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and Rondor Music International, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

VEOH NETWORKS, INC., a California corporation, Plaintiff, vs. UMG RECORDINGS, INC., a Delaware Corporation; UNIVERSAL MUSIC CORP., a New York corporation; SONGS OF UNIVERSAL, INC., a California corporation; UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC., a Delaware corporation; RONDOR MUSIC INTERNATIONAL, INC., a California corporation; and DOES 1-10 INCLUSIVE, Defendants.	Case No. 07 CV 1568 TJW (BLM) **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER** **FILED CONCURRENTLY HEREWITH: DECLARATION OF BENJAMIN GLATSTEIN IN SUPPORT OF MOTION** Date: October 9, 2007 Time: 10:00 a.m. Judge: Hon. Thomas J. Whelan Courtroom: 7 **No Oral Argument Pursuant to Civil Local Rule 7.1(d).**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 9, 2007, at 10:00 a.m., or as soon thereafter as this matter can be heard before the Honorable Thomas J. Whelan of the United States District Court for the Southern District of California, at 940 Front Street San Diego, CA 92101, Defendants UMG Recordings, Inc., Universal Music Corp., Songs of Universal, Inc., Universal-Polygram International Publishing, Inc., and Rondor Music International, Inc., (collectively, "UMG") will move and hereby does move pursuant to Rule 12(b)(1) to dismiss this declaratory judgment action or, in the alternative, to transfer this action, pursuant to 28 U.S.C. § 1404(a), to the Central District of California where related litigation has been ongoing for nearly a year.

This motion is based on the attached Memorandum of Points and Authorities in Support Thereof, the Declaration Benjamin Glatstein, all files and pleadings in this action and any other matters that may properly come before the court at or before the time of hearing on this matter.

Dated: September 4, 2007

Respectfully Submitted,

IRELL & MANELLA LLP

By: _____
Steven A. Marenberg
Elliot Brown
Benjamin Glatstein

Attorneys for Declaratory Defendants UMG RECORDINGS, INC.; UNIVERSAL MUSIC CORP.; SONGS OF UNIVERSAL, INC.; UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC.; RONDOR MUSIC INTERNATIONAL, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

In its complaint, Veoh Networks, Inc. ("Veoh") purports to sue some of the record and music publishing companies within the Universal Music Group ("UMG") – the world's largest music company – for declaratory relief. Veoh seeks a judicial declaration that it is entitled to blanket and permanent, retrospective and prospective, immunity under Section 512(c) of the Copyright Act for its "video sharing" service. However, in its haste to forum shop and wage a publicity campaign, Veoh has failed to properly invoke this Court's jurisdiction.

Indeed, although Veoh purports to seek a declaration for non-infringement of copyright, it does not identify even one specific copyrighted work in dispute. Just as a complaint for infringement must allege the existence of at least one registered copyright for jurisdiction to attach, it only makes sense that a complaint seeking a declaration of non-infringement must do so as well. Otherwise, jurisdiction would attach differently for plaintiffs and defendants – and that has never been the law. Moreover, this is not the only reason that the Court lacks subject matter jurisdiction over Veoh's complaint. Veoh's description of the purported "dispute" is so nebulous (indeed, Veoh does not identify a single specific act that is alleged to constitute infringement), that its complaint fails to satisfy the "case or controversy" requirement necessary to support federal subject matter jurisdiction. At best, Veoh's complaint amounts to a request for an advisory opinion.

However, even if Veoh could cure its subject matter jurisdiction problems, its complaint should still be dismissed since Veoh filed this case for improper and tactical purposes including to facilitate a publicity campaign aimed to combat the public perception that Veoh is a "piracy-dependent company,"[1] to improve its negotiating leverage with UMG, and to forum shop – none of which are permissible uses of the Declaratory Judgment Act.

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[1] *The Ogre In Veoh's Closet*, Valleywag (6/20/2007) (noting "many feature films available for download" on Veoh), *available at* http://valleywag.com/tech/youtube/the-ogre-in-veohs-closet-270695.php.

Alternatively, if the case is not dismissed outright, it should be transferred pursuant to 28 U.S.C. § 1404(a) to the Central District of California where it can be coordinated with several related and pending lawsuits involving overlapping and identical issues of law and fact that have been ongoing for almost a year – and where UMG sued Veoh on September 4, 2007. The Central District is not just the most convenient, efficient, and logical forum to resolve any copyright disputes between the parties, Los Angeles also happens to be the *exclusive* forum *that Veoh itself has selected*, and which it contractually imposes upon the public, to adjudicate claims against Veoh. Veoh furthermore also handles claims of copyright infringement in Los Angeles, where Veoh's Senior Manager of Copyright Compliance and many of Veoh's top executives are based. Veoh's attempt to avoid litigating in its own exclusive forum of choice, and where its own copyright compliance operations are based, could not be a more telling sign of the improper tactical purposes animating Veoh's preemptive suit in this Court.

II. FACTUAL BACKGROUND

A. UMG's Infringement Battles With "File-Sharing" Mass Infringers.

Since 1999, with the advent of the infamous Napster service, UMG, the rest of the music industry, and other major copyright owners have had to deal with the phenomenon of the piracy of their copyrighted works online through the use of "peer-to-peer" (also known as "p2p") file-sharing networks. Peer-to-peer file-sharing networks operate by connecting users' computers over the Internet and enabling the users to download or "share" copies of files from one another.

In a series of copyright infringement suits litigated all the way to the United States Supreme Court, UMG and other major copyright owners have succeeded in obtaining injunctive relief and monetary damages against Napster (and its investors) and many other major peer-to-peer file-sharing services that followed in Napster's wake including Kazaa, Scour, Bearshare, Aimster, iMesh, and Grokster.[2] During the same timeframe and against the backdrop of these legal successes, lawful online sales of music through legitimate retailers, such as the iTunes store,

[2] *See, e.g., M.G.M. Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

have grown significantly, and many new opportunities have developed to license music and music videos online through legitimate services that respect copyright.

B. UMG's Three Pending Actions In The Central District Of California Against "Video Sharing" Sites .

Recently the Internet has witnessed the proliferation of websites featuring video that can be "streamed" over the Internet, including most notably the Internet website called YouTube. Some of these sites are popularly referred to as "video sharing" sites, because they enable "file-sharing" of videos, and it is said that they feature "user-generated content." In reality, however, much of the content on "video sharing" sites consists of professionally made audiovisual works, including music videos featuring UMG's copyrighted works. These videos are not "generated" by the video file-sharing site users in any sense other than the user "generates" unauthorized copies.

The "video sharing" sites present new opportunities for copyright owners, such as UMG, to license their works for digital display and distribution. UMG has entered into licenses granting rights to a number of websites to display UMG's music videos over the Internet, including most prominently a deal UMG struck with YouTube in late 2006. UMG's licensed music videos are among the most watched content on YouTube, where in a very short period of time they have been viewed over 246 million times, and is the most popular "channel" on the entire YouTube site, attesting to both to the popularity of UMG's copyrighted works and their value in drawing the public to "video sharing" sites.

