

**Who's Walking the Plank?:  
The Recording Industry's Fight to Stop Music Piracy**

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The advent of the Internet has forever changed the way people interact, communicate, and share information. The World Wide Web allows Internet users to send a letter in a matter of seconds, to instantly find out the latest sports scores and stock prices, or to learn of breaking world news. The Internet even allows people to have real-time conversations with other Internet users anywhere around the world. The Internet has also provided users a medium through which they can engage in any number of illicit acts. One of the more popular illicit acts, engaged in by millions of Internet users, involves trading music files across file sharing networks. Users accomplish this file sharing, or pirating, by copying the music from a compact disc onto their computers and uploading a file of the copied music onto a network created by software such as Kazaa or Napster. An infinite number of other users can then access this network, providing them an instant ability to copy the file of that song to their own computers.

The Recording Industry Association of America (RIAA), which represents the legitimate copyright owners of much of this illegally traded music, has taken up arms

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against these file sharers. On September 8, 2003, the RIAA filed individual complaints against two hundred and sixty one file sharers alleging copyright infringement.<sup>2</sup>

The purpose of this Note is to examine the procedural issues arising under the Federal Rules of Civil Procedure that are implicated in this series of lawsuits.<sup>3</sup> It addresses the procedural vehicles available to the Plaintiff RIAA for establishing liability, as well as those procedural vehicles available to the defendants for avoiding liability, both as individuals and as a class. Part II will provide an outline of the history of the Recording Industry's fight against illegal file sharing. Part III will evaluate the procedural matters and the relevant Federal Rules of Civil Procedure, from the plaintiff's point of view, that will be implicated with the Recording Industry's current battle against the two hundred and sixty one file sharers. Part IV analyzes the procedural tools available to the defendants under the Federal Rules of Civil Procedure when answering the charges filed against them by the RIAA. Part V then summarizes the positions of both sides and determines whether suing individuals who share music files is the most effective method to accomplishing the RIAA's goal of curbing music piracy.

## II. The History of Music Piracy

### A. The Rise and Fall of Napster

The music industry has to contend with individuals copying music for their personal use. Technology allows individual listeners to record songs as they are played

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<sup>2</sup> Although actual complaints are not readily available to the public, the Recording Industry Association of America has provided a sample complaint on their website. RECORDING IND. ASSOC. OF AM., SAMPLE COMPLAINT, <http://www.riaa.com/news/newsletter/pdf/sampleComplaint.pdf> (last visited Feb. 11, 2005). The sample complaint contains the allegations of copyright infringement under 17 U.S.C. § 101. 17 U.S.C. §101 (2002).

<sup>3</sup> The two hundred and sixty one complaints all allege copyright infringement under federal law making the only rules of consequence the Federal Rules of Civil Procedure.

on the radio or to copy an entire album onto an analog tape. More recently, with the advances in compact disc (CD) technology, music listeners can make copies of their favorite CDs that sound as clear as the original. The RIAA and the rest of the music industry have conceded that an individual's act of duplicating copyrighted music for his personal use does not violate any law.<sup>4</sup>

Copying music for individual use has had a long history and has been tacitly approved by the music industry, however, the Internet now allows music lovers the opportunity to copy and distribute music on a massive scale. This widespread distribution of copied music files is known as piracy. The RIAA defines piracy as “the illegal duplication and distribution of sound recordings.”<sup>5</sup> This definition is further distilled into four distinct categories of piracy: pirate recordings, counterfeit recordings, bootleg recordings, and online piracy.<sup>6</sup> The first three categories all concern unauthorized recordings of various types of music, including specific sounds, packaging, and concert recordings.<sup>7</sup> The fourth category – online piracy – is the focus of this Note. Online piracy, as defined by the RIAA, is “the unauthorized uploading of a copyrighted sound recording and making it available to the public, or downloading a sound recording

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<sup>4</sup> RECORDING IND. ASSOC. OF AM., FREQUENTLY ASKED QUESTIONS - NAPSTER AND DIGITAL MUSIC, [http://www.riaa.com/news/filings/napster\\_faq.asp#ahra](http://www.riaa.com/news/filings/napster_faq.asp#ahra) (last visited Feb. 11, 2005). A discussion of the implication of relevant copyright law to music piracy would stray from the purpose of this Note and will not be discussed. For an in-depth discussion of the copyright law issues present in duplication of music, see Raymond T. Nimmer, *Symposium on Intellectual Property, Digital Technology & Electronic Commerce: The Uniform Computer Information Transactions Act and Electronic Commerce: Licensing in the Contemporary Information Economy*, 8 WASH. U. J.L. & POL'Y 99 (2002).

<sup>5</sup> RECORDING IND. ASSOC. OF AM., ANTI-PIRACY, <http://www.riaa.com/issues/piracy/default.asp>, (last visited Feb. 11, 2005).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

from an Internet site, even if the recording isn't resold. Online piracy may now also include certain uses of 'streaming' technologies from the Internet."<sup>8</sup>

Online piracy became a major concern for the music industry with the creation of a software program known as Napster in the late 1990s. In describing this program, Lee Burgunder<sup>9</sup> wrote:

Napster is a Web service that enables users to find audio MP3 files on the hard drives of other participants and then download selected files from the remote hard drives to their own computers. Napster provides the necessary software. It also posts a directory containing the names of MP3 files stored in the hard drives of users that are on-line. Napster does not determine the names of the files posted on its directory; rather, the users make those designations.<sup>10</sup>

This program allowed people all over the world to access other users' music files and to copy them to their own hard drive in seconds, effectively allowing one user to distribute a music file to millions of other users through a simple double-click of the mouse.

