



Attorneys at Law

Internet Law Update

August 2004

By Cecily Anne Snyder and Patrick T. O'Regan, Jr.*

CABLEVISION SUBSCRIBER AGREEMENT ALLOWS SONY TO OBTAIN USER INFORMATION ON PEER-TO-PEER FILE SHARERS

[Sony Music Entertainment, Inc. v. Does 1-40, 2004 U.S. Dist. LEXIS 14122 (S.D.N.Y. July 27, 2004)]

Seventeen record companies, including Sony Music, sued forty Doe defendants for copyright infringement based on their activity of illegally downloading and distributing copyrighted music using peer-to-peer networks. Plaintiffs' subpoenaed a non-party Internet service provider, Cablevision, to obtain defendants' identities. Four of the defendants filed a motion to quash the subpoena on First Amendment grounds. Defendants first argued that a person who uses the Internet to download or distribute copyrighted music is exercising free speech which is protected under the First Amendment. Defendants further contend that their identities should be protected from disclosure in order to protect their right to anonymous speech. The court denied the motion to quash.

1. Anonymous Speech is Protected With Limits

As the court noted in its decision, the Supreme Court has recognized that anonymous speech is protected under the First Amendment.ⁱ In overturning an Ohio law that prohibited anonymous pamphleteering, the Supreme Court stated that "'anonymity is a shield the tyranny of the majority.'"ⁱⁱ Further, this court observed that "[c]ourts have recognized the Internet [is] a valuable forum for robust exchange and debate."ⁱⁱⁱ Notwithstanding the importance of freedom of speech and anonymous speech, the court concluded that the First Amendment does not provide absolute protection of speech and "[p]arties may not use the First Amendment to encroach upon the intellectual property rights of others."^{iv}

2. P2P File Sharing Qualifies as Speech, to a Limited Degree

*Cecily Anne Snyder is the Vice President of Legal Affairs at ConforMIS, Inc., San Mateo CA and Lexington MA. She handles a wide range of intellectual property matters, including developing market focused patent strategies. She can be reached at cecily.snyder@conforMIS.com. Patrick T. O'Regan Jr., is a principal of O'Regan & O'Regan in Falmouth MA. He works with local Cape Cod businesses handling a wide variety of both litigation and transactional matters. He can be reached at patrick@oreganlaw.com. ©2004 Cecily Anne Snyder and Patrick T. O'Regan, Jr.



Attorneys at Law

The court's began its argument with the proposition that "a person who engages in P2P file sharing is not engaging in true expression."^v However, it acknowledged that "by downloading and making available to others copyrighted music without charge with without license to do so..." the file sharer is "making a statement"^{vi} which is entitled to "'some level of First Amendment protection.'^{vii}

3. Defendants' Identities Are not Entitled to Protection Under the First Amendment

In order to determine whether the defendants' identities were entitled to protection, the court evaluated four factors. First, whether there was a "concrete showing of a prima facie claim of actionable harm."^{viii} Second "the specificity of the discovery request."^{ix} Third, the absence of alternative means of obtaining the subpoenaed information."^x Finally, whether there was "a central need for the subpoenaed information to advance the claim."^{xi} In this case, the court concluded after analysis of each of the factors, the disclosure of the defendants' identity was appropriate.

4. Defendants have no Expectation of Privacy

Finally, before denying the motion to quash, the court also evaluated defendants' expectation of privacy. The court concluded that defendants had a "minimal expectation of privacy".^{xii} The court based this conclusion on Cablevision's (the subpoenaed party) Terms of Service to which each of the defendants had agreed. Cablevision's Terms of Service specifically prohibit "the transmission or distribution of any material in violation of any applicable law or regulation... This includes without limitation, material protected by copyright, trademark, trade secret, or other intellectual property right used without proper authorization.'^{xiii} The court concluded that "defendants' First Amendment right to remain anonymous must give way to plaintiff's right to use the judicial process to pursue what appear to be meritorious copyright infringement claims."^{xiv} The court did not address whether the fact that the Terms of Service were a contract of adhesion, offered on a take it or leave it basis to subscribers without the opportunity to negotiate its terms, would effect the outcome.



Attorneys at Law

ⁱ 2004 U.S. Dist. LEXIS 13122 at *13.

ⁱⁱ *Id.* Citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

ⁱⁱⁱ 2004 U.S. Dist. LEXIS 13122 at *14.

^{iv} *Id.* At *16.

^v *Id.* At *19.

^{vi} *Id.* At *19-20.

^{vii} *Id.* At *20 citing *Verizon* 257 F.Supp.2d at 260.

^{viii} *Id.* At *21 citing *Seescandy.com*, 195 F.R.D. at 577.

^{ix} *Id.*

^x *Id.*

^{xi} *Id.*

^{xii} 2004 U.S. Dist. LEXIS 13122 at *26-27.

^{xiii} *Id.* At *27 citing Cablevision Mem. 2 which in turn cites

<http://www.optimumonline.com/index.jhtml?jsessionid=IJGQQMJ2FS4OSCQLASDFEQKBMCIMI5G?pageType=terms>

^{xiv} *Id.* At *28.