

New Jersey Law Journal

VOL. CLXVIII – NO. 1 – INDEX 23

APRIL 1, 2002

ESTABLISHED 1878

Opinion & Commentary

Don Quixote and Digital Snake Oil: The Importance of Tilting at Windmills

By Grayson Barber

Fed up with Napster and MP3, the Recording Industry Association of America issued a challenge to the Internet community in April 2001. It offered a contest, inviting contenders to download half a dozen digital music samples from the Web, and offering \$10,000 to anyone who could defeat its new encryption devices, called “digital watermarks,” which protected the music samples online.

A team of academic researchers, led by Professor Edward Felten at Princeton University, took up the challenge and, in three weeks, successfully downloaded the music samples and analyzed and removed the watermarking devices — success, according to the “oracle” that judged the competition. The researchers decided to publish their results, turning down the \$10,000 prize, as permitted by the “click-through” agreement they entered in the contest.

The results were newsworthy. The Felten team was surprised at how easy it was to defeat the encryption. Though intended to protect the vast profits of the recording industry, the watermarking

The author, a solo practitioner in Princeton who concentrates on First Amendment issues, was one of the attorneys of record representing the plaintiff in Felten v. Recording Industry Association of America.

scheme appeared to be little more than digital snake oil.

This put the RIAA in a predicament. It could go back to the drawing board and try to come up with better encryption technology. But it had another option. Congress had recently passed, at the RIAA's behest, a new statute called the Digital Millennium Copyright Act.

The DMCA makes it unlawful to disseminate “technology” that can be used to circumvent copyright owners' technical protection measures. Acts of copyright infringement have always been illegal under standard copyright law; but the DMCA goes further, prohibiting acts of “circumvention.”

Similarly, the DMCA supplements standard copyright infringement law by making it unlawful to “offer to the public, provide or otherwise traffic” in technologies that circumvent technological measures that “effectively protect a right of a copyright owner.” To “circumvent protection afforded by a technological measure” means “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure” — like removing digital watermarks.

The DMCA carries severe civil and criminal penalties. The statute empowers “any person injured” (like the recording industry) to seek damages and profits or statutory damages. Criminal liability of up to \$500,000 and

imprisonment for up to five years can be imposed for first offenses.

The RIAA sent a letter to Felten, threatening him and his academic conference with prosecution under the DMCA. The recording industry's lost profits could wipe out Princeton University's endowment. Felten withdrew his team's academic paper from publication.

This was another skirmish in the cultural war between intellectual property holders and the Internet community dedicated to keeping information free on the Web.

A group of volunteer attorneys, including me, took up the Felten case and sued the RIAA for violating the First Amendment free speech rights of the research team. The Electronic Frontier Foundation led the charge, mounting a challenge to the DMCA as an instrument of intimidation, seriously threatening scientific and technical innovation in the United States.

The case, *Felten v. Recording Industry Association of America*, CV-01-2669, was filed in federal district court in Trenton. The RIAA immediately responded by writing to the *Industry Standard* stating “Felten should publish his findings, because everyone benefits from research into the vulnerabilities of security measures.” Its press releases characterized the conflict as a regrettable misunderstanding.

On the legal front, the RIAA moved to dismiss the case. It gave the researchers permission to publish their results, so long as the RIAA could review the academic papers beforehand. There was no controversy; the case was moot.

This was cold comfort to the

researchers. Would they have to ask permission for every academic paper they wanted to publish? Would they be threatened again if they exposed weaknesses in technological measures? The prudent thing would be to avoid the research altogether, and certainly to avoid publication. This meets the classic definition of a "chilling effect."

The problem is an old one, and First Amendment jurisprudence permits challenges to statutes that tend to suppress speech. The Felten team argued that the RIAA created a controversy by cloaking itself with authority under the DMCA to pass on the legal legitimacy of academic publications, scientific conferences and doctoral dissertations.

Judge Garrett Brown was not impressed. The plaintiffs, he said, may think of themselves as modern-day Galileos, suppressed by the authorities of the digital Renaissance, but they are more like modern-day Don Quixotes, tilting at windmill monsters of their own imaginations.

The metaphor is provocative. Some people read Don Quixote as pure satire, which is certainly the novel's announced intent. But others see Don

Quixote as a hero. They contrast the knight's commitment to his ideals with the pedestrian nature of the novel's "sane" characters. To them, Don Quixote embodies the best of human aspirations. He is the Man of La Mancha who dares to dream the impossible dream.

The RIAA may be the "unbeatable foe." There is no question that the RIAA is committed to enforcing the DMCA. It represents companies that control nearly all of the digital music and sound recordings in the United States. RIAA can threaten suit under the DMCA over potentially any information disclosing weaknesses in any technological measure used to protect copyrighted music and sound recordings. The RIAA sent out more than 10,000 notices last year to universities and Web sites charging them with copyright violations.

The courts lag behind the times, partly because of built-in delays of the litigation system, but also because judges usually subscribe to established rules of order that neither welcome innovation nor anticipate social transformation. But social transformation is

what we have, brought to us by the Internet, digital music and the entertainment industry's campaign to protect its profits.

Literary critics have explicated the "Sanchification" of Don Quixote and the "Quixotization" of Sancho Panza. The Felten team hoped its case would similarly serve to sensitize the courts and Congress to the unintended consequences of the DMCA. We need to take action against software piracy, but Metallica's profits should not be guaranteed at the expense of the First Amendment rights of computer science professors.

Don Quixote, the gentleman idealist, says to Sancho Panza the servant realist, "In order, Sancho, that you may see the good that there is in knight-errantry and how speedily those who follow the profession, no matter what the nature of their service may be, come to be honored and esteemed in the eyes of the world, I would have you here in the company of these good folk. Seat yourself at my side."

Attorneys interested in joining the cause may contact the Electronic Frontier Foundation at www.eff.org. ■