

**ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 16, 2003**

**Nos. 03-7015, 03-7053 (consolidated appeals)**

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

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IN RE: VERIZON INTERNET SERVICES, INC.  
Subpoena Enforcement Matter

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RECORDING INDUSTRY ASSOCIATION OF AMERICA,

Appellee,

v.

VERIZON INTERNET SERVICES INC.,

Appellant.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**BRIEF FOR APPELLANT**

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May 12, 2003

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED  
CASES IN NOS. 03-7015 & 03-7053**

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies:

**A. Parties and Amici**

**District Court.** The parties and *amici* before the District Court were as follows:

Plaintiff

Recording Industry Association of America, Inc.

Defendant

Verizon Internet Services Inc.

Intervenor (D.D.C. No. 1:03MS00040)

United States

Amici Curiae (D.D.C. No. 1:02MS0323)

Alliance for Public Technology

Computer Professionals for Social Responsibility

Consumer Alert

Electronic Frontier Foundation

Media Access Project

National Grange

National Consumers League

Privacy Rights Clearinghouse

Privacy Activism

Public Knowledge

Utility Consumers' Action Network

Electronic Privacy Information Center (EPIC)

Samuelson Law, Technology & Public Policy Clinic at Boalt Hall

School of Law

United States Internet Industry Association

The Computer & Communications Industry Association

Internet Service Providers Association (South Africa)

Yahoo!, Inc.

Southern Star

Mercury Networks, LLC

Netlink 2000, LLC

Zzapp! Internet Services

SMCNET LLC

Ice Communications, Inc.

Frontier and Citizens Communications

DM Solutions

Motion Picture Association of America (MPAA)

Amici Curiae (D.D.C. No. 1:03MS00040)

The Computer & Communications Industry Association

Texas Internet Service Providers Association

Washington Association of Internet Service Providers

Inkeeper Co.

Progressive Internet

Southern Star

Mercury Network Corp.

Zzapp! Internet Services

Capricia Internet Services

LRBCG.com, Inc.

STIC.net, LP

Wiredsafety.org

Parry Aftab

Motion Picture Association of America (MPAA)

**Court of Appeals.** The parties and *amici* before this Court are as follows:

Plaintiff-Appellees

Recording Industry Association of America, Inc.

Defendant-Appellants

Verizon Internet Services Inc.

Intervenor

United States of America

*Amici Curiae* (D.C. Cir. No. 03-7015)

Public Citizen

American Legislative Exchange Council

Caprica Internet Services

Computer & Communications Industry Association

European Internet Service Provider Association

InKeeper Co.

Mercury Network Corp.  
New York State Telecommunications Association, Inc.  
Progressive Internet Action  
SBC Internet Services  
Southern Star  
Stic.Net, LP  
Texas Internet Service Providers Association  
United States Internet Industry Association  
United States Internet Service Provider Association  
United States Telecom Association  
Washington Association of Internet Service Providers  
ZZAPP! Internet Services  
Alliance for Public Technology  
American Civil Liberties Union  
ACLU of the National Capital Area  
American Association of Law Libraries  
American Library Association  
Association of Research Libraries  
Citizens for a Sound Economy Foundation  
Competitive Enterprise Institute  
Computer Professionals for Social Responsibility  
Consumer Action  
Consumer Federation of America

Consumers Union  
DigitalConsumer.org  
Digital Future Coalition  
EDUCAUSE  
Electronic Frontier Foundation  
Electronic Privacy Information Center  
Media Access Project  
National Association of Consumer Agency Administrators  
National Coalition Against Domestic Violence  
National Consumers League  
National Grange of the Order of Patrons of Husbandry  
Pacific Research Institute  
Privacy Rights Clearinghouse  
Privacyactivism  
Public Knowledge  
Utility Consumers' Action Network  
WiredSafety.org

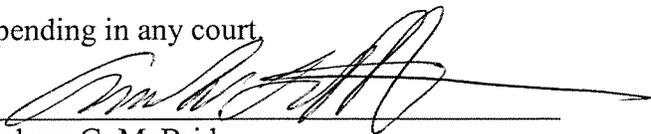
**B. Rulings Under Review**

Appellant Verizon Internet Services Inc. (“Verizon”) appeals from two final orders in subpoena enforcement proceedings entered by the district court (Honorable John D. Bates). The first order was entered on January 21, 2003, and was modified by an order dated February 11, 2003. *See In Re: Verizon Internet Services Inc., Subpoena Enforcement Matter*, No. 1:02MS00323(JDB) (D.D.C. Jan. 21, 2003) (“*First Subpoena Opinion*”). The *First Subpoena*

*Opinion* granted Appellee Recording Industry Association of America's ("RIAA") Motion to Enforce a July 24, 2002 subpoena issued by the district court under putative authority conferred by 17 U.S.C. § 512(h), and is reported at 240 F. Supp. 2d 24 (D.D.C. 2003). The second order was entered on April 24, 2003, and was modified by an order dated April 28, 2003, and denied Verizon's motion to quash a second subpoena issued by the district court under the same putative authority. See *In re Verizon Internet Services Inc., Subpoena Enforcement Matter*, No. 03-MS-00040 (JDB) (D.D.C. April 24, 2003) ("*Second Subpoena Opinion*"). The *Second Subpoena Opinion* is not yet reported. The *First Subpoena Opinion* is found at JA \_\_ - \_\_, along with its correcting order at JA \_\_; and the *Second Subpoena Opinion* is found at JA \_\_ - \_\_, along with its correcting order at JA \_\_. On April 29, 2003, this Court entered an order consolidating the appeals of both orders for purposes of briefing and oral argument in this Court.

**C. Related Cases**

Counsel is unaware of any related cases pending in any court.

  
\_\_\_\_\_  
Andrew G. McBride

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to D.C. Cir. R. 26.1, Verizon Internet Services Inc., by its attorneys, respectfully submits this corporate disclosure statement.

Verizon Internet Services Inc. is a wholly owned subsidiary of Bell Atlantic Entertainment and Information Services Group, and an indirect wholly owned subsidiary of Verizon Communications Inc., a publicly traded corporation, which has debt in the hands of the public. Among other services, Verizon Internet Services Inc. provides Internet access services to the public. Verizon Communications Inc. provides communications and communications-related products and services to the public through a number of operating companies. Verizon Communications Inc. does not have a parent company, and no publicly held company has a 10% or greater interest in it.

## **STATEMENT REGARDING JOINT APPENDIX**

Pursuant to Fed. R. App. P. 30(c), D.C. Cir. R. 30(c), and this Court's briefing order of March 17, 2003, modified on April 16, 2003, the parties intend to use a deferred joint appendix.

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## GLOSSARY

### **Broadband**

The term “broadband” refers to a facility that offers the two-way high-speed transmission of data, such as Digital Subscriber Line (“DSL”) or cable modem service. In the context of Internet access services, broadband is often defined as a transmission facility having the capability to support upstream and down stream communication with the Internet at speeds in excess of 200 Kilobits per second. *See Inquiry Concerning the Deployment of Advanced Telecommunications Ability* (Third 706 Report), 17 F.C.C.R. 2844, ¶ 9 (2002).

### **BOTS**

The term “bots” refers to automated computer programs that can run 24 hours a day seven days a week without human intervention. Bots can be used to perform key word or other searches of content available on the World Wide Web. *See generally* Newton’s Telecom Dictionary 99 (17 ed. 2001).

### **Caching**

The term “caching” refers to the typically automated practice of storing copies of information at locations closer to the end user in order to improve the speed and reliability of transmission. *See generally* Newton’s Telecom Dictionary 114-15 (17 ed. 2001).

### **Conduit Functions**

The term “conduit functions” refers to the provision of a transmission service, where the service provider transmits information of the user’s choosing, between or among points selected by the user, without any change in the content of the information as sent and received. *See* 17 U.S.C. § 512(a).

### **Counter Notification**

The term “counter notification” refers to the procedure specified in Section 512(g)(3) of the Copyright Act, 17 U.S.C. § 512(g)(3)(B), whereby the owner of an online site that has been the subject of a take-down notice under 17 U.S.C. § 512(c)(3)(A) may inform the service provider that the material designated is not infringing.

### **DMCA**

The term “DMCA” refers to the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in various sections of 17 U.S.C.). The DMCA was enacted into law on October 28, 1998.

### **FIRST SUBPOENA OPINION**

The phrase “*First Subpoena Opinion*” refers to the Memorandum Opinion and Order of the district court entered on January 21, 2003 in No. 1:02-MS-00323 (JDB) (D.D.C.), which granted RIAA’s motion to enforce a subpoena served on Verizon on July 24, 2002. This judgment is the subject of the appeal in No. 03-7015.

### **FTP**

The term “FTP” refers to File Transfer Protocol, which is a system through which individual users interact with a host computer (the FTP host) to upload and download digital files. Access to the FTP host may be password protected and the host computer may provide cataloging and search functions. *See Shea v. Reno*, 930 F.Supp. 916 (S.D.N.Y. 1996); *see also* Webopedia, *The Difference Between FTP and HTTP*, available at <[http://www.webopedia.com/DidYou Know/Internet/2002/FTP\\_HTTP.asp](http://www.webopedia.com/DidYouKnow/Internet/2002/FTP_HTTP.asp)> (visited May 10, 2003).

### **Hyperlink**

The term “Hyperlink” refers to a link from one part of a page on the Internet to another page, either on the same website or on a distant site. Newton’s Telecom Dictionary 337 (17 ed. 2001).

### **Internet**

The term “Internet” means the international computer network of both federal and non-federal interoperable packet switched data networks. *See* 47 U.S.C. § 230(f)(1). The Internet is a network of computer networks joined by high-speed transmission facilities and the shared use of common protocols for the routing of information. Newton’s Telecom Dictionary 361 (17 ed. 2001).

### **IP Address**

The term “IP Address” or “Internet protocol address” refers to a unique 32-bit number, usually expressed as four numbers separated by decimal points (*e.g.*, 128.127.50.224) that identifies a particular server or computer connected to the Internet. A service known as domain name resolution or “DNS” translates domain names into numeric IP addresses. Internet service providers assign IP addresses to their subscribers to allow them to send and receive information over the Internet. *See* Webopedia, *IP Address – Definition*, available at <[http://www.webopedia.com/TERM/I/IP\\_address.html](http://www.webopedia.com/TERM/I/IP_address.html) > (visited May 10, 2003).

### **KaZaA**

The term “KaZaA” refers to software distributed by Kazaa BV, which is based upon FastTrack networking technology. KaZaA users may exchange digital files from their personal computers, including documents, pictures, music files, and any other information that can be digitized. *See generally Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, No. CV01-08541, 2003 WL 1989129 (C.D. Cal. April 25).

