

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. 1:03MS00040 (JDB)
)
VERIZON INTERNET SERVICES, INC.)
_____)

**RIAA'S BRIEF IN OPPOSITION TO VERIZON'S MOTION
TO QUASH FEBRUARY 4, 2003 SUBPOENA**

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already ruled that § 512(h) of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(h), unambiguously authorizes the Recording Industry Association of America (“RIAA”) to subpoena Verizon for information about users who engage in copyright infringement on a peer-to-peer (“P2P”) network. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) (“first subpoena action”). In the first subpoena action, Verizon deliberately chose not to raise directly the constitutional arguments it now interposes against a new § 512(h) subpoena. Its effort to do so now is pure desperation, and would appear to be nothing more than a last-ditch effort to bolster its stay prospects by injecting new legal arguments into the case. On the merits, however, Verizon’s constitutional arguments provide no more reason for invalidating § 512(h) in this case than they did for interpreting it in the contorted manner Verizon advocated in the first subpoena action. As will be demonstrated, § 512(h) does not suffer from the slightest infirmity under either Article III or the First Amendment.

Section 512(h) Does Not Violate Article III. Verizon’s Article III challenge to § 512(h) is fundamentally misconceived. As Verizon reads Article III, it flatly bans the Judicial Branch from issuing any subpoenas – or, for that matter, taking any other action – outside the context of a pending “case or controversy,” thus requiring that § 512(h) be struck down in all its applications. That argument fails for three independent reasons.

First, as this Court has recognized, the “case or controversy” requirement is fundamentally about the separation of powers. *Walker v. Cheney*, 230 F. Supp. 2d 51, 63 (D.D.C. 2002). But Article III and the separation-of-powers principles it embodies do not impose anything like the kind of rigid and formalistic straightjacket Verizon asserts. In evaluating the Constitution’s division of “the power of government between the courts and the

two political branches,” *id.* (internal quotation marks and citation omitted), the Supreme Court has adopted a “flexible understanding of separation of powers” that does not “turn on the labeling of a particular activity.” *Mistretta v. United States*, 488 U.S. 361, 388, 393 (1989). The question is whether the “practical consequences” of the approach Congress has adopted impose any genuine, real-world threat to “the larger concerns that underlie Article III” – *i.e.*, whether Congress’ actions either encroach upon the power of the Judicial Branch or impermissibly aggrandize that power at the expense of another Branch. *Id.* Applying these established principles (which Verizon nowhere mentions), the Supreme Court has specifically rejected the contention on which Verizon’s entire Article III argument rests. The Court has held that Congress may assign “federal courts and federal judges” functions that “do not necessarily involve adversarial proceedings within a trial or appellate court,” including even “investigative” actions. *Morrison v. Olson*, 487 U.S. 654, 681 (1988). Thus, it is hardly surprising that Congress has, since the earliest days of the republic, often delegated to the clerks of the federal courts the authority to issue subpoenas to assist in gathering evidence for patent proceedings, for arbitrations under the Railway Labor Act, and even for proceedings resolving disputes over contested congressional elections – all of which are outside the context of a pending judicial case. Section 512(h) is comfortably within the boundaries *Morrison v. Olson* set for permissible delegations of power to the Judicial Branch.

Second, even if Verizon were correct that the Judicial Branch may only issue subpoenas connected to Article III cases, § 512(h) is nevertheless constitutional. Functionally, § 512(h) is no different than Federal Rule of Civil Procedure 27, which Verizon concedes is constitutional. Rule 27 authorizes discovery in advance of anticipated federal litigation in order to ensure that vital information is preserved. Section 512(h) does the same thing. Section 512(h) allows copyright holders to obtain from ISPs the names of those infringing their copyrights so that the

copyright holders will be able to vindicate those rights in a federal copyright infringement action. Section 512(h) requires that the copyright holder attest to this purpose and attest to the elements of a copyright cause of action. There is no difference between the two provisions sufficient to support the conclusion that one passes muster under Article III while the other does not.

Third, there is no Article III problem here in any event because a dispute regarding whether a copyright holder is entitled to infringer information from an Internet service provider (“ISP”) is itself a “case or controversy.” Like other laws creating rights to information, § 512(h) provides copyright owners a federal right to the identity of infringers. The fact that Congress made the right enforceable through a subpoena and subsequent adjudication rather than a complaint and subsequent adjudication is irrelevant under Article III. The Supreme Court has long held that it is the substance, not the form, that matters for Article III purposes. All the hallmarks of an Article III case or controversy are present. *See Walker*, 230 F. Supp. 2d at 63 (listing doctrinal requirements).

Section 512(h) Does Not Violate the First Amendment. Verizon’s First Amendment challenge to § 512(h) is likewise meritless. “The First Amendment is not a license to trammel on legally recognized rights in intellectual property.” *In re Capital Cities/ABC Inc.*, 918 F.2d 140, 143 (11th Cir. 1990) (internal quotation marks and citation omitted). Yet Verizon’s First Amendment claim seeks exactly that. The conduct of the subscriber whose identity RIAA seeks is theft, not expression protected by the First Amendment. That subscriber can claim no First Amendment entitlement to preserving anonymity with respect to this unprotected conduct. And Verizon has no First Amendment right of its own to assert in this context. Thus, Verizon can prevail only by meeting the “heavy burden” of a facial overbreadth challenge. *Verizon*, 240 F. Supp. 2d at 44, n.2. Whatever the precise contours of the right to anonymous speech, Verizon cannot possibly show that § 512(h) violates that right in most of its applications, particularly

given the protections built into the statute. Indeed, this Court has already recognized that § 512(h) provides procedural protections at least as great as those that some courts have required under the First Amendment in other contexts.¹

Verizon Is Not Entitled to a Stay. Verizon’s case for a stay is weaker now than it was before it belatedly raised these constitutional challenges. Verizon still lacks the *sine qua non* for the relief it seeks: irreparable injury. It has suffered no such harm, and as a matter of law has no argument that it will suffer such harm in the future. In sharp contrast, the irreparable harm to RIAA’s members and to the public interest continues to mount. Verizon has made clear by its conduct that it will not comply with any § 512(h) subpoena involving the use by its subscribers of P2P service if a stay is granted – effectively, it seeks an injunction of the statute. And the palliatives Verizon has offered as a substitute – John Doe actions and notifications to the offending subscribers – are patently inadequate to protect RIAA’s members. Nor has Verizon strengthened its claim to likely success on the merits. Indeed, Verizon’s belated assertion of these constitutional claims would appear to be principally aimed at bolstering its stay prospects, in the hope that its portrayal of § 512(h) as an “unheard of” procedural device will persuade this Court to grant it interim relief pending appeal on the basis of the “novelty” of the issue presented. But there is nothing unusual about § 512(h). Congress has routinely authorized the clerk of the federal district court to issue subpoenas in numerous contexts (*see infra* at 10), and no court has ever held – or even suggested – that doing so raises constitutional difficulties.

