

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

_____)	
)	
IN RE SUBPOENA TO VERIZON)	
INTERNET SERVICES, INC.)	
)	
_____)	Misc. Act. No. 03-MC-804-HHK/JMF
)	
RECORDING INDUSTRY ASSOCIATION)	
OF AMERICA,)	
Plaintiff,)	
)	
v.)	
)	
VERIZON INTERNET SERVICES, INC.,)	
Defendant.)	
_____)	

**OPPOSITION OF RECORDING INDUSTRY ASSOCIATION OF AMERICA TO
MOTION OF INTERVENOR TO STAY MOTION TO ENFORCE SUBPOENA**

The Recording Industry Association of America (“RIAA”) hereby files this opposition to Intervenor’s Motion to Stay proceedings on RIAA’s Motion to Enforce a DMCA subpoena issued to Verizon Internet Services, Inc.¹

The RIAA does not oppose nycfashiongirl’s motion to intervene, and so advised her counsel. However, having failed to take any action to be heard for more than a month, nycfashiongirl should not be permitted to further delay these proceedings while she brings a new and separate motion to quash the same subpoena that already is the subject of the pending motion to enforce. Therefore, the RIAA respectfully requests that the Court deny nycfashiongirl’s

¹ RIAA is filing this opposition as the agent of its members, Universal Music Group, EMI Recorded Music, Sony Music Entertainment, BMG Music Group, and Univision Music, Inc.

motion for a stay and order her, if she desires, immediately to file an opposition to the RIAA's pending motion to enforce.

Well over a month ago, RIAA served a subpoena on Verizon Internet Services, Inc. to obtain the identity of nycfashiongirl, a subscriber of Verizon's Internet service who was distributing on the Internet more than 900 copyrighted sound recordings without the authorization of the copyright owners, RIAA's members. And over a month ago, nycfashiongirl's counsel announced that he would be filing a motion to quash or some other pleading to object to the subpoena. Since that time, RIAA has been waiting for nycfashiongirl to specify the nature and content of her objections. When she failed to provide any explanation of them, RIAA filed the motion to enforce. On the day oppositions to the motion to enforce were due, nycfashiongirl filed a motion to stay in which, finally, she has specified her objections. It is now clear, however, that her objections have been either previously rejected by this Court, or are totally irrelevant to a subpoena enforcement proceeding.

Nycfashiongirl's efforts to stay these proceedings are in clear contravention of Congress's "express and repeated direction to make the subpoena process 'expeditious.'" *In re: Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 34 (D.D.C. 2003) ("*Verizon I*"). In the DMCA, Congress intended copyright owners to obtain information quickly in order to protect their rights; thus DMCA subpoenas should proceed far more quickly – not less quickly – than other subpoenas. *See Verizon I*, 240 F. Supp. 2d at 35 ("there is an important reason why Congress required service providers to act promptly upon receipt of a subpoena to prevent further infringement – 'the ease with which digital works can be copied and distributed worldwide virtually instantaneously.'" (quoting S. Rep. No. 105-190, at 8)). To obtain the sort of delay that

nycfashiongirl seeks – in the face of the DMCA’s clear mandate for expedition – she would have to make a very significant showing that such delay is warranted.

Nycfashiongirl has utterly failed to make any such showing. Having announced, through counsel, on July 24, 2003, that she would file a motion to quash, she has provided *no* reason why she requires more time than she has already had to draft a pleading that puts before this Court her objections to the subpoenas. The arguments that she describes in her motion to intervene fall into two categories (1) recycled arguments that the DMCA subpoena provision is improper and unconstitutional, which have already been rejected by this Court after lengthy proceedings, *see Verizon I* and *Verizon II*, and (2) an argument that nycfashiongirl may not have engaged in copyright infringement – an argument that obviously cannot be factually supported and is simply irrelevant to a subpoena enforcement proceeding. As demonstrated in this Opposition, nycfashiongirl’s argument – supported by her counsel’s unsworn “Offer of Proof” – that some (but not all) of her conduct did not constitute copyright infringement, is disingenuous. As the Second Declaration of Jonathan Whitehead (attached hereto as Exhibit 1) demonstrates, nycfashiongirl’s Offer of Proof is seriously misleading, and the impression it plainly seeks to create is downright untruthful. Nycfashiongirl is not an innocent or accidental infringer. As discussed more fully in Part II below and in the Second Whitehead Declaration, the files nycfashiongirl was making available from her computer were *not* simply those which she had copied onto her computer from her personal CDs, but rather were files that had been (illegally) downloaded from the Internet, likely from other users of the Kazaa file distribution system. Moreover, the RIAA *twice* sent her notices that her activities on the Kazaa system violated the copyright laws.

