IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. _____

IN RE: SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS, LLC; AND UMG RECORDINGS, INC.

Petitioners.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

District Court Case No. 07-11446-NG (D. Mass.)
(Consolidated with District Court Case No. 03-11661-NG (D. Mass.))
Hon. Nancy Gertner, United States District Judge, presiding

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record provides the following statement under Fed. R. App. P. 26.1(b): Each Plaintiff-Appellant identifies its parent corporations and lists any publicly held company that owns 10% or more of its stock:

The following companies are parents of, or partners in Plaintiff-Appellant Sony BMG Music Entertainment (successor-in-interest to Sony BMG Music Entertainment): Sony Music Holidngs Inc.; USCO Sub LLC and Sony Corporation, of which only Sony Corporation is publicly traded in the United States.

The following companies are parents of, or partners in Plaintiff-Appellant Warner Bros. Records Inc.: Atlantic Recording Corporation; WMG Acquisition Corp.; WMG Holdings Corp.; and Warner Music Group Corp., of which only Warner Music Group Corp. is publicly traded. Warner Music Group Corp. is publicly traded in the United States.

The following companies are parents of, or partners in Plaintiff-Appellant Atlantic Recording Corporation: Warner Bros. Records Inc.; WMG Acquisition Corp.; WMG Holdings Corp.; and Warner Music Group Corp., of which only Warner Music Group Corp. is publicly traded. Warner Music Group Corp. is publicly traded in the United States.

The following companies are parents of, or partners in Plaintiff-Appellant Arista Records LLC.: BMG Music; Sony BMG Music Entertainment; Ariola Eurodisc LLC; USCO Holdings Inc.; BeSo Holding LLC; Sony Music Entertainment Inc.; Bertelsmann Music Group; Bertelsmann, Inc.; Arista Holding, Inc.; Zomba US Holdings, Inc.; Bertelsmann AG; and Sony Corporation, of which only Sony Corporation is publicly traded. Sony Corporation is publicly traded in the United States.

The following companies are parents of, or partners in Plaintiff-Appellant UMG Recordings, Inc.; Interscope Records; PRI Productions, Inc.; Polygram Holding, Inc.; Universal Music Group, Inc.; Vivendi Holding I Corp.; Vivendi Holdings Company; Vivendi Holding S.A.S.; SPC S.A.S.; and Vivendi S.A., of which only Vivendi S.A. is publicly traded. Vivendi S.A. is publicly traded in France.

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Introduction

A petition for a writ of mandamus seeks an extraordinary remedy. Nevertheless, in this case, the issuance of such a writ is not only warranted, but necessary.

In an order issued on January 14, 2009, the district court granted a motion by the Defendant to permit a private media entity to record and broadcast upcoming proceedings in the case. The decision directly contravenes *both* the plain language of Rule 83.3 of the Local Rules for the United States District Court for the District of Massachusetts *and* the established policies of the Judicial Conference of the United States.

Apart from the fact that the decision of the district court is wrong on its face, it is troubling in its application. The Order requires members of the public who wish to view the broadcast to do so by visiting the website of the Berkman Center for Internet and Society (the "Berkman Center"), an organization founded by the Defendant's counsel which has filed amicus briefs against Petitioners and their copyright enforcement efforts. That result undermines basic principles of fairness and is flatly inconsistent with the public interest.

Recording and broadcasting this proceeding will prejudice Petitioners' efforts to enforce their legal rights, and no appeal at a later date could correct that prejudice once done. A writ of mandamus ordering the district court to vacate its

Order of January 14, 2009 should issue so that the rules of the United States District Court for the District of Massachusetts and the policies of the Judicial Conference can be upheld, and so that the core interests of the parties in this case—the need to ensure fairness to *all* litigants in the trial court—can be adequately protected.

I

RELIEF SOUGHT

Petitioners Sony BMG Music Entertainment, Warner Bros. Records, Inc., Atlantic Recording Corporation, Arista Records, LLC, and UMG Recordings, Inc. (collectively "Petitioners"), the Plaintiffs in the underlying action, hereby petition this Honorable Court to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, and under Rule 21 of the Federal Rules of Appellate Procedure, to set aside the Order of January 14, 2009 (Addendum at 1) issued by Judge Gertner that authorizes the recording and broadcasting of the proceedings currently scheduled in the district court for January 22, 2009. Specifically, Petitioners respectfully request this Honorable Court to issue a writ of mandamus directing Judge Gertner to vacate that Order and to instead issue an order barring the recording and broadcasting of the district court proceedings in the underlying case.

