

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
)
)
VERIZON INTERNET SERVICES, INC.)
Subpoena Enforcement Matter)
_____)
)
RECORDING INDUSTRY)
ASSOCIATION OF AMERICA)
)
v.) Miscellaneous Action
) Case No. 1:02MS00323
VERIZON INTERNET SERVICES, INC.)
_____)

REPLY BRIEF IN SUPPORT OF MOTION TO ENFORCE

The Recording Industry Association of America (“RIAA”), as authorized representative for its member companies, respectfully submits this reply in support of its motion to enforce the subpoena issued to Verizon Internet Services, Inc. (“Verizon”) on July 24, 2002 by this Court pursuant to § 512(h) of the Digital Millennium Copyright Act (“DMCA”).

INTRODUCTION AND SUMMARY OF ARGUMENT

For all their overheated rhetoric, Verizon and its supporting *amicus* never deal forthrightly with the fact that what is at issue here is not speech, but theft – indeed, the theft of others’ creative works on a massive scale. Nor is it about privacy; it is about piracy. Congress enacted § 512(h) of the DMCA precisely because it understood that copyright owners needed the assistance of Internet service providers such as Verizon to stop such theft. The individual whose identity RIAA seeks from Verizon is making available to anyone on the Internet free unauthorized copies

of works of some of America's most beloved artists, including Billie Holiday, the Beatles, the Who, Johnny Cash, Stevie Wonder, Billy Joel, Barry White, Aerosmith, Janet Jackson, Madonna, U2, Jennifer Lopez, N'Sync, Britney Spears, and many others. See Declaration of Frank Creighton at ¶18 ("Creighton Decl."); Attachment B to Motion to Enforce (listing over 600 infringing files offered for download). Piracy on this scale threatens the value of sound recordings that take thousands of hours and tens of millions of dollars to produce and bring to market. RIAA bows to none in its opposition to censorship. But stopping such piracy is not censorship. To the contrary, copyright is the "engine of free expression" because it promotes the creation and dissemination of creative works. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Verizon ultimately does not contest that the infringer identified by RIAA's subpoena is engaging in massive theft, that only Verizon can identify the infringer, or that responding to the subpoena is a simple matter of fifteen minutes' work. Nonetheless, Verizon refuses to comply with the subpoena, contending that it has no obligation to cooperate in stopping this theft because it is not storing the infringing work on its own network. Verizon Br. at 14-17. Indeed, Verizon and its supporting amici go to great lengths to portray this as a "test case" threatening a dramatic expansion of §512(h) to all service providers and not just those who store infringing materials.

Verizon's position is meritless. This case is a routine application of the DMCA. Verizon once championed the DMCA in order to protect itself from its own liability for copyright infringement but now is trying to extend that protection to conceal copyright infringement committed by those who use its network. Since Congress passed the DMCA more than three years ago, RIAA and others have routinely served §512(h) subpoenas on service providers that were *not* storing infringing works on their systems. Until Verizon's refusal to honor the

subpoena in this case, service providers across the country had routinely disclosed, upon receipt of a valid subpoena, the identities of individuals engaged in the theft of copyrighted recordings.

See Creighton Decl. at ¶10.

Remarkably, Verizon itself has repeatedly (at least 9 times) taken the position in letters to RIAA that §512(h) was intended *for exactly this situation*. *Id.* at ¶13. Prior to this case, when RIAA has identified subscribers of Verizon's high-speed DSL service who were committing copyright infringement but did not store any material on Verizon's servers, Verizon *asked* RIAA to "provide [Verizon] with a written subpoena, pursuant to 17 U.S.C. §512(h), if you would like for us to provide you with the identification information about this user" and pledged that "[u]pon receipt of the subpoena, we will disclose to you the information requested, subject to the provisions of Section 512(h)." *E.g.*, Letter from Lauren K. Crowder, Contracts Manager, Verizon, to Sarah Ehrlich, RIAA, dated September 29, 2000 (Attachment A to the Creighton Declaration). In its brief, Verizon has no explanation for its complete reversal of position.

