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1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant argues that “Veoh has diligently responded to Plaintiff’s discovery requests  
4 in this case, and has already produced documents responsive to many of Plaintiff’s requests.”  
5 However, as of the filing of this Reply, forty-two (42) days have passed since Defendant’s  
6 Responses to Plaintiff’s First Set of Requests for Production were due and in spite of repeated  
7 requests by Plaintiff’s counsel, Veoh has failed to produce a single document in response to those  
8 requests – not a single document! Sperlein Declaration at ¶4.  
9  
10

11 The *only* documents Defendant has produced are those it produced with its initial  
12 disclosures. *Id.* at ¶3. By definition Defendant has hand selected those documents for possible  
13 use to support its claims or defenses. It is unlikely that Veoh would produce culpatory documents  
14 as part of its initial disclosures. Even with regard to those documents, Defendant asked for a last  
15 minute extension and produced them nearly a month later than originally scheduled by the Court.  
16 *Id.* at ¶2.  
17

18 Defendant has continually disrupted Plaintiff’s ability to properly investigate and prepare  
19 its case for trial. In addition to stalling on document production, Defendant canceled a scheduled  
20 deposition less than twenty-four hours in advance. Defense counsel called the day before the  
21 deposition of Mr. Joseph Papa to inform Plaintiff that Mr. Papa could not attend due to a sinus  
22 infection. Plaintiff does not question Defense Counsel’s veracity on this issue, but the net result is  
23 the same – Plaintiff’s ability to prepare for trial is being hampered by Defendant. *Id.* at ¶¶5 and 6.  
24

25 This motion will be heard on April 10, 2007. Discovery is currently scheduled to close  
26 on April 30, 2007. Even if the Court orders immediate production, Plaintiff will not have  
27 sufficient time to review and analyze the documents and perform follow up discovery as  
28

1 necessary. In Plaintiff's very first meet and confer letter, it stressed the short time schedule and  
2 warned Defendant that it would have to immediately seek a production order if the issues were not  
3 resolved quickly. *Id.* at ¶7. Yet defense counsel continued to delay.

4  
5 Indeed, in light of Defendant's failure to produce a single document in response to  
6 Plaintiff's discovery requests, Plaintiff anticipates seeking an extension of the fact discovery cut  
7 off date.

8 **II. FURTHER STATEMENT OF FACTS**

9 Defendant dismisses Plaintiff's references to *Napster* and *Grokster*, stating that this case is  
10 different because Plaintiff did not notify Veoh of the alleged infringements prior to filing suit.  
11 However, in both *Napster* and *Grokster*, plaintiffs' primary argument was that in certain  
12 situations, the operator of a computer website or the creator of peer-to-peer software has a  
13 responsibility to prevent copyright infringement from occurring by and through their systems  
14 without prior notice from the copyright holder of specific infringing acts. *A&M Records v.*  
15 *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) and *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S.  
16 913, 921 (2005).

17  
18  
19 The provisions of the Digital Millennium Copyright Act (DMCA) can immunize Internet  
20 service providers (ISPs) from liability for copyright infringement occurring on their system,  
21 provided the ISP follows certain prerequisites. 17 U.S.C. §512. One of the features of the DMCA  
22 is to provide immunity to an ISP when it removes infringing material upon formal notice from the  
23 copyright holder. However, that is only one of the provisions and in fact, an ISP will lose its  
24 eligibility for safe harbor if it is aware of facts from which infringing activity is apparent and does  
25 not expeditiously remove the material – without notice from the copyright holder. 17 U.S.C.  
26 §512(c)(1)(A). Similarly, an ISP will not be eligible for the safe harbor provisions if it receives a  
27  
28

1 direct financial benefit from the infringing activity and has the right and ability to control the  
2 infringing activity. This is true regardless of whether or not the ISP had knowledge of the  
3 infringing activity through a formal notice or by any other means. 17 U.S.C. §512(c)(1)(B).

