alleging violation of federal statutes, particularly 17 U.S.C. § 101 et seq. (“Copyright Act”) and 15 U.S.C. 1051, et seq. (“Lanham Act”), this Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338. See generally 4th Am. Compl. (Doc. No. 115). Further, this Court has supplemental jurisdiction of all state-based claims pursuant to 28 U.S.C. § 1367. Id.

11. This Court is the proper venue for this action pursuant to 28 U.S.C. § 1391 as Voxel and the myVidster Defendants have no objections. See Def. Gunter and Def. SalsaIndy, LLC’s Ans. to 3d Am. Compl. ¶ 11. (Doc. No. 58).

III. UNDISPUTED MATERIAL FACTS

A. Voxel’s Relationship with Defendants Gunter and SalsaIndy, LLC

12. Voxel and SalsaIndy entered into a contract on June 6, 2010 for the provision of a dedicated domain server by Voxel to SalsaIndy (“Voxel Contract”). Aff. of Matthew Toback ¶ 6 (Ex. A); Cont., Salsa Indy, LLC and Voxel Dot Net, Inc. (June 6, 2010). (**Ex. C**).

13. Gunter, as SalsaIndy’s agent, executed the Voxel Contract on behalf of SalsaIndy. Aff. of Matthew Toback ¶ 6 (Ex. A); Cont., Salsa Indy, LLC and Voxel Dot Net, Inc. (June 6, 2010). (**Ex. C**).

14. By providing a dedicated server to the myVidster Defendants, Voxel provided the myVidster Defendants with the facilities to autonomously publish and operate the myVidster website. Aff. of Matthew Toback ¶ 8 (**Ex. A**).

15. By providing a dedicated server to the myVidster Defendants whereby they could autonomously publish and operate the myVidster website, Voxel lacked any control over the content on the myVidster website. Aff. of Matthew Toback ¶ 9 (**Ex. A**). Specifically, Voxel lacked the ability to upload or remove any content from the myVidster website. Id.

16. In other words, Voxel lacked direct access to or control over any of the content found on the myVidster website. Aff. of Matthew Toback ¶ 10 (**Ex. A**).

17. In response to notices received pursuant to the Digital Millennium Copyright Act (“DMCA”) regarding the myVidster website, Voxel could only inform the myVidster Defendants of alleged infringements on the myVidster.com website. Aff. of Matthew Toback ¶ 11 (**Ex. A**).

18. On March 6, 2011, Voxel terminated its relationship with SalsaIndy. Aff. of Matthew Toback ¶ 12 (**Ex. A**); Email from Matthew Toback to Marques Gunter (Mar. 6, 2011 4:24 PM) (**Ex. D**).

19. As of the end of March 14, 2011, Voxel no longer provided a dedicated server to SalsaIndy nor hosted the myVidster.com website. Aff. of Matthew Toback ¶ 12 (**Ex. A**).

B. Voxel’s Policies Regarding Copyright Infringement

20. Voxel provides webhosting services to its clients. Aff. of Matthew Toback ¶ 13 (**Ex. A**).

21. Voxel's purpose in providing its webhosting services is not to facilitate copyright infringement. Aff. of Matthew Toback ¶ 14 (**Ex. A**).

22. Further, Voxel has never promoted its services as a means to conduct copyright infringement for others. Aff. of Matthew Toback ¶ 15 (**Ex. A**).

23. Voxel has established a written policy for purposes of responding to notices of alleged copyright infringement ("DMCA Policy") from owners of exclusive rights or persons authorized to act on their behalf ("Copyright Owners"). Aff. of Matthew Toback ¶ 16 (**Ex. A**); see also Acceptable Use, Billing, DMCA, and Privacy Policies – Voxel, <http://web.archive.org/web/20080918103255/http://www.voxel.net/about/policies> (last visited Jan. 11, 2012) (**Ex. E**); DMCA Policy | Voxel Dot Net, New York, Singapore, and Amsterdam, <http://voxel.net/dmca> (last visited Jan. 11, 2012) (**Ex. F**).

24. Voxel's DMCA Policy has been in place, enforced, and on its website since at least 2008. Aff. of Matthew Toback ¶ 17 (**Ex. A**); see also Acceptable Use, Billing, DMCA, and Privacy Policies – Voxel, <http://web.archive.org/web/20080918103255/http://www.voxel.net/about/policies> (last visited Jan. 11, 2012) (**Ex. E**).

