

RE: DOCKET NO. 336

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15 **UNITED STATES DISTRICT COURT**

16 **CENTRAL DISTRICT OF CALIFORNIA**

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

18 Plaintiffs,

19 v.

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

21 Defendants.

Case No. CV 07 5744 – AHM (AJWx)

22 **VEOH NETWORKS, INC.’S EX PARTE**  
23 **APPLICATION FOR PERMISSION TO**  
24 **SUPPLEMENT THE RECORD IN**  
25 **SUPPORT OF ITS MOTION FOR**  
26 **SUMMARY JUDGMENT TO**  
27 **INCORPORATE UMG’S RECENT**  
28 **WITHDRAWAL OF ALLEGED**  
**INFRINGEMENTS**

**CONCURRENTLY FILED HEREWITH:**

**(1) DECLARATION OF ERIN R.**  
**RANAHAN IN SUPPORT OF EX PARTE**  
**APPLICATION; AND**

**(2) [PROPOSED] ORDER**

Discovery Cutoff: April 13, 2009  
Pretrial Conference: August 3, 2009  
Trial Date: August 18, 2009

1                   **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2                   PLEASE TAKE NOTICE that pursuant to Local Rule 7-19, Defendant Veoh  
3 Networks, Inc. (“Veoh”) hereby applies to this Court *ex parte*, for an order granting  
4 permission for Veoh to supplement the record in support of its Motion for Summary  
5 Judgment Re Entitlement to Section 512(c) Safe Harbor (Docket No. 336) (“Motion”)   
6 with UMG’s recently amended Exhibit A to UMG’s Response to Veoh’s Interrogatory  
7 No. 25, in which UMG withdraws forty alleged infringements from this action.  
8 Declaration of Erin R. Ranahan (“Ranahan Decl.”) ¶ 2 and Exhibit A (attaching  
9 UMG’s April 22, 2009 correspondence and amended Exhibit A to UMG’s Response  
10 to Veoh’s Interrogatory No. 25 (“UMG’s Withdrawal of Alleged Infringements”).

11                   This *ex parte* application is brought on the grounds that more than four months  
12 after UMG identified its list of alleged infringements, two days ago, on April 22,  
13 2009, UMG withdrew its claim with respect to forty of the alleged infringements. *Id.*  
14 This amounts to a reduction in potential statutory damages of up to \$6,000,000.  
15 Notably, after waiting more than a year to identify any alleged infringements in this  
16 action, it took UMG (who would be expected to have devoted considerable resources  
17 to properly locating and identifying its alleged infringements) more than four months  
18 to figure out that it had misidentified numerous works. This information is directly  
19 relevant to Veoh's Motion because, in addition to eliminating forty of the alleged  
20 infringements at issue in Veoh’s Motion, UMG’s own difficulties in identifying  
21 alleged infringements of its works only highlights that Veoh lacked the ability to make  
22 such determinations without cooperation or notification from UMG.

23                   *Ex parte* relief is necessary because this information is directly relevant to  
24 Veoh's Motion, and UMG’s own error in wrongly identifying certain videos as  
25 infringing caused this problem. Veoh only received this information two days ago  
26 and would be prejudiced if it is not permitted to supplement the record before the  
27 Court rules on its Motion. On April 23, 2009, Veoh’s counsel asked Plaintiffs’  
28 counsel whether it would oppose this application. On April 24, 2009, Plaintiffs’

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counsel indicated that it would oppose this application.

The names, addresses, and telephone numbers of UMG's counsel are as follows:

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Dated: April 24, 2009

**WINSTON & STRAWN LLP**

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Rebecca L. Calkins  
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VEOH NETWORKS, INC

1 **I. INTRODUCTION**

2 Veoh seeks permission to supplement the record in support of its Motion for  
3 Summary Judgment Re Entitlement to Section 512(c) Safe Harbor (Docket No. 336)  
4 (“Motion”), to include a supplemental interrogatory response received two days ago,  
5 in which UMG withdraws forty of the alleged infringements in this action (“UMG’s  
6 Withdrawal of Alleged Infringements”).

7 After the parties have completed briefing Veoh’s Motion, UMG has now  
8 withdrawn forty alleged infringements that it had previously identified, and identified  
9 numerous additional errors concerning copyright registration numbers. This  
10 information is highly relevant to Veoh's Motion because, in addition to eliminating  
11 forty of the alleged infringements at issue in Veoh’s Motion, UMG’s own difficulties  
12 identifying alleged infringements of its works highlights that Veoh lacked the ability  
13 to make such determinations without cooperation or notification from UMG.

14 UMG’s supplemental interrogatory response presents additional support for  
15 granting Veoh’s Motion, and Veoh respectfully requests that the Court grant Veoh’s  
16 *ex parte* application to consider UMG’s Withdrawal of Alleged Infringements.