Although Verizon's position has changed, the text of §512(h) has not. This is the first case to address the scope of §512(h) only because Verizon is the first service provider that, to RIAA's knowledge, has chosen to defy the plain text of the DMCA. But Verizon's newly minted legal position is baseless. Nothing in §512(h) limits DMCA subpoena to material on a service provider's "system or network," nor would such a limitation make any sense. Moreover, a copyright owner can never know whether pirated material it discovers on the Internet is stored on a service provider's server or on the home computer of an infringer. Creighton Decl. at ¶12. Only the service provider has the identifying information and can provide it without burden. Section 512(h) requires that the service provider do so.

This Court should thus enforce § 512(h) as written, and order Verizon to comply immediately.

ARGUMENT

I. THE TEXT, STRUCTURE, AND PURPOSE OF THE EDMCARE FUTE VERIZON'S CLAIM THAT IT IS EXEMPT FROM THE SUBPOENA OBLIGATIONS OF SECTION 512(h).

RIA will show that Verizon's "sky is falling" policy warnings are far fetched in the extreme. But Verizon cannot get past the first and most important step of the legal analysis. Verizon's contention – that it has no responsibility to respond to the § 512(h) subpoena issued by this Court because § 512(h) can be invoked only against the subset of service providers who store infringing material on their own systems – lacks any foundation in the statute.

Section 512(h) provides, in part:

- (1) *Request.* – A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.
- (2) *Contents of request.* – The request may be made by filing with the clerk –
 - (A) a copy of a notification described in subsection (c)(3)(A);
 - (B) a proposed subpoena; and
 - (C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.
-
- (5) *Actions of service provider receiving subpoena.* – Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service providers shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

17 U.S.C. § 512(h). This statutory text, as well as the rest of § 512, defeats Verizon at every turn.

First, by its plain terms, § 512(h) applies to all service providers, not just those that store infringing material. The DMCA's definition of "service provider" makes that crystal clear.

§ 512(k)(1)(A)-(B). Remarkably, not once in its brief does Verizon ever mention this dispositive statutory text. Section 512(k) establishes two definitions of "service provider" — one that applies only to § 512(a) and one that applies to the remainder of the provisions in § 512, including § 512(h):

(k) Definitions. —

(1) *Service provider*. — (A) As used in subsection (a) [i.e., § 512(a)], the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

17 U.S.C. § 512(k). Thus, as used in § 512(h) and defined in § 512(k)(1)(B), the term "service provider" encompasses entities providing all of the functions covered by § 512, whether or not they store infringing material on their systems. Far from exempting entities providing solely § 512(a) functions (as Verizon contends), Congress went out of its way to make clear that the term "service provider" expressly "includes" those entities ("includes an entity described in subparagraph (A)") and thereby subject them to § 512(h). Therefore, Verizon must respond to a § 512(h) subpoena even if it qualifies for the § 512(a) safe harbor. ¹ Indeed, Verizon has

¹ In any case, Verizon, as a provider of Internet access, does not fall within the bounds of § 512(a). Entities offering "network access" fall only within the broader definition of § 512(k)(1)(B), which includes any "provider of online services or network access, or the operator of facilities therefor." § 512(k)(1)(B). As Congress explained, unlike subsection (k)(1)(A), the definition in § 512(k)(1)(B) "includes, for example, services, such as providing Internet access, e-mail, chat room and web page hosting services." H. Rep. No. 105-551 (II) at 64 (1998).

repeatedly acknowledged this obligation in the past and has offered to provide identifying information in response to a subpoena where it engaged solely in functions covered by §512(a). See Attachment A to Creighton Declaration.

Second, contrary to Verizon's contentions, §512(h) nowhere states, or even remotely implies, that copyright owners may subpoena only service providers whose store infringing information on their networks. Had Congress intended such a limitation, it could easily have said so in any number of ways. Congress could have used the type of language that Verizon uses in its brief, establishing an "express condition" that the provider bestoring infringing material on its network. Verizon Br. at 14. Or Congress could have provided for the issuance of subpoena only to service providers engaging in the functions listed in §512(c), or have required copyright owners to include in a declaration a statement of their good faith belief that the service provider was storing infringing material on its system. Congress did none of these things. The plain fact is that §512(h) contains no such limitation. It requires *all* service providers to respond to a validly issued subpoena to identify an alleged infringer – as Verizon has previously acknowledged many times. See Attachment A to Creighton Declaration.