Some "video sharing" sites have, unfortunately, chosen to exploit music and music videos featuring UMG's copyrighted works without obtaining the right to do so, without paying, and in willful violation of UMG's rights under the copyright laws. In late 2006, in the face of growing infringement of its works on "video sharing," websites, UMG filed separate actions in the Central District of California against Grouper, Bolt and MySpace, three companies that operate or sponsor "video sharing" to illicitly profit from mass infringement of UMG's copyrights in sound recordings and musical compositions. *See* Glatstein Declaration, Exs. A, D, G (respective complaints).[3] The

[3] Glatstein Declaration, Ex. A, Complaint in *UMG Recordings, Inc., et al. v. Grouper Networks, Inc., et al.*, C.D. Cal. Case No. CV 06-06561 AHM (filed 10/16/2006); Ex. D.,

three suits raise many overlapping issues of fact and law, for example: Grouper, Bolt, and MySpace each encouraged the public to upload *thousands* of infringing videos to their websites without using filters or people to screen them for copyright infringement; each has reproduced, displayed and distributed thousands of copies of music videos that infringe copyrights owned by UMG; and UMG has alleged each of these "video sharing" defendants (as well as their corporate parents) is liable for direct infringement and indirect infringement of UMG's copyrights. *Id.* The defendants have responded with similar defenses, and in particular each has given prominence to a purported affirmative defense under the safe harbor provision of the "Digital Millennium Copyright Act" (the "DMCA") codified in Section 512(c) of the Copyright Act.[4]

UMG's first-filed action, brought against Grouper, was assigned to Judge A. Howard Matz. UMG's subsequently filed actions against Bolt and MySpace were transferred to Judge Matz as "related cases." All three cases are being overseen by a single Magistrate Judge, Honorable Andrew J. Wistrich. Because of the factual and legal overlap, Judge Matz ordered coordination of discovery among the cases. Glatstein Decl. Ex. J (3/1/2007 Amended Civil Minutes). Under Judge Matz's coordination order, Magistrate Judge Wistrich's determinations with respect to specific discovery disputes bind other parties as to "*all* overlapping or jointly applicable discovery disputes, including not only document requests but also issues arising out of depositions, interrogatories and requests for admission." *Id.* (emphasis in original). Additionally, to reduce the likelihood witnesses would be burdened by multiple depositions, Judge Matz ordered defendants to "undertake good faith efforts to coordinate" discovery with one another. *Id.*

Complaint in *UMG Recordings, Inc., et al. v. Bolt, Inc., et al.*, C.D. Cal. Case No. 06-06577 AHM (filed 10/16/2006); Ex. G, Complaint in *UMG Recordings, Inc., et al. v. MySpace, Inc., et al.*, C.D. Cal. Case No. CV 06-07361 AHM (filed 11/11/2006).

[4] *See* Glatstein Decl. Ex. B (Grouper Answer ¶ 61, second affirmative defense); Ex. E (Bolt Answer p. 5, second affirmative defense); Ex. H (MySpace Answer pp. 9-10) (first affirmative defense); Glatstein Decl. Ex. C (UMG/Grouper Joint Rule 26(f) Report) (Grouper identifies DMCA affirmative defense as the first "principal legal issue"); Ex. I (UMG/MySpace Joint Rule 26(f) Report) (MySpace, same); Ex. F (UMG/Bolt Joint Rule 26(f) Report) (Bolt, same).

C. The Veoh "Video Sharing" Service.

Veoh is a video "file-sharing" company that has chosen to exploit the copyrighted works of others without paying. Following in the ignominious footsteps of Napster, Veoh created and operates a peer-to-peer service that Veoh and its users have used extensively for copyright infringement. Veoh also operates a "video sharing" website (www.Veoh.com), where members of the public are invited to upload, display and "share" videos, similar to the websites of the three defendants in the pending suits in the Central District. It is widely known and has been widely reported that Veoh has "copyright infringing material aplenty on its site."[5]

Veoh first achieved notoriety as a repository for hard core pornography, "drawing outsized attention from bloggers and other Internet users for its willingness to host racy videos that other sites prohibit." *Veoh Cleans Up Its Act, But Some Users Cry Foul*, Wall Street Journal (6/29/2006). However, after repeatedly "sharing" infringing copies of full length pornographic motion pictures, Veoh was sued by a producer of pornographic movies and Veoh pulled its "adult" content – over 15% of the total content its was "sharing" with the public. *Id.*[6]

More recently, Veoh has been in the news as a "hard core infringer,"[7] that eschews even the most basic safeguards against infringement that have been adopted by other video sharing sites. As a recent New York Times article explained:

> [T]he major media companies think the firm [Veoh], backed by Time Warner and Michael Eisner, takes a cavalier attitude toward keeping copyrighted material off its service. They complain that Veoh imposes no time limits on uploaded clips and will not embrace digital fingerprinting technology to filter out copyrighted-material.

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[5] *Veoh file pre-emptive copyright lawsuit*, The Register (8/13/2007), *available at* http://www.theregister.co.uk/2007/08/13/veoh_dont_hit_us/.

[6] *See also Why Veoh Pulled the Plug On Porn*, Valleywag (6/30/2006), *available at* http://valleywag.com/tech/veoh/why-veoh-pulled-the-plug-on-porn-184737.php.

[7] *Forget about YouTube: Go To These Sites If You Want Hard Core Copyright Infringement*," TechCrunch (4/4/2007) (singling out Veoh as one of top destinations for "hard core copyright infringement"), *available at* http://www.techcrunch.com/2007/04/04/forget-youtube-go-to-these-sites-if-you-want-hard-core-copyright-infringing-content/.

Brad Stone, *Veoh vs. Copyright Holders: Is a War Brewing?*, New York Times (8/9/2007). Veoh has, of course, chosen not to employ the typical safeguards used by competitors for a simple reason: those safeguards work, and if employed would reduce the number of infringing works on Veoh.com, which are the "main draw . . . for the piracy-dependent company."[8]

In late July 2007, respective representatives of UMG and Veoh held a meeting to discuss UMG's investigation into Veoh's unauthorized use of UMG's copyrighted works. The parties agreed the meeting would be treated as a settlement discussion covered by Rule 408 of the Federal Rules of Evidence. The meeting did not result in any agreement and UMG continued its investigation. *See* Veoh Complaint ¶ 64.

D. Veoh's Tactical Suit And Litigation In The Press.

Shortly after the July meeting, on August 9, 2007, Veoh filed this declaratory judgment suit naming as defendants precisely the same UMG entities that are plaintiffs in the three infringement actions in the Central District (though these are by no means all the entities that comprise the Universal Music Group). That is no coincidence; Veoh's counsel plainly studied UMG's pleadings in the Central District and just listed the UMG plaintiffs in those actions as declaratory defendants in this suit. Veoh's justification for bringing a federal lawsuit against UMG is a purported "dispute" with UMG that Veoh summarizes in eight sentences notable for the dearth of information they actually provide. *See generally* Veoh Complaint ¶¶ 61-67.

