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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN JOSE DIVISION**

Winston & Strawn LLP
 101 California Street
 San Francisco, CA 94111-5894

14 IO GROUP, INC.

15 Plaintiff,

16 vs.

17 VEOH NETWORKS, INC.

18 Defendant.

Case No. C 06-3926 HRL

**DEFENDANT VEOH NETWORKS, INC.'S
 OPPOSITION TO PLAINTIFF'S MOTION
 FOR SUMMARY JUDGMENT**

Date: September 4, 2007
 Time: 10:00 a.m.
 Place: Courtroom 2

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1 **I. INTRODUCTION**

2 Plaintiff Io Group, Inc. (“Plaintiff” or “Io”) has moved for summary judgment on the issues
3 of Veoh’s liability to Io for direct, contributory, and vicarious copyright infringement. Because Io
4 cannot support the requisite elements of either its direct or indirect claims, its motion should be
5 denied in its entirety. Moreover, because Veoh’s own pending motion for summary judgment, based
6 on its entitlement to DMCA safe harbor from all of Io’s claims, would moot Io’s motion, the Court
7 need not even reach Io’s motion.

8 Even putting aside Veoh’s entitlement to safe harbor, this is not a close case. Veoh is an
9 Internet service provider that allows users to share video content. Users can upload video content
10 directly to Veoh’s website, or by using Veoh’s proprietary software. Regarding Io’s claims for
11 direct infringement, the case law makes clear that the Veoh system’s automated “copying” of user
12 uploaded content lacks the requisite volition to establish direct infringement. As this Court
13 recognized in the *Netcom* decision, such actions, to the extent that they create copies, are necessary
14 to have a working system for transmitting user content on the Internet. To the extent Io seeks to hold
15 Veoh directly liable for the automated generation of thumbnails to assist users in finding such
16 content, Veoh is also protected by the fair use doctrine.

17 Io’s claims that Veoh should be held indirectly liable for the actions of its users are equally
18 misplaced. It is undisputed that Io brought this lawsuit without ever bothering to first notify Veoh of
19 the alleged infringements, and when Io sued, Veoh had already terminated access to all pornographic
20 content, including any of the allegedly infringing material. There is also no evidence to support that
21 Veoh had the right or the ability to control the allegedly infringing activity or derived a financial
22 benefit from it. There is simply no evidence to support the elements of Io’s claims of contributory or
23 vicarious infringement. To find Veoh indirectly liable on the facts of this case would extend those
24 doctrines beyond all workable boundaries.

25 For these reasons, Veoh asks that the Court deny Io’s motion because Io has not and cannot
26 establish the essential elements of its claims, and as moot because Veoh is entitled to DMCA safe
27 harbor.

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1 **II. STATEMENT OF ISSUES**

2 Whether Io’s motion must be denied because it has failed to present evidence showing that
3 no reasonable jury could find for Veoh on all of the essential elements of Io’s claims for direct and
4 indirect copyright infringement, and whether Io’s motion is mooted by Veoh’s entitlement to DMCA
5 safe harbor.

6 **III. STATEMENT OF FACTS**

7 The background for this case is set forth in detail in Veoh’s Motion for Summary Judgment
8 filed July 30, 2007 (Docket No. 77), which Veoh incorporates in this Opposition by reference as if
9 fully set forth herein in accordance with Federal Rules of Civil Procedure 7(b) and 10(c). The
10 following additional facts are also relevant to this Opposition.

11 Veoh is an internet service provider that allows users to upload and share videos.¹ Io admits
12 that Veoh is capable of non-infringing uses,² and there is no doubt that Veoh is capable of substantial
13 non-infringing uses. Users have uploaded and shared hundreds of thousands of videos on Veoh. To
14 date, Veoh has received notices of alleged copyright infringement in one form or another in
15 connection with less than seven percent of those videos.³ In addition to the video content submitted
16 by Veoh users, Dunning Decl. ¶ 4, Veoh has entered into agreements with prominent content
17 providers such as Turner, CBS, Us Magazine, Road and Track Magazine, Car and Driver Magazine,
18 and United Talent Agency to distribute their content on Veoh.⁴

19 To search for videos on Veoh, users may enter keyword search terms, in response to which
20 Veoh returns a page of search results in a grid, each result identified by a title and a “thumbnail”,
21 which is a reduced-size screenshot extracted from a video. If a user clicks on a specific thumbnail

22 ¹ Declaration of Ted Dunning ("Dunning Decl.") ¶ 2. The Dunning Decl. accompanied Veoh's own
23 motion for summary judgment.

24 ² Pl’s. Resp. to Def’s. First Set of Requests for Admission, attached to the Declaration of Matthew
25 Scherb in Support of Defendant Veoh's Opposition to Plaintiff's Summary Judgment Motion
26 ("Scherb Opp. Decl.") as Exh. A, No. 8.

27 ³ Declaration of Ted Dunning Submitted in Support of Defendant Veoh Networks, Inc.'s Opposition
28 to Plaintiff's Motion for Summary Judgment ("Dunning Opp. Decl") ¶ 6.

⁴ Transcript of May 21, 2007 Deposition of Dmitry Shapiro (“Shapiro Dep. Tr.”), attached to the
Declaration of Matthew Scherb (“Scherb Opp. Decl.”) as Exh. B, 33:17-19, 37:11-16; Pl’s. Mot. for
Summary Judgment filed July 31, 2007 (Docket No. 78) (Pl’s. Mot.) at 7. For the Court’s
convenience, all deposition portions cited in this Opposition have been collected in the Scherb Opp.
Decl.

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1 on the search results page, he or she will see a “Video Details Page” that contains the video and a
 2 link called “Video Screenshots.” Clicking on the “Video Screenshots” link shows the user a set of 16
 3 thumbnails of screenshots from the video.⁵ The thumbnails help users search for videos on Veoh’s
 4 service and give users a quick idea, without having to watch a video, of the video’s content. The
 5 creation of these thumbnails is an entirely automated process.⁶ The full-size screenshots underlying
 6 the thumbnails never appeared on Veoh. Papa Dep. Tr. (Day Two) at 161:19-23.

7 Nearly all of the allegedly infringing works at issue in this case are less than a minute in
 8 length, and the majority of these were less than about six seconds in length.⁷ Each of Io’s alleged
 9 works have each been published in a multitude of formats, including on DVDs, VHS tapes, and on
 10 Io’s internet sites. Compl. ¶ 2. Io gives away excerpts of those videos for free on the Internet and
 11 has occasionally given away free DVDs to promote its works.⁸

12 **IV. IO’S MOTION IS MOOT IF THE COURT GRANTS VEOH’S PENDING MOTION**
 13 **FOR SUMMARY JUDGMENT.**

14 The Court need not reach the merits of Plaintiff’s Motion for Summary Judgment, because
 15 Veoh is entitled to safe harbor from all of Io’s claims pursuant to section 512(c) of the Digital
 16 Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c), and has moved for summary judgment
 17 on that basis. If this Court grants Veoh’s motion, it will obviate the need to consider Io’s motion.
 18 As set forth in Veoh’s summary judgment motion, if the Court finds that Veoh is entitled to safe
 19 harbor, Io will be entitled to no monetary relief and only to the injunctive relief permitted by 17
 20 U.S.C. § 512(j), which is moot in this case, as it is undisputed that Veoh had already disabled access

21 _____
 22 ⁵ Dunning Opp. Decl. ¶ 5; Declaration of Keith Ruoff (“Ruoff Decl.”) ¶¶ 13, 26 & Exhs. D, H. The
 23 Ruoff Decl. accompanied Io’s motion for summary judgment.

24 ⁶ Transcript of May 22, 2007 Deposition of Joseph Papa (“Papa Dep. Tr. (Day Two)”), attached to
 25 the Scherb Opp. Decl. as Exh. C, 166:13-17, *id.* 158 4-8 (“The screen caps feature provided a way to
 26 get a little bit more information about the content of the video, prior to downloading it.”); Dunning
 27 Opp. Decl. ¶ 5.

28 ⁷ Plaintiff’s Responses to Defendant’s Third Set of Requests for Admissions, attached to the Scherb
 Opp. Decl. as Exh. D, Nos. 65-78.

