CV-01-9358 FMC (Ex)

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PARAMOUNT PICTURES CORPORATION, *et al.*,

Plaintiffs

v.

REPLAYTV, INC., *et al.,*

Defendants.

The Honorable Florence-Marie Cooper

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE; AND BRIEF OF AMICUS CURIAE IN OPPOSITION TO MOTION OF COPYRIGHT OWNER PLAINTIFFS FOR PROTECTIVE ORDER

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Amicus Curiae for Defendants

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the Stanford Law School Center for Internet and Society ("CIS"), Earthjustice, the Electronic Privacy Information Center ("EPIC"), the First Amendment Project, Deirdre K. Mulligan Esq., Jennifer M. Urban Esq., Privacyactivism, and the Privacy Rights Clearinghouse, respectfully request leave to file the attached Brief Amici Curiae in opposition to the Entertainment Companies' Motion for Protective Order.

A. The Amici Curiae.

Earthjustice is a nonprofit law firm representing citizens and citizen groups in public interest litigation to protect the environment. Originally established in 1971 as the Sierra Club Legal Defense Fund, Earthjustice has its headquarters in Oakland, California and regional offices in Oakland, Seattle, Juneau, Honolulu, Denver, Bozeman, New Orleans, Tallahassee and Washington, D.C. Earthjustice often litigates against commercial entities and trade associations about controversial issues that are also the subject of intense political activity before

Congress aimed at overturning courtroom victories, precluding potential lawsuits or tinkering with the environmental laws that Earthjustice exists to enforce. For that reason, Earthjustice has had a lobbying presence in Washington for almost 20 years. The ability to lobby in support of laws that protect the environment is crucial for Earthjustice to be able to use litigation effectively on behalf of its clients and to further its mission.

The Electronic Privacy Information Center ("EPIC") is a non-profit, public interest research organization focusing on privacy and civil liberties in the fields of telecommunications, electronic information and computer networks. EPIC's activities include the promotion and defense of individuals' constitutional rights in the face of new technologies and communications media. EPIC frequently presents testimony before Congress and administrative bodies, publishes educational materials, and maintains an active litigation docket of cases addressing significant and precedent-setting issues.

The First Amendment Project is a nonprofit civil liberties organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice,

educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

Deirdre K. Mulligan, Acting Clinical Professor, Boalt Hall School of Law, University of California at Berkeley, is the Director of the Samuelson Law, Technology and Public Policy Clinic*. Jennifer M. Urban is a practicing attorney and the Samuelson Clinic Fellow. The Clinic provides law students with the opportunity to represent the public interest in cases and matters on the cutting-edge of high technology law. Through the Clinic, students file friend-of-the-court briefs, comment on proposed legislation and regulations, and provide legal assistance in lawsuits that raise important issues relating to law and technology. The Clinic represents the public interest in intellectual property, communications regulation and Internet privacy issues.

Privacyactivism is a non-profit organization dedicated to informing and empowering individuals about their privacy rights on

* The Samuelson Law, Technology and Public Policy Clinic is referred to here for purposes of affiliation only.

the Internet. Through a combination of education (using graphics such as posters and video games), activism, and the law, we strive to make complex issues of privacy law, policy, and technology accessible to all. We can be found on the Internet at www.privacyactivism.org.

The Privacy Rights Clearinghouse is a nonprofit consumer education and advocacy program, established in 1992, based in San Diego, Calif. It provides information and assistance to consumers on a variety of informational privacy issues including identity theft, telemarketing, Internet privacy, and financial privacy. It represents consumers' interests in public policy proceedings (legislative and regulatory agency) at the state and federal level.

The Stanford Center for Internet and Society (CIS) is a public interest technology law and policy program at Stanford Law School and a part of Law, Science and Technology Program at Stanford Law School. The CIS brings together scholars, academics, legislators, students, hackers, and scientists to study the interaction of new technologies and the law and to examine how the synergy between the two can either promote or harm public goods like free speech, privacy, public commons, diversity, and scientific inquiry. The CIS

strives as well to improve both technology and law, encouraging decision makers to design both as a means to further democratic values. CIS provides law students and the general public with educational resources and analyses of policy issues arising at the intersection of law, technology and the public interest. CIS presents clients and files amici briefs in cases that raise issues involving civil rights and technology. The Center also sponsors a range of public events focusing on computer and copyright laws, including a speaker series, conferences and workshops.

