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She Fought the RIAA

And the RIAA won. But Cecilia Gonzalez's fight may not be over yet.

By Bob Mehr

In February I covered the story of Cecilia Gonzalez, who was one of 261 people across the country—51 in the Chicago area—accused of illegal downloading in the first wave of civil suits brought by record companies and their trade organization, the Recording Industry Association of America, in 2003. In a summary judgment in January a district court judge ordered Gonzalez to pay five major record companies a total of \$22,500 for 30 songs she downloaded using Kazaa.

That figure—\$750 per song—is the minimum fine for this kind of violation. But for Gonzalez, a married mother of five, the amount constitutes more than her current annual income from a part-time clerical job; even the RIAA's initial proposed settlement of \$3,000 to \$4,000, she's said, would bankrupt her. Shortly after the ruling Gonzalez's attorney, Geoff Baker of the Oak Park firm Dowell Baker, appealed the case to the Seventh Circuit Court of Appeals, which Baker says made it the first downloading case brought against an individual by the RIAA to progress to a federal circuit court. Baker argued the case in October, but on December 9 the court affirmed the initial ruling—a victory for the RIAA and the record labels.

Baker stressed two points as he argued the case in October. First, he argued that the summary judgment was improper because Gonzalez has a constitutional right to have a jury determine what damages, if any, are due. Judge Frank Easterbrook, who wrote the court's opinion, disagreed. "Where there are no disputes of material fact the court may enter summary judgment without transgressing the Constitution," he wrote. Interestingly, during oral arguments an attorney representing the labels called into question the number of tracks Gonzalez both downloaded and owned on CD—inadvertently suggesting that there was perhaps a dispute about the material facts of the case. Easterbrook briefly chided the lawyer—"You're busily shooting your foot full of holes," he said—before moving on.

Baker's second argument was that Gonzalez's downloading fell under the doctrine of fair use because, he said, she caused "no pecuniary damage to the record companies"—she was sampling songs in order to decide whether to buy them. "She would listen and buy, and buy and listen," he says. "It was not the kind of pimply-faced Princeton junior literally downloading anything he could for free so he didn't have to buy it. It's sort of this anomalous case." In the initial suit Gonzalez was accused of illegally downloading 1,374 songs, the overwhelming majority of which she already owned on CD, according to Baker; the record companies later reduced their claim to 30 songs to be as fair and reasonable as possible to Gonzalez, according to an RIAA spokesperson.

Easterbrook didn't buy the fair-use argument either, noting that Gonzalez had not erased the files from her hard drive at the time she was caught. He also cited statistics about the damage that illegal downloading has done to the music industry: "As file sharing has increased over the last four years, the sales of recorded music have dropped by 30 percent," he wrote. He doesn't say where the figure comes from, but his argument echoes the RIAA's line about the downturn in the industry. However, it doesn't address some of the concerns many critics have about the RIAA's gloom-and-doom figures—CD sales in fact rose in 2004, for example, and though they fell in 2005, paid downloads jumped 150 percent.

For anybody listening to Easterbrook during oral arguments—which are available as an MP3 at www.ca7.uscourts.gov—the ruling wasn't a surprise. The judge took a confrontational tone with Baker,



Cecilia Gonzalez

sighing loudly as he spoke and interrupting him often; during oral arguments (and later in the written opinion) Easterbrook equated Gonzalez's behavior to that of a shoplifter.

"I was quoted by the Associated Press after the ruling as saying there was some inflammatory language in the opinion," Baker says. "I would certainly stand by that. I actually like Judge Easterbrook, but I was not very happy about the way he treated my client. And I don't think judges should call people thieves, particularly when they don't even know who the person is."

Baker has until March 9 to decide whether to make the next move—petitioning the Supreme Court on Gonzalez's behalf. "Our view right now is that there is a possibility, although extraordinarily slim, that the Supreme Court would accept an appeal on the very narrow issue of a right to a jury trial for damages."

Baker says a settlement is still possible. "We would be interested in hearing how the RIAA might like to try to resolve this," Baker says. "Even Judge Easterbrook noted kind of scoffingly during the oral argument that Cecilia is what we call 'judgment-proof.' They're not going to get anything out of her." (The RIAA declined to comment on how it would pursue collecting the fines from Gonzalez.)

Baker says Gonzalez hasn't made a decision about what she'll do. "We haven't had a chance to sit down and really talk about what's next or how she wants us to proceed," he says. "We'll do that after the holidays. Part of it is, maybe she just wants this whole thing to be over. I don't know. I certainly wouldn't blame her."