⁸ Pl’s Resp. to Def’s. Third Set of Requests for Admission, attached to the Scherb Decl. as Exh. L,
 No. 64; Transcript of May 25, 2007 Deposition of Keith Ruoff (“Ruoff Dep. Tr.”), attached to the
 Scherb Opp. Decl. as Exh. E, 35:21 (“We do allow trailers to be shown.”); *id.* 44:8-10 (“We do
 provide free copies of DVD’s to reviewers in magazines, to be able to allow them to write reviews of
 our films.”); *id.* 90:7-9 (discussing Plaintiff’s “free week of porn” promotion).

1 to all pornographic content, including any of Io's alleged material in June of 2006 before Io filed this
 2 lawsuit. *See* Veoh's Mot. for Summary Judgment at 24 (citing *Corbis Corp. v. Amazon.com, Inc.*,
 3 351 F. Supp. 2d 1090, 1111 (W.D. Wash. 2004)). Similarly, the *Corbis* court faced cross summary
 4 judgment motions, defendant's on the ground that it was entitled to section 512(c) safe harbor, and
 5 plaintiff's seeking a declaration of liability for copyright infringement. That court held that
 6 defendant was entitled to DMCA safe harbor, obviating the need to consider most issues of liability.
 7 351 F. Supp. 2d at 1113 ("Corbis has filed a motion for partial summary judgment on its claims of
 8 direct and vicarious copyright infringement Once the claims arising from DMCA-protected
 9 activity and the claims relating to unregistered images have been culled, only two direct copyright
 10 infringement claims. . . remain."); *id.* at 1298 ("The relief sought by Corbis for the alleged
 11 infringements is prohibited under the DMCA. As a result, even if Corbis's copyright infringement
 12 claims can bare fruit, Amazon's liability protection ensures that the claims will wither on the
 13 vine."); *cf. Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003) (granting
 14 summary judgment to defendant on grounds that it was entitled to DMCA safe harbor, not
 15 addressing merits of vicarious claim, and entering judgment in favor of defendant).

16 **V. IO HAS FAILED TO SUBMIT EVIDENCE TO ESTABLISH THE ESSENTIAL**
 17 **ELEMENTS OF ITS CLAIMS AND ITS MOTION FOR SUMMARY JUDGMENT**
 18 **MUST BE DENIED.**

19 The party moving for summary judgment has the initial burden of establishing that there is
 20 "no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law."
 21 Fed. R. Civ. P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978) ("[The]
 22 burden of establishing that there is no genuine issue of material fact lies initially with the moving
 23 party and resolution of all doubts should be in favor of the party opposing the motion."). To
 24 warrant summary judgment, a plaintiff must present evidence affirmatively showing that no
 25 reasonable jury could find for the non-moving party for *all* essential elements of its case. *Miller v.*
 26 *Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). Where, as here, the moving party fails
 27 to carry its initial burden of production, the opposing party has no obligation to produce anything.
 28 *Nissan Fire & Marine Ins. Co. v. Gritz Cos.*, 210 F.3d 1099, 1102-1103 (9th Cir. 2000). Inferences

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1 drawn from any evidence produced must be viewed in a light most favorable to the nonmoving
2 party. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992); *accord Addisu*
3 *v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000) (“Reasonable doubts as to the existence of
4 material factual issues are resolved against the moving parties and inferences are drawn in the light
5 most favorable to the non-moving party.”).

6 Here, Io has moved for summary judgment on its claims of direct, vicarious, and contributory
7 copyright infringement, and must establish all of the essential elements of those claims in order to be
8 entitled to summary judgment. Io has not, and cannot, meet this burden.

9 **A. Io has Failed to Produce Sufficient Evidence of Copying of its Alleged Works**

10 As a threshold matter, to establish the elements of its claims for either direct or indirect
11 copyright infringement, Io must meet its burden to show that copying of its works took place. Io has
12 failed to meet its burden.

13 Copying can be proved by (1) direct evidence of copying or by (2) evidence of access to a
14 work and evidence of substantial similarity between the original and allegedly infringing work.
15 *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996). Here, Io seeks summary judgment on all of its
16 claims without bothering to introduce sufficient evidence that its alleged works were in fact copied,
17 or if so, how much of the works were copied. Io’s entire factual discussion of the alleged infringing
18 copies is in paragraphs 13, 14, and 15 of the Ruoff Declaration. Io apparently now alleges that ten
19 works were infringed, Ruoff Decl. ¶¶ 13-15, but fails to support its claims that these works were in
20 fact copied, and has failed to produce either copies of the works it alleges were infringed, or of the
21 allegedly infringing copies. Regarding Io’s alleged work *River Patrol*, for example, Mr. Ruoff
22 summarily states that he “located” a “portion” of that work on June 13, 2006. *Id.* ¶ 13. As
23 “evidence” that this video was copied, Mr. Ruoff submits only a copy of a Veoh Video Details Page
24 for a video titled “Military Men”, and states that he “observed the large image in the upper left hand
25 corner playing as a streaming Flash video file.” *Id.* ¶ 13 & Exh. D. Having failed to produce a copy
26 of the alleged work *River Patrol*, explain how or whether the “large image” of “Military Men” he
27 observed copied *River Patrol*, or how much of the infringing work the “portion” allegedly copied,
28

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1 there is insufficient evidence for this Court to determine whether *River Patrol* was in fact copied.

2 Io’s evidence of the other alleged infringements is even more paltry and deficient. For
3 example, the extent of its “evidence” of copying of its alleged works *Don’t Ask, Don’t Tell, Detour,*
4 *Seamen, Heat, Island Guardian, and Boner*, is to state that “I similarly witnessed and documented
5 selections” from those works, and to attach video detail pages of still images with names like
6 “piss12”, “piss4”, “GWN-Short Series”, and “Rough Sex”, without explaining how these works
7 correlate to Io’s alleged infringed works, or how much of the infringing work the “portion” allegedly
8 copied. *Id.* ¶ 14 & Exh. E. Io’s evidence of copying of its remaining alleged works is even weaker
9 still, consisting of one or two pages of “frames” from video files that Veoh produced in discovery,
10 and to which Io acknowledges Veoh had terminated access on its own accord prior to Io’s filing
11 suit.⁹ *Id.* ¶ 15 & Exh. F.

12 Io’s purported evidence of copying is insufficient to determine whether and to what extent
13 any copying of its alleged works ever took place. In *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319
14 (9th Cir. 1986), the Ninth Circuit held that:

15 There can be no proof of ‘substantial similarity’ and thus of copyright infringement unless
16 [the claimed] works are juxtaposed with [the allegedly infringing works] and their contents
17 compared. Since the contents are material and must be proved, [Plaintiff] must either
produce the original or show that it is unavailable through no fault of his own. . . . The [best
evidence rule] ensure[s] that proof of the infringement claim consists of the works alleged to
be infringed.

18 *Accord General Universal Sys., Inc. v. Lee*, 379 F.3d 131, 145-47 (5th Cir. 2004); *Bridgmon v.*
19 *Array Sys. Corp.*, 325 F.3d 572, 576-77 (5th Cir. 2003). The Court should deny Io’s motion for
20 summary judgment on this basis alone. Courts even encumber a “non-moving [plaintiff] with the
21 burden of proof in copyright cases to produce the alleged infringed and infringing products for
22 comparison purposes at the summary judgment stage.” *Berkla v. Corel Corp.*, 66 F. Supp. 2d 1129,
23 1139 (C.D. Cal. 1999) (“To the extent that Berkla has not presented his other infringed databases for
24 review, Corel is entitled to summary judgment.”); *see generally Shaw v. Lindheim*, 919 F.2d 1353,
25 1355 (9th Cir. 1990) (“Summary judgment is not highly favored on questions of substantial

26 ⁹ Pursuant to a stipulation entered by this Court on April 26, 2007, Veoh produced to Io copies of
27 video files to which Veoh had terminated access prior to the filing of Io's lawsuit on June 23, 2006.
28 *Joint Stipulation Regarding Responses to Plaintiffs' Document Requests and Maintenance of
Electronic Data* (Apr. 26, 2007) (docket no. 70).

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1 similarity in copyright cases.”). Without any evidence of the works at issue, Io has failed to meet its
2 burden of production to prove copying and the Court has no means of assessing whether any
3 underlying infringement exists.

