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7  
 8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN JOSE DIVISION

11 IO GROUP, INC.,

12 Plaintiff,

13 v.

14 VEOH NETWORKS, INC.,

15 Defendant.

CASE NO. C 06-3926 HRL

The Honorable Howard R. Lloyd

**BRIEF OF *AMICI CURIAE* VIACOM  
 INTERNATIONAL INC. AND NBC  
 UNIVERSAL, INC. RE: MOTION FOR  
 SUMMARY JUDGMENT OF VEOH  
 NETWORKS, INC.**

16 Date: September 4, 2007

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1 Viacom International Inc. (“Viacom”) and NBC Universal, Inc. (“NBCU”) submit this  
 2 brief as *Amici Curiae* in regard to the Motion for Summary Judgment of Defendant Veoh  
 3 Networks, Inc. (“Veoh”).  
 4

5 **I. BACKGROUND AND POSITION OF *AMICI CURIAE***

6 *Amici Curiae* Viacom and NBCU are two of the world’s leading creators, producers, and  
 7 distributors of media content. Viacom and NBCU own the copyrights in thousands of works,  
 8 including some of the most successful, popular, and critically acclaimed motion pictures and  
 9 television programs in the United States. *Amici* have a broad interest in the development of the  
 10 law of intellectual property generally, and a particular interest in the Digital Millennium Copyright  
 11 Act (“DMCA”) and its application to services such as Veoh, whose business is based on the  
 12 intellectual property of others. Viacom and NBCU do not have any pecuniary interest in the  
 13 outcome of this lawsuit, but they have a specific and tangible interest in the legal issues raised in  
 14 Veoh’s Motion. (Viacom’s and NBCU’s copyrighted works have appeared, and continue to  
 15 appear, repeatedly on the veoh.com website and on other video-sharing websites that operate  
 16 similarly to Veoh.)

17 The central issue raised in Veoh’s Motion, namely, whether Veoh qualifies for the DMCA  
 18 limitations on liability for its copying, performance, and dissemination of copyrighted works on its  
 19 commercial website, is a critically important issue of first impression. This issue is the subject of  
 20 scholarly and industry debate. This issue also is at the heart of no fewer than six lawsuits,  
 21 including a putative class action, currently pending against so-called video-sharing websites:  
 22 Veoh Networks, Inc v. UMG Recordings, Inc., No. 07 1568 (S.D. Cal., filed Aug. 9, 2007); The  
 23 Football Ass’n Premier League Limited and Bourne Co. v. YouTube, Inc., No. 07 Civ. 03582  
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 27 (C.D. Cal., filed Oct. 16, 2006); Tur v. YouTube, Inc., No. CV 06-4436 (C.D. Cal., filed July 14,  
 28 2006). Viacom, as well as UMG Recordings (the largest record company in the United States),

1 the United Kingdom’s Premier Football League and the Finnish Football League Association are  
2 plaintiffs in these lawsuits. (NBCU is not a plaintiff in any of those cases.) The resolution of  
3 Veoh’s Motion may have a far-reaching impact on *Amici* and other content creators, as well as on  
4 the pending lawsuits and any future litigation against enterprises like Veoh, YouTube, and others.

5 Viacom and NBCU request to be heard as *Amici* and offer this brief to apprise the Court of  
6 the broader context in which this case arises, to offer the Court the benefit of Viacom and NBCU’s  
7 perspective on the important legal issues raised by Veoh’s Motion, and to request that the Court  
8 take this broader context into account in ruling on Veoh’s Motion. In making this request, *Amici*  
9 emphasize that they do so as friends of the Court, solely to address the legal issues presented in  
10 Veoh’s Motion. *Amici* do not take a position on other issues in this case or on its ultimate  
11 outcome. Certainly, the works that underlie this action may be offensive to many, and *Amici*’s  
12 legal arguments here should not be misconstrued as an endorsement of such material. But  
13 Congress has not established separate copyright laws for adult-oriented and family-friendly works.  
14 The DMCA is content-neutral, and Plaintiff’s legitimate claims to copyright protection deserve  
15 equal consideration and enforcement. Indeed, anyone concerned about the indiscriminate  
16 profusion and availability of Plaintiff’s content should support Plaintiff’s efforts to confine  
17 distribution of its owned works to its lawful, paying subscribers, and to police infringement of  
18 those works by websites that make them available without authorization for free to anyone in the  
19 world.

20 NBCU recently was permitted to file a brief and appear as *amicus* in the Central District of  
21 California in Tur v. YouTube, Inc., No. CV 06-4436 (C.D. Cal., filed July 14, 2006), a case that  
22 raised issues quite similar to those at bar. In that case, YouTube, a website that, among other  
23 functions, allows users to upload and then disseminates digital video files, moved for summary  
24 judgment, making many of the same arguments under the DMCA as does Veoh. After extensive  
25 briefing and a lengthy hearing, the Court denied YouTube’s Motion, finding that “there is a  
26 significant amount of maintenance and management that YouTube exerts over its website” and  
27 that although “YouTube [] asserts that its system does not have the technical capabilities needed to  
28 detect and prescreen allegedly infringing videotapes [] there is insufficient evidence before the

1 Court concerning the process undertaken by YouTube from the time a user submits a video clip to  
2 the point of display on the YouTube website.” Tur v. YouTube, Inc., 2007 WL 1893635 at \*3  
3 (C.D. Cal. June 20, 2007). Thus, the Court held that, on an issue central to Veoh’s motion here,  
4 YouTube had not met its burden of proving, for purposes of summary judgment, that it lacked the  
5 right and ability to control infringing activity, and thus that it qualified for DMCA protection.