In the alternative, Petitioners respectfully request this Honorable Court to issue a writ of mandamus directing Judge Gertner to vacate the Order of January

14, 2009 and to refer the Defendant's Motion seeking to record and broadcast the proceedings in the underlying case to a full panel of judges for the United States District Court for the District of Massachusetts.

II

JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1651 (the "All Writs Act"), as well as Rule 21 of the Federal Rules of Appellate Procedure and Local Rule 21.0 of the Rules of this Court.

In the alternative, this Court may assume jurisdiction over this matter under the collateral order doctrine. See United States v. Horn, 29 F.3d 754, 768 (1st Cir. 1994) ; Gill v. Gulfstream Park Racing Assocs., 399 F.3d 391, 397-398 (1st Cir. 2005). A Notice of Appeal of the January 14, 2009, Order has been filed in the district court. Petitioners respectfully request that the docketing and consideration of that appeal be expedited and the appeal be consolidated with this Petition.

III

ISSUES PRESENTED

1. Can the district court issue an order authorizing the recording and broadcasting of its proceedings even when its own Local Rules, as well as the policies of the Judicial Conference of the United States, prohibit the district court from issuing such an order?

2. Can the district court issue an order overturning its own Local Rule that prohibits the recording and broadcasting of its proceedings without first referring the matter to a full panel of the judges of the district court which has approved that Local Rule?

IV

STATEMENT OF FACTS

This petition for a writ of mandamus arises from a lawsuit filed by Petitioners against Defendant Joel Tenenbaum on August 7, 2007. Petitioners are a group of record companies who own the copyrights to a wide variety of sound recordings (the "Copyrighted Recordings"). In their claim against Mr. Tenenbaum, Petitioners have alleged that Mr. Tenenbaum has violated their exclusive rights to those Copyrighted Recordings by (1) downloading unauthorized copies of those recordings from the internet, and (2) making copies of the Copyrighted Materials and distributing them to users around the world though the internet. See Complaint (Addendum at 23). While discovery in the case is not yet complete, that discovery has borne out the validity of Petitioners' claims: Petitioners have uncovered substantial evidence indicating that Mr. Tenenbaum has, *inter alia*, copied and distributed hundreds of digital copies of Petitioners' Copyrighted Recordings to other internet users around the world. Indeed, Mr. Tenenbaum has admitted doing so in his deposition.

Mr. Tenenbaum originally appeared in this case *pro se* (although he was regularly accompanied to court and in settlement negotiations by his mother, who is an active member of the Massachusetts Bar). In June 2008, during a status conference in the case, the district court explained that it had been engaged in active efforts to obtain private counsel for Mr. Tenenbaum. Specifically, the district court stated to Mr. Tenenbaum: "I still want you to find a lawyer. I am not giving up. Did you get a call from an individual named Charlie Nesson or someone from the Berkman Center?" See Tr. of Proceedings, June 17, 2008 at 4-5 (Addendum at 28). The Court then directed Mr. Tenenbaum to be sure to provide his contact numbers to the Court. Id. at 5. Thereafter, on September 22, 2008, attorney Charles Nesson, the founder and co-director of the Berkman Center, entered an appearance in the case on behalf of Mr. Tenenbaum.

On December 23, 2008, Defendant's counsel submitted to the district court a Motion captioned as a "Motion and Memorandum to Admit the Internet Into the Courtroom." The Motion sought to allow the Defendant's self-selected media entity, Courtroom View Network ("CVN"), to provide audio-visual coverage of all motion and trial proceedings in connection with the case—including the January 22, 2009 hearing.

On January 12, 2009, Petitioners submitted their response to the Defendant's Motion. In that response, Petitioners explained that the proposed recording and

broadcasting of the district court proceedings was barred by Rule 83.3 of the Local Rules of the United States District Court for the District of Massachusetts. See D. Mass. Local Rule 83.3. Petitioners also explained that the ban established by Local Rule 83.3 specifically tracked the Policy Statement adopted by the Judicial Conference of the United States regarding the recording and broadcasting of proceedings in the district courts. Petitioners also argued that the relationship between CVN and the Defendant and his counsel strongly suggested that the proposed broadcast was not in furtherance of the public interest, but rather part of a larger strategy to advance Defendant's and his counsel's interests in connection with the case.