¹ Verizon’s attempt to recycle its statutory arguments must be rejected. As this Court has already held, those arguments cannot be squared with the text, structure, purpose, and legislative history of the statute. Moreover, Verizon cannot relitigate the construction of § 512(h), because that issue was raised and contested in the first subpoena action and was “actually and necessarily determined by a court of competent jurisdiction in that prior case.” *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992); Restatement (Second) of Judgments § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties.”). That Verizon has sought a stay of the first judgment does not impede the preclusive effect of that judgment; indeed, issue preclusion would operate even if a stay of that judgment were actually in place. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); Restatement (Second) of Judgments § 13, cmt. f.

Thus, Verizon's motion to quash should be denied, and this Court should decline to stay its judgment pending appeal.

BACKGROUND

This Court understands the dispute between RIAA and Verizon. Nevertheless, it bears emphasis at the outset that the crisis that led to RIAA's issuance of subpoenas to Verizon nine months ago grows worse with every passing week. Massive digital piracy continues to devastate the music industry, and the pace of that devastation is increasing. Creighton Decl. ¶ 9. The rise of P2P networks, such as Napster and KaZaA, are the source of that devastation. *See id.* ¶ 8; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (enjoining operation of the Napster network). KaZaA, like Napster before it, is a haven for massive piracy – with as many as 4 million users logged on at any given time. Creighton Decl. ¶ 9. RIAA has introduced evidence in a case against KaZaA showing that roughly 90% of the use of the KaZaA network is likely copyright infringement. *Id.* ¶ 8. Verizon profits handsomely from the propagation of KaZaA and other P2P networks. Because theft on this massive scale requires large amounts of digital bandwidth, those downloading music tend to be subscribers of broadband ISPs, such as Verizon. *Id.* ¶ 10. It has been reported between 50% and 70% of the use of cable broadband services derives from P2P networks. *Id.* Indeed, Verizon's recent advertisements for broadband service trumpet the ability to quickly “download[] the latest singles.” *Id.*

The conduct of the particular Verizon subscriber at issue in this case also underscores the severity of the problem generally. Like the subscriber whose identity Verizon refused to disclose in response to the subpoena previously before this Court, the subscriber at issue in this case is routinely making available for illegal copying many hundreds of copyrighted songs. *Id.* ¶ 20. Because the files being offered are perfect, digital copies, they can – and surely will – be disseminated and re-disseminated instantaneously, generating thousands and tens of thousands of

instances of infringement. As in the previous case, there is no dispute that Verizon can readily determine the infringer's identity and provide it to RIAA in a matter of minutes. Lebrede Decl. ¶ 12 (Aug. 30, 2002). Without Verizon's compliance, RIAA is left with no means by which to enforce the rights of its members, short of filing a "John Doe" suit and sending Verizon a subpoena pursuant to Federal Rule of Civil Procedure 45 – which Verizon undoubtedly would then oppose on other grounds. *See* Tr. of Hearing re Verizon's Motion for a Stay Pending Appeal in No. 1:02MS00323, at 76-77 (Feb. 13, 2003) ("Feb. 13 Transcript").

It also bears emphasis that § 512 of the DMCA was a heavily negotiated statutory provision that sought to balance the interest of copyright owners and service providers, and that Verizon supported its passage. *See Verizon*, 240 F. Supp. 2d at 36 (discussing the "dual purpose and balance of the DMCA" and citing cases). Its goal was not to shield the conduct of copyright infringers, but to ensure effective copyright enforcement, while also giving innocent service providers some measure of protection from liability. To that end, service providers receive significant benefits in exchange for important obligations to assist in the fight against copyright piracy. While Congress was debating the DMCA, service providers and their trade associations argued strongly that the statute should require copyright holders, not service providers, to monitor infringing conduct on the Internet and to take direct action against infringers. As Roy Neel, the President of the trade association representing Verizon, told Congress:

[w]e believe that the task of ferreting out copyright infringement on the Internet should fall to the copyright owner. Today, copyright owners have access to a large array of Internet search engines and "spiders" to sniff out material they know belongs to them Once the copyright owners discover infringement, they can bring it to the attention of the ISPs. It is at this point that the ISPs can sensibly act.

See Hearings On Copyright Infringement Liability Before the Senate Committee on the Judiciary (Sept. 4, 1997) (Statement of Roy Neel, President of the United States Telephone Ass'n). For Verizon to now argue that "bots" are an invasion of privacy and that it should be able to shield

its subscribers from copyright infringement actions is the most blatant revisionist history.

Verizon wanted copyright holders to search for infringers, rather than being required to do so itself. That is exactly what RIAA has done here. Now that RIAA has alerted Verizon to this infringement, Verizon wants to be relieved of the obligation to identify the infringer while still maintaining its limitation of liability.

Every day that Verizon is allowed to conceal the identity of the infringer in this case, RIAA's member companies are irreparably injured. Stripped of its statutory arguments, Verizon now raises constitutional arguments in a last-ditch attempt to avoid compliance with its statutory obligations. But Verizon did not raise these constitutional arguments in the first subpoena action for good reason: they are completely without merit. For the reasons discussed below, as well as in this Court's prior opinion in the first subpoena matter, the Court should deny Verizon's motion to quash, order Verizon to comply immediately with the subpoena, and deny Verizon's motion for a stay pending appeal.

ARGUMENT

I. SECTION 512(h) OF THE DMCA DOES NOT VIOLATE ARTICLE III

A. Nothing About Congress' Authorizing the Clerk of Court to Issue a Section 512(h) Subpoena Offends Article III

Verizon's entire argument misconceives the issue before this Court. The "clear and unequivocal" principle Verizon announces on the very first page of its brief – that "Article III does not authorize federal courts to issue binding judicial process outside a pending case or controversy" (Verizon Brief at 1) – misses the mark. The subpoena at issue here was not issued by a federal court on its own initiative by invoking Article III authority. To the contrary, Congress *expressly authorized* the clerk of the court, acting in a ministerial capacity, to issue the subpoena pursuant to § 512(h). The relevant question in this case, therefore, is not whether

Article III itself *authorizes* issuance of the subpoena, but whether Article III *forbids* Congress from authorizing the clerk of this Court to issue a subpoena pursuant to § 512(h). Supreme Court precedent (which Verizon conveniently ignores) is dispositive on that question. As the Court made clear in *Morrison v. Olson*, 487 U.S. 654 (1988), and *Mistretta v. United States*, 488 U.S. 361 (1989), nothing in Article III, or the separation-of-powers principles it embodies, bars Congress from delegating to a federal court clerk the functions encompassed within § 512(h).

