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7
 8 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 9 **SAN JOSE DIVISION**

)	CASE NO.: C-06-03926 (HRL)
)	
10 IO GROUP, INC., a California corporation,)	PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT ON LIABILITY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
11)	
12 Plaintiff,)	
13)	
14 vs.)	
)	
15 VEOH NETWORKS, Inc., a California)	
16 Corporation,)	DATE: September 4, 2007
)	TIME: 10:00 a.m.
17 Defendant.)	COURTROOM: 2

18 TO: DEFENDANT VEOH NETWORKS, INC. AND ITS ATTORNEYS OF RECORD:
 19 PLEASE TAKE NOTICE THAT ON September 4, 2007 at 10 a.m., or as soon thereafter
 20 as the matter maybe heard in the above-entitled Court located at 280 South First Street, San Jose,
 21 California, Courtroom 2, Plaintiff Io Group, Inc. will and hereby does move this Court pursuant to
 22 Federal Rule of Civil Procedure 56 for summary judgment against Defendant Veoh Networks, Inc.
 23 on the issue of defendant's liability to Plaintiff for direct copyright infringement, vicarious
 24 copyright infringement, and/or contributory copyright infringement.
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26 This motion is brought on the grounds that, as to the forgoing, there are no genuine issues
 27 of material fact and that Plaintiff is entitled to judgment on those issues as a matter of law.
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This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Gill Sperlein and Keith Ruoff, the Depositions of Joseph Papa (“Papa Depo.”), Dr. Ted Dunning (“Dunning Depo.”), Dmitry Shapiro (“Shapiro Depo.”), Arthur Bilger (“Bilger Depo.”) and John Styn (“Styn Depo.”), Defendant’s Answer in this Action, Defendant’s interrogatory and other discovery responses, all matters of which this Court may take judicial notice, all pleadings and papers on file in this action, and upon such other evidence and argument as may be presented to the Court at the time of the hearing.

This Motion is filed pursuant to this Court’s July 30, 2007 order allowing parties to exceed otherwise applicable page limitations.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 This is an action to recover damages for Defendant’s infringement of Plaintiff’s
4 audiovisual works which Defendant, without authorization, copied, made derivative works
5 therefrom, distributed and publicly displayed and performed via an Internet Television Network
6 which Defendant owns and operates at www.veoh.com.

7
8 Defendant is as an Internet Television Network, (Shapiro Depo. 53:24-54:1) which
9 acquires audiovisual works from various sources, including anonymous individuals who submit
10 and purport to license video files to Defendant through Defendant’s website. Papa Depo. 33:25-
11 34:25. After obtaining video files, Defendant creates a new version of each file in a different
12 format known as Flash[®]. Papa Depo. 154:23-155:15. This “transcoding” into Flash[®] format makes
13 it technologically feasible for Defendant to publicly perform and display the works through its
14 website.
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16
17 Defendant indexes user-entered information in a database which it controls and maintains
18 on its servers. Dunning Depo. 22:18-21, 28:1-29:1. Users can perform searches of the database in
19 order to locate video files they wish to view. *Id.* Defendant creates and retains on its servers a copy
20 of each submitted video file in its original (non-Flash[®]) file format. Dunning Depo. 39:19-40:21.
21 This makes it possible for Defendant’s users to download and retain a copy of the video file in its
22 original format. *Id.*
23

24 Earlier cases originating in this circuit resulted in liability on the part of defendants who
25 developed software used by individuals to transfer pirated copies of music and videos from one
26 user’s computer to another’s, even where the infringing files never appeared on the defendants’
27 servers and the defendants never engaged in any acts of direct infringement. *See A&M Records,*
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1 *Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 907 (N.D.Cal 2000) *aff'd in part, rev'd in part, and*
2 *remanded*, *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)(“*Napster I*”); *MGM*
3 *Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed.2d 781 (U.S.
4 2005)(“*Grokster*”). In contrast to those cases, this matter involves direct copyright infringement.
5 Defendant’s creation of the Flash[®] version of the video files, the creation of the still frame images,
6 the copying and storing of the original file format version, and the public performance and display
7 of the Defendant-created Flash[®] version are all acts of *direct* infringement of Plaintiff’s exclusive
8 rights.
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11 Moreover, all of the infringing acts subsequent to the initial submission of the works occur
12 on servers and other computer equipment operated and controlled entirely by Defendant. Unlike
13 *Napster I* and *Grokster* where the infringing files remained on the computers of individual users,
14 here users provide the infringing copies to Defendant and Defendant makes additional infringing
15 copies in a new file format and stores, distributes, and publicly displays the infringing copies,
16 using its hardware and software. All of the infringing activity occurs in a closed environment over
17 which Defendant holds complete and total dominion.
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19 Additionally, Defendant is liable for the infringing activities of its users under the theories
20 of vicarious and contributory liability.
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22 **II. STATEMENT OF FACTS**

23 As the accompanying depositions, declarations and exhibits demonstrate, Defendant
24 directly, vicariously and contributorily infringed Plaintiff’s exclusive rights in its copyrighted
25 works. Defendant, which refers to itself as an Internet Television Network, owns and operates a
26 website at www.veoh.com. Shapiro 53:24-54:1. Defendant encourages individuals to submit
27 video files through an on-line interface. Styn Depo. 24:4-21, 27:14-18. Defendant copies and
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1 manipulates the video files and makes them available to the general public by and through
2 Defendant's website as described below.

3
4 **A. User Registration** - In order to submit and upload video files users must first
5 register with Defendant through the use of an online form and agree to Defendant's Terms of Use
6 and Acceptable Use Policies, including a provision, granting "nonexclusive, perpetual, royalty-
7 free, irrevocable and transferable" permission to Defendant make the video "freely available"
8 through the Veoh Service. Shapiro Depo. 23:6-14, 24:6-26:18, Ex 5); Papa Depo. 12:2-5, 31:14-
9 19. Users are required to select a user name (Dunning Depo. 72:2-6) and may enter an e-mail
10 address, which Defendant does not currently check for validity. Dunning Depo. 72:17-21. Users
11 wishing to view sexually explicit video files must state that they are over eighteen. Dunning Depo.
12 153:21-154:10. Users are not required to identify themselves or provide any other information.
13 Dunning Depo. 72:2-13.

14
15 **B. Defendant's Video Acquisition Process** - Defendant only processes video files
16 with a compression format ("codec") that is compatible with Defendant's system. *Id.* 12:10-17:21.
17 During the upload process, users are requested to provide a title and description for the video file.
18 Dunning Depo. 131:22-132:6. Users are also requested to "select between one to four categories
19 that best describe" the video file (*Id.* 78:9-16; Ruoff Decl. ¶24, Ex G) and to enter key words or
20 "tags" "to describe [the] video so they are easily searched and organized." Dunning Depo. 22:24-
21 23:15. Users are required to select a content rating "in order to ensure that users see only the
22 content they feel is appropriate". Ruoff Decl. ¶25, Ex G; Dunning 106:11-107:5. Defendant
23 reserves "the right to remove any inappropriately identified videos or change its content filter." *Id.*
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1 **C. Defendant's Index Database** - All of the information entered by the user goes
2 into a centralized database that Defendant maintains on its servers "to allow users to frame queries
3 in terms of metadata and then find videos." Dunning Depo. 22:18-21. A user may search the index
4 database from www.veoh.com in order to locate either specific video files the user wishes to view,
5 or a type of video file the user wishes to view. *Id.* The database also automatically indexes video
6 file entries into a series of lists. For example, when a user on www.veoh.com clicks the tab
7 marked "Most Recent" the indexing server generates a listing of the video files most recently
8 added to www.veoh.com. Papa Depo 39:10-40:9. Other lists of video files automatically generated
9 by Defendant's index at the time of the infringement included, "Top Rated" (video files which had
10 received the highest ratings from other Veoh users), "Most Popular" (video files most viewed by
11 others), "Most Discussed" (video files that received the most comments from users"), and "Top
12 Favorites" (video files the most users had marked as their favorite). Ruoff Depo. ¶26, Ex. H.

