

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.

---

**MOTION FOR LEAVE TO  
INTERVENE AND  
PLEADING PURSUANT TO  
FRCP 24(c)**

RECORDING INDUSTRY ASSOCIATION  
OF AMERICA,

Plaintiff,

v.

JANE DOE,  
(a.k.a. nycfashiongirl@KaZaA.com),<sup>1</sup>

Intervenor.

---

---

<sup>1</sup> Jane Doe respectfully declines to comply with Local Rule 11.1 requiring the first filing by a party to identify in the caption the name and full residence address of the party. Jane Doe seeks through this motion in intervention to protect her identity from disclosure. Compliance with Rule 11.1 would necessarily defeat that purpose. Counsel will provide Jane Doe's name and residence address in camera to the Court if the Court so requests. Counsel for Jane Doe confirm and declare that Jane Doe is a very real living human who has participated in the preparation of these papers. Declaration of Daniel N. Ballard in support of Motion to Intervene at §§2, 4.

**TABLE OF CONTENTS**

	<b><u>Page No.</u></b>
Table of Authorities .....	ii
Introduction .....	1
Summary of Argument .....	2
Statement of Facts .....	5
Argument .....	7
I.    The Nature of Jane Doe's Interest .....	7
II.   Granting the Motion to Enforce will Impair Jane Doe's Interest.....	12
III.  No Existing Party Can or Will Protect Jane Doe's Interests.....	12
IV.   This Motion to Intervene is Timely .....	13
Conclusion and Prayer .....	14

**TABLE OF AUTHORITIES**

**Page No.**

**Cases**

Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227 (1st Cir. 1992).....15

In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001) .....8

In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998).....13

In re Sealed Case, 237 F.3d 657 (D.C. Cir. 2001).....8, 13

In re Verizon Subpoena Enforcement Matter, 240 F.Supp.2d 24 (D.D.C. 2003).....4

In re Verizon Subpoena Enforcement Matter, 257 F.Supp.2d 244 (D.D.C. 2003).....1, 4, 14

Oneida Indian Nation v. New York, 201 F.R.D. 64 (N.D.N.Y. 2001) .....16

Reid L. v. Illinois State Board of Education, 289 F.3d 1009 (7th Cir. 2002) .....16

United States v. Dallas County Comm’n, 850 F.2d 1433 (11th Cir. 1988) .....16

United States v. Oregon, 745 F.2d 550 (9th Cir. 1984).....15

Whalen v. Roe, 429 U.S. 589 (1977) .....14

**Statutes**

17 U.S.C. §106.....11

17 U.S.C. §106(3).....14

17 U.S.C. §512(c)(3)(A).....11

17 U.S.C. §512(h).....1, 3, 5, 10, 11, 12, 13, 14

28 U.S.C. §1746.....5

28 U.S.C. §2403.....5

**Rules**

Fed. R. Civ. P. 24(a) .....2, 8  
Fed. R. Civ. P. 24(b).....2  
Fed. R. Civ. P. 45(b)(2) .....12  
Local Civil Rule 7.1(j).....7

**Other Authorities**

17A C. Wright, A. Miller & M. Kane,  
Federal Practice and Procedure §1916 at 424 (2d ed. 1986).....15

## INTRODUCTION

This motion arises because 17 U.S.C 512(h) offers no opportunity to the individuals who are the real targets of subpoenas issued under that section to be heard. By this motion, Jane Doe seeks to intervene anonymously in this special proceeding<sup>2</sup> to protect her privacy and other interests against the summary, anonymous, and procedurally informal intrusion engendered by such a subpoena. It is ironic that she must intervene here to safeguard her right of privacy and anonymous association against anonymous intruders; i.e., un-named copyright owners represented by an industry association,<sup>3</sup> based on the fortuity of receiving a letter from the subpoena's recipient.