The Supreme Court explained in *Mistretta* that “[t]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct,” and instead adopted a “flexible understanding of separation of powers.” 488 U.S. at 380-81. Thus, “separation-of-powers analysis does not turn on the labeling of a particular activity” as judicial or investigative. *Id.* at 393. To the contrary, the inquiry “is focused on the unique aspects of the congressional plan at issue and its *practical consequences* in light of the larger concerns that underlie Article III.” *Id.* (internal quotation marks and citation omitted) (emphasis added). The question is whether the congressional enactment poses an actual “threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or [legislative] power . . . with the judicial power of the courts.” *Id.*

Applying these principles, the Supreme Court has routinely upheld “statutory provisions that do to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.” 488 U.S. at 382; *see Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856-57 (1986). Indeed, “federal courts and judges have long performed a variety of functions that . . . *do not necessarily or directly involve adversarial proceedings within a trial or appellate court.*” *Morrison*, 487 U.S. at 681 n.20 (emphasis

added). For example,

federal courts have traditionally supervised grand juries and assisted in their “investigative function” by, if necessary, compelling the testimony of witnesses. . . . Federal courts also participate in the issuance of search warrants . . . and review applications for wiretaps . . . both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding.

*Id.*² Thus it is clear from *Morrison* and *Mistretta* that Congress may delegate to the Judicial Branch the function of providing process to assist in the gathering or preservation of information, even in situations where there is no specific pending “case or controversy” within the meaning of Article III.

Verizon’s Article III argument flies in the face of this settled law. The offending feature of § 512(h), according to Verizon, is that it gives the federal courts the authority to issue subpoenas outside the confines of an “adversarial proceeding seeking a judicial determination of an actual legal claim.” Verizon Brief at 4. As will be shown, that argument provides no basis for invalidating § 512(h) both because Congress plainly can authorize investigatory discovery in advance of a potential judicial proceeding (*see* Point I.B) and because a § 512(h) enforcement proceeding itself constitutes a “case or controversy” of its own (*see* Point I.C). But Verizon’s argument is wrong for the even more basic reason that Congress can – and routinely has – authorized the Judicial Branch to conduct “a variety of functions that . . . do not necessarily or directly involve adversarial proceedings within a trial or appellate court,” including those that involve assisting the investigative function and making decisions on the basis of “evidence or

² At the same time that it ignores on-point Supreme Court precedent, Verizon mischaracterizes the ancient authority on which it relies. Contrary to Verizon’s assertions, in *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852), the Supreme Court did not invalidate the federal statute at issue, which assigned to a federal court in Florida the task of provisionally determining claims arising out of a treaty with Spain, subject to review by an Executive Branch official. The Court merely held that because the court’s function was not an exercise of the judicial power within Article III to begin with, the reviewing court lacked subject matter jurisdiction to consider the court’s decision on appeal. As the Court subsequently explained in *Mistretta*, the *Ferreira* decision did not purport to invalidate the underlying delegation of power to the federal court in Florida. 488 U.S. at 405.

affidavits submitted in an *ex parte* proceeding” – the very thing Verizon claims is fatal to § 512(h). *See Morrison*, 487 U.S. at 681 n.20.

Far from being “novel” or “unheard of,” statutes authorizing the clerk of the court to issue subpoenas are common and have never been thought to raise constitutional concerns. For example, such subpoenas are authorized by various patent laws, *see* 35 U.S.C. § 24 (authorizing, since 1870, issuance of subpoena by federal district court clerks and enforcement in federal courts of subpoenas for evidence to be used in patent interference proceedings at the Patent and Trademark Office); 7 U.S.C. § 2354(a) (enacted in 1970 and providing for same procedure); the Railway Labor Act, 45 U.S.C. § 157(h) (authorizing, as of 1926, clerks to issue subpoenas at request of private party arbitrators); and the laws establishing Judicial Councils for investigating allegations of judicial misconduct, 28 U.S.C. § 332(d)(1) (authorizing, as of 1990, issuance of subpoenas by clerk and enforcement through contempt). All of these statutes authorize the clerk of the federal court to issue a subpoena in contexts divorced from a present, or even potential, Article III case or controversy. Indeed, since the earliest days of the republic, Congress authorized clerks of the federal courts to issue subpoenas to gather evidence relevant to challenges to elections for the House of Representatives, even though resolution of the dispute is textually committed by the Constitution to Congress itself. *See Dornan v. Sanchez*, 978 F. Supp. 1315, 1325-26 (C.D. Cal. 1997). It follows that Congress encounters no separation-of-powers bar when it assigns the power to issue subpoenas to the clerk of the court in a situation where, as here, the information is being obtained for the purpose of initiating a possible judicial action.

Verizon does not even try to show that the “practical consequences” of the authority delegated by § 512(h) threaten “the larger concerns that underlie Article III.” *Mistretta*, 488 U.S. at 393 (internal quotation marks and citation omitted). Nor could such an argument be made. Section 512(h) threatens no separation-of-powers harm whatsoever. It does not assign to the

clerk of the court a “function that may not be performed by an entity within the Judicial Branch, either because [it] is inherently nonjudicial or because it is a function exclusively committed to the Executive Branch.” *Id.* at 386. As in *Morrison*, the functions that § 512(h) assigns to the clerk are “not inherently ‘Executive’; indeed, they are directly analogous to functions that federal judges perform in other contexts.” 487 U.S. at 681. Nor does § 512(h) involve “an attempt by Congress to increase its own powers at the expense of the Executive Branch,” or a “judicial usurpation of properly executive functions.” *Id.* at 694. Nor does it “disrup[t] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.” *Id.* at 695 (internal quotation marks and citation omitted). Finally, it is implausible to suggest that Congress’ decision to authorize federal court clerks to issue § 512(h) subpoenas will undermine public confidence in the independence and impartiality of the judiciary or take the court’s resources away from their primary role. Section 512(h) does not invite the judiciary to assume an affirmative investigatory role, or call the Judicial Branch’s impartiality into question in any way. In short, § 512(h) is in no way “inconsistent as a functional matter with the courts’ exercise of their Article III powers.” *Id.* at 679 n.16.

The cases on which Verizon relies are inapposite because they all lack the critical feature present here: express congressional authorization. In *Morton Salt*, for example, the Supreme Court made clear that an administrative agency can demand production of information, and that such a demand does not intrude upon the “judicial power” in Article III. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). The power at issue in that case, as in this one, was “the power to get information from those who best can give it and who are most interested in not doing so.” *Id.* at 642. Such a power “is not derived from the judicial function.” *Id.* Rather, it “is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated.” *Id.* To be

sure, the Court noted in dictum that an Article III court could not assume the role of investigator on its own initiative based on its own desire to make public policy. But that unremarkable proposition has no relevance here because this case does not involve any such conduct. Congress has expressly authorized issuance of a § 512(h) subpoena, and the court is not involved in an “investigation.” The clerk is merely performing the nondiscretionary task of issuing a subpoena when presented by a copyright holder with the application required by Congress.