The music industry responded to the threat of file sharing by filing a lawsuit against Napster. The industry sought to enjoin Napster from engaging in actions that would violate copyright laws or that would allow others to violate copyright laws.<sup>11</sup> The United States District Court for the Northern District of California granted the injunction and found Napster guilty of contributory and vicarious copyright infringement, thereby preventing Napster from facilitating file swapping by Internet users.<sup>12</sup> The injunction prohibited Napster "from engaging in, or facilitating others in copying, downloading,

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<sup>8</sup> *Id.*

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<sup>10</sup> Lee B. Burgunder, Comment, *Reflections on Napster: The Ninth Circuit Takes a Walk on the Wild Side*, 39 AM. BUS. L.J. 683, 684 (2002).

<sup>11</sup> *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

<sup>12</sup> *Id.* at 927.

uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner.”<sup>13</sup>

Napster appealed the District Court’s decision and the case went to the United States Court of Appeals for the Ninth Circuit. On appeal, a three-judge panel sitting for the Court of Appeals affirmed in part and reversed in part the opinion of the District Court. Consequently, the case was remanded back to the District Court for further consideration.<sup>14</sup> The Ninth Circuit stayed the injunction until the District Court modified its order in a manner consistent with its opinion.<sup>15</sup>

Upon remand the District Court amended the injunction order as directed by the Court of Appeals.<sup>16</sup> The injunction now prohibits Napster “from engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings in accordance with this Order.”<sup>17</sup> The District Court, in complying with the Court of Appeals’ ruling, stated that the record companies are required to provide Napster with notice of files that are included in the Napster index in violation of copyright law.<sup>18</sup> The Court of Appeals affirmed this injunction as a proper exercise of the District Court’s supervisory power.<sup>19</sup>

## B. Verizon Fights for Privacy

The recording industry’s next major courtroom battle was against Verizon Internet Services. In furtherance of the music industry’s goal of reducing the threat of

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<sup>13</sup> *Id.*

<sup>14</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001).

<sup>15</sup> *Id.* at 1027.

<sup>16</sup> *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2001 U.S. Dist. LEXIS 2186, at 1 (N.D. Cal. March 5, 2001).

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

music piracy, the RIAA subpoenaed Verizon Internet Services, requesting that Verizon reveal the identity of an individual whose Internet Protocol (IP) address<sup>20</sup> was responsible for downloading six hundred music files in a single day along Verizon's network.<sup>21</sup> The RIAA provided Verizon with a list of the six hundred songs downloaded on that day as evidence to support the subpoena.<sup>22</sup> Finally, the RIAA requested that Verizon "remove or disable access to the infringing sound files."<sup>23</sup>

Verizon responded by informing the RIAA that it refused to comply with the subpoena. Verizon did not believe that the subpoena powers under the Digital Millennium Copyright Act (DMCA) extended to files being transferred along Verizon's network. It relied on the fact that the files did not reside on the network, but instead on the individual users' personal computers.<sup>24</sup> Verizon also notified the RIAA that it was not going to terminate the users' Internet access.<sup>25</sup> After receiving notice of Verizon's refusal to comply with the subpoena, the RIAA filed suit against Verizon in the United States District Court for the District of Columbia seeking a judicial order which would require Verizon's compliance.<sup>26</sup>

The central issue of the case was whether the DMCA granted the power to subpoena Internet Service Providers (ISPs) to reveal the identities of those users who illegally transmit copyright-protected material.<sup>27</sup> The District Court determined that under § 512(h) of the DMCA, Congress had authorized the use of subpoenas such as the

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<sup>20</sup> The IP address is unique to the user's computer.

<sup>21</sup> Recording Indus. Assoc. of Am. v. Verizon Internet Servs., 240 F. Supp. 2d 24, 26 (D.D.C. 2003).

<sup>22</sup> *Id.* at 28.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 28- 29.

<sup>25</sup> *Id.* at 29.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 26.

one served on Verizon.<sup>28</sup> After recognizing that the RIAA acted within the subpoena powers of the DMCA, the District Court then granted the RIAA's motion to enforce the subpoena and ordered Verizon to comply by providing the identity of the offending user.<sup>29</sup>

In response to the holding in favor of the RIAA, Verizon filed a motion to quash the original enforcement order, claiming that the order violated the user's First Amendment rights.<sup>30</sup> Verizon also filed a motion to stay the original order pending appeal.<sup>31</sup> The District Court denied both of Verizon's motions.<sup>32</sup> The Court did, however, order a temporary stay of fourteen days to allow Verizon to seek further relief from the United States Court of Appeals.<sup>33</sup>

Verizon sought additional relief by filing an appeal with the United States Court of Appeals for the District of Columbia Circuit. On December 19, 2003, the Court of Appeals remanded the case back to the District Court and directed the court to grant Verizon's motion to quash the subpoena order.<sup>34</sup> The Court of Appeals stated that § 512(h) of the DMCA applies to files stored by the ISP in various forms; however, the Court stated that the DMCA did not apply to files stored on customers' personal computers because the ISP does not have any power to restrict or control these files.<sup>35</sup>

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<sup>28</sup> *Id.* at 44-45.

