

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA**

**In Re Subpoena to North
Carolina State University**

) **1:03-MC 139**
)
) **JANE DOE'S AMENDED**
) **MEMORANDUM IN SUPPORT**
) **OF THE MOTION TO QUASH**
) **THE RECORDING INDUSTRY**
) **OF AMERICA'S SUBPOENA**
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Background and Procedural History

In the late 1990's, individuals began to share copies of recordings of music with a program called Napster. Upon information and belief, the record companies, fearing a decrease in sales, successfully obtained an injunction against Napster's assisting others in file sharing. See A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002). Subsequently, other websites began to emerge, with a different emphasis on Person-to-Person ("P2P") file sharing; instead of having a central structure to identify the files available for download, people who enter the system can search directly into the libraries of other users. On many of these sites, the default setting is to allow a person to share another's files if both parties are on the website.

In an effort to halt further P2P file sharing, the Record Industry of America ("RIAA") attempted to hold Internet Service Providers ("ISPs") contributorily liable for their user's actions. However, the copyright owners have been unsuccessful in their actions. See Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

The RIAA has now changed its focus to stopping individual users from file sharing. The RIAA has learned the identities of many individuals based upon their IP address. Citing §512(h) of the Digital Millennium Copyright Act ("DMCA"), the RIAA has moved to compel ISPs to disclose subscribers' names, and many providers have complied with the § 512(h) subpoenas, while others have moved to quash the subpoenas

On November 10, 2003, the RIAA issued a subpoena to North Carolina State University ("N.C. State") ordering information, including the name, address, telephone number, and e-mail address, to identify the alleged infringer of copyrighted recordings N.C. State to produce the name of the user. The attachment lists five songs that were downloaded from the IP address on September 13, 2003. The subpoena requires production "on the 7th calendar day after the issuance date of Subpoena."

Argument

I. 17 U.S.C. § 512(h) Does Not Allow the issuance of a Subpoena to an ISP Acting Solely as a Conduit for Communications Between Parties

The main issue is whether § 512(h) applies to an ISP acting as a conduit for transferring data between parties. As stated above, under § 512(h) of the DMCA, a copyright owner can compel an ISP to disclose subscriber's names. In order for the district court to issue a subpoena, the copyright owner must file: a notification of claimed infringement to the designated agent of the ISP as defined by § 512(c)(3)(A), a proposed subpoena, and a sworn declaration explaining that the purpose for the subpoena is to identify the alleged infringer, and that the information received will only be used to protect the copyright owner's rights under Title 17. See 17 U.S.C. § 512(h)(2)(A)-(C).

If the copyright owner's request complies with all three requirements, then the clerk should issue a subpoena and return it to the requester for delivery to the ISP. 17 U.S.C. § 512(h)(4).

§ 512(a)-(d) outlines four safe harbors that immunize ISPs from liability for copyright infringement. § 512(a) immunizes the provider if the "transmission of the material was initiated by or at the direction of a person other than the service provider" if the transmission is sent through an automatic technical process without material selection by the provider or if a copy of the material is not maintained on the network and if the material is sent without modification of the content. In other words, if the Internet Service Provider's role in the transmission is mainly that of connecting two users, then § 512(a) applies. The second safe harbor is system caching, in which material is stored temporarily, and in which additional conditions must be met to achieve immunity. § 512(c) provides immunity for "infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." Additional conditions must also be met under § 512(c) to achieve immunity. § 512(d) provides immunity for providers that link or refer users to locations that contain infringing materials. In § 512(b)-(d), there are provisions that require the ISP to take action upon notification of infringing materials. These provisions are the "take down" notice provisions. § 512(a) does not contain that provision, because § 512(a) deals with immunity when the ISP is simply facilitating the sending of messages between two parties and is the applicable provision in this subpoena.

§ 512(h) fails to meet the required notice requirement of § 512 (c)(3)(A)(iii). As stated above, under § 512(c)(3)(A), the elements of notification must include

"identification of the material that is claimed to be infringing or to be the subject of the infringing activity and that is to be *removed or access to which is to be disabled*, and information reasonably sufficient to permit the service provider to locate the material." 17 U.S.C. § 512 (c)(3)(A)(iii). This notice requirement does not correlate with § 512(a) which does not require the removal of material by an ISP that is just acting as a transmitter of materials.