**Narrowband**

The term “Narrowband” refers to a facility that offers the two-way transmission of data at upstream or downstream speeds of less than 200 Kilobits per second. An example of a Narrowband connection is dial-up Internet access over a standard telephone line, which today can provide data transmission at rates of up to 56 Kilobits per second. *See In the Matter of Applications for Transfer of Licenses from Comcast Corp. and AT&T Corp.*, 17 F.C.C.R. 23246, ¶ 128 & n.356 (2002).

**Peer-to-Peer Application (“P2P”)**

The term “peer-to-peer” application or software (also known as “P2P”) refers to a set of functionalities that allows users to search and access digital files on other users’ computers. In a peer-to-peer system, each computer linked to the network has equivalent capabilities and responsibilities. *See Webopedia, Peer-to-Peer Architectures – Definition, available at <[http://www.webopedia.com/TERM/P/Peer\\_to\\_Peer\\_architecture.html](http://www.webopedia.com/TERM/P/Peer_to_Peer_architecture.html) >* (visited May 10, 2003).

**RIAA**

The term “RIAA” refers to “Recording Industry Association of America, Inc.,” a trade organization that represents the interests of its members, various owners of copyrights in sound recordings.

**SECOND SUBPOENA OPINION**

The phrase “*Second Subpoena Opinion*” refers to the Memorandum Opinion and Order of the district court entered on April 24, 2003 in No. 1:03-MS-00040 (JDB) (D.D.C.), which denied Verizon’s motion to quash a subpoena served on Verizon by RIAA on February 4, 2003. This judgment is the subject of the appeal in No. 03-7053.

**Take-Down Notice**

The term “Take-Down Notice” refers to a notice sent by a copyright owner or the agent of a copyright owner to an Internet service provider as specified in Sections 512(c)(3)(A), 512(b)(2)(E), and 512(d)(3) of the Copyright Act, 17 U.S.C. §§ 512(c)(3)(A); 512(b)(2)(E) & 512(d)(3).

**URL**

The term “URL” or “Uniform Resource Locator” refers to a global address used to identify the location of online sites connected to the World Wide Web. The first part of the address indicates the particular Internet protocol used (*e.g.*, “http”) and the second part identifies the specific IP address where the resource is located (*e.g.*, [www.fcc.gov](http://www.fcc.gov)). *See Webopedia, URL Definition, available at <<http://www.webopedia.com/TERM/U/URL.html> >* (visited May 10, 2003).

**Verizon**

The term “Verizon” refers to Verizon Internet Services Inc., d/b/a Verizon.net, an Internet service provider.

## **JURISDICTIONAL STATEMENT**

The district court's *First Subpoena Opinion* (Jan. 21, 2003), granting a motion to compel enforcement of the subpoena in Appeal No. 03-7015, and the district court's *Second Subpoena Opinion* (April 24, 2003), denying Verizon's motion to quash the subpoena in Appeal No. 03-7053, constitute final dispositions of miscellaneous subpoena enforcement proceedings by the district court and are therefore properly appealed to this Court pursuant to 28 U.S.C. § 1291. Verizon filed a timely notice of appeal of the *First Subpoena Opinion* on January 31, 2003, and timely appealed the *Second Subpoena Opinion* on April 28, 2003. Verizon believes that the district court was without statutory jurisdiction or Article III authority to issue or enforce either of the subpoenas in these actions, *see supra* Sections I & II, but submits that this Court has jurisdiction to examine and resolve those questions.

## **STATUTES AND REGULATIONS**

Addendum A to this brief contains the text of relevant statutes and rules.

## **ISSUES PRESENTED**

1. Whether the issuance and subsequent enforcement of a subpoena *duces tecum* by a district court in the absence of any independent case or controversy within its subject matter jurisdiction impermissibly requires the court to undertake a purely investigative function in violation of Article III of the Constitution and the separation of powers.

2. Whether the district court's conclusion that the novel subpoena power contained in 17 U.S.C. § 512(h) should be read expansively to reach all expressive activities on the Internet, including electronic mail, web browsing, and peer-to-peer file sharing, is contrary to the text, structure, history, and purpose of Section 512.

3. Whether the subpoena power contained in Section 512(h), as interpreted and applied by the court below, violates the First Amendment because it strips Internet users of their

rights to speak, receive speech, and associate anonymously without any notice to them and on the basis of an *ex parte* filing that need not even allege the elements of infringement.

### **STATEMENT OF THE CASE**

On July 24, 2002, RIAA served Verizon with a subpoena *duces tecum* issued by the United States District Court for the District of Columbia under authority purportedly conferred by Section 512(h) of Title 17. Verizon objected to the subpoena and, on August 20, 2002, RIAA filed a motion to enforce the subpoena in the district court. Verizon filed an opposition to the motion, and the district court heard oral argument on October 4, 2002. It issued its final ruling in the matter granting RIAA's motion to compel on January 21, 2003. On January 31, 2003, Verizon timely appealed.

On February 4, 2003, RIAA served Verizon with a second Section 512(h) subpoena. Verizon moved to quash. On April 24, 2003, the district court issued an opinion denying that motion as well as Verizon's motion for a stay pending appeal in both proceedings. On April 28, 2003, Verizon timely appealed the *Second Subpoena Opinion* and filed an emergency motion with this Court to stay both judgments pending appeal. On April 29, 2003, this Court consolidated both appeals and entered a temporary administrative stay while it considered Verizon's stay motion. Verizon's motion remains pending with this Court as of the filing of this brief.

### **STATEMENT OF FACTS**

#### **A. The Digital Millennium Copyright Act**

The DMCA amended the Copyright Act in order to balance copyright owners' interests in protecting their rights with the need to protect and foster the Internet as an important medium of free expression. Title I of the DMCA provided new rights to copyright holders, granting them certain powers to prevent the circumvention of technological "self-help" measures used to

protect their copyrights. 17 U.S.C. §§ 1201-1205. Self-help was to be copyright owners' primary remedy in combating infringement. Title II of the DMCA codified immunities for Internet service providers, which turn upon the particular function the service provider performs in the control, storage, and dissemination of Internet content. 17 U.S.C. § 512 (a)-(d). In both titles, Congress recognized the substantial interest in protecting the privacy and freedom of expression of the over 100 million Internet users in America. *See id.* § 512(m) (entitled "Protection of Privacy"); *id.* § 1205 ("savings clause" for all state and federal privacy protections that otherwise apply to Internet communications).

Title II of the DMCA codified a distinction long-recognized in copyright law—the difference between i) the Internet service provider acting as a passive conduit for communications created, controlled, and hosted by others, and ii) the service provider hosting information on its own network or systems. *Compare id.* § 512(a) (entitled "Transitory Digital Network Communications"), *with id.* § 512(c) (entitled "Information Residing on Systems or Network at Direction of Users"). The DMCA thus makes clear that Internet service providers, such as Verizon, enjoy the same immunities that have traditionally applied to other entities that provide pure "transmission" or "conduit" functions. *See, e.g., E. Microwave, Inc. v. Doubleday Sports*, 691 F.2d 125, 128 (2d Cir. 1982) (discussing historical "common carrier" immunity for copyright infringement); P. Huber, *et al.*, *Federal Telecommunications Law* 1240-55 (2d ed. 1999). Consistent with this recognition, subsection (a) of Section 512 does not impose *any duties* on Internet service providers in the context of transmitting the content of others.

By contrast, subsections (b), (c), and (d) of Section 512 impose limited duties to assist copyright owners in protecting their property interests in contexts where the service provider has some direct access to, or control over, the particular allegedly infringing material. These duties are carefully calibrated depending upon the service provider's involvement with, and control

over, the material. Thus, subsection (c) provides that where a user stores content on the service provider's systems or network (*e.g.*, the provider hosts a website for a business or organization) it must respond to a "take-down" notice claiming that the material is infringing. 17 U.S.C. § 512(c)(1)(C). Subsections (b) and (d) contain more limited duties where the service provider maintains a copy of material that resides elsewhere or provides only a hyperlink to material that resides elsewhere. *Id.* §§ 512(b) & (d). These functional distinctions are central to the application of the statute, and Congress specifically so provided in the rule of construction contained in Section 512(n). *Id.* § 512(n) ("Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section.").

Title II of the DMCA also contains the novel subpoena provision, codified in Section 512(h), at issue in these appeals. This provision was designed to require a service provider to identify the owner of particular content stored on the provider's network or systems that is claimed to be infringing in a valid "take-down" notice as provided in subsection (c). The operation of subsection (h) is explicitly made contingent on the filing of a "take-down" notice, valid under subsection (c), identifying a particular "online site" where the material is located and requesting that the service provider "remove[]" or disable access to the particular "material" that is claimed to be infringing. *See id.* § 512(h)(4) (take-down notice must "satisf[y] the provisions of subsection (c)(3)(A)" for any subpoena to issue). The limitation of this unique subpoena power to the subsection (c) context makes perfect sense in light of the provider's ability to control the content stored on its own systems and the fact that peer-to-peer file-sharing such as that at issue here did not exist in 1998.<sup>1</sup> It also reflects the fact that Congress viewed those

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<sup>1</sup> In 1998, when the DMCA was enacted, the vast majority of Internet users were limited to "narrowband" dialup Internet connections over traditional telephone lines that operated at a speed of 28.8 kilobits per second. *See, e.g., Inquiry Concerning the Deployment of Advanced*

subsection (a) conduit functions that did exist in 1998, such as electronic mail and web browsing, as private expressive activities not to be disturbed by *any* provision of the DMCA.

### **B. The Subpoenas at Issue in These Appeals**

The two subpoenas at issue purport to compel the disclosure of the names, addresses, and telephone numbers of two otherwise anonymous subscribers to Verizon’s Internet access service. The form letter accompanying each subpoena explained that RIAA contended that the subscriber was “offering for download [by other Internet users] files containing copyright sound recordings through a peer to peer application” without authorization of the copyright owner. *See* Subpoena Letters (JA \_\_, \_\_). A “peer-to-peer application” is software that allows multiple users to exchange communications and files *residing on their personal computers* directly with those on the personal computers of other users (“peers”).<sup>2</sup>

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(Continued . . .)

*Telecommunications Capability*, 14 F.C.C.R. 2398, ¶¶ 6, 16 (1999) (faster broadband services were at “an early stage of deployment”; only a “fledgling market” for faster services existed). The sharing of digital music files through individual personal computers over such slow connections was a practical impossibility—it would have taken literally hours to upload a single song. In addition, as the district court recognized, peer-to-peer (“P2P”) file sharing software, such as KaZaA, did not exist in 1998. *First Subpoena Opinion* 23-24 (JA \_\_-\_\_).

