

2004

## The Battle of Piracy versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act (DMCA) As Its Weapon Against Internet Users' Privacy Rights

Jordana Boag

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

---

### Recommended Citation

Boag, Jordana (2004) "The Battle of Piracy versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act (DMCA) As Its Weapon Against Internet Users' Privacy Rights," *California Western Law Review*: Vol. 41 : No. 1 , Article 5.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol41/iss1/5>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

## COMMENTS

### **THE BATTLE OF PIRACY VERSUS PRIVACY: HOW THE RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA) IS USING THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA) AS ITS WEAPON AGAINST INTERNET USERS' PRIVACY RIGHTS**

"I thought Joe McCarthy and Joe Stalin were dead, but obviously they're alive and well and running the RIAA."<sup>1</sup>

#### I. INTRODUCTION

Just as you are settling down into your couch after a long day at work, the doorbell rings. You rise and look through the peephole to discover a tall man in a suit waiting patiently for you to open the door. As you do, he looks up, extends his arm, and serves you with notice of a lawsuit. You slowly begin reading and discover that you are being sued for copyright infringement under the accusation that you illegally traded music files on the Internet; you are being accused of Internet piracy.<sup>2</sup>

Approximately 2,500 Internet users have had a similar experience since September 2003.<sup>3</sup> The Recording Industry Association of

---

1. Statement by Wayne Rosso, president of Grokster, a peer-to-peer Internet service provider, after an announcement by the RIAA that they had reached a \$2,000 settlement agreement in a music copyright infringement suit against a twelve-year-old girl. John P. Mello, Jr., *RIAA Settles First Lawsuit Against 12-Year-Old Brianna LaHara* (Sept. 11, 2003), at <http://www.technewsworld.com/story/31561.html>.

2. "Internet piracy refers to the use of the Internet for illegally copying or distributing unauthorized software. The offenders may use the Internet for all or some of their operations including the advertising, offering, acquiring, or distribution of pirated software." Microsoft Software Piracy, Piracy Basics, at <http://www.microsoft.com/piracy/basics/what/ip.asp> (last visited Dec. 2, 2003). "[E]ven possession of software that has been illegally copied is piracy." Microsoft Software Piracy, Types of Piracy, at [http://www.microsoft.com/piracy/how\\_types.msp](http://www.microsoft.com/piracy/how_types.msp) (last visited Oct. 28, 2004).

3. Over 250 Internet users were served in September of 2003 during the RIAA's first wave of lawsuits. Press Release, Electronic Frontier Foundation, Recording Industry Announces Lawsuits Against Music Sharers: Electronic Frontier Foundation Warning on "Amnesty" Program (Sept. 8, 2003), at [http://www.eff.org/IP/P2P/20030908\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20030908_eff_pr.php). In April 2004, the RIAA filed another round of lawsuits "against 477 anonymous music file swappers bringing the total number of people sued to nearly 2,500 in eight months." John Borland, *RIAA Files New Round of File-Swapping Suits*, CNET NEWS.COM (Apr. 28, 2004), at

America (RIAA),<sup>4</sup> the music industry-trade group, continues to file lawsuits against people who allegedly share copyrighted music online via peer-to-peer (P2P)<sup>5</sup> services.<sup>6</sup> But how does the RIAA know whom to name as defendants?

Since January of 2003, a few district courts have held that 17 U.S.C. § 512(h)<sup>7</sup> of the Digital Millennium Copyright Act (DMCA)<sup>8</sup> allows copyright owners, without any judicial supervision or due

---

[http://news.com.com/2102-1027\\_3-5201637.html](http://news.com.com/2102-1027_3-5201637.html).

4. The RIAA is the industry trade association for sound and music recordings. They estimate that their "members create, manufacture, and/or distribute" nearly 90% of all music that is made and distributed in the United States. Recording Industry Association of America, About Us, at <http://www.riaa.com/about/default.asp> (last visited Oct. 28, 2004).

5. P2P services are services where software is used that "permits multiple users to exchange communications and files *residing on their personal computers* directly with the personal computers of other users (peers), without uploading any information to a location on the Internet service provider's system or network." Verizon Internet Services Inc.'s Motion to Expedite at 7, Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 257 F. Supp. 2d 244 (D.D.C. 2003) [hereinafter *Verizon Subpoena II*] (No. 03-7015).

6. Stephanie Losi, *RIAA Sues Hundreds in "First Wave" of War* (Sept. 8, 2003), at [www.technewsworld.com/story/31525.html](http://www.technewsworld.com/story/31525.html). The RIAA named users they thought were "the most egregious file swappers," allegedly sharing over one thousand copyrighted songs. *Id.*

7.

Subpoena to identify infringer. (1) Request.—A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection. (2) Contents of request.—The request may be made by filing with the clerk (A) a copy of a notification . . . ; (B) a proposed subpoena; and (C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title. (3) Contents of subpoena.—The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider. (4) Basis for granting subpoena.—If the notification filed satisfies the provisions . . . the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider. (5) Actions of service provider receiving subpoena.—Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification . . . the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification. (6) Rules applicable to subpoena.—Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure.

17 U.S.C. § 512(h) (1998).

8. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.).

process, to obtain personal information from Internet Service Providers (ISPs) of individuals they believe are infringing upon their copyrights.<sup>9</sup> Under this interpretation of 17 U.S.C. § 512(h), one claiming to be a copyright holder need only fill out a one-page subpoena request and give it to a federal clerk to obtain personal information of individuals he or she believes are pirating copyrighted material.<sup>10</sup> The subpoena request must be accompanied by a sworn declaration that the copyright holder believes the ISP subscriber is pirating his or her materials.<sup>11</sup> Once submitted, the federal court clerk must immediately issue a subpoena ordering the ISP to release the personal information of the subscriber to the complaining party, including name, home address, and telephone number.<sup>12</sup> Under this process, alleged pirates have no opportunity to defend their privacy rights because they usually do not even know that they have been targeted until after their information has been divulged to a complaining party.<sup>13</sup> “Given the utter lack of safeguards connected with this process, both innocent mistakes and intentional abuses of this subpoena power are inevitable.”<sup>14</sup>

This subpoena process raises many privacy issues. Most importantly, people other than legitimate copyright owners could use this process to obtain personal information about someone without that person ever knowing it, including but not limited to, stalkers, pedophiles, and market research firms.<sup>15</sup> The personal information capable of being obtained could be used to threaten Internet users. For example, a gay pornography site attempted to use this subpoena clause as leverage to boost sales by telling Internet users that if they did not buy the site’s pornography the user would be sued, forever tying the user’s name to the gay porn industry.<sup>16</sup> Further, there have been circum-

---

9. See, e.g., *Verizon Subpoena II*, 257 F. Supp. 2d at 261, 267; see also Complaint for Declaratory Relief and Demand for Jury Trial [hereinafter Complaint] at 5, *Pacific Bell Internet Servs. v. Recording Indus. Ass’n of Am., Inc.*, 2003 U.S. Dist. LEXIS 21659 (N.D. Cal. 2003) (No. C 03-3560 SI) (seeking declaratory relief under the DMCA for the identity of subscribers alleged to have engaged in copyright infringement).

10. 149 Cong. Rec. S11569 (daily ed. Sept. 16, 2003) [hereinafter Statement of Sen. Brownback], available at [http://www.eff.org/IP/DRM/20030916\\_brownback\\_statement.pdf](http://www.eff.org/IP/DRM/20030916_brownback_statement.pdf).

11. *Id.*

12. Peter P. Swire, *Protecting Privacy from the “New Spam,”* THE BOSTON GLOBE, July 27, 2003, at E11. The ISP can simply track this personal information from the IP address that the copyright owner has found through research. *Id.*

13. Statement of Sen. Brownback, *supra* note 10.

14. Verizon Internet Services Inc.’s Motion to Expedite at 12, *Verizon Subpoena II* (No. 03-7015).

15. Statement of Sen. Brownback, *supra* note 10.

16. *See id.*

stances where copyright holders have based the subpoenas on horrible mistakes. For instance, the astronomy department at Pennsylvania State University was almost shut down during final exams because the RIAA mistakenly identified the music file of a school capella group performing a song about gamma rays as that of an illegally downloaded song.<sup>17</sup> The RIAA's argument that it is performing thorough research before requesting these subpoenas is laughable in light of this type of situation.

Fortunately for ISPs and Internet users, an appellate court for the District of Columbia made a favorable decision in December of 2003.<sup>18</sup> The court held the subpoenas in one such controversy were not valid, and therefore the ISP should not be required to turn over clients' private information.<sup>19</sup> In October 2004, the Supreme Court denied the RIAA's petition for writ of certiorari.<sup>20</sup> The RIAA and other copyright holders will now have to use other methods to obtain the identities of individuals in this jurisdiction who they claim infringe on their copyrights.

As a result of the Supreme Court's denial of certiorari, there remains the potential for a circuit split. A case currently pending on appeal in the Eighth Circuit<sup>21</sup> creates this possibility. If it is decided in favor of the RIAA, there will be a circuit split. This situation would create the obvious need for Supreme Court guidance, which means uncertainty regarding Internet users' privacy rights will persist until the Supreme Court considers the issue.

This comment will first provide a brief background of the DMCA in Part II. Part III will then address the privacy concerns raised through litigation regarding the recent application of 17 U.S.C. § 512(h) of the DMCA by the RIAA and others. Next, Part IV will discuss the amnesty program that was offered by the RIAA. Following, Part V will describe situations in which RIAA subpoenas have been misused and the corresponding effect on Internet users, prior to the appellate court decision. Next, Part VI will discuss how the D.C.

---

17. Telephone Interview with Wendy Seltzer, Staff Attorney, Electronic Frontier Foundation (Aug. 28, 2003).

18. *See generally* Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

19. *Id.* at 1236.

20. *See* Verizon Internet Servs., Inc. v. Recording Indus. Ass'n of Am., No. 03-1722, 2004 U.S. LEXIS 6701 (Oct. 12, 2004); *see also* Supreme Court Collection, Orders in Pending Cases, <http://supct.law.cornell.edu/supct/html/101204.ZOR.html> (last visited Oct. 13, 2004).

21. *See generally* Appellant's Opening Brief, The Recording Indus. Ass'n of Am. v. Charter Communications, No. 03-3802, (8th Cir. dated Jan 15, 2004).

appellate court decision has forced the RIAA to alter their litigation strategy. Part VII will evaluate the possibility of a circuit split. Finally, Parts VIII and IX will discuss possible remedies to the current situation and actions taken by the U.S. Senate. The conclusion will assess the implementation of compulsory licensing in conjunction with the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003,<sup>22</sup> a bill that was introduced by Senator Sam Brownback of Kansas, and will recommend that this approach will ultimately satisfy concerns of both piracy and privacy.

