Wireless World: A marketing malfunction?

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The music industry's latest lawsuit -- this time against XM Satellite Radio Holdings Inc. over its new player -- is generating a lot of poor publicity. Still, experts tell UPI's Wireless World the recording business probably has a good argument in court because of an apparent marketing malfunction by the satellite-radio producers.

Recent court decisions are giving the Washington-based Recording Industry Association of America a likely edge in this litigation.

Last week the RIAA sued XM Satellite Radio, saying its new music player enables consumers to record individual songs from radio broadcasts and sort them into playlists for later playback. If true, that's patently illegal conduct, attorneys tell Wireless World.

"Based on the recent Supreme Court MGM/Grokster case, which established inducement of copyright infringement, the RIAA may have a good argument if XM markets these features in a non-time sharing way, such as 'create your own library of songs to play without having to buy the CD'," James P. Muraff, a copyright attorney with Chicago-based Wallenstein, Wagner & Rockey Ltd., told Wireless World.

The content of the marketing may, moreover, prove problematic for XM, as they likely promote this feature and what to do with it, "which may cause an indirect infringement," said Muraff. "It may come down to what is said in the promotions, user's manual, etc. for inducement."

Most interestingly, the industry was abuzz with talk this week that the

recording mavens were reaching a deal with XM's rival, Sirius satellite radio, which would enable that distributor to provide recording services to its customers -- for an additional fee. That company also announced that vulgar-mouthed star Howard Stern had settled his legal contretemps with former employer CBS.

So the solution to the satellite-radio-revenue problem is at hand -- at least as far as the recording business is concerned: more money to recording artists, less for XM, Sirius and their respective shareholders.

XM Radio, though, tried to take the high road against the wicked music moguls, who have the temerity to ask for additional money -- just because XM's customers want to copy songs of leading artists, from Madonna to David Bowie, and not have to pay for them. Essentially, XM thinks RIAA is rude and overly concerned with things like, well, money, which apparently XM does not really, down in the vestiges of its soul, bother with all that much.

"Everything we've done at XM since our first minute on the air is about giving you more choices," said an XM spokesman. "We've developed new radios -- the Inno, Helix and NeXus -- that take innovation to the next level in a totally legal way. Like TiVo, these devices give you the ability to enjoy the sports, talk and music programming whenever you want."

What is more, XM's spokesman said the music industry wants to "stop your ability to choose when and where you can listen. Their lawyers have filed a meritless lawsuit to try and stop you from enjoying these radios."

Not enough customers seem to be enjoying these satellite radios, however. XM this week lowered its forecast for full-year subscriber growth and sales, citing "overall softness" of retail sales for satellite radios in the second quarter and "product availability" problems. During

a first-quarter conference call XM had assured investors and analysts that it would meet its numbers. Consequently, the company's shares dropped by more than 10 percent on the news that it now expects to have 8.5 million subscribers by the end of the year, down from its previous estimate of 9 million.

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