6 As set forth below, Veoh’s arguments that it is qualified for the DMCA Section 512(c) safe  
7 harbor similarly rest on an erroneous, overly narrow, and unsupported view of the law and of the  
8 burdens that Section 512(c) imposes on Veoh to show, among other things, that it has no direct  
9 financial interest or ability to control infringement that takes place on its own website and through  
10 its own server. Veoh cannot carry its burden merely by claiming that it did not sell advertising  
11 during the time period at issue or that it cannot (or will not) control what its users upload. Veoh  
12 directly benefits from the number of users who visit its website and cannot legitimately dispute  
13 that at least some (if not the majority) of those users are drawn by infringing content. Veoh also  
14 possesses the legal right and practical ability to control the content on its own premises (i.e., its  
15 website) because, among other things, it collects, maintains, distributes, indexes, reformats, and  
16 edits that content.

17 To the extent the Court decides to reach beyond this dispositive issue, this brief also  
18 discusses Veoh’s burden of proving the other elements of its safe harbor affirmative defense,  
19 including that it lacks constructive or “red flag” knowledge of infringement and effectively  
20 implements a repeat infringer policy. If, as *Amici* respectfully urge, this Court rules narrowly and  
21 denies Veoh’s Motion based on Veoh’s inability to satisfy all the requirements of the DMCA safe  
22 harbor, then this Court will not need to confront the more fundamental question of whether the  
23 safe harbor provisions ever can apply to an entity like Veoh. However, in the event this Court  
24 believes it must confront that question, this brief explains, in the alternative, that Veoh cannot  
25 qualify for safe harbor protection because it is not the type of Internet service provider  
26 contemplated by Congress to be covered by Section 512(c), the only safe harbor Veoh invokes.

27 If Veoh’s interpretation of the DMCA is credited, Veoh would be free to set up a business  
28 that knowingly infringes copyrighted works on a massive scale by copying, publicly performing,



1 displaying, and distributing those works. Under its view, Veoh could continue to profit from  
 2 infringement while imposing on copyright owners such as *Amici* the costs of constantly attempting  
 3 to monitor the Veoh website and invoking the ineffective process of repeatedly demanding  
 4 removal of infringing works. This game of “cat and mouse” would continue perpetually;  
 5 copyright owners would have to send new DMCA notices every time a user uploads an infringing  
 6 video and Veoh copies it to its own server, with Veoh profiting from infringement all the while.  
 7 Indeed, under its view, Veoh could actively encourage its users to commit infringement and still  
 8 claim DMCA protection simply by its after-the-fact response to “takedown” notices, and after  
 9 considerable harm to copyright owners. Congress did not intend such a patently unjust result, and  
 10 yet this result is the necessary consequence of Veoh’s claim that the DMCA provides blanket  
 11 protection so long as it responds to takedown notices.<sup>1</sup>

12 Irrespective of this Court’s ultimate decision on these issues, *Amici* submit that the  
 13 particular facts of this case (including the nature and amount of the content at issue, the fact that  
 14 Veoh no longer permits videos such as Plaintiff’s to be posted to its website, and Plaintiff’s  
 15 apparent decision not to give DMCA notice) make this an inappropriate “test” case to make broad  
 16 conclusions about how the DMCA should apply to Internet media aggregators and content  
 17 providers such as Veoh. Additionally, there are numerous unsettled questions specifically as to  
 18 how Section 512(c) of the DMCA applies to websites such as Veoh. The answers to those  
 19 questions may differ depending on what a particular record shows about the nature of a website’s  
 20 business model, the extent of the website (or its operators’) knowledge of infringement (including  
 21 its intention to infringe or willful blindness to obvious evidence of infringement), the ability of the

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23 <sup>1</sup> Veoh claims (which *Amici* do not concede) that it removes infringing material *after* receiving  
 24 DMCA notice. However, Veoh omits that first the copyright holder must locate the infringing  
 25 material, which is indexed by Veoh and located *on its own server*, provide Veoh with notice, and  
 26 then wait for Veoh to process the notice and remove the infringing material. During this time, the  
 27 infringing material remains available. This process then must constantly be repeated. The DMCA  
 28 recognized these realities by providing the separate requirements for safe harbor protection in  
 addition to, and not in place of, notice. The facts of this case are unusual – and perhaps *sui*  
*generis* – in that this case involves content that Veoh itself took down as the result of a business  
 decision to purge its system of adult content, rather than in response to a notice. That is not the  
 situation with respect to *Amici*, whose works currently can be found on the Veoh system and  
*repeatedly* are uploaded to and performed and distributed by Veoh.

1 website (or its operators) to take active steps to prevent infringement from which it obtains a direct  
 2 financial benefit, and whether a policy has been implemented that effectively prevents repeat  
 3 infringers among its users from continuing to infringe. These considerations strongly counsel for  
 4 deciding the summary judgment motions before the Court on the narrowest possible grounds. See  
 5 Ellison v. Robertson, 357 F.3d 1072, 1079 (9th Cir. 2004) (affirming summary judgment because  
 6 “the record lack[ed] evidence” on a particular aspect of the DMCA); see also Fame Publ’g Co. v.  
 7 Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975) (statutory exceptions to copyright  
 8 holder’s exclusive rights “construed narrowly”).<sup>2</sup>

9  
 10 **II. THE BALANCE AND PROTECTIONS OF THE DMCA WILL BE ELIMINATED**  
 11 **IF VEOH IS GRANTED “SAFE HARBOR” UNDER SECTION 512(c).**

12 Contrary to Veoh’s suggestion, the DMCA is not a one-sided framework that exists only to  
 13 shield Internet service providers (“ISPs”) from liability. Veoh Motion at 10. Rather, Section  
 14 512(c) of the DMCA was designed to strike a careful balance between the interests of copyright  
 15 owners and the interests of ISPs. Indeed, Congress recognized that “[d]ue to the ease with which  
 16 digital works can be copied and distributed worldwide virtually instantaneously, copyright owners  
 17 will hesitate to make their works readily available on the Internet *without reasonable assurance*  
 18 *that they will be protected against massive piracy.*” S. Rep. No. 190, 105th Cong., 2d Sess., at 8  
 19 (1998) (emphasis added). Accordingly, the statute grants protection only to “innocent” service  
 20 providers, ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001), and  
 21 applies only where they are acting in an entirely passive mode, making no active use themselves  
 22 of copyrighted material.

