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VEOH NETWORKS, INC.

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

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

20 Plaintiffs,

21 vs.

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

23 Defendants.
24
25
26

Case No. CV 07 5744 – AHM (AJWx)

Discovery Matter

**VEOH'S REPLY IN SUPPORT OF
ITS RENEWED MOTION TO
COMPEL PLAINTIFF UMG TO
IDENTIFY WORKS AT ISSUE**

Hearing: 12/17/08
Time: 10:00 a.m.

Discovery Cut off: 1/12/09

1 **I. INTRODUCTION**

2 This motion seeks information that is absolutely basic to this lawsuit: the
3 identity of the works Plaintiffs claim Veoh has infringed and the alleged
4 infringements. Veoh quite clearly requested this information more than ten months
5 ago when it served its first discovery requests at issue in this motion. For example,
6 Veoh's Interrogatory no. 1 asks Plaintiffs to identify "all copyrights owned by, or
7 exclusively licensed to you, that you claim Veoh has infringed. . . ." and Veoh's
8 Interrogatory no. 2 asks Plaintiffs to identify the "direct infringement[s] from which
9 [Veoh's] contributory or vicarious liability arises."

10 Plaintiffs have still never provided meaningful responses to those
11 interrogatories or the related requests at issue in this motion. On December 1, 2008,
12 more than a year into this case, and just over a month before the close of fact
13 discovery, in response to a different interrogatory, and after Veoh filed this motion,
14 Plaintiffs did finally identify 1,591 allegedly infringing video files upon which they
15 are basing this lawsuit, and the copyright works they claim were infringed. Plaintiffs,
16 however, purport to reserve their right to further supplement their identification.

17 This is not an adequate response to Veoh's discovery requests. Veoh is entitled
18 to a full identification of alleged infringements and asserted works in time to take
19 discovery about Plaintiffs' ownership of those works. Accordingly, Veoh respectfully
20 requests that the Court require Plaintiffs to supplement its responses to Veoh's
21 discovery to immediately identify any remaining works at issue by responding fully to
22 Veoh's Interrogatory Nos. 1, 2, and 3, and producing documents in response to
23 Requests for Production No. 26.

24 Having no good basis to withhold such basic and crucial information until the
25 very end of fact discovery, Plaintiffs' opposition to this motion instead attempts to
26 shift the Court's focus to procedural issues with respect to the timing of this motion,
27 and to blame Veoh for Plaintiffs' inability to identify alleged infringements.

28 Plaintiffs attempt to excuse their own discovery failures based upon outright

1 misrepresentations that Veoh has somehow hindered Plaintiffs' access to Veoh's video
2 files. Notably, though Plaintiffs have not been shy to seek this Court's assistance with
3 discovery matters, Plaintiffs have never sought relief regarding its access to Veoh's
4 video files. That is because the issues raised in Plaintiffs' opposition are nothing more
5 than a smokescreen that provide no excuse for allowing Plaintiffs to resist identifying
6 infringements until it is too late for Veoh to take meaningful discovery regarding the
7 alleged works.

8 Plaintiffs also attempt to continue to seek to distract the Court from the
9 substantive failures of their position with extensive argument that Veoh's motion
10 should be rejected on procedural grounds. The procedural history confirms that Veoh
11 has gone to great lengths seeking to compel this basic information. Plaintiffs suggest
12 that Veoh's effort to promptly address this Court's concerns with its original motion by
13 filing the present, renewed motion in the manner permitted by the Court in connection
14 with the filing of its prior motion¹ and as quickly as possible in light of the discovery
15 cut-off, was somehow improper. Plaintiffs also oddly attempt to assign a nefarious
16 motive to Veoh's efforts to obtain a ruling on this issue in advance of the current
17 January 12, 2009 deadline for fact discovery.² Veoh would not have had to file any
18 such motion if Plaintiffs would have simply identified the alleged infringements,
19
20

21 ¹ The Court permitted expedited briefing of this issue, originally scheduled for
22 November 13, 2008. (Docket 193). That briefing was clearly outside of the joint
23 stipulation briefing procedures contemplated by Local Rule 37.

24 ² During a scheduling conference he held last week, Judge Matz indicated that he is
25 now considering a modest extension of the schedule for this case. The parties are
26 submitting their proposals with respect to the length of that extension on December
27 15.