On January 13, 2009, the district court heard argument on Defendant's Motion via a telephonic status conference. One day later, on January 14, 2009, the district court issued an order granting Defendant's Motion and allowing CVN to broadcast the January 22, 2009, hearing. See Order (Addendum at 1). In doing so, the district court concluded that Rule 83.3 of the Local Rules of the District of Massachusetts "assigns the decision to permit recording or broadcast to the discretion of the district judge." Id. at 5. Although the district court acknowledged that its decision conflicted with the position of the Judicial Conference of the United States, the district court concluded that broadcasting the proceedings in this case was in the public interest. Curiously, however, the district court allowed only

CVN, the media entity sponsored by the Defendant, to record and broadcast the proceedings. See Order at 10. And even more unusual, the Court directed the Berkman Center, the organization that was founded by and is directed by Mr. Tenenbaum's counsel, to be the entity to provide the broadcast of the proceedings to the general public. Id.[1]

While the district court's Order is limited at present to the January 22 hearing, the court specifically reserved the right to consider the same request with the respect to other hearings and the trial in the future. To the extent that the district court believes it has the discretion to allow cameras in the courtroom at any point, there is no reason to believe that the district court will not permit more broadcasting of this case in the future.

V

GOVERNING STANDARD

An applicant for a writ of mandamus "must show that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld." See In re United States, 158 F.3d 26, 30 (1st Cir. 1998) (internal

[1] The Court's order describes the proposed broadcast of its proceedings as "narrowcasting" because CVN would be limiting their distribution to select individuals and entities, including the Berkman Center. But, as the court's order makes clear, the recording would then be made available worldwide real-time on the Internet to anyone who wanted to watch it through the Berkman Center's website. As a result, this "narrowcast" would have a wider distribution both immediately and over time than any traditional over-the-air broadcast.

quotation marks omitted) (quoting In re Cargill, Inc., 66 F.3d 1256, 1260 (1st Cir. 1995)). Mandamus is appropriate "in those rare cases in which the issuance of an order presents a question about the limits of judicial power, poses a risk of irreparable harm to the appellant, and is plainly erroneous, and the case for mandamus is particularly compelling where the order poses an elemental question of judicial authority." See Christopher v. Stanley-Bostitch, 240 F.3d 95, 99-100 (1st Cir. 2001). Use of this Court's power mandamus is also appropriate in order to address important issues that can significantly affect "other jurists, parties or lawyers" practicing in the federal courts. See Horn, 29 F.3d at 769-70; see also In re United States of America, 426 F.2d 1, 5 (1st Cir. 2005).

Moreover, this Court has the authority to compel the district court to adhere to the terms of its own Local Rules. See Crowley v. L.L. Bean, Inc., 361 F.3d 22, 25 (1st Cir. 2004). While trial courts have some discretion and flexibility in interpreting and applying their own local rules, that discretion is not "unbridled." See Nepsk, Inc. v. Town of Houlton, 283 F.3d 1, 7 n.6 (1st Cir. 2002). For example, that discretion does not extend to instances where the court's departure from its rules unfairly jeopardizes the substantial rights of the parties. Garcia-Goyco v. Law Environmental Consultants, Inc., 428 F.3d 14, 19 (1st Cir. 2005). In addition, a district court cannot enforce its local rules in a manner that conflicts with the Federal Rules of Civil Procedure. See Nepsk, 283 F.3d at 7.

VI

ARGUMENT

A. Rule 83.3 of the Local Rules of the District of Massachusetts Prohibits The District Court from Allowing CVN and the Berkman Center To Record and Broadcast the Proceedings in this Case.

The district court committed an egregious error of law when it authorized the CVN and the Berkman Center to record and broadcast of the proceedings in this case. The Local Rules of the United States District Court for the District of Massachusetts directly address the issue of when proceedings may be recorded and broadcast. Specifically, Rule 83.3 provides, in relevant part:

> **(a) Recording and Broadcasting Prohibited.** Except as specifically provided in these rules or by order of the court, no person shall take any photograph, make any recording or make any broadcast by radio, television or other means, in the course of or in connection with any proceedings of this court, on any floor of any building on which proceedings of this court are or, in the regular course of business of the court, may be held.
>
> . . . .
>
> **(b) Voice Recordings by Court Reporters.** Official court reporters are not prohibited by section (a) from making voice recordings for the sole purpose of discharging their official duties. No recording made for that purpose shall be used for any other purpose by any person.
>
> **(c)** The court may permit (1) the use of electronic or photographic means for the preservation of evidence or the perpetuation of the record, and (2) the broadcasting, televising, recording, or photographing of investigative, ceremonial, or naturalization proceedings.
>
> **(d)** The use of dictation equipment is permitted in the clerk's office of this court by persons reviewing files in that office.

