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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 UMG RECORDINGS, INC., a Delaware Corporation, et al.,  
18 Plaintiffs,  
19 vs.  
20 VEOH NETWORKS, INC., a California Corporation, et al.,  
21 Defendants.  
22

Case No. CV 07 5744 -- AHM (AJWx)  
**VEOH'S RESPONSE TO UMG'S OBJECTIONS TO "NEWLY SUBMITTED EVIDENCE" BY VEOH IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT RE ENTITLEMENT TO SECTION 512(c) SAFE HARBOR**  
Date: HEARING TAKEN OFF-CALENDAR AND MOTION TAKEN UNDER SUBMISSION (DKT. No. 484)

1 **I. INTRODUCTION**

2 In its effort to manufacture any issue of fact with respect to Veoh’s Renewed  
3 Motion for Summary Judgment Re Entitlement to Section 512(c) Safe Harbor (Dkt.  
4 No. 449) (“Renewed MSJ”), UMG purports to object to “newly submitted  
5 evidence”—even though Veoh explicitly cited such evidence as evidence it was  
6 relying upon in its Notice of Motion and Motion in Support of its Renewed MSJ (Dkt.  
7 No. 449, Notice of Motion and Motion, p. 1). Because there was no “new evidence”  
8 submitted with Veoh’s reply, as all such evidence was submitted in support of Veoh’s  
9 Renewed MSJ, UMG’s objections to this so-called “newly submitted evidence” are  
10 misleading and misplaced.

11 UMG’s additional arguments for excluding the evidence likewise fail. There  
12 are no inconsistencies between prior testimony and the testimony provided in the  
13 Supp. Papa Decl. (Dkt. No. 396-4) or the Supp. Simons Decl., and the exhibits  
14 submitted with the Supp. Ranahan Decl. (Dkt. No. 416)—which contain documents  
15 produced in this case—speak for themselves. As set forth below, UMG’s evidentiary  
16 objections are immaterial, baseless, and present no issue of material fact that would  
17 preclude Veoh from obtaining summary judgment. For these and the foregoing  
18 reasons, Veoh respectfully requests that UMG’s objections be overruled.

19 **II. THERE IS NO “NEWLY SUBMITTED” EVIDENCE**

20 When Veoh originally noticed its Motion for Summary Judgment Re  
21 Entitlement to Section 512(c) Safe Harbor for April 13, 2009 (“Original MSJ”),  
22 UMG’s opposition referenced several misleadingly excerpted items of purported  
23 evidence. Though Veoh was able to set the record straight with supplemental  
24 evidence presented with its reply in support of its Original MSJ, UMG asked this  
25 Court to ignore or disregard this evidence. (Dkt. No. 420).

1           When Veoh noticed its Renewed MSJ for June 15, 2009,<sup>1</sup> *Veoh explicitly cited*  
2 *all supplemental declarations that UMG now complains are “newly submitted” in its*  
3 *Notice of Motion and Motion in Support of its Renewed MSJ as evidence it was*  
4 *relying upon in support of its Renewed MSJ.*<sup>2</sup> (Dkt. No. 449, Notice of Motion and  
5 Motion, p. 1). *Veoh also cited to the evidence where appropriate in its Statement of*  
6 *Uncontroverted Facts and in Response to UMG’s Statement of Genuine Issues.* (Dkt.  
7 No. 450, ¶¶ 15, 19, 22, 36, 39, 43, 70-71; Dkt. No. 473, ¶¶ 1, 3, 18, 19-21, 26-28, 41,  
8 50-51, 54-56, 60, 68, 86-87, 116, 119, 122, 125, 129, 133, 134-136, 141, 151, 158,  
9 160, 162-163, 165, 176). In other words, while Veoh submitted supplemental  
10 evidence to correct the record in support of its Original MSJ, it did not submit any  
11 new evidence in support of its Renewed MSJ. Curiously, now UMG complains that  
12 the evidence (evidence that was submitted in March 2009 and April 2009) was  
13 “nowhere cited in its Renewed Motion for Summary Judgment,” (*see pp. 1:27-28;*  
14 *3:16-17; 4:10-11; 5:6-7; 5:18-19; 5:27-28*); when the evidence was explicitly  
15 referenced in support of Veoh’s Renewed Motion for Summary Judgment, and cited  
16 in supporting documents where appropriate.