B. Interest of Amici Curiae.

Amici are public interest organizations advocating a diverse range of policies in the media, to the public, to the legislative and executive branches. They are concerned that the ruling sought by the Entertainment Companies here would set a dangerous precedent that could limit the ability of nonprofit organizations to represent clients in litigation or could require nonprofit organizations to choose between representing clients in litigation and advocating for issues before Congress and the public.

An amicus brief is desirable in this case because the creation of the rule advocated by the copyright holders could have a severe negative impact on the public interest by blindfolding public interest advocates and litigators during the discovery process as a result of public statements. Amici public interest organizations have a unique perspective that could help the Court see the impact the rule would have, should this Court adopt it, beyond the interests of the parties to this litigation. See e.g. Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

C. Conclusion

Because of the importance of the issues presented by the entertainment companies' Motion, amici respectfully request that this Court grant this motion and consider the attached *amicus curiae* brief in opposition to the Motion.

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Dated: October 8, 2002 Respectfully submitted,

By: _____

Jennifer Stisa Granick, Esq.
STANFORD CENTER FOR
INTERNET AND SOCIETY
Amicus Curiae

CERTIFICATE OF COMPLIANCE

I, Jennifer Stisa Granick, Esq., hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the attached brief complies with the type-volume limitation set forth in FRAP 32. Specifically, the word count of the word-processing system I used states that the brief contains 5,898 words.

Dated: October 7, 2002

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Jennifer Stisa Granick, Esq.
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ARGUMENT

I. THE PUBLIC INTEREST IS SERVED BY ORGANIZATIONS ENGAGED IN LITIGATION FOR POLITICAL PURPOSES

Courts have long recognized that the public interest, indeed some of our most precious freedoms, are served and protected by non-profit organizations with political goals acting as advocates and litigating public interest cases in our courts. Public interest litigation provides an important role in society and should be promoted, not chilled.

Providing legal assistance to persons in need is an important public good and an obligation of all lawyers. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 470 (1978) (Marshall, J., concurring in part and concurring in the judgment) ("The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available 'where the litigant is in need of assistance, or where important issues are involved in the case,' has long been established." Citations omitted.)

As the Supreme Court noted of the NAACP litigation efforts, "[t]he NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive

contribution of a minority group to the ideas and beliefs of our society." NAACP v. Button, 371 U.S. 415, 430 (1963).

The court in Louis v. Nelson, 646 F.Supp.1300 (S.D. Fla. 1986) similarly recognized the special societal contribution that attorneys make when they litigate cases not "merely to vindicate the pecuniary interests" of their clients, but to "vindicate their rights to fair process and equal treatment." Id. at 1317. In Louis, the District Court lauded the actions of counsel in seeking vindicate public rights for their clients who were illegally detained by the INS, when enhancing the attorneys' fee award in a Equal Access to Justice Act case. The court stated, "[a]ctions of this kind seeking to vindicate such important public interests are especially to be commended…." Id. at 1318.

Legal professionals whose primary motives are short term, to win or to get paid, are less likely to tackle issues where the law is uncertain, evolving, and there is no direct economic gain for the individual client. For this reason, public interest advocacy is particularly important. For example, the NAACP pursued its mission of advancing the rights of black citizens before Congress, the Executive branch, and the public for 30 years before its seminal court victory in Brown v. Board of Education, 349 U.S. 294 (1955). Argued by NAACP Special Counsel Thurgood Marshall, the court's ruling that racial discrimination in public education

is unconstitutional, and that all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle was the result of NAACP's comprehensive campaign.

In some instances, the work of public interest groups requires both advocacy before agencies and in the courts because these groups need to have appeared during the regulatory process to have standing to challenge agency rulings in court. This is true of public interest groups such as the Natural Resources Defense Council, Defenders of Wildlife, and the Sierra Club, which have been instrumental in developing environmental law. See, e.g. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (with regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (respondents bear the burden of showing standing by establishing, *inter alia,* that they have suffered an injury in fact, *i.e.,* a concrete and particularized, actual or imminent invasion of a legally-protected interest). These seminal cases were only litigated and decided because the environmental groups acted in multiple arenas to promote their members' interests.

