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

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

19 Plaintiffs,

20 vs.

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

22 Defendants.
23

Case No. CV 07 5744 – AHM (AJWx)

VEOH’S NOTICE OF MOTIONS
AND MOTIONS *IN LIMINE* NOS.
1-7; MEMORANDUM OF POINTS
AND AUTHORITIES

Hearing Date: 8/3/09
Time: 10:00 a.m.
Hon. A. Howard Matz

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on August 3, 2009, or as soon thereafter as this
3 matter can be heard before the Honorable A. Howard Matz of the United States
4 District Court for the Central District of California, at 312 North Spring Street, Room
5 170, Los Angeles, California, 90012, Veoh Networks, Inc. (“Veoh”) will and hereby
6 does move for an order restricting the parties, all counsel and witnesses from
7 mentioning, directly or indirectly, before jurors and prospective jurors, certain
8 evidence and matters articulated below. These items should not be permitted for any
9 purpose because even assuming there were some limited relevance, the probative
10 values of the evidence is outweighed by potential prejudice to the jury, waste of time,
11 and/or unnecessary confusion of the issues. Fed. R. Evid. 401-403.¹ Due to these and
12 the other evidentiary infirmities described herein, the Court should grant Veoh’s
13 Motions *in Limine* Nos. 1-7 (“Motion”).²

14 The seven matters that are subject to this Motion are as follows:

- 15 (1) Allegedly infringing videos that are not UMG’s music videos;
- 16 (2) Copies of screenshots that omit certain items that would appear for a
17 Veoh user;
- 18 (3) Any documents or argument specifying any of Veoh’s investors or
19 documents constituting or relating to communications to and from Veoh’s investors
20 regarding allegedly infringing videos;
- 21 (4) Any evidence regarding the timing of Veoh’s implementation of filtering
22 through Audible Magic;
- 23 (5) Evidence constituting and relating to press articles, blogs and
24 communications from Veoh’s users (other than relating to the users’ own alleged
25 infringement) regarding alleged infringement on Veoh;

26 _____
27 ¹ All further statutory references are to the Federal Rules of Evidence unless otherwise
noted.

28 ² For the convenience of the Court, in the interest of efficiency and to avoid
unnecessary duplication, Veoh consolidates these seven separate motions herein.

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(6) Evidence and arguments that support a claim that statutory damages should be assessed by any other means other than per Compact Disc (“CD”); and

(7) Evidence constituting Veoh’s power point presentations and other internal materials that discuss or refer to general music strategy.

This Motion is based on this Motion and Notice of Motions, the Declaration of Erin R. Ranahan ("Ranahan Decl."), the exhibits attached thereto, the supporting documents filed concurrently herewith, previously filed documents incorporated by reference herein, and upon such oral argument and submissions that may be presented at or before the hearing on this Motion. Pursuant to Local Rule 7-3, this Motion is made following the conference of counsel that took place on June 16, 2009.

Dated: July 6, 2009

WINSTON & STRAWN LLP

By /s/ Erin R. Ranahan
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Evidence 401-403, 602 and/or 901, Defendant
4 Veoh Networks, Inc. (“Veoh”) moves for an *in limine* order precluding Plaintiffs
5 (“UMG”) from introducing at trial any testimony or evidence regarding the seven
6 matters set forth herein.³ Though the underlying issues in this case are
7 straightforward, there is a series of potential distractions that could sidetrack the jury.
8 These seven potential areas of distraction constitute evidence that not only provide
9 little, if any, probative value, but the introduction of this evidence would waste the
10 Court’s and the jury’s time, make issues appear to be more confusing than they are,
11 and could prejudice the jury. Fed. R. Evid. 403. For these and all the foregoing
12 reasons, Veoh respectfully requests that the Court grant Veoh’s Motions *in limine*.

13 **II. ARGUMENT**

14 **A. Where Evidence Is More Prejudicial than Probative, or a Waste of**
15 **Time, The Court May Exclude Such Evidence**

16 Rulings on motions *in limine* are committed to the discretion of the trial court.
17 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (district court has
18 “broad discretion to make . . . evidentiary rulings conducive to a fair and orderly
19 trial”); *Gametech Int’l Inc. v. Trend Gaming Sys., LLC.*, Nos., 05-15626, 05-16026,
20 05-16542, 2007 WL 1454934 (9th Cir. May 16, 2007). District courts can exercise
21 their discretion to exclude evidence where the evidence is not relevant, or where the
22 probative value is outweighed by other considerations. Fed. R. Evid. 401-403;
23 *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1177-78 (9th Cir. 2008)
24 (district court did not abuse discretion in excluding conclusive, speculative evidence).
25 Even if evidence is considered relevant, “evidence may be excluded when its
26 probative value is substantially outweighed by the danger of unfair prejudice,

27 _____
28 ³ All further statutory references are to the Federal Rules of Evidence unless otherwise noted.