According to Veoh, at some unspecified time in "late July," some unspecified person "threatened Veoh with the prospect of litigation at some point in the future." *Id.* ¶¶ 61-62. UMG allegedly accused Veoh of "massively infringing upon UMG's copyrights" and furthermore, "[i]ncluded in UMG's threats of litigation were indications that UMG was, or is currently, investigating the alleged infringement." *Id.* ¶¶ 62, 64. Beyond the apparently threatening "investigating," however, Veoh fails to identify *any* specific UMG work at issue or *any* specific act by Veoh at issue. UMG allegedly provided no specifics: "UMG has not provided any

[8] *The Ogre In Veoh's Closet*, Valleywag (6/20/2007) (noting "many feature films available for download" on Veoh), *available at* http://valleywag.com/tech/piracy/the-ogre-in-veohs-closet-270695.php.

information about the alleged infringement that would allow Veoh to adequately assess UMG's threats"; Veoh is "[w]ithout concrete knowledge of its rights or the likelihood of future litigation"; and "UMG has not stated with any particularity a level of damages suffered due to the alleged infringement." Veoh Complaint ¶¶ 65- 67. Elsewhere in it Complaint, Veoh is emphatic that Veoh has no independent knowledge regarding *any* infringement: "Veoh does not have knowledge of any activity or material on its system that is infringing alleged UMG copyrights and is not aware of facts or circumstances from which the infringing activity is apparent," *id.* ¶ 29; "Veoh has no actual knowledge nor is aware of any facts suggesting that infringing activity is apparent." *id.* ¶ 78; Veoh "lack[s] knowledge regarding any alleged infringement." *Id.* ¶ 84.

Veoh, in sum, professes complete ignorance about *any* basis for *any* claim as to *any* UMG copyright. The ballyhooed "threat" that purportedly justified a federal suit reduces to UMG accusing Veoh of being an infringer – which, as the articles cited above show, is an allegation Veoh has heard many times before from other content owners – and "indications" that UMG is "investigating alleged infringement." Nothing in Veoh's nebulous description explains Veoh's race to the courthouse or its dramatic, unsupported assertion that "without concrete knowledge of its rights or the likelihood of future litigation, Veoh cannot operate effectively as a business." *Id.* ¶ 66. The nebulous "threat" and Veoh's emphatic lack of any knowledge about its alleged infringement is of course not sufficient to invoke federal court jurisdiction. Veoh's contrary conclusion – that litigation against UMG is a business imperative without which Veoh "cannot operate" – is a non sequitur.

The truth about the real reasons Veoh rushed to file this action soon emerged, however, when simultaneous with filing suit Veoh issued a press release entitled "Veoh Takes Action To Protect Rights of Copyright Complaint [sic] Companies Offering Innovative Online Content Solutions."[9] Veoh's new CEO, Mr. Steve Mitgang, called numerous reporters to spin the story, and Veoh's Chief Scientist immediately updated Veoh's Wikipedia entry to proclaim "In a bold

[9] Veoh's press release dated 8/9/07, *available at* http://www.veoh.com/corporate/aboutUs.html. Rather than just report on the suit, the Veoh press is filled with self-serving propaganda about Veoh's respect for copyright and its interest in working with content owners, *e.g.*,: "Veoh is actively taking steps to create a copyright friendly environment. . . . "

move, Veoh has sued Universal Music Group" and to provide Wikipedia's readers with a link the Reuters' article quoting Veoh's CEO's spin on the suit.[10]

Veoh's CEO, Mitgang, was forthcoming in explaining to one reporter that "the reason Veoh took this action is because the company wanted the courts, content owners and others to know that it is compliant with DMCA and Fair Use rules and has been working with content owners to put best practices in place."[11] In other words, "the reason" Veoh took its action against UMG had nothing to do with UMG's purported "threat." Rather, "the reason" for the suit was to get publicity for Veoh's message that Veoh is a "white-hat company."[12] Indeed, regarding UMG, Veoh's CEO stated, "I still hope to work constructively with Universal,"[13] *i.e.*, no hard feelings, Veoh considers this a negotiation and still wants to strike business deal, not litigate.[14]

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[10] *See* Veoh's Wikipedia entry, *available at* http://en.wikipedia.org/wiki/Veoh. The History section of this page shows the "bold move" comment was added by Ted Dunning, Veoh's Chief Scientist. Mr. Dunning also added a link to the Reuters article about the suit in which Veoh's CEO was interviewed and gives Veoh's spin. *See id.* (citing Kenneth Li, *Veoh seeks court protection from Universal Music* (8/9/2007), *available at* http://www.reuters.com/article/internetNews/idUSN0923286220070809.

[11] Quoted in Om Malik, *In Reversal of Roles, Veoh Sues Universal*, (8/9/2007), *available at* http://newteevee.com/2007/08/09/in-reversal-of-roles-veoh-sues-universal/.

[12] Brad Stone, *The Boat Is About To Rock (Again) In Internet Video*, New York Times (6/15/2007) (quoting Veoh board member and Director Todd Dagres, but noting rights holders' complaints "that Veoh has fallen behind in protecting intellectual property"). Veoh's blatant publicity agenda caused Daily Variety to quip: "it's possible Veoh, which has a new CEO who has vowed to get the firm more attention, just wants some publicity. Now that would be a different kind of viral campaign." *Veoh Battles Universal Music*, Daily Variety (8/10/2007), available at http://www.variety.com/article/VR1117970046.html?categoryid=2525&cs=1

[13] Quoted in *Veoh seeks court protection from Universal Music,* Reuters (8/9/2007), *available at* http://www.reuters.com/article/industryNews/idUSN0923286220070813.

[14] Veoh's publicity campaign, like so many, is fundamentally dishonest, and does nothing to change the fact that Veoh is a notorious copyright infringer that fosters and profits from an environment of hardcore copyright piracy. Putting the big picture aside, Veoh's CEO, moreover, could not even get his facts straight about the lawsuit, stating, for example, that "We're not suing them. We're not seeking damages." Quoted in *Veoh seeks court protection from Universal Music,* Reuters (8/9/2007), *supra* n.11. Veoh's press release similarly states the falsehood that the "action does not seek payment from UMG for damages." Veoh did sue UMG and is seeking damages. Veoh's Complaint – Prayer for Relief ¶ g (asking that "Veoh be awarded its damages").

E. UMG's Suit Against Veoh.

Veoh's preemptory suit left UMG with no choice but to take action. UMG intensified its investigation into Veoh and its activities. UMG carefully analyzed Veoh's operations and collected evidence confirming that Veoh is engaging in the rampant direct and indirect infringement of thousands of UMG's works. UMG then prepared and has just filed a Complaint against Veoh in the Central District of California. *See* Glatstein Decl. Ex. K (*UMG Recordings, Inc., et al. v. Veoh Networks, Inc.*, C.D. Cal. Case No. CV 07-5744 GW (RCx) (filed 9/4/2207). UMG concurrently filed a related case notice and it expects that like the three earlier-filed actions, it will be assigned to Judge Matz. Glatstein Decl. Ex. L.