17 **III. THE EVIDENCE VEOH SUBMITTED IN SUPPORT OF ITS**  
18 **RENEWED MSJ IS ENTIRELY PROPER**

19           UMG asks this Court to disregard evidence Veoh submitted in support of its  
20 Renewed MSJ, and in doing so relies on three cases that actually *support* the inclusion  
21 of Veoh’s evidence even if it had been submitted at the reply stage. First, UMG cites  
22 *Provenz, et al. v. Miller, et al.*, 102 F.3d 1478, 1483 (9th Cir. 1996) as supporting its  
23 request that the Court should disregard evidence. But in *Provenz*, the Ninth Circuit

24 <sup>1</sup> Veoh initially filed its Motion for Summary Judgment Re Entitlement to Section  
25 512(c) Safe Harbor on March 12, 2009. On April 24, 2009 the Court vacated Veoh’s  
26 motion instructing that “[o]nce non-expert discovery has ended, any party may file a  
27 motion or a renewed motion for summary judgment,” and that the non-expert  
discovery cut-off was May 11, 2009. (Dkt. No. 431.) In accordance with that Order,  
Veoh renewed its motion for summary judgment.

28 <sup>2</sup> The April 24, 2009 Order also stated that if the renewed “motion refers to exhibits  
that were previously filed, the exhibits need not be filed anew.” *Id.*

1 *allowed and considered* the plaintiffs’ supplemental declaration to rebut the  
2 defendants’ evidence, overruling the lower court. (“We believe that the district court  
3 erred in not considering plaintiffs’ supplemental declaration.”) *Id.* Second, UMG  
4 cites *Schwartz, et al. v. Upper Deck Co.*, 183 F.R.D. 672 (S.D. Cal. 1999), which  
5 reserved the question of whether the supplemental evidence would be stricken for a  
6 later time, but considered such evidence in ruling on the motion. *Id.* at 682. Third,  
7 UMG cites to *Edwards, et al. v. Toys “R” Us et al.*, 527 F. Supp. 2d 1197 (C.D. Cal.  
8 2002), which merely states that “new evidence submitted in reply should not be  
9 considered without affording plaintiffs an opportunity to respond.” *Id.* at 1205, n. 31.

10 UMG has unquestionably had the opportunity to respond to or otherwise rebut  
11 the evidence presented in Veoh’s Renewed Motion. If UMG had any further means  
12 by which to counter any of the substantive facts set forth in Veoh’s supplemental  
13 declarations, it would have presented evidence in its opposition, in its Statement of  
14 Genuine Issues, or in its objections to evidence. Tellingly, UMG has not done so. As  
15 UMG has had many opportunities to respond to this evidence that was submitted with  
16 Veoh’s Renewed MSJ, the concern raised by the *Edwards* court is not present here.

17 UMG also cites *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, (N.D. Cal. 2005) as  
18 an example of a court striking newly submitted evidence, yet in that case, the court  
19 explicitly noted that it was only striking in part a declaration, and only to the extent  
20 that it sought to introduce new arguments and facts not raised by the motion or  
21 opposition. *Id.* at 3091, n. 5. Veoh did not present *any* new evidence with its reply, let  
22 alone evidence that presents new arguments or facts not otherwise raised by the  
23 motion or opposition.