## II. BACKGROUND OF THE DMCA

“We are in the infancy of a networked, digital society. The early benefits of this transformation are obvious to anyone who has replaced his or her VCR with a DVD player, downloaded or updated software products over the Internet, or sampled and purchased music without visiting a record store.”<sup>23</sup> This new realm of technology has opened the door for digital pirates to take advantage of new Internet capabilities. As a result of the growing use and abuse of the Internet, the DMCA was enacted in 1998 as a set of amendments to chapter 5 of the Copyright Act.<sup>24</sup> The new section that was created by the DMCA, 17 U.S.C. § 512, was named “Limitations on liability relating to material online.”<sup>25</sup> The main purpose for creating the DMCA was to shelter ISPs from the liability of potential copyright infringing activities of its customers,<sup>26</sup> which the ISPs have little to no control over, and to limit the burden on ISPs to be “copyright policemen.”<sup>27</sup> Additionally, Congress had to “balance copyright owners’ interests in protecting their rights with the need to foster the Internet as an important medium of free expression, cultural exchange, and commerce.”<sup>28</sup> The DMCA was Congress’ answer to a prevailing concern that copyright holders

---

22. Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong. (2003).

23. Brief of Amici Curiae Motion Picture Association of America, Inc. et al. at 1, *Verizon Subpoena II*, (Nos. 03-7015, 03-7053).

24. Verizon Internet Services Inc.’s Motion to Expedite at 3, *Verizon Subpoena II* (No. 03-7015).

25. Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 27 (D.C.C. 2003) [hereinafter *Verizon Subpoena I*].

26. *Id.*

27. “Copyright policeman” is the term used to describe an ISP having the duty to invade the privacy of their customers and to exercise specific control over information on their systems. Verizon Internet Services Inc.’s Motion to Expedite at 5, *Verizon Subpoena II* (No. 03-7015).

28. *Id.* at 3.

and creators would stop producing music for fear of their product being easily pirated on the Internet because files could be transferred between users nearly anonymously.<sup>29</sup>

A pressing question that has raised much debate is what type of service providers should be covered by the DMCA and what type of "limitation[] on liability"<sup>30</sup> they should receive. Per the statute, service providers are separated into four distinct groups.<sup>31</sup> They are generally described as service providers who: (a) transmit material at the request of a customer without the knowledgeable assistance of the service provider and no material is saved on the network or system for more than a reasonable amount of time during transfer, (b) temporarily store material on the system or network as a result of an automatic technical process after a customer requested transmission and the material was not made available by the service provider, (c) unknowingly store material on the system or network and once the service providers are aware of the activity they work quickly to remove the material and, (d) connect users to an online site that harbors infringing material or activity through a search tool without knowing of the infringing activity and when made aware of the illegal activity work quickly to remove access to the material.<sup>32</sup> Each of these distinct groups has a different level of limited liability. Once certain conditions have been satisfied, the ISP can enjoy a variety of "safe harbors" that limit the ISPs potential liability.<sup>33</sup> Many of the ISPs in the recent P2P software copyright infringement cases arguably qualify for the group listed in subsection (a),<sup>34</sup> as evidenced by the recent District of Columbia appellate court decision,<sup>35</sup> and therefore should not be liable for their customers merely transmitting allegedly copyright infringing material

---

29. Colin Folawn, *Neighborhood Watch: The Negation of Rights Caused by the Notice Requirement in Copyright Enforcement Under the Digital Millennium Copyright Act*, 26 SEATTLE U. L. REV. 979, 988 (2003).

30. Referring to the title section 512 was given: "Limitations on liability relating to material online." 17 U.S.C. § 512 (1998).

31. Designation into a particular group is determined by the way in which the allegedly infringing material interacts with the service provider's system or network. See 17 U.S.C. § 512(a).

32. *Id.*

33. *Verizon Subpoena I*, 240 F. Supp. 2d at 27.

34. Subsection (a) reads: "Transitory digital network communications.—A service provider shall not be liable . . . for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . ." 17 U.S.C. § 512(a).

35. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

on their networks, without storing it there.<sup>36</sup> In these file-swapping situations, the allegedly infringing material is stored on the Internet user's computer hard drive and not necessarily on the service provider's system.

The subpoena clause, 17 U.S.C. § 512(h), has raised important privacy issues. The main purpose of the subpoena clause is to require an ISP to divulge the personal information of a customer who the copyright holder believes is infringing on his or her copyright, via subpoena with no judicial review.<sup>37</sup> This section of the statute raises several concerns, including due process, free association, anonymous association, and privacy rights.<sup>38</sup>

Interestingly, P2P file-sharing services, which are the main focus of the subpoena and privacy issues, did not exist in 1998 when the DMCA was enacted. At that time, most users were connecting to the Internet via dial-up connections, which were much slower than cable or DSL connections available today. Thus, the ability to download and transfer music files would not have been an issue, even if downloading music had been available in 1998, because music files are typically large and a slow speed connection, such as dial-up, cannot support such an activity.<sup>39</sup> When drafting the DMCA, Congress was most concerned with "electronic mail, web browsing, and participation in chat rooms as private activities, different in kind from the placement of content on an Internet service provider's network or system in what is often a commercial setting,"<sup>40</sup> such as a P2P network. Arguably, the number of Internet abusers has grown exponentially since the introduction of a faster Internet, as has the number of subpoena abusers.<sup>41</sup> Therefore, the RIAA and other copyright defenders have a higher number of potential pirates to pursue with lawsuits. When Congress drafted the subpoena clause into the DMCA, it is unlikely the intent was to use the statute in the manner that the RIAA and others have been using it today. It is valid to ask: if Congress

---

36. *Verizon Subpoena I*, 240 F. Supp. 2d at 27.

37. See 17 U.S.C. § 512(h).

38. Telephone Interview with Wendy Seltzer, *supra* note 17.

39. Complaint at 5, *Pacific Bell Internet Servs. v. Recording Indus. Ass'n of Am., Inc.*, 2003 U.S. Dist. LEXIS 21659 (N.D. Cal. 2003) (No. C 03-3560 SI).

40. *Verizon Internet Service Inc.'s Motion to Expedite at 5, Verizon Subpoena II* (No. 03-7015).

41. A subpoena abuser is anyone who is not a legitimate copyright holder and is using the DMCA to retrieve personal information for a reason other than to deter copyright infringement. They are often blackmailers, market research firms, stalkers and pedophiles. Statement of Sen. Brownback, *supra* note 10.



were to re-draft the DMCA today, in light of the technological advances, would there be any changes to section 512(h)?

### III. THE ISPS FIGHT BACK

Despite the recent interpretation by some district courts and the ultimate dismissal of one such case by the appellate court in Washington, D.C., there continues to be unresolved issues regarding the DMCA. Following is a discussion of two cases that deal with these issues.

#### A. *Verizon Internet Servs., Inc. v. Recording Indus. Ass'n of Am.*<sup>42</sup>

Verizon Online (Verizon) was the first ISP to take a stand and fight back in court against the RIAA, believing that the privacy rights of their customers were important and the DMCA was being unfairly interpreted.<sup>43</sup> Although Verizon eventually had to release the identifying information of the requested customers, it continued its legal challenge and finally got the subpoenas dismissed on appeal.<sup>44</sup>

#### 1. Procedural History

On July 24, 2002, Verizon was served with a subpoena by the RIAA demanding the identity of one of Verizon's customers per the authority provided by the DMCA.<sup>45</sup> As the statute requires, a letter accompanied the subpoena that accused the customer of "'offering for download [by other Internet users] files containing copyright sound recordings through a peer to peer application' without authorization of the copyright owner."<sup>46</sup> Verizon refused to release the personal information of its customer, and as a result, the RIAA filed a Motion to Enforce on August 20, 2002.<sup>47</sup> Thereafter, on August 30, 2002, Verizon opposed the motion and the district court granted briefing on the grounds that the subpoena was unenforceable under 17 U.S.C. § 512(h).<sup>48</sup> Verizon raised many arguments, including that they were

42. *Verizon Subpoena I*, 240 F. Supp. 24 (D.C.C. 2003).

43. *Id.* at 26.

44. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

45. *Verizon Subpoena I*, 240 F. Supp. 2d at 28; *see also* 17 U.S.C. § 512(h) (1998).

46. Verizon Internet Services Inc.'s Motion to Expedite at 7, *Verizon Subpoena II* (No. 03-7015).

47. *Id.*

48. *Id.*

sheltered under section (a) of the DMCA and that the subpoena presented First Amendment issues.<sup>49</sup>

On January 21, 2003, the district court issued its final opinion and agreed with the RIAA in determining that section (h) does, in fact, extend to ISPs that have no infringing copyright material on their systems or networks.<sup>50</sup> The district court ordered Verizon to release the identity of its customer in accordance with the subpoena.<sup>51</sup> Verizon appealed the decision and the court heard arguments on September 16, 2003.<sup>52</sup> On December 19, 2003, the appellate court dismissed the recording industry's subpoenas and found that Verizon was sheltered under section (a) of the DMCA and, therefore, was not required to release any of its customers' information.<sup>53</sup> As a result, on May 24, 2004, the RIAA filed a Petition for a Writ of Certiorari with the Supreme Court,<sup>54</sup> and on October 12, 2004, the Supreme Court denied the RIAA's Petition for a Writ of Certiorari.<sup>55</sup>

## 2. Diverse Interests

Many parties were interested in the *Verizon* case. In response to Verizon's appeal, amici curiae briefs were filed on behalf of each side<sup>56</sup> addressing many of the issues that the district court did not

---

49. *Id.*

50. This was a blow to the P2P networks that thought they were sheltered by being categorized under subsection (a). Verizon Internet Services Inc.'s Motion to Expedite at 9, *Verizon Subpoena II* (No. 03-7015).

51. *Id.*

52. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003).

53. *Id.* at 1229, 1239.

54. Petition for a Writ of Certiorari, *Recording Indus. Ass'n of Am.* (No. 03-1722).

55. See *Verizon Internet Servs., Inc. v. Recording Indus. Ass'n of Am.*, No. 03-1722, 2004 U.S. LEXIS 6701 (Oct. 12, 2004); see also Supreme Court Collection, Orders In Pending Cases, <http://supct.law.cornell.edu/supct/html/101204.ZOR.html> (last visited Oct. 13, 2004).

