No. 09-55902, No. 09-56777

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

UMG RECORDINGS, INC., *et al.*,

*Plaintiffs-Appellants*

v.

SHELTER CAPITAL PARTNERS, LLC, *et al*.,

*Defendants-Appellees*.

On Appeal from the United States District Court
for the Central District of California, Western Division—Los Angeles
Hon. A. Howard Matz, District Judge
No. 07-cv-05744

# DEFENDANTS-APPELLEES SHELTER CAPITAL PARTNERS, LLC, SHELTER VENTURE FUND, L.P., SPARK CAPITAL, LLC, SPARK CAPITAL, L.P., AND THE TORNANTE COMPANY LLC'S RESPONSE TO JUNE 7, 2012 ORDER

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## I. INTRODUCTION

On December 20, 2011, the Ninth Circuit affirmed the District Court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) of UMG's claims against Defendants-Appellees Shelter Capital Partners, LLC, Shelter Venture Fund, L.P., Spark Capital, LLC, Spark Capital, L.P., and the Tornante Company LLC (the "Investor Defendants"). In doing so, the Circuit held that the District Court properly dismissed the claims against the Investor Defendants regardless of whether Veoh was protected by the safe harbor provision of the Digital Millennium Copyright Act ("DMCA"). *UMG Recordings v. Shelter Capital Partners, LLC*, 667 F.3d 1022, 1045 (9th Cir. 2011). That is to say, the Ninth Circuit affirmed the District Court's ruling as to the Investor Defendants independent of any interpretation of the DMCA, either its own or that of the Second Circuit. Accordingly, while the Investor Defendants fully agree with the positions advanced by Veoh Networks, Inc. ("Veoh") about the Second and Ninth Circuit interpretations of the DMCA's safe harbor provision, the Court should deny UMG's petition for rehearing en banc as to the Investor Defendants because the panel's holding as to the Investor Defendants is not related to or dependent on the DMCA in any way.

## II. ARGUMENT

The Court's June 7, 2012 Order directs the parties to address: (1) whether the Second Circuit drew the correct distinction between actual and "red flag" knowledge under the DMCA's "safe harbor" provision, 17 U.S.C. § 512(c), and if so, how this distinction affects the disposition of this case; and (2) whether a service provider needs to be aware of the specific infringing material in order to have the "right and ability to control" the infringing activity under 17 U.S.C. § 512(c)(1)(B); whether importing such a knowledge requirement makes it duplicative of 17 U.S.C. § 512(c)(1)(A); whether, assuming such knowledge is not a requirement, a copyright holder need show more than the ability to remove or block access to infringing materials in order to have the right and ability to control infringement; and whether the Ninth Circuit should adopt the Second Circuit's resolution of these questions. June 7, 2012 Order (Docket No. 59).

Each of these questions is about the Second and Ninth Circuit's interpretation of 17 U.S.C. § 512(c), the safe harbor provision of the DMCA, which constituted the basis of the District Court's grant of summary judgment in Veoh's favor and the Ninth Circuit panel's affirmation of that judgment. *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1118 (C.D. Cal. 2009); *UMG Recordings*, 667 F.3d at 1045. The Investor Defendants agree with the positions advanced by Veoh in its response to the Court's June 7, 2012 Order

on these issues. However, the resolution of these issues does not affect the Investor Defendants' liability in any way, because the District Court's dismissal of UMG's claims against the Investor Defendants, and the Ninth Circuit's affirmation of that dismissal, were not based on, or even tangentially related to, the DMCA's safe harbor provision. Indeed, the District Court's only mention of the DMCA in its dismissal order is in a footnote explaining that UMG's argument that the Investor Defendants were required to "take every proactive step to protect copyright holders' interests" would subject the Investor Defendants to a higher standard than service providers, who are entitled to the protection of the DMCA's safe harbor for doing far less. *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, 2009 U.S. Dist. LEXIS 70553, at *22 n.5 (C.D. Cal. May 5, 2009). Instead, the District Court dismissed UMG's claims against the Investor Defendants because UMG failed to state facts sufficient to constitute any claims for tortious conduct, irrespective of the DMCA's safe harbor.

Likewise, the Ninth Circuit panel affirmed the District Court's dismissal on the basis of "the merits of UMG's secondary liability arguments," not premised in any way on whether Veoh was entitled to the DMCA's safe harbor provision. *UMG*, 667 F.3d at 1046. As to UMG's contributory infringement claim, the Circuit agreed with the District Court that this claim failed because "UMG did 'not allege sufficiently that [the Investor Defendants] gave material assistance in

helping Veoh or its users accomplish infringement." *Id.* In addition, the Ninth Circuit affirmed the District Court's dismissal of UMG's vicarious liability and inducement of infringement claims, and held that the contributory infringement claim further failed, because UMG failed to allege that the Investor Defendants agreed to work in concert to obtain and leverage majority control. *Id.* at 1047. None of these holdings has anything to do with the DMCA's safe harbor provision.

Accordingly, because neither the District Court nor the Ninth Circuit panel considered the DMCA's safe harbor in holding that UMG failed to state any claims against the Investor Defendants, neither the Ninth nor Second Circuit's interpretations of the safe harbor have any bearing on the dismissal of UMG's claims against the Investor Defendants.

## III. CONCLUSION

For the aforementioned reasons, the Second and Ninth Circuit's interpretations of the DMCA's safe harbor provision are irrelevant to, and do not impact the validity of, the Ninth Circuit's affirmation of the District Court's dismissal of UMG's claims against the Investor Defendants. Thus, for the reasons stated in the Investor Defendants' response to UMG's petition for rehearing en banc (Docket No. 55), the Court should deny UMG's petition.

Dated: June 28, 2012

By: /s/ Andrew B. Grossman

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a) and Circuit Rule 40-1(a), I certify that the attached response complies with the type-volume limitations because it contains 880 words.

This response complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point font size and Times New Roman font style.

Dated: June 28, 2012

By: /s/ Andrew B. Grossman
Andrew B. Grossman

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 28, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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