28 The suggestion that Veoh's efforts to resolve outstanding discovery disputes
before the current January 12 discovery cut-off was nothing more than an attempt to
interfere with Plaintiffs' counsel's Thanksgiving plans is particularly odd given that
UMG served a joint stipulation that required a response from Veoh the day before
Thanksgiving. Moreover, the impending discovery cut-off and motion schedule also
required Veoh to file three supplemental memorandums pursuant to Rule 37 the
Monday after Thanksgiving. It is unfortunate that anyone had to work over
Thanksgiving, but there was certainly no effort to inflict any inconvenience on
Plaintiffs in this regard.

1 rather than forcing Veoh to seek this Court's assistance.³ As conceded by Plaintiffs,
2 the arguments in Veoh's present motion come as no surprise as Plaintiffs have
3 opposed (with the same arguments) Veoh's efforts to obtain this critical information in
4 the prior briefing. Plaintiffs' suggestion that Veoh should be sanctioned for seeking to
5 obtain this critical information prior to the discovery cut-off is patently without merit.

6 Veoh's respectfully requests that its motion to compel responses to Interrogatory
7 Nos. 1-3 and Request No. 26 be granted, and the Court require Plaintiffs to promptly
8 identify all alleged infringements.

9 **II. VEOH'S MOTION IS PROPER**

10 Plaintiffs also suggest that despite Veoh having complied precisely with the
11 Court's November 21 Order, and having re-filed the motion promptly so that it could
12 be decided before the discovery cut-off, Veoh's Motion should again be deferred on
13 purely procedural grounds, and sanctions should be awarded to Plaintiffs because
14 Veoh has sought to have this issue decided on the merits. Apparently Plaintiffs
15 believe that Veoh should never have this motion resolved, which Plaintiffs would
16 effectively accomplish if their approach was adopted.

17 **A. Veoh Addressed All Points Raised by The Court In Its November 21** 18 **Order**

19
20 ³ If this Court had not granted expedited consideration of this critical issue pursuant to
21 the October 28, 2008 Order (Docket 193), Veoh would have followed the Local Rule
22 37 Procedures, and sent a joint stipulation by November 14, as it did with other
23 outstanding discovery motions scheduled to be heard on December 17. Because by
24 the time the Court denied the motion without prejudice, and made no mention of
25 Local Rule 37 in its Order, Veoh relied on the permission to bring these crucial issues
26 to the Court's attention on an expedited basis, outside of Local Rule 37, on November
27 13. *Id.* Additionally and importantly, the Court's November 21, 2008 Order did not
28 mention failure to comply with Local Rule 37 as a grounds for denial, as such would
have been inconsistent with the Court's own October 28, 2008 Order (Docket 193).
Conversely, in denying a recent *ex parte* application by Veoh, this Court's December 5
order explicitly stated that grounds for denial included failure to comply with Local
Rule 37. (Docket 271). Thus, if the Court had intended Veoh to re-file the motion in
accordance with Local Rule 37, presumably the Court would have included such
language in the Order. In any event, Veoh did not believe that the Court's intention in
its November 21 Order was to foreclose Veoh's ability to ever re-file the motion given
the discovery cut-off, and never address the merits of the dispute, which Plaintiffs'
approach would effectively accomplish.

1 The Court's November 21, 2008 Order stated that "the motion is denied without
2 prejudice to its renewal on the basis of a more adequate record." (Docket 219). The
3 Court specifically stated that:

4 although some of the propositions asserted by Veoh are
5 "unexceptionable" this motion is defective. First, the court previously
6 denied a motion to compel filed by Veoh because it was presented in an
7 unmanageable manner. Rather than file a new motion including copies
8 of the discovery requests and responses thereto that are at issue, Veoh
9 merely refers to the court to a portion of the 314 page joint stipulation
10 filed in support of the previously denied motion. Second, the relief Veoh
11 seeks in its proposed order is too broad and has not been shown to be
12 tethered to any particular discovery requests that it has served. Third, it
13 is unclear whether Veoh is essentially attempting to compel a response to
14 the interrogatory it served on October 24, 2008. Based upon assertions
15 by UMG in its opposition, the court is concerned about the possibility
16 that UMG may not have received the unfettered access to Veoh's video
17 files that Veoh has represented the spreadsheet would allow. . if issues
18 concerning the production of Veoh's video files need to be revisited, the
19 parties should cooperate in promptly placing those issues before the court
20 for resolution.