1 confusion of the issues, or misleading the jury.” Fed. R. Evid. 403; *U.S. v. Ellis*, 147
2 F.3d 1131, 1135 (9th Cir. 1998) (evidence should be excluded if probative value is
3 outweighed by unfair prejudice); *United States v. W.R. Grace*, 504 F.3d 745, 760 (9th
4 Cir. 2008) (affirming district court's exclusion of evidence that was low in probative
5 value and could have confused the jury as more prejudicial than probative under Rule
6 403); *E.E.O.C. v. GLC Rests., Inc.*, No., CV05-618 PCT-DGC, 2007 WL 30269, at *1
7 (D. Ariz. Jan. 4, 2007); *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983,
8 993 (9th Cir. 2009) (holding district court did not abuse its discretion in granting
9 plaintiff’s motion *in limine* to exclude evidence based on concerns that it might
10 improperly influence the jury on the amount of statutory damages to assess under
11 504(c)(1) of the Copyright Act of 1976, because the evidence did not provide
12 sufficiently probative information.)

13 Evidence has probative value only if it has any tendency to make the existence
14 of any legally necessary proposition in the case more or less likely. Fed. R. Evid.
15 401-402. Evidence is unfairly prejudicial if it has an “undue tendency to suggest
16 decision on an improper basis.” Advisory Comm. Notes, 1972 Proposed Rules; Fed.
17 R. Evid. 403. Rule 403 explicitly states that evidence may also be excluded if the
18 waste of time caused by its introduction outweighs its probative value.

19 **B. The Court Should Grant Veoh’s Motions *In Limine* To Exclude The**
20 **Following Evidence From Trial**

21 As discussed herein, the probative value of the evidence at issue in this Motion
22 is substantially outweighed by the danger of unfair prejudice, misleading the jury, or
23 confusing the jury. The probative value is also outweighed by the tremendous waste
24 of time that would be incurred by the parties, the Court and the jury if the evidence
25 were allowed. Due to the low probative value and the serious risk of prejudicing the
26 jury, and/or to avoid a needless waste of time, for each of the matters set forth below,
27 the Court should exclude the evidence.

1 **1. UMG Should Be Precluded From Including Allegedly Infringing**
2 **Videos That Are Not UMG’s Music Videos**

3 Throughout this litigation, UMG has suggested that its entire list of what now
4 amounts to over 7,000 allegedly infringing videos constitute actual music videos,
5 recognizable as UMG’s copyrighted content. Though UMG *never notified* Veoh of a
6 single alleged infringement into well over a year into this case, UMG suggests that
7 Veoh should have somehow proactively recognized these alleged infringements as
8 UMG’s content. *See* UMG's Opp. to Veoh's Renewed Mot. for Summary Judgment
9 Re Entitlement to Section 512(c) Safe Harbor (Dkt. No. 465) ("UMG's Opp to MSJ")
10 p. 1:6-16, 23; pp. 8:7- 9:26; pp. 11:15-12:7; p. 14:26- p. 15:16; pp. 17:15-17.

11 Remarkably, it turns out that thousands upon thousands of the alleged
12 infringing videos are not music videos at all, let alone identifiable UMG music videos.
13 For example, many of the videos are home videos set to music or are videos of people
14 filming themselves playing video games set to music. And, in fact, approximately a
15 full third of the videos are Anime (Japanese cartoons) set to music. As a result, none
16 of these large categories of the videos put in issue by UMG would be reasonably
17 identifiable as UMG music videos, much less actually be UMG music videos.
18 (Ranahan Decl. ¶ 2).

19 UMG’s entire premise that Veoh was somehow capable of identifying works
20 without cooperation from UMG cannot possibly apply to these videos. Because UMG
21 did not notify Veoh of any of these videos until over a year into the case,⁴ the
22 inclusion of these videos does not serve to make any fact of consequence more or less
23 likely. Accordingly, these videos fail to meet the relevance test, and should be
24 excluded under Rules 401-402.

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26
27 ⁴ The only notices received by Veoh regarding any of the alleged infringements
28 asserted by UMG, were sent by an industry group the Recording Industry Association
of America ("RIAA"), and it is undisputed that Veoh promptly responded to the RIAA
notices and took down the identified videos.