The plaintiffs in UMG's suit against Veoh are copyright owners that UMG's pre-filing investigation determined have copyrighted works that are being infringed by Veoh. The plaintiffs include the companies pursuing the co-pending suits against Grouper, MySpace and Bolt (UMG Recordings, Inc., Universal Music Corp., Song of Universal, Inc., Universal-Polygram International Publishing, Inc., Rondor Music International, Inc.). In addition, three other UMG publishing companies (Universal Music – MGB NA LLC, Universal Music – Z Tunes LLC, and Universal Music – MBG Music Publishing, Ltd.) have asserted claims against Veoh for infringement of their works. *Id.* These entities were not named as declaratory defendants by Veoh, which apparently conducted no pre-filing investigation of its own.

UMG's Complaint properly puts in controversy an actual dispute that is ripe for adjudication. It describes in detail the basis for UMG's claim that Veoh is a direct and indirect infringer of thousands of UMG's copyrights. Veoh can no longer profess ignorance. In responding to UMG's complaint, Veoh will have the opportunity to address the actual issues in dispute between the parties.

III. VEOH'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

Veoh bears the burden of establishing the existence of subject matter jurisdiction. *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) ("a party seeking a declaratory judgment has the burden of establishing the existence of an actual case or

controversy[.]").[15] Article III of the U.S. Constitution prohibits federal courts from issuing advisory opinions, they therefore may not entertain nebulous disputes as they are "'are not pressed before the Court with that clear correctness provided when a question emerges *precisely framed* and necessary for decision.'" *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (emphasis added) (citation omitted). Absent a "definite and concrete" dispute, there is no subject matter jurisdiction. *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (citation omitted). Accordingly, "in the declaratory judgment context, the Supreme Court has admonished that '[t]he disagreement *must not be nebulous* or contingent *but must have taken on fixed and final shape* so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.'" *United States v. Arnold*, 678 F. Supp. 1463, 1465-66 (S.D. Cal. 1988) (emphasis added) (citation omitted); *see also Westlands Water Dist. Distribution Dist. V. Natural Resources Defense Council, Inc.*, 276 F. Supp. 2d 1046, 1050 (E.D. Cal. 2003) (the "Supreme Court has repeatedly recognized the increased likelihood that declaratory judgment actions will fall outside Article III."). Moreover, because Veoh seeks a declaration under the Copyright Act, Veoh must a further threshold subject matter jurisdiction requirement: "[N]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made" with the Copyright Office. 17 U.S.C. § 411(a).

Veoh's Complaint fails to meet both Article III's case or controversy requirement and the Copyright Act's subject matter jurisdiction requirement under Section 411. Veoh's request for an advisory opinion should be dismissed on these two independent grounds.

A. Veoh Fails To Identify A "Precisely Framed" or "Definite And Concrete" Dispute.

What exactly is Veoh's dispute with UMG about? According to Veoh's pleading, UMG claims Veoh is an infringer, and Veoh denies it. Beyond that, Veoh knoweth not. "Veoh does not have knowledge of any activity or material on its system that is infringing alleged UMG

[15] *Staacke v. U.S. Secretary of Labor*, 841 F.2d 278, 280 (9th Cir. 1988) (citation omitted) (affirming dismissal for lack of subject matter jurisdiction) ("It is well settled that the Declaratory Judgment Act 'does not itself confer federal subject matter jurisdiction,' but merely provides an additional remedy in cases where jurisdiction is otherwise established.").

copyrights and is not aware of facts or circumstances from which the infringing activity is apparent[.]" Veoh Complaint ¶ 29. UMG allegedly "has not provided any information about the alleged infringement that would allow Veoh to adequately assess UMG's threats." *Id.* ¶ 65. And Veoh is "[w]ithout concrete knowledge of its right or the likelihood of future litigation," it "has no actual knowledge nor is aware of any facts suggesting that infringing activity is apparent," and it "lack[s] knowledge regarding any alleged infringement." *Id.* ¶¶ 66, 78, 84.

With due respect, if Veoh itself does not know what this case concerns, then neither can the Court. And, as such, the "dispute" described by Veoh is neither "precisely framed" nor "definite and concrete" so as to confer on this court subject matter jurisdiction.

B. Veoh Fails To Identify Any Registered Copyright In Dispute.

Which UMG copyrighted works are at issue in this case? Veoh does not say, and says it does not know. Veoh does not identify even one registered copyright in dispute as required by 17 U.S.C. § 411 as a condition precedent to this Court's exercise of subject matter jurisdiction. 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16[B][1][a] (2007). On this independent basis, Veoh's complaint must be dismissed for lack of subject matter jurisdiction. *See, e.g.*, *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1112 (W.D. Wash. 2004) (dismissing claims not in compliance with § 411 "for lack of subject matter jurisdiction"); *RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F. Supp. 2d 556, 562 (C.D. Cal. 2005) (§ 411 is a "condition precedent for a court to exercise jurisdiction in an infringement action").[16]

C. Veoh Seeks An Impermissible Advisory Opinion.

Unmoored from any actual, concrete dispute as to even one registered UMG work, Veoh seeks an unqualified declaration it is not a direct, contributory, or vicarious infringer of *any* UMG

[16] Veoh should have done its homework before suing. Veoh could, for example, have easily have used Veoh's own search tools to locate UMG works on Veoh's website, Veoh.com, where there are thousands of UMG copyrighted works to be found. Veoh could have used the public records of the Copyright Office to obtain registration numbers. But actually investigating the infringement of UMG works would have forced Veoh to act against its policy of turning a blind eye and demolished Veoh's incredible claim it is completely ignorant of any infringement. The alternative would have been for Veoh to just pick one or two UMG copyright registrations as examples of works that may or may not be in dispute, but that, of course, would have just highlighted the extent to which Veoh is seeking an advisory opinion.

copyright and that Veoh it is not inducing infringement of *any* UMG copyright. Veoh Complaint ¶ 5 & and Prayer for Relief ¶¶ c-d. To provide the declaration sought by Veoh, the Court would be required to scrutinize every aspect of Veoh's business and all of Veoh's conduct to negate the possibility that Veoh is a direct, contributory, or vicarious infringer (and ruling out Veoh's inducing infringement) as to *any* UMG copyright. Veoh's request for a wide-ranging declaration divorced from any specific dispute is an extreme example of a impermissible request for an advisory opinion. *See Coalition for a Healthy California v. F.C.C.*, 87 F.3d 383, 386 (9th Cir. 1996) (dismissing declaratory judgment complaint where the plaintiff was "not seeking . . . to resolve a specific dispute . . . federal courts have never been empowered to render advisory opinions") (citation omitted).