4 Therefore, Plaintiff's document requests exploring Veoh's ability to control the infringing  
5 environment and ability to reap a financial benefit from the infringing activity are all directly on  
6 point and relevant.  
7

8 Like the plaintiffs in *Napster* and *Grokster*, Plaintiff Io Group correctly argues that Veoh is  
9 not eligible for the safe harbor provisions of the DMCA and must either take measures to prevent  
10 the Veoh System from being used for copyright infringement or be prepared to accept  
11 responsibility for infringement when it occurs.  
12

### 13 **ARGUMENT**

#### 14 **A. Boilerplate Objections**

15 In its opposition papers, Defendant provided authority supporting the use of general  
16 objections. However, Plaintiff did not protest the use of general objections; it protested the use of  
17 *boilerplate* objections whether set forth as general or request-specific objections. There should be  
18 no confusion as to which boilerplate objections Plaintiff complains, since Plaintiff created bold  
19 headings for each type of boilerplate objection: overbroad, burdensome and oppressive; vague,  
20 ambiguous and unintelligible; privileged; private and confidential; and non-relevant.  
21

22 Rather than cutting and pasting from a list of objections without further comment,  
23 Defendant should have explained the specific basis for its objections, so that if possible  
24 deficiencies could have been cured. For example, Defendant objected that fourteen of Plaintiff's  
25 requests were vague, ambiguous or unintelligible, but took no effort to explain why it found the  
26 request difficult to understand. Clearly this type of objection could have been cured through the  
27  
28

1 meet and confer process had the Defendant been sufficiently motivated. It's clear that  
2 Defendant's goal is not to understand or focus Plaintiff's requests, but simply to delay production  
3 as long as possible.  
4

5 Defendant is dismissive of Plaintiff's statement that "in many instances plaintiff cannot  
6 determine where Defendant has actually withheld responsive documents." Plaintiff's point is  
7 simple: where Defendant has not agreed to produce any documents, it is difficult to determine if  
8 Defendant is refusing to produce responsive documents based on its objections or if Defendant  
9 cannot determine whether or not there are any responsive documents at all. When Defendant  
10 simply regurgitates from a list of boilerplate objections without further explanation it will always  
11 be difficult to find resolution.  
12

13 **B. Specific Requests**

14 **Request No. 2:**

15 All DOCUMENTS which constitute, describe, refer to or relate to reports identifying the  
16 amount of daily traffic, hits, and/or visits to veoh.com since VEOH NETWORKS began operating  
17 veoh.com.  
18

19 **Io Group's Reply:**

20 Io Group has clearly explained the relevance of this request - obvious changes in traffic  
21 may correlate to whether or not content added to or removed from the Veoh System served to  
22 draw users to the site. For example, the traffic reports will show that when Veoh removed adult  
23 content from its system (including Plaintiff's infringed works) it suffered a profound drop in  
24 traffic.

25 Moreover, Plaintiff is entitled to explore why Defendant distributed adult video files and  
26 infringing content through the Veoh System in spite of the associated legal risks. The answer is of  
27 course that there was a potential for great financial reward. The reward is inextricably linked to  
28 the amount of traffic the website gained from allowing this material. Documents reflecting

1 changes to traffic which may correspond to changes in available content are relevant and  
2 discoverable.

3 Moreover, as discovery progresses Plaintiff will learn more about how the Veoh System  
4 operated and what changes were made to the system overtime. One way of analyzing why  
5 changes were made (including changes to Veoh's copyright infringement or content review  
6 policies) and what effect those changes had on the operation of the site, is to look at how the  
7 traffic patterns changed over the same time frame.

8 Io Group has also addressed the proportionality requirement by agreeing narrow the  
9 request to daily traffic reports. There is no need to limit the time frame because Veoh's has been  
10 in existence for less than two years.

11 Notably Defendant does not dispute that daily traffic information is routinely maintained  
12 and easily retrievable.

13 **Request No. 4:**

14 All DOCUMENTS which constitute, describe, refer to or relate to DEFENDANT's  
15 procedures for verifying the accuracy and/or appropriateness of the categorization or indexing of  
16 content submitted to veoh.com for publication by and through veoh.com, including all original,  
17 draft, subsequent, or revised versions of such DOCUMENTS.

