

RIAA Subpoenas Those Who Allegedly Download Music

The Recording Industry Association of America (RIAA) continues to vigorously utilize the unique subpoena provision in the 1998 Digital Millennium Copyright Act (DMCA) to track down individuals suspected of illegally downloading music, while offering amnesty to those individuals who repent their file-swapping ways. Section 512(h) of the DMCA allows a copyright holder, or the organization representing the holder, to obtain a subpoena from a clerk of a federal district court in order to obtain the name of an alleged copyright infringer from that individual's Internet service provider (ISP) using that individual's IP address — a unique number assigned to an individual's computer which allows him or her to connect to the Internet. Issuance of a subpoena is largely based on the "good faith" representation that the seeker is requesting the information solely to investigate the suspicious downloading of copyrighted materials.

Reuters reported that those individuals who have not yet been served with a subpoena might qualify for an "amnesty program," titled the Clean Slate agreement. On September 8, RIAA announced the program to coincide with another announcement that it would be suing 261 individuals who allegedly shared copyrighted songs using peer-to-peer software, according to *Wired News*. On September 9, 12-year-old Manhattan resident Brianna LaHara settled with RIAA, agreeing to pay \$2,000, roughly \$2.00 per song she downloaded, according to the *Washingtonpost.com*. LaHara was the first of the 261 individuals to settle with RIAA. Under the Clean Slate agreement, users would protect themselves from a possible RIAA lawsuit by signing a notarized affidavit in which they promise to refrain from downloading copyrighted music. Users would also have to remove from their hard drives any downloads they currently have.

Those individuals who are already facing lawsuits by RIAA for copyright infringement would not qualify. Furthermore, Clean Slate does not protect individuals from being sued by an individual label or songwriter. This loophole prompted one individual to file a lawsuit against the RIAA for what he calls "unlawful business practices," according to *Wired News*. Eric Parke, who does not use peer-to-peer software, filed the lawsuit on behalf of the general public of the state of California the day after RIAA announced Clean State, *Wired News* reported.

RIAA's amnesty gesture comes on the heels of a government inquiry into its subpoena process and practice. As newly elected chairman of the Senate Governmental Affairs Committee, Sen. Norm Coleman (R-Minn.) marked the start of his appointment by probing the number of subpoenas issued by RIAA. Coleman submitted a written request to RIAA for details as to its criteria for tracking down and pursuing copyright infringers, expressing concern that the vigorous nature of RIAA's tactics might be, "making criminals out of 13- and 14-year-olds," according to a story by *Gannett News Service*.

Under section 512(h) of the DMCA, a subpoena may be served on behalf of the copyright holder to the suspect's ISP, requesting that the user information be released to the copyright holder's representative in order to facilitate a legal action against the alleged infringer, and that any suspect documents be removed from the user's server and his or her online access be disabled. The subpoena does not require that the user be notified that identifying information, such as name and telephone number, is being released to a third party. To date, RIAA has reportedly issued over 1,000 such subpoenas. In a response to Sen. Coleman's request, RIAA stated that it seeks the identities only of those individuals who trade a "substantial amount" of materials, and is not "targeting 'de-minimus' users," according to the *Associated Press*. RIAA did not define what a "substantial amount" would be. RIAA has faced challenges in its quest, mostly from colleges and universities that often have certain policies intact that prohibit the release of student information.

RIAA's pursuit of its agenda of tracking down copyright infringers was enhanced by its January 2003 victory against Verizon Internet Services (See *Recording Industry Association of America v. Verizon Internet Services*, 240 F. Supp. 2d 24 (D.D.C. 2003)), the first case to deal specifically with the DMCA's subpoena provision and the extent to which it is an ISP's responsibility to disclose customer information. In this case, Verizon contended that it was not obliged to disclose a customer's identity because Verizon did not store the information directly on its server, but instead only provided a means of connecting to the Internet. On Jan. 21, 2003, Judge John Bates ruled that Verizon must release the identity of the individual to the RIAA in order to facilitate further legal action. Verizon appealed the decision and requested that it not be required to release the consumer information until a decision would be reached in the appeal. The appeals court for the 9th Circuit denied Verizon's request, requiring them to turn over the identities of four consumers in the interim. Oral arguments on Verizon's appeal were held on September 16.

RIAA v. Verizon prompted many scholars and privacy advocates to express concern that the DMCA makes it too easy for an individual's identity to be obtained by a third party. The Center for Democracy and Technology released a statement following the January ruling, which amplified this concern, stating, "The court's ruling, coupled with the explosive growth of Internet usage, leaves open the possibility that a broad range of Internet users could have their identity revealed without their knowledge and without significant level process." The statement is available online at <http://www.cdt.org/copyright/030130cdt.shtml>.

The Consumer Electronics Association also issued a statement, arguing that "No American should live in fear that their ISP will be required to turn over their identity to any self-asserted copyright holder simply because someone claims you are doing something illegal." That statement is available online at http://www.ce.org/press_room/press_release_detail.asp?id=10203.

In August 2003, in *Theofel v. Farey-Jones* (U.S. App Lexis 17963, (9th Cir. 2003)), a panel of the 9th Circuit Court of Appeals found that an overbroad subpoena, not limited to the scope of on-going litigation, violated the Stored Communications Act, which protects an individual's privacy and proprietary interests. Although the subpoenas in this case were not issued under 512(h) of the DMCA, the court's rationale might be useful for future challenges to DMCA subpoenas. A subscriber could argue that an overbroad subpoena issued to that individual's ISP violated the Stored Communications Act by intruding on that individual's private communications in its use of an ISP to obtain identifying information.

The Electronic Frontier Foundation has created an online service that allows individuals to find out whether their information has been subpoenaed by RIAA. Go to <http://www.eff.org/IP/P2P/riaasubpoenas/>.

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