23 The DMCA likewise does not shelter Veoh merely because Veoh claims to “act[]  
 24 responsibly upon obtaining information indicating an infringement” (an assertion which  
 25 apparently is contested). Veoh Motion at 2. Veoh repeats throughout its Motion that Plaintiff did  
 26 not provide DMCA notice, seeking to imply that this alone confers on Veoh the safe harbor or

27  
 28 <sup>2</sup> *Amici* take no position on Plaintiff’s Motion for Summary Judgment, except insofar as it necessarily implicates Veoh’s DMCA affirmative defense.

1 refutes any attempt to disqualify it from safe harbor protection. See, e.g., Veoh Motion at 1  
2 (“Rather than send Veoh a notice”); 9 (“Plaintiff never notified Veoh of any alleged infringements  
3 prior to filing suit”); 18 (“Despite ample opportunity to do so, Plaintiff never provided Veoh with  
4 any notice of alleged infringements”). But DMCA notice is not a prerequisite to an infringement  
5 claim. 3 M. & D. Nimmer, Nimmer On Copyright § 12B.04[A][3] at 12B-58 (2006 ed.)  
6 (hereinafter, “Nimmer”) (“[C]opyright owners are not obligated to give notification of claimed  
7 infringement in order to enforce their rights.”). The DMCA generally (and Section 512(c)  
8 specifically) expressly and unambiguously denies safe harbor for any one of multiple reasons: for  
9 example, when an entity has not acted responsibly to stop infringement it knows about or is aware  
10 of facts or circumstances from which such infringement is apparent; when an entity financially  
11 benefits from infringing activity that it has the right and ability to control; or when an entity does  
12 not maintain and enforce a policy against repeat infringers. The failure to respond to DMCA  
13 notice is just one *additional* disqualifying factor. It is in all of these various requirements (which  
14 Veoh downplays behind its arguments concerning DMCA notice) that Congress built into Section  
15 512(c) protection for copyright owners as well as for genuine ISPs. Specifically, the structure of  
16 the DMCA requires that an ISP claiming safe harbor must establish affirmatively each of the  
17 following elements:

18 (1) That it falls within the definition of one of the four narrowly described safe harbors  
19 (for transmission, caching, storage, and linking). 17 U.S.C. § 512(a)-(d). Veoh here seeks refuge  
20 only under Section 512(c), for “information storage”; *and*

21 (2) That the *particular functions* of the ISP that are alleged to be the cause of  
22 infringement qualify for safe harbor. Thus, simply because one function of an ISP qualifies for  
23 safe harbor does not confer blanket immunity for all its other functions that go beyond the  
24 specifically covered function. 17 U.S.C. § 512(n); see A&M Records, Inc. v. Napster, Inc., 54  
25 U.S.P.Q.2d 1746, 1750-51 (N.D. Cal. 2000) (denying motion for summary adjudication, in part  
26 because safe harbor does not cover all functions of the allegedly infringing system); S. Rep. No.  
27 105-190 at 55 (“Section 512’s limitations on liability are based on functions, and each limitation is  
28 intended to describe a separate and distinct function.”). Here, to the extent Veoh provides any

1 Section 512(c) storage function, that is but one small aspect of its business, and not the entirety of  
2 its service. It is the remainder of its copying, performance, adaptation, and dissemination  
3 functions that are infringing, and not covered; *and*

4 (3) Even if an ISP meets the above criteria, it may claim the benefit of the DMCA safe  
5 harbor only if it proves four additional things: (a) that it does not have a direct financial benefit  
6 from and the ability to control infringement; (b) that it does not have actual knowledge of  
7 infringement or is not aware of facts or circumstances from which infringing activity is apparent;  
8 (c) that upon notice it expeditiously removes infringing material; and (d) that it has and  
9 implements a “repeat infringer” policy. 17 U.S.C. § 512(c)(1).

10 In view of the numerous fact-specific issues involved and the broad ramifications of any  
11 ruling on Veoh’s ability to invoke the safe harbors of the DMCA, *Amici* respectfully urge the  
12 Court to decide this Motion on narrow grounds that focus on the record before the Court, and to  
13 avoid broad rulings that may have an impact on future claims against Veoh or litigation against  
14 other similar websites.

15  
16 **III. VEOH HAS THE BURDEN OF PROVING THAT IT MEETS THE**  
17 **REQUIREMENTS OF SECTION 512(c).**

18 The DMCA safe harbor protection that Veoh asserts is an affirmative defense. Thus, Veoh  
19 must satisfy its heavy burden of proving that it is entitled to that safe harbor because it has  
20 complied with *each and every one* of the Section 512(c) requirements that Congress included in  
21 the DMCA to protect copyright owners. Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914,  
22 915 (C.D. Cal. 2003) (“[B]ecause Amazon is asserting an affirmative defense on the vicarious  
23 liability claim, it must establish all elements of the safe harbor rule under the DMCA.”); H.R. Rep.  
24 No. 551, pt. I, 105th Cong., 2d Sess. at 26 (1998) (“The exemption and limitations provided in this  
25 subsection are affirmative defenses.... [A] defendant asserting this exemption or limitation as an  
26 affirmative defense in such a suit bears the burden of establishing its entitlement.”).

