

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

IN RE: )  
)  
VERIZON INTERNET SERVICES, INC. )  
Subpoena Enforcement Matter )  
)  
\_\_\_\_\_)  
)  
RECORDING INDUSTRY )  
ASSOCIATION OF AMERICA )  
1330 Connecticut Avenue, N.W. Ste. 300 )  
Washington, DC 20036 )  
)  
v. )  
)  
VERIZON INTERNET SERVICES, INC. )  
1880 Campus Commons Drive )  
Reston, VA 20191 )  
)  
\_\_\_\_\_)

Miscellaneous Action  
Case No. 1:02ms00323

**BRIEF OF *AMICI CURIAE*  
UNITED STATES INTERNET INDUSTRY ASSOCIATION,  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,  
INTERNET SERVICE PROVIDERS' ASSOCIATION (SOUTH AFRICA), YAHOO!,  
INC., SOUTHERN STAR, MERCURY NETWORK, LLC, NETLINK 2000, INC., ZZAPP!  
INTERNET SERVICES, SMCNET LLC, ICE COMMUNICATIONS, INC.,  
FRONTIER AND CITIZENS COMMUNICATIONS, AND DM SOLUTIONS  
IN SUPPORT OF VERIZON'S OPPOSITION TO MOTION TO ENFORCE SUBPOENA**

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*Amici Curiae* United States Internet Industry Association (USIIA), Computer & Communications Industry Association (CCIA), and Internet Service Providers' Association (South Africa), Yahoo!, Inc., Southern Star, Mercury Network, LLC, NetLink 2000, Inc., ZZAPP! Internet Services, smcNet LLC, ICE Communications, Inc., Frontier and Citizens Communications, and DM Solutions respectfully submit this memorandum in support of the Opposition of Verizon Internet Services to the Motion to Enforce Ex Parte Subpoena. The subpoena served by the Recording Industry Association of America (RIAA) is invalid because an Article III court lacks the power to issue a subpoena completely divorced from any pending or imminently impending litigation. Moreover, service of a subpoena on an Internet Service Provider (ISP) that is no more than a passive conduit to the Internet deprives the ISP of due process. Finally, Verizon's construction of Section 512(h) of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h) – not RIAA's – best comports with the text and purposes of the DMCA, and properly allocates the burdens of copyright enforcement between copyright holders and ISPs.

#### **INTEREST OF THE *AMICI CURIAE***

The USIIA is the North American trade association for Internet commerce, content, and connectivity. Founded in 1994, USIIA advocates effective public policy for the Internet and provides its members with essential business news, information, support, and services. USIIA is a member-owned and managed association. With members of every size, engaged in virtually every facet of the Internet, USIIA works to craft a business environment in which Internet companies can thrive.

The CCIA is a nonprofit membership organization for companies and senior executives from diverse sectors of the computer and communications industry. CCIA was established nearly three decades ago to represent its members' vital interests, especially the need to promote competitive and fair open markets, open systems, and open networks. CCIA's member companies range from small

start-ups to global leaders that operate in all aspects of the high-tech economy. They include information technology, telecommunications, and networking equipment manufacturers, as well as software, Internet, telecommunications, and financial service providers, and others.

The Internet Service Providers' Association (ISPA) (South Africa) is a non-profit organization representing the interests of 50 Internet service providers in South Africa.

Yahoo! Inc. is the Internet's leading global consumer and business services company, offering a comprehensive network of essential services for Web users around the globe as well as businesses of all sizes. As the first online navigational guide to the Web, Yahoo! is the leader in traffic, advertising, household and business user reach. Yahoo! is also the most recognized and valuable Internet brand globally, reaching over 237 million unique users in 25 countries and 13 languages.

Southern Star, Mercury Network, LLC, NetLink 2000, Inc., ZZAPP! Internet Services, smcNet LLC, ICE Communications, Inc., Frontier and Citizens Communications, and DM Solutions (the ISP *amici*) are companies that provide Internet connectivity to their customers. The ISP *amici* vary in size and mission. Frontier and Citizens Communications, for example, comprises a group of more than 60 affiliated Incumbent Local Exchange Carriers and Interexchange Carriers under the common ownership of Citizens Communications Company that provide Internet access (under the name Frontiernet) and other services in 24 states. Southern Star is a small ISP providing Internet service in New Orleans, Louisiana, and smcNet is an ISP serving Haines Alaska. ZZAPP! is a non-profit 501(c)(3) community-supported Internet Service Provider which, among other community services, provides free one-year Internet access accounts to selected deserving individuals suffering terminal or chronic illness. Each company is concerned that, if RIAA is permitted to obtain evidence through this subpoena, it will receive similar subpoenas from copyright holders.