But the strength or weakness of the copyright owners' case for infringement against nycfashiongirl is simply not at issue in this proceeding. The only thing at stake in this proceeding is Verizon's disclosure of identifying information. *See Verizon I*, 240 F. Supp. 2d at 35 (noting that transforming DMCA subpoena proceedings into "contested factual" proceedings is inconsistent with the language and purpose of the DMCA). Nycfashiongirl will be able to raise whatever arguments she wants in the copyright infringement action that is sure to follow.

Respectfully, nycfashiongirl's motion to stay should be denied.

BACKGROUND

RIAA's Motion to Enforce Subpoena Issued to Verizon Internet Services, Inc., Pursuant to 17 U.S.C. § 512(h), filed in this Court on August 7, 2003, provides substantial additional background about the problem of copyright piracy on the Internet and the "expeditious" subpoena process Congress created in order to permit copyright owners to stop such piracy as quickly as possible. A more detailed discussion of the proper interpretation of § 512(h) can be found in the Court's two opinions in prior litigation between Verizon and RIAA on these same issues. *See In re: Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) ("*Verizon I*"); *In re: Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) ("*Verizon II*").

RIAA obtained a subpoena issued by the clerk of this Court on July 9, 2003, seeking the identity of the individual operating on the Internet under the alias "nycfashiongirl" and offering to anyone who wanted them on the Internet over 900 copyrighted sound recordings without the authorization of the copyright owners, RIAA's members. Prior to seeking the subpoena, RIAA twice sent messages to nycfashiongirl explaining that by offering copyrighted music for download by other Kazaa users she was infringing the rights of the copyright owners. *See*

Second Whitehead Decl., ¶ 7. RIAA also notified Verizon via e-mail that it would be seeking the identity of this subscriber. Verizon in turn notified the subscriber of the subpoena.

On July 24, 2003, an attorney representing nycfashiongirl informed Verizon that his client intended to “file a response and seek a protective order.” *See* Exhibit 1 to Verizon’s Opp. to Mot. to Enforce. On July 25, 2003, Verizon notified RIAA that an attorney representing nycfashiongirl (counsel who has filed the motion to intervene) intended to “serve objections, and/or seek a protective order or other judicial relief in response to this subpoena.” *See* Exhibit 2 to Verizon’s Opp. to Mot. to Enforce. While agreeing to comply with over 100 other DMCA subpoenas issued to it, Verizon indicated that it would not respond to this one subpoena pending litigation between nycfashiongirl and RIAA. *Id.* At about the same time, counsel for nycfashiongirl announced to the *New York Times* that his client intended to take legal action to prevent compliance with the subpoena. *See* “Subpoenas to File Sharers Prompt Anger and Remorse,” *New York Times*, July 28, 2003.

In response, RIAA took no action on the subpoena, waiting for nycfashiongirl to identify her specific objections in a motion to quash or some other form. When nycfashiongirl took no action for two weeks, RIAA notified counsel for Verizon on August 6, 2003 that it was filing a motion to enforce the subpoena. Verizon requested that RIAA wait for 24 hours while it determined whether it would comply with the subpoena. The next day, nycfashiongirl’s counsel sent a letter to counsel for RIAA demanding that RIAA delay taking legal action and claiming that Intervenor “will soon be filing suit to enjoin compliance with that subpoena.” *See* Exhibit 3 to Verizon’s Opp. to Mot. to Enforce at 2. Verizon further indicated that it would not disclose the name, absent a court order. On August 7, 2003, RIAA filed its motion to compel. RIAA

provided copies of the motion to compel by e-mail and overnight mail to counsel for nycfashiongirl.