Nor can Verizon credibly contend that §512(h)'s reference to §512(c)(3)(A) limits the subpoena provision to only those providers who qualify for the §512(c) safe harbor. Section 512(h)(2)(A) states that a copyright owner must provide "a notification described in subsection (c)(3)(A)." Subsection (c)(3)(A) specifies the "Elements of Notification" – the information that copyright owners must give to a service provider to notify it that copyright infringement is occurring over its network. §512(c)(3)(A)(Title). The requirement that Verizon fabricates – that the infringing material must "reside[] on a system or network controlled or operated by or for the service provider" – is *not* one of the requirements of §512(c)(3)(A).

To be sure, § 512(c)(3)(A) contains prefatory language stating that “[t]o be effective under this subsection” a notification must include all of the information specified in the remainder of § 512(c)(3)(A). But *that* prefatory language merely establishes the relationship of § 512(c)(3)(A) to the remainder of § 512(c). It imposes no limitations on § 512(h). The copyright owner’s obligation under § 512(h) is to provide the information “described in § 512(c)(3)(A),” *not* to provide that information *and* also satisfy the conditions of § 512(c) (such as the requirement that the service provider bestoring infringing material under § 512(c)(1) that would trigger the provider’s obligation to take down infringing material under § 512(c). Verizon’s argument – which seeks to transform a substantive requirement of § 512(c)(1) into part of the notice provisions of § 512(c)(3)(A) – blatantly misconstrues the statutory text.

The fallacy of Verizon’s position is confirmed by the rest of the DMCA. Two other safe harbors of § 512 – § 512(b) and § 512(d) also require a copyright owner to provide a “notification...described in” § 512(c)(3). If Verizon’s interpretation is correct and the mere reference to § 512(c)(3)(A) requires the infringing material be stored on the service provider’s system, those two safe harbors would be utterly redundant of § 512(c). But such an absurd result is hardly required, if the statute is simply interpreted according to its plain language. Subsection (c)(3)(A) establishes the elements of notification that trigger the obligations under the three safe harbors ((b), (c), and (d)), as well as the subpoena provision (§ 512(h)), but the actual obligations, i.e., whether the provider is required to disable access to infringing material or to identify an infringer, are defined independently in each subsection.

Moreover, § 512(h) itself makes clear that whether a notification triggers a provider’s obligations under § 512(c) to take down infringing material is totally separate from the provider’s obligation to respond to a subpoena. Section 512(h) requires a service provider to

respond expeditiously to a subpoena “notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.” § 512(h)(5). Thus, a service provider’s obligation to respond to a subpoena does not depend in any way on its status under §§ 512(a)-(d). Verizon contends that because it provides only § 512(a) functions to the individual identified in RIAA’s notice and is thus not obligated under § 512(a) to take any action against that person, it cannot be a proper recipient of a § 512(h) subpoena. Under the plain terms of § 512(h)(5), however, Verizon must respond to the subpoena “regardless of whether [it] responds to the notification” by disabling access to the infringing material or taking other action.

Even if the court were to accept Verizon’s implausible argument about the relationship between § 512(c) and § 512(h), it would nonetheless have to enforce the subpoena because RIAA’s notification complied with all of the requirements of § 512(c)(3)(A) and thus was “effective” as Verizon uses the term. Specifically, the notification identified the infringing material and provided Verizon with information that easily allows it to locate and disable access to that material. *See* Attachment B to RIAA’s Motion to Enforce. Verizon’s contrary arguments are not plausible. Indeed, in previously requesting that RIAA send it a subpoena under § 512(h) in situations just like that presented here, Verizon long ago conceded that a notification identifying the IP address of the infringer’s computer was sufficient to satisfy § 512(c)(3)(A) and to trigger its obligations under § 512(h). *See* Attachment A to Creighton Declaration. Verizon does not actually contest its ability to disable access to the infringing material. It can easily do so by terminating the infringing user’s access to its system. Instead, Verizon asserts that Congress never intended for entities providing only § 512(a) functions to terminate subscribers as a means of denying access. Verizon Br. at 15-16. But whether Verizon is required to disable access says nothing about whether it has sufficient information to do so—it clearly has.

In any event, Verizon is simply wrong on this point. Congress expressly contemplated termination of a user's access as a means to stop blatant copyright infringement. Indeed, Congress required all service providers (including those providing only § 512(a) functions) to establish and implement a policy "that provides for termination... of subscribers... who are repeat infringers." § 512(i)(1)(A).² And Congress expressly authorized injunctive relief against entities providing only § 512(a) functions that would "restrain[] the service provider from providing access to a subscriber... who is engaging in infringing activity... by terminating the accounts of the subscriber." § 512(j)(1)(B)(i). Congress was thus quite clear that one perfectly acceptable way for a service provider engaged in § 512(a) functions to disable access to infringing material is to terminate the subscriber engaged in the infringement.