The enforcement of this subpoena – and the very real risk that thousands of other subpoenas will follow in its wake – would pose a substantial threat to Internet service. Unless quashed, the subpoena would require Verizon – and other ISPs that serve merely as passive conduits to the Internet – to turn over the names of its customers, based on nothing more than the purported copyright holder’s assertion, never tested by a court or other impartial arbiter, that the customer has engaged in infringing activity. Acceding to the RIAA’s position would impair the relationship between ISPs and their customers; it could even drive many customers from the Internet altogether.<sup>1</sup> To avoid the substantial burdens that could be associated with responding to these subpoenas, and to protect the interests of their customers and their relationships with their customers, the ISP *amici* have a strong interest in ensuring that the subpoena is not enforced. Because that outcome would also promote their mission of ensuring a fair and open business environment for those entities doing business on the Internet, USIIA, CCIA, ISPA (South Africa), and Yahoo! also have a substantial interest in seeing that this subpoena is quashed.

## INTRODUCTION

On July 24, RIAA served a subpoena on Verizon, demanding that Verizon identify a subscriber who RIAA believed was using a peer-to-peer service to offer the download of copyrighted

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<sup>1</sup> In view of these significant stakes, it is hardly surprising that this case of first impression has received considerable attention from the news media. See, *e.g.*, “RIAA and Verizon face of in copyright suit,” (Reuters, Aug. 21, 2002) (at [http://onstagemag.com/ar/performance\\_riaa\\_verizon\\_face/](http://onstagemag.com/ar/performance_riaa_verizon_face/)); “RIAA presses Verizon for name of peer-to-peer subscriber” (Aug. 21, 2002) (at [www.politechbot.com/p-03908.html](http://www.politechbot.com/p-03908.html)); Declan McCullagh, “Watchdogs rap RIAA’s file-trade assault,” CNET News.com, Aug. 30, 2002 (at [http://news.com.com./2100-1023-956176.html?tag=cd\\_mh](http://news.com.com./2100-1023-956176.html?tag=cd_mh)); Jonathan Krim, “A Story of Piracy and Privacy,” Washington Post, Sept. 5, 2002, at E01 (at <http://www.washingtonpost.com/wp-dyn/articles/A38034-2002Sep4.html>).

material. See Attachment A to Motion to Enforce. RIAA also served what it claims is a notice pursuant to Section 512(c)(3)(A) of the DMCA, 17 U.S.C. § 512(c)(3)(A), to which RIAA attached a list of various works, some of which were copyrighted materials allegedly belonging to one or more RIAA members. See Attachment B to Motion. The Notice informed Verizon: “We are asking for your immediate assistance in stopping this unauthorized activity. Specifically, we request that you remove or disable access to the infringing sound files via your system.” *Ibid.* The Notice further threatened that Verizon “may also be liable for any resulting infringement” under the DMCA. *Ibid.*

As Verizon argues persuasively in its Opposition to RIAA’s Motion to Enforce, this Notice does not “meet the requirements” subsection (c)(3)(A), because it has nothing to do with subsection (c) and because there is no provision for any takedown notice in connection with the subsection (a) conduit activities at issue in this matter. What is more, it does not provide the information required in part (iii) of that subsection – identification of the information on Verizon’s network that is to be removed or access to which is to be disabled – nor does it provide information sufficient to locate the material on Verizon’s network. In other words, subsection (c)(3)(A) specifically contemplates that the ISP has sufficient access *to the infringing material* either to remove it or to disable access to it. See Opp. at 3, 15. Because the kind of notice required by subsection (c)(3)(A) simply cannot be given when the ISP does not itself store the information (but is instead a passive conduit), the requirements of Section 512(h) cannot be met in this case and a subpoena cannot issue.

As we show below, RIAA’s contrary construction of Section 512(h) gives rise to serious Article III and due process difficulties. First, as we explain in Point I below, it is doubtful whether Section 512(h) can be constitutionally applied even if limited, as Verizon urges, to ISPs that store the allegedly offending material on their networks. But the RIAA’s interpretation of the statute –

according to which even a passive conduit to the Internet is subject to compulsory process – exacerbates the Article III difficulties several times over, by asking a federal court to issue a subpoena that is wholly untethered to any pending or immediately impending litigation.

But that is not all. As we show in Point II, RIAA’s interpretation poses insurmountable due process problems. According to RIAA, Section 512(h) entitles a purported copyright owner to demand, with virtually no showing and only the “ministerial” stroke of a court clerk’s pen, that an ISP turn over proprietary business information. Such a deprivation of property ordinarily requires a pre-deprivation hearing. But Section 512(h), construed as RIAA would have it, affords none. Only by interpreting the statute as Verizon has urged can a court alleviate the due process burdens that Section 512(h) would otherwise entail.

