

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
NO. 09-1090

IN RE: SONY BMG MUSIC ENTERTAINMENT; WARNER BROS.
RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA
RECORDS, LLC; AND UMG RECORDINGS, INC.

Petitioners.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

District Court Case No. 07-11446-NG (D. Mass.)
(Consolidated with District Court Case No. 03-11661-NG (D. Mass.))
Hon. Nancy Gertner, United States District Judge, presiding

***AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION,
PUBLIC.RESOURCE.ORG, INC., MEDIA ACCESS PROJECT,
INTERNET ARCHIVE, FREE PRESS, CALIFORNIA FIRST
AMENDMENT COALITION, AND BEN SHEFFNER'S BRIEF IN
SUPPORT OF RESPONDENTS**

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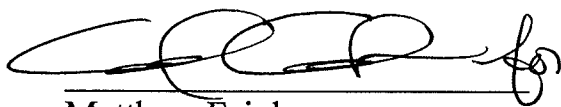
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**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES
WITH A DIRECT FINANCIAL INTEREST IN LITIGATION**

Pursuant to FRAP 26.1, *amici* Electronic Frontier Foundation, (“EFF”), and Free Press, 501(c)(3) non-profit corporations incorporated in the Commonwealth of Massachusetts; Public.Resource.Org, Inc., Media Access Project, Internet Archive, and California First Amendment Coalition, 501(c)(3) non-profit corporations incorporated in California, make the following disclosure:

1. *Amici* are not publicly held corporations or other publicly held entities.
2. *Amici* have no parent corporations.
3. No publicly held corporation or other publicly held entity owns 10% or more of *amici*.
4. *Amici* are not trade associations.



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FEINBERG & KAMHOLTZ

January 29, 2009

I. INTRODUCTION

From the moment we announced in June 2003 that we would be gathering evidence for the purpose of bringing lawsuits against end users, the program has generated attention and debate. We welcome that national conversation.

-Cary Sherman, President, RIAA¹

*Amici*² write in support of the District Court's decision to allow the recording of a single upcoming motion hearing in order that it may be simultaneously broadcast on the Internet. Specifically, we seek to present information to the Court that will confirm the District Court's observation that "these cases have generated widespread public attention, much of it on the internet," *Capitol Records, Inc., et al v. Alaujan, et al*, --- F.Supp.2d ----, 2009 WL 82486, *2 (D. Mass 2009).

Since 2003, the members of the Recording Industry Association of America (RIAA) have brought lawsuits or sent pre-litigation settlement demands to over 35,000 individuals across the nation whom they accuse of engaging in copyright infringement over peer-to-peer networks. The litigation campaign has elicited

¹ Cary Sherman, *Perspective: Rights and Wrongs in the Antipiracy Struggle*, CNET NEWS, October 16, 2007, <http://news.cnet.com/Rights-and-wrongs-in-the-antipiracy-struggle/2010-1027_3-6213649.html>.

² As the accompanying motion for leave describes in further detail, the *amici* on this brief are the Electronic Frontier Foundation, Public.Resource.Org, Media Access Project, Internet Archive, Free Press, California First Amendment Coalition, and Ben Sheffner.

strong opinions on both sides. Some, like *amicus* Ben Sheffner, have backed the campaign, arguing that the recording industry has little choice but to bring these lawsuits in the face of widespread, unauthorized copying of digital music. Others, including *amicus* EFF, have argued that this litigation campaign is misguided, futile and likely to be counterproductive in the long run.

Amici do not ask this Court to take a position on this ongoing dispute. The strong voices on each side, however, and the ongoing public interest strongly support the District Court's decision to allow an Internet broadcast of the upcoming oral argument. The issues at stake affect not only the 35,000 people who have been directly involved, but the reportedly one-third of all personal computer users worldwide who have installed peer-to-peer software.³

Additionally, *amici* Public.Resource.org and Internet Archive offer an alternative for the Internet hosting of the broadcast, which resolves one of the biggest complaints made by the petitioners: hosting by the Berkman Center for Internet and Society at Harvard University, which represents a Defendant in this action.

II. THE RIAA'S OWN EFFORTS HAVE LED TO STRONG PUBLIC INTEREST IN THE LITIGATION CAMPAIGN

The District Court's decision to allow increased public access for this particular case is a wise one. This lawsuit is not a singular situation affecting only

³ <http://www.emediawire.com/releases/2007/12/emw576418.htm>.

the parties in this case or only people in this particular District Court or Circuit. For the last five years RIAA members have reportedly launched legal threats or lawsuits against more than 35,000 individuals all across the country, most of them ordinary people who have never been involved in litigation before.⁴

As the quote from RIAA President Cary Sherman above demonstrates, the RIAA members' stated goal of this litigation campaign is to raise public awareness. The organization announced the litigation campaign in a press release and has regularly issued them thereafter. In a September 8, 2003 press release the RIAA noted: "Since the recording industry stepped up the enforcement phase of its education program [i.e. lawsuits], public awareness that it is illegal to make copyrighted music available online for others to download has risen sharply."⁵ In 2004, the RIAA's Chief Executive Mitch Bainwol told the *New York Times* that due to the lawsuits "awareness that trading music violates the law 'has shot through the roof.'"⁶

⁴ The RIAA recently announced that it is ending the filing of new lawsuits under the campaign. Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL STREET JOURNAL, Dec. 19, 2008, <<http://online.wsj.com/article/SB122966038836021137.html>>. However, it has continued to litigate the thousands of pending lawsuits, including the instant one.