56. A brief in support of Verizon's position was filed by the following amici curiae: Alliance for Public Technology, American Association of Law Libraries, American Civil Liberties Union, American Civil Liberties Union Capital Area, American Legislative Exchange Council, American Library Association, Association of Research Libraries, Caprica Internet Services, Citizens for a Sound Economy Foundation, Competitive Enterprise Institute, Computer & Communications Industry Association, Computer Professionals for Social Responsibility, Consumer Action, Consumer Federation of America, Consumers Union, DigitalConsumer.Org, Digital Future Coalition, Electronic Frontier Foundation, Electronic Privacy Information Center, European Internet Industry Association, Frontier & Citizens Communications Companies, InKeeper Co., Media Access Project, Mercury Network Corp., National Association of Consumer Agency Administrators, National Coalition Against Domestic Violence, National Consumers League, National Grange of the Order of Patrons of Husbandry, New York State Telecommunications Association, Inc., Pacific Research Institute, Privacy

reach. Additionally, both the United States and a subpoenaed customer, Jane Doe, sought to intervene.<sup>57</sup>

The amicus brief filed in support of Verizon raised many issues. It discussed the district court's interpretation of the procedural section of the subpoena clause, section (h)(2) of the DMCA, and argued the result of the district court decision is that a burden automatically attaches "to the ISP who receives the subpoena (and, if the ISP gives notice to its customer, perhaps to the customer herself) to take steps to protect the customer's anonymity—all in a severely truncated time frame and generally in a jurisdiction other than the customer's home."<sup>58</sup> With limited time, the ISP would have to notify the customer who would then have to retain counsel and file objections, all before the short deadline set by the subpoena. Further, the amicus brief noted that the alleged infringer in this case was accused of pirating a substantial amount of files;<sup>59</sup> however, that was only in *this* case. There is potential that someone who is accused of illegally trading only a single file could be sued, or worse, an innocent victim who has never traded a single song could be thrown into a legal battle. Hence,

Rights Clearinghouse, Privacyactivism, Progressive Internet Action, Public Knowledge, SBC Internet Services, Southern Star, Stic.Net, LP, Texas Internet Service Providers Association, United States Internet Industry Association, United States Internet Service Provider Association, United States Telecom Association, Utility Consumers Action Network, Washington Association of Internet Service Providers, WiredSafety.Org, and ZZAPP! Internet Services. Brief of Amici Curiae Alliance for Public Technology et al., *Verizon Subpoena II*, 257 F. Supp. 2d 244 (D.D.C. 2003) (Nos. 03-7015, 03-7053).

A brief in support of RIAA's position was filed by the following amici curiae: Motion Picture Association of America, Inc., AFMA, American Federation of Musicians of the United States and Canada, American Federation of Television and Radio Artists, American Society of Media Photographers, Inc., Association for Independent Music, Association of American Publishers, Broadcast Music, Inc., Business Software Alliance, Directors Guild of America, Inc., Graphic Artists Guild, Inc., Interactive Digital Software Association, NFL Ventures, L.P., Office of the Commissioner of Baseball, Producers Guild of America, Professional Photographers of America, Recording Artists Coalition, Screen Actor's Guild, Inc., Software & Information Industry Association, and Writers Guild of America, West, Inc. Brief of Amici Curiae Motion Picture Association of America, Inc. et al., *Verizon Subpoena II* (Nos. 03-7015, 03-7053).

57. The United State's brief concentrates on the constitutional issues that were raised as a result of this case and not the privacy issues. See Brief for Intervenor United States of America In Response to Defendant's "Brief in Support of its Motion to Quash February 4, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003," *Verizon Subpoena II*, 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 1:03MS00040 (JDB)). Jane Doe is the Verizon customer who is named in the subpoena at issue between Verizon Online and the RIAA. She filed a motion to intervene anonymously to protect her privacy rights. See Motion for Leave to Intervene and Pleading Pursuant to FRCP 24(c), *Verizon Subpoena II*, 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 03-MC-804-HHK/JMF).

58. Brief of Amici Curiae Alliance for Public Technology et al. at 2, *Verizon Subpoena II* (Nos. 03-7015, 03-7053).

59. *Id.*

“the district court failed to grasp that this case is not merely about actual copyright infringement—unless one assumes that no one who invokes Section 512(h) will ever be wrong, malicious, or lazy.”<sup>60</sup> The brief made clear that parties opposing the district court decision were not arguing that true violators should be shielded.<sup>61</sup> They were simply arguing that because of how the district court was interpreting the DMCA, the number of innocent people whose privacy interests could be violated would likely outweigh those that are actually guilty.<sup>62</sup> The overall policy concern is “what will happen *as a result of this case*.”<sup>63</sup>

The amicus brief in support of the RIAA also focused on many issues. The brief argued that there is no governmental or copyright owner interest in creating a requirement that an Internet user receive notice when his private information has been subpoenaed.<sup>64</sup> The brief further argued that nothing is stopping the ISP from notifying its customer when a subpoena has been served requesting the customer’s information and, further, that the statute does not preclude an objection by the ISP or the alleged infringer.<sup>65</sup> Yet, the brief only half-heartedly discussed the short time period in which an ISP has to notify the customer and in which the customer would have to enlist counsel and file objections.<sup>66</sup> The brief merely argued that the copyright holders’ interests outweighed the interests of the ISPs and their customers, stating that copyright owners would suffer damage because the additional procedures would inevitably result in the delay of the prosecution of copyright cases.<sup>67</sup> Further, the brief failed to address the concern of potential abuse of section (h) if used by a pedophile or a stalker.<sup>68</sup>

While the appellate court in the District of Columbia temporarily remedied some of the issues raised in the amicus briefs with its recent dismissal of the subpoenas, the privacy concerns are still pertinent to future cases in other circuits. If another circuit court interprets section 512(h) of the DMCA differently, by holding that ISPs such as Verizon are required to turn over information when served with a subpoena, the privacy of Internet users will once again be placed in jeopardy.

---

60. *Id.*

61. *Id.* at 3.

62. *See id.* at 2.

63. *Id.* at 3.

64. *See generally* Brief of Amici Curiae Motion Picture Association of America, Inc. et al., *Verizon Subpoena II* (Nos. 03-7015, 03-7053).

65. *Id.* at 16.

66. *Id.*

67. *Id.*

68. *See id.*

Besides additional litigation, the district court decision prompted numerous articles and editorials that focused on the public's concern for privacy while using the Internet.<sup>69</sup> Many law professors have commented on the recent decision. Peter Swire, a Professor at the Moritz College of Law at Ohio State University and former Chief Counselor of Privacy for the Clinton Administration, was quoted as saying that the decision in this case "will be a terrible blow for privacy. ISPs will be flooded with legitimate and illegitimate claims . . . ."<sup>70</sup> The district court decision "extends the reach of Section 512(h) subpoenas into the most routine Internet communications, where privacy and anonymity expectations are most pronounced—e.g, electronic mail between customers, instant messaging, chat rooms, and personal web browsing."<sup>71</sup> The possible reach of section (h) could change the open and expressive Internet society we have grown accustomed to into an Internet society of users who fear public disclosure of every line written in an e-mail and every word expressed while instant messaging.

Similarly, the appellate court decision also received a lot of attention. However, this time the attention was given in the form of praise, instead of criticism. A staff attorney at the Electronic Frontier Foundation (EFF) said, "Internet users are the winners in the Verizon [sic] case. . . . The effect of the appeals court decision is that we do not lose our privacy simply by connecting to the Internet."<sup>72</sup>

### B. *PBIS v. RIAA*<sup>73</sup>

On July 30, 2003, the communications giant, Pacific Bell Internet Services (PBIS),<sup>74</sup> filed suit against the RIAA, MediaForce,<sup>75</sup> and Titan Media,<sup>76</sup> claiming the nearly 200 subpoenas they had recently re-

69. Verizon Internet Service Inc.'s Motion to Expedite at 10, *Verizon Subpoena II* (No. 03-7015).

70. Jefferson Graham, *Privacy vs. Internet Piracy*, USA TODAY, June 11, 2003, at D3.

71. Verizon Internet Service Inc.'s Motion to Expedite at 11, *Verizon Subpoena II* (No. 03-7015).

72. Press Release, Electronic Frontier Foundation, Court Rules Verizon Can Refuse to ID Customers to Music Industry (Dec. 19, 2003), at <http://www.eff.org/effector/16/36.php#III> (quoting Wendy Seltzer, Electronic Frontier Foundation Staff Attorney).

73. Complaint, *Pacific Bell Internet Servs. v. Recording Indus. Ass'n of Am., Inc.*, 2003 U.S. Dist. LEXIS 21659 (N.D. Cal. 2003) (No. C 03-3560 SI).

74. PBIS is operated by SBC and in many media sources PBIS is referred to as SBC. *Id.*

75. MediaForce is named in the complaint as Mediasentry, Inc. d/b/a Mediaforce. Throughout the complaint the defendant is referred to as Mediaforce. *Id.*

76. Titan Media is named in the complaint as IO Group, Inc., d/b/a Titan Media, Titan-media.com, and Titanmen.com. Throughout the complaint the defendant is referred to as Titan. *Id.*

ceived from the defendants were the result of a misinterpretation of copyright law.<sup>77</sup> “We’re making the argument that the DMCA subpoena power is being misapplied. . . . Anyone can request private information of someone over the Internet [using the subpoenas]. We believe it’s a threat to the privacy rights of our customers.”<sup>78</sup> PBIS urged the court to find the subpoenas illegal, thus PBIS would not have to release the private information of their customers.

MediaForce, the second defendant named on the complaint, is a company that issues many “cease-and-desist” letters<sup>79</sup> to ISPs.<sup>80</sup> The company has been described as a kind of “copyright ‘bounty hunter’ . . . [who] employs automatic search engines (robots or ‘bots’) to search the Internet for specific word combinations that it believes suggests the presence of copyrighted materials.”<sup>81</sup> MediaForce alone has been responsible for serving more than 16,700 DMCA notices to ISPs.<sup>82</sup>

PBIS has been inundated with notices that MediaForce claims are legitimate under 17 U.S.C. § 512(c)(3)(A).<sup>83</sup> PBIS has responded in writing to each stating that such notices are not proper per section (c).<sup>84</sup> MediaForce has not responded to any of these letters, yet continues to serve similar notices.<sup>85</sup> PBIS argues that the persistent stream of notifications “indicates that MediaForce will also serve similar invalid 17 U.S.C. § 512(h) subpoenas on PBIS.”<sup>86</sup>

Titan Media, the final defendant named in the complaint, is a gay-themed adult entertainment company<sup>87</sup> that served PBIS with subpoenas requesting the personal information of fifty-nine PBIS custom-

77. See Complaint, *Pacific Bell* (No. C 03-3560 SI).

78. Jay Lyman, *SBC Fights Back Over RIAA Subpoenas* (July 31, 2003), at <http://www.technewsworld.com/perl/story/31236.html> (quoting Joe Izbrand, SBC spokesperson).

79. A cease and desist order is a court or agency’s order prohibiting a person from continuing a particular course of conduct. BLACK’S LAW DICTIONARY 90 (2nd pocket ed. 2001).