25. Voxel's DMCA Policy provides Copyright Owners with the process for submitting a DMCA Takedown Notice ("DMCA Notice") to Voxel. Aff. of Matthew Toback ¶ 18 (**Ex. A**); Acceptable Use, Billing, DMCA, and Privacy Policies – Voxel, <http://web.archive.org/web/20080918103255/http://www.voxel.net/about/policies> (last visited Jan. 11, 2012) (**Ex. E**); DMCA Policy | Voxel Dot Net, New York, Singapore, and Amsterdam, <http://voxel.net/dmca> (last visited Jan. 11, 2012) (**Ex. F**).

26. Under Voxel's DMCA Policy, DMCA Notices will only be accepted if sent by facsimile, regular mail, or, if by prior agreement, electronic mail. Aff. of Matthew Toback ¶ 19 (Ex. A); Acceptable Use, Billing, DMCA, and Privacy Policies – Voxel, <http://web.archive.org/web/20080918103255/http://www.voxel.net/about/policies> (last visited Jan. 11, 2012) (Ex. E); DMCA Policy | Voxel Dot Net, New York, Singapore, and Amsterdam, <http://voxel.net/dmca> (last visited Jan. 11, 2012) (Ex. F).

27. Voxel's DMCA Policy also contains its "repeat infringer policy," which states Voxel will terminate repeat infringers in the "appropriate circumstances." Acceptable Use, Billing, DMCA, and Privacy Policies – Voxel, <http://web.archive.org/web/20080918103255/http://www.voxel.net/about/policies> (last visited Jan. 11, 2012) (Ex. E) (see the heading of "Account Termination"); DMCA Policy | Voxel Dot Net, New York, Singapore, and Amsterdam, <http://voxel.net/dmca> (last visited Jan. 11, 2012) (Ex. F) (see the heading of "Account Termination").

28. Voxel has established a designated agent to receive DMCA Notices ("DMCA Agent") alleging copyright infringement. Aff. of Matthew Toback ¶ 20 (Ex. A); see also Acceptable Use, Billing, DMCA, and Privacy Policies – Voxel, <http://web.archive.org/web/20080918103255/http://www.voxel.net/about/policies> (last visited Jan. 11, 2012) (Ex. E); DMCA Policy | Voxel Dot Net, New York, Singapore, and Amsterdam, <http://voxel.net/dmca> (last visited Jan. 11, 2012) (Ex. F).

29. In 2006, Voxel registered its designated DMCA Agent with the Register of Copyrights. Interim Designation of Agent to Receive Notification of Claimed Infringement, Voxel Dot Net, Inc., (Sept. 1, 2006), <http://www.copyright.gov/onlinesp/agents/v/voxeldot.pdf> (Ex. G).

30. Voxel does not interfere with standard technical measures in relation to copyrights. Aff. of Matthew Toback ¶ 21 (**Ex. A**).

C. Voxel's Relationship with myVidster's Users

31. Voxel has no control over any users of the myVidster website ("myVidster's Users"). Aff. of Matthew Toback ¶ 22 (**Ex. A**).

32. As such, Voxel has no control over the content that myVidster's Users upload to, download from, or share or post on the myVidster.com website. Aff. of Matthew Toback ¶ 23 (**Ex. A**).

33. Specific to this litigation, Voxel has no control over any of Flava Works' material(s) that myVidster's Users have allegedly uploaded to, download from, or shared or posted on the myVidster.com website. Id.

34. None of myVidster's Users pay Voxel directly to use the services found on the myVidster website provided by the myVidster Defendants. Aff. of Matthew Toback ¶ 24 (**Ex. A**).

D. DMCA Notices Received From Plaintiff

December 2, 2010 DMCA Notice

35. On December 2, 2010, Voxel received a facsimile communication from Flava Works entitled "DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act" ("December 2nd Notice"). Facsimile from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc. and Gregory Leighton, Associate, Neal, Gerber & Eisenberg LLP. (Dec. 2, 2010) (**Ex. H**). The December 2nd Notice alleged that specific content on the myVidster.com website infringed Flava Works' Copyrights. Id. The December 2nd Notice called for Voxel to immediately remove the

specified alleged infringing content. Id.

36. On December 2, 2010, Voxel notified Gunter about the December 2nd Notice, asked Gunter to remove the content specified in the December 2nd Notice, and asked Gunter to notify Voxel upon completion upon of the removal of contents. Email from Marlene Mangubat, Voxel Dot Net, Inc. to Marques Gunter. (Dec. 2, 2010 9:42 PM) (**Ex. I**).

37. On December 3, 2010, Voxel asked Gunter for confirmation that the content specified in the December 2nd Notice had been removed. Email from Matthew Toback, Voxel Dot Net, Inc. to Marques Gunter. (Dec. 3, 2010 5:59 PM) (**Ex. I**).

38. On December 3, 2010, Gunter sent notification to Voxel that he removed the content specified in the December 2nd Notice. Email from Marques Gunter, myVidster.com, to billing@voxel.net. (Dec. 3, 2010 6:01 PM) (**Ex. I**).

