

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA**

<b>ACHTE/NEUNTE BOLL KINO</b>	)	
<b>BETEILIGUNGS GMBH &amp; CO KG</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>CA. No. 1:10-cv-00453-RMC</b>
	)	
<b>DOES 1 – 4,577</b>	)	
	)	<b><u>Telephonic Conference: TBD</u></b>
<b>Defendants.</b>	)	
	)	

**MEMORANDUM OF PLAINTIFF REGARDING NOTICE TO DEFENDANTS**

I. INTRODUCTION

Plaintiff hereby submits its memorandum in response to the memorandum filed by Amici Curiae regarding the form of notice to be sent by the non-party Internet Service Providers (“ISPs”) pursuant to the Court’s July 2, 2010 order. Plaintiff has already submitted its proposed form of notice [Doc. No. 36] and for convenience has attached that version of the notice as Exhibit 1 hereto. Additionally, for the convenience of the Court, Plaintiff has attached the notice approved by the Eastern District of Pennsylvania court (*Elektra Entertainment Group, et al. v. Does 1-6*, Civil Action No. 04-1241), which Amici had previously submitted to the Court with its amicus brief, as Exhibit 2 hereto. Plaintiff shall address the issues as raised by Amici, as well as one additional sentence in Amici’s notice that Plaintiff’s notice does not include.

II. SPECIFIC UNRESOLVED ISSUES

1. The Defendants should be informed of the proper terminology related to a motion to quash.

Amici argue that the phrase “motion to quash or vacate” is too much legalese and that it is “unenlightening to most lay people.” While Plaintiff has worked with Amici to reduce the amount of legalese in the notice, some legal terms and phrases are necessary.

Amici have proposed that the notice state the Defendants can “ask the Court to block the subpoena....” While Amici’s proposed notice goes on to state that the Defendants can do this by filing a motion, the preceding phrasing is misleading. By stating (twice) that the Defendants can “ask the Court” for something and using the term “block,” it will lead to unintelligible and improper communications and filings to the Court.<sup>1</sup>

As with other arguments presented by Amici, Amici are advocating that the Defendants, particularly any Defendants acting *pro se*, be given a different, more lenient standard for filing documents in this case. That should not be permitted. *Pro se* litigants must comply with the Federal Rules of Civil Procedure just like represented litigants. Rogler v. U.S. Dept. of Health and Human Services, 620 F.Supp.2d 123, 127 (D.D.C. 2009) (stating that while pleadings filed by *pro se* litigants are held to less stringent standards than formal pleadings drafted by lawyers, *pro se* litigants must still comply with court rules).

If Defendants truly wants to file proper objections to subpoenas, there are a variety of resources at their disposal, including law libraries, pro bono legal organizations, and Amici.

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<sup>1</sup> It is quite reasonable to assume that even though the parties have agreed to a sentence at the end of the notice that states “You should not call the Court,” earlier references to “ask the Court” will likely lead to phone calls and other improper forms of communications with the Court, notwithstanding the warning.

Plaintiff's notice informs the Defendants of the key issues involved and even provides them with contact information for further help, including Amici's website. Thereby, even if a person does not necessary know or understand what a "motion to quash" is, at least that person will have the correct terminology to conduct their own research or approach legal professionals. If the notice included Amici's language, the Defendants who attempted to do more inquiry or seek legal advice would be even more confused when they search for or tell an attorney they need a "motion to block."<sup>2</sup>

Lastly, the notice approved by the Eastern District of Pennsylvania contained the exact language proposed by Plaintiff. [See Ex. 2 hereto] As the Court will recall, Amici submitted that notice with its amicus brief to "assist the Court" in fashioning a similar order in this case. [See Doc. No. 23 at p. 14] Further, as stated in the order accompanying that notice [see Doc. No. 23-1 at p. 31 fn. 1], the same Amici in this case participated in the drafting of the notice in that case. Therefore, it is disingenuous for Amici to object to the language in Plaintiff's proposed notice when that language came verbatim from the sample order Amici previously submitted to this Court.