18 **Io Group's Reply:**

19 There is nothing vague about this request. When Users submit video files to the Veoh  
20 System the User also supplies a title, enters a description of the video file and places the video in a  
21 category. Veoh compiles all this information in a central data base and indexes it so that other  
22 Users can locate the file by using Veoh's search function. Veoh has publicly stated that it reviews  
23 each submission to make sure Users supply accurate information and place video files in  
24 appropriate categories. Plaintiff seeks to obtain any documents verifying or relating to this policy.  
25 These documents might be the actual written procedures, or they may be a memo or e-mail by a  
26 Veoh employee stating that such procedures should or should not be implemented. To the extent  
27 Veoh currently states that no such documents exist the issue is resolved. However, that was not  
28 the Veoh's position prior to the filing of its Opposition. Moreover, if Plaintiff's further



1 explanation here changes Veoh's understanding such that there are responsive documents, Veoh  
2 should be ordered to produce those documents immediately.

3 **Request No. 5:**

4 All DOCUMENTS which constitute, describe, refer to or relate to DEFENDANT's  
5 procedures for processing and handling content once submitted to veoh.com for publication by  
6 and through veoh.com.

7 **Io Group's Reply:**

8 There is no doubt that this request would likely encompass a large number of documents.  
9 However, the fact that a large number of documents are responsive to a request does not render the  
10 request patently overboard. As described by Defendant, "Veoh's core function of allowing users  
11 to share content through Veoh" is precisely what is at issue in this case. Veoh provided a means  
12 for wholesale copyright infringement, did nothing to prevent the infringement in spite of its right  
13 and ability to do so, and gained a direct financial benefit from the infringing activity. In order to  
14 argue as to why Veoh had the right to control the infringing activity and how it may have  
15 prevented the infringing activity, it is imperative that Plaintiff be given an opportunity to examine  
16 what Veoh did with the video files its Users submitted and licensed to Veoh.

17 **Request No. 7:**

18 All DOCUMENTS which constitute, describe, refer to or relate to material used by VEOH  
19 NETWORKS to market veoh.com or to attempt to obtain capital financing for VEOH  
20 NETWORKS, INC.

21 **Io Group's Reply:**

22 At the time Plaintiff filed its motion to compel Defendant had not agreed to Plaintiff's  
23 proposed limiting language. Defendant has now agreed to produce documents responsive to the  
24 narrowed request. However, agreeing to produce and actually producing are two different things.  
25 Defendant still has not produced any responsive documents.

26 **Request No. 8:**

27 All DOCUMENTS which constitute, describe, refer to or relate to DEFENDANT's policy  
28 or policies regarding the display by and through veoh.com of explicit material (whether such

1 material is described as “explicit,” “adult,” “pornographic,” “nude,” “sexual” or any other similar  
2 word), including all original, draft, subsequent, or revised versions of such DOCUMENTS.

3 **Io Group’s Reply:**

4 Defense counsel skillfully attempts to misconstrue plaintiff’s argument and the application  
5 of the law. In order to answer the question of whether or not Veoh had the right and ability to  
6 control the infringing activity, one must first ask the broader question of whether or not Veoh has  
7 the right and ability to control which video files are can be broadcast through the Veoh system and  
8 which files cannot. “The ability to block infringers’ access to a particular environment for any  
9 reason whatsoever is evidence of the right and ability to supervise.” *A&M Records v. Napster,*  
10 *Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001)(citing *Fonovisa Inc. v. Cherry Auction, Inc.*, 76 F.3d  
11 259, 262).

12 Io Group will prove that Veoh exercised enormous control over what video files resided on  
13 and were broadcast through the Veoh System. One way to show this is to demonstrate how  
14 effectively Veoh was able to regulate the broadcast of video files that contained adult material.

15 At the time Plaintiff filed its motion to compel defendant had not agreed to produce  
16 documents responsive to this request. It is unclear from defendant’s discussion in its opposition as  
17 to whether or not it now agrees to produce responsive documents. In any event Defendant should  
18 be order to immediately produce all responsive documents.

19 **PRODUCTION REQUESTS 9, 10, 11 and 12**

20 **Request No. 9:**

21 All DOCUMENTS which discuss if or how 18 U.S.C. § 2257 and implementing  
22 regulations at 28 C.F.R. 75.1 et seq. relate to VEOH NETWORK’S operations.

