

'Sony v. Does':

P2P Filesharing May Involve Protected Speech



By Peter J. Pizzi

Is the sharing of copyrighted songs on peer-to-peer (P2P) networks an exercise of a citizen's First Amendment rights? The decision in *Sony Music Entertainment Inc. v. Does 1-40*, gives credence to that notion, but the decision also grants record companies the right to use subpoenas to identify those who engage anonymously in filesharing of copyrighted works. Thus, this ruling is not likely to slow down the Recording Industry Association of America (RIAA) litigation onslaught aimed at stopping the widespread distribution on the Internet of copyrighted recorded works.

Because the decision represents the first exhaustive examination of the procedure to be followed in deciding ex parte applications for identity discovery in P2P filesharing cases, it merits closer examination.

The entertainment industry has responded to the proliferation of P2P filesharing of copyrighted music and movies by filing copyright infringement lawsuits against Internet users whom it believes to have engaged in such activities.

Because users engage in P2P filesharing anonymously over the Internet, record companies first commence the suits against anonymous "John Doe" or "Jane Doe" defendants. Dozens of such suits have been filed since the fall of 2003.

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The plaintiff record companies immediately seek a court order to permit the service of a subpoena on local internet service providers (ISPs) to obtain account information for the "Doe" defendant.

Once the ISP produces "identity discovery," the RIAA amends the complaint to name the individual filesharers disclosed by the ISPs. After the defendant's identity is revealed, the individual defendant usually settles on standard RIAA terms, and a stipulation is filed dismissing the defendant from the suit.

In most of the RIAA lawsuits, the decision to grant the industry's application for "identity discovery" is made perfunctorily by judges because the application is ex parte and the issue seems free of controversy.

The *Sony* case progressed a bit differently, in large part because Public Citizen, Electronic Freedom Foundation and the American Civil Liberties Union jointly intervened in the suit.

Due to the advocacy of these amici, *Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, 71 U.S.P.Q.2d 1661 (S.D.N.Y. July 26, 2004), recognizes the notion that the First Amendment offers some protection to the Doe defendants engaging in P2P filesharing.

Before the amici submitted their Feb. 2, 2004, letter in *Sony* seeking to intervene, Southern District Judge Denny Chin had entered an order granting the plaintiffs the right to serve a subpoena upon Cablevision, the ISP used by the Doe defendants, for account information based upon the Internet Protocol (IP) information for their individual computers. The order did not require Cablevision to notify the Doe parties of the subpoena request before producing

their account information.

After intervention of the amici, the court modified the order, requiring Cablevision to provide notice to the Doe customers about the subpoena, thereby giving the customers a brief interval within which to file a motion to quash before their identity was revealed.

A lawyer for one of the defendants wrote to Cablevision before the due date for the subpoena advising that his client objected to the subpoena and was joining the earlier letter to the court from the amici objecting to issuance of the subpoena. Cablevision produced the account information to the record companies anyway, without waiting for a further order of the court, apparently because it did not consider the counsel's letter to constitute a "motion to quash."

Thus, the first issue Judge Chin confronted was an argument that the objections to the subpoena request was mooted by Cablevision's hair-trigger production of the account information. Judge Chin rejected that argument, holding that counsel's initial letter to Cablevision should have been construed as, or was the equivalent of, a motion to quash and, if the court was so inclined, it could order the plaintiffs to return the information produced by Cablevision.

The court then turned to the arguments of amici and Doe defendants' on the merits. The movants argued that the First Amendment protects the right to engage in online activity anonymously and that the "identity discovery" subpoenas seeking to "unmask" online users threaten, or at least implicate, First Amendment rights.

The RIAA countered that there is no First Amendment right to engage in copyright infringement and that any such right to

engage in anonymous online activity was waived by the Does when they chose to make their own PC available for filesharing to countless others on the Internet.

Free Speech Issues

In addressing the Does' First Amendment arguments, Judge Chin recognized the principle often cited in cases involving free speech on the Internet: that anonymous speech is a long-protected and honorable form of advocacy and dissent.

For that proposition, Judge Chin cited *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), which protected anonymous campaign literature, and *Talley v. California*, 362 U.S. 60 (1960), protecting the distribution of pamphlets without the name and address of the author.

These principles have frequently been applied to Internet speech. *Reno v. ACLU*, 521 U.S. 844 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.")

In *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp.2d 1088 (W.D. Wash 2001), for example, the court granted a motion to quash a subpoena seeking the identity of anonymous non-party ISP subscribers in a shareholder derivative suit. There, the court held that where the message involves speech by a non-party to the suit, a more rigorous showing of necessity must be established. In particular, the movant must show that: "(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source."