In the end, Amici cannot justify why telling the Defendants to "block" the subpoena is proper or easier to understand than to simply inform the Defendants to file a motion to quash. The purpose of the notice is to inform the Defendants of the subpoenas and that their personal information may be turned over to Plaintiff. It is unfathomable that such a notice would not clearly state that they can "file a motion to quash or vacate" in response. Overall, Amici's

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<sup>2</sup> Amici also argues that people will not know what it means to "file a motion" in a lawsuit. Apparently, Amici believes that stating "You can do this by filing a legal document called a 'motion'" somehow cures this. However, there seems to be little more guidance to the Defendants by simply telling them that a motion is a "legal document."

language is more confusing and harmful than beneficial. Therefore, the Court should adopt Plaintiff's version of the notice.

2. Amici's demand to include statements regarding joinder and the First Amendment is inappropriate.

Amici propose that the Defendants be informed that they can challenge the subpoena or lawsuit on joinder or First Amendment grounds. However, these arguments have already been raised with the Court in this case and rejected. It is without question that the Court denied Amici's arguments related to the First Amendment and clearly stated that it would not sever the case at this point based on Amici's joinder argument.<sup>3</sup> On the other hand, the Court did address concerns regarding Defendants being made aware of personal jurisdiction issues. Accordingly, Plaintiff has included a paragraph to address that issue.

Additionally, Amici argue that the notice should include a reference to Defendants filing a motion to dismiss. However, such a reference is misleading and improper at this time. Such a suggestion does not advance the purpose of the notice, which is to inform the Defendants of the subpoena and their ability to defend against the subpoena – by filing a motion to quash.<sup>4</sup>

As with the first issue, Amici are again advocating against the sample notice they provided to the Court. The notice approved by the Eastern District of Pennsylvania does not

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<sup>3</sup> It should make no difference if an individual Defendant brings these arguments, especially as Amici have repeatedly stated that they have presented their arguments on behalf of the Defendants.

<sup>4</sup> When taken in conjunction with Amici's refusal to include the phrase "motion to quash or vacate" in the notice, it is quite obvious that Amici do not want the Defendants to be informed of their rights and options for challenging the subpoena. Rather, Amici are seeking to persuade the Defendants to challenge the lawsuit in its entirety, which is not the purpose of the notice or proper at this stage of the case.

contain any of the language proposed by Amici related to joinder, the First Amendment, or motions to dismiss.

Overall, Amici are again providing overkill in their notice, including issues that are improper and do not advance the purpose of the notice. Therefore, the Court should adopt Plaintiff's version of the notice that does not include references to joinder, the First Amendment, or motions to dismiss.<sup>5</sup>

3. Amici's demand that Plaintiff host a website posting all of the filings in the case is unreasonable.

Amici claim that Plaintiff has declined Amici's suggestion to have Plaintiff host a website. That is simply not true. Plaintiff was willing to possibly host a website that would include a copy of the Complaint and a Frequently Asked Questions page, with the URL of that website in the notice. However, Plaintiff would not agree with Amici's demand that such a website host virtually all of the filings in the case.<sup>6</sup>

Amici's reference to class action settlement websites only highlights Plaintiff's position. The websites cited by Amici, and many similar websites, do not include the vast scope of documents and filings suggested by Amici for this case. Rather, the websites merely host the one or two documents necessary for the class members, i.e. the settlement agreement and/or

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<sup>5</sup> It is also unnecessary to have a link to Amici's brief in the notice. The notice already contains a link to Amici's (EFF's) website where the brief can be obtained. Plus, this is just another example of overkill – Amici are attempting to bombard the Defendants with nearly every single piece of paper filed in this case, certainly an overwhelming proposition for most people.

<sup>6</sup> Amici propose that the website would host the Complaint and Plaintiff's motion for discovery along with all motions filed by any Defendant and all of Plaintiff's oppositions to motions filed by any Defendant on an ongoing and continuous basis.

court order. The websites do not include the briefing on the settlement approval or all motions and oppositions filed with the court.

Likewise, here it is unreasonable to require Plaintiff to host a website that will include countless documents and that also requires updating on an ongoing basis. If any Defendant truly wishes to see all of the documents filed in the case, that Defendant can access any document on Pacer. Not only would it be an unfair burden and expense for Plaintiff to, in essence, replicate Pacer, such a website would seem to violate Pacer's policy. As stated in the most recent Pacer Policy, "[a]ny attempt to collect data from PACER in a manner which avoids billing is strictly prohibited and may result in criminal prosecution or civil action."