23 **Request No. 10:**

24 All DOCUMENTS which constitute, refer to or relate to VEOH NETWORK, INC.’S  
25 policies for preventing child pornography from being published by and through veoh.com.

26 **Request No. 11:**

27 All DOCUMENTS which constitute, refer to or relate to VEOH NETWORK, INC.’S  
28 policies for obtaining proof that individuals appearing in explicit material submitted to VEOH

1 NETWORK, INC. for publication by and through veoh.com were over eighteen years of age at the  
2 time the material was produced.

3 **Request No. 12:**

4 All DOCUMENTS which constitute, refer to or relate to VEOH NETWORK, INC.'S  
5 policies for ensuring that any sexually explicit material VEOH NETWORKS transmitted by and  
6 through veoh.com was properly labeled with information as to where the producer of such content  
7 maintained records proving the individuals appearing in the material were over eighteen years of  
8 age at the time the material was produced.

9 **Io Group's Reply:**

10 Again Veoh attempts to argue that its right and ability to control content on the Veoh site is  
11 not relevant, when in fact it is extremely relevant. Io Group, Inc. is entitled to any documents  
12 which show that Veoh was able to control what video files appeared on its system, including video  
13 files containing sexually explicit material and also including video files containing illegal child  
14 pornography.

15 Federal laws require that any video containing sexually explicit material be labeled with  
16 the actual name and business address of the producer of the material. Had Veoh followed the law,  
17 the infringing activity would have been all the more apparent. Specifically, Plaintiff seeks to  
18 explore whether Veoh ignored the law in order to willfully blind itself to the true ownership of  
19 sexually explicit video files. Veoh's reasons for not following federal labeling laws therefore  
20 become relevant. Perhaps Veoh simply was not aware of the law or believed it did not apply.  
21 Whatever the reason, Plaintiff is entitled to know. If Veoh was unaware of the law, than no  
22 documents are likely to be responsive and Veoh is simply choosing to use this opportunity to  
23 argue its case and expend resources rather than to relieve Veoh of any burden to produce.

24 While Plaintiff offered to combine the language of requests Nos. 9 and 12, Defendant has  
25 not agreed to produce documents responsive to the proposed new language. When and until Veoh  
26 agrees to the produce documents responsive to the proposed language, the existing requests stand.  
27  
28

1 **Request No. 14:**

2 All DOCUMENTS which discuss, refer to or relate to VEOH NETWORK, INC.'S ability to  
3 discover the true identity of individuals who submit content for publication by and through  
4 veoh.com.

5 **Io Group's Reply:**

6 As Judge Patel noted in *Napster*, efforts to remain ignorant of user's names can be  
7 indicative of efforts to protect the use of a Service for the transfer of infringing files. *A & M*  
8 *Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (D. Cal. 2000). Veoh purposefully  
9 created a system whereby users could anonymously submit material without fear of being  
10 identified, thereby permitting, if not inducing, its users to engage in copyright infringement. Had  
11 Veoh seriously wanted to reduce the amount of infringement occurring through the Veoh System,  
12 it would have taken measures to learn the identity of the individuals from whom it licensed  
13 content. Any documents speaking to whether or not Veoh's users could use the system while  
14 remaining anonymous are relevant, as are any documents relating to why Veoh allowed (or did not  
15 allow) its content contributors to remain anonymous.

16 **Request No. 16:**

17 Electronic copies, in a readily viewable format, of all files containing adult material  
18 (whether such material is described as "explicit," "adult," "pornographic," "nude," "sexual" or any  
19 other similar word) ever published by and through veoh.com.

20 **Io Group's Reply:**

21 Plaintiff has not complained about Veoh's decision to remove sexually explicit material  
22 from the Veoh System. Plaintiff merely points out that it is impossible for it to determine the  
23 extent of additional infringement of its works without having the opportunity to review video files  
24 no longer available by and through the Veoh System. Plaintiff has limited its request to sexually  
25 explicit video files, because Plaintiff does not produce any non-sexually explicit material.

