

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE SUBPOENA TO VERIZON
INTERNET SERVICES, INC.,

Misc. Act. No. 03-MC-804-HHK/JMF

RECORDING INDUSTRY ASSOCIATION
OF AMERICA,

Plaintiff,

v.

VERIZON INTERNET SERVICES, INC.,

Defendant.

**JANE DOE'S REPLY TO
RECORDING INDUSTRY
ASSOCIATION OF AMERICA'S
OPPOSITION TO MOTION TO
STAY**

RECORDING INDUSTRY ASSOCIATION
OF AMERICA,

Plaintiff,

v.

JANE DOE,
(a.k.a. nycfashiongirl@KaZaA.com),

Intervenor.

INTRODUCTION

Although the RIAA has reportedly obtained more than a thousand subpoenas under 17 U.S.C. Sec. 512(h), this proceeding represents the first occasion on which an individual targeted by one of those subpoenas has come forward in an attempt to challenge it. In effect, the issue currently before the Court is whether that individual, Jane Doe, should be allowed reasonable time to prepare a motion to quash a subpoena compelling the production of her identifying personal information.

RIAA correctly states in opposition that "the strength or weakness of the

copyright owners' case for infringement against [Jane Doe] is simply not at issue in this proceeding." RIAA's Opposition at p. 4. Nevertheless, RIAA filed 162 pages of material dedicated solely to this admittedly irrelevant issue.¹ This sideshow should not be allowed to divert attention from the central issue that will underlie Jane Doe's forthcoming motion to quash: Is the *subpoena process* in 17 U.S.C. section 512(h) constitutional as applied to Jane Doe and other members of peer to peer communities?² The issue has never been litigated by an internet service subscriber. Jane Doe attempts to do so now through pro bono counsel.

Both the Court and the parties will benefit by the grant of this motion to stay. Additional time is needed for the parties to research and develop the constitutional issues raised by the question posed above—issues which are of significant public interest and with weighty consequences to both copyright owners and the literally millions of people who participate in peer to peer communities. In light of RIAA's public statements that it expects to file thousands of copyright infringement suits³ against peer to peer file sharers—using information gained from section 512(h) subpoenas—the additional time requested by Jane Doe seems prudent. RIAA will suffer no detriment in the interim because Jane Doe no longer participates in any peer to peer community.

In contrast to this measured approach, RIAA demands that Jane Doe be required to "immediately" file an opposition to its motion to enforce. Opp. at p.2. Thus, while acknowledging her right to a voice in this proceeding, RIAA expects the

¹ RIAA submitted 60 pages of screen shots of Jane Doe's My Shared Folder, 92 pages of allegedly infringing sound recordings, an article discussing a case of *criminal* copyright infringement, and at least 10 pages of infringement analysis from its chief investigator. *None* of this information is relevant to whether the Court should stay RIAA's motion to enforce.

² The related question of whether RIAA acted in accordance with the provisions of section 512(h) also must be addressed.

³ See < <http://www.riaa.com/news/newsletter/062503.asp> >.

Court to artificially, and unnecessarily, truncate her opportunity to be heard. This expectation, coupled with RIAA's apparent belief that its computerized instant messages to peer to peer file sharers constitutes proper notice of infringement, illustrates the gulf between the parties on their views of due process. As noted in her motion to intervene, due process will be a central issue to both Jane Doe's substantive challenge to the section 512(h) subpoena process and her procedural challenge to RIAA's compliance with that statute. RIAA's suggestion, therefore, that Jane Doe merely submit an immediate opposition to its pending motion to enforce should be rejected. An opposition is an insufficient vehicle to present all the arguments Jane Doe is entitled to make on her own behalf.

ARGUMENT

Federal courts are vested with inherent powers enabling them to manage their cases and courtrooms effectively. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). This Court should exercise its power to stay RIAA's motion to enforce and allow Jane Doe the opportunity to develop and present her arguments to quash the subpoena before RIAA's motion to enforce is heard. RIAA's motion to enforce is *currently* ready to be set for hearing.

