

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5894

1 Rebecca Calkins (SBN: 195593)
Erin Ranahan (SBN: 235286)
2 **WINSTON & STRAWN LLP**
333 South Grand Avenue, 38th Floor
3 Los Angeles, CA 90071-1543
4 Telephone: 213-615-1700
5 Facsimile: 213-615-1750
6 Email: rcalkins@winston.com
7 Email: eranahan@winston.com

6 Jennifer A. Golinveaux (SBN 203056)
WINSTON & STRAWN LLP
7 101 California Street
San Francisco, CA 94111
8 (415) 591-1506 (Telephone)
9 (415) 591-1400 (Facsimile)
10 Email: jgolinveaux@winston.com

10 Michael S. Elkin (*pro hac vice*)
Thomas P. Lane (*pro hac vice*)
11 **WINSTON & STRAWN LLP**
200 Park Avenue
12 New York, New York 10166
13 (212) 294-6700 (Telephone)
14 (212) 294-4700 (Facsimile)
15 Email: melkin@winston.com
16 Email: tlane@winston.com

15 Attorneys for Defendant
16 VEOH NETWORKS, INC.

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 UMG RECORDINGS, INC., *et al.*) **Case No. CV 07 5744 – AHM (AJWx)**
20)
21) **VEOH NETWORKS, INC.’S**
22 **Plaintiffs,**) **OPPOSITION TO UMG’S MOTION**
23) **FOR PARTIAL SUMMARY**
24 **vs.**) **JUDGMENT RE: VEOH’S SECOND**
25) **AFFIRMATIVE DEFENSE (17 U.S.C.**
26 **VEOH NETWORKS, INC., *et al.***) **§ 512)**
27) **Judge: Hon. A. Howard Matz**
28) **Date: October 20, 2008**
Time: 10:00 a.m.
Ctrlm: 14

Table of Contents

Page No.

I. INTRODUCTION 1

II. FACTUAL STATEMENT 3

 A. Veoh's Service and Functions 3

 1. Transcoding..... 4

 2. Storage of User Video Files in Chunks 5

 3. Streaming/Progressive Downloading 6

 4. Downloads 6

 B. Veoh's Copyright Policy and Compliance With the DMCA 6

 C. Plaintiffs Never Provided Veoh With Notice of Any Infringing Videos Prior to Filing This Lawsuit, And Continue to Refuse to Identify Any Infringing Videos..... 8

III. **PLAINTIFFS' MOTION MUST BE DENIED BECAUSE THE ALLEGEDLY INFRINGING MATERIAL WAS STORED AT THE DIRECTION OF USERS** 10

 A. The Four Specific Acts of Alleged Direct Infringement by Veoh Do Not Disqualify Veoh From Section 512(c) Safe Harbor 10

 B. The Statutory Language of Section 512(c) Forecloses Plaintiffs' Argument..... 12

 C. Case Law Interpreting Section 512(c) Makes Clear that the Subsection Applies to Service Providers Who Provide Access to User-Supplied Material 15

 1. The Sole Issue Raised in this Motion Has Already Been Decided Against Plaintiffs..... 15

 2. The *Io* Decision Did Not Rely Upon Inapplicable Authority..... 19

 3. An Unbroken Line of Cases Apply Section 512(c) To Service Providers That Provide Access To User-Supplied Material 22

 D. Plaintiffs Have Failed to Cite Any Authority To Support Their Novel Interpretation of Section 512(c) and Instead Rely Entirely Upon Inapplicable Decisions That Do Not Involve The DMCA 23

IV. **THE COURT SHOULD ENTER JUDGMENT IN VEOH'S FAVOR ON THE ISSUE RAISED IN PLAINTIFFS' MOTION** 24

V. **CONCLUSION** 25

Table of Authorities

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Atlantic Recording Corp. v. XM Satellite Radio, Inc.,
No. 06 CIV3733 (DAB), 2007 WL 136186 (S.D.N.Y. Jan. 19, 2007)..... 24

Corbis Corp. v. Amazon.com, Inc.,
351 F.Supp.2d 1090 (W.D. Wash. 2004) 22

CoStar Group, Inc. v. LoopNet, Inc.,
164 F.Supp.2d 688 (D.Md.2001)..... 19, 22

CoStar Group, Inc. v. Loopnet, Inc.,
373 F.3d 554 (4th Cir. 2004) 20

Fair Housing Council of San Fernando Valley v. Roomates.com LLC,
521 F.3d 1157 (9th Cir. 2008) 23, 24

Hendrickson v. Amazon.com, Inc.,
298 F. Supp. 2d 914 (C.D.Cal 2003)..... 22

Hendrickson v. eBay,
165 F.Supp.2d 1082 (C.D.Cal.2001)..... 22

Io Group, Inc. v. Veoh Networks, Inc.,
2008 U.S. Dist. LEXIS, 65915, No. 06-3926, slip op. (N.D. Cal. Aug. 27,
2008) passim

Merck KGaA v. Integra Lifesciences I, Ltd.,
545 U.S. 193 (2005)..... 14

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,
545 U.S. 913 (2005)..... 5

Perfect 10, Inc. v. Amazon.com Inc.,
487 F.3d 701 (9th Cir. 2007) 20

Perfect 10, Inc. v. Amazon.com Inc.,
508 F.3d 1146 (2007) 20

Perfect 10, Inc. v. Visa Int'l Serv. Ass'n,
494 F.3d 788, 794 n.2 (9th Cir. July 3, 2007) 23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Cartoon Network LP, LLP v. CSC Holdings, Inc.,
536 F.3d 121 (2d. Cir., Aug. 4, 2008)15, 19, 21

STATUTES

17 U.S.C. § 512(c)(1)..... 12
17 U.S.C. § 512(c)(1)(A)(iii) 13
17 U.S.C. § 512(k) 13, 18
17 U.S.C. § 512(k)(1)(B) 13, 18

OTHER AUTHORITIES

H. Rep. No. 105-796, at 73 (1998),
as reprinted in 1998 U.S.C.C.A.N. 639, 649 10
H.R. Rep. No. 105-551 (II) (1998) 13
S.Rep. No. 105-190 (1998).....2, 14

1 **I. INTRODUCTION**

2 With its motion, the Universal Music empire seeks to eradicate the safe harbor
3 provided by Section 512(c) of the Digital Millennium Copyright Act. Rather than
4 arguing that Veoh failed to meet its obligations under Section 512(c)—an argument it
5 knows it would lose—Plaintiffs attempt to shut the door so tightly on the safe harbor
6 that it is hard to imagine that any Internet service provider could fit through, or that
7 any practical use for the safe harbor would remain.