Tortoise and Will Oldham in '06

In April I reported that Tortoise and Will Oldham had finished recording an album featuring covers of songs by Bruce Springsteen, Richard Thompson, and the Minutemen, among others. That album, *The Brave and the Bold*, was slated to come out on local indie Overcoat this past fall, but the release date has now been moved to January 24. Oldham and Tortoise also discussed playing a handful of shows behind the album, but scheduling differences forced them to scrap that idea.

Delays in album artwork and

production are part of the reason for the new release date. Another was Overcoat's surprise success with *In the Reins*, a collaboration between Iron & Wine and Calexico, which has sold nearly 100,000 copies worldwide since it came out in September—twice what label owner Howard Greynolds anticipated.

Greynolds says he has no plans to develop a series of such collaborations, though, stressing that the two releases were products of long-standing relationships with the bands involved.

"Yes, people have been pitching me on different things," Greynolds says. "But it took four years for me to get these two records done. . . . I don't want to force some other situations or collaborations together just to try and sell records."

Smile, You're Up for a Grammy

In June I profiled local filmmaker John Anderson, who's been working with former Beach Boys leader Brian Wilson as a videographer since 1998. He's shot and directed numerous Wilson concerts, including one included on the two-disc *Smile* DVD, which was released in May and spent much of the summer on *Billboard*'s music video sales chart.

Superior Street, the production company Anderson cofounded in 1995, went out of business in September, but he's currently finishing two music-related projects slated to come out in 2006. Rhino Handmade will release *God Bless Tiny Tim*, a documentary on the cult figure; a video of a 1997 Steve Goodman tribute concert at the Old Town School of Folk Music featuring John Prine, Emmylou Harris, and Lyle Lovett will come out on Red Pajama, a label dedicated to archival Goodman releases.

In December the *Smile* DVD was nominated for a Grammy in the Best Long Form Video category; Anderson shares the nomination with David Leaf, who directed a documentary included in the set. They're up against some stiff competition: the video for R. Kelly's *Trapped in the Closet (Chapters 1-5)*, the Ramones documentary *End of the Century*, the companion video to Bruce Springsteen's *Devils & Dust* album, and Martin Scorsese's film on Bob Dylan, *No Direction Home*.

Anderson will attend the ceremony in LA on February 8. "I think Brian is going to be sitting next to us for good luck, which we'll need," he says. ☐

The Treatment

A day-by-day guide to our Critic's Choices and other previews
friday30



Matthew Dear

CC MATTHEW DEAR Nu-lectro darling Matthew Dear grew up in Texas, and he moved to Detroit too late to have firsthand knowledge of the time when Motor City techno defined and refined the sound heard on dance floors around the world. But though he first got known as a microhouse artist—his 2003 full-length debut, *Leave Luck to Heaven* (Spectral Sound), put both him and Spectral's parent label, Ghostly, on the map—lately he's been pledging allegiance to ye olde techno nation. Both his recent singles—like the 12-inch "Just Fucking," recorded under his Audion moniker—and his DJ sets are propulsive and tracky as hell. When he swept through town last September while supporting Ellen Allien, he delivered a sort of bullet-points memo on techno's halcyon days: crisp, frigid, uncut Detroit, then some clubbier Euro bang-und-klang, and finally some 303 acid. Dear's going to take it down a notch for tonight's show, which his publicist promises will be "a little less in your face and not so assaultive." But even when Dear's not assaulting you, he's still intense. Rex the Dog, Shift, and M50 open. ►► 10 PM, Smart Bar, 3730 N. Clark, 773-549-4140 or 312-559-1212, \$10 before midnight, \$12 after. —Jessica Hopper



Diplo

CC DIPLO, BOOKS Musique concrete—music made from recordings of everdays sounds—alienated the cold-war-era European bourgeoisie, but when the premise was unwittingly revisited decades later by American sample junkies like Public Enemy's Bomb Squad, it turned out that what didn't quite work as art music worked great as pop. Composing with found sounds is old hat now, in the age of mass-market digital home recording, but the **BOOKS**' prismatic chamber music reminds us what a radical, wondrous world of possibilities it still presents. *The Lemon of Pink* (2003) sounds like a string quartet armed with Laurie Anderson's magnetic-tape violins, and more of them than Sonic Youth have guitars. Julienned viola fragments dart in and out of the mix without attempting to sound "organic," the brief electric pops of their entrance like bubbles rising in champagne. The duo's latest, *Lost and Safe* (Tomlab), expands their palette with more singing and guitars and fewer deliberately Ginsu'd cadences, but as before the samples percolate in the rhythm of conversation rather than the inflexible beats that usually organize other sample-based music like electronica or hip-hop.

DJ and producer **DIPLO**, half of Philly's Hollertronix (with partner Low Budget), was propelled to minor fame in 2004 with *Piracy Funds Terrorism*, his underground collaboration with M.I.A. Year-end plaudits for the downloadable mix (accessible before her formal releases were available outside continued on page 6