<sup>29</sup> *Id.* at 45.

<sup>30</sup> *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 246 (D.D.C. 2003).

<sup>31</sup> *Id.* at 247.

<sup>32</sup> *Id.* at 275.

<sup>33</sup> *Id.* at 248 n.3. A separate order concerning this case and this motion was issued by this court on the same day, April 24, 2003. *In re Verizon Internet Servs., Inc.*, 258 F. Supp. 2d 6 (D.D.C. 2003).

<sup>34</sup> *Recording Indus. Assoc. of Am., Inc., v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

<sup>35</sup> *Id.* at 1237

Since Verizon did not have control over the infringing files, the files were not subject to the subpoena powers stated in §512(h) of the DMCA.<sup>36</sup>

### C. Other Cases, Same Result ...

In order to analyze the RIAA's most recent legal battles against music piracy, this Note focuses on the Napster and Verizon litigation as primary examples. Although several other lawsuits involving the RIAA or members of the RIAA are not discussed in detail, the following is a brief description of two other important cases in this area of litigation.

The music industry has filed several other successful suits against other companies whose services allowed Internet users the opportunity and the technology to trade music files in violation of U.S. copyright law. One such suit was filed against Aimster, a service similar to Napster that allowed peer-to-peer file sharing. The RIAA sought an injunction to stop Aimster from facilitating the transfer of illegally copied music files.<sup>37</sup> The United States District Court for the Northern District of Illinois granted the motion and issued the injunction against Aimster.<sup>38</sup> This injunction was affirmed by the United States Court of Appeals for the Seventh Circuit.<sup>39</sup>

In an earlier suit, the music industry filed suit against MP3.com alleging that those who ran MP3.com were illegally copying music files and replaying the files for their subscribers.<sup>40</sup> The United States District Court for the Southern District of New

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<sup>36</sup> *Id.*

<sup>37</sup> *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002).

<sup>38</sup> *Id.* at 665.

<sup>39</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

<sup>40</sup> *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).



York granted partial summary judgment in favor of the plaintiffs, finding that the defendant company, MP3.com, was in violation of U.S. copyright law.<sup>41</sup>

The clear result of these cases is that one who copies music files, or permits those who copy music files to distribute those files to the masses, is in violation of copyright law.

### III. The Procedural Options for the RIAA

#### A. The “Must Haves”: Personal Jurisdiction, Subject Matter Jurisdiction and Venue

The beauty of the RIAA lawsuits lies in the simplicity of this first phase.<sup>42</sup> The RIAA filed two hundred and sixty one lawsuits; each suit was filed in the federal judicial district in which the defendant was believed to reside.<sup>43</sup> What this approach lacks in terms of judicial efficiency is made up for by the impact on the defendant’s position.

For a court order to be binding on an individual, the court must have personal jurisdiction over that individual. As stated in *International Shoe Co. v. Washington*:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’<sup>44</sup>

By filing suit against the defendants in the judicial district where they are believed to reside, the RIAA eliminated one of the seven possible affirmative defenses that the plaintiffs could have raised – lack of personal jurisdiction.<sup>45</sup> By virtue of their residency,

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<sup>41</sup> *Id.* at 353.

<sup>42</sup> See Press Release, Recording Ind. Assoc. of Am., New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers, *available at* <http://www.riaa.com/news/newsletter/012104.asp> (Jan. 21, 2004).

<sup>43</sup> Recording Ind. Assoc. of Am., *supra* note 1, at 2.

<sup>44</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

<sup>45</sup> FED. R. CIV. P. 12(b)(2).

each defendant will have the required minimum contacts so as to not violate due process.<sup>46</sup>

The RIAA's decision to file suit where each defendant resides also eliminated any claim of improper venue, another affirmative defense.<sup>47</sup> According to 28 U.S.C. §1391 venue in a non-diversity case is proper where any defendant resides, "if all defendants reside in the same State."<sup>48</sup> Each suit was filed against a single defendant and so the latter language of the venue statute is inapplicable. Venue is proper for each defendant because each suit was filed in the judicial district where the defendant resides.

The last essential requirement that must be present before a case can proceed is subject matter jurisdiction. Federal courts are courts of limited jurisdiction, that jurisdiction being limited to cases involving diversity of citizenship<sup>49</sup> or cases concerned with a question of federal law.<sup>50</sup> For a case filed in federal court, establishing subject matter jurisdiction is extremely important because any party, or the Court, may claim a lack of subject matter jurisdiction at any time.<sup>51</sup> If a lack of subject matter is found, the Court must dismiss the case.<sup>52</sup> In the RIAA litigation, this requirement is met as each suit filed by the RIAA alleges violations of federal copyright law<sup>53</sup> thus the RIAA should not be faced with any motions to dismiss for lack of subject matter jurisdiction since all two hundred and sixty one suits allege violations of federal copyright law.

