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**RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA**

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17 AOL Time Warner Inc.

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 PACIFIC BELL INTERNET SERVICES,

22 Plaintiff,

23 v.

24 RECORDING INDUSTRY ASSOCIATION
25 OF AMERICA, INC., MEDIA SENTRY,
26 INC., d/b/a MEDIAFORCE, and
27 IO GROUP, INC., d/b/a TITANMEDIA,
28 TITANMEDIA.COM, and
TITANMEN.COM,

Defendants.

Case No. C-03-3560 (SI)

**MOTION OF AOL TIME
WARNER INC. FOR LEAVE
TO FILE A BRIEF AMICUS
CURIAE**

Date: November 21, 2003
Time: 9:00 a.m.
Dept.: 10, 19th Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on November 21, 2003, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Susan Illston, United States District Judge, in the United States Courthouse located at 450 Golden Gate Avenue, San Francisco, California, AOL Time Warner Inc. ("AOL

1 Time Warner”) will, and hereby does, move the Court for leave to file this brief
2 *amicus curiae*.

3 This case raises questions concerning the extent to which Internet Service
4 Providers (“ISPs”) must comply with the subpoena process of the Digital Millennium
5 Copyright Act (“DMCA”).¹ AOL Time Warner has significant business interests on
6 both sides of this debate: it is both one of the world’s largest content companies and
7 one of the world’s largest ISPs. Thus, AOL Time Warner is uniquely situated to
8 provide balanced comment on the issues raised in this case, and should for that reason
9 be permitted to participate as an *amicus curiae*.

10 **STATEMENT OF RELIEF SOUGHT**

11 AOL Time Warner seeks leave to file this brief *amicus curiae*.

12 **STATEMENT OF FACTS**

13 AOL Time Warner is a publicly traded, diversified media and entertainment
14 company. AOL Time Warner’s business interests include filmed entertainment,
15 television network programming, publishing, music, online services, and cable. For
16 purposes of this motion, the most immediately affected of these businesses are
17 conducted by Warner Music Group Inc. and the affiliated music companies it
18 oversees, by America Online, Inc. (“America Online”), and by Road Runner.²

19 Warner Music Group Inc. and its affiliated music companies, including its
20 recorded music labels (among others, Atlantic Recording Corporation, Elektra
21 Entertainment Group Inc., and Warner Bros. Records Inc.) and its music publishing
22 company, Warner/Chappell Music, Inc. (together, “Warner Music Group”) are
23 engaged in the business of music publishing and the creation, promotion, distribution,

24 _____
25 ¹ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in various sections of
17 U.S.C., including 17 U.S.C. § 512).

26 ² Other AOL Time Warner divisions that produce, market, and distribute
27 copyrighted content — in particular, Warner Bros., which produces, markets, and
28 distributes filmed entertainment — may also be affected by the outcome of this
litigation.

1 marketing, and sale of recorded music on compact discs (“CDs”), cassette tapes, and
2 other packaged media, as well as via online services. Warner Music Group owns a
3 vast number of copyrighted sound recordings and musical compositions.

4 In recent years, the sales and licensing of music, including that of Warner
5 Music Group, have been seriously harmed by peer-to-peer (“P2P”) Internet-based file
6 copying and distribution systems like KaZaA and Grokster, whose primary objective
7 is to promote and facilitate copyright infringement. These systems have allowed
8 millions of P2P users to make and distribute copies of copyrighted sound recordings
9 embodying copyrighted musical compositions — including Warner Music Group’s
10 works — without authorization or payment. This conduct is unquestionably unlawful.³

11 America Online is the world’s largest Internet service provider (“ISP”). Its
12 AOL service, which currently has over 33 million subscribers worldwide, offers a
13 wide range of features, including electronic mail, instant messaging, content,
14 electronic commerce, and Internet access service. Subscribers may access the AOL
15 service using dial-up telephone service or “broadband” services like Digital
16 Subscriber Line (“DSL”) and cable-modem service.

17 Road Runner is — like America Online — an Internet service provider. Road
18 Runner provides service primarily via broadband, not via dial-up. Road Runner
19 provides its ISP service principally to the cable-modem-service subscribers of Time
20 Warner Cable, which is the Nation’s second largest cable operator and a subsidiary of
21 AOL Time Warner. Road Runner currently serves approximately 3 million Time
22 Warner Cable subscribers.

23 Over the past several months, America Online and Road Runner have received
24 numerous P2P-related subpoenas issued pursuant to the DMCA. These subpoenas
25 have required America Online and Road Runner to provide the names and addresses
26

27 ³ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir.
28 2001).

1 of subscribers who have allegedly used the AOL and Road Runner services to access
2 P2P services and unlawfully distribute copies of copyrighted recordings.