4 **B. Veoh Does Not Engage in Direct Infringement**

5 Acknowledging that the relevant case law requires an internet service provider to act with the
6 requisite volition to be held directly liable for copyright infringement, Io apparently claims that
7 Veoh does so for four reasons: (1) because the Veoh system automatically copies and stores content
8 uploaded by users;¹⁰ (2) because the user content uploaded to the Veoh system is automatically
9 “transcoded” into Flash format for viewing; (3) because the Veoh system automatically generates
10 “thumbnails” to assist in the location of user provided content; and (4) because Veoh’s Terms of Use
11 required users to give Veoh permission to host user provided content. None of these actions are
12 sufficient to establish the requisite volition for a finding of direct infringement, and to the extent Io
13 seeks to hold Veoh directly liable for the automated generation of thumbnails to assist users in
14 finding such content, Veoh is also protected by the fair use doctrine.

15 1. Veoh Does Not Act With the Requisite Volition To Be Held Liable for Direct
16 Infringement

17 To establish direct copyright infringement, Plaintiff must not only show ownership of a valid
18 copyright, but also copying of elements of the work that are original. *Feist Publ’ns, Inc. v. Rural*
19 *Telephone Serv. Co.*, 499 U.S. 340, 361 (1991); *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462
20 F.3d 1072, 1076 (9th Cir. 2006). The “copying” that must be proved to establish direct infringement
21 involves more than mere automatic behavior; only volitional conduct can give rise to infringement.
22 *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (citing *Religious Tech. Ctr.*
23 *v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)); *Sega Enters. v.*
24 *Sabella*, No. C 93-04260, 1996 U.S. Dist. LEXIS 20470 (N.D. Cal. Dec. 18, 1996); *Parker v.*
25 *Google*, 422 F.Supp.2d 492, 497 (E.D. Pa. 2006), *aff’d* by No. 06-3074, 2007 U.S. App. LEXIS

26 _____
27 ¹⁰ While Io argues that Veoh may, in very limited circumstances, upload content on behalf of certain
28 partners, *see* Pl’s. Mot. at 7, Io does not claim that Veoh ever itself uploaded the allegedly infringing
works at issue in this case, and so this is entirely irrelevant to Io’s claims.

1 16370, at *6-7 (3d Cir. July 10, 2007); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev.
2 2006); *Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181, 186 n.3 (D.D.C. 2005).

3 This means that for direct liability, the Copyright Act only inculcates “conduct by a person
4 who causes in some meaningful way an infringement.” *CoStar*, 373 F.3d at 549. “[S]omething
5 more must be shown than mere ownership of a machine used by others to make illegal copies. There
6 must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying
7 that one could conclude that the machine owner himself trespassed on the exclusive domain of the
8 copyright owner.” *Id.* at 550; *see also id.* at 549 (noting that the staple article of commerce doctrine
9 of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) eliminated strict liability for
10 copyright infringement when the maker of a device has constructive knowledge of purchasers
11 making infringing uses).

12 Therefore, websites that merely provide a forum where users may share content lack the
13 requisite volition to be held liable for direct infringement. For example, this Court’s seminal *Netcom*
14 decision declined to impose direct liability for copying, distribution, and display on an Internet
15 service provider and a website operator for merely providing a forum for the sharing of content. 907
16 F. Supp. 1371-73, 1381-82. Plaintiff’s proper remedy was against the offending users for direct
17 infringement, as the forum providers’ actions were “automatic and indiscriminate” and could have
18 just as easily been “done” by any other number of forum providers *Id.* at 1372. Holding the forum
19 providers were not directly liable, this Court noted that “[b]illions of bits of data flow through the
20 Internet and are necessarily stored on servers throughout the network and it is thus practically
21 impossible to screen out infringing bits from noninfringing bits.” *Id.* at 1372-73. In another case
22 before this Court, a bulletin board operator (the predecessor to a website operator) was not liable for
23 direct infringement when she did not upload or download the infringing content herself, even though
24 she encouraged infringement, knew it was going on (touting the “HUNDRED’s of \$\$\$\$\$\$\$\$ worth
25 of games” for free), monitored it, and profited from it (by selling hardware to help her users make
26 copies of games that could be uploaded to her bulletin board). *Sega*, 1996 U.S. Dist. LEXIS 20470
27 at *7-8, *19-20 (“[W]hether Sabella knew her . . . users were infringing on Sega’s copyright, or
28

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1 encouraged them to do so, has no bearing on whether Sabella directly caused the copying to
2 occur.”). Likewise, in *Field*, Google’s automatic provision of cached (backup) copies of third-party
3 webpages to its users at the users’ direction did not give rise to direct liability. 412 F. Supp. 2d at
4 1115. The court reasoned that “Google is passive,” its “computers respond automatically” to
5 requests,” and without a “request, the copy would not be created . . . and the alleged infringement at
6 issue in this case would not occur.” *Id.*

7 In *CoStar*, the Fourth Circuit adopted this Court’s *Netcom* approach and analogized the
8 operators of content-hosting websites “to owner[s] of a traditional copying machine whose
9 customers pay a fixed amount per copy and operate the machine themselves to make copies.”:

10 When a customer duplicates an infringing work, the owner of the copy machine is not
11 considered a direct infringer. Similarly, an ISP who owns an electronic facility that responds
12 automatically to users’ input is not a direct infringer. If the Copyright Act does not hold the
13 owner of the copying machine liable as a direct infringer when its customer copies infringing
14 material without knowledge of the owner, the ISP should not be found liable as a direct
15 infringer when its facility is used by a subscriber to violate a copyright without intervening
16 conduct of the ISP.

17 373 F.3d at 550; *accord Netcom*, 907 F. Supp. at 1368-70 (making the same analogy). Therefore,
18 Loopnet, a website hosting and displaying user-submitted photographs and other information, was
19 not directly liable for its users uploading unauthorized photographs: it acted as mere conduit. *Id.* at
20 551, 555 (Loopnet “provide[d] a system that automatically transmits users’ material but is itself
21 totally indifferent to the material’s content. In this way, it functions as does a traditional telephone
22 company when it transmits the contents of its users’ conversations”). Even though Loopnet
23 reviewed each uploaded photograph prior to making those photographs public to ensure each in fact
24 depicted real estate and that each did not contain an obvious copyright notice, this practice did not
25 render its hosting a volitional act, *id.* at 547, 556, and Loopnet was entitled to summary judgment.
26 *Id.* at 557.

27 Likewise here Io has failed to produce any evidence showing that Veoh acts with the
28 requisite volition to be held liable for direct infringement of Io’s alleged works. As in *CoStar*, Veoh
was a conduit for material submitted by its users. Any automated processing of uploaded videos
does not alter this. Operating with even less involvement than Loopnet, Veoh does not review files

1 prior to publication to determine whether they should or should not be published, and any such
 2 review would be infeasible.¹¹ The undisputed facts show only that Veoh employees made extremely
 3 limited post-publication review of content on Veoh and, when appropriate, removed access to
 4 content that violated Veoh's Terms of Use, including content suspected to be infringing.¹²

5 While Io cites *Playboy Enters. v. Webworld*, 991 F. Supp. 543 (N.D. Tex. 1997) as support
 6 for its direct infringement claim, the website operator in *Webworld* faced direct liability because he
 7 provided the infringing content himself. Users of the website did not upload their own content;
 8 rather, the website operator culled adult images from Internet newgroups. *Id.* at 549. The operator
 9 "took affirmative steps" by "troll[ing] the Internet." *Id.* at 552. Veoh, on the other hand, did not
 10 seek out Io's content. Content on Veoh is uploaded by users or, in very limited circumstances not
 11 relevant to this case, Veoh may upload content on behalf of certain partners. Dunning Decl. ¶ 4;
 12 Shapiro Dep. Tr. 33:17-19, 37:11-16.

13 Similarly, Io's reliance on *Playboy Enters. v. Hardenburgh*, 982 F. Supp. 503 (N.D. Ohio
 14 1997) is misplaced. In *Hardenburgh*, a bulletin board operator was found directly liable when the
 15 operator encouraged users to upload content of all sorts to the system and manually reviewed each
 16 file uploaded before making that file accessible to all users. *Id.* at 513. *Hardenburgh*, then, is
 17 readily distinguished on its facts. Veoh did not review videos prior to making them available to
 18 users. Transcript of March 26, 2007 Deposition of Ted Dunning ("Dunning Dep. Tr."), attached to
 19 the Scherb Opp. Decl as Exh. F, 129:24 to 130:15; Papa Dep. Tr. (Day One) 35:6-8. Moreover,
 20 courts in this District, in *Sabella*, and the Fourth Circuit, in *CoStar*, have properly rejected the
 21 *Hardenburgh* approach as inconsistent with copyright law. In *Sabella*, the bulletin board operator
 22 "monitored the uploading and downloading of games in great detail," 1996 U.S. Dist. LEXIS at *19,
 23 but ultimately, this Court recognized that whether the operator knew of or encouraged infringement,
 24 while possibly relevant to secondary liability, was irrelevant to direct liability. It was error for
 25 *Hardenburgh* to base its decision, as it clearly did, on encouragement and review. *See CoStar*, 373

26 ¹¹ Dunning Dep. Tr 129:24 to 130:15; Transcript of May 21, 2007 Deposition of Joseph Papa ("Papa
 27 Dep. Tr. (Day One)"), attached to the Scherb Opp. Decl. as Exhs. F & G, 35:6-8.