D. Mass. Local Rule 83.3 (Addendum at 12). On its face—as the caption to subsection (a) plainly indicates— this Rule bars the recording and broadcast authorized by the district court in the January 14, 2009, Order.

In its January 14, 2009, Order, the district court sidestepped the plain meaning of Rule 83.3 by concluding that the phrase "by order of the court" in Rule 83.3(a) somehow creates a broad exception to this Rule which gives a district court limitless discretion to authorize audio-visual coverage of its proceedings. See Order at 5 (concluding that the phrase "by order of the court" is a "residual phrase that does not carry any limitation"); see also id. at 10 (referring to "the discretion afforded by Local Rule 83.3(a)"). But that interpretation misreads the plain language of the Rule. In fact, the Rule establishes only two types of exceptions by which the outright ban on recordings and broadcasts of court proceedings in the District of Massachusetts can be avoided: (1) as "specifically provided in the rules", such as when court reporters are discharging their official duties or dictation equipment is being used in the clerk's office, and (2) by "order of the court" for a limited set of circumstances as described in section (c), specifically for the preservation of evidence or the perpetuation of the record, or for investigative, ceremonial or naturalization proceedings. Beyond those two exceptions, the Rule clearly bans the recording and broadcasting of the district court proceedings.

As the Rule's use of the term "or" makes clear, the first of the two exceptions applies to those contexts in which no court order is required. Those contexts are specifically described in sections (b) and (d) of Rule 83.3. Rule 83.3(b) allows official court reporters to make "voice recordings for the sole purpose of discharging their official duties." See D. Mass. Local Rule 83.3(b). Rule 83.3(d) permits "[t]he use of dictation equipment . . . in the clerk's office of this court by persons reviewing files in that office." See D. Mass. Local Rule 83.3(d). Both of these exceptions are examples of recording that is "specifically provided in these rules" and for which no further court order is required. Thus, for example, an official court reporter need not seek judicial permission to make a voice recording in connection with his or her reporting duties.

The second category of exception arises where recording is permitted "by order of the court." But that category of exceptions is plainly restricted by Rule 83.3(c), which sets forth the narrow set of circumstances in which a court in the District of Massachusetts is permitted to issue an order permitting photography, recording or broadcasting of judicial proceedings. Indeed, the use of the term "may" in subsection (c) of the Rule makes clear that the instances set forth in that subsection are the *only* instances where a district court may grant such permission.

In its January 14, 2009 Order, the district court erroneously interpreted the phrase "by order of the court" as being without limitation, basically providing it

with complete discretion to permit recording and broadcasting of proceedings whenever it may so choose. But if that interpretation were correct, there would be no need for subsection (c) of the Rule. Instead, judges in the District of Massachusetts would be free to issue orders permitting broadcasting whenever they saw fit.

In fact, by rendering subsection (c) of the rule meaningless, the district court's reading of the Rule contravenes the "familiar canon of construction" that each word and phrase of a statute or rule must be given effect. See Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec., 510 F.3d 1, 10 (1st Cir. 2007) (rejecting a statutory interpretation that would render portions of the statute "superfluous and effectively excis[ing] it from the statute.") Indeed, this Court has repeatedly explained that this canon of construction "demands our fidelity." Id. Accordingly, "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985); Breest v. Cunningham, 752 F.2d 8, 9 (1st Cir. 1985). But of course the district court's interpretation of the "by order of the court" language in Rule 83.3(a) does just that—it renders "superfluous" all of subsection (c).

Here, the proposed broadcast does not meet either of the two categories of exceptions available under Rule 83.3. Neither CVN nor the Berkman Center is an

official court reporter, nor are they proposing to use dictation to review files in the clerk's office. See D. Mass. Local Rule 83.3(b), (d). The purpose of the proposed recording and broadcast is not to preserve evidence or to perpetuate the record. See D. Mass. Local Rule 83.3(c)(1). And, of course, the court proceeding that CVN/Berkman Center intends to record and broadcast is not an "investigative, ceremonial or naturalization proceeding." See D. Mass. Local Rule 83.3(c)(2).

Because the district court abused its discretion in disregarding the plain meaning of Rule 83.3, its order should be reversed.

B. Local Rule 83.3 Follows the Policies of the Judicial Conference of the United States, Which Also Preclude the Recording and Broadcasting of the Proceedings in this Case.

