

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.,
A Delaware corporation, et al.,

Plaintiffs,

v.

Civil File No. 06-1497 (MJD/RLE)

JAMMIE THOMAS,

Defendant.

**MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE OF
ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE,
UNITED STATES INTERNET INDUSTRY ASSOCIATION, AND
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF DEFENDANT JAMMIE THOMAS**

The Electronic Frontier Foundation (“EFF”), Public Knowledge, the United States Internet Industry Association (“USIIA”), and the Computer & Communications Industry Association (“CCIA”) hereby move for leave to file the accompanying brief *amici curiae* in the above-captioned matter. *Amici* are public interest and industry groups with strong interests in ensuring that the distribution right defined in 17 U.S.C. § 106(3) is given its proper, limited scope. An inappropriately broad reading of § 106(3) would have ramifications far beyond the scope of this case. *Amici* express no view regarding the merits of any other claims Plaintiffs may have, nor on any fair use or other defenses that Thomas may have with respect to those claims.

EFF is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of

copyright owners and the interests of the public. Founded in 1990, EFF represents more than 13,000 dues-paying members including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring broad access to information in the digital age. Because a ruling on this motion may have implications for consumers and new technology innovators, EFF has a strong interest in ensuring that the statutorily limited § 106(3) right is correctly applied in this and other cases.¹

Public Knowledge is a non-profit, public interest organization advocating for consumers' digital rights and a vibrant information commons. These goals can only be met when the rights of all parties—creators, users, and intermediaries—are balanced appropriately. An inappropriately expansive reading of the distribution right will have far-reaching effects on the rights of users of digital works as well as the ability of innovators to find new, legal uses for those works.

USIIA is a trade association with more than 100 members who provide the facilities and services that constitute the Internet as we know it today. USIIA members include Internet Service Providers (“ISPs”), who provide proprietary content, email

¹ EFF has appeared as *amicus curiae* in several other district court cases that have addressed the scope of the distribution right. *Elektra Enter. Group v. Barker*, No. 05-CV-7340 KMK (S.D.N.Y., brief filed Feb. 23, 2006); *Fonovisa v. Alvarez*, No. 1:06-CV-011 (N.D. Tex., brief filed June 1, 2006); *Elektra v. Dennis*, No. 07-CV-39 DPJ JCS (S.D. Miss., brief filed Apr. 6, 2007); *Atlantic v. Howell*, No. CV 06-02076 PHX NW (D. Ariz., brief filed Jan. 11, 2008); *London-Sire v. Doe*, No. 1:04-CV-12434-NG (D. Mass., brief filed Feb. 7, 2008). As in this case, those cases involve individuals accused by record labels of downloading and uploading music over the Internet.

capability, and web browsing functionalities to their subscribers. USIIA President David P. McClure, a prominent Internet industry spokesperson, has testified before Congress on numerous occasions regarding the intersection of Internet policy and intellectual property. USIIA has participated in numerous federal and state court cases raising issues of ISP duties and subscriber policies in the context of interpretations of the DMCA.

CCIA is an international, nonprofit association of technology companies dedicated to open markets, open systems, and open networks. CCIA members participate in the Internet, information, and communications technology industries, ranging from the largest in the business to small entrepreneurial firms. CCIA members employ nearly one million people and generate annual revenues exceeding \$200 billion. A complete list of CCIA's members is available online at <http://www.cciagnet.org/members.html>. CCIA members rely heavily on their intellectual property and depend upon robust intellectual property protection to encourage innovation and produce profits. At the same time, the ability to create and innovate free from disputes over intellectual property is essential to innovation in CCIA members' industries. CCIA members thus depend upon the copyright system to strike the right balance between underprotection and overprotection, and thereby fulfill its constitutional purpose of promoting progress.

The Court's ruling on the motion for new trial will be one of many recent court decisions addressing the scope of the distribution right defined by 17 U.S.C. § 106(3). As explained in the accompanying brief, the issue of whether section 106(3) creates "making available" liability, as Plaintiffs argue, has effects that extend far beyond the facts of this case, and indeed beyond the record companies' current campaign of file

sharing lawsuits. Because the accompanying briefs offers insights that might not otherwise be available to the Court from public interest advocacy groups and groups representing industries that could be affected by the Court's ruling, the Court should grant leave to participate as *amici*.

For the foregoing reasons, EFF, Public Knowledge, USIIA, and CCIA respectfully request that leave to participate as *amici* be granted.

Respectfully submitted,

Dated: June 20, 2008

Electronic Frontier Foundation
Public Knowledge
United States Internet Industry Association
Computer & Communications Industry Association

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