24 Further, UMG cites one claim construction order in a patent case to support its  
25 claim that courts “commonly sustain objections” like those UMG raises, *Enovsys LLC*  
26 *v. Nextel Communications, Inc.*, 2008 WL 4974849 (C.D. Cal. 2008). In *Enovsys*  
27 *LLC*, the court sustained an objection to a newly proposed claim construction that was  
28 submitted with a reply. *Id.* Once again, the evidence at issue here was submitted with

1 Veoh’s Renewed MSJ—not at the reply stage. The specific evidence was presented  
2 with Veoh’s Renewed MSJ in anticipation of responding to arguments expected in  
3 UMG’s opposition and to provide complete facts. Thus, Veoh’s previously submitted  
4 evidence is nothing like the situation in *Enovsys*, where the movant sought to present  
5 an entirely new claim construction at the reply stage. Because Veoh’s supplemental  
6 evidence was submitted in direct response to UMG’s anticipated arguments in its  
7 opposition and to present complete facts, and was submitted not with Veoh’s reply but  
8 in support of its Renewed Motion, UMG’s request to disregard the supplemental  
9 evidence should be rejected.

10 Finally, UMG cites *Verizon California Inc. v. Ronald A. Katz Technology*  
11 *Licensing, L.P.*, 2003 WL 25761597 (C.D. Cal. Dec. 2, 2003), which involved a case  
12 in which the defendant sought to introduce declarations that *contradicted* prior  
13 deposition testimony, arguing that to the extent the declarations were inconsistent with  
14 such prior depositions, such prior testimony “should be disregarded.” *Id.* at \*35. As  
15 discussed below with respect to the supplemental declarations of Stacie Simons and  
16 Joseph Papa, Veoh is not asking this Court to “disregard” any prior testimony, as there  
17 are no inconsistencies between any of the prior and supplemental testimony. The  
18 supplemental declarations of Papa and Simons simply offer clarifying statements to  
19 present a complete record in response to distortions Veoh expected UMG would raise  
20 in its opposition.

21 Here, we are not even dealing with supplemental evidence submitted at the  
22 reply stage, because Veoh explicitly relied on the information in its Renewed MSJ.  
23 To the extent UMG objects to Veoh having cited more specifically in its Response to  
24 UMG’s Statement of Genuine Issues certain sections of the supplemental declarations  
25 filed in support of Veoh’s Renewed MSJ, the cases cited above would *support* the  
26 inclusion of such evidence. As this evidence was submitted long before Veoh filed its  
27 Renewed MSJ, and was specifically cited as supporting evidence in its Renewed MSJ,  
28 UMG’s attempt to manufacture an “issue of material fact” should be rejected.

1 **IV. UMG’S OBJECTIONS TO VEOH’S EVIDENCE ARE WITHOUT**  
2 **MERIT AND SHOULD BE OVERRULED**

3 **A. UMG’s Objections to the Supplemental Joseph Papa Declaration**  
4 **Should Be Overruled**

5 UMG’s objection to ¶ 2 of the Supplemental Declaration of Joseph Papa (Dkt.  
6 No. 396-4) (“Supp. Papa Decl.”) presents no “issue of material fact” because contrary  
7 to UMG’s suggestion, there is no inconsistency in Papa’s testimony, to wit:

- 8 ■ In Section III.A.1. of UMG’s Objections, the discussion UMG quotes from  
9 Papa’s Rule 30(b)(6) deposition testimony specifically addressed Veoh’s  
10 “technical ability” to delete content (which is undisputed and necessary for  
11 Veoh to comply with its obligations under the DMCA), while the Supp. Papa  
12 Decl. ¶ 2 simply notes that Veoh is able to remove content upon notice.  
13 There is no “inconsistency.”
- 14 ■ UMG also claims “inconsistency” between Papa’s Supp. Decl. ¶ 3 and the  
15 deposition testimony of Dmitry Shapiro. Batsell Decl. Ex. B., at 43:8-16.  
16 Specifically, UMG cites to a response from Shapiro where he responds to a  
17 question about whether “anything” changed about the “way that the client  
18 software application functioned.” After Veoh lodged an objection on the  
19 record specifically to the “technological process,” Shapiro responded “I don’t  
20 know, but I don’t believe so.” *Id.* Thus, as it was qualified with “I don’t  
21 know,” this testimony can hardly be considered an inconsistency with Papa’s  
22 testimony. In an event, it presents no disputed fact material to Veoh’s  
23 motion.
- 24 ■ Regarding Supp. Papa Decl. ¶ 5, UMG cites to Papa’s prior deposition  
25 testimony when he did not know off-hand what altMeta referred to. Since  
26 that deposition on January 20, 2009, and since UMG subsequently served an  
27 interrogatory about the field, Papa investigated in order to respond to UMG’s  
28 interrogatory and to respond to UMG’s specious allegations regarding the