<sup>2</sup> The use of P2P software by individual Internet subscribers does not involve the hosting of any material by the service provider. As the name suggests, it involves the personal computers of individual Internet users communicating with each other in the same manner as they do in exchanging electronic mail. Both parties placed facts in the record below to this effect. *See, e.g.*, Lebedo Decl. ¶¶ 4-8 (JA \_\_ - \_\_) (discussing passive transmission of peer-to-peer communications); Creighton Decl. ¶ 14 (JA \_\_) (discussing subpoenas in the peer-to-peer context where “infringing material did not reside on the service provider’s system or network”).

Each subpoena specifically ordered Verizon to identify the subscriber online using a particular Internet protocol address at a particular date and time.<sup>3</sup> Aware that a peer-to-peer application was being used in each instance, RIAA did not assert that any copyrighted sound recordings resided on Verizon's network or system or that Verizon had control of or altered the content of any offending materials. Nonetheless, the letters incongruously demanded that Verizon "remove or disable access" to the material "*via your system.*" *Id.* (emphasis added).

### **C. Proceedings Below**

Verizon did not reveal its subscribers' identities to RIAA. On August 20, 2002, RIAA filed a motion to enforce the July 24, 2002 subpoena. Verizon opposed the motion on the ground that the subpoena was not authorized under Section 512(h) because that provision does not apply where the service provider is merely acting as a passive conduit as described in Section 512(a). Verizon also argued that the extension of the subpoena provision to subsection (a) conduit functions raised serious First Amendment and Article III issues, counseling a more limited construction.

In its *First Subpoena Opinion* the lower court agreed with RIAA that the subpoena authority of Section 512(h) extended to situations in which the Internet service provider acts merely as a passive conduit, with no infringing material residing on the provider's system or network. *Id.* at 7-25 (JA \_\_ - \_\_). The lower court recognized that both peer-to-peer file sharing

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<sup>3</sup> Whenever a user is connected to the Internet, the service provider assigns the user a numeric "IP address" in order to properly route Internet communications to and from the user. When the user browses web pages, sends email, posts speech to chat rooms or newsgroups, sends an instant message, or even, in some cases, when the user *receives* email, the user's IP address can be discovered by third parties. February 13, 2003 Hearing Tr. 26-27 (JA \_\_-\_\_). Prior to the decision below, this IP address could not be publicly associated with the user's name and real address, allowing users to browse websites, read email, send documents, and post speech to private chat rooms anonymously.

software, such as KaZaA, and the robotic search devices now used by the agents of copyright owners to detect infringement on the Internet, were “not even a glimmer in anyone’s eye when the DMCA was enacted’ by Congress in 1998.” *Id.* at 23-24 (citation omitted) (JA \_\_-\_\_). It nonetheless concluded that Section 512(h) should be extended to conduit activities to avoid creating what the court perceived as a “huge loophole,” *id.* at 18 (JA \_\_), in the operation of the statute.

The lower court rejected the argument that Section 512(h) is tied through text, operation, and express cross-reference to subsection (c). *Id.* at 8-11 (JA \_\_-\_\_). In reaching this result, it relied heavily on the use of the defined term “service provider” in Section 512(h), a term that is used throughout the statute in numerous provisions that do not apply to the conduit function. *Id.* at 10-11 (JA \_\_-\_\_). Based upon its conclusion that Section 512(h) extended to conduit functions, and that this result presented no serious constitutional questions, the district court ordered Verizon to comply with the subpoena.

During the period of the administrative stay in the first proceeding, RIAA served a second Section 512(h) subpoena on Verizon. On February 19, 2003, Verizon filed a motion to quash this subpoena (JA \_\_). On March 7, 2003, the district court noted the related nature of the two actions and directed the parties to submit additional briefs addressing the merits of Verizon’s constitutional challenges as well as the issue of a stay pending appeal. (JA \_\_). The court heard oral argument on April 1, 2003 (JA \_\_).<sup>4</sup>

In its *Second Subpoena Opinion*, issued on April 24, 2003, the district court denied Verizon’s motion to quash the second subpoena on Article III and First Amendment grounds,

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<sup>4</sup> After the parties had completed briefing and argument of the motion to quash, the government filed a brief defending the constitutionality of Section 512(h).

and denied a stay pending appeal in both actions. *Second Subpoena Opinion* (JA \_\_). The court recognized that the subpoena was not supported by any case or controversy at the time of its issuance, but reasoned that because the act was, in its view, “ministerial” it did not involve an exercise of Article III power at all. *Id.* at 6-10 (JA \_\_ - \_\_). Alternatively, the district court ruled that if the issuance and enforcement of the subpoena was a judicial act, its constitutionality was supported by analogy to various statutes involving enforcement of administrative process and Federal Rule of Civil Procedure 27. *Id.* at 10-21 (JA \_\_ - \_\_).

The district court also rejected Verizon’s arguments that Section 512(h) violated the First Amendment. The lower court recognized that Verizon has standing to represent its subscribers’ First Amendment interests, *id.* at 20-23 (JA \_\_-\_\_), and that the First Amendment protects anonymous Internet speech and association, *id.* at 23-24 (JA \_\_-\_\_). The court distinguished Supreme Court precedent establishing that “[t]he separation of legitimate from illegitimate speech calls for sensitive tools,” *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (citation omitted), finding that the *ex parte* assertion of a “good faith” belief that infringement had occurred, combined with the possibility of subsequent challenge by the service provider in Rule 45 proceedings, satisfied the First Amendment. *Second Subpoena Opinion* 26-32 (JA \_\_ - \_\_). The lower court also rejected Verizon’s overbreadth argument, holding that Verizon had produced insufficient evidence of mistakes or abuse. *Id.* at 32-36 (JA \_\_ - \_\_). Finally, the lower court found that a limiting construction of the subpoena power to subsection (c) was unwarranted and was precluded by its statutory analysis in the *First Subpoena Opinion*. *Id.* at 36-39 (JA \_\_ - \_\_).

### **SUMMARY OF ARGUMENT**

1. As interpreted by the lower court, Section 512(h) crosses a constitutional line drawn at the Founding of the Republic. Both the Supreme Court and this Court have repeatedly held that Article III prohibits federal courts from undertaking investigative duties or issuing judicial

process outside of a pending case or controversy within their subject matter jurisdiction. Federal courts cannot be compelled or permitted to act like administrative agencies or grand juries, gathering facts that might (or might not) reveal possible violations of federal law. The district court recognized these principles, *Second Subpoena Opinion* 6 (JA \_\_\_), and further recognized that no Article III case or controversy was present when these subpoenas were issued in the court's name, *id.* at 19 n.12, 43 (JA \_\_, \_\_), but it resisted the inescapable conclusion that these subpoenas are constitutionally void.

The district court's primary holding was that the issuance of these subpoenas was a purely "ministerial" act by the clerk of the court, involving no exercise of the judicial power. *Id.* at 6-8 (JA \_\_-\_\_). But these subpoenas were issued by an inferior officer of the Judicial Branch in the name of the court. They carried with them on the day they were issued the enforcement authority that federal courts only derive from Article III of the Constitution. The very authorities cited by the district court undermine its conclusion—confirming that a subpoena *is* a court order when it is issued and that defiance of that order is punishable by contempt. *See, e.g., Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975) ("A subpoena is a lawfully issued mandate of the court issued by the clerk thereof.").

In the alternative, the district court held that even if Article III power were being exercised in the issuance and enforcement of these subpoenas, that exercise was constitutional by analogy to other federal statutes and Rule 27. *Second Subpoena Opinion* 10-16 (JA \_\_ - \_\_). But none of the cited statutes authorizes a private party to use the machinery of the Judicial Branch as a "private investigator service," in the absence of some existing controversy regarding an issue of federal law. The analogy to Rule 27 only highlights the constitutional infirmity here. Rule 27 requires an averment under oath that suit will be brought in federal court, a further averment that the evidence is subject to imminent loss, and adversarial proceedings *prior* to the

issuance of any judicial process. The district court itself recognized that these elements were not present here, *id.* at 14 (JA \_\_\_), and further recognized the historical pedigree of a suit at equity to preserve testimony, *id.* at 11-12 (JA \_\_\_ - \_\_\_), a pedigree that an *ex parte* request for an investigation into possible copyright infringement obviously lacks.

2. The lower court's reading of Section 512(h) was also incorrect. The court based its broad interpretation on the general statutory definition of "service provider" contained in Section 512(k) and concluded that Section 512(h) extended to subsection (a) conduit functions. The statute, however, assigns rights and duties entirely according to the *particular functions* that service providers furnish in specific contexts. Numerous provisions of this statute use the broad term "service provider," but by context or cross-reference clearly indicate that their scope is limited to particular functions specified in subsections (a) through (d). The district court relied upon a statutory definition that simply bears no weight in the inquiry into the scope of any particular subsection, thus violating both a general canon of construction and one specifically contained in this statute. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); 17 U.S.C. § 512(n).

This error caused the district court to ignore or gloss over numerous statutory directives that compel the conclusion that the Section 512(h) subpoena power is limited to the subsection (c) context. Section 512(h) contains *three separate cross-references* to subsection (c) and conditions the issuance of any Section 512(h) subpoena on the filing and service of a valid subsection (c) take-down notice. That notice is a legal *non sequitur* in the subsection (a) context, both because subsection (a) contains no take-down procedure of any kind and because it is impossible for the service provider to comply with the take-down notice as to material it does not control. Neither the district court nor RIAA has ever offered a convincing explanation for this problem, which does not occur when the statute is read as Congress wrote it, and the subpoena

power is confined to the only context where the take-down notice required to trigger a Section 512(h) subpoena is effective, *i.e.*, the subsection (c) context.

3. The district court erred in concluding that Supreme Court precedent requiring “sensitive tools” for the separation of protected from unprotected speech did not apply here and further erred in holding that an *ex parte* procedure (that the district court itself characterized as “ministerial” in discussing Article III) adequately protected First Amendment interests. A self-interested declaration of a “good faith” belief that speech or association is unprotected is not sufficient to shift the burden to the speaker to defend his or her presumptively protected activities on the Internet. This statute provides for no notice to the actual subscriber and no opportunity for the subscriber to challenge the elements of a copyright complaint or raise defenses such as “fair use.” The district court also erred in requiring *evidence* of mistakes and abuse to support an overbreadth claim in a “test case” about whether the statute should apply to conduit functions at all. Finally, the district court ignored the numerous distinctions between the subsection (a) context and the subsection (c) context in failing to properly apply principles of constitutional avoidance to adopt a more confined reading of the statute.

