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Telecommunications Law Update

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D.C. Circuit Invalidates RIAA Subpoenas

On December 19, 2003, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the music recording industry cannot use the expedited subpoena provision of the Digital Millennium Copyright Act ("DMCA") to force Internet service providers ("ISPs") to disclose the identities of subscribers suspected of illegally downloading and distributing copyrighted music. *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, Nos. 03-7015 & 03-7053 (D.C. Cir. Dec. 19, 2003). The ruling is the first federal appellate decision to address this issue. It represents the latest chapter in, and a setback for, the widely publicized anti-infringement efforts of the Recording Industry Association of America ("RIAA").

Since the late 1990s, individuals have exchanged copyrighted music — in the form of digital MP3 files — over the Internet. The activity often is referred to as "file swapping." Originally, file swapping was facilitated by Napster, a centralized service that identified MP3 files that were available to be downloaded from individuals' personal computers. After the recording industry obtained an injunction against Napster, file swappers began to use peer-to-peer ("P2P") file sharing software to search for and download copyrighted MP3 files from each other's computers. This requires no centralized service. File sharing that relies on this software occurs anonymously: While an individual's directory of MP3 files is open to the public, his or her identity is not, except for an Internet ID assigned by that person's ISP.

In order to identify the individuals suspected of making copyrighted music available over the Internet through P2P file sharing, in July 2002 the RIAA — an industry trade association authorized to enforce the copyrights of its members — began to subpoena ISPs to disclose the actual identities associated with their customers' Internet ID's. Although a party seeking a subpoena ordinarily must present such a request to a judge, the RIAA relied on a provision of the DMCA that permits a copyright owner to bypass that procedure and instead to "request the clerk of any United States district court to issue a subpoena to [an ISP] for identification of an alleged infringer." 17 U.S.C. § 512(h)(1). The RIAA obtained hundreds of subpoenas through this expedited process, and many ISPs complied with them by disclosing the names of their subscribers. The RIAA ultimately sued 382 of these individuals and settled with hundreds more.

The case before the D.C. Circuit arose when Verizon's online division refused to comply with two subpoenas issued to it pursuant to the DMCA. In challenging the subpoenas, Verizon argued that the DMCA's expedited subpoena provision does not apply to an ISP that serves merely as a conduit for the exchange of copyrighted material and, as with P2P file sharing, stores no copyrighted material on its own servers. Verizon also argued that the subpoena provision itself is unconstitutional, for two reasons: It authorizes a federal court (through the clerk of court) to issue a binding subpoena in the absence of a case or controversy in violation of Article III, and it violates the First Amendment rights of users of the Internet. The district court rejected all of these arguments and ordered Verizon to comply with the subpoenas.

The D.C. Circuit reversed the district court and held that the DMCA's expedited subpoena provision applies only to ISPs that store copyrighted material on their own servers, and not to those engaged solely in transmitting such material on behalf of others. The court based its conclusion on the text, structure, and legislative history of this specific section of the statute, and expressly declined to address its constitutionality. The court noted that, in order to be valid under the DMCA, a subpoena must contain "a copy of a notification" to the ISP of claimed infringement, which in turn requires, among other things, identification of the allegedly infringing material "that is to be removed or access to which is to be disabled." 17 U.S.C. § 512(c)(3)(A)(iii). The court observed that infringing material obtained or distributed via P2P file sharing resides in the individual user's computer rather than on the ISP's servers, and that the ISP can therefore neither "remove" nor "disable" access to that material. Because the RIAA's subpoenas to Verizon did not identify any material that Verizon could remove or to which it could disable access, the court concluded that the subpoenas were invalid under the plain terms of the DMCA.

The D.C. Circuit's ruling reveals the DMCA as another example of technology outpacing the law. The court determined that the DMCA's legislative history "betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works" rather than obtain such material from a centralized source such as an ISP. As the district court had noted, P2P file sharing was "not even a glimmer in anyone's eye when the DMCA was enacted" in 1998. The D.C. Circuit concluded that the DMCA was not designed to account for the possibility that technology would evolve to permit this capability, noting that Congress did not "draft the DMCA broadly enough to reach the new technology when it came along."

In the short term, and pending further review by the D.C. Circuit *en banc* or the Supreme Court, the D.C. Circuit's decision will effectively preclude use of the DMCA to obtain subpoenas seeking the identities of users of P2P file sharing software and offers a reprieve for those individuals whose names have not yet been disclosed in response to previously issued subpoenas. This result will likely affect not only the recording industry but also the film and software industries, for which P2P file sharing is an issue as well.

While the D.C. Circuit's decision complicates the anti-infringement efforts of all of these industries, it is not necessarily fatal to them. The court's ruling need not disturb pending lawsuits against file swappers whose names have already been disclosed by their ISPs. In addition, the RIAA or any other copyright owner can still file suit against unknown infringers and, if the applicable requirements are met, obtain a subpoena against an ISP to identify them. Further, because the D.C. Circuit did not invalidate the DMCA's subpoena provision and instead only limited the circumstances under which it can be used, subpoenas may still be obtainable against ISPs that store copyrighted material on websites hosted on their servers or that host information-locating tools. Finally, there remains the possibility that Congress will either amend the DMCA or enact new legislation authorizing the type of subpoenas that the D.C. Circuit addressed. Indeed, the court noted that, even before it issued its decision, several congressional

subcommittees had begun to consider new means for dealing with the threat to copyrights posed by P2P file sharing arrangements. These legislative efforts will likely accelerate in the wake of the D.C. Circuit's ruling.

In any event, the D.C. Circuit's ruling will not be the end of the recording industry's anti-piracy efforts or of the debate surrounding them. As the court noted, the "stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture." Therefore, while ISPs will not be required to comply with expedited subpoenas in the immediate future, both Congress and copyright owners are likely to devise alternative strategies for limiting copyright infringement that occurs via P2P file sharing.

If you have questions or would like further information, please contact:

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