Record Companies Backing Down?

01.26.2009

In cases across the country, the major record companies have pursued individuals for illegal sharing of music files on the Internet based on the outcome of cases such as MGM Studios, Inc. v. Grokster, 545 U.S. 913 (2005) (holding software distributors that distributed a device to promote copyright infringement by allowing customers to freely download copyrighted files liable for contributory copyright infringement). However, in two cases in the Eastern District of Virginia, the record companies were briefly stalled by Judge Walter D. Kelley, Jr.'s denial of motions for leave to take expedited discovery and issue subpoenas to the College of William & Mary for the identity of William & Mary students who were allegedly sharing copyrighted music files. Capital Records, Inc. v. Does 1-13, Case No. 2:08-cv-00090 (E.D.Va. 2008); and Interscope Records v. Does 1-7, Case No. 4:07-cv-00052. Judge Kelley denied the motions on the basis that only the Digital Millennium Copyright Act ("DMCA") expressly provides subpoena authority for internet related copyright infringement cases and the DMCA did not extend to William & Mary.

The record companies filed motions for reconsideration claiming that the DMCA only applied in the pre-litigation context and that Federal Rule of Civil Procedure 45 allowed for the issuance of subpoenas in the post-litigation context where good cause was shown, attaching an exhibit of more than 200 cases across the country where the subpoenas to obtain the identity of John Does had issued. An amicus brief was also filed by similarly situated defendants in North Carolina, asking the court to deny the motion for reconsideration, in part because the record companies had failed to state a claim for copyright infringement. The cases were transferred to Judge Henry Coke Morgan, Jr., and the motion for reconsideration was heard by Magistrate Judge F. Bradford Stillman, who granted the record companies' motions, denied the motion for leave to file the amicus brief as too late under the local rules, and consolidated the two cases under Case No. 2:08-cv-00090.

These cases raise interesting issues about whether the DMCA rather than Rule 45 applies in post-litigation context: Judge Kelley thought that it did but Judge Stillman agreed with the record companies that it did not. Also, whether the record companies stated a claim of copyright infringement, allowing them to obtain the identity of John Does simply by alleging that they are downloading or distributing sound recordings to the public was never addressed: a majority of other district courts appear to allow such cases to proceed merely by claiming that

individuals are distributing copyrighted music files over the Internet. The Eastern District of Virginia and the Fourth Circuit have not yet addressed these issues, nor will they be able to this time around -- since the record companies dismissed both cases without prejudice in September, 2008. Does that mean file sharers can remain anonymous awhile longer?

Related People

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