Counsel for nycfashiongirl asked for and received RIAA's consent to her intervention in the motion to enforce proceedings. Nonetheless, nycfashiongirl did not file any motion to intervene or other papers in this Court until the day that oppositions to RIAA's motion to enforce were due. On that day, nycfashiongirl filed this motion, seeking to intervene and to stay the proceedings until September 10, 2003 – a date that is more than two months after RIAA obtained the subpoena, seven weeks after counsel for nycfashiongirl announced to Verizon and the *New York Times* that she would file a motion to quash, and five weeks after RIAA filed its motion to enforce.

I. Intervenor Has Had More Than Enough Time to Prepare a Response to RIAA's Motion to Compel and Has No Need to File a Motion to Quash.

Intervenor's sole basis for seeking a stay of these proceedings is that her lawyer wants additional time to prepare a motion to quash. Intervenor's papers, however, provide no basis for giving Intervenor more time than that allotted by the federal rules for responding to RIAA's motion to enforce, and such a delay flies in the face of Congress' mandate that DMCA subpoenas be issued and complied with "expeditiously." Moreover, given the facts of this case and the objections Intervenor seeks to lodge more fully, it is simply incredible that Intervenor would seek more time.

The claim of Intervenor's counsel that he needs more time to prepare a motion to quash is simply not borne out by the facts. The subpoena in this case was issued on July 9, 2003. Intervenor had legal counsel shortly thereafter, because, on July 24, 2003, Intervenor's first counsel informed Verizon that his client intended to file a response and seek a protective order,

and Intervenor's current counsel told the *New York Times* that his client intended to take legal action. See "Subpoenas to File Sharers Prompt Anger and Remorse," *New York Times*, July 28, 2003.

Intervenor has now had over a month to file the threatened motion to quash and has had the full amount of time allotted by the local rules to raise its arguments in response to RIAA's motion to enforce. Under the rules of this Court, RIAA's pending motion will be fully submitted as of August 28, 2003. If nycfashiongirl's motion to stay is granted, under the rules, the quickest a motion to quash could be briefed and submitted is September 29 – resulting in more than a month of additional delay. Intervenor's motion for a stay provides no justification why such a delay, or a separate motion to quash, is warranted. Indeed, Intervenor's counsel cannot claim that he needs time to get up to speed on these issues; both Intervenor's California counsel and her local counsel have held themselves out as knowledgeable on issues related to DMCA subpoenas, and have put their names on a national list of attorneys seeking to represent people subject to DMCA subpoenas. See <http://www.subpoenadefense.org/legal.htm>.

Nor can Intervenor claim that she needs additional time to develop and present her arguments. The arguments that Intervenor claims she will present are identical to arguments fully presented to and rejected by Judge Bates in *Verizon I* and *Verizon II*. Indeed, Verizon itself is collaterally estopped from re-raising these arguments, which have been litigated and decided against them. See *Yamaha Corp v. United States*, 961 F. 2d 245, 254 (D.C. Cir. 1992); Restatement (Second) of Judgments § 27 (1982) (“[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties”).

Intervenor claims that the Court would benefit from a subscriber's perspective, but Verizon argued (and Judge Bates accepted) that it could assert the interests of its subscribers and raise their First Amendment and privacy rights. Moreover, that perspective was also before Judge Bates, in the form of an amicus brief filed on behalf of groups representing the interests of subscribers. As Judge Bates held, those First Amendment and privacy arguments have no merit, especially where the conduct at issue is copyright infringement, not speech. *See Harper & Row, Publ. Inc., v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *Verizon I*, 240 F. Supp. 2d at 42; *see also Eldred v. Ashcroft*, 123 S.Ct. 769, 789 (2003) (the First Amendment "bears less heavily when speakers assert the right to make other people's speeches"). Moreover, as Judge Bates held, § 512(h), the provision at issue here, neither suppresses nor deters protected speech in any way. *See Verizon II*, 257 F. Supp. 2d at 261 ("the DMCA does not regulate protected expression or otherwise permit a prior restraint of protected speech"). It merely requires identification of a speaker where there are good faith allegations of illegal conduct. Just as a shoplifter has no right to conceal her identity from authorities, a computer user has no right to conceal her identity when she opens up her home computer to anyone in the world on the Internet and copies (downloads) and distributes (uploads) copyrighted material without authorization. *See American Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information").