But *this proceeding is not about terminating a subscriber*. Throughout its brief, Verizon seeks to misdirect the Court by suggesting that the outcome of enforcing RIAA's subpoena will be the termination of a particular individual's access to the Internet without that person having a chance to defend himself for herself. But that is simply untrue. The outcome of enforcing the subpoena will be that Verizon will have to provide the name, address, and phone number of the person committing infringement over Verizon's network. That will allow the copyright owners who are being wronged to address the infringement directly with the infringer.

Third, Verizon's suggestion that copyright owners should have to identify whether information resides on a service provider's system in order to provide an "effective" notice under § 512(h) ignores both the statutory text and reality. Verizon suggests that RIAA has conceded that the infringer is not storing information on Verizon's system. Verizon Br. at 3. That is

²Verizon purports to have adopted a policy for terminating repeat infringers in the terms of service agreed to by all customers. See Verizon Terms of Service, Att. Bat ¶ 5 ("Acceptable Use and Your Responsibilities"), http://www.verizon.net/policies/popups/internet_aa_popup.asp.

incorrect. RIAA has no way of knowing whether the information is on a Verizon server or not. As discussed in the attached declaration of Frank Creighton, copyright owners cannot know where the infringing material on the Internet is stored, i.e., whether it is on a service provider's server or on the person's home computer. Creighton Decl. at ¶12. As Verizon assuredly knows, all a copyright owner can determine is the IP address of the computer that is making available the infringing material, which in turn reveals which service provider is giving the infringer access to the Internet and to the facilities needed to distribute the infringing material. *Id.* But that information – the IP address – tells the service provider exactly who the infringer is. *Id.* Verizon's construction of § 512(h) would eviscerate the subpoena provision Congress created because it would impose an impossible burden on copyright owners – to know information that only service providers have in their possession before issuing the subpoena. 3

At bottom, Verizon offers no reason why Congress would have wanted the result that Verizon advocates. That is not surprising, for a victory for Verizon in this case would be devastating to Congress's core purpose in enacting DMCA. In the DMCA, Congress sought to create a legal regime in which service providers would be active participants in the fight against digital piracy. The statute "preserves strong incentives for service providers and copyright owners to cooperate *to detect* and deal with copyright infringements that take place in the digital networked environment." S. Rep. No. 105 -190 at 40 (1998) (emphasis added). To be sure, as Verizon contends, the DMCA gives service providers new protections from copyright liability. But that is only half the story. In return for those protections, Congress imposed new

³Verizon has submitted a declaration stating that the infringing information was not stored on Verizon's servers, *see* Lebrede Decl. at ¶7, but, unless Verizon has already taken the time to determine the identity of the infringer, it is unclear how it can possibly determine whether the IP address of the infringer refers to a home computer or a server under Verizon's control.

responsibilities. Thus, to qualify for *any* safe harbor under § 512 –including that of § 512(a) –a service provider must have “adopted and reasonably implemented... a policy that provides for termination... of subscribers and account holders... who are repeat infringers.” § 512(i). Responding to a validly issued § 512(h) subpoena is merely an additional responsibility the DMCA imposes on every service provider to cooperate in addressing digital piracy.

There is no sound policy reason why Congress would have wanted to exempt entities providing only § 512(a) functions from the requirement of providing the identity of those using the provider’s network to infringe valid copyrights. Congress provided such entities with broader protection from copyright liability than that afforded other service providers. But those entities are just as able as any other service provider to *identify* an infringing user –and that is all § 512(h) obliges them to do. Moreover, the harm to copyright owners from large -scale infringement on the Internet is no different if the infringing material resides on a service provider’s network or simply is disseminated through the service provider’s network from a home computer. To interpret the statute as Verizon does would allow a service provider both to facilitate illegal conduct –by allowing copyright infringers to disseminate their pirated works using the provider’s facilities –and to shield the direct infringer from any realistic threat of being called to account. That could not be what Congress wanted, and that is not the statute that Congress passed.