December 6, 2010 DMCA Notice

39. On December 6, 2010, Voxel received a facsimile communication dated December 5, 2010 from Flava Works entitled “DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act” (“December 6th Notice”). Facsimile from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc. and Gregory Leighton, Associate, Neal, Gerber & Eisenberg LLP. (Dec. 5, 2010) (**Ex. J**). The December 6th Notice alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id. The December 6th Notice called for Voxel to immediately remove the specified alleged infringing content. Id.

40. On December 6, 2010, Voxel notified Gunter about the December 6th

Notice, asked Gunter to remove the content specified in the December 6th Notice, and asked Gunter to notify Voxel upon completion of the removal of contents. Email from Matthew Toback, Voxel Dot Net, Inc. to Marques Gunter. (Dec. 6, 2010 1:36 PM) (**Ex. K**).

41. On December 6, 2010, Gunter sent notification to Voxel that he removed the content specified in the December 6th Notice. Email from Marques Gunter, myVidster.com, to Matthew, Voxel Dot Net, Inc. (Dec. 6, 2010 4:38 PM) (**Ex. L**).

December 9, 2010 DMCA Notice

42. On December 9, 2010, Voxel received a facsimile communication from Flava Works entitled “DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act” (“December 9th Notice”). Facsimile from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc. and Gregory Leighton, Associate, Neal, Gerber & Eisenberg LLP. (Dec. 9, 2010) (**Ex. M**). The December 9th Notice alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id. The December 9th Notice called for Voxel to immediately remove the specified alleged infringing content. Id.

43. On December 9, 2010, Voxel notified Gunter about the December 9th Notice, asked Gunter to remove the content specified in the December 9th Notice, and asked Gunter to notify Voxel upon completion of removal of contents. Email from Matthew Toback, Voxel Dot Net, Inc. to Marques Gunter. (Dec. 9, 2010 6:37 PM) (**Ex. N**).

44. On December 9, 2010, Gunter sent notification to Voxel that he removed

the content specified in the December 9th Notice. Email from Marques Gunter, myVidster.com, to Matthew, Voxel Dot Net, Inc. (Dec. 9, 2010 6:41 PM) (**Ex. N**).

January 6, 2011 Notice

45. On January 7, 2011, Voxel received a facsimile communication dated January 6, 2011 from Flava Works entitled “DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act” (“January 6th Notice”). Facsimile from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc. and Gregory Leighton, Associate, Neal, Gerber & Eisenberg LLP. (Jan. 6, 2011) (**Ex. O**). The January 6th Notice called for Voxel to immediately remove the specified alleged infringing content. Id. The January 6th Notice alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id.

46. On January 7, 2011, Voxel notified Gunter about the January 6th Notice, asked Gunter to remove the content specified in the January 6th Notice, and asked Gunter to notify Voxel upon completion of removal of contents. Email from Matthew Toback, Voxel Dot Net, Inc. to Marques Gunter. (Jan. 7, 2011 2:15 PM) (**Ex. P**).

47. On January 7, 2011, Gunter sent notification to Voxel that he removed the content specified in the January 6th Notice. Email from Marques Gunter, myVidster.com, to Matthew Toback, Voxel Dot Net, Inc. (Jan. 7, 2010 6:45 PM) (**Ex. Q**).

February 7, 2011 Notice

48. On February 7, 2011, Voxel received an email from Flava Works entitled “DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act” (“February 7th

Notice”). Email from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc., and Gregory J. Leighton, Neal, Gerber & Eisenberg LLP. (Feb. 7, 2011 8:45 PM) (**Ex. R**). The February 7th Notice alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id. The February 7th Notice called for Voxel to immediately remove the specified alleged infringing content. Id.

49. On February 8, 2011, Voxel notified Flava Works that it only accepts DMCA requests by facsimile or traditional mail. Email from Matthew Toback, Voxel Dot Net, Inc. to Flava Works (Feb. 8, 2011 5:14 PM) (**Ex. R**).

50. On February 8, 2011, before Voxel could notify Gunter of the February 7th Notice, Gunter sent notification to Voxel that he removed the content specified in the February 7th Notice. Email from Marques Gunter, myVidster.com, to Voxel Dot Net, Inc. (Feb. 8, 2011 11:00 PM) (**Ex. S**).

February 10, 2011 Notice

51. On February 10, 2011, Voxel received from Flava Works a facsimile communication entitled “DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act” (“February 10th Notice”). Facsimile from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc. and Gregory Leighton, Associate, Neal, Gerber & Eisenberg LLP. (Feb. 10, 2011) (**Ex. T**). The February 10th Notice alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id. The February 10th Notice called for Voxel to immediately remove the specified alleged infringing content. Id.

