

1 IRELL & MANELLA LLP
Steven A. Marenberg (101033)
2 smarenberg@irell.com
Elliot Brown (150802)
3 ebrown@irell.com
Brian D. Ledahl (186579)
4 bledahl@irell.com
Benjamin Glatstein (242034)
5 bglatstein@irell.com
1800 Avenue of the Stars, Suite 900
6 Los Angeles, California 90067-4276
Telephone: (310) 277-1010
7 Facsimile: (310) 203-7199

8 Attorneys for Plaintiffs

9 WINSTON & STRAWN LLP
Rebecca Lawlor Calkins (195593)
10 rcalkins@winston.com
Erin R. Ranahan (235286)
11 eranahan@winston.com
333 South Grand Avenue, 38th Floor
12 Los Angeles, California 90071
Telephone: (213) 615-1700
13 Facsimile: (213) 615-1750

WINSTON & STRAWN LLP
Jennifer A. Golinveaux (203056)
jgolinveaux@winston.com
101 California Street, 38th Floor
San Francisco, California 94111-5894
Telephone: (415) 591-1000
Facsimile: (415) 591-1400

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

19 Attorneys for Defendants

20 UNITED STATES DISTRICT COURT
21 CENTRAL DISTRICT OF CALIFORNIA

22
23 UMG Recordings, Inc., et al.,
24 Plaintiffs,
25 vs.
26 Veoh Networks, Inc., et al.,
27 Defendants.

) Case No. CV 07-5744 AHM (AJWx)
) JOINT RULE 26(f) REPORT
) Date: March 17, 2008
) Time: 1:30 p.m.
) Ctrm: 14
) Judge: Hon. A. Howard Matz

1 Pursuant to Federal Rule of Civil Procedure 26(f), Central District of
2 California Local Rule 26-1, and this Court's December 20, 2007 Order, counsel for
3 all parties met and conferred on February 11, 2008 and hereby submit this Joint
4 Report.

5 **I. SHORT SYNOPSIS OF PARTIES' MAIN CLAIMS AND DEFENSES**

6 **A. UMG's Statement:¹**

7 This is an action for direct, contributory and vicarious copyright infringement
8 and for inducement of copyright infringement brought by plaintiffs UMG
9 Recordings., Inc., *et al.* ("UMG") against defendant Veoh Networks, Inc. ("Veoh").
10 UMG's claims arise out of Veoh's unauthorized exploitation of UMG's copyrighted
11 materials on the website veoh.com, and through the use of its Veoh player software.
12 Veoh provides video content to its users both on its website and through its player
13 software. Much of the content that Veoh makes available for streaming and
14 downloading is not so-called user-generated content, but is in fact the stolen
15 intellectual property of UMG and others. As the Court may recall, Veoh first
16 brought a claim against UMG for declaratory relief in the Southern District of
17 California, alleging that "[w]ithout concrete knowledge of its rights or the likelihood
18 of future litigation, Veoh cannot operate effectively as a business." Veoh
19 Declaratory Relief Complaint, ¶ 66. At the time this lawsuit was filed, Veoh knew
20 that hundreds, if not thousands, of UMG's copyrighted works, including
21 professionally-created music videos embodying sound recordings and musical
22 compositions owned by UMG, were available for viewing and download at
23 veoh.com and through the Veoh player. Though it could have, Veoh did nothing to
24 prevent this infringement. Indeed, UMG's Complaint pointed out, for example, that
25 a video for the song "Fergalicious" by the UMG artist Fergie could readily be found
26

27 ¹ UMG does not regard Rule 26(f) reports as an appropriate forum for the
28 submission of mini-briefs as to the parties' substantive disagreements. To that end,
UMG's positions presented herein are brief, non-exhaustive, and not intended as a
waiver of its arguments or rights.

1 on Veoh's internet site. UMG attached a screen-shot of one instance of that video as
2 Exhibit B to its Complaint. Months later, the same video (and many other copies of
3 it) are still available on Veoh's internet site. Veoh offers its users free access to
4 UMG's copyrighted works and profits from advertising it displays to users who
5 view those works. Neither Veoh, nor its users have obtained the rights to use and
6 exploit UMG's copyrighted works, and neither UMG nor its artists have received
7 any compensation for Veoh's unauthorized use of UMG's works.