26 Defendant has a high level of expertise with regard to transferring video files. In fact, prior  
27 to removing all sexually explicit material from the Veoh System, Defendant was able to deliver  
28 multiple copies of the material to hundreds of thousands of world wide Users apparently with no

1 difficulty and according to Defendant's arguments it did so for free. Now Defendant complains  
2 that it cannot produce that same content to Plaintiff for review. Defendant has not provided a  
3 declaration from any Veoh employee, estimating the amount of material, the technological  
4 difficulties or any other reason why the material would be difficult to produce. Defendant simply  
5 refers to the production as an enormous burden. With regard to cost shifting, Plaintiff has  
6 repeatedly offered to provide high capacity storage devices.

7 Defendant relies on a citation from the *Perfect 10* case which refers to whether or not  
8 evidence of *third-party* copyrights are relevant to a claim of copyright infringement. *Perfect 10 v.*  
9 *CCBill, LLC*, 71 U.S.P.Q.2d 1568 (C.D.Cal.2004). This is completely beside the point. Plaintiff  
10 seeks to determine how many additional *Plaintiff*-owned works Veoh infringed by copying and  
11 broadcasting them through the Veoh System.

12 **Request No. 21:**

13 All DOCUMENTS which constitute, refer to or relate to DEFENDANT's ability to  
14 monetize veoh.com including, without limitation, through advertising revenue, video on demand  
15 fee sharing or any other means.

16 **Io Group's Reply:**

17 Defense counsel misrepresents the state of the law. In fact, she relies on a thirty-seven-  
18 year-old case from the Eastern District of New York involving non-Internet based patent  
19 infringement. *Scharmer v. Agnew Associates, Inc.* 167 U.S.P.Q. 77 (E.D.N.Y. 1970). Instead of  
20 relying on irrelevant case law, counsel should look to the current authoritative cases of this  
21 Circuit. In *Napster II* the Ninth Circuit ruled that a showing that infringing activity served to draw  
22 more users to a site is sufficient to establish a direct financial benefit. *A & M Records v. Napster*,  
23 239 F3d 1004 (9<sup>th</sup> Cir. 2001). In fact, *Elision*, the case upon which Veoh relies, not only affirms  
24 that holding from *Napster II*, but goes even further to hold that there is no requirement that the  
25 draw be "substantial." *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9<sup>th</sup> Cir. 2004).

26 Finally, in *Google v. Perfect 10* (a case which should be familiar to defense counsel as she  
27 served as lead counsel for Google), the District Court acknowledged the Ninth Circuit's "draw  
28 equals direct financial benefit" position as reflected in *Napster II* and *Ellison* and went on to note

1 that “[t]his broad definition of ‘direct financial benefit’ would encompass even a ‘future hope to  
2 ‘monetize.’” Nimmer § 12.04[A][1] (commenting on *Napster II*).” *Perfect 10 v. Google, Inc.*, 416  
3 F. Supp. 2d 828, 857 (D. Cal. 2006).

4 Thus, Veoh’s “ability to monetize veoh.com” is directly relevant to claims and defenses  
5 and the Court should order Veoh to produce all responsive documents immediately.

6 **Request No. 22:**

7 All DOCUMENTS explaining how veoh.com and each of its features operates or was  
8 intended to operate, including without limitation, such DOCUMENTS given to employees or  
9 contractors tasked with designing, programming or constructing veoh.com.

10 **Io Group’s Reply:**

11 For all the reasons stated in Plaintiff’s Motion to Compel, Plaintiff is entitled to know and  
12 understand the operations of veoh.com, the website by and through which Plaintiff’s works were  
13 infringed. Virtually every aspect of the website is relevant as to whether Veoh directly infringed  
14 Plaintiff’s works, if Veoh knew of the infringing activity, how much control Veoh had over the  
15 infringing activity and whether or not the infringing activity served as a draw, thereby providing a  
16 direct financial benefit. There is no doubt that the veoh.com website is complex, but that only  
17 creates a further need for the production of documents, so that Plaintiff can determine how each  
18 feature of the website adds to Veoh’s right and ability to control the infringing activity at issue.

19 The document request is narrowly drawn in that it does not seek documents *relating* to or  
20 *referring* to how the website operates, but only documents which actually explain how the website  
21 features operate.