Though people may disagree about the policies that these landmark rulings ushered in, public interest legal organizations, whether liberal or conservative, were prominent forces in bringing these issues before the courts, and vindicating the rights of plaintiffs in our system of justice. As the District Court stated in Legal Aid Society of Hawaii v. Legal Services Corporation, "[t]he public interest favors a vibrant marketplace of ideas where qualified, knowledgeable legal aid organizations are not foreclosed from representing the best interests of the indigent in the legislative and judicial arena. Moreover, there is a strong public interest in assuring that the channels of government are open to people whose legal rights have been or may be adversely affected by government action. Lastly, perhaps no greater public interest exists than protecting a citizen's rights under the constitution." Legal Aid Society of Hawaii v. Legal Services Corp., 961 F.Supp. 1402, 1419 (D. Haw. 1997).

A rule that penalizes public interest attorneys during the pendency of litigation by blindfolding them in the discovery process harms the recognized benefit to society from public interest litigation.

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II. DENYING PUBLIC INTEREST ORGANIZATION LAWYERS ACCESS TO DOCUMENTS PRODUCED IN DISCOVERY IMPERMISSIBLY BURDENS THEIR CLIENT'S FIRST AMENDMENT RIGHTS

The First Amendment clearly protects the right to lobby legislators and administrators. Legal Aid Society of Hawaii at 1408. The First Amendment of the U.S. Constitution also protects litigation. Button, supra, 371 U.S. at 429. "Under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." Id. at 429. "It would be destructive of rights of association and petition to hold that groups with common interests may not… use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view." California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 510-11 (1972). "The efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." In re: Primus, 436 U.S. 412, 431 (1978). Indeed, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Id. at 426 (citations omitted).

The fact that the litigation is intended not only to vindicate the rights of the clients but also to press a political agenda, means the activity is **more**, not less protected. "Normally, the purpose or motive of the speaker is not central to First

Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of 'expression',' and other activity subject to plenary regulation by government." Id. at 438, n. 32.

This First Amendment right is so paramount that the United States Supreme Court has repeatedly ruled that even the legitimate state interest in regulating the professional conduct of attorneys can only be accomplished by narrowly drawn regulations that do not impinge on the litigation right any more than is necessary. See, e.g., Button, 371 U.S. at 433; In re: Primus, 436 U.S. at 438, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). In re: Primus and Ohralik struck down state attempts to discipline attorneys from the NAACP and ACLU for soliciting clients in civil rights and civil liberties cases. In In re Primus, the Court first noted that organizations like the NAACP and the ACLU engage in extensive educational and lobbying activity and devote much of their funds and energies to an extensive program of assisting certain kinds of litigation of behalf of their declared purposes. Second, the Court recognized that "for [these organizations], "'litigation is not a technique of resolving private differences', but 'a form of political expression and political association.'" In re: Primus, 436 U.S. at 428. Finally, the Court held that the state's action in punishing a lawyer for soliciting a prospective litigation on

behalf of the ACLU, "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights." Id. at 432.

The purpose of a protective order is to enable lawyers to get full access to relevant documents in the litigation by addressing the producing party's concern that sensitive information such as trade secrets might be used by competitors. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992). In the Brown Bag case, the Magistrate Judge only limited access by in-house counsel after holding an extensive evidentiary hearing at which the Court questioned the in-house lawyer about the exact nature of his responsibilities. Id. at 1470.

The Entertainment Companies misstate the "competitive decisionmaking" factor when they argue that an EFF lawyer should prohibited access to their confidential business plans because, for example, he has discussed the business models of the producing party's entire industry in general terms in magazine articles and other public statements and might do so again in the future. Motion at 13. Incredibly, the owners profess concern that EFF attorneys will inadvertently use their information not in ways adverse to not merely to them, but to all of "Hollywood." This is not the kind of direct "use" of confidential information that protective orders are intended to prevent. Competitive decision making does not mean, as owners would have it, making any decisions that relate to how best to

advocate for a purpose adverse to the producing party's interests. Rather, it means that the parties have been direct, head-to-head business competitors, not merely litigation adversaries or ideological adversaries.