8 Veoh engages in direct infringement of UMG's copyrighted works by, *inter*
9 *alia*, copying, reformatting, distributing, publicly displaying and performing, and
10 creating derivative works of those works. Veoh also participates in and contributes
11 to the infringement of its users by inviting and encouraging users all over the world
12 to view and copy UMG's copyrighted works and by facilitating, encouraging,
13 participating in, and inducing its users to engage in the unauthorized reproduction,
14 adaptation, distribution, and public performance of UMG's copyrighted works.
15 Veoh's conduct is not excused by any provision of the Copyright Act, including, but
16 not limited to the "safe harbor" provisions of the Digital Millennium Copyright Act
17 ("DMCA").

18 **B. Veoh's Statement**

19 Veoh provides a website and software that allow users to upload and share
20 videos on the Internet. Veoh strictly prohibits infringing content; from its inception
21 Veoh has promptly terminated access to allegedly infringing content upon notice,
22 and has also promptly terminated repeat violators of its policies.

23 Plaintiffs assert that Veoh should be held liable both directly and indirectly
24 for copyright infringement of Plaintiffs' alleged works on the grounds that certain of
25 the works uploaded by Veoh's users infringed Plaintiffs' copyrights. This comes
26 despite the fact that Plaintiffs have consistently (and inexplicably) refused to
27 identify any specific infringing videos available on Veoh. Despite Veoh's well
28 publicized DMCA policy, Plaintiffs have **never sent** Veoh a notice pursuant to the

1 DMCA, or any notice for that matter, identifying infringing videos. Plaintiffs
2 apparently take the position that the DMCA should not apply to them. Plaintiffs
3 continue to insist on playing this game--accusing Veoh of being a massive infringer
4 on the one hand, and yet refusing to identify any specific infringements on the other-
5 -even after filing their Complaint. Concerning "Fergalicious" videos referenced in
6 Plaintiffs' Complaint and by Plaintiffs in the section above, for example, Plaintiffs
7 neglect to mention that Veoh's counsel promptly wrote to Plaintiffs' counsel
8 concerning such videos after Veoh was served with Plaintiffs' Complaint in this
9 action, and asked Plaintiffs to identify which "Fergie" videos they contended were
10 infringing (since the Complaint simply referred to "a list of available Fergie videos
11 (including many infringing copies of music videos featuring UMGR's copyright
12 sound recordings) that are available to be viewed from Veoh.com," without
13 specifying which videos Plaintiffs claimed to be infringing), but Plaintiffs' counsel
14 refused to identify any specific infringing videos.

15 Defendant believes that it is shielded from any claims for monetary damages
16 by Section 512(c) of the DMCA, and that, even putting aside the DMCA safe
17 harbor, Plaintiffs cannot establish the elements of their direct or indirect
18 infringement claims. Defendant also asserts a number of other defenses that are
19 summarized under Section II.B. below.

20 **II. BRIEF DESCRIPTION OF KEY LEGAL ISSUES**

21 **A. UMG's Description of the Principal Legal Issues:**

22 1. Whether Veoh has directly infringed UMG's copyrights by copying,
23 reformatting, distributing, publicly displaying, publicly performing, and/or creating
24 derivative works of UMG's copyrighted works in connection with its internet site or
25 its player software.

26 2. Whether Veoh has indirectly infringed UMG's copyrights by
27 facilitating, encouraging, participating in, and/or inducing its users to engage in the
28 unauthorized reproduction, adaptation, distribution, public display and/or public

1 performance of UMG's copyrighted works in connection with its internet site or its
2 player software.

3 3. Whether Veoh is entitled to the "safe harbor" under the DMCA, 17
4 U.S.C. § 512.

5 4. UMG's damages.

6 **B. Veoh's Description of the Principal Legal Issues:**

7 1. Whether Veoh is entitled to safe harbor pursuant to Section 512(c) of
8 the DMCA.