28 ¹² Dunning Decl. ¶¶ 9-12; Dunning Dep. Tr. 125:6 to 126:16, 128:20-23, 136-37; Papa Dep. Tr.
 (Day Two) at 233:23 to 234:17.

1 F.3d at 549-550 (stating a similar principle); *see also* 3 Melville B. Nimmer & David Nimmer,
 2 Nimmer on Copyright § 12B.01[A][1] (noting “*Netcom* remains the touchstone” while *Webbworld*,
 3 *Hardenburgh*, and their predecessor, *Frena*, are “disapproved” by courts and by Congress through
 4 legislative history).

5 Io makes the same error here, arguing that because Veoh “reviews or screens,” Veoh goes
 6 even further than the defendant in *Hardenburgh*. Pl’s. Mot. at 13-14. In doing so, Io is wrong on
 7 the law, and misrepresents the evidence to which it cites. Even if Veoh reviewed files before
 8 making them available, which the evidence shows it does not,¹³ that would not subject Veoh to direct
 9 liability. Moreover, to support its claim that Veoh reviews files, Io argues that “[f]irst, Defendant
 10 reviews or screens files by only accepting files which users agree to license to Defendant to be
 11 exploited on to its system.” *Id.* The testimony Io cites does not support its argument. Mr. Shapiro
 12 and Mr. Papa merely state that users must register with Veoh to upload files and that during
 13 registration, users agree that Veoh may make any uploaded videos available on Veoh. Shapiro Dep.
 14 Tr. 23:6-14; Papa Dep. Tr. 12:2-5, 31:14-19. This is not review or screening. Io also argues that
 15 Veoh “reviews files to ensure they are video files capable of being shown on its system,” citing to
 16 Papa Dep. Tr. 12:10-17:21. This statement is equally misleading, as the cited portions of Mr. Papa’s
 17 deposition only show that Veoh’s system automatically rejected files that were not in fact video files.
 18 The pre-publication “review” that Io attributes to Veoh is all part of the automatic and necessary
 19 processing of video files, including that Veoh’s computers automatically confirm that uploaded files
 20 are in fact video files, that third-party software converts video files to Flash format, the automatic
 21 generation of thumbnails from videos to help users locate videos and learn about their contents, and
 22 the indexing of newly submitted videos. Dunning Dep. Tr. 132-33 135, 138; Papa Dep. Tr. (Day
 23 Two) at 155:5-6; Dunning Decl. ¶ 6; Dunning Opp. Decl. ¶¶ 3-5.

24 To the extent that Io claims Veoh “completes” its review of files after publication, Pl’s. Mot
 25 at 14, this statement is false and also a legal non-starter. As noted, any comprehensive is infeasible,
 26 and therefore Veoh cannot and does not have a policy of reviewing all files post-publication. *See*

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 28 ¹³ Dunning Dep. Tr 129:24 to 130:15; Papa Dep. Tr. (Day One) 35:6-8.

1 Dunning Dep. Tr 129:24 to 130:15; Papa Dep. Tr. (Day One) 35:6-8. Veoh only engages in limited
 2 *ad hoc* post-publication review.¹⁴ Papa Dep. Tr. (Day Two) at 203:4-15; Dunning Dep. Tr. 136-37.
 3 As is clear from *CoStar* and *Sabella*, even pre-publication review does not give rise to volition, let
 4 alone *ad hoc* post-publication review.

5 Io also refers to that fact that user content uploaded to Veoh's system is automatically
 6 converted to Flash format, to support its argument that Veoh should be held directly liable. Pl's.
 7 Mot. at 14. As Io acknowledges, users submit video files to Veoh in "multiple formats." Pl's. Mot.
 8 at 5; *cf.* Dunning Dep. Tr. 62:19 to 63:5 ("There are several hundred video formats at least."). Veoh
 9 utilizes widely-used third-party software that merely automatically encodes user-submitted videos
 10 into Flash format for compatibility purposes, because the vast majority of Web users have software
 11 that can play videos in the Flash format. Dunning Opp. Decl. ¶ 3; Pl's. Mot. at 5 (noting it is
 12 "technologically impractical" to show videos in a variety of formats and that Veoh encodes videos
 13 into Flash because the "format is supported by most users' browsers").¹⁵ The conversion to Flash
 14 format is an entirely automated process. Dunning Decl. ¶ 6. While Veoh pre-selects some encoding
 15 specifications, such as frame rate, *see* Pl's. Mot. at 5, these specifications are simply default
 16 parameters passed along to the encoding software, Dunning Opp. Decl. ¶ 3, and are the same for
 17 each video.¹⁶ Content uploaded to any website will require automatic processing prior to
 18 publication. Automatic transcoding to Flash format is no more volitional than the processing
 19 undertaken by the website operators in *CoStar*, *Netcom*, *Sabella*, or *Field* and *Parker*.

20 Similarly, Io's suggestion that Veoh's conduct should be considered volitional because its
 21 storage of content is more than transitory, Plaintiff's Motion at 14, is misplaced. The length of
 22 storage has no relation to whether the copy placed in storage was placed there by one person or

23 ¹⁴ While Io notes that Veoh, for a brief period of time before disallowing adult content, checked
 24 "sexually explicit video files to determine if they should be tagged as "gay" or "straight," Pl's. Mot.
 25 at 4 (citing Papa Dep. Tr. (Day Two) at 240:6-245:17). Io offers no evidence about the
 26 comprehensiveness of this review or evidence that such review conveyed any actual or constructive
 27 knowledge to Veoh of any infringement.

28 ¹⁵ *See also* Veoh Networks, Inc.'s Supplemental Responses to Interrogatory Nos. 6, 21, and 22,
 attached to the Scherb Decl. as Exh. E, at 3; Papa Dep. Tr. (Day One) at 124:3-17, 125:7-12
 ("Adobe's Flash player has something like 98 percent penetration in the browser market, so a
 video formatted into Flash can be played by just about anybody on the Web."); Dunning Decl. ¶ 6.

¹⁶ Papa Dep. Tr. 127:1-4, 128:16 to 129:9; Scherb Decl., Exh. E at 3.

1 another. Moreover, *Netcom*, the only case Io cites to support this argument, dealt both with the
 2 temporary storage of content by an Internet Service Provider, but also the indefinite storage by the
 3 bulletin board operator. *Netcom*, 907 F. Supp. at 1381-82. Likewise, *CoStar* and *Sabella* both
 4 involved content residing on servers indefinitely.

5 The evidence shows that Veoh never directly copied, distributed,¹⁷ performed, displayed, or
 6 made derivative works on its own volition. While Io argues that Veoh is more like the defendants in
 7 *Webbworld* and *Hardenburgh*, then in *CoStar* or *Netcom*, the evidence supports the opposite
 8 conclusion. The evidence fails to show that Veoh acted with the requisite volition and at the very
 9 least creates a question of fact requiring denial of Io's motion for summary judgment on liability for
 10 direct infringement.

