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

10		)	<b>CASE NO.: C-06-03926 (HRL)</b>
11	IO GROUP, INC., a California corporation,	)	
12	Plaintiff,	)	<b>REPLY TO DEFENDANT'S OPPOSITION</b>
13		)	<b>TO PLAINTIFF'S MOTION FOR</b>
14		)	<b>SUMMARY JUDGMENT</b>
15		)	
16	vs.	)	
17		)	
18	VEOH NETWORKS, Inc., a California	)	DATE: September 4, 2007
19	Corporation,	)	TIME: 10:00 a.m.
20	Defendant.	)	COURTROOM: 2
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. SUMMARY OF ARGUMENT**

Parties have filed cross motions for summary judgment, Plaintiff on the issue Defendant's liability for direct, contributory and vicarious infringement of Plaintiff's creative works, and Defendant solely on its asserted entitlement to safe harbor under 17 U.S.C. §2257(c). In Defendant's Opposition it contends that this is not even a close case. Plaintiff agrees. Defendant's liability is clear and based on many of the same facts, its DMCA defense fails.

Defendant attempts to avoid responsibility for its infringing activities (which go well beyond copying) by asserting that all of its acts were automated. The law simply does not support this position. Defendant's volitional acts constitute direct infringement. As to the infringing screen capture images, Defendant compares its actions to that of an Internet search engine, which it simply is not. Defendant is not entitled to a fair use defense for these infringing acts.

Moreover, Io Group has established that Defendant is liable as a vicarious infringer because it receives a direct financial benefit from the infringing use of Plaintiff's works, and Defendant has the right and ability to control the infringing activity well within the traditional bounds of vicarious infringement. Defendant is also contributorily liable, since it materially contributed to the infringing activity, especially by means of the index it maintained, and it should have been aware of the infringing activity based on numerous red flags.

For the reasons set forth herein and in Plaintiff's Opposition to Defendant's Summary Judgment Motion, Plaintiff respectfully requests that the Court deny Defendant's Motion for Summary Judgment and grant Plaintiff's Motion.

1           **II.       FURTHER STATEMENT OF FACTS**

2           Testimony of Defendant and its employees acknowledges that Defendant can identify  
3 infringing video files yet declines to fully implement a system for identifying infringing files and  
4 removing them from its system unless it receives a formal DMCA take down notice.  
5

6           Defendant instructs employees that if they encounter “blatantly copyrighted material, then  
7 they can take it down.” Papa Depo. 99:10-100:18, 203:16-206:10, 231:17-233:5. Defendant  
8 admits that some factors might indicate a video file on its system is infringing. Among those  
9 factors are: 1) whether a movie is still in theaters; 2) the length of the video file; 3) whether it  
10 would be a stretch for one of Veoh’s users to own the rights to the file; and 4) whether or not the  
11 Defendant had a relationship with the producer. Papa 100:24-105:21.  
12

13           Prior to the filing of the Complaint in this matter, Defendant included on its flagging  
14 feature a menu selection that users could click to bring to Defendant’s attention any video file  
15 users believed might represent an infringing use. However, shortly after the filing of this suit,  
16 Defendant changed its policy (Papa Depo. 174:7-18) and removed the flag feature menu selection  
17 “appears to contain copyright material”. Papa Depo 168:11-169:20. Defendant refuses to provide  
18 an explanation as to why it once asked users to bring potentially infringing video files to its  
19 attention, but later removed their ability to do so. Papa Depo. 174:7-178:6.  
20  
21

22           **III.       PLAINTIFF HAS ESTABLISHED COPYING OF ITS REGISTERED WORKS**

23           Keith Ruoff has testified that he witnessed content taken directly from Plaintiff’s works  
24 being displayed on [www.veoh.com](http://www.veoh.com). Ruoff Summary Judg. Decl. at ¶¶ 13-15. With regard to the  
25 display of the Flash versions of the video files through [www.veoh.com](http://www.veoh.com), Plaintiff is not aware of  
26 any technological means of downloading the Flash versions to its own computers. Thus, Plaintiff  
27  
28

1 has already provided the best available testimony in the form of Keith Ruoff's declaration and the  
2 printouts he made while the Flash files were in the process of streaming from [www.veoh.com](http://www.veoh.com). *Id.*