Plaintiff, Recording Industry Association of America ("RIAA"), obtained a subpoena<sup>4</sup> on July 9, 2003 from the Clerk of this Court directing Verizon Internet Services, Inc. ("Verizon") to produce information that would identify and locate Jane Doe, one of its internet service subscribers. Verizon sent Jane Doe a letter informing her of the subpoena on July 15, 2003. Counsel for Jane Doe advised Verizon of Jane Doe's intention to challenge the validity of the subpoena and requested that Verizon withhold

---

<sup>2</sup> On August 18, 2003, counsel for RIAA and Jane Doe discussed this motion. In that discussion RIAA's attorney stated that RIAA would not oppose intervention by Jane Doe. Ballard Declaration at ¶5. On August 20, 2003, counsel for Verizon and Jane Doe discussed this motion. Verizon's attorney stated in that discussion that Verizon would not oppose intervention by Jane Doe. Ballard Declaration at ¶6.

<sup>3</sup> The "Recording Industry Association of America ("RIAA") is the trade organization representing the United States recording industry. RIAA members, comprised of hundreds of record labels, create, manufacture and/or distribute approximately 90 percent of all sound recordings legitimately sold in the United States." Letter dated August 14, 2003 allegedly from RIAA representative Cary Sherman to Senator Norm Coleman.

<sup>4</sup> The subpoena was issued pursuant to 17 U.S.C. §512(h) and was based on RIAA's subjective belief that Jane Doe committed copyright infringement. The constitutionality of the subpoena mechanism was considered in the context of a challenge raised by a service provider in In re Verizon Subpoena Enforcement Matter, 257 F.Supp.2d 244 (D.D.C. 2003) (currently on consolidated appeal at Nos. 03-7015 and 03-7053). However, no court has yet considered direct constitutional challenges asserted by an individual subscriber such as Jane Doe.

compliance. In light of that information, Verizon withheld compliance and advised RIAA of the foregoing facts by a letter dated July 25, 2003. With knowledge of Jane Doe's intent to challenge the subpoena, RIAA preemptively filed its now pending motion to enforce on August 7, 2003.

### **SUMMARY OF ARGUMENT**

Jane Doe moves to intervene by special appearance for the limited purpose of moving to quash the subpoena directed to Verizon.<sup>5</sup> Jane Doe moves pursuant to Rule 24(a) of the Federal Rules of Civil Procedure as a matter of right in order to assert her constitutional rights and other legal interests.<sup>6</sup> Jane Doe makes this motion on the grounds that she has an interest in the subpoena and RIAA's motion to enforce and that the Court's order on that motion will, as a practical matter, impair and impede her ability to protect that interest.

If permitted to intervene, counsel for Jane Doe intend to file a motion to quash the subpoena. Jane Doe will present arguments in that motion to protect her contractual, common law, and constitutional rights to privacy, and her constitutional rights of association and due process. These "as applied" constitutional and other substantive law challenges arise in a new context—peer to peer file sharing communities—and will permit the Court to consider the rights and interests of a real person affected by the subpoena mechanism created by 17 U.S.C. §512(h).

In particular, Jane Doe will argue that intervention is necessary to permit her the

---

<sup>5</sup> While we acknowledge the arguable incongruity of intervention by special appearance, Jane Doe does so in an effort to preserve jurisdiction or venue challenges to cross-claims or counter-claims potentially made possible by this intervention.

<sup>6</sup> In the alternative, Jane Doe moves to intervene under Rule 24(b) of the Federal Rules of Civil Procedure.

opportunity to protect from disclosure the personal information that Verizon promised in its service contract to maintain in confidence. She will also argue that her constitutional right to informational privacy—the right to prevent disclosure of personal matters—cannot be invaded by the agent of a copyright owner based simply on that agent's untested, and perhaps untestable, assertions to the clerk of a federal district court. In addition, she will argue that her choice to anonymously participate in a peer to peer file sharing community is protected by the constitutional right of association, on which the section 512(h) subpoena process impinges impermissibly. She will assert that her constitutional right to due process has been and will be violated if Verizon is forced to comply with the subpoena: among other things, RIAA did not explicitly identify the right allegedly infringed, Jane Doe had no opportunity to inspect or challenge the documents submitted by RIAA to justify the subpoena, the procedure did not afford her judicial review, and she is now being forced to litigate in a distant court without ever having been afforded legal notice.