9 2. Whether UMG suffered any damages, whether UMG failed to mitigate
10 damages, or whether such alleged damages are unconstitutionally excessive and
11 disproportionate to any actual damages that have been sustained, in violation of the
12 Due Process Clause.

13 3. Whether UMG's claims are barred for lack of subject matter
14 jurisdiction or otherwise because their copyrights are invalid, unenforceable, were
15 not timely registered with the U.S. Copyright Office, or were otherwise abandoned
16 or forfeited.

17 4. Whether UMG's claims are barred by misuse of copyright.

18 5. Whether UMG's claims are barred by laches, waiver, estoppel, or
19 unclean hands.

20 6. Whether UMG's claims are barred for lack of standing.

21 7. Whether UMG's claims are barred by license, consent or acquiescence.

22 8. Whether UMG's claims are barred because Veoh has no primary
23 liability, contributory liability, and committed no volitional act with respect to the
24 actions of Veoh's users.

25 9. Whether UMG's claims are barred because Veoh had no right or ability
26 to control the alleged primary infringement, had no knowledge of the alleged
27 primary infringement, did not encourage or induce the alleged primary infringement,
28 or because Veoh acted in good faith at all times.

1 10. Whether UMG's claims are barred by fair use or otherwise barred by
2 the First Amendment of the Constitution of the United States.

3 11. Whether UMG's claims are barred because Veoh's products and/or
4 services are capable of substantial non-infringing uses and/or are staple articles of
5 commerce.

6 12. Whether UMG's claims for vicarious liability are barred because Veoh
7 did not obtain a direct financial benefit from the alleged primary infringement.

8 13. Whether UMG's claims are barred by the applicable statute of
9 limitations.

10
11 **III. REALISTIC RANGE OF PROVABLE DAMAGES**

12 **A. UMG's Statement**

13 It is not possible at this time to provide an accurate estimate of damages.
14 Veoh's infringing activities are ongoing and many of the salient facts relating to
15 damages – such as how many of UMG's copyrighted works have been infringed by
16 Veoh and Veoh's revenues – are unknown to UMG at this time.

17 Nevertheless, given the vast commercial value of UMG's copyrighted works
18 and the willful nature of Veoh's infringement, UMG would be entitled to the
19 statutory maximum of \$150,000 per infringed work under the Copyright Act.

20 In addition, UMG is entitled to statutory damages for each instance of
21 contributory infringement or inducement of infringement. It is not possible to say in
22 advance of discovery how extensive Veoh's acts of contributory infringement and
23 inducement might be.

24 **B. Veoh's Statement**

25 Because Veoh is entitled to safe harbor under the DMCA, Veoh believes that
26 Plaintiffs are not entitled to any monetary relief, even if they were able to establish
27 any underlying infringements by Veoh's users. Even putting aside DMCA safe
28 harbor, Veoh believes that UMG's claims suffer from a fundamental absence of

1 damages, and thus does not believe that UMG would be able to prove any actual
2 damages. Veoh also believes that any alleged statutory damages, would be
3 unconstitutional and disproportionate to any actual damages that may have been
4 sustained, in violation of the Due Process Clause. Veoh also maintains that UMG
5 failed to mitigate any alleged damages by, for example, failing to provide proper
6 notice(s) of the alleged infringement as required by the DMCA.

7 **IV. INSURANCE COVERAGE**

8 Veoh has indicated that there is an insurance policy under which a person or
9 entity carrying on an insurance business may be liable to satisfy part or all of a
10 judgment which may be entered in this action or to indemnify or reimburse for
11 payments made to satisfy the judgment. Veoh will produce that policy upon entry
12 by the Court of a mutually agreed-upon protective order.

13 **V. LIKELIHOOD OF MOTIONS**

14 UMG has indicated that it may seek to amend its complaint to add one or
15 more of the investors in Veoh as defendants in this action, depending upon
16 information learned in discovery. Neither party intends to seek a transfer of venue.
17 Both parties anticipate seeking summary judgment or summary adjudication on
18 liability issues, including Veoh's DMCA defense.

