

rec'd 4:50 PM 1/17/14

UNITED STATES DISTRICT COURT

for the

Eastern District of Texas

PERSONAL AUDIO, LLC

Plaintiff

v.

TOGI ENTERTAINMENT, INC. ET AL.

Defendant

Civil Action No. 2:13-cv-13 consolidated ED Tex

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: ELECTRONIC FRONTIER FOUNDATION, 815 Eddy Street, San Francisco, CA 94109

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

See attachment

Table with 2 columns: Place (Veritext - San Francisco, 101 Montgomery St., Suite 450, San Francisco, CA 94104) and Date and Time (01/31/2014 9:00 am)

The deposition will be recorded by this method: Stenography and videotape

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 01/17/2014

CLERK OF COURT

OR

/s/ Jeremy S. Pitcock

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party)

Personal Audio, LLC, who issues or requests this subpoena, are:

Jeremy S. Pitcock, 1501 Broadway, 12th Floor New York, NY 10036, jpitcock@pitcocklawgroup.com, (646) 571-2237
Papool S. Chaudhari, P.O. Box 1863, Wylie, TX 75098, papool@chaudharilaw.com, (214) 702-1150

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:13-cv-13 consolidated ED Tex

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

DEFINITIONS

The following definitions apply to these deposition topics:

- A. "Personal Audio" shall mean and refer to Plaintiff Personal Audio, LLC.
- B. "'504 Patent" shall mean the patent-in-suit, U.S. Patent No. 8,112,504.
- C. "Defendants" shall refer to any potential or actual Defendants in any civil case regarding the '504 patent, including, but not limited to, Defendants Togi Entertainment, Inc., HowStuffWorks, NBCUniversal Media, LLC, CBS Corporation, FOX Broadcasting Company, FOX Networks Group, Inc., Lotzi Digital, Inc., Adam Carolla, Donny Misraje, Kathee Schneider-Misraje, and Sandy Ganz, and also includes any agents, employees, counsel and/or attorneys thereof. Potential Defendants include, without limitation, any person or entity that has received a licensing letter from Personal Audio concerning the '504 Patent and also includes any agents, employees, counsel and/or attorneys thereof.
- D. "EFF" and "You" shall mean and refer to the Electronic Frontier Foundation, any subsidiaries, affiliates, officers, employees and counsel thereto.
- E. "Person" shall mean any natural person or any business, proprietorship, firm, partnership, corporation, association, organization or other legal entity. The acts of a Person shall include the acts of directors, officers, owners, members, employees, agents, attorneys, or other representatives acting on the Person's behalf.
- F. "Document" shall be construed under the broadest possible construction under the Federal Rules of Civil Procedure and shall include without limitation any written, recorded, graphic, or other matter, whether sent or received or made or used internally, however produced or reproduced and whatever the medium on which it was produced or reproduced (whether on paper, cards, charts, files, or printouts; tapes, discs, belts, video tapes, audiotapes, tape recordings, cassettes, or other types of voice recording or transcription; computer tapes, databases, e-mails; pictures, photographs, slides, films, microfilms, motion pictures; or any other medium), and any other tangible item or thing of readable, recorded, or visual material of whatever nature including without limitation originals, drafts, and all non-identical copies of each document (which, by reason of any variation, such as the presence or absence of handwritten notes or underlining, represents a distinct version). By way of example, the term "document(s)" as used herein shall include, without limitation: correspondence; blueprints; memoranda; notes; diaries; letters; telegraphs; telegrams; telexes; e-mails; minutes; agendas; contracts; reports; studies; checks; statements; receipts; returns; summaries; pamphlets; circulars; press releases; advertisements; books; inter-office and intra-office communications; handwritten or typewritten notes; notations or summaries of telephone conversations, meetings, or conferences; bulletins; computer printouts; databases; teletypes; telefax; invoices; worksheets; photographs; tape recordings; and all other tangible items of readable, recorded, or visual material of any kind.
- G. "Thing" shall be construed under the broadest possible construction under the Federal Rules of Civil Procedure.

H. "Communication" shall mean any transmission of information in any context or situation by or between two or more persons by any means or medium whatsoever, whether in the form of an original, a draft, or a copy, whether stored in hard copy, electronically or digitally, or on tape, either orally or in writing, including without limitation but not limited to conversations, correspondence, electronic mails, telexes, facsimile transmissions, telecopies, recordings in any medium of oral, written, or typed communication, telephone or message logs, notes or memoranda concerning written or oral communications, and any translation thereof.

