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11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA  
 13 WESTERN DIVISION

14 UMG RECORDINGS, INC., *et al.*,

15 Plaintiffs,

16 v.

17 VEOH NETWORKS, INC., *et al.*

18 Defendants.

19 Case No. CV-07-05744 AHM (AJWx)

20 **OPPOSITION TO CERTAIN**  
**DEFENDANTS' MOTION TO DISMISS**  
**FIRST AMENDED COMPLAINT**

21 Judge: Hon. A. Howard Matz

22 Date: November 10, 2008

23 Time: 10:00 a.m.

24 Courtroom: 14

25 Discovery Cutoff: January 12, 2009

26 Pretrial Conference: April 6, 2009

27 Trial Date: April 21, 2009

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1 **I. INTRODUCTORY STATEMENT**

2 On June 16, 2008, UMG moved for leave to amend its complaint to assert  
3 claims for contributory and vicarious copyright infringement, as well as inducement  
4 of copyright infringement, against several of Veoh’s investor-owners: Shelter  
5 Capital Partners, LLC, Shelter Venture Fund, L.P. (collectively “Shelter Capital”),  
6 Spark Capital, LLC, Spark Capital, L.P. (collectively “Spark Capital”), and The  
7 Tornante Company, LLC (“Tornante”) (hereinafter, the “Owner Defendants”). In  
8 opposition to that motion, Veoh vigorously argued that UMG’s amendment would  
9 be futile because it asserted “nothing more than that [the investors] made  
10 investments in Veoh, and each chose an individual to sit on Veoh’s Board of  
11 Directors.” Veoh’s Opp’n to UMG’s Mot. for Leave to Amend at 8. The Court  
12 rejected Veoh’s arguments and granted UMG’s motion for leave to amend.

13 Now the Owner Defendants move to dismiss UMG’s First Amended  
14 Complaint (“FAC”) on identical grounds: because UMG purportedly alleges nothing  
15 more than (1) investment in Veoh and (2) seats on Veoh’s board of directors. Mot.  
16 to Dismiss at 6. While the Court gave the Owner Defendants leave to file a motion  
17 to dismiss, it probably did not expect them to simply raise the same arguments that  
18 Veoh presented in opposing the amendment in the first place. But that is what the  
19 Owner Defendants have done. They have rehashed the same arguments that Veoh  
20 already unsuccessfully raised and in essence ask the Court to reconsider its decision  
21 to grant UMG’s motion for leave to amend.

22 Just as Veoh did when opposing UMG’s motion for leave to amend, the  
23 Owner Defendants try to rewrite UMG’s allegations to attack a strawman, rather  
24 than UMG’s real allegations. *In fact, the Owner Defendants fail to quote a single*  
25 *passage from the FAC.* The reason for this shortcoming is not surprising—the  
26 Owner Defendants have no valid argument to support dismissal of UMG’s  
27 complaint, and must resort to creative “paraphrasing” to make UMG’s allegations fit  
28 the arguments they want to make.

1           As the Court recognized in its order granting UMG’s motion for leave to  
2 amend, UMG’s FAC alleges far more than mere passive investment. UMG alleges  
3 that the Owner Defendants, through their seats on Veoh’s board of directors and  
4 through the actions they have taken, exercise control over Veoh and make *all*  
5 material decisions regarding its operations, including (but by no means limited to)  
6 deciding on the types of content that Veoh makes available and deciding whether to  
7 implement filtering technology that could avoid or curtail infringement. The FAC  
8 alleges that the Owner Defendants knowingly chose to continue Veoh’s infringing  
9 operations in order to draw users and advertising dollars, thereby increasing the  
10 value of their financial interests in Veoh.