80. Press Release, Electronic Frontier Foundation, *Pacific Bell Sues Recording Industry for Customer Privacy* (July 31, 2003), at [www.eff.org/IP/P2P/20030731\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20030731_eff_pr.php).

81. Complaint at 11, *Pacific Bell* (No. C 03-3560 SI).

82. *Id.*

83. *Id.* at 5. For an explanation of effective notification, see 17 U.S.C. § 512(c) (1998).

84. Complaint at 5, *Pacific Bell* (No. C 03-3560 SI).

85. *Id.*

86. *Id.*

87. *Pacific Bell Sues Recording Industry for Customer Privacy*, *supra* note 80. The general counsel of Titan described their business as “the Playboy of gay erotica . . . . ‘Our material is traded more than anyone else’s on the gay erotica front.’” Benny Evangelista, *Pac Bell Online Sues RIAA/S.F. Gay-Porn Maker Also Named in Battle Over File Sharing*, S.F. CHRON., Aug. 1, 2003, at B1 (quoting Gil Sperlein, Titan Media’s general counsel).

ers.<sup>88</sup> The company justified its actions by arguing that they were simply requesting the personal information in an attempt to protect children from easily accessing pornography and that its sales were being hurt by online file trading.<sup>89</sup> General counsel for Titan Media argues that the pornography industry may be harmed more than the music industry as a result of Internet piracy.<sup>90</sup> He was quoted as saying, “[w]e can’t compete with free. . . . It’s probably even more true of us, where people have always looked for a way to get our product without going in and buying it off the shelf. Now they have a way to do it without paying for it, too.”<sup>91</sup> As a result of PBIS stating they intended to challenge the subpoenas, Titan Media withdrew.<sup>92</sup> Nonetheless, PBIS named them in the suit to prevent additional subpoenas.<sup>93</sup>

Titan’s critics argue that its actions were not as innocent as Titan Media would like the public to think, alleging that the subpoenas were to be used as a method to threaten Internet users into buying their pornography.<sup>94</sup> This abuse of the subpoena process by Titan Media is a blatant example of the potential damage that a lack of privacy protection could cause if left unchecked. “Without vetting by any court, companies can issue subpoenas that disclose the identities of targeted individuals and link their names to gay-themed adult porn, making it impossible for them to regain their privacy later even if the allegations are patently false.”<sup>95</sup>

Immediately following the filing of this suit, the RIAA voiced their disappointment in the actions of PBIS and expressed their intention to continue with mass subpoenas.<sup>96</sup> The RIAA labeled PBIS actions as “procedural gamesmanship” and further explained that it “will not ultimately change the underlying fact that when individuals engage in copyright infringement on the Internet, they are not anonymous and service providers must reveal who they are.”<sup>97</sup>

---

88. Complaint at 7, *Pacific Bell* (No. C 03-3560 SD).

89. Chris Gaither & James Collins, *SBC Challenges File-Sharing Subpoenas Unit Fighting Music Industry’s Quest for Names*, BOSTON GLOBE, Aug. 1, 2003, at D3.

90. Amy Harmon, *Efforts to Stop Music Swapping Draw More Fire*, N.Y. TIMES, Aug. 1, 2003, at C1.

91. *Id.* (quoting Gill Sperlein, Titan Media’s general counsel).

92. Gaither & Collins, *supra* note 89.

93. *Id.*

94. Statement of Sen. Brownback, *supra* note 10.

95. *Pacific Bell Sues Recording Industry for Customer Privacy*, *supra* note 80 (quoting Cindy Cohn, Electronic Frontier Foundation Legal Director).

96. Lyman, *supra* note 78.

97. *Id.*

On November 21, 2003, the district court dismissed the lawsuits against Titan Media and MediaForce for lack of subject matter jurisdiction.<sup>98</sup> Further, the court granted the RIAA's motion to transfer the action to the United States District Court for the District of Columbia.<sup>99</sup> While the motion for transfer may have looked like a good strategic move for the RIAA at the time,<sup>100</sup> a recent decision by the appellate court for the District of Columbia to dismiss a similar case brought by the RIAA against Verizon cuts against that strategy. The RIAA may have been better off allowing California courts to hear the case.

### C. Why Only Two ISPs are Fighting Back

Money drives many business actions, and this situation is no different. Verizon and PBIS are in an economic position where they can fight against the alleged misuse of the DMCA. Mike Goodman, a senior analyst of the Yankee Group,<sup>101</sup> recently explained that the fact that smaller ISPs are not fighting back in the courtroom does not mean they agree with releasing their customers' private information. "The bottom line is no ISP wants to be placed in the policing position they've been put into."<sup>102</sup>

### IV. RIAA'S AMNESTY PROGRAM, A/K/A "SHAM-NESTY"<sup>103</sup> PROGRAM

Along with the first round of lawsuits, the RIAA announced a plan to offer an amnesty program, also called the Clean Slate agreement,<sup>104</sup> where users "can avoid lawsuits if they sign a declaration

---

98. Order Granting Motions by Defendants Mediasentry, Inc. and IO Group, Inc. to Dismiss and Granting Motion by Defendant Recording Industry Association of America, Inc. to Transfer Venue at 9, Pacific Bell Internet Servs. v. Recording Indus. Ass'n of Am., Inc., No. C 03-3560 SI, 2003 U.S. Dist. LEXIS 21659 (N.D. Cal. 2003), available at <http://www.eff.org/IP/P2P/20031121-order.pdf>.

99. *Id.*

100. The RIAA may have thought this motion to transfer venue was a good strategic move because the district court in the District of Columbia had just come down with a favorable decision in the *Verizon* case. See *Verizon Subpoena II*, 257 F. Supp. 2d at 275.

101. The Yankee Group is "[t]he most trusted name for communications and networking research and consulting." The Yankee Group, at <http://www.yankeegroup.com> (last visited Oct. 28, 2004).

102. Lyman, *supra* note 78 (quoting Mike Goodman, Senior Analyst of the Yankee Group).

103. The term "sham-nesty" was created by EFF Staff Attorney Jason Schultz. Recording Industry Announces Lawsuits Against Music Sharers: Electronic Frontier Foundation Warning on "Amnesty" Program, *supra* note 3.

104. Katie Dean, *Lawsuit Attacks RIAA Amnesty Plan* (Sept. 10, 2003), at <http://>



pledging that they will delete all copyrighted music files from their hard drives and mp3 players and never again share or download music illegally.”<sup>105</sup> This program was only offered to violators not sued by the RIAA.<sup>106</sup> This program has been described by critics as “largely illusory” due to the fact that “the RIAA cannot actually protect anyone from all civil suits, and individuals who sign these affidavits may open themselves up to criminal prosecution.”<sup>107</sup> Under the No Electronic Theft (NET) Act,<sup>108</sup> the signed admission could be used against an Internet user in a criminal suit as an admission of violating copyright laws.<sup>109</sup> Repercussions could range from large fines to jail time.<sup>110</sup>

There are many things to consider before signing an affidavit that admits guilt of piracy. First, this amnesty offer protects a user only from future lawsuits by the RIAA but not by other copyright holders.<sup>111</sup> “The recording industry wants file-sharers to confess guilt, while leaving these music fans vulnerable to lawsuits from record companies and music publishers and bands like Metallica that control independent music rights.”<sup>112</sup> The RIAA does not own any copyrights and the way their relationship is set up with the member copyright holders, not even RIAA labels are bound by the amnesty arrangement.<sup>113</sup> Further, “the RIAA would almost certainly turn over this information in response to any valid subpoena,” facilitating the process by which a user’s signed affidavit could be used against him or her in a court of law as an admission of guilt.<sup>114</sup>

Finally, the amnesty program only extends to Internet users who have not yet been sued and are not under investigation.<sup>115</sup> It is extremely hard for Internet users to tell if they are being investigated by

---

[www.wired.com/news/digiwood/0,1412,60376,00.html](http://www.wired.com/news/digiwood/0,1412,60376,00.html).

105. Recording Industry Announces Lawsuits Against Music Sharers: Electronic Frontier Foundation Warning on “Amnesty” Program, *supra* note 3.

106. *Id.*

107. *Why the RIAA’s “Amnesty” Offer is a Sham*, Electronic Frontier Foundation, at <http://www.eff.org/share/amnesty.php> (last visited Oct. 28, 2004).

108. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1975) (codified in scattered sections of 17 U.S.C.).

109. *Why the RIAA’s “Amnesty” Offer is a Sham*, *supra* note 107.

110. *Id.*

111. *Id.*

112. Recording Industry Announces Lawsuits Against Music Sharers: Electronic Frontier Foundation Warning on “Amnesty” Program, *supra* note 3 (quoting Jason Schultz, Electronic Frontier Foundation staff attorney).

113. *Why the RIAA’s “Amnesty” Offer is a Sham*, *supra* note 107.

114. *Id.*

115. *Id.*

the RIAA as these investigations are not open to the public.<sup>116</sup> Therefore, it may be unwise to sign an affidavit admitting guilt that could be used against you in a court of law.<sup>117</sup>

To put the amnesty program into perspective, “[i]f you look at who is actually filing the . . . lawsuits, it’s the record label themselves individually, not the RIAA. . . . Therefore, amnesty from the RIAA doesn’t really help you.”<sup>118</sup>

As a result, the program has been dubbed with the satiric title of being a “sham-nesty” program.<sup>119</sup> While a user may look at the program and think it would be beneficial to avoid litigation, in fact it is not a program created with the user’s interests in mind and may even entrap the user. Users are led to believe they will be protected under this program, but they are just opening themselves up to scrutiny by painting a target on their foreheads for future legal actions. In contrast, “[a] true amnesty would end the threat of lawsuits and make file sharing legal in the minds of the recording industry.”<sup>120</sup>

One California resident who disagreed with the amnesty program brought legal action against the RIAA.<sup>121</sup> Thereafter, as of April 19, 2004, the amnesty program was terminated.<sup>122</sup> The trade group quietly announced an end to the program on their website, but the news was not disseminated until the RIAA sought to have the lawsuit dismissed on the grounds that it was rendered moot because the program had ended.<sup>123</sup> The court filing by the RIAA noted that only 1,108 individuals partook in the program and “that its file-sharing lawsuits have had far more success in discouraging the practice than did the amnesty program.”<sup>124</sup> Further, RIAA’s attorney noted that “as public aware-

---

116. *See id.*

117. *Id.*

118. Dean, *supra* note 104 (quoting Jason Schultz, Electronic Frontier Foundation staff attorney).

119. Recording Industry Announces Lawsuits Against Music Sharers: Electronic Frontier Foundation Warning on “Amnesty” Program, *supra* note 3.

