

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: .	)	
	)	
VERIZON INTERNET SERVICES, INC.	)	
Subpoena Enforcement Matter	)	
_____	)	
RECORDING INDUSTRY	)	
ASSOCIATION OF AMERICA	)	
v.	)	Miscellaneous Action
	)	Case No. 1:02MS00323
VERIZON INTERNET SERVICES, INC.	)	
_____	)	

**Declaration of Jonathan Whitehead in Opposition To Verizon Internet Services, Inc.'s  
Motion for Stay Pending Appeal**

I, Jonathan Whitehead, have personal knowledge of the facts stated below and, under penalty of perjury, hereby declare:

1. I am Vice President and Anti-Piracy Counsel, Internet and New Media for the Recording Industry Association of America ("RIAA"). I submit this declaration in support of RIAA's Opposition to Verizon Internet Service Inc.'s ("Verizon's") Motion for a Stay Pending Appeal.
2. This declaration is based on my personal knowledge, and if called upon to do so, I would be prepared to testify as to its truth and accuracy.
3. On July 30, 2002, RIAA served a July 25, 2002 subpoena and other supporting documentation pursuant to Section 512(h) of the Digital Millennium Copyright Act ("DMCA")

to EarthLink Network, Inc. ("EarthLink"), an Internet Service Provider ("ISP"), seeking information identifying a single alleged copyright infringer. *See Attachment 1.*

4. On August 5, 2002, Esteban Martorell, an Investigations Specialist from EarthLink, sent me a letter indicating that EarthLink would comply with RIAA's July 25 subpoena within 15 days unless the particular subscriber who was the subject of the subpoena filed an objection with the court from which it was issued. *See Attachment 2.*

5. On August 19 and 21, 2002, my paralegal, Michael Mayhew, contacted Mr. Martorell by phone to inquire about EarthLink's compliance with the July 25 subpoena. Mr. Mayhew left messages for Mr. Martorell inquiring about the status of the information.

6. On August 23, 2002, Matthew Oppenheim, RIAA's Senior VP of Business and Legal Affairs, and I had a conference call with Dave Baker, the Vice President, Law and Public Policy for Earthlink. Mr. Oppenheim and I indicated that the subpoena issued to EarthLink involved an egregious P2P user offering hundreds of infringing sound recordings. We also explained that because the identity of the infringer was unknown to us, absent EarthLink's compliance, we could do nothing about this infringement. Accordingly, we requested EarthLink to turn over the identifying information immediately.

7. Mr. Baker responded that EarthLink's position had changed since its August 5, 2002 letter. EarthLink asserted for the first time that the July 25 subpoena exceeded the authority granted under Section 512(h) of the DMCA and that, therefore, it would not comply. Mr. Baker indicated that EarthLink, contrary to its previous indication that it would provide the requested information (*See Attachment 2*), had reversed its decision and would not comply with

RIAA's subpoena because Verizon, based on the grounds EarthLink now touted, had likewise refused compliance with a July 24, 2002 RIAA subpoena.

8. At the end of the August 23, 2002 conference call, Mr. Baker stated that EarthLink would consider a potential agreement in which RIAA would refrain from seeking a motion to enforce its July 25, 2002 subpoena against EarthLink in exchange for EarthLink's agreement to provide the information requested in the subpoena upon a court order mandating Verizon's compliance with RIAA's July 24, 2002 subpoena.

9. On September 9, 2002, Mr. Baker, Mr. Oppenheim, and I once again spoke via teleconference as a follow-up to our initial conversation on August 23, 2002. Mr. Baker indicated during this call that EarthLink would, in fact, provide the information requested by the July 25 subpoena if the U.S. District Court for the District of Columbia ordered Verizon to comply with the July 24, 2002 RIAA subpoena. In exchange, RIAA agreed to refrain from filing a motion to enforce against EarthLink pending that decision.

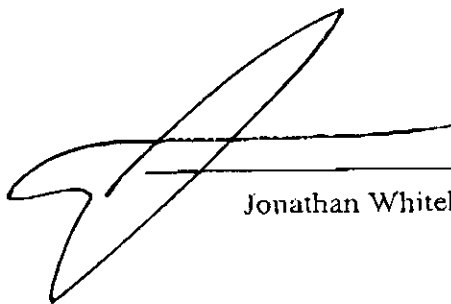
10. On January 21, 2003, the U.S. District Court for the District of Columbia ordered Verizon to comply with RIAA's July 24, 2002 subpoena. EarthLink, based on its comments to the press, has been well aware of the order since the date it was issued. On January 22, 2003, the Washington Post published comments from Dave Baker regarding the order. See <http://www.washingtonpost.com/wp-dyn/articles/A24577-2003Jan21.html>. On January 28, 2003, I called Mr. Baker at EarthLink and left a message on his voicemail inquiring as to the status of the pending July 25 subpoena. On February 6, 2003, not having heard back from Mr. Baker, I sent him a follow-up e-mail with a letter sent via Federal Express, again requesting

compliance with RIAA's July 25 subpoena. Mr. Baker has not yet responded, and, to date, EarthLink refuses to comply.

11. On February 5, 2003, RIAA served another DMCA subpoena on EarthLink. Like the July 25 subpoena, the February 5 subpoena involves an egregious P2P user offering hundreds of infringing sound recordings. *See* Attachment 3. On February 5, 2003, RIAA also served another Section 512(h) subpoena on Verizon. *See* Attachment 4. RIAA is awaiting a response from both EarthLink and Verizon on these new subpoenas. Compliance with these subpoenas is of critical importance to RIAA's member companies.

12. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: February 7, 2003



Jonathan Whitehead