

1 GILL SPERLEIN (172887)
2 121Capp Street, Suite 200
3 San Francisco, California 94110
4 Telephone: (415) 487-1211 X32
5 Facsimile: (415) 252-7747
6 legal@titanmedia.com

7 Attorney for Defendant
8 IO GROUP, INC.

9 **UNITED STATES DISTRICT COURT**

10 **NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION**

11 PACIFIC BELL INTERNET SERVICES,)
12)
13 Plaintiff,)

14 v.)

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

22 Defendants.)
23)
24)
25)
26)
27)
28)

CASE NO.: C-03-3560 (SI)

**DEFENDANT IO GROUP INC.'S REPLY IN
SUPPORT OF MOTION TO DISMISS**

Date: November 21, 2003

Time: 9:00 a.m.

Place: Courtroom No. 10, 19th Floor

1
2
3
4
5
6
7
8
9
10
11
12

INTRODUCTION

This Court should dismiss PBIS's Complaint because, as a matter of law, neither Titan Media's withdrawn subpoena nor the DMCA notice letters that Titan Media has sent PBIS establish a live, concrete controversy. PBIS has failed to explain why resolving its concerns about Titan Media's non-existent and purely hypothetical subpoena is preferable to resolving its concerns in the future if and when Titan Media actually issues a subpoena. Thus, even if this Court were to conclude that a live controversy exists (which it does not), this Court should exercise its discretion to dismiss the case, because the issues would be better resolved by litigation over an actual subpoena, not a hypothetical one.

ARGUMENT

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. PBIS Has Failed to Show the Existence of a Concrete Case or Controversy.

1. The Withdrawn Subpoena

PBIS has failed to point to a live, concrete subpoena issued by Titan Media. Nor could it, because Titan Media withdrew the only subpoena ever issued on its behalf to PBIS. There is simply no actual case or controversy involving Titan Media. PBIS claims that there is a live controversy based on its concern that Titan Media might at some point in the future have a subpoena issued to PBIS. But this speculation is insufficient to establish a concrete controversy. *See Titan Media Mot. to Dismiss at 9-10.* Furthermore, PBIS cannot explain why this speculative "threat" prejudices PBIS. *See Opp. at 3.* If a Titan Media DMCA subpoena were issued to PBIS in the future, then PBIS at that point would have a full and fair opportunity to litigate the issues surrounding the subpoena. In the meantime, in the absence of an actual pending subpoena, a decision by this Court not to rule on the validity of a purely hypothetical Titan Media subpoena

1 would not harm PBIS, and there is therefore no need for PBIS to obtain a declaratory judgment.

2 *See Titan Media Mot. to Dismiss at 10.*

3
4 Moreover, litigating the validity of a non-existent Titan Media subpoena would pose
5 serious problems. The facts at the center of the dispute over the hypothetical subpoena would be
6 unknown. What information would the Titan Media subpoena request? What would be the terms
7 of the subpoena's request? How quickly would Titan Media ask PBIS to comply? *See Complaint*
8 ¶¶ 48, 76. Would the subpoena seek the identity of multiple subscribers or a single subscriber?
9 *See Complaint* ¶ 77. Would the subpoena seek a subscriber's e-mail address? *See Complaint* ¶¶
10 47, 75. Would PBIS be offered compensation for complying with the subpoena? *See Complaint*
11 ¶¶ 32, 44, 80-82. So long as there is no actual subpoena pending, no one can answer these
12 questions. Yet, as PBIS's Complaint and its objections to RIAA's pending subpoenas make clear,
13 the answers to these questions are critical to resolving the dispute about the validity of the
14 subpoenas. In light of these unknown factors, this Court should refrain from ruling on the non-
15 existent dispute between PBIS and Titan Media. By awaiting the issuance of an actual subpoena,
16 the terms of which are known to the parties and the Court, this Court can avoid the pitfalls of
17 resolving important legal issues blindly. Indeed, this is precisely why the Constitution requires an
18 actual case or controversy. *See Titan Media Mot. to Dismiss at 7-10.*

2. **The Notice Letters**

23 PBIS further suggests in passing that there is an actual controversy because Titan Media
24 has continued to send DMCA notices to PBIS. *See Opp.* at 2. To the extent that PBIS is arguing
25 that the notices contribute to the possibility that Titan Media might possibly in the future issue a
26 subpoena, the argument is indistinguishable from the speculative argument discussed above, and
27 should be dismissed for the same reasons. To the extent that PBIS is arguing that the notices
28

1 independently create a concrete controversy, that argument is fully refuted by Media Sentry's
2 Motion to Dismiss, at 10-13, which Titan Media has joined and incorporated by reference. *See*
3 Titan Media Mot. to Dismiss at 6 n.1. PBIS's only claim in this regard is that the notices subject
4 PBIS to inconvenience and cost, not potential liability. *See* Opp. at 2. But inconvenience and cost
5 are insufficient to establish a justiciable controversy. *See* Media Sentry Mot. to Dismiss at 10. It
6 is well settled that notice letters are not legal process and thus cannot create a concrete case or
7 controversy. *See id.* at 11. The notice letters would only have legal effect if PBIS were sued for
8 copyright infringement, at which point PBIS could try to invoke the affirmative defense that it
9 complied with the DMCA's take-down provisions in response to the notices and therefore is not
10 liable. *See* 17 U.S.C. § 512(c)(1), § 512(i). That potential invocation, however, is a long way off
11 and is contingent on PBIS being sued in the first place. The contingent nature of these events
12 demonstrates that PBIS's argument ultimately is too speculative to establish a concrete case or
13 controversy. *See* Media Sentry Mot. to Dismiss at 11-12.