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14
15 Defendant can change information in the description field and admits that on occasion it
16 makes such changes. Papa Depo. 110:10-111:16. At the time of the infringement, Defendant also
17 reviewed video files to ensure that any file containing sexually explicit material was properly
18 rated. *Id.* 203:4-15. Defendant admits it reviewed sexually explicit video files to determine if they
19 should be tagged as "gay" or "straight" and added those tags where needed. *Id.* 240:6-245:17.

20
21 **D. Defendant's Manipulation of Video Files It Acquires** - If an acquired file is a
22 compatible video file, Defendant proceeds with processing. *Id.* 155:3-24. Defendant makes a copy
23 of the file in its original file format and moves that copy to Defendant's video servers, where it
24 resides indefinitely. Dunning Depo. 40:5-11. For example, if a user submitted a video file in
25 Microsoft Windows Media format, Defendant makes an exact copy of the .wmv file and places it
26 on Defendant's video servers. *Id.* 42:8-11. Before a user can download a copy of the video file in
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1 its original file format, the user simply has to first download Defendant's proprietary software
2 known as the Veoh Client. *Id.* 40:1-4. Users can then retain a copy of the video file in its original
3 file format on their home computer and play it whenever he or she desires. *Id.*
4

5 It is a challenge to persuade users to download and install any piece of software, such as
6 the Veoh Client (Papa Depo. 130:25-131:2), and it is technologically impractical to display and
7 perform video files in multiple formats through video streaming from www.veoh.com. Therefore,
8 Defendant sends a copy of all files to its Flash[®] conversion servers in Los Angeles (Dunning
9 Depo. 47:3-48:1.), transcodes the video file and creates a new Flash[®] version of the video file.
10 Papa Depo. 155:5-15. Defendant-created Flash[®] files are generally smaller and better compressed
11 than the original files and Flash[®] format is supported by most users' browsers. Dunning Depo.
12 61:10-13; Papa Depo. 125:7-12. By converting video files into Flash[®] video format, Defendant can
13 make the video files easily available to users through video streaming embedded within the
14 webpage of www.veoh.com. Papa Depo. 125:7-12. Defendant sets the specifications for the
15 creation of the new Flash[®] file, including the bit rate, frame size, frame rate, and the codec. Papa
16 Depo.126:1-129:18. Users who provide video files to Defendant have no control over what
17 encoding specifications Defendant applies when transcoding the files into Flash[®] format. Papa
18 Depo. 128:16-22.
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22 Prior to October 2006, Defendant would only convert an entire video file into Flash[®]
23 format if the video file was shorter than ten minutes. Papa Depo.129:19-130:12. If the video file
24 was longer than ten minutes, Defendant created a three minute Flash[®] preview file. *Id.* If a user
25 wanted to view the entire video file he or she would first have to download and install the Veoh
26 Client and then download the entire video file in its original format. *Id.* 130:19-24. Defendant
27 changed its strategy in October 2006, because it believed that by offering full-size video files in
28

1 Flash[®], with no time limitations, Defendant could better compete with YouTube and other
2 competitors who limited the length of video files. *Id.* 129:15-130:18.

3
4 For every video file Defendant acquires from a user, Defendant also extracts a number of
5 frames from the video file and creates new single frame, still image files in .jpg format. Papa
6 Depo. 155:16-24. Defendant selects the most interesting screen extraction, makes a thumbnail of it
7 and displays it with the name of the video file in search results. Dunning Depo. 133:4-14.

8 **E. Sexually Explicit Content on www.veoh.com** - At the beginning of its
9 operations, Defendant acquired and processed video files containing sexually explicit content
10 along with all other content (Dunning Depo. 104:22-105:4) and monitored to ensure users had set
11 the correct content rating, (*i.e.* adult material was marked as adult). Papa Depo. 203:4-15.
12 Defendant admits that it was aware of federal labeling law 18 U.S.C. §2257. *Id.* 192:12-196:3;
13 Styn Depo. 43:1-48:13; Shapiro Depo. 64:2-21; Dunning Depo. 154:24-156:13. Nonetheless,
14 Defendant did not ensure or confirm that sexually explicit video files it acquired were labeled with
15 the name and address of the producer and the location of records confirming the age of the persons
16 appearing in the sexually explicit video files as required at 18 U.S.C. §2257(f). Papa Depo.197:19-
17 23.

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19
20 In June of 2006, Defendant changed its policy so that sexually explicit video files would
21 no longer be permitted and on June 23, 2006, blocked access to all sexually explicit video files
22 appearing at www.veoh.com (Dunning Depo. 105:5-17) and deleted all such files from the home
23 computers of users. *Id.*; Shapiro Depo. 70:25-73:3.

24
25 Defendant's viewing audience was interested in viewing sexually explicit material on
26 veoh.com. Shapiro Depo. 63:16-64:1. In fact the site became "overrun" with adult material.
27 Shapiro 64:2-13. Traffic to www.veoh.com decreased when Defendant changed its adult content
28

1 policy (Shapiro Depo. 71:5-8) which was instituted because Defendant feared the large amount of
2 sexually explicit content would deter potential investors or advertisers and would make it difficult
3 to form relationships with mainstream content producers. Bilger Depo.33:9-35:2. Shapiro Depo.
4 64:2-66:24.

6 **F. Plaintiff's Works on www.veoh.com** - In June of 2006, Plaintiff discovered that
7 Defendant was displaying and distributing portions of seven (7) of its works by and through
8 www.veoh.com. Ruoff Decl. ¶5, 13 and 14. Counters on the Defendant's website indicated that
9 all of Plaintiff's works had been viewed numerous times and that one work had been viewed
10 nearly 10,000 times. *Id.* at ¶17, Ex. D. Upon review of those video files produced by Defendant in
11 discovery, Plaintiff catalogued three (3) additional Plaintiff owned works that had been improperly
12 exploited by and through www.veoh.com. *Id.* at ¶15.

14 **G. Defendant's Control of Content on Its Internet Television Network -**
15 Defendant operates as an Internet Television Network (Shapiro 53:24-54:1) and acquires content
16 from a number of sources. For example, Defendant has offered through its Internet Television
17 Network located at www.veoh.com content acquired from Turner Broadcasting, CBS, *Us*
18 *Magazine*, *Road and Track Magazine*, *Car and Driver Magazine*, and United Talent Agency. *Id.*
19 34:25-35:20. Defendant obtains content from these providers because both the content and the
20 association with well-branded companies draw users to the website increasing its value. *Id.* 43:12-
21 24. In some cases, Veoh employees actually perform the task of uploading the video files and
22 entering the titles, descriptions and tags. *Id.* 36:19-39:7. Papa Depo. 29:19-30:2. Defendant's
23 marketing department produces videos promoting Veoh, which Defendant also uploads to the
24 website. Papa Depo.28:12-29:1. As discussed *supra*. Defendant also acquires content from
25 anonymous users who submit video files by through Defendant's website interface located at
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1 www.veoh.com. Defendant's paid consultant encouraged people to upload video files to
2 www.veoh.com in this manner and suggested programs that would-be-producers might create.
3
4 Styn Depo. 31:16-33:24.

