



THE DAILY RECORDER

Official Newspaper for the City of Sacramento

September 26, 2003

TECHNOLOGY

Music-Downloading War Continues, Industry Wants Subscription Lists

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SPECIAL TO THE DAILY RECORDER

The recording industry's decision to sue 261 individuals for sharing files online grabbed the spotlight this month in the knock-down, drag-out war over music downloading.

But another legal fight is heating up that could make or break the music labels' crusade to use the courts to throttle at-home pirates.

Last week, in a Washington, D.C., appeals court, lawyers argued whether the Recording Industry Association of America can force Internet service providers to release the names of subscribers who have downloaded music on their hard drives from peer-to-peer file-sharing networks like KaZaA and Grokster.

Verizon Internet Services Inc. and SBC Communications argue that the record labels are misusing the 1998 Digital Millennium Copyright Act and invading subscribers' privacy. The association contends that they are protecting artists' copyrights.

Ultimately, experts say, resolving the dispute might take an act of Congress or action by the Supreme Court.

"I think the statute itself is clearly open to multiple interpretations," said Evan Cox, a partner at San Francisco's Covington & Burling and an intellectual property and Internet expert.

The subpoenas are vital to the recording industry's crusade to stop online music swapping, because file-sharing services purposely mask their users' identities.

On services like KaZaA or Grokster, users find and retrieve files from each other's computers rather than from a central server, from which they might be traced. Typically, users sign on to the services under pseudonyms.

To crack down on piracy, the recording industry searches the peer-to-peer networks, which are available to anybody on the Internet, for infringing downloads. When it finds them, the association issues subpoenas to Internet access providers to find out who owned the account used to log on to the service.

So far, Verizon and SBC are the only two providers standing up to the association in court.

One individual subscriber with Verizon, a Brooklyn, N.Y. resident who uses the screen-name "NYCfashiongirl," also is contesting a copyright subpoena served by the music industry on her Internet provider.

Her request, which cites her constitutional right to privacy and anonymous association, is pending before a Washington, D.C., federal judge. According to her lawyer, Glenn W. Peterson of McDonough, Holland & Allen in Sacramento.

Other Internet service providers are complying with subpoenas from the association to turn over the names of their customers who have downloaded music from file-sharing services.

But that may change, according to Jason Schwartz, a staff attorney with San Francisco's Electronic Frontier Foundation.

"I think most ISPs are loyal to their customers and want to protect their privacy but are letting SBC and Verizon lead the way,"

Schwartz said. "I think they are sitting back and waiting to see what happens."

Schwartz added that SBC and Verizon are two of the largest and most powerful providers, with lawyers in Washington, D.C., to lobby on their behalf. SBC has 4 million high-speed broadband and dial-up Internet subscribers; Verizon has 2.5 million.

The foundation, which has filed an amicus brief in support of Verizon, has been documenting the subpoenas from the association. Of the 1,500 issued so far, Schwartz said, 400 have gone to Comcast, 250 to SBC, 150 to Time Warner and 100 to Verizon.

AmericaOnline, by far the largest Internet service provider, with 33 million customers worldwide, said it has cooperated with the association and will continue to do so.

AOL spokesman Nicholas Graham said that the cooperation has nothing to do with the Internet enterprise's ties to Warner Music (both are part of Time Warner). Rather, Graham said, the company believes it has an obligation under law to comply with the subpoenas.

Verizon, however, believes the subpoenas go beyond what's authorized by the Digital Millennium Copyright Act.

Verizon reluctantly released the names of four subscribers after a federal judge rejected its subpoena challenge in the U.S. District Court for the District of Columbia in January.

'Congress hasn't created a sweeping subpoena power over the whole Internet.'

Andrew McBride
Wiley Rein & Fielding

In arguments last week before the U.S. Court of Appeals for the District of Columbia Circuit, Verizon urged a three-judge federal appellate panel to overturn the lower-court ruling. *Recording Industry Association of America v. Verizon Internet Services*, 03-7015 (D.C. Cir., filed 2003).

"Congress hasn't created a sweeping subpoena power over the whole Internet," said Verizon's appellate attorney, Andrew McBride of Washington D.C.'s Wiley Rein & Fielding.

Verizon argued that the alleged pirated music must reside on Verizon's system or network for the subpoena to be valid.

Verizon also contended that the Digital Millennium Copyright Act makes violating the rights of Internet users too easy. Under the law, anyone can ask for a subpoena with little more than a suspicion of copyright infringement, disregarding whether a user might be sharing music files he or she legitimately purchased or songs whose copyright has expired, they contend.

The subpoena can be signed by a court clerk. The law doesn't require the Internet service provider to notify the subscriber that a user's name is being released.

Instead, Verizon argued, copyright holders should be forced to go back to the old method of exposing copyright infringers: the "John Doe" civil suit, in which a copyright holder has to persuade a judge that an Internet user's identity ought to be revealed.

The recording industry interpreted the law differently.

"What Congress was doing here is legislating for the future," said Donald B. Verrilli Jr., the appellate attorney for the association.

Verrilli argued that Congress wrote the law to give copyright holders the power to pursue violators.

"We are being victimized to a staggering extent every day of the week," said Verrilli of Jenner & Block in Washington, D.C.

Twenty entertainment and technology organizations, including the Motion Picture Association of America and the Screen Actors Guild, filed amicus briefs supporting the recording industry's position. A ruling is pending.

SBC's legal fight against the association began in July, when the company's Pacific Bell Internet Services sued in federal court in San Francisco over 200 subpoenas, mainly for the names of California customers. *Pacific Bell Internet Services v. Recording Industry Association of America Inc.*, CO3-3560 (N.D. Cal., filed July 30, 2003).

Pacific Bell Internet Services is being represented by San Francisco's Kecker & Van Nest, which referred calls to the SBC parent company. An SBC spokesman said that a hearing in the suit has yet to be scheduled.

But last week, SBC General Counsel Jim Ellis testified at a U.S. Senate committee hearing convened by Sen. Sam Brownback, R-Kansas, to introduce legislation targeting the subpoena dispute.

Called the Digital Rights Management Act of 2003, the bill would bar subpoenas except in pending civil lawsuits or in cases in which the labels could show that pirated data files were stored on Web sites.

Ellis said in his testimony that the recording industry's distorted interpretation of digital copyright law makes obtaining subpoenas against alleged music file-swappers easier than against suspected felons.

"Under the RIAA's interpretation of the law, anyone willing to pay a small fee and represent that its copyright is being violated would be entitled to know the name, address and phone number of the person behind an anonymous e-mail," Ellis said.

Brownback said that he strongly supports copyright protections but is concerned that the subpoenas used by the recording industry include no due process for the accused downloader. Many of the music downloads allegedly were made by children, ostensibly without parents' knowledge or consent.

Brownback noted that Titan Media, a producer of pornographic videos, is trying to obtain the identities of people who may have downloaded its movies illegally.

"I support strong protections of intellectual property, and I will stand on my record in support of property rights against any challenge," Brownback said. "But I cannot in good conscience support any tool ... that can be used by pornographers and potentially even more distasteful actors to collect the identifying information of Americans, especially our children."

But association President Cary Sherman, also at the hearing, insisted that the issue was piracy, not privacy.

"Although this committee has long stood on the front line in the battle to protect consumer privacy online and off line, it is important to make something crystal clear. No one has a privacy or First Amendment right to engage in online copyright infringement," Sherman said.

Sherman said that he finds it hard to understand how a person might have any

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expectation of privacy "after essentially opening [his] computer to the world" through peer-to-peer file-sharing.

"The reality is that Verizon and SBC, under the self-serving guise of protecting their customers' privacy, simply do not want to provide] copyright owners with the limited information necessary to protect their rights in the digital world," he said.

Sherman blamed a drastic decline in record industry sales — 31 percent over the past three years — on online music piracy.

But Schwartz said other factors, including the poor economy, the introduction of online music services offering single songs, the high price of compact discs, and the end of the cycle of consumers replacing vinyl and tapes with CDs, also have hurt the industry.

The record labels could solve their problem, Schultz suggested, by imposing an access fee on the monthly Internet provider bills of downloaders, with proceeds to be distributed to copyright holders. The recording industry has discounted the idea as a "crude and inflexible instrument" that couldn't keep pace with the dynamic, rapidly evolving Internet.

As the battle continues, however, Sen. Norm Coleman, R-Minn., has scheduled a hearing in Washington, D.C., Sept. 30 to investigate recording industry actions.

"He's very concerned that the industry is abusing the legal practice, reacting disproportionately and taking advantage of American families," Schwartz said.

"He is for copyright protections but doesn't think people should be punished with jail time and pay thousands of dollars, when many times they didn't know that their children were doing anything illegal," Schwartz said.

Whether Congress will step in anytime soon is anybody's guess.

Cox said that the Digital Millennium Copyright Act is clearly open to multiple interpretations.

The consensus of observers, Cox said, is that the District of Columbia Circuit in the Verizon case will rule in favor of the recording industry. However, judges in the SBC case in the U.S. District Court for the Northern District of California, under the 9th Circuit's jurisdiction, could find for the Internet provider.

"That only gets resolved if the Supreme Court takes it up," Cox said.