

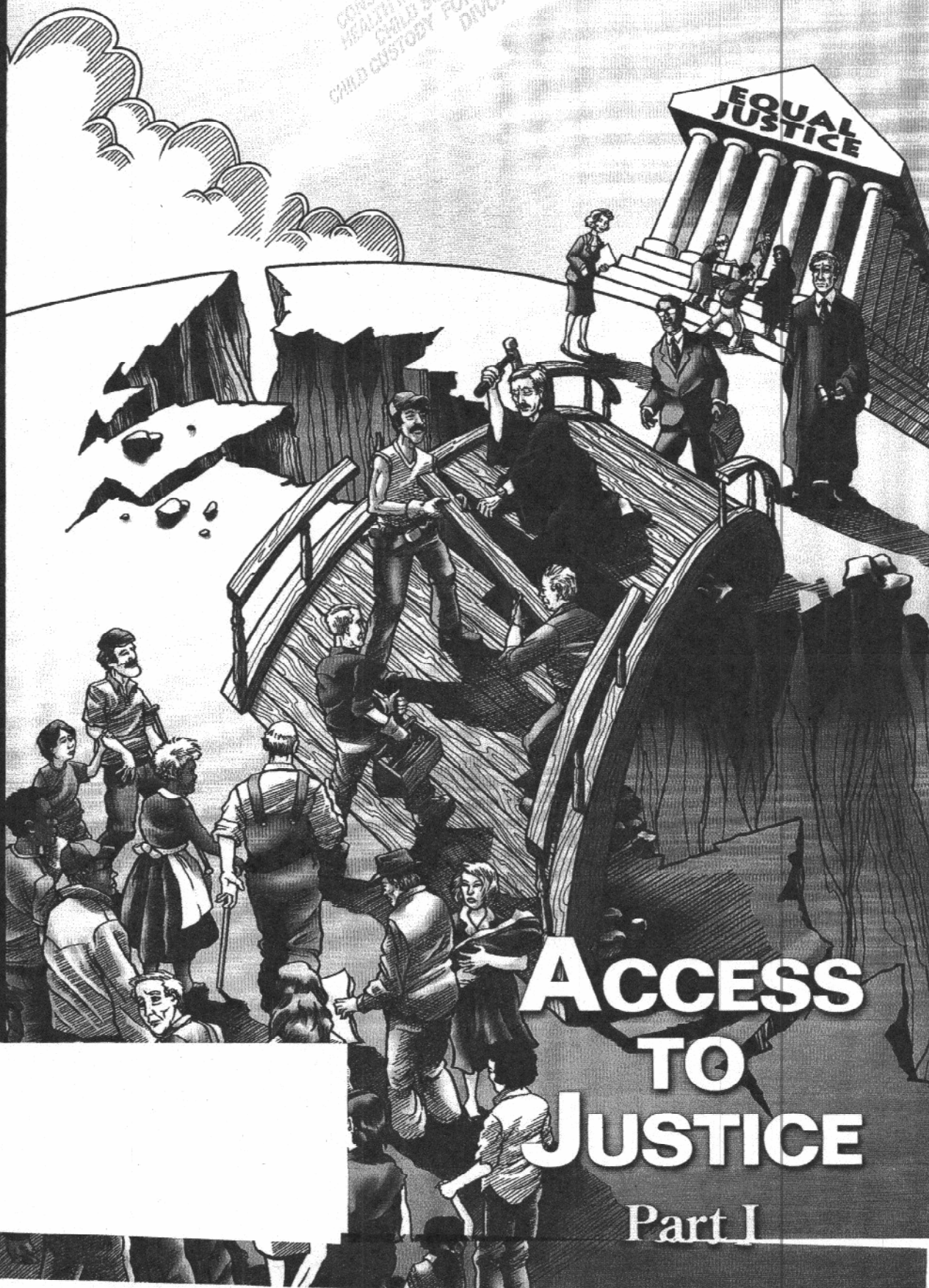
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THE JUDGES' JOURNAL

A QUARTERLY OF THE JUDICIAL DIVISION
SUMMER 2008 · VOL. 47 NO. 3 · AMERICAN BAR ASSOCIATION

ABA

EVICTED
DOMESTIC VIOLENCE
CONSUMER FRAUD BANKRUPTCY
HEALTH INSURANCE INDEMNITY
CHILD SUPPORT DISABILITY BENEFITS
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ACCESS TO JUSTICE

Part I

THE JUDGES' JOURNAL

A QUARTERLY OF THE JUDICIAL DIVISION

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INTRODUCTION

1 Judges Promote the Bar's Core Value of Access to Justice

The ABA president elect considers the calling of the legal profession and dedicates his presidential year to the issue of access to justice for all.

By H. Thomas Wells Jr.

FEATURES

5 "And Justice For All": When Will the Pledge Be Fulfilled?

A veteran of California's Court of Appeal describes the daunting task judges face when litigants lack counsel. Justice, he says, should not be a matter of charity or good luck. Ethics, history, and laws here and abroad mandate the right to counsel.

By Justice Earl Johnson Jr.

10 The Reality of Poverty: Reflections on Access to Justice

A former California Supreme Court justice and lifelong advocate for the poor detects a new vigor "to seek after justice." But still: the most serious impediment to justice is poverty. Public policy must be reinvigorated by the ideals of an earlier time.

By Justice Cruz Reynoso

14 Access to Justice in New York City

Twenty percent of New Yorkers—two million people—live in poverty. Few have access to the legal system. Legal Services NYC reports from the trenches.

By Edwina F. Martin

20 Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations

The age of the Internet heralds new access to justice challenges. Thousands of poor and working-class people are sued by the RIAA for allegedly improper downloading. Most appear pro se.

By Ray Beckerman

30 Self-Represented Litigants: Challenges and Opportunities for Access to Justice

Judges can provide innovative leadership in the courtroom and in the community on the issues raised by the ever-increasing numbers of litigants without lawyers.

By Bonnie Rose Hough and Justice Laurie D. Zelon

Large Recording Companies v. The Defenseless

Some Common Sense Solutions to the Challenges of the RIAA Litigations

By Ray Beckerman

The concern of this court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants.

—Judge S. James Otero,
Elektra Entertainment
Group Inc. v. O'Brien, 2007.¹

As every federal judge must be painfully aware by now, an estimated 30,000 ordinary people² have been sued during the past four years in U.S. district courts by the world's four largest record companies, EMI, SONY BMG, Warner Brothers Records, and Vivendi/Universal, or their affiliates. The suits have been brought for alleged infringement of sound recording



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copyrights. Although these companies are represented by a trade association, the Recording Industry Association of America (RIAA), none of the hundreds of other members of this association has participated in the litigation campaign. The large majority of the defendants have defaulted, and the default judgments against them have been in amounts that represent more than 2,000 times the actual damages sustained by the plaintiffs.³

Of those remaining, most have paid settlement amounts that exceed 1,000 times the plaintiffs' actual damages, and a great number of the settling defendants—perhaps most of them—are people who did not actually engage in file sharing, let alone copyright infringement through file sharing, and against whom no legally cognizable claim for secondary infringement could be mounted. However, they are settling because the alternative—protracted, costly federal litigation—is not possible for them.