11           The Owner Defendants urge the Court to believe that UMG alleges “tertiary”  
12 copyright liability, and that no court has ever recognized such a theory. Of course,  
13 this was the same argument made by Bertelsmann and the venture capital firm  
14 Hummer Winblad in the *Napster* litigation that was rejected by Judge Patel. What  
15 Bertelsmann, Hummer Winblad – and now the Owner Defendants – ignore is that  
16 where an infringer stands in the infringement line is really of no consequence and is  
17 not nearly as important as the conduct they engage in while they are in that line.  
18 Here, as set forth in the FAC, that conduct is extensive and extends to every aspect  
19 of Veoh’s operations and the rampant infringement taking place on Veoh website.

20           In any event, the Owner Defendants’ “tertiary” argument is grounded in the  
21 fundamentally false assumption that Veoh is not itself a *direct* copyright infringer.  
22 Veoh is, as UMG clearly alleges. FAC ¶ 34 (Veoh is liable for direct copyright  
23 infringement for reproducing, distributing, and publicly performing UMG’s  
24 copyrighted works.).

25           Thus, whether the Owner Defendants are responsible for the direct  
26 infringement by Veoh’s users or by Veoh itself, the FAC more than adequately  
27 pleads a claim. The Owner Defendants’ argument that technological innovation  
28 would come to a screeching halt if liability was imposed on them is both untrue and

1 hyperbolic. Ultimately, though, this argument (along with the Owner Defendants’  
2 other arguments) has no relevance whatsoever to UMG’s actual allegations of  
3 secondary liability, which are similar to allegations that the Ninth Circuit and the  
4 Northern District of California have found sufficient to state claims for copyright  
5 infringement.

6 For these reasons, the Owner Defendants’ motion to dismiss should be  
7 denied.

## 8 **II. UMG’S FIRST AMENDED COMPLAINT**

9 On August 22, 2008, the Court granted UMG’s motion for leave to amend its  
10 complaint. The Court rejected Veoh’s argument that UMG’s proposed amendment  
11 would be futile because it was, in Veoh’s words, “based upon the mere fact that they  
12 invested in Veoh and chose a person for its Board.” August 22, 2008 Minute Order  
13 at 5 (quoting Veoh Opp’n to UMG’s Motion to Amend at 10). The Court

14 recognized that UMG had alleged far more in its proposed FAC than “mere”  
15 investment and seats on Veoh’s board. As the Court noted, UMG alleged that  
16 the investor defendants, by seeking and obtaining seats on Veoh’s Board  
17 of Directors as a condition of their investments, exercised substantial  
18 control over Veoh’s operations, with full knowledge of Veoh’s alleged  
19 copyright infringement. FAC ¶¶ 30-32. UMG alleges that the investor  
20 defendants exercised control over “all critical decisions regarding the  
21 content available on Veoh” and whether and how Veoh would  
22 “implement any technology and filter copyrighted content to prevent  
23 infringement on Veoh’s site.” *Id.* ¶¶ 31-32. Rather than use their control  
24 to remove infringing content from Veoh, the investor defendants  
25 allegedly decided instead “to continue Veoh’s infringing operations in  
26 order to continue to attract users and advertising dollars to Veoh, and  
27 increase the value of their financial interests in Veoh.” *Id.* ¶ 31.

28

1 August 22, 2008 Minute Order at 6. The Court rejected Veoh’s arguments that these  
2 claims were futile and granted UMG’s Motion for Leave to Amend. *Id.* UMG filed  
3 its FAC on August 26, 2008.

4 **III. THE OWNER DEFENDANTS FACE A HIGH BAR TO SUSTAIN A**  
5 **MOTION TO DISMISS**

6 Under Rule 8(a), a plaintiff in federal court need only give a “short and plain  
7 statement of the claim showing that the pleader is entitled to relief.” Rule 8 requires  
8 nothing more than fair notice of the claim and the grounds upon which it rests.

9 *Mendiondo v. Centinela Hosp. Medical Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

10 To survive a motion to dismiss, the complaint need have “only enough facts to state  
11 a claim to relief that is plausible on its face,” assuming that all factual allegations are  
12 true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007). While “a  
13 formulaic recitation of the elements of a cause of action will not do,” *id.* at 1964-65,  
14 “heightened fact pleading of specifics” is not required; “a complaint ... does not  
15 need detailed factual allegations,” *id.* at 1974; *Weber v. Dep’t of Veterans Affairs*,  
16 521 F.3d 1061, 1065 (9th Cir. 2008).