11 2. Veoh's Creation of Thumbnails is Also a Fair Use

12 To the extent Io seeks to hold Veoh directly liable for the automated generation of
 13 thumbnails to assist users in finding videos, Veoh is also protected by the fair use doctrine. The
 14 Ninth Circuit has held that websites that generate thumbnail images from full-size works engage in
 15 fair use. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 725 (9th Cir. 2007) ("Google has put
 16 Perfect 10's thumbnail images (along with millions of other thumbnail images) to a use
 17 fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a
 18 significant benefit to the public."); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-22 (9th Cir.2003)
 19 (holding Arriba's use of thumbnail images to help its users locate images on the Internet was a fair
 20 use that was transformative and a benefit to the public). To evaluate whether a use is fair, courts

21 _____
 22 ¹⁷ Regardless of whether Veoh acts with the requisite volition, Veoh has not violated Io's
 23 distribution right because it does not distribute "copies." Section 106(3) defines the "distribution"
 24 right as the right "to distribute *copies* . . ." 17 U.S.C. §106(3) (emphasis added). "Copies," in turn,
 25 is a defined term and is specifically limited to "material objects." 17 U.S.C. § 101. As Professor
 26 Nimmer has stated, "[i]nfringement of [the distribution right] requires an actual dissemination of
 27 either copies or phonorecords." 2 Nimmer on Copyright § 8.11[A], at 8-124.1."). While the Ninth
 28 Circuit stated in dicta that "[t]he Supreme Court has indicated that in the electronic context, copies
 may be distributed electronically, *Perfect 10*, 487 F.3d at 718, courts that have considered the issue
 disagree. *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317 (2d Cir. 1995) (holding that the
 unauthorized satellite transmission of a copyrighted television program was a performance, not a
 distribution, because no material object changed hands); *Nat'l Car Rental Sys., Inc. v. Computer
 Assoc. Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) ("[E]ven with respect to computer software, the
 distribution right is only the right to distribute copies of the work.").

1 consider the equities in the context of four non-exclusive factors: “(1) the purpose and character of
2 the use, including whether such use is of a commercial nature or is for nonprofit educational
3 purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion
4 used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential
5 market for or value of the copyrighted work.” 17 U.S.C. § 107. Here, the first, third and fourth
6 factors weigh in favor of fair use, and the second factor weighs only slightly in favor of Io if at all.

7 The first factor weighs strongly in favor of a finding of fair use, as Veoh’s use of thumbnails
8 is both highly transformative and non-commercial. Both Google and Arriba created thumbnails that
9 were diminutive versions of full-size images and used those images to help users locate images and
10 determine whether they wanted to view the full-size images. Veoh’s thumbnails help users find
11 videos on Veoh’s service, and provide users a quick idea, without watching a video, what that
12 video’s contents will be like. Dunning Opp. Decl. ¶ 5; Ruoff Decl. ¶¶ 13, 26 & Exhs. D, H. When
13 users search for videos on Veoh, they enter keywords and Veoh returns a grid of videos, each
14 identified by a title and a thumbnail of a screenshot from that video. If users click on a video’s
15 thumbnail, they see a “Video Details Page” that contains the video and a link called “Video
16 Screencaps.” Clicking on the “Video Screencaps” links shows the user a set of 16 thumbnails of
17 screenshots from the video. *Id.* Thus, as in *Perfect 10* and *Kelly*, the thumbnails serve an
18 information location purpose. Veoh’s thumbnails are arguably even more transformative, because
19 the thumbnails are not merely diminutive versions of full-size images, but are still images extracted
20 from a different form of content: videos. The thumbnails do not incorporate the entirety of any
21 video, but are only reduced-sized screenshots of a fraction of the screenshots that comprise any
22 given video.

23 There is also no evidence that Veoh’s use of thumbnails was commercial. During the period
24 at issue in this litigation, June 1-22 of 2006, there was no advertising on Veoh, and Veoh did not
25 charge users for viewing videos or for memberships or subscriptions. Declaration of Joseph Papa
26 (“Papa Decl.”)¹⁸ ¶ 2. In *Perfect 10* and in *Kelly*, the Ninth Circuit found fair use despite the fact that

27 _____
28 ¹⁸ The Papa Decl. accompanied Veoh's own motion for summary judgment.

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1 Google had advertising relationships, *Perfect 10*, 487 F.3d at 722, and when on appeal Arriba never
2 contested that its search engine had a limited commercial purpose, *Kelly*, 336 F.3d at 818.

3 Regarding the second factor, while Io’s alleged works may be creative, they have been
4 previously published in a multitude of formats, including on DVDs, VHS tapes, and on Plaintiff’s
5 internet sites. Compl. ¶¶ 2, 8; Ruoff Dep. Tr. 96-98. The same facts led the *Perfect 10* court to
6 conclude that the second fair use factor, the nature of the copyrighted work, weighed at best only
7 slightly in favor of the plaintiff and contributed little to the fair use calculus. 487 F.3d at 723, 725.
8 The same is true here.

9 The third factor weighs in favor of fair use. In *Perfect 10* and *Kelly*, the Ninth Circuit held
10 that incorporating the entire contents of a full-size image in a thumbnail “was necessary . . . to allow
11 users to recognize the image and decide whether to pursue more information about the image or the
12 originating [website]. *Id.* at 724 (quoting *Kelly*, 336 F.3d at 821). Otherwise, “it would be more
13 difficult to identify it, thereby reducing the usefulness of the visual search engine.” *Id.* (quoting
14 *Kelly*, 336 F.3d at 821). Thus, the Ninth Circuit concluded that the “amount” factor favored neither
15 party. *Id.* In this case, Veoh uses far less of the original work: it merely uses a few thumbnails of
16 screenshots to identify an entire video. A screenshot is “such an insignificant portion of the complex
17 copyrighted work as a whole” that in these circumstances, the “third factor will almost always weigh
18 against the [content owner].” *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028-
19 29 (9th Cir. 2000) (holding that use of screen shots of another’s video game for advertising a video
20 game player is fair use). Therefore, this factor also favors Veoh and fair use.

21 Finally, the fourth factor weighs in favor of fair use because Veoh’s thumbnails have no
22 effect upon the potential market for or value of the copyrighted work. Io sells videos and, for
23 promotional purposes, gives away DVDs of these videos and offers excerpts of those videos online
24 for free. *See, e.g.*, Ruoff Dep. Tr. 35:21 (“We do allow trailers to be shown.”); *id.* 44:8-10 (“We do
25 provide free copies of DVD’s to reviewers in magazines, to be able to allow them to write reviews of
26 our films.”); *id.* 90:7-9 (discussing Plaintiff’s “free week of porn” promotion). Veoh’s thumbnails,
27 reduced-size screenshots from these and other videos, hardly compete. “[B]ecause thumbnails were
28

1 not a substitute for the full-sized images, they did not harm the photographer’s ability to sell or
 2 license his full-sized images.” *Perfect 10*, 487 F.3d at 724; *Kelly*, 336 F.3d at 821-22. If thumbnails
 3 do not harm the market for full-size images, they certainly do not harm the market for videos. *Cf.*
 4 *Bleem*, 214 F.3d at 1028-29 (screenshots are an insignificant portion of a larger audiovisual work).
 5 Moreover, Io has provided no evidence of market harm from Veoh’s thumbnails, and “market harm
 6 cannot be presumed.” *Perfect 10*, 487 F.3d at 724.

7 As three of the fair use factors weigh in favor of a finding of fair use, and one weighs at best
 8 only slightly in Io’s favor, the undisputed evidence establishes that Veoh’s use of thumbnail images
 9 to aid its users in locating videos is protected by the fair use doctrine. At the very least, there is a
 10 material issue of fact as to Veoh’s protection by the doctrine that requires denial of Io’s motion for
 11 summary judgment.

12 **C. Veoh is Not Secondarily Liable**

13 Io has also failed to marshal evidence sufficient to support the elements of its claims for
 14 secondary copyright infringement. Although the Copyright Act does not provide for secondary
 15 liability, courts have imported into copyright law the doctrines of contributory and vicarious liability
 16 from common law. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930-31
 17 (2005). Io’s motion for summary judgment on its secondary liability claims fails both because it has
 18 not met its burden to prove underlying acts of direct infringement by third parties, and because it has
 19 failed to come forward with evidence to support the elements of its contributory and vicarious
 20 infringement claims.

21 1. Io has Failed to Submit Evidence of Underlying Infringement by Third Parties

22 “Secondary liability for copyright infringement does not exist in the absence of direct
 23 infringement by a third party.” *Perfect 10*, 487 F.3d at 725 (quoting *A&M Records, Inc. v. Napster,*
 24 *Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir.2001)). Plaintiff bears the burden of proving the existence of
 25 third-parties’ infringements and courts will not infer such infringement, even in the preliminary
 26 injunction context where evidentiary burdens are arguably lessened. *Id.* at 726 (“There is no
 27 evidence in the record directly establishing that users of Google’s search engine have stored
 28

1 infringing images on their computers, and the district court did not err in declining to infer the
 2 existence of such evidence.”). As discussed in Section V above, Io has produced insufficient
 3 evidence that any Veoh user made an infringing use of Io’s works. At the very least there is a
 4 material issue of fact as to whether any direct infringements exist. This alone defeats Io’s motion for
 5 summary judgment on its secondary claims.