⁵ *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online* RIAA Press Release (Sep. 8, 2003).

⁶ John Schwartz, *Recording Industry Is Accusing 532 People of Music Piracy*, THE NEW YORK TIMES ONLINE, Jan. 21, 2004, <<http://www.nytimes.com/2004/01/21/business/21WIRE-MUSIC.html?ex=1232859600&en=eaa24225824c9763&ei=5070>>.

That public education goal continues. In 2007 RIAA spokesman Jonathan Lamy embraced the media coverage of the verdict in the only litigation campaign case to go to trial:

Look at the extensiveness of the coverage [of the Jammie Thomas verdict]. Every single newspaper and TV station carried the story that a jury of Thomas' peers found her guilty of copyright violations. This sends a very clear message that if you steal music online there can be real consequences. There is a lot of deterrent value to that message becoming public.⁷

Just a cursory search on Lexis/Nexis turned up over 3,000 media stories from the past five years referencing the peer to peer litigation campaign. Of those, over 900 are from mainstream media ranging across the country from the *Boston Globe* and *New York Times* to the *Seattle Post Intelligencer* and *Los Angeles Times*.⁸

The litigation campaign has been controversial both in the public discussion and in the courts. For instance, the District Court handling the only case to have gone to trial to date stated:

The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer

⁷ Greg Sandoval, *For RIAA, A Black Eye Comes With the Job*, CNET NEWS, October 9, 2007, <http://news.cnet.com/For-RIAA%2C-a-black-eye-comes-with-the-job/2100-1027_3-6212374.html>.

⁸ Similarly, as of fall of 2008, the website hosting amicus EFF's White Paper aimed at explaining the lawsuits to potential defendants received an average of 500 visitors per day.

network cases such as the one currently before this Court. . . . While the Court does not discount Plaintiffs' claim that, cumulatively, illegal downloading has far-reaching effects on their businesses, the damages awarded in this case [more than one hundred times the cost of the works] are wholly disproportionate to the damages suffered by Plaintiffs.

Capitol Records v. Jammie Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) .

Some members of Congress have also raised concerns, while others have expressed support for the litigation campaign.⁹ Again, regardless of one's position on the merits of the legal arguments, the depth of this public interest and the passionate disputes surrounding the litigation campaign support the District Court's decision to allow the broadcast of the upcoming hearing.

III. THE DISTRICT COURT HAS THE AUTHORITY TO ALLOW PASSIVE PUBLIC VIEWING OF THE PROCEEDINGS

The District Court's decision to allow this case to be an experiment in broadcasting online is both appropriate and within its sound discretion.¹⁰ The only remaining question is whether the District Court's decision was permitted by the Local Rules. It was. Local Rule 83.3(a) explicitly permits recordings and

⁹ See e.g. Grant Gross, *Congress Scrutinizes RIAA Tactics*, IDG NEWS, Sept. 17, 2003; Katie Dean, *Senator Wants Answers From RIAA*, WIRED NEWS, Aug. 1, 2003; John Borland, *Newsmaker: Why File Swapping Tide is Turning*, CNET NEWS, Sept. 18, 2003, <http://news.cnet.com/Why-file-swapping-tide-is-turning/2008-1082_3-5078418.html>.

¹⁰ While the District Court ruling allows Internet broadcasting or webcasting rather than traditional television broadcasting, this should make no difference to the legal analysis.

broadcasts of courtroom proceedings “as specifically provided in these rules or by order of the court.” Since the District Court has issued such an order, this should end the inquiry.

Petitioners attempt to infer a limitation on the general authority given Rule 83.3(a) by reference to in Rule 83.3(c), which lists a few situations in which the court “may permit” recording or broadcasting of courtroom. Petitioners argue subsection (c) presents an exhaustive list of situations in which the District Court is empowered to allow broadcasting. But the plain language of the Local Rule does not support this argument. First, the Rule allows recording either “as specifically provided in these rules” *or* “by order of the court.” The word “or” negates the argument that “specifically provided in these rules” is the only basis on which a broadcast may be allowed.

Second, Rule 83.3(c) plainly does not state that a court “may only” permit broadcasting in the specific circumstances listed, or other words indicating a specific limitation. Petitioners cannot invent such a limitation in the face of the Rule’s plain language. The Supreme Court dealt with a similar case of statutory interpretation in *Chevron U.S.A. v. Echazabal*, where the controversy centered around the phrase, “may include.” 536 U.S. 73, 80 (2002). There, the Court recognized that the “expansive phrasing of [the words] ‘may include’ points directly away from the sort of exclusive specification [claimed].” *Id.* (job