3  
4 With regard to files that were available for download from [www.Veoh.com](http://www.Veoh.com) (*i.e.* copies of  
5 the files users originally submitted to Defendant), Io Group was able to download and save copies.  
6 Io Group made those files available to Defendant in discovery along with copies of Io Group's  
7 corresponding registered works. Ruoff Rely Decl. at ¶¶ 5 and 6. Defendant had ample time and  
8 opportunity to compare Plaintiff's registered works with the infringing files downloaded from  
9 [www.veoh.com](http://www.veoh.com) and the printouts of pages from [www.veoh.com](http://www.veoh.com) documenting the Flash streaming  
10 presentation of the works, and to question Plaintiff about those works in discovery. Having  
11 completed its thorough investigation, Defendant does not challenge Plaintiff's assertion that the  
12 Flash streaming and original format video files found on [www.veoh.com](http://www.veoh.com) are comprised entirely of  
13 Plaintiff's registered works. Nor has Defendant presented any evidence to support such a  
14 challenge. Veoh raises this issue only as a red herring and a diversion from the real issues at play  
15 in this matter. This is not a "substantially similar" case; the files on [www.veoh.com](http://www.veoh.com) contain the  
16 same content as Plaintiff's works, albeit in different file formats. There is no need for a side by  
17 side comparison of the works, especially in light of the fact that Defendant has not challenged  
18 Plaintiff's ownership of the infringed works.  
19  
20  
21

22 However, in the event that the Court finds it necessary to engage in a side by side  
23 comparison, Plaintiff has lodged the material with the Court along with its Motion to File Under  
24 Seal. Plaintiff seeks to seal the works because the files contain sexually explicit material not  
25 appropriate for general public access which would create possible exposure to minors. Defendant  
26 believes it is not proper to file the works under seal, in spite of the fact that Defendant consistently  
27 refers to Plaintiff's sexually explicit works using the legally imprecise but inflammatory word  
28

1 “pornography”. Perhaps this is not surprising since Defendant chose to commercially exploit  
2 sexually explicit material, while ignoring concomitant legal and moral responsibilities such as  
3 ensuring proper labeling (in order to ensure the actors are over eighteen) and keeping the material  
4 out of the hands of children.  
5

6 Should the Court elect not to exercise its authority to seal these documents, Plaintiff  
7 requests that they be immediately filed unsealed so that the Court may access them if necessary to  
8 establish that the infringing works were indeed copies of Plaintiff’s registered works.  
9

10 **IV. DEFENDANT ENGAGES IN VOLITIONAL ACTS THAT CLEARLY**  
11 **ESTABLISH DIRECT INFRINGEMENT.**

12 There is no dispute that Defendant copied, displayed and distributed video files containing  
13 Plaintiff’s works and even made derivative works from those video files. Defendant simply argues  
14 that it cannot be held accountable because its actions are automated rather than volitional. In an  
15 era when nearly every aspect of human life is affected by computer automation, such a position  
16 taken to its logical conclusion, is nothing short of absurd. It is difficult to imagine an unlawful act  
17 that could not be achieved entirely through computer automation and robotics. The law does not  
18 allow wrongdoers to avoid culpability merely because they are clever enough to develop a system  
19 that automatically performs operations which would otherwise subject them to liability. Indeed,  
20 one’s actions can be both automated and volitional, since any automated system must be created  
21 and maintained.  
22

23 The cases Defendant relies on to support its “everything automated is ok” argument, do not  
24 go so far as Defendant would have the Court believe. Those cases hold only that in well defined  
25 situations, Internet access providers will not be held liable for automatic *copying*. Defendant’s  
26 activity goes well beyond mere automatic copying and includes distribution, public performance  
27 and display, creation of derivative works, and indexing of the works for its own commercial gain.  
28

1           *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, is widely  
2 regarded as the case that established the principle that access providers should not be held  
3 accountable for certain automated copying necessary for the smooth operation of the Internet.  
4  
5 *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 373 F. 3d 544  
6 (N.D. Cal. 1995)(“Netcom”). In *Netcom*, the defendant was not accused of engaging in any  
7 activity other than copying. *Id.* at 1370. Netcom was not accused of public display, distribution or  
8 creating derivative works. The Court did not hold that access providers would be absolved of  
9 infringing activities resulting from the automation of other rights exclusive to copyright holders.  
10 Indeed the court was careful to clarify this. “[P]laintiffs do not argue that Netcom is liable for its  
11 public distribution of copies. Instead, they claim that Netcom is liable because its computers in  
12 fact made copies.” *Id.* The narrow holding of the court was that “the storage on a defendant’s  
13 system of infringing copies and retransmission to other servers is not a direct infringement by the  
14 BBS operator of the exclusive right to *reproduce* the work where the copies are uploaded by an  
15 infringing user.” *Id.* at 1371 (emphasis added).