Finally, we show in Point III that RIAA’s construction of Section 512(h) fundamentally disserves the purposes of the DMCA. The DMCA was designed to *relieve* ISPs of burdens and costs when they serve merely as conduits to the Internet. But the RIAA would turn that fundamental goal on its head. And the burdens will hardly end with just this single subpoena for a single customer name and address. Can anyone doubt that RIAA intends this as a test case? If this subpoena is enforced, others will soon follow. Declaration of David P. McClure (McClure Decl.) ¶ 9. That will impose substantial costs both for the large ISPs, who may receive thousands of subpoenas, and for the smaller ISPs, for which the burden of even an isolated subpoena may prove overwhelming. *Id.* What the RIAA is *really* seeking, at the end of the day, is to shift the burden of copyright enforcement from its own members – who apparently would prefer not to alienate potential customers by suing them outright – to an ISP that does nothing more than provide an Internet connection to the customer. That result is plainly contrary to the balance struck by the DMCA. See,

*e.g.*, 17 U.S.C. § 512(a) (providing safe harbor for ISPs providing these services); see also Opp. at 9-13.

## ARGUMENT

### I. **BECAUSE THE REQUESTED SUBPOENA IS UNTETHERED FROM ANY PENDING OR IMMINENTLY IMPENDING LITIGATION, AN ARTICLE III COURT LACKS THE AUTHORITY TO ISSUE IT**

Although RIAA devotes numerous pages of its Motion to describing the allegations contained in the subpoena and the accompanying correspondence (Motion at 7-8, 11), those documents are more notable for one glaring omission: They do not say that the subpoena relates to any case currently pending in federal court or to any case that RIAA is about to file. In the absence of any such closely connected lawsuit, there simply is no “case or controversy” within the meaning of Article III. This Court accordingly lacks the power to issue the subpoena.

It is black-letter law that “Article III of the Constitution limits the power of federal courts to deciding ‘cases’ and ‘controversies.’” *Diamond v. Charles*, 476 U.S. 54, 61 (1986); see also *id.* at 62 (“The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”). Here, however, rather than commence a case against the person allegedly responsible for the infringement of a copyright – even as a “John Doe” lawsuit – RIAA has assumed the mantle of Inspector Javert and seeks this Court’s assistance in ferreting out evidence it may or may not ever use in court.

*United States v. Morton Salt Co.*, 338 U.S. 632 (1950), makes clear, however, that Article III courts may not serve such a purely investigatory function. As the Supreme Court explained, Article III courts are not like Executive Branch agencies; there is a fundamental “difference,” the Court

stated, “between the judicial function and the function [an executive branch agency might] attempt[] to perform.” *Id.* at 641. Whereas the Executive Branch is free to engage “in a mere ‘fishing expedition’ to see if it can turn up evidence of guilt” (*ibid.*),

Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power \* \* \* is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

*Id.* at 641-42. As the Supreme Court summarized the matter: “[the] judicial power is reluctant if not unable to summon evidence until it is shown to be *relevant to issues in litigation.*” *Id.* at 642 (emphasis added).

Thus, “the subpoena power of a court cannot be more extensive than its jurisdiction.” *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). “It follows,” for example, “that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void.” *Ibid.* Nor, for example, may a party to a state-court action obtain a federal subpoena to get documents that it could not obtain through the state subpoena power. “[T]he district court is \* \* \* without power to issue a subpoena when the underlying action is not even asserted to be within federal-court jurisdiction.” *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996); see also *Washington Consulting Group. v. Monroe*, No. 00MS141 HHK/JMF, 2000 WL 1195290, \*3 (D.D.C. 2000) (recognizing that federal court would not have power to issue subpoena for evidence relevant to state-court proceeding).

Here, there is no pending controversy, nor is there even an allegation that a lawsuit is imminent. Without at least such a showing, this Court cannot issue a subpoena. “The federal courts” simply “are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others.” *Houston Bus. Journal*, 86 F.3d at 1213; see also *ibid.* (“[T]he discovery devices in federal court stand available to facilitate the resolution of actions cognizable in federal court.”).<sup>2</sup>

Nor does it matter if Congress has authorized the issuance of the subpoena under Section 512(h). The requirement that courts hear only cases and controversies is dictated by Article III of the Constitution. It is therefore “absolute” and not “malleable by Congress.” See, e.g., *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996) (distinguishing between constitutional rules, which are absolute, and prudential rules, which may be altered or superseded by act of Congress); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998) (assuming without deciding that Congress had authorized lawsuit but nevertheless resolving case against the plaintiffs on the ground that they lacked Article III standing). Congress

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<sup>2</sup> Although in certain limited circumstances Federal Rule of Civil Procedure 27(a) permits the taking of a deposition before the filing of a lawsuit, that does not change the analysis. Before taking the deposition, the party seeking the evidence must establish to a court’s satisfaction not only an unequivocal intent to file a lawsuit, but also demonstrate that the party is unable to file a lawsuit at the current time. See 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2072 (3d ed. 1998). Here, RIAA has not stated that it ever intends to use the evidence it seeks in a lawsuit; indeed, it has conceded that it would prefer *not* to initiate litigation. Reply at 13-14. Moreover, it is not clear that RIAA would have standing to bring any such lawsuit. See *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333 (1977). Moreover, Rule 27 is not a discovery device, but instead is designed to preserve testimony of whose substance the petitioner already is aware. See *Penn. Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) (“a Rule 27(a) deposition ‘may not be used as a substitute for discovery’”) (quoting rule).

has no more power to implicate the courts in matters that stray beyond the bounds of Article III than it does to pass laws that abridge the freedom of speech.

