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 10 VEOH NETWORKS, INC.

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

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
 REPLY IN SUPPORT OF ITS MOTION
 FOR SUMMARY JUDGMENT**

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

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1 **I. INTRODUCTION**

2 This is a clear case for DMCA section 512(c) safe harbor. Io chose to sue Veoh without
3 notifying Veoh of a single alleged infringement. It is undisputed that Veoh lacked knowledge of the
4 alleged infringements when it independently decided to disable access to all adult content, including
5 any alleged infringements of Io’s content, before Io filed this lawsuit.

6 In a strained attempt to defeat Veoh’s motion, Io argues that Veoh nonetheless should have
7 known of the alleged infringements and that, in any event, Veoh had the right and ability to control
8 the alleged infringements. With respect to the requirement of section 512(c)(1)(A), Io spends less
9 than a page discussing knowledge and in effect concedes that it was fatally lacking here. Io instead
10 pushes a vicarious liability theory under section 512(c)(1)(B), arguing that Veoh had the right and
11 ability to control the alleged infringements and received a financial benefit directly attributable to the
12 allegedly infringing activity. Io spends a significant part of its opposition arguing that the standards
13 for section 512(c)(1)(B) and for common law vicarious liability are identical. While the logical
14 extension of Io’s argument is that section 512(c) does not provide a safe harbor from vicarious
15 liability, a result clearly not intended by Congress, in this case Io’s arguments fail under either
16 standard.

17 To prop up its feeble argument that Veoh *did* have the right and ability to control the alleged
18 infringements, Io ignores DMCA case law and relies largely upon the *Napster* decision, without
19 acknowledging a critical point of distinction: the Ninth Circuit found that Napster had the ability to
20 identify and police infringing conduct by searching its index for song titles provided by content
21 owners. Here, Io never bothered to provide Veoh with titles for which to search. Even if it had,
22 nearly none of the alleged infringements uploaded to Veoh contained titles even remotely matching
23 those of Io’s alleged works. Veoh could not possibly have controlled alleged infringements it had no
24 practical ability to discern.

25 Io’s alternative argument, that Veoh does not meet threshold eligibility requirements for safe
26 harbor, is equally weak. Its position that Veoh failed to “reasonably” implement its strict repeat
27 infringer policy is half hearted and unsupported. Io’s more radical argument, that Veoh is not
28 eligible for safe harbor because the alleged infringements were “not by reason of storage at the

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1 direction of a user” is contrary to all authority and would render section 512(c)’s safe harbor
2 meaningless.

3 With the DMCA safe harbors, Congress carefully balanced the rights and responsibilities of
4 content providers and Internet service providers. Veoh has fully lived up to its obligations and is
5 entitled to safe harbor. Io, on the other hand, seeks to shift the entire burden of policing for
6 infringements onto Veoh without providing Veoh the basic information required to enable it to do
7 so. Io’s reading of the law would disqualify a service provider from safe harbor eligibility based
8 merely upon the fact that it hosts user content and intends to generate advertising revenue. This is
9 not what Congress had in mind.

10 Io has failed to present any viable issue of fact regarding Veoh’s eligibility for safe harbor,
11 and the Court should grant Veoh’s motion for summary judgment.

12 **II. VEOH MEETS THE THRESHOLD REQUIREMENTS FOR DMCA SAFE HARBOR**

13 Io concedes that Veoh meets most of the threshold requirements of DMCA safe harbor. Io
14 does not dispute that Veoh is a service provider as defined by subsection 512(k)(1)(B). *See* Def’s.
15 Motion for Summary Judgment (“Def’s. Mot.”) at 12. Nor does Io dispute that Veoh accommodates
16 and does not interfere with standard technical measures pursuant to subsection 512(i)(1)(B), or that
17 Veoh has an appointed agent to receive infringement notifications pursuant to subsection 512(c)(2).
18 *See id.* at 15-16.

19 Io also concedes that Veoh meets most of the requirements of subsection 512(i)(1)(A),
20 concerning repeat infringer policies. *See id.* at 13. This subsection requires adoption, reasonable
21 implementation, and communication of a repeat infringer policy. 17 U.S.C. §512(i)(1)(A). Io does
22 not contest that Veoh “adopted” a repeat infringer policy and does not contest that Veoh “informed”
23 its users of this policy. Io has saved only one issue for debate, having conceded every other point
24 regarding qualification for the safe harbor. Io rests its entire case on the allegation that Veoh has not
25 “reasonably implemented” the policy. Pl’s. Opp. to Def’s. Mot. for Summary Judgment (“Pl’s.
26 Opp.”) at 3-5.

27 Moreover, Io offers only one reason why Veoh implementation is supposedly unreasonable:
28 although Veoh blocks registration of new accounts of repeat infringers using user IDs and email

1 addresses, Dunning Declaration in Support of Veoh's Motion for Summary Judgement ("Dunning
2 Decl.") ¶ 11, Io argues that Veoh should *also* block registration of new Veoh accounts when a new
3 user attempts to access Veoh from a computer or network with an Internet Protocol ("IP") address of
4 a computer or network previously used by a terminated user.