Further, not only will this create an unnecessary burden on Plaintiff, it will only lead to confusing people. It is daunting enough to look at a two-page notice and the subpoena without also having all of the other filings suggested by Amici. Once again Amici's arguments are at odds with each other. Amici previously argued that the Defendant will not know what a "motion to quash" is or even what it means to "file a motion," but at the same time Amici want to present the same people with all of the motions to quash filed in the case, those oppositions, and Plaintiff's motion for discovery, which is filled with the very legalese Amici claim should be avoided. In fact, Amici specifically argued that "legal terms and phrases [] will be unenlightening to most lay people." If one phrase ("motion to quash") is unenlightening to people, it only follows that providing the same people with all of the legal filings in the case is pure overkill.

Amici's argument that Plaintiff must host a website with all Court filings so that the Defendants will have a mechanism to receive Plaintiff's oppositions to motions to quash, and thereby be able to file replies, again attempts to circumvent the clear court rules that apply to all

litigants. Again, there is no impediment to Defendants, even if acting *pro se*, requesting the Court to seal their personal information. There is also no impediment to Defendants contacting a legal representative or doing their own research and investigation, especially considering the notice provides legal resources.

Further, it is disingenuous for Amici to claim that the Defendants will be “hard-pressed” to file a motion to quash without revealing their identity and contact information. The latest two purported motions to quash [Doc. No. 35] were filed “anonymously” while also presenting a mechanism for Plaintiff to serve its opposition. Also, as Amici are most likely aware, the judges presiding over similar cases in this Court have freely granted motions to seal and have forwarded Plaintiff’s oppositions to the appropriate defendants.

Lastly, the introductory language in both Plaintiff’s and Amici’s notice provide the Defendants with straight-forward information about the claims against them – the precise reason Amici claimed a website is necessary. As opposed to the Court filings (including the Complaint), which are filled with legalese, the notice informs the Defendants in plain language that Plaintiff is claiming they illegally downloaded or distributed a movie. Along with a copy of the subpoena, this should be all of the information the Defendants need to know so that they can determine a course of action or investigate further. Therefore, the Court should adopt Plaintiff’s proposed notice

4. Informing the Defendants that Plaintiff wants the Court to order them to pay thousands of dollars is improper, misleading, and irrelevant.

Amici have proposed adding the following sentence to the fourth paragraph of the notice: “The Plaintiffs want the court to order you to pay them significant damages, which may be

thousands of dollars, for uploading or downloading the movie without permission.” However, this sentence is improper, misleading, and irrelevant.

Plaintiff’s First Amended Complaint’s prayer for judgment is just that – a request that judgment be entered against any Defendant that Plaintiff names and is found to be liable in this case. It is misleading to state that the Court would “order” people to pay, as, among other things, Plaintiff would have to enforce any judgment it obtained. In the context of the entire notice, the sentence seems to suggest that this Court order could come in the near future or somehow as a result if a Defendant does not do anything in response to the notice.

Overall, such language is premature and intimidating. Again, the purpose of the notice is to inform the Defendants that their personal information is being requested. They have not been named in the lawsuit, and Plaintiff has not yet been able to determine the scope and extent of any particular Defendant’s alleged infringing activity, which could potentially change the damages calculation for that particular Defendant. Therefore, the Court should not include this sentence.

### III. CONCLUSION

Overall, Plaintiff’s version of the notice adequately serves the purpose of this notice – it informs the Defendants that a subpoena has been issued requesting their personal information. Further, Plaintiff’s notice properly balances the Defendants’ need for information without overwhelming them. On the other hand, Amici’s proposed notice is a slippery slope of overkill.<sup>7</sup>

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<sup>7</sup> Amici’s statement that the ISPs “agree with *amici* that [Amici’s] notice will better serve the needs, and protect the rights, of their customers than the proposed notice submitted by the plaintiff” is rather misleading. While the ISPs may “support” Amici’s proposed notice, in meeting and conferring on this notice, it was Plaintiff’s understanding that the ISPs would likewise support the notice in the form proposed by Plaintiff. That is, it did not seem to Plaintiff that the ISPs opposed Plaintiff’s notice or necessarily thought Amici’s notice was “better,” only

Therefore, the Court should not include Amici's proposed additions and should accept Plaintiff's form of notice.