Likewise, it is no answer to contend, as RIAA does (Reply at 21),<sup>3</sup> that courts are often called upon to review the issuance of process – such as grand jury subpoenas or search warrants – before the commencement of litigation. In each of the cited cases, the Executive Branch initiates the investigation, pursuant to its Article II duties to enforce the law, and the court is then called upon to examine whether the Executive Branch has exercised its powers appropriately. That, of course, is a far cry from requisitioning an Article III court into assisting a *private party* in fishing for evidence. What is more, each of the executive functions cited by the RIAA has a specific constitutional grounding – search warrants in the Fourth Amendment, and grand jury subpoenas in the Fifth Amendment. By contrast, nothing in the Copyright Clause of Article I purports to authorize courts to assist alleged owners of copyrights in a search for evidence of violations, outside the ambit of ordinary litigation. Because “[t]he judicial subpoena power \* \* \* is subject to those limitations inherent in the body that issues them” (*Morton Salt*, 338 U.S. at 642), the Section 512(h) subpoena must be quashed.

It must be added, finally, that Verizon’s proposed construction of Section 512(h) goes a considerable distance toward alleviating these Article III difficulties. Where an ISP stores the

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<sup>3</sup> That RIAA addressed the Article III issue in its reply brief should dispel any doubt that Verizon raised an objection to this Court’s jurisdiction in its opposition papers. See, e.g., *Opp.* at 4 & n.1. In any event, this Court is required to determine whether there is a defect in its jurisdiction regardless of the manner in which the issue is raised. See, e.g., *U.S. Catholic Conference*, 487 U.S. at 77 (“The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power.”).

allegedly offending material on its server – and, after appropriate notice, fails to take it down – there is a sharper, riper controversy between the purported copyright owner and the ISP. By contrast, RIAA’s interpretation of Section 512(h) would embroil an Article III court in obtaining investigatory leads from a merely passive conduit to the Internet – which, as we explain further below, could *not* be sued in its own right. While the constitutionality even of the *former* use of a Section 512(h) subpoena is not free from doubt, the *latter* use – which RIAA now requests – is plainly beyond the powers of an Article III court.

## **II. RIAA’S INTERPRETATION OF 512(h) RESULTS IN A VIOLATION OF VERIZON’S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT**

As RIAA reads Section 512(h), Verizon has a “mandatory, unconditional duty” to disclose the name of its subscriber upon receipt of the subpoena. See Motion at 1; see also *id.* at 12. This deprives Verizon of many of the protections that would be available to it if RIAA had filed a “John Doe” lawsuit and served Verizon with a third-party subpoena pursuant to Fed. R. Civ. P. 45. If Verizon had received such a subpoena, it would have had the right under Rule 45(c) to assert objections, which would relieve it of any obligation to comply with the subpoena. It would also have had a right to file a motion to quash on the ground that the subpoena requires disclosure of confidential commercial information. Fed. R. Civ. P. 45(c)(3)(B)(i). In other words, Rule 45 provides for a real adversarial process between the proponent and the recipient of a subpoena. Section 512(h), as RIAA reads it, does not. Moreover, in filing a “John Doe” lawsuit, RIAA would be representing to the court that its allegations have “evidentiary support.” Fed. R. Civ. P. 11(b).



RIAA argues that Section 512(h)'s procedures provide more – not less – protection for the recipient of a subpoena (Reply at 13) because RIAA provided a notice pursuant to Section 512(c)(3)(A), but that argument rings hollow. As explained in Verizon's papers (Opp. at 3, 14-16), RIAA's notification did not comply with subsection (c)(3)(A) because (among other reasons) it did not provide any identification of material "that is to be removed or access to which is to be disabled" or "information reasonably sufficient to permit" Verizon "to locate the material" on Verizon's network. See 17 U.S.C. § 512(c)(3)(A)(iii). Yet, simply by asserting that it has complied with that subsection's notification requirements, RIAA insists that it has an unconditional right to obtain the information sought by the subpoena, even if, as Verizon believes, RIAA has not provided proper notification.<sup>4</sup>

If accepted, RIAA's construction of the statute would give rise to serious procedural due process concerns. The Due Process Clause of the Fifth Amendment requires federal courts to ensure that a party is accorded adequate procedural safeguards before being deprived of a property or liberty