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988), is inapposite for the identical reason. In that case, the Supreme Court held that a federal district court lacked authority under Rule 45 to enforce a subpoena when the court lacked subject matter jurisdiction over the underlying judicial action pursuant to which the subpoena was issued. 487 U.S. at 76. But that case did not purport to involve a statute expressly authorizing the clerk of the court to issue a subpoena. The very point of the decision was that there was no source of authority for the subpoena because the only conceivable source of authority – the underlying dispute – was defective.³ *Catholic Conference* cannot reasonably be read to hold that Congress is forbidden from authorizing federal district court clerks to issue subpoenas in the absence of a specific, ongoing adversarial proceeding.

Verizon’s invocation of *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), is particularly remarkable. In that case, the Supreme Court upheld the power of a federal court to issue process to aid in identifying potential plaintiffs not presently before the district court. The Court did so despite the fact that – by definition – that issuance of process was not in aid of resolving the case presently before the district court, and even though no statute expressly authorized issuance of the process. Indeed, Verizon’s argument here is even more extreme than

³ Similarly, in *Houston Business Journal, Inc. v. Officer of the Comptroller of Currency*, 86 F.3d 1208 (D.C. Cir. 1996), no authority for the subpoena existed because the only possible basis for the subpoena was a state court lawsuit, which provided no federal subject matter jurisdiction. *See id.* at 1213.

that of the two dissenting Justices in *Hoffman-LaRoche*. The Chief Justice and Justice Scalia dissented precisely because Congress had not expressly authorized issuance of the process. As the dissenters recognized, an express congressional authorization would have eliminated the constitutional issue that troubled them. 493 U.S. at 176-77, 181 (Scalia, J., dissenting).

Verizon's argument ultimately fails because it incorrectly equates the issuance of subpoenas by the clerk of the court with the exercise of the judicial power by an Article III judge. Article III limits judges to deciding cases or controversies, and Congress cannot authorize judges to issue binding decrees unless the requirements of Article III (standing, ripeness, etc.) are met. But § 512(h) does not violate that principle. It does not authorize the exercise of any judicial authority. The clerk's task of issuing the subpoena is ministerial, not adjudicatory. *See* S. Rep. No. 105-190 at 51 (1998) (describing issuance of § 512(h) subpoena as a "ministerial function"); *see also, e.g., Lewis v. NLRB*, 357 U.S. 10, 15 (1958) ("The agents issuing the subpoenas perform ministerial acts only."); *United States v. Klubock*, 832 F.2d 649, 655 (1st Cir. 1987) (discussing "the clerk's ministerial authority to issue subpoenas"). Section 512(h) subpoenas are not themselves orders of the Court. *See Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985) (holding that a grand jury subpoena is like any other subpoena and is not an order of a court). As Verizon concedes, the mere request for issuance of the 512(h) subpoena does not "seek any form of judicial relief or decree," "does not call upon the court to decide a legal issue," "does not even require action by an Article III judge," and the clerk issues the subpoena "without any judicial intervention or oversight." Verizon Brief at 9.

That Congress has authorized private parties, Executive Branch agencies, and even Congress itself to issue subpoenas amply demonstrates that the issuance of subpoenas is not a task exclusively reserved to Article III judges. Under the Federal Arbitration Act, for example, arbitrators in private disputes are authorized to issue subpoenas to compel attendance of

witnesses at proceedings, as well as, in some circumstances, to issue subpoenas for pre-hearing discovery. *See* 9 U.S.C. § 7 (“arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him any book, record, document, or paper which may be deemed material”); *id.* (authorizing federal courts to compel attendance before the arbitrator); *Comsat Corp. v. National Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999) (holding that federal courts may compel witness to appear before arbitrators and may compel prehearing discovery where there is “a showing of special need or hardship”). Similarly, many laws and regulations establish proceedings before administrative law judges that give the parties the opportunity to obtain issuance of subpoenas that will be enforceable in federal court. *See, e.g., Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (subpoena power of National Labor Relations Board under 29 U.S.C. § 161(1)); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1 (1st Cir. 1996) (subpoena power of Occupational Safety and Health Administration under 29 U.S.C. § 654(a)(1)). And Congress itself issues investigative subpoenas that are enforceable in federal court. *See* Senate Rule XXVI(1), Standing Rules of the Senate, Senate Manual, S. Doc. No. 107-1 (rev. 2001); Rule XI(2)(m), Rules of the House of Representatives, H.R. Doc. No. 106-320 (rev. 1999). Obviously, the issuance of subpoenas is not a task reserved exclusively for an Article III judge in the confines of an Article III case or controversy. By delegating the authority to issue subpoenas to the clerk of the court, Congress has no more transgressed the bounds of Article III than it would by delegating that authority to an administrative agency or even a prior arbitrator.

Just as there is no doubt that § 512(h) permissibly delegates to the clerk of the court the authority to issue subpoenas, there is no doubt that resolution of disputes respecting such subpoenas falls within this Court’s Article III power. For centuries, courts have had authority to enforce subpoenas that were issued by the clerk of the court outside the context of Article III

proceedings. *See, e.g.*, 35 U.S.C. § 24. And, it has long been established that a subpoena enforcement action – without any showing of the likelihood of future litigation in federal court – is a stand-alone case or controversy for purposes of Article III. *ICC v. Brimson*, 154 U.S. 447, 475-76 (1894). Far from being *ex parte*, such a proceeding allows a party with a basis to object to the subpoena a full and fair opportunity to do so.

Verizon’s misconceived Article III challenge thus provides no basis for invalidating § 512(h).

B. Even if Verizon’s Article III Legal Argument Were Correct, The Subpoena Issued Here Is “Tethered to an Anticipated Action in Federal Court” Over Which This Court Has Subject Matter Jurisdiction

In any event, § 512(h) is constitutional even under Verizon’s impermissibly narrow and formalistic reading of Article III. Even assuming that there must be a “case or controversy” separate from the subpoena proceeding, it is enough that one, such as the potential copyright action here, is contemplated. Verizon concedes, as it must, that Rule 27 is unimpeachable. *See Houston Business Journal*, 86 F.3d at 1213 (recognizing the validity of Rule 27 under Article III). To prevail then, Verizon must demonstrate that there lies a constitutional line between a Rule 27 subpoena and a § 512(h) subpoena. But there can be no such line. A § 512(h) subpoena is as much “tethered to an anticipated action in federal court,” (Verizon Brief at 15), as a Rule 27 subpoena. The main point of § 512(h) is to get the name of an infringer from the ISP so that the copyright holder can enforce its rights. And the copyright holder must make, in effect, the same showing as that required by Rule 27.