Veoh further requests that the Court declare that "Veoh, as a host of third-party web-based content, is entitled to safe harbor pursuant to 17 U.S.C. § 512(c)." Veoh Complaint ¶ 5. Section 512(c) of the DMCA provides an affirmative defense. *See Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098-99 (W.D. Wash. 2004) (DMCA is affirmative defense). Veoh's attempt to obtain a broad declaration about its anticipated this affirmative defense in the factual vacuum of Veoh's pleading similarly invites an advisory opinion .[17] Contrary to Veoh's suggestion, Section 512(c) does not accord some sort of blanket immunity from infringement liability to which a company may be "entitled" or not. To the contrary, the DMCA safe harbor under Section 512(c) applies *only* to *specific activities* of companies that qualify as "service providers" – namely "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider" (and only then if the "service provider" meets all the other requirements). 17 U.S.C. § 512(c). Given Veoh's failure to identify any specific infringing

[17] Declaratory judgment actions that are just attempts to anticipate affirmative defenses are disfavored, and "numerous courts have refused to grant declaratory relief to a party who has come to the court only to assert an anticipatory defense." *Gribin v. Hammer Galleries, a Div. of Hammer Holding, Inc.*, 793 F. Supp. 233, 235 (C.D. Cal. 1992) (citing, *inter alia*, *Armerada Petroleum Corp. v. Marshall*, 381 F.2d 661 (5th Cir. 1967); *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir. 1969)). For example, the Court in *State Farm Fire and Cas. Co. v. Taylor*, 118 F.R.D. 426 (M.D. N.C. 1988), examined the issue in detail and concluded that "[t]he anticipation of defenses is not a proper use of the declaratory judgment procedure." *Id.* at 429-30 (quoting *Hanes Corp. v. Millard*, 531 F.2d 585, 592-93 (D.C. Cir. 1976)).

conduct in dispute, it is not possible to determine whether analysis of Section 512(c) is warranted at all, much less applicable to some unspecified Veoh conduct with respect to an unspecified UMG work.

The misguided nature of Veoh's attempt to obtain an advisory ruling on an affirmative defense without reference to a specific claim of infringement can be further appreciated when one leaves the abstraction of Veoh's nebulous Complaint, and considers instead the particular acts of infringement alleged by UMG in its Complaint. Among other things, UMG alleges that Veoh operates a Napster-like peer-to-peer network called "Veohnet" that is used to facilitate copyright infringement; Veoh distributes free software to facilitate copyright infringement; Veoh reformats videos to so they can be downloaded more easily to a variety of platforms; Veoh provides the public with free downloads of videos on demand. This Veoh conduct, alleged by UMG as part of the basis for its claims, has nothing remotely to do with "storage at the direction of a user," or the DMCA safe harbor provisions.

In sum, Veoh is not entitled to any advisory opinion, whether framed as a wide-ranging request concerning all of Veoh's conduct and all of UMG's copyright, or a request for an opinion about the hypothetical applicability of a single affirmative defense. Veoh's complaint should be dismissed for lack of subject matter jurisdiction.

IV. VEOH'S TACTICAL SUIT SHOULD BE DISMISSED AS AN ABUSE OF THE DECLARATORY JUDGMENT ACT

Even if Veoh's pleadings were sufficient to articulate a "case or controversy," the Court should still dismiss Veoh's Complaint as a matter of its discretion because Veoh filed it for an improper tactical purposes. The exercise of jurisdiction in a declaratory judgment action is discretionary. 28 U.S.C. § 2201 (the Court "*may* declare the rights and other legal relations..."); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) (the Declaratory Judgment Act provides "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants"). Courts have held that it is an abuse of the Declaratory Judgment Act to file suit for tactical purposes. *Gribin v. Hammer Galleries, a Div. of Hammer Holding, Inc.*, 793 F. Supp. 233, 236 (C.D. Cal. 1992) (Declaratory Judgment Act "is not a tactical device whereby a

party who would be a defendant in a coercive action may choose to be plaintiff if he can beat the other party to the courthouse") (quotation marks and citations omitted). For that reason, courts decline to exercise jurisdiction over declaratory judgment matters if they appear to have been file for tactical purposes.

For example, in *EMC Corp. v. Norand Corp.*, 89 F.3d 807 (Fed. Cir. 1996), *overruled in part on other grounds*, *MedImmune, Inc. v. Genentech, Inc.*, --- U.S. ---, 127 S. Ct. 764 (2007), the declaratory judgment plaintiff "had taken the step [of filing suit] because its management 'thought it was in their interest to protect themselves first and continue discussions.'" *Id.* at 809 (quoting plaintiff's attorney). The district court concluded and the Federal Circuit agreed that "to allow a declaratory judgment action to proceed under such circumstances would encourage parties who were negotiating with patentees to use the declaratory judgment procedure to improve their bargaining positions." *Id.* at 810.

This disapproval of tactical, premature declaratory judgment filings accords with the decisions of other courts that "it would be inappropriate to reward—and indeed abet—conduct which is inconsistent with the sound policy of promoting extrajudicial dispute resolution, and conservation of judicial resources." *Davox Corp. v. Digital Systems Intern., Inc.*, 846 F. Supp. 144, 148 (D. Mass. 1993); *see also, e.g.*, *Bausch & Lomb Inc. v. Alcide Corp.*, 684 F. Supp. 1155, 1160 (W.D.N.Y. 1987) (refusing to exercise jurisdiction); *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742, 747 (S.D.N.Y. 1977) (staying first-filed action) ("[a]s federal court calendars become increasingly burdened, attorneys should exercise a correspondingly increased responsibility to attempt to resolve disputes without using limited judicial resources to decide issues which might, by reasonable discussions between reasonable people, be settled out of court").

In its rush to create good buzz about Veoh as a "white-hat" company, Veoh brought suit prematurely. According to Veoh, it did not know the basis for an infringement claim and UMG stated that it was "investigating" Veoh – nothing more. Veoh's CEO apparently did not think that the discussions with UMG were over, and he made a point of telling a reporter "I still hope to

work constructively with Universal."[18] Veoh apparently hoped that filing its Complaint would improve its bargaining position vis-à-vis UMG in a negotiation.

As shown by Veoh's "serving" a press release in tandem with launching the suit, its immediate "bold move" update of Veoh's Wikipedia entry and numerous calls Veoh's CEO put in to reporters, Veoh brought suit *not* because of the need to remove any "Damoclean threat of impending litigation,"[19] but rather as a public relations move. Again, in the words of Veoh's CEO, "the reason Veoh took this action is because the company wanted the courts, content owners and others to know that it is compliant with DMCA and Fair Use rules and has been working with content owners to put best practices in place."[20] Notably absent in this explanation is any mention of UMG's supposed "threat." Veoh's message to the "courts,[21] content owners and others" is rather Veoh's "white-hat company" theme. What "the company wanted" the world "to know" includes issues that are not even part of Veoh's preemptory Complaint, e.g., that Veoh is allegedly compliant with the "fair use rules" and that it is working "to put best practices in place."