### **STANDARD OF REVIEW**

These consolidated “test cases” present questions of law regarding the proper interpretation of a federal statute, whether the statute violates the Constitution, and whether the doctrine of constitutional avoidance requires the Court to adopt a more limited construction of the statute. Because these are “pure question[s] of law,” this Court owes no deference to the lower court’s conclusions and must review each one *de novo*. *See, e.g., United States v. Doe*, 934 F.2d 353, 356 (D.C. Cir. 1991).

## ARGUMENT

### **I. THE APPLICATION OF SECTION 512(h) OUTSIDE OF A PENDING CASE OR CONTROVERSY VIOLATES ARTICLE III OF THE CONSTITUTION.**

#### **A. Controlling Supreme Court and Circuit Precedent Require Reversal of the District Court’s Article III Holding.**

As interpreted and applied by the district court, Section 512(h) allows for the issuance of a subpoena *duces tecum* on an *ex parte* basis in the absence of a pending case or controversy.

The subpoena is then subject to enforcement by an Article III court—without any lawsuit ever being filed (or even promised) and without any attempt to invoke the subject matter jurisdiction of the federal courts. Judicial officers are thus engaged in purely investigative duties that are constitutionally reserved to grand juries or administrative agencies. From the Framers’ time to the present, the Supreme Court consistently has held that Article III of the Constitution forbids the use of the federal courts as free floating investigative bodies to discover facts unconnected to the adjudication of actual cases or controversies. *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171-72 (1803); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Yale Todd’s Case*, printed at 54 U.S. (13 How.) 52 (1851); *Gordon v. United States*, 117 U.S. Appx. 697, 699-706 (1864); *Muskrat v. United States*, 219 U.S. 346, 353-63 (1911); *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950); *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989).

In *Morton Salt*, the Supreme Court made clear that “[t]he *judicial* subpoena power not only is subject to specific constitutional limitations ... but also is subject to those *limitations inherent in the body that issues them* because of the provisions of the Judiciary Article of the Constitution.” 338 U.S. at 642 (emphases added). The Supreme Court reaffirmed this principle in *Catholic Conference*, holding 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 and an order of civil contempt based on refusal to honor it must be reversed.” 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642) (emphasis added). This Court relied upon both *Catholic Conference* and *Morton Salt in Houston Business Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208 (D.C. Cir. 1996), where it held that a district court is “without power to issue a subpoena when the underlying action is not even asserted to be within federal-court jurisdiction.” *Id.* at 1213 (emphasis added); accord *Barwood, Inc. v. Dist. of Columbia*, 202 F.3d 290, 294-95 (D.C. Cir. 2000).

That the district court improperly ignored these fundamental principles is clear on the face of its own opinion. The lower court recognized that “[f]ederal 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.” *Second Subpoena Opinion* 6 (JA \_\_) (quoting *Morton Salt*, 338 U.S. at 641-42). It also recognized that, “at the time of issuance, a § 512(h) subpoena will not necessarily be tethered to a present or even anticipated ‘adversary proceeding, involving a real, not a hypothetical, controversy’ over providing the name.” *Id.* at 19 n.12 (JA \_\_) (citation omitted); see also *id.* at 43 (JA \_\_) (“To be sure, the clerk of the court is not commonly called upon to issue a subpoena in the absence of a pending case or controversy.”).

Thus, the lower court *conceded that no Article III case or controversy was present when the subpoenas in these proceedings were issued*, but refused to apply the teachings of *Morton Salt*, *Catholic Conference*, and *Houston Business Journal*. The district court and RIAA have offered three separate (and somewhat conflicting) rationales for refusing to apply the holdings of the cases cited above to the “novel” subpoena power at issue in this case. None is persuasive and some actually raise more separation of powers questions than they resolve.

**B. A Judicial Subpoena Is a Court Order That Must Be Supported by a Case or Controversy at the Time of its Issuance.**

In order to reach the conclusion that Section 512(h) was constitutional, the lower court endorsed the extraordinary proposition that “the clerk’s issuance of a § 512(h) subpoena does not involve either the exercise of judicial power or the exercise by federal judges of Article I or Article II-type investigatory power.” *Second Subpoena Opinion* 6 (JA \_\_). Based upon its belief that the issuance of a Section 512(h) subpoena is “a quintessentially ministerial duty,” *id.* at 7 (JA \_\_), the district court apparently concluded that it does not involve the exercise of the constitutional power of *any* branch of government.

This transparent attempt to side-step well-established limitations on the judicial power must be rejected. These two subpoenas were issued *in the name of the district court*, *see* Subpoenas (JA \_\_ & \_\_), and carried with them *on the day of their issuance* the enforcement authority that federal courts derive only from Article III of the Constitution. *See* Advisory Committee Notes to Rule 45 (1937) (“This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts.”); *In re Simon*, 297 F. 942, 944 (2d Cir. 1924) (“The fact that a writ of subpoena is actually signed in writing by the clerk of the court ... makes it no ne the less the court’s order.”). The very cases relied upon by the district court flatly contradict its ultimate conclusion. *See, e.g., Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975) (“A subpoena is a lawfully issued mandate of the court issued by the clerk thereof.”).

No doubt the subpoenas at issue in *Catholic Conference* and *Houston Business Journal* were processed by clerks of the federal district courts—but their *issuance* outside a case or controversy rendered them void and unenforceable by an Article III court. Even if the issuance of these subpoenas could be characterized as ministerial, their effect is clearly not; a private party must either comply with them or face the full contempt powers of the federal district court.

Under the district court's reasoning, as long as the clerk initiates the process, Article III courts can be pulled into a myriad of purely investigative duties that are clearly forbidden to them by the Constitution.

**C. Congress Cannot Impose Purely Investigative Functions on the Court or its Clerk.**

Somewhat in tension with its primary holding, the district court apparently endorsed the argument that the clerk of the court is exercising delegated legislative authority, pursuant to Article I of the Constitution, in issuing the subpoena. *Second Subpoena Opinion* 8, 15-16 (JA \_\_, \_\_ - \_\_). The lower court then opined that in a “real-world sense,” (presumably as opposed to a legal or constitutional sense) an Article III judge does not take action until a dispute arises over enforcement of the subpoena “at which time there is sufficient controversy to confer jurisdiction under Article III of the Constitution.” *Id.* at 8 (JA \_\_). In the district court's view, the fact of statutory authorization served to distinguish *Catholic Conference* and *Houston Business Journal* because, in those cases, “the only conceivable source for the district court's jurisdiction to issue a subpoena was a pending case or controversy.” *Id.* at 15 (JA \_\_). In essence, the lower court held that Congress had supplanted the need for a case or controversy by statute.

This argument fails on many levels and actually serves to highlight why Section 512(h) violates both the requirements of Article III and the separation of powers. First and foremost, the Supreme Court has repeatedly made clear that the case or controversy requirement is a *per se* rule; it cannot be relaxed or modified by the Congress. Thus, in *Hayburn's Case*, five of the six Justices of the Supreme Court, sitting as Circuit Justices, concluded that a law that assigned to federal judges the role of taking pension applications and making recommendations to the Secretary of War, imposed duties “not of a judicial nature.” 22 U.S. at 410-14. Chief Justice

Marshall alluded to the results in those circuit cases with favor in *Marbury* itself, and further noted that Congress had quickly repealed the 1792 law that had assigned *ex parte* investigative duties to judges. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171-72 (1803). Similarly, in *Ferreira*, the Supreme Court struck down a law that assigned to district court judges in Florida the adjustment of claims by Spanish inhabitants under a treaty. 54 U.S. 40. The Court found that the role assigned by statute was not judicial in nature:

For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there ....

*Id.* at 46-47; accord *ICC v. Brimson*, 154 U.S. 447, 485 (1894) (Harlan, J.) (reaffirming the “salutary doctrine that congress ... may not impose upon the courts of the United States any duties not strictly judicial”).

These principles were expressly reaffirmed by the Supreme Court in *Morton Salt* and *Catholic Conference*—in the very context of the power of the federal courts to issue writs of subpoena. Thus in *Morton Salt* the Court opined: “The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, ... but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.” 338 U.S. at 642 (emphasis added). In *Catholic Conference*, the Court cited this language from *Morton Salt* in support of its holding that a subpoena issued in the absence of subject matter jurisdiction is void. 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642). The *Catholic Conference* Court went on to note that the absence of subject matter jurisdiction is “not a mere nicety of legal metaphysics.” *Id.* at 77. Rather, “[i]t

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.” *Id.* Thus, both *Morton Salt* and *Catholic Conference* make clear that the limitations of Article III are analogous to those contained in the Bill of Rights. They preclude the issuance of binding judicial process outside of a pending case or controversy and Congress cannot relax or modify that preclusion by statute.

The district court’s “statutory authority” holding is also directly contrary to the Supreme Court’s Article III standing precedents. Although the lower court recognized that there was no live controversy at the time these subpoenas were issued, it found that the statute solved this constitutional dilemma. But Congress is not free to alter the requirement that binding judicial action can only occur in the context of live, adversarial proceedings regarding a claim within the subject matter jurisdiction of a federal court. The requirement of Article III standing is “absolute” and not “malleable by Congress.” *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996); accord *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, 577 (1992); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

Beyond the *per se* violation of the requirements of Article III, legislative cooptation of federal judicial clerks for non-judicial duties raises a host of *additional* separation of powers concerns. The clerk of court is an inferior officer of the Judicial Branch, who derives all of his or her authority from appointment by an Article III judge. 28 U.S.C. § 956; see also *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The derivative authority of an inferior officer generally cannot exceed the authority of the appointing officer. See, e.g., *Lloyd v. Lawrence*, 60 F.R.D. 116, 118 (S.D. Tex. 1973) (“Obviously, the Clerk may not take action which the Court itself may not take.”). Thus, it is difficult to see how the clerk can be authorized to take action that an Article

III judge could not take, particularly where that action is taken in the name of the court and requires the exercise of the court's enforcement authority to have any effect.

Moreover, the assignment of extra-judicial duties to an inferior judicial officer is, in itself, an intrusion into the powers and organization of the judicial branch. Must the court itself pay some deference to the clerk's actions when they are authorized by Article I as opposed to Article III? Must the clerk's office give priority to the work assigned to it by Congress over that assigned to it by Article III judges? The district court recognized the concern that Section 512(h) subpoenas would divert the resources of inferior judicial officers from the work of the courts, but found that to date "no such barrage of requests has occurred." *Second Subpoena Opinion* 18 (JA \_\_\_). But RIAA itself represented to the district court that it intended to "issue very substantial numbers of subpoenas" during the brief period necessary to prosecute these appeals, *see* April 1, 2003 Hearing Tr. 72 (JA \_\_\_), thus promising the very harm to the operations of the Judicial Branch that the district court dismissed as "speculative." *Second Subpoena Opinion* 18 (JA \_\_\_).