As to the handful of defendants who have neither defaulted nor settled, most are pro se. Only a very few have had any form of legal representation. And in those instances where there has been representation, the attorneys are usually working pro bono, or on a basis closely resembling it, sometimes as a favor and sometimes even involuntarily.⁴

The courts of other countries—notably the Netherlands and Canada—are not clogged with these cases for the simple reason that they were quick to recognize the paucity of the RIAA's evidence and refused to permit the identities of Internet subscribers to be disclosed to

the record companies.⁵ The courts of the United States have not been so discriminating and have allowed a veritable flood of one-sided litigation to crowd their dockets.

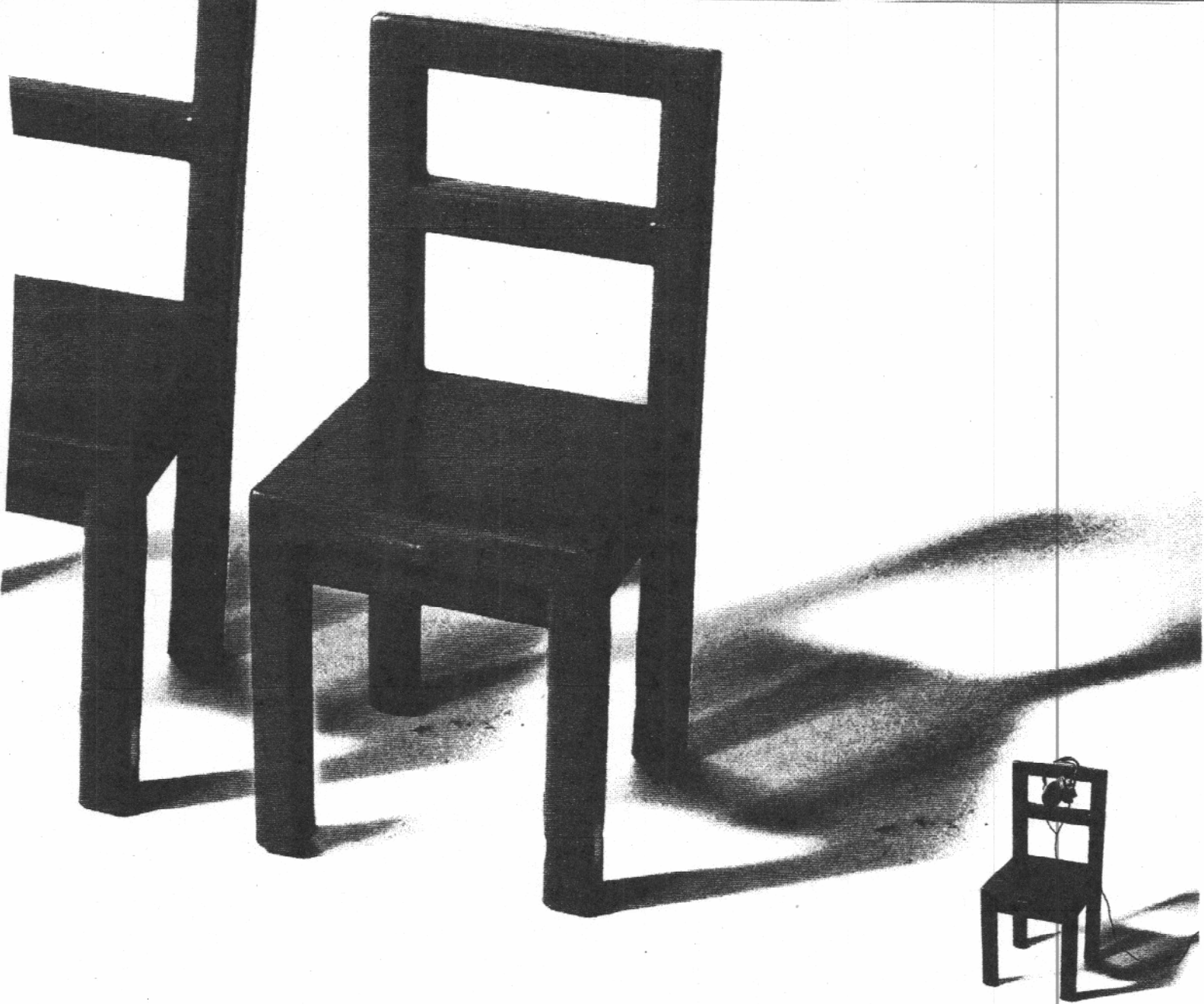
This article will attempt to remove some of the mythology regarding these cases, to make observations regarding some of the points at which the process is breaking down, and at each of those junctures, to offer one or more practical, constructive suggestions as to what the courts need to do to make the process more fair and balanced.

The Origin of a Case

There is a common misconception, actively fostered by the RIAA's public relations spokespeople, that these are "downloading" cases. Nothing could be further from the truth. The cases are brought without any proof of downloading whatsoever.

The way in which these cases come about is that an unlicensed "investigator" (through a method the RIAA has termed "automated," "proprietary," and "confidential" and that it refuses to disclose),⁶ engages in a pretexting operation in which the investigator pretends to be an ordinary user of one of the peer-to-peer file-sharing networks. When the investigator locates a group of "shared files" on his computer screen, he makes a screen shot, downloads a small number of files, and, from the data packet he retrieves, supplies the RIAA with the

Photo montage by Eimonte Colungoggin



Internet protocol (IP) address contained in the packet, together with the date and time of the screenshot.⁷

One investigative company, SafeNet (formerly known as MediaSentry), conducts all of these automated-process investigations for the RIAA. In each case, a single investigator gathers the information. According to the RIAA's court papers, it appears that a total of three investigators, not a one of whom is a licensed investigator, have collected the information upon which all 30,000 cases have been based over the past four years.

The RIAA's expert witnesses have been deposed only once so far in these cases. In that testimony,⁸ the expert witness conceded that neither his own testi-

mony and methods, nor the investigators' work product upon which he relied, met any of the *Daubert* reliability standards. And yet, the investigator's testimony and that work product have formed the basis for the 30,000—and counting—federal court litigations to date.

The expert's testimony similarly concedes that the investigators could not detect any "individual." Rather, they merely identified a computing device. And yet the RIAA lawyers have continued to sign and to file complaints and other documents stating that their investigators "detected an individual."

Since almost all of the cases are ex parte cases, default cases, pro se cases, or barely defended cases, there is rarely

an attorney, and almost never a defendant's expert, to call these oversights to the court's attention.

Armed only with an Internet Protocol (IP) address, the files the RIAA investigator himself downloaded, and a date and time of the screenshot, the plaintiffs then proceed to court to sue the person who paid for the Internet access account linked by an Internet service provider (ISP) to the IP address. The result is the filing of a lot of cases that probably would never have been brought had they been thoroughly reviewed by competent plaintiffs' counsel, or had plaintiffs' counsel asked their clients a few tough questions.

The same adversary system of justice

that works brilliantly when there are equally weighted adversaries can sometimes produce disastrous consequences where one side is not represented if the courts are not vigilant, especially where, as here, plaintiffs' attorneys have been less than mindful of their duties as officers of the court. In such an instance, it is the duty of the court to see to it that the court system is not used in an improper manner. These cases, where four multinational, multibillion-dollar corporations have joined forces to team up against ordinary individuals, represent just such an instance, and courts must pay special attention and be vigilant if they are to ensure a level playing field.

