

1 ANN BRICK (SB # 65296)
2 American Civil Liberties Union Foundation
3 of Northern California, Inc.
4 1663 Mission St., Suite 460
5 San Francisco, CA 94103
6 Telephone: (415) 621-2493
7 Facsimile: (415) 255-8437

CINDY COHN (SB # 145997)
WENDY SELTZER
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

6 CHRISTOPHER A. HANSEN
7 ADEN J. FINE (SB # 186728)
8 American Civil Liberties Union
9 125 Broad Street, 18th Floor
10 New York, NY 10004-2400
11 Telephone: (212) 549-2500
12 Facsimile: (212) 549-2651

Counsel for *Amici Curiae*

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 PACIFIC BELL INTERNET SERVICES

14 Plaintiff,

15 v.

16 RECORDING INDUSTRY ASSOCIATION
17 OF AMERICA, INC., MEDIASENTRY, INC.,
18 dba MEDIAFORCE, and IO GROUP, INC.,
19 dba TITANMEDIA, TITANMEDIA.COM,
20 and TITANMEN.COM

21 Defendants.

Case No. C 03-3560 SI

APPLICATION OF *AMICI*
***CURIAE* FOR LEAVE TO**
FILE BRIEF IN SUPPORT
OF PLAINTIFF PBIS'S
OPPOSITION TO RIAA'S
MOTION TO DISMISS

Judge: Hon. Susan Illston

Hearing on Mo. to Dismiss:

Nov. 21, 2003

Complaint Filed: July 30, 2003

1 **INTRODUCTION**

2 Pursuant to Civil L.R. 7.10 of the Local Rules of the U.S. District Court for the Northern
3 District of California, *amici*, the American Civil Liberties Union, American Civil Liberties
4 Union Foundation of Northern California, Electronic Frontier Foundation, Alliance for Public
5 Technology, American Association of Law Libraries, American Library Association,
6 Association of Research Libraries, Consumer Federation of America, Consumers Union,
7 DigitalConsumer.org, Digital Future Coalition, Electronic Privacy Information Center, National
8 Coalition Against Domestic Violence, Privacy Rights Clearinghouse, Privacyactivism, Public
9 Knowledge, and WiredSafety.org., respectfully request leave to file the attached Brief *Amici*
10 *Curiae* in support of plaintiff Pacific Bell Internet Service’s opposition to defendant Recording
11 Industry Association of America’s motion to dismiss.
12

13 This case challenges the constitutionality of Section 512(h) of the Digital Millennium
14 Copyright Act on the grounds that, *inter alia*, it violates procedural due process and the First
15 Amendment right to anonymous speech of Internet users. *Amici* are specifically concerned that
16 (1) Section 512(h)’s procedure requiring court clerks to issue subpoenas without any due process
17 invites the possibility of abuse and error, and (2) use of this procedure in the context of the
18 Internet would result in stripping away the constitutional right to anonymous speech recognized
19 as long ago as the Federalist Papers.

20 *Amici* are organizations concerned with the Constitution and with the Internet. *Amici*
21 such as the ACLU and EFF have participated in all of the major cases applying constitutional
22 principles to the medium of the Internet. All of the *amici* participated in the one other case
23 raising similar issues, in the Court of Appeals for the D.C. Circuit, and seek to participate here,
24 because *amici* believe that this statute fails any reasonable application of constitutional
25 principles. Although this case arises in the context of RIAA’s use of the subpoena power to
26 obtain the identity of alleged file sharers, it can be used in many other contexts. Thus, for
27
28

1 example, some of the *amici* concerned with protecting the location of battered women fear the
2 lack of safeguards could permit the statute's use by batterers to identify and locate their victims.

3 *Amici* have read the parties' pleadings and conferred with PBIS's counsel in an attempt to
4 avoid duplication of arguments raised in those pleadings. For that reason, this brief focuses in
5 greatest depth on the procedural due process issues.

6 **INTERESTS OF AMICI**

7 *Amici* are 17 entities and organizations. The group includes a broad array of public
8 interest organizations, consumer advocacy groups, library associations, and civil liberties
9 organizations. Almost all represent individuals whose constitutional rights are implicated by the
10 matters at issue in this action. *Amici* submit this brief urging this Court to deny RIAA's motion
11 to dismiss the declaratory relief complaint filed by PBIS concerning the subpoena provisions of
12 the Digital Millennium Copyright Act. Although *amici* limit this brief to a discussion of PBIS's
13 claim that the subpoena provisions violate the First and Fifth Amendments (Claim 3), *amici*
14 support PBIS's separate argument on its claim (Claim 2) that the DMCA violates Article III of
15 the United States Constitution.

16 *Amici's* members are targets and potential targets of subpoenas issued by RIAA and other
17 alleged copyright holders under Section 512(h) of the DMCA. *Amici* have serious concerns
18 about the impact of such subpoenas on consumer privacy, the First Amendment and due process
19 rights of Internet users (including the millions of ordinary people who lack the economic
20 resources to litigate these issues on their own), and the development of the Internet as a forum
21 for the robust exchange of ideas. *Amici*, accordingly, have a direct and unique stake in the
22 outcome of this action.

23
24 The following are the *amici* that have joined in this motion:

25 The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan
26 organization with approximately 400,000 members dedicated to the principles of liberty and
27 equality embodied in the U.S. Constitution. The protection of principles of freedom of
28 expression as guaranteed by the First Amendment is an area of special concern to the ACLU. In

1 this connection, the ACLU has been at the forefront in numerous state and federal cases
2 involving freedom of expression on the Internet. The ACLU has also been involved in numerous
3 cases raising issues of due process and the right to anonymous speech.