17 UMG’s decision to take discovery before filing the complaint has no impact  
18 on this standard. The Owner Defendants make much of the fact that UMG  
19 subpoenaed documents from them before UMG filed its FAC. The Owner  
20 Defendants seem to assert that the Court should view UMG’s allegations with more  
21 scrutiny because some discovery has already taken place. The Owner Defendants  
22 cite to no authority suggesting that this fact has any bearing on the standard UMG  
23 must meet under Rule 8 or Rule 12(b)(6).<sup>1</sup> In any event, the parties have not  
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25 <sup>1</sup> Indeed, in *UMG Recordings, Inc. v. Bertelsmann AG*, a case that the Court  
26 cited in its order granting UMG’s motion to amend, the plaintiff subpoenaed  
27 documents from Hummer Winblad officials long before filing suit. *See In re*  
28 *Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1063 (N.D. Cal. 2006) (noting  
subpoenas were served in 2000, and the complaint against Hummer Winblad was  
filed in 2003). That fact was so irrelevant to the Court’s decision regarding  
Hummer Winblad’s motion to dismiss that it was not even mentioned. *See* 222  
F.R.D. 408 (N.D. Cal. 2004).



1 engaged in “extensive” discovery as the Owner Defendants suggest. Indeed, UMG  
2 has not received any discovery at all from Shelter Capital, as the Investor  
3 Defendants admit. *See* Sullivan Decl., ¶ 14.<sup>2</sup> As set forth in Section IV, *infra*,  
4 UMG has more than sufficiently alleged each of its causes of action against the  
5 Owner Defendants.

#### 6 **IV. UMG’S FAC STATES VALID CLAIMS FOR SECONDARY** 7 **LIABILITY**

8 Contrary to the Owner Defendants’ misleading arguments, UMG has alleged  
9 sufficient facts, indeed more than required under the notice pleading standard of  
10 Rule 8, to state claims for vicarious and contributory copyright infringement, and  
11 inducement of copyright infringement.

##### 12 **A. The FAC States Claims for Contributory Copyright Infringement**

13 Liability for contributory infringement of copyright lies where a party  
14 “knowingly contributes to the infringing conduct of another.” *Fonovisa, Inc. v.*  
15 *Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (holding plaintiff’s allegation  
16 that defendant “actively [strove] to provide the environment and the market for  
17 counterfeit recording sales to thrive” was sufficient to state contributory  
18 infringement claim because “providing the site and facilities for known infringing  
19 activity is sufficient to establish contributory liability.”).

##### 20 **1. UMG Has Alleged Knowledge of Infringing Activities**

21 Contrary to the Owner Defendants’ assertions, UMG’s allegations of  
22 knowledge, including constructive knowledge, are sufficient to state claims for  
23 contributory liability. Relying on *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d  
24 1004 (9th Cir. 2001), the Owner Defendants claim that, where the accused service is

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25 <sup>2</sup> Furthermore, Veoh continues to withhold basic discovery in this case,  
26 including communications between Veoh and the various Owner Defendants. Veoh  
27 apparently continues to withhold such material (and numerous other categories of  
28 basic discovery) until ordered to provide it in response to a motion to compel  
(argued August 25, 2008) which is currently *sub judice* before Magistrate Judge  
Wistrich.

1 “capable of substantial noninfringing uses,” then the plaintiff must show actual  
2 knowledge and material assistance with respect to specific acts of direct  
3 infringement. In the *Napster* case, the direct infringement at issue was acts by end  
4 users of Napster’s file sharing system. Thus the analysis in *Napster* examined  
5 whether the provider (Napster) would be liable for the direct infringement of its  
6 users as a contributory infringer. Indeed, the Ninth Circuit noted that it would “not  
7 impute the requisite level of knowledge to Napster merely because peer-to-peer file  
8 sharing technology *may* be used to infringe plaintiffs’ copyrights.” *Id.* at 1021  
9 (emphasis added). Here, the case is quite different. The FAC alleges that Veoh  
10 itself reproduces, publicly performs, and distributes UMG’s copyrighted works.  
11 FAC ¶ 34.