Competitive decision making means decision making by a direct competitor of the producing party in the business marketplace. This has been the standard in every case where a lawyer's participation in "competitive decision making" has justified limiting attorney access to discovery information. The phrase is "shorthand for a counsel's activities, association and relationship with a client that are such as to involve counsel's advice and participation in light of any or all of the client's decisions (pricing, product design, etc) made in light of corresponding information about a competitor." U. S. Steel Corp. v. U.S., 730 F.2d 1465, 1468 (Fed Cir. 1984). The Brown Bag court accordingly described competitive decision making as "advising on decisions about pricing or design 'made in light of similar or corresponding information about a competitor.'" Amgen, Inc. v. Elanex Pharms,, 160 F.R.D. 134, 138 (W.D. Wash. 1994) (denying motion to exclude in-house counsel who advised company on legal issues, not competitive issues) (quoting Brown Bag, 960 F.2d at 1470 (quoting U.S. Steel, 730 F.2d at 1468)). The very phrase "Similar or corresponding information" assumes the parties offer competing goods or services. There can be no such "similar or corresponding

information" between a manufacturer and a consumer or between manufacturer and an organization like EFF, representing consumers in litigation. Where the parties are not business competitors, any harm from disclosure of confidential information can be mitigated by a protective order that allows attorneys, but not the public, access to documents. *See* Coca Cola Bottling Co. v. Coca Cola Co., 107 F.R.D. 288, 293 (D. Del. 1985) (ordering parties who were not competitors to negotiate a protective order that would allow access to information but prevent public disclosure of trade secrets). There is simply no precedent for limiting litigation attorneys' access to documents on the ground that the information might "influence" their future litigation strategies.

The EFF, no less than the ACLU, the NAACP, or for that matter, amicus Stanford CIS, Earthjustice and others, uses litigation as a form of political expression and association. Button, Primus and Ohralik show that even rules that are generally applicable to attorneys receive much higher scrutiny from reviewing courts when applied to organizations for whom litigation is a political act. Here, the copyright attorneys are asking that a rule created to protect litigants from their business competitors, in order to allow attorneys full access to relevant documents, be applied to deny access to the EFF attorneys because the EFF is a political organization. This rule singles out and targets public interest attorneys and their

clients in cases that seek to vindicate legal rights rather than pecuniary interests. The extension of this rule to public interest lawyers and their clients is a content-based rule that punishes attorneys for what they say and for the cases they litigate. Such a rule violates the First Amendment and subverts the public good.

III. THE RULE SOUGHT BY PLAINTIFFS HAS BROAD NEGATIVE IMPLICATIONS FOR AMICI AND FOR ADVOCACY IN PUBLIC INTEREST, ACROSS THE POLITICAL SPECTRUM

Excluding the EFF lawyers from review of documents relevant to this litigation would have devastating repercussions for every other individual or organization that engages in public interest litigation, across the political spectrum. An attorney who believes in her cause should be able to advocate for that cause, whether in the media, to the public, or before the judicial, legislative or executive branches. That advocacy should not be a reason to blindfold the attorney during litigation. The fact that an attorney firmly believes in something, and that her adversary holds the opposite view, is not a startling circumstance that justifies the extension of a narrow rule designed to protect businesses from their competitors. Litigation between adversaries holding opposite views about facts, law and policy is the nature of the practice of law business.

The creation of this rule would particularly affect attorneys who are experts in their field – the kind sought after by the press or by Congress for commentary

and advice – and who have made public statements that could later be used to show that the attorney held a particular opinion. Several problems result. First, clients would be dissuaded from or prohibited from hiring experienced, knowledgeable, dedicated attorneys for fear that their chosen advocate would later be hamstrung in litigation. Second, matters of public interest would be underrepresented.

Attorneys often take these cases because they believe that their position in litigation is the right one, not to earn attorneys' fees. If speech based on those beliefs is just cause for blindfolding the attorney during discovery, the quality of representation on behalf of the public interest will suffer, since those attorneys who believe in their cause could be disqualified from litigation. One need not agree as to the nature of a "public interest" ruling to see that issues without a well-financed constituency able to litigate will go underrepresented. Third, the public, Congress and the executive branch would lose the benefit of testimony from experts in particular fields of law because attorneys might decide to self-censor their testimony and commentary or refuse to participate so their statements could not be used by opposing counsel to expel them from the discovery process in future litigation.

