

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-5744 AHM (AJWx) Date September 11, 2009

Title UMG RECORDINGS, INC., et al. v. VEOH NETWORKS INC., et al.

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes Not Reported
Deputy Clerk Court Reporter / Recorder Tape No.

Attorneys NOT Present for Plaintiffs: Attorneys NOT Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

On September 4, 2007, Plaintiffs, members of Universal Music Group (collectively “UMG”), sued Veoh Networks, Inc., a privately held California corporation, for direct, contributory, and vicarious copyright infringement, and for inducement of copyright infringement. Veoh operates an internet-based service that allows users to share videos with others, free of charge, and UMG controls the copyrights to a vast library of sound recordings and musical compositions. On December 29, 2008, this Court found that Veoh’s services fall within the scope of the Digital Millennium Copyright Act (“DMCA”) “safe harbor” codified at 17 U.S.C. § 512(c), because they occur “by reason of the 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” *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1092 (C.D. Cal. 2008). Veoh now moves for summary judgment that it has satisfied the remaining requirements of section 512(c), and is therefore not liable for monetary or injunctive relief. The Court circulated a tentative order to the parties, and held a hearing on September 8, 2009. For the reasons stated below, the Court now GRANTS Veoh’s motion.

Although UMG strains to demonstrate a genuine issue of material fact as to the applicability of the section 512(c) safe harbor, for the most part the parties do not dispute the basic and material facts of this case. Rather, they disagree on the extent to which the DMCA obligates internet-based services like Veoh, which rely on content contributed by users, to police their systems to prevent all copyright infringement. This legal question is at the center of this dispute, and it is therefore the focus of this Order.

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I. BACKGROUND¹

This background section presents a brief (but unredacted) overview of the material facts.²

A. Accessing and Contributing Videos

Veoh's services allow users to view and share videos with anyone who has an internet connection. Users have uploaded millions of videos to Veoh, and Veoh currently has over a million videos available for viewing. RSGI ¶¶ 14-15.³ In addition to user-uploaded videos, Veoh also makes available "partner content" provided by major

¹ Unless otherwise stated, the facts below are undisputed. Throughout UMG's Statement of Genuine Issues of Material Fact, it purports to "dispute" a fact, but then states allegations that are consistent with the asserted fact. *See, e.g.*, SGI ¶ 23 (in response to the assertion that "Veoh does not charge users for its website or software," UMG agrees that Veoh does not charge a fee, but states "Otherwise DISPUTED: Veoh generates revenue by placing advertisements Veoh's users allow Veoh to generate revenue from infringing content."). The Court will not address these immaterial "disputes," which do nothing more than strain the Court's resources and distract from the real issues in this litigation.

² The parties filed several motion papers under seal. But as has occurred previously in this litigation, they did not identify the facts claimed to be confidential. *See* Protective Order at ¶ 24 (Docket No. 150) ("In order to enable the Court to determine whether there is evidence that the Court should attempt not to disclose . . . all [confidential] documents [filed with the Court] shall clearly identify the particular aspects of the documents that contain, refer to, or rely upon such CONFIDENTIAL INFORMATION. Absent such notification, the Court will be free to incorporate all such documents and any information contained, referred to, or relied upon therein in its written and oral rulings. The parties may do so at any time prior to the hearing or trial at which the material may be used.").

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copyright holders, such as SonyBMG, ABC, CBS, ESPN, Viacom, and Warner Television. RSGI ¶¶ 15, 18, 76.

Users can access and share videos via the veoh.com website and also via a standalone software application. The software application became available in September 2005, and the website became accessible in February or March 2006. RSGI ¶¶ 1-2, 4-5, 77, 84.

A user who wishes to share a video by uploading it to Veoh's systems must register at veoh.com by providing a user name, e-mail address, and password. RSGI ¶ 8. When a user uploads a video, she can provide information to help other users find it for viewing or downloading, such as a title, descriptive "tags" (keywords), and pre-set categories such as "children's music," "politics," and "faith & spirituality." RSGI ¶¶ 9-10, 81, 83, 88; Papa Decl., Ex. B. After a user submits a video to Veoh's system, it is automatically processed and made available to other users. RSGI ¶ 6. This processing includes the assignment of a "permalink," or web address, that uniquely identifies each video. RSGI ¶ 11.

B. Veoh's Revenues and Business Model

Veoh does not charge users of its website or software. RSGI ¶ 23. Like many internet businesses, Veoh's plan has been to "build or create an audience" and then "subsequently . . . turn that into a revenue stream" through advertising. RSGI ¶¶ 24, 90, 95-96. Consequently, Veoh's executives concluded that having a wide range of content on its system would be important to its success. RSGI ¶¶ 92-94. Thus far, however, Veoh has not turned a profit. RSGI ¶ 25.