The tactical nature of Veoh's suit is further revealed when one considers Veoh's choice of venue; specifically, its decision to evade the Central District of California. Even ignoring the efficiencies and cost-savings that would be derived from filing in the Central District where the related litigation with overlapping and identical issues has been underway for nearly a year, the Central District, specifically Los Angeles, is Veoh's own forum of choice. Veoh's Terms of Use ("TOU"), which Veoh purports protect Veoh from liability provide: "You expressly consent to the

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[18] Kenneth Li, *Veoh seeks court protection from Universal Music* (8/9/2007), *available at* http://www.reuters.com/article/industryNews/idUSN0923286220070813

[19] "The purpose of the Declaratory Judgment Act is 'to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure -- or never.'" *Hal Roach Studios Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d. 1542, 1556 (9th Cir. 1989) (quoting *Societe de Conditionnement v. Hunter Engineering Co.*, 655 F.2d 938 , 943 (9th Cir. 1981)).

[20] Quoted in Om Malik, *In Reversal of Roles, Veoh Sues Universal*, (8/9/2007), *available at* http://newteevee.com/2007/08/09/in-reversal-of-roles-veoh-sues-universal/.

[21] It is unclear what Mr. Mitgang had in mind by "courts." Veoh is currently a defendant in the case of *Io Group v. Veoh, Networks*, N.D. Cal. Case No. C06-3926 HRL, in which Veoh was sued for infringing certain gay male pornographic movies during a three week period. The parties recently filed cross-motions for summary judgment.

personal and exclusive jurisdiction and venue of the state and federal courts located in Los Angeles County of the State of California for any claim or action arising out of or relating to these TOU or your use of the Veoh Service." Glatstein Decl. Ex. M (Veoh Terms of Use). A link to Veoh's TOU is right on Veoh's home page. *See* Veoh – Terms of Use, *available at* http://www.veoh.com/corporate/termsofuse.html. Veoh's Complaint makes Veoh's TOU a critical component of Veoh's theory of why it is not liable to UMG: "the TOU agreement contained on Veoh.com protects Veoh from any claims for violation of copyright . . . Because all registered users of Veoh.com must electronically accept the TOU, Veoh is not liable for content posted by registered users." Veoh Complaint ¶¶ 73-74; *see also id.* ¶¶ 35-38, 44 (citing TOU). Veoh's flight from its own *exclusive* forum of choice – Los Angeles – to file this preemptory suit could not be more telling that its choice of forum was driven by tactical considerations.

Forum shopping, and using a declaratory judgment suit to improve bargaining leverage and as a vehicle to spin positive press, are wholly improper uses of the Declaratory Judgment Act. The exercise of jurisdiction under the circumstances at bar would reward tactical behavior and create an incentive to file a declaratory judgment action for purposes wholly unrelated to the declaration of the litigants' rights.[22] The Court should not reward Veoh's tactics, but it rather should decline to exercise its discretionary jurisdiction and dismiss on that second independent basis.

V. IN THE ALTERNATIVE, THE CASE SHOULD BE TRANSFERRED TO THE CENTRAL DISTRICT

"For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).[23] The Supreme Court has explained that "the purpose of [§ 1404(a)] is to

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[22] Indeed, Veoh will have the opportunity to litigate its defenses under the DMCA by virtue of UMG's Central District Complaint against Veoh.

[23] 28 U.S.C. § 1404(a) "serves as a statutory substitute for forum non conveniens in federal court when the alternative forum is within the territory of the United States." *Ravelo Monegro v. Rosa*, 211 F.3d 509, 512-13 (9th Cir. 2000). Accordingly, "*forum non conveniens* considerations are helpful in deciding a § 1404 transfer motion." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). Because of their common law history, courts sometimes relate

prevent the waste of 'time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal quotation marks and citations omitted) (quoting *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26, 27 (1960)); *see also Continental Grain Co.* 364 U.S. at 26-27 (affirming transfer to district court with similar action).

It understates matters to say this case *could* have been brought in the Central District. But for tactical maneuverings it *should* have been brought there. While dismissal outright is preferable, transfer would at least facilitate coordination between Veoh's action and UMG's similar actions against other video-sharing websites. Transfer serves the interests of justice and also the convenience of the parties and witnesses.

A. Veoh Could Have Brought, And Should Have Brought, Its Action in the Central District.

A transfer is only proper to a district where the action "might have been brought." 28 U.S.C. § 1404(a). Veoh could have brought its action in the Central District of California for three independently sufficient reasons: First, UMG was subject to personal jurisdiction in the Central District, 28 U.S.C. §§ 1391(b)(1), 1391(c); second, a "substantial part of the events or omissions giving rise to the claim occurred" in the Central District, 28 U.S.C. §§ 1391(b)(2); and third, "a substantial part of property that is the subject of the action is situated" in the Central District, 28 U.S.C. §§ 1391(b)(2). A transfer to the Central District meets the first requirement of 28 U.S.C. § 1404(a). As noted, moreover, Los Angeles, is also Veoh's own chosen *exclusive* forum for adjudicating matters concerning TOU that Veoh contends is central to its defense and to resolve disputes concerning the Veoh services that will front and center in any litigation concerning Veoh's infringing activities.

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the § 1404(a) "convenience" test to the *forum non conveniens* "private interest factors," while the interest of justice test corresponds to the *forum non conveniens* concept of "public interest factors." *See, e.g., Amazon.com v. Cendant Corp.*, 404 F. Supp. 2d 1256, 1259 (W.D. Wash. 2005).

B. The Interest of Justice Favors Transfer to Facilitate Coordination with UMG's Pending Actions Against Other "Video-Sharing" Services.

A transfer is proper where—as here—it is "in the interest of justice." 28 U.S.C. § 1404(a). The "interest of justice" analysis requires that courts consider the superior forum for "'ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case.'" *Amazon.com v. Cendant Corp.*, 404 F. Supp. 2d 1256, 1261 (W.D. Wash. 2005) (quoting *Heller Financial, Inc., v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989)). The interest of justice analysis may be an independently sufficient basis for transfer: "'Consideration of the interest of justice, which includes judicial economy, may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses might call for a different result.'" *Id.* (quoting *Regents of the University of California v. Eli Lilly and Company*, 119 F.3d 1559, 1565 (Fed. Cir. 1997)).

Transfer to the Central District is in the interest of justice because it will allow coordination with UMG's pending actions against Grouper, Bolt, and MySpace. As the Supreme Court explained, "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co.*, 364 U.S. at 26; *see also Heller Financial, Inc.*, 883 F.2d at 1293 (courts should consider the benefit from "trying related litigation together, and having a judge who is familiar with the applicable law try the case").