8 Section 512(c) provides safe harbor for service providers "for infringement of
9 copyright by reason of the storage at the direction of a user of material that resides on
10 a system or network controlled or operated by or for the service provider." In order to
11 qualify, a service provider must also meet a number of conditions that are not
12 addressed in Plaintiffs' motion.¹

13 Plaintiffs' motion asks the Court to hold, as a matter of law, that Veoh is not
14 even eligible for Section 512(c) safe harbor; this is before the Court even reaches
15 whether Veoh meets all of the requirements of the safe harbor. Plaintiffs concede that
16 the content at issue is uploaded to Veoh's system by its users. Plaintiffs assert,
17 however, that because Veoh's system allows users to access and view the videos
18 stored on its system, Veoh somehow becomes ineligible for the safe harbor. Nothing
19 in the statute or in case law interpreting the statute supports such an interpretation. In
20 fact, Plaintiffs' unfounded interpretation would exclude the very examples Congress
21 provided of services eligible for Section 512(c) safe harbor protection, such as
22 chatrooms, or other forums in which material may be posted at the direction of users.
23 The entire point of such services is to allow users to share content, not to provide mere
24 storage locker services. Quite clearly Congress did not intend to provide safe harbor
25 only to websites, chatrooms, or other forums where no one could access or view the

26 _____
27 ¹ If a service provider qualifies for the safe harbor, it does not eliminate remedies
28 available to a copyright owner, but the service provider will not be liable for monetary
relief, and injunctive relief must be tailored to prevent specified infringing material or
activity.

1 content in question. In fact, Plaintiffs' bizarrely narrow and dangerous interpretation
2 of Section 512(c) would eliminate protection for nearly every Internet service that
3 courts across the country have held to be entitled to safe harbor under the subsection.

4 Not surprisingly, Plaintiffs can cite no authority to support their strained
5 interpretation of the statutory language. In fact, the very issue raised by Plaintiffs'
6 motion has already been decided by a Court in the Northern District of California,
7 which rejected out of hand Plaintiffs' interpretation of the statutory language, holding
8 that:

9 [i]nasmuch as [the automated functions] [are] a means of
10 facilitating user access to material on its website, the court
11 finds that Veoh does not lose safe harbor through the
12 automated creation of these files.

13 *Io Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS, 65915, No. 06-3926,
14 slip op. at 20 (N.D. Cal. Aug. 27, 2008); Golinveaux Decl. at ¶ 8 and Exh. G.

15 With the possibilities afforded by the Internet and the digital age, also come
16 new challenges, particularly with respect to questions of copyright infringement and
17 liability. It was these very challenges that prompted Congress to enact the DMCA a
18 decade ago. The safe harbors for service providers provided by Section 512 of the
19 DMCA were intended to strike a balance, and "preserve[] strong incentives for service
20 providers and copyright owners to *cooperate* to detect and deal with copyright
21 infringements that take place in the digital networked environment." S.Rep. No. 105-
22 190, at 20 (1998) (emphasis added). Plaintiffs, however, do not think they should be
23 required to "cooperate" in detecting and dealing with copyright infringements taking
24 place on the Internet (as illustrated by the fact that Plaintiffs have never provided
25 Veoh with notice of any alleged infringements). This motion is a transparent attempt
26 to legislate the statutory compromise through judicial action and put the entire burden
27 of policing copyright infringement on Internet service providers.

28 UMG ignores the language of the statute, this Congressional intent, and the case

1 law, instead seeking summary judgment based upon a fatally flawed premise, that
2 Veoh is just like a traditional "brick and mortar" television network. Because of its
3 fundamental misunderstanding of the DCMA, Plaintiffs' motion effectively seeks to
4 eviscerate the safe harbor protections afforded by Section 512(c) of the DMCA. Of
5 course, Veoh is not like a traditional television network. Veoh is able to allow
6 thousands upon thousands of independent users to upload their video content to an
7 online forum, where others may browse, view, and download such content. That is
8 why Veoh's founder referred to the concept for Veoh as the "democratization of
9 television." No traditional television network could accomplish such a feat.

10 The Court should reject Plaintiffs' effort to twist the clear language of the
11 DMCA and override congressional intent. Veoh is eligible for Section 512(c) safe
12 harbor, and UMG's motion should be rejected.

13 **II. FACTUAL STATEMENT**

14 With respect to Plaintiffs' Statement of Uncontroverted Facts, the facts
15 regarding Veoh's technology are largely undisputed. Veoh does dispute certain of
16 Plaintiffs' misleading terminology and phrasing, and many of Plaintiffs' conclusions of
17 law as summarized in Veoh's separate Statement of Genuine Issues and Response to
18 Plaintiffs' Conclusions of Law.²

19 **A. Veoh's Service and Functions**

20 Veoh was founded to provide a forum for user generated video content on the
21 Internet. Veoh "provides software and a website (veoh.com) that enables the sharing
22 of user-provided video content over the Internet—from job interviews, to family
23 gatherings, to films by aspiring filmmakers. Since its website launch in February
24 2006, users have uploaded and shared hundreds of thousands of videos on Veoh." *Io*

25 ² For example, Veoh disputes Plaintiffs' use of the phrase "permanent" with
26 respect to copies of videos downloaded by users, as described in paragraphs 24 and 35
27 of Plaintiffs' Statement of Uncontroverted Facts. The videos are not "permanent"
28 because Veoh retains the ability to terminate the user's access to copies of such videos
through the Veoh player or VeohTV if, for instance, Veoh receives a DMCA notice so
long as the file resides in the user's Veoh directory. Papa Decl., ¶ 18.

1 *Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS, 65915, No. 06-3926, slip
2 op. at 2; (Declaration of Joseph Papa ("Papa Decl."), ¶ 2.) Veoh also features partner
3 content from prominent content owners such as ABC, CBS, ESPN, Viacom, Warner
4 Television, *TV Guide*, *Vogue*, and *Sports Illustrated*. *Id.* at ¶ 3. Plaintiffs have not
5 alleged that any such partner content is infringing.

6 Users can upload, view and download videos either through the Veoh.com
7 website, or through Veoh's client software application, referred to as VeohTV or the
8 Veoh Client. Papa Decl., ¶ 4. Veoh's system receives users' video submissions and
9 automatically processes them so that they are available on the Veoh.com website or
10 through VeohTV; the content of the videos is unchanged. Papa Decl., ¶ 5.

11 Plaintiffs argue that Veoh is ineligible for safe harbor based upon four basic
12 functions of Veoh's system: (1) the automatic transcoding of user uploaded files into
13 Flash format; (2) Veoh's storage of user submitted video files in 256-kilobyte data
14 "chunks"; (3) allowing users to view the uploaded video files by streaming; and (4)
15 allowing users to download the video files. Mot. p. 20:11-19. Plaintiffs are wrong on
16 each count.

17 **1. Transcoding**

18 As part of the uploading process, when Veoh receives a video file from a user,
19 its system automatically converts (transcodes) each user-submitted video into Flash
20 format using third-party software. Golinveaux Decl. ¶ 6 and Exh. E (Papa Depo. at
21 45:3-17, 48:14-15.) User-submitted videos may arrive at Veoh's computers in a
22 multitude of different formats. Papa Decl., ¶ 6. Veoh transcodes user-submitted
23 videos into Flash format because the vast majority of Web users have software that
24 can play videos in Flash format. Papa Decl. ¶ 7; Golinveaux Decl. ¶ 6 and Exh. E
25 (Papa Depo. at 48:16-20.) The conversion to Flash format is an entirely automated
26 process. Veoh merely selects default values that are necessary for the encoding
27 process, such as frame rate, bit rate, and frame size, from within a narrow range of
28 parameters set by the third party software. Papa Decl., ¶ 8. Veoh stores copies of the

1 user's video file on its system in both Flash format and in the original file format in
2 which it was uploaded. *Id.* at ¶ 9.