These legal and constitutional challenges will be joined by the argument that the Clerk of this Court did not have constitutional authority to issue the subpoena because no case or controversy has been brought before the Court. Although Jane Doe previously had no opportunity to investigate the basis for the subpoena, her motion to quash may further challenge its validity on grounds of noncompliance with the requisites of the statute.

Intervention by subscribers—the targets of the subpoenas and, therefore, the real parties in interest—is consistent with, and was apparently contemplated by, two recent decisions of this Court. In re Verizon Subpoena Enforcement Matter, 240 F.Supp.2d 24, 44 (D.D.C. 2003) (the First Amendment issues are the same in either the DMCA subpoena process or in a John Doe suit for copyright infringement); In re Verizon

Subpoena Enforcement Matter, 257 F.Supp.2d 244, 258 n.15 (D.D.C. 2003) ("the alleged infringers could assert their own First Amendment rights, while still protecting their anonymity as 'John Doe' litigants."). Notably, the Verizon subscribers targeted by the subpoenas in those cases were not before the court and Verizon did not, indeed could not, make those subscribers' full range of arguments—as will be done in this proceeding if leave to intervene is granted.

The constitutional rights and other legal interests Jane Doe seeks to protect here are fundamentally different from the interests that Verizon has heretofore attempted to defend. Though Verizon has previously offered a number of limited First Amendment arguments on behalf of its subscribers,<sup>7</sup> Jane Doe is a real party in interest with direct standing to assert actual, not generalized, violations of her First Amendment and other constitutional rights and interests, many of them not raised in prior proceedings. Most importantly, Jane Doe is the person who has suffered actual harm as a result of the subpoena's issuance and will suffer additional irreversible harm if Verizon is compelled to comply with the subpoena before her challenges are considered. Verizon has neither the same access to information as Jane Doe nor the same incentive to diligently defend or assert her individual rights and interests against the application of section 512(h).

Accompanying this document is a motion to stay RIAA's enforcement motion and a motion to expedite hearing on that motion to stay. In light of her arguments challenging the constitutionality of 17 U.S.C. §512(h), Jane Doe will also lodge a notice to the U.S. Attorney General pursuant to 28 U.S.C. §2403 should this Court grant her leave to intervene.

---

<sup>7</sup> "Verizon is . . . an adequate advocate to assert the First Amendment rights of its subscribers." In re Verizon Subpoena Enforcement Matter, 257 F.Supp.2d at 258.



## STATEMENT OF FACTS

Jane Doe and her family use their home computer for personal use.<sup>8</sup> They use the computer for, among other things, playing music, sending and receiving email, internet research, and word processing. Jane Doe lawfully purchased a number of compact discs containing sound recordings and transferred some of those sound recordings onto the family computer. A number of sound recordings were also present on the computer when it was first purchased. In order to listen to these sound recordings, Jane Doe used software called KaZaA Media Desktop. Jane Doe listened to these recordings when the computer was connected to the internet and at times when it was not.

The family computer accesses the internet through a direct subscriber line connection provided by Verizon. When connected to the internet, Jane Doe formerly participated in the peer to peer file sharing community known as KaZaA. On more than one occasion Jane Doe took steps to ensure that no other KaZaA user could access any of the folders on her family's computer. Access may have occurred, however, without her consent. Jane Doe is no longer a member of the KaZaA peer to peer file sharing community or any other peer to peer community.