21 Contrary to Plaintiffs' assertions that Veoh 'ignored' this Court's November 21
22 Order, Veoh immediately sought to resolve all issues raised by the Court's Order so
23 that the Motion could be re-filed and re-noticed before the close of discovery. First,
24 Veoh incorporated the specific requests and responses into the motion, so that there
25 was no question which requests and responses were at issue.⁴ Second, Veoh added the

26 _____
27 ⁴ Veoh originally did not include the specific requests, but incorporated them by
28 reference, because Veoh sought to make the motion more manageable, given that its
prior motion was denied on that basis, and to comply with the 25-page limit (which
applied given that the Court allowed the motion to be filed outside of Local Rule 37).

1 specificity to the proposed order, so that it was clear what requests were at issue and
2 what relief was being sought. Finally, Veoh's adding this specificity necessarily
3 resolved the third issue, because it made clear that Veoh was not seeking to
4 prematurely compel a new request, but was moving to compel responses to
5 Interrogatory Nos. 1, 2, and 3, and documents in response to Request for Production
6 No. 26. Veoh also explained in the Motion that it was not seeking to compel a
7 response to Interrogatory No. 25.⁵

8 As discussed above and in Veoh's Motion, Veoh also squarely addressed
9 Plaintiffs' long-ago resolved complaints about access to video files. Because Veoh
10 resolved all issues addressed in the Court's November 21 Order, the Court should not
11 indulge Plaintiffs' request to again avoid the merits of this crucial discovery dispute,
12 especially because this action is now nearing the close of discovery.

13 **B. The Procedural History Necessitated Filing A Regularly Noticed**
14 **Motion In Order For Veoh's Renewed Motion to Be Decided Before**
15 **the Discovery Period Expired**

16 Veoh originally pursued the discovery sought by this Motion pursuant to Local
17 Rule 37 on August 25, 2008, but the Court denied that Motion without prejudice to be
18 presented in a more manageable format. With the Court's approval, given the crucial
19 nature of this information, Veoh then presented the Motion pursuant to the expedited
20 November 13, 2008 hearing schedule set forth in the Court's October 28, 2008 Order
21 (Docket 193). The Court, however, denied Veoh's Motion without prejudice to its
22 renewal with a more "adequate record."

23 ⁵ As Veoh explained in its Motion, on October 24, 2008, after it became abundantly
24 clear that Plaintiffs intended to entirely stonewall providing information identifying
25 the infringements at issue in response to Veoh's original interrogatories (served nine
26 months earlier), Veoh requested through an interrogatory specific identifying
27 information about the allegedly infringing works. The information sought would be
28 responsive to Veoh's Interrogatory No. 2 ("for each infringement for which you claim
Veoh bears contributory or vicarious liability, identify the direct infringement from
which the contributory or vicarious liability arises"), for which Plaintiffs served its
response on April 9, 2008. Interrogatory No. 2 is indisputably long overdue, and is
specifically at issue and addressed in this Motion, and plaintiffs should be ordered to
respond to Interrogatory 2 with all infringements at issue in this action.

1 As Veoh explained in its notice of motion, Veoh presented this Motion as a
2 regularly noticed motion and not pursuant to the joint stipulation procedures of Local
3 Rule 37 given the procedural background of this issue described above, and because
4 the last Motion, which was permitted on an expedited schedule outside of the Local
5 Rule 37 procedures, was denied solely on procedural grounds resolved herein (and not
6 failure to comply with Local Rule 37). Because the discovery cut-off is January 12,
7 2009, and because the Honorable Judge Wistrich has closed hearing dates between
8 December 22, 2008 and January 12, 2009, November 24, 2008 was the last day to
9 serve regular notice of this Motion such that relief can be granted sufficiently in
10 advance of the discovery cut-off, which is required to comply with the Scheduling
11 Order of the Honorable Judge Matz. If Veoh were required to re-file this Motion
12 under the joint stipulation procedures of Local Rule 37, given the discovery cut-off,
13 Veoh would not have the opportunity to re-file this Motion to present a more adequate
14 record in accordance with this Court's November 21 Order. Plaintiffs fail to articulate
15 any prejudice from Veoh's motion, especially because it has already had the
16 opportunity to set forth its substantive arguments twice before.

17 **III. THE COURT SHOULD REQUIRE PLAINTIFFS TO PROMPTLY**
18 **IDENTIFY ALL ALLEGED INFRINGEMENTS**

19 Plaintiffs should be required to immediately identify all alleged infringements
20 as sought by discovery requests issued over eight months ago, and not be allowed to
21 sandbag Veoh with this information at the close of fact discovery when it can no
22 longer take meaningful discovery regarding the alleged infringed works.