3 **2. Storage of User Video Files in Chunks**

4 The original file format copy of user videos that are uploaded through VeohTV
5 or the veoh.com website are stored in 256-kilobyte pieces or "chunks." *Id.* at ¶ 10;
6 Golinveaux Decl. ¶ 6 and Exh. E (Papa Depo. at 41:1-14; 73:5-13.) For a short time
7 during a beta test, the Flash format version of the user's files were also broken into
8 chunks. Papa Decl. ¶ 10. The video files are stored on Veoh's system in 256-kilobyte
9 chunks in order to facilitate Veoh's peer-assisted distribution of the videos. *Id.*

10 Veoh utilizes what it refers to as a "peer-assisted distribution network" as a
11 component of the technology it utilizes to deliver files when a user requests a file
12 download. *Id.* at ¶ 11. This simply means that when a user requests a file, some of
13 the file may be delivered from the computers of other Veoh users who have already
14 downloaded that file. *Id.*; Golinveaux Decl., ¶ 6 and Exh. E (Papa Depo. at 19:5-16;
15 210.) Storage in pieces allows the video files to be retrieved from different servers
16 when users request a copy of the file. Papa Decl., ¶ 12. Storage of data files in
17 chunks is an entirely automated process. *Id.* It is standard for modern operating
18 systems to store files in chunks, and not something unique to Veoh. *Id.*, ¶ 12.

19 Veoh's peer-assisted distribution network is different from and should not be
20 confused with so called "peer-to-peer" file sharing services, whereby individual
21 computers utilize peer-to-peer software to communicate directly with other users'
22 computers to share files, and the company that distributes the software does not retain
23 central control of such files. Papa Decl., ¶ 13. Plaintiffs misleadingly attempt to
24 exploit the similarity in terminology to suggest that Veoh is akin to peer-to-peer file
25 serving companies such as those at issue in *Metro-Goldwyn-Mayer Studios, Inc. v.*
26 *Grokster, Ltd.*, 545 U.S. 913 (2005). Mot. at fn. 29. Veoh does not offer peer-to-peer
27 file sharing services, and was specifically designed so that it would have the ability to
28 terminate access to videos on its system if it received notice that they were infringing.

1 Papa Decl., ¶ 13.

2 **3. Streaming/Progressive Downloading**

3 Once a user uploads a file to Veoh and the file has been processed and stored on
4 Veoh's system, Veoh users are able to view the file either through a process referred to
5 as streaming, or by downloading a copy of the file from Veoh's servers or servers
6 within its content distribution network. Papa Decl., ¶ 14.

7 Streaming is a technique for transferring data such that it can be processed as a
8 steady and continuous stream, and the user's browser can begin displaying the data
9 before the entire file has been transmitted. *Id.* Veoh utilizes a form of streaming
10 referred to as progressive downloading. *Id.* at ¶ 15. This means that when a user
11 wishes to play a video on Veoh, they click play, and a copy of the video file begins to
12 download into the user's temporary computer memory, or browser cache. *Id.* At some
13 point when a certain amount of the video has been downloaded, the Veoh media
14 player automatically begins playing the video from the beginning. *Id.*; Golinveaux
15 Decl. ¶ 6 and Exh. E (Papa Depo. at 149-150.) How long the file remains in the user's
16 temporary computer memory is a function of a user's browser's settings. *Id.* at 151:16-
17 22.

18 **4. Downloads**

19 A user can also choose to download a copy of the original video file that was
20 uploaded to and stored on Veoh's system. *Id.* at 207; Papa Decl. ¶ 16. To do so, a
21 user clicks on a download video button. When the user selects download video, it
22 opens the VeohTV player, and the original content file will automatically begin
23 downloading from Veoh's peer-assisted distribution network. The downloaded file is
24 then stored on the user's computer within a Veoh directory. *Id.*

25 **B. Veoh's Copyright Policy and Compliance With the DMCA**

26 Far from encouraging its users to upload copyrighted content as asserted
27 (without any support) by Plaintiffs, Veoh has always had a robust DMCA policy and
28 zero tolerance for infringing content. Veoh promptly terminates access to allegedly

1 infringing content upon notice and promptly terminates repeat infringers. Declaration
2 of Stacie Simons ("Simons Decl."), ¶ 2. Veoh's Terms of Use have always
3 prominently stated that Veoh does not permit copyright infringing activities.³ *Io*
4 *Group*, 2008 U.S. Dist. LEXIS, 65915, No. 06-3926, slip op. at 3-5.

5 From its inception, Veoh has had a comprehensive DMCA policy. As the *Io*
6 Court recognized, Veoh fully complies with the requirements of Section 512(c), and in
7 fact, goes well beyond those requirements:

- 8 • Veoh identifies its Copyright Agent and informs users how and where to
9 submit infringement notices (*Io Group, supra*, at 13);
- 10 • Veoh often responds to infringement notices the same day they are
11 received, or at most, within a few days (*Id.*);
- 12 • Veoh has adopted a means for generating a hash or digital "fingerprint,"
13 for each video file, which enables Veoh, when it receives notice and
14 terminates access to an allegedly infringing video file, to terminate access
15 to any other identical files and prevent additional files from *ever* being
16 uploaded by *any* user (*Id.* at 5);
- 17 • When Veoh receives a DMCA notice that a user has uploaded infringing
18 content after a first warning, all content provided by that user is disabled
19 (unless the content was posted by another non-terminated user and not
20 the subject of a DMCA notice), and the user's email is blocked so that the
21 user cannot create a new account with that email address (*Id.* at 13).

22 Thus, the *Io* court found, in holding that Veoh qualified for the Section 512(c)
23 safe harbor as a matter of law:

24 _____
25 ³ Veoh's Terms of Use preclude the uploading of infringing content. Nevertheless,
26 Plaintiffs argue that because the Terms of Use grant Veoh permission to actually make
27 content accessible (through "display, publicly perform, transmit, distribute, copy,
28 store, reproduce, and/or provide . . .") this is somehow evidence of volitional
infringement. But simply because Veoh is diligent in obtaining permissions for Veoh
to automatically make user-generated content accessible, does not render Veoh liable
for content uploaded by its users as a result of automated features that render such
material accessible.

1 far from encouraging infringement, Veoh has a strong
2 DMCA policy, takes active steps to limit incidents of
3 infringement on its website and works diligently to keep
4 unauthorized works off its website.

5 *Id.* at 31.