5 Defendant has complete control and discretion to refuse or remove submitted video files
6 for any reason. Shapiro Depo. 27:16-28:13 and Ex 5. Defendant's Acceptable Use Policy in effect
7 at the time of the alleged infringement prohibited files containing defamatory material, unsolicited
8 advertising, charity requests, vulgar, hateful, racially or ethnically offensive material or material
9 "otherwise inappropriate, regardless of whether [the] material or its dissemination is unlawful".
10 Ruoff Depo. ¶9, Ex. C. Defendant reserved the right to reject or remove such material and actively
11 exercised that right. Shapiro Depo. 58:24-59:11; Papa Depo. 94:21-95:9.

13 Defendant reviews its system to determine if video files fall within Defendant's Terms of
14 Service. Papa Depo.36:7-17; 48:3-19. If Defendant finds video files that violate its terms of
15 service, Defendant takes measures to remove such files from its system. *Id.* 52:5-53:4. When
16 Defendant permitted sexually explicit video files on its system, Defendant reviewed files to ensure
17 that all sexually explicit files were marked as adult and changed the setting if necessary (*Id.* 53:5-
18 18) and also marked adult videos as "gay" or "straight". *Id.* 240:6-245:17. Defendant can even
19 remove video files from a user's home computer if the user used the Veoh Client to download the
20 file. Dunning Depo. 98:4-10; Papa Depo. 95:21-25.

23 Moreover, Defendant has the ability to filter and prevent content from appearing on
24 prominent portions of the website like the front page or featured videos. Dunning Depo. 136:9-
25 137:8. Shapiro Depo 75:3-10, 88:24-89:16. Papa Depo.113:9-24. This filtering can be applied to a
26 class of videos or an individual video. Dunning Depo. 136:9-137:8. Papa Depo.121:1-122:16 and
27 Ex. 3.
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1 Defendant also selects videos that its employees find interesting as “Featured Videos”.
2 Dunning Depo. 194:17-21; Papa Depo.173:14-174:6. Defendant gives “Featured Videos” special
3 treatment in visual design and sometimes they automatically play on the home page as soon as a
4 user navigates to www.veoh.com. Papa Depo.172:18-173:7. Dunning Depo. 197:13-198:2.
5 Defendant collects data about users’ viewing habits and when a user comes to the website, the
6 system immediately begins to play a video file the user might be interested in based on his past
7 viewing habits. Dunning Depo. 198:7-13.
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9 All of these factors evidence Defendant’s intense interest in the content on
10 www.veoh.com, as well as Defendant’s definitive ability to affect and control that content and
11 how the content appears.
12

13 **III. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT**

14 A party seeking summary judgment has the initial burden of "informing the district court
15 of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to
16 interrogatories, and admissions, on file together with the affidavits, if any,' which it believes
17 demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S.
18 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has met its burden
19 under Rule 56, "its opponent must do more than simply show that there is some metaphysical
20 doubt as to the material facts [in question]." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio
21 Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "The mere existence of a
22 scintilla of evidence in support of the [opposing party's] position will be insufficient[.]" Anderson
23 v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "No longer
24 can it be argued that any disagreement about a material issue of fact precludes the use of summary
25 judgment." Cal. Arch. Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th
26 Cir. 1987). As argued *infra*. there are no genuine issues of material fact in dispute with regard to
27 liability in this matter and thus Plaintiff is entitled to summary judgment on issue of liability.
28

1 **IV. PLAINTIFF OWNS AND HAS REGISTERED THE COPYRIGHTS TO THE**
2 **INFRINGEMENTS**

3 “As a threshold question, a plaintiff who claims copyright infringement must show: (1)
4 ownership of a valid copyright; and (2) that the defendant violated the copyright owner's exclusive
5 rights under the Copyright Act. 17 U.S.C. § 501(a) (2003)(Cited in *Ellison v. Robertson*, 357 F.3d
6 1072, 1076 (9th Cir. 2004)). *See also, Feist Pub'ns, Inc. v Rural Tel. Serv. Co.*, 499 US 340,361
7 (U.S. 1991). Plaintiff has testified that it holds the copyrights in the works and has also produced
8 copies of the relevant certificates of registration. Ruoff Decl. ¶2, Ex. A. “In any judicial
9 proceedings the certificate of a registration [...] shall constitute *prima facie* evidence of the
10 validity of the copyright and of the facts stated in the certificate.” 17 U.S.C. §410(c). *Transgo, Inc.*
11 *v. Ajac Transmission Parts Corp.*, 786 F.2d 1001, 1019 (9th Cir. 1985); *Perfect 10, Inc. v.*
12 *Cybernet Ventures , Inc.*, 213 F. Supp. 2d 1146, 1166 (C. Cal. 2002). *See also, Los Angeles News*
13 *Serv. v. Reuters TV Int'l*, 942 F. Supp. 1275, 1283 (CD Cal. 1996)(Citing *Nimmer on Copyright* §
14 12.11[3] at 12-163, 171-74 (1995). Defendant has offered no evidence challenging Plaintiff's
15 ownership of the works or rebutting the presumption created by the registrations.
16
17

18 **V. DEFENDANT IS LIABLE FOR DIRECT COPYRIGHT INFRINGEMENT OF**
19 **PLAINTIFF'S WORKS**

20 “Infringement occurs when a defendant violates one of the exclusive rights of the
21 copyright holder. 17 U.S.C. § 501(a).” *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*,
22 907 F. Supp. 1361, 1367 (N. Cal. 1995)(“*Netcom*”). These rights include the right to reproduce the
23 copyrighted work, the right to prepare derivative works, the right to distribute copies to the public,
24 and the rights to publicly perform and publicly display the work. 17 U.S.C. §§ 106(1)-(5). Often
25 these rights are referred to collectively as the right to copy. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d
26 1081, 1085 n.3 (9th Cir. 1989).
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1 In *MAI Sys. Corp. v. Peak Computer*, plaintiff produced computer software designed to
2 diagnose and repair computers. *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511 (9th Cir.
3 1993)(“*MAI*”). Defendant, who loaded the software into its computer’s random access memory
4 (RAM), argued that there was no infringement because the copy created in the RAM was not
5 “fixed.” The Ninth Circuit disagreed, stating that, a "copying" for purposes of copyright law
6 occurs when a computer program is transferred from a permanent storage device to a computer's
7 RAM”. *Id.* at 518. Similarly, in the matter before the Court the copies of Plaintiff’s works are
8 sufficiently “fixed” on Defendant’s servers and are capable of being “perceived, reproduced and
9 otherwise communicated”.

10 Subsequent to *MAI*, a court in this district defined a limited set of conditions in which
11 digital files may not be sufficiently “fixed” for a finding a direct infringement, even though a copy
12 of a file appeared on a defendant’s computer. In *Netcom*, the court looked at the issue of “whether
13 the operator of a computer bulletin board service (‘BBS’), and the large internet access provider
14 that allow[ed] that BBS to reach the Internet, should be liable for copyright infringement
15 committed by a subscriber of the BBS”. *Netcom*, 907 F. Supp at 1365. A subscriber to a BBS
16 posted infringing copies of written works directly to the servers of the BBS (through a direct
17 connection via a phone line). The BBS used Netcom as its provider for access to the internet. In
18 finding that the access provider had not directly infringed plaintiff’s works, the court noted that
19 Netcom automatically forwarded messages from subscribers onto the Usenet and only *temporarily*
20 (11 days) stores copies on its system. *Id.* at 1367. The court noted that “Netcom’s actions, to the
21 extent that they created a copy of plaintiff’s works, are necessary to having a working system for
22 transmitting Usenet postings to and from the Internet. The Court was concerned that finding
23 liability in those circumstances would result in “liability for every single Usenet server in the
24 worldwide link of computers transmitting [the posting individual’s] message to every other
25 computer.” *Id.* at 1370. Thus the court ruled that under those circumstances, the defendant must
26 engage in some further volitional or causal elements in order for the copying to the hard drive to
27 be considered a direct infringement. *Id.* at 1382.