I. RIAA Will Not Suffer Any Harm If The Motion To Stay Is Granted

RIAA asserts this motion should be denied in deference to the "expeditious disclosure" it expects from the underlying subpoena. See, e.g., Opp. at p. 2. But "expeditious" need not mean "immediate," especially where speedy action places individual rights at risk without producing any substantial countervailing benefit. RIAA is calling for urgency in a vacuum; there are simply no facts to suggest that additional time will cause or threaten actual harm to RIAA. In fact, even the theoretical harm argued is not articulated beyond "[t]he database can still be used to further violate Plaintiffs' rights." Opp. at p. 10. In contrast, the Offer of Proof

submitted in connection with Jane Doe's Motion to Intervene and Motion to Stay is direct and declarative: Jane Doe "left the KaZaA peer to peer file sharing community . . . and . . . has removed the KaZaA Media Desktop software from the family computer [and] . . . she is not a member of any other peer to peer file sharing community." Offer of Proof at ¶ 9.

Despite its obviously formidable investigative abilities, RIAA was unable to refute these representations. Nonetheless, RIAA protests that Jane Doe's withdrawal from all peer to peer communities is not enough because it has "no assurance that [she] will not attempt to destroy or tamper with evidence to make prosecution more difficult." Opp. at p. 10, fn. 2. RIAA's fear of evidence spoliation seems disingenuous in light of the extensive information it has gathered, analyzed, and submitted to the Court regarding the files in Jane Doe's My Shared Folder. Moreover, the common law has developed ample safeguards against evidence spoliation—including negative inference instructions, issue sanctions, monetary sanctions, and default judgments. See, e.g., *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277 (8th Cir. 1995); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995). In this context, and with important constitutional challenges pending, the interests of all concerned in a reasonable briefing schedule clearly outweigh the purely theoretical harm RIAA implies.

II. Counsel For Jane Doe Did Not Delay In Asserting Her Rights

RIAA protests that Jane Doe and her counsel have been dilatory. On the contrary. Jane Doe's California counsel became aware of the subpoena on July 24, 2003 and did not actually undertake this pro bono representation until August 8, 2003. Thereafter, they were required to locate and coordinate with local counsel (who also had to process her request for pro bono representation). Nevertheless, counsel for Jane Doe filed her motion to intervene—and her two related motions and supporting papers on August 21—twenty-eight calendar days after first learning of the matter.

The section 512(h) subpoena process does not contemplate involvement by those targeted by the subpoena, the internet service subscribers. Counsel for Jane Doe, therefore, researched a number of alternatives to challenge both the validity and compliance with the subpoena, including filing a declaratory judgment action against her internet service provider, Verizon Internet Services, Inc. ("Verizon"), the party served with the subpoena. Counsel was also obligated to research the jurisdictional and venue complications inherent in section 512(h).⁴ After deciding to challenge the subpoena in this Court, counsel for Jane Doe had to research her arguments for intervention and draft her motion to intervene and its related motions. Twenty-eight days to accomplish all of the above, to establish internal procedures to preserve Jane Doe's anonymity, to hire computer technical support, to perform normal client intake, and to deal with the myriad small matters inherent in civil litigation is certainly not "dilatory."

III. Jane Doe Intends to Present Arguments Not Previously Considered By This Court And Never Made Directly By A Subscriber

RIAA incorrectly predicts that "[t]he arguments that Intervenor claims she will present are identical to arguments fully presented to and rejected by Judge Bates in *Verizon I* and *Verizon II*." Opp. at p. 7. RIAA argues that because Verizon claimed to represent the interests of its subscribers, Jane Doe's individual legal interests were somehow adjudicated in these prior actions, which were concerned with subpoenas other than the one seeking her personal identifying information. Jane Doe, however, provided the Court with a sampling of arguments that *were not* asserted previously and indicated that she may make additional arguments if permitted to intervene.⁵

⁴ As illustrated by the recent related federal district court actions involving section 512(h) subpoenas directed to Boston College (D. Mass. Misc. Act. No. 1:03-MC-10210-JLT), Massachusetts Institute of Technology (D. Mass. Misc. Act. No. 1:03-MC-10209-JLT), SBC Internet Services, Inc. (N.D. Cal. 3:03-cv-03560), and Columbia University (D.D.C. Misc. Act. No. 1:03-mc-01059-RWR-DAR)—only the last of which was filed in this Court—the venue in which to challenge these subpoenas is far from clear.