1 Further, even if these non-music videos have some probative value because
2 snippets of UMG’s music may have been included at some point in the videos, Veoh
3 has a viable fair use defense with respect to many of these videos. Litigating these
4 fair use defense(s) would require decisions on a per video basis. This exercise would
5 take a considerable amount of time and require significant resources of both the Court
6 and the jury. Requiring the Court, the jury and the parties to devote resources to
7 individual fair use analysis with respect to so many individual videos (when given
8 UMG’s lack of notice, such videos have little if any bearing on this case) militates in
9 favor of excluding the evidence to avoid a colossal waste of time under Rule 403.

10 Finally, if UMG is entitled to continually refer to the alleged infringements in
11 this case as exceeding 7,000 videos, this will mislead the jury into believing there are
12 a greatly exaggerated number of “music videos” at issue and that Veoh could have
13 somehow managed to proactively identify such videos.

14 Because the probative value of these thousands of non-music videos offer
15 virtually nothing to advance UMG’s arguments in this case, and there is a serious risk
16 that introduction of this evidence will waste time and prejudice the jury, this Court
17 should preclude UMG from alleging or introducing as examples of alleged
18 infringement any videos other than actual UMG music videos. Further, the Court
19 should order UMG to produce a revised list of alleged infringements to comport with
20 any Court order granting Motion No. 1, so that Veoh has the opportunity to rebut any
21 excerpted list against its own findings.

22 **2. UMG Should Be Precluded From Introducing Copies of Screenshots**
23 **that Omit Certain Items that Would Appear to a Veoh User**

24 During depositions, UMG has introduced screenshots as exhibits that do not
25 appear as they would to a Veoh user. For example, during the deposition of Joseph
26 Papa in July 2008, UMG introduced screenshots as Exhibits 3 and 4. (Ranahan Decl.
27 ¶ 3 and Exhs. 1 and 2) These screenshots did not appear as they would to a Veoh
28 user because they failed to identify the permalink of the video, which would normally

1 have appeared at the top of the page, in the URL of the web page. There is no
2 probative value to introducing incomplete screenshots that a Veoh user would not
3 have actually viewed, especially when UMG could simply adjust its evidence
4 appropriately. Presenting screenshots in an inaccurate manner by omitting identifying
5 information has the potential to mislead the jury into making it seem more difficult
6 than it actually is for users to identify and notify Veoh of suspected infringing works.
7 Fed. R. Evid. 403. Accordingly, the Court should preclude UMG from introducing
8 any screenshots that do not appear as they would to a Veoh user because the evidence
9 is irrelevant under Rules 402-402, and more prejudicial than probative under Rule
10 403.

11 **3. UMG Should Be Precluded From Introducing Any Documents or**
12 **Argument Specifying Any of Veoh’s Investors**

13 As this Court well knows, UMG has repeatedly attempted to drag Veoh’s
14 various investors into this case, and has failed. (*See* UMG's First Amended
15 Complaint (Dkt. No. 104); UMG's Second Amended Complaint (Dkt. No. 308);
16 Order Granting Investor Defendants' Motion to Dismiss with Prejudice, Dkt. No. 434.)
17 It should not now be allowed to mention or refer to Veoh’s investors, many of which
18 are well known companies and individuals. Indeed, specifying the names of Veoh’s
19 investors should not be admissible in evidence for any purpose because the identity of
20 Veoh’s investors has no bearing on the issues or the rights of the parties in this case.
21 Fed. R. Evid. 401 and 402. The investor defendants have been dismissed with
22 prejudice from this action. (*See* Order Granting Investor Defendants' Motion to
23 Dismiss with Prejudice, Dkt. No. 434.) It is therefore not relevant which investors
24 have invested in Veoh.

25 Nevertheless, as UMG has done throughout this action, it can be expected to
26 attempt to exploit the identity of Veoh’s investors to sway the jury into believing that
27 Veoh must have more resources than it actually does, and thus must be a “deep
28 pocket” that could withstand a massive infringement award. This prejudice could

1 cause a juror to decide differently, to award damages higher than he or she ordinarily
2 would, or spend less time deliberating if the juror believes Veoh to have considerable
3 resources. UMG has also repeatedly used the stature of Veoh’s investors when
4 seeking to distract from the fact that when compared to UMG, Veoh is a considerably
5 smaller company with far less resources. Thus, the Court should restrict any reference
6 to Veoh’s investors because it would be unnecessary and inflammatory. The potential
7 prejudice to the jury outweighs any probative value. Fed. R. Evid. 403.