The court also noted, in dictum, that the best practice is for ISPs to give notice to the customer when a subpoena is received seeking disclosure of account information so that the customer can engage counsel and move to quash if he or she so chooses.

Applying principles discussed in *2TheMart* and other cases, some courts have denied motions for identity discovery where the anonymous target was a Doe defendant in the suit, and not a mere bystander as in *2TheMart*.

A particularly rigorous test was applied in *Dendrite International, Inc. v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001), where the court denied a motion for discovery to identify an anonymous online poster of a message critical of the plaintiff corporation's management because there had been an inadequate showing of harm, an element of defamation.

It is a bit anomalous to require a plaintiff to prove harm at such an early stage in a lawsuit, before any discovery as to the identity of

the defendant and the full scope of his or her activities.

Dendrite also imposed a requirement that the plaintiff attempt to give notice to the Doe that a subpoena was being sought to disclose his/her identity. In the factual scenario in that case — the posting of an anonymous message in a chat room — the court held that this notice requirement should be satisfied by posting a message about the subpoena request in the chatroom where the offending communication had first appeared.

In *Sony*, Judge Chin identified two ways in which P2P filesharing could be deemed a form of expression protected by the First Amendment. First, the act of sharing copyrighted music could be deemed a form of protest against the system of copyrights itself: "Arguably ... a file sharer is making a statement by downloading and making available to others copyrighted music without charge and without a license to do so."

Second, according to Judge Chin, there is the form of expression involved in the selection of music to download or to share with others. That selection process could be deemed a form of expression: "[T]he file sharer may be expressing himself or herself through the music selected and made available to others. Although this is not 'political' expression entitled to the 'broadest protection' of the First Amendment [citations omitted], the file sharer's speech is still entitled to 'some level of First Amendment protection.'"

He concluded "that a person who uses the Internet to download or distribute copyrighted music without permission is engaging the exercise of speech, albeit to a limited extent only."

Having determined that some element of First Amendment activity is present in the act of filesharing, Judge Chin reaffirmed his earlier order requiring Cablevision to give notice to the customer that a subpoena had been served and advising him/her of the deadline to file a motion to quash.

Because filesharing involves at least these elements of First Amendment expression, Judge Chin borrowed from earlier identity discovery cases involving anonymous postings in chatrooms to arrive at five factors to determine if the RIAA was entitled to issuance of a subpoena: (1) the complaint must satisfy the prima facie standard such as was applied in *2TheMart* and *Dendrite*, requiring the plaintiff record companies had to prove "a concrete showing of a prima facie claim of actionable harm;" (2) the discovery request must be reasonably specific; (3) there must be no alternative means to obtain the subpoenaed information; (4) there must exist a central need for the subpoenaed information to advance the claim; and (5) the plaintiff's need for the information must outweigh the party's expectation of privacy.

With respect to the first element — proof of a prima facie case of harm — Judge Chin

held that the record company plaintiffs had satisfied this element based upon sworn allegations that songs had been copied by the Doe defendants and that the plaintiffs held the copyrights to those works.

Judge Chin also resolved the other factors in favor of the RIAA. A request for account information based upon the specific dates and times when songs were downloaded satisfied the court's specificity requirement. There certainly appeared to be no other way for the RIAA to obtain the identity of the filesharing Doe defendants, satisfying the third and fourth requirements. The court also held that the Doe defendants' expectations of privacy were minimal because, among other things, as subscribers of Cablevision, each Doe defendant had entered into "Terms of Service" forms which acknowledged that Cablevision could produce account information in response to any governmental request and also prohibited use of the service for any conduct in violation of law. Based on these findings, Judge Chin granted the plaintiffs' applications for identity discovery.

Conclusion

Sony holds that filesharing is an activity protected by the First Amendment to a limited extent but such protection does not defeat an application to identify the filesharer who is alleged to have infringed upon copyrights. It remains to be seen whether the decision will adversely affect the RIAA's litigation onslaught against P2P filesharing.

Certainly, Judge Chin's decision places the RIAA's Doe cases within the rubric of *2TheMart*, *Dendrite*, and other Internet speech cases.

These decisions require that (1) notice of the subpoena request should be given to the Doe defendant by the ISP before account information is disclosed and (2) in deciding the subpoena request, jurists should look carefully at the complaint and other supporting papers to insure that the claim for relief would survive a motion to dismiss.

In the dozens of ex parte applications it has been filing this year, the RIAA usually includes an affidavit in which counsel lists the dozens of court orders for identity discovery obtained by the RIAA. It will be interesting to see whether, in future ex parte applications, the RIAA brings to the attention of other courts Judge Chin's published decision, the first exhaustive examination of the issuance of judicial subpoenas in P2P filesharing cases.

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