⁵ See Jane Doe's Motion to Intervene at pp. 8 – 10 and p. 13.

Specifically, Jane Doe informed the Court in her motion to intervene that she will make a number of due process arguments not made previously by Verizon and will also assert her right to informational privacy, again an argument Verizon did not make. It is clear that these are arguments Verizon lacked standing to make, and that—in any event—as the real party in interest in this matter, she should have the opportunity to them on her own behalf.

Jane Doe may also present additional arguments not previously addressed by Verizon. For example, she *may* argue that (1) RIAA violated state and/or federal law by intercepting Jane Doe's internet protocol address, (2) RIAA's association with law enforcement implicates the Fourth Amendment's prohibition against unreasonable search and seizures, (3) the subpoena is invalid due to the dual agency created when the law firm of Mitchell, Silberberg & Krupp LLP requested the subpoena on behalf of RIAA who, in turn, requested the subpoena on behalf of the copyright owners, (4) RIAA used the section 512(h) subpoena process not to enforce its copyrights—as is required—but rather to educate and intimidate the peer to peer community, and (5) the legislative history of section 512(h) reveals that it was intended to apply only to direct, as opposed to contributory, infringers.

Jane Doe respectfully urges the Court to consider the breadth and complexity of these potential arguments, among others, and the need for her counsel to develop those that are supportable. Indeed, should the Court recognize an obligation to provide Jane Doe time to develop these arguments, it will have already appreciated at least one due process failure within section 512(h).

IV. RIAA's Arguments In Opposition Are Inherently Flawed

RIAA assumes in its opposition, and in its filings elsewhere, that it is entitled to enforcement of section 512(h) subpoenas simply because it is entitled to the information contemplated by section 512(h). This argument *assumes* both the validity of and RIAA's compliance with section 512(h)—the very issues Jane Doe is

challenging. Due process provides Jane Doe with the right to challenge both assumptions—on her own motion and procedurally bound only by the discretion of the Court—and sufficient time to prepare that motion. In short, section 512(h) cannot usurp Jane Doe's right to assert her fundamental constitutional protections.

RIAA characterizes the Offer of Proof previously submitted by counsel for Jane Doe as misleading. Opp. at p. 10, fn. 2. It also attacks the Offer as “untruthful in the impression it seeks to create.” Opp. at p. 11. These challenges focus on what the Offer does not say, however, rather than what it does. For example, the Offer does not say that Jane Doe never downloaded sound recordings. Similarly, it does not say or imply that all of the content in her My Shared Folder was copied from her collection of compac discs. The Offer simply does not mention or even refer to video, image, or software files.

The Offer was provided to rebut the assumption in RIAA's motion to enforce that all the sound recordings resident in Jane Doe's My Shared Folder were illicit. At the same time the Offer sought to protect her anonymity. We believe it is both appropriate and sufficient for those purposes, and that it cannot fairly be characterized as misleading.

CONCLUSION

Though RIAA prefers a speedier timetable, its interests are not at risk should the Court grant this motion to stay. It is worth noting that the burdens on the parties are not equal: RIAA merely has to defend the section 512(h) subpoena process and its compliance with the statute while Jane Doe has to overcome the presumption that the statute is constitutional. In light of this disparity, it is not surprising that RIAA opposes Jane Doe receiving any time to marshal her arguments.

Jane Doe hereby respectfully requests that the Court grant her motion to stay. Counsel for Jane Doe originally requested that the Court grant her until September 10, 2003 to file her motion to quash. Since that request was made, considerable time and

effort has been expended on proceedings relating to Jane Doe's intervention, including RIAA's opposition to her original motion to stay. On August 28, Jane Doe filed an amended motion to expedite, indicating that all parties look forward to an early determination of that motion. Considering the burden on Jane Doe, the novelty and importance of the issues raised by the subpoena provision, Jane Doe's limited resources, and the capabilities of her opponent, we now request that Jane Doe be given at least two weeks from the time at which of her motions to intervene and to stay are decided in which to prepare and file her motion to quash.

Dated: August 31, 2003

By: / s /

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