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<sup>4</sup> Nor is RIAA's claim that Section 512(h) provides substantial protections for the recipient of a subpoena supported by the assertion that a person who makes knowing misrepresentations in a subpoena may face liability under Section 512(f). Reply at 12. In *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 CIV. 4660 (SHS), 2002 WL 1997918, \*15 (S.D.N.Y. Aug. 29, 2002), a federal court held that a notice sent by the RIAA purporting to comply with subsection 512(c)(3)(A) was inadequate, but nonetheless held that "liability cannot be incurred by the RIAA pursuant to Section 512(f) for merely sending a letter that constitutes insufficient notification." Thus, Section 512(f) does not provide protection to recipients of subpoenas whenever a notice that fails to comply with subsection (c)(3)(A) is established, but instead covers only that small subset of instances in which the notification rises to the level of a "knowing material misrepresentation." *Ibid.* Moreover, Section 512(f) provides a remedy *only* when the ISP has "rel[ied] upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing." That damages are available only when an ISP takes these steps confirms Verizon's construction of Section 512(h) because, were RIAA correct, an ISP that provides only Internet connectivity (and therefore cannot remove the material from its network) would have no remedy for being forced to respond to a subpoena based on a knowing material misrepresentation.

interest. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-49 (1993); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The identity of an Internet service provider’s customer is confidential business information in which the provider has a property interest. As the Supreme Court has explained, “[c]onfidential business information has long been recognized as property.” *Carpenter v. United States*, 484 U.S. 19, 26 (1987); see also *ibid.* (“[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit”) (quoting 3 W. FLETCHER, *CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS* § 857.1, at 260 (rev. ed. 1986)). Indeed, the Court has made clear that information owned by a business – particularly information that the owner maintains as confidential and from which the owner excludes others – can also constitute property within the meaning of the Takings Clause. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1001 (1984); see also *Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (takings analysis has been, and properly can be, applied to intangible intellectual property); *id.* at 554 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting) (same); *United States v. Zolin*, 491 U.S. 554, 571 (1989) (attorney-client privilege is a property or liberty interest subject to the protection of the Due Process Clause).<sup>5</sup>

Requiring a service provider to turn over confidential business information – the identity of a customer – to a third party upon receipt of a subpoena under Section 512(h) results in a serious impairment or deprivation of the provider’s property interest in that information. See *Kaiser Aetna v.*

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<sup>5</sup> Even beyond contractual obligations assumed by a service provider, the “common law may impose confidentiality and security obligations on the service provider” to safeguard information concerning a customer’s identity or activities. B. WRIGHT & J. WINN, *THE LAW OF ELECTRONIC COMMERCE* § 19.07[B], at 19-17 (3d ed. 2000).

*United States*, 444 U.S. 164, 176 (1979) (“one of the most essential sticks in the bundle of rights that are commonly characterized as property” is “the right to exclude others”). Once the information is turned over to a third party, its confidentiality is irretrievably lost. In addition, the compelled disclosure in this situation also threatens to have more substantial ripple effects on the service provider’s business and customer base. For example, it would prevent the service provider from making contractual commitments to its subscribers to maintain their anonymity in the face of requests for disclosure by private individuals and entities made before a court or other neutral arbiter has determined that such disclosure is appropriate.

What is more, the deprivation of the service provider’s property interest occasioned by Section 512(h) occurs – under RIAA’s reading of the statute – without any prior opportunity for the service provider to be heard. Thus, according to RIAA, service providers such as Verizon must immediately hand over the information requested – thereby destroying its confidentiality – regardless of whether Verizon may later object to this deprivation of its property interests.<sup>6</sup>

In *Connecticut v. Doehr*, 501 U.S. 1 (1991), the Supreme Court invalidated a Connecticut statute that authorized prejudgment attachment of real estate based solely on the submission of an affidavit to a state court (and without any showing of extraordinary circumstances). The Court ruled

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<sup>6</sup> That the recipient of a subpoena lacks the right to challenge the subpoena in Court (at least under RIAA’s view) also defeats RIAA’s claim that its notification pursuant to subsection (c)(3)(A) is sufficient to protect the individual customers’ privacy and due process rights. See Reply at 19-20, addressing Consumer *Amicus* Br. at 14-19. Although RIAA may believe that it has satisfied the four prongs of the *Doe v. 2TheMart.com, Inc.* case (140 F. Supp. 2d 1088 (W.D. Wash. 2001), and that its allegations would survive a motion to dismiss (see *Columbia Insurance Co. v. SeesCandy.com.*, 185 F.R.D. 573 (N.D. Cal. 1999)), *no court has made the determination that RIAA’s submission is sufficient.* It is the absence of a neutral, impartial arbiter to determine the adequacy of RIAA’s submission that confirms the constitutional infirmity of RIAA’s position.

that the statute violated due process because it permitted attachment without affording the property owner prior notice and an opportunity for a hearing. The *ex parte* attachment proceeding at issue in *Doehr*, moreover, required the approval of a judicial officer based on a determination that the attachment was supported by probable cause. In Section 512(h), in contrast, at least under RIAA's view, Congress has authorized a private party to demand the extinguishment of a property interest without any intervention of a federal judge, based solely on the submission to the *court clerk* of certain materials. Under RIAA's view, once the clerk carries out the "ministerial act" of issuing the subpoena, and the subpoena is delivered to the service provider, the provider is required immediately to turn over its confidential business information to the requester. The substantial due process concerns raised by this scheme should be obvious in light of *Doehr*.