1 manner in which the altMeta field was (and was not) used. Because there is  
2 no inconsistency and no genuine issue of disputed fact, UMG’s objection  
3 should be overruled.

4 **B. UMG’s Objections to Stacie Simons’ Supplemental Declaration (Dkt.  
5 No. 396-2) Should Be Overruled**

6 **1. Simons’ Statement About Her Inspection of Works Identified  
7 By The Audible Magic Filter Is Not Inconsistent With Her  
8 Deposition Testimony**

9 UMG claims an inconsistency exists between Simons’ Supp. Decl. ¶ 2 (Dkt.  
10 No. 396-2) and Simons’ prior deposition testimony in which Simons testified that  
11 “Veoh’s repeat infringer policy” does not relate to the Audible Magic filter. But  
12 Simons explains precisely that in Simons’ Supp. Decl. ¶ 2. As opposed to Veoh’s  
13 policy of automatically terminating a user upon Veoh receiving a second DMCA  
14 notice, the Simons Supp. Decl. explains that because of the manner in which the  
15 Audible Magic filter works, and because Veoh was not provided information for  
16 counter-notifications by the copyright holders who submit works to Audible Magic,  
17 she personally reviews the accounts of those who have videos caught by the Audible  
18 Magic filter (rather than automatically applying Veoh’s policy of two strikes and you  
19 are out, such that two hits from the filter would automatically cause termination.)  
20 Simons Supp. Decl. ¶ 2 thus describes the alternate way that Veoh treats Audible  
21 Magic hits (Simons personally reviewing accounts to make the determination about  
22 whether to terminate a user), which is different from Veoh’s standard repeat infringer  
23 policy with respect to notices of infringement. Therefore, there is no “inconsistency”  
24 in Simons’ testimony.

25 **C. UMG’s Objections to the Ranahan Declaration Are Immaterial**

26 With respect to UMG’s objections to the Declaration of Erin Ranahan (Dkt. No.  
27 407) (“Ranahan Decl.”) ¶ 4 and ¶ 11, both Exhibits C and E are documents produced  
28 long ago in this action, and speak for themselves.

1 Exhibit C is not cited as an example on “Veoh.com,” but does stand for the  
2 proposition stated – that UMG produced documents that show that bands’ other agents  
3 have leaked or otherwise placed videos “onto the Internet.” The alleged dispute does  
4 not create a material disputed issue. Notably, UMG does not proffer evidence to  
5 substantively refute the contents of Exhibit C, and does not explain how its objections  
6 would create a genuine disputed fact material to Veoh’s motion.

7 UMG’s objection to Exhibit E is simply its attempt to present only a portion of  
8 the email chain (attached as Exhibit 44 to the Batsell Decl. filed with UMG’s  
9 opposition) about suspected infringing videos on Veoh. What UMG conveniently  
10 omits is the portion of the email chain where Veoh states that the suspected infringing  
11 videos were immediately taken down. Once again, UMG does not proffer evidence to  
12 substantively refute the contents of Exhibit C, and does not explain how its objections  
13 would create a genuine disputed fact material to Veoh’s motion. UMG’s objection to  
14 including the entire context of the email chain should be overruled.

15 **V. CONCLUSION**

16 UMG’s evidentiary objections are baseless and should be overruled in their  
17 entirety.

18 Dated: June 12, 2009

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