12 To make their arguments, the Owner Defendants ignore the fact that UMG  
13 has alleged that *Veoh* directly infringes UMG’s copyrights, not just that Veoh’s  
14 services have been used by Veoh’s *users* to infringe. Regardless, however, the  
15 Owner Defendants’ focus on labeling claims as “secondary” vs. “tertiary” liability is  
16 misplaced. Such distinctions are not applied in evaluating claims for contributory  
17 liability in this circuit. For example, in *Ellison v. Robertson*, 357 F.3d 1072 (9th  
18 Cir. 2004), the Court found triable questions of fact regarding whether AOL had the  
19 requisite knowledge and material contribution to infringement where an  
20 unauthorized copy of a book was uploaded to a USENET system by a remote user  
21 and then subsequently made available by AOL to its subscribers. *Id.* at 1077-78.  
22 The Ninth Circuit did not focus on whether the relationships were “secondary” or  
23 “tertiary,” but rather whether the elements of knowledge and material contribution  
24 could be satisfied.<sup>3</sup> Thus, whether Veoh is a “dual-use technology,” as the Owner

25 \_\_\_\_\_  
26 <sup>3</sup> Notably, in arguing the *Ellison* case on behalf of the plaintiff, counsel for  
27 The Tornante Company here argued to the Ninth Circuit: “That defendants had no  
28 control over those responsible for originally uploading the infringing images onto  
the Internet is not relevant to the issue of defendants’ control over their infringing  
activity.” Reply Brief of Plaintiff Appellant in *Ellison v. Robertson*, available at  
2002 WL 32302139, at \*27.

1 Defendants claim (which issue the FAC by no means concedes), is irrelevant  
2 because the Owner Defendants’ liability does not solely arise from the fact that  
3 Veoh’s services *may* be used for infringement, but also from the fact that Veoh has  
4 *directly* infringed UMG’s copyrights. The reasoning of *Fonovisa* applies here, and  
5 the Owner Defendants may be held liable for contributing to direct infringement,  
6 both by Veoh and by those who uploaded material, whether they had actual or  
7 constructive knowledge of the activities.

8 In any event, UMG has alleged that the Owner Defendants had knowledge of  
9 Veoh’s infringing activities. UMG alleges that they obtained control of Veoh  
10 “knowing full well that the site displayed and distributed copyrighted works without  
11 appropriate licenses,” FAC ¶ 5, and that “these investors decided to continue Veoh’s  
12 infringing operations in order to continue to attract users,” *id.* ¶ 31. Indeed, the  
13 Court recognized in its order granting UMG leave to amend that UMG alleged that  
14 the Owner Defendants acted “with full knowledge of Veoh’s alleged copyright  
15 infringement.” August 22, 2008 Minute Order at 6.<sup>4</sup>

## 16 2. UMG Has Alleged Material Contribution to Infringement

17 While the Owner Defendants try to downplay its relevance, the Northern  
18 District of California’s decision in *UMG Recordings, Inc. v. Bertelsmann AG*, 222  
19 F.R.D. 408 (N.D. Cal. 2004), is directly on point here. In that case, the Court

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20  
21 <sup>4</sup> The Owner Defendants apparently believe that UMG’s allegations of  
22 knowledge are merely “conclusory,” and that UMG must allege specific facts  
23 showing how the Owner Defendants obtained that knowledge as to specific  
24 infringing acts under *Bell Atlantic Corp. v. Twombly*. In that case, the Supreme  
25 Court warned that it was not “requir[ing] heightened fact pleading of specifics,” and  
26 that “a complaint ... does not need detailed factual allegations.” 127 S. Ct.at 1974;  
27 *see Weber*, 521 F.3d at 1065. Thus, the Owner Defendants’ argument lacks legal  
28 authority and is inconsistent with the notice pleading standard under Rule 8, which  
*Twombly* did not overrule. UMG need only give fair notice of the claim and the  
grounds upon which it rests. *Mendiondo*, 521 F.3d at 1104. UMG need not, as the  
Owner Defendants suggest, explain all of the details underlying its allegations or  
prove them up in its pleading. UMG alleges numerous facts sufficient to state its  
claims and does not merely recite the elements of the claims – the type of practice  
rejected in *Twombly*.