Moreover, in *Doehr* the Court explained that the due process inquiry there was substantially informed by a review of "[h]istorical and contemporary practices" concerning prejudgment attachment, including a "survey of state attachment provisions." 501 U.S. at 16-17. The fact that prejudgment attachment "is a remedy unknown at common law" and that "nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place," this Court explained, "confirm[s] our view that the Connecticut provision \* \* \* clearly falls short of the demands of due process." *Id.* at 16-18; see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("traditional practice provides a touchstone for constitutional analysis" and the State's "abrogation of a well-established common-law protection \* \* \* raises a presumption that its procedures violate the Due Process Clause"); *Burnham v. Superior Court*, 495 U.S. 604, 621-22 (1991) (opinion of Scalia, J.).

As explained above, the extraordinary subpoena power created in Section 512(h) represents a substantial departure from “historical and contemporary practices” in the area of subpoena authority conferred on civil litigants. See, e.g., Fed. R. Civ. P. 45(c) (describing “Protection of Persons Subject to Subpoena”). Section 512(h)’s substantial departure from the traditional safeguards accorded to third parties subjected to demands for information in civil litigation underscores the serious due process issues raised by Section 512(h).

Finally, these due process concerns are heightened if, as RIAA suggests, the subpoena power created by Section 512(h) is *not* limited to situations in which the allegedly offending material is actually stored on a service provider’s system. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court explained:

identification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 334-335. But when, as in *Doehr* or in this case, the due process challenge is to a statute that “ordinarily appl[ies] to disputes between private parties rather than between an individual and the government,” the third *Mathews* factor must be adjusted somewhat. *Doehr*, 501 U.S. at 10-11. In that setting “any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other’s property”; therefore the “relevant inquiry requires \* \* \* principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have” in forgoing additional procedures. *Id.* at 11.

Consideration of these factors strongly suggests that Section 512(h) violates due process as applied to a service provider such as Verizon. First, the private interest of Verizon in maintaining the confidential nature of its customer's identity is substantial. That property interest will be destroyed as soon as the disclosure is required. Moreover, Verizon's customers also have substantial interests in maintaining their anonymity, for reasons set forth in the *amicus* brief filed by organizations concerned with the privacy rights of Internet users. See Brief of Amici In Support of Verizon's Opposition to RIAA's Motion to Enforce (Consumer *Amicus* Br.) at 11-23. Those interests would also be adversely affected by the compelled disclosure sought by RIAA. Second, the risk of error inherent in the procedure set forth by Section 512(h) is substantial. No judicial officer is required to review the application for a subpoena – or ensure the accuracy of the information underlying the application – before the subpoena is issued. The only review that takes place, as RIAA admits, is purely ministerial in nature, involving only a cursory review by the court clerk. In these circumstances, the risk of erroneous disclosure is high and the value of a pre-deprivation hearing substantial. Finally, the applicant's interest in immediate disclosure is not weighty, and the burden of imposing additional safeguards is no more than would be required for an ordinary subpoena obtained under Fed. R. Civ. P. 45. Thus, due process would require that a service provider such as Verizon be given an opportunity to be heard in a judicial forum before being required to disclose the confidential business information sought by RIAA's subpoena.

Notably, however, the due process concerns are much less significant if – as Verizon correctly contends – the subpoena power created in Section 512(h) is limited to situations in which the allegedly offending material is stored on a service provider's system. For one thing, the privacy interests of the customer are much less weighty in that circumstance, because the customer has

already elected to expose the material to the service provider and its employees by placing the materials on the service provider's network. See *United States v. Miller*, 425 U.S. 435, 442 (1976) (bank customer has no legitimate expectation of privacy in bank records involving checks, deposit slips, and other documents that "contain only information voluntarily conveyed to the banks and exposed to [its] employees in the ordinary course of business"). Second, the risk of error is much less because, if the material is actually stored on the provider's system, the provider may at least be able to confirm the accuracy of the statements submitted in support of the subpoena request. In light of those considerations, the due process balance may well *not* require a pre-deprivation hearing before a service provider is required to disclose information pursuant to Section 512(h) when the allegedly offending information is stored on the provider's system.

Verizon's construction of the statute has the virtue of avoiding the serious due process problems that would otherwise arise. For that reason as well, it should be accepted by this Court.

### **III. VERIZON'S CONSTRUCTION OF SECTION 512(h) IS THE ONLY CONSTRUCTION CONSISTENT WITH THE TEXT AND PURPOSES OF THE DMCA**

#### **A. Verizon's Construction of Section 512(h) Comports With the Structure and Purposes of the DMCA**

The Motion Picture Association of America (MPAA) claims that Verizon's understanding of Section 512(h) would lead to an "absurd result." MPAA Br. at 10. But that statement completely disregards the structure and purposes of the DMCA. By design, the DMCA extends protections to ISPs based on the extent of their involvement in the allegedly infringing activity. Verizon's construction of Section 512(h) – which confines its application to ISPs which have a close connection to the infringing material – comports with this fundamental purpose of the DMCA.