28

1 Here, Defendant is not merely holding a file on its servers long enough to pass it on to
2 other users. The files are maintained indefinitely so that Defendant may make them available as
3 part of the programming for its Internet Television Network in order to earn advertising revenue.

4 In *CoStar Group, Inc. v. LoopNet, Inc.*, the Fourth Circuit Court of Appeals further
5 explained the principles set forth in *Netcom*, writing, “When an electronic infrastructure is
6 designed and managed as a conduit of information and data that connects users over the Internet,
7 the owner and manager of the conduit hardly “copies” the information and data in the sense that it
8 fixes a copy in its system of more than transitory duration. Even if the information and data are
9 “downloaded” onto the owner’s RAM or other component as part of the transmission function, that
10 downloading is a temporary, automatic response to the user’s request, and *the entire system*
11 *functions solely to transmit the user’s data to the Internet*. Under such an arrangement, *the ISP*
12 *provides a system that automatically transmits users’ material but is itself totally indifferent to the*
13 *material’s content.”* *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-501 (4th Cir.
14 2004)(“CoStar”). (Emphasis added). The Fourth Circuit’s opinion in *CoStar* does not discuss how
15 long the photographic images remained on the defendant’s servers, but the opinion of the court as
16 reflected above clearly indicates a reliance on the principle that permanent copies are to be
17 considered “fixed” and thereby constitute direct infringement. Any other interpretation would be
18 entirely at odds with the definition of ‘fixed’ set forth at 17 U.S.C. §101 and would represent a
19 departure from of Judge Whyte’s holding in *Netcom*.

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22
23 In *Playboy v. Webworld*, defendants operated www.netpics.com, a website through which
24 subscribers could view adult images. *Playboy Enters. v. Webworld Inc.*, 991 F. Supp. 543 (D.
25 Tex. 1997)(“*Webworld*”). To obtain the images, defendants developed software that
26 *automatically* scanned adult oriented Internet newsgroups, located digital images and copied them
27 to its servers. The software *automatically* created thumbnails of the images (re-sized versions of
28

1 the original versions) which subscribers could review by and through www.netpics.com. *The*
2 *entire process was automated*. By clicking on the thumbnails, subscribers could view the full
3 sized images residing on defendant's servers or download those images to their home computers.
4 Relying in part on *MAI*, and differentiating the facts from *Netcom*, the Court found that these
5 actions constituted a direct infringement of plaintiff's works. *Id. at 551*. Webbworld "reproduced"
6 the works by creating the thumbnails and by copying the full sized images to its hard drives and
7 Webbworld "distributed" the works by allowing its subscribers to download the photographs to
8 their home computers. *Id. See also, Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003)(direct
9 infringement where search engine stored and displayed results in the form of thumbnail images,
10 but defendant's actions were fair use for reasons which do not apply here).
11

12
13 The defendant in *Playboy v. Hardenburgh* encouraged users to upload adult photographs
14 which it in turn made accessible to the subscribers of its BBS. *Playboy Enters v. Russ*
15 *Hardenburgh, Inc.* 982 F. Supp. 503(E.D. OH 1997) ("*Hardenburgh*"). The court found direct
16 infringement where defendant's policy of encouraging subscribers to upload files, including adult
17 photographs" and "[d]efendants' policy of using a screening procedure in which [defendant]
18 viewed all files in the upload file and moved them into the generally available files for subscribers.
19 *Id. at 513* (emphasis in the original). Similarly, Defendant in this matter encourages users to
20 upload files. Then Defendant reviews those files and moves them to locations where they are
21 generally available. The *Hardenburgh* Court squared its ruling with *Netcom*, finding that the
22 defendant in *Hardenburgh* had engaged in the necessary additional volitional acts to find direct
23 infringement.
24

25
26 Defendants in the matter before the Court go even further than the defendant in
27 *Hardenburgh*. First, Defendant reviews or screens files by only accepting files which users agree
28

1 to license to Defendant to be exploited on to its system. Shapiro Depo. 23:6-14; Papa Depo. 12:2-
2 5, 31:14-19. Then Defendant reviews files to ensure they are video files capable of being shown
3 on its system. Papa Depo. 12:10-17:21. The files Defendant accepts are then processed in the
4 manner described *supra* including the creation of a new version in Flash[®] video format. (See §II-D
5 *supra*). Defendant moves all of the Flash[®] video files it creates onto Defendant's Preview Servers
6 (where they are available to the public), and then Defendant manually reviews them, corrects
7 indexing errors, adds information if needed and cancels videos files if they violate Defendant's
8 Terms of Use or Acceptable Use Policy. Papa Depo. 36:7-17; 48:3-19, 52:5-53:4. The fact that
9 Defendant moves files onto the publicly viewable portion of its system before completing its
10 review and removing offending files, should not be considered any different from completing the
11 review before moving files into the publicly viewable area, as was the case in *Hardenburgh*. These
12 facts, "transform [Defendant] from passive providers of a space in which infringing activities
13 happen to occur to active participants in the process of copyright infringement. *Hardenburgh*, 982
14 F. Supp at 513. "It is inconsistent to argue that one may actively encourage and control the
15 uploading and dissemination of adult files, but cannot be held liable for copyright violations
16 because it is too difficult to determine which files infringe upon some else's copyrights. *Id.*

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19
20 The role Defendant plays and the actions it takes more closely resemble the defendants in
21 *Webbworld*, *Kelly* and *Hardenburgh* than defendants in *Netcom* and *CoStar*. Defendant is not a
22 conduit storing files temporarily with no interest in the content, and even if it is, Defendant's other
23 volitional acts dictate a finding of direct infringement. Defendant becomes intimately involved in
24 the content by purporting to license its use from the submitting user. Shapiro Depo. 23:6-14, 24:6-
25 26:18. Defendant not only stores video files submitted by users, but it also creates new files in
26 several different formats (Flash[®], .jpg) so that Defendant can further exploit the video files. Papa
27
28

1 Depo. 154:23-155:24. Defendant maintains on its servers a large and complete index database
2 which helps users locate the video files they wish to view. Dunning Depo.22:18-21. The index
3 database even makes recommendations as discussed above. (See §II-C, *supra*.)
4

5 To the extent Defendant has designed its system so that the infringing acts occur
6 automatically, *Webbworld* and *Arriba* make it clear that such built-in automation does not absolve
7 otherwise infringing activity. Referring to defendant’s automated system in *Playboy*, the court
8 wrote, “having developed and launched the ScanNews software for commercial use, [defendant]
9 cannot now evade liability by claiming helplessness in the face of its ‘automatic’ operation.”
10 *Webbworld*, 991 F. Supp. at 553. Any other approach would simply encourage would-be
11 infringers to develop automated systems specifically in order to avoid liability for any
12 infringement, regardless of any factors that would otherwise give rise to such liability.
13

14 Specifically, Defendant directly infringed on Plaintiff’s exclusive rights under 17 U.S.C.
15 §106 in the following ways.
16

17 **A. Defendant Has Infringed on Plaintiff’s Exclusive Right to Reproduce the Works**
18 **in Copies (17 U.S.C. §106(1))**

19 “The Copyright Act defines ‘copies’ as ‘material objects, other than phonorecords, in
20 which a work is fixed by any method now known or later developed, and from which the work can
21 be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine
22 or device’. 17 U.S.C. § 101. “A work is ‘fixed’ in a tangible medium of expression when its
23 embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently
24 permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a
25 period of more than transitory duration.” *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 517-
26 518 (9th Cir. 1993)(*Citing* 17 U.S.C. §106).