8 Similarly, UMG should be precluded from introducing documents constituting
9 communications with the investor defendants. In its opposition to Veoh’s motion for
10 summary judgment and in its complaint, UMG has cited to a few instances where
11 Veoh’s investors were notified of suspected infringement on Veoh. (*See e.g.*, Veoh's
12 Response to UMG's Statement of Genuine Issues (Dkt. No. 473) ("RSGI") ¶¶ 126,
13 141 and 147). These communications have nothing to do with any of the alleged
14 infringements at issue in this case, and in fact have nothing to do with music videos at
15 all. *Id.* The knowledge of the investors—who have been dismissed as parties from
16 this case with prejudice—of a few sporadic suspected instances of infringement, none
17 of which are UMG alleged infringements, are entirely irrelevant and have no bearing
18 on the issues or the rights of the parties in this case. Fed. R. Evid. 401 and 402.

19 Additionally, and importantly, when these communications are shown in their
20 full context, they demonstrate Veoh’s commitment to its DMCA and copyright
21 policies. *See, e.g.*, RSGI (Dkt. No. 473) ¶ 141. The risk of confusion and misleading
22 the jury given the manner that UMG has chosen to misleadingly excerpt such
23 documents in the past, demonstrate a need to preclude the introduction of this
24 evidence. Fed. R. Evid. 403. UMG's efforts to mislead the jury with this evidence
25 should be rejected.

26 **4. UMG Should Be Precluded From Introducing Any Evidence**
27 **Regarding the Timing of Veoh’s Implementation of Filtering**
28 **Through Audible Magic**

1 Veoh strictly enforces its policies prohibiting infringing content.⁵ In
2 accordance with its DMCA policy, Veoh has always promptly terminated access to
3 allegedly infringing content when it receives notice of such content.⁶ Veoh has also
4 implemented additional technological safeguards to prevent infringing material. For
5 example, beginning in 2006, Veoh has identified duplicate file submissions by means
6 of a unique fingerprint (called a “hash”) of a video file.⁷

7 Veoh has also introduced a state of the art filtering system, Audible Magic.
8 Audible Magic’s service works by taking an audio fingerprint from videos files and
9 matching it against Audible Magic’s database of content. *Id.* In the summer of 2007,
10 months before this lawsuit was filed, Veoh began working with Audible Magic and
11 testing its filtering technology. (Golinveaux Decl. (Dkt. No. 338) ¶ 4 & Ex. C, 81;
12 Papa Decl. (Dkt. No. 336-10) ¶ 15.) After a period of testing, Veoh put Audible
13 Magic’s filtering system into production in October 2007. *Id.* Beginning at that time,
14 if a user attempted to upload a video that matched against Audible Magic’s database

15 ⁵ Veoh has been adjudicated to be both eligible for and entitled to Section 512(c) safe
16 harbor. Earlier in this case, this Court denied UMG’s motion for partial summary
17 judgment seeking a ruling that Veoh was ineligible for Section 512(c) safe harbor.
18 (12/29/08 Order Denying UMG’s Mot. for Partial Summary Judgment, Dkt. No. 293)
19 Last year, a court granted Veoh’s motion for summary judgment regarding its
20 entitlement to Section 512(c) safe harbor in a copyright infringement suit, holding that
21 the record demonstrated that “far from encouraging copyright infringement, Veoh has
22 a strong DMCA policy, takes active steps to limit incidents of infringement on its
23 website and works diligently to keep unauthorized works off its website.” *Io Group,*
24 *Inc. v. Veoh Networks, Inc.*, 586 F.Supp.2d 1132, 1155 (N.D. Cal. Aug. 27, 2008).

21 ⁶ In addition to its DMCA policy, Veoh has been at the forefront of collaborative inter-
22 industry efforts alongside content owners to prevent infringing materials from
23 appearing on its service. In October 2007, Veoh, along with major content owners
24 Disney, Viacom, Fox, CBS, and NBC Universal, signed on to “The UGC Principles,”
25 available at www.ugcprinciples.com. Papa Decl. (Dkt. No. 336-10) ¶ 12 & Ex. F.
26 The UGC Principles serve as a comprehensive set of guidelines to help services like
27 Veoh and content creators work together toward their collective goal of “foster[ing] an
28 online environment that promotes the promises and benefits of UGC Services and
protects the rights of Copyright Owners.” *Id.*

26 ⁷ Once Veoh disables access to a video for any reason, including alleged copyright
27 infringement, Veoh’s system automatically disables access to any other duplicate
28 videos with the identical hash, and also blocks any subsequently submitted videos that
are duplicates of disabled videos. *See* Papa Decl. (Dkt. No. 336-10) ¶ 13; Golinveaux
Decl. (Dkt No. 338) Ex. C, 132.