22 During meet and confer efforts defense counsel suggested that Plaintiff should wait to  
23 make this request until after it takes depositions because it would then be able to more narrowly  
24 tailor the request. While this may be true, it puts Plaintiff in an unacceptable catch-22 situation.  
25 Should Plaintiff postpone requesting these relevant documents until after depositions, Plaintiff will  
26 not have the opportunity to ask clarifying questions in a deposition environment. Moreover, under  
27 the current discovery and deposition schedule, Plaintiff would not even have sufficient time to  
28 request additional production after depositions, much less have an opportunity to schedule follow

1 up depositions to inquire about any documents produced. Plaintiff is entitled to receive these  
2 documents (the request for which will have been pending ninety (90) days by the time this motion  
3 is heard) prior to taking depositions and with sufficient time to engage in follow up discovery.

4 **Request No. 23:**

5 All DOCUMENTS with reference to or written policies, procedures and guidelines related  
6 to DEFENDANT’S computers or computer systems including, without limitation, back up  
7 schedules and procedures, electronic retention and preservation schedules, and file naming  
8 conventions.

9 **Io Group’s Rely:**

10 Defendant’s computer systems provided the means by which Veoh infringed Plaintiff’s  
11 works. These computer systems were the location of the unauthorized copying, distribution and  
12 public display of Plaintiff’s works. The written policies, procedures and guidelines for these  
13 systems are directly relevant and are essential to determining, how the infringing activity occurred  
14 and the degree to which Veoh is culpable for the infringing activity. For example, Defendant  
15 claims that it is a service provider under 17 U.S.C. §512(a) which requires that copies of material  
16 be maintained on its computer system no longer than is reasonably necessary for the transmission,  
17 routing, or provision of connections. 17 U.S.C. §512(a)(4). In order to evaluate the application of  
18 this provision it is essential to review Veoh’s written procedures for retaining material on its  
19 computer systems. Defendant’s computer procedures may also have resulted in making multiple  
20 copies of Plaintiff’s works, possibly creating new acts of direct infringement with each copy.

21 These documents are relevant. Defendant has provided no explanation whatsoever as to  
22 why it would be burdensome to produce responsive documents.

23 **Request No. 24:**

24 All DOCUMENTS identifying computers, equipment and software used in conjunction  
25 with the operation of veoh.com.

26 **Io Group’s Reply:**

27 Like Request No. 23, this request asks for basic documents describing Veoh’s computer  
28 systems – the systems that were used to infringe Plaintiff’s works. In its deposition of Dr. Ted

1 Dunning, Plaintiff was able to learn the location and purpose of several different groups of  
2 computers involved in the infringement. However, Plaintiff's attempts to question Dr. Dunning  
3 about these systems and how they operate were hampered because Defendant failed to produce  
4 these documents on schedule and therefore Plaintiff did not have a basic understanding of the  
5 system in advance of the deposition. Sperlein Declaration at ¶8. Moreover, at deposition, the  
6 deposing party's search for the truth is subject to the memory, veracity and recollection ability of  
7 the deponent. By requesting the production of documents, Plaintiff is more likely to get an  
8 accurate understanding of where Defendant's servers are located and how the system operates.

9 It's worth noting that had Defendant properly produced these documents on schedule, the  
10 deposition of Dr. Dunning could have been more efficient thereby saving the time and expense of  
11 both parties.

12 **IV. CONCLUSION**

13  
14 For all of the reasons stated above and in Plaintiff's original Motion to Compel, the Court  
15 should order Defendant Veoh Networks to produce within seven (7) days all documents  
16 responsive to Plaintiff's Requests for Production Numbered 2, 4, 5, 7, 8, 9, 10, 11, 12, 14, 16, 21,  
17 22, 23 and 24, as well as, all documents Defendant previously agreed to produce.

18  
19  
20 Dated: March 26, 2007

*/s/ Gill Sperlein*

21 \_\_\_\_\_  
22 GILL SPERLEIN  
23 THE LAW OFFICE OF GILL SPERLEIN  
24 Attorney for Plaintiff Io Group, Inc.