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1           **A. Veoh Misconstrues The Elements of Direct Financial Benefit And The**  
 2           **Right and Ability To Control Infringing Activity.**

3           In order to avail itself of the safe harbor of Section 512(c), Veoh must prove that it “does  
 4 not receive a financial benefit directly attributable to the infringing activity, in a case in which the  
 5 service provider has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B).  
 6 Veoh’s arguments on this question hinge on a clearly incorrect view of the applicable law. While  
 7 Veoh concedes that “the language of subsection 512(c)(1)(B) mirrors that of the common law  
 8 doctrine,” it nevertheless argues that “the DMCA must require less of a service provider than the  
 9 common law.” Veoh Motion at 19. The Ninth Circuit now firmly has rejected that contention.  
 10 See Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1117 (9th Cir. 2007) (“Based on the ‘well-  
 11 established rule of construction that where Congress uses terms that have accumulated settled  
 12 meaning under common law, a court must infer, unless the statute otherwise dictates, that  
 13 Congress means to incorporate the established meaning of these terms,’ we hold that ‘direct  
 14 financial benefit’ should be interpreted consistent with the similarly-worded common law standard  
 15 for vicarious copyright liability.”) (citations omitted), quoting Rossi v. Motion Picture Ass’n of  
 16 America, Inc., 391 F.3d 1000, 1004 n.4 (9th Cir. 2004); see also H.R. Rep. No. 105-551, Pt. I at  
 17 25-26 (“The financial benefit standard ... is intended to codify and clarify the direct financial  
 18 benefit element of vicarious liability ... The ‘right and ability to control’ language...codifies the  
 19 second element of vicarious liability.”).<sup>3</sup> Applying the two prongs of Section 512(c)(1)(B) as they  
 20 have been interpreted and defined by the Ninth Circuit, Veoh’s arguments that that it meets each  
 21 prong of the test are deeply flawed.

22           **Direct Financial Benefit:** Veoh argues that it has not received a direct financial benefit  
 23 from the infringing content based entirely on its claim that, at the time the Plaintiff’s content was  
 24 \_\_\_\_\_

25 <sup>3</sup> Veoh’s strained assertion that vicarious liability cannot be imposed here because there is no  
 26 “special relationship” between Veoh and its users (equivalent to the employer-employee or  
 27 principal-agent relationship), Veoh Motion at 21-22, also misstates the common law of vicarious  
 28 liability. See 3 Nimmer § 12.04[A][2] at 12-81 (“[V]icarious liability exceeds the traditional  
 scope of the master-servant theory... [A] party may be liable as a related defendant even in the  
 absence of an employer-employee relationship, as long as the two elements of vicarious liability  
 are present.”).

1 available on its website, Veoh did not “realize any advertising revenue from its service” and  
2 “generated no revenue.” Veoh Motion at 23. Veoh’s argument rests on an incorrect and overly  
3 narrow view of the “direct financial benefit” test.

4 For a website to receive a “direct financial benefit” from the presence of infringing  
5 content, it is not necessary that it have received *any* revenue, including advertising revenue. See  
6 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000) (Napster received  
7 a direct financial benefit from the presence of infringing content even though it “currently collects  
8 no revenues and charges its clientele no fees; it is a free service”), aff’d, 239 F.3d 1004 (9th Cir.  
9 2001); Realsongs v. Gulf Broad. Corp., 824 F. Supp. 89, 92 (M.D. La. 1993) (“Defendants still  
10 have a direct financial interest in the infringing activity if the [radio] station is a for-profit  
11 enterprise and defendants benefit from its operation. The fact that [the radio station] may not be  
12 making a profit does not make it a non-profit organization.”). As Professor Nimmer explains, the  
13 “direct financial benefit” test is extremely broad, and is “understood to encompass a possible,  
14 indirect benefit.” 3 Nimmer § 12.04[A][2] at 12-82.

15 Nor is it necessary that Veoh “capitalize” on providing infringing material. All that is  
16 required is that the infringing content be a “draw” that “enhance[s] the attractiveness of the venue”  
17 to the website’s customers. Napster, 239 F.3d at 1023, quoting Fonovisa, Inc. v. Cherry Auction,  
18 Inc., 76 F.3d 259, 263-64 (9th Cir. 1996); see Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.  
19 Supp. 2d 1146, 1171 (C.D. Cal. 2002) (“Cybernet benefits from the draw posed by the existence  
20 of [plaintiff’s] works provided at a cost far below that provided by the copyright owner.”);  
21 Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997) (“the  
22 quantity of adult files available to customers increased the attractiveness of the service”); Playboy  
23 Enters., Inc. v. Webworld, Inc., 968 F. Supp. 1171, 1177 (N.D. Tex. 1997) (photographs  
24 “enhanced the attractiveness of the [defendant’s] website to potential customers”).

25 Regardless of whether it was selling advertising at the time the infringement took place,  
26 Veoh’s ability to draw users by offering content has a direct impact on the value of the website  
27 and on its ability to monetize its business – including by *later* selling advertising and “premium

1 content” to its user base. See Papa Decl., ¶¶ 3-4 (discussing ways in which Veoh currently derives  
2 revenue). As this Court noted in Napster:

3 Napster, Inc. currently collects no revenues and charges its clientele  
4 no fees; it is a free service. However, it has never been a non-profit  
5 organization. It plans to delay the maximization of revenues while it  
6 attracts a large user base.... Defendant eventually plans to  
7 “monetize” its user base. Potential revenue sources include targeted  
8 email; advertising; commissions from links to commercial websites;  
9 and direct marketing of CDs, Napster products, and CD burners and  
10 rippers. Defendant also may begin to charge fees for a premium or  
11 commercial version of its software. The existence of a large user  
12 base that increases daily and can be “monetized” makes Napster,  
13 Inc. a potentially attractive acquisition for larger, more established  
14 firms.

15 114 F. Supp. 2d at 902 (citations omitted).