The intent behind Local Rule 83.3 is not in dispute. The Rule tracks the Policy Statement established by the Judicial Conference of the United States, which the district court acknowledged but declined to follow. See Order at 7-8. That Policy Statement provides as follows:

> A judge may authorize broadcasting, television, recording, or taking photographs in the courtroom and in adjacent areas during investigative, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such proceedings, only:
>
> (a) for the presentation of evidence;
> (b) for the perpetuation of the record of the proceedings;
> (c) for security purposes;
> (d) for other purposes of judicial administration; or
> (e) for the photographing, recording or broadcasting of appellate arguments.

See Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol. 1, Ch. 3, Part E.3 (See Addendum at 13). Under this Policy Statement, the Judicial Conference permits cameras and other recording equipment *only* for specified purposes, such as "investigative, naturalization or other ceremonial proceedings"—and does not permit such recording for coverage of pre-trial proceedings or trials. As the commentary to the Policy Statement explains:

> The general policy of the Conference recognizes a distinction between ceremonial proceedings and non-ceremonial proceedings. Cameras and electronic reproduction equipment may be used in the courtroom during ceremonial proceedings for any purpose. *During non-ceremonial proceedings, they may be utilized only for the limited purposes specified in the policy statement.* . . .

Id. at 2 (emphasis added). Thus, the Judicial Conference's policy is straightforward -- unless a request to broadcast court proceedings falls within a specific exception to the general ban on cameras and recording devices, such a request should not be granted.

This policy was reiterated in September 2007 when the Judicial Conference was asked to provide testimony to the Judiciary Committee of the United States House of Representatives in response to a bill that proposed to authorize the use of cameras in the federal district courts. In that Statement, Hon. John R. Tunheim, the Chair of the Court Administration and Case Management Committee of the Judicial Conference explained that "the Judicial Conference *strongly opposes any*

legislation that would allow the use of cameras in the United States district courts." See Statement of Judge John R. Tunheim on Behalf of the Judicial Conference of the United States to the United States House of Representatives Committee on the Judiciary (September 27, 2007) (emphasis added).

The Judicial Conference's policy is highly authoritative. It was created by Congress, is chaired by the Chief Justice of the United States Supreme Court, and is the one body that is recognized as having the authority to speak on behalf of the entire federal judiciary. See 28 U.S.C. § 331. Accordingly, in this Circuit, "the views of the Judicial Conference are entitled to respectful attention." United States v. Merric, 166 F.3d 406, 412 (1st Cir. 1999). Indeed, the views of the Judicial Conference should be followed unless the court has a compelling reason not to do so. Id.

Perhaps even more significantly, the legislative history of Rule 83.3 makes clear that the intent of the judges adopting it was to follow the policies established by the Judicial Conference. Local Rule 83.3 was enacted in September 1990, the very same time the Judicial Conference first enacted its current Policy Statement. See Report of the Proceedings of the Judicial Conference of the United States (September 12, 1990) (Addendum at 16). Not surprisingly, Rule 83.3 *directly tracks* the language used in the Policy Statement. Specifically, the exceptions listed in Rule 83.3(c) are identical to exceptions set forth in the Judicial

Conference policy. Thus, Rule 83.3 was plainly designed to follow and to implement the Judicial Conference's views. The Judicial Conference Policy Statement therefore conveys not just its own views, but also the views of the judges in the District of Massachusetts who attempted to mirror Judicial Conference policy in crafting Local Rule 83.3.

The District of Massachusetts' intent to follow the Judicial Conference policy is further evidenced by the fact that, to undersigned counsel's knowledge, no judge in the District of Massachusetts has previously deviated from the Judicial Conference's policies regarding the use of cameras or recording equipment in non-ceremonial proceedings.[2] Thus, it is clear that Rule 83.3 was intended to mirror that policy, and unless one of the two enumerated exceptions are met, both Rule 83.3 and Judicial Conference policy dictate that requests for allowing cameras and other recording equipment in a courtroom should be denied.

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[2] The pilot program that was in place in this District from 1991 through 1994 was itself specifically authorized by the Judicial Conference. See Report of the Proceedings of the Judicial Conference of the United States (September 12, 1990) (Addendum at 16); see also D. Mass. Local Rule 83.3.1 (expired December 1994).

C. The District Court's Citation to Decisions from Federal Courts in New York Does Not Support Its Disregard for the Massachusetts Rule.