5 Neither the language of the statute nor decisions interpreting the requirement require service
6 providers to block IP addresses, which are merely network or machine identifiers, as opposed to
7 usernames, which identify persons.¹ Section 512(i)(1)(A) requires only a "reasonably implemented .
8 . . . policy that provides for the termination in appropriate circumstances of subscribers . . . who are
9 repeat infringers." The statute imposes no specific obligation beyond reasonableness. *Cf.* H.R. Rep.
10 105-551, part 2, at 61; S. Rep. 105-190, at 52 (by requiring a repeat infringer policy, Congress was
11 not "suggesting that a provider must investigate possible infringements, monitor its service, or make
12 difficult judgments as to whether conduct is or is not infringing").

13 Not one decision interpreting this subsection has required that service providers block IP
14 addresses. For example in *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104 (W.D.
15 Wash. 2004), Corbis presented evidence that a user Amazon had terminated was able to create new
16 accounts with a slightly different user name. Corbis argued that this proved Amazon's policy was
17 not reasonably implemented under the DMCA. *Id.* at 1103-04. The court disagreed. *Id.* at 1104.
18 The court held that Corbis failed to present evidence to meet its summary judgment burden and
19 noted that the "silence" was "telling." *Id.* ("The mere fact that Posternow [a customer/subscriber]
20 appeared on zShops under a different user name and identity does not, by itself, create a legitimate
21 question of fact regarding the procedural implementation of Amazon's termination policy."). The
22 court also noted that the DMCA required a policy implementation that was "reasonable," not perfect.
23 *Id.* The evidence of Amazon's efforts to terminate the users' new accounts when put on notice
24 showed that Amazon's repeat infringer policy was working well. *Id.* 1104 n.7; *see also Perfect 10,*
25 *Inc. v. CCBill LLC*, 488 F.3d 1102, 2007 U.S. App. LEXIS 12508, at *10-11 (9th Cir. May 31,

26 ¹ It is apparent why IP address screening is an inappropriate tool for blocking repeat infringers. One
27 computer has one IP address but can have multiple users (mom, dad, sister, friend). Many
28 computers on one network, such as a company or school network, or coming from one internet
service provider, can all appear as coming from one IP address. *See* Def's. Req. for Judicial Notice
(attaching current Wikipedia entry explaining IP addresses).

1 2007) (holding that “[t]o identify and terminate repeat infringers, a service provider need not
 2 affirmatively police its users for evidence of repeat infringement.”). The plaintiff in *Corbis* at least
 3 attempted to offer evidence on this point, even though inadequate. Io does not even bother to offer
 4 any evidence that terminated repeat infringer were able to create new accounts on Veoh.² Io offers
 5 no evidence that Veoh’s current policy is unreasonable. It offers no evidence that restricting access
 6 based on IP address is either feasible or a requirement of a reasonable implementation of a repeat
 7 infringer policy.

8 To support its far-fetched theory that blocking IP addresses should be a requirement of any
 9 reasonable repeat infringer policy, Io relies largely on an unpublished *Napster* district court decision,
 10 *A & M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 U.S. Dist. LEXIS 6243, at *28-29 (N.D.
 11 Cal. May 5, 2000), that does not support Io’s position. That decision denied Napster summary
 12 judgment as to DMCA section 512(a) safe harbor because plaintiffs submitted expert testimony
 13 raising doubts about the reasonableness of Napster’s particular policy implementation. *Id.* The
 14 district court denied summary judgment on the ground that plaintiff had presented a triable issue of
 15 fact. The court reached no conclusion about whether IP address screening should have been required
 16 of Napster, or even whether IP address screening is feasible or effective. Even if it had, a finding of
 17 fact by another court in another litigation cannot substitute for evidence that Io must produce to this
 18 Court to meet its summary judgment burden. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir.
 19 2003) (“Factual findings in one case ordinarily are not admissible for their truth in another case. . .
 20 .”).

21 There is no evidence in the record to justify denying summary judgment to Veoh. To the
 22 contrary, the undisputed evidence shows Veoh terminated more than 1,000 users for alleged repeat
 23 copyright violations, even in the absence of proof of actual repeat violations. Dunning Decl. ¶ 12.
 24 In fact, Veoh goes well beyond the requirements of section 512(i)(1)(A) and when it receives notice
 25 of an alleged infringement, uses the unique hash of that file to terminate access to any other identical
 26 files, and prevents additional identical files from being uploaded to Veoh in the future *by any user*.

27 ² Io’s assertion that its Vice President Keith Ruoff could obtain a second account on Veoh, Pl’s.
 28 Opp. at 4, is not evidence of a failed policy, as there is no evidence that Mr. Ruoff is a repeat
 infringer and should have been blocked.

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1 Dunning Decl. ¶ 13.

2 Io has failed to raise a triable issue of fact as to the reasonableness of Veoh’s implementation
3 of its repeat infringer policy.

4 **III. VEOH QUALIFIES FOR SECTION 512(c) SAFE HARBOR BECAUSE THE**
5 **ALLEGEDLY INFRINGING MATERIAL RESIDED ON VEOH’S SYSTEM AT THE**
6 **DIRECTION OF USERS.**

7 Io, without citation to any legal authority, very briefly argues that Veoh is not entitled to
8 section 512(c) safe harbor for “two types of new works from the video files it acquires from its
9 users.” Pl’s. Opp. at 5-6. Io argues that, as to both (1) files that are automatically transcoded into
10 Flash format and (2) thumbnails extracted from video files uploaded by users, Veoh is not entitled to
11 safe harbor because those files do not reside on Veoh’s system at the direction of users as required
12 by section 512(c)(1).