C. Veoh's Copyright Policies and Practices

Veoh's Terms of Use has always contained language prohibiting users from uploading videos that infringe copyrights and reserving Veoh's right to remove videos and terminate repeat infringers. RSGI ¶¶ 29-31. Veoh's current Copyright Policy sets forth its DMCA policy and describes how to send Veoh notices of claimed infringement. RSGI ¶¶ 32-33. In addition, each time users begin to upload a video to the veoh.com

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are pornographic, obscene, violent, or any other videos that violate Veoh's Terms of Use." RSGI ¶ 34.⁴

Veoh's employees do not review user-submitted content before it becomes available to other users. RSGI ¶ 17. Veoh's system does, however, allow it to disable access to inappropriate videos. RSGI ¶ 28. For example, when a copyright holder sends Veoh a notice of infringement that complies with the DMCA's notice-and-takedown provisions, Veoh disables access to the allegedly infringing videos, often the same day that Veoh receives notice, or within a day or two of notice. RSGI ¶ 36.⁵ At least since April 2007, Veoh's Senior Manager of Copyright Compliance has also investigated less formal complaints of infringement. RSGI ¶ 37; Simons Decl. ¶ 5.

⁴ Veoh did not include all of the Copyright Policies it has used since its inception in its motion papers, so it is unclear whether this language appeared in previous versions and whether users always received pre-upload warnings.

⁵ UMG's SGI "disputes" these facts, but UMG has not established that the dispute is material. Instead, it makes four assertions that are consistent with Veoh's asserted fact. See RSGI ¶ 36 ("1. Veoh's system is also configured so that Veoh can disable access to content regardless of whether it has received a specific infringement notice. . . . 2. Veoh implemented Audible Magic filtering in October 2007 . . . but did not apply the filter to its backlog of works until the summer of 2008. . . . 3. Veoh's system allowed Veoh's employees to disable access to videos which they knew (or should have known) were infringing, but Veoh chose to implement a policy which allowed employees to ignore such videos. . . . 4. Regardless of whether it received notice, Veoh's system could have allowed its employees to examine . . . videos 'recommended' as 'similar' by its 'recommendation engine.'").

The Court does sustain UMG's objection that the declaration of Stacie Simons does not establish a foundation for statements about Veoh's practices prior to April 2007. But facts about those practices are supported by the supplemental declaration of Joseph Papa. Papa Suppl. Decl. ¶ 6. Papa is Veoh's V.P. of Engineering. UMG objects that parts of Papa's declaration are excludable because Veoh did not cite to them in its

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Veoh uses a number of technologies to automatically prevent copyright infringement on its system. For example, when Veoh disables access to a video that infringes a copyright, “hash filtering” software that it introduced in 2006 automatically disables access to any identical video and blocks any subsequently submitted duplicates. RSGI ¶ 47.⁶ In 2006, Veoh began developing another method of filtering potentially infringing content, but it ultimately adopted a third-party solution from a company called “Audible Magic.” RSGI ¶ 48; Motion at 8.⁷ Veoh began testing Audible Magic’s filtering technology in the summer of 2007. RSGI ¶ 50. Audible Magic’s product works by taking an audio “fingerprint” from video files and comparing it to a database of copyrighted content that is provided by copyright holders like UMG. (The record on this motion does not reveal precisely how this database is compiled and tailored to each internet service provider that uses it.) This system is meant to filter out content that the copyright holders have not authorized to appear on Veoh’s system. RSGI ¶ 49. There is evidence that Audible Magic’s system does not succeed at filtering out all forbidden videos, RSGI ¶ 65, but in any event UMG faults Veoh for taking too long to implement it.

Veoh put Audible Magic’s technology into use in October 2007 to filter uploaded works. RSGI ¶ 51. Beginning then, if a user attempted to upload a video that matched

⁶ UMG disputes the effectiveness of this mechanism because it can identify only files that are exactly identical. This contention, and some others raised by UMG, are based on affidavits by two experts, Ellis Horowitz and Benjamin Edelman. Veoh objects that these affiants are not qualified as experts and argues that their testimony is irrelevant. It is unnecessary for the Court to rule on these objections in light of this Order’s conclusion that the applicability of the section 512(c) safe harbor does not turn on when Veoh implemented the filtering system that UMG prefers. The other opinions expressed in the Edelman declaration (*i.e.*, that Veoh distributes music video content because it draws viewers, and that “Veoh generates advertising revenue from its display of advertising in connection with the display of UMG’s copyrighted content”) and the Horowitz declaration (*i.e.*, that Veoh has available more effective filtering technologies which it has not adopted), also are not material in light of the analysis below.

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