16 It certainly is “likely that at least some users are drawn to [Veoh] because they know that  
17 copies of [infringing videos] can be viewed for free, and it is indisputable that [Veoh] does stand  
18 to benefit the more users visit and use [Veoh].” See Perfect 10, Inc. v. Google, Inc., 416 F. Supp.  
19 2d 828, 857 (C.D. Cal. 2006), aff’d in part, rev’d in part, 487 F.3d 701 (9th Cir. 2007). The  
20 amount of this draw, either in the abstract or as a proportion of Veoh’s overall content, is  
21 irrelevant to the vicarious liability analysis. Ellison, 357 F.3d at 1078-79 (rejecting argument that  
22 there was no financial benefit because access to infringing USENET group “constituted a  
23 relatively insignificant draw when cast against AOL’s vast array of products and services.”).  
24 Veoh’s attempt to analogize the financial benefit to its service of infringing content to a “one-time  
25 set up fee” or “flat periodic payments,” see Ellison, 357 F.3d at 1079, is meritless. That is not  
26 Veoh’s business model. Veoh cannot legitimately dispute that the value of its service is directly  
27 related to the number of visitors it attracts.<sup>4</sup>

28 <sup>4</sup> Veoh’s argument that infringing material is not a draw because “Veoh has always prohibited  
infringing content and has acted expeditiously to remove it *when put on notice*” (Veoh Motion at  
23; emphasis added) is a *non sequitur*. That such material appears on Veoh and is repeatedly  
viewed and downloaded by Veoh users *despite* the fact that it is “prohibited” by Veoh’s terms of  
use actually proves that it is a draw for many users. In any event, Veoh cannot avoid liability for  
infringement merely by stating that it has instructed its users not to infringe. See Chess Music,  
Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977) (“Sipe should not profit at the expense of  
these song composers by instructing musical groups not to play copyrighted music and by

(...continued)

1            **Right And Ability To Control:** Under the applicable vicarious liability standard, the  
 2 right and ability to “limit” infringement is sufficient ability to control. Fonovisa, 76 F.3d at 263.  
 3 That ability need not be exercised and it need not be absolute. Metro-Goldwyn-Mayer Studios  
 4 Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) (defendant infringes vicariously “by profiting  
 5 from direct infringement while declining to exercise a right to stop *or limit* it.”) (emphasis added).

6            Veoh does not and cannot dispute that it possesses the legal right to limit or control  
 7 infringement on its system. See Fonovisa, 76 F.3d at 263 (“Cherry Auction had the right to  
 8 terminate vendors for any reason whatsoever and through that right had the ability to control the  
 9 activities of vendors on the premises.”); Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d  
 10 304, 306 (2d Cir. 1963) (agreements required that infringer “abide by, observe and obey all rules  
 11 and regulations promulgated” by the defendant).

12            Veoh also has the practical ability to control infringement. See Gershwin Publ’g Corp. v.  
 13 Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1163 (2d Cir. 1971) (defendant was “in a position to  
 14 police” infringement); Fonovisa, 76 F.3d at 263 (same). Veoh’s argument that it cannot control  
 15 material being uploaded (because it claims it is not feasible to “screen” every user submission) and  
 16 cannot determine whether material being uploaded is infringing (even if assumed, without  
 17 conceding it, to be true) blurs the issue of the ability to control the *uploading* of content with the  
 18 ability to control the use, exploitation, and further dissemination of that content *after* the material  
 19 has been copied on Veoh’s server. One court expressly emphasized this distinction:

20            There is insufficient evidence regarding YouTube’s knowledge and  
 21 ability to exercise control over the infringing activity *on its site*.  
 22 There is clearly a significant amount of maintenance and  
 23 management that YouTube exerts over its website, but the nature  
 24 and extent of that management is unclear. YouTube also asserts that  
 25 while it is able to remove clips once they have been uploaded and  
 26 flagged as infringing, its system does not have the technical  
 27 capability to detect and prescreen allegedly infringing videotapes.  
 28 However, there is insufficient evidence before the Court concerning  
 the process undertaken by YouTube *from the time a user submits a  
 videoclip to the point of display on the YouTube website*.

27            (...continued)

28            claiming ignorance as to their program. He is deemed to have acquiesced in the musicians’  
 performance as he allowed the musicians the discretion to select the program.”).



1 Tur, 2007 WL 1893635 at \*3 (emphasis added).

2 Even leaving aside the issue of whether Veoh can screen the works uploaded to and copied  
 3 on its server,<sup>5</sup> there can be little dispute that websites like Veoh have the practical ability to police  
 4 their own premises (i.e., their websites) and thereby limit infringement thereon. See, e.g.,  
 5 Grokster, 545 U.S. at 930-31; Napster, 239 F.3d at 1023 (“The ability to block infringers’ access  
 6 to a particular environment for any reason whatsoever is evidence of the right and ability to  
 7 supervise”); Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., 907 F. Supp. 1361, 1376  
 8 (N.D. Cal. 1995) (ability to delete infringing postings – even if not exercised – is ability to  
 9 control); see also UMG Recordings, Inc. v. Sinnott, 300 F. Supp. 2d 993, 1001-02 (E.D. Cal.  
 10 2004) (summary judgment against operator of flea market finding right and ability to control  
 11 vendors within his own premises). Review of Veoh’s website and basic operation alone confirms  
 12 that, among other activities, Veoh collects, reformats, copies, and indexes the infringing material.  
 13 The infringing videos, the infringing thumbnail images it makes, and its index all reside on its  
 14 server. Veoh acts as the gateway and roadmap to infringing material. See Napster, 239 F.3d at  
 15 1023-24 (ability to police infringement by searching its index for song titles). Veoh also provides  
 16 the means and mechanism to perform videos directly from its website, to embed them in third-  
 17 party websites, to e-mail them to others, and to download the videos to a home computer. Veoh  
 18 performs and streams the infringing material from its server. It creates its own web pages,  
 19 including placing advertising (or other material) around the infringing material. It purports to  
 20 acquire rights from its users to exploit without limitation the videos they upload. Veoh also  
 21 enables and encourages the dissemination of infringing videos by its users. Each of these  
 22 activities is within Veoh’s “premises” and within its control, and goes far beyond the ability to  
 23 limit infringement merely by removing selected infringing content.