Respectfully submitted,  
ACHTE/NEUNTE BOLL KINO BETEILIGUNGS  
GMBH & CO KG

**DATED:** July 21, 2010

By: /s/ Thomas M. Dunlap  
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that the ISPs were forced to be included on the side of Amici in filing the proposed notice because of Amici's insistence on keeping the terms at issue.

**READ AT ONCE**

**COURT-DIRECTED NOTICE  
REGARDING ISSUANCE OF SUBPOENA  
SEEKING DISCLOSURE OF YOUR IDENTITY**

A legal document called a subpoena has been sent to your Internet Service Provider, \_\_\_\_\_, requiring the disclosure of your name, address and other information. The subpoena was issued pursuant to a Court Order in one of two lawsuits pending in the United States District Court for the District of Columbia.

Plaintiffs have filed two lawsuits alleging that various people have infringed their copyrights by illegally downloading and/or distributing one of these two movies: “Far Cry” or the “The Steam Experiment” (a/k/a “The Chaos Experiment”). However, the Plaintiffs do not know the actual names or addresses of these people – only the Internet Protocol address (“IP address”) of the computer associated with the illegal activity.

Accordingly Plaintiffs have filed their lawsuits against anonymous “John Doe” defendants and issued subpoenas to various Internet Service Providers to determine the identity of these people. If you are receiving this notice, that means the Plaintiffs have asked your Internet Service Provider to disclose your identification information to them, including your name, current (and permanent) addresses, and your email address and Media Access Control number. Enclosed is a copy of the subpoena seeking your information and the exhibit page containing the IP address that has been associated with your computer and showing the date and time you are alleged to have used the Internet to download or upload the particular movie.

This is a civil lawsuit, not a criminal case. You have not been charged with any crime. If the Plaintiffs receive your information from your Internet Service Provider, you will likely be added as a named defendant to one and/or the other of the two lawsuits.

**INFORMATION ABOUT YOU HAS NOT YET BEEN DISCLOSED,  
BUT IT WILL BE DISCLOSED IN 30 DAYS IF YOU DO NOT  
CHALLENGE THE SUBPOENA.**

Your identifying information has not yet been disclosed to the Plaintiffs.

This notice is intended to inform you of some of your rights and options. It does not provide legal advice. We cannot advise you about what grounds exist, if any, to challenge this subpoena. If you would like legal advice you should consult an attorney. On the following pages of this notice you will find a list of resources that may help you locate an attorney and decide how to respond to the subpoena or lawsuit

If you want to prevent being identified, you have 30 days from the date of this notice to file a motion to quash or vacate the subpoena. You must also notify your ISP. If you need more than 30 days to file such a motion or find a lawyer to assist you, you can file a motion asking for an extension of time; you should notify your ISP if you file a motion asking for more time.

If you file a motion to quash the subpoena, your identity will not be disclosed until the court makes a decision on your motion. If you do nothing, then after 30 days your ISP will be compelled to send the Plaintiff your name, address, email address, telephone number, and your modem's Media Access Control number.

You may wish to obtain an attorney to advise you on these issues or to help you take action.

To help you find a lawyer, the American Bar Association's attorney locator can be found on the Internet at <http://www.abanet.org/lawyerlocator/searchlawyer.html>

The Bar Association of the District of Columbia has a Lawyer Referral Service that can be reached at 202-296-7845.

The Electronic Frontier Foundation is an organization that seeks to protect the rights of Internet users. They have created a website that lists attorneys who have volunteered to consult with people in your situation and contains further information about the lawsuit that has been filed against you as well as similar lawsuits:

<https://www.eff.org/issues/file-sharing/subpoena-defense>

#### OTHER ISSUES REGARDING THE LAWSUIT AGAINST YOU

To maintain a lawsuit against you in the District Court for the District of Columbia, the court must have personal jurisdiction over you. You may be able to challenge the District Court for the District of Columbia's personal jurisdiction over you. However, please note that even if your challenge is successful, the Plaintiff can still file against you in the state in which a court has personal jurisdiction over you.