Nor can any Verizon subscriber plausibly claim a right to privacy, contractual or constitutional, given that Verizon's terms of service prohibit copyright infringement, *see* Verizon Online Terms of Service, http://www.verizon.net/policies/popups/internetaa_popup.asp, **and inform subscribers that their identities will be disclosed in response to subpoenas.** *See* Verizon

Privacy Principles, <http://www22.verizon.com/About/Privacy/genpriv>; *see also Verizon II*, 257 F. Supp. 2d at 267.

The only “new” argument that this subscriber raises is her counsel’s suggestion that her conduct – in uploading copyrighted works to the Internet – was not copyright infringement. *See* Motion to Intervene at 9-10. That argument – besides having been rejected by all courts that have considered it, *see e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-15 (9th Cir. 2001); *In re Aimster Copyright Litigation*, No. 02-4125, 2003 WL 21488143 (7th Cir. June 30, 2003) – is simply irrelevant to Verizon’s obligation to comply with a DMCA subpoena. In order to obtain a DMCA subpoena, a copyright owner or its agent must have “a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” 17 U.S.C. § 512(c)(3)(A)(v). The ultimate merits of the copyright claim are deliberately left for another day. DMCA subpoenas – which are designed to be expeditious and were created to ensure that copyright owners can take up their claims of infringement directly with the alleged infringer – are not the forum for litigation of Intervenor’s claims. Intervenor will have a full opportunity to raise her arguments and copyright defenses in any subsequent suit for copyright infringement. This is an action to enforce a subpoena.

The prejudice to a copyright owner of allowing a stay in DMCA subpoena cases such as this one would be enormous. Such a stay violates Congress’s express direction that the DMCA subpoena process must be expeditious. *Verizon I*, 240 F. Supp. 2d at 34-35. The longer that an alleged infringer is able to delay disclosure of his or her identity, the more irreparable harm will befall the copyright owner. It was for that reason that Congress created a streamlined process for copyright owners to obtain the information they need to assert their rights. *Id.* at 35 (“there is an important reason why Congress required service providers to act promptly upon receipt of a

subpoena to prevent further infringement – ‘the ease with which digital works can be copied and distributed worldwide virtually instantaneously’”) (quoting S. Rep. No. 105-190, at 8).

Moreover, although counsel for Intervenor has indicated that nycfashiongirl is no longer using the peer-to-peer services that she once used to disseminate copyrighted material, she nonetheless still has a computer full of illegally obtained copyrighted works. That database can still be used to further violate Plaintiffs’ rights.²

For all of these reasons, the Court should deny nycfashiongirl’s motion and require her to file an opposition, if any, immediately.

II. Intervenor’s Carefully Crafted Unsworn “Offer of Proof” Is Both Irrelevant And Highly Misleading.

Because she and her counsel are so tardy in seeking to assert whatever arguments they might wish to make, nycfashiongirl appeals to the equities, seeking to cloak herself in innocence *without actually denying* that she has been committing massive copyright infringement on the Internet. Intervenor’s “Offer of Proof” addressing the merits of her copyright infringement defense is, however, irrelevant to this proceeding.