6 2. The Evidence Does Not Support Io’s Claims of Contributory Infringement

7 Io has also failed to present evidence to support the elements of its contributory infringement
 8 claim. “One infringes contributorily by intentionally inducing or encouraging direct infringement.”
 9 *Grokster*, 545 U.S. at 930. To be liable, one must act with knowledge of another’s infringing
 10 activity and must induce, cause, or materially contribute to that conduct. *Perfect 10*, 487 F.3d at
 11 727. In the “context of cyberspace,” the Ninth Circuit has further refined this test. *Id.* at 728. A
 12 computer system operator can be held contributorily liable if it “has actual knowledge that specific
 13 infringing material is available using its system” but “fails to purge such material from the system.”
 14 *Id.* (citing *Napster*, 239 F.3d at 1021-22; *Netcom*, 907 F. Supp. at 1375). A computer system
 15 operator may also be liable for “distributing a product distributees use to infringe copyrights, if the
 16 product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” *Id.* at 726
 17 (citing *Sony*, 464 U.S. at 442). Here, it is undisputed that Veoh had no actual knowledge of the
 18 specific allegedly infringing material, and Io has failed to present any evidence that would support
 19 constructive knowledge. Moreover, because Veoh’s website and software have substantial and
 20 commercially significant non-infringing uses, it is improper to impute knowledge to Veoh for the
 21 distribution of its products. There is also no evidence at all to support that Veoh induced, caused, or
 22 materially contributed to the allegedly infringing conduct at issue in this case.

23 a. Veoh Had No Knowledge of the Specific Allegedly Infringing
 24 Material at Issue in this Case

25 In *Napster*, the Ninth Circuit “considered claims that the operator of an electronic file sharing
 26 system was contributorily liable for assisting individual users to swap copyrighted music files stored
 27 on their home computers with other users of the system.” *Perfect 10*, 487 F.3d at 728 (citing
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1 *Napster*, 239 F.3d at 1011-13, 1019-22). The Ninth Circuit held Napster liable, but only because it
2 knew of “specific infringing material” and “failed to block access to such files.” *Id.* (quoting
3 *Napster*, 239 F.3d at 1022).

4 It is undisputed that unlike Napster, Veoh had no actual knowledge of the specific alleged
5 infringements.¹⁹ Io never provided Veoh with notice of any alleged infringements on Veoh’s
6 system before filing this lawsuit, at which time Veoh had already disabled access to all pornographic
7 content, including any of Io’s alleged material.²⁰

8 There is also no evidence to support that Veoh had constructive knowledge of the alleged
9 infringing material. Io concedes that none of the alleged infringements it identified on Veoh
10 contained copyright notices, Scherb Decl., Exh. J, No. 58 (Pl’s. Resp. to Def’s. Second Set of
11 RFAs), and Io testified at deposition that none of the works identified Plaintiff in any way. Ruoff
12 Dep. Tr. 55:13-16 (“I don’t remember seeing any reference to Titan Media within those audio-visual
13 works that I downloaded through Veoh.”); *id.* at 56:19 to 57:13 (same for thumbnails).²¹ Even if the
14 allegedly infringing works had copyright notices or attribution, such features are not evidence that a
15 work is unauthorized, only that someone claims the work. Knowledge of “specific infringing
16 material” is required. *Perfect 10*, 487 F.3d at 729. A content owner:

17 cannot know that any given image on the internet is infringing someone’s copyright merely
18 because the image contains a copyright notice. Google would need more information in order
19 to know whether the operator of that third-party website [posting the image] created the
work, licensed its use or instead was illegally displaying an infringing copy of it.

20 *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 853 (C.D. Cal. 2006) (holding that Google was
21 therefore not a contributory infringer). As recently stated by the Ninth Circuit in analyzing the
22 related DMCA inquiry concerning constructive knowledge of infringements, even when “titillating”

23 ¹⁹ Even had Io provided Veoh with notice, which it did not, there may still have been a factual issue
24 preventing summary judgment. *See Netcom*, 907 F. Supp. at 1374-75 (“Since Netcom was given
notice . . . there may be a question of fact.”).

25 ²⁰ Scherb Decl., Exh. K, Nos. 21, 22, 24; *id.* Exh. L, No. 61 (Io admits it “never sent any notice to
Veoh regarding infringements of [its] copyrights, apart from communications in connection with this
26 action”); Ruoff Dep. Tr. 57:19-23; 60:6 to 61:6.

27 ²¹ In its summary judgment motion Io identified one allegedly infringing work bearing the
TitanMedia logo, but the logo does not appear in the video until more than four minutes into the
28 video. Ruoff Decl., Exh. F at 2 (showing the TitanMedia logo appearing at 4 minutes and 42
seconds into the excerpt, as indicated in the top right corner of the printout).

1 photographs are described as “illegal” or “stolen,” (which was not the case here) courts “do not place
 2 the burden of determining whether [they] are actually illegal on the service provider.” *Perfect 10,*
 3 *Inc. v. CCBill LLC*, ___ F.3d ___, 2007 U.S. App. LEXIS 12508, at *19 (9th Cir. May 31, 2007)
 4 (noting that photographs could have been untruthfully described as “stolen” to create buzz and
 5 excitement only); *see also Corbis*, 351 F. Supp. 2d at 1107-08 (“The issue is not whether Amazon
 6 had a general awareness that a particular type of item [celebrity photos,] may be easily infringed;”
 7 rather, whether Amazon knew of specific infringements.”).

8 Even if the allegedly infringing material had copyright notices or attribution, it is not feasible
 9 for Veoh to review every user submission before it is made available on the Veoh system, Dunning
 10 Dep. 129:17 to 130:15; Shapiro Dep. Tr. 84:16 to 85:1, and the law places no such burden on a
 11 service provider, *CCBill*, 2007 U.S. App. LEXIS 12508, at *10 (“[A] service provider need not
 12 affirmatively police its users.”). The mere ability to review does not render a service provider
 13 contributorily liable. As recently stated by another court considering this issue:

14 Nor does Google obtain actual knowledge of infringement as a result of its alleged
 15 monitoring practices. . . . [M]erely because Google may have reserved the right to monitor
 16 its AdSense partners does not mean that it could thereby discern whether the images served
 by those websites were subject to copyright. Only upon receiving proper notice of alleged
 infringement can Google determine whether a given AdSense partner has violated the terms
 of Google’s AdSense Program Policies.

17 *Perfect 10*, 416 F. Supp. 2d at 854; *cf. Netcom*, 907 F. Supp. at 1375 n.21 (“A policy and practice of
 18 acting to stop postings where there is inadequate knowledge of infringement in no way creates a
 19 higher standard of care under the Copyright Act as to subsequent claims of user infringement.”).

20 To the extent Veoh reviewed videos on an *ad hoc* basis after publication, its review was
 21 limited and could not confer knowledge of infringement. As Io points out, reviewers largely would
 22 catch and correct improperly rated or mis-categorized adult material. Pl’s. Mot. at 4 (citing Papa
 23 Dep. Tr. (Day Two) 203:4-15); *see also supra* n.14. Employees would do this by reviewing
 24 metadata submitted with each video and the thumbnails associated with the video. Papa Dep. Tr.
 25 50:15-17. Io misleadingly refers to this as “filtering” on page 8 of its motion. Papa Dep. Tr. (Day
 26 One) 113:9-24. The cited deposition testimony and other evidence only demonstrates that such
 27 review was *ad hoc* and largely accomplished by Veoh employees as they spot checked videos

1 appearing in prominent places on the website, such as the home page or on a featured video list.²²
 2 Dunning Dep. Tr. 136-37; *see generally* Papa Dep. Tr. (Day Two) 233:23 to 234:17.

3 Io's argument that there were "red flags" that would, as a matter of law, confer constructive
 4 knowledge of infringement on Veoh (Pl's Mot. for Summary Judgment at 28) fails. First, Io cannot
 5 establish "red flags" because its works were "professional" looking. Service providers are not
 6 required to draw such broad generalizations about content; they need only respond when aware of
 7 specific infringements. *Perfect 10*, 487 F.3d at 729; *cf. Corbis*, 351 F. Supp. 2d at 1107-08 ("The
 8 issue is not whether Amazon had a general awareness that a particular type of item [celebrity
 9 photos,] may be easily infringed;" rather, whether Amazon knew of specific infringements."").
 10 Moreover, the allegedly infringing works in this case were hardly "blatant" infringements in terms of
 11 labeling and length as Io claims. Io has admitted that nearly all of the allegedly infringing works
 12 were less than a minute in length, and the majority of these were less than about six seconds in
 13 length. Scherb Opp. Decl., Exh. D, (Pl's. Resp. to Def's. Third Set of Requests for Admissions,
 14 Nos. 65-78).