I. "Identify" and "Identity" shall each mean:

(a) as applied to an individual, to state the individual's full name, present or last known address and telephone number, present or last known employer, present or last known business address and telephone number, present and prior employment positions and corresponding dates of such positions, and a description of his present employment responsibilities;

(b) as applied to a Person other than a natural person (including without limitation, but not limited to, any business or other entity), to state the entity's full name, place and date of incorporation or formation, principal place of business or activity, and the identity of the natural persons within that entity having knowledge of the matter with respect to which that entity is named;

(c) as applied to a Document (whether or not any claim of privilege is made in respect thereof), to state the type of Document, the date of creation of the Document, the date of communication of the Document, the names and Identities of the individuals who drafted, authored, or signed the Document or a copy thereof was addressed or sent, a summary of the subject matter of the Document, the number of pages of the Document, the present whereabouts of the Document, including without limitation all originals and copies, and the name and address of the present or last-known custodian of the Document;

(d) as applied to a Thing, to state the date that the Thing was first introduced for sale, the date of the Thing's first sale, all versions, parts or revision numbers or codes, all product names, and all team names or project titles used in connection with the design, development, testing, or engineering of that product;

(e) as applied to a process, to state the date that the process was first used, the date the products or goods made by the process were first sold, all numbers or codes used to refer to the process, including but not limited to process revision numbers or codes, all process names, and all team names or project titles used in connection with the design, development, testing, or engineering of that process; or

(f) as applied to a Communication, to state the type of Communication, the date and the parties to such Communication, and if such Communication has been recorded in documentary form, to identify all Documents recording such Communication.

J. "Information" shall mean information in any form, including but not limited to documentary, electronic, graphical, or tabular, and communicated by any means, including but not limited to orally, in writing, or via electronic communication.

K. "Describe," when used in relation to an act, event, instance, occasion, transaction, conversation, or Communication, shall mean (1) to state the date and place thereof; (2) to identify the individual participants; (3) to summarize separately for each individual participant what was said or done; and (4) to identify each document used or prepared in connection therewith or making any reference thereto.

L. "Date" shall mean the exact date, if known, or the closest approximation to the exact date as can be specified, including without limitation the year, month, week in a month, or part of a month.

M. "Concerning" shall mean in whole or part constituting, containing, embodying, reflecting, concerning, referring to, describing, involving, supporting, contradicting, evidencing, stating, dealing with, relating to, or in any way pertaining to.

N. As used herein, the singular form of a term shall be interpreted to include the plural and vice versa.

O. As used herein, the masculine form of a term shall be interpreted to include the feminine and vice versa.

P. Except where the context does not permit, the term "including" shall be without limitation.

Q. Except where the context does not permit, the terms "and" and "or" shall be both conjunctive and disjunctive.

R. Except where the context does not permit, the terms "each" and "any" shall mean any and all.

DEPOSITION TOPICS

1. Any communications between the EFF and Defendants specifically Concerning the '504 patent, including but not limited to the construction of any claim terms and any alleged prior art relevant to any claim of the patent.
2. Any communications between the EFF and any actual or potential witness specifically Concerning the '504 patent or prior art to the '504 patent.
3. Any communications between the EFF and any third parties specifically Concerning the '504 patent, including but not limited to any communications with the Cyberlaw Clinic at the Harvard University Berkman Center for Internet and Society, Julie Samuels, Mark Cuban, RPX, Article One Partners, Mark Lemley, Durie Tangri Page Lemley Roberts & Kent LLP, the Open Innovation Network, StackExchange, Google, Inc and/or their representatives, agents or counsel.

4. Any non-privileged communications regarding the prior art cited in any proceedings in the Patent and Trademark Office Concerning the '504 patent.
5. All fundraising activities in connection with the proceedings in the Patent and Trademark Office specifically Concerning the '504 patent, including but not limited to the Identification of the names of all Persons who donated or contributed and Identification of the amounts contributed by each Person, as well as the Identification of any promised contributions which have not been received yet as well as the Persons who promised such contributions and the amount thereof.
6. All steps taken in order for the EFF to be "fully prepared" to take on Personal Audio with respect to the '504 patent.
7. Identification of any Information Concerning any prior art (whether or not included in any Patent and Trademark Office proceeding) that would tend to show either: (1) the art did not disclose any element of the claims of the '504 patent or (2) the art was not demonstrably available prior to any filing date of the '504 patent.
8. Any nonprivileged analysis or Communications Concerning the following: (1) the claims of the '504 patent; (2) any prior art to the '504 patent; and (3) the meaning or construction of any of the terms in the claims of the '504 patent.