Facilitating coordination of related cases within a single district precisely tracks the policy rationale behind § 1404(a) as articulated by the Supreme Court in *Van Dusen* and *Continental Grain Co*. Accordingly, transfer to a district with a pending, related case is a frequently-cited and independently sufficient basis for a transfer. *See also A.J. Industries, Inc. v. U.S. Dist. Court for Central Dist. Of California*, 503 F.2d 384, 389 (9th Cir. 1974); *Jolly v. Purdue Pharma L.P.*, 2005 WL 2439197 (S.D. Cal. 2005) (transferring to district with pending similar action); *Republic of Bolivia v. Philip Morris Cos., Inc.*, 39 F. Supp. 2d 1008, 1009-10 (S.D. Tex. 1999) (same); *Posven, C.A. v. Liberty Mut. Ins. Co.*, 303 F. Supp. 2d 391, 406 (S.D.N.Y. 2004) (same); *Durham*

Prods, Inc. v. Sterling Film Portfolio, Ltd., Series A, 537 F. Supp. 1241, 1243 (S.D.N.Y. 1982) (same).[24]

For example, in *A.J. Industries*, 503 F.2d at 389, the Ninth Circuit upheld a district court's transfer order based in part on the existence of a pending, related action in another district. The *A.J. Industries* Court explicitly rejected the contention that anything less than complete consolidation was necessary before granting a transfer motion: "[E]ven the pendency of an action in another district is important because of the positive effects it might have in *possible consolidation of discovery and convenience to witnesses and parties*." *Id.* (emphasis added) (citing *Schneider v. Sears*, 265 F. Supp. 257 (S.D.N.Y. 1967)). As *Schneider* explains,

> There is a strong policy favoring the litigation of claims in the same tribunal in order that: (1) pretrial discovery can be conducted more efficiently; (2) the witnesses can be saved time and money, both with respect to pretrial and trial proceedings; (3) duplicitous litigation can be avoided, thereby eliminating unnecessary expense to the parties and at the time serving the public interest; (4) inconsistent results can be avoided.

256 F. Supp. at 266-27. *See also Durham Products*, 537 F. Supp. at 1244 ("litigation of related claims in the same tribunal is strongly favored because it facilitates *efficient, economical and expeditious pre-trial proceedings and discovery and avoids [duplicative] litigation and inconsistent results*") (emphasis added; citation and quotation marks omitted).

Similarly, *Republic of Bolivia*, 39 F. Supp. 2d at 1008, involved one of several actions by various foreign governments against tobacco companies. In that case, the district court *sua sponte* transferred the action from Texas to the District of Columbia, explaining that transfer would allow for consolidation with six other pending actions by other foreign governments against tobacco companies. *Id.* at 1009 ("proceedings brought by the Republic of Guatemala are currently well underway in that Court in a related action"); *see also Jolly v. Purdue Pharma L.P.*, 2005 WL

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[24] *See also Falconwood Financial Corp. v. Griffin*, 838 F. Supp. 836, 843 (S.D.N.Y. 1993) (transferring, despite parties' forum selection clause, to avoid duplicative litigation).

2439197 (S.D. Cal. 2005) (explaining that the interest of justice "strongly" favors transfers from S.D. Cal. to S.D.N.Y. where similar litigation was pending).

Veoh's decision to file in the Southern District rather than the Central District despite the detriment to overall judicial economy caused by inefficient, parallel litigations, was motivated by tactical considerations that are antithetical to the interests of justice. As but a few examples of the predictable inefficiency likely to result from Veoh's forum choice: two courts will need to familiarize themselves with the copyright law applicable to websites; two courts will need to study the case law relating to the DMCA; two courts will need to familiarize themselves with the technical operation of "video sharing" sites; two courts will need to learn about the music industry in general, and UMG in particular, in order to resolve issues relating to copyright ownership and damages; two courts will need to hear motions for protective orders by third-parties, and third-parties will need to bring two such motions. In short, the parallel, uncoordinated litigation of similar actions with overlapping and some instances identical issues in the Southern District and Central District would result in a certain but preventable waste of judicial resources, and the parties' and non-parties' time and money. Accordingly, the interest of justice strongly favors transfer to the Central District.

Finally, some courts consider relative docket congestion, measured by the median number of months from filing to trial, as part of the transfer analysis, reasoning that the interest of justice is served by a transfer to a relatively less congested district. *See Saleh*, 36 F. Supp. 2d at 1167 (comparing median time from filing a suit until trial in S.D. Cal. and E.D. Va., and transferring to the latter). According to the most recent *Annual Report of the Director: Judicial Business of the United States Courts*, the median time interval between filing and trial in the Southern District is 33.0 months, while the median time interval between filing and trial in the Central District is 21.3 months, a difference of over one year, or approximately 55% longer. Glatstein Decl. Ex. U (2006 Annual Report of the Director). The facts that the Central District is relatively less congested further militates in favor of transfer. It also further belies any pretense by Veoh that it brought suit to obtain a speedy resolution of an actual controversy rather than for tactical purposes.

C. Convenience of the Witnesses and Parties Favor Transfer.

To evaluate the convenience associated with a transfer, courts consider, (i) the convenience of the parties; (ii) convenience of the witnesses; and (iii) ease of access to evidence. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). In short, this prong requires consideration of "'all … practical problems that make a trial easy, expeditious and inexpensive.'" *Id.* (citing and quoting *Gulf Oil Corp. v Gilbert*, 330 U.S. 501, 508 (1947)). These factors weigh strongly in favor of a transfer to the Central District.[25]

The location of evidence in the Central District favors transfer.[26] *In re Horseshoe Entertainment*, 305 F.3d 354, 358 (5th Cir. 2002) (location of books and records weighs in favor of transfer). Veoh identifies Los Angeles as one of its two principal offices, and many of its employees work there, including its Senior Manager – Copyright Compliant, Stacie Simons.[27] *See* Glatstein Decl. Ex. HH. In particular, the Veoh's website identifies seven members of Veoh's executive team, all of whom are likely to have relevant knowledge concerning Veoh's operations, including for example Veoh's knowledge of widespread infringement on Veoh.com, Veoh's decision to not to use filters to screen for copyright infringement, and Veoh's business reasons for engaging UMG in copyright litigation. Based on publicly available information, UMG believes that at least three of Veoh's top executive team members are based in Los Angeles. Glatstein Decl. Exs. Q, R, S & T (Messrs. Bilger, Eisner, and Metzger). Furthermore, Veoh's Senior

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[25] Of course, as explained above, if the "interest of justice" overwhelmingly favors transfer—as it does here—the Court may transfer the case even if the convenience of the parties militates against transfer. *Amazon.com*, 404 F. Supp. 2d at 1261 (quoting *Regents of the University of California*, 119 F.3d at 1565).

[26] For both the UMG and Veoh witnesses residing in the Central District, litigation in the Central District will plainly be more convenient. Whether it is *possible* for these witnesses to participate in litigation in the Southern District is not dispositive. *Saleh*, 361 F. Supp. 2d at 1162-63 (transferring case).

[27] In Veoh's recent press releases, including the press release it issued concerning its preemptive declaratory judgment action, Veoh states that "the company's principal offices are in Los Angeles and San Diego, California." *See* "Veoh Takes Action To Protect Rights of Copyright Complaint [sic] Companies Offering Innovative Online Content Solutions" (8/9/07), *available at* http://www.veoh.com/corporate/aboutUs.html. In an apparent effort to deemphasize Veoh's connection to Los Angeles, Veoh's Complaint makes no mention of Veoh's principal office in Los Angeles and it states that Veoh's principal place of business is San Diego. Veoh Complaint ¶ 10.