120. Dean, *supra* note 104 (quoting Jason Schultz, Electronic Frontier Foundation staff attorney).

121. Matt Hines, *RIAA Drops Amnesty Program*, CNET NEWS.COM (Apr. 20, 2004), at [http://news.com.com/2102-1027\\_3-5195301.html?tag=st.util.print](http://news.com.com/2102-1027_3-5195301.html?tag=st.util.print). *See generally* Complaint for Injunctive and Declaratory Relief Against Fraudulent Business Practices and Demand for Jury Trial, Parke v. Recording Indus. Ass’n of Am., Inc., (filed by Eric Parke, as a representative of The General Public of the State of California, seeking injunctive and declaratory relief under the Business and Professions Code § 17200 that the amnesty program offered by the RIAA is unlawful, unfair and deceptive).

122. *Id.*; *see also* RIAA Information Page provided by Law Offices of Charles Lee Mudd Jr., at <http://www.muddlawoffices.com/laws/RIAA/RIAA.htm> (last visited Oct. 28, 2004).

123. Hines, *supra* note 121.

124. *Id.*

ness about the illegality of unauthorized copying and distribution of music files over peer-to-peer computing has dramatically increased since the inception of the program, the RIAA has concluded that the program is no longer necessary or appropriate.”<sup>125</sup>

#### V. FLAWS IN THE RIAA’S LEGAL STRATEGY: EXAMPLES OF MISTAKE, MISUSE, AND WRONG IDENTITY PRIOR TO THE APPELLATE COURT DECISION IN *VERIZON*

Along with numerous suits recently filed, many examples of mistakes, misuse, and wrong identity issues on the part of the RIAA also arose. Following are a few examples which occurred prior to the appellate court decision in *Verizon*. If there is a circuit split, it is inevitable that stories similar to, or worse than these, will continue to arise.

##### A. The Twelve-Year-Old Honor Student

Brianna LaHara, a twelve-year-old honor student, was one of the first people to settle with the RIAA after being named as a defendant in the RIAA’s first round of lawsuits.<sup>126</sup> Through the assistance of a non-profit group,<sup>127</sup> her mother was able to pay \$2,000 to settle the lawsuit, along with an apology and an admission that her daughter violated U.S. copyright laws.<sup>128</sup>

While \$2,000 may seem like a large amount of money, the penalty was actually rather low considering it could have been upward of \$150,000 per pirated song.<sup>129</sup> The chairman and chief executive officer of the RIAA stated that they were “trying to send a strong message that you are not anonymous when you participate in peer-to-peer file sharing and that the illegal distribution of copyrighted music has consequences.”<sup>130</sup>

How twelve-year-old Brianna came to be named in the subpoena remains a mystery. A spokesman for the RIAA claimed they have no personal information on the recipients of the subpoenas.<sup>131</sup> Typically,

---

125. *Id.*

126. *Downloading Girls Escapes Lawsuit*, CBSNEWS.COM (Sept. 9, 2003), at <http://www.cbsnews.com/stories/2003/08/28/tech/main570507.shtml>.

127. The group, P2P United, pledged to pay the settlement fees in Brianna’s case. Mello, *supra* note 1.

128. *Downloading Girls Escapes Lawsuit*, *supra* note 126.

129. Mello, *supra* note 1.

130. *Id.*

131. Lorena Mongelli, *Music Pirate*, N.Y. POST (Sept. 9, 2003), <http://www.nypost.com/cgi-bin/printfriendly.pl>.

the person named as the defendant is the person who pays for the Internet account, but that is not usually a child.<sup>132</sup> Additionally, the family was very confused about the suit as they were under the impression they were paying for a legitimate file trading service and, therefore, not breaking copyright law because the family had registered for a three-month service package with KaZaA and paid a \$29.99 service fee.<sup>133</sup>

While this looks like a valid lawsuit, this could prove to be “a potential minefield for the music industry from a public relations standpoint.”<sup>134</sup> No one likes to see a twelve-year-old girl sued for something that she does not understand. One lawyer for Verizon Communications used this suit as leverage at a Senate hearing when he stated that “lawyers had resorted to a ‘campaign against 12-year-old girls’ rather than trying to help consumers turn to legal sources for songs online.”<sup>135</sup> Senator Dick Durbin also spoke of Brianna’s case during a Senate Judiciary hearing when he asked the RIAA president, “Are you headed to junior high schools to round up the usual suspects?”<sup>136</sup>

#### B. The Sixty-Six-Year-Old Sculptor and Retired School Teacher

Sarah Ward, a sixty-six-year-old sculptor and retired school teacher, was shocked when she received notice that she was being sued for music piracy.<sup>137</sup> Ms. Ward was even more shocked when she realized she was being sued for using the P2P file sharing network KaZaA because she owns an Apple Macintosh computer that is not compatible with KaZaA software.<sup>138</sup> Further, she was accused of sharing hardcore rap songs, such as “I’m a Thug” by rapper Trick Daddy,<sup>139</sup> even though Ms. Ward says her musical tastes lean towards Celtic and folk music.<sup>140</sup> Ms. Ward explained that as “a very much

---

132. *Downloading Girls Escapes Lawsuit*, *supra* note 126.

133. Mongelli, *supra* note 131.

134. *Downloading Girls Escapes Lawsuit*, *supra* note 126.

135. *Id.* (quoting William Barr, Verizon Communications attorney).

136. *Id.* (quoting Sen. Durbin, Democrat from Illinois).

137. John Schwartz, *She Says She’s No Music Pirate. No Snoop Fan, Either*, *NEW YORK TIMES*, Sept. 25, 2003, at C1, available at <http://www.nytimes.com/2003/09/25/business/media>.

138. Chris Gaither, *Recording Industry Withdraws Suit Mistaken Identity Raises Questions on Legal Strategy*, *BOSTON GLOBE*, Sept. 24, 2003, at C1, available at <http://www.boston.com/business/articles/2003/09/24>.

139. *Id.*

140. Schwartz, *supra* note 137.

dyslexic person who has not actually engaged using the computer as a tool yet," she was extremely perplexed by the allegations.<sup>141</sup>

Ms. Ward's counsel demanded that the RIAA dismiss the case with prejudice, barring any future lawsuit against her for piracy, and also asked for an apology to his client.<sup>142</sup> The case was dropped, but not with prejudice, and the counsel for the plaintiffs<sup>143</sup> stated that they "reserve the right to refile the complaint . . . if and when circumstances warrant."<sup>144</sup>

There is still confusion as to how the alleged misidentification of Ms. Ward occurred. There are two possibilities: either the ISP, after being served with a section (h) subpoena, matched the named IP address with the incorrect customer; or the RIAA requested the information for the wrong IP address due to a wrong or transposed number.<sup>145</sup> However, Ms. Ward's ISP confirmed, "that the company had investigated the case and that it gave the right name associated with the . . . I.P. number, that the industry lawyers demanded."<sup>146</sup>

These possible mistakes by the RIAA are likely to cast doubt on their efforts and may weaken their cases, if and when they go to trial.<sup>147</sup> A professor at Harvard Law School explained, "the record companies may find it tough to prevail if their lawsuits go to court. Their legal strategy assumes that most defendants will settle rather than fight, and the lawsuits are so damaging to their public image that they cannot afford protracted legal battles with alleged file-swappers."<sup>148</sup>

### C. The Self-Employed Businessman

Ross Plank, a self-employed businessman, has been under a lot of stress since he realized that he is now the defendant in a copyright lawsuit stemming from an RIAA subpoena.<sup>149</sup> While he did receive a

---

141. *Id.*

142. Sarah Ward's counsel was Jeffrey Beeler. Gaither, *supra* note 138.

143. The plaintiffs included Sony Music, BMG, Virgin, Interscope, Atlantic, Warner Brothers, and Arista. *Id.*

144. *Id.*

145. *Id.*

146. Schwartz, *supra* note 137.

147. Gaither, *supra* note 138.

148. *Id.* (quoting Jonathan Zittrain, Associate Professor of Internet Law at Harvard Law School).

149. Press Release, Electronic Frontier Foundation, Electronic Frontier Foundation Defends Alleged Filesharer (Oct. 14, 2003), at [www.eff.org/IP/P2P/20031014\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20031014_eff_pr.php). See generally Complaint for Copyright Infringement at 2-3, *Fanovisa, Inc. v. Ross Plank*, (No. CV03-6371 DT (FMOx)) (complaint filed by Fanovisa, BMG Music and Warner Bros.

notice from his ISP that his information had been requested, he quickly discarded it due to the fact that he did not use KaZaA, the P2P network that was named in the letter, and also did not recognize the song titles.<sup>150</sup> In fact, the lawsuit accused him of trading hundreds of Latin songs, yet, Ross Plank does not speak Spanish and does not listen to Latin music.<sup>151</sup> Most surprising and detrimental to RIAA's suit is the fact that KaZaA was not even installed on his computer when the investigation occurred.<sup>152</sup>

Plank, who is a website consultant and works at home, is very concerned about how this conflict with the RIAA will affect his business.<sup>153</sup> He stated, "I shouldn't have to feel my business and future are at risk because the RIAA has somehow linked my name to a set of Latin songs."<sup>154</sup> Individuals should not have to fear that they are financially vulnerable because the RIAA's research is not thorough or effective.

The case has been taken over by the EFF whose position is that "[i]t's not fair to hold people like Mr. Plank as collateral damage in the RIAA dragnet."<sup>155</sup> The EFF is suggesting that the RIAA dismiss the complaint, otherwise they are interested in discovering how this misidentification occurred in the first place.<sup>156</sup>

#### D. A University's Sing Song Mix Up

Spring 2003 finals at Pennsylvania State University were almost drastically interrupted when the RIAA sent a notice to the university demanding removal of infringing material the RIAA had discovered or else the machine hosting the infringing material would be disabled.<sup>157</sup> The letter was sent to the central computing office at Pennsylvania State and was then forwarded to Matt Soccio, the astronomy and astrophysics department's system administrator.<sup>158</sup> The RIAA

---

Records, Inc. alleging that Ross Plank has used, and continues to use, an online media distribution system to download, distribute, and/or make available copyrighted material(s) to others for distribution).

150. Press Release, Electronic Frontier Foundation, *Electronic Frontier Foundation Defends Alleged Filesharer* (Oct. 14, 2003), at [www.eff.org/IP/P2P/20031014\\_eff\\_pr.php](http://www.eff.org/IP/P2P/20031014_eff_pr.php).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* (quoting Wendy Seltzer, staff attorney with Electronic Frontier Foundation).

156. *Id.*

157. Declan McCaullagh, *RIAA Apologizes for Threatening Letter*, CNET NEWS.COM (May 12, 2003), at [http://news.com.com/2100-1025\\_3-1001095.html](http://news.com.com/2100-1025_3-1001095.html).

