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Protecting Intellectual Property: The Client's Need, The Lawyer's Duty

Hansen Information Technologies Chairman and CEO Chuck Hansen, left, and Hansen General Counsel Perry Ginsberg, right, with Kathi Finnerty of Livingston & Mattesich

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Local Lawyers Put Putting Privacy Back Into Digital Entertainment

By Ed Goldman

Business litigation attorney **Glenn Peterson's** early training as an illustrator of aircraft manuals may have provided the philosophical orientation to view the music downloading case in which he has become embroiled. The case has attracted the attention of the national news media, legal minds, entertainment industry figures and music consumers.

"Technical drawing is basically just line art," he says. "But the thing you have to conquer before anything else is perspective."

Perspective is, in fact, what Peterson, a shareholder with *McDonough Holland & Allen PC*, and **Dan Ballard**, an associate at the Sacramento law firm, felt the Recording Industry Association of America (RIAA) was missing when it launched a highly publicized civil action against their client, a young woman who enjoyed sharing music with her friends.

"Essentially, RIAA has targeted individual music downloaders also called file swappers, music swappers, rippers, and P2P, for 'peer-to-peer' sharers and has been very ugly about it," Peterson says.

"To send a signal to consumers everywhere, RIAA decided to go after people who download music on the Internet through various peer-to-peer networks. In a way, it's no different from what kids did in the 1970s and '80s when a hot new album came out and they shared it with friends, who turned around and made their own cassette copies of it. There was no malice involved, no profit motive." The Internet, of course, has magnified the practice, Peterson says, since "a song now can be sent to hundreds of thousands of people at the touch of a key stroke. But that simply doesn't make the file sharers, most of whom are kids or young adults, criminals."

Ballard seconds that notion. "The tactics used by the recording industry to educate the public about the rights to their sound recordings are unfortunate," he says. "There are more civilized ways to approach the file-sharing problem. I deal with recording industry attorneys on a regular basis and know they passionately believe in what they're doing. But they have blinders on. What we're seeing is an industry desperately hanging onto a dying business model. In the face of a digital challenge to their business model, they've decided to litigate against those least able to defend themselves."

Piracy v. Privacy

Although the recording industry was able to shut down Napster, the first peer-to-peer network, it was unable to shut down Napster's progeny: Grokster, Morpheus, and Kazaa. RIAA decided to try another tack. It decided to sue the individuals who used those peer-to-peer networks to share music and other digital files on-line. Its goal was to create an atmosphere of fear among file sharers in order to stop the piracy of copyrighted music and to protect the royalty payments that lawful sales would bring to the record labels and the artists who wrote and recorded the works.

But for Peterson and Ballard, the case they handled was more about privacy than piracy and certainly, overkill. They maintained that RIAA's tactics violated the privacy rights of peer-to-peer users who, presumptively, were using those networks for lawful purposes.

To identify the file sharers, RIAA served their Internet service providers (ISPs) with subpoenas and assumed the providers would quickly crumble and offer up their subscribers' names. "RIAA went after the file sharers who were offering for distribution a minimum of 1,000 songs," Peterson says. "The RIAA investigators downloaded a handful of songs from those file-sharer's computers and also took screen shots of the folders where those songs were located in order to support their claims of copyright infringement."

That process, Ballard says, was not the problem. The problem arose when the RIAA used Section 512(h) of the Digital Millennium Copyright Act to go straight for the file-sharers' jugulars. That provision, Ballard says, allowed RIAA to improperly obtain subpoenas demanding the identity of the file sharers, without any judicial oversight, from the clerk of the Washington D.C. District Court.

"The trouble with 512(h) was that consumers weren't told and the law did not require them to be told that they were being investigated," Peterson says. "There is no provision for notice. This makes the practice both unique and mischievous, since parties to a lawsuit ordinarily have the right to come forward and challenge a subpoena that seeks their personal information.

Instead, in the way RIAA was going about this, the file sharers' learned they were being investigated only when their ISP told them that it had been served." "Many times, the file-sharers were never told they were being investigated until the information was released," adds Ballard.

A Significant Case

Verizon Internet Services was the first service provider to challenge Section 512(h) in court. After Verizon lost its challenge, RIAA requested and received more than 3,500 subpoenas from the clerk of the Washington D.C. District Court in order to identify file sharers who were allegedly downloading music unlawfully.

McDonough Holland & Allen PC permitted Peterson and Ballard to represent, on a pro bono basis, one such file sharer, "Jane Doe." Jane Doe was lucky she was told her identity was being sought, Ballard says. "Jane was the only file-sharer to challenge the constitutionality of Section 512(h). ISPs like Verizon challenged the law, but ultimately it is the file-sharer's privacy rights that are being invaded," continues Ballard.

Peterson says the decision was made to file a motion to quash the

subpoena demanding Jane Doe's identity. "We filed a motion to intervene in the dispute between Verizon and RIAA: after all, the problem with Section 512(h) is that it does not require the actual target of the subpoena be a party to the proceeding. We prepared an offer of proof indicating what Jane might say if she testified. We had to be extremely careful not to compromise her identity at any point."