## B. Efficiency and Expenses: Consolidating Cases

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<sup>46</sup> *Int'l Shoe Co.*, 326 U.S. at 316.

<sup>47</sup> FED. R. CIV. P. 12(b)(3).

<sup>48</sup> 28 U.S.C. § 1391(b)(1) (2002).

<sup>49</sup> For diversity of citizenship requirements, see 28 U.S.C. § 1332 (2002).

<sup>50</sup> 28 U.S.C. § 1331 (2002).

<sup>51</sup> FED. R. CIV. P. 12(h)(3).

<sup>52</sup> *Id.*

<sup>53</sup> Each suit is seeking damages and injunctive relief under 17 U.S.C. § 101. RECORDING IND. ASSOC. OF AM., *supra* note 1.

The RIAA cases, like all civil cases filed in the federal system, are governed by the Federal Rules of Civil Procedure. One of the goals of these rules is to encourage an efficient judicial system. Rule 1 says that the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>54</sup> With two hundred and sixty one suits being filed in the home district of each defendant the RIAA suits are shining examples of judicial inefficiency given the similarity of the claims and the actions that precipitated the lawsuits. In addition to the inefficiency of the RIAA suits, such a barrage of legal action is sure to come with a high price tag regardless of whose shoulders upon which the financial responsibilities fall. By utilizing various rules of civil procedure, the RIAA can dramatically increase the efficiency of these suits as well as lower the expenses associated with the actions.

One of the biggest impediments to any litigation is the cost, especially for particularly large, complex or complicated cases. Here, the RIAA filed two hundred and sixty one suits; each suit is accompanied by billable hours, court costs, discovery costs and possible settlements or verdicts. By consolidating cases, the RIAA could benefit in several ways. First, consolidating cases in several districts will lower the litigation costs for the RIAA, mainly in terms of reduced lawyer fees<sup>55</sup> and fewer court costs. Second, by consolidating cases the RIAA may be able to apply pressure to the defendants to settle. Presenting evidence against several defendants in front of the same jury will have a greater impact compared to doing so individually.<sup>56</sup> Third, by presenting one jury with

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<sup>54</sup> FED. R. CIV. P. 1.

<sup>55</sup> In its complaint, the RIAA asks the Court to include in the judgment any attorney fees and any other plaintiff’s costs incurred as a result of this action. *See* RECORDING IND. ASSOC. OF AM., *supra* note 1.

<sup>56</sup> Presenting evidence against several defendants rather than a single defendant will allow one jury to hear a greater amount of evidence favoring the RIAA.

evidence against several defendants the RIAA will be in a position to better educate the jury about complicated and technical issues.<sup>57</sup>

#### 1. Rules of Joinder:

The Federal Rules of Civil Procedure allow parties in a civil action to join additional parties as either plaintiffs or defendants.<sup>58</sup> Rules 19 and 20 allow for joinder of parties depending on whether the court considers the party to be joined a permissive party<sup>59</sup> or whether the court considers the party to be joined necessary for the adjudication.<sup>60</sup>

To be joined as a party under Rule 19, that party must be necessary for the adjudication. The rule defines a party as necessary

if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to...double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.<sup>61</sup>

Since the RIAA can be afforded complete relief from each party individually, Rule 19 joinder is unavailable to the RIAA.

Rule 20 governs the permissive joinder of a party. Under Rule 20, a party can be joined as a defendant if they may be held jointly or severally liable for the claim made by

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<sup>57</sup> In this case, the alleged copyright infringement occurred when digital music files were traded across the internet without the copyright owner's permission.

<sup>58</sup> FED. R. CIV. P. 19, 20.

<sup>59</sup> FED. R. CIV. P. 20.

<sup>60</sup> FED. R. CIV. P. 19.

<sup>61</sup> FED. R. CIV. P. 19(a).

the plaintiff.<sup>62</sup> Defendants may also be joined if the plaintiff's claim for relief against the defendant to be joined arises out of the same transaction or occurrence as the plaintiff's claim against the defendants already made a party to the action.<sup>63</sup> Although the suits filed by the RIAA are all based on the common theme of illegal file sharing over the Internet, each suit is based on separate transactions of each individual defendant.<sup>64</sup> Since there is no common nexus among all the defendants, joinder would likely fail under Rule 20.

A quick analysis of Rules 19 and 20 demonstrates that the RIAA will not be able to use the normal rules of joinder in order to consolidate a portion of the two hundred and sixty one cases they have filed. To consolidate these cases, the RIAA must use a more creative approach.

## 2. Less Conventional Means of Consolidation:

By suing each defendant in his or her home district, the RIAA has ensured that each defendant will be subject to the court's jurisdiction. However, each defendant will likely be subject to personal jurisdiction in other courts as well. Based on the minimum contact standard used to determine whether a party is subject to personal jurisdiction,<sup>65</sup> many, if not all, of the defendants in the RIAA cases are likely to have the sufficient minimum contacts with other judicial districts that would allow a court to exercise specific or general in personam jurisdiction over a defendant.<sup>66</sup> For example, a defendant

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<sup>62</sup> FED. R. CIV. P. 20(a).