Thus, for all these reasons, Verizon’s interpretation of § 512(h) must be rejected.

II. THE FAR-FETCHED POLICY ARGUMENTS RAISED BY VERIZON AND ITS SUPPORTING AMICI PROVIDE NO REASON FOR DEPARTING FROM THE CLEAR MEANING OF SECTION 512(h).

Lacking any textual support for their position, Verizon and its supporting amici serve up as much gas-borne policy reasons why § 512(h) subpoenas should not be enforced in this (or presumably any other) case. Verizon Br. at 19–25; Amici Br. at 6–10. Those arguments, however, all involve totally hypothesized abuses that are not even remotely threatened by the actual subpoena at issue in this case—which seeks the identity of a single infringer based on specifically identified infringing activity. Verizon cannot plausibly object to the narrowly targeted subpoena at issue on the ground that service providers might someday be subject to overly burdensome subpoena requests.

In any event, there is no realistic prospect that § 512(h) can be used for vexatious purposes. Only copyright owners or their authorized representatives can invoke the provision. § 512(h)(1). They can do so only if they identify specific works that they believe were infringed, and the specific basis of their belief that infringement occurred. § 512(c)(3)(A)(ii), (iii), (v). The only information they can obtain is the identity of the infringer. § 512(h)(1). They must provide a sworn declaration that “the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.” § 512(h)(2). Additionally, § 512(f) provides that “any person” who knowingly misrepresents that material or activity is infringing can be held liable for damages, including attorneys fees, incurred by the alleged infringer or a service provider.⁴

⁴In this case, RIAA listened to several of the recordings that the infringer listed as available for download and determined that they were copies of copyrighted recordings. Creighton Decl. at ¶ 19. There can be no doubt that the dissemination of such copies to the public violates the copyright laws.

In this regard, the suggestion by Verizon and its supporting amici that RIAA should have instead commenced a “John Doe” lawsuit is particularly inappropriate. Verizon Br. at 24 -25; Amici Br. at 24 -25. That approach would result in less protection than § 512(h) affords, not more. Were a copyrightholder to commence litigation, it would need only to satisfy the good faith requirements of Fed. R. Civ. P. 11. The copyrightholder would not have to provide the same level of specificity regarding the works infringed, would not have to swear under penalty of perjury that it sought information about the infringer’s identity solely for purposes of enforcing valid copyrights, and could use discovery to seek far more than just the identity of the alleged infringer. Moreover, subpoenas in litigation do not require any prior court approval and would proceed without the intervention of the court, absent a challenge by the recipient; as discussed *infra*, even if the subpoena were challenged and a court incorrectly applied the heightened standards advocated for by amici, the subpoena would still issue.

Nor would the “John Doe” approach solve the problems that Verizon and its amici assert. Indeed, Verizon appears to believe that, if RIAA were to pursue this route, it would obtain the exact same information it seeks through § 512(h). Verizon would thus have to face the same “burden” – 15 to 25 minutes which cannot possibly satisfy the burdensomeness standard of Rule 45 – and all of the other perceived problems would be identical. But that simply goes to show that forcing RIAA to file a John Doe action would serve no purpose other than to delay and increase the burden on copyrightholders attempting to protect their works from unlawful dissemination on the Internet. The “John Doe” approach would also preclude consensual resolutions short of litigation, and thus clog the courts with lawsuits that need never have been brought. Congress created § 512(h) as a straight forward mechanism precisely to avoid this

problem. To date, it has functioned as intended, with service providers, to RIAA's knowledge, regularly complying with valid subpoenas until now. Creighton Decl. at ¶10.

Finally, Verizon's "limiting" construction of §512(h) – besides being untethered to the text of the statute – is not a principled basis for making the distinctions Verizon seeks to draw. All of the abuses Verizon conjures up would apply equally in situations where the service provider is storing infringing material on its network. If Verizon were correct that §512(h) authorized such abuses, then there would be an equal risk with respect to the categories of service providers (those storing information) that even Verizon admits have a legal obligation to respond to a §512(h) subpoena.

III. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE HAS NO APPLICATION TO THIS CASE BECAUSE SECTION 512(h) IS PLAINLY CONSTITUTIONAL.