6 In addition to its strong DMCA policy, Veoh has also been at the forefront of
7 collaborative inter-industry efforts alongside content owners to prevent infringement.
8 In October 2007, Veoh, along with major content owners Disney, Viacom, Fox CBS,
9 Microsoft, and NBC Universal signed on to "The UGC Principles," available at
10 www.ugcprinciples.com. Simons Decl., ¶ 2 and Exh. 1. The UGC Principles serve as
11 a comprehensive set of guidelines to help user-generated content services like Veoh
12 and content creators together work toward their collective goal of "foster[ing] an
13 online environment that promotes the promises and benefits of UGC Services and
14 protects the rights of Copyright Owners." *Id.*

15 Last year, Veoh took the additional voluntary step of implementing state of the
16 art filtering technology to automatically identify suspected infringing content and
17 prevent users from uploading it. This filtering occurs even if Veoh has never received
18 a DMCA notice regarding such content. Papa Decl., ¶ 17.⁴ Implementing filtering
19 technology was an extension of Veoh's strong commitment to preventing copyright
20 infringement, and something that Veoh had always contemplated once effective
21 technology became available. *Id.*

22 **C. Plaintiffs Never Provided Veoh With Notice of Any Infringing**
23 **Videos Prior to Filing This Lawsuit, And Continue to Refuse to**
24 **Identify Any Infringing Videos**

25 Plaintiffs' motion is full of blunderbuss about the "thousands" of infringements

26 ⁴ The filtering technology implemented by Veoh is provided by a third party, Audible
27 Magic, which Plaintiffs acknowledge in footnote 25 of their motion. In downplaying
28 this example of Veoh's commitment to preventing copyright infringement, Plaintiffs
suggest that Veoh's implementation should be disregarded because Veoh was
allegedly "forced" to implement Audible Magic upon request of an investor, Time
Warner. Veoh was not "forced" to do anything, and had contemplated filtering
options even before any agreement with Time Warner.

1 of their works available on Veoh. Yet until they filed this motion, Plaintiffs had never
2 notified Veoh of a single infringing video. Simons Decl., ¶ 4. The complaint itself
3 fails to identify a single infringing video on Veoh, but rather only refers to a list of
4 "representative examples" of works for which Plaintiffs have "applied for" or
5 "obtained" "Certificates of Copyright Registration issued by the Registrar of
6 Copyrights." Plaintiffs' First Amended Compl., ¶ 10. The complaint also refers
7 generally to infringing videos by the artist "Fergie," but fails to identify any specific
8 infringing videos. *Id.* at ¶ 25. Despite the fact that each video available on Veoh is
9 clearly marked with its own identifying number (or permalink), Plaintiffs have always
10 refused to provide Veoh with information sufficient to allow it to locate allegedly
11 infringing videos as required by Section 512(c)(3).⁵ Simons Decl., ¶ 5.

12 For this reason, promptly after Plaintiffs filed this lawsuit, Veoh's counsel wrote
13 to Plaintiffs' counsel and explained that if Plaintiffs would simply identify which
14 videos they contended were infringing, Veoh would promptly take appropriate action
15 to terminate access to any such videos. Golinveaux Decl., ¶ 2 and Exh. A. In
16 response, Plaintiffs still refused to identify any infringing videos and instead insisted
17 that Veoh should be able to figure out on its own which UMG "content" is on its site.
18 *Id.* at ¶ 3 and Exh. B. Plaintiffs also claimed that they had "no oblig[ation]" to take
19 steps to "identify" the allegedly infringing videos. *Id.*

20 For the first time in this motion, Plaintiffs identify five videos that they contend
21 were available on Veoh and infringe their works. Mot. at 9-10. Notably, despite
22 having received no notice from Plaintiffs, Veoh had independently disabled access to
23 all five examples cited in Plaintiffs' motion back in 2007. Simons Decl., ¶ 6. Two of
24 the videos were terminated in response to DMCA notices Veoh received from a trade
25 organization called the Recording Industry Association of America. *Id.* The other

26 ⁵ To date, Plaintiffs have refused to respond to Veoh's interrogatories requesting that
27 Plaintiffs identify the direct infringements from which Veoh's alleged contributory
28 and vicarious liability arises, or to identify the facts upon which Plaintiffs base their
claims of indirect infringement, other than to refer Veoh to Plaintiffs' complaint.
(Golinveaux Decl., ¶ 5 and Exh. D.)

1 three videos were also independently terminated by Veoh. *Id.*

2 **III. PLAINTIFFS' MOTION MUST BE DENIED BECAUSE THE**
3 **ALLEGEDLY INFRINGING MATERIAL WAS STORED AT THE**
4 **DIRECTION OF USERS**

5 Rather than attack Veoh's implementation of its DMCA policy, Plaintiffs assert
6 that Veoh is ineligible for Section 512(c) safe harbor because its system automatically
7 processes and allows users to view and download videos that users have uploaded to
8 its system. As detailed below, Plaintiffs' reading of Section 512(c) would eviscerate
9 any protection offered by the subsection, and flies in the face of the statutory
10 language, the legislative history, and the applicable case law. Indeed, Plaintiffs cite
11 no authority to support this radical interpretation—an interpretation that has already
12 been soundly rejected by a court in the Northern District of California.

13 **A. The Four Specific Acts of Alleged Direct Infringement by Veoh Do**
14 **Not Disqualify Veoh From Section 512(c) Safe Harbor**

15 Plaintiffs assert that four specific acts of alleged direct infringement by Veoh
16 are not subject to the limitation on liability found in Section 512(c) because they do
17 not constitute "storage at the direction of a user," namely:⁶

18 (1) the automatic transcoding of user uploaded files into Flash format, which
19 Plaintiffs contend violates their reproduction right;

20 (2) the storage of user uploaded video files in 256-kilobyte data chunks, which
21 Plaintiffs contend violates their Section 106(1) reproduction right;

22 (3) allowing users to view the video files uploaded by users through the
23 streaming of those files, which Plaintiffs contend violates their Section 106(4) and (6)

24 ⁶ Plaintiffs' motion addresses only the four acts of alleged direct infringement,
25 and does not address Veoh's eligibility for DMCA safe harbor for any other acts,
26 including for any acts that they contend constitute secondary infringement. In
27 addition to claims for direct copyright infringement, Plaintiffs have asserted claims for
28 contributory, vicarious, and inducing copyright infringement against Veoh. Independent of any other defense to copyright infringement claims that a defendant
might raise, the Section 512 safe harbors "protect qualifying service providers from
liability for all monetary relief for direct, vicarious and contributory infringement. . .
." H. Rep. No. 105-796, at 73 (1998), as reprinted in 1998 U.S.C.C.A.N. 639, 649.

1 public performance rights; and

2 (4) allowing users to download the video files uploaded by users, which
3 Plaintiffs contend violates their Section 106(3) distribution right.