As its title indicates, Section 512 is designed to provide “limitations on liability relating to material online.” See also S. REP. NO. 105-190, at 8 (1998) (“[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet. \* \* \* In short, by limiting liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”). The DMCA provides immunity from liability based on the quality of the ISP’s connection to the allegedly infringing material, the ISP’s knowledge of infringement, and the ISP’s ability to remove or disable access to that material. Compare 17 U.S.C. § 512(a) (ISP is never liable by reason of transmitting, routing, or providing connection for material) with 17 U.S.C. § 512(c) (ISP is not liable for storage of infringing material *only* if ISP does not know about or financially benefit from storing infringing material, and removes material upon notification from copyright holder). Thus, the DMCA focuses on the ISP’s status and conduct, *not* merely on the potential injury to the copyright holder.

MPAA therefore misses the mark when it argues that, in enacting Section 512(h), Congress could not have meant to draw a distinction between peer-to-peer systems and situations in which the ISP is storing infringing material. See MPAA Br. at 11. The DMCA is deliberately and systematically focused on the extent of the ISP’s connection to the infringement, and it explicitly draws the distinction between a situation in which the material is stored on the ISP’s network and in which the ISP acts only as a conduit (which it always does in the case of peer-to-peer technology). What matters is that Congress did not intend to impose significant burdens on the ISP, including the burden of responding to a Section 512(h) subpoena, when the ISP had no connection to the alleged infringement other than providing Internet access, .



The RIAA's contrary view threatens to undermine the goals of the DMCA. Although RIAA casually invokes two of its favorite metaphors – “theft” and “piracy” (Reply at 1) – its interpretation of Section 512(h) would permit subpoenas to be issued to investigate a wide range of activity that, even by RIAA's lights, would be protected speech. As Verizon explains (Opp. at 21-22), copyright protection extends to a wide array of material, including articles, letters, e-mails, and personal web pages. ISPs act as conduits for much of this activity, none of which involves the peer-to-peer file sharing about which the RIAA is so exercised. Yet, if the RIAA's interpretation of Section 512(h) is correct, an ISP would be required to identify any customer that someone may believe is infringing a copyright. This would extend the subpoena power to a variety of commonplace uses, including the everyday occurrence of forwarding an amusing email to a few friends. And it would extend the subpoena power to a variety of persons who, under the guise of protecting their copyrights, are attempting to quash criticism of their work (see, e.g., *Consumer Amicus Br.* at 9-10) or to blackmail a consumer by threatening to disclose a website visited or a product purchased. See Verizon Opp. at 22-23. There is no indication that, in passing the DMCA, Congress intended to transform every ISP into a potential Big Brother.

RIAA's interpretation of Section 512(h) – by permitting the automatic issuance of subpoenas in a variety of situations in which there may be no copyright infringement or in which the copyright holder is not motivated by halting the infringement – cannot be sustained under Supreme Court precedent. In *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Court was careful to note that, although the VCR undoubtedly could be used for infringing uses, a manufacturer could not be held liable for contributory infringement based on selling the product because the product was capable of substantial noninfringing use. *Id.* at 432; see also *ibid.* (“Sound policy,

as well as history” counsels against pushing copyright principles too far, in the absence of specific congressional mandate, “when major technological innovations alter the market for copyrighted materials.”). Moreover, the ministerial, unquestioning issuance of subpoenas could chill free speech, as persons who would have engaged in constitutionally protected, non-infringing speech will refrain from doing so for fear that their identities will be revealed by their ISP. Such a result would violate the First Amendment. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (“[T]he possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (Rehnquist, C.J.) (“[f]reedoms of expression require “breathing space””) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986), in turn quoting *New York Times v. Sullivan*, 376 U.S. 254, 262 (1964)); see also Consumer *Amicus* Br. at 19-25.

**B. Contrary to RIAA’s Protests, The Burden on The Copyright Holder To Comply Faithfully With The Requirements of Section 512(h) Is Minimal, And The Burden on an ISP to Comply With A Section 512(h) Subpoena Is Substantial**

RIAA complains that it cannot faithfully comply with Section 512(h)’s limitation that subpoenas be served only on ISPs that are storing the infringing content because it cannot possibly tell where the content is stored. And it insists – contrary to the representations in its own papers and the brief of its *amicus* – that the burden on Verizon to respond to such a subpoena is minimal. Both assertions are wrong.

1. *Burden on the Copyright Holder.* RIAA claims that it “has no way of knowing whether the [allegedly infringing] information is on a Verizon server or not.” Reply at 10. To the contrary, RIAA should know that the content at issue is not – and could never be – stored on

Verizon's servers. The client software programs distributed by peer-to-peer services do not permit a user to download files to any location except a local drive from the user's home computer or on a file on a physically mapped network. McClure Decl. ¶ 11. Similarly, these programs do not permit a user to allow the uploading of files from any location except a local drive on the user's home computer or on a file on a physically mapped network. *Ibid.* Accordingly, the allegedly infringing material could *only* be stored on the user's own PC or network, not on Verizon's network or any other storage facility offered by an ISP. Stated otherwise, the files cannot under any circumstances be shared on a web site, File Transfer Protocol (FTP) site, or any other external file facility that cannot be "mapped" or designated with a drive letter on the user's own PC. These "mapped" locations cannot under any circumstances reside on a server under the control of the ISP. *Ibid.* Accordingly, the basic principles of peer-to-peer technology establish that the infringing material can never be stored by the ISP.