15 Io's remaining arguments for knowledge equally lack merit. Its citation of 18 U.S.C. § 2257
 16 and claim that Veoh failed to comply with the section's labeling requirement, Pl's. Mot. at 29, are
 17 irrelevant. Section 2257 has nothing to do with imputed knowledge, or copyright law for that
 18 matter, and is irrelevant to this case.²³ Further, Io's suggestion that its copyright registrations
 19 somehow put Veoh on notice of the *alleged infringements* is baseless. Pl's. Mot. at 29-30. The only
 20

21 ²² Sometimes employees also categorized videos they saw as "featured", meaning the video may
 22 receive more prominent placement on the Veoh website. Pl's. Mot. at 9 (citing Papa Depo.173:14-
 23 174:6). Io does not offer any evidence how Veoh employees "featuring" a video results in
 24 knowledge of infringement, and does not claim that any allegedly infringing works were ever
 25 featured.

26 ²³ 18 U.S.C. § 2257 is a statute that requires the maintenance of certain records in connection with the
 27 *creation* of adult content. It is plain on the face of the statute that Section 2257's reporting
 28 requirements apply only to one who "produces" sexually explicit conduct, and would not apply to
 Veoh. 18 U.S.C. § 2257(a). "Produces . . . **does not** include mere distribution or any other activity
 which does not involve hiring, contracting for managing, or otherwise arranging for the participation
 of the performers depicted." 18 U.S.C. § 2257(h)(3) (emphasis added); *see also Sundance Assocs.,
 Inc. v. Reno*, 139 F.3d 804, 807-08, 810-11 (10th Cir. 1998) (invalidating Attorney General's
 regulation that attempted to broaden the definition of "produces"). Veoh has never produced adult
 content.

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1 case cited by Io to support this proposition, *Saenger Org. v. Nationwide Ins. Licensing Assoc.*, 119
2 F.3d 55, 66 (1st Cir. 1997), holds only that a copyright registration can, in limited circumstances,
3 give constructive notice as to the *ownership* of a copyright, not that a work is or is not infringing.
4 Plaintiff’s citation to 17 U.S.C. § 205(c) is similarly flawed. It only states that “[r]ecordation of a
5 document in the Copyright Office gives all persons constructive notice of the facts stated in the
6 recorded document.” Copyright registrations alone cannot provide notice of infringements.

7 b. Whenever Aware of Infringements, Veoh Removed Them, and In No
8 Way Contributed to or Induced Alleged Infringement

9 There is no dispute that Veoh, when aware of infringing content, acted expeditiously to
10 remove or disable access to the material. Dunning Decl. ¶¶ 9-10. As to infringements alleged in this
11 case, it is undisputed that Veoh had no knowledge or awareness that Io claimed they were infringing
12 until this lawsuit was filed, at which time they had already been removed from Veoh along with all
13 other adult content.

14 Io’s weak argument for a finding of material contribution rests entirely on the fact that Veoh,
15 like Napster, maintains a centralized index of content available through Veoh. Plaintiff’s Motion at
16 27. As explained by the court in *Perfect 10, Napster* held that “if a computer system operator learns
17 of specific infringing material available on his system and fails to purge such material from the
18 system, the operator knows of and contributes to direct infringement.” *Perfect 10*, 487 F.3d at ____.
19 Accordingly, it was “[b]ecause Napster knew of the availability of infringing music files, assisted
20 users in accessing such files, and failed to block access to such files, we concluded that Napster
21 materially contributed to infringement.” *Id.* Unlike in *Napster*, Io has offered no evidence that that
22 Veoh became aware of specific infringing material and failed to act, and here, Veoh uses a
23 centralized index in order to terminate access to infringing content upon notice.

24 Finally, after the Supreme Court’s decision in *Grokster*, it is clear that “[o]ne infringes
25 contributorily by intentionally inducing or encouraging direct infringement,” and that intent is
26 required for contributory infringement. 545 U.S. at 930. Io has presented no evidence that Veoh
27 had intent to infringe Io’s copyrights. Veoh has certainly never advocated or encouraged

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1 infringement of any kind. To the contrary, Veoh has always had a policy of excluding infringing
2 content, Papa Decl. ¶¶ 5-9, and has always acted expeditiously to remove any allegedly infringing
3 works upon notice and, as appropriate, to terminate the user account associated with the infringing
4 work if the user account had previously been subject to a copyright removal, Dunning Decl. ¶¶ 9-10.
5 There is no evidence to the contrary.

6 c. Veoh’s Website and Software are Capable of Substantial Non-
7 Infringing Uses

8 Nor is Veoh contributorily liable for the design of its video sharing tools. Since the Supreme
9 Court’s decision in *Sony*, 464 U.S. at 439, copyright law does not permit contributory infringement
10 claims against those providing a technology that, though used for both infringing and non-infringing
11 purposes, is “capable of substantial non-infringing uses,” *id.* at 442. The Ninth Circuit recently
12 explained that Google “cannot be held liable for contributory infringement solely because the design
13 of its search engine facilitates such infringement . . . [or] because it did not develop technology that
14 would enable its search engine to automatically avoid infringing images.” *Perfect 10*, 487 F.3d at
15 727 (citing *Grokster*, 545 U.S. at 931-32, 939 n.2). Io admits that Veoh is capable of non-infringing
16 uses. Scherb Opp. Decl., Exh. A, No. 8. That Veoh is capable of *substantial* non-infringing uses, is
17 evidenced by the existence on Veoh of content from respected, major content providers such as CBS
18 and Turner, Shapiro Dep. Tr. 33:17-19, 37:11-16, and by the minimal number of alleged
19 infringements compared to the large number of videos available on Veoh. Dunning Opp. Decl. ¶ 6.
20 To the extent Io attempts to impute knowledge for purposes of a finding of contributory liability
21 based upon Veoh’s design alone, this effort fails.

22 Io has failed to present evidence to support its claim of contributory infringement.

23 3. Veoh is Not Vicariously Liable

24 Io has also failed to present evidence sufficient to support its claim of vicarious infringement.
25 Vicarious liability for copyright infringement arises when a defendant enjoys a direct financial
26 benefit from another’s infringing activity and has the right and ability to supervise the infringing
27 activity. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). Veoh has neither the right and
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1 ability to control the infringing activity nor the requisite direct financial relationship with alleged
2 infringers.

3 a. Veoh Lacks the Right and Ability to Control the Allegedly Infringing
4 Activity

5 Veoh has neither the right nor the ability to control the allegedly infringing activity. First,
6 Veoh does not have the ability to control the infringing activity. As already noted, it is not feasible
7 for Veoh to review every user submission before it is made available on the Veoh system. Dunning
8 Dep. 129:17 to 130:15; Shapiro Dep. Tr. 84:16 to 85:1. Similarly, the Ninth Circuit recently held
9 that “[w]ithout image-recognition technology, Google lacks the practical ability to police the
10 infringing activities of third-party websites.” *Perfect 10*, 487 F.3d at 731. Because Veoh lacks the
11 ability to comprehensively review videos for infringements – video comparisons being even more
12 challenging than image comparisons – Veoh does not have the ability to control infringing content.

13 This distinguishes Veoh from Napster, which “had the ability to identify and police
14 infringing conduct by searching its index for song titles” upon notice from the music industry. *Id.*
15 Moreover, the Ninth Circuit stated that for “Napster to function effectively . . . file names must
16 reasonably or roughly correspond to the material contained in the files, otherwise no user could ever
17 locate any desired music.” *Napster*, 239 F.3d at 1023. There is no evidence in the record that the
18 allegedly infringing works in this case generally had titles resembling the titles of Io’s works, and in
19 fact the record shows that the allegedly infringing material had titles that did not match the actual
20 titles of Io’s alleged works. *Compare* Ruoff Decl. ¶¶ 13-14 (listing works claimed), *with id.* Exhs. D
21 & E (showing titles of allegedly infringing works). In any event, Io never provided Veoh with the
22 names of any titles for which to search.