13 Both the plain language of section 512, and the interpreting case law doom Io’s argument.
14 Veoh is not disqualified because of its automated processing of user uploaded files so that other
15 users can actually *view* such files (Flash format), and *find* such files (thumbnails). Because any
16 service provider must engage in basic processing of user provided content in order for it to be
17 available to other users, the result urged by Io would mean no service provider could be eligible for
18 section 512(c) safe harbor.

19 Veoh’s automated Flash formatting, using widely employed third-party software, is a
20 necessary part of the process of making users’ videos available to other users. User-submitted
21 videos may arrive at Veoh’s computers in any of “several hundred” formats. Dunning Dep. Tr.
22 62:19 to 63:5. The videos are automatically transcoded into Flash format for compatibility purposes,
23 as the vast majority of Web users have software that play videos in Flash format. The process is
24 entirely automated. Decl. of Ted Dunning Submitted in Supp. of Def. Veoh Networks, Inc.’s Opp.
25 to Pl’s. Mot. for Summary (“Dunning Opp. Decl.”) ¶ 3. Io’s argument that Veoh’s automated
26 extraction of thumbnails, to allow users to find videos uploaded by other users, takes Veoh outside
27 the 512(c) safe harbor for those files is irrational. It makes no sense to provide a safe harbor for
28

1 hosting material that no one can find.³ Both Flash conversion and thumbnail extraction are the kinds
 2 of basic and automatic processing of user material by a service provider that Congress intended to
 3 protect with the section 512(c) safe harbor.

4 The DMCA permits service providers seeking section 512(c) safe harbor to do more than
 5 merely store bits of data. Subsection 512(c)(1)(A)(iii) makes plain that service providers do not lose
 6 safe harbor by providing access to content. 17 U.S.C. §512(c)(1)(A)(iii) (presupposing access and
 7 requiring service providers “remove, or *disable access to*” infringing material) (emphasis added).
 8 Service providers for purposes of the 512(c) hosting safe harbor, (unlike for purposes of the 512(a)
 9 conduit safe harbor), may also modify content and still qualify, as evidenced by the different
 10 definitions of “service provider” applicable to these sections. *Compare* 17 U.S.C. §512(k)(1)(A)
 11 (defining “service provider” for 512(a) purposes as “an entity offering the transmission . . . of
 12 material of the user’s choosing, *without modification* to the content”) (emphasis added), with *id.*
 13 §512(k)(1)(B) (defining the term for 512(c) purposes without the italicized language).

14 Unsurprisingly, cases construing DMCA safe harbor apply it to service providers who
 15 automatically process, recast, and provide access to user-submitted materials. In *Corbis*, Amazon
 16 users would use Amazon’s software to create web pages to advertise the sale of products, and
 17 Amazon allowed users to upload images to help make the sale. 351 F. Supp. 2d at 1094. *Corbis*
 18 sued Amazon based on Amazon’s users’ use of allegedly infringing images. *Id.* at 1096-97. The
 19 court recognized Amazon’s entitlement to safe harbor. *Id.* at 1110-11. That Amazon’s software
 20 automatically created the web pages incorporating *Corbis*’s images, images that made it possible for
 21 buyers to find the products they wished to purchase, did not deprive Amazon of safe harbor. *See*
 22 *also CoStar Group Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 692 & n.2, 703 (D. Md. 2001) (safe
 23 harbor would apply when service provider hosted real estate listings with allegedly infringing
 24 photographs submitted by users, allowed other users to view those listings, and sold advertising

25 ³ While Veoh’s automatic thumbnail extraction and use of those thumbnails for search purposes
 26 clearly fall within section 512(c), they also fall within the information location tool safe harbor
 27 provided by section 512(d) (protecting use of directories, pointers, and references to online content).
 28 Also, as Veoh argues in its Opposition to Io’s summary judgment motion, both Flash preview
 generation and thumbnail extraction are automatic acts done without volition. Def’s. Opp. to Io’s
 Summary Judgment Motion (“Def’s. Opp.”) at 7-13. Moreover, any thumbnail generation is not
 infringement, but a fair use. *Id.* at 13-16.

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1 space on its website).

2 Under Io’s view, no Internet service provider could qualify for section 512(c) safe harbor,
3 including user content sites like Veoh and the very chatrooms Congress specifically singled out for
4 protection. Congress intended the DMCA to facilitate the robust development of electronic
5 communications, not destroy it. *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, No. 05-15170, App.
6 LEXIS 15824, at *8 n.2 (9th Cir. July 3, 2007) (The DMCA’s purpose was to “facilitate the robust
7 development and world-wide expansion of electronic commerce, communications, research,
8 development, and education in the digital age”) (quoting S. Rep. 105-190, at 1-2). The automated
9 transcoding of files into Flash format and the automated creation of thumbnails both fall within
10 section 512(c) safe harbor.