Contrary to MPAA's protests, however, this does not leave a copyright holder powerless to fight infringement. See MPAA Br. at 11. It simply means that a copyright holder cannot use a Section 512(h) subpoena as one of its weapons. A copyright holder can certainly, as Verizon suggested that RIAA do in this case, file a "John Doe" lawsuit and seek the identity of the customer through ordinary discovery methods. RIAA claims that this is not the most efficient way to target the individual (Reply at 13-14), but efficiency (even if well served) cannot trump the explicit limitations of Section 512(h) or the constraints imposed by the Constitution.

RIAA's complaints ring particularly hollow in light of the DMCA's clear decision to impose the burden on the copyright holder to detect, identify, and locate infringing activity.<sup>7</sup> See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1027 (2001) (placing burden on copyright holders to provide notice of identity and location of infringing works on defendant's network); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995) (copyright holder must provide necessary documentation to establish that there is a likely infringement, and website operator must be able to reasonably verify claim, before liability can run to website operator); see also H.R. REP. NO. 105-551(I), at 11 (1998) ("[The DMCA] essentially codifies the result in the leading and most thoughtful judicial decision to date \* \* \* and provides certainty that *Netcom* and its progeny \* \* \* will be the law of the land."). What RIAA is attempting to do – by issuing the subpoena, together with a notice that RIAA claims requires Verizon to disable access to the material (i.e., terminate the user) (*id.*) – is to shift the cost of enforcing copyright laws from the copyright holder to ISPs that have no control over or access to the allegedly infringing content. See McClure Decl. ¶ 13; see also *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 CIV. 4660 (SHS), 2002 WL 1997928, \*15 (S.D.N.Y. Aug. 29, 2002) ("The RIAA cannot shift the DMCA's duty to identify infringing material from the copyright holders or their agents to ISPs, which was what the [notification at issue in this case] seeks to do."). Understandably, but *not* legitimately, RIAA and its members would prefer to have the ISPs suffer the business consequences associated with terminating their customers' accounts and turning over their customers names. See, e.g., Borland, *File-Trading Pressure Mounts on ISPs*, News.Com (July 25, 2001) (at

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<sup>7</sup> It is only after the copyright holder has fulfilled its obligation that an ISP is required to take steps to halt the infringement – and the ISP is *never* required to take these steps where it is providing only Internet connectivity. See 17 U.S.C. § 512(a).

<http://news.com.com/2100-1033-270568.html>) (quoting a customer who terminated all of his accounts with Adelphia after the ISP suspended his account as requested by a copyright holder: “They are a communications provider. They are not censors or a government agency. Adelphia will never get another penny from me and I hope others follow suit.”).

2. *Burden on the ISP.* RIAA also avoids the real issue when it argues that Verizon will not be burdened by responding to this subpoena. The issue is *not* whether Verizon incurs a large expense in responding to one subpoena requesting the identity of one user. If Section 512(h) is held to permit subpoenas to be served on ISPs providing only Internet connectivity, then RIAA will be able to send a subpoena to every ISP seeking the identity of any person who RIAA or one of its members believes is engaging in copyright infringement. And there is no reason to doubt that there will be will be a flood of subpoenas. Companies seeking to locate possible copyright infringement on the Internet operate automated systems, or “bots,” that can search peer-to-peer and other file-sharing networks. These bots can locate thousands of instances of possible copyright infringement per day. McClure Decl. ¶ 9. Indeed, RIAA’s Director of Anti-Piracy has stated that there are “millions of infringing downloads.” Creighton Decl. ¶ 9. If RIAA’s interpretation of Section 512(h) is correct, ISPs will have to respond to every single subpoena, expeditiously and without an opportunity to object based on cumulative burden or any other ground.

The large-scale issuance of subpoenas would impose a substantial cost burden for ISPs. There are approximately 3,500 to 4,000 ISPs in the United States providing Internet access to anywhere from 200 to more than 1 million customers. McClure Decl. ¶ 9. For the large ISPs, such as Verizon, which may receive thousands of subpoenas (RIAA estimates that there are millions of infringing downloads), the cost of complying with that volume of subpoenas would be over-

whelming. See *id.*, Verizon Opp. at 9. For the smaller ISPs, the burden of even an isolated subpoena could be substantial. McClure Decl. ¶ 9.

### CONCLUSION

For the foregoing reasons, the Court should deny RIAA's Motion to Enforce the Ex Parte Subpoena.

Respectfully Submitted.

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