RIAA alleges it recently discovered that Jane Doe was offering to distribute files over the internet that contained copyrighted music owned by its members. Declaration of Jonathan Whitehead in Support of Motion to Enforce at ¶15. RIAA further alleges that it sent notice to Verizon of its discovery. RIAA attached to its moving papers a

---

<sup>8</sup> Normally, this fact and those following would be offered in a declaration by the client in compliance with 28 U.S.C. § 1746. In this instance, protecting the identity of the client is the sole purpose of intervention. Rather than proffer such a declaration signed by Jane Doe with that pseudonym, counsel have instead attached an offer of proof as to the facts that counsel are informed and believe Jane Doe will testify to, including the facts set forth in this portion of the moving papers.

letter dated July 4, 2003 purporting to be that notice. Whitehead Decl. at ¶15; Attachment C to RIAA's Motion to Enforce. RIAA then obtained a subpoena from the Clerk of this Court on July 9, 2003 that directed Verizon to produce Jane Doe's name, address, phone number, and email address. Attachment C to RIAA's Motion to Enforce.<sup>9</sup>

Verizon informed Jane Doe on July 15, 2003 that the subpoena in question had issued. Offer of Proof at ¶6. Jane Doe first read the letter from Verizon on July 22, 2003. Offer of Proof at ¶6. She sought counsel the following day by contacting a number of attorneys. Offer of Proof at ¶7. One of those attorneys, Charles L. Mudd Jr., Esq., agreed to, and did, notify Verizon by letter that Jane Doe intended to seek judicial review of the subpoena. Mr. Mudd further requested that Verizon not comply with the subpoena until that challenge was adjudicated. Offer of Proof at ¶7. Soon thereafter, Jane Doe sought the counsel of Daniel N. Ballard, Esq., who discussed the matter with Verizon on July 24, 2003. Offer of Proof at ¶8. By letter on July 25, 2003, Verizon notified RIAA that it would not comply with the subpoena until either Attorney Ballard or RIAA notified it as to the outcome of the expected court proceeding challenging the validity of the subpoena. RIAA's Motion to Enforce at Attachment A.

---

<sup>9</sup> In light of the July 4th holiday and the time delay inherent in the Court's processing of the subpoena request, the July 4, 2003 "notice" provided neither Verizon nor Jane Doe with any notice of RIAA's intent to seek the subpoena.

## ARGUMENT

Rule 24(a) of the Federal Rules of Civil Procedure provides the controlling law on intervention. In pertinent part, it provides:

Upon timely application anyone shall be permitted to intervene in an action ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This Rule raises three issues that must be evaluated: (I) nature of the applicant's interest, (II) whether the disposition of the action will impair that interest, and (III) whether existing parties will or can adequately protect the interest.

### **I. The Nature of Jane Doe's Interest**

Though the subpoena was served on Verizon, Jane Doe is the target of the subpoena because it is her identifying personal information that the subpoena seeks to compel and it is she who will be harmed by Verizon's production of that information. This Circuit recognizes that the subject or target of subpoena enforcement meets the basic requirements for intervention when the subject has a legally cognizable interest in maintaining the confidentiality of the information at issue. In re Sealed Case, 237 F.3d 657, 663-65 (D.C. Cir. 2001); accord, In re Grand Jury Subpoena, 274 F.3d 563, 570 (1st Cir. 2001).

Jane Doe has legally cognizable interests that will be directly and unavoidably affected if Verizon complies with the subpoena. Normally, an intervenor must file with the motion for intervention an original pleading setting forth the claims or defenses for which intervention is sought. FRCivP 24(c); LCvR 7.1(j). Here, however, there is no underlying civil action in connection with which to plead; indeed, the absence of an underlying justiciable case is a source of many of the infirmities of the section 512(h) subpoena process. Nonetheless, in an effort to comply with Rule 24(c) as closely as possible, the following Challenges or Defenses to the Subpoena are

submitted. The Challenges and Defenses discussed here are not exclusive and Jane Doe may submit additional ones in her motion to quash. These Challenges or Defenses, however, will establish the nature of Jane Doe's interest in this proceeding, thus fulfilling the function of the pleading requirement of Rule 24(c).<sup>10</sup>

#### FIRST CHALLENGE OR DEFENSE

(Interference With Contract)

