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

CORRECTED *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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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.

January 29, 2009

_____
Matthew Feinberg
FEINBERG & KAMHOLTZ

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, RIAA[1]

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

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[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.Resoure.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, of which counsel for the Defendant is a faculty director.

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]

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[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

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[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

qualification standards "may include" a veto on those who would directly threaten others in the workplace). As in *Chevron*, the use of the words "may permit" in of Rule 83.3(c) is correctly read to be illustrative rather than exhaustive.[11]

IV. PUBLIC ACCESS TO COURTS IS LONGSTANDING AND IMPORTANT AND IS ENHANCED BY PERMITTING WEBCASTING OF PROCEEDINGS.

The District Court's decision is also supported by the longstanding recognition of the importance of public and press monitoring of the courts. As this Circuit has observed, "[c]ourts long have recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'" *In re Providence Journal Co., Inc.*, 293 F.3d 1, 9 (1st Cir. 2002) (quoting *Siedle v. Putnam Inv., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998)). "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). As the Eastern District of New York aptly observed:

> In our democracy, the knowledgeable tend to be more robustly engaged in public issues. Information received by direct observation is often more useful than that strained through the media. Actually seeing and hearing court proceedings, combined with commentary of

[11] In fact, none of the cases cited by Petitioners consider phrases remotely similar to "may permit." *Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec.*, 510 F.3d 1, 10 (1st Cir. 2007) (interpreting "arising from"); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985) (interpreting "without reasonable cause to believe the truth of such statement"); and *Breest v. Cunningham*, 752 F.2d 8, 9 (1st Cir. 1985) (interpreting "sexual assault").

> informed members of the press and academia, provides a powerful device for monitoring the courts

Hamilton v. Accu-Tek, 942 F. Supp. 136, 138 (E.D.N.Y. 1996) (permitting Court TV to broadcast arguments on a motion).

The strong public policy favoring direct public observation of judicial processes stems from the First Amendment, which provides the press and the public the right to personally attend trials and pre-trial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open"); *In re Globe Newspaper Co*., 729 F.2d 47, 51, 59 (1st Cir. 1984) (right applies to pre-trial proceedings); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

The Supreme Court has rejected an absolute bar on court experimentation with cameras in the courtroom. *Chandler v. Florida*, 449 U.S. 560 (1981). Since then courts have continued to experiment with cameras in the courtroom. *See e.g. E*Trade Financial Corp. v. Deutsche Bank AG,* 582 F.Supp.2d 528 (S.D.N.Y. 2008) (permitting camera placement despite bank's opposition); *In re Zyprexa Prods. Liab. Litig.*, 2008 WL 1809659 (E.D.N.Y. 2008) (granting Courtroom View Network's application in class action case where "tens of thousands of individuals, organizations and governmental entities all over the United States are parties to, or affected by, the instant litigation"). Even when

cameras were not permitted, this Court has committed the decision to the sound discretion of the trial court. *See In re Providence Journal Co., Inc*., 293 F.3d at 18 (no abuse of discretion for trial court to deny media right to material where there was no reasonable way to rerecord it).

Technology now allows an unobtrusive, practicable and affordable way for people to see and hear exactly what has transpired in the courtroom, and supplement the reports in the print and electronic media with the source material. Thus, it will benefit the public to be able to acquire information about this case by direct observation through the broadcast. As discussed below, the Petitioners have failed to show any harm from permitting this direct observation.

> [O]nce the evidence has become known to the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

In re Application of Nat'l Broad. Co. (United States v. Myers), 635 F.2d 945, 952 (2d Cir. 1980) (addressing whether television networks may copy and televise videotapes entered into evidence).

V. PETITIONERS' HAVE NOT MET THEIR BURDEN OF DEMONSTRATING IRREPARABLE HARM

As Petitioners' acknowledge, to obtain a writ of mandamus overturning the District Court's exercise of its sound discretion, they must demonstrate that they will suffer irreparable harm. *In re United States,* 158 F.3d 26, 30 (1st Cir. 1998). They have failed to do so.

Given Petitioners very public and repeated assertions that their goal is to foment a public discussion about Internet copyright issues, Petitioners' assertion that public viewing of the proceedings in this case through an Internet broadcast would cause them irreparable harm is curious, and they provide little specific support for it. Instead of identifying specific harms that they *would* suffer, Petitioners quote three statements expressing the views of the Judicial Conference that irreparable harm *can* occur from the broadcast of District Court proceedings.[12]

Yet the Supreme Court in *Chandler* required a party challenging the fairness of cameras in the courtroom during a criminal trial to come forward with specific evidence that their trial would be tainted by broadcast coverage. *See Chandler, supra,* 449 U.S. at 579. It expressly rejected the notion that merely stating that

[12] Judge O'Scannlain, whose statement on behalf of the Judicial Conference was cited by Petitioners, also testified on his own behalf in support of cameras in appellate courtrooms, reporting that his own experience with cameras had been "overwhelmingly positive" but noting that "[t]rial courts and appellate courts differ in important respects, primarily the presence of victims, witnesses and juries." (Written Testimony of Diarmuid F. O'Scannlain to the United States Senate Committee on the Judiciary (November 9, 2005)). Petitioners have failed to demonstrate that, in the absence of the potential impact on victims, jurors, or witnesses, the Judicial Conference general statements about harm support their specific situation.