24

25 <sup>5</sup> Veoh admits that it can, and does, spot-check and edit the content on its website for its own  
 26 business reasons. See, e.g., Veoh Motion at 4 (Veoh “spot checks” videos after publication for  
 27 “terms of use compliance and proper categorization”), 8 (Veoh disabled access to adult content).  
 28 See Cybernet Ventures, 213 F. Supp. 2d at 1173 (defendant monitored some images and blocked  
 others: “This ability to control other types of images belies any attempt to argue that Cybernet  
 does not exercise sufficient control over its webmasters to monitor and influence their conduct or  
 to deny copyright offenders the benefits of its service.”).

1           **B. Whether Veoh Lacks Knowledge Of Infringement Or Has Adopted An**  
 2           **Effective “Repeat Infringer” Policy Are Factual Issues On Which Veoh**  
 3           **Bears The Burden.**

4           Veoh’s inability to meet the requirements of Section 512(c)(1)(B) would mandate denial of  
 5 its motion. In addition, Veoh’s own papers raise serious questions as to whether it also can satisfy  
 6 its burden of proving that it (1) lacks knowledge of infringement or awareness of facts or  
 7 circumstances from which infringing activity is apparent (§ 512(c)(1)(A)); and (2) has adopted and  
 8 “reasonably implemented” a repeat infringer policy (§ 512(i)). To the extent these issues need to  
 9 be decided at all, they should be decided only in a narrow manner that takes into account the  
 10 specific record in this case.

11           1.       Knowledge. Section 512(c)(1)(A) permits a service provider to claim safe harbor  
 12 only where the ISP shows it “does not have actual knowledge” that material or activity on its  
 13 system is infringing or “in the absence of such actual knowledge, is not aware of facts or  
 14 circumstances from which infringing activity is apparent.” Veoh’s claim that it was unaware of  
 15 “facts or circumstances from which infringing activity is apparent” is based largely (if not entirely)  
 16 on Veoh’s claim (apparently contested) that Plaintiff did not give DMCA notice and the infringing  
 17 material did not contain a copyright notice. But DMCA notice is not a prerequisite for an  
 18 infringement claim – much less for “red flag” constructive notice. 3 Nimmer § 12B.04[A][3] at  
 19 12B-58 (“[C]opyright owners are not obligated to give notification of claimed infringement in  
 20 order to enforce their rights. They may instead prevail if they prove that a provider ignored a ‘red  
 21 flag’ that was waving in its face...”). Veoh’s suggestion that there can be no “red flag”  
 22 knowledge of infringement without formal DMCA notice reads Section 512(c)(1)(A)(ii) (the  
 23 “facts and circumstances” provision) out of the statute, because such notice would, of course, give  
 24 *actual* knowledge of infringement. See Fonovisa v. Napster, Inc., No. 3:01-02669, 2002 WL  
 25 398676 at \*9 (N.D. Cal. Jan. 28, 2002) (distinguishing between notice and knowledge acquired in  
 26 other ways, either of which is sufficient for copyright infringement).

27           Veoh’s assertion that the infringed works did not contain a copyright notice also is not  
 28 dispositive. At best, it is one fact to be considered amongst the surrounding facts and

1 circumstances (many of which are noted in Plaintiff’s Motion), including that the massive  
2 infringement of the works of *Amici* and others on video-sharing websites such as Veoh has been  
3 discussed at length in major media. See, e.g., A New Copyright Battlefield: Veoh Networks,  
4 CNET News.com, Feb. 21, 2007 ([http://news.com.com/2100-1026\\_3-6160860.html](http://news.com.com/2100-1026_3-6160860.html)) (“A review  
5 of Veoh found an extensive list of professionally made shows, including an hour-long animated  
6 feature produced by Disney called *Cinderella III: A Twist in Time* ... and a two-hour video of a  
7 soccer match between England and Spain.”). Veoh also certainly is aware of the visible action  
8 taken against video sharing websites, including Viacom’s lawsuit against YouTube and Google.  
9 Veoh’s CEO has publicly acknowledged that he is aware of infringement on his website. Id.  
10 (“We’re all inventing a new medium.[] When you start off you have some issues, but all of us in  
11 this industry are working to solve those issues.”).

12 2. Repeat Infringer Policy. All ISPs, as a “condition[] for eligibility,” must “adopt[]  
13 and reasonably implement[]... a policy that provides for the termination in appropriate  
14 circumstances of subscribers and account holders of the service provider’s system or network who  
15 are repeat infringers.” 17 U.S.C. § 512(i). This requirement is designed so that “those who  
16 repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual  
17 property rights of others should know that there is a *realistic* threat of losing that access.” S. Rep.  
18 No. 105-190 at 52 (emphasis added).

19 This case is unusual because Veoh, for business reasons apparently unrelated to Plaintiff’s  
20 claims, does not now permit adult videos to be copied to its server. However, whether a “repeat-  
21 infringer” policy is effective and “reasonably implemented” is not dependent on whether  
22 infringing material has been removed or blocked, but whether infringing *users*’ access to the  
23 system has been terminated. Cybernet Ventures, 213 F. Supp. 2d at 1177 (“[S]ection 512(i) is  
24 focused on infringing users, whereas 512(c) is focused primarily on the infringing material  
25 itself.”). In evaluating a repeat infringer policy, the Court must consider not just its response to  
26 Plaintiff’s claims, but also the “actions towards copyright holders who are not a party to the  
27 litigation.” CCBill, 488 F.3d at 1111.

1 Review of Veoh's papers and its website reflect that there are issues as to whether Veoh's  
 2 purported repeat infringer policy gave its users any "realistic threat of losing [their] access" to the  
 3 Veoh system. Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1101 (W.D. Wash.  
 4 2004); see also Napster, 54 U.S.P.Q.2d at 749 (triable issues concerning implementation of repeat  
 5 infringer policy). Despite its purported "robust" policy, a quick review of Veoh's website reveals  
 6 many statements by users who boast that they repeatedly have posted infringing works (even after  
 7 prior infringing postings have been deleted) but their accounts have not been terminated. See, e.g.,  
 8 Ex. A ("Hey guys, here's a few more clips for your enjoyment...glad Veoh hasn't taken me  
 9 down."); ("sorry about my other episodes getting deleted"). Veoh apparently does not terminate  
 10 accounts upon discovery that a user has posted multiple infringing works (a true repeat *infringer*)  
 11 but rather only terminates an account after multiple *warnings*. Dunning Decl., ¶ 10; Cybernet  
 12 Ventures, 213 F. Supp. 2d at 1177 (ISP must terminate users when confronted with "sufficient  
 13 evidence to create actual knowledge of blatant, repeat infringement by particular users").

14 Veoh's policy also cannot be effective because its operating methods prevent copyright  
 15 holders from detecting infringement of their works. While Veoh has access to everything that it  
 16 copies, indexes, and performs from its servers, copyright holders do not, as Veoh enables its users  
 17 to restrict the audience able to view videos they upload. Thus, while Veoh could locate infringing  
 18 videos on its server, copyright holders cannot always do the same. See CCBill, 488 F.3d at 1110  
 19 ("[A] repeat infringer policy is not implemented [] if the service provider prevents copyright  
 20 holders from providing DMCA-compliant notifications.").

21  
 22 **IV. SECTION 512(c) DOES NOT PROTECT COMMERCIAL WEBSITES SUCH AS**  
 23 **VEOH THAT COLLECT, PROVIDE, DISSEMINATE, AND PROFIT FROM**  
 24 **COPYRIGHTED WORKS.**

25 Veoh devotes only two conclusory sentences to the issue of whether it qualifies for the  
 26 safe-harbor of Section 512(c) as an information storage facility. Motion at 11 ("Veoh allows users  
 27 to upload and share video content. The material is stored on Veoh's servers at the direction of  
 28 Veoh's users."). The preceding discussion establishes that for independent reasons, Veoh cannot  
 prevail on its Motion even assuming, *arguendo*, that Veoh is providing (and only providing) a

1 function that Section 512(c) protects. Therefore, the Court need not decide the more fundamental  
2 question of whether Veoh qualifies for Section 512(c) protection at all. Since a ruling on that  
3 issue could have a broad impact on numerous other lawsuits in this Circuit and beyond, *Amici*  
4 respectfully urge the Court to avoid, or at least defer, such a ruling if it is not necessary to  
5 disposition of the instant motions.

6 If the Court approaches this case via this threshold path, Veoh cannot meet the qualifying  
7 definition of a Section 512(c) ISP. Section 512(c) limits the liability of an ISP solely and  
8 exclusively “for infringement of copyright *by reason of the storage* at the direction of a user of  
9 material that resides on a system or network controlled or operated by or for the service  
10 provider....” (emphasis added). It is intended to limit liability only to the extent it arises from  
11 basic storage functions, such as “providing server space for a *user’s* web site, for a chatroom, or  
12 other forum in which material may be posted at the direction of users.” S. Rep. No. 105-190, at 43  
13 (emphasis added); *see, e.g.*, Heidi P. Salow, *Liability Immunity for Internet Service Providers –*  
14 *How Is It Working?*, 6 J. Tech. Law & Policy 1 (2001) (“Examples of such storage include  
15 providing server space for a user’s web site (web hosting) or for a chat room.”); *see also Doe v.*  
16 *GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003) (web host is like a delivery service or phone  
17 company, an intermediary that profits from the sale of server space and bandwidth).

18 From Veoh’s self-descriptions and from the observable characteristics of its website, its  
19 conduct largely, if not entirely, falls outside the limited functions protected under Section 512(c).  
20 Veoh is not a mere provider of “server space.” Its acts of direct infringement do not arise solely  
21 “by reason of” storage functions. It is not a passive “host” to others’ websites. And it is not  
22 simply storing content at the direction of its users. To the contrary, Veoh actively manipulates and  
23 modifies the content in ways that the uploading user clearly does not, including by copying,  
24 reformatting, and adapting the works, surrounding them with other material (including links to  
25 other videos and advertising), further disseminating them, and providing functionality that permits  
26 them to be downloaded, e-mailed, and embedded in other websites. Veoh has created and rapidly  
27 expanded its own commercial website business, [veoh.com](http://veoh.com), by engaging in these activities and  
28 thereby becoming a self-proclaimed “video network.” By bundling together and making

1 collectively available the millions of videos copied onto its servers, providing functions that allow  
 2 users to locate the videos they want to see, “featuring” and touting the “most popular” videos on  
 3 its website, surrounding the display and performance of those videos with its own logo (and, now,  
 4 advertisements) and then allowing users to e-mail, “embed,” and download the videos, Veoh’s  
 5 operations are very different from the kinds of passive, innocent service provider conduct that was  
 6 before Congress when it enacted the DMCA. See Sony Corp. of Am. v. Universal City Studios,  
 7 Inc., 464 U.S. 417, 431 (1984) (“[W]e must be circumspect in construing the scope of rights  
 8 created by a legislative enactment which never contemplated such a calculus of interests.”).

9 In operating its own commercial website, Veoh engages in activities that are reserved to  
 10 the copyright holder. See, e.g., Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478  
 11 F. Supp. 2d 607, 618 (S.D.N.Y. 2007) (copying); Video Pipeline, Inc. v. Buena Vista Home  
 12 Entm’t, Inc., 192 F. Supp. 2d 321, 331-32 (D. N.J. 2002), aff’d, 342 F.3d 191 (3d Cir. 2003)  
 13 (publicly performing); Jarvis v. K2 Inc., 486 F.3d 526, 532 (9th Cir. 2007) (adapting); Playboy  
 14 Enters., Inc. v. Webworld, Inc., 991 F. Supp. 543, 551-52 (N.D. Tex. 1997), aff’d, 168 F.3d 486  
 15 (5th Cir. 1999) (displaying, distributing). Neither the legislative history nor the caselaw supports  
 16 the application of Section 512(c) to such acts of direct infringement by commercial websites. See  
 17 CCBill, 488 F.3d at 1120 n.6 (DMCA offers “no immunity for infringement” for displaying  
 18 infringing images on a website); H.R. Rep. No. 105-551, pt. I, at 11 (DMCA intended to “rule[]  
 19 out” direct infringement liability only for “passive, automatic acts engaged in through a  
 20 technological process initiated by another”); cf. UMG Recordings, Inc. v. MP3.com, Inc., 92 F.  
 21 Supp. 2d 349, 350 (S.D.N.Y. 2000) (in non-DMCA context, “defendant seeks to portray its service  
 22 as the ‘functional equivalent’ of storing its subscribers’ CDs, in actuality defendant is re-playing  
 23 for the subscribers converted versions of the recordings it copied”).

24 Veoh’s position that Section 512(c) applies to its *entire* business and various uses of  
 25 copyrighted material amounts to the contention that, because the content it provides originated  
 26 from its users – from whom it purports to obtain a perpetual, irrevocable, and transferable license  
 27 – it is engaged in “storage.” Veoh apparently claims that once it “stores” any user-uploaded  
 28 content, it can do whatever it wants with that content and continue to be eligible for safe-harbor

1 protection. That position would provide unqualified, broad immunity for infringing services  
 2 when, at best, only a small part of their functions might qualify. The safe-harbors of the DMCA  
 3 cannot so easily be invoked. CCBill, 488 F.3d at 1117 (“Even if CCBill’s provision of a  
 4 hyperlink is immune . . . CCBill does not receive blanket immunity for its other services.”).

5 Review of the few cases that have applied the safe-harbor of Section 512(c) to an Internet  
 6 website illustrates the vast differences between Veoh and those activities that have been held  
 7 within Section 512(c). Each of those related to websites whose only involvement in infringement  
 8 was that they permitted third-parties to post notices offering infringing products for sale directly  
 9 from the third parties. See Corbis, 351 F. Supp. 2d at 1110 (Section 512(c) applied to the posting  
 10 by Amazon.com of a “zShops” advertisement for infringing posters: “Amazon is never in  
 11 possession of the products sold . . . . Furthermore, Amazon does not preview the products prior to  
 12 their listing, does not edit the product descriptions, does not suggest prices or otherwise involve  
 13 itself in the sale.”)<sup>6</sup>; Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d at 918 (“the infringing  
 14 activity is the sale of the unauthorized work, not the posting of the listing... [The defendant] never  
 15 possessed the [infringing] DVD, and never had the opportunity to inspect the item. Amazon  
 16 merely provided the forum for a third-party seller to list and sell his merchandise. Amazon was  
 17 not actively involved in the listing, bidding, sale or delivery of the DVD.”); Hendrickson v. eBay,  
 18 Inc., 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (an auction notice for infringing product was  
 19 posted on eBay: “the infringing activities at issue are the sale and distribution of pirated copies of  
 20 [a video] by various eBay sellers – which are consummated ‘offline’ and not the display of any  
 21 infringing material on eBay’s website. . . . [I]t does not have any control over the allegedly  
 22 infringing items – the pirated films. The evidence also shows that eBay never has possession of,  
 23 or opportunity to inspect, such items because such items are only in possession of the seller.”). Cf.

24  
 25  
 26  
 27 <sup>6</sup> Where Amazon *did* combine actual copyrighted images with advertising, Section 512(c) was not  
 28 even claimed to be applicable. Corbis, 351 F. Supp. 2d at 1093 (claims concerning use of images  
 directly on Amazon’s IMDb website remained in case).

1 CCBill, 488 F.3d at 1102 (Section 512 applied to Internet services that provided web hosting,  
2 “connectivity,” and billing technology).<sup>7</sup>

3 Not one of these prior cases involved a defendant like Veoh that was alleged to have  
4 copied, performed, or displayed infringing material on its website. Their websites were not  
5 “Internet Television Broadcasting Systems,” as Veoh claims to be. Unlike those websites, Veoh  
6 has possession of the infringing material, has the opportunity to inspect it, has control over the  
7 infringing material, and is involved directly in its performance and dissemination.

8 Veoh incorrectly contends that the DMCA permits it to avoid any responsibility for the  
9 content on its commercial website and completely shift the burden to content owners to discover  
10 and notify it of infringements. See Hendrickson v. Amazon.com, 298 F. Supp. 2d at 917 (“[I]t is  
11 [] against the spirit of the DMCA if the entire responsibility lies with the copyright owner to  
12 forever police websites in search of possible infringers.”). In the meantime, the presence of the  
13 infringing content draws users to the Veoh website. Congress certainly did not intend that the  
14 DMCA be used to escape liability for commercial activities of the nature engaged in by Veoh.  
15 Therefore, even if Veoh could carry its burden with respect to all of the other requirements of the  
16 DMCA, Veoh cannot meet the qualifying definition of a Section 512(c) ISP.

17  
18 **CONCLUSION**

19 *Amici* respectfully request that the Court deny Veoh’s motion for summary judgment or, in  
20 the alternative, narrowly base any ruling on the specific facts and record in this case.

21  
22 I attest that I have on file all holograph signatures for any signatures indicated by a  
23 “conformed” signature (/S/) within this efiled document.

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27 <sup>7</sup> Veoh also cites the district court opinion in CoStar Group Inc. v. Loopnet, Inc., 164 F. Supp. 2d  
28 688 (D. Md. 2001), aff’d, 373 F.3d 544 (4th Cir. 2004). However, the district court’s discussion  
of Section 512(c) was solely in the context of the allegations of contributory infringement. That  
discussion was not adopted by the Fourth Circuit, and thus is of limited (if any) precedential value.



1 DATED: August 14, 2007

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