Because the plain terms of §512(h) require Verizon to comply with RIAA's subpoena, Verizon and its supporting amici contend that the principle of "constitutional doubts" requires this Court to narrow the text's meaning to avoid possible unconstitutional applications. As the Supreme Court aptly observed, however, "[t]he 'constitutional doubts' argument has been the last refuge of many an interpretive lost cause." *Renov. Flores*, 507 U.S. 292, 314 n.9 (1993). "Statutes should be interpreted to avoid serious constitutional doubts, not to eliminate all possible contentions that the statute might be unconstitutional." *Id.* (citation omitted). *Accord Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (only "grave and doubtful constitutional questions" trigger avoidance) (quotation marks and citation omitted). Moreover, the principle "does not give a court the prerogative to ignore the legislative will." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001).

Verizon cannot save its “interpretive lost cause” by invoking the constitutional doubts principle here. To begin with, this Court is not at liberty to ignore the unambiguous command of §512(h). The provision is clear and should be enforced as written. Moreover, Verizon and its *amici* have not raised “grave and serious” doubts about the constitutionality of §512(h). To the contrary, their constitutional arguments are frivolous. ⁵

A. Section 512(h) Is Entirely Consistent With The First Amendment.

The subpoenas Congress authorized in §512(h) raise no First Amendment concerns of any kind. Section 512(h) does not restrict protected expression in any way. It merely requires service providers such as Verizon to disclose the identity of copyright infringers using the providers’ networks. A disclosure requirement of this kind is plainly constitutional. Although the Supreme Court has recognized a right to anonymous speech in certain narrow circumstances, there is no right to anonymous theft – and the theft is all that is at issue here.

At the outset it is important to clarify what is, and is not, before this Court. Verizon and its supporting *amici* go on for page after page extolling the hypothetical legitimate, non-infringing possibilities of peer-to-peer file “sharing” on the Internet. *See* Verizon Br. at 7–8; Amicus Br. at 6–7, 10. ⁶ But that discussion is irrelevant, for three reasons. First, whatever its hypothetical

⁵This Court should not entertain any challenge to the statute raised solely by *amici*. *See A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 266 (3d Cir. 2001) (“new issues raised by an *amicus* are not properly before the court in the absence of exceptional circumstances”) (quotation marks and citation omitted), *cert. denied* 122 S.Ct. 813 (2002). Although Verizon argues for constitutional avoidance, it does not argue that the Court strike down the statute, as *amici* appear to. Nor does Verizon raise due process or “privacy” arguments, as *amici* appear to. *Amici* in this case have tried and failed before to invalidate the DMCA on constitutional grounds. *See Universal Studios Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁶Verizon’s declaration includes wholly unsupported statements that there are many non-infringing uses of peer-to-peer file sharing. That claim, however, does not appear to be based on any personal knowledge or investigation. Indeed, the available evidence demonstrates that peer-to-peer file copying’s dominant use is to unlawfully disseminate copyrighted sound recordings.

possibilities, peer-to-peer communication also offers unparalleled opportunities for digital piracy. The most well-known example of peer-to-peer file copying was the Napster system, against which the Ninth Circuit has twice upheld a preliminary injunction to stop its ongoing infringement of copyrights. *See A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2001); *A & M Records, Inc. v. Verizon*. Indeed, Verizon appears to believe that, if RIAA were to pursue this route, it would obtain the exact same information (9th Cir. 2001). In Napster's case, over 87% of the content available through the system was copyrighted material being disseminated without authorization. *Id.* at 1013. In plain English, "file sharing" is theft when it comes to disseminating copyrighted works without authorization. Second, this Court is not being asked to enjoin the peer-to-peer service (KaZaA) used by the individual infringer who is the subject of RIAA's subpoena. ⁷ All that is being sought here is that the infringer's identity. Thus, all that matters here is that a single user of KaZaA was engaged in the theft of copyrighted sound recordings on a significant scale, offering hundreds of copyrighted works of famous artists, from the Beatles to Madonna to James Taylor, without permission from the copyright owners. *See Creighton Decl.* at ¶ 18. Third, while Verizon focuses on the means by which the individual is disseminating copyrighted works without authorization, there is no dispute that the infringer's action constitutes direct infringement in violation of the copyright laws. *See Napster*, 239 F.3d

To the extent that Verizon seeks to use such assertions as evidence in this case, RIAA objects to their admissibility. Moreover, directly contrary to Verizon's assertions, the court's findings in the Napster case demonstrate that any non-infringing uses are overwhelmed by the widespread infringement that occurs through these services. *A & M Records, Inc. v. Napster, Inc.*, 2001 WL 1009483, at *1 (N.D. Cal. 2000); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d at 1013.