<sup>63</sup> *Id.*

<sup>64</sup> *See* RECORDING IND. ASSOC. OF AM., *supra* note 1.

<sup>65</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>66</sup> The manner of the action with respect to the contacts will determine whether a court could exercise general or specific jurisdiction over a defendant. A defendant may be subject to general in personam jurisdiction (subject to suit in the state for any claim) if the defendant has sufficient contacts with the forum. *Helicoptores Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). For a court to exercise specific in personam jurisdiction over an individual, the individual's minimum contacts with the forum must be related to the action at hand. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *McGee*

who resides in Connecticut is likely to have the required level of minimum contacts in judicial districts in New York, Massachusetts, New Jersey, and Rhode Island.<sup>67</sup> Based on the proximity of the states within New England, residents of a New England state will have traveled within many of the other states and are therefore subject to personal jurisdiction within those other states. These residents have purposefully availed themselves of the protections and benefits of the other New England states' laws.<sup>68</sup>

Assuming that service of process and notice<sup>69</sup> will not be an obstacle to a court obtaining personal jurisdiction over a defendant, there is a means available to the RIAA to consolidate a portion of its cases. The first step in consolidating is to transfer cases into one venue using § 1404. Section 1404 states that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”<sup>70</sup> So long as the defendant is subject to personal jurisdiction within the district where the case is to be transferred, the case could have originally been brought there.<sup>71</sup> The RIAA, in order to begin consolidating cases, would have to go to the district court where the individual cases were filed and file a motion for a change of venue to transfer the case to another district where the defendant was also subject to personal jurisdiction. This process could be repeated, wherein each time the RIAA would move to transfer cases from various

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v. Int'l Ins. Co., 355 U.S. 220 (1957). For further discussion of the minimum contacts standard, refer to the text of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>67</sup> In order to obtain personal jurisdiction over a non-resident, one must consult the long-arm statute of the state in which a plaintiff seeks jurisdiction. For the sake of argument, I have assumed that the state considering jurisdiction has a long-arm statute that would allow for the exercise of personal jurisdiction.

<sup>68</sup> Service of process and notice are still needed in order to obtain *in personam* jurisdiction over a defendant; for purposes of this Note, I have assumed that such service will not be an issue.

<sup>69</sup> FED. R. CIV. P. 4. Rule 4 governs service of process in the federal system.

<sup>70</sup> 28 U.S.C. § 1404 (2002).

<sup>71</sup> *See id.* at § 1391(a)(3). Transferring a case is always subject to venue rules, and for the sake of this Note, I have assumed that any transfer would not violate the rules of venue.

district courts to one district court that is geographically close to the others, thereby ensuring that each defendant is subject to personal jurisdiction. This process would allow the RIAA to minimize the number of district courts where litigation would proceed.<sup>72</sup>

The RIAA's next step is to consolidate all transferable cases into one case. Rule 42 allows for consolidation of cases that are pending in the same court.<sup>73</sup> Specifically, Rule 42 states:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.<sup>74</sup>

The rule demonstrates why the RIAA must change venue for as many cases as possible in order to meet the goal of minimizing the cost of litigation. Rule 42 requires several things in order for the cases to be consolidated. First, the cases to be consolidated must all be pending in the same court.<sup>75</sup> Second, the cases must all concern a common question of law or fact.<sup>76</sup> Finally, the consolidation should help avoid “unnecessary costs or delay”<sup>77</sup> in the eyes of the court issuing the order to consolidate.

In the RIAA cases, once the change of venue motions under § 1404<sup>78</sup> have been granted, the RIAA would have two or more cases in the same district court, and thus the first requirement for consolidation under Rule 42 would have been met. Since the basis

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<sup>72</sup> Consolidation of cases will be subject to minimum contacts and the standard of “traditional notions of fair play and substantial justice” set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Any question of fairness to the defendant has been answered if a court determines that the defendant is subject to personal jurisdiction.

<sup>73</sup> FED. R. CIV. P. 42(a).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 28 U.S.C. § 1404 (2002).

for each of the RIAA suits is the same – violation of U.S. copyright laws – the second requirement would also be met. Additionally, consolidation of the RIAA cases would avoid unnecessary costs and delays, which is evidence to a court that a consolidation should be ordered.<sup>79</sup> Once the RIAA has transferred cases into common district courts<sup>80</sup> using § 1404, Rule 42 then permits the several cases to be consolidated into one multi-defendant case. If consolidation does occur under Rule 42, the court still has the power to order separate trials in cases where a particular defendant’s case warrants such an order.<sup>81</sup> Also, the defendants should request special jury instructions to ensure that judicial fairness is not compromised.

### 3. The Defendant Class Action:

A third alternative available to the RIAA for litigating numerous cases in the most efficient manner is to try the defendants as a class in a class action suit. The first step in litigating these suits as a class action is to file a class action complaint. In order to file a class action complaint, the RIAA would have to drop the individual suits or seek leave of court in each district to amend the original complaint.<sup>82</sup> However, since the individual suits were filed on September 8<sup>th</sup>, 2003, and a party only has twenty days to file an answer to a complaint,<sup>83</sup> the RIAA would presumably be unable to freely amend its complaints.<sup>84</sup> Thus, the RIAA would be best served by filing a class action complaint

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<sup>79</sup> The Rule lists cost avoidance as a factor that would call for consolidation. FED. R. CIV. P. 42(a).

