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LITIGATION

## Conglomerate targeted over privacy

*Music industry tries new tactic in long - running infringement battle*

By Ben Adlin  
Daily Journal Staff Writer

First it was Napster. Then came copycats like Gnutella and Kazaa. In the ongoing battle against digital piracy, copyright holders have perennially complained of the seemingly never-ending line of computer programs allowing users to illegally download files.

So instead of targeting individual software developers, plaintiffs in one of the latest cases are going after what they describe as the “king-pin” of music piracy: CBS Interactive Inc., owner of websites CNET and Download.com, which plaintiffs say have long guided consumers to some of the Internet’s most infamous piracy programs.

“The developers of the software have come and gone,” said Jaime W. Marquart of Baker Marquart LLP, “but CNET has stayed the same.”

Marquart represents dozens of music artists in the case, which U.S. District Judge Dale S. Fischer said last week could go forward on the grounds CBS Interactive allegedly led users to a third-party program called LimeWire, through which consumers could download copyrighted material.

LimeWire was effectively shut down by a 2010 court judgment finding it liable for copyright infringement. The company later reached a roughly \$105 million settlement with record companies.

**‘The First Amendment concerns jump right out at you.’**

—Julie Ahrens, associate director of Stanford Law School’s Fair Use Project.

CNET, a popular technology website, operates Download.com, which links to thousands of programs available for download. Of all LimeWire downloads, plaintiffs allege 95 percent originated from the CBS-controlled websites.

CBS also allegedly posted video tutorials showing staff members using LimeWire and other programs to download copyrighted music from artists like Nine Inch Nails, will.i.am, Usher and others, according to the suit. *David et al. v. CBS Interactive et al.*, CV11-9437 (C.D. Cal., filed Nov. 14, 2011).

Lawyers at Kendall Brill & Klieger LLP, which represents CBS, declined to comment. In court they’ve argued that CBS and its websites were too far removed from the illegal activity



Daily Journal File Photo

Jaime W. Marquart of Baker Marquart LLP, who represents dozens of music artists in a copyright lawsuit against CBS Interactive Inc.

to be held liable.

“Control is the key point,” Richard B. Kendall told Fischer during a July 2 hearing on a motion to dismiss the case. Users downloaded LimeWire through other, third-party sources that CBS merely linked to, he said, and CBS couldn’t control how the software was used.

That argument carried some weight with Fischer, who dismissed a claim of vicarious infringement on the grounds that users “would not be prevented from seeking the software out elsewhere and continuing to pirate copyrighted music.” She also tossed plaintiffs’ claim that CBS contributed materially to the infringement.

Ultimately, Fischer allowed the case to proceed under the inducement theory of contributory liability, **so plaintiffs can try to prove CBS distributed the device “with the object of promoting its use to infringe copyright.”**

Pointing to the CBS-hosted videos that allegedly showed staff using the software to download copyrighted music, Fischer wrote in a July 13 ruling that the defendants allegedly distributed the software “while simultaneously providing explicit commentary on that software’s effectiveness in infringing copyright” — activity she called “unusual and ill-advised.”

In a written statement, CBS Interactive said it was a “very good sign” that Fischer dismissed the two claims. “We will continue vigorously defending the third claim, and are fully con-

fidant we will prevail on that count as well.”

Some technology and free speech advocates said Fischer’s decision to allow the case to go forward on an inducement claim could unfairly restrain websites’ ability to offer editorial commentary.

“The First Amendment concerns jump right out at you,” said Julie Ahrens, associate director of Stanford Law School’s Fair Use Project. “This seems to limit the ability to talk about these products or describe what they do or how they work.”

She acknowledged the alleged tutorial videos could have shown users downloading files that aren’t copyrighted, but added that “if you’re thinking about it from a news perspective, that’s not necessarily a true picture of what’s going on in the world.”

In her ruling, Fischer called the First Amendment argument “greatly overstated.”

“It would not be difficult to avoid liability,” she wrote, “by either (1) only providing editorial content without distributing the software or (2) distributing the software without demonstrating or advocating its use for violating copyrights.”

In June, the Recording Industry Association of America sent a letter asking CNET to remove software that allows users to convert music from YouTube videos into MP3 files. The association said it has been asking the company for over a year to remove software used to pirate music.