23 In a similar case before Judge Matz, he recognized that the same information
24 sought by this Motion would "set the contours for what the dispute is about" as well as
25 define the "outside limit on potential issues of liability and corresponding damages."
26 *UMG Recordings, Inc. et al., v. Divx, Inc., et al.*, (Case No. CV07-6385-AHM
27 (AJWx) ("The *Divx* Action") (Calkins Decl. ¶ 3 and Exh. A, p. 6:14-16 *Id.* at p. 7:17-
28 25). As Judge Matz also noted, "I definitely will impose that obligation on UMG. I'm

1 not going to permit amendments. I'm not going to permit specifications right up to the
2 date of trial." *Id.* (Calkins Decl. ¶ 3 and Exh. A, pp. 6:14-12:18).⁶ Thus, not only did
3 Judge Matz order UMG to identify all currently known alleged infringements within
4 28 days of the initial scheduling conference in *The Divx* Action, Judge Matz ordered
5 UMG to identify the remaining discovered alleged infringements within 119 days.

6 Plaintiffs appear to be proceeding in precisely the manner that Judge Matz
7 sought to avoid in *DivX*, seeking to "permit amendments" and "add specifications"
8 right up to trial. Yet this approach forecloses Veoh's ability to investigate Plaintiffs'
9 rights to such works and related discovery. Plaintiffs should be ordered to
10 immediately identify any additional infringements claimed in this action in response
11 to Interrogatory Nos. 1, 2 and 3 and produce documents sought by Request for
12 Production 26.

13 **IV. PLAINTIFFS' COMPLAINTS REGARDING ACCESS TO VEOH'S**
14 **VIDEO FILES ARE WITHOUT MERIT**

15 Plaintiffs should not be permitted to continue to hide behind excuses and
16 procedural complaints in refusing to define the scope of their lawsuit. Although
17 Plaintiffs have always had access to the publicly available video files on Veoh, which
18 is a publicly available website, and should have been able to at least identify, from the
19 outset of the lawsuit, any allegedly infringing works that were publicly accessible,
20 Plaintiffs waited until more than a year after this action was filed to identify such
21 works. Plaintiffs have no justification for failing to identify a single copyrighted work
22 or single infringing video file until December 1, 2008, and should be ordered to
23 identify all infringements without further delay.

24
25 ⁶ Judge Matz also made clear that UMG's identification should include URL
26 information for the alleged infringing videos, noting that:
27 [i]t's undoubtedly going to be consistent with that ability and that requirement that
28 they specify the URL because that's how they got it . . . in fact, that would be an
obligation . . . I'm not making a definitive ruling on this—in order to carry out your
DMCA obligations anyway . . . URL identification will be in both sides' interests.
Okay? (*Id.* at pp. 14:7-16:7).

1 With respect to videos to which Veoh had terminated access ("cancelled") for
2 copyright or other reasons, Veoh provided Plaintiffs secure access to all of its video
3 files including cancelled videos on September 5, 2008. Plaintiffs' misleading
4 complaints about access are simply an effort to create a smokescreen to justify their
5 own discovery failures. Significantly, though Plaintiffs have not been shy about
6 seeking this Court's assistance on a host of alleged discovery disputes, Plaintiffs have
7 not once raised a single issue regarding delayed or hindered access. That is because
8 each of Plaintiffs' purported issues, were promptly resolved. For example:

9 • First, Plaintiffs claimed that although they were able to access all of the
10 video files in the file format in which they were uploaded, Veoh failed to adequately
11 provide access to all Flash format versions of such files. Although Plaintiffs waited
12 almost a month after receiving access to Veoh's video files to raise this issue, Veoh
13 fully resolved the issue for Plaintiffs within a week of their raising the issue, back on
14 October 3, 2008. (Ranahan Decl. (Docket 221-2) ¶¶ 8-9 and Exhs. G-H).

15 • Second, Plaintiffs claim that Veoh "unilaterally terminated" their secure
16 access to the video files at one point. On October 9, 2008, more than a month after
17 initially providing Plaintiffs with access to the video files, Veoh's counsel sent
18 Plaintiffs' counsel an urgent email explaining that Plaintiffs' software was using the
19 secured access to access the video database in excess of 60 times per second, which
20 was overloading Veoh's entire system. (Ranahan Decl. ¶ 4 and Exh. C). Veoh's
21 counsel asked Plaintiffs' counsel to confirm whether Plaintiffs were able to limit the
22 access to one file per second, and explained that Veoh would have to terminate
23 Plaintiffs' secure private access until the issue could be resolved. *Plaintiffs refused to*
24 *respond at all for nearly two weeks, forcing Veoh to send two additional letters, and*
25 *finally threaten to take the issue before the Court, at which point Plaintiffs finally*
26 *responded that they would agree to abide by compromise access terms proposed by*
27 *Veoh* (allowing them to access the video files ten times per second during off peak
28

1 hours and once per second during peak hours). *Id.* at ¶¶ 4-7 Exhs. C-F. Veoh restored
2 Plaintiffs' access that same day.

