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VEOH NETWORKS, INC.

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **WESTERN DIVISION**

20 UMG RECORDINGS, INC., *et al.*,
21 Plaintiffs,
22 vs.
23 VEOH NETWORKS, INC. *et al.*,
24 Defendants.

Case No. CV 07 5744 – AHM (AJWx)
**SUPPLEMENTAL MEMORANDUM
PURSUANT TO LOCAL RULE 37-
2.3 IN SUPPORT OF VEOH'S
RENEWED MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
RELATING TO FINANCIAL
INFORMATION AND DAMAGES**
Date: 12/15/08
Time: 10:00 a.m.
Crtrm: 690
Discovery Cut-Off: January 12, 2009
Pretrial Conference: April 6, 2009
Trial Date: April 21, 2009

1 **I. INTRODUCTION**

2 Plaintiffs' chief argument for having refused to produce documents sought by
3 this motion is that the issues raised in Veoh's motion were previously before the
4 Court. But that is not a basis for denial, and Plaintiffs ignore the fact that the Court
5 *explicitly invited* Veoh to renew its motion upon completing review of Plaintiffs'
6 (eleventh hour) production. Before renewing any aspect of its motion, Veoh
7 conducted a careful review of Plaintiffs' production, a production which is not tailored
8 to the issues in this action and appears to largely be a data dump of documents UMG
9 produced in prior lawsuits. In renewing certain parts of its prior motion to compel,
10 Veoh has focused on information crucial to Veoh's defense relating to damages and
11 financial information—and is moving on only the most pressing 46 requests (thereby
12 eliminating more than half of the requests on which Veoh previously moved).
13 Further, Veoh has broken its motion into four discrete sections, each discussing the
14 necessity of such documents to Veoh's investigation of damages. Plaintiffs' argument
15 that Veoh somehow "ignored" this Court's instructions only exposes the lack of any
16 legitimate response in opposition to Veoh's motion. Plaintiffs have simply failed to
17 produce critical information relating to damages, and as such, Veoh's motion should
18 be granted.

19 **II. PLAINTIFFS CANNOT CONTINUE TO HIDE BEHIND THEIR CLAIM
20 OF STATUTORY DAMAGES AND MANUFACTURED PROCEDURAL
21 DEFECTS TO AVOID PRODUCING RELEVANT FINANCIAL
22 INFORMATION**

23 **A. Plaintiffs' Valuations and Analysis of the Allegedly Infringed Works**

24 Plaintiffs argue that "Veoh makes no effort to explain the relevance of the
25 discovery it seeks" to statutory damages, though this Court has repeatedly recognized
26 that financial information about the value of the allegedly infringed works are relevant
27 to an investigation of statutory damages. Ranahan Decl. ¶ 4 and Exh. C, p. 33 ("**there**
28 **is nothing in Section 504 to prevent a Court from taking account of evidence**
concerning actual damages and profits in making an award of statutory damages")

1 **within the range set out in subsection (b)**") (emphasis in Order); *Id.* at ¶ 3 and Exh.
2 B., pp. 15-18 ("The caselaw suggests to me, and the legislative history, that the
3 defendant may offer evidence that the profits the plaintiff lost were small or the work
4 wasn't as valuable as part of the court's determination of what level of statutory
5 damages is appropriate"). *Id.* at p. 18:11-16; See also 11/26/08 Order, note 1 (Docket
6 217) ("it does not appear that UMG is relying on the argument previously rejected by
7 the court in March 17, 2008 order in the MySpace case, namely, that such material is
8 irrelevant because UMG is seeking only statutory damages"). Yet Plaintiffs have
9 unequivocally taken that position here.