4 Mot. at 9, 20.⁷

5 Both the plain language of Section 512 and the applicable case law doom
6 Plaintiffs' argument. Veoh is not disqualified because of its automated processing of
7 user uploaded material so that other users are able to *view* and *access* such material.
8 As detailed in Section III.B. below, Section 512(c) *presupposes* that a service provider
9 shall provide such functions. Because any Internet service provider must engage in
10 basic processing of user provided content in order for the content to be available to
11 other users, the result urged by Plaintiffs would mean that no service provider could
12 be eligible for Section 512(c) safe harbor. Plaintiffs' attempt to distort the statutory
13 language to gut Section 512(c) should be rejected. Assuming such activities even
14 amount to direct copyright infringement by Veoh, they are clearly encompassed by
15 Section 512(c) safe harbor.⁸

16 Taken in turn, none of the four functions disqualify Veoh from Section 512(c)
17 safe harbor. First, the fact that Veoh's system automatically transcodes user submitted
18 material into the widely accessible Flash format, so that users can view such content
19 does not disqualify Veoh. Plaintiffs' argument that Veoh's automated transcoding of
20 files into Flash format, takes Veoh outside the 512(c) safe harbor has been soundly
21 rejected. *See Io Group, supra*, slip op. at 20. It makes no sense to provide a safe
22 harbor for hosting material that no one can access.

23
24 ⁷ Even aside from any issues of eligibility for DMCA safe harbor, Veoh does not
25 concede that these four acts constitute direct infringement of Plaintiffs' copyrights by
26 Veoh. Plaintiffs' motion, however, is limited to the issue of whether Veoh is eligible
27 for Section 512(c) safe harbor for such acts.

28 ⁸ Veoh asserted Section 512 as an affirmative defense and did not limit its affirmative
defense to subsection 512(c). (Veoh's Answer (Docket No. 33) at ¶ 62.)
Consequently, contrary to Plaintiffs' assertion that "[t]he present motion, if granted,
wholly disposes of Veoh's DMCA defense" (Mot. at 10 fn 16), as Plaintiffs
acknowledge, the present motion does not address Veoh's entitlement to Section
512(d) safe harbor. Mot. at 11 fn. 18.

1 Plaintiffs argue that the fact that Veoh stores certain user submitted video files
2 in chunks should also disqualify Veoh from the safe harbor because the chunk copies
3 are "not done by Veoh at the request of its user." Mot. at 17. But Section 512(c) does
4 not require that a service provider's users be involved in every technical decision as to
5 how material is stored and processed. Such a requirement would make no sense and
6 be entirely impractical (and would also eliminate Section 512(c) safe harbor for even
7 mere storage services). How and in what manner Veoh chooses to "store" videos
8 doesn't detract from the point that there is storage at the direction of the user. There is
9 no dispute that the material is uploaded to and stored on Veoh at the direction of its
10 users as required by Section 512(c).

11 Finally, the fact that Veoh allows other users to view and access user submitted
12 material by streaming or downloading the material does not disqualify Veoh from safe
13 harbor. As discussed in Section III.B below, Section 512(c) presupposes that users
14 will access the material at issue.

15 **B. The Statutory Language of Section 512(c) Forecloses Plaintiffs'**
16 **Argument**

17 Section 512(c) provides safe harbor for qualifying service providers "for
18 infringement of copyright by reason of the storage at the direction of a user of material
19 that resides on a system or network controlled or operated by or for the service
20 provider. . . ." 17 U.S.C. § 512(c)(1).

21 Plaintiffs do not contest that the allegedly infringing material at issue was
22 uploaded to and stored on Veoh's system at the direction of users. Instead, they urge
23 that Section 512(c) should be interpreted to provide a service provider safe harbor
24 only for the storage, and not for enabling others to access that material. The statutory
25 text belies such an interpretation; nothing in the statute's text indicates that Congress
26 intended to limit the safe harbor only to a service provider's storage function. To the
27 contrary, the "by reason of the storage" language is itself broad causal language that
28

1 is clearly meant to cover more than mere electronic storage lockers.

2 This is confirmed by the remainder of the subsection. Section 512(c)
3 *presupposes* that the service provider will be providing access to the user's material.
4 One of the requirements for a service provider's entitlement to the safe harbor is that
5 once a service provider obtains knowledge or awareness that the material is infringing,
6 that the service provider "***acts expeditiously to remove, or disable access to, the***
7 ***material.***" 17 U.S.C. §512(c)(1)(A)(iii)(emphasis added). This provision makes no
8 sense if the mere fact of providing access to the material made the service provider
9 ineligible for the safe harbor in the first place.⁹ Similarly, the notice and take down
10 provisions of Section 512(c)(1)(A)(C) make no sense if material was stored in a
11 manner in which no one (including copyright owners) could locate the allegedly
12 infringing material in the first place.

13 The legislative history confirms that Congress did not intend to limit Section
14 512(c) safe harbor to mere electronic storage facilities. According to the legislative
15 history, Section 512(c) is intended to protect service providers that host a "chatroom,
16 or other forum in which material may be posted at the direction of users." H.R. Rep.
17 No. 105-551 (II) at 53 (1998). In contrast, material is excluded from Section 512(c)
18 safe harbor if it "resides on the system or network operated by or for the service
19 provider through its own acts or decisions and not at the direction of a user. . . ." H.R.
20 Rep. No. 105-551 (II), at 53 (1998). Plaintiffs have not suggested that Veoh
21 contributes in any way to, or is otherwise responsible for, the creation or selection of
22 the allegedly infringing content available on Veoh. Users post material to chatrooms
23 and other forums (like Veoh) in order to share that material with others. These
24 examples necessarily involve content uploaded by third parties that other third parties

25 ⁹ Moreover, as discussed further in Section III.C. below, Section 512 contains
26 two definitions of the term "service provider." See 17 U.S.C. §512(k). As the
27 Honorable Howard Lloyd recognized in the *Io* decision, the definition for purposes of
28 Section 512(c), see 17 U.S.C. §512(k)(1)(B), is broader than the definition for
purposes of the Section 512(a) conduit safe harbor, see 17 U.S.C. §512(k)(1)(B), and
presupposes that a Section 512(c) service provider may do more than merely store
material.

1 may search for and view, and thus presumes that the service provider will make such
2 material accessible.

3 In fact, the legislative history specifically confirms Congress' expectation that
4 websites offering access to user-supplied *audio* and *video* material (the same material
5 at issue in this case) would be eligible for the protections of Section 512(c). *See* S.
6 Rep. No. 105-190, at 44 (identifying "the activity at an online site offering audio or
7 video" as within the ambit of Section 512(c) if the service provider met the other
8 statutory requirements). Congress enacted the Section 512(c) safe harbor to ensure
9 that "the variety and quality of services on the Internet will continue to expand." *Id.* at
10 8. Plaintiffs' exceedingly narrow construction under which Section 512(c) applies
11 only to a single type of service—passive storage repositories—contradicts these
12 pronouncements and the objectives of the DMCA. *See, e.g., Merck KGaA v. Integra*
13 *Lifesciences I, Ltd.*, 545 U.S. 193, 207 (2005) (refusing to construe a safe harbor in the
14 Patent Act so narrowly as to render it illusory).

15 Rather than address the fact that the text of Section 512(c) and the legislative
16 history specifically contemplate that the service provider would provide access to its
17 users' content, Plaintiffs rely entirely upon dictionary definitions of the terms
18 "storage" and "reside" to parse the meaning of those words in the abstract. The terms
19 cannot be properly interpreted divorced from their context within the statute's text.