⁷ Litigation against other file copying services, including KaZaA, are proceeding in other courts across the country. *Creighton Decl.* at ¶ 6. The allegations in those suits are similar to those made against Napster.

at 1025 (holding that “evidence of massive, unauthorized downloading and uploading of plaintiffs’ copyrighted works” constituted infringement).

Ultimately, Verizon and its amici are forced to concede that there is no First Amendment right to commit copyright infringement. *Amici Br.* at 13. See also *Harper & Row Pubs., Inc. v. The Nation Enters.*, 471 U.S. 539, 555–60 (1985); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 574–78 (1977); *Schnapp v. Foley*, 667 F.2d 102, 112–16 (D.C. Cir. 1981). But that concession destroys their First Amendment argument, and renders the “anonymous speech” cases they cite totally inapposite. To begin with, the Internet copyright infringer is a far cry from the anonymous pamphleteer of the Revolutionary War era. The former is a thief, while the latter is a hero. Thus, preliminary injunctions are routinely granted against copyright infringers, where as such injunctions would be impermissible prior restraints against the pamphleteer. See, e.g., *Napster*, 239 F.3d at 1027, 1029. That is because the copyright infringer is not adding to the marketplace of ideas, but merely copying another’s expression and stealing the fruits of the copyright owner’s labor. In so doing, the copyright infringer actually reduces the incentives of others to create new works and reduces the flow of free expression. Moreover, the cases amici cited draw a clear distinction between forcing a person to be identified while speaking (such as being forced to wear an identification badge while petitioning) and being identified after speaking (by being required to sign an affidavit attesting to signatures obtained while petitioning).⁸ See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 197–200 (1999). As *Buckley* makes clear, requiring the identification of a speaker—even one

⁸This case is nothing like the broad prior restraint cases cited by amici. *Amici Br.* at 11–13. In those cases, the government, for a broad prophylactic purpose, imposed a condition to be met before anyone could engage in the category of speech being regulated. Section 512(h), in contrast, is a narrow, targeted provision that focuses solely on uncovering and addressing illegal conduct after it has occurred.

engaged in core political speech – after the fact in order to advance important societal interests (there to ensure the integrity of the petition process) raises no First Amendment problem. *Id.* at 199 (explaining that requiring identification afterwards is less likely to be used for retaliation or harassment). *Amici* cannot plausibly claim, for example, that a person who is alleged to have forged or falsely collected signatures for a petition cannot be identified through subpoena or other means. That is exactly what is occurring here – RIAA is merely seeking the identity of someone who has violated the law.

Amici also dress up the same arguments in the form of privacy or due process claims, but they fare no better. At the outset, the Court should not address these claims, as they were not raised by Verizon. In any event, they are meritless. Courts have regularly concluded that there is no legitimate expectation of privacy in the information that a subscriber gives to his or her service provider. *See United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (D. W. Va. 1999); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000). *See also Smith v. Maryland*, 442 U.S. 735 (1979) (no expectation of privacy in records of telephone calls). That is especially true where, as here, the individual infringer has actually opened his or her files (wherever they are stored) to anyone who wants to receive them. *Kennedy*, 81 F. Supp. 2d at 1110 (turning on sharing mechanisms shows no expectation of privacy). Indeed, Verizon makes clear in its terms of service to customers that copyright infringement using its network is strictly forbidden and can result in a variety of sanctions, including termination of access. Verizon Terms of Service, *supra*, Att. Bat ¶ 5. All of these factors demonstrate that there is simply no privacy right at issue here.

Amici's ultimate goal, short of invalidating the DMCA, is to persuade the Court to impose a heightened standard of review in deciding whether to enforce this subpoena. As

discussed above, there is no basis in the Constitution or any other source of law for this Court to stray from the requirements that Congress set forth in the DMCA. Significantly, none of the cases cited by *amici* involve allegations of copyright infringement. That is because with respect to copyright, unlike defamation, trademark, or other areas of law, Congress has already established a procedure for requiring the disclosure of the identity of an online tortfeasor who is known to the service provider but unknown to the party injured by the tort. That procedure is § 512(h), with which RIAA has fully complied. Safeguards that other courts, in other causes of action, may have deemed appropriate in the absence of any specific statutory authority are irrelevant where, as here, Congress has established a procedure and incorporated in it safeguards more stringent than those created by judges in isolated cases.