10 Plaintiffs also claim that "UMG has already produced documents more than
11 sufficient for Veoh to analyze issues of damages in this case." The fact is that
12 Plaintiffs have not produced any meaningful financial documents¹ and the documents
13 Plaintiffs claim are "summaries of UMG's revenues from the download and streaming
14 of music videos, and licenses that evidence UMG's licensing and royalty terms" are
15 meaningless, particularly given that UMG has delayed indicating allegedly infringing
16 works are at issue, and whether any of such licenses actually relate to such works.
17 Veoh is not seeking to "encompass every document tangentially related to UMG's
18 finances." Veoh is seeking financial documents including those that relate to the
19 valuations and royalties and other income of the infringements at issue in this. UMG
20 should be ordered to produce such documents.

21 **B. Plaintiffs' Deals With Third Parties Regarding The Allegedly**
22 **Infringed Works**

23 Veoh is entitled to investigate Plaintiffs' lost revenues claims by examining
24 licensing agreements showing the values attributed to such works. This Court has
25 recognized information relating to third party deals, and negotiations of those deals is
26 relevant to the investigation of appropriate statutory damages. Indeed, Plaintiffs made
27 this precise argument in seeking to compel *all* licensing, advertising and content

28 ¹ For example, Plaintiffs have not produced a single profit and loss statement for any entity.

1 agreements Veoh has entered. Specifically, Plaintiffs argued, in seeking to compel all
2 licensing and content agreements from Veoh, that "[a] court determining the proper
3 level of damages may consider 'revenues lost' by the plaintiff." (UMG's Joint Stip
4 (Docket 71) pp. 123-124). Plaintiffs further argued that "Veoh's licenses are relevant
5 to negating its affirmative that its use was *de minimus* and damages are excessive"
6 and to show that UMG's works have "substantial value." (*Id.*). Clearly, if Plaintiffs
7 need such information to "negate" Veoh's assertions, Veoh is entitled to the
8 corresponding licensing documents to establish that any use by Veoh *was de minimus*;
9 that UMG's "damages *are excessive*;" and that UMG's works *do not* have "substantial
10 value."

11 This Court agreed that such agreements and negotiations were relevant, and
12 granted Plaintiffs' motion to compel Veoh to produce these licensing documents and
13 negotiations on November 21, 2008. (Docket 220). Plaintiffs also argued in seeking
14 to compel the corresponding documents from Veoh that "Veoh's license agreements
15 with third parties will reflect on Veoh's motivation for refusing to enter into a license
16 agreement with UMG and may also reflect Veoh's benefit financially. . . ." ((Docket
17 71) UMG's Joint Stip, p. 124). Likewise, UMG's licensing agreements with third
18 parties will reflect on UMG's motivation for refusing to enter into a mutually
19 agreeable arrangement with Veoh.

20 Negotiations about these same agreements offer the various motivations for
21 including certain provisions. In other words, the ultimate product of the licensing
22 agreement can only be fully investigated by understanding the context under which
23 relevant provisions were decided. The "more than 50 license agreements" UMG has
24 already produced may have no clear relevance to this action, because the works for
25 which the license agreements relate may not even be at issue in this action. UMG
26 should be required to produce all licensing agreements and negotiations of those
27 agreements, for all of the allegedly infringing works at issue in this action.

1 **C. The Value of Allegedly Infringed Works With Respect to**
2 **Distribution Over the Internet**

3 Though the Court *granted* the defendants' motions to compel viral marketing
4 documents in the *MySpace/Grouper* actions, like those documents sought by this
5 section, UMG maintains that these documents are not relevant. Plaintiffs completely
6 ignore that this Court has previously determined and repeatedly noted that these
7 documents are relevant. Similarly, the Court has indicated in this action that it does
8 "not appear" that UMG is denying such relevance in this context. (11/26/08 Order,
9 note 1 (Docket 217)). Thus, Plaintiffs' opposition confirms that it is Plaintiffs that
10 continue to cling to "tired" theories of irrelevance—with full knowledge that this
11 Court has undeniably rejected such a position.²

12 Plaintiffs' reliance on its own internal policies as reason not to search for
13 responsive documents fails. Whether or not UMG has a policy against certain conduct
14 does not foreclose Veoh's opportunity to investigate whether UMG employees have
15 complied with such policies.³ Plaintiffs' piecemeal, haphazard and incomplete