4 The ACLU of Northern California is the local affiliate of the ACLU. Like the national
5 ACLU, the ACLU of Northern California is frequently involved in cases raising issues of
6 freedom of expression and due process.

7 The Electronic Frontier Foundation (EFF) is a nonprofit public interest organization
8 dedicated to protecting civil liberties and free expression in the digital world. With over 6,000
9 members, EFF represents the interests of Internet users in court cases and in the broader policy
10 debates surrounding the application of law in the digital age. EFF opposes misguided legislation,
11 initiates and defends court cases preserving individuals' rights, launches global public
12 campaigns, introduces leading edge proposals and papers, hosts frequent educational events,
13 engages the press regularly, and publishes a comprehensive archive of digital civil liberties
14 information at one of the most linked-to websites in the world (www.eff.org).

15 The Alliance for Public Technology (APT) is a nonprofit organization of public interest
16 groups and individuals. APT's members work together to foster broad access to affordable,
17 usable information and communications services and technology for the purpose of bringing
18 better and more affordable health care to all citizens, expanding educational opportunities for
19 lifelong learning, enabling people with disabilities to function in ways they otherwise could not,
20 creating opportunities for jobs and economic advancement, making government more responsive
21 to all citizens, and simplifying access to communications technology.

22 The American Association of Law Libraries is a nonprofit educational organization of
23 over 5,000 members who respond to the legal information needs of legislators, judges, and other
24 public officials at all levels of government, corporations and small businesses, law professors
25 and students, attorneys, and members of the general public.

26 The American Library Association is a nonprofit educational organization of
27 approximately 61,000 librarians, library educators, information specialists, library trustees, and
28

1 friends of libraries representing public, school, academic, state, and specialized libraries.

2 The Association of Research Libraries is a nonprofit association of research libraries in
3 North America, including university, public, government, and national libraries whose mission is
4 to influence the future of research libraries in the process of scholarly communication.

5 Since 1968, the Consumer Federation of America (CFA) has provided consumers a well-
6 reasoned and articulate voice in decisions that affect their lives. Day in and out, CFA's
7 professional staff gathers facts, analyzes issues, and disseminates information to the public,
8 legislators, and regulators. The size and diversity of its membership – more than 285
9 organizations from throughout the nation with a combined membership exceeding 50 million
10 people – enables CFA to speak for virtually all consumers. In particular, CFA looks out for those
11 who have the greatest needs, especially the least affluent.

12 Consumers Union is a nonprofit membership organization chartered in 1936 under the
13 laws of the state of New York to provide consumers with information, education and counsel
14 about goods, services, health and personal finance, and to initiate and cooperate with individual
15 and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's
16 income is solely derived from the sale of *Consumer Reports*, its other publications and from
17 noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own
18 product testing, *Consumer Reports* (with a paid circulation of more than 4 million) regularly
19 carries articles on health, product safety, marketplace economics and legislative, judicial, and
20 regulatory actions that affect consumer welfare. Consumers Union's publications carry no
21 advertising and receive no commercial support.

22 DigitalConsumer.org is a consumer membership organization formed in 2002 and
23 comprised of over 49,000 individuals from across the United States. Its mission is to restore the
24 balance of copyright law so that artists and creators can prosper while citizens have reasonable
25 flexibility to use content in fair and legal ways. DigitalConsumer.org has offices in Palo Alto,
26 CA.

27 Digital Future Coalition (DFC) is an alliance of many of the nation's leading nonprofit
28

1 educational, scholarly, library and consumer groups, along with major commercial trade
2 associations representing leaders in consumer electronics, telecommunications, computer and
3 network access industries.

4 The Electronic Privacy Information Center (EPIC) is a public interest research center in
5 Washington, D.C. that was established to focus public attention on emerging civil liberties issues
6 and to protect privacy, the First Amendment, and other constitutional values. EPIC has
7 participated as *amicus curiae* in numerous privacy cases, including most recently in *Watchtower*
8 *Bible and Tract Soc’y of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002).

9 The National Coalition Against Domestic Violence (NCADV) is the leading nonprofit
10 association committed to the elimination of personal and societal violence in the lives of battered
11 women and their children. NCADV is the only national organization of grassroots shelter and
12 service programs for battered women.

13 The Privacy Rights Clearinghouse is a nonprofit consumer education and advocacy
14 program, established in 1992 and based in San Diego, California. It provides information and
15 assistance to consumers on a variety of informational privacy issues including identity theft,
16 telemarketing, Internet privacy, and financial privacy. It represents consumers’ interests in public
17 policy proceedings (legislative and regulatory agency) at the state and federal level.

18 Privacyactivism is a nonprofit organization dedicated to informing and empowering
19 individuals about their privacy rights on the Internet. Through a mixture of education (using
20 graphics such as posters and video games), activism, and the law, the organization strives to
21 make complex issues of privacy law, policy, and technology accessible to all. Privacyactivism
22 can be found on the Internet (www.privacyactivism.org).

23 Public Knowledge is a Washington, D.C. based public-interest advocacy and research
24 organization dedicated to fortifying and defending a vibrant “information commons” – the shared
25 information resources and cultural assets that we own as a people. It works with diverse
26 creators, consumers, civic groups, and enlightened businesses to ensure that public access,
27 creativity, and competition are embodied in the digital age. One of its core goals is to ensure that
28