The very purpose of § 512(h) is to allow copyright holders to obtain and preserve the information that they need to bring a copyright infringement action. Indeed, the § 512(h) subpoena is so closely tethered to that Article III proceeding that the seeker of the subpoena must attest to all the elements of its copyright claim: ownership of, or license to, a particular

copyright, and a violation of its exclusive rights. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (proof of copyright infringement requires only proof of the existence of an valid of copyright and of “copying of constituent elements of the work that are original”); 6 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 31.01[B], at 31-6 (2002).

Section 512(h) is thus constitutionally indistinguishable from Federal Rule of Civil Procedure 27, which Verizon concedes is constitutional under Article III. A § 512(h) subpoena, just like a Rule 27 subpoena, is a prelude to a potential federal court action, and neither Rule 27 nor § 512(h) involves filing a complaint. Under Rule 27, a party must show “a sufficient likelihood that the expected litigation will eventuate.” *De Wagenknecht v. Stinnes*, 250 F.2d 414, 417 (D.C. Cir. 1957). Similarly, under § 512(h), the copyright holder must declare, under penalty of perjury, that the information obtained is for the enforcement of rights under the copyright laws, *i.e.*, a future infringement action in federal court.⁴ Under both Rule 27 and § 512(h), a party must provide some detail about the expected claim, although only § 512(h) requires specific factual detail. Neither provision requires the present ability to file a complaint, and Rule 27 petitions are often filed before the future case is even ripe. *See id.* at 416-17. In contrast, § 512(h) subpoenas are only sought once a copyright holder’s claim is ripe because the infringement already has occurred. Significantly, neither provision requires that the future lawsuit be brought. Indeed, it would be contrary to public policy to mandate the bringing of a lawsuit if the dispute could be settled without litigation.

Although Verizon lists a catalogue of perceived distinctions between Rule 27 and § 512(h), *see* Verizon Brief at 14-17, it nowhere explains why these distinctions make an *Article*

⁴ Verizon tries to suggest, with respect to the first subpoena, that if RIAA obtains the infringer’s identity, it may only send a letter to the infringer. *See* Verizon Brief at 15 & n.7. That is not the case. RIAA will send a cease and desist letter to the infringer, but if the infringer does not cease and desist, the copyright holders would have little choice but to bring claims.

III difference. For example, Verizon argues that Rule 27 provides for an initial adversarial proceeding, whereas a § 512(h) subpoena is issued *ex parte*. *See id.* at 16. But this distinction makes no Article III difference because, in either case, a party who has a basis to object has the opportunity for a hearing before an Article III judge before it must comply. Moreover, nothing in Rule 27 suggests that it defines the limit of Congress' power or the scope of the Judicial Power of the United States. Indeed, § 512(h) is far narrower than Rule 27, as it is precisely crafted to permit copyright holders to obtain the very limited amount of information that is essential to enforcing its rights. Unlike Rule 27, under § 512(h) copyright holders are able to use only one discovery device (the subpoena), must provide specific factual information supporting their eventual claim, and are allowed to obtain only limited information. In contrast, Rule 27 allows for a wide range of discovery including orders allowing for the production of documents, an inspection of land, or even the mental or physical examination of an individual. Fed. R. Civ. P. 27(a)(3). Under § 512(h) the copyright holder has to fore swear any other use of the information; that is not required under Rule 27.

Verizon also attempts to distinguish § 512(h) from Rule 27 by arguing that Rule 27 only allows the perpetuation and preservation of testimony, whereas § 512(h) has no similar purpose. But § 512(h) subpoenas are critical to the perpetuation of evidence. The identifying information that RIAA seeks is maintained by ISPs in Internet history logs for only a limited period of time. Without an expeditious method for RIAA to compel the information it seeks, Verizon or any other ISP might destroy it at any time, and RIAA would have no way of identifying the infringer. Creighton Decl. ¶ 14. RIAA is thus in the same position as any party under Rule 27 – it needs evidence that is in the hands of a third party and that may not be available for future proceedings.

Indeed, Verizon's suggestion that Rule 27 essentially defines the outer limits of pre-complaint discovery under Article III, is wholly belied by the long history of pre-litigation

discovery allowed under the rules of equity. Federal courts sitting in equity jurisdiction frequently sustained “the right to file a bill of discovery to ascertain the proper persons to make defendants in a proposed suit at law.” *Brown v. McDonald*, 133 F. 897, 898 (3d Cir. 1905); *see Huey v. Brown*, 171 F. 641, 642 (3d Cir. 1909) (affirming lower court grant of bill of discovery to identify defendants); *Kurtz v. Brown*, 152 F. 372, 373-77 (3d Cir. 1906) (same).⁵ Thus, far from being novel, pre-litigation discovery mechanisms have long been a part of American jurisprudence. Section 512(h) is merely an extremely focused and well-crafted form of such discovery, and, as such, it raises no issue under Article III.

C. A Dispute Concerning Legal Obligations Under Section 512(h) Is, By Itself, a Case or Controversy Within the Meaning of Article III

Verizon’s Article III arguments fail for a third independent reason: a proceeding to enforce a § 512(h) subpoena is itself a “case or controversy” within the meaning of Article III. In § 512(h), Congress created a federal right to information enforceable in federal court. A dispute over that right has all the necessary prerequisites of a “case or controversy,” and the fact that Congress created a streamlined procedure for enforcing the right presents no Article III problem.

Section 512(h) is substantively no different than other statutes creating federal rights to obtain information which are backed up by court enforcement. Under ERISA, for example, a beneficiary has the right to demand information from his or her plan administrator, regardless whether a federal lawsuit is pending. *See* 29 U.S.C. § 1132(c)(1). If the administrator fails to comply, the beneficiary may seek the assistance of a federal court, which can compel disclosure,

⁵ *See also* 2 Joseph Story, *Equity Jurisprudence* § 1483 (explaining that a bill of discovery could be sustained in an action not otherwise before the court “where the object of discovery is to ascertain who is the proper party against whom the suit should be brought”), *cited in McDonald*, 133 F. at 899. Indeed, the origins of the bill of discovery “may be traced to old, rigid common-law rules” and many states continue to allow it. Rupert F. Barron, *Existence and Nature of Cause of Action for Equitable Bill of Discovery*, 37 A.L.R.5th 645, §§ 1, 3 (1996).

impose statutory penalties, and provide other remedies in the court's sound discretion. *Id.* The Freedom of Information Act creates similar rights and remedies. *See* 5 U.S.C. § 552(a).

To be sure, the procedural mechanism for enforcing the § 512(h) right to information does not entail the filing of a “complaint,” but the fact that Congress chose a streamlined legal action essential to Congress’ goal of stopping digital piracy does not change the Article III inquiry, or make the dispute between RIAA and Verizon less of a “case or controversy.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937) (fact of “modified procedure” does not determine whether case or controversy). Instead, whether a dispute is a “case or controversy” is a question “not with form, but with substance.” *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 259 (1933); *id.* (courts “look not to the label which the Legislature has attached to the procedure . . . or to the description of the judgment which is brought here for review, . . . but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts”).