But the Court also should disregard the Offer of Proof because it is shockingly misleading. Counsel for Intervenor seeks to portray his client as an innocent victim. In the *New York Times*, counsel claimed that “computer intruders may have re-arranged the files on [her] hard drive without her knowledge.” “Subpoenas to File Sharers Prompt Anger and Remorse,” *New York Times*, July 28, 2003. Apparently, realizing the dubious nature of that claim, in his

² Moreover, this Court does not have before it any statement under oath by anyone that nycfashiongirl is no longer distributing or otherwise infringing the copyrights of RIAA’s member companies. Given the misleading nature of Intervenor’s Offer of Proof, discussed below, this Court, we respectfully submit, should not readily accept the unsworn statement of Intervenor’s counsel. Nor does the Court have any assurance that nycfashiongirl will not attempt to destroy or tamper with evidence to make prosecution more difficult.

carefully worded Offer of Proof, counsel now claims that his client has lawfully purchased “a number of compact discs containing sound recordings and transferred some of those sound recordings onto the family computer” (a process referred to as “ripping”). Counsel then not-so-subtly suggests that the only use his client made of Kazaa, a peer-to-peer network that is a haven for copyright piracy, was to use the built-in media player to listen to those recordings and that any distribution of those files was “accidental.”

The Court should not be fooled by Intervenor’s “non-denial denial” of copyright infringement. The Second Declaration of Jonathan Whitehead, attached hereto, details some of the ways in which Intervenor’s “Offer of Proof” is demonstrably untruthful in the impression it seeks to create. There can be little doubt that nycfashiongirl was a frequent and significant participant in illegal downloading and distribution of music over the Kazaa peer-to-peer network.

First, there are the facts of what she was making available at the time that RIAA caught her. She was offering for download over 1100 files, including over 900 music files, almost all of which were infringing, as well as video, image, and software files, many of which appear to be blatantly infringing. Second Whitehead Decl., ¶ 6. The sound recordings included popular copyrighted works by artists such as the Rolling Stones, U2, Michael Jackson, Guns N Roses, Celine Dion, and Elton John. Among the non-music files is the feature motion picture “Pretty Woman.” *Id.*, ¶ 11(d). The copyrighted files were made available by nycfashiongirl to anyone on the Internet who wanted them.

Second, nycfashiongirl was warned of her copyright infringement not once, but twice. *Id.*, ¶ 7. As part of an educational campaign, the RIAA sent instant messages to infringing Kazaa users. The messages advised users that they were engaged in copyright infringement; of the

harm it is causing the legitimate music industry; and the potential consequences of their conduct. *Id.* Explicit notices were sent to nycfashiongirl on June 30, 2003 and again on July 3, 2003. *Id.*

Third, a technical review of the files in nycfashiongirl's Kazaa "share" folder demonstrates, flatly contrary to the Offer of Proof, that those files were not merely recordings she had copied from her own CDs. By and large, they were downloaded from the Internet, in violation of the Copyright Act, *see, e.g., Napster*, 239 F.3d at 1014-15, most likely from other users of the Kazaa file distribution system.

As explained more fully in the Second Whitehead Declaration, most media files contain descriptive information (known as "metadata") which is associated with a file, and travels with the file when downloaded or uploaded. Second Whitehead Decl., ¶¶ 8-12. In response to nycfashiongirl's Offer of Proof, RIAA undertook an expedited review of the metadata associated with the files that she was offering for others to download. The metadata for numerous files indicate explicitly that they were ripped, encoded and/or uploaded by people other than nycfashiongirl (*e.g.*, "Ripped by ATOMIC PLAYBOY 1999!"; "Uploaded by Jerome and Rudy"; "rip'd n up'd by Sw0rdz"). *Id.*, ¶ 11(a) (citing many other examples). Numerous other files indicate expressly that they originally were downloaded from blatant pirate Internet sites (*e.g.*, www.mp3-2002.com; www.supermp3s.net). *Id.*, ¶ 11(b) (citing many other examples). Numerous other files contain in the metadata explicit invitations for other users to download or further share the files (*e.g.*, "So PLEASE SHARE!!!"; "SHARE WITH OTHERS!!!"; "This is the real song. I'm not lying. Download it"). *Id.*, ¶ 11(e) (citing many other examples). Numerous other files contain detailed assurances to users about the quality of the file or other telltale indicia that the files were intended for mass distribution to other, unknown persons, over a file-trading network such as the Kazaa system (*e.g.*, "not very good quality! but its ok";

“REAL FULL TRACK FROM THERE (sic) NEW ALBUM”; “This is the real version, I ripped it from the music video myself”). *Id.*, ¶ 11(f) (citing many other examples).