1 of copyrighted content, the video was cancelled before publication so that it was never
2 available for viewing on Veoh. (Golinveaux Decl. (Dkt. No. 338) ¶ 4 & Ex. C, 83;
3 Papa Decl. (Dkt. No. 336-10) ¶ 15.) This filtering occurs even if Veoh has never
4 received a DMCA notice regarding the video. By mid-2008, Veoh had also run its
5 entire existing database of videos against Audible Magic’s filter and disabled access to
6 any video that matched against Audible Magic’s database that were not submitted by
7 Veoh partners. Golinveaux Decl. (Dkt. No. 338) ¶ 4 & Ex. C, 159; Papa Decl. (Dkt.
8 No. 336-10) ¶ 15. Veoh has invested significant resources licensing and continuing to
9 employ Audible Magic’s services. *Id.*

10 UMG has argued that Veoh should have implemented Audible Magic when it
11 first launched its service, based on the speculative conclusions of UMG’s expert, Ellis
12 Horowitz. Horowitz (who opined in his report that Veoh could have introduced
13 Audible Magic filtering when it launched), admitted in a deposition on July 3, 2009,
14 that he was not aware of any company that had implemented Audible Magic at an
15 earlier time. (Ranahan Decl. ¶ 4 and Exh. 3 (Rough Transcript of Horowitz at 120:23-
16 121).) Horowitz also testified that he had no experience in implementing a content
17 filtering system like Audible Magic, but acknowledged that there would be a fair bit
18 of mathematics and a fair bit of software that would have to be developed in order to
19 do so.⁸ *Id.* (Rough Transcript of Horowitz at 122:1-14.) Allowing the introduction of
20 this speculative evidence from Horowitz and UMG’s counsel, without any
21 consideration for what is involved in implementing Audible Magic, creates a real risk
22 that the jury will be confused and mislead about the feasibility of Veoh introducing
23 filtering at an earlier time. Thus, UMG should be precluded from presenting evidence
24 regarding the timing of Veoh’s implementation of Audible Magic; any probative value
25

26 ⁸ Horowitz instead based his suggestion that Veoh could have introduced Audible
27 Magic at an earlier phase based on testimony from the deposition of Audible Magic,
28 which indicated that Audible Magic had certain technology available at an earlier
date, but did not address whether it would have been feasible to have implementation
of Audible Magic complete.

1 is greatly outweighed by considerations of misleading the jury and wasting time. Fed.
2 R. Evid. 403.

3 Moreover, this Court should exercise its discretion to exclude this evidence for
4 public policy reasons. Courts applying Rule 407 have routinely held that it is
5 reversible error to allow the introduction of a subsequent remedial measure that
6 unfairly prejudices the opposing party. *See, e.g., Lindsay v. Ortho Pharmaceutical*
7 *Corp.*, 637 F.2d 87, 94 (2nd Cir. 1980); *Gray v. Hoffman-La Roche, Inc.*, 82 Fed.
8 Appx. 639, 647 (10th Cir. 2003); *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 763
9 (5th Cir. 1989); *Fish v. Georgia-Pacific Corp.*, 779 F.2d 836, 840 (2nd Cir. 1985).
10 Similar to the policy reasons for excluding subsequent remedial measures to implicate
11 liability, permitting UMG to introduce evidence about Veoh's implementation of
12 Audible Magic to be used against Veoh could create a disincentive to companies who
13 are considering whether to expand the means by which to prevent suspected
14 infringement. If taking additional preventative steps to combat suspected copyright
15 infringement subjects the company that implements added measures to stricter
16 scrutiny about whether the implementation could have occurred earlier, companies
17 may think twice about implementing such measures in the first place.

18 **5. Evidence Constituting and Relating to Press Articles, Blogs and**
19 **Communications From Veoh's Users (Other Than With Respect to**
20 **the User's Own Alleged Infringement) Regarding Alleged**
21 **Infringement on Veoh**

22 At various times, including throughout the complaint in this matter, UMG has
23 cited to uncorroborated third party statements about alleged infringement on Veoh
24 that have nothing to do with the alleged infringements in this case. Not only is this
25 evidence irrelevant and more prejudicial than probative, it also suffers from other
26 evidentiary infirmities including that UMG will be unable to authenticate these
27 documents under Rule 901 or properly lay a foundation pursuant to Rule 602. None
28 of the authors of these articles or communications have been disclosed as witnesses in

1 this action in accordance with Rule 26 or in interrogatory responses, and Veoh has
2 not had the opportunity to depose these witnesses or pursue alternate forms of
3 discovery. *See, e.g.*, Fed. R. Civ. P. 37(c)(1). Without such witnesses, UMG cannot
4 authenticate or lay a proper foundation for these documents.