27 Defendant invites individuals to anonymously submit and license video files to Defendant
28 and then copies the video file in its original format to its server and makes the copy available for

1 users to download using the Veoh Client. Dunning Depo. 40:5-11. Defendant also sends an
2 additional copy of the file to Defendant's Flash[®] conversion servers (Dunning Depo. 47:3-48:1)
3 where it creates new copies of the works in Flash[®] format. Papa Depo. 125:7-12. These actions
4 clearly constitute a reproduction of Plaintiff's works and a direct infringement of Plaintiff's
5 copyrights.
6

7 **B. Defendant Has Infringed on Plaintiff's Exclusive Right to Prepare Derivative**
8 **Works Based Upon the Works. (17 U.S.C. §106(2))**

9 Section 101 of the Copyright Act defines a derivative work as "a work based upon one or
10 more preexisting works, such as a translation, musical arrangement, dramatization,
11 fictionalization, motion picture version, sound recording, art reproduction, *abridgment*,
12 *condensation*, or any other form in which a work may be recast, transformed, or adapted." 17
13 U.S.C. §101 (emphasis added). Copying the substance of a design in a different medium is
14 prohibited under the copyright act. *Walco Products, Inc. v. Kittay & Blitz, Inc.*, 354 F. Supp. 121
15 (D.N.Y. 1972).
16

17 Once Defendant acquires a video file, Defendant creates a series of still images taken from
18 individual frames of the video file. Papa Depo. 155:16-24. Using proprietary software, Defendant
19 selects and extracts individual frames, uses those extracted frames to create .jpg image files (*Id.*
20 159:24-160:6), and stores the newly created .jpg files its servers. *Id.* 161:8-13. (See §II-D, *supra.*)
21

22 Once a user has navigated to the video details page for any given video file, he may click
23 on a tab labeled "screen captures" and view the corresponding .jpg files defendant created. Papa
24 Depo. 160:17-161:7. The use of these derivative works in the form of still .jpg images is entirely
25 consumptive as they serve no purpose other than the viewing pleasure of the user.
26
27
28

1 In *Perfect 10 v. Amazon* defendant Google's¹ software automatically crawled the internet
2 and located images which it copied in a reduced size. Google stored these reduced-sized images,
3 commonly referred to as thumbnails² in a database which it maintained on its servers. Google then
4 displayed these images in response to searches performed using its browser interface. The Ninth
5 Circuit found these acts to be direct infringement noting that, "[b]ecause Google initiates and
6 controls the storage and communication of these thumbnails images, we do not address whether an
7 entity that merely passively owns and manages an Internet bulletin board or similar system
8 violates a copyright owner's display and distribution rights when the users of the bulletin board or
9 similar system posts infringing works, contrasting the facts in *Amazon (Google)* to those in
10 *CoStar. Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 n.6 (9th Cir. 2007).

11 Defendant's actions are similar to Google's in this regard. However, unlike Google who
12 simply reduced the size of *existing* .jpg files, Defendant created new works transforming the
13 content from video files into still images in a new file format. Defendant's users neither request
14 that Defendant create the still frame .jpg files, nor are they informed that Defendant will do so.
15 Defendant, on its own volition, determines which frames from the original video file it will use,
16 how many still-frame .jpps it will create, what the size and resolution of the images will be and
17 how Defendant will use or display the new files it creates, if at all.

18 **C. Defendant Has Infringed on Plaintiff's Exclusive Right to Distribute Copies of**
19 **the Works to the Public (17 U.S.C. §106(3))**

20 Distributing unlawful copies of a copyrighted work violates the copyright owner's
21 distribution right and, as a result, constitutes copyright infringement. *Hotaling v. Church of Jesus*
22 *Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997). Placing unauthorized copies of
23

24
25 ¹ The district court consolidated Perfect 10's actions against Google and Amazon. *Perfect 10 v.*
26 *Google, Inc.*, 416 F. Supp. 2d 828 (C. Cal. 2006).

27 ² A thumbnail is created by simply resizing an existing image file, as *Google* did. In this matter
28 the new files Defendant creates should not be considered thumbnails; they are actually new works
in a new format.

1 work in a publicly accessible portion of a website constitutes a violation of a copyright holder's
2 exclusive right to distribute. *Hardenburgh* 982 F. Supp. at 513.

3 As explained above, Defendant maintains on its servers a copy of each work in the original
4 format in order to distribute copies to users who elect to download, store and play the video files
5 on their own computers rather than watching the Defendant-created Flash[®] version of the video
6 file by and through the www.veoh.com website. *Id.* 39:19-40:4. By copying and moving the
7 original file format version of Plaintiff's works to a publicly assessable portion of its website and
8 by helping users locate the infringing files by maintaining its index, Defendant has infringed
9 Plaintiff's exclusive right to distribute its works.
10
11

12 **D. Defendant Has Infringed on Plaintiff's Exclusive Right to Perform and Display**
13 **the Works Publicly (17 U.S.C. §106(4) and (5)).**

14 "The comment to 17 U.S.C. § 106 states that a display is public if 'it takes place 'at a place
15 open to the public or at any place where a substantial number of persons outside of a normal circle
16 of a family and its social acquaintances are gathered.'" *Hardenburgh* 982 F. Supp. at 513 (citing
17 H.R.Rep.No. 1476, 94th Cong., 2d Sess. 64 (Sept. 3., 1976), reprinted in U.S. Code Cong. &
18 Admin. News 5659, 5677).

19 Defendant transcoded Plaintiff's video files into Flash[®] video format, and stored the newly
20 created video files on Defendant's servers along with newly created still images in .jpg format as
21 discussed *supra*. Any member of the public could than view the infringing Flash[®] and .jpg files on
22 www.veoh.com, thus Defendant infringed Plaintiff's exclusive right to perform and display the
23 works publicly.
24

25 All of Defendant's actions as described above represent acts of direct copyright
26 infringement.
27
28

1 **VI. DEFENDANT IS VICARIOUSLY LIABLE FOR INFRINGEMENT OF**
2 **PLAINTIFF’S WORKS**

3 Even if some of the infringing acts could be deemed to have been performed entirely by
4 Defendant’s users rather than by Defendant itself, Defendant is still liable for the infringing acts
5 under secondary infringement doctrines of vicarious infringement and contributory infringement.
6 These doctrines have some similarities but have a different genesis and are comprised of different
7 elements. *See e.g. Demetriades v. Kaufman*, 690 F. Supp. 289, 292 n.5 (S.D.N.Y. 1988). A
8 defendant is vicariously liable if it “has the right and ability to supervise the infringing activity and
9 also has a direct financial interest in such activities.” *Napster I*, 329 F.3d at 1022, (quoting
10 *Fonovisa*, 76 F.3d at 262). “When the right and ability to supervise coalesce with an obvious and
11 direct financial interest in the exploitation of copyrighted materials – even in the absence of active
12 knowledge that the copyright monopoly is being impaired – the purpose of the copyright law may
13 be best effectuated by the imposition of liability upon the beneficiary of the exploitation.”
14 *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