158. *Id.*

claimed there had been an unlawful distribution of a song by the well-known musician Usher.<sup>159</sup> Soccio professed that he searched the server for a long time without finding any infringing material when he recognized two interesting facts: there was a professor on the faculty named Peter Usher and the department's server housed a recording of an a capella song about a Swift gamma ray satellite.<sup>160</sup> The RIAA's automated copyright crawlers had identified the combination of "Usher" and the suffix ".mp3" as suspect.<sup>161</sup> Once this was brought to the attention of the RIAA, they apologized and retracted the strongly worded letter, stating that a temporary employee had caused the mix up.<sup>162</sup> Additionally, they sent Peter Usher an Usher CD and t-shirt as a special thank you for his understanding.<sup>163</sup>

"Th[is] incident . . . shows just how easily automated programs that search for copyrighted material can be fooled, as well as how disruptive such notices can be on college campuses."<sup>164</sup> Disabling the computer system of a university the size of Pennsylvania State due to a mistake like this could have been detrimental, especially during exam time.<sup>165</sup> Soccio declared that if the network had been taken down, he would not have time to discuss the matter because many angry students and faculty members would storm into his office wanting to know when the system would be up and running.<sup>166</sup>

Due to the RIAA's mistake, Soccio said he intended to write a letter to Congress in opposition to the DMCA and planned to post it in the astronomy and astrophysics department for signatures.<sup>167</sup> He said, "I'm loath to think that our educational resources and years of valuable resources can be jeopardized just because some kid in a dorm room is downloading copyrighted material. That's not a price that society should have to pay."<sup>168</sup>

---

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

## VI. ALTERATIONS MADE TO THE RIAA LEGAL STRATEGY DUE TO THE APPELLATE COURT DECISION

After the appellate court in the *Verizon* case made its decision, the RIAA was forced to alter its tactics for suing those it believes are infringing on copyrights. While the RIAA's methods may have changed slightly, they are still pursuing numerous suits in court.

### A. RIAA Files More Lawsuits Using the "John Doe" Process

The RIAA, or the music companies that the RIAA represents, has now filed suit against several thousand Internet users claiming that they shared illegal music files online.<sup>169</sup> While the RIAA has been using the "John Doe" process,<sup>170</sup> where the private information, including identity, of the alleged infringers is not known until after a court has reviewed the case to ensure it is valid, the RIAA found another way to avoid simple civil procedure rules by grouping the defendants together into only a handful of lawsuits.<sup>171</sup>

The RIAA filed the suits in jurisdictions where the ISPs are based, including Atlanta, Georgia; Orlando, Florida; Philadelphia, Pennsylvania and Trenton, New Jersey.<sup>172</sup> These actions by the trade group created yet another issue for Internet users who find themselves at the wrong end of an infringement lawsuit; it is likely that they will be sued in a location far from where they live. Cindy Cohn of the EFF stated, "[i]t is unlikely that they have jurisdiction over these people where they sued because most ISPs have customers nationwide."<sup>173</sup> The filing of these lawsuits in locations far from the named defendants' homes is unfair; each of the claims must be evaluated on its own merit. Cohn further stated, "[i]t's clearly not appropriate to lump a bunch of people into a single lawsuit when they don't have any connection to each other. The basic legal protection that your case will be judged on its own merits should not be cast aside in the recording companies' crusade against its customers."<sup>174</sup>

---

169. Heins, *supra* note 121. *See., e.g.* Plaintiff's Complaint for Copyright Infringement at 5, *Interscope Records v. Does 1-25*, (No. 6:04-cv-197-Orl-22DAB).

170. *See also infra* Part IX.A.

171. Katie Dean, *New Flurry of RIAA Lawsuits* (Feb. 17, 2004), at <http://www.wired.com/news/digiwood/0,1412,62318,00.html>.

172. *Id.*

173. *Id.* (quoting Cindy Cohn, Electronic Frontier Foundation Legal Director).

174. *Id.*



Judge Clarence Newcomer, a federal judge in Philadelphia, agreed with the EFF.<sup>175</sup> The suit that was filed in February 2004 in federal court in Philadelphia grouped together 203 potential defendants.<sup>176</sup> Judge Newcomer authorized the subpoena of one of the named John Does, John Doe No. 1, because the RIAA had provided enough detailed evidence against that user to indicate the court had jurisdiction over that defendant; however, the judge ordered the trade group to file 202 separate suits against the remaining John Doe defendants.<sup>177</sup> For each lawsuit filed, the RIAA will have to pay a court filing fee amounting to \$150 per case.<sup>178</sup> While the RIAA has asked the Philadelphia district court to reevaluate its decision, courts in Georgia and New Jersey have granted similar subpoenas.<sup>179</sup>

## B. Settlement Agreements Prominent in Ending RIAA Lawsuits

Settlement agreements have become a common occurrence in the legal proceedings instigated by the RIAA. The group has stated that after each defendant is identified, RIAA's attorneys will contact them individually to negotiate a settlement agreement before amending the suit and transferring it to the appropriate venue.<sup>180</sup> Reported settlements average around \$3,000 per case.<sup>181</sup> However, if a defendant cannot afford the settlement agreement or negotiations fail, the RIAA is prepared to take each case to court, where the ultimate price to pay could be hundreds of thousands of dollars.<sup>182</sup>

---

175. Katie Dean, *One File Swapper, One Lawsuit* (Mar. 8, 2004), at <http://www.wired.com/news/digiwood/0,1412,62576,00.html>.

176. *Id.*; see also Complaint at 2, *BMG v. Does 1-203*, (No. 04-cv-650) (complaint filed by BMG Music alleging that 203 John Doe defendants have used, and continue to use, an online media distribution system to download, distribute, and/or make available copyrighted material(s) to others for distribution).

177. Dean, *supra* note 175; see also Order, *BMG v. Does 1-203*, (No. 04-cv-650) (order of Judge Clarence C. Newcomer requiring severance into 203 lawsuits).

178. Dean, *supra* note 175.

179. April Seipp, *RIAA Defies New Ruling* (Mar. 25, 2004), at <http://www.theeagleonline.com/news/2004/03/25/News/Riaa-Defies.New.Ruling-641193.shtml>.

180. *RIAA Targets More Downloaders*, CBSNEWS.COM (Feb. 17, 2004), at <http://www.cbsnews.com/stories/2004/04/26/entertainment/main613773.shtml>.

181. *Id.*

182. See Leslie Brooks Suzukamo, *Single Mom Overwhelmed by Recording Industry Suit* (May 26, 2004), at <http://www.siliconvalley.com/mlid/siliconvalley/8765723.htm>.

## VII. CIRCUIT SPLIT: HOW *RIAA v. CHARTER* MAKES THIS A REAL POSSIBILITY

In the fall of 2003, the RIAA served Charter Communications (Charter), a cable company that provides Internet capabilities to its subscribers, with subpoenas seeking the identifying information for more than 150 of its customers.<sup>183</sup> Charter filed its motion to quash these subpoenas in the federal district court in St. Louis, Missouri, where Charter is headquartered, in an effort to bar the RIAA from obtaining this personal information.<sup>184</sup> This made Charter the first cable Internet provider to fight back against the RIAA.<sup>185</sup>

Charter sent letters to the 150 customers to warn them that their identities were being sought by the RIAA in connection with Internet piracy and “that Charter [was] making legal objections to the [subpoena] requests.”<sup>186</sup> “We feel it’s our responsibility to exercise our legal rights to protect the legitimate interests of our customers,” a Charter spokesman stated, adding that this move is “consistent with Charter’s privacy policy.”<sup>187</sup>

Unfortunately for Charter and their customers, the motion to quash was denied by the district court.<sup>188</sup> However, this decision was made before the D.C. appellate court reversed *RIAA v. Verizon*,<sup>189</sup> the case upon which the RIAA primarily relied in *Charter*.<sup>190</sup> Subsequently, in January of 2004, Charter appealed the Missouri district court’s decision, asking for a similar outcome to the Verizon case.<sup>191</sup> The result of this appeal is still pending.

183. Stefanie Olsen, *Charter Files Suit Against RIAA*, CNET NEWS.COM (Oct. 6, 2003), at [http://news.com.com/2102-1027\\_3-5087304.html](http://news.com.com/2102-1027_3-5087304.html); see also Appellant’s Opening Brief at 5, *Recording Indus. Ass’n of Am., Inc. v. Charter Communications, Inc.*, (No. 03-3802) (8th Cir. Jan. 15, 2004).

184. Olsen, *supra* note 183. This is the same strategic move that began the Verizon and PBIS lawsuits. *Id.* See discussion *supra* Part III.A-B.

185. *Id.*

186. *Id.*

187. *Id.* (quoting Anita LaMont, Charter spokeswoman).

188. Brief of Amicus Curiae Consumer And Privacy Groups in Support of Appellant Charter Communications, Inc. at 2, *Recording Indus. Ass’n of Am. v. Charter Communications, Inc.*, No. 03-3802 (8th Cir. Jan. 23, 2004).

189. *Recording Indus. Ass’n of Am.*, 351 F.3d at 1231.

190. Brief of Amicus Curiae Consumer And Privacy Groups in Support of Appellant Charter Communications, Inc. at 2, *Recording Indus. Ass’n of Am. v. Charter Communications, Inc.*, No. 03-3802 (8th Cir. Jan. 23, 2004). RIAA v. Verizon held that “the DMCA does not authorize § 512 (h) subpoenas to conduit ISPs—such as Charter—for users allegedly engaged in infringing peer-to-peer filesharing.” *Recording Indus. Ass’n of Am.*, 351 F.3d at 1231.

191. See generally Appellant’s Opening Brief, *Recording Indus. Ass’n of Am. v. Charter Communications, Inc.*, No. 03-3802 (8th Cir. Jan. 15, 2004).

Because this case is still pending before the Eighth Circuit, there remains a good chance for a circuit split. The Legal Director for the EFF said, “[t]he RIAA wants to use the Charter case to erase the D.C. court’s Verizon decision and set back Internet users’ privacy. . . . The courts should require careful judicial consideration of facts supporting any accusations and hear the other side of the story before violating the privacy of any Internet user.”<sup>192</sup> As a result of the Supreme Court’s denial of certiorari in the *Verizon* case, and if the Eighth Circuit Court of Appeals decides that the RIAA subpoenas are legitimate under the DMCA, there will be no clear precedent as to whether or not the subpoenas are legal. The pending *Charter* case means that a favorable outcome for the RIAA remains a possibility. If *Charter* is decided in favor of the RIAA, the trade group will once again be able to legally serve subpoenas and continue to violate Internet users’ privacy rights through the legal system.

### VIII. PROPOSED RESOLUTIONS

“Online music distribution is here to stay. And although it presents a challenge to old business models, artists and copyright holders can make a living with these new technologies.”<sup>193</sup>

#### A. The “Everyone Wins” Resolution: Create a System Where On-Line Music Can be Traded and Copyright Owners Will be Paid

There are many ideas currently floating around about the best resolution to recent issues surrounding illegal file sharing and copyright violations. While there is no perfect solution, there are better options than filing lawsuits against numerous Internet users, which sometimes leave innocent or mistaken defendants in their wake. “A good solution will get artists paid, while protecting the privacy and free-speech rights of fans.”<sup>194</sup> Following are some possible viable options.

---

192. Press Release, Electronic Frontier Foundation, Music Industry Must Respect Privacy of Accused Music Sharers (Jan. 26, 2004), at [http://www.eff.org/IP/P2P/Charter/20040126\\_eff\\_pr.php](http://www.eff.org/IP/P2P/Charter/20040126_eff_pr.php).

193. *Making P2P Pay Artists*, Electronic Frontier Foundation, at <http://www.eff.org/share/compensation.php> (last visited Nov. 8, 2004).

194. Jason Schultz, *File Sharing Must be Made Legal*, Electronic Frontier Foundation (Sept. 12, 2003), at [http://www.eff.org/share/20030912\\_jason\\_salon.php](http://www.eff.org/share/20030912_jason_salon.php).

## 1. Voluntary Collective Licensing

When radio stations first started playing copyrighted songs, they faced a similar situation to what P2P sites face today. The radio station solution was voluntary collective licensing.<sup>195</sup> The basic premise of voluntary collective listening is that copyright holders “voluntarily join together and offer ‘blanket’ licenses.”<sup>196</sup> To solve the radio issue, “a ‘performing rights organization’ (PRO)<sup>197</sup> was formed, songwriters and music publishers were invited to join, and blanket licenses were given to any and all radio stations that wanted them.”<sup>198</sup> In return for the fee collected by the PROs, radio stations were legally allowed to use the copyrighted music without having to request specific permission each time.<sup>199</sup> The PROs were then given the task of dividing the revenue generated by these licensing agreements amongst the participating members.<sup>200</sup>

Something similar could be organized for file-sharing networks where the “major labels could get together and offer fair, non-discriminatory license terms for their music.”<sup>201</sup> However, this option will only be successful if “virtually all copyright owners join and forgo lawsuits in exchange for a reasonable piece of the pie.”<sup>202</sup> The fact that this option has been available all along and that “big entertainment companies have shown no interest in pursuing a voluntary ‘collective licensing’ plan”<sup>203</sup> suggests that this tool will not be employed anytime soon.

## 2. Compulsory Licensing

Compulsory licensing could be implemented to create an effective compromise between the music industry and file traders. This would entail Congress stepping in and requiring artists, songwriters, and

---

195. *Making P2P Legal*, Electronic Frontier Foundation, at <http://www.eff.org/share/legal.php> (last visited Oct. 28, 2004).

196. *Id.*

197. There are currently three major PROs: ASCAP, BMI, and SESAC. *Making P2P Legal*, *supra* note 195.

198. *Id.* The negotiation over these licensing agreements was disputed ferociously for over twenty years, and terms were finally settled by consent decrees, but fees for blanket licenses are still being litigated. See ARTHUR W. CAMPBELL, ENTERTAINMENT LAW: CASES AND MATERIALS 49-75 (2001).

199. *Making P2P Pay Artists*, *supra* note 193.

200. *Id.*

201. *Making P2P Pay Artists*, *supra* note 193.

202. *Making P2P Legal*, *supra* note 195.

203. *Id.*

copyright holders to permit file sharing in exchange for reasonable compensation.<sup>204</sup> The government would specify fees and then companies would compete to claim these fees and compensate the artists.<sup>205</sup> Companies acting as intermediaries between consumers and copyright holders could create unique and individual business plans, including charging users a flat monthly rate, a per song fee, or a per bandwidth fee.<sup>206</sup> Consumers could shop around and determine what services they preferred, while the copyright holders would be guaranteed payment for whatever vehicle the users enlist to obtain their music.

Another option would be for each Internet user to pay a little more for Internet access from the ISPs (including universities).<sup>207</sup> The ISPs, in turn, would remit part of these fees to the record labels and part of the fees to the artists themselves.<sup>208</sup> This would cut out the middleman and allow fans to engage in file sharing without having to worry about repercussions.<sup>209</sup>

Compulsory licensing has been used as a remedy in the past. It was originally used in 1909 when sheet music publishers claimed that the publication of piano readable sheets for player pianos was unlawful.<sup>210</sup> Congress, in support of the new technology, implemented a compulsory license.<sup>211</sup> In addition, this remedy was used for copyright issues that arose with cable, satellite television programming, and webcasting.<sup>212</sup>

While compulsory licensing is a creative option, it does have its difficulties. Caution must be taken when determining the details of this model and the focus must be on creating a system that ensures benefits to the artist and the file traders.<sup>213</sup> There are very aggressive and strong parties involved in this issue and a delicate balance needs to be taken into account when determining the intricacies of a “com-

---

204. Schultz, *supra* note 194.

205. *Making P2P Pay Artists*, *supra* note 193.

206. *Id.*

207. Fred von Lohmann, *New Music Rules Are Needed* (Apr. 14, 2003), at <http://www.dailypincetonian.com/archives/2003/04/14/opinion/7930.shtml>.

208. *Id.*

209. *Id.*

210. *Making P2P Legal*, *supra* note 195.

211. *Id.*

212. Schultz, *supra* note 194.

213. Miriam Rainsford, *Taxing Questions: Are Compulsory Licenses a Solution to the P2P Debate?* (Oct. 2, 2003), at <http://www.openp2p.com/lpt/a/4253>.

pulsory infrastructure.”<sup>214</sup> It would be beneficial for a commission of experts to determine the best system for Internet access to music.<sup>215</sup>

### 3. Advertisement Revenue Sharing

Internet users are familiar with the prominent advertising that pervades almost every site they visit in the form of pop up boxes and banners. Sometimes they are so clever that they do not even look like advertisements. This common phenomenon could be the answer to copyright issues for music fans.

The basic premise of advertisement revenue sharing is that fans view advertisements while listening to music or trading files on a site.<sup>216</sup> In return, “revenues [from advertising sales] are split between the site and the copyright holders.”<sup>217</sup> Consumers are advocates of this method because the advertisers, not the consumers, provide the money that is dispersed to copyright holders.<sup>218</sup> One benefit of advertisement revenue sharing is that it can be implemented with other payment methods and the file trader is only slightly affected by having to view the advertisements.<sup>219</sup> The site Internet Underground Music Archive (IUMA) has been successfully using this method since 1999.<sup>220</sup> They give an allocated percentage of artist site advertisement revenues to the artists.<sup>221</sup> The artists have the opportunity to visit the IUMA site and look at daily reports to see how much advertisement revenue they have earned.<sup>222</sup> Advertisement revenue sharing has proven to be a simple solution to a complicated problem.

### 4. P2P Subscriptions

The title of this method basically explains it all. P2P software vendors, such as Napster and KaZaA, could require users to subscribe to their sites and charge for their services.<sup>223</sup> Providers could charge a

---

214. *Id.*

215. *Id.*

216. *Making P2P Pay Artists*, *supra* note 193.

217. *Id.*

218. *Id.*

219. *Id.*

220. Press Release, Internet Underground Music Archive, IUMA To Share Advertising Revenue With All IUMA Artists On An Ongoing Basis (Nov. 15, 1999), *at* [http://www.iuma.com/About/pagePressRelease\\_5.html](http://www.iuma.com/About/pagePressRelease_5.html) (last visited Sept. 26, 2004).

221. The allocated amount is 25%. *Id.*

222. *Id.*

223. *Making P2P Pay Artists*, *supra* note 193.

monthly flat fee or a per song download fee, and then distribute these fees to the copyright holders.<sup>224</sup> This method would only be successful if licensing agreements with the studios and labels were obtained or if compulsory licensing was implemented.<sup>225</sup> This method differs from voluntary collective licensing because the copyrighted products would not be bulked together. The vendors would need to create a licensing agreement with each individual artist they wanted to make available to its users. Latest attempts at subscription services by P2P vendors, such as Apple's iTunes Music Store, have proven that consumers are willing to pay for the music they love.<sup>226</sup>

While this method looks feasible, in reality, it may be very complicated. It would be a taxing job for any P2P vendor to create individualized and separate licensing agreements with each artist. Furthermore, unless there is a standard agreement, the vendor would need to determine the amount due each artist per payment period, which potentially could become an accounting nightmare. However, the current commercial success of this method proves that it could be a valid remedy.

#### B. A University's Answer: LAMP<sup>227</sup>

Two engineering students from Massachusetts Institute of Technology (MIT)<sup>228</sup> created an innovative solution to the recent subpoenas issued to the university by the RIAA.<sup>229</sup> They created an electronic music library, LAMP, which allows students, faculty, and staff to access thousands of songs via the system and listen to those recordings throughout the campus, including student dormitory rooms and faculty offices.<sup>230</sup> LAMP is "a fully-licensed program for on-demand listening" and "provides access to 3,500 contemporary and classical CDs."<sup>231</sup>

---

224. *Id.*

225. *Id.*

226. *Id.*

227. LAMP is an acronym for Library Access to Music Project. Press Release, Massachusetts Institute of Technology, MIT Students Launch Campus-Wide Electronic Music Library (Oct. 27, 2003), at <http://lamp.mit.edu/lamp-release.txt>.

228. The system was created by students Keith Winstein, age 22, and Josh Mandel, age 21. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

The beauty of this system is that it does not violate copyright law.<sup>232</sup> The LAMP system operates on MIT's analog closed-circuit cable television system and allows listeners to hear the music but does not allow it to be downloaded or copied.<sup>233</sup> The university would obtain a blanket license,<sup>234</sup> as similarly required for radio stations, and would then be authorized to allow analog public performances of the music.<sup>235</sup> Listeners access the LAMP system by visiting the website and selecting a song or CD which then plays directly to their television or stereo.<sup>236</sup> This idea is similar to what digital music evangelists like to call the "celestial jukebox."<sup>237</sup> "[T]his is a networked device that will allow you to download any song your heart desires, anytime."<sup>238</sup> While this "celestial jukebox" is still years away, it is an exciting technological advance that music lovers are awaiting.<sup>239</sup>

The creators of the LAMP system will soon make the program freely accessible to others that are interested, especially other universities.<sup>240</sup> The estimated cost for another university to replicate the system is "about \$10,000 in off-the-shelf equipment, plus \$25,000 to buy the CD collection. The total recurring cost is about 60 cents per student per year for licenses."<sup>241</sup> This seems like a small price to pay for not having to battle the legality of invasive and forceful subpoenas.

## IX. THE SENATE TAKES ACTION

ISPs, recording labels, and Internet users are not the only ones aware of the growing privacy concerns resulting from the recent litigation between ISPs and the RIAA; the Senate is also paying attention. For example, Senator Norm Coleman from Minnesota, concerned that the DMCA, as it stands, will be abused, scheduled a hearing of the Senate Permanent Subcommittee on Investigations (PSI) in September of 2003 to address the matter.<sup>242</sup> Additionally, Senator Orrin Hatch

---

232. *Id.*

233. *Id.*

234. *See supra* Part VIII.A.1.

235. MIT Students Launch Campus-Wide Electronic Music Library, *supra* note 227.

236. *Id.*

237. Janelle Brown, *The Jukebox Manifesto* (Nov. 13, 2000), at <http://dir.salon.com/tech/feature/2000/11/13/jukebox/index.html>.

238. *Id.*

239. *Id.*

240. MIT Students Launch Campus-Wide Electronic Music Library, *supra* note 227.

241. *Id.*

242. Roy Mark, *Brownback Bill Aims to Curb DMCA Subpoena Powers* (Sept. 17, 2003), at <http://dc.internet.com/news/print.php/3078541>. *See generally* *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on*



from Utah responded to the large number of lawsuits filed by the RIAA by questioning the subpoena campaign and asking the music industry to create an alternative method for pursuing copyright infringers.<sup>243</sup> Other Senate actions include the introduction of the Consumers, Schools, and Libraries Digital Rights Management Awareness Act<sup>244</sup> and the Protecting Intellectual Rights Against Theft and Expropriation Act.<sup>245</sup>

#### A. Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003

Senator Sam Brownback from Kansas has introduced a bill that many think could be the answer to Internet privacy problems.<sup>246</sup> The Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003 (the Act) was introduced in response to the legal fights between ISPs and the music industry.<sup>247</sup> The Act would prevent copyright holders from using the DMCA to force ISPs to reveal the private names and information of their subscribers without first filing a John Doe lawsuit.<sup>248</sup>

In a John Doe lawsuit, a copyright holder files a complaint naming the defendant as "John Doe."<sup>249</sup> The ISP then contacts "John Doe" and informs him or her that his or her personal information is being requested per subpoena and if he or she does not respond, the ISP will release the information.<sup>250</sup> This shifts the responsibility to the defendant to enlist counsel and bring a motion to quash the subpoena.<sup>251</sup> In a preliminary hearing, the court then analyzes whether it is necessary to release the identification of the alleged infringer.<sup>252</sup> If the court de-

---

*the Entertainment Industry Before the Permanent Subcomm. on Investigations*, 108th Cong. (2003).

243. Scarlet Pruitt, *New Bill Challenges RIAA's Subpoena Campaign* (Sept. 17, 2003), at <http://www.macworld.com/news/2003/09/17/subpoenabill/index.php>.

244. Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong., available at <http://thomas.loc.gov/cgi-bin/query/F?c108:l:/temp/~c108PcR02e:e0>: (introduced in the Senate Sept. 16, 2003).

245. Protecting Intellectual Rights Against Theft and Expropriation Act of 2004, S. 2237, 108th Cong., available at <http://thomas.loc.gov/cgi-bin/query/D?c108:4:/temp/~c108o3GDkZ::>: (passed by the Senate June 25, 2004).

246. See S. 1621.

247. *Id.*

248. Katie Dean, *Senator Takes a Swing at RIAA* (Sept. 17, 2003), at <http://www.wired.com/news/print/0,1294,60461,00.html>.

249. Telephone Interview with Wendy Seltzer, *supra* note 17.

250. *Id.*

251. *Id.*

252. *Id.*

termines that there is no case, the identification of “John Doe” is never revealed.<sup>253</sup> Conversely, if the court determines that there is a valid copyright infringement challenge against the defendant, then the identifying information is revealed and the action proceeds in a typical manner.<sup>254</sup>

When introducing the Act, Senator Brownback explained that the Act “will provide immediate privacy protections to Internet subscribers by forcing their accusers to appear publicly in a court of law, where those with illicit intentions will not tread, and provides the accused with due process required to properly defend themselves.”<sup>255</sup> The Senator argued that the DMCA, while answering a need to protect copyrights in a new digital age, is too broad, allowing copyright owners, or anyone posing to be a copyright owner, to obtain the personal information of any Internet user that they suspect of violating a copyright.<sup>256</sup> The Senator seemed most concerned with the abuse of section 512(h) of the DMCA by pedophiles and stalkers.<sup>257</sup>

Many ISPs and non-profit groups support this Act. An attorney with the EFF said, “[i]t reaffirms Internet users’ rights to privacy and anonymity and it reaffirms that we preserve traditional fair-use rights as we move to the online environment.”<sup>258</sup>

Although this Act may have lost its timeliness after the appellate decision in *Verizon*, it remains pertinent given the potential circuit split in the Eighth Circuit Court of Appeals. Furthermore, it offers a fair and equitable process to protect copyright holders’ interests as well as Internet users’ privacy rights.

## B. The PIRATE Act

The United States Department of Justice may soon be involved in the online piracy battles. The Protecting Intellectual Rights Against Theft and Expropriation Act, better known as the PIRATE Act, was passed by the Senate on June 25, 2004 and referred to the House Committee.<sup>259</sup> The PIRATE Act essentially allows federal prosecutors to file civil lawsuits against suspected copyright infringers that could

---

253. *Id.*

254. *Id.*

255. Dean, *supra* note 248.

256. Sam Brownback, *Who Will Police the Pirate-Hunters?*, WALL ST. J., Oct. 7, 2003, at A20, available at [http://eff.org/share/20031007\\_wsj\\_piratehunters.pdf](http://eff.org/share/20031007_wsj_piratehunters.pdf).

257. *See id.*; see also Statement of Sen. Brownback, *supra* note 10.

258. Dean, *supra* note 248.

259. *See* S. 2237, 108th Cong. (2004), <http://thomas.loc.gov/cgi-bin/query/D?c108:4:/temp/~c108o3GDKZ::>

result in penalties of tens or even hundreds of thousands of dollars.<sup>260</sup> There is great fear among copyright lawyers and lobbyists for peer-to-peer firms that the Justice Department will be even more ambitious in their fight against online piracy than the RIAA has been.<sup>261</sup>

Senator Orrin Hatch, a Republican from Utah, has been an influential proponent of this act stating that, “[t]ens of thousands of continuing civil enforcement actions might be needed to generate the necessary deterrence.”<sup>262</sup> Senator Hatch and other proponents favor the actions of the RIAA and agree that “dramatic action is necessary to prevent file-swapping networks from continuing to blossom in popularity.”<sup>263</sup>

Those opposing the PIRATE Act were surprised at the speed at which it was introduced and passed.<sup>264</sup> It was introduced on March 25, 2004 and passed on June 25, 2004, just three months later.<sup>265</sup> This quick passage has been criticized as “an attempt to move it in a stealthy manner.”<sup>266</sup> Furthermore, foes of the PIRATE Act attack it for using taxpayer money to pay for the RIAA and other copyright holders’ lawsuits.<sup>267</sup>

## X. CONCLUSION

Downloading music from the Internet is a technological innovation that will not go away. While it is never acceptable to download music illegally, instead of suing and fighting in court to stop downloading, the RIAA needs to embrace this new technology and work towards a solution where music can be legally downloaded. Most music consumers, if given the option, will obtain music online through legal means. However, there are currently very few ways to do so.

The RIAA has resisted discussing remedies to the important issue of balancing the need to protect copyright holders from piracy with the privacy rights of Internet users. The RIAA prefers to fight its battles in the courtroom where it believes it has the upper hand, by utiliz-

---

260. Declan McCullagh, “Pirate Act” Raises Civil Rights Concerns (May 26, 2004), at [http://news.com.com/2102-1027\\_3-5220480.html?tag=st.util.print](http://news.com.com/2102-1027_3-5220480.html?tag=st.util.print).

261. *Id.*

262. *Id.* (quoting Sen. Hatch, Republican from Utah).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* (quoting Philip Corwin, lobbyist for Sharman Networks, operator of the KaZaA network).

267. *Id.*

ing scarce government resources and subjecting people to the emotional and financial distress of a lawsuit when the RIAA may have mistakenly identified the wrong perpetrator. Unfortunately, the RIAA is setting the tone for other copyright holders who are eagerly following in their footsteps. The RIAA has made clear that if you want someone's private information, just try to force it out of the ISP. There is no need to do research or follow due process; in fact, you do not even need to have a legitimate claim. The RIAA is clearing the way to arm all requestors of private information with a dangerous weapon. While the appellate court decision in the *Verizon* case was a win for Internet users' privacy rights, there is no guarantee it will remain that way. If a circuit split results from *Charter*, or a similar suit in another circuit, then Internet users' privacy will again be uncertain. The best solution is to implement compulsory licensing in conjunction with Senator Brownback's Consumers, Schools, and Libraries Digital Rights Management Awareness Act.

Past experience has proven that compulsory licensing is a great tool. While it is not an easy solution to implement, if the time is taken to ensure that the method's infrastructure is not taken advantage of, it has the ability to satisfy the concerns of all parties involved. If a panel of experts is assembled to discuss the issues and concerns of both sides, including advocates for copyright holders, advocates for privacy rights, and neutral parties familiar with the inner workings of compulsory licensing, then a balanced agreement could be reached with copyright holders and Internet users as winners. Congress plays an integral role in compulsory licensing, and the recent activity in the Senate shows that congressional representatives know there is a problem and they are interested in working towards a solution. With this recognition, Congress must acknowledge compulsory licensing as a valid tool used in the past to satisfy the concerns of diverse parties, and that it is the best solution for protecting copyright holders and the privacy rights of Internet users.

Compulsory licensing would be most efficient if coupled with Senator Brownback's Consumers, Schools, and Libraries Digital Rights Management Awareness Act. This Act focuses primarily on protecting the privacy rights of individual Internet users and preventing abuse of the DMCA. Copyright holders are not barred from suing copyright infringers, but they are forced to file a lawsuit and have a judge determine if there is a legitimate claim before private information is handed over. This Act protects privacy rights while allowing copyright holders to pursue accused infringers in a court of law. This Act will impede the mistakes, misuses, and abuses of section 512(h)

of the DMCA. It protects Internet users from stalkers, pedophiles, and blackmailers.

When these two methods are used together, innocent Internet users will not have to fear an attack by copyright holders or individuals posing as copyright holders. Also, fair and equitable methods for file trading will be implemented. Technology is not going to stop developing, so instead of fighting it tooth and nail, it is time that the RIAA and other copyright holders acknowledge and embrace the way music is being enjoyed in our developing society and work so that all can reap the benefits from it.

*Jordana Boag\**

---

\* J.D. Candidate, California Western School of Law, 2005; B.S., University of Colorado at Boulder, 2000. I would like to thank Professor Campbell for his time and guidance, the Electronic Frontier Foundation for its resources, Wendy Seltzer of the EFF for her assistance, and to Jake, my Mum, my Dad, and Duke for their endless love and support.