Finally, the district court's suggestion that subsequent litigation can supply the necessary "case" or "controversy" for purposes of Article III, *id.* at 8 (JA \_\_\_), is obviously wrong. The jurisdiction necessary to issue the subpoena cannot be created by an after-the-fact dispute. "A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *In re Marc Rich & Co.*, 707 F.2d 663, 669 (2d Cir. 1983). Both *Catholic Conference* and *Houston Business Journal* make this clear—the subsequent dispute over the legality of the subpoenas could not create the requisite federal case or controversy to support their issuance. *See also Barwood*, 202 F.3d at 294 (rejecting argument that violation of a temporary restraining order could supply federal jurisdiction as "a remarkable feat of bootstrapping").

**D. The District Court’s Reasoning by Analogy to Other Statutes and Federal Rule of Civil Procedure 27 Cannot Save Section 512(h).**

Next, the lower court switched gears and opined that, “assuming that the issuance of a § 512(h) subpoena can be conceptualized as a judicial act,” *Second Subpoena Opinion* 10 (JA \_\_), it was nonetheless constitutional by analogy to other statutes. Here, the district court simply cited four federal statutes *seriatim*, without analysis, for the proposition that “§ 512(h) is by no means as unique as Verizon claims.” *Id.* Nowhere was the district court willing to say that any of these statutes authorized the issuance and enforcement of purely investigative judicial process, because they do not. The statutes relied upon by the district court are clearly distinguishable as they: (1) involve the issuance of subpoenas that are not enforceable by Article III courts, 2 U.S.C. § 388; (2) involve an underlying case or controversy regarding independent issues of federal law pending before a federal agency, 35 U.S.C. § 24 (“testimony ... to be taken for use in any contested case in the Patent and Trademark Office”); 7 U.S.C. § 2354(a) (same for Plant Variety Protection Office); *see Sheehan v. Doyle*, 513 F.2d 895, 897-98 (1st Cir. 1975); or (3) permit a clerk to issue a subpoena during a contested arbitration involving federal labor matters where the award itself is subject to judicial enforcement, 45 U.S.C. § 157(h). None of these statutes places the clerk and the court in the role of the initial investigator of facts that may or may not be useful in the potential civil claims of private parties.

Finally, the district court reached for Federal Rule of Civil Procedure 27 as a “compelling precedent for judicial compulsion of information outside the context of a pending case or controversy.” *Second Subpoena Opinion* 15 (JA \_\_). The district court recognized that there were differences between Rule 27 and Section 512(h), *id.* at 14 (JA \_\_), but reasoned that those differences “are neither as substantial nor consequential as Verizon contends.” *Id.* What the

district court ignored is that there are least four fundamental differences, of constitutional dimension, that separate Rule 27 proceedings from the subpoenas at issue here.

*First*, a Rule 27 petition must state under oath a firm intention to bring a lawsuit in federal court. Fed. R. Civ. P. 27(a)(1); 8 Charles A. Wright, *et al.*, Federal Practice and Procedure § 2072 (3d ed. 1998). The district court itself recognized that this was not the case in the context of a Section 512(h) subpoena. *Second Subpoena Opinion* 14 (“an entity seeking a subpoena under § 512(h) need not state that it expects to be a party to an action cognizable in federal court”).

*Second*, Rule 27 is not a discovery tool, *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.’”); rather it authorizes the perpetuation of known evidence in the face of an averment as to its imminent loss. “Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost.” *Ash v. Cort*, 512 F.2d 909, 911 (3d Cir. 1975). Again, the district court recognized that these subpoenas were not (and could not be) supported by such an averment of imminent loss. *Second Subpoena Opinion* 14 (JA \_\_\_). It is undisputed that Verizon preserves the relevant data. *See* April 1, 2003 Hearing Tr. 14-15 (JA \_\_\_ - \_\_\_); Lebrede Decl. ¶ 4 (JA \_\_\_).

*Third*, Rule 27 requires notice to the potential adverse party (the defendant in the promised civil action) and the conduct of adversarial proceedings before any judicial process issues. It is in essence a lawsuit for the perpetuation of testimony, with all the elements of a case within the subject matter jurisdiction of the court pled in the petition. *See Arizona v. California*, 292 U.S. 341, 347 (1934) (“The sole purpose of such a *suit* is to perpetuate the testimony.” (emphasis added)); *see also Green v. Compagnia Generale Italiana di Navigation*, 82 F. 490 (S.D.N.Y. 1897). By contrast, Section 512(h) does not require any notice to the real party in

interest (the anonymous subscriber) and authorizes an *ex parte* issuance of binding judicial process. Notice to subscribers will be impracticable in any event once RIAA begins its promised deluge of subpoenas.

*Finally*, a suit to perpetuate testimony has roots in equity that predate the Constitution itself. By contrast, the issuance of an *ex parte* subpoena *duces tecum* to a third-party to discover facts unconnected to any case or controversy has no common law or equity roots at all. It is, as the district court characterized it, an “innovation.” *Second Subpoena Opinion* 6 (JA \_\_\_).

As this Court observed in *Houston Business Journal*: “The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others.” 86 F.3d at 1213. As utilized in these two subpoena actions, Section 512(h) allows a private party to bring the coercive power of the district court to investigate facts unconnected to any pending (or promised) case or controversy within the subject matter jurisdiction of the court. RIAA has consistently maintained that its primary use of this statute will be not to sue potential infringers, but rather to issue warnings to subscribers enunciating RIAA’s legal position on the use of peer-to-peer software. Jonathan Krim, *A Story of Piracy and Privacy*, *The Washington Post*, Sept. 5, 2002, at E1 (“RIAA simply wants to warn the subscriber that he or she is violating the law.”). The court and its clerk are thus reduced to the role of a “private investigator,” facilitating the business communications of a particular sector of the

economy. This is not analogous to Rule 27 or any other accepted judicial device, and if it is upheld it will open the door to countless other non-judicial assignments for the Judicial Branch.<sup>5</sup>

**II. THE LOWER COURT’S READING OF THE STATUTE IS CONTARY TO ITS TEXT, STRUCTURE, HISTORY, AND PURPOSE AND VIOLATES ESTABLISHED CANONS OF CONSTRUCTION.**

Even should this Court conclude that an Article III court can issue and enforce subpoenas outside of a pending case or controversy, the subpoenas at issue in these appeals should not be enforced against Verizon because they are outside the authorization of the statute itself.

Although the court below cited the proper canons of statutory construction at the outset of its opinion, *see First Subpoena Opinion* 7-8 (JA \_\_-\_\_), it then proceeded to violate them one by one in adopting a tortured reading of the language and structure of the statute. In addition, its view of the statute conflicts with its history and purpose. The district court erroneously stretched Section 512(h) to reach a problem that did not exist when the law was passed, with dire consequences for Internet functions, such as electronic mail and web browsing, that Congress viewed as private and with which it did not wish to interfere in the DMCA. The lower court thus violated the Supreme Court’s warning that courts should leave for Congress the task of fashioning responses to new technology in the area of copyright law. *See Sony Corp. v.*

*Universal City Studios, Inc.*, 464 U.S. 417, 430-31 (1984) (“Repeatedly, as new developments

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<sup>5</sup> The only Article III issue before this Court is the constitutionality of these two subpoenas, which were clearly issued outside of any pending case or controversy. Because this is not a free-standing challenge to Section 512(h), and because the statute can undoubtedly be construed to have constitutional applications in the context of pending lawsuits (permitting identification of an alleged infringer immediately after filing the lawsuit and before normal discovery would commence), this Court need not conduct a “severability analysis” regarding Verizon’s Article III challenge to Section 512(h). The procedural provisions of Section 512(h) relax the rules otherwise applicable to discovery in civil suits, *see, e.g.*, Fed. R. Civ. P. 26(d) (no discovery prior to Rule 26(f) conference) and can clearly apply in a “John Doe” lawsuit or other infringement action. In any event, Verizon submits that Section 512(h) is severable. *See, e.g.*, *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932).

have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.... Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”).

**A. The Text and Structure of Section 512 Compel the Conclusion that Section 512(h) Applies Only to Material Stored on a Service Provider’s Network or Systems.**

The district court began its analysis by citing the familiar canon that “[s]tatutory construction “is a holistic endeavor,” and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure and subject matter.” *First Subpoena Opinion 7* (JA \_\_) (citations omitted). It then proceeded to violate this canon by giving talismanic significance to the general definition of “service provider” contained in subsection (k) in a statute that is organized entirely by *what* service providers do, not *who* they are. *Id.* at 8-11 (JA \_\_-\_\_).

Section 512 involves a careful calibration of service provider involvement with content on the one hand, and service provider duties in relation to that content, on the other hand. Thus, subsection (a) deals with the situation where the Internet service provider performs a pure transmission or “conduit” function between its subscribers and the myriad opportunities for political, cultural, commercial and personal exchange that are available on the Internet. This function is analogous to the role played by common carriers in transmitting information selected and controlled by others. In the Internet context, it includes email, web browsing, and, more recently, peer-to-peer functions, where the user selects both the content and the destination of the communication. Traditionally, this passive role of conduit for the expression of others has not created any duties or liabilities under the copyright laws.

At the other end of the spectrum is subsection (c), which deals with material residing on the servers of an Internet service provider at the request of one of its customers. In this frequently commercial setting, the Internet service provider is “hosting” an online site on its own servers. Here, Section 512 imposes greater duties on the service provider in exchange for limited immunity, including a duty to “remove” or “disable access to” infringing material upon receiving a valid take-down notice as specified in subsection (c)(3)(A) of the statute. Section 512(g) provides for notice to the owner of the website in the face of an allegation of copyright infringement and further provides an opportunity for the website owner to provide a “counter notification” disputing that the website contains infringing material. 17 U.S.C. § 512(g)(3). The service provider must then reinstate access to the website, unless the copyright owner files a lawsuit seeking to enjoin the website owner under the copyright laws. *Id.* § 512(g)(2)(B). The statute also provides for damages and attorney’s fees to be awarded for misrepresentations in either a take-down notice or a counter notification that causes the improper removal or replacement of the material. *Id.* § 512(f).