3 There is no question that the unauthorized copying and distribution of
4 copyrighted works via P2P systems constitute infringement on an unprecedented,
5 massive scale. As both a significant owner and creator of content and the world's
6 largest ISP, AOL Time Warner believes that this illegal and harmful conduct must be
7 curbed. AOL Time Warner further believes that, as discussed below, the United
8 States District Court for the District of Columbia correctly interpreted the DMCA and
9 its constitutionality,⁴ and therefore believes that properly drafted and served DMCA
10 subpoenas must be obeyed. In this respect, AOL Time Warner's position in this case
11 is fully supportive of, and congruent with, that of RIAA.⁵ As a matter of law, RIAA
12 is entitled to compliance with properly drafted and served DMCA subpoenas.

13 At the same time, AOL Time Warner also recognizes that DMCA subpoenas
14 may impose a compliance burden on ISPs. Particularly given the large number of
15 subpoenas being served within short periods of time, compliance with subpoenas
16 requires dedication of substantial human and other resources. For example, for every
17 subpoena, an ISP employee needs to conduct a complex process to identify the
18 subscriber involved. In addition, the ISP's legal department typically reviews
19 subpoenas and, as a matter of practice, sends prompt notification to customers. The
20 ISP therefore requires a reasonable amount of time to comply with each subpoena.

21
22 ⁴ See *Recording Indus. Ass'n of Am. v. Verizon Internet Servs. (In re Verizon*
23 *Internet Servs., Inc.)*, 240 F. Supp.2d 24 (D.D.C. 2003) ("*Verizon I*") (subpoena
24 process of 17 U.S.C. § 512(h) covers service providers' activities in transmitting,
25 routing, or providing connections for copyrighted materials maintained on computers
of ISP's subscribers); *Recording Indus. Ass'n of Am. v. Verizon Internet Servs. (In re*
Verizon Internet Servs., Inc.), 257 F. Supp.2d 244 (D.D.C. 2003) ("*Verizon II*")
(subpoena process of 17 U.S.C. § 512(h) does not violate Article III or the First
Amendment).

26 ⁵ Warner Music Group's recorded music affiliates are members of RIAA. As
27 RIAA has previously indicated, however, RIAA does not represent Warner Music
28 Group in this proceeding. See Defendant RIAA's Certification of Interested Entities
or Persons; Defendant RIAA's Motion to Dismiss at 1 n.1.

ARGUMENT

1 AOL Time Warner is uniquely situated to provide balanced comment on the
2 issues raised in this case. ISPs generally may undervalue the significant harm illegal
3 P2P file-copying and distribution inflicts on copyright owners and may have little
4 incentive to refrain from advocating positions that would unduly hamper copyright
5 owners' efforts to enforce their rights. Conversely, copyright owners may assign
6 little weight to burdens imposed on ISPs and may have little incentive to refrain from
7 advocating positions that would impose substantial costs. AOL Time Warner, on the
8 other hand, has significant business interests on both sides of the debate over the
9 DMCA subpoena process. Thus, it has an incentive to stop illegal file-copying and
10 distribution without imposing unreasonable burdens or costs.

11 Courts — including this Court — have consistently recognized the value of
12 hearing perspectives that are not otherwise represented and that may aid in resolving
13 the issues before them. *See, e.g., Sonoma Falls Developers, LLC v. Nevada Gold &*
14 *Casinos, Inc.*, 272 F. Supp.2d 919, 925 (N.D. Cal. 2003) (“District courts frequently
15 welcome amicus briefs from non-parties concerning legal issues that have potential
16 ramifications beyond the parties directly involved or if the amicus has ‘unique
17 information or perspective that can help the court beyond the help that the lawyers for
18 the parties are able to provide’”) (quoting *Cobell v. Norton*, 246 F. Supp.2d 59, 62
19 (D.D.C. 2003)). Because AOL Time Warner will be able to present such
20 perspectives in this litigation, it should be permitted to participate as *amicus curiae*.

21 AOL Time Warner is in agreement with RIAA’s position that the DMCA
22 subpoena process that RIAA has invoked is both authorized by the DMCA and
23 constitutionally permissible. As the United States District Court for the District of
24 Columbia correctly held in *Verizon I*, the subpoena process of 17 U.S.C. § 512(h)
25 applies to service providers’ activities in transmitting, routing, or providing
26 connections for copyrighted materials maintained on computers of ISPs’ subscribers.
27 *See Verizon I*, 240 F. Supp.2d at 44. AOL Time Warner therefore concurs with
28

1 RIAA's arguments on this statutory interpretation issue. *See* Defendant RIAA's
2 Motion to Dismiss at 18-20.

3 The D.C. District Court was likewise correct when, in *Verizon II*, it upheld
4 the DMCA subpoena process in the face of constitutional objections. *See Verizon II*,
5 257 F. Supp.2d at 275. The *Verizon II* decision correctly held that the subpoena
6 process of 17 U.S.C. § 512(h) "does not violate the case or controversy requirement
7 of Article III," *id.* at 247, and "provide[s] sufficient safeguards and judicial
8 supervision to protect Internet users' First Amendment rights, including anonymity,"
9 *id.* at 264. AOL Time Warner therefore concurs with RIAA's arguments on these
10 issues, and further supports RIAA's argument that the subpoena process of 17 U.S.C.
11 § 512(h) does not violate the due process clause of the Fifth Amendment. *See*
12 Defendant RIAA's Motion to Dismiss at 20-24.