23 Moreover, Napster “could have escaped liability by exercising its “reserved right to police
24 . . . to its fullest extent,” even despite its central index. *Napster*, 239 F.3d at 1024. The mere ability
25 to control a central index does not give rise to the ability to control infringing content. *Perfect 10*
26 held that “Google’s ability to control its own index, search results, and webpages does not give
27 Google the right to control the infringing acts of third parties even though that ability would allow
28

1 Google to affect those infringing acts to some degree.” *Perfect 10 v. Visa Int’l Serv. Ass’n*, ___ F.3d
 2 ___, 2007 WL 1892885, at *10 (9th Cir. July 3, 2007) (citing *Perfect 10*, 487 F.3d at 731). Here,
 3 Veoh responded to notices of infringement. Dunning Decl. ¶¶ 9-10. Veoh’s central index and its
 4 ability to terminate access to certain files only evidences an ability to control access to videos, not an
 5 ability to identify and terminate *infringing videos*. As noted, it is infeasible for Veoh to review all
 6 content and even when it reviews content, it is not in a position to determine infringing from non-
 7 infringing works. See *CCBill LLC*, 2007 U.S. App. LEXIS 12508, at *19 (noting that photographs
 8 could have been untruthfully described as “stolen” to create buzz and excitement only). Only with
 9 notice from content owners can Veoh identify and block infringements.

10 This fact is underscored by the fact that Io itself initially identified a work, *Prowl 3*, as
 11 having been infringed, and then changed its mind months later and conceded that it had not been
 12 infringed after all. Scherb Decl. ¶ 3. Compare Scherb Decl., Exh. H, No. 1 (the original
 13 identification of alleged infringements), with Scherb Decl., Exh. I, No. 1 (the supplemental
 14 response). If Io could not itself accurately identify whether user submitted works infringed Io’s
 15 works, it is unclear how Veoh could possibly have had the ability to do so.

16 Veoh also lacks the right to control the allegedly infringing activity. The “right and ability to
 17 control,” as it is understood in the common law of vicarious copyright infringement, arises from a
 18 special relationship between an infringer and another. Vicarious liability was an outgrowth of
 19 respondeat superior, which would make an employer liable for certain acts of his employee.
 20 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261-62 (9th Cir. 1996). Today, relationships
 21 such as the employer-employee relationship and the principal-agent relationship and those like them
 22 may give rise to a right and ability to control, see, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643,
 23 654 (7th Cir. 2003), but other relationships do not. The Second Circuit has distinguished landlord-
 24 tenant relationships, which do not create vicarious liability, from employer-employee relationships,
 25 which can give rise to such liability, and it used those examples as ends of a spectrum on which to
 26 place, and by which to evaluate, challenged conduct. *Shapiro, Bernstein and Co. v. H.L. Green Co.*,

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1 316 F.2d 304, 307-308 (2d Cir. 1963). Courts should be wary of finding the right and ability to
2 control in other contexts.

3 There are no facts suggesting any relationship between Veoh and alleged direct infringers
4 equivalent to an employer-employee or principal-agent relationship with respect to the alleged
5 infringing activity that would give Veoh the right and ability to control the alleged infringers'
6 conduct. Veoh and the alleged infringers are only connected in the loosest sense as anyone can
7 become a Veoh user. The main contact Veoh might have with an infringing user is to terminate that
8 user's account. Veoh goes to great lengths to remove infringing content from its service upon notice
9 and to protect the rights of content providers. It does not, however, have a relationship with alleged
10 direct infringers that gives it a right to control their infringing conduct, nor does it have the ability,
11 absent notice, to determine which of the multitude of videos on Veoh may be infringing. Veoh had
12 neither the right nor ability to control the allegedly infringing activity in this case.

13 Io argues that there is a significant licensing relationship between Veoh and its users in that
14 users who upload videos to Veoh grant Veoh a "nonexclusive" license to make those videos "freely
15 available" on Veoh and referring to Veoh's Terms of Use. Pl's. Mot. at 23. First, Io cites no law in
16 support of its claim. Second, a mere contractual relationship between an alleged direct infringer and
17 an alleged vicarious infringer does not give rise to the right to control. *See, e.g., Adobe Sys. Inc. v.*
18 *Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1047, 1053 (C.D. Cal. 2001) (denying summary
19 judgment to plaintiff despite fact that the alleged direct infringer contracted with defendant for a
20 booth at its trade show). Third, the provision of Veoh's Terms of Use that Io cites merely asks users
21 to acknowledge that any user provided content may be made freely available on Veoh. Pl's. Mot. at
22 23 (citing Veoh's Terms of Use).

23 b. Veoh Obtained No Financial Benefit Directly Attributable to the
24 Allegedly Infringing Activity

25 Although the Court need not reach the financial benefit inquiry because Veoh does not have
26 the right and ability to control the alleged infringing activity, it is also clear from the evidence that
27 that Veoh does not receive a financial benefit directly attributable to the allegedly infringing activity.

1 Direct financial benefit exists only where the availability of infringing material “acts as a draw for
2 customers” and there is a “causal relationship between the infringing activity and any financial
3 benefit.” *Ellison*, 357 F.3d at 1077, 1079. Thus, in *Ellison*, the existence of infringing content on
4 one of America Online’s Internet services was not a “draw” because it was a part of a larger service
5 with non-infringing content and there was no evidence that users joined the service for the illegal
6 content or left the service when the content was removed. *Id.* at 1079. However, where Napster
7 operated a file sharing service devoted to the traffic of unauthorized audio works and refused to
8 respond to takedown notices concerning those works, those works were a “draw.” *A&M Records,*
9 *Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

10 *Ellison* affirmed the grant of summary judgment to a copyright defendant, AOL, on the issue
11 of vicarious infringement. 357 F.3d at 1079. The court noted “the question before us is whether
12 there is a triable issue of a material fact regarding whether AOL received a direct financial benefit
13 from the copyright infringement.” It evaluated the evidence, a document stating the importance of
14 attracting and retaining subscribers for business and documents showing that many subscribers
15 inquired about AOL blocking access to the USENET group at issue, and concluded: “This evidence
16 is hardly compelling.” *Id.* (“The record lacks evidence that AOL attracted or retained subscriptions
17 because of the infringement or lost subscriptions because of AOL’s eventual obstruction of the
18 infringement.”).

19 While Io argues that *adult material* was once a draw to Veoh, Pl’s. Mot. at 20-21, adult
20 content does not equate to infringing content, and there is simply no evidence that Veoh ever
21 attempted to capitalize on providing *infringing material*. Io notes some number of Veoh users who
22 complained that Veoh removed adult content; however, in the words of *Ellison*, this evidence is
23 hardly compelling that infringement was a draw. 357 F.3d at 1079 (affirming summary judgment
24 for a copyright defendant despite complaints from users who lost access to a USENET group).
25 Neither in *Ellison* nor in this case was there evidence of complaints over lost *infringing* content.

26 Moreover, at the time of the alleged infringements in this case and at all times while Veoh
27 permitted adult content, Veoh generated no revenue from its service, and no direct financial benefit
28

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1 directly attributable to the alleged infringing activity. Only months after this lawsuit began and after
2 Veoh had banned adult content did Veoh realize any advertising revenue from its service. Papa
3 Decl. ¶ 2. In any event, there can be no direct financial benefit “where the infringer makes the same
4 kind of payment as non-infringing users.” Cf. H.R. Rep. No. 105-551 Part 2, at 54 (describing what
5 would not be a direct financial benefit in the DMCA context).

6 The undisputed evidence shows that both before and after Veoh changed its adult content
7 policy, infringing content has never been a draw for Veoh. To the contrary, Veoh has always
8 prohibited infringing content and has acted expeditiously to remove it when put on notice. These
9 actions make clear that Veoh has no interest in using infringing content as a draw. *Adobe Sys. Inc.*
10 *v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1052 (C.D. Cal. 2001) (denying summary
11 judgment to plaintiff when defendant stated its reputation would be harmed by existence of
12 infringing content at its trade shows and when defendant “expelled” vendors for “providing
13 adulterated and infringing products”). While the evidence indicates that Veoh does not derive a
14 financial benefit directly attributable to infringing conduct, at a bare minimum there is an issue of
15 fact on this issue and summary judgment for Io is improper.

16 **VI. CONCLUSION**

17 Io has moved for summary judgment as to liability on its direct and indirect claims for
18 copyright infringement without evidence to support the elements of those claims. The Court should
19 deny Io’s motion because Io has not and cannot establish the essential elements of its claims, and as
20 moot in the face of Veoh’s entitlement to DMCA safe harbor.

21
22 Dated: August 14, 2007

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23
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