I maintain that the exact opposite has occurred. Many judges, perhaps caught off guard by this onslaught, have been lulled into a pattern of inadvertently waiving, for the plaintiffs' benefit, the normal requirements for federal litigation. As a consequence, the courts have increased, rather than decreased, the imbalances, in some cases presiding over infernos of ex parte communication with judicial personnel, ex parte orders, default judgments, and forced settlements, where defendants see no alternative—because there is no alternative—between accepting the risk of financial ruin and paying thousands of dollars in “settlement” of something they have not done.

The Two Phases of a Case: “John Doe” and “Named Defendant”

There are two distinct phases of the RIAA litigations, the “John Doe” or ex parte discovery phase and the “named defendant” phase.

John Doe. Although the IP address and the date and time of its procurement could at best yield no more than the identity of the owner of an Internet access account and could not show that any particular individual had engaged in the file sharing complained of, the RIAA proceeds on the assumption that the person who paid for the Internet access account is liable and must pay or be sued.

To compensate for this shotgun approach,⁹ the RIAA's lawyers are fond of suggesting that the person who paid for an Internet access account is responsible for any copyright infringement with which that Internet access has been associated. The only problem with this viewpoint is that the U.S. Supreme Court disagrees with it. In *MGM v. Grokster*,¹⁰ the Court adopted an “inducement rule,” holding that sec-

Many judges have been lulled into a pattern of inadvertently waiving, for plaintiff's benefit, the normal requirements for federal litigation.



ondary copyright infringement liability requires “clear expression or other affirmative steps taken to foster infringement.”

Going into the discovery or John Doe phase, the RIAA has an IP address, a date, and a time. Although it could discern, through publicly available Web sites and from the IP address alone, the state and particular region of a state for each John Doe, it disregards that information in selecting the venue of its John Doe suit. Instead, it concerns itself with neither venue nor personal jurisdiction

because it has no intention of actually pursuing its copyright infringement claim in that proceeding. The “John Doe copyright infringement” case, in other words, is a sham proceeding. In reality, it is an action for pre-action discovery, which is an action that is not provided for in the Federal Rules of Civil Procedure. So the RIAA improvised a method of its own, one that involves misleading the court.

A long line of unbroken authority makes it quite clear that the Federal Rules do not permit joinder in these cases because the claims are merely “parallel” and do not arise from common acts or transactions. This authority includes a specific joint directive from the District Court in Austin, Texas, to the RIAA plaintiffs to cease and desist from the practice. The RIAA nevertheless commences suit against a number of unrelated John Does in the venue where the ISP is located to pursue its ex parte discovery motion. After it learns the identities of the John Does, it typically dismisses the John Doe cases and brings individual suits against the named defendants (thus, incidentally, denying those defendants the potential economies of scale that the plaintiffs might seek to invoke for themselves by misjoinder in the “discovery” phase).

The John Does are never served with anything, except that after the action has been commenced, after the ex parte motion has been made, and after the ex parte motion has been *granted*, they receive a few items by mail from the ISP: a copy of a subpoena directed to the ISP and a copy of an ex parte order. They receive no summons, no complaint, no copies of the court rules, no copy of the motion papers, usually little or no time to react, and no meaningful opportunity to be heard in opposition to the motion.

The proceeding is usually hundreds or thousands of miles from the defendant's home and is over before it has begun.

Named Defendant. After getting names and addresses from the ISPs, the RIAA's next litigation step is not

to investigate but to file suit against the person identified as having paid for Internet access. Not surprisingly, many, perhaps even most, of the people sued are not the individuals who engaged in file sharing. As noted earlier, the large majority of these cases have resulted in default judgments, a plurality of them have settled, and a handful are contested, almost none meaningfully.

Because of the ex parte applications, the large number of default judgments, and the proliferation of pro se cases in which the defendants show up in court at some scheduled appearances and not at others, there is a huge volume of ex parte communication between the RIAA lawyer handling the cases and the judicial personnel. The ex parte communication problem is further exacerbated by consolidation of the cases (e.g., District of Massachusetts) or "related case" treatment (e.g., Eastern District of New York), where all of the RIAA's cases are turned over to a single district judge, thus giving the single law firm representing the plaintiffs virtually untrammelled ex parte access to a single set of judicial personnel and providing huge economies of scale to plaintiffs that are unavailable to the defendants.

The defendants in these cases invariably experience a sense of hopelessness. They feel that they have no chance at all for a fair hearing. And they are, unfortunately, right.

In the contested cases, the defendants are without the resources needed to challenge the plaintiffs' pleadings or to conduct discovery, and they are barraged with discovery requests by the plaintiff, especially for hard-drive examinations and for unending streams of depositions bearing upon the identities of possible infringers other than the defendant. The RIAA widens its net as far as it is permitted to go, unless and until a court shuts it down. It will first depose close family members, then distant family members, then neighbors, friends, and classmates if the court allows it.

Similarly, in the rare event that the defendants seek discovery of their own, the RIAA will stonewall each and every

request except for materials it plans to present as part of its prima facie case. If the defendant asserts one or more counterclaims, the RIAA will move to dismiss all of the counterclaims, thus generating still more expense in pointless motion practice.

If the hard drive does not suggest liability, the RIAA will not dismiss the case, but will instead try to claim that the defendant erased something from the hard drive, in one case persuading the judge that an automatic defragmentation scheduler was somehow a basis for claiming spoliation of evidence. If it cannot claim erasure, it will claim that the defendant switched hard drives. It will never concede that the absence of corroborating evidence on the hard drive means what most reasonable people would conclude it means, which is that the defendant "didn't do it." And the RIAA has paid investigators and expert witnesses on call, which the defendants are without resources to match.

Only a single case in four years, *Capitol v. Thomas*,¹¹ has ever gone to trial, and that one only because the judge denied the defendant's attorney's motion for leave to withdraw. The defendant's involuntary lawyer never even called a single witness on his client's behalf and failed to object to the RIAA's "expert" testifying, even though the expert had conceded meeting none of the *Daubert* reliability standards.

Suggestions for the John Doe Phase

Plaintiffs are ordered to file any future cases of this nature against one defendant at a time, and may not join defendants for their convenience.

—Judges Sam Sparks and Lee Yeakel, *Fonovisa v. Does*, 2004.¹²

[I]t is difficult to ignore the kind of gamesmanship that is going on here. . . . These plaintiffs have devised a clever scheme . . . , but it troubles me that they do so with impunity and at the expense of the requirements of Rule 11(b)(3) because they have no

good faith evidentiary basis to believe the cases should be joined.

—Judge Margaret J. Kravchuk, *Arista v. Does*, 2008.¹³

Joinder. The key words from the above two quotations are "2004" and "2008." In November 2004, the RIAA was ordered "to file future cases of this nature against one defendant at a time." And yet in 2008 it continues the practice of deliberate misjoinder, seemingly disregarding the joint order from Austin, Texas. District of Maine Magistrate Judge Kravchuk was so troubled by the false statements the plaintiffs had made in order to justify joinder that she recommended to the district judge that he order plaintiffs to show cause why they should not be subject to Rule 11 sanctions.