14
15
16
17 In addition, PBIS's mischaracterization of Titan Media's notices as "threat[s]" that are
18 "menacing" must be corrected. Opp. at 2-3. When Titan Media discovers that an Internet user is
19 illegally infringing its copyrighted material through a peer-to-peer network, it sends a DMCA
20 notice to the infringer's Internet Service Provider ("ISP"). The notice identifies the infringed
21 copyrighted material and the IP address of the infringer, includes a statement, under penalty of
22 perjury, that the information in the notice is accurate, and it requests that the ISP forward the
23 notice to the subscriber. The notice directs the infringer to a web site where the infringer can
24 obtain a release of Titan Media's claims by paying a settlement fee of \$75. The notices thus
25 reflect an effort by Titan Media to use the § 512(h) provision judiciously and when possible to
26 negotiate with infringers in order to avoid litigation of any kind.
27
28

1 **B. This Court Should Exercise Its Discretion Under the Declaratory Judgment Act to**
2 **Dismiss PBIS's Complaint Against Titan Media.**

3 Even if there were a live controversy between PBIS and Titan Media (which there is not),
4 PBIS has failed to offer any sound basis for this Court to exercise its discretion to take jurisdiction
5 over the case. As Titan Media argued in its motion to dismiss, there is no reason why this Court
6 should not wait to consider the case until Titan Media actually issues a subpoena (if ever). PBIS
7 would not be prejudiced by waiting for an actual concrete controversy to arise, and waiting for a
8 concrete dispute would have the added benefit of enabling a court to resolve the issues in the
9 context of an actual controversy. *See Titan Media Mot. to Dismiss at 10.* PBIS has utterly failed
10 to explain why this is not the better course of action.
11

12 Moreover, PBIS appears to have included Titan Media in this case merely as a vehicle for
13 challenging the DMCA in the North District of California. That is not a valid reason for this
14 Court, in its discretion, to exercise jurisdiction over PBIS's claims. The inclusion of Titan Media
15 adds nothing to the questions of law for which PBIS seeks declaratory judgment.
16

17 PBIS's claim that the issues in the District of Columbia litigation "do not address the heart
18 of PBIS's dispute with Titan," *Opp. at 5*, is simply untrue. The issues relating to Titan Media in
19 PBIS's Complaint have been fully raised both in the District of Columbia litigation and in the
20 instant litigation against RIAA, with the exception of a single question raised in this litigation
21 against Titan Media: whether the DMCA authorizes Titan Media to include multiple demands for
22 subscriber information in a single subpoena. *See Complaint ¶ 77.* With regard to that issue, PBIS
23 alleges that the inclusion of multiple subscribers in a single subpoena is not allowed under the
24 DMCA. *Id.* But nothing in the DMCA prevents a copyright owner from seeking the identities of
25 more than one infringer in a single subpoena. Indeed, this consolidation of information into a
26 single subpoena promotes the expeditious subpoena process envisioned by Congress. *Verizon I,*
27
28

1 240 F. Supp. 2d at 34. It would be nonsensical to require copyright holders to go through the
2 administrative niceties of obtaining a single subpoena per alleged infringer rather than requesting
3 multiple identities in a single subpoena where, in the end, if multiple subpoenas were sought, the
4 service provider would be required to supply the identities regardless. "Procedural niceties and
5 technical obstructionism . . . with rare exception, should not be judicially nurtured." *Local Lodge*
6 *1746, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Pratt and Whitney Division*
7 *of United Aircraft Corp.*, 329 F. Supp. 283, 286 (D. Conn. 1971). Provided there is substantial
8 compliance with the subpoena requirements, an ISP must comply. *See EEOC v. C&P Telephone*
9 *Co.*, 813 F. Supp. 874, 874 (D.D.C.) (holding that even if service of the subpoena was "technically
10 defective," party was made to comply given "substantial compliance.").

11
12
13 Moreover, as discussed above, there is no reason to believe that, if Titan Media ever issued
14 a subpoena in the future, it would include multiple demands for subscriber information.
15 Accordingly, PBIS's request for a declaratory judgment on this issue is nothing more than a
16 request for an advisory opinion on an issue that may never arise.¹

17 CONCLUSION

18 Defendant Titan Media's motion to dismiss should be granted.

19
20 Respectfully submitted,

21
22 Dated: November 7, 2003

23 /s/ Gill Sperlein
24 Gill Sperlein,
25 Attorney for Defendant IO GROUP, INC.

26
27
28 ¹ PBIS suggests that this Court should exercise jurisdiction over the case in the interest of potentially creating a circuit split with the District of Columbia, so that the issues will be ripe for Supreme Court review. Opp. at 5-6. But a party's interest in fabricating a case or controversy in an effort to create a circuit split is not a proper basis for this Court to exercise jurisdiction under the Declaratory Judgment Act.