prejudice could happen was sufficient, noting: "no one has presented empirical data sufficient to establish that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on that process." *Id*., at 576. n. 11.[13]

Petitioners then argue that there is an increased risk of manipulation of the transcript of the proceedings if it is in video format. They raise the specter that manipulation could be used to present some issues out of context. Yet the transcripts of court proceedings are ordinarily available to the public as text or word processing files. These files, which require only a basic word processor to edit, are manifestly more vulnerable to the types of manipulation that petitioners posit than video files, which require some level of skill to edit and splice. For example, an edit to video will often show a jump, where the people depicted will appear in different positions after the cut. An edit to text, on the other hand, has no such tell-tale signs. Petitioners' claim that video versions of the proceedings would be more vulnerable to manipulation than text transcripts is exactly backwards.

Moreover, other Circuit Courts have long made audio transcripts available online with none of the harms that Petitioners posit. Notably, this includes oral argument in a Seventh Circuit case arising from this litigation campaign, *BMG Music v. Gonzales*, 430 F.3d 888 (2005).

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[13] As with traditional media coverage of litigation, concerns about any members of the jury or jury pool watching the proceedings can be easily addressed during voir dire and through an admonition to jurors during trial.

If the public has access to the full video of the proceedings, it will be easier, not harder, for Petitioners to correct any attempted manipulations by referring the public to the actual, full video. As Justice Brandeis long ago observed: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, concurring).[14]

Petitioners also complain that they will be harmed because, as originally ordered, the video might have been exclusively available on the Berkman Center's website. As an initial matter, the Berkman Center's website has a long history of educating and informing as an online public resource. More importantly, the District Court has now clarified that Petitioners are free to host the webcast on their servers as well. (Dkt. 738 at 3).

Additionally, *amici* Public.Resource.org and Internet Archive are willing to host the webcast in addition to, or instead of, the Berkman Center. These two nonprofit organizations, whose missions are to facilitate public access to information, are able serve as neutral hosts for the broadcast and will provide the gavel-to-gavel coverage that the District Court required. Public.Resource.org will

[14] Petitioners also claim that failure to overturn the District Court's order "may well open the doors to a flood of applications." Petition at 20. Yet other District Judges in this Circuit are certainly capable of evaluating any such requests in the ordinary course of litigation.

host the video with the same conditions as all other government works it hosts, which includes no restrictions on reuse of the content. Public.Resource.org, in fact, has previously partnered with Courtroom View Network for other recordings of court proceedings, which are now available on *amicus* Internet Archive's website.[15]

Petitioners next argue that the fact that the request came first from the defendant somehow undermines the claim of public interest in the proceedings. Yet as noted *infra*, a strong general public interest in the litigation campaign exists and would be served by allowing the Internet broadcast. In short, there is both willing media and a wanting public.

Petitioners then claim that there will be prejudice to them if the public is only shown the proceedings from here forward, characterizing it as a "snippet." But a hearing on these three motions is hardly a snippet, and the public can gain much understanding from even a limited view into a District Court's process the context of the wide-spread litigation campaign.

Petitioners repeatedly make the unsupported assertion that allowing broader public viewing of their litigation campaign would "benefit the Defendant and his counsel to the detriment of Petitioners." Yet especially given the Petitioners' vocal

[15] *See e.g.* Michael B. Nifong, Day 1, AM Session 1 (2007), available at http://www.archive.org/details/nifong.day1.am1 (proceedings in *The North Carolina State Bar v. Michael B. Nifong*).

public media strategy in support of the cases, it is difficult to see why members of the general public would be more likely to agree with the defendants than with the plaintiffs in this case if they see an actual hearing for themselves. *Amicus* Ben Sheffner has argued on his blog that public support for Petitioners will increase as the public gains awareness of the actual proceedings in the case.[16] Regardless, the Petitioners have made the choice to avail themselves of the public courts and what transpires in these courts should be available to all members of the public, whether they can travel to the courthouse or not.

[16] *Why the record labels should WANT the* Tenenbaum *hearing webcast*. COPYRIGHTS & CAMPAIGNS, Jan. 19, 2009 (available at <http://copyrightstandcampaigns.blogspot.com/2009/01/why-record-labels-should-want-tenenbaum.html>) (citing currently available audio webcast of Defendant Joel Tenenbaum's deposition)

CONCLUSION

Based upon the foregoing, *amici* respectfully request that the District Court's Order be Upheld and the Petition for Mandamus or Prohibition be Dismissed.

January 29, 2009

Respectfully Submitted,

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Certificate of Compliance with Circuit Rule 32-1

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure and First Circuit Rule 32-1, I hereby certify that the foregoing brief uses 14-point Times New Roman spaced type; the text is double-spaced; and footnotes are single-spaced. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) as it contains less than 7,000 words.

DATED: January 29, 2009

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MATTHEW H. FEINBERG
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I, Cindy Cohn, hereby certify that I am over the age of 18 years, not a party to the cause. My business address is 454 Shotwell Street, San Francisco, CA 94110.

On January 28, 2009, I caused the foregoing document: **MOTION FOR LEAVE TO FILE** and **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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by delivering them to Federal Express for delivery the next day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of January, 2009, at San Francisco, California.

_____

Cindy Cohn