A dispute is a “case or controversy” so long as “the subject is submitted to [the judiciary] by a party who asserts his rights in the form prescribed by law,” *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.), and “so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy” are present, 288 U.S. at 264. In other words, the parties must have standing; the dispute must be concrete, not hypothetical or advisory; the parties must be adverse; and the dispute must not be one, such as those cases involving a political question, that interferes with the operation of another branch of government. *Walker*, 230 F. Supp. 2d at 63. “Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised.” *Aetna*, 300 U.S. at 241.

All of the traditional requirements of an Article III “case or controversy” are present here. Congress established a federal right for copyright holders to obtain the information they need to enforce their copyrights and made the right enforceable in federal court. Section 512(h) requires copyright holders to allege at least as much information in the subpoena and notification as required by Rule 8’s notice pleading. The dispute presented by this enforcement action is ripe, not moot, neither hypothetical nor advisory, nor is there any claim that it is a political question or otherwise non-justiciable. The parties are, without question, adverse and each has a significant incentive to litigate the issues. Finally, the remedy is one that is clearly and traditionally within the competence of the courts to issue – enforcement of a subpoena.

Nevertheless, Verizon contends that Article III requires that, before RIAA can compel Verizon to make the disclosure required by § 512, RIAA first file a “John Doe” complaint that names no defendant and is served on no one. But the Supreme Court has wholly rejected that notion: “We cannot assent to any view of the constitution that concedes the power of congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form.” *Brimson*, 154 U.S. at 486.

II. THE DMCA DOES NOT VIOLATE THE FIRST AMENDMENT

Verizon’s First Amendment arguments are no more persuasive asserted directly in this case than they were when asserted in the prior case as a ground for constitutional avoidance. Once again, those arguments founder on the reality that the conduct at issue in this case is theft, not speech. To obtain any relief here, Verizon would thus have to show that § 512(h) is facially invalid, and it has not come close to meeting that heavy burden.

A. There Is No First Amendment Interest Here

There is no dispute that the individual whose identity RIAA seeks was committing copyright infringement. In its notification to Verizon, RIAA informed Verizon that it had a good faith basis for believing that the individual at issue was engaging in copyright infringement and identified specific infringing material. RIAA also downloaded some of the material and determined that the files were indeed unauthorized copies of RIAA's members' copyrighted works. Creighton Decl. ¶¶ 16-20. That evidence is unrebutted.

Accordingly, the person whose identity RIAA seeks is not engaged in any legitimate form of constitutionally protected expression. As this Court correctly has recognized, "the First Amendment does not protect copyright infringement." *Verizon*, 240 F. Supp. 2d at 42; *see Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555-60 (1985); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-78 (1977); *Schnapper v. Foley*, 667 F. 2d 102, 112-16 (D.C. Cir. 1981). Verizon concedes as much. *See Verizon Brief* at 24. The subpoena here thus infringes on no First Amendment rights.

B. The Statute Is Not Unconstitutionally Overbroad

Because Verizon has no First Amendment rights of its own at stake in this case, the only possible claim that Verizon could be asserting here is a facial overbreadth challenge to § 512(h). And the only possible First Amendment challenge it raises in this regard is that, in some hypothetical situations, § 512(h) might violate the right to anonymous speech and association. That falls far short of meeting Verizon's "heavy burden" of showing that "in virtually every application the DMCA offends the First Amendment." *Verizon*, 240 F. Supp. 2d at 44 n.22. As this Court has recognized, "the judiciary must refrain from deal[ing] with . . . difficult and sensitive issue[s] of constitutional adjudication on the complaint of one who does not allege a

personal stake in the outcome of the controversy.” *Walker*, 230 F. Supp. 2d at 74 (internal quotation marks and citation omitted, alternation in original).

As the Supreme Court has held, invalidating a federal statute based on a facial challenge under the First Amendment is “strong medicine” and is “employed . . . with hesitation, and then ‘only as a last resort.’” *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Only if the overbreadth of the statute is “real” and “substantial as well, judged in relation to the statute’s plainly legitimate sweep,” will a court invalidate the statute. *Broadrick*, 413 U.S. at 615. “[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Moreover, even if there are some situations where people would agree that the statute should not apply, that is not itself a reason to invalidate the statute facially: Whatever overbreadth may exist “should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Ferber*, 458 U.S. at 773-74 (quoting *Broadrick*, 413 U.S. at 615-16).

Given the “various protections incorporated into subsection (h),” *Verizon*, 240 F. Supp. 2d at 43, it is virtually inconceivable – nor has Verizon shown – that § 512(h) will reveal, to any substantial degree, the identity of individuals engaged in protected anonymous speech, as opposed to unprotected copyright infringement. Indeed, Verizon has supplied absolutely no factual record that § 512(h) has been applied to protected speech, as opposed to illegal conduct.⁶ And, whatever the precise contours of protected anonymous speech, there is no dispute that the

⁶ Notably, Verizon does not – and cannot – claim that a § 512(h) subpoena was issued with respect to the Harry Potter book report example on which it relies. See *Verizon Brief* at 27.

First Amendment does not protect the right to violate the copyright laws anonymously and without subsequent accountability.

Indeed, the right to anonymous speech identified by the cases upon which Verizon relies is not even implicated by § 512(h). *First*, unlike those cases involving core political speech, the application of § 512(h) instituted by a copyright holder is unlikely to involve someone who is “is anonymously using the Internet to distribute the speeches of Lenin, Biblical passages, educational materials, or criticisms of the government.” *Verizon*, 240 F. Supp. 2d at 43. *Second*, in each of those cases, the government, for a broad prophylactic purpose, imposed conditions to be met *before* anyone could engage in the category of speech being regulated. Section 512(h), in stark contrast, applies only in a narrow set of circumstances, and allows for the uncovering of purely illegal conduct after it has occurred (or while it is occurring). Verizon subscribers are able to express themselves in any way that they wish; they just cannot violate the law and assume that Verizon will shield them from being caught.

Third, the cases cited by Verizon all involve requiring an individual to affirmatively provide information to the government and/or access to private papers. But the Supreme Court has made clear that there is a vast difference between searching an individual’s home for private papers and obtaining business records from a corporation that may pertain to an individual. *See Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186 (1946) (rejecting argument under First and Fourth Amendments that documents of newspaper could not be disclosed absent a warrant); *United States v. Miller*, 425 U.S. 435, 444-45 (1976) (same). The latter does not implicate any constitutional privacy interest – based on the First Amendment or any other part of the Constitution. *See also American Fed’n of Gov’t Employees v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing “grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.”)