To support its decision to permit the recording and broadcasting of the proceedings in this case, the district court cites to several decisions from federal district courts in New York which permitted the broadcasting of certain proceedings. See Order at 8.[3] However, the rule governing the use of cameras and recording equipment in the New York Districts from which those decisions emanate is dramatically different from Local Rule 83.3. Local Civil Rule 1.8 for the Eastern and Southern Districts of New York governs the use of recording equipment in those districts, and provides only that "[n]o one other than court officials engaged in the conduct of court business shall bring any camera, transmitted, receiver, portable telephone or recording device into any courthouse or its environs without written permission of a judge of that court." See E.D.N.Y. & S.D.N.Y. Civ. R. 1.8. Unlike Rule 83.3, this New York rule is permissive, does not track the Judicial Conference's policy statements, and apparently leaves the use

[3] Petitioners note that even with that more permissive language, not all judges in the federal district courts in the Southern and Eastern Districts of New York believe they are free to deviate from the Judicial Conference policy prohibiting cameras in their courtrooms. See, e.g., UBS Securities LLC and UBS Loan Finance LLC v. The Finish Line, et al., Order No. 07-CV-10382 (S.D.N.Y. Feb. 25, 2008) (denying request for video coverage of proceedings on the basis that coverage is barred by the Judicial Conference policy).

of cameras up to any judge willing to give "written permission." The Massachusetts rule, which clearly embraces of the Judicial Conference policy, does not allow the same broad discretion as the New York rule, and only provides for the allowance of cameras in the Court under the narrow exceptions set forth in the Rule. See D. Mass. Rule 83.3(c).

D. At a Minimum, Defendant's Request to Allow CVN to Broadcast the Proceedings in this Case Should be Considered by a Full Panel of Judges in the District of Massachusetts.

Given that the both the plain language of Local Rule 83.3 and the Judicial Conference policy forbid precisely the type of recording that the district Court's Order allows, the Order essentially overturns Local Rule 83.3. But the district court's attempt to overturn the long-standing policy of the District of Massachusetts, as defined in the Local Rules, should not be effectuated by a single member of this Court. Rather, as the Federal Rules of Civil Procedure mandate, once enacted, "a local rule. . . remains in effect *unless amended by the court* or abrogated by the judicial council of the circuit." Fed. R. Civ. P. 83(a)(1) (emphasis added). The Rule further provides that for the Court to amend its local rules, it must do so "by a majority of its district judges." Id.

Here, the district court has essentially overturned Local Rule 83.3, regardless of what opinion a majority of the judges of the District of Massachusetts may have on the matter. Indeed, the practical effect of the district court's decision is to allow

cameras to enter a federal trial court in Massachusetts for non-ceremonial proceedings for the first time in fifteen years. This invalidation of the existing rule by a single judge is flatly inconsistent with the requirements of the Federal Rules of Civil Procedure. See Nepsk, 283 F.3d at 7. Given the dramatic impact of such a result upon the existing rules, as well as upon the daily practice in every courtroom in the District of Massachusetts, any decision to allow the broadcasting proposed by Defendant requires the input of the entire judiciary of the District of Massachusetts, as required by the Federal Rules of Civil Procedure.[4] Viewed in this light, the district court's Order implicates precisely the type of "elemental question of judicial authority" for which mandamus is appropriate. See Christopher, 240 F.3d at 99-100; accord In re United States, 426 F.3d at 9 (issuing writ of mandamus to district court where court of appeals concluded that district court's order failed to comport with jury selection plan adopted by the District of Massachusetts as a whole).

Accordingly, in the alternative, Petitioners respectfully submit that this Court should order the district court to vacate its Order permitting the recording

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[4] Indeed, when last faced with such a request, this district court openly considered precisely this approach. See Miller v. Countrywide, Order No. 07-CV-11275-NG (D. Mass. July 8, 2008) (questioning whether "an individual judge may order broadcasting in an individual case, or does such a decision require a collective decision by all of the judges of this Court?"). The issue in Miller was never resolved as the case was transferred to another district. Id.

and broadcasting of the proceedings in this case and order that the Defendant's Motion seeking permission for such a broadcast be considered by a full panel of the judges in the District of Massachusetts.

E. The District Court's Order Permitting the Broadcasting of The District Court Proceedings Will Cause Irreparable Harm.

There is no doubt that the significance of the district court's order to all jurists, parties and lawyers in the District of Massachusetts is alone sufficient to establish the "irreparable harm" required for the issuance of a writ of mandamus. As this Court has previously explained, issues that present important questions that are "likely of significant repetition prior to effective review" merit special consideration by this Court when considering whether to exercise its mandamus power. See Horn, 29 F.3d at 770. Here, where the district court's interpretation of the Local Rule may well open the doors to a flood of applications by broadcasters seeking to record and to broadcast other proceedings throughout the District of Massachusetts, there is necessarily a "sufficient showing of irreparable harm" to merit the exercise of this Court's power of mandamus. Id; In re Globe Newspaper Co., 920 F.2d 88, 90 (1st Cir. 1990); In re: Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 25 (1st Cir. 1982); see also In re United States of America, 426 F.3d at 5 (finding mandamus appropriate where, *inter alia*, district court's decision "prompted motions in other pending cases").