<sup>80</sup> A common district court, in this context, refers to a district court where several defendants are all subject to personal jurisdiction.

<sup>81</sup> FED. R. CIV. P. 42(b).

<sup>82</sup> FED. R. CIV. P. 15(a).

<sup>83</sup> FED. R. CIV. P. 12(a).

<sup>84</sup> FED. R. CIV. P. 15(a). A party may amend its complaint without leave of court prior to the filing of a responsive pleading. *Id.* If a party wishes to amend after a responsive pleading has been filed, it must obtain leave of court. *Id.*



and then dropping the individual complaints against those defendants who had been incorporated into the class.

Rule 23(a) specifically allows for defendant class actions, stating that “[o]ne or more members of a class may...be sued.”<sup>85</sup> This rule lists the requirements that any class must satisfy. For a class to be certified by a court, the class must be so numerous that joinder of claims is impractical,<sup>86</sup> the cases must involve a common question of law or fact,<sup>87</sup> the claims and defenses of the class representative must be typical of the class,<sup>88</sup> and the named representative must fully and fairly represent the entire class.<sup>89</sup> Presupposing that the class meets all four requirements, the class must still be maintainable under Rule 23(b).<sup>90</sup> Any defendant class for the RIAA suits would probably be maintainable under Rule 23(b)(3)<sup>91</sup> as a class because common questions of law or fact predominate the entire class.<sup>92</sup> If the RIAA had a defendant class action certified under Rule 23(a) and a court found that the class action was maintainable under Rule 23(b), the RIAA could litigate against all class members in one forum allowing the RIAA the chance to litigate against all class defendants in one large case instead of potentially having to litigate in two hundred and sixty one separate lawsuits.

### C. Easing the Pain of Discovery: The Multi-District Panel for Multi-District Litigation

Another potentially costly and inconvenient aspect of the RIAA litigation will be the discovery phase. It is likely that a significant number of the two hundred and sixty

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<sup>85</sup> FED. R. CIV. P. 23(a).

<sup>86</sup> FED. R. CIV. P. 23(a)(1).

<sup>87</sup> FED. R. CIV. P. 23(a)(2).

<sup>88</sup> FED. R. CIV. P. 23(a)(3).

<sup>89</sup> FED. R. CIV. P. 23(a)(4).

<sup>90</sup> FED. R. CIV. P. 23(b).

<sup>91</sup> FED. R. CIV. P. 23(b)(3).

<sup>92</sup> *Id.*

one defendant will choose to settle and will not want to go to trial. Nonetheless, the RIAA will still face the possibility of having to go to trial against several of the remaining defendants, and going to trial means having to conduct discovery. Disregarding those defendants who settle the suits brought against them, the RIAA may have to conduct discovery for more than two hundred individual defendants. Such discovery is a very time consuming and expensive proposition.

Instead of conducting individual discovery against all of the defendants, the RIAA can request the Multi-District Panel (MPL) conduct pre-trial procedures.<sup>93</sup> The purpose of transferring cases concerning a common question of fact or law that are pending in different judicial districts is to coordinate and consolidate the pre-trial procedures.<sup>94</sup> A motion to transfer cases to the MPL can be made by either party or by the panel itself.<sup>95</sup> Once cases have been transferred to the MPL, the MPL will then conduct the appropriate pre-trial proceedings, including all relevant discovery proceedings.<sup>96</sup> After these pre-trial proceedings are finished, the MPL must transfer the cases back to the district court from which they came.<sup>97</sup>

By invoking § 1407<sup>98</sup>, the RIAA can avoid having to expend the time and effort that multiple discovery requires. Another added benefit of invoking § 1407 is the increased efficiency of the discovery process. Discovery by the MPL is conducted by a panel of seven district and circuit court justices who are appointed by the Chief Justice of the United States.<sup>99</sup> Discovery is likely conducted with greater efficiency when parties

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<sup>93</sup> The Multi-District Panel is governed by 28 U.S.C. § 1407 (2002).

<sup>94</sup> 28 U.S.C. § 1407(a).

<sup>95</sup> 28 U.S.C. § 1407(c).

<sup>96</sup> 28 U.S.C. § 1407(a).

<sup>97</sup> *Id.*

<sup>98</sup> *See supra* n. 92.

<sup>99</sup> 28 U.S.C. § 1407(d).

are dealing directly with a panel of judges, as opposed to when parties are forced to deal with each other, especially given the adversarial nature of the process. This increased efficiency will also likely lower the overall costs of the discovery process.