19 **VI. DISCOVERY AND EXPERTS**

20 Pursuant to Rule 26(f), the parties report as follows:

21 **A. Preservation of Discoverable Information**

22 The parties have discussed evidence preservation generally and understand
23 their respective obligations to preserve evidence.

24 **B. Initial Disclosures**

25 The parties exchanged initial disclosures pursuant to Rule 26(a) on February
26 25. The parties do not propose changes to the requirements of Rule 26(a)(1).

27 **C. Subjects of Discovery**

28 1. UMG's Position:

1 Without limitation, UMG anticipates that discovery will be needed on
2 subjects related to: the functionality of the Veoh.com internet site and the player
3 software, including the extent to which Veoh modifies the content uploaded onto its
4 system; whether and how Veoh obtains the rights to exploit the works that users
5 upload onto its website; which of UMG's copyrighted works have been exploited by
6 Veoh and its users without authorization; the extent of Veoh's knowledge of the
7 infringing activities that take place on its website and through its player software;
8 the extent to which Veoh has invited or encouraged the infringing activity connected
9 to its website and player software; the extent to which Veoh benefits from the
10 infringing activities that occur on its website and through its player software; the
11 role of Veoh's investors in the acts that form the basis of this lawsuit; UMG's
12 damages; and Veoh's profits.

13 As the Court is aware, UMG is also party to other, related actions pending
14 before this Court in which UMG has already produced a substantial volume of
15 material in discovery. Veoh is also party to litigation in the Northern District of
16 California involving issues of its liability for copyright infringement, and claims of
17 immunity from liability under the DMCA. As that action has progressed to the
18 summary judgment stage, UMG presumes that Veoh has already produced some
19 volume of its own information. UMG has requested that Veoh produce the material
20 produced in its other litigation at the outset of this case in order to move discovery
21 forward expeditiously. UMG remains ready to produce the applicable portions of its
22 own prior document productions in the *MySpace* and *Grouper* cases as a means to
23 expedite discovery.

24 2. Veoh's Position:

25 Without limitation, Veoh anticipates that discovery will be appropriate on
26 subjects relating to Veoh's DMCA policy and implementation; ownership and chain
27 of title information regarding UMG's claimed copyrights; factual issues relevant to
28 Veoh's misuse of copyright defense; and UMG's purported damages or lack thereof.

1 Veoh will produce the applicable portions of its own prior document productions in
2 *IO Group Inc. v. Veoh Networks, Inc.*

3 **D. Discovery Phases and Deadlines**

4 Both parties have served initial written discovery requests. The parties
5 disagree about the appropriate timing of a cut-off for fact discovery. UMG proposes
6 a cut-off for fact discovery of December 1, 2008, while Veoh proposes a cut-off of
7 March 17, 2009. The parties generally agree upon appropriate intervals after the
8 cut-off of fact discovery for various subsequent events such as expert disclosures
9 and motion cut-offs. The parties have submitted, attached to this Joint Report, a
10 chart setting forth their respective proposed dates for various pretrial events.

11 1. UMG's Position

12 UMG believes that discovery of issues relating to the ownership of UMG's
13 copyrights is a subject that should be handled in a second phase of discovery
14 because such discovery is highly burdensome, and relevant only to issues of
15 damages. UMG will produce copies of its copyright registrations, which provide
16 *prima facie* evidence of its copyright ownership. In light of the number of works
17 potentially at issue in this case, discovery relating to the chain of title of each work
18 would present undue burdens. UMG submits that the production and analysis of
19 such materials would, at most, relate to issues of damages since no party could
20 reasonably contend that UMG does not have valid title to some of the copyrights at
21 issue. UMG notes that this approach of delaying discovery into the chain of title of
22 the copyrights at issue has been consistently employed by Courts evaluating mass
23 infringement cases such as this one.