Indeed, the procedural requirements that the DMCA imposes as a prerequisite to obtaining a § 512(h) subpoena exceed the constitutional requirements that Verizon and its *amici* claim are required. In particular, the requirement that the information be sworn under penalty of perjury and that the copyright owner declare that the sole purpose of the subpoena is to protect intellectual property rights prevent all of the “abuses” Verizon and *amici* hypothesize and fully satisfy any First Amendment or other concerns.

Thus, even if the Court were to apply the standards from cases cited by *amici*, RIAA’s subpoena request would clearly meet them. RIAA’s subpoena request easily meets the standard set forth in *Doe v. 2TheMart.com Inc.*, 140 F.Supp.1088 (W.D. Wash. 2001), a case imposing a higher standard than would be applicable to RIAA’s subpoena because the subpoenaing party there was seeking information about non-party witnesses, not about potential defendants. *Id.* at 1095. In *Doe*, the court merely required that the information: 1) be sought in good faith and not for any improper purpose; 2) be related to a core claim or defense; 3) be directly and materially

relevant to that claim or defense and 4) be unavailable from another source. *Id.* Here RIAA is plainly acting in good faith to vindicate the copyrights of its members – a point Verizon and its *amicus* do not challenge. Indeed, RIAA filed a declaration to that effect in order to obtain the subpoena. *See* Attachment C to Motion to Enforce (Declaration of Jonathan Whitehead). Moreover, the information RIAA seeks is directly relevant to the infringement claims of RIAA’s members – it is the identity of the person who has been distributing copyrighted works without authorization. Nor is there any other way RIAA can locate this infringer – the sole information available to RIAA is the IP address and only Verizon can associate that information with a name and address. Creighton Decl. at ¶12. Thus, RIAA easily meets even the “high bar” standard suggested by *Do* for cases in which information is sought about non-party witnesses.

RIA A likewise meets the requirements set forth in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), and *Dendrite International Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (applying New Jersey Constitution), that a person seeking identity information provide allegations that would survive a motion to dismiss. Here, RIAA has specifically identified some 600 popular songs that the alleged infringer has made available on the Internet, songs whose copyrights are owned by RIAA’s members companies and the copying of which is unauthorized. *See* Creighton Decl. at ¶18; Attachment B to Motion to Enforce (Notification listing infringing works being offered for download). That is sufficient to meet any motion to dismiss standard. *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (proof of copyright infringement requires only proof of the existence of a valid copyright and of “copying of constituent elements of the work that are original”); Nimmer on Copyright 31.01[B], at 31-6.

Thus, Verizon and its *amicis* have not raised any plausible First Amendment objection to enforcing § 512(h) as it is written.

B. Section 512(h) Raises No Issue Under Article III of the Constitution.

Similarly meritless is the suggestion hinted at by Verizon and its *amicis* that § 512(h) raises concerns under Article III of the Constitution. Article III courts have undoubtedly jurisdiction to issue subpoenas and other processes to require evidence from non-party to litigation (for example, pursuant to Fed. R. Civ. P. 45), and that power exists even though, as *amicis* concede (*Amici Br.* at 23), litigation has not yet commenced. Courts routinely issue search warrants, authorize grand jury subpoenas, and enforce demands for evidence in a host of other contexts. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 389 n.16 (1989) (“Article III courts perform a variety of functions not necessarily or directly connected to adversarial proceeding in a trial or appellate court. Federal courts supervise grand juries and compel the testimony of witnesses before those juries, ... participate in the issuance of search warrants ..., and review wiretap applications.”). The radical and unprecedented interpretation of Article III suggested by Verizon and its *amicis* is utterly inconsistent with the accepted authority of Article III courts.

Finally, it is noteworthy that the narrowing construction that Verizon proposes (applying § 512(h) only to providers that qualify under § 512(c)) does nothing to avoid the purported constitutional issue they raise. Thus, there is no basis for using that argument as a ground for narrowing § 512(h).

CONCLUSION

For the reasons stated above and in the Motion to Enforce, this Court should grant RIAA's Motion to Enforce and require Verizon to comply with the terms of the subpoena issued by this Court.

Respectfully submitted,

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