If you are interested in discussing this matter with the Plaintiff's attorneys, you may contact them by telephone at (877) 223-7212, by fax at (866) 874-5101 or by email at [subpoena@dgwlegal.com](mailto:subpoena@dgwlegal.com). Please understand that these lawyers represent the company that sued you. They can speak with you about settling the lawsuit, if you wish to consider that. You should be aware that if you contact them they may learn your identity, and that anything you say to them can later be used against you in court.

You should not call the Court.

Again, you may wish to retain an attorney to discuss these issues and your options.

**COURT-DIRECTED NOTICE  
REGARDING ISSUANCE OF SUBPOENA**

A subpoena has been issued directing \_\_\_\_\_, your Internet Service Provider ("ISP") to disclose your name. The subpoena has been issued because you have been sued in the United States District Court for the Eastern District of Pennsylvania in Philadelphia, PA as a "John Doe" by the major record companies. You have been sued for infringing copyrights on the Internet by uploading and/or downloading music. The record companies have identified you only as a "John Doe" and have served a subpoena on your ISP to learn your identity. This notice is intended to inform you of some of your rights and options.

**YOUR NAME HAS NOT YET BEEN DISCLOSED.  
YOUR NAME WILL BE DISCLOSED IN 21 DAYS IF YOU DO NOT  
CHALLENGE THE SUBPOENA.**

Your name has not yet been disclosed. The record companies have given the Court enough information about your alleged infringement to obtain a subpoena to identify you, but the Court has not decided whether you are liable for infringement. You can challenge the subpoena in Court. You have 21 days from the date of this notice to file a motion to quash or vacate the subpoena. If you file a motion to quash the subpoena, your identity will not be disclosed until the motion is resolved (and the companies cannot proceed against you until you are identified). The second page of this Notice can assist you in locating an attorney and lists other resources to help you determine how to respond to the subpoena. If you do not file a motion to quash, at the end of the 21 day period, your ISP will send the record company plaintiffs your identification information.

**OTHER ISSUES REGARDING THE LAWSUIT AGAINST YOU**

To maintain a lawsuit against you in the District Court in Philadelphia, the record companies must establish jurisdiction over you in Pennsylvania. If you do not live or work in Pennsylvania, or visit the state regularly, you may be able to challenge the Pennsylvania court's jurisdiction over you. If your challenge is successful, the case in Philadelphia will be dismissed, but the record companies may be able to file against you in another state where there is jurisdiction.

The record companies are willing to discuss the possible settlement of their claims against you. The parties may be able to reach a settlement agreement without your name appearing on the public record. You may be asked to disclose your identity to the record companies if you seek to pursue settlement. If a settlement is reached, the case against you will be dismissed. Defendants who seek to settle at the beginning of a case may be offered more favorable terms by the record companies. You may contact the record companies' representatives by phone at (206) 973-4145, by fax at (206) 242-0905 or by email at [info@settlementsupportcenter.com](mailto:info@settlementsupportcenter.com).

You may also wish to find your own lawyer (see resource list below) to help you evaluate whether it is more in your interest to try to reach a settlement or defend against the lawsuit.

### RESOURCE LIST

The organizations listed below provide guidance on how to find an attorney. If you live in or near Pennsylvania or Philadelphia, the second and third listings below provide referrals for local attorneys.

American Bar Association – <http://www.abanet.org/legalservices/findlegalhelp/home.htm>.

Pennsylvania Bar Association – [www.pba.org](http://www.pba.org).  
Lawyer referral service – (800) 692-7375 or (717) 238-7807.

Philadelphia Bar Association – [www.philabar.org](http://www.philabar.org)  
Lawyer referral service – (215) 238-6333.

The below-listed organizations appeared before the Court as “friends of the court” to attempt to protect what they believe to be the due process and First Amendment rights of Doe defendants. These organizations are prepared to help you consider your legal options.

American Civil Liberties Union of Pennsylvania  
P.O. Box 1161  
Philadelphia, PA 19105  
Phone: – (215) 592-1513, ext. 1

Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110-1914  
E-mail: [RIAAcasc@eff.org](mailto:RIAAcasc@eff.org)

Public Citizen  
1600 20<sup>th</sup> Street, NW  
Washington, DC 20009  
Phone: (202) 588-7721  
E-mail: [litigation@citizen.org](mailto:litigation@citizen.org)