Subsections (b) and (d) of the statute describe situations that lie between the two poles of the conduit functions described in subsection (a) and the hosting functions described in subsection (c). Subsection (b) applies to caching functions, where the service provider temporarily stores a duplicate of material found elsewhere on the Internet in order to facilitate efficient transmission of the material. (For example, when a user hits the “back” button on his or her browser, the user accesses cached material rather than the original website.) The Internet service provider is required to take-down such material only where the material has been removed from the “originating site” by court order or by another service provider. *Id.* § 512(b)(2)(E). Subsection (d) involves information location tools, such as hyperlinks, that might lead a subscriber from a service provider’s home page or website to an infringing website. That

subsection provides for its own specific type of take-down notice, requiring information sufficient to allow the service provider to “locate” and “remove” or “disable access to” the reference or link. *Id.* § 512(d)(3). Subsection (a) of the statute thus stands alone, with no take-down notice or any other specific duties imposed upon the service provider by that subsection.

The district court’s decision that the definition of “service provider” in subsection (k) overrides the careful calibration of functions and duties that drive the structure of the entire statute was legal error. The broad definition of “service provider” contained in subsection (k)(1)(B) is used in numerous provisions of the statute, *that each then go on to delineate specific functions and limited duties applicable to all service providers in specific contexts*. For example, subsections (b), (c), and (d) all use the same defined term as subsection (h), but other provisions in those subsections make quite clear that they do not apply to service providers performing conduit functions. Subsections (e), (f), (g), and (j) of the statute also use the same defined term “service provider,” yet either by context or cross-reference some or all of their operative provisions are limited to particular functions described in subsections (a) through (d).

The use of the broad definition of “service provider” in 512(h) simply means that all service providers are potentially subject to Section 512(h), *if that subsection by its terms otherwise applies*. It says nothing about what particular functions are covered by Section 512(h). This is made clear by Section 512(n) of the statute, entitled “Construction,” which provides that “Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section.”<sup>6</sup> The district court’s singular focus on the definition of service provider

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<sup>6</sup> The district court erroneously dismissed this argument, based on the second sentence of Section 512(n). *Second Subpoena Opinion* 42 (JA \_\_\_). What the district court ignored is that subsection (n) is broadly entitled “Rule of Construction.” The first sentence of that subsection states a general rule of construction regarding the application of Section 512 as a whole. The second sentence of subsection (n) contains a more specific directive, consistent with that general

thus violated both a general canon of statutory construction and a specific one contained in the statute itself. A court must make every attempt to interpret a statute ““as a symmetrical and coherent regulatory scheme”” and ““fit, if possible, all parts into an harmonious whole.”” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted)). The district court eschewed such an effort, and instead focused the bulk of its analysis on a statutory definition that simply bears no substantive weight in the context of the statutory question presented.

When one turns to the correct statutory question, *viz.*, to what particular category of functions does subsection (h) apply, it becomes clear that the subpoena power applies only to material residing on a service provider’s network or systems as described in subsection (c) of the statute. Section 512(h) contains three separate cross-references to the take-down notice described in subsection (c)(3)(A), which applies exclusively to the particular functions described in subsection (c) of the statute. In fact, subsection (c)(3)(A) expressly stated that it sets conditions that must be met for a take-notice to be “effective under” subsection (c). The issuance of every Section 512(h) subpoena is expressly conditioned on the requester’s filing and service of such a take-down notice. 17 U.S.C. § 512(h)(4) (“If the notification filed satisfies the provisions of subsection (c)(3)(A)” and other factors are met the subpoena shall issue.). The required subsection (c)(3)(A) notice, the statute says, can only be “effective under this subsection” only if it allows the service provider to “locate” and “remove” or “disable[]” “access to” “the *material* that is claimed to be infringing.” *Id.* § 512(c)(3)(A) (emphasis added).

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(Continued . . .)

rule of construction, pertaining to the immunity provisions of the statute. The district court read the title and first sentence of subsection (n) out of the statute.

These statutory requirements for the issuance of a Section 512(h) subpoena cannot have any force or effect in the subsection (a) context, because the statute does not authorize any subsection (a) take-down notices, and because Verizon has the ability neither to locate the material at issue nor to remove or disable access to it. The material resides not on Verizon's network or systems, but on a personal computer or other information storage device entirely outside of Verizon's control. The district court's reading of the statute thus renders Section 512(h)'s repeated cross-references to subsection (c)(3)(A) meaningless and requires the filing and service of a take-down notice that has no purpose or effect in a subsection (a) context. This construction violates not just *a* canon of statutory construction, but what the Supreme Court has described as *the cardinal canon* of construction—that no provision may be read to be without operation or effect. *Bennett v. Spear*, 520 U.S. 154, 173 (1997); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

The most logical reading of Section 512(h) is that the cross-references to subsection (c)(3)(A) *do* have meaning and effect, because Section 512(h) applies only to the subsection (c) context. *See, e.g., Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 65 (D.C. Cir. 1987) (“highly specific cross reference” must be read to limit scope of more general statutory provision); *Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1055 (D.C. Cir. 1999) (holding that a statutory provision's “cross references also evidence an intent to limit the meaning of the term” in that provision).

The district court buried its analysis of this central issue in a footnote. *First Subpoena Opinion* 15 n.5 (JA \_\_\_). It suggested that Verizon could terminate a subscriber's entire account, thereby “disabl[ing] access” to *everything* stored on the subscriber's home computer. *Id.* But this “explanation” conflates two very distinct concepts in the DMCA. The take-down notice requires the service provider to “locate” and “remove[]” or “disable[] access to” particular

“material” identified in the notice. The statute separately describes the process of terminating a subscriber’s Internet account in *different* language with different statutory predicates. 17 U.S.C. § 512(j)(1)(B)(i) (referring to injunctive relief that requires “terminating the accounts of the subscriber”). The lower court thus gave the same meaning to the different language chosen by Congress for two distinct factual situations—violating another well-recognized canon of statutory construction. *See Transbrasil S.A. Linhas Aereas v. Dept. of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) (“[W]here different terms are used in a single piece of legislation, the Court must presume that Congress intended the terms have different meanings.”).

The district court’s alternative explanation, buried in the same footnote, is that “it is irrelevant whether the service provider is able, or intends, to disable access to the material.” *First Subpoena Opinion* 15 n.5 (JA \_\_\_). It relied upon Section 512(h)(5) for this proposition, which states that an Internet service provider must comply with a Section 512(h) subpoena, “regardless of whether the service provider responds to the notification.” But, far from supporting the district court’s reading of the statute, Section 512(h)(5) provides further evidence that Section 512(h) as a whole is tied to subsection (c). Only in the subsection (c) context is there the possibility of a “counter notification” by the customer that might result in the service provider refusing to comply with a take-down notice but nonetheless identifying a customer storing material on its network or systems. *See* 17 U.S.C. § 512(g)(2). Thus, Section 512(h)(5) constitutes a further cross-reference to procedures that only apply in the context of subsection (c). It cannot be read as a reference to an invalid take-down notice under subsection (a)—a creature that is found nowhere in the statute itself.

There are other textual flaws in the district court’s reading of the statute. For example, subsection (c)(3)(A)(ii) refers to copyrighted works “at a single online site.” An “online site” is hardly an apt description for an Internet user’s personal computer. However, it is an apt

description of a website or bulletin board that is hosted on the Internet service provider's own network or systems. *See* S. Rep. No. 105-190 at 46 (describing “the URL address of the location (web page) which is alleged to contain the infringing material” as an online site for purposes of the subsection (c) take-down notice). The district court either elided or ignored all of these textual flaws in its own reading of the statute. Each one is solved by giving this admittedly “novel” provision a less sweeping reading, consistent with its repeated references back to subsection (c) of the statute.

**B. The Legislative History and Purpose of the Statute Support Limiting Section 512(h) Subpoenas to the Subsection (c) Context.**

Reading Section 512(h) to apply only to the subsection (c) context comports with both the purpose of the statute and the legislative history. Peer-to-peer file sharing software, such as KaZaA, simply did not exist in 1998. At that time, the vast majority of Internet connections operated at speeds that precluded the uploading of large files, such as music or video files, from a home computer.<sup>7</sup> The central concern in 1998 was infringement through online websites, hosted by service providers, with the capacity to store and disseminate large amounts of data. The response was take-down duties and a subpoena provision limited to “online sites” hosted by the service provider.

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<sup>7</sup> RIAA has suggested that technology known as “file transfer protocol” (“FTP”) constitutes a peer-to-peer type application that existed in 1998. *E.g.*, RIAA Stay Opp’n 8 n.8 (JA \_\_\_). This assertion is demonstrably incorrect. FTP generally involves a centrally hosted site where material is catalogued and stored. *See, e.g., Shea v. Reno*, 930 F.Supp. 916, 928 (S.D.N.Y. 1996) (“One type of software implements a set of conventions for copyright files from a host computer known as ‘file transfer protocol’ [which allows a user to] *contact the server*, view a directory of available files, and copy one or more of those files” (emphasis added)). Indeed, RIAA’s own testimony regarding the DMCA shows that this was RIAA’s understanding at the time: “What are all these people accessing on the Internet? Information, *information that is stored on computer servers.*” *Hearing Before the Senate Comm. on the Judiciary on S. 1146*, at 13, 105th Cong. 366 (1997) (statement of Cary H. Sherman, then-Senior Executive Vice-President and General Counsel of RIAA) (emphasis added).

The conduit functions Congress knew about in 1998 were electronic mail and web browsing. *See* H.R. Rep. 105-551 at 42 (referring to both “email” and “storage of a web page in the course of transmission to a specific user” as conduit functions). These subsection (a) functions were not seen as presenting infringement problems in 1998 and were, in fact, viewed by Congress as qualitatively different from hosted websites in terms of the privacy and free expression interests of Internet users. Thus, there was no “huge loophole,” *First Subpoena Opinion* 18 (JA \_\_\_), from the point of view those who enacted the statute in 1998. Rather, Congress simply did not extend the novel device contained in Section 512(h) to conduit functions, because they were not viewed as a threat to the interests of copyright owners in 1998, and because the conduit functions Congress knew about were those it thought were worthy of substantial protection from outside intrusion. 17 U.S.C. §§ 512(m), 1205.