Even after that, in *LaFace v. Does I-38*,¹⁴ Judge Britt was required to remind the RIAA yet again, as so many judges have done before, of the contents of Rule 20. As recently as April 3, 2008, Magistrate Judge Lenihan, did so again.¹⁵ In view of the RIAA's lengthy history of ignoring judicial precedents in this area, a court should consider Rule 11 sanctions, as Magistrate Kravchuk recommended, and contempt. Since most "John Does" never get anywhere near one of the "John Doe" proceedings,¹⁶ courts need to step in and create an effective deterrent to the plaintiffs' persistent rule violation.

Suggestion 1: Be alert to misjoinder in "John Doe" cases. If a court is presented with a "John Doe" case that joins more than one defendant, under well-settled principles the case should be dismissed as to all John Does except John Doe number one. Plaintiffs should be ordered to show cause why they should not be held in contempt of the November 17, 2004, order of the district court in *Fonovisa v. Does*¹⁷ and subject to Rule 11 sanctions. And because there will likely be no defendant's counsel present, the court should read the plaintiffs' response with a critical eye.

Jurisdiction and Venue. As noted above, most of the John Doe defendants are being sued in a jurisdiction hundreds

or thousands of miles from their homes although it is readily ascertainable to the plaintiffs, through several publicly accessible Web sites, as to which state and which region of that state each IP address is assigned.

Suggestion 2: Require in personam jurisdiction and venue. If a court is presented with a John Doe case that fails to set forth detailed factual allegations of the basis for venue and for in personam jurisdiction in that district, the action should be dismissed.

Ex Parte Nature of Proceeding

Plaintiffs contend that unless the Court allows ex parte immediate discovery, they will be irreparably harmed. While the Court does not dispute that infringement of a copyright results in harm, it requires a Coleridgean "suspension of disbelief" to accept that the harm is irreparable, especially when monetary damages can cure any

alleged violation. On the other hand, the harm related to disclosure of confidential information in a student or faculty member's Internet files can be equally harmful. . . . Moreover, ex parte proceedings should be the exception, not the rule.

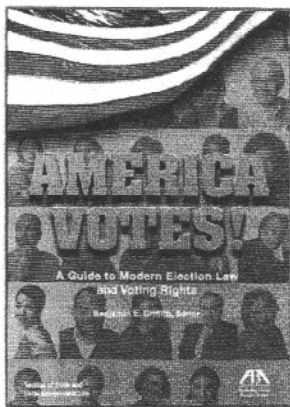
—*Judge Lorenzo F. Garcia,*
Capitol Records, Inc. v. Does,
*2007.*¹⁸

It is fundamental to practice under the Federal Rules that ex parte motion practice is a last, rather than a first, resort. Not so in the world of RIAA litigation.

In support of a request for an ex parte order, the RIAA generally makes a conclusory allegation that, if the motion is made any other way, the commercial ISP or the college or university ISP will destroy the evidence. First, it is difficult to imagine that any college or university in the United States, or any of the commercial Internet service providers, which are mostly large public utilities, cable

companies, and other large corporations, would destroy the evidence if asked not to.¹⁹ Second, even were such an averment to be credited, it could be resolved judicially in a much less onerous fashion by simply issuing a temporary restraining order to retain such records.²⁰

In the third place, papers submitted by the recording industry's lawyers in an ex parte environment should not be accepted as gospel. In *Arista v. Does 1-17*, for instance, the attorney general of the State of Oregon pointed out to the court that the RIAA's ex parte motion papers, which had sought to create the aura of an emergency and the need for immediate ex parte action, had concealed a highly material fact: *that the University of Oregon had informed the RIAA prior to the institution of the proceeding that the requested information had been gathered and would be preserved.*²¹ And, as noted earlier, RIAA attorneys routinely allege that RIAA



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Benjamin E. Griffith

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investigators have “detected an individual,” only to have investigators admit under oath that they have not.

Suggestion 3: No ex parte motion practice. Nothing should be granted ex parte unless it involves an order providing for meaningful notice of the motion for discovery to be afforded to the John Doe and to the ISP. The order should state that the ISP is to be provided with a full set of papers for transmission to the John Doe, and should provide ample time from the Doe’s receipt of such papers, consistent with the court’s usual practices for motions on notice, to respond. These should include everything a defendant is normally entitled to receive under the court’s usual rules and practices, including the summons and complaint, all of the motion papers, and the court rules, notices, and other materials supplied to defendants.

Merits of Statutory Basis for Discovery Application

The Court is unaware of any other authority that authorizes the ex parte subpoena requested by plaintiffs.
—District Court Judge Walter D. Kelley, Jr., *Interscope v. Does*, 2007.²²

We must accept the fact that digital copyright law, Internet law, information technology law, and the panoply of laws being developed to protect privacy in the Internet age are new and evolving areas and that there are many unsettled questions to be resolved. There is a vacuum of appellate authority on the procedural questions that need to be raised, and in view of the RIAA’s preference for ex parte practice and the courts’ quiescence in that practice, it is an unfortunate reality that the questions that need to be asked and the issues that need to be raised are not generally being heard at all, even at the district court level. It is not at all clear that the RIAA even has a legal basis for the pre-action discovery it is seeking.

There are complex statutes on the books protecting the privacy rights of ISP subscribers and college and university students that are being ignored on

virtually a daily basis by the courts, in large part because (a) the RIAA has not raised them, and (b) due to the ex parte nature of the proceedings, there is no one in the courtroom to bring them to the court’s attention. In such cases, it is up to the courts to protect the privacy rights of the RIAA’s targets, both by requiring that defendants be provided ample notice and an opportunity to retain knowledgeable counsel and by

The RIAA nevertheless commences suit against a number of unrelated John Does in the venue where the ISP is located to pursue its ex parte discovery motion.



ensuring in those instances where the defendants have not been able to retain counsel that the application is consistent with applicable law. In *Interscope v. Does 1–7*,²³ a typical RIAA ex parte John Doe pre-action discovery proceeding, Judge Kelley, for example, did just that. He rejected the RIAA’s application altogether, after a thorough review of the laws, concluding that there was simply no legal basis for the identity discovery the RIAA was seeking. Additionally, in *Arista v. Does 1–17*,²⁴ the attor-

ney general in Oregon has argued that the RIAA’s discovery application, if granted, would force the university to violate statutes protecting the rights of the university’s students.

Suggestion 4: Make explicit the legal authority upon which discovery applications are permitted or rejected. Justice will be well served if a court is able to take the time to scrutinize the statutory basis invoked for each discovery application, cite the authority supporting its rulings, and deny discovery applications on their merits if they are not warranted by existing statutes or case law.

Preliminary Determination of the Validity of Plaintiffs’ Copyright Infringement Claim

[W]ithout actual distribution of copies . . . there is no violation [of] the distribution right.
—William F. Patry, Patry on Copyright, 2007.²⁵

Plaintiff . . . must present at least some facts to show the plausibility of their allegations of copyright infringement. . . . However, . . . Plaintiffs have presented no facts that would indicate that this allegation is anything more than speculation.

—Judge Rudi M. Brewster, *Interscope v. Rodriguez*, 2007.²⁶

The courts in various jurisdictions are generally in agreement, both as a matter of constitutional law and common law, that pre-action discovery of an anonymous person’s identity should not be permitted, regardless of whether there is a valid legal underpinning for the discovery process invoked, absent a concrete showing that the party seeking discovery (1) has pled a valid claim for relief against the anonymous party and (2) has submitted a concrete and competent evidentiary showing of each element of that claim. I am of the view that the RIAA’s boilerplate complaint clearly fails to state a claim for relief, even under pre-*Twombly* standards,²⁷ but I cannot ask the reader to necessarily agree in the absence of appellate authority on the subject. I do, however, ask that courts scrutinize the

pleading and the evidence carefully at the John Doe stage.