A review of the work of several public interest organizations illustrates these dangers. Public Citizen is a national, nonprofit consumer advocacy organization

founded by Ralph Nader in 1971 "to represent consumer interests in Congress, the executive branch and the courts." (Public Citizen Website, http://www.citizen.org/about/, last visited October 3, 2002.) Mr. Nader has long advocated positions contrary to those supported by the automotive industry. In 1965, he authored Unsafe at Any Speed, an indictment of the safety policies of General Motors. Nader then successfully lobbied Congress for the National Traffic and Motor Vehicle Safety Act and the Highway Safety Act, the nations' first highway safety laws. Public Citizen later lobbied for and litigated for mandatory safety features like automobile air bags, which were opposed by the automotive industry as too expensive. Officers of Public Citizen have also been called before Congress to testify about highway and automobile safety. The organization has also recently sued the Department of Transportation over its ruling regarding mandatory tire pressure monitoring systems in cars and trucks. In the course of that litigation, Public Citizen will request access to documents regarding the cost of installing such systems and the auto manufacturers' ability to pay.

Under the plaintiff Entertainment Companies' theory, the auto manufacturers could seek a protective order denying Public Citizen attorneys access to these documents because the attorneys would then have more information

about the auto industry – information that would presumably inform their opinions and statements when they next testified before Congress or to the National Highway and Traffic Safety Agency and commented in the press, even if they did not disclose confidential information. The reasoning in the copyright owner's Motion for Protective Order as just cause for expelling the EFF attorneys from the discovery process could apply equally to Public Citizen attorneys challenging the auto industry. *See* Motion for Protective Order, pp. 6-9. If the groups' previous positions adverse to those held by the manufacturers were good cause to deny Public Citizen attorneys access to relevant documents, then Public Citizen could not be an effective advocate in favor of requiring the tire pressure monitors. Conversely, the rule would dissuade knowledgeable attorneys from making any statements adverse to auto industry interests, leaving the legislative and executive branches without access to much needed expertise.

While Public Citizen advocates for more stringent government regulation of auto safety, the Pacific Legal Foundation is a 25-year old public interest law foundation urging less government, and the preservation of free enterprise, private property rights and individual liberties. *See* Pacific Legal Foundation Website, http://www.pacificlegal.org/, last visited October 3, 2002. The Pacific Legal Foundation, and the views its represents, could equally suffer under the copyright

owner's proposed ruling. The PLF is actively involved in both litigation and advocacy. As its Mission Statement says, "[a]t any given time, PLF has about 100-125 active cases in varying stages of research or litigation. PLF also pursues its work through legal research, public outreach, monitoring government administrative proceedings, preparation of legal briefs and oral arguments, moot court sessions, on-site meetings, and the preparation and distribution of other legal documents relating to specific legal actions. … In many instances, PLF is the average citizen's only recourse against well-financed governmental opponents." Ibid.

The PLF's work includes testifying before Congress advocating a limited application of the Endangered Species Act (ESA)– which it views as harmful to private property interests – as well as filing suit to challenge applications of the ESA. The PLF also advocates for an end of racial preferences in hiring and contracting through its public education campaigns and publications. It also litigates against preferential hiring practices. For example, it has sued the City and County of San Francisco for its policy encouraging contracting with minority- and women-owned businesses. Because PLF's position is directly contrary to that of the City of San Francisco, the City could argue that its sensitive documents, such as those about specific contracting decisions, experience with particular contracts

and future contracting plans should not be disclosed to PLF attorneys, who may learn something in litigation that will inform their opinions in later legislative or judicial advocacy.

Amicus Earthjustice would be similarly harmed by a rule that limits access by counsel to otherwise-discoverable material in litigation by virtue of the fact that her law firm disagrees with the opposing party in the public arena or lobbies against the opposing party. Thus, Earthjustice may be a frequent opponent of mining, logging, grazing and polluting interests, but it has no competing business or commercial interests. Over almost 30 years of its existence, Earthjustice and its staff have gained extensive practical experience in enforcing environmental laws, which by necessity includes an understanding of how the entities subject to those laws operate on a day-to-day basis, how those laws and their requirements affect the economic and other interests of the entities subject to them and the public at large, and how those entities interact with public agencies charged with implementing those laws. All of that knowledge and experience makes Earthjustice an effective advocate in public or on Capitol Hill on behalf of policies that protect the environment and against the political actors who view natural resources as commodities.