11 **IV. THE TWO CONDITIONS OF SUBSECTION 512(c)(1)(B) ARE NOT IDENTICAL**
12 **TO THE COMMON LAW ELEMENTS OF VICARIOUS INFRINGEMENT, AND**
13 **REGARDLESS, IO CANNOT PREVAIL UNDER EITHER STANDARD.**

14 Io wrongly argues that section 512(c) simply does not provide any safe harbor from vicarious
15 liability. Pl’s. Opp. at 8 (“There may be other sections of the DMCA that provide protection for
16 ISPs not available at common law, but §512(c)(1)(B) is not one of them”). This argument is
17 inconsistent with the plain language of section 512, the expressed intent of its drafters, and with the
18 need to give section 512(c) meaningful effect. It therefore must fail. As demonstrated below, even
19 assuming *arguendo* the standard set forth in section 512(c)(1)(B) is identical to the common-law
20 standard for vicarious liability, the cases interpreting the common-law standard in the context of
21 Internet service provider liability also make clear that Veoh (a) did not have the right and ability to
22 control the infringements alleged in this case and (b) did not receive a financial benefit directly
23 attributable to, the alleged infringements.

24 **A. Section 512(c)(1)(B) Is Not Identical to the Common Law Standard For**
25 **Vicarious Liability**

26 Io attempts to divert the Court’s attention from the section 512(c) safe harbor and the
27 relevant case law interpreting section 512(c), by instead arguing that, despite the contrary authority,
28 section 512(c) does not provide a service provider safe harbor from vicarious liability at all.

To qualify for section 512(c) safe harbor, a service provider must “not

1 receive a financial benefit directly attributable to the infringing activity, in a case in which the
 2 service provider has the right and ability to control such activity.” 17 U.S.C. §512(c)(1)(B). While
 3 the language of subsection 512(c)(1)(B) is similar to the two prongs of common law vicarious
 4 liability, Congress clearly intended for the DMCA to shield against vicarious infringement.
 5 “*Subsection (c)* limits the liability of qualifying service providers for claims of direct, *vicarious* and
 6 contributory infringement.” S. Rep. 105-190, at 43 (emphasis added); *see also CCBill*, 2007 U.S.
 7 App. LEXIS 12508, at *28 (quoting verbatim the legislative history approvingly).⁴ Io’s argument
 8 that section 512(c) does not provide safe harbor from vicarious liability, Pl’s. Opp. at 8, is at odds
 9 with the legislative history specifically discussing the section 512(c) safe harbor.

10 To support its argument that the DMCA provides no safe harbor for vicarious liability, Io
 11 cites to the Ninth Circuit’s decision in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 2007 U.S.
 12 App. LEXIS 12508 (9th Cir. May 31, 2007). While Io claims that the “Ninth Circuit has found that
 13 the ‘financial benefit’ prong of 512(c)(1)(B) should be considered *identical to and analyzed in the*
 14 *same manner as* the ‘financial benefit’ prong from the common law doctrine” (Pl’s. Opp. at 8
 15 (emphasis added)), Io misleadingly misstates *CCBill*’s holding and discussion of the financial
 16 benefit prong. First, *CCBill* specifically affirms that the section 512(c) safe harbor limits the liability
 17 of service providers for claims of vicarious infringement. 2007 U.S. App. LEXIS 12508, at *28
 18 (“Section 512(c) limits the liability of qualifying service providers for claims of direct, vicarious,
 19 and contributory infringement.”). With regard to the “financial benefit directly attributable to the
 20 infringing activity” inquiry, contrary to Io’s assertion *CCBill* does not say that it should be
 21 considered “identical to and analyzed in the same manner as” (Opp. at 7) the financial benefit prong
 22 from the common law doctrine, but merely that it “should be interpreted *consistent with the*
 23 *similarly-worded common law standard for vicarious copyright liability*” 2007 U.S. App. LEXIS
 24 12508, at *28 (emphasis added). *CCBill* held that the plaintiff failed to raise a genuine issue of fact
 25 that defendant received a direct financial benefit from infringing activity. *Id.* Accordingly, the
 26 *CCBill* case did not reach the right and ability to control of subsection 512(c)(1)(B) and held that

27 ⁴ Commentators writing in the years following the DMCA’s enactment make this clear. *See* 3
 28 Melville B. Nimmer & David Nimmer, *Nimmer on Copyrights* §12B.04[A][2] (“The legislative
 history clearly intends to extend this safe harbor to vicarious liability.”).

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1 defendant would be entitled to section 512(c) safe harbor so long as it met the threshold
2 requirements. *Id.*

3 Section 512(c) unambiguously provides safe harbor from vicarious liability, and the relevant
4 case law makes clear that Veoh meets the requirements of subsection 512(c)(1)(B) because it lacked
5 both the right and ability to control the allegedly infringing activity in this case, and did not receive a
6 financial benefit directly attributable to the activity.

7 **B. Veoh Lacked the Right and Ability to Control the Allegedly Infringing Activity**

8 Io has failed to raise any genuine issues to challenge the inescapable conclusion that Veoh
9 lacked the practical ability to control the alleged infringements in this case. Both the DMCA cases
10 cited by Veoh in its opening brief and the cases interpreting the right and ability to control prong at
11 common law make this abundantly clear.

12 Under Io’s formulation, the mere fact that a service provider hosts content at the direction of
13 its users gives the service provider the right and ability to control any alleged infringements. Its
14 position flies in the face of both statutory language and the cases interpreting section 512(c). The
15 statute’s language itself establishes that the mere ability to control a website in general does not
16 translate into the ability to control infringement. Io’s assertion that Veoh “has the right and ability to
17 decide *what users can and cannot do on its system*” and therefore has an ability to control
18 infringement is misplaced. *See* Pl’s. Opp. at 22 (emphasis added). Under section 512(c), any
19 service provider that qualifies for safe harbor *controls* its system by definition: section 512(c) only
20 applies to “material that resides on a system or network *controlled or operated* by or for the service
21 provider.” 17 U.S.C. §512(c)(1) (emphasis added). Io has failed to present any evidence that Veoh
22 had the ability to control the allegedly *infringing* activity in this case, and has failed to raise a
23 material issue of fact on this prong.