Suggestion 5: Scrutinize John Doe pleadings and evidence without being intimidated by technology jargon. The complaint, of course, affords the opportunity to ensure that plaintiffs have validly pleaded a copyright infringement claim and that the evidence is admissible and covers all elements of the claim. It is easy to be overwhelmed by impressive-sounding technical and pseudo-technical jargon. Allow me to observe that if the court and the court's law clerks and law secretaries (many of whom are "digital natives") do not understand the case, that may be a sign that the plaintiff has none.

Suggestions for the "Named Defendant" Phase

The Sufficiency of the Complaint. Once the RIAA has obtained the information it subpoenaed from the ISP, it then knows the identity and address of the person who paid for an Internet access account. While most of us would think that a place to begin an investigation, the RIAA treats it as the end of its investigation. If that account holder will not pay the RIAA's settlement demand, the RIAA sues. It uses a standard boilerplate complaint.

At this juncture the courts should be especially mindful of the admonition of the Supreme Court in *Bell Atlantic v. Twombly*²⁸ that sustaining a complaint and allowing a federal case to proceed to the discovery phase imposes enormous financial consequences upon the defendant²⁹ and is not a step to be taken lightly. This principle is more, not less, important, in cases like the RIAA cases, because the defendants are not businesses or corporations, but individuals, often poor and working-class individuals, whose family budgets do not include the hundreds of thousands of dollars needed to withstand the hundreds of thousands of dollars the RIAA is willing to spend in any given case.

Some courts³⁰ have made pronouncements to the effect that the court does not "understand the technology" well enough to make the dismissal determina-

tion, and that therefore the determination should be made after completion of pre-trial discovery. I submit that, if the court does not understand the technology well enough, it means that the plaintiffs have not pled their claim well enough and their complaint should be dismissed.

A court would be well advised to treat its decision at the pleadings stage to be, by far, the most important determination it will make because a denial

It is simply
not consistent
with the law
to provide
consolidation
or related-case
treatment to one
nongovernmental
party because it
is a high-volume
litigant.



of the dismissal motion sentences the defendant to one of two hells: payment of an extortionate settlement for something he did not do or a nightmare of vexatious litigation.

And the dismissal question is especially critical at the district court level at this time because there is no appellate authority at all on the subject. If a court, after due consideration, should sustain a RIAA complaint, it should certify the

order for an interlocutory appeal and stay all proceedings during the pendency of the appeal. Thousands of people's lives are being affected by these cases; they are worthy of, and are crying out for, some appellate guidance.

Suggestion 6: Carefully evaluate motions to dismiss under Rule 12(b) (6) of the Federal Rules of Civil Procedure. Careful evaluation of a complaint's sufficiency on a motion to dismiss may ultimately spare defendants significant and unwarranted hardship. A court, therefore, should stay all discovery while the motion is pending, and, if it denies the motion, certify the order denying the dismissal motion for an interlocutory appeal.

Relatedness and Consolidation. As noted above, consolidating cases or treating cases as "related" when the only relationship among them is that the plaintiffs are the same, is unfair to the defendants in that it creates a huge economy of scale available only to the plaintiffs and accentuates the problem of ex parte communication, thus heightening, rather than lessening, the already disproportionate imbalance between plaintiff and defendant. Consolidation essentially vests these private, for-profit, corporations with the trappings of a government agency and creates a sense of hopelessness among all defendants who enter the courthouse door. It is simply not consistent with the law to provide consolidation or related-case treatment to one nongovernmental party because it is a high-volume litigant.

What is more, in the absence of appellate guidance on any of the important legal questions, it would be much healthier for each district court to get a diversity of viewpoints from all of its judges, rather than let one judge hearing consolidated cases compound errors that he or she may be making. See, e.g., *Fonovisa v. Does, supra*, which, after severing all of the John Does and ordering the record companies to commence separate actions with separate filing fees as to each, specifically admonished plaintiffs not to file the cases as "related."³¹

Suggestion 7: No routine consolidation or "related case" treatment.

A court need only follow tradition-

al principles for consolidation and "related case" treatment. There is no need to create a special exception for these plaintiffs. Where the defendants are unrelated to each other, their cases are unrelated to each other and should be treated as such.

The Discovery Phase. The greatest potential for abuse in these cases lies in the discovery phase, where most defendants simply have no means to fight back. The RIAA lawyers characteristically try to keep a case alive as long as possible, despite the likelihood that the defendant did not commit copyright infringement, because of the subpoena power that the pendency of a federal litigation affords them. However, their subpoena power is invariably directed at targets other than the defendant. Put simply, the subpoena power was not given to attorneys to enable them to conduct investigations of other cases they might have brought had they conducted a proper investigation in the first place.

The "expert" report, "expert" testimony, and investigator's materials may be dispensed with, under a suitable preclusion order, since the investigator and plaintiffs will likely refuse to disclose the investigator's methods, rendering them unusable at trial, and since the RIAA's "expert" has admitted that neither his methods, nor the methods of the investigators upon whose work he relies, meet *Daubert* reliability standards.

Suggestion 8: Keep discovery short and sweet. If, and only if, the plaintiffs can muster an evidentiary showing that their case has merit and that the defendant committed copyright infringement, then the court may allow (1) a deposition of the plaintiffs; (2) a deposition of the defendant; and (3) an examination of the hard drive by a mutually agreeable independent neutral forensics expert whose fees will be advanced by the plaintiffs and will be treated as a taxable disbursement to abide the event. The plaintiffs would not properly be permitted to use the pendency of the action as a platform for conducting an investigation to find out who, other than the defendant, they should have sued.

Suggestion 9: Expert witness fees should be advanced by plaintiffs.

Plaintiffs should be required to pay their own expert witness fees and to advance the defendant's expert witness fees with the expenditure to be a taxable cost to abide the event. Without this, the trier of fact will be unable to obtain a true picture of the technological questions that need to be resolved.

Attorney Fees. In view of the virtual impossibility of defendants finding counsel willing and able to represent them in these proceedings, and in view of the novelty of the legal issues that the RIAA is presenting, the award of attorney fees to those few defendants who somehow manage to fight back and win is crucial. Otherwise, it will continue to be virtually impossible for the courts to hear the "other side of the story." Each defendant who fights back is fighting on behalf of hundreds of thousands of other people, and each attorney who represents such a defendant, at the risk of being unpaid or of being very poorly paid, is doing an important service to the development of copyright law.

Suggestion 10: The court should award attorney fees, in most cases with a multiplier.

In every instance in which a defendant wins on the merits, the plaintiffs voluntarily dismiss with prejudice, or the plaintiffs dismiss without prejudice but have forced the defendant to incur significant attorney fees, the court should deem the defendant a "prevailing party" under the Copyright Act and award attorney fees. In most cases, there should be a multiplier due to the financial risk taken by the attorney.