3 Plaintiffs do not dispute that both of these issues were fully resolved some time ago.

4 Plaintiffs' latest apparent excuse for refusing to identify the works at issue is
5 that they lack certain information associated with Audible Magic filtering. Before this
6 dispute, Plaintiffs had never requested that Veoh capture such additional data, Veoh
7 has never represented that it would capture and retain such data. On October 27,
8 2008, Plaintiffs filed an *ex parte* application seeking an order requiring Veoh to
9 capture volumes of data that exists only momentarily in RAM on Veoh's system as
10 Audible Magic's system processes videos. The Court ordered Veoh to retain such
11 information prospectively. (Docket 217).

12 Plaintiffs misleadingly argue that Veoh "destroyed" data associated with
13 Audible Magic. As the Court is aware from earlier briefing, Veoh historically logged
14 certain of the fields available in RAM as Audible Magic's system processes, including
15 the video Id; the corresponding Audible Magic database; the Label; the Recording
16 Owner; and the Vendor Name. These Audible Magic logs have all been produced to
17 Plaintiffs. Veoh logged these fields so that it could record in its video database
18 whether a particular video was blocked by Audible Magic processing, the date it was
19 blocked, and the copyright claimant who had registered the work with Audible Magic.
20 This last piece of information was logged so that Veoh could potentially contact the
21 copyright claimant in the event that Veoh received a "counter-notice" from a user,
22 claiming that the content was blocked in error. Veoh historically did not log the rest
23 of the information that runs through its RAM as Audible Magic processes videos
24 because such logging is not necessary to or part of Veoh's business operations.

25 Plaintiffs also misleadingly assert that counsel for Veoh represented that Veoh
26 would produce the Audible Magic log data at the August 25, 2008 discovery hearing.
27 Veoh's counsel never represented that Veoh had captured all data from Audible Magic
28

1 processing in Veoh's RAM.⁷ Veoh's counsel explained to the Court that in response to
2 Plaintiffs' document requests seeking all video files uploaded to Veoh, Veoh was
3 prepared to produce a spreadsheet that "would be organized by video with metadata
4 for each video, which would include, for example, the title that the user provided, any
5 key words that the user provided associated with that video so that they could do those
6 kind of electronic searches within the spreadsheet for whatever titles they might have
7 concern about. . . ." (Declaration of Erin R. Ranahan in Support of Summary of
8 Discovery Orders (Docket 112) ¶ 10 and Exh. I, p. 403.) Veoh maintains a video
9 database that includes more than 100 fields of metadata that may be populated for
10 each video uploaded to Veoh. Veoh has always been explicit that the spreadsheets it
11 planned to produce to Plaintiffs would contain the video metadata maintained in that
12 video database. *See, e.g.*, Joint Stipulation Re UMG' Recordings, Inc.'s Motion to
13 Compel Responses to Discovery Against Veoh Networks, Inc. at 59, Docket No. 78,
14 filed July 21, 2008 ("Veoh offered to produce to UMG copies of spreadsheets
15 populated from Veoh's video databases that would contain metadata regarding each
16 video uploaded to Veoh (such as title, date of upload, current status of video, etc.)".)
17 Veoh produced the spreadsheets populated from the video database.

18 In any event, it is unclear why Plaintiffs would require this third party data in
19 order to be able to identify infringements of their own work, particularly
20 since they have access to the video files themselves. Moreover, in an effort to resolve
21 this dispute informally, and with no obligation to do so, Veoh requested that Audible
22 Magic run a report of such data and provide it to Veoh this week to provide to
23 Plaintiffs.

24 **V. CONCLUSION**

25 Veoh respectfully requests that the Court order UMG to immediately identify
26 all copyrighted works and infringements claimed in this action in response to
27 Interrogatory Nos. 1, 2, 3 and Request for Production 26.

28 ⁷ Veoh is now logging such data in compliance with the Court's November 18 Order.

1 Dated: December 10, 2008
2

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