1 refused to dismiss claims for contributory infringement against investors in the  
2 Napster online peer-to-peer network where the plaintiffs alleged the investors were  
3 directly responsible for the infringing activity. The plaintiffs had alleged that  
4 Bertelsmann and Hummer Winblad, “as entities exercising full control over  
5 Napster’s operations--were directly responsible for the infringing activity  
6 perpetrated by Napster’s online users; more than merely knowing of and  
7 contributing to the infringing activity, they are alleged to have specifically ordered  
8 that such activity take place.” *Id.* at 413. The court ruled that, “[u]nder well-  
9 established Ninth Circuit law, such allegations state a viable claim for relief under  
10 the theories of contributory and vicarious liability.” *Id.* at 414 (citing *Fonovisa*, 76  
11 F.3d at 262; *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443  
12 F.2d 1159, 1162 (2d Cir. 1971)). Indeed, given that Veoh directly infringes UMG’s  
13 copyrights, the Owner Defendants’ conduct is even more centrally related to the  
14 infringement than that alleged in the *Bertelsmann* case.

15       The Owner Defendants contend that, in *Bertelsmann*, the allegations were  
16 sufficient only because the plaintiffs alleged operational supervision on behalf of  
17 each investor on an individual, rather than collective basis. The Owner Defendants  
18 have misstated the case. While one plaintiff in that case had alleged that  
19 Bertelsmann was the sole source of funding for Napster, other plaintiffs made  
20 different allegations, and the court never suggested that this fact was either  
21 necessary or sufficient to support claims for vicarious and contributory liability.  
22 The court noted that the plaintiffs’ allegations against Bertelsmann and Hummer  
23 Winblad “may be mutually exclusive, as plaintiffs variously claim that both  
24 Hummer Winblad and Bertelsmann were managing the same corporate enterprise at  
25 approximately the same time.” 222 F.R.D. 408, 413 (N.D. Cal. 2004). The Owner  
26 Defendants contend that this language supports the dubious proposition that the  
27 FAC must allege that each Owner Defendant had individual majority control of  
28 Veoh. This argument puts form over substance. Notably, the Owner Defendants

1 omit the fact that the *Bertelsmann* court stressed that such questions of control  
2 “must be left for resolution upon motions for summary judgment or at trial.” *Id.*

3       The Owner Defendants would have the Court hold that, if none of them had  
4 individual majority control over Veoh, then they should be shielded, as a matter of  
5 law, from copyright liability even if they knowingly encouraged Veoh to infringe  
6 copyrights and prevented Veoh from adopting filtering measures to stop the  
7 infringement. No court has so held, and for good reason.<sup>5</sup> The Owner Defendants’  
8 position is contrary to both the letter and spirit of copyright law. UMG need not  
9 allege that any one of the owners had majority or sole control over Veoh. What  
10 UMG does allege is that each of the Owner Defendants “used their sizable  
11 investments to obtain board seats and otherwise obtain and maintain operational  
12 control over all of Veoh’s operations,” including control over “all critical decisions  
13 regarding the content available on Veoh,” and control of “decisions over how to  
14 monetize Veoh’s business, including its substantial use of infringing content.” See  
15 FAC ¶ 32. Thus, contrary to the Owner Defendants’ arguments, the FAC does not  
16 simply “pool” together the voting rights of the Owner Defendants to find operational  
17 control on that basis alone.