Confidentiality. The world changes, and litigation in 2008 is different than it was five years ago. One of the major differences has been the advent of electronic filing in the federal courts and the proliferation of digital versions of litigation documents. This shift has enabled Web sites to make actual legal documents available online and to report much more closely on the details of important litigation. See, e.g., Web sites such as <http://growklaw.net>; blogs

such as the author's blog, "Recording Industry vs. The People," <http://recordingindustryvspeople.blogspot.com>; and online legal publications such as Pike & Fisher's "Internet Law & Regulation," <http://ilrweb.com>.

At present, the primary way of thoroughly researching the RIAA cases is on the Internet. Prior to the advent of the coverage of these cases by these sites, one of the RIAA's many strategic advantages was that plaintiffs' one national law firm was fully aware of everything going on in all the cases, while the defendants and their lawyers did not know about anything going on in any other case, or indeed if anyone was fighting back anywhere, at all. The Internet coverage of the cases has diminished that particular strategic advantage somewhat, and empowered defendants and defendants' lawyers by making available to them court decisions and orders, pleadings, motion papers, discovery documents, transcripts of oral arguments and depositions, expert witness reports, stipulations, and other filings, thus reducing the costs of litigation to defendants. In response, the RIAA, whose litigation strategies appear to include driving up the costs of defense, has embarked on a policy of seeking confidentiality wherever possible.

Courts should not succumb. It is in the interest of our society to reduce, not to enhance, the cost of access to legal representation. The RIAA's confidentiality mantra is not in the public interest and should not be countenanced.

Additionally, there is widespread public interest in these cases among people from all walks of life and from all across the world. The courts should take into account the First Amendment and the public's right to know in deciding upon the RIAA's confidentiality requests.

Suggestion 11: Scrutinize the plaintiffs' confidentiality requests carefully.

In analyzing the RIAA's confidentiality requests, the court should take into account the public's right to know under the First Amendment, and should not allow the RIAA to use "confidentiality requests" as a means of depriving current and future defendants, who are

already at a significant economic disadvantage, from obtaining the tools they need to defend themselves.

Summary Judgment. In cases where a dismissal motion has not been made, a defendant's early-stage summary judgment motion is the best way for a court to purge cases that should not have been brought in the first place, as summary judgment searches the record. Such motions should be encouraged and evaluated open mindedly, and discovery should be stayed during their pendency to avoid undue expense.

The summary judgment motion should be meaningfully available before, rather than after, protracted litigation has occurred. If the defendant swears under oath that he or she did not do what plaintiffs claim he or she did, that should search the record and the plaintiffs should be put to their proof. If they cannot then make out a case against the defendant, the motion should be granted, and should not await the defendant's having to spend a fortune in legal fees to get to the close of discovery, based on plaintiffs' surmise that discovery might possibly turn up something.

The plaintiffs routinely oppose any summary judgment motion with mounds of inconclusive paper, larded with fake techno-speak but saying nothing about any copyright infringement by the defendant.

The court in this context should be mindful of the admonition of *Grokster* that no case for secondary copyright infringement liability can be mounted absent proof that the defendant engaged in affirmative acts to induce or encourage copyright infringement. If plaintiffs cannot muster enough evidence of (a) direct copyright infringement by the defendant or (b) affirmative acts to induce or encourage copyright infringement by another to create a triable issue of fact, a defendant's summary judgment motion should be granted.

Suggestion 12: In accordance with standard summary judgment practice, grant defendants' summary judgment motions in the absence of proof of infringement or inducement.

ment. If, in opposition to the motion, plaintiffs cannot prove that the defendant (1) personally committed a copyright infringement or (2) by affirmative acts induced or encouraged someone else to commit copyright infringement, the motion should be granted, regardless of the stage at which the motion is made. It should not have to await the close of discovery.

Default Judgments. These are unliquidated tort cases, not cases brought on liquidated contract claims, and plaintiffs should not be awarded the privilege of obtaining default judgments based on written papers and scripted submissions. They should be required to produce live witnesses at an inquest, and the witnesses should be subject to cross-examination by the court. What is more, the constitutionality of the plaintiffs' statutory damages theory should be tested at the inquest: the plaintiffs should be required to prove the actual damages proximately flowing from the defendant's alleged infringement, for without such proof a court is unable to determine the all-important question of whether the statutory damages sought are unconstitutionally disproportionate.³²

Suggestion 13: Require inquests in cases of default. Default judgments are never to be granted only on the basis of written papers and scripted submissions. The plaintiffs must (1) produce live witnesses who can be cross-examined by the court and (2) prove actual damages proximately flowing from defendant's infringement, so that the court can determine whether the statutory damages being sought are unconstitutionally excessive.

Helpless Defendants. The rumors of the RIAA pursuing defendants from among the most vulnerable segments of our society are, unfortunately, not exaggerated. It will not drop cases against defendants based on hardship, helplessness, injury, or any other factor. It has sued, and relentlessly prosecuted, children, people with multiple sclerosis, stroke victims, grandparents, people on welfare, people living on Social Security disability, people displaced by hurricanes, people who have never used a computer . . . the list goes on and on. In *Priority Records v.*

*Chan*³³ where the RIAA planned to sue a fourteen-year-old based upon an alleged copyright infringement she committed at the age of thirteen, the court ruled that a guardian ad litem had to be appointed and that the funding had to come from the plaintiffs. In *Elektra v. Schwartz*,³⁴ a guardian ad litem was appointed to protect a defendant suffering from multiple sclerosis and related conditions. Similar solutions should be invoked by the courts to protect helpless litigants.

Suggestion 14: Justice will be served by the appointment of guardians ad litem or the use of other procedures to ensure that the rights of helpless people are protected. The court should appoint guardians ad litem where authorized by law and seek assistance from pro bono panels, bar associations, legal aid organizations, and other possible sources to ensure that the rights of helpless people are protected.

Need for Published Decisions. It is a small, but important matter: plaintiffs' counsel have access to all of the unpublished decisions, and the defendants do not.

Suggestion 15: Send decisions for publication. Please send all decisions, other than grants of uncontested applications, out for publication so that the defendants' bar will have access to them.

Conclusion

While there is much more that could be written on the subject, I believe that implementing the above suggestions will help to make the federal courts a fairer forum for the determination of these actions. These proposed measures will advance the correct determination of important and evolving legal question, reduce the number of forced settlements being paid by completely blameless defendants, and reduce the number of cases on the federal court dockets that do not belong there.

Endnotes

1. *Elektra Entertainment Group Inc. v. O'Brien*, 2007 ILR Web (P&F) 1555 (C.D. Cal. 2007). (S. James Otero, J.), www.ilrweb.com/viewILRPDF.asp?filename=elektra_obrien_070302Decision.

2. The author's statistical information is anecdotal, based on personal experience, on press accounts, and RIAA press releases. The actual numbers would be an interesting statistical study.

3. The wholesale price of each song file is approximately 70 cents per song. The royalties payable for each download and other expenses are typically in the neighborhood of 35 cents per song. In lieu of proving its 35 cents per song file in damages, the RIAA predictably elects to obtain statutory damages on a theory that entitles it to \$750 per song file. In *Capitol v. Thomas*, 2006cv01497 (D. Minn. Aug. 31, 2007), the only fully contested case known to have gone to trial, a verdict in favor of the plaintiff was awarded in which the damages, \$9,250 per song file, represented approximately 23,000 times the actual damages. http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Virgin_v_Thomas.