17 “The Supreme Court has recently offered (in dictum) an alternate formulation of the test
18 ‘One...infringes vicariously by profiting from direct infringement while declining to exercise a
19 right to stop or limit it’” *Perfect 10, Inc. v. Visa Int’l Service Asso., et al.*, No. 05-15170, 2007
20 U.S. App. LEXIS 15824, 15831 (9th Cir., July 3, 2007)(citing *Grokster*, 545 U.S. at 930).
21 Defendant is clearly the beneficiary of the unauthorized exploitation of Plaintiff’s works and
22 clearly had the right and ability to supervise the infringing activity, thus it is Defendant’s legal
23 duty to police its system and take whatever measures it can to stop or reduce infringement from
24 occurring thereon.
25
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1 **A. Defendant Receives a Direct Financial Benefit from the Infringing Acts of Its**
2 **Users.**

3 Courts have uniformly held that the “financial benefit” element of vicarious infringement
4 is met when the infringing activity serves to draw customers. *Napster I*, 239 F.3d at 1023, quoting
5 *Fonovisa*, 76 F.3d at 263-64 (infringing activities “enhance the attractiveness of the venue to
6 potential customers.”); *In Re: Aimster Copyright Litigation*, 252 F. Supp. 2d 634,655 (N.D.Ill.
7 2002)(accord); *PolyGram Int’l Publishing, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1333 (D.
8 Mass. 1994)(trade show participants “derived a significant financial benefit from the attention”
9 attendees paid to the infringing music being played). “There is no requirement that the draw be
10 ‘substantial’”. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).

11
12 Defendant’s business model relies on people visiting Defendant’s website to view
13 advertising. Shapiro Depo. 59:18-62:23. Users come to the website for one main reason: to view
14 video files. Defendant has admitted that the more content available on the website, the higher the
15 draw for potential users. Shapiro 61:15-62:23; Styn Depo. 30:11-24.

16
17 At the time of the infringements, free sexually explicit video files were particularly alluring
18 to many users visiting Defendant’s website (Shapiro Depo. 63:16-64:1; Bilger Depo. 35:3-36:12)
19 and Veoh users were particularly interested in gay adult content. Papa Depo. 238:24-239:20,
20 Ex16. In fact, in June of 2006, the same month that Plaintiff discovered the infringing copies of its
21 works on www.veoh.com and filed this action, the amount of interest in sexually explicit material
22 was so high that Defendant, concerned it would affect its ability to attract advertisers and
23 investors, blocked public access to all sexually explicit material on its site. Bilger Depo. 33:9-
24 35:2; Shapiro Depo. 64:2-66:24.

25
26 Plaintiff’s works were among the sexually explicit video files drawing users to
27 www.veoh.com. In fact, information available from the website indicated that users viewed one of
28

1 Plaintiff's works nearly ten thousand (10,000) times. Ruoff Decl. ¶17, Ex. D. The counter on each
2 video details page indicated that each of Plaintiff's works was viewed on Defendant's website
3 numerous times. *Id.*

4
5 Upon Defendant's removal of all sexually explicit video files (including Plaintiff's works),
6 traffic to www.veoh.com dropped (Shapiro Depo. 71:5-8) and Defendant received complaints
7 from its users. Papa Depo. 201:10-202:17 and Ex.11. This further evidences the draw created by
8 access to free sexually explicit material including Plaintiff's works.

9
10 **B. Defendant Had the Right and Ability to Control the Infringing Activity of Its
Users.**

11 Defendant had the right and ability to control the activity of its users. In *Napster I*, the
12 Ninth Circuit reaffirmed earlier decisions, ruling that "[t]he ability to block infringers' access to a
13 particular environment for any reason whatsoever, is evidence of the right and ability to
14 supervise." *Napster I*, 239 F.3d at 1023; See *Fonovisa*, 76 F.3d at 262 (defendant "had the right
15 and ability to terminate vendors for any reason" and "controlled the access of customers to the
16 swap meet area."); *Shapiro, Bernstein*, 316 F.2d at 306-08 (element satisfied where defendant
17 department store had "unreviewable discretion" to terminate employees of its concessionaires);
18 *Aimster*, 252 F. Supp. at 642 (Terms of Service gave Defendant's right to terminate users).
19 Because "the reserved right to police *must be exercised to its fullest extent*" *Napster I*, 239 F.3d at
20 1023, (emphasis added), a party "may be vicariously liable when it fails to affirmatively use its
21 ability to patrol its system and preclude access to potentially infringing files listed in its search
22 index." *Id.* at 1027.

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25
26 Where a defendant is "in a position to police infringing conduct," its "failure to police the
27 conduct" gives rise to vicarious liability. *Gershwin*, 443 F.2d at 1162-63. Just because Defendant
28 chooses not to fully exercise its duty to supervise the activities of the individuals who supply the

1 content from which Defendant profits, does not mean it does not indeed have the right and ability
2 to do so. There are numerous indications that Defendant held the right and ability to control the
3 infringing actions.
4

5 **i. The Infringing Activity Occurred on Defendant's Servers and Within**
6 **Premises Controlled by Defendant.**

7 Defendant is in a unique position in that the infringing activity occurred within a closed
8 environment over which Defendant exercises complete dominion. The infringing Flash[®] version of
9 each of Plaintiff's works was created on Defendant's servers with Defendant controlled software.
10 Papa Depo. 155:5-15. The new versions were stored on Defendant's servers and were located
11 using an index that also resided wholly on Defendant's servers. *Id.* 124:21-129:18.
12

13 This goes far beyond what previous courts have found to be indicative of control. In
14 *Napster I* the Court found sufficient control for a finding of vicarious infringement when only the
15 index listing the infringing files resided on defendant's servers and was therefore in defendant's
16 control. *Napster I*, 239 F.3d at 1024. The infringing files themselves were located on the home
17 computers of the users and were never transferred to Napster's servers. *Id.*
18

19 Moreover, Defendant even has control over copies of the files that have been transferred to
20 the home computers of its users. When Defendant decides that it no longer wishes any given video
21 file to be available through its system it can search the home computer of every user who has
22 downloaded the Veoh Client (if the computer is still connected to the Internet) and can physically
23 remove any of the video files the user downloaded from Defendant. Dunning Depo. 98:4-10; Papa
24 Depo. 95:21-25. Defendant needs no reason or excuse to delete files from its system; it can do so
25 unilaterally for whatever reason it sees fit. Shapiro Depo. 27:16-28:13 and Ex. 5. This is clearly
26 indicative of Defendant's far reaching control over the content residing on its system.
27
28

1 **ii. Defendant Purported to License All Works Appearing on Its System,**
2 **Including Plaintiff’s Works.**

3 The Terms of Use, which submitters had to agree to (Papa Depo. 12:2-5, 31:14-19)
4 included the following licensing provision:

5 “You expressly acknowledge and agree that any User Material that
6 You make available on the Veoh Service may be made freely
7 available by Veoh through the Veoh Service, including without
8 limitation for download by others, and that this permission is made
9 and granted in consideration of Your use of the Veoh Service and
 is nonexclusive, perpetual, royalty-free, irrevocable and
 transferable.” Ruoff Decl. ¶9, Ex. B.