Representing clients effectively in environmental litigation cannot be separated from full participation in public debate and the processes through which the government makes the laws and policies that govern the environment. For example, Earthjustice currently represents a spectrum of environmental organizations as defendant-intervenors in a set of eight pending lawsuits brought to overturn a nation-wide Forest Service policy adopted in 2001 that would protect 58.5 million acres of pristine "roadless" national forest from road building and associated logging and other extractive activity. The disputed rule would culminate decades of advocacy by the environmental community, as well as litigation aimed at protecting unspoiled areas of the National Forest System from the effects of commercial exploitation. The plaintiffs in the current set of lawsuits include States, local government, timber companies and trade associations against whom Earthjustice and its clients lobbied the Executive Branch during the rulemaking process leading up to the disputed decision, and against whom Earthjustice is currently lobbying Congress about legislation introduced to codify the protective rule. Earthjustice also represented conservation groups in an earlier round of unsuccessful lawsuits brought by the timber industry and their political allies during the rulemaking process, prior to a final decision on procedural grounds. In the roadless rule litigation, the State of Wyoming sought discovery from

Earthjustice about its lobbying activity in the hope of showing that the rule making process was tainted. That example shows how litigation and lobbying are intimately and inextricably bound together as a controversy moves back and forth between Congress and the courts. If Earthjustice as counsel cannot fully participate in discovery for those cases because Earthjustice is also exercising rights under the First Amendment opposing the policy goals of its litigation adversaries, then Earthjustice cannot fully represent its clients. By the same token, if full participation in discovery means, on the other hand, that Earthjustice must cease speaking out on the same issues before Congress, the Executive Branch or the public, then First Amendment rights are impaired.

Amicus Stanford Center for Internet and Society ("CIS") would also be adversely affected by the creation of a rule excluding public interest attorneys from participating in the discovery process. Amicus Stanford CIS is a public interest technology law and policy program at Stanford Law School. The program is both academic – including a law clinic, classes, conferences, speaker series' – and advocacy-oriented – students work with faculty on litigation and policy projects. The Stanford CIS founder, Professor Lawrence Lessig, is also serving as lead counsel in a landmark Constitutional copyright case, *Eldred v. Ashcroft*, to be argued before the United States Supreme Court on October 9, 2002, challenging a

law, the Sony Bono Copyright Term Extension Act, lobbied for by the Entertainment Companies. Stanford CIS Director Jennifer Granick teaches the Cyberlaw Clinic and directs the organization's litigation projects. For example, Ms. Granick and Stanford CIS are co-counsel with the law firm of Keker and Van Nest in *MGM et al v. Grokster,* Case No. CV 01-0851SVW consolidated with CV 01-09923 SVW, currently before this Court.

Professor Lessig and Attorney Granick, in statements to the press, at conferences, and in their publications, have advocated for policies contrary to the ones put forth by the Plaintiff Entertainment Companies, the federal government and others. In addition, Stanford CIS represents clients in litigation in copyright matters, like the *Grokster* case, and in federal criminal prosecutions. Sensitive documents are disclosed in the course of these cases. As with this case, there is a standing protective order in the *Grokster* litigation that covers both EFF (as counsel for a co-defendant) and Stanford CIS. Similarly, courts have also issued protective orders in Ms. Granick's criminal cases, shielding the identities of cooperating witnesses and the government's tactics for recruiting them. Though Stanford CIS attorneys have been critical of the copyright holders and of the federal government policies about cooperating witnesses, these firmly-held political positions in no way prevent Stanford CIS attorneys from their obligation

to adhere to the terms of protective orders. A rule that hides discovery from Stanford CIS attorneys would either dissuade the attorneys from speaking out in the future, deprive important issues and underrepresented person of competent legal counsel, or both.

There is nothing special about the EFF as a public interest organization that participates in advocacy and litigation in promotion of a political cause, that should distinguish it from Public Citizen, The Pacific Legal Foundation, the N.A.A.C.P., the A.C.L.U., the Sierra Club or Amici Stanford CIS and Earthjustice. The EFF litigates in areas of the law that are uncertain and evolving, and where there are strongly held views on each side. It also represents clients in disputes where those on the other side are dramatically more powerful and better funded. It is exactly these kinds of disputes in which society needs public interest counsel motivated by political goals rather than pecuniary remuneration to get involved in litigation.

Amici express no opinion as to whether the positions advocated by EFF attorneys are extreme or mainstream. It does not matter. There must be no "litmus test" to determine whether the political views of attorneys are sufficiently mainstream to permit them to participate fully in litigation on a particular issue. Classification of an attorney's political viewpoint is not an element of the Brown Bag test and could not be, under the First Amendment. However, a closer review

of the cases in which the EFF was involved illustrates the broad scope and number of attorneys, commentators and legal advocates who would be subject to expulsion from the discovery process in this litigation under the theory urged by the copyright holders.