4. In *Capitol v. Thomas*, note 3 *supra*, the defendant's lawyer had made a motion for leave to withdraw, which was denied.

5. *BMG v. Doe* (Canada), documents collected at [http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#BMG_v_Doe\(Canada\)](http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#BMG_v_Doe(Canada)); *Foundation v. UPC Nederland*, documents collected at http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Foundation_v_UPC_Nederland.

6. See litigation documents in *UMG v. Lindor*, 05-cv-1095 DGT/RML (E.D.N.Y.), appended to "Marie Lindor moves to compel MediaSentry to respond to document subpoena," *Recording Industry vs. The People*, February 19, 2008, <http://recordingindustryvspeople.blogspot.com/2008/02/marie-lindor-moves-to-compel.html>.

7. It would take an entire book to explain how fraught with error even the preliminary identification process, which seeks to identify the owner of an Internet access count, is, but suffice it to say for our purposes that (1) the files on the screenshot, or the files downloaded, probably did not appear on any single computer, but more likely represented the combined contribution of thirty or forty "peer" and "superpeer" computers in the network; (2) the IP address in the data packet may or may not be an IP address that was assigned to a computer that had any of the songs on it; (3) because most IP addresses are dynamic IP addresses that are repeatedly reassigned, each time an Internet connection is turned off, sometimes within a single second, and often within a single minute, MediaSentry does not synchronize its equipment with the Internet service providers (ISPs) and the ISPs' recordkeeping is not designed for this type of inquiry, so there are numerous incorrect identifications of the Internet service accounts; and (4) the world of the Internet abounds in insecurity, such as insecure wireless connections, "zombies," "slaves," use of routers, and numerous other possibilities, for which the RIAA's witnesses make no allowance.

8. The deposition transcript is hosted online at Pike & Fischer's *Internet Law & Regulation*, at www.ilrweb.com/viewILRPDF.asp?filename=umg_lind

or_070223JacobsonDepositionTranscript. Links to the exhibits are likewise hosted on the same site; a list of the links is online at <http://recordingindustryvspeople.blogspot.com/2007/03/deposition-of-riaas-expert-available.html>.

9. The RIAA has itself described it as "fishing with a net": "When you go fishing with a net, you sometimes are going to catch a few dolphin." Dennis Roddy, *The Song Remains the Same*, PITTSBURGH POST-GAZETTE, Sept. 14, 2003, available at www.postgazette.com/columnists/20030914edroddy0914.pl.asp, quoted in amicus curiae brief of American Civil Liberties Union, Public Citizen, American Association of Law Libraries, Electronic Frontier Foundation, and ACLU Foundation of Oklahoma, submitted in *Capitol v. Foster*, 2007 WL 1028532 (W.D. Okla. 2007), brief at 8, www.ilrweb.com/viewILRPDF.asp?filename=capitol_foster_amicus. 10. 545 U.S. 913 (2005).

11. *Capitol v. Thomas*, 2006cv01497 (D. Minn.) Aug. 31, 2007, Order, reprinted at <http://docs.justia.com/cases/federal/district-courts/minnesota/mndce/0:2006cv01497/82850/48/0.html>.

12. Hon. Sam Sparks & Hon. Lec Yeakel, District Judges, Western District of Texas, Nov. 17, 2004, *Fonovisa v. Does* 1-41, 2004 ILRWeb (P&F) 3053, www.ilrweb.com/viewILRPDF.asp?filename=fonovisa_does_041117OrderGrantSeverance.

13. Hon. Margaret J. Kravchuk, Magistrate Judge, District of Maine, Jan. 25, 2008, *Arista v. Does* 1-27, 2008 WL 222283.

14. 2008 WL 544992 (E.D. N.C., Feb. 27, 2008).

15. *Fonovisa v. Does* 1-9, 2008 U.S. Dist. Lexis 27170, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008).

16. As Judge Otero noted, joinder issues are never subject to challenge by a defendant in these cases because the defendants "do not set foot in the courthouse": "[A]n overwhelming majority of cases brought by recording companies against individuals are resolved without so much as an appearance by the defendant, usually through default judgment or stipulated dismissal. . . . The Defendant Does cannot question the propriety of joinder if they do not set foot in the courthouse." *SONY BMG v. Does* 1-5 (C.D. Cal. Aug. 29, 2007) 2007 ILRWeb (P&F) 2533, www.ilrweb.com/viewILRPDF.asp?filename=sony_does1-5_070904OrderDenyReconsideration.

17. *Fonovisa v. Does* 1-41, 2004 ILRWeb (P&F) 3053 (W.D. Tex. 2004).

18. *Capitol Records, Inc. v. Does*, 1-16, 2007 WL 1893603 (N.M. May 24, 2007)(Lorenzo F. Garcia, J.).

19. In *Arista v. Does* 1-7, 07 CV 649 (S.D. W. Va.), it was alleged by attorneys for Marshall University that the RIAA "misrepresented information" to obtain ex parte treatment of its application, falsely claiming that there was a danger of spoliation, when there was not. The university further pointed out that the RIAA had waited four months after obtaining the right to discovery to serve its subpoena, something it would not have done

had its concerns about "urgency" been genuine. See "Moving memorandum," at 2-3, in "Second university, Marshall U., moves to quash RIAA subpoena; Magistrate Judge denies motion; *Arista v. Does* 1-7." *Recording Industry vs. The People*, April 15, 2008, <http://recordingindustryvspeople.blogspot.com/2008/04/marshall-university-unsuccessfully.html>.

20. The attorneys for a John Doe at the University of Maine made this observation in *Atlantic v. Does* 1-14: "This is at least the third case brought by these plaintiffs against various Does: the first of which the undersigned is aware of was filed on May 3, 2007. It was *Atlantic et als v. Does* 1-22, Dkt No. 07-00057. It has terminated. The second is 07-162, which is presently before Judge Woodcock. 07-162 has been hotly contested and there was ample opportunity for plaintiffs to do something to protect their interests as respects the records they seek from the University System. However, as far as one can tell from the Linares Declaration, plaintiffs have never inquired of the University System as to the nature of its retention policy. That means they have never sought an agreement that the University System would retain records long enough for the plaintiffs to obtain the information without ex parte discovery. That means they have never learned, even though they had almost a year, what the actual policy might be. Also, if there was such a need for speed, why did the plaintiffs wait over ninety days to sue these defendants who were identified as targets beginning on September 9 and ending on October 31? They waited because they knew there was no urgency. They probably knew the University System would not destroy records they were seeking once it was notified of the pendency of this action. They most likely knew the records would be there if and when this court said they could have them." See "Motion to vacate and quash" at 5-6. In a new John Doe case directed at University of Maine, John Doe #10 moves to strike Linares declaration for illegality, and to vacate ex parte order." *Recording Industry vs. The People*, Apr. 15, 2008.

21. See documents collected in "Oregon Attorney General's Reply Papers Go on the Offensive, Seek Investigation of RIAA Tactics, in *Arista v. Does* 1-17," *Recording Industry vs. The People*, Nov. 29, 2007, <http://recordingindustryvspeople.blogspot.com/2007/11/oregon-attorney-general-files-reply.html>.

22. *Interscope v. Does* 1-7, 494 F. Supp. 2d 388 (E.D. Va. 2007).