10 It is worth noting that the license grants *Veoh* the right to make the work available through
11 the Veoh System, thereby acknowledging that Defendant must take further action to achieve the
12 final goal of making the video files available to other Veoh users. Defendant sought and obtained
13 this purported license for a reason; without a valid license, Defendant could not exploit the works
14 without infringing upon the exclusive rights of the copyright holder. 17 U.S.C. §106. Moreover,
15 the license Defendant obtained was both *perpetual* and *irrevocable*, meaning that Defendant had
16 so much control over the work that it could continue to exploit the works even if the submitting
17 user requested that they stop.
18
19

20 However, the users from whom Defendant acquired Plaintiff’s works had no authority to
21 grant a license to Defendant, and Defendant had no reason to believe the anonymous licensor was
22 so authorized. It defies logic to argue that Defendant does not have the right and ability to control
23 the infringing activity, when Defendant bargained for the right to engage in the activities exclusive
24 to the copyright holder and it is hard to imagine an element more indicative of control than a
25 license to exploit a work. Before obtaining and exploiting such a license it is (and always has
26 been) incumbent upon the licensee to investigate whether or not the licensor controls the rights he
27 is purporting to license. *Netcom*, 907 F. Supp. at 1370 (“[C]opyright is a strict liability statute”).
28

1 Defendant could have exercised its right to police the environment it controlled by
2 refraining from licensing works from an individual without obtaining more information from the
3 licensing individual such as the licensor's name and address, the name and address of the producer
4 or copyright holder of the work and/or information as to how the licensing individual obtained
5 authority to grant a license to the work. Or Defendant could have simply followed federal laws
6 *requiring* sexually explicit material to be labeled with the producer's business address. 18 U.S.C.
7 § 2257(f)(4). Rather, Defendant turned a blind eye. The only attempt Defendant made to ensure
8 the submitting individual was authorized to license the work was to force the user to click a box
9 saying he read and agreed to a long list of terms in Defendant's Terms of Use which included a
10 term that required the user to have the right to offer the work to Veoh. Defendant's failure to take
11 further measures to limit infringement (when it had the right and ability to do so) produced a
12 predictable result.
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16 **iii. Defendant Reserves and Exercises Absolute Editorial Control over the
Video Files Appearing on Its System**

17 Defendant takes a keen interest in the material that appears on its site and reserves the right
18 to monitor and remove any material which it, in its sole discretion, it deems as inappropriate.
19 Shapiro Depo. 27:16-28:13 and Ex 5. Defendant describes itself as an Internet Television Network
20 (*Id.* 53:24-54:1), and just like a traditional television station, Defendant has an interest in the
21 content it makes available to its viewing audience as described in detail above. (See § II-G *supra.*)
22 More and better content leads to a higher viewing audience, thereby increasing advertising
23 revenue potential. *Id.* 61:15-62:23. Therefore, Defendant actively seeks relationships with content
24 producers such as Turner Broadcasting, CBS, and others. *Id.* 43:12-24.
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27 The most obvious example of editorial control exercised by Defendant is in its current
28 policy prohibiting sexually explicit material on its System. Allowing a certain type of content one

1 day and prohibiting it the next, and effectively removing that content from the system
2 instantaneously, certainly is indicative of a high level of control.

3 Defendant reserves for itself editorial decision making with regard to how prominently it
4 will display a video file on the www.veoh.com website. For example, if a user complained about a
5 religiously offensive video file, Defendant could allow the video to remain on the system, but
6 could blocked it from being viewed on prominent pages. Dunning Depo. 136:9-137:8; Papa Depo.
7 113:9-24. On the other hand, Defendant showcases video files it deems to be of higher quality by
8 selecting them for the “Featured Video” section. Dunning Depo. 194:17-21.

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11 **iv. Defendant Reviews Files on Its System for Terms of Use Violations
Including Copyright Violations.**

12 Defendant acknowledges that early plans called for an “eyes on” review of every video
13 file it acquired from users through the internet based user interface, in order to cull out videos that
14 violated Defendant’s Terms of Use including its copyright policies. Shapiro Depo. 57:20-58:2.
15 Styn Depo. 56:14-63:2. In spite of numerous statements to the press, to investors and on
16 Defendant’s website that Defendant had such a policy, Defendant now claims that the procedure
17 was never in effect. Defendant contends that one of reasons this policy was not implemented was
18 “scalability” i.e., it became impractical when Defendant started reviewing large numbers of
19 material. Shapiro Depo. 84:13-85:11. Nonetheless, Defendant admits that during the time of the
20 infringements, it reviewed video files on its system *after* they were processed and made available
21 to the public. The review included checking for the proper content rating as discussed above (Papa
22 Depo. 203:4-15), checking for violent videos (*Id.* 94:21-25), child pornography (*Id.* 96:1-6),
23 bestiality (*Id.*) and other Terms of Use violations, including copyright infringement (*Id.* 96:10-15).
24 Defendant removed at least some video files because employees thought the content might be
25 infringing. Papa Depo. 96:10-97:21.
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v. Defendant Created and Maintained the Index Used to Organize and Locate Video Files on Its System Including the Infringing Copies of Plaintiff’s Works.

Defendant controls the infringing activity by creating and maintaining an index of all of the files on its system, including infringing files. Individuals submitting a video file initially enter information about the video file, but Defendant reviews those entries and makes adjustments when necessary. Papa Depo. 110:10-111:16. For example, Defendant reviewed and changed the content rating for files (Papa Depo. 203:4-15), added “tags” so that searches would distinguish between “gay” sexually explicit video files and “straight” sexually explicit video files (*Id.* 240:6-245:17), and changed misleading titles or descriptions to more accurately describe the content of the associated video file. *Id.* 110:10-111:16.

Defendant has the right and ability to completely control the material appearing on its system, including the infringing copies of Plaintiff’s works.

VII. DEFENDANT IS CONTRIBUTORILY LIABLE FOR INFRINGEMENT OF PLAINTIFF’S WORKS

Contributory infringement consists of the following elements: “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *A&M Records v. Napster*, 239 F.3d 1004, 1019 (N.D. Cal 2001)(*Napster I*); *accord Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). For the first element, constructive knowledge is sufficient. *Napster I*, 239 F3d at 1020 (“Contributory liability requires that the secondary infringer ‘know of or have reason to know’ of direct infringement.”), *citing Cable/Home Communication Corp. v. Network Prod., Inc.*, 902 F.2d 829, 846 n.29 (11th Cir. 1990); *see also, e.g., Sega Enters., Ltd. v. MAPHIA*, 948 F. Supp. 923, 933 (N.D. Cal. 1996).

1 **A. Defendant Induced, Caused, and Materially Contributed to Direct**
2 **Infringement.**

3 In *Napster I*, Defendant maintained an index on its servers that users employed to help
4 locate infringing files on other users' computers. The infringing files never resided on Napster's
5 servers. The Court ruled that the maintenance of the index alone was sufficient to find a material
6 contribution. "Napster is an integrated service designed to enable users to locate and download
7 MP3 music files." *Napster I*, 239 F.3d at 1022 (citing the District Court). "[W]ithout the support
8 services defendant provides, Napster users could not find and download the music they want with
9 the ease of which defendant boasts." *Id.* Thus the Court held that Napster provided "the site and
10 facilities for direct infringement. *Id.*

11
12 Defendant here goes even further, at least occasionally reviewing the index to make sure
13 that items are properly categorized. Papa Depo. 203:4-15, 240:6-245:17. Moreover, Defendant's
14 index does not point users to infringing files on unassociated computers, rather the index points
15 users to infringing files that reside on Defendant's own servers. Dunning Depo. 22:18-21, 40:5-11.
16 More broadly, Defendant designed, maintained and operated all of the other elements which
17 comprised the Veoh System, as described *supra*. All of these actions represent further contribution
18 to the infringement that resulted by and through Defendant's system.
19
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21 **B. Defendant Had Direct Knowledge or Constructive Knowledge of the**
22 **Infringement of Plaintiff's Works.**