20 Nothing in the language or legislative history of the DMCA indicates that an
21 Internet service provider becomes ineligible for Section 512(c) safe harbor merely
22 because it automatically processes a user's content into a format that is widely
23 accessible, and allows users to access and view the content. To the contrary, as
24 detailed above, Congress specifically contemplated that qualifying Internet service
25 providers would provide such functions.

1 **C. Case Law Interpreting Section 512(c) Makes Clear that the**
2 **Subsection Applies to Service Providers Who Provide Access to**
3 **User-Supplied Material**

4 The precise issue raised in Plaintiffs' motion—whether Veoh's automatic
5 processing of content uploaded by its users so that others can view and download such
6 content disqualifies it from safe harbor—has already been ruled upon by a court in the
7 Northern District of California. Moreover, courts routinely hold that Section 512(c)
8 provides protection to online service providers that provide access to user-supplied
9 material.

10 **1. The Argument Plaintiff Advance Was Recently Rejected**

11 In *Io Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS, 65915, N.D.
12 Cal. Case No. C06-03926 HRL, the court held that Veoh was not disqualified from
13 Section 512(c)'s safe harbor because automated functions facilitate access to user-
14 submitted content on its website. *Id.*, slip op. at 18-20. Like Plaintiffs here, in *Io*
15 *Group* the plaintiff failed to provide Veoh with any notice of infringement prior to
16 filing its complaint, and argued that Veoh was not entitled to Section 512(c) safe
17 harbor as a result of automated functions that made user submitted content accessible.
18 *Id.*

19 The *Io* court specifically rejected the plaintiff's argument that video files on
20 Veoh were not made available by Veoh "at the direction of a user," because Veoh
21 converted each user-submitted video into Flash format so that such videos were
22 widely accessible by viewers. As explained by the court:

23 Veoh has simply established a system whereby software
24 automatically processes user-submitted content and recasts it
25 in a format that is readily accessible to its users . . . But
26 Veoh does not itself actively participate or supervise the
27 uploading of files. . . [v]ideo files are uploaded through an
28

1 automated process which is initiated entirely at the volition
2 of Veoh's users.

3 *Io Group, Inc., supra*, slip op. at 20 (citing *The Cartoon Network LP, LLP v. CSC*
4 *Holdings, Inc.* 536 F3d 121 (2d Cir., Aug. 4, 2008) ("significant difference" exists
5 between human employee volitionally operating copying system, and issuing
6 command directly to automated system that engages in no volitional conduct.)

7 As the *Io* Court found with respect to the same automated functions complained
8 about in Plaintiffs' motion:

9 [i]nasmuch as this is a means of facilitating user access to
10 material on its website, the court finds that Veoh does not
11 lose safe harbor through the automated creation of these
12 files.

13 *Io Group, supra*, slip op. at 20.

14 In its 33-page decision, the *Io* court granted summary judgment in favor of
15 Veoh holding that it was eligible for and entitled to Section 512(c) safe harbor. *Id.* at
16 31. In reaching its decision, the *Io* court carefully balanced competing interests
17 between copyright owners and service providers, and found Veoh was precisely the
18 type of service intended to be protected by the Section 512(c) safe harbor:

19 The ever expanding realm of the Internet provides many
20 new ways for people to connect with one another. The court
21 appreciates that these new opportunities also present new
22 challenges to the protection of copyright in the online world;
23 and the decision rendered here is not intended to push the
24 bounds of the safe harbor so wide that less than scrupulous
25 service providers may claim its protection. Nevertheless,
26 the court does not find that the DMCA was intended to have
27 Veoh shoulder the entire burden of policing third-party
28 copyrights on its website (at the cost of losing its business if

1 it cannot). Rather, the issue is whether Veoh takes
2 appropriate steps to deal with copyright infringement that
3 takes place. Far from encouraging infringement, Veoh has a
4 strong DMCA policy, takes active steps to limit incidents of
5 infringement on its website and works diligently to keep
6 unauthorized works off its website. In sum, Veoh has met
7 its burden in establishing its entitlement to safe harbor for
8 alleged infringements here.

9 *Id.* at 31.

10 Knowing that the *Io* decision is precisely on point, Plaintiffs make strained
11 efforts to distinguish the decision on the grounds that the court relied on statutory
12 definitions and inapplicable authority. As Plaintiffs concede, however, the *Io* decision
13 specifically addressed the fact that Veoh transcoded user uploaded videos into Flash
14 format and held that such automated functions did *not* disqualify Veoh from the
15 Section 512(c) safe harbor. *Id.* at 20. While Plaintiffs assert that the *Io* decision did
16 not specifically address the technological aspects of storing the video files in chunks,
17 streaming or downloading, each of these functions are likewise automated functions
18 whereby a user's content is made accessible to other users. The *Io* court specifically
19 recognized that Veoh's users could view videos once uploaded and specifically
20 addressed the fact that Veoh facilitated "access" to material on its website. *Id.* at 20.

21 Although the *Io* decision analyzed the same issue with respect to the same
22 defendant here, Plaintiffs argue that it is "inapplicable;" "wrongly decided;"
23 "erroneous;" "not rightfully decided;" "incorrect[.];" "not controlling;" and "not
24 binding." Despite the fact that *Io* involved the same defendant and functionality, the
25 same statutory safe harbor and a plaintiff who (as here) refused to cooperate with
26 DMCA procedures, Plaintiffs apparently find nothing about the well-reasoned *Io*
27 decision proper or applicable to this case. Because the *Io* decision was properly
28 decided based upon a careful consideration of the statutory framework of the DMCA,

1 the functionality of Veoh's service, and applicable case law, this Court should not
2 indulge Plaintiffs' request that this Court ignore directly relevant precedent.

3 In seeking to confuse the plainly applicable precedent, Plaintiffs argue the *Io*
4 decision "incorrectly relied on the definition of 'service provider' to limit liability."
5 Motion pp. 22-23. Section 512 contains two definitions of the term "service
6 provider." *See* 17 U.S.C. §512(k). As the court recognized in *Io*, the definition for
7 purposes of Section 512(c), *see* 17 U.S.C. §512(k)(1)(B), is broader than the definition
8 for purposes of the Section 512(a) conduit safe harbor, *see* 17 U.S.C. §512(k)(1)(A),
9 and *presupposes* that a Section 512(c) service provider may do more than merely store
10 material. *Io Group, supra*, slip op. at 19. As the court explained:

11 The narrower definition, which pertains only to service
12 providers falling under Section 512(a), 'means an entity
13 offering the transmission, routing, or providing of
14 connections for digital online communications, between or
15 among points specified by a user, of material of the user's
16 choosing, *without modification to the content of the material*
17 *as sent or received.*'

18 By contrast, no such limitation as to the modification of
19 material is included in the broader definition of 'service
20 provider,' which the parties agree applies to Veoh.

21 *Id.* at 19 (internal citations omitted)(emphasis in original).