Fourth, the subscriber whose identity is sought by a § 512(h) subpoena is by no means anonymous; the ISP knows exactly who it is. *Verizon*, 240 F. Supp. 2d at 43-44. As courts have repeatedly held, under the First or the Fourth Amendments, there is no legitimate expectation of privacy in the telephone toll records or the business records of an ISP. *See Smith v. Maryland*, 442 U.S. 735 (1979) (no expectation of privacy in telephone call records).⁷ Indeed, in a case involving the First Amendment rights of reporters to keep their sources confidential from the government, the D.C. Circuit explained that, by using the telephones, “plaintiffs and their sources have contacted each other through the facilities of third parties In so doing, they have knowingly assumed the risk of disclosure by placing in the hands of those third parties documentary evidence that their relationship exists.” *Reporters Committee for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1050 n.67 (D.C. Cir. 1978).

That the infringer had no expectation of privacy is especially true here, because Verizon’s customers are on notice that they cannot use Verizon’s network to infringe copyrights. *See Verizon Online Terms of Service*, http://www.verizon.net/policies/popups/internetaa_popup.asp. Moreover, Verizon informs every subscriber that it will “disclose individual customer information to an outside entity . . . when Verizon is served with valid legal process for customer information.” *See Verizon Privacy Principles*, <http://www22.verizon.com/About/Privacy/genpriv>.

Fifth, § 512(h) does not affect the ability of Verizon’s subscribers to be anonymous (to everyone but Verizon) when they speak. The only issue is whether subscribers have a right to

⁷ *See United States v. Lustig*, 555 F.2d 737, 747 n.10 (9th Cir. 1977) (“[i]t is well-established that the ‘expectation of privacy’ only extends to the content of telephone conversations, not to records that conversations took place.”); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (no expectation of privacy where user has opened files up on home computer to anyone who wants to receive them); *United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (D.W. Va. 1999), *aff’d*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision); *United States v. Cox*, 190 F. Supp. 2d 330 (N.D.N.Y. 2002); *see also New York v. P.J. Video Inc.*, 475 U.S. 868 (1986) (no heightened standard when 1st Amendment involved); *United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in bank records).

remain anonymous, no matter what they do. But the Supreme Court has drawn 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 (such as being required to sign an affidavit attesting to signatures obtained while petitioning). *See Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 197-200 (1999). As *Buckley* makes clear, requiring the identification of a speaker – even one 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).

At bottom, Verizon’s First Amendment challenge rests on nothing more than speculation that the statute might some day be used by those not before the Court in an improper manner. But that does not provide a sufficient basis for invalidating a statute in all its applications.⁸ In *Whalen v. Roe*, 429 U.S. 589 (1977), a unanimous Supreme Court rejected a similar challenge to a New York law requiring disclosure to the state of a copy of every prescription of certain drugs. The Court held that speculation that information might become public in a judicial proceeding or that parties might violate the statute and disclose or use information improperly, even if based on declarations claiming a chilling effect, was not sufficient for a facial challenge. *Id.* at 600-01.

The same is true here. Verizon’s only “evidence” that speech will be chilled derives not from an evaluation of the effects of the statute, properly applied, but on Verizon’s speculation that unscrupulous people might misuse it. For someone to so misuse the statute, however, he would have to commit perjury, because § 512(h) requires the subpoena requestor to submit “a sworn declaration . . . that the purpose for which the subpoena is sought is to obtain the identity

⁸ Nor is Verizon’s claim that there are other ways that RIAA could obtain this information that, in Verizon’s view, would be more protective of speech. A party cannot meet its burden to invalidate a statute facially by arguing that there is a less restrictive alternative. *Broadrick*, 413 U.S. at 617-18.

of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.” 17 U.S.C. § 512(h). Any attenuated chill that might flow from the speculative possibility of such abuse cannot support a facial challenge (or an as-applied challenge, for that matter), especially where the statute itself provides for case-by-case review. The Supreme Court has held repeatedly that any possible constitutional problems can be resolved through challenges to grand jury and other subpoenas. *See Oklahoma Press. Publ'g Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Miller*, 425 U.S. at 444-45 (1976). Moreover, the DMCA has been in existence since 1998. RIAA and others have been using the subpoena power throughout, including to obtain information not on a service providers' computer, Creighton Decl. ¶¶ 11, 14, and Verizon itself has disclosed subscriber information pursuant to § 512(h) subpoenas, Lombardo Decl. ¶ 7. Yet Verizon can provide no evidence that the free flow of communication on the Internet has been chilled in that time.

What Verizon seeks here is something *beyond* an absolute right to anonymity for speech on the Internet: under Verizon's theory, not only a person's identity, but all traces of their passing – that is, the records of their illegal conduct on the Internet – would be protected from disclosure. There is no precedent for such a right. Indeed, for all of Verizon's rhetoric about child exploitation, it is Verizon's interpretation of the Constitution which would be a boon to child pornographers. A recent GAO Study found that P2P networks are a haven for child pornographers. *See U.S. GAO, GAO-03-351, File Sharing Programs: Peer-To-Peer Networks Provide Ready Access to Child Pornography* (Feb. 2003); Nance Decl. ¶ 7. If Verizon's view that P2P users have an absolute right to anonymity were the law, a subpoena to obtain the identity of a child pornographer would also violate the Constitution, even though such “speech” is no more protected by the First Amendment than the copyright infringement at issue here.

In any event, case-by-case review is ample protection against the extreme scenarios Verizon hypothesizes, and particularly appropriate in the copyright context, given the Copyright Clause’s “built-in First Amendment accommodations,” including the idea/expression dichotomy and the “fair use” doctrine, which “are generally adequate to address” any First Amendment concerns. *Eldred v. Ashcroft*, 123 S. Ct. 769, 788-89 (2003); *Verizon*, 240 F. Supp. 2d at 42-43 (quoting same). As this Court has recognized, the Framers of the Constitution intended copyright’s limited monopoly to be an “engine of free expression.” *Verizon*, 240 F. Supp. 2d at 42 (internal quotation marks and citations omitted). Indeed, Congress expressly found that the DMCA would *promote* free expression. Absent enactment of the DMCA and the tools it created to respond to digital piracy, Congress was concerned that “copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.” S. Rep. No. 105-190, at 8 (1998). Congress designed the DMCA to foster speech by ensuring that digital piracy did not cause some speakers – artists, authors, musicians – to stop creating because they would no longer be able to obtain a reasonable return on their labor.

For all of these reasons, Verizon’s First Amendment claim must fail.