23 Courts have found constructive knowledge for the purposes of establishing contributory
24 infringement in a wide variety of situations. *See, e.g. Hardenburgh*, 982 F.Supp. at 514
25 (constructive knowledge because "Playboy Magazine is one of the most famous and widely
26 distributed adult publications in the world"); *RSO Records, Inc. v. Peri*, 596 F.Supp.849, 858
27 (S.D.N.Y. 1984)(knowledge where "the very nature of [the product at issue] would suggest
28

1 infringement to a rational person.”); *Universal City Studios, Inc. v. American Invsco Management,*
2 *Inc.*, 217 U.S.P.Q. 1076, 1077 (N.D. Ill. 1981)(fact that motion picture was just released in
3 theaters supported inference of actual or constructive knowledge that videocassette was
4 infringing); *see also Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d
5 1159, 1162-63 (2d Cir. 1971)(general knowledge that “copyrighted works were being performed
6 at [the concert] and that neither the local association not the performing artists would secure a
7 copyright license.”).

8
9 Defendant receives large numbers of notices from copyright owners requesting that it
10 remove infringing files from its website and knows infringement occurs thereon. A common sense
11 examination of the infringing files of Plaintiff’s works submitted to www.veoh.com, should
12 immediately raise red flags. First, each of the works is clearly professionally made employing
13 professional cameras, multiple camera angles, film industry lighting, professional models and the
14 sets and locations indicative of professional rather than amateur productions. Ruoff Decl. at ¶3. In
15 fact, many of the works received industry awards. *Id.* ¶4. Only one of the works was marked with
16 any indicia of ownership. *Id.* at ¶16. Without any indication of who produced the work or where
17 one might go to purchase the works, the rightful copyright holder would receive no benefit from
18 the appearance of the works on Veoh.com and it simply makes no sense for the copyright holder
19 to allow the works to be copied, distributed and/or displayed by and through Defendant’s system
20 in this manner.
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23 Also, the user information for the individuals who initially provided the infringing works
24 to Defendant was not indicative of individuals associated with a professional adult film producer
25 or licensee thereof. See user names on Ruoff Exhibits D and E. Defendant admits that factors like
26 quality and length of the movie and an inconsistent user name can be indicative that a user does
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1 not have the proper authorization to provide a video file to Defendant. Dunning Depo. 126:17-
2 127:10. Papa Depo. 100:4-105:21. Remarkably, the one user page Plaintiff was able to document
3 indicates the submitting user was a seventeen-year-old boy from Herod, Illinois. Ruoff Decl. ¶21.
4 This individual did not even have the legal right to view this material, much less produce and
5 distribute it. Again, Defendant should have been alerted that this user was not the copyright holder
6 and was not authorized to provide the work to Defendant.
7

8 Finally, and perhaps most significantly, Defendant knowingly ignored federal laws
9 requiring sexually explicit material to be labeled with the date of production and the location of
10 age verification records for all performers. (18 U.S.C. §2257 (f)(4)). Anyone transferring such
11 material, including Defendant is required to ensure that such a label is affixed. Defendant admits
12 to knowledge of the law, yet offers no explanation as to why it ignored it. Papa Depo. 192:12-
13 196:3; Styn Depo. 43:1-48:13; Shapiro Depo. 64:2-21; Dunning Depo. 154:24-156:13. Just as a
14 merchant accepting a shipment of cigarettes without the federally required warning label or tax
15 stamp, would have reason to question the authenticity of those cigarettes, an absent §2257 label on
16 a sexually explicit video file is a clear indication that the video files were illicitly obtained. *See*
17 *Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989) (In a trademark matter, "[I]t is enough
18 . . . that the defendant failed to inquire . . . because he was afraid of what the inquiry would
19 yield."). Here, Defendant should have asked questions, before it acquired sexually explicit content
20 that failed to conform to the federal labeling law and transferred that material in further violation
21 of the law.
22

23 Plaintiff's copyright registrations also provide constructive knowledge of Plaintiff's
24 ownership of their copyrighted works. 17 U.S.C. §205(c); *Saenger Org., Inc. v. Nationwide Ins.*
25
26
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1 *Licensing Assocs., Inc.*, 119 F.3d 55, 66 (1st Cir. 1997)(“A copyright registration
2 certificate...serves to put the world on constructive notice as to the ownership of the copyright”).

3
4 **VIII. DEFENDANT HAS NOT PRODUCED EVIDENCE TO SUPPORT ANY OF ITS
AFFIRMATIVE DEFENSES.**

5 Where the defendant raises affirmative defenses and plaintiff moves for summary
6 judgment, plaintiff need not produce any evidence. It may simply point out the absence of
7 evidence from the defendant. *Fontenot v. Upjohn, Co.*, 780 F2d 1190, 1195 (5th Cir. 1986); *Zands*
8 *v. Nelson*, 797 F.Supp. 805, 808 (SDCA 1992). Defendant has not produced sufficient evidence
9 to support any of its affirmative defenses.
10

11 **IX. CONCLUSION**

12 Defendant engaged in direct infringement of Plaintiff’s works. In addition Defendant is
13 liable as a contributory and vicarious infringer for the reasons set forth above. Defendant has not
14 set forth facts to support any of its affirmative defenses. Therefore, Plaintiff requests that the
15 Court rule that Defendant is liable for the copyright infringement alleged in this action.
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20 Dated: *July 31, 2007*

/s/ Gill Sperlein

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22 _____
23 GILL SPERLEIN
24 THE LAW OFFICE OF GILL SPERLEIN
25 Attorney for Plaintiff Io Group, Inc.
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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of 18 years , and not a party to the action within. My business address is 69 Converse Street, San Francisco, California, 94103. On July 31, 2007 I served the within documents:

- **PLAINTIFF IO GROUP INC.'S NOTICE AND MOTION FOR SUMMARY JUDGMENT**
- **GILL SPERLEIN'S DECLARATION IN SUPPORT OF PLAINTIFF IO GROUP INC.'S MOTION FOR SUMMARY JUDGMENT**
- **KEITH RUOFF'S DECLARATION IN SUPPORT OF PLAINTIFF IO GROUP INC.'S MOTION FOR SUMMARY JUDGMENT**
- **[PROPOSED] ORDER GRANTING PLAINTIFF IO GROUP INC.'S MOTION FOR SUMMARY JUDGMENT**

by causing a true and correct copy of the above to be placed with God's Speed Delivery Service for personal delivery in a sealed envelope with postage prepaid, addressed as follows:

JENIFER A. GOLINVEAUX
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, SUITE 3900
SAN FRANCISCO, CA 94111-5894

UNITED STATES DISTRICT COURT
280 South First Street
San Jose, CA 95113

E-Filing Chambers Copy
Io Group, Inc. v. Veoh Networks, Inc.,
C-06-06-3926 (HRL)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 31, 2007.

/s/ Eric Burford

Eric Burford

I hereby attest that this is the declaration of Eric Burford and the original with Eric Burford's holographic signature is on file for production for the Court if so ordered, or for inspection upon request by any party. Pursuant to the laws of the United States, I declare under penalty of perjury the foregoing is true and correct.

Dated: *July 31, 2007*

/s/ Gill Sperlein

GILL SPERLEIN,
Counsel for Plaintiff Io Group, Inc.