24 If when Io says that Veoh controls its users Io means that Veoh can remove content or
25 terminate accounts, this argument fails as well. Courts have routinely held that ‘the right and ability
26 to control infringing activity, as the concept is used in the DMCA, cannot simply mean the ability of
27 a service provider to remove or block access to materials posted on its website or stored in its
28 system.” *Corbis*, 351 F. Supp. 2d at 1110; *accord Hendrickson v. eBay*, 165 F. Supp. 2d 1082, 1094,

1 1096 (C.D. Cal. 2001) Courts have reached the same conclusion when applying the common-law
2 standard for vicarious liability. *CoStar*, 164 F. Supp. 2d at 704 (citing *Hendrickson* and applying
3 common law vicarious test). Io has no sufficient answer to these cases but must instead resort to
4 cases decided outside the DMCA context that nonetheless still fail to support its position.

5 While Io relies heavily upon the Ninth Circuit’s discussion of the common-law elements of
6 vicarious liability in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), that
7 decision is readily distinguishable upon the facts, and *Napster* supports a finding of no right and
8 ability to control here. In *Napster* the Ninth Circuit explained that the district court “failed to
9 recognize that the boundaries of the premises that Napster ‘controls and patrols’ are limited. . . . Put
10 differently, Napster’s reserved ‘right and ability’ to police is cabined by the system’s current
11 architecture.” *Napster*, 239 F.3d at 1023-24. The Ninth Circuit went on to find that Napster’s
12 system had the “ability” to locate infringing material listed on its file name indices, and it accepted
13 the district court’s conclusion that plaintiffs had demonstrated a likelihood of success on the merits
14 of their vicarious copyright infringement claim. *Id.* at 1024. The Ninth Circuit specifically stayed
15 the preliminary injunction of the district court as overbroad, however, because the district court
16 placed “on Napster the entire burden of ensuring that no ‘copying, downloading, uploading,
17 transmitting, or distributing’ of plaintiffs’ works occur on the system. As stated, we place the
18 burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such
19 works available on the Napster system before Napster has the duty to disable access to the offending
20 content.” *Id.* at 1027.

21 The Ninth Circuit recently explained, in analyzing the “control” element of common law
22 vicarious liability, that Napster “had the ability to identify and police infringing conduct by
23 searching its index for song titles”. *Perfect 10 v. Amazon.com*, 487 F.3d at 731 (9th Cir. May 16,
24 2007). “[U]nder *Grokster*, a defendant exercises control over a direct infringer when he has both a
25 legal right to stop or limit the directly infringing conduct, *as well as the practical ability to do so*.
26 *Id.* at 730 (emphasis added).

27 In this case, Io has presented no evidence that Veoh had the practical ability to control the
28 allegedly infringing works. Io admits it never notified Veoh about the alleged infringements. Decl.

1 of Matthew Scherb in Support of Pl.’s Mot. for Summary Judgment (“Scherb Decl.”), Ex. L, RFA
 2 No. 61; *id.* Ex. K, RFA Nos. 21, 22, 24. Io never provided Veoh with the names of any titles for
 3 which to search, and even if it had, the record shows that the allegedly infringing files bore titles, in
 4 almost every case, that did not match the actual titles of Io’s alleged works. *Compare* Ruoff Decl. ¶¶
 5 13-14 (listing works claimed), *with id.* Exhs. D & E (showing titles of allegedly infringing works).
 6 Io admits that none of its alleged works contained copyright notices, *id.* Ex. J, RFA No. 58, or
 7 identified Io as the author, except for one work that contained a Titan Media logo some four minutes
 8 into the clip. Ruoff Decl., Ex. F at 2. Moreover, the allegedly infringing works in this case were
 9 hardly “blatant” infringements in terms of labeling and length, as Io claims. Io has admitted that
 10 nearly all of the allegedly infringing works were less than a minute in length, and the majority of
 11 these were less than about six seconds in length. Scherb Opp. Decl., Ex. D, (Pl.’s. Resp. to Def’s.
 12 Third Set of Requests for Admissions, Nos. 65-78).

13 The fact that Veoh lacked the ability to control the alleged infringements is underscored by
 14 the fact that Io *itself* initially identified a work as having been infringed, and then changed its mind
 15 months later and conceded that it had not been infringed after all, Veoh's Motion for Summary
 16 Judgment at 21, another point to which Io fails to respond. If Io could not itself accurately identify
 17 whether user submitted works infringed Io’s works, it is unclear how Veoh could possibly have had
 18 the ability to do so.

19 Veoh has always controlled its system to the limits of the system’s architecture, and there is
 20 no evidence to the contrary. Veoh fully implemented its DMCA takedown and repeat infringer
 21 policies. Dunning Decl. ¶¶ 9-12. Veoh’s ability to terminate access to certain files only evidences
 22 an ability to control access to material on its system, not an ability to identify and terminate
 23 *infringing material*.