III. THE OTHER STATUTORY INTERPRETATION AND CONSTITUTIONAL CLAIMS ADVANCED BY AMICI ARE MERITLESS AND NOT PROPERLY BEFORE THIS COURT

Amici USIIA, *et al.* (collectively, “USIIA”) raise claims that Verizon has either failed to raise or has repudiated. Specifically, USIIA argues that the subpoena power authorized by 17 U.S.C. § 512(h) violates due process because it allegedly requires Verizon to divulge “confidential business information.” Such a constitutional claim is not raised by Verizon, which merely alludes to it in a footnote, *see* Verizon Brief at 26 n.12. That is insufficient to raise the issue. *See Verizon*, 240 F. Supp. 2d at 42 (a court should refuse to consider a “constitutional

challenge briefly addressed by the defendant in a footnote, although fully examined by an *amicus*”). USIIA also claims that § 512(h) subpoena power should be read to apply only in pending civil lawsuits. This statutory interpretation claim is improper because it is “urged by an *amicus*” but “rejected by the actual parties to this case.” *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (*amicus* “generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal”), *aff’d*, 123 S. Ct. 769 (2003). Accordingly, these claims are not properly before this Court. *See Verizon*, 240 F. Supp. 2d at 42 (“Unless raised by the parties, a court normally should not entertain statutory or constitutional challenges asserted solely by *amici*.”).

If this Court were to consider the merits of *amici*’s arguments, it should reject them. Although *amici* assert that Verizon has a due process claim based on a property interest in its subscribers’ identities as “confidential business information,” they cite no case to suggest that a single requested customer name qualifies as such. And, even if a single subscriber’s name were “property” for due process purposes, § 512(h) procedures provide more than sufficient process to protect any “property” right of Verizon’s – as Verizon’s litigation of this subpoena amply demonstrates. As for *amici*’s statutory interpretation argument – which conflicts with Verizon’s own interpretation – *amici* point to absolutely nothing in the statute’s language, purpose, or legislative history, to suggest that Congress intended § 512(h) to apply only in pending lawsuits. In any event, that Congress intended § 512(h) to apply only in pending lawsuits. In any event, the doctrine of issue preclusion would forbid Verizon from raising this new statutory argument in the present proceeding, because the question of § 512(h)’s meaning has already been resolved conclusively against Verizon in the first subpoena action. *See Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992); Restatement (Second) of Judgments § 27 (1982).

IV. IF THE COURT WERE TO INVALIDATE SECTION 512(h), IT WOULD HAVE TO INVALIDATE THE ENTIRETY OF SECTION 512

The question of severability is one of legislative intent. *See Minnesota v. Mille Lacs Bank of Chippewa Indians*, 526 U.S. 172, 191 (1999). Verizon's claim that a presumption of severability applies here, *see* Verizon Brief at 18 n.10, is simply incorrect: *no* such presumption applies in the absence of a severability clause. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence – and does not raise a presumption against severability."). In deciding whether to strike down only a portion of an unconstitutional statute, a court must consider the structure and nature of the legislation, including "the importance of the [unconstitutional provision] in the original legislative bargain." *Id.* at 685. Such an inquiry is particularly important where the legislation at issue is compromise legislation in which Congress balanced many different interests in crafting the statute as a whole. *See American Fed'n of Gov't Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 306-07 (D.C. Cir. 1982) (finding compromise legislation non-severable). The fact that § 512 could "operate" absent § 512(h) is not determinative of the severability inquiry. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). The question is whether Congress would have wanted the statute to remain in force, absent the provision challenged.

As this Court already recognized, § 512 is just such a piece of compromise legislation. *Verizon*, 240 F. Supp. 2d at 36 ("The legislative history makes clear that in enacting the DMCA, Congress attempted to balance the liability protections for service providers with the need for broad protection of copyrights on the Internet."). Indeed, Verizon concedes that the DMCA was heavily negotiated and was only enacted into law after the copyright holder community and the ISP community agreed on its provisions. *See* Opposition of Verizon to Motion to Enforce July 24, 2002 Subpoena at 1-2. Section 512 provides huge benefits to ISPs such as Verizon,

affording them limitations on liability for copyright violations committed by those using their networks. However, the statute also requires ISPs to expeditiously supply copyright holders, upon proper demand, the identity of copyright infringers, so that the copyright holders can pursue their claims directly against such infringers. Invalidating only § 512(h) would wreak havoc on that legislative compromise, severely handicapping copyright holders who seek to stop and redress blatant copyright infringement, while allowing ISPs such as Verizon to retain limitations on liability for those same copyright violations.

Where Congress has, as here, balanced two goals in enacting a statute, invalidating a provision that advances one of those goals necessarily upsets the legislative balance. *See MD/DC/DE Broad. Ass'n v. FCC*, 253 F.3d 732, 734-36 (D.C. Cir. 2001) (agency regulations non-severable because removing unconstitutional provision, but not other provisions, would disturb the balance between “the Commission’s two goals as it described them”), *cert. denied*, 534 U.S. 1113 (2002). In such cases, severability is not appropriate, and Congress should be given another opportunity to enact the statute. If the Court determines that § 512(h) is invalid (which it should not), then the entirety of § 512 must be struck down.

V. VERIZON IS NOT ENTITLED TO A STAY PENDING APPEAL

Verizon’s arguments in support of a stay pending appeal – more accurately described as an injunction against § 512(h) – do not improve with age. A stay pending appeal is an “extraordinary remedy,” and is thus only appropriate if a party has mounted a considerable case on the merits and will truly suffer irreparable harm. *Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (*per curiam*). Verizon does not come close to satisfying this standard.

It is *RIAA*’s members that have suffered irreparable harm for the eight months since the filing of the first subpoena action against Verizon, and who will continue to suffer such harm if

this Court issues a stay pending appeal. As not even Verizon disputes, these members' copyrights are being violated daily on a massive scale by Verizon's subscribers. It is hornbook law that such continued infringement constitutes irreparable harm. 4 *Nimmer on Copyright* § 14.06[A]; see also *Health Ins. Ass'n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) (“[A] copyright holder [is] presumed to suffer irreparable harm as a matter of law when his right to the exclusive use of copyrighted material is invaded.” (quoting *Hart v. Sampley*, No. Civ. A. 91-3068, 1992 WL 100135, at *3 (D.D.C. Feb. 4, 1992))).⁹

The Court should not be fooled by Verizon's “self-help” proposals for RIAA. The possible existence of other measures – here, wholly inadequate ones – provides no basis for taking away the one self-help provision that Congress created. Verizon continues to intimate that RIAA's members could learn the identity of Verizon subscribers by filing John Doe lawsuits and issuing subpoenas to Verizon in the context of such proceedings, see Verizon Brief at 34. However, at the stay hearing concerning the first subpoena, Verizon undermined this “remedy,” stating that it very well might refuse to comply with subpoenas issued in John Doe proceedings as well. See Feb. 13 Transcript, at 76-77. Because the John Doe route provides no certain relief for RIAA's members, Verizon proposes another, new “self-help” remedy: RIAA should send “direct mail” electronic messages to copyright infringers using a special feature of KaZaA. However, this direct mail option is completely insufficient to protect RIAA from irreparable harm. See Creighton Decl. ¶ 23. Not only can users disable KaZaA's direct mail feature, making direct mail to many users impossible in the first place, but the software also provides RIAA no way to know whether users with the direