



August 11, 2003

Mr. Cary Sherman
President
Recording Industry Association of America
1330 Connecticut Avenue, NW
Washington, D.C. 20036

Dear Mr. Sherman:

The announcement by the Recording Industry Association of America (RIAA) that it intends to seek thousands of subpoenas to obtain personal information about individuals who allegedly have infringed its members' copyrights has generated considerable concern not only among consumers but also Internet companies that are likely to become involved in the dispute.¹ As Senator Norm Coleman (R-MN) indicated in his letter to you dated July 31, 2003, the RIAA's plans have already impacted a diverse cross-section of consumers and could cause injury and harm to people who "may have been victims of circumstance or possess a lack of knowledge of the rules relating to digital sharing of files."² The Senator also correctly pointed out that the RIAA's initiative has already overwhelmed the United States District Court in the District of Columbia, forcing the reassignment of clerks from pressing matters to simply process the paperwork.

The members of NetCoalition, which include hundreds of small Internet service providers across the country, support strong copyright protection, and we fully appreciate the need of copyright owners to protect their works from illegal use. As your association has observed, this constitutionally guaranteed right is more than an abstract component of intellectual property law; it is fundamental to artistic creativity, experimentation, and survival.³

Conversely, valid concerns about the downloading of copyrighted material should not be allowed to devolve into an attack on the legitimate uses of P2P technology. File sharing is not *per se* illegal, and there are countless incidents where the sharing of information is not only permissible; it is far more economical and feasible if done online.

¹ See, e.g., "Music Giants Target Internet Song Swappers," *Financial Times Information*, June 25, 2003.

² Letter from Senator Norm Coleman to Mr. Cary Sherman, President, RIAA, July 31, 2003.

³ Corporate Web site, Recording Industry Association of America, www.riaa.com.

Even in the music world there are artists who have permitted their works to be disseminated over P2P networks and have benefited from having access to an alternative means of distribution.

We are concerned that the RIAA's legal strategy – using a subpoena process in the Digital Millennium Copyright Act to obtain personal information about subscribers of basic Internet service – may have legal and technical consequences that exceed the stated purpose of this effort. Little is known or understood about this initiative, how individuals are being targeted, what is being done with the information, what is being done to facilitate compliance with subpoena requests and pay for the resulting costs, how long this information will be kept, and how it is being protected. Moreover, the extensive public relations campaign accompanying the RIAA's legal initiative has exacerbated this confusion, especially given the announcement that the association may be seeking statutory damages of as much as \$150,000 per infringement.

The RIAA's actions also are being viewed through the lens of its well-financed lobbying activities, including support for legislation that would have allowed association members to deny Internet access to personal computers without notice. There are understandable fears among many in the Internet community that the real purpose of this legal campaign is to achieve in court what the association has not yet been able to accomplish in Congress – to make Internet companies legally responsible for the conduct of individuals who use their systems, forcing these companies to become not only the police of the Internet but also permanent and constant watchdogs of the substance of all email traffic, instant messaging, and file sharing. Obviously, such a result would be an anathema to Internet companies and the millions of Americans who use this medium on a daily basis to engage in countless legitimate activities impossible in the off-line world.

Some of the Internet community's concerns could be addressed if the RIAA were to share more about the substance and intent of its legal campaign. Consequently, we ask that you schedule a meeting with NetCoalition and other interested parties to discuss the RIAA's legal initiative and, hopefully, provide answers to the questions set forth below. In asking these questions, when we refer to the RIAA, we of course include its member companies.

- 1) What methods does the RIAA employ to search for potential copyright infringers on P2P networks? For example, there have been reports that the RIAA itself has made available music files to develop a list of potential litigants. There have also been assertions that the association has solicited music files for the same purpose. Is the association or its members employing these kinds of investigative methods?

- 2) Some have alleged that the RIAA uses Internet companies to act like technological bounty hunters, sending out millions of "bots" to search the Internet for word combinations that suggest the presence of copyrighted material. Is the

association or its members employing these kinds of investigative methods? If not, could you please explain the technological or other activities that the RIAA is utilizing to identify potential copyright infringements?

3) Are the RIAA's investigative efforts also targeting potential file sharing that may be occurring through email, instant messaging, or other comparable technology? If so, could you please explain what techniques are being utilized?

4) Once the RIAA believes it has identified a possible infringing file through technological means, what "due diligence" does RIAA perform to ensure the accuracy of this identification? Does a person, as opposed to technology such as a software robot, verify that the contents of a traded file are in fact infringing?

5) The Digital Millennium Copyright Act requires that the copyright owner certify to the Internet service provider that it has a "good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner." Can you explain the RIAA's interpretation of "good faith belief" in this context?

6) Under the process currently employed by the RIAA, whether to issue a subpoena is not a decision made by a judge. Instead, the issuance of a subpoena is really a paperwork process, handled by judicial clerks relying entirely upon assertions made by the RIAA. Consequently, would you please explain what standard the RIAA employs to determine whether to seek a subpoena and the level of damages sought?

7) The RIAA has stated that it intends to target those who traffic in substantial numbers of files, yet in court filings in California, it is asserted that the RIAA has sought a subpoena even in instances of a single alleged infringement.⁴ Have subpoenas been issued in instances involving only a single infringement?