5 a. Correspondence Between Veoh and its Users Regarding
6 Suspected Alleged Infringements By Other Veoh Users
7 Should Be Excluded

8 In opposition to Veoh’s pending motion for summary judgment, UMG cited to
9 four exhibits that constitute correspondence between Veoh and its users, *after* the
10 users had videos taken down for suspected infringement pursuant to Veoh’s policies.
11 These users cite vaguely and generally to other infringing works because they were
12 angry that their own videos were removed in accordance with Veoh’s policies. UMG
13 cites these exhibits as examples of “notice” of infringement and to show that Veoh
14 users “regularly wrote to Veoh to report” on a “huge range of infringing content.”
15 (*See* UMG's Statement of Genuine Issues, Dkt. No. 468 ("SGI") 142-145, and Batsell
16 Decl. (Dkt. No. 388) and Exs. 45-48).

17 First, these and similar communications are not relevant to the alleged
18 infringements in this action. This alone is reason enough to exclude this evidence as
19 not relevant pursuant to Rule 402. Further, under FRE 901, UMG has not (and
20 cannot) authenticate or lay any foundation regarding any of the users’ vague and
21 unsubstantiated assertions of other alleged infringements. Because there can be no
22 foundation with respect to the knowledge of these users and the extent to which they
23 have reviewed Veoh’s site for infringement (or would even know which videos might
24 be potentially infringing), any such evidence should be precluded. Further, as this
25 evidence purports to describe the conduct of Veoh, it also constitutes inadmissible
26 hearsay in violation of FRE 602, which is yet another reason to disallow this
27 evidence. Finally, any limited relevance would be outweighed by the prejudice
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1 caused when considering that UMG has not established the credibility of such
2 statements. Thus, the Court should preclude these and similar communications.

3 b. Press Articles or Blogs Regarding Alleged Infringement on
4 Veoh Should Be Excluded

5 Similarly, without authenticating pursuant to Rule 901 or laying any foundation
6 whatsoever to the statements pursuant to Rule 602, UMG’s opposition to Veoh’s
7 pending motion for summary judgment (and its second amended complaint) also
8 improperly relied heavily on statements in various news articles and third party
9 websites—SGI 17, Batsell Decl. (Docket No. 388) Ex. 5 (Revver’s Copyright
10 Information); SGI 110, Batsell Decl. (Docket No. 388) Ex. 36 (MySpace and
11 Gracenote Press release); SGI 112, Batsell Decl. (Docket No. 388) Ex. 38 (AM Pres
12 Release); SGI 146, Batsell Decl. (Docket No. 388) Ex. 49 (New York Times Article);
13 SGI 149, Batsell Decl. (Docket No. 388) Ex. 51 (article titles “Forget YouTube . .
14 ..”); SGI 149, (Valleywag’s article); SGI 150, Batsell Decl. (Docket No. 388) Ex. 53
15 (article titled “Veoh v. Copyright Holders...”). None of these articles discuss any
16 specific alleged infringements at issue in this action, and offer little, if any, probative
17 value. Accordingly, this evidence should be precluded as not relevant under Rules
18 401-402.

19 Not only is this evidence irrelevant, such articles also suffer from other
20 evidentiary infirmities because UMG will be unable to authenticate these documents
21 under Rule 901 or properly lay a foundation pursuant to Rule 602. None of these
22 articles were or could be properly introduced (as none of the authors have been
23 disclosed or deposed in this action), and therefore these exhibits should not be
24 allowed into evidence pursuant to Rule 901. These exhibits also constitute
25 inadmissible hearsay in violation of Rule 602. As this evidence has not and cannot be
26 properly introduced, allowing the evidence would unnecessarily prejudice the jury
27 into believing the veracity of these unsubstantiated press statements. Rule 403.
28 Accordingly, the Court should also preclude from introduction these and similar

1 articles or blogs regarding suspected infringement on Veoh as more prejudicial than
2 probative under Rule 403.

3 **6. Evidence and Arguments that Support a Claim that Statutory**
4 **Damages Should be Assessed by Any Means Other Than Per**
5 **Compact Disc (“CD”)**

6 UMG alleges that Veoh infringed hundreds of its alleged sound recording
7 copyrights, and seeks statutory damages under 17 U.S.C. § 504(c)(1). UMG has
8 indicated its intention to argue that statutory damages should be assessed per
9 individual “song,” rather than per individual “CD,” thereby dramatically increasing its
10 potential statutory damages award. It does so despite knowing that courts have
11 repeatedly calculated statutory damages per “CD.” *See UMG Recordings, Inc., et al.*
12 *v. MP3.com, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000) (finding statutory
13 damages should be assessed per CD and not per “song;” UMG was a plaintiff in the
14 action); *TeeVee Toons v. MP3.com, Inc.*, 134 F. Supp. 2d 546, 548 (S.D.N.Y. 2001);
15 *Country Road Music, Inc. v. MP3.com, Inc.*, No. 02 Civ. 8006 (JSR), 2003 WL
16 22038295, at *5 (S.D.N.Y. Aug. 27, 2003).