24 While Io argues that it was Veoh’s obligation to review every user submission, Io does not
 25 explain how this would have given Veoh the ability to identify and control the alleged infringements.
 26 In any event, as explained in Veoh’s opening brief, section 512 and the interpreting case law make
 27 clear that a service provider need not monitor its users submissions under any circumstances.
 28 Moreover, section 512(m) specifically states in relevant part “[n]othing in this section shall be

1 construed to condition the applicability of subsections (a) through (d) on—a service provider
 2 monitoring its service or affirmatively seeking facts indicating infringing activity, except to the
 3 extent consistent with a standard technical measure complying with the provisions of subsection (i).
 4 . . . 17 U.S.C. §512(m).

5 While Io claims Veoh improperly attempts to inject knowledge as an element of
 6 512(c)(1)(B), Opp. at 9-12, Io misses the point. There is no ability to control infringing content that
 7 a service providers lacks the practical ability to discern. Io’s suggestion that Veoh should either
 8 decrease the number of submissions it processes to a manageable number which it can review or
 9 question its “legitimate existence”, Pl’s. Opp. at 21-22, reveals Io’s misapprehension of both the
 10 control requirement and the balance struck by the DMCA. *See also* 2007 U.S. App. LEXIS 15824,
 11 *41-42 n.17 (“there are many providers of essential services who could limit infringement by
 12 refusing to offer those services,” be they “software operators, network technicians, or even utility
 13 companies,” but they are not be vicariously liable.) .

14 Io’s attempt to rely upon vicarious liability cases concerning flea-markets and dance halls, in
 15 lieu of discussing DMCA or even Internet cases, is even more desperate than its reliance on *Napster*.
 16 The *Arista* litigation to which Io cites, Pl’s. Opp. at 21, perfectly illustrates Io’s improper reliance on
 17 those cases. An earlier, published decision in the *Arista* case distinguished the real-world flea
 18 market scenario from an Internet service provider scenario, simultaneously showing why flea-market
 19 and dance hall cases have no application to this case while underscoring why section 512(c)(1)(B) of
 20 the DMCA is not a proxy for the vicarious liability prongs. *Arista Records, Inc. v. Flea World, Inc.*,
 21 356 F. Supp. 2d 411, 417 (D.N.J. 2005). The court rejected a flea-market’s attempt to avail itself of
 22 the DMCA:

23 The public policy creating a safe harbor for ISPs is informed by considerations of lack of ISP
 24 control and knowledge of the millions of items of data flowing daily through the providers
 25 facilities; these considerations are absent in this matter’s lessor/lessee relationships arising
 from the rental of real market space to vendors on Defendants’ premises. For these reasons,
 Defendants’ ninth affirmative defense will remain stricken.

26 *Id.*

27 Io throws out several other arguments as to why Veoh had the right and ability to control the
 28 alleged infringements without much explanation, apparently hoping that something will stick. Each

1 of these is easily disposed of. First, contrary to Io's characterization, Veoh's automatic generation of
 2 Flash previews and thumbnail extractions as part of the video publication process, Pl's. Opp. at 20,
 3 do not confer the right and ability to control. Even Io does not explain this argument. The
 4 undisputed evidence shows that Veoh's automated publication process does not involve human
 5 intervention and does not give Veoh the right or ability to control infringements. Dunning Opp.
 6 Decl. at 3-4. Io has offered no evidence to the contrary. Second, Io's reference to 18 U.S.C. §2257
 7 and claim that Veoh failed to comply with the section's labeling requirement, Pl's. Mot. at 24, are
 8 irrelevant. Section 2257 has nothing to do with a right or ability to control infringements, let alone
 9 copyright, and does not even apply to Veoh.⁵ In fact, this Court denied discovery concerning section
 10 2257 as irrelevant in its Order dated April 13, 2007 (docket no. 63), stating that Io "has not
 11 convincingly demonstrated that Veoh's compliance (or not) with that statute is relevant or
 12 reasonably calculated to lead to the discovery of admissible evidence."⁶

13 In addition to lacking the practical ability to control alleged infringements, Veoh also does
 14 not have the type of relationships with its users that give it the *right* to control the alleged

15 ⁵ 18 U.S.C. §2257 is a statute that requires the maintenance of certain records in connection with the
 16 *creation* of adult content. It is plain on the face of the statute that Section 2257's reporting
 17 requirements apply only to one who "produces" sexually explicit conduct, and would not apply to
 18 Veoh. 18 U.S.C. §2257(a). "Produces . . . **does not** include mere distribution or any other activity
 19 which does not involve hiring, contracting for managing, or otherwise arranging for the participation
 20 of the performers depicted." 18 U.S.C. §2257(h)(3) (emphasis added); *see also Sundance Assocs.,*
 21 *Inc. v. Reno*, 139 F.3d 804, 807-08, 810-11 (10th Cir. 1998) (invalidating Attorney General's
 22 regulation that attempted to broaden the definition of "produces"). Veoh has never produced adult
 23 content.