Finally, the practical consequences of the district court’s reading of the statute cannot be ignored. Using the Section 512(h) subpoena power to monitor the activities of *tens of millions* of Internet users, as opposed to the more limited universe of commercially hosted online websites, would cause a sea change in the use and operation of the Internet. Substantial protections apply in the context of subsection (c) take-down notices. *See, e.g., id.* § 512 (g)(2) (notice to subscriber of receipt of take-down notice and possibility of counter notification by subscriber); *id.* § 512(f) (damages remedy for harm caused by misrepresentations in take-down notice or counter notification). The district court’s statements to the contrary notwithstanding, *see Second Subpoena Opinion* 30 (JA \_\_\_), there are no such protections when Section 512(h) is stretched to include subsection (a) conduit activities. There is no provision for notice to the subscriber of the receipt of such a subpoena by the service provider, no mechanism for the subscriber to assert any rights, and no damages protection should the subpoena result in the improper revelation of an

Internet user's identity. One would expect to find *some* protections in a statute that elsewhere expressed such solicitude for the privacy interests of Internet users.<sup>8</sup>

Congress has repeatedly recognized the importance of the Internet as a medium of social and political discourse and commerce. *E.g.*, 47 U.S.C. § 230(a)(3); *see Reno v. ACLU*, 521 U.S. 844, 870 (1997). It has sought to foster that growth, free from excessive governmental regulation. 47 U.S.C. § 230(b)(2). And Title II of the DMCA itself was designed to clarify limitations on service provider liability to “ensure[] 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.” S. Rep. No. 105-190 at 8 (1998). The district court's interpretation of Section 512(h) threatens each of these goals. Congress specifically instructed that the immunities recognized for Internet service providers should not turn them into “Big Brother,” monitoring the private communications of their subscribers. 17 U.S.C. § 512(m). There is *nothing* in the statute or the legislative history that suggests that Congress intended the district courts to assume that role under Section 512(h).<sup>9</sup>

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<sup>8</sup> The absence of any such protections is particularly probative in light of the fact that Congress has limited the ability of private parties to obtain access to the identity of individuals in connection with private communications over the telephone, the Internet, and other media. *See, e.g.*, 18 U.S.C. § 3121(a) (limiting pen registers to governmental use for criminal and national security purposes); 47 U.S.C. § 551(c) (providing substantial protections surrounding “disclosure of personally identifiable information” in the context of cable television services).

<sup>9</sup> The district court asserted that “[t]he clear purpose of the DMCA, evident in its legislative history confirm[ed]” its reading of Section 512(h). *First Subpoena Opinion* 20 (JA \_\_). But, this statement is unsupported by citation to *any* legislative history relevant to Title II of the DMCA or Section 512(h). Indeed, the district court and RIAA acknowledged below that there is nothing in the legislative history of Title II that is directly on point as to the statutory issue before this Court. October 4, 2002 Hearing Tr. 37 (JA \_\_) (Judge Bates) (“There’s nothing in the legislative history ... that really is very helpful for either side of this question of the application of a 512 subpoena to the various subsections of 512.”); *id.* at 17 (JA \_\_) (Counsel for RIAA) (“I can’t point to any legislative history that says directly either that we’re right or that Verizon’s right.”).

### **III. SECTION 512(h) VIOLATES THE FIRST AMENDMENT RIGHTS OF INTERNET USERS.**

The district court correctly held that Internet users have a First Amendment right to speak and associate anonymously, *Second Subpoena Opinion* 23-26 (JA \_\_\_), and that Verizon has standing to defend those interests, *id.* 20-23 (JA \_\_ - \_\_). The lower court then proceeded to ignore entirely those rights merely because Section 512(h) is triggered by an *assertion* of copyright infringement. The Supreme Court has never endorsed anything like the district court's theory that expression and association can be *presumed* to constitute unprotected copyright infringement based merely on the *ex parte* "good faith" belief of an interested party.

#### **A. The District Court Erroneously Held that First Amendment Procedural Protections Apply Only to "Core Political Speech."**

The district court attempted to limit the First Amendment issues by claiming that no "core political speech" is implicated by Section 512(h). *Id.* at 24-25 (JA \_\_ - \_\_). This was legal error for at least three reasons. First, Section 512(h)'s *ex parte* procedure, by design, does not permit any judicial inquiry into whether "core political speech" is involved before the subpoena is issued. At the time the subpoena issues, no judge has passed upon the nature of the speech at issue.

Second, copyright extends to every form of expressive activity, including political speech. *See, e.g., Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (memoirs of President Gerald R. Ford). In this very proceeding, Verizon used the KaZaA peer-to-peer software to search for and download the speeches of Martin Luther King. *See* Kidd Decl. ¶¶ 5-6 (JA \_\_ - \_\_). In fact, a federal district court recently held that distribution of the KaZaA software did not constitute contributory or vicarious copyright infringement *precisely because there are numerous perfectly licit uses for this file-sharing technology. Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, No. CV01-08541, 2003 WL 1989129, \*5 (C.D. Cal. April 25).

Third, in order to warrant constitutional protection, anonymous expression need not, as the district court believed, be similar in kind to “speeches of Lenin, Biblical passages, educational materials, or criticisms of the government,” *First Subpoena Opinion* 33 (JA \_\_\_). The very Supreme Court precedent the district court cites makes clear that the right to speak and associate anonymously extends beyond the political realm. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995) (discussing the import of anonymity in “the field of literary endeavor” and art and referencing, *inter alia*, Mark Twain and O. Henry).

**B. An *Ex Parte* Assertion of Infringement Is Constitutionally Insufficient To Shift the Burden to Verizon To Defend its Subscribers’ Rights.**

Verizon has not argued that there is a First Amendment right to engage in copyright infringement. However, at the time Section 512(h) is invoked, there has been nothing approaching a judicial determination of copyright infringement. The filings required by Section 512(h) fall far short of meeting even the notice pleading requirements for *alleging* a case of copyright infringement. The copyright law places limits on expressive activity, and thus by its nature implicates the First Amendment. *See Eldred v. Ashcroft*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 769, 788-89 (2003) (noting that the “idea/expression dichotomy” and “fair use defense” both provide First Amendment protection against copyright infringement claims). Section 512(h) provides no such built-in protection for expression that may very well be, following more careful examination in court or otherwise, found to be fully protected. That is the First Amendment issue at the heart of these appeals.

Because Section 512(h) is a procedure designed to strip Internet speakers of their presumptively protected anonymity, “those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government ‘is not free to adopt whatever procedures it pleases for dealing with [illicit content]

without regard to the possible consequences for constitutionally protected speech.” *Blount*, 400 U.S. at 416 (citation omitted); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 220 (1990) (plurality opinion) (noting need for First Amendment “procedural safeguards”); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir. 1981). The Supreme Court has repeatedly “recognized that ‘the line between speech unconditionally guaranteed and speech which may legitimately be regulated ... is finely drawn,’” “[t]he separation of legitimate from illegitimate speech calls for sensitive tools.” *Blount*, 400 U.S. at 417 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

Section 512(h) lacks these procedural safeguards. It strips Internet users of their anonymity based upon no more than an *ex parte*, self-proclaimed “good faith” assertion by anyone willing to assert he or she is a copyright owner, or authorized to act on behalf of a copyright owner, that copyright infringement *might* be occurring. 17 U.S.C. § 512(c)(3)(A)(v). It permits no adversarial proceedings before destroying presumptively protected First Amendment rights. *See, e.g., Blount*, 400 U.S. at 418 (“The teaching of our cases is that, because only a judicial determination in an *adversary proceeding* ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial *determination* suffices to impose a valid final restraint.” (emphases added)); *id.* at 420; *see also Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 179 (1968) (10-day restraining order against particular

rallies or meetings invalid under the First Amendment because obtained by *ex parte* procedure).<sup>10</sup>

The district court's attempts to narrow or distinguish *Blount* and its progeny are unpersuasive. First, it asserted that *Blount* and similar cases are inapplicable to suppression of expressive activity outside of the obscenity context. *Second Subpoena Opinion* 26, 28-29 (JA \_\_, \_\_-\_\_). *Blount* addresses the constitutional requirements for precise procedural tools to separate protected from unprotected speech, *see also Speiser*, 357 U.S. at 526, and the Supreme Court has recognized the need for "sensitive tools" in situations far beyond the obscenity context. *Bd. of Educ. v. Pico*, 457 U.S. 853, 874 n.26 (1982) ("We have recognized in numerous precedents that when seeking to distinguish activities unprotected by the First Amendment from other, protected activities, the State must employ 'sensitive tools' in order to achieve a precision of regulation that avoids the chilling of protected activities." (citing *Speiser*, 357 U.S. 513 (speech at issue was advocacy of overthrow of the government); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (speech at issue was seditious words)); *see also Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1369 (D.C. Cir. 1988) (now-Justice Ginsburg noting that the Postal Service's screening of political solicitations "poses genuine constitutional questions" as articulated in *Blount*). At the time of the issuance of a Section 512(h) subpoena, Internet speech and association may either constitute fully protected First Amendment activity or copyright

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<sup>10</sup> Even apart from the heightened protection required in the First Amendment context, rudimentary principles of due process require more than Section 512(h) accords here. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 13-14 (1991) ("good faith" *ex parte* attachment statute creates "too great a risk of erroneous deprivation"); *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972). Not only are Internet users' rights to free expression and association threatened by this inadequate process, but Verizon's property interest in its subscriber lists is also placed in jeopardy. *See General Privacy Principles at Principles 1 & 4* (JA \_\_, \_\_); Verizon Online's Terms of Service (JA \_\_); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

infringement. The proper focus is the moment when the subpoena issues and the proper First Amendment question is whether the procedure is sufficient *at that time* to support a court-ordered disclosure of the speaker's identity. *Blount, Speiser, Pico* and the cases that apply them speak precisely to this issue.

Second, the district court suggested that there is some significance in *Blount* to the fact that it involved direct governmental censorship rather than suppression initiated by a private party and enforced by a court. *See Second Subpoena Opinion* 27-28 (JA \_\_\_-\_\_\_). In *Blount*, however, the federal government's officer had the ability and duty not to issue a restraint if he or she found no probable cause; here the clerk "shall" issue the restraint upon the *ex parte* application of a self-interested party. Initiation of the restraint by private parties is worse, not better. *Cf., e.g., New York Times v. Sullivan*, 376 U.S. 254, 279 (1964); *Cohens v. Cowles Media Co.*, 501 U.S. 663, 668 (1991).<sup>11</sup>

The district court alternatively concluded that even if procedural protections were required, the "good faith" belief that infringement had occurred, *see Second Subpoena Opinion* 29-30 (JA \_\_\_-\_\_\_), satisfied the First Amendment. The district court opined that the subpoena requester "must, in effect, plead a prima facie case of copyright infringement." *Id.* at 30. These supposed "safeguards" provide even less protection than did the statutory scheme in *Blount*, wherein the Postmaster General was required to make "a showing of probable cause to believe

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<sup>11</sup> The district court also suggested that *Blount*'s principles are applicable only to a prior restraint. *See Second Subpoena Opinion* 27-28 (JA \_\_\_ - \_\_\_). But in this case particular forms of anonymous expression and association are prevented by the disclosure. *Cf. NAACP*, 357 U.S. at 462 (production order would entail a "substantial *restraint* upon the exercise by ... its members of their rights to freedom of association"). The "decision to *remain* anonymous," *McIntyre*, 514 U.S. at 342 (emphasis added), is part and parcel of the expression and association that is protected by the First Amendment. *See also NAACP*, 357 U.S. at 463 (disclosure of member lists would alter the current association by "induc[ing] members to withdraw from the Association").

the statute [at issue was] being violated.” 400 U.S. at 413-14. In neither situation does the “procedure requir[e] a judicial determination,” which the First Amendment demands. *Id.* at 418. Similarly, in both situations, the burden of proving that the underlying expression or association is unconstitutionally shifted to the speaker. *See id.*; *Speiser*, 357 U.S. at 526 (“The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.”). In essence the district court found that the vouchsafe of a party interested in limiting expression was sufficient First Amendment protection.