17 The Copyright Act expressly states that the trier of fact must calculate statutory
18 damages according to the number of “works” infringed. It further specifies that
19 compilations must be treated as single works for the purpose of calculating statutory
20 damages. As UMG admits, and as the *UMG Recordings* court found, CDs are
21 compilations of sound recordings. This is in accordance with the manner in which
22 UMG registered such works with the Copyright Office. Therefore, the relevant
23 “work” for the purpose of calculating statutory damages is the “CD.” Thus, this Court
24 should exclude evidence and arguments that statutory damages should be assessed by
25 any means other than per the relevant compilation, or “CD.”

26 a. UMG Is Bound By Its Election of Statutory Damages

1 Under the Copyright Act, a copyright holder may elect to forego actual
2 damages in favor of statutory damages. See 17 V.S.c. § 504(a)-(c). Specifically,
3 Section 504(c)(1) states that:

4 [T]he copyright owner may elect, at any time before final judgment is rendered,
5 to recover, instead of actual damages and profits, an award of statutory damages
6 for all infringements involved in the action, with respect to any one work, for
7 which any one infringer is liable individually, or for which any two or more
8 infringers are liable jointly and severally, in a sum of not less than \$750 or more
9 than \$30,000 as the court considers just. For the purposes of this subsection, all
10 the parts of a compilation or derivative work constitute one work.

11 17 U.S.C. § 504(c)(1).⁹

12 A plaintiff may elect statutory damages at any time before final judgment is
13 rendered, but once a plaintiff elects statutory damages, it may no longer seek actual
14 damages. See *Twin Peaks Prods., Inc. v. Publ. Int’l, Ltd.*, 996 F.2d 1366, 1380 (2d
15 Cir. 1993); *Latin Am. Music Co. v. Spanish Broad. Sys., Inc.*, 866 F. Supp. 780, 782
16 (S.D.N.Y. 1994). UMG has repeatedly informed the Court and Veoh that it is electing
17 statutory damages. (See e.g., 11/26/08 Order, note 1 (Dkt. No. 217) (noting that
18 "UMG is seeking only statutory damages".) Thus, UMG is now precluded from
19 seeking actual damages in this case. See *Twin Peaks*, 996 F.2d at 1380; *Latin Am*
20 *Music*, 866 F. Supp. at 782.

21 b. Any Statutory Damages Should Be Calculated Per
22 Compilation or CD

23 Further, UMG has informed Veoh that it intends to argue that statutory damages
24 should be assessed on a per “song” basis. Such an assessment would directly violate
25 the Copyright Act, would be contrary to Congressional intent, and “would be nothing
26 less than an unconstitutional arrogation of power by the judiciary.” *UMG Recordings*,
27 109 F. Supp. 2d at 225.

28 ⁹ This section allows a maximum recovery of \$150,000 per work. *Id.*

1 The Copyright Act clearly states that statutory damages are to be calculated
2 according to the number of works infringed. Specifically, the statute provides that the
3 copyright owner may elect “an award of statutory damages for all infringements
4 involved in the action, with respect to any one work...” 17 U.S.C. § 504(c)(1)
5 (emphasis added). The Copyright Act also states that for the purpose of calculating
6 damages, “all the parts of a compilation or derivative work constitute one work...” *Id.*
7 As stated in the applicable House Report, section 504(c)(1) “makes it clear ... that,
8 although they are regarded as independent works for other purposes, ‘all the parts of a
9 compilation or derivative work constitute one work,’“ for the purposes of determining
10 an award of statutory damages. *See* H.R. Rep. No. 1476, at 162(1976), reprinted in
11 1976 U.S.C.C.A.N. 5659, 5778.

12 The Act defines a “compilation” as, “a work formed by the collection and
13 assembling of preexisting materials or of data that are selected, coordinated, or
14 arranged in such a way that the resulting work as a whole constitutes an original work
15 of authorship.” 17 U.S.C. § 101. The statute further states that the:

16 “term ‘compilation’ includes collective works,” which the statute defines as
17 “work[s], such as ... periodical[s], antholog[ies] or encyclopedia[s], in which a
18 number of contributions, constituting separate and independent works in
19 themselves, are assembled into a collective whole.”