#### IV. The Defendants Fight Back

The defendants being sued by the RIAA are not left with many concrete or even novel means of defense. The RIAA has eliminated several of the defendants' stronger defenses by simply suing the defendants in the judicial district where they reside or by moving and consolidating cases where multiple defendants are subject to personal jurisdiction, if the RIAA chose to consolidate in that manner. Settlement is by and large the best option for the defendants. For those defendants who have chosen not to settle with the RIAA, however, the discussion below poses one means of mitigating their liability. Still, for every defendant who refuses to settle or to otherwise mitigate his or her liability, that defendant will retain the opportunity to go to court and to force the RIAA to make a compelling case against them.

##### A. The Best Option: Settlement

The RIAA defendants are facing serious allegations that could potentially lead to significant judgments against them. The method employed by the RIAA (i.e., filing individual suits) has left the defendants with very little judicial recourse. Each complaint is accompanied by screen shots<sup>100</sup> of the individual defendant's computer and the music files he or she is accused of sharing.<sup>101</sup> In addition, the RIAA's complaint asks not only

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<sup>100</sup> A screen shot is a picture taken of the defendant's computer showing the pirated music files in a list format. See RECORDING INDUS. ASSOC. OF AM., *supra* note 1.

<sup>101</sup> *Id.*

for monetary damages but also for reasonable attorney fees as allowed by the statute.<sup>102</sup> Every individual defendant, if he or she chose to go to trial, is facing potential liability for monetary damages and the RIAA's attorney fees, in addition to their own attorney fees.

As of October 18, 2003, the RIAA had already settled with sixty four defendants.<sup>103</sup> These settlements ranged from \$2500.00 to \$10,000.<sup>104</sup> Some file sharers have preemptively settled, having learned that they could be named as defendants in the later phases of the RIAA's fight against file sharing.<sup>105</sup> Though the defendants range in age from a twelve-year-old girl to a grandmother (who claims she was falsely accused),<sup>106</sup> most are college students.<sup>107</sup> Given the composition of the defendants in this first phase of lawsuits, it is less likely that they have the resources to pay their own attorney fees in addition to the monetary damages and plaintiff's attorney fees that could be awarded if their cases went to trial. Thus, settlement clearly seems to be the best option.

#### B. Defenses Beyond "I didn't do it"

For those defendants who chose not to settle and to instead progress to trial, their options are anything but promising. Each defendant in the first phase was sued because he was engaging in illegal file sharing of copyrighted material on the grandest scale.<sup>108</sup>

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<sup>102</sup> *Id.* See also 17 U.S.C. §§ 504(c), 505 (2002).

<sup>103</sup> The Associated Press, *Industry Warns Suspected File Swappers*, available at <http://www.cnn.com/2003/SHOWBIZ/Music/10/18/song.swap.ap/index.html> (Oct. 18, 2003).

<sup>104</sup> The Associated Press, *Music Group Settles with 52 File Sharers*, available at <http://news.designtechnica.com/article1383.html> (last visited Feb. 11, 2005).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See The Associated Press, *Industry Warns Suspected File Swappers*, *supra* note 102.

<sup>108</sup> Marci A. Hamilton, *Why Suing college Students for Illegal Music Downloading Is Right*, CNN.com, at <http://www.cnn.com/2003/LAW/08/07/findlaw.analysis.hamilton.music/index.html> (last visited Feb. 11, 2005).

<sup>108</sup> CNN, *12-Year-Old Settles Music Swap Lawsuit*, CNN.com, at <http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement/index.html> (Feb. 18, 2004). The

The individual defendant can claim that he was not the person responsible for downloading the music, thereby requiring the RIAA to present its evidence to the contrary; the defendant must take the risk that the RIAA will fail to meet its burden of proof. An individual defendant has the right to try and poke holes in the plaintiff's case, but this approach is not without risk. These defendants in the first phase of lawsuits were charged because they are allegedly guilty of trading the greatest number of music files. Ultimately, the person who owns the computer through which the illegal files were traded will be held accountable, although that liability may be shared.<sup>109</sup>

The defendants who end up going to trial may want to invoke Rule 14 regarding third party practice.<sup>110</sup> Rule 14 allows a defendant who is already a party to the action to implead a third party.<sup>111</sup> This rule allows a defendant to serve a complaint on a third party "who is or may be liable to the third-party plaintiff [the original defendant] for all or part of the plaintiff's claim" against the defendant.<sup>112</sup> Many of the RIAA defendants are college students who shared files over their university's Internet network.<sup>113</sup> Anyone who has ever been to a college can attest to the fact that privacy is a scarce commodity on almost any college campus. As a result, by invoking Rule 14, those college-aged defendants may be able to implead others who downloaded songs that were found to be

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President of the RIAA is quoted as describing the defendants in the first phase as having shared an average of 1,000 music files. *Id.*

<sup>109</sup> The basis of the RIAA complaint is that each defendant illegally downloaded and distributed music files via the Internet. The presence of the music files on a defendant's hard drive and the distribution of those files across the Internet to other users are in violation of U.S. copyright law. The RIAA states in its complaint that it believes that each defendant acted willfully and intentionally to distribute music files illegally. *See* Recording Industry Association of America, *supra* note 1, at 4.

<sup>110</sup> FED. R. CIV. P. 14.

<sup>111</sup> FED. R. CIV. P. 14(a).

<sup>112</sup> *Id.*

<sup>113</sup> *See* Hamilton, *supra* note 103.

on the defendants' computers. This practice will not absolve these defendants completely, but it may soften the blow of any judgment against them.