Manager of Copyright Compliance, the Veoh executive who is specifically responsible for handling copyright infringement notices is apparently based in Los Angeles. Glatstein Decl. Ex. HH (Ms. Simons). Based on testimony Veoh has given in another case, UMG also believes that Veoh operates computer servers in the Central District that are used to make unauthorized "transcoded" copies of infringing videos uploaded to Veoh. *See* Glatstein Declaration, Ex. P. UMG anticipates that evidence relating to these servers will be an important source of evidence concerning Veoh's infringement. 17 U.S.C. § 106(1) (right to reproduce); § 106(2) (right to prepare derivative works); Glatstein Decl. Ex. K (UMG Complaint) at ¶¶ 19-21.

What makes the Central District more than just "convenient" for Veoh is the fact that Veoh itself has chosen to make the Central District the forum for litigation of disputes concerning Veoh's services and where it handles infringement claims and takes service of lawsuits. As already noted, Veoh requires as a condition of using its services that its users agree to submit to the *exclusive* jurisdiction of courts in Los Angeles to resolve any issues about its TOU and the Veoh services. Glatstein Decl. Ex. M (Veoh Terms of Use). According to Veoh, its TOU will be a key element in Veoh's defense, and Veoh's services will obviously be the focal point a copyright infringement suit. In addition, Veoh directs the public to send notices concerning copyright infringement to its location in Los Angeles, where Veoh's Senior Manager of Copyright Compliance is based. *See* Glatstein Decl. Ex. N (Veoh Copyright Policy) (requiring that DMCA notices be sent to Ms. Stacie Simmons in Los Angeles, CA, Veoh's Senior Manager for Copyright Compliance). The infringement notices sent to Veoh, Veoh's policies and practices relating to such notices and how they are infringement claims are handled by Veoh, are highly relevant to Veoh's claimed defense under the DMCA. For example, in order for an entity to be eligible for the DMCA safe harbors, it must "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing [by a DMCA notice]." 17 U.S.C. ¶ 512(c)(1)(C). Additionally, the DMCA safe harbors only apply to a "service provider" which "adopt[s] and reasonably implement[s]" a policy for the termination of "repeat infringers." 17 U.S.C. § 512(i). According to testimony Veoh has given in a pending infringement action, the witnesses and documents relating to Veoh's DMCA defense are located in the Central District. Glatstein Decl.

Ex. P (Dunning Depo.). In addition, Veoh's agent for service of process is located in the Central District, meaning that Veoh itself anticipates and expects to respond to suit in the Central District. Glatstein Decl. Ex. O (California Secretary of State filing). The Central District, in sum, is not just "convenient" for Veoh, in the sense that it is one of the principal locations in which its witnesses and records are locates, it the forum Veoh has chosen to make singularly important for copyright claims and litigation.

The Central District is also the more convenient forum for litigation because transfer would enable discovery coordination between this action, and UMG's cases against MySpace, Grouper, and Bolt. The same reasoning that prompted Judge Matz to order discovery coordination as among Grouper, MySpace and Bolt suits would apply to the Veoh action as well. There are likely many witnesses in common as between the pending Central District litigations and the Veoh suit, including third party witnesses, and coordination reduces the risks that witnesses will be subject to multiple depositions. Among others, the following third parties are implicated by discovery in the pending Central District cases, and it seems will likely discovery from them will be relevant too in litigation between UMG and Veoh:

- Providers of Advertising Services. The defendants' financial interest in the infringement is a common element in the cases. *See, e.g.* 17 U.S.C. § 512(c)(1)(B) (safe harbor not available if there is "financial benefit directly attributable to the infringing activity").Third party Google sells advertising to many "video sharing" websites shown in connection with infringing content, and Google's agreements have been a subject of discovery in the Central District and motion practice. Google also provides advertising services to Veoh and it is therefore likely that it will be a subject to discovery in UMG's action against Veoh.
- UMG Licensees. All the defendants have sought discovery of UMG's licenses on the purported basis they are relevant to damages. In addition to defendants document requests to UMG seeking those licenses, Grouper has served eight document subpoenas on third parties it believes have license agreements with UMG, including Apple, America On-Line, YouTube, and Best Buy, among others.

See Glatstein Decl. Exs. V through CC (Grouper document subpoenas). Veoh is likely to seek discovery relating to UMG's agreements too.

- Filtering Companies. Veoh contends that it is implementing "state of the art technologies that include filtering," In light of this allegation, Veoh's communications and dealings with third party filtering companies will be a subject of discovery in UMG's claim against Veoh. Defendants dealings with third parties that provide filtering solutions have been the subject of discovery in the Central District actions. *See* Glatstein Decl. Exs. DD through GG (UMG subpoenas).

Third parties who may have relevant evidence in all of the related cases, including but not limited to providers of advertising (*e.g.*, Google), UMG licensees (*e.g.*, YouTube), and filtering companies (*e.g.*, Audible Magic), will all be unnecessarily inconvenienced by parallel, uncoordinated litigation in two separate courts, before two separate judges. The coordination of discovery that can be facilitated by transfer will reduce the likely burdens on third parties, thereby serving the interests of justice.

Litigation in the Central District would also, of course, be more convenient for UMG's witnesses as well, UMG's records and witnesses are located in the Central District, which is why UMG has pursued the related actions there. As is evident, for example, from the witnesses UMG identified in its Rule 26 disclosures in the Grouper, Bolt, and MySpace actions, not only are there *many* witnesses located in the Central District, but their testimony is highly relevant to the parties' claims and defenses. *See* Glatstein Decl. Ex. II (MySpace Rule 26 disclosures). *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1161 (S.D. Cal. 2005) (court should evaluate the number of witnesses and the importance of their testimony).

In addition to witness overlap, the Veoh action will likely involve substantial and sometimes *identical* discovery and legal issues with the pending Central District cases as is readily evident by a comparison of the pleadings. *Compare* UMG's Complaint against Veoh (Glatstein Decl. Ex. K) *with* UMG's Complaints Against Grouper, Bolt and MySpace (*Id.* Exs. A, D and G); and *compare* Veoh's Complaint *with* Answers of Grouper, Bolt and MySpace (*Id.* Exs. B, E, and H). Transfer and coordination makes it more likely those discovery and legal issues will only

need to be resolved one time by one judicial officer. This benefits overall judicial efficiency (as noted above), but also benefits the parties and third-parties, who must only bring their issues to the court one time for a single determination.

In sum, it is fair to say the Central District is overwhelmingly the most logical and convenient forum for the parties, third parties, and taking into account judicial economy and the interests of justice. Veoh's perceived tactical advantage in initiation litigation in the Southern District, thereby avoiding Veoh's own exclusive forum of choice, is entitled to no weight. Accordingly in the event the Court chooses not dismiss Veoh's action, it should be transferred to the Central District.

VI. CONCLUSION

For the foregoing reasons, the Court should grant UMG's motion to dismiss or, in the alternative to transfer this action to the Central District of California.

Dated: September 4, 2007

Respectfully Submitted,

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