The service contract between Jane Doe and Verizon requires Verizon to hold Jane Doe's identifying personal information in confidence absent a valid legal obligation to disclose the information. The contractual benefit that the subpoena vitiates inures primarily to Jane Doe. The subpoena served on Verizon that ostensibly provides the legal obligation to disclose Jane Doe's identifying personal information was issued by the Clerk of this court without any judicial review and solely on information provided by RIAA. In light of her contractual interest and the inability of Verizon—as the promisor—to assert her interest, Jane Doe must be joined in this action so she can defend her contractual right to privacy before a judge of this Court by challenging the subpoena's validity.

#### SECOND CHALLENGE OR DEFENSE

(Violation of Privacy)

RIAA has already determined Jane Doe's screen name, the name of at least one folder on her family's computer that was apparently available to other members of the KaZaA peer to peer file sharing community, and a list of songs, videos, and software on that computer. RIAA now seeks to add Jane Doe's name, phone number, mailing address, and email address to that list of information. Combining this latter pool of personal and demographic information with the former would result in a detailed personal profile of Jane Doe. This profile would expose not only private facts about her

---

<sup>10</sup> Jane Doe will submit, if the Court so desires, a separate pleading setting forth her defenses to the issuance and compliance with the subpoena in question.

as an individual, e.g., her taste in music, humor, and computer skills but would also disclose her persona—her approach to life, her biases, and other uniquely private aspects—to review and analysis. Jane Doe has a constitutional right under the Fourth, Fifth, and Ninth Amendments to maintain such information private and a corresponding right to oppose any unwanted intrusion into that information.

### THIRD CHALLENGE OR DEFENSE

(Violation of Anonymous Association)

The KaZaA peer to peer file sharing community to which Jane Doe belonged is a cyberspace public forum where people meet confer to share information. Peer to peer file sharing communities bring people together from around the world and are used to share an almost unfathomable amount of literary works, art, music, pictures, and video. The anonymous sharing of information has been protected throughout American history as a necessary complement to our democratic process and has become an expected freedom that flows from our democracy. The subpoena in question—and the statute that authorized that subpoena, 17 U.S.C. §512(h)—chills, and has chilled, Jane Doe's right to associate anonymously. RIAA's assertion of its good faith belief that Jane Doe has engaged in copyright infringement is insufficient to overcome her constitutional right to anonymously associate for legal purposes.

### FOURTH CHALLENGE OR DEFENSE

(Violation of Due Process)

Jane Doe possesses numerous legal interests that are safeguarded by the Fifth Amendment right to due process. This due process protection is invaded by the application of section 512(h).

The documents filed by RIAA underlying the subject subpoena allege that Jane Doe was "offering for download" copyrighted sound recordings owned by RIAA members. RIAA relied upon this allegation in an attempt to fulfill its notice obligation under 17 U.S.C. §512(c)(3)(A), which requires the complaining party to assert a good

faith belief that the use complained of was not authorized. RIAA did not assert in that notice an identification of the exclusive right listed in 17 U.S.C. §106 that was allegedly violated by Jane Doe. This lack of specificity by RIAA violates Jane Doe's right to procedural due process.

If RIAA is asserting that the right Jane Doe allegedly infringed was 17 U.S.C. §106(3)—the exclusive right to distribute a copyrighted work—then it cannot have a good faith belief that that right was infringed, i.e., "unauthorized." RIAA does not allege that Jane Doe "uploaded" files onto a newsgroup, bulletin board, or other external site on the internet. RIAA does allege, however, that because the sound recordings *on her family's home computer* were accessible by other members of the KaZaA peer to peer file sharing community Jane Doe infringed RIAA's distribution rights. Jane Doe, however, took reasonable, good faith steps to ensure that no other member of the community could access the folders, and the files within those folders, located on her family's home computer. Under equivalent circumstances, no person has ever been found to have violated the 17 U.S.C. §106(3) distribution right. This novel claim of infringement cannot suffice to justify an invasion of her legally protected rights to privacy and association without judicial review.