For example, the Entertainment Companies cite the EFF lawyers' efforts to overturn the "Children's Internet Protection Act of 2000 – legislation that requires federally funded schools and libraries to maintain software on their computers to filter out pornography." Motion at p. 7. The EFF was not the only counsel advocating against the Act. In fact, the attorneys on the brief for the lead plaintiff – Multnomah County Library in Oregon – included not only the ACLU, and amicus Electronic Privacy Information Center, but also four pro bono attorneys from Proskauer Rose, the law firm for several of the entertainment companies here. The Plaintiffs in the CIPA case were all libraries, including the Connecticut Library Association, the Maine Library Association, the Santa Cruz Public Library Joint Powers Authority, the South Central Library System (Wisconsin), the Westchester Library System, and the Wisconsin Library Association. (See *ALA v. United States* No. 01-1303; *Multnomah County Public Library v. United States*, No. 01-1322, E.D. Penn., May 31, 2002.)

The Plaintiff Entertainment Companies also criticize the EFF attorneys for their representation of 2600 magazine in *Universal City Studios v. Reimerdes*. However, amicus briefs were filed on behalf of the EFF's position by the ACLU, the American Library Association, Reporters' Committee for Freedom of the Press, Newspaper Association of America, the First Amendment Project, numerous law professors, including Lawrence Lessig and Margaret Radin of Stanford, Julie Cohen of Georgetown University, Mark Lemley of UC Berkeley, Jonathan Zittrain of Harvard and Yochai Benkler of NYU. (*See* archive of amicus briefs located at http://www.eff.org/IP/Video/MPAA_DVD_cases/.)

Under the new rule proposed by the plaintiffs, not only attorneys from public interest organizations, but also law professors, and counsel for county library associations and professional organizations could be barred from full participation in the discovery process in any litigation they conducted against copyright holders. Far from being a "narrowly tailored" rule, the plaintiffs would cut a wide swath against the full participation in litigation of scores of attorneys, law professors, academics and professional associations.

Nor do Amici take a position against protective orders issuing under the proper circumstances. Amici's position is simply that there should be no blanket bar against the disclosure of "restricted" or "highly restricted" material to EFF by

virtue of the existing protective order on the grounds that the EFF attorneys are political adversaries of the copyright holders. Our position would not preclude independent protection of particular material as privileged, otherwise exempt from disclosure for constitutional or other reasons or beyond the scope of discovery, just like any other material under Rule 26.

CONCLUSION

The courts must not be in the business of assessing whether the individual politics of public interest attorneys are middle of the road or at the end of the spectrum, before allowing them to access properly produced documents they need to prepare cases and represent their clients. While some amici are organizations that do not currently undertake litigation, they might in the future. Moreover, skilled and knowledgeable attorneys from these organizations may consult in litigation in the areas in which they have expertise. The Brown Bag rule already protects producing parties from improper use of their confidential information by business competitors. The rule should not be extended to ideological adversaries. If parties could cite the public statements made by lawyers for public interest groups, like amici, and thus disqualify attorneys from full participation in discovery as a result of these statements, the legal system would lose educated

advocates, or the public and the government would lose the expertise of these organizations. This result is not authorized by Rule 26, is prohibited by the First Amendment, and unwise. Accordingly, the Court should deny the Entertainment Companies' motion.

Dated: October 7, 2002

Respectfully submitted,

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CV-01-9358 FMC (Ex)

IN THE UNITED STATES DISTRICT COURT

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The Honorable Florence-Marie Cooper

PROOF OF SERVICE

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Amicus Curiae for Defendants

PROOF OF SERVICE

I, Joanne Newman do hereby certify and declare as follows:

I am over the age of 18 years, and not a party to the instant proceedings. I am employed in the county of Santa Clara, California. My business address is: 559 Nathan Abbott Way, Stanford, California.

On October 7, 2002 I caused to be served the following documents:

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE; AND BRIEF OF AMICUS CURIAE IN OPPOSITION TO MOTION OF COPYRIGHT OWNER PLAINTIFFS FOR PROTECTIVE ORDER

via **Federal Express** by placing said documents in a properly sealed and addressed envelope for overnight delivery on the following interested parties:

Counsel for Plaintiffs:

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I declare under the penalty of perjury that the foregoing is true and correct. Executed this 7th day of October 2002 at Stanford, California.

_____
Joanne Newman