23. *Id.*

24. *Id.* See 07-cv-6197 (MRH) (D. Oregon), Moving papers of Oregon Attorney General, Documents collected at http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Arista_v_Does1-17.

25. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9 (2007); see also *MGM v. Grokster*, 545 U.S. 913 (2005); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (affirming the district court's finding "that dis-

continued on page 48

New York City

Continued from page 19

many either do work or have recently lost jobs. Many of the people served by Legal Services NYC belong to that ever-expanding class of people: the working poor. We also know that those who are not currently working are not "undeserving." Most do not at all fit the mold from the movies of a happy-go-lucky Alfred P. Doolittle. Most are caught up in desperate circumstances, struggling to stabilize their lives and those of their families, or they are disabled and unable to work. Our challenge going forward is to educate lawyers, judges, and the general public about what we can, and must, do to help. ■

Endnotes

1. Jo Blanden, Paul Gregg, & Stephen Machin, *Intergenerational Mobility in Europe and North America*, April 2005, at 7, www.lse.ac.uk.
2. *Id.*
3. Economic Policy Institute and Center on Budget and Policy Priorities, *Pulling Apart: A State-by-State Analysis of Income Trends*, Jan. 18, 2000, revised Apr. 9, 2008, www.cbpp.org/1-18-00sfp.htm.
4. New York State Bar Association Committee on Legal Aid, *The New York Legal Needs Study*, June 1990, revised and reprinted Dec. 1993.

RIAA Litigations

Continued from page 29

tribution requires an 'actual dissemination' of a copy"); Hon. Janet Bond Arterton, District Judge, District of Connecticut, Feb. 13, 2008, *Atlantic v. Brennan*, 2008 WL 445819.

26. Senior District Judge, Southern District of California, August 17, 2007, *Interscope v. Rodriguez*, 2007 WL 240848407-cv-6197 (MRH) (D. Oregon). Moving papers of Oregon Attorney General, documents collected at http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Arista_v_Does1-17.

27. The earlier version of the complaint failed to provide any details at all of the supposed "distribution" or "reproduction" and concocted a third theory having no basis in the Copyright Act that it termed "making available."

5. *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans, A Report of the Legal Services Corporation*, 2nd ed. June 2007, www.lsc.gov/justicegap.pdf.

6. While criminal defendants have gained access to justice through the landmark case *Gideon v. Wainwright*, 372 U.S. 335 (1963), there is currently no legal precedent to ensure low-income and poor citizens are guaranteed the civil right to counsel.

7. "Rent Control and Rent Stabilization, systems that regulate privately owned housing in New York, are responses to the housing shortage that has existed since World War II. . . . Both systems are now administered by the New York State Division of Housing and Community Renewal." Andrew Scherer, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK*, § 4:1 (2007-2008 ed.).

8. Kira Krenichyn, *Results from Three Surveys in New York City Housing Courts*, Feb. 2007, www.brennancenter.org.

9. Right to Counsel for Low-Income Seniors Facing Eviction & Foreclosure, Intro. 648.

10. Vesselin Mitev, *State Bar Conference Promotes Right to Counsel in Civil Cases*, N.Y.L.J., Mar. 11, 2008.

11. Laura Klein Abel is the Deputy Director of the Justice Program of the Brennan Center for Justice at New York University School of Law.

12. American Bar Association, Task Force on Access to Civil Justice, Section of Business Law, Commission on Interest on Lawyers' Trust Accounts, Commission on Law and Aging, Section of Litigation and Steering Committee on the Unmet Legal Needs of Children, *Report to the House of Delegates*, Aug. 2006. Resolution adopted. Available at www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

13. *New York County Lawyers' Association*

After the *Interscope v. Rodriguez* ruling referred to earlier, it began using a modified version of the complaint, which omitted the troubling "making available" language, continued to offer no details at all as to the defendant's "distribution" or "reproduction," and added a few "factual"-sounding allegations about its own investigators' activities that are irrelevant but, more importantly, directly contradicted by the RIAA's witnesses' own sworn testimony, and fail the "plausibility" test on that ground.

28. 127 S. Ct. 1955 (2007).

29. In these cases the consequences are even more ruinous and oppressive than in the average case. The defendants are people without resources, and most have not engaged in the supposed file-sharing activity of which they are suspected. And of those, many have not actually committed copyright infringement. But the cost of defending one's good name from the RIAA onslaught is staggering. In *Atlantic v. Andersen*, documents collected at [*Report on Right to Counsel in Housing Court*, Dec. 4, 2006, \[www.NYCLA.org\]\(http://www.NYCLA.org\).](http://recordingindustryvspeople.blogspot.com/2007/01/index-of-</p></div><div data-bbox=)

14. See www.IOLA.org.

15. Eric Stein, *Quantifying the Economic Cost of Predatory Lending*, July 25, 2001, Center for Responsible Lending, www.responsiblelending.org.

16. S6759, A8972-B (May 7, 2008).

17. A10083, S8093.

18. 2007 WL 2437810 (E.D.N.Y., August 22, 2007).

19. A8527, S6203.

20. 2005 WL 2105810 (E.D.N.Y. Aug. 31, 2005).

21. Located at www.LegalServicesNYC.org.

22. 8105197/08 (Sup. Ct. New York County, 2008).

23. 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860 (2007).

24. Tom Perotta, *Judge Clarifies Use of Section 8 Subsidies in Rent Stabilization*, 234 N.Y.L.J. 1-2 (July 7, 2005); also in Brennan Center for Justice at New York University School of Law, *Legal Services, Section 8 Tenants, Represented by the Legal Aid Society of New York and Legal Services for New York City-Bronx, Can Retain Subsidies When Renewing Rent-Stabilized Leases in City Subsidized Buildings*, E-LERT, July 29, 2005, www.brennancenter.org/content/eletters/; C. Feldman, *New Lease on Life—Good news for Section 8 tenants: New York Supreme Court rules that landlords can't stop accepting vouchers when leases expire*, City Limits.org, No. 492, July 11, 2005, www.citylimits.org/content/articles/weeklyView.cfm?articlenumber=1748.

25. 406514/07 (Sup. Ct. New York County, Mar. 27, 2008), N.Y.L.J., Apr. 2, 2008, at 27; Kenny Schaeffer, *Section 8 Discrimination Banned*, TENANT/INQUILINO, Apr. 2008 at 6, www.met-council.net/publications/april08.pdf.

litigation-documents.html, where the RIAA pursued an obviously innocent woman for three years before finally admitting its mistake, the defendant's attorney's incomplete time records showed \$150,000 in time charges.

30. *Interscope v. Duty*, 2006 WL 9880 (D. Ariz. 2006).

31. *Fonovisa v. Does*, 1-9, 2008 U.S. Dist. LEXIS 27170, 2008 WL 919701 (W.D.Pa. Apr. 3, 2008).

32. *UMG v. Lindor*, 2006 WL 3335048 (E.D.N.Y. 2006); J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

33. 04-CV-73645 (E.D. Mich. June 23, 2005), www.ilrweb.com/viewILRPDF.asp?filename=priority_chan_050623Order.

34. 06-CV-3533 (E.D.N.Y. April 12, 2007), www.ilrweb.com/viewILRPDF.asp?filename=clktra_schwartz_070412OrderGrantMotGAL.