Additionally, the subpoena process under 17 U.S.C. §512(h) does not require either the requestor, the court, or the service provider to inform Jane Doe of the allegations made against her or even that a subpoena was sought to compel disclosure of her identifying personal information. As a result, Jane Doe has not had the opportunity to challenge the RIAA documents for compliance with the technical requirements of 17 U.S.C. §512(h). In fact, 17 U.S.C. §512(h) does not require that Jane Doe ever be informed of the subpoena—or her service provider's compliance with it—and even permits the copyright owner to remain anonymous during the process. These structural deficiencies in 17 U.S.C. §512(h) violate Jane Doe's right to due process because she is not provided the means to protect her constitutional liberty and other

interests.

Jane Doe's right to protect her legal rights and interests cannot simply be abstract or, as a practical matter, unattainable without great effort. Jane Doe does not reside in or near the District of Columbia. Because Verizon does, however, Jane Doe cannot simply move to quash the subpoena in the district where she resides with the argument that the subpoena was served in violation of the 100-mile service limit set by FRCP 45(b)(2). The subpoena in question and the subpoena process under 17 U.S.C. §512(h) violates Jane Doe's right to due process by forcing her to specially appear in a distant court to protect her constitutional rights to informational privacy, anonymous association, and her others rights and interests.

#### FIFTH CHALLENGE OR DEFENSE

(Lack of Constitutional Authority to Confer Jurisdiction)

Article III of the Constitution limits the power of the judicial branch to hear "cases or controversies" properly brought before them. The 17 U.S.C. §512(h) subpoena process, however, grants to the clerk of any district court the authority—and obligation—to issue a subpoena in the name of the Court in the absence of a case or controversy before the court. This fundamental constitutional deficiency in section 512(h) has had real consequences in Jane Doe's case. The subpoena that targets Jane Doe is not limited by the framework of any identified action or case. Article III provides for the exercise of judicial power only where such limitation exists. Although Jane Doe is the target of the subpoena and the real party who will be harmed by compliance with the subpoena, she is not a party to this proceeding. Indeed, she has no right under 17 U.S.C. §512(h) to even be notified of the subpoena request or of her service provider's response with the issued subpoena. As a result, she may never know of the invasion of her rights and if she is told—as happened here—she has no convenient forum with which to assert those rights; she does not reside in Washington D.C. and has been forced by necessity to litigate in this forum.

In light of the foregoing Challenges and Defenses, it is clear that, absent intervention, Jane Doe will suffer injury in fact through an invasion of her constitutional rights and other legally protected interests. These rights and interests are concrete, particularized, well recognized in law, and are sufficient to find that Jane Doe has standing.

## **II. Granting the Motion to Enforce will Impair Jane Doe's Interest**

RIAA has moved to compel disclosure of Jane Doe's identifying personal information. If Verizon is compelled to provide that disclosure, Jane Doe's identity, address, phone number, and potentially email address will be disclosed—a clear invasion of the constitutional rights and other legal interests described above to which she is entitled. No later lawsuit can restore her private information to its present private status. In re Sealed Case, 237 F.3d 657, 663-64 (D.C. Cir. 2001), citing In re Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998) (“the cat is out of the bag”).

## **III. No Existing Party Can or Will Protect Jane Doe's Interests**

Jane Doe's rights and interests are not shared with or represented by any of the existing parties. RIAA, of course, wants her identifying personal information. Verizon wants to avoid contempt for not complying with the subpoena and is frankly trapped, in this case, between RIAA and its subpoena on one side and Jane Doe's claims of constitutional rights and legal interests on the other.

Although Verizon made an effort to represent the interests of its subscribers in its earlier litigation with RIAA<sup>11</sup> the rights and interests at issue are specific to Jane Doe and best represented by her. Verizon does not, and cannot, claim the rights claimed by Jane Doe and, in fact, does not have the information to do so. A comparison between the arguments asserted by Verizon in its earlier litigation and the arguments set out in the Challenges or Defenses section of this motion reveals that Jane

---

<sup>11</sup> In re Verizon Subpoena Enforcement Matter, 257 F.Supp.2d 244, 258 n.15 (D.D.C. 2003).



