Recording industry shows some cunning

By Hiawatha Bray, Globe Staff, 1/27/2003

It’s an article of faith among the digital elite that the entertainment business is run by morons. After all, the recording industry and the movie studios still think that they can somehow prevent us from copying and swapping our favorite digital amusements, without compensation or permission. Dream on, the enlightened ones say.

Surely the enlightened ones are right. So far, no one has conceived a practical strategy against digital piracy. And yet, you can hardly blame the entertainment companies for trying. Piracy is costing them billions; they must at least try to slow it down.

Besides, the events of the last couple of weeks should dispose of any illusions that the amusement moguls are just a pack of fools. The Recording Industry Association of America has shown itself a cunning strategist, able to learn from its errors. And a court ruling last week has put it in a position to do some real damage to those who steal recorded music.

Just under two weeks ago, the RIAA did a deal with a group representing eight of the nation’s top computer companies. Included in the deal was a pledge to oppose mandatory anti-copying hardware for personal computers.

You’ll remember that Congress briefly considered such legislation last year. RIAA never embraced it, possibly because it recalls a time when the organization really did behave stupidly. In 1998, it asked a federal court to ban the first portable MP3 digital music player. Luckily the RIAA lost, and we can all listen to our Apple iPods in peace.

The RIAA seems to have taken the hint. By opposing the anti-piracy hardware plan, it went some way toward draining the reservoir of bitterness it’s built up among the tech crowd.

Just as well, because a few days later RIAA won a court victory that’ll bring the company a whole new set of enemies. A judge in Washington ruled that the Internet service provider Verizon Communications must provide the RIAA with the identity of a customer who used the network to swap illegal music files.

Unless a higher court overturns the ruling, music companies need only present the most minimal evidence of a violation to a court, which will automatically issue a subpoena. An Internet provider must then hand over the customer’s name and address, tearing away his shield of privacy and exposing him to the tender mercies of an enraged multinational corporation.

Of course, millions of Americans swap illegal files. Will AOL Time Warner or Sony sue them all?

They won’t have to. Nailing a few dozen or a few hundred will chill many of the others. Let a few of them be fined, at up to $150,000 for each offense, and you’ll likely see many casual swappers fall away.

Still, that leaves many thousands of perps out there, and even Sony can’t go after them all. Jonathan Zittrain, assistant professor at the Harvard Law School and co-director of the Berkman Center on Internet and Society, thinks Sony doesn’t want to and won’t have to. It’ll hand off the job to the Internet providers.

The Internet providers like to point out that the Digital Millennium Copyright Act shields them from liability if a customer sends illegal materials over the network. But Zittrain points to another passage, which requires the providers to shut off service to users who engage in copyright-infringing activities.
Armed with the ruling in the Verizon case, the RIAA or one of its member companies can identify the peer-to-peer users with the biggest collections of illegal music. They can sue a few of them, enough to establish in court what everyone already knows: that thousands of such people are customers of the nation’s big Internet providers. ”If they can get a couple suits in which people admit they’re infringing, then they get a pattern of abuse,” Zittrain says.

Armed with evidence of ongoing infringement, the music companies then can request a court order forcing the Internet provider to halt service to any customer found to be dealing in illicit files.

Now the music companies don’t have to litigate each and every case. Indeed, once they’ve proven a pattern of violations, they might not even need to obtain the offenders’ names and addresses. They’d just request that the holder of a particular Internet address should be cut off. And the Internet provider would have to comply.

There’s another benefit for the recording industry - the tactic is more consumer friendly. No more sending threatening letters to consumers or taking them to court. ”They don’t want to be the Net police,” says Zittrain. ”It’s bad for business.” Instead, the Internet providers get stuck with the job. They’re forced to kick their customers to the curb, and suffer the ensuing outrage.

Even this tactic surely won’t suffice to snuff out file-swapping. But it could make something of a dent. In any case, it’s another hint that those stodgy old media companies may not be quite as dumb as some of us would like to believe.

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