22 Plaintiffs do not contest that the *Io* decision properly relied upon the definition
23 of service provider applicable to Section 512(c). Rather, Plaintiffs argue that Judge
24 Lloyd put "too much reliance" on the statutory language. Mot. at 22. Apparently
25 Plaintiffs would have this Court ignore the distinction Congress made between service
26 providers eligible for Section 512(a) conduit safe harbor and those eligible for Section
27 512(c) safe harbor. As Judge Lloyd rightly recognized, "[h]ad Congress intended to
28 include a limitation as to a service provider's modification of user-submitted

1 information [with respect to those eligible for Section 512(c) safe harbor], it would
2 have said so expressly and unambiguously." *Io Group, supra*, slip op. at 19.

3 **2. The *Io* Decision Did Not Rely Upon Inapplicable Authority**

4 Plaintiffs also claim that the *Io* decision was based on "inapplicable authority"
5 because of the *Io* court's reference to two directly relevant cases, *CoStar Group, Inc.*
6 *v. LoopNet, Inc.*, 164 F.Supp.2d 688 (D.Md.2001) and *The Cartoon Network LP, LLP*
7 *, supra*, 536 F.3d 121. Plaintiffs' claim that the *Io* court "incorrectly" relied on
8 *CoStar*, because the Fourth Circuit in that case "*did not* uphold the district court's
9 conclusions about the DMCA, but rather concluded that the accused infringer had not
10 engaged in any infringing conduct." Mot. p. 23:20-27. *Costar* involved a defendant
11 who offered a service that enabled subscribers to upload real estate photos to a folder
12 on the defendant's system. *CoStar Group Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688
13 (D. Md. 2001.) The plaintiff sought to hold the defendant service provider liable for
14 "displaying, distributing and copying" allegedly infringing photographs on its real
15 estate listing site. *Id* at 692. The service provider allowed users to automatically post
16 photographs and allowed other viewers to view those listings, through automatic
17 upload and download functions. *Id.* at 695. The court found the Section 512(c) safe
18 harbor applied even where the defendant engaged in certain review functions before
19 the photographs were uploaded. *Id.* at 701. The court found that the plaintiffs'
20 attempt to make the defendant responsible for infringing content as a result of the
21 cursory screening process was a:

22 mischaracterization of the process by which the photographs
23 are uploaded. They are uploaded at the volition of the user
24 and are subject, not to a review and selection process, but to
25 a mere screening to assess whether they are commercial
26 property and to catch any obvious infringements. . . .

27 Although humans are involved rather than mere technology,
28

1 they serve only as a gateway and are not involved in a
2 selection process.

3 *Id.* at 702

4 The Fourth Circuit affirmed the judgment of the lower court, holding that the
5 defendant had "not engaged in any infringing conduct:"

6 At bottom, we hold that ISPs, when passively storing
7 material at the direction of users in order to make that
8 material available to other users upon their request, do not
9 "copy" the material in direct violation of § 106 of the
10 Copyright Act.

11 *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 554, 555-557 (4th Cir. 2004).

12 In addition to affirming that the photos at issue were stored by Costar at the
13 direction of users, the Fourth Circuit held that, for this reason, Costar itself had not
14 engaged in direct infringement as a threshold matter and that it therefore need not
15 reach whether it was entitled to DMCA safe harbor. Judge Lloyd properly relied on
16 *Costar* for the proposition that material uploaded to Veoh is stored at the direction of
17 its users, as it was in *Costar*. Moreover, the Fourth Circuit's *Costar* decision indicates
18 that, even aside from issues of safe harbor, Veoh does not engage in direct
19 infringement for the material uploaded by its users.¹⁰ As explained by the Fourth

20 ¹⁰ Plaintiffs also state "conclusions about infringement reached by the Fourth Circuit"
21 in *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004) are "inconsistent"
22 with Ninth Circuit law, "as set forth in *Perfect 10, Inc. v. Amazon.com Inc.*, 487 F.3d
23 701, 725-26 (9th Cir. 2007) (recognizing that a website directly infringes copyrights
24 by reproducing, displaying and distributing unauthorized copies of copyrighted
25 works)." (Mot. p. 24, fn. 27). But the *Perfect 10* case to which Plaintiffs refer dealt
with a search engine (Google) that itself initiated the storage of the material at issue.
*Contrary to Plaintiffs' misleading assertion, the Ninth Circuit specifically reserved the
issue of whether such storage would constitute direct infringement by an entity like
Veoh that hosts material uploaded by its users:*

26 Because Google initiates and controls the storage and communication of these
27 thumb-nail images, we do not address whether an entity that merely passively
owns and manages an Internet bulletin board or similar system violates a
28 copyright owner's display and distribution rights when the users of the bulletin
board or similar system post infringing works. *Cf. CoStar Group, Inc. v.
LoopNet*, 373 F.3d 544 (4th Cir. 2004).

1 Circuit "[a]s to direct infringement, liability is ruled out for passive, automatic acts
2 engaged in through a technological process initiated by another." *Id.* at 555. (Section
3 512(c) protects an Internet service provider that "lacks scienter about a copyright
4 violation by a user.")

5 UMG also tries to downplay the applicability of the Second Circuit's recent
6 decision in *Cartoon Network* stating that the case is "inapplicable." In *Cartoon*
7 *Network*, the appellate court reversed a lower court decision that enjoined the
8 defendant cable company's plans to release a new DVR-like service, rejecting the
9 lower court's decision that the service would directly infringe copyrights.¹¹

10 The plaintiff's theory was that the defendant cable company should be liable for
11 direct copyright infringement because "RS-DVR would directly infringe their
12 exclusive rights to both reproduce and publicly perform their copyrighted works." In
13 reversing the lower court and finding that the defendant would not be liable as a direct
14 infringer, the court found key to its decision a finding that the defendants lacked
15 "volitional conduct" in making copies. *Id.* at 24. Significantly, the *Cartoon Network*
16 decision explicitly notes that "operating an ISP" involves far less discretion than the
17 defendant in *Cartoon Network*, but still found the defendants' conduct did not give rise
18 to direct liability for copyright infringement. *Id.* at 24-25.

19 Plaintiffs argue that this decision is "inapplicable" and should not have been
20 relied on in the *Io* decision because it does not discuss "whether an act constitutes
21 'storage at the direction of a user' under the DMCA" and "did not rely on the
22 automated nature of the copying as a basis for its decision." To the contrary, the
23 language from *Cartoon Networks* included in the *Io* decision specifically supports that
24 material uploaded to Veoh is stored at the direction of Veoh's users, and that it also

25
26 *Perfect 10, Inc. v. Amazon.com Inc.*, 508 F.3d 1146, 1160, fn. 6 (9th Cir. 2007)

27 ¹¹ The defendant's proposed service was a "remote storage DVR system" ("RS-DVR")
28 that allowed customers "who did not have a stand-alone DVR to record cable
programming on central hard drives housed and maintained by Cablevision at a
'remote' location." *Id.* p. 5-6.