13 Weighing its significant copyright interests and its significant ISP interests,
14 AOL Time Warner believes that the DMCA provisions currently on the books
15 properly balance the interests of ISPs and copyright owners by limiting ISPs' liability
16 for subscribers' acts of copyright infringement while requiring ISPs to assist in
17 combating online infringement, including by identifying infringing subscribers through
18 the DMCA subpoena process.⁶ The DMCA accomplishes this while providing
19 "substantial protection to service providers and their customers against overly
20

21 ⁶ *See Verizon I*, 240 F. Supp.2d at 36 ("The legislative history makes clear
22 that in enacting the DMCA, Congress attempted to balance the liability protections for
23 service providers with the need for broad protection of copyrights on the Internet.");
24 *see also Hearing on Pornography, Technology, and Process: Problems and Solutions*
25 *on Peer-to-Peer Networks Before the Senate Comm. on the Judiciary*, 108th Cong.
26 (Sept. 9, 2003) (statement of Hon. Marybeth Peters, Register of Copyrights)
27 <available at http://judiciary.senate.gov/testimony.cfm?id=902&wit_id=2560 >
28 ("[R]epresentatives of ISPs demanded that the legislation . . . limit their liability
. . . . Congress heeded this call and provided the ISPs with a huge benefit —
virtually no liability for qualifying ISPs. This was balanced by a carefully developed
set of obligations in the DMCA. Among those balancing obligations was the
requirement that ISPs 'expeditiously' respond to subpoenas to provide identifying
information about subscribers accused of copyright infringement so that the
controversy could be settled in court.").

1 aggressive copyright owners and unwarranted subpoenas.”⁷ Having accepted the
2 benefits of the DMCA’s bargain, ISPs must also accept its burdens.⁸ Thus, AOL
3 Time Warner believes that the DMCA subpoena process is unfolding as Congress
4 intended.

5 Although AOL Time Warner agrees with RIAA’s position that the DMCA
6 subpoena process is lawful, AOL Time Warner may, at a later time in this case, seek
7 to address discrete points concerning the mechanics of subpoena enforcement that
8 implicate legitimate ISP interests and on which reasonable accommodations should be
9 made.⁹

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19 ⁷ *Verizon I*, 240 F. Supp.2d at 40-41; *see also Verizon II*, 257 F. Supp.2d at
20 260-61 (“the DMCA contains adequate safeguards to ensure that the First Amendment
rights of Internet users will not be curtailed”).

21 ⁸ *See Verizon I*, 240 F. Supp.2d at 34 n.6 (“in exchange for complying with
22 subpoenas under subsection (h), service providers receive liability protection from any
23 copyright infringement — direct or vicarious — by their users”); *id.* at 37 (“Congress
24 thus created tradeoffs within the DMCA: service providers would receive liability
25 protections in exchange for assisting copyright owners in identifying and dealing with
infringers who misuse the service providers’ systems.”); *Verizon II*, 257 F. Supp.2d
at 274-75 (“It would not serve the public interest for Verizon to continue to receive
the benefits of the legislation — liability protection — without the concomitant
obligations of disclosing the identity of an alleged infringer.”).

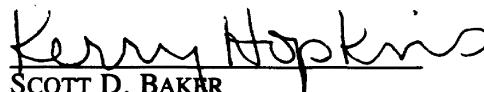
26 ⁹ In particular, AOL Time Warner may seek to address the following issues
27 that were raised in Plaintiff’s Complaint: whether ISPs should be allowed
28 compensation for their costs in complying with DMCA subpoenas, *see* Complaint
¶¶ 5, 80, 82; and how much time ISPs should be allowed to comply with DMCA
subpoenas, *see id.* ¶¶ 5, 48, 76.

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Conclusion

For the reasons set forth above, this motion should be granted.

Respectfully submitted,



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Dated: October 10, 2003

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of October 2003, I caused one copy of the foregoing Motion of AOL Time Warner Inc. for Leave To File a Brief *Amicus Curiae* to be served by first-class mail upon all parties listed below:

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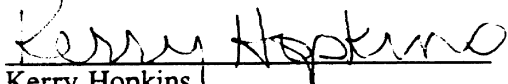
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