Nor is there any doubt that Petitioners would suffer irreparable harm if the proposed broadcast of the proceedings in this case is allowed to proceed. The Judicial Conference has repeatedly expressed the view that the presence of cameras in district court proceedings "can do *irreparable harm* to a citizen's right to a fair and impartial trial." See Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts (September 6, 2000) (emphasis added); see also Statement of Judge Diarmuid O'Scannlain on Behalf of the Judicial Conference of the United States to the United States Senate Committee on the Judiciary (November 9, 2005) (repeating position that broadcast coverage of district court proceedings can cause "*irreparable harm*") (emphasis added); See Statement of Judge John R. Tunheim on Behalf of the Judicial Conference of the United States to the United States House of Representatives Committee on the Judiciary (September 27, 2007) (same). These views, which are entitled to "respectful attention" here (see Merric, 166 F.3d at 412)—are alone sufficient to establish the harm necessary to justify the issuance of Petitioners' requested writ.

In addition, Petitioners are concerned that, unlike a trial transcript, the broadcast of a court proceeding through the Internet will take on a life of its own in that forum. The broadcast will be readily subject to editing and manipulation by any reasonably tech-savvy individual. Even without improper modification,

statements may be taken out of context, spliced together with other statements and broadcast rebroadcast as if it were an accurate transcript. Such an outcome can only do damage to Petitioner's case. The district court has attempted to fix this problem by ordering the broadcast to be "gavel to gavel" and that there be no "editing" of the proceedings. See Order at 10. But this restriction will be virtually impossible to enforce, as non-parties will still be able to excerpt and circulate portions of the proceedings in a variety of edited forms.

F. The District Court's Order Will Harm Petitioners by Promoting the Defendant's Position to the General Public and the Potential Jury Pool.

There are additional defects in the district court's Order which only serve to magnify the harm the Petitioners will likely suffer. The district court bases its decision to allow a broadcast of the proceedings upon a conclusion that there is a public interest in the underlying litigation and that broadcasting the "gavel to gavel" proceedings over the internet will somehow serve as a public benefit—"especially via a medium so carefully attuned to the Internet Generation captivated by these file-sharing lawsuits." See Order at 4. But the district court's chosen means to achieve this so called "public benefit" is deeply flawed—indeed it is a means that appears specifically designed to benefit the Defendant and his counsel to the detriment of Petitioners.

First, the district court has elected to use the Berkman Center—an entity that was founded by and is currently co-directed by Mr. Tenenbaum's counsel—as the exclusive source for the public to view the proposed broadcast. As the district court likely knows, Berkman Center's website contains a wide variety of material that is harshly critical of Petitioners and the proceedings in the underlying litigation. See, e.g., http://blogs.law.harvard.edu /cyberone/2008/11/03/in-plain-english-quashing-subpoenas (video discussion erroneously accusing the Petitioners of misusing the discovery process in an effort to "victimize Joel"); http://blogs.law.harvard.edu/cyberone/category/riaa (lengthy blog purporting to describe the district court litigation); http://blogs.law.harvard.edu/mediaberkman /2008/12/02/radio-berkman-the-pay-us-hotline-fines-and-the-riaa (recorded interview with Mr. Tenenbaum and his defense counsel regarding the litigation and advocating on behalf of Mr. Tenenbaum's legal position). As discussed below, much of that material misrepresents the actual underlying facts of the case. Id. The Berkman Center's website even includes a link to twitter.com, through which users can access a website entitled "Joel Fights Back" which is actively soliciting donations to fund Mr. Tenenbaum's legal costs in connection with this matter. See www.joelfightsback.com. Accordingly, in the name of "public interest", the district court has directed the general public to a website replete with propaganda regarding the Defendant's position in connection with this case, and that is

specifically designed to promote Defendant's interests in this case. Under these circumstances, it is unclear how the court's January 14, 2009 Order in any way advances the "public interest." To the contrary, by electing to expand selectively the district court's proceedings into a forum that is plainly sympathetic and supportive of the Defendant in this case, the Order creates a serious risk of unfairly infecting the pool from which the jury in this case will be selected.