Nycfashiongirl even had files that indicate they were originally put on the Internet by a criminal enterprise devoted to distributing sound recordings before they are commercially released. *Id.*, ¶ 12. Finally, to allay any lingering doubt, a couple of nycfashiongirl’s files, in their metadata, state: “Finally the Real Full CD delivered fresh for everyone on Grokster and Kazaa to Enjoy! --- Compliments of [dmb] ~ {DMB} ~ [dmb].” *Id.*, ¶ 11(e). The impression nycfashiongirl tries to create in her Offer of Proof is, simply put, false.

Fourth, as an additional confirmation that nycfashiongirl’s files were not merely copied from her own CDs, the RIAA performed an analysis of another piece of metadata – known as a “hash.” A hash, essentially, is a “fingerprint” that uniquely identifies a particular file. *Id.*, ¶ 14. For a small sample of files from nycfashiongirl’s Kazaa “share” folder, the RIAA compared the hashes to hashes in a database dating back to May of 2000, created from downloads from users on the Napster system. *Id.*, ¶ 15. (As the Court may recall, Napster was the notorious pirate service that ultimately was shutdown by a federal court as a result of its facilitation of massive infringement by its users.) Several of the files examined from nycfashiongirl’s Kazaa “share” folder were an exact hash match to files that previously had been downloaded from the Napster system. *Id.*, ¶¶ 13,15. Thus, either nycfashiongirl was a Napster user and has offered the files for distribution to other users on both the Kazaa and Napster systems, or she downloaded the files from other users who previously had downloaded them from Napster. *Id.*, ¶ 16. Either way, the source for nycfashiongirl’s sound recordings was not her own personal CDs.

Finally, nycfashiongirl’s claim that “on several occasions” she sought unsuccessfully to disable the sharing of files from her computer is simply not credible. As explained at Paragraph

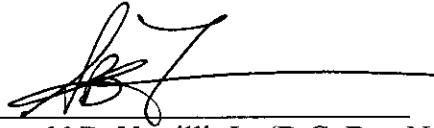
17 of the Second Whitehead Declaration, a Kazaa user seeking to prevent others from accessing folders on her computer need only click a single “check box” to disable “sharing.” This is a relatively simple process. Certainly for someone, such as nycfashiongirl, who claims to have used specialized ripping software to extract the digital audio files from her computer, and then to have moved those files into her Kazaa “share” folder, turning off file-sharing in the Kazaa program would have been a trivial matter. Her (unsworn) suggestion to the contrary is as incredible as her (now disproven) claims that she used Kazaa merely to listen to her own CDs.

CONCLUSION

The *sworn* evidence shows that nycfashiongirl is not an innocent or accidental infringer; she actively traded pirated music files, among other copyrighted works, in violation of the copyright laws and the rights of RIAA’s members. She will have her day in court in defending against the music industry’s claims of copyright infringement.

But this proceeding is not about her copyright defenses. It is to enforce a subpoena that Congress mandated should be issued and responded to expeditiously. RIAA does not oppose nycfashiongirl’s intervention, but there is no excuse for her dilatory conduct in waiting until the eleventh hour to seek a stay of this proceeding. RIAA respectfully requests that the Court deny her motion to stay and direct nycfashiongirl, if she wishes to be heard, to file *immediately* an opposition to RIAA’s pending motion to enforce.

Respectfully Submitted,



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Dated: August 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition of Recording Industry Association of America to Motion of Intervenor to Stay Motion to Enforce Subpoena and the accompanying declaration, including exhibits, were served on August 26, 2003 by First Class Mail upon the individuals listed below, and by email upon Andrew G. McBride at amcbride@wrf.com, and Daniel N. Ballard at dballard@mhalaw.com.

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