Finally, contrary to the district court’s statements, Section 512(h) does not require that the elements of copyright infringement be contained in the notice or the subpoena. An action for copyright infringement can be brought only by the owner of the exclusive rights. 17 U.S.C. § 501(b); *see, e.g., Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002). Registration of the copyright with the U.S. Copyright Office is also a *jurisdictional* prerequisite to the lawsuit. 17 U.S.C. § 411; 3 Nimmer & Nimmer, Nimmer on Copyright §12.09[A]. Here, RIAA is not even the owner of the copyrights at issue and no allegation of registration has been made. By contrast, in a real lawsuit, a complaint is filed subject to the strictures of Rule 11. All of the elements of the civil action must be pled and possible defenses (such as “fair use”) must be investigated prior to the filing of the complaint. The procedures in *Blount* itself and in an actual infringement lawsuit are both substantially more protective than those contained in Section 512(h).

**C. Section 512(h) Raises Substantial Overbreadth Concerns, Particularly as Extended to Conduit Functions.**

The district court’s reasoning regarding Verizon’s overbreadth claim is no more persuasive than is its analysis of *Blount*. The district court acknowledged that “[t]he scope of § 512(h) may impact some protected expression and association, in that the threat of a subpoena

under the DMCA, and the resulting disclosure of identity, could discourage some Internet users from otherwise protected activity. It is also possible that a copyright owner could mistakenly pursue, and obtain, the identity of an anonymous Internet user who was not, in actuality, infringing copyrighted materials.” *Second Subpoena Opinion* 32 (JA \_\_\_). Despite these acknowledgements, the district court rejected overbreadth concerns because, in its view, Verizon had not come forward with sufficient evidence of mistake and abuse. *See id.* at 32-36 JA \_\_\_ - \_\_\_). The district court was wrong on this score for two reasons.

First, the very nature of a facial overbreadth challenge dictates that there will not be a significant amount of “as applied” proof of overreaching. In fact, despite its threat to unleash a wave of Section 512(h) subpoenas, RIAA has issued only four such subpoenas to Verizon in the conduit context in the more than four years that the DMCA has been in effect. Verizon has not been afforded any discovery of RIAA (or other copyright owners or agents) in these cases and is not required to provide documentary proof of mistakes and abuse. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (overbreadth challenge may rest upon a “*judicial prediction or assumption* that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression” (emphasis added)).

Second, Verizon *did* provide substantial evidence of past errors as well as expert declarations on the likelihood of mistakes and abuse more than sufficient to satisfy its burden under *Broadrick*. As a case in point, MediaForce, a copyright bounty hunter of sorts, acting on behalf of RIAA member Warner Brothers, sent a notice to an Internet service provider that alleged copyright infringement of the film *Harry Potter and the Sorcerer’s Stone*. The notice stated that MediaForce had a good faith belief that copyright infringement had taken place at a particular IP address at a specific date and time. *See MediaForce Notice* (JA \_\_\_). The notice demanded that the service provider terminate the account of the person who had posted the

alleged infringing material. But the allegedly infringing work—a 1-kilobyte file entitled “Harry\_Potter\_Book\_Report.rtf”—was in fact a child’s book report. The robotic program designed to identify infringement could not tell the difference and the notice was issued.

A clerk faced with such a notice, which on its face complied with the requirements of Section 512(h), would have had no choice but to issue a subpoena. As the use of robotic software or “bots” increases, such automatic and erroneous demands to strip an innocent Internet user of his or her First Amendment rights will multiply many times over and thereby chill perfectly licit Internet communications and association. *See* John Borland, *RIAA to file swappers: Let’s chat*, News.com, April 29, 2003, at [http://www.news.com.com/2102-1025\\_3-998825.html?tag=ni\\_print](http://www.news.com.com/2102-1025_3-998825.html?tag=ni_print) (visited April 30, 2003) (RIAA is now using such bots to search for alleged infringement and send warnings). The result will be an unconstitutional use of judicial process to “suppress lawful speech as the means to suppress unlawful speech.” *Ashcroft v. Free Speech Coalition*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 1389, 1404 (2002). “Protected speech does not become unprotected merely because it resembles the latter.” *Id.*

In addition to mistakes made by overzealous copyright enforcers, the lack of any judicial supervision or oversight will encourage abuse. An individual with sinister intentions could carry cyberstalking one step further by alleging that someone he or she “met” in a chat room is a possible copyright infringer, thereby “expeditiously” obtaining that person’s name, address, and telephone number. *E.g.*, Fulcher Decl. ¶¶ 4-8 (JA \_\_\_-\_\_\_); Aftab Decl. ¶¶ 5-24 (JA \_\_\_-\_\_\_). RIAA itself submitted the sworn declaration of a pornography purveyor who had obtained a Section 512(h) subpoena. Lombardo Dec. (JA \_\_\_-\_\_\_); *see* Second Lebrede Decl. ¶¶ 5-7 (JA \_\_\_-\_\_\_). This threat to privacy, and even personal safety, will substantially chill speech and association on the Internet. *Talley*, 362 U.S. at 64; *McIntyre*, 514 U.S. at 342; *Cnty.-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1118 (D.C. Cir. 1978) (“[I]t is the task of

the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute.”).

The Supreme Court has repeatedly recognized that “[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.” *Broadrick*, 413 U.S. at 612; *see Free Speech Coalition*, 122 S. Ct. at 1404. There is an obvious and substantially more protective alternative that would ensure identification and punishment of most, if not all, of the unprotected speech RIAA wishes to reach: RIAA’s member whose copyright is at issue can file a John Doe lawsuit against the alleged infringer. Or, if what RIAA wants to do is simply “send a warning,” *see supra* p. 21, it can continue to do so through the very warning campaign it instituted in April, *see Amy Harmon, Music Swappers Get a Message on PC Screens: Stop It Now*, N.Y. Times, Apr. 30, 2003, at C1 (describing RIAA’s messaging campaign “which seek[s] to turn a chat feature in popular file-trading software to the industry’s benefit”). Accordingly, RIAA’s interpretation of Section 512(h) cannot satisfy the narrow tailoring requirement of the First Amendment. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

**D. The Serious First Amendment Problems Raised by Extending Section 512(h) to Conduit Functions Compel a More Modest Reading of the Statute’s Scope.**

Even assuming *arguendo* that the district court was correct in its reading of Section 512(h) and further assuming that Section 512(h) on its face can withstand First Amendment scrutiny, the lower court nonetheless erred in not choosing a clearly permissible and less speech-restricting interpretation of the scope of the provision. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (“[A]n Act of Congress ought not be construed to violate the Constitution if *any other possible construction* remains available.” (emphasis added)); *Loveday*

*v. FCC*, 707 F.2d 1444, 1459 n.24 (D.C. Cir. 1983); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Reading Section 512(h) to apply only where the subscriber voluntarily chooses to store his or her content on the service provider's system or network is an alternative construction that avoids the serious First Amendment questions raised by application of Section 512(h) to private email, web browsing, and other private expressive and associational activity.

The individual who chooses to speak and receive speech from his own personal computer, often located in his home, without permitting a service provider to store his content on an outside network or computer system, enjoys the greatest degree of privacy. *Cf.* Swire Dec. ¶¶ 4-5 (JA \_\_-\_\_) (privacy in home activities is paramount). “An individual’s claim to First Amendment protection is at its strongest when he is in the privacy of his own home, far removed from the bustle of ‘public gatherings.’” *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1288 (D.C. Cir. 1972) (Wright, J., concurring); *see also, e.g., United States v. Playboy Entm’t*, 529 U.S. 803, 815 (2000); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”). Thus, the Supreme Court has held that speech that may be regulated (or even banned) when engaged in outside the home is fully protected by the First Amendment inside the confines of a private dwelling. *Id.* at 565-66.

The statutory problems with the district court’s reading conclusively establish that it is a *permissible* reading of the statute to confine the Section 512(h) subpoena power to the subsection (c) setting. *See supra* Section II. This reading takes the most private and sensitive, protected Internet activities, such as email, web browsing, and other expressive interaction, undertaken from the home, out of the ambit of Section 512(h). It also means that the subscriber notice, subscriber counter notification procedures, and the availability of damages for abuses, as

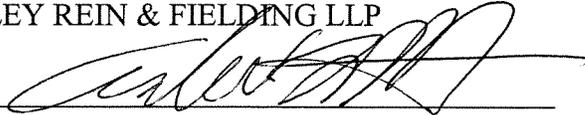
provided for in subsections (f) and (g) of the statute, will always apply when a Section 512(h) subpoena is issued. Moreover, in the subsection (c) context, the service provider can at least identify the material at issue and contact its customer to assess the copyright owner's assertion.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the judgments of the district court in both subpoena enforcement proceedings and remand with directions to dismiss RIAA's motion to enforce in No. 03-7015 with prejudice and to grant Verizon's motion to quash in No. 03-7053.

Respectfully submitted,

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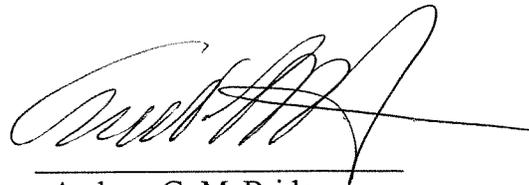
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Date: May 12, 2003

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. P. 32(a)(7)(C)**

Counsel for Verizon Internet Services Inc. certifies the following:

In accordance with Fed. R. App. P. 32(a)(7)(B) and (C) and Circuit Rule 32(a), the attached brief for Appellant is printed using a proportionally spaced, 12-point Times New Roman typeface and contains 13,951 words.

A handwritten signature in black ink, appearing to read 'Andrew G. McBride', written over a horizontal line.

Andrew G. McBride