24 ⁶ Just as section 2257 is irrelevant to Veoh's right and ability to control infringing activity, so are the
 25 plethora of state statutes regarding labeling requirements for recordings to which Io string cites.
 26 Pl's. Opp. at 23 & n.2. For example, the two California statutes that Io cites, both criminal laws, are
 27 irrelevant to this case. Section 653w prohibits the knowing possession of a "physical embodiment"
 28 of an audiovisual work that does not identify the manufacturer and author. Cal. Penal Code
 §653w(a). On its face it does not apply to electronic dissemination, is irrelevant to this case, and
 certainly does not demonstrate Veoh's right and ability to control infringement. To the contrary, the
 statute specifically makes knowledge a prerequisite for a violation. In addition, the statute does not
 apply to service providers like Veoh. Veoh only republishes the title and description provided by its
 users, which makes it immune from liability under section 230 of the Communications Decency Act,
 47 U.S.C. Sec. 230., which preempts inconsistent state laws *Stoner v. eBay Inc.*, 56 U.S.P.Q.2d
 1852 (Cal. Super. Ct. 2000) (holding section 653w does not apply to eBay because of section 230).
 In addition, section 653aa prohibits the knowing, widespread electronic dissemination of an
 audiovisual work, but only by those who do not provide a valid email address for contact. Cal. Penal
 Code §653aa(a). Obviously, Veoh provides valid contact information through its website. Finally,
 the statute explicitly does not apply to service providers at all. *Id.* §653aa(f) (excepting service
 providers).

1 infringements. Io argues the right to control exists simply because Veoh's users agree to a Terms of
 2 use that prohibit certain activities, including the submission of infringing content, and gives Veoh
 3 the right to remove infringing material. Pl's. Opp. at 18. Such policies alone clearly do not evidence
 4 a right to control. *E.g., Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, No. 05-15170, 2007 U.S. App.
 5 LEXIS 15824, at *33 (9th Cir. July 3, 2007). In *Visa*, defendant's policies prohibited its members
 6 from providing services to "merchants engaging in certain illegal activities" and required members
 7 to "investigate merchants suspected of . . . illegal activity and to terminate" violators. *Id.* at *33.
 8 The Ninth Circuit held that, "even with all reasonable inferences drawn in Perfect 10's favor," the
 9 existence of defendant's policies "cannot support a finding" of the right and ability to control prong
 10 of vicarious infringement. *Id.*

11 Moreover, policies, such as Veoh's, that prohibit infringement, provide for removal of
 12 infringing content, and provide for termination of repeat infringers are *required* by the DMCA. It
 13 would truly be an absurd result for Veoh to lose DMCA safe harbor for adopting and implementing
 14 the very policies that the DMCA requires. In *Hendrickson*, 165 F. Supp. 2d at 1094, 1096, the court
 15 granted eBay's summary judgment motion based on DMCA safe harbor despite eBay's "limited
 16 monitoring" of its website for and removal of apparent infringements acknowledging that Congress
 17 wanted to encourage such monitoring. *Id.* at 1094; 17 U.S.C. §512(m)(1) (making clear that all
 18 DMCA safe harbors are available to a service provider regardless of whether it is "monitoring its
 19 service or affirmatively seeking facts indicating infringing activity"). Further, the court noted that,
 20 because the DMCA requires disabling access to infringing content upon notice, "Congress could not
 21 have intended for courts to hold that a service provider loses immunity under the safe harbor
 22 provision of the DMCA because it engages in acts that are specifically required by the DMCA." *Id.*
 23 at 1093-94. Other courts reach the same conclusion. *E.g., CoStar*, 164 F. Supp. 2d at 704 (citing
 24 *Hendrickson*); *Corbis*, 351 F. Supp. 2d at 1110 (same).⁷ The undisputed evidence shows Veoh lacks

25
 26 ⁷ That *Hendrickson* concerned alleged direct infringers who used a website to sell content offline in
 27 no way make that case's pronouncements approving monitoring and DMCA policies any less viable.
 28 *Cf.* Pl's. Mot. at 19-20 (futilely attempting to distinguish *Hendrickson*). Moreover, both *Corbis* and
CoStar involved online content, despite Io's contrary argument concerning *Corbis*. *Compare* Pl's.
 Opp. at 20, *with Corbis*, 351 F. Supp. 2d at 1094, 1096-97 (discussing the uploading of *Corbis*
 allegedly copyrighted images).

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1 the right and ability to control under subsection 512(c)(1)(B).

2 **C. Veoh Does Not Receive a Financial Benefit Directly Attributable to the Alleged**
3 **Infringing Activity**

4 Because Veoh lacks the right and ability to control the alleged infringement, the Court need
5 not reach the financial benefit question. However, Veoh also satisfies section 512(c)(1)(B) because
6 it “does not receive a financial benefit directly attributable to the infringing activity.” Despite the
7 fact that the statute requires that the “financial benefit” be “directly attributable” to the infringing
8 activity, Io argues that Veoh receives a sufficient financial benefit merely because “video files serve
9 as a draw to veoh.com” and “Defendant benefits when users come to their website.” Pl.’s Opp. at
10 16. Io asserts that “[t]hese facts alone are sufficient to establish a draw.” *Id.* Under Io’s
11 formulation, if any infringing material is ever posted to a commercial service provider’s website, the
12 service provider would be deemed to have received a financial benefit under section 512(c)(1)(B).
13 Again Io ignores the language of the statute, the legislative history and the case law.

14 Io fails even to address the relevant legislative history cited in Veoh’s motion:

15 In general, a service provider conducting a legitimate business would not be considered to
16 receive a “financial benefit directly attributable to the infringing activity” where the infringer
makes the same kind of payment as non-infringing users of the provider’s service.