18       Further, the Owner Defendants apparently contend that UMG must allege that  
19 they did something “sufficiently out of the ordinary to justify the imposition of  
20 copyright liability.” Mot. at 9. Once again, the Owner Defendants cite no legal  
21 authority for this strange notion. The behavior of some hypothetical “ordinary”  
22 investor is irrelevant here. The Owner Defendants seek to create additional legal  
23 requirements out of whole cloth, without regard to the actual law of secondary  
24

25  
26 <sup>5</sup> Indeed, courts have held the opposite. Courts have recognized that “[a]ll  
27 persons and corporations who participate in, exercise control over or benefit from an  
28 infringement are jointly and severally liable as copyright infringers.” *Musical  
Prods., Inc. v. Roma’s Record Corp.*, No. 05-CV-5903, 2007 WL 750319, at \*1  
(E.D.N.Y. Mar. 7, 2007) (quoting *Syigma Photo News, Inc. v. High Soc’y Magazine,  
Inc.*, 778 F.2d 89, 92 (2d Cir. 1985)).

1 liability. The authorities cited by UMG make clear that UMG's allegations are  
2 sufficient.

3 UMG has clearly alleged, in more detail than necessary, that the Owner  
4 Defendants exercised control over what content was available on Veoh, failed to use  
5 that control to prevent Veoh's infringement, and knowingly chose to facilitate  
6 Veoh's infringement in order to increase the value of their investment. The full  
7 extent of each Owner Defendants' control over Veoh is a factual issue that should be  
8 addressed during discovery and trial, not at the pleading stage.

9 **B. The FAC States Claims for Vicarious Copyright Infringement**

10 Vicarious liability for copyright infringement may be imposed where the  
11 defendant (1) possesses the right and ability to supervise the infringing activity, and  
12 (2) has a direct financial interest in the exploitation of the copyrighted materials.  
13 *See* M. Nimmer & D. Nimmer, *Copyright*, § 12.04[A][2] (2007); *Metro-Goldwyn-*  
14 *Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *Fonovisa, Inc. v.*  
15 *Cherry Auction, Inc.*, 76 F.3d at 262-63. Thus, courts have held corporate officers,  
16 members of boards of directors, and investors vicariously liable where the defendant  
17 has the ability to control the activities of the company committing the infringement.  
18 *See, e.g., UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal.  
19 2004) (refusing to dismiss claims for vicarious infringement against investors in the  
20 Napster online peer-to-peer network); *M. Lady, LLC v. Aji, Inc.*, 2007 WL 2728711  
21 (S.D.N.Y. Sept. 19, 2007) (holding a President and CEO, who was also the  
22 dominant shareholder and Chairman of the Board of Directors of the defendant  
23 company, vicariously liable for copyright infringement); *Broadcast Music, Inc. v.*  
24 *Hartmarx Corp.*, 1988 WL 128691, at \*3 (N.D. Ill. Nov. 17, 1988) (holding that the  
25 right to control the Board of Directors constituted control of day-to-day activities  
26 and thus made investor vicariously liable for infringement).

27  
28

1                   **1.     UMG Has Alleged Financial Interest in Veoh’s Infringement**

2           The Owner Defendants contend that UMG has failed to allege a direct  
3 financial interest. They claim that “[b]y definition, as investors they profit only  
4 indirectly through either distributions from the company or a sale of its business.”  
5 Mot. at 10. The Owner Defendants ignore UMG’s allegations that Veoh’s  
6 infringement “attract[ed] users and advertising dollars to Veoh, and increase[d] the  
7 value of their financial interests in Veoh.” FAC ¶ 31.

8           The Ninth Circuit has held that the customer “draw” of infringing materials is  
9 a sufficient financial benefit to establish vicarious liability. In *Fonovisa*, the  
10 plaintiff alleged that Cherry Auction, which operated a swap meet where vendors  
11 sold allegedly infringing copies of the plaintiff’s copyrighted works, received  
12 various fees from vendors and customers. The court found that the plaintiff had  
13 sufficiently alleged a financial benefit because the “sale of pirated recordings at the  
14 Cherry Auction [acted as] a ‘draw’ for customers,” who paid for entrance, parking,  
15 and food at the swap meet. 76 F.3d at 263.