Indeed, by issuing an order designating the Berkman Center's website—a website replete with information that is openly antagonistic to the Plaintiffs' legal position in this case—as the exclusive means by which the general public can educate itself about these proceedings, the district court has already provoked a rash of publicity directing the public to the Berkman Center's website. See Order at 10; Federal Judge Orders Groundbreaking Webcast of Hearing, The Boston Globe, pages A1, A12 (January 15, 2009) (hereinafter "Globe Article") (stating that "Courtroom View Network will "narrowcast" the hearing in its entirety to the website of the Berkman Center, which is open to the public"); In Internet First, RIAA File Sharing Hearing to Be Webcast, Wired.com (January 14, 2009) (hereinafter "Wired Article") (explaining that "[t]he internet feed will be provided by Courtroom View Network and will be funneled to the Berkman Center for Internet and Society at Harvard Law School, which will broadcast the hearing live"). Much of this new publicity repeats various misrepresentations that are

available through the Berkman Center's website. See, e.g., Wired Article (stating that "the RIAA seeks $1 million for the seven songs Tenenbaum downloaded in 2004" when in fact there are hundreds of sound recordings at issue in the case and Petitioners have not specified the damages they are seeking); Globe Article (stating that "the RIAA sued Tenenbaum over songs it says he downloaded when he was about 17" when in fact the claims in the case address conduct by the Defendant that occurred at least as recently as 2005, when the Defendant was in his mid-20s). The proposed broadcast will likely only increase the number of such inaccurate reports.

Second, in a typical case in which the issue of cameras in the courtroom is debated, including the various New York cases cited by the district court, a media entity seeking to obtain access what it has independently determined to be a newsworthy proceeding would file on its own behalf either a motion to intervene or an application for the limited purpose of engaging in the requested newsgathering activity. See, e.g., Order at 8 (citing cases from the Southern District of New York and the Eastern District of New York). That separate, independent application by a media entity tends to evidence the required neutrality by the broadcaster and its genuine interest in the proceedings. See Ethics Code of the Radio-Television News Directors Association (RTDNA) (adopted September 14, 2000) (requiring, *inter alia*, that "professional electronic journalists should

present the news with integrity and decency, *avoiding real or perceived conflicts of interest*") (emphasis added). Here, however, it was Defendant—*not* CVN—who filed the Motion seeking leave to broadcast the proceedings in this case. This conduct suggests that Defendant is seeking to record and broadcast these proceedings not for "the public interest" but rather in an effort to advance Defendant's and his counsel's goals in the lawsuit. Under these circumstances, it is far from clear that the purpose and intent of Defendant's proposed broadcast is in any way to further the "public interest."[5]

Third, in recent years, Petitioners have brought cases against many peer to peer infringers and obtained many rulings and judgments from those cases. Without question, publication of the courts' decisions in those proceedings is important and serves the public interest. The district court's Order—which permits the Defendant's selected media entity to broadcast the proceedings through a website operated by Defendant's counsel—would not put the spotlight on the courts' decisions in these cases nationwide or even the single decision in this case.

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[5] The flaws in the district court's order are only compounded by its requirement that the broadcast "be gavel to gavel" and that there be no "editing" of the proceedings. Even if such a prior restraint on any possible editing of the broadcast were valid—and it likely is not—it will be virtually impossible to enforce, as non-parties will still be able to excerpt and circulate portions of the proceedings in a variety of edited forms. Thus, it is unclear how the district court's Order will achieve its supposedly desired end of not having the proceedings appear on an "evening news soundbite." See Order at 4.

Instead, it would likely serve to highlight selectively the arguments of a single counsel in a limited part of a single case. The public interest will not be served by broadcasting a single snippet of these proceedings, because doing so places a misleading emphasis on a limited aspect of the judicial process.

In fact, Petitioners respectfully submit that the district court's Order of January 14, 2009, does little to further the "public interest," but instead advances the specific cause and agenda of Defendant and his counsel. Accordingly, Petitioners necessarily will suffer significant and serious harm in the absence of the issuance of a writ vacating that Order.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Court issue a writ reversing the district court's Order of January 14, 2009.

In the alternative, Petitioners request that this Court issue a writ vacating the Order of January 14, 2009, and directing the Defendant's request to broadcast the proceedings below to a full Panel of judges for the United States District Court for the District of Massachusetts.

Respectfully submitted,

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS LLC; and UMG RECORDINGS, INC.

By Their Attorneys,

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CERTIFICATE OF SERVICE

I, Daniel J. Cloherty, attorney of record for Petitioners hereby certify that on Friday, January 16, 2009, copies the foregoing Petition For A Writ of Mandamus Or Prohibition were served, via hand delivery, upon the following persons:

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Dated: January 16, 2009

_____
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