Doe has arguments that were not made or fully developed by Verizon. For example, in those proceedings Verizon did not or could not:

- Argue that its subscriber's contractual right to privacy would be affected if Verizon complied with the subpoena.
- Argue in protection of its subscribers' constitutional right to informational privacy. See, e.g., Whalen v. Roe, 429 U.S. 589 (1977),
- Make a number of available arguments under the due process clause of the Fifth Amendment,
- Challenge RIAA's formal compliance with the 17 U.S.C. 512(h) requirements that provided the basis for the subpoenas,
- Challenge whether the distribution right under 17 U.S.C. 106(3) is violated, i.e. is "an unauthorized use," when a copyrighted sound recording is reproduced by another from a subscriber's computer without the assistance or permission of the subscriber,

In sum, Jane Doe must make these and other arguments on her own behalf, and should be give leave to intervene to do so by a limited appearance in this miscellaneous proceeding.

#### **IV. This Motion to Intervene is Timely**

The person seeking leave to intervene is required to do so in a timely fashion, judged in light of all the circumstances. When interpreting this rule courts are especially lenient if intervention is sought as of right because of the risk of serious harm and injustice to the proposed intervenor if intervention is denied. Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227, 1230 n.2 (1st Cir. 1992); United States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984); 17A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §1916 at 424 (2d ed. 1986).

The factors to consider when timeliness is a question include the stage of the proceeding at which intervention is sought, the prejudice or lack thereof to the existing parties, the reason for the delay, and the length of the delay. Banco, 964 F.2d at 1231.

In this case, Jane Doe seeks to intervene very early in the proceedings—even before Verizon's opposition to RIAA's motion to enforce is due. Findings of untimeliness typically involve many years or many months of delay. E.g., Reid L. v. Illinois State Board of Education, 289 F.3d 1009, 1017-20 (7th Cir. 2002) (motion 9 years after litigation began); United States v. Dallas County Comm'n, 850 F.2d 1433, 1442-43 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989) (motion 8 years after action began). In one case, even a delay of 26 years was found insufficient to bar intervention as untimely. Oneida Indian Nation v. New York, 201 F.R.D. 64, 68-69 (N.D.N.Y. 2001).

Furthermore, the existing parties will not be prejudiced by any delay, if there was any, by the filing of this motion. RIAA may argue that every day's delay subjects its members to enormous losses due to the potential infringements it believes may be caused by Jane Doe's alleged offerings for download. However, due to RIAA's aggressive (and highly publicized) use of the section 512(h) subpoena process to target over a thousand people in the peer to peer file sharing community, Jane Doe no longer participates in any of those communities.<sup>12</sup>

---

<sup>12</sup> See the attached Offer of Proof at ¶9.

**CONCLUSION AND PRAYER**

The constitutional rights and other legal interests Jane Doe claims are rights of great importance, not calculable in dollars, that have never been adjudicated in this context. Under these extraordinary circumstances, no federal court has denied leave to intervene. In accordance with the foregoing points and authorities, Jane Doe respectfully urges this Court to grant leave to intervene.

Dated: August 21, 2003

By:            / s /

---

Richard S. Ugelow, Esq.  
D.C. Bar No. 65224  
Glushko-Samuelson  
Intellectual Property Law Clinic  
Washington College of Law  
American University  
4801 Massachusetts Ave. N.W.  
Washington D.C. 20016  
Telephone: 202.274.4140

Glenn W. Peterson, CA Bar No. 126173  
Daniel N. Ballard, CA Bar No. 219223  
HAC VICE COUNSEL  
McDonough Holland & Allen PC  
555 Capitol Mall, 9th Floor  
Sacramento, CA 95814  
Telephone: 916.444.3900  
*Attorneys for Intervenor*