17 **II. UMG’S WITHDRAWAL OF FORTY VIDEOS FROM ITS LIST OF**  
18 **ALLEGED INFRINGEMENTS IS DIRECTLY RELEVANT TO VEOH’S**  
19 **PENDING MOTION FOR SUMMARY JUDGMENT**

20 Though UMG filed this action in September 2007, it did not specifically  
21 identify any allegedly infringing videos in its Complaint. Not until December 1, 2008  
22 (after Veoh was forced to engage in motion practice) did UMG finally identify alleged  
23 infringements in response to Veoh's Interrogatory No. 25. UMG supplemented its list  
24 of infringements on January 16, 2009.<sup>1</sup>

25 <sup>1</sup> As addressed in the Motion briefing, UMG identified the alleged infringements in  
26 two separate batches. The first batch of 1,591 allegedly infringing videos was  
27 identified on December 1, 2008. The second batch of 854 was identified on January  
28 16, 2009, and Plaintiffs have conceded involved videos for which the RIAA sent Veoh  
DMCA notices (SGI 66), and to which Veoh promptly responded and removed the  
videos. (Veoh’s Reply to Statement of Genuine Issues (Docket No. 415) No. 66;  
Supplemental Declaration of Stacie Simons (Docket No. 396-2) ¶¶ 4-13 (noting that

1 Just two days ago, on April 22, 2009, UMG notified Veoh that its list of alleged  
2 infringements contained numerous errors and that UMG was withdrawing at least  
3 forty videos which it had previously claimed were infringing. *See* Ranahan Decl. ¶ 2,  
4 Ex. A. This is a significant change amounting to up to a \$6,000,000 reduction in  
5 potential statutory damages.<sup>2</sup>

6 In addition to eliminating forty of the alleged infringements at issue in this case,  
7 the recent withdrawal is also highly relevant to Veoh’s pending Motion because UMG  
8 argues as one of the centerpieces of its opposition, that despite its never having sent  
9 Veoh a single DMCA notice, Veoh should have had “awareness of apparent  
10 infringements” because the allegedly infringing videos contained “red flags” that  
11 provided Veoh knowledge of the alleged infringements. *See* UMG’s Opposition to  
12 Veoh’s Motion for Summary Judgment Re Section 512(c) Safe Harbor (Docket No.  
13 380) at pp. 2:9-13, 7:23-8:5, 10:6-11:9. UMG’s inability to itself accurately identify  
14 infringements *of its own works*—even in the context of providing verified  
15 interrogatory responses in the midst of high stakes litigation—only highlights that  
16 there were no such “red flags,” and moreover, that Veoh lacked the ability to make  
17 such determinations without UMG’s assistance. UMG’s suggestion that Veoh should  
18 be on notice of UMG’s alleged infringements just by viewing certain videos is absurd  
19 considering the admitted errors UMG has experienced in identifying alleged  
20 infringements on Veoh. If UMG and its entire team of lawyers, who have been

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21 for each of the works identified in the RIAA notices that UMG submitted with its  
22 opposition, such works were removed within 24 hours.)

23 <sup>2</sup> Tellingly, UMG’s recent disclosure of numerous errors in its identification of alleged  
24 infringements follows UMG being ordered by Magistrate Judge Wistrich to produce  
25 chain of title documents for twenty percent of its allegedly infringed works (chosen by  
26 Veoh), which came to 241 works. (Docket No. 321). Magistrate Judge Wistrich  
27 explained that he would require UMG to produce the information with respect to the  
28 twenty percent and if sufficient defects were found in this sample twenty percent, the  
parties should meet and confer regarding whether production of the remaining eighty  
percent was warranted and if the parties could not agree, the Court would consider the  
matter on expedited means. *Id.* Following Magistrate Judge Wistrich’s Order, UMG  
has now withdrawn its claims with respect to 24 (or ten percent) of those sample  
works. Veoh is now addressing with Plaintiffs the need for ownership information  
with respect to the other eighty percent.

1 litigating UMG's claims in this action for nearly two years, are unable to properly  
2 identify UMG's alleged infringements, Veoh's employees cannot reasonably be  
3 expected to do so. UMG's attempt to force Veoh to shoulder the entire burden of  
4 policing and accurately identifying infringements, with no assistance or cooperation  
5 from UMG, is unreasonable and unworkable.

6 **III. EX PARTE RELIEF IS NECESSARY**

7 *Ex parte* relief is appropriate here because Veoh is without fault in creating this  
8 problem and Veoh would be prejudiced if such matters were heard on regular notice.  
9 First, there is no question that UMG delayed four months, and after the Motion papers  
10 were submitted, before notifying Veoh that it made significant errors in identifying its  
11 alleged infringements at issue in this case. Second, Veoh may be irreparably  
12 prejudiced if the Court rules on its Motion without allowing Veoh the opportunity to  
13 supplement the record with UMG's newly revised list of alleged infringements. For  
14 the good cause set forth above, Veoh respectfully requests that the Court grant Veoh's  
15 *ex parte* relief, and consider UMG's Withdrawal of Alleged Infringements as part of  
16 the record on Veoh's Motion.

17 **IV. CONCLUSION**

18 For all the foregoing reasons, Veoh respectfully requests that Court grant  
19 Veoh's *ex parte* application and consider UMG's Withdrawal of Alleged  
20 Infringements as part of the record on Veoh's Motion.

21  
22 Dated: April 24, 2009

**WINSTON & STRAWN LLP**

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