16           Here, UMG has alleged that Veoh’s infringing activities drew users to the  
17 site, thereby increasing the value of Defendants’ investments in Veoh. UMG  
18 intends to show that the value of a website like Veoh is heavily influenced by the  
19 number of users that visit the site. If unauthorized copies of UMG’s works on Veoh  
20 drew users to the site (as UMG alleges), that traffic increased the value of the Owner  
21 Defendants’ stake in the company. Thus, the Owner Defendants obtained a direct  
22 financial benefit. If the Owner Defendants want to dispute the merits of this  
23 analysis, the proper place to do so is at trial, not in a motion to dismiss.

24                   **2.     UMG Has Alleged Right and Ability to Control the**  
25                   **Infringement**

26           According to the Owner Defendants, the FAC asserts that “the statutory  
27 collective management power vested in a company’s board of directors to manage  
28 its affairs under state law automatically satisfies the ‘right and ability to supervise’

1 prong.” Mot. at 10. Once again, the Owner Defendants set up a strawman version  
2 of what they wish UMG had alleged, and attack that illusion instead of addressing  
3 what the FAC actually states. UMG does not assert that the Owner Defendants’  
4 positions on the board of directors, without more, automatically creates a “right and  
5 ability to control.” UMG has alleged that the Owner Defendants maintained  
6 “operational control over *all* of Veoh’s operations,” including control over “*all*  
7 *critical decisions* regarding the content available on Veoh,” control of “decisions  
8 over how to monetize Veoh’s business, including its substantial use of infringing  
9 content,” and control over the decision whether to implement filtering technology.  
10 See FAC ¶ 32 (emphasis added).<sup>6</sup>

11 Clearly, UMG has alleged that the Owner Defendants were in a position to  
12 prevent Veoh’s infringing activities, but they chose instead to benefit from Veoh’s  
13 continuing infringement. UMG’s allegations are more than sufficient under Ninth  
14 Circuit authority. See *Fonovisa*, 76 F.3d at 263 (holding that where defendant swap  
15 meet owner had right to expel vendors for any reason, the control element of  
16 vicarious liability was satisfied because defendant was in a position to police the  
17 infringing vendors). Once again, the nature and extent of each Owner Defendants’  
18 individual control over Veoh’s activities is a factual issue better addressed at  
19 summary judgment and trial.

### 20 C. The FAC States Claims for Inducement of Copyright Infringement

21 The Supreme Court stated in *Grokster*, 545 U.S. at 936-37, 125 S. Ct. 2764,  
22 that “one who distributes a device with the object of promoting its use to infringe  
23 copyright, as shown by clear expression or other affirmative steps taken to foster  
24 infringement, is liable for the resulting acts of infringement by third parties.” The  
25 Owner Defendants assert that they cannot be liable for inducement of infringement  
26 because UMG fails to allege they have distributed a device. According to the

27 <sup>6</sup> The fact that the Owner Defendants repeatedly resort to rewriting UMG’s  
28 allegations is a tacit admission that they have no valid arguments about UMG’s  
actual allegations.



1 Owner Defendants, UMG’s “theory of inducement liability [is] premised upon an  
2 investment in the distributor of an accused device.” Mot. at. 11.