16 ² Such evidence would clearly be relevant to Veoh's affirmative defenses of estoppel,
17 unclean hands and implied license, and UMG's premature efforts to litigate these
18 claims on the merits fall short of offering grounds to foreclose this crucial discovery.
19 UMG would be estopped from asserting a copyright claim if it has aided in the posting
20 of allegedly infringing material on Veoh without Veoh's knowledge. If UMG
21 encouraged or enabled the posting of allegedly infringing content to Veoh, any such
22 evidence is squarely relevant to this action. Plaintiffs' attempt to parse the facts set
23 forth in *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) in such a narrow
24 and confusing manner ignores the generally applicable holding that a plaintiff is
25 estopped from asserting a copyright claim "if he has aided the defendant in infringing
26 or otherwise induced it to infringe or has committed covert acts such as holding out . .
27 . by silence or inaction." *Id.* at 1116. Veoh is simply seeking information to
28 investigate whether UMG or its agents have aided in the alleged infringement.
Likewise, UMG would have unclean hands if it posted allegedly infringing works
onto Veoh because as Veoh has explained "uploading music videos to internet sites
for marketing, promotion" and investigation, and then suing for infringement "is
plainly inequitable." It is unclear how UMG has trouble deciphering how such
conduct would be inequitable. Finally, such discovery is squarely relevant to Veoh's
implied license affirmative defense, because it is not a stretch to assume that where a
UMG employee has uploaded the infringing work, that UMG has impliedly licensed
such work to Veoh, especially considering that Veoh's terms of use require the user to
certify that it has authorization to post such content. Plaintiffs can argue the merits
when such discussion is ripe, but has presented no grounds to prevent this basic
inquiry.

³ This is especially ironic considering Plaintiffs' entire lawsuit is based upon UMG's
speculation that Veoh is conducting activities in contrast to the manner in which Veoh

1 production of certain viral marketing documents is a far cry from complying with its
2 discovery obligations and producing all responsive documents relating to viral
3 marketing of the allegedly infringing works in this action.

4 **D. Plaintiffs' Efforts to Protect the Allegedly Infringed Works**

5 UMG's argument that its sending DMCA notices or taking other steps to protect
6 UMG's content from infringement is irrelevant to mitigation of any alleged damage is
7 ludicrous. In a case where Veoh employs swift procedures to remove allegedly
8 infringing content, the protections UMG has taken in other contexts to notify third
9 parties of similar allegations (or more likely, UMG's widespread refusal to cooperate)
10 is directly relevant to this action. Even though UMG is challenging Veoh's right to
11 invoke the DMCA procedures, that is no excuse for UMG's failure to minimize any
12 alleged damages by enabling Veoh to remove any allegedly infringing works (unless,
13 of course, UMG's goal was to run-up alleged damages by hiding the ball regarding
14 alleged infringements, and running up litigation costs before such issues could be
15 resolved.) The steps UMG has taken in similar litigations are relevant to this same
16 inquiry. UMG can argue that its duty to mitigate should not extend to its obligation to
17 cooperate in DMCA procedures or other conduct, but its attempt to prematurely
18 litigate on the merits this issue should not foreclose Veoh from obtaining discovery
19 about the means by which UMG protects its works.

20 **III. CONCLUSION**

21 For all the foregoing reasons, the Court should grant Veoh's motion.
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25 has conducted its business with respect to infringing content since its inception. Veoh
26 devotes considerable efforts and resources to keep infringing content off Veoh and
27 ensuring compliance with DMCA procedures, which is confirmed by the extensive
28 discovery produced to Plaintiffs. Indeed, Veoh was held to be protected by the safe
harbor of Section 512(c) of the DMCA in a similar lawsuit because of its strong
DMCA policies. *Io Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS,
65915, No. 06-3926, slip op. at 20 (N.D. Cal. Aug. 27, 2008).

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Dated: December 1, 2008

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