The defendants in the RIAA cases may try to implead Sharman Networks, LTD, the software manufacturer which is responsible for programs such as Kazaa.<sup>114</sup> Kazaa is a peer-to-peer computer program similar to Napster which allows users to trade music files. Relying on the Napster case that began all this litigation<sup>115</sup> as precedent, the defendants may attempt to shift some of their liability onto the shoulders of Sharman Networks. The problem with this approach will be in obtaining personal jurisdiction over Sharman Networks, since it is incorporated in Vanuatu, an island in the South Pacific, and has its main offices in Sydney, Australia.<sup>116</sup> The defendants could obtain a default judgment against Sharman Networks, but it would have to be enforced at a time when a court has personal jurisdiction over the company.<sup>117</sup> As an alternative, the defendants could serve Rule 14 complaints against Sharman Networks attempting to serve Sharman Networks, under Rule 4<sup>118</sup> in the same district where the company has filed suit against the RIAA.<sup>119</sup> Successfully impleading another party can be difficult, but for a defendant with few other options it may be worth trying.

## V. Conclusion

The RIAA has chosen to directly sue those individuals who are responsible for illegally sharing copyrighted music files. This is an enormous task and one must

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<sup>114</sup> See The Associated Press, *Makers of Kazaa Suing Record Labels*, available at <http://www.cnn.com/2003/TECH/biztech/09/24/kazaa.sues.ap/index.html> (Sept. 24, 2003).

<sup>115</sup> See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

<sup>116</sup> See The Associated Press, *Makers of Kazaa Suing Record Labels*, *supra* note 113.

<sup>117</sup> FED. R. CIV. P. 55.

<sup>118</sup> FED. R. CIV. P. 4(h)(1).

<sup>119</sup> See The Associated Press, *Makers of Kazaa Suing Record Labels*, *supra* note 113.

consider whether such a course of action is worth the effort. The RIAA now faces the possibility of litigating more than one hundred lawsuits on a case-by-case basis unless steps are taken to consolidate. The potential monetary gain from these suits is not likely to adequately compensate the music industry for the royalties lost due to file sharing. With so many suits, the RIAA is facing the risk of unfavorable verdicts, judgment proof defendants, and, in some cases, defendants who have never downloaded a song.<sup>120</sup> The monetary gain is clearly not the purpose of filing these suits. Instead, the aim is to discourage file sharing among individuals. In at least one case, the RIAA has succeeded in its goal of discouraging this behavior. In an article for CNN, Powell Fraser admitted to file sharing but also admitted that the experience of a classmate at Princeton has scared him into paying for his digital music.<sup>121</sup>

It is clear that the RIAA is in a position where they must do something to discourage those who chose to share digital music files in order to avoid the cost of a compact disc. While the RIAA's methods are not perfect, they have proven effective in preventing some individuals from downloading music. However, these methods have certainly not prevented everyone from participating in illegal file sharing. The RIAA began its quest by going after a relative handful of individuals who were responsible for the greatest number of shared files. This first phase of lawsuits was aimed at the tip of the iceberg, and like any iceberg, the real danger lies below the surface. The RIAA is fighting an uphill battle that will probably never be won. The technology will always improve and at some point the costs and hassles associated with litigation will outweigh the benefits gained by suing the individual file sharer.

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<sup>120</sup> See The Associated Press, *supra* note 110.

<sup>121</sup> Powell Fraser, *Why I've Stopped Sharing Music*, CNN.com, at <http://www.cnn.com/2003/TECH/internet/06/27/music.sharing.column/index.html> (Sept. 8, 2003).

It is important to note that these two hundred and sixty lawsuits represent the first phase of lawsuits brought by the RIAA. The expenses associated with these initial suits will likely pale in comparison to the expenses of the later phases, especially in light of the United States Court of Appeals for the District of Columbia Circuit's decision denying the RIAA's request to force Verizon to reveal the identities of customers who were engaged in illegal file sharing.<sup>122</sup> This decision is going to force the RIAA to file "John Doe" lawsuits, which require the suit to be filed against an unnamed defendant; the RIAA would then use the courts to help determine the identity of each individual defendant.<sup>123</sup> These "John Doe" suits will be more time consuming and much more expensive than the initial suits. Although these two hundred and sixty one individual lawsuits were a necessary step in the fight against music piracy, the RIAA, must, at some point, re-evaluate its strategy. Technology will always improve, and consumer taste will change and falter at times. These are the most important considerations that should be addressed by the RIAA.

The best path for the RIAA may be to use technology instead of the courts to help prevent piracy and to promote fair and legal use of music files. The RIAA should look at this piracy battle as a message from the consumer – the industry should reduce its prices and make music more readily available. Further, the RIAA should realize that it is suing the very people it wants to attract - tread lightly and be careful what you wish for.

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<sup>122</sup> See Recording Indus. Assoc. of Am., Inc., v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

<sup>123</sup> Press Release, Recording Ind. Assoc. of Am., New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers, *available at* <http://www.riaa.com/news/newsletter/012104.asp> (Jan. 21, 2004).