The D.C. Circuit came to this conclusion in Record Industry of America v. Verizon, No. 03-7015, 2003 U.S. App. LEXIS 25735 (D.C. Cir. Dec. 19, 2003). In that case, the RIAA issued a subpoena to Verizon compelling the names of IP addresses. Verizon moved to quash the subpoena. The District Court rejected Verizon's arguments and ordered Verizon to disclose the subscriber's names. Verizon appealed the issue and the D.C. Circuit reversed the district court's order enforcing the subpoenas. The court stated: "Verizon can not remove or disable one user's access to infringing material resident on another user's computer because Verizon does not control the content on its subscribers' computers." Id. at 15. The Court concluded that "we agree with Verizon that a § 512(h) subpoena simply cannot meet the notice requirement of 512(c)(3)(A)(iii)." Id. at 18-19.

The D.C. Circuit also addressed the legislative history of the DMCA. The Court stated that Congress did not seem to take into account the possibility of P2P sharing prior to drafting the DMCA. The Court stated "the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able to exchange files containing copyrighted works." Id. at 23. The Court further stated that the file sharing that Congress was concerned about involved "hackers" setting-up websites were they would

post stolen music for others to download. "The Congress had no reason to foresee the application of § 512(h) to P2P file sharing...nothing in the legislative history supports the issuance of a §512(h) subpoena to an ISP acting as a conduit for P2P file sharing." Id. at 24.

The facts in Record Industry of America v. Verizon are very similar to this case. There is alleged P2P music sharing that was facilitated by a website. The ISP served the same role in that it merely acted as a conduit. Additionally, the D.C. Circuit's opinion was broad in the sense that it reached all § 512(h) issued subpoenas.

II. N.C. STATE IS REQUIRED BY FEDERAL LAW NOT TO DISCLOSE STUDENT RECORDS IN RESPONSE TO SUBPOENAS UNLESS THOSE SUBPOENAS WERE LAWFULLY ISSUED

The Family Education Rights and Privacy Act ("FERPA") defines an "education record" as records, files, documents, and other materials that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C.

§1232g(a)(4)(a). Education records may not be disclosed by an educational institution under limited, specified circumstances. 20 U.S.C. §1232(g)(b)(2). The Act allows for the release "pursuant to any lawfully issued subpoena" if the student and the parent are notified in advance of the subpoena compliance. 20 U.S.C. § 1232(g)(b)(2)(B).

Thus, N.C. State must ensure that the subpoenas were lawfully issued prior to releasing student records. Because the subpoenas failed to comply with the notice requirement, N.C. State can not issue the subpoenas.

III. RIAA SUBPOENAS WERE NOT LAWFULLY ISSUED DUE TO IMPROPER VENUE

Venue is proper in the judicial district in which any defendant resides, if all the defendants reside in the same state. See 28 U.S.C. §1391. Additionally, venue is proper if it is filed in a district in which a substantial part of the claim arose. Id. Dismissal of a case may be justified if a timely objection to improper venue is made. See Polizzi v. Cowles Magazine, 345 U.S. 663, 73 S. Ct. 900; 97 L. Ed. 1331 (1953). In the case at bar, venue is improper because N.C. State is located in Raleigh, North Carolina in the Eastern District of North Carolina. The alleged action occurred on the N.C. State campus, which is also located in Raleigh. Therefore, the Eastern District of North Carolina would be the appropriate venue for filing the action.

IV. THE SUBPOENA WAS NOT LAWFULLY ISSUED BECAUSE IT DID NOT ALLOW N.C. STATE REASONABLE TIME TO PROVIDE NOTICE

The DMCA provides that "notwithstanding any other provisions of law," service providers that receive DMCA subpoenas must "expeditiously disclose" the information sought. See 17 U.S.C. § 512(h)(5). There are no requirements in the DMCA establishing time boundaries for the disclosure. Furthermore, FERPA requires that the students and/or their parents must be allowed a reasonable time to respond to a subpoena issued which will disclose education records. 20 U.S.C. § 1232(g)(b)(2)(B).

Jane Doe was notified of the disclosure on or about November 13, 2003, by Student Legal Services. The uniqueness of the legislation, as well as the situation, along with the time-frame needed for the University to consult with their counsel, requires that Jane Doe should have been provided more than a week to adequately respond. Although an Amended Motion to Quash the subpoena is being drafted over two months later, this still does not alter the initial procedural requirements for the subpoena to be issued.

Conclusion

Based upon the aforementioned reasons in the memorandum, Jane Doe requests that the Court quash the subpoena served upon it, 1:03 MC 139.

Respectfully Submitted,

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