20 *Id.* *See also Heyman v. Salle*, 743 F. Supp. 190, 192 (S.D.N.Y. 1989) (stating that
21 those compilations that “consist of contributions which themselves constitute ‘works’
22 capable of copyright are called ‘collective works’“). As a CD is a work that
23 assembles into a collective whole separate and independent sound recordings, each
24 capable of obtaining their own copyright, a CD is a collective work, and thus a type of
25 compilation. UMG has acknowledged by virtue of registering its works on a per CD
26 basis as "works for hire" that the CDs it registers under its sound recording copyrights
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1 are compilations. 17 U.S.C. sec 101.¹⁰ Moreover, in a previous litigation, UMG
2 conceded that the CDs it registers under sound recording copyrights are compilations
3 under section 504(c)(1) *See UMG Recordings*, 109 F. Supp. 2d at 225 ("Plaintiffs
4 concede that each CD that [the] defendant copied is a 'compilation' under §
5 504(c)(1)").

6 Thus, because a CD is a compilation of sound recordings, and compilations
7 must be treated as single works for the purpose of calculating statutory damages, any
8 statutory damages awarded in this case may only be awarded on a per-CD basis. *See*
9 17 U.S.C. § 504(c)(1). *See generally, Eastern Am. Trio Prods., Inc. v. Tang Elec.*
10 *Corp.*, 97 F. Supp. 2d 395, 420 (S.D.N.Y. 2000) (finding two sales catalogs
11 containing additional individual photos were compilations and therefore plaintiff is
12 only eligible for two awards of statutory damages for copyright infringement); *Xoom,*
13 *Inc. v. Imageline, Inc.*, 94 F. Supp. 2d 688, 693 (E.D. Va. 1999), *aff'd*, 323 F.3d 279
14 (4th Cir.), *cert. denied*, 540 U.S. 879 (2003) (finding two computer programs
15 containing individual clip-art images were compilations and therefore plaintiff is only
16 eligible for two awards of statutory damages for copyright infringement); *Stoke Seeds*
17 *Ltd. v. Ceo. W. Park Seed Co., Inc.*, 783 F. Supp. 104, 107 08 (W.D.N.Y. 1991)
18 (finding all photos appearing in one book constitute compilation and therefore
19 plaintiff is only eligible for one award of statutory damages for copyright
20 infringement).

21 In accordance with the foregoing principles, courts have repeatedly found that a
22 CD is a compilation of sound recordings, and therefore that the CD was the work by
23 which to assess statutory damages. *See UMG Recordings*, 109 F. Supp. 2d at 225;
24 *TeeVee Toons v. MP3.com, Inc.*, 134 F. Supp. 2d 546, 548 (S.D.N.Y. 2001) (Rakoff,
25 J.); *Country Road Music, Inc. v. MP3.com, Inc.*, No. 02 Civ. 8006 (JSR), 2003 WL
26 22038295, at *5 (S.D.N.Y. Aug. 27, 2003). It certainly should come as no surprise to

27 ¹⁰ Indeed, the works at issue in this case were registered as "works for hire;" and the
28 only possible work for hire category enumerated in 17 U.S.C. sec 101 that would
apply to the sound recordings are compilations.

1 UMG, as it was a plaintiff in the UMG Recordings case. In that case, Judge Rakoff
2 explicitly told Plaintiffs that statutory damages should be assessed per CD and that to
3 find otherwise would be to disregard Congress’ “express mandate that all parts of a
4 compilations must be treated as a single ‘work’ for purposes of computing statutory
5 damages.” *Id.*

6 Thus, because a CD is a compilation of sound recordings, and compilations
7 must be treated as single works for the purpose of calculating statutory damages, any
8 statutory damages awarded in this case may only be awarded on a per-CD basis. Any
9 evidence or argument to the contrary is irrelevant and impermissible as a matter of
10 law, and should be excluded.

11 **7. Evidence Constituting Veoh’s Power Point Presentations and Other**
12 **Internal Materials that Discuss or Refer to Music**

13 UMG has repeatedly suggested that Veoh should somehow be found culpable
14 for specific alleged infringements at issue in this action because on a few, isolated
15 occasions, internal Veoh documents discuss general strategies regarding music content
16 on Veoh. (RSGI (Docket No. 473) ¶¶ 177-178). UMG makes this argument knowing
17 full well that Veoh has authorized music content on Veoh. (*Id.* at ¶ 135). Further, this
18 evidence is wholly irrelevant to the issues in this case given that none of this evidence
19 makes reference to UMG or any of UMG’s alleged infringements, and does not
20 discuss any effort to feature or allow any allegedly infringing content. Based on the
21 limited probative value of these documents (especially considering that Veoh has
22 authorized music content on Veoh) these power points and other documents relating to
23 Veoh’s plans with respect to music, which were never even implemented, are far more
24 prejudicial than probative, and should be excluded under Rule 403.

25 **III. CONCLUSION**

26 For all the foregoing reasons, Veoh respectfully requests that the Court grant its
27 Motions *in Limine* Nos. 1-7.

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