24 2. Veoh's Position

25 Veoh does not agree that discovery of issues relating to the ownership of
26 UMG's copyrights and/or chain of title discovery should be handled in a later phase
27 of this case. While UMG argues that ownership information is relevant only to
28 damages, a plaintiff of course must prove ownership of valid copyrights in order to

1 establish infringement of those copyrights. Veoh considers that this discovery will
2 be critical to investigating not only whether UMG has standing to prosecute this
3 action with respect to such copyrights, but to investigate whether UMG's copyrights
4 are invalid, unenforceable, or were otherwise abandoned or forfeited. Veoh is
5 entitled to test the validity of Plaintiffs' alleged copyrights before a finding on the
6 issue of liability for infringement of such copyrights. Further, UMG states above
7 that "no party could reasonably contend that UMG does not have title to *some* of the
8 copyrights at issue" (emphasis added)-- but apparently not all. Without being
9 permitted to promptly conduct discovery on such matters, Veoh will have no way of
10 knowing which of UMG's alleged copyrights Veoh may challenge. In the
11 meantime, Veoh will be burdened by producing its own discovery related to all
12 purported copyrights. There is no good reason to allow UMG to prosecute an
13 infringement action for numerous copyrights it allegedly owns without at the same
14 time allowing Veoh to investigate whether UMG actually has the right to proceed
15 with such an action. UMG is seeking statutory damages of up to \$150,000 from
16 Veoh per alleged infringement. Veoh is entitled to discovery regarding whether
17 UMG even owns each of the copyrights it is claiming.

18 **E. Discovery of Electronically Stored Information**

19 The parties have discussed the production of electronically stored information
20 and the form in which this information will be produced.

21 **F. Issues Relating to Claims of Privilege or Trial Preparation**
22 **Material**

23 UMG has proposed adoption of the form of Protective Order entered in the
24 MySpace and Grouper litigation, which includes a provision for asserting a privilege
25 after production and for the prompt return of materials as to which a claim of
26 privilege is subsequently asserted. Veoh has indicated that this form of Protective
27 Order is generally acceptable, and the parties are in the process of finalizing a
28 Protective Order to present to the Court.

1 **G. Limitations on Discovery**

2 The parties have discussed the likely need to exceed the presumptive limit of
3 ten depositions of fact witnesses per side. The parties continue to discuss
4 appropriate limitations which are likely to become clearer as discovery progresses.
5 To the extent the parties are unable to agree upon these issues, the parties will
6 present an appropriate motion. The parties further will continue to discuss
7 appropriate time limitations with respect to witnesses who are both noticed for
8 deposition in their individual capacity and designated to testify in response to Rule
9 30(b)(6) corporate deposition notices.

10 **H. Expert Disclosures**

11 The parties agree that expert disclosures should take place after the close of
12 fact discovery and generally agree upon the intervals at which expert disclosures
13 should take place after the close of fact discovery. Specifically, the parties agree
14 that initial expert disclosures (for expert opinions on issues as to which the party
15 bears the burden of proof) should be made approximately two weeks following the
16 close of fact discovery, with rebuttal expert reports following three weeks thereafter,
17 and a close of expert discovery approximately three weeks following the rebuttal
18 reports. The parties' respective scheduling proposals are set forth in the chart
19 attached to this Joint Report.

20 **VII. SUMMARY JUDGMENT/MOTIONS IN LIMINE**

21 As noted above, both parties anticipate that they will likely seek summary
22 judgment or summary adjudications, particularly with respect to Veoh's defense
23 under the DMCA. The parties set forth their respective proposals for the timing of a
24 dispositive motion cut-off date in the chart attached to this Joint Report.

25 **VIII. SETTLEMENT**

26 Prior to the filing of this action, the parties engaged in limited settlement
27 discussions. To date, the parties have not conducted further settlement discussions.
28

1 Pursuant to Local Rule 26-1(c) and 16-15.4, the parties agree to participate in a non-
2 judicial dispute resolution proceeding, Settlement Procedure No. 3.

3 **IX. ESTIMATE OF TIME REQUIRED FOR TRIAL**

4 UMG estimates that approximately 15 trial days will be required to try this
5 case. Veoh estimates that approximately 30 trial days will be required. Trial will be
6 by jury. In the absence of discovery, neither party knows how many witnesses it
7 will call at trial.

8 **X. PRESUMPTIVE SCHEDULE OF PRETRIAL DATES**

9 Pursuant to the Court's December 20, 2007 Order, the parties have completed
10 the scheduling form attached as Exhibit A to the Court's Order and have attached
11 the completed form hereto.

12 **XI. OTHER ISSUES AFFECTING CASE STATUS OR MANAGEMENT**

13 The parties agree that this case is not a complex case and that the Manual for
14 Complex Litigation should not be used in this case. The parties are not aware at this
15 time of any other issues, other than those discussed elsewhere in this report,
16 affecting the status or management of the case.

17 **XII. CONFLICT INFORMATION**

18 For conflict purposes, each of the plaintiffs in this action identifies Vivendi,
19 S.A., which is a publicly traded French company on the Paris Stock Exchange, as its
20 ultimate parent. The plaintiffs have scores of subsidiaries and affiliates, all of which
21 are ultimately owned by Vivendi, S.A.

22 **XIII. PATENT CASES**

23 This case is not a patent case.

24 /

25 /

26 /

27 /

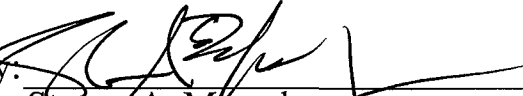
28 /

1 **XIV. MAGISTRATE JUDGE**

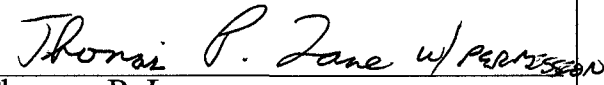

2 The parties do not wish to have a Magistrate Judge preside at trial.

3 Dated: March 10, 2008

4 IRELL & MANELLA LLP
5 Steven A. Marenberg
6 Elliot Brown
7 Brian D. Ledahl
8 Benjamin Glatstein

9 By: 
10 Steven A. Marenberg
11 Attorneys for Plaintiffs

12 WINSTON & STRAWN LLP
13 Michael S. Elkin
14 Thomas P. Lane
15 Jennifer A. Golinveaux
16 Rebecca Lawlor Calkins
17 Erin R. Ranahan

18 By:  w/ permission
19 Thomas P. Lane
20 Attorneys for Defendants 

**JUDGE A HOWARD MATZ
PRESUMPTIVE SCHEDULE OF PRETRIAL DATES**

Matter	Time	Weeks before trial	Plaintiff's Request	Defendant's Request	Court Order
Trial date (jury) (court) Estimated length: <u>15-30</u> days	8:00 a.m.		4/20/09	6/23/09	
[Court trial:] File Findings of Fact and Conclusions of Law and Summaries of Direct Testimony		- 1			
Final Pretrial Conference; Hearing on Motions in Limine; File Agreed Upon Set of Jury Instructions and Verdict Forms and Joint Statement re Disputed Instructions and Verdict Forms; File Proposed <i>Voir Dire</i> Qs and Agreed-to Statement of Case	11:00 a.m.	- 2	4/13/09	6/08/09	
Lodge Pretrial Conf. Order File Memo of Contentions of Fact and Law; Exhibit List; Witness List; Status Report re Settlement		- 4	3/30/09	5/25/09	
Last day for hand-serving Motions in Limine		- 6	3/16/09	5/11/09	
Last Day to Meet Before Final Pretrial Conference (L.R. 16-2)		8	3/02/09	4/27/09	
Last day for hearing motions	10:00 a.m.	8	2/09/09	4/27/09	
Last day for hand-serving motions and filing (other than Motions in Limine)		12	12/15/08	3/30/09	
Non-expert Discovery cut-off		- 14	12/01/08	3/17/09	

ADDITIONAL MATTERS TO BE DETERMINED AT SCHEDULING CONFERENCE

L.R. 16-14 Settlement Choice: (1) CT/USMJ (2) Atty (3) Outside ADR

Expert discovery cut-off		- 6	2/02/09	5/11/09	
Rebuttal Expert Witness Disclosure		- 9	1/12/09	4/20/09	
Opening Expert Witness Disclosure [See F.R.Civ.P. 26(a)(2)]		- 13	12/15/08	3/23/09	
Last day to conduct Settlement Conference					
Last Day to Amend Pleadings or Add Parties					

EXHIBIT A