1 does not constitute direct infringement by Veoh because Veoh's system simply
2 automatically copies such material at the direction of its users:

3 In determining who actually 'makes' a copy a significant
4 difference exists between making a request to a human
5 employee, who then volitionally operates the copying
6 system to make the copy, and issuing a command directly to
7 a system which automatically engages in no volitional
8 conduct.

9 *Id.* at 20 (citing *The Cartoon Network, supra*, at 131).

10 The volitional nature of the automated functions are directly relevant to whether
11 the storage is at the direction of the user or at Veoh's direction; and the court explicitly
12 considered the "automated" nature of the RS-DVR in reaching its decision.

13 Plaintiffs have provided this Court with no reason to either distinguish or ignore
14 the *Io* Court's holding.

15 **3. Courts Routinely Apply Section 512(c) To Service Providers**
16 **That Provide Access To User-Supplied Material**

17 Under Plaintiffs' interpretation of Section 512(c), it is hard to imagine what
18 service could possibly qualify for protection. Indeed, under UMG's scheme, every
19 case in which courts have granted 512(c) safe harbor would have denied it.

20 Unsurprisingly, cases construing the DMCA safe harbor apply it to service providers
21 like Veoh who automatically process and provide access to user-submitted materials.

22 Courts have twice found Amazon.com protected by Section 512(c) for storing,
23 organizing and allowing other users to search for user-submitted content. *See Corbis*
24 *Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090 (W.D. Wash. 2004); *Hendrickson v.*
25 *Amazon.com, Inc.*, 298 F. Supp. 2d at 918. Likewise, courts have extended Section
26 512(c) safe harbor to eBay and LoopNet, companies that also display user-submitted
27 material. *See Hendrickson v. eBay*, 165 F.Supp.2d 1082, 1084 (C.D.Cal.2001) (eBay
28 categorizes material uploaded by users, offers other users a search engine to enable

1 them to find content, and provides users with tools for the buying and selling of
2 goods); *CoStar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 692 (D. Md. 2001),
3 aff'd, 373 F.3d 544 (4th Cir. 2004) (LoopNet hosts real estate listings including
4 photographs submitted by users, and allows other users to view the listings).

5 Under Plaintiffs' view, no Internet service provider could qualify for Section
6 512(c) safe harbor protection, including user content sites like Veoh and the very
7 chatrooms Congress specifically singled out for protection. Under Plaintiffs' standard,
8 because their automated features allowed users to find, access, and view content, none
9 of the defendants in *Corbis Corp.*, *CoStar*, or *Hendrickson* would have qualified for
10 the DMCA safe harbor.

11 Congress intended the DMCA to facilitate the robust development of electronic
12 communications, not to destroy it. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d
13 788, 794 n.2 (9th Cir. July 3, 2007) (The DMCA's purpose was to "facilitate the
14 robust development and world-wide expansion of electronic commerce,
15 communications, research, development, and education in the digital age.") quoting S.
16 Rep. 105-109, at 1-2. The automated transcoding to files into Flash format and the
17 related automated functions, that enable access to and facilitate communications, fall
18 well within Section 512(c) safe harbor.

19 **D. Plaintiffs Have Failed to Cite Any Authority To Support Their Novel**
20 **Interpretation of Section 512(c) and Instead Rely Entirely Upon**
Inapplicable Decisions That Do Not Involve The DMCA

21 Plaintiffs have failed to cite a single case that would support their novel and
22 radical reading of Section 512(c). Instead, Plaintiffs' motion relies entirely upon
23 dictionary definitions and inapposite authority to support its argument that even if
24 Veoh stores material for some operations, it should not be "immunized" for other
25 purportedly infringing conduct. The additional conduct UMG complains of is merely
26 a hyper-technical breakdown of the same activities at issue in *Io* that were found to
27 fall within the protections of the DMCA safe harbor—automated functions triggered
28 to make user-generated content accessible. The only cases cited by Plaintiffs in this

1 regard have nothing to do with DMCA safe harbor and are otherwise
2 distinguishable—involving defendants who created or selected their own content.

3 First, *Fair Housing Council of San Fernando Valley v. Roomates.com LLC*,
4 521 F.3d 1157 (9th Cir. 2008) involved the scope of safe harbor protection under the
5 Communications Decency Act. The court noted that "[a] website operator can be both
6 a service provider and a content provider: if it passively displays content that is
7 created entirely by third parties, then it is only a service provider with respect to that
8 content. But as to content that it creates itself, or is 'responsible, in whole or in part'
9 for creating or developing, the website is also a content provider." *Id.* at 1162. Thus,
10 this case sets forth the unremarkable position that with respect to content a website
11 operator created or was responsible for creating or developing, the website operator is
12 also a content provider for purposes of CDA immunity not at issue in this case.

13 Second, *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ3733
14 (DAB), 2007 WL 136186 (S.D.N.Y. Jan. 19, 2007) dealt with immunity under the
15 Audio Home Recording Act (not the DMCA), and a defendant that was a licensed
16 satellite radio broadcaster. By its nature, the defendant selected the content to
17 distribute on the airways through its broadcasts. Thus, unlike Veoh, the defendant in
18 *Atlantic Recording* selected the content it chose to broadcast. Neither of these cases
19 offers a shred of applicability to this case, much less provide a basis to undue every
20 applicable precedent decided with respect to the DMCA safe harbor.

21 **IV. THE COURT SHOULD ENTER JUDGMENT IN VEOH'S FAVOR ON**
22 **THE ISSUE RAISED IN PLAINTIFFS' MOTION**

23 Pursuant to this Court's 3/17/08 Order, Veoh did not file a cross-motion for
24 summary judgment on the issue raised in Plaintiffs' motion because it would have
25 presented "identical issues of law."¹² Accordingly, Veoh requests that in denying

26
27 ¹² Plaintiffs purport to reserve their rights to present "further-DMCA related issues"
28 "not yet ready for summary judgment" "at an appropriate time." Mot. pp. 10, fn. 16;
p. 20, fn 25; p. 21, fn. 26. Plaintiffs should not be permitted multiple partial summary
judgment motions on Veoh's entitlement to Section 512(c) safe harbor.

1 Plaintiffs' motion for partial summary judgment, summary judgment be instead
2 granted in Veoh's favor with respect to its eligibility for Section 512(c) safe harbor.

3 **V. CONCLUSION**

4 Plaintiffs' motion is a transparent effort to undue Congressional intent, and gut
5 Section 512(c) safe harbor so that the entire burden of policing online copyright
6 infringement would fall on the shoulders of Internet service providers. Congress quite
7 clearly did not intend for Section 512(c) safe harbor to apply only to electronic storage
8 lockers where no one could access user uploaded material. For these reasons, Veoh
9 respectfully requests that Plaintiffs' motion be denied, and partial summary judgment
10 be entered in Veoh's favor with respect to its eligibility for Section 512(c) safe harbor.

11 DATED: September 29, 2008

WINSTON & STRAWN LLP

12
13 By: /s/ Erin R. Ranahan
14 Michael S. Elkin
15 Thomas P. Lane
16 Jennifer A. Golinveaux
17 Rebecca Lawlor Calkins
18 Erin Ranahan

Attorneys for Defendant