IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1090

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

SUPPLEMENTAL BRIEF OF PETITIONERS

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Introduction

The June 1996 Resolution by the Judicial Council of the First Circuit confirms that the recording and broadcasting of proceedings in the District of Massachusetts has been and still is banned. Indeed, the Resolution shows that the District Court was simply wrong when it concluded that it had the discretion to authorize a broadcast in this case. For that reason, as well as the reasons previously advanced by the Petitioners, a writ of mandamus should issue.

I. BACKGROUND

In September 1990, the United States Judicial Conference adopted a formal Policy Statement restricting the recording and broadcasting of federal district court proceedings to a limited set of circumstances, such as ceremonial proceedings or for evidentiary purposes. *See* Petition at Add. 16-22.[1] The Conference also authorized a three-year experiment with cameras in the courtrooms that was conducted in federal courts throughout the United States (including the District of Massachusetts). *Id.* at Add. 17.

At the conclusion of the pilot program, the Judicial Conference declined to accept a recommendation that the pilot programs be extended and expanded. Instead, the Conference reaffirmed its position that cameras should be banned from federal trial courts. *See Report of the Proceedings of the Judicial Conference of*

[1] Prior to 1990, the ban on cameras in federal courts was set forth in Canon 3A(7) of the Code of Judicial Conduct.

the United States, September 20, 1994, at 46-47 (DE[2] 720 at Ex. 9). Two days later, the Director of the Administrative Office of the United States Courts sent a memorandum to all federal judges reaffirming the Judicial Conference's position on the issue. *See* Memorandum from L. Ralph Mecham to All Judges, United States Courts, September 22, 1994 (DE 720 at Ex. 10).

Thereafter, on March 1, 1996, a judge in the Southern District of New York ruled that the Judicial Conference's Policy Statement did not "overrule or supplant" the local rules of that district, which he interpreted as granting a district judge the discretion to permit a broadcast. *Marisol A. v. Giuliani*, 929 F. Supp. 660, 661 (S.D.NY. 1996). On March 12, 1996, in direct response to the *Marisol* decision, the Conference voted to "strongly urge" the judicial councils of each circuit to adopt orders "reflecting the Conference's September 1994 decision not to permit the taking of photographs and radio and television coverage of proceedings in U.S. district courts." *See* "Judicial Conference Acts on Cameras In Court," News Release, Administrative Office of the U.S. Courts, March 12, 1996. The Conference also voted "to strongly urge circuit judicial councils to abrogate any rules of court that conflict with this decision". *Id.*

On June 12, 1996, the Judicial Council of the First Circuit responded to the Judicial Conference's March 12, 1996 vote by passing a Resolution stating that the

[2] "DE" refers to a docket entry in the district court proceedings in this case.

Judicial Council will "continue to bar the taking of photographs and radio and television coverage of proceedings in the United States district courts within the circuit, except as otherwise provided for ceremonial occasions." The Judicial Council took no further action to modify or abrogate any of the local rules of the district courts in the First Circuit, including D. Mass. Local Rule 83.3.

II. ARGUMENT

A. The June 1996 Resolution Confirms That Local Rule 83.3 Bars the Recording and Broadcasting of Proceedings in This Case.

The June 1996 Resolution confirms what the Petitioners have consistently advocated in this case: the recording and broadcasting of judicial proceedings in the District of Massachusetts is prohibited by Local Rule 83.3. The plain language of Local Rule 83.3 makes this clear (*see* Petition at 9-13), and the June 1996 Resolution confirms that this is the way to read the rule's language. The Resolution states that the Judicial Council will "continue to bar" all such recording and broadcasting. Thus, at the time it passed the Resolution, the Judicial Council had necessarily concluded that the then-existing local rules of the district courts in the First Circuit—including Local Rule 83.3—*already complied* with the Judicial Conference policy prohibiting broadcasting and recording.

Under 28 U.S.C. § 2071(c)(1), rules of federal district courts, such as Rule 83.3, shall remain in force unless and until a contrary rule is adopted by the judicial council of the relevant circuit. Thus, if the Judicial Council believed that Rule 83.3

conflicted with the Judicial Conference policy embraced by the Judicial Council in its June 1996 Resolution or its own views, the Judicial Council had the power to change the local rule. *See* 28 U.S.C. §331(d). But no modification or abrogation was necessary because Rule 83.3 already complied with the Judicial Conference and this Circuit's Judicial Council. Instead, the Judicial Council chose only to announce that it would "continue" the policy of banning cameras that was already in place in district courts throughout the First Circuit—including the District of Massachusetts.[3]

B. The District Court's Decision to Authorize the Broadcast Rested on the Erroneous Conclusion that the First Circuit Judicial Council Had Not Acted.

Moreover, the June 1996 Resolution makes clear that the District Court erred when it authorized the recording and broadcasting of its proceedings in this case. In its Order permitting the broadcast, the District Court acknowledged that its decision was flatly inconsistent with Judicial Conference policy. *See* Order of January 14, 2009 ("Order") at 7-8. The District Court also acknowledged the March 1996 vote by the Judicial Conference encouraging each circuit judicial council to adhere to Judicial Conference policy. *Id.* at 9. Nevertheless, the District

[3] This fact is alone sufficient to distinguish this case from the litany of cases from the Second Circuit—including *Marisol*, *supra*—that were cited by the District Court. *See* Order at 8-9; *cf. Hamilton v. Accu-tek*, 942 F. Supp. 136, 137 (E.D.N.Y. 1996) ("The Judicial Council of the Second Circuit has not followed the Conference suggestion. It has taken no action, leaving [the local rule] operative.").

Court concluded that the First Circuit Judicial Council had not responded to that March 1996 vote. *See* Order at 9.[4] Relying on this erroneous premise, the District Court proceeded to interpret Rule 83.3 in a manner that is inconsistent with both Judicial Conference policy and the unambiguous view of the Judicial Council. *Id.* at 9-10.

But of course the June 1996 Resolution makes clear that the District Court's conclusion was simply wrong. In fact, the First Circuit Judicial Council *did* respond to the Judicial Conference's March 1996 recommendation by reaffirming that it would "continue to bar" broadcasting of proceedings in district courts within the First Circuit. Thus, the District Court erred when it interpreted Rule 83.3 as giving it discretion to permit recording and broadcasting of its proceedings.

III. CONCLUSION

For all the foregoing reasons, as well as those set forth in our prior submissions to this Court, Petitioners respectfully request that their Petition for a Writ of Mandamus or Prohibition be granted.

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[4]The District Court may have relied on Respondent's counsel's representations. During the proceedings in the District Court, counsel for Respondent asserted that, to his knowledge, "no circuit judicial council" had acted in response to the Judicial Conference's March 1996 vote. *See* DE 718 at 9; *see also* Brief *Amicus Curiae* of Courtroom View Network at 5 n.6 (making the same claim). Petitioners' counsel, who could not confirm whether the Judicial Council had acted or not, did not address the Judicial Council's actions, and instead contended that Local Rule 83.3 unambiguously banned any broadcast and that the District Court should adhere to the Judicial Conference policy. *See* DE 728 at 3-7.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I, Daniel J. Cloherty, attorney of record for Petitioners hereby certify that on Thursday, March 12, 2009, I filed with the Clerk of the United States Court of Appeals for the First Circuit, via hand delivery, the requisite number of copies of the Petitioners' Supplemental Brief per Federal Rule of Appellate Procedure 31, as modified by Local Rule 31. The requisite numbers of copies of Petitioners' Brief were served, via hand delivery, upon the following persons on March 12, 2009:

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