While RIAA did not oppose Peterson and Ballard's motion to intervene, it did, of course, oppose their motion to quash. Ultimately, the Washington D.C. Circuit Court of Appeals ruled in the Verizon case that Section 512(h) subpoenas are unenforceable when served on ISPs that act as mere conduits for the infringing material.

By then, however, Ballard says RIAA had filed copyright infringement suits against more than 280 of the 3,500 people whose identity was already revealed by their service providers. These file sharers each paid between $1,500 and $5,000 to settle the cases against them. The remainder may yet still be sued. "Unfortunately, none of the settlement money went to the artists. It went to RIAA," says Peterson. "RIAA has a self-perpetuating litigation process that is being fueled by settlement money received from kids and fearful parents."

In light of the appellate court ruling, RIAA has recently decided to seek the identity of more than 500 additional file-sharers in the conventional manner by filing suit first and using the normal discovery process. "This process," Ballard says, "provides file sharers the legal standing, and an opportunity, to challenge the release of their personal information."

Art, Science and Law

In addition to legal expertise, Peterson and Ballard each bring unique life experience to the case.

Peterson, 43, first admitted to the California Bar in 1986, handles cases involving a variety of subjects, with a strong emphasis on intellectual property and franchise matters. Before coming to Sacramento from Los Angeles in 1989, he had practiced with a nationally-known law firm based in Chicago. He has handled cases involving all aspects of insurance and business litigation, with a primary emphasis on business torts, intellectual property and franchise controversies. His practice has maintained a nearly equal mix of plaintiff and defense matters.

While he attended UCLA as an undergraduate, he owned and operated a small advertising agency in Santa Monica. He acquired a personal interest in copyright law as a teenager, having sold many pieces of his graphic artwork to other designers and print shops for commercial use, including a line of greeting cards. He was involved in his first copyright dispute, as a plaintiff, at the age of 16, when he discovered that one of his illustrations was used on a cereal box without his permission.

The Jane Doe case is not Peterson's first high-profile music dispute. He was hired by the estate of the late rapper, Tupac Shakur, to prosecute a federal copyright infringement action in Sacramento against a group of underground music producers who had misappropriated a handful of Shakur's early master recordings. In contrast to his involvement in rap music matters, he has served as General Counsel to the Sacramento Philharmonic Orchestra for the past four years.

He is also a gifted illustrator and cartoonist, a devout music lover, and a father of two. He characterizes ongoing file-swapping lawsuits and countersuits as "an emotional issue even though it's economically driven. Trademarks and copyrights involve high dollars, high emotions and a good deal of high-impact litigation activity."

Ballard, 40, joined McDonough Holland & Allen PC in 2001 as a member of the firm's litigation and business sections. His practice focuses on intellectual property transactions, entertainment law, and civil litigation. With an undergraduate degree in biological sciences, Ballard prosecutes biotechnology, medical device, and mechanical patent applications. In addition, he advises business clients and artists, clothes designers, and art galleries in intellectual property transactions.

A former flight medic in the U.S. Air Force, Ballard, the father of three, has been a medical laboratory technologist, a research scientist, and an environmental laboratory technologist, and is an environmental science officer in the U.S. Army Reserves. He taught science and math as a substitute teacher in the local high schools and has been asked to teach a course in intellectual property law this summer at the University of the Pacific's McGeorge School of Law.

"I'm drawn to this work partly because the issues are fascinating and because I meet some very interesting people," he says. "I don't think I have a creative bone in my body. But I sure enjoy hanging out with people who do."

What's Next

Peterson says that while RIAA has "thrown in the towel," and abandoned its efforts to pursue music swappers by way of Section 512(h) subpoenas, "the story doesn't end here." The RIAA recently filed new lawsuits in Washington D.C. and New York. "These new cases are traditional 'Doe' lawsuits, so it appears that RIAA will be pursuing these anonymous defendants the old- fashioned way."

"Dan and I claim that as a victory for privacy rights," says Peterson, "because consumers will be entitled to notice, and there will be traditional judicial oversight of the privacy issues."

Ballard agrees, and adds, "There's at least one solution to all of this for the recording industry, artists, and consumers: compulsory licensing that would grant consumers the right to reproduce and distribute digital recordings in exchange for royalties paid from a fund created by a levy on broadband access, blank digital media, even personal computers." Our copyright law is "replete with compulsory licenses that promote the distribution of creative works," he continues. "The litigation against music downloaders, and perhaps even the criminal prosecution of downloaders, are simply desperate measures to force brick and mortar copyright law into our digital world."

The challenge of fitting copyright into the digital environment will very likely require the key skill Peterson notes is needed for both technical drawing and litigation: perspective.

The author, Ed Goldman, is the author of three books and more than 4,000 magazine articles. He is a monthly columnist for Sacramento Magazine and Comstock's Business Magazine.