52. On February 11, 2011, Voxel notified Gunter about the February 10th Notice, asked Gunter to remove the content specified in the February 10th Notice, and asked Gunter to notify Voxel upon completion of the removal of the content. Email from Matthew Toback, Voxel Dot Net, Inc. to Marques Gunter. (Feb. 11, 2011 11:04 AM) (**Ex. U**).

53. On February 14, 2011, Voxel asked Gunter for confirmation that the content specified in the February 10th Notice had been removed. Email from Matthew Toback, Voxel Dot Net, Inc. to Marques Gunter. (Feb. 14, 2011 10:35 AM) (**Ex. U**).

54. On February 15, 2011, Gunter sent notification to Voxel that he removed the content specified in the February 10th Notice. Email from Marques Gunter, myVidster.com, to Matthew, Voxel Dot Net, Inc. (Feb. 15, 2011 5:41 PM) (**Ex. V**).

February 16, 2011 Notice

55. On February 16, 2011, Voxel received a facsimile communication from Flava Works entitled “DMCA Notice of Copyright Infringement: Notice to Cease and Desist Copyright Infringement Under the Provisions of Digital Millennium Copyright Act” (“February 16th Notice”). Facsimile from Phillip Bleicher, Chief Executive Officer, Flava Works, to Marques Gunter, Voxel Dot Net, Inc. and Gregory Leighton, Associate, Neal, Gerber & Eisenberg LLP. (Feb. 16, 2011) (**Ex. W**). The February 16th Notice alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id. The February 16th Notice called for Voxel to immediately remove the specified alleged infringing content. Id.

56. On February 18, 2011, Gunter sent notification to Voxel that he removed the content specified in the February 16th Notice. Email from Marques Gunter,

myVidster.com, to Voxel Dot Net, Inc. (Feb. 18, 2011 2:15 PM) (**Ex. X**).

February 25, 2011 Email

57. On February 25, 2011, Voxel received an email from Flava Works (“February 25 Email”). Aff. of Matthew Toback ¶ 39 (Ex. A); Email from Marques Gunter, myVidster.com, to Phillip Bleicher (Feb. 25, 2011 2:30 PM) (**Ex. Y**) (the body of this email reflects the contents of the February 25 Email as exhibited in the thread included therein. The contents of the Feb 25 Email were similar in not identical to the contents of an email sent by Flava Works to Def. Gunter on the same day. Id. The February 25 Email alleged that specific content on the myVidster.com website infringed Flava Works’ Copyrights. Id. The February 25 Email called for Voxel to immediately remove the specified alleged infringing content. Id.

58. That same day, Gunter sent notification to Voxel indicating that he removed the content specified in the February 25 Email. Email from Marques Gunter, myVidster.com, to Voxel Dot Net, Inc. (Feb. 25, 2011 2:45 PM) (**Ex. Y**).

Authentication of Documents

59. At all times relevant to the instant litigation, Zachary Smith, Chief Operations Officer for Voxel, managed DMCA Notices that Voxel received. Aff. of Zachary Smith ¶ 3 (**Ex. Z**). In doing so, Zachary Smith maintains all records relative to DMCA Notices that Voxel receives. Id. ¶ 3

60. The attached Exhibits H through Y represent authentic copies of records created, recorded, and maintained by Voxel in its systems in the regular course of its business. Aff. of Zachary Smith ¶¶ 5-6 (**Ex. Z**).

Awareness of Alleged Infringements

61. Until receiving notice of specific alleged infringement from Flava Works, Voxel lacked any knowledge of such specific infringement identified in such notices. Aff. of Matthew Toback ¶ 25 (**Ex. A**); Aff. of Zachary Smith ¶ 7 (**Ex. Z**).

E. Voxel Ceases to Host myVidster.com

62. On March 14, 2011, Voxel ceased hosting the myVidster.com website. Aff. of Matthew Toback ¶ 7, 12 (**Ex. A**).

F. Voxel Has Never Used Flava Works' Trademarks

63. Voxel has never used any of Flava Works' trademarks in any manner. This includes using such marks in commerce, in advertisements and/or promotions. Aff. of Matthew Toback ¶ 26 (**Ex. A**).

G. Voxel's Offer of Judgment to Flava Works

64. Voxel sent its Offer of Judgment for \$2,500.00 to Flava Works on April 27, 2011. (Doc. No. 37). Flava Works never responded to Voxel's Offer of Judgment.

Dated: Chicago, Illinois
January 12, 2012

Respectfully submitted,

DEFENDANT,
VOXEL DOT NET, INC.

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