3 The Owner Defendants overlook the fact that the Supreme Court itself  
4 suggested in *Grokster* that liability for inducing infringement can lie for other acts  
5 than distributing a device. The *Grokster* Court cited with approval *Water Techs.*  
6 *Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988), which held that a  
7 defendant may be held liable for inducement of patent infringement where he  
8 “actively and knowingly aid[s] and abet[s] another’s direct infringement.” The  
9 court in *Water Techs.* found a defendant liable for inducing infringement for giving  
10 formulas to the direct infringer, helping the direct infringer make the infringing  
11 product, and preparing customer use instructions. *Id.* Thus, while *Grokster*  
12 specifically dealt with distribution of a device, that does not mean that the  
13 inducement doctrine is specifically limited to that factual situation. The FAC  
14 alleges that *Veoh*, in addition to *Veoh*’s users, directly infringes UMG’s copyrights.  
15 Thus, the relevant question is not just whether the Owner Defendants induced  
16 *Veoh*’s users to infringe, but also whether they induced *Veoh* to infringe. UMG has  
17 alleged sufficient facts showing the Owner Defendants knowingly induced  
18 infringement.

19 Furthermore, UMG has alleged that the Owner Defendants “distribute” and  
20 have “made available technology and devices with the object and intent of  
21 promoting their use to infringe copyrighted materials.” FAC ¶ 59. This contention  
22 is supported by numerous factual allegations, already discussed above, that the  
23 Owner Defendants had “operational control over *all* of *Veoh*’s operations,”  
24 including control over “*all critical decisions* regarding the content available on  
25 *Veoh*,” control of “decisions over how to monetize *Veoh*’s business, including its  
26 substantial use of infringing content,” and control over the decision whether to  
27 implement filtering technology, all with full knowledge of *Veoh*’s infringing  
28 activities. *See* FAC ¶ 32 (emphasis added). These allegations are sufficient to put

1 the Owner Defendants on notice of UMG’s claims, and further consideration of the  
2 merits of these allegations is not appropriate at the pleading stage.<sup>7</sup>

3 **V. PUBLIC POLICY FAVORS HOLDING THE OWNER DEFENDANTS**  
4 **LIABLE FOR COPYRIGHT INFRINGEMENT**

5 Throughout their motion, the Owner Defendants lament the “negative societal  
6 consequences” of UMG’s supposed allegations of “tertiary” liability. According to  
7 the Owner Defendants, “if an angel investor can be held liable solely because it  
8 believed in the promise of an inventor’s technology ... such inventions would never  
9 see the light of day.” Mot. at 13. The Owner Defendants claim, without citing a  
10 single passage of the FAC, that “UMG proposes that a corporate investor shall be  
11 liable for all downstream consequences of lawful products sold by the company  
12 commercializing the invention.” *Id.*

13 Leaving aside the fact that it is absurd for the Owner Defendants to refer to  
14 themselves as “angels,” the FAC does no such thing. The Owner Defendants’  
15 hyperbolic arguments are based entirely on their intentional misreading of UMG’s  
16 FAC. UMG does not allege “tertiary” copyright liability, but rather, the sort of  
17 secondary liability that the Ninth Circuit and Supreme Court have upheld time and  
18 again. UMG does not intend to hold the Owner Defendants liable solely as passive  
19 investors or shareholders. Indeed, UMG did not pursue claims against other  
20 investors in Veoh. Far from being mere passive investors, the Owner Defendants  
21 are alleged to have taken control of all of Veoh’s operations and made all critical  
22 decisions, with full knowledge of Veoh’s infringing activities. Indeed, in light of  
23 the true allegations of the FAC, the Owner Defendants are essentially arguing that  
24 investors should be permitted to control a business and wantonly encourage that  
25 business to engage in illegal activity, without any fear of civil liability. The Owner  
26 Defendants’ arguments would not encourage innovation, but rather illegal

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27 <sup>7</sup> The Owner Defendants remaining arguments that, under patent caselaw,  
28 UMG should have to establish they were the alter egos of Veoh are clearly  
misplaced. UMG has alleged far more than passive investment.

1 enterprises. Simply stated, they run a business that is founded on, and supported by,  
2 illegal behavior, and they cannot escape liability by misnaming their activities and  
3 by mischaracterizing the FAC.

4 **VI. CONCLUSION**

5 For the foregoing reasons, UMG respectfully requests that the Court deny the  
6 Owner Defendants' motion to dismiss.

7  
8 Dated: October 27, 2008

Respectfully Submitted,  
  
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