8) Has the RIAA reached agreements with any Internet service provider facilitating the release of personal information about an alleged infringer absent a subpoena?

9) According to court filings in California, there have already been instances where the RIAA has misidentified the Internet service provider from which it sought information concerning a particular subscriber. For example, it has been asserted that the RIAA served at least 97 subpoenas against "SBC," which is not a corporate entity but a registered trademark. These subpoenas were "served" by dropping them off with the receptionist at a Washington, D.C. office of SBC Telecommunications Inc., which is not a service provider as that term is defined

⁴ *Pacific Bell Internet Services v. RIAA*, Complaint for Declaratory Relief, United States District Court Northern California, July 30, 2003, paragraph 30.

under the DMCA.⁵ What steps is the RIAA taking to ensure the accuracy of the information contained in a subpoena prior to requesting one?

10) Under the Federal Rules of Civil Procedure, rules of venue normally require a subpoena to be issued from the court where the subpoenaed party resides. As you know, Congress has made occasional exceptions to this requirement where it believes issues of vital national interest, such as combating terrorism, are involved. For example, the USA Patriot Act allows a federal court to issue a "roving subpoena," allowing a subpoena to be enforced in different jurisdictions. Does the RIAA believe that it, too, has "roving subpoena" authority, and can seek a subpoena in one federal court (*e.g.*, the federal district court for the District of Columbia), which can be served no matter where a service provider is actually located?

11) To date, how many subpoenas has the RIAA requested from the clerk of the District Court of the District of Columbia under the Digital Millennium Copyright Act? Could you please provide a breakdown of that number by Internet service provider? How many of these requests have been rejected by the clerk and for what reasons? In addition, how many of these subpoenas have had to be retracted because the alleged offender was not in violation of any copyright law?

12) Once the RIAA receives the identity and other personal information about an alleged infringer from the Internet service provider, what criteria does the RIAA employ to determine whether to file a copyright infringement suit? Is consideration given to whether the alleged infringer is a minor?

13) More and more, individuals are accessing the Internet through wireless technologies and other access points that can be shared by more than one person, sometimes with permission and sometimes not. This is also true of federal and corporate institutions, many of which do not keep permanent records of who is using the system. For example, anyone entering the Patent and Trademark Office can access the Internet through the agency's WiFi system. How does the RIAA determine whether the person being sought through a subpoena is actually the individual who engaged in the alleged infringement?

14) Does the RIAA believe that ISPs are legally required to reconfigure the operation of their networks, particularly WiFi networks and other networks using temporary or "dynamic" Internet Protocol addresses, to facilitate the identification of alleged infringers using such networks?

⁵ *Id.* at paragraph 34.

15) Thus far, how many lawsuits have been filed as a result of the subpoenas? Of these, in how many cases have the alleged infringers asserted they were engaging in legal activity?

16) What steps are being taken by the RIAA to protect the personal information it receives about alleged infringers as a result of the subpoenas? What is being done with this information in instances where the RIAA ultimately decides not to sue? Is the RIAA utilizing specific precautions to protect the privacy of minors?

17) In national security and criminal matters, the federal government is required by law to reimburse Internet companies for time and effort spent in complying with subpoenas. Also, the Federal Rules of Civil Procedure provide for reasonable compensation to the person responding to the subpoena when the subpoena subjects the person to an "undue burden." Does the RIAA intend to reimburse Internet companies, especially small ones, for the resources they expend answering RIAA's subpoenas? How will the RIAA calculate those reimbursement schedules?

18) What compensatory damages will the RIAA provide to an individual whose personal information was released by the RIAA as a result of the subpoena process but was not subject to a lawsuit or were wrongfully targeted?

Your responses to these questions are of additional importance because of the precedent-setting nature of the RIAA's legal initiative. Others are already copying your strategy, and there is no guarantee that their assertions of damage are legitimate. There is a very real possibility that in the near future, Internet companies will be swamped by subpoenas from literally anyone who claims a copyright infringement, and there will be no way for the Internet company to determine which are valid. Smaller ISPs, whose limited resources are already being exhausted by legitimate law enforcement requests, simply cannot afford to underwrite legal fishing expeditions and still provide services for their subscribers.

Moreover, as recently demonstrated by the success of Apple's iTunes Music Store, with one million downloads and \$1 million in sales during its first week alone, most Americans are searching for a way to use the Internet legally to find, purchase, and enjoy recorded works. Peer-to-peer networks also serve as an economical way for "undiscovered" artists to distribute their works to a greater audience. We stand ready to work with the RIAA and other interested parties to find an equitable balance among the rights of copyright owners, the interest of Internet companies who have done nothing wrong, and the desire of millions of consumers who want to use this new medium to listen to their favorite artists. There has to be a better answer than litigation.

It is our hope that a meeting such as the one envisioned by this letter will help to address some of the concerns and confusion generated by the RIAA's initiative. While it

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is clear that there will continue to be strong differences of opinion about the appropriateness, consequences, and legal justification of the RIAA campaign, a broader common understanding of the use of the subpoena process should help all of the stakeholders in this issue better comprehend what is actually involved in this unprecedented legal initiative.

Sincerely,

Kevin S. McGuiness
Executive Director