17 H.R. Rep. No. 105-551, pt. 2, at 50; S. Rep. No. 105-190, at 44 (same). There is no evidence that
18 Veoh received revenue from the alleged infringements different in kind from any revenue from non-
19 infringing material. In its motion Veoh cited to the district court opinion in *CoStar*, which held that,
20 since no users made any payments for use of a service provider’s site, there could be no direct
21 financial benefit as a result of the infringing conduct and therefore safe harbor was appropriate. 164
22 F. Supp. 2d at 705. Io is wrong when it says that *CoStar* is inconsistent with *Napster* and other
23 Ninth Circuit precedent. Pl.’s Opp. at 15. *CoStar* is a DMCA case analyzing the requirements for
24 section 512(c) safe harbor while all of the Ninth Circuit cases to which Io cites are analyzing the
25 elements of common law vicarious liability.

26 While the financial benefit addressed in section 512(c)(1)(B) is not “identical” to the
27 common law standard for financial benefit under the common-law of vicarious liability for the
28 reasons addressed in Section IV.A. above, Io is also wrong even under the common-law standard.

1 The *Napster* decision upon which it relies is readily distinguishable from *CoStar* and from this case.
2 Napster operated a file sharing service *devoted* to trafficking in unauthorized audio works, and it
3 refused to respond to takedown notices concerning those works; therefore, the infringing works were
4 found to be a “draw.” *Napster*, 239 F.3d at 1023. Neither the *Costar* defendant nor Veoh operate a
5 site devoted to unauthorized works, a point which Io effectively concedes. Pl’s. Opp. at 16 (“The
6 percentage of infringing material available at www.veoh.com may be smaller than that in Napster.”).

7 Moreover, Napster’s view of direct financial benefit must be read in light of the Ninth
8 Circuit’s more recent decision in *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004). *Ellison*
9 explains that there must be a “causal relationship between the *infringing activity* and any financial
10 benefit.” *Id.* at 1079 (emphasis added). A link between other activities and financial benefit will not
11 do. Therefore, when users complained to AOL about losing access to a USENET group that
12 contained some infringing content, that was not evidence that users were drawn to infringing
13 content, but to the USENET group. *Id.* Similarly, in this case, Io’s contention that users were drawn
14 to video content or adult video content, for which Io offers no evidence, Pl’s. Opp. at 16, does not
15 support a conclusion that users were drawn to the allegedly infringing content. In addition, at the
16 time of the alleged infringements in this case, Veoh generated no revenue from its service, and no
17 financial benefit directly attributable to the alleged infringing activity. Papa Decl. in Support of
18 Veoh’s Motion for Summary Judgment (“Papa Decl.”) ¶¶ 2, 10.

19 The undisputed evidence shows that, both before and after Veoh changed its adult content
20 policy, infringing content has never been a draw for Veoh. To the contrary, Veoh has always
21 prohibited infringing content and has acted expeditiously to remove it when aware of alleged
22 infringements. These actions make clear that Veoh does not use such content as a draw. *Adobe Sys.*
23 *Inc. v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1052 (C.D. Cal. 2001) (denying summary
24 judgment to plaintiff when defendant stated its reputation would be harmed by existence of
25 infringing content at its trade shows and when defendant “expelled” vendors for “providing
26 adulterated and infringing products”).

27 Both because Veoh lacked the right and ability to control the alleged infringing activity, and
28 did not receive a financial benefit directly attributable to alleged infringing activity, Veoh meets the

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1 requirements of subsection 512(c)(1)(B) and is entitled to safe harbor. There is no genuine factual
2 dispute on that point.

3 **V. THERE IS NO ISSUE OF FACT THAT VEOH MEETS ALL THE REQUIREMENTS**
4 **OF SUBSECTION 512(c)(1)(A)**

5 Acknowledging the weakness of its position, Io devotes less than a page of its opposition to
6 subsection 512(c)(1)(A), and focuses this portion of its argument entirely on subsection
7 512(c)(1)(A)(ii). Pl’s. Opp. at 24-25. Io thus concedes that Veoh lacked actual knowledge of
8 infringement pursuant to subsection 512(c)(1)(A)(i), and that Veoh, “upon obtaining such
9 knowledge or awareness, acts expeditiously to remove, or disable access to,” infringing material
10 pursuant to subsection 512(c)(1)(A)(iii). Io contends only that Veoh was “aware of facts or
11 circumstances from which infringing activity is apparent,” *id.* §512(c)(1)(A)(ii), and should lose safe
12 harbor on that basis. In fact, by conceding that Veoh meets the requirements of 512(c)(1)(A)(i) and
13 (iii), Io concedes that Veoh meets the requirements of 512(c)(1)(A), because even if Veoh fails
14 512(c)(1)(A)(ii), it is still entitled to safe harbor if, when aware of infringing material, it
15 expeditiously removes it, pursuant to subsection (c)(1)(A)(iii), which Io has conceded.

16 Io’s fails to cite any authority to support its contention that Veoh was aware of facts or
17 circumstances from which the alleged infringements were apparent. Io fails even to address the
18 *CCBill* case, which rejected out of hand the type of “red flag” arguments upon which Io continues to
19 rely. *Compare* Def’s. Mot. for Summary Judgment at 17-18 (raising *CCBill* and arguments
20 concerning subsection 512(c)(1)(A)(ii)), *with* Pl’s. Opp. at 24-25. Io summarily refers the Court to
21 its own motion for summary judgment, to which Veoh has responded.

22 There is no genuine factual dispute as to whether Veoh meets the requirements of
23 512(c)(1)(A), and Veoh is entitled to safe harbor as a matter of law.

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