18           Post *Netcom*, Congress took a similar approach in the enactment of 17 U.S.C. §512(a)  
19 which established specific automated acts that would receive blanket immunity, apparently  
20 adopting the reasoning set forth in *Netcom* that certain acts are necessary to the smooth operation  
21 of the Internet. In 17 U.S.C. §512(a) these action are referred to as “transitory digital network  
22 communications”. The definition of Service Provider for the purposes of subsection (a) is  
23 narrower than in other provisions of the DMCA. 17 U.S.C. 512(k)(1)(A). Under subsection (a)  
24 providers are not liable for copyright infringement if the provider’s actions were similar to  
25 Netcom’s actions, that is if the actions involved “transmitting, routing, or providing connections”  
26 and 1) the “transmission of the material was initiated by or at the direction of a person other than  
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1 the service provider”, 2) the transmission or storage was automated, 3) the ISP does not select the  
2 recipients of the material, 4) if no copy of the material is maintained on the system for longer than  
3 necessary and 5) if the material is transmitted without modification to the content. 17 U.S.C.  
4 §512(a).  
5

6 Although Defendant does not assert a defense under subsection (a) for the purposes of this  
7 Summary Judgment Motion, the language of the statute helps one understand the Court’s  
8 reasoning in *Netcom*. The automated actions described in *Netcom* and 512(a) are fundamental  
9 requirements for the most basic operation of the Internet.  
10

11 However, when an entity’s actions go beyond the basic automated copying, storage and  
12 transmission functions described in *Netcom* the fact that other functions operate automatically is  
13 no longer relevant. For example, when an enterprise takes an interest in the content and makes that  
14 content available to others for commercial purposes as Defendant does here, those functions go  
15 beyond automated copying, storage and transmission of information, as Described by the court in  
16 *Netcom*.  
17

18 Automatic or not, Defendant is responsible not only for making copies of video files, but  
19 also for, distributing those copies, making new Flash versions of those files, displaying those files  
20 publicly through its website, and making other derivative works in the form of still image  
21 screencaps. Like the court in *Netcom*, *Sega Enters. v. Sabella* holds that a BBS operator who  
22 controls servers which members use to upload and download infringing *copies* is not liable for  
23 direct infringement when there is no evidence that the operator uploaded or downloaded the  
24 works. *Sega Enters. v. Sabella*, No. C93-04260, 1996 U.S. Dist. LEXIS 20470 at \*20 (N.D. Cal.  
25 Dec. 18, 1996). In *Parker v. Google*, the court held that Googles’ automatic *copying* and  
26 temporary caching of websites was not direct infringement. *Parker v. Google*, 42 F. Supp.2d 492,  
27  
28

1 498 (E.D.Pa. 2006), aff'd by No. 06-3074, 2007 U.S. App. LEXIS 1630 (3d Cir. July 10, 2007). In  
2 *Newborn v. Yahoo!, Inc.*, the plaintiff did not even allege direct infringement, and the court merely  
3 made a passing reference to direct infringement in a footnote. *Newborn v. Yahoo!, Inc.*, 391 F.  
4 Supp. 2d 181, 186 n.3 (D.C.C.2005).

6 The strongest authority for Defendant's position that all automated activity is exempt from  
7 claims of direct infringement is *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 ("CoStar").  
8 However, even there the court described the defendant's system as an electronic infrastructure  
9 designed and managed as a conduit of information that connects users over the Internet. *Id.* at 551.  
10 "They are conduits from or to would be copiers and have *no interest in the copy itself*" *Id.*  
11 (emphasis added). "[T]he entire system functions *solely to transmit* the user's data to the Internet.  
12 Under such a system, the ISP provides a system that automatically transmits users' material but is  
13 itself *totally indifferent to the materials' content.*" *Id.* (emphasis added). Clearly Defendant's  
14 system is no such operation. As an Internet Television Network, Defendant takes a great deal of  
15 interest in the content on its system and in fact Defendant significantly modifies the content to  
16 serve its commercial purposes. The eventual elimination of adult content evidences the degree to  
17 which Defendant takes an interest in what content it will allow.

20 *CoStar* is often quoted for its passage that an ISP that automatically makes copies is  
21 analogous to a copy machine. *Id.* at 550. However, Defendant's system is not merely designed to  
22 copy. The maker of a copy machine would be liable if he commercially exploited the copies made  
23 by others on his machine, even if he engineered a way to achieve it through automation.  
24 Defendant's actions go beyond mere copying and Defendant's commercial exploitation of the  
25 works through automated infringement of other exclusive rights are volitional acts that establish  
26 Defendant's liability for direct infringement.  
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1           **V.     DEFENDANT’S CREATION OF SCREEN CAPTURES DOES NOT**  
2           **CONSTITUTE FAIR USE.**

3           Defendant, perhaps intentionally, blurs the distinction between three different types of still  
4 images it creates from each video file – 16 full resolution screen captures, 16 lower resolution  
5 screen captures and a thumbnail image generated from one those screen captures.

6           When Defendant acquires a video file from a user, it extracts sixteen full-size frames from  
7 the video and creates derivative works in the form of .jpg screen captures (“screencaps”). From  
8 those sixteen still frames, defendant creates two 16-image sets of screencaps. Papa Depo at 164:5-  
9 165:24. Defendant creates the first set of 16 images in the same full-size resolution as the  
10 incoming video file. *Id.* Defendant testified that these full-resolution .jpgs reside on Defendant’s  
11 storage system but are never viewable by users. *Id.* In earlier versions of Defendant’s business  
12 model, when Defendant did not display video files in Flash streaming from its website, Defendant  
13 planned to present one of these high-resolution screencap images to depict what appeared in the  
14 corresponding video file. *Id.* at 166:8-17.

15           Defendant also creates a second set of 16 images in reduced resolution, approximately 120  
16 by 90 pixels<sup>1</sup>. These “screencap” images are viewable by clicking on the screencaps link from the  
17 video detail page. They are described in Dr. Dunning’s Opposition Declaration at pg 3:9-11. In  
18 Defendant’s pre-website based business model, these 16 low-resolution screencaps were to be  
19 displayed to give a user an understanding of what appeared on the video file before it was  
20 downloaded. When Defendant introduced streaming Flash presentation of video files through its  
21 website, it continued to display the 16 lower-resolution (120 x 90) screencaps, even though they  
22 served no function. Defendant acknowledges that the creation of the screencaps is legacy  
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1 programming the usefulness of which was greatly diminished once users could immediately view  
2 the streaming Flash versions of video file through [www.veoh.com](http://www.veoh.com). Papa Depo. 157:20-159:19.

3  
4 Finally, Defendant selects the most interesting screencap and generates a much smaller  
5 version called a “thumbnail”. Dunning Depo. 133:4-14. Defendant displays the thumbnail along  
6 with the name of the video file in search results. *Id.* The thumbnail is approximately 96 x 72  
7 pixels. Ruoff Reply Decl. at ¶2. Only this single small image can properly be referred to as a  
8 “thumbnail” because it is a version that is exactly the same file format as the larger “screencap”  
9 except it is smaller in size. For the purposes of this Summary Judgment Motion, Plaintiff does not  
10 seek to hold Defendant liable for the generation of the single small “thumbnail”.

11  
12 Plaintiff *does* allege that the set of 16 full-resolution screencaps which are created but not  
13 displayed, and the set of 16 lower-resolution screencaps which are created *and* displayed but serve  
14 no functional purpose, represent direct acts of infringement which are not subject to a fair use  
15 defense. To the extent Defendant seeks to apply its fair use defense to the thirty-two screencaps it  
16 created rather than the one “thumbnail” generated and used for indexing purposes, the fair use  
17 defense surely fails.<sup>2</sup>

18  
19 In order to be eligible for a fair use defense under 17 U.S.C. §107, the use of the work  
20 must be “for purposes such as criticism, comment, news reporting, teaching (including multiple  
21 copies for classroom use), scholarship, or research.” 17 U.S.C. §107. Defendant’s creation of  
22 screencaps from Plaintiff’s video works was not for any of those purposes. Moreover, applying the  
23 fair use factors to Defendant’s creation of screencaps is not identical to applying the fair use  
24

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25  
26  
27 <sup>1</sup> Joe Papa testified that he believed these images were approximately 90 x 60 pixels but was  
28 unsure. Papa Deposition 155:159:24 – 160:4. Examination of [www.veoh.com](http://www.veoh.com) shows that the  
resolution was actually 120x90 pixels.

<sup>2</sup> Plaintiff does not concede that the thumbnail is entitled to a fair use defense.

1 factors to “thumbnails” in *Perfect 10 v. Amazon* or *Kelly v. Arriba Soft* and does not produce the  
2 same result. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Kelly v. Arriba*  
3 *Soft Corp.*, 336 F.3d 811 (9<sup>th</sup> Cir. 2003)  
4

5 In *Perfect 10 v. Amazon* and *Kelly v. Arriba Soft*, the court specifically found fair use for  
6 *Internet search engines* not for *websites* generally. The generation of thumbnails by Internet  
7 search engines is a transformative use in that the newly generated thumbnails serve to assist  
8 people in locating information on the Internet. *Perfect 10 v. Amazon* and *Kelly v. Arriba Soft* do  
9 not apply here because Defendant is not an Internet search engine and the purpose of the  
10 screencaps it creates is different from the purpose of the thumbnails generated by Google (in  
11 *Perfect 10 v. Amazon*) and *Arriba Soft*. In the matter before the Court, Defendant creates the new  
12 screencaps in .jpg format from video files maintained on its servers for its own commercial  
13 purposes; it does not generate thumbnails from already existing images residing on third party  
14 websites.  
15

16  
17 Thus, the purpose and character of the use does not weigh in favor of Defendant.  
18 Defendant’s entirely commercial use of the screencaps it creates solely benefit Defendant and its  
19 audience. They do not help people to locate information on the Internet. Moreover, the newly  
20 created screencaps do not even assist individuals to locate video files on Defendant’s system. By  
21 the time a person reaches the video details page where the screencaps are displayed, the Flash file  
22 streaming version of the video file is already playing on the users’ computer screen.  
23

24 As Defendant acknowledges, the works are creative in nature and thus are “closer to the  
25 core of intended copyright protection than are more fact-based works. *Perfect 10 v. Amazon*, 487  
26 F.3d at 723 (citing *Kelly v. Arriba Soft*). Thus this factor weighs in favor of Io Group.  
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1 Defendant's analysis of the amount and substantiality of the portion used is fundamentally  
2 flawed. Defendant fails to evaluate, how much of the work is necessary to achieve the purported  
3 purpose of the new works. Defendant creates thirty-two new .jpg files. Sixteen of these are not  
4 even available for users to view and thus those files are completely unnecessary. Moreover, if the  
5 purpose is to generate a thumbnail of one of the screen captures to display with search results, than  
6 Defendant only needs to create one screencap. The remaining fifteen screencaps serve no indexing  
7 purpose whatsoever and Defendant has set forth no other purpose for the creation of the  
8 screencaps. Thus the creation of two 16-image sets of screen captures (32 images total) goes well  
9 beyond what is required to serve the purported purpose of Defendant's use and this factor weights  
10 heavily in favor of Io Group.  
11

12  
13 The fourth factor, effect of use on the market, also weighs in favor of Io Group, Inc. In  
14 addition to selling DVDs, Defendant also sells access to still images as part of the material  
15 available to customers who subscribe to Io Group's website at [www.titanmen.com](http://www.titanmen.com). Ruoff Reply  
16 Dec. at ¶13. Defendant's display and distribution of this material without charge decreases the  
17 value those still images would otherwise add to a subscription. Defendant also fails to  
18 acknowledge the value normally associated with promotional activities. For example, the DVDs Io  
19 Group gives away to reviewers result in published reviews of the works, which are likely to  
20 generate increased sales of the works. *Id.* at ¶14. Plaintiff requires individuals wishing to view  
21 promotional trailers to confirm they are adults, supply a verified e-mail address, and agree to  
22 accept future promotional e-mails from Io Group before they are permitted to view the trailers,  
23 which are carefully edited to pique the viewer's interest. *Id.* at ¶15. Such verified e-mail addresses  
24 are extremely valuable since the viewer has already expressed interest in Io Group's product and  
25 unsolicited e-mail is unlawful. *Id.* On the other hand, Defendant's unlawful creation of screen  
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1 captures offers no benefit because users have no way of determining where to purchase the  
2 corresponding videos or images.

3 Defendant also fails to recognize that unlike heavily plot or character driven movies and  
4 television, even small portions of adult material have value. “Still images and short video clips are  
5 the stock-in-trade of Internet adult entertainment businesses.” *Bret Michaels v. Internet*  
6 *Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998)(finding use of small portions of  
7 adult work were not fair use); (Citing *Playboy Enterprises Inc. v. Webbworld, Inc.* 991 F.Supp.  
8 543 (N.D. Tex. 1997) and *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503  
9 (N.D. Ohio 1997). Defendant has a licensing agreement to distribute still images through cell  
10 phones and other mobile devices. Defendant’s creation and display of screencaps could also have  
11 a negative impact on Io’s ability to sell its content through these channels, especially since  
12 Defendant does not take measures to prevent the copying and downloading of the screencaps it  
13 creates and displays. *Id.* 16.

14  
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17 **VI. DEFENDANT IS VICARIOUSLY LIABLE FOR THE INFRINGING**  
18 **ACTIVITY OF ITS USERS.**

19 The standards for vicarious infringement are identical to the standards set forth at 17  
20 U.S.C. (C)(1)(B). *Perfect 10 v. CCBill, LLC*, 481 F.3d 751, 767 (9th Cir. 2007). Thus a defendant  
21 is liable for vicarious copyright infringement and is unqualified for a 17 U.S.C. 512§(c)  
22 affirmative defense if it 1) receives a financial benefit directly attributable to the infringing  
23 activity, in a case in which it has the right and ability to control such activity. 17 U.S.C.  
24 512(c)(1)(B); *Shapiro Bernstein & Co., Inc. v. H.L. Green Company, Inc.*, 316 F.2d 304 (2<sup>nd</sup> Cir.  
25 1963)(“Shapiro”). Plaintiff has more fully briefed the application of these standards in its Motion  
26 for Summary Judgment and Opposition to Defendant’s Motion for Summary Judgment, which Io  
27 Group incorporates herein in accordance with Federal Rules of Civil Procedure 10(c).  
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1 Unlike the situation in *Tur v. YouTube*, where the Court denied defendant's motion for  
2 summary judgment because there was insufficient evidence, here the parties have engaged in  
3 significant discovery and have fully briefed the issue to the court. *Tur v. YouTube, Inc.*, 2007 U.S.  
4 Dist. LEXIS 50254 at \*10 (C.D. Cal. filed Aug. 14, 2006). The factual record clearly establishes  
5 that Defendant has the right and ability to control the infringing activity.  
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7 Before a user can submit a video file, he must first agree to Veoh's Terms of Use and the  
8 parties thereby enter a legally binding contract. See, *Hotmail Corp. v. Van\$ Money Pie*, 1998 U.S.  
9 Dist. LEXIS 10729 \*16 (N.D. Cal. 1998)(clickwrap creates binding contract); *Feldman v. Google,*  
10 *Inc.*, 2007 U.S. Dist. LEXIS 22996 at \*15 (E.D. Pa. 2007)(clickwrap agreements are enforceable).  
11 Courts have consistently held that a contract that allows control over the infringing behavior  
12 creates the requisite control for a finding of vicarious liability. *Shapiro, Bernstein & Co. v. H.L.*  
13 *Green Co.*, 316 F.2d 304, 306 (2d Cir. 1963); *Polygram Int'l Publishing v. Nevada/TIG, Inc.*, 855  
14 F. Supp. 1314, 1329 (D. Mass. 1994).  
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16 Defendant retains the right to police and monitor the system and to remove videos that  
17 violate its terms of use. Defendant freely exercises all of these rights, including its right to review  
18 and remove files that violate its terms of use. One of the most powerful examples of this right is  
19 Defendant's ability to reach into users' home computers and without cause, notice and or  
20 justification, remove files previously downloaded through its system. Veoh exercised this  
21 powerful example of control in June 2006 when it purged sexually explicit material from its  
22 network. Long after users had downloaded these files to their home computers, Defendant had the  
23 legal right and the technical ability to reach into their users' home computers and remove these  
24 files.  
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1 Defendant turns to *Perfect 10 v. Amazon* to support its argument that it cannot control  
2 infringing activity without image-recognition technology. Defendant once again is off mark. In  
3 *Perfect 10 v. Amazon*, defendant's Internet search engine automatically culled images residing on  
4 third party websites and servers with whom it had no relationship. Here, Defendant has an ongoing  
5 contractual relationship with the submitting users and the content resides on Defendant's own  
6 servers, not on third party websites.

8 Defendant argues that its inability to discern acts of infringement distinguishes it from  
9 *Napster*. Defendant argues that Napster could police its index only after the music industry  
10 plaintiffs provided it with notice as to which songs were infringing. Here again, Defendant sings  
11 its familiar tune that it cannot be held liable for vicarious infringement unless it receives notice.  
12 But the tune plays flat. Defendant relies on the Ninth Circuit's Decision in *Napster* which  
13 narrowed the scope of a preliminary injunction order requiring the music industry to supply a list  
14 of song titles to Napster for the purposes of the injunction. *A&M Records v. Napster, Inc.*, 239  
15 F.3d 1004, 1027 (9th Cir. 2001). Finding itself a defendant again, Napster made the argument  
16 Defendant makes here in *Fonovisa, Inc. v. Napster, Inc.* The district court flatly rejected it.  
17 *Fonovisa, Inc. v. Napster, Inc.*, 2002 U.S. Dist. LEXIS 4270 at \*28 (N.D. Cal. 2002). This burden  
18 shift in *A&M Records v. Napster* was affective only for the purposes of the preliminary injunction,  
19 where the court is given broad equitable discretion, but must take care to avoid prohibiting  
20 legitimate conduct prior to resolution at trial or summary judgment. *Id.* at \*30. The modification  
21 of the injunction did not create a burden shift under the law. *Id.* In fact, "[t]his argument turns  
22 copyright law on its head and encourages the worst form of willful blindness." *Id.* at 31. Besides,  
23 Defendant admitted in deposition that that even if Io Group had supplied it with copies of its  
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1 works and a list of its titles Defendant would have taken no action to prevent its works from  
2 appearing on the veoh system. Papa Depo. 222:25-230:20.

3 Defendant's heavy reliance on *Perfect 10 v. Visa* and *Perfect 10 v. Amazon* is similarly  
4 misplaced. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 2007 U.S. App. LEXIS 15824 (9th Cir.  
5 2007)("Visa"); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007)("Amazon"). In  
6 those cases the Ninth Circuit held that Google and Visa did not have the right and ability to  
7 control infringing activity occurring on websites *they did not own, operate or control* because  
8 even if the defendants discontinued their participation (Google generating thumbnails and  
9 directing traffic to infringing websites and Visa supplying payment services for infringing  
10 websites) the infringing activity could continue. *Visa* LEXIS 15824 at \*34 (citing Amazon).  
11 That's just not the case here. The infringement occurs entirely on Defendant's servers and if  
12 Defendant turns off its servers, the infringement stops. Defendant has the exact authority and  
13 ability that Visa and Google lacked. The courts have been careful not to extend vicarious  
14 infringement when a defendant truly does not have control over the direct infringer or his  
15 infringing activities. The courts should be equally careful to hold a defendant accountable when it  
16 has control and should not give way to clever arguments that attempt to borrow the knowledge  
17 element from contributory infringement and insert it into a vicarious infringement analysis.

18 Even if the ability to identify infringing acts were required under the law, which it is not,  
19 Defendant's assertion that it cannot identify infringing video files is contradicted by the facts.  
20 Defendant clearly contemplates that at least some infringing videos are identifiable, yet it elects to  
21 avoid any proactive attempt to identify infringing videos and remove them from the system.  
22 Rather, Defendant relies on its misapplication of the DMCA, avoids detecting possible infringing  
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1 activity and only removes infringing files if it first receives a formal take down notice from the  
2 owner of a video file or his agent.

3 Defendant acknowledges that early plans called for an “eyes on” review of every video file  
4 it acquired, in order to cull out videos that violated Defendant’s Terms of Use including its  
5 copyright policies. Shapiro Depo. 57:20-58:2. See Plaintiff’s Motion for Summary Judgment at §  
6 VI(B)(vi). Thus, Defendant clearly contemplated reducing infringement by reviewing content even  
7 though it never implemented its policy. Moreover, Defendant’s inclusion of the “appears to be  
8 copyrighted” choice on the flag function menu which formerly allowed users to bring potentially  
9 infringing videos to Defendant’s attention (Papa Depo. 174:7-18) shows that Defendant  
10 contemplated that even people with no training could identify at least some potential acts of  
11 infringement. Finally, Defendant had a policy of removing “blatantly infringing” files when it  
12 discovered them, (Papa Depo. 99:10-100:18, 203:16-206:10, 231:17-233:5.) but declined to  
13 systematically review files in order to identify files that were “blatantly infringing”. As discussed  
14 previously, Defendant also declined to obtain information from its uploading users that could help  
15 Defendant determine if the user was authorized to submit the material. Dunning Depo. 72:2-13.

16 Although prior to the filing of the complaint in this matter, Veoh had a mechanism that  
17 allowed users to easily flag potentially infringing video file’s and thereby bring them to the  
18 attention of Defendant, shortly after the filing of this suit, Defendant changed its policy. Papa  
19 Depo. 174:7-18. Veoh removed the “appears to contain copyright material” selection from the flag  
20 feature and instead only allows formal DMCA take down notices which can only be submitted by  
21 the copyright owner or an authorized agent. Papa Depo 168:11-169:20. Defendant has refused to  
22 provide an explanation as to why it removed this function. Papa Depo. 174:7-178:6. However, it is  
23 clear that the change corresponds to Defendant’s argument that it cannot be deemed to have  
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1 control of the infringing activity because it cannot detect infringing acts. If this or any other court  
2 were to accept Defendant's "ability to detect" argument, it would change the very essence of  
3 vicarious liability and the result will be that similarly situated website operators will take the same  
4 approach. That is, they will be motivated to avoid detecting infringing activities rather than being  
5 motivated to detect and remove acts of infringement. This is precisely why the right and ability to  
6 control has never meant the ability to detect infringing acts, but rather the right and ability to  
7 control the acts that result in infringement.  
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10 Plaintiff has also clearly established that Defendant receives a direct financial benefit from  
11 the infringing activity. See Plaintiff's Motion for Summary Judgment §VI(A); Plaintiff's  
12 Opposition at §IV(C).

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14 With regard to financial benefit, Defendant has failed to present a cogent argument as to  
15 how it can overcome the Ninth Circuit's ruling in *Napster*, which is directly on point. *A&M*  
16 *Records v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001). Defendant argues with no support  
17 that it cannot be deemed to have gained a direct financial benefit from the infringing activity,  
18 because only a small portion of the material on its website is infringing. That is not the law. Even  
19 if it were, Defendant's acknowledgement that it has received complaints in connection with less  
20 than seven percent of user submitted materials establishes that Defendant does benefit from quite a  
21 bit of infringing activity. Dunning's Opposition Decl. at ¶6. If Defendant has received complaints  
22 relating to seven percent of hundreds of thousands of videos, then it has received a direct financial  
23 benefit from a minimum of tens of thousands of infringing videos. Furthermore, the amount of  
24 actual infringement is obviously significantly higher since there are clearly many infringements  
25 that go unreported, either because: 1) they are not detected; 2) copyright holders cannot review  
26 massive amounts of videos published daily by Veoh, YouTube and a multitude of similar  
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1 websites; 3) copyright holders don't understand their legal rights; or 4) copyright holders do not  
2 believe the DMCA is applicable and therefore refuse to submit DMCA notices. For example, in  
3 it's recently filed declaratory action in the Southern District of California, Defendant alleges that  
4 UMG Recordings has threatened Defendant with litigation based on alleged massive infringement  
5 of its works, yet UMG "has never delivered any notice or instruction to Veoh to take down  
6 allegedly infringing material." *Veoh Networks, Inc. v. UMG Recordings, Inc, et al.*, No. 07-1568  
7 (S.D.Cal. filed Aug. 9, 2007)(Complaint ¶¶4 and 63). In their proposed amicus brief NBC  
8 Universal, Inc. and Viacom International, Inc. also allege massive infringement on  
9 [www.veoh.com](http://www.veoh.com). Proposed Brief of *Amici Curiae* 1:12-16 and n. 1.

12 Thus Plaintiff has established vicarious liability and Defendant has failed to establish its  
13 eligibility for the safe harbor provisions of 512(c). Plaintiff believes that the facts relating to these  
14 standards are not in dispute and that a determination on the issues of financial benefit and right  
15 and ability to control can and should be made on summary judgment.

17 **VII. DEFENDANT FAILS TO ADEQUATELY REBUT THAT IT HAD**  
18 **CONSTRUCTIVE KNOWLEDGE OF THE INFRINGING ACTIVITY**

19 Not only were there red flags that should have given Defendant notice of infringing  
20 activity, but there is evidence that Defendant engaged in willful blindness.

21 Defendant once again is dismissive of Plaintiff's reference to 18 U.S.C. § 2257 and directs  
22 the Court to an irrelevant subsection of the statute, upon which Plaintiff does not rely. While the  
23 record keeping requirements to which Defendant refers may only apply to primary producers, 18  
24 U.S.C. §2257 subsection (f)(4) applies to *anyone* who knowingly transfers sexually explicit  
25 content, including Defendant and its users. 18 U.S.C. §2257(f)(4). The provision applies to both  
26 professional and amateur sexually explicit material. Defendant knew it was unlawful to transfer  
27 sexually explicit content without a §2257 label, but nonetheless knowingly accepted, copied, and  
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1 distributed unlabeled sexually explicit material - perhaps to avoid being exposed to the identity of  
2 the producer of the works, or perhaps because requiring the label would virtually eliminate the  
3 large amount of unauthorized sexually explicit material being submitted.  
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5 Plaintiff acknowledges that this law was not designed to prevent copyright infringement,  
6 however, nonetheless it is relevant to this matter. Defendant's Director of Product Development  
7 testified that he sought out information on blogs and message boards regarding §2257 (Papa Depo  
8 at 191:14-193:16), and Defendant's paid advisor John Styn previously operated adult sites upon  
9 which he had properly attached §2257 labeling. Styn Depo at 43:25-44:15. Both men discussed  
10 §2257 with CEO Dmitry Shapiro. Papa Depo. at 195:19-196:3; Styn Depo at 45:6 to 46:22 As an  
11 entity intimately involved with the adult entertainment industry ( which Veoh was at the time),  
12 and having researched and discussed the issue, Defendant should have known that it is unheard of  
13 in the industry to transfer sexually explicit content without a proper §2257 label. Ruoff Reply Decl  
14 at ¶¶ 11 and 12. The fact that individuals submitted this material to [www.veoh.com](http://www.veoh.com) without a  
15 §2257 label was a clear red-flag signal that the license and transfer was not authorized by a  
16 legitimate copyright holder. Indeed based on this knowledge, it is clear that practically none of the  
17 adult material that appeared on [www.veoh.com](http://www.veoh.com) was legitimately provided, as virtually none of the  
18 sexually explicit files that were available through [www.veoh.com](http://www.veoh.com) contained the industry standard  
19 and federally required §2257 label. Ruoff Reply Decl. at ¶17. Also, the statute is evidence that  
20 control over this material is not only possible, but it is mandated by federal law, which goes to  
21 Defendant's right and ability to control. See Plaintiff's Opposition §IV(D).  
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25 Defendant has also demonstrated its willingness to willfully blind itself to facts suggesting  
26 infringement by removing the "appears to contain copyrighted material" selection from its  
27 flagging feature function as described above.  
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1 In response to other arguments raised by Defendant in its Opposition, Plaintiff points out  
2 that this is not a staple article of commerce case. Defendant did not create a staple article of  
3 commerce like a typewriter, recorder or camera, and put it into the stream of commerce without  
4 further direct involvement with purchasers. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464  
5 U.S. 417, 426 (U.S. 1984). The system and website used for infringement stays in Defendant's  
6 control at all times. Whether or not Defendant's system is capable of non-infringing uses,  
7 substantial or not, is of no importance whatsoever. Similarly, for the purposes of this Summary  
8 Judgment Motion, Plaintiff has not advanced a contributory infringement theory based on  
9 inducement and thus *MGM v. Grokster* is inapplicable. Defendant materially contributed to the  
10 infringing activity for the reasons advanced in Plaintiff's Motion for Summary Judgment.  
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13 **VIII. CONCLUSION**

14 Plaintiff has established that Defendant has engaged in direct infringement. Alternatively,  
15 Defendant is vicariously or contributorily liable for the direct infringing acts of its users.  
16 Defendant's affirmative defense under 17 U.S.C. §512(c) fails as does its fair use defense. The  
17 Court should deny Defendant's Motion for Summary Judgment and Grant Plaintiff's Summary  
18 Judgment Motion of the issue of liability.  
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22  
23 Dated: *August 21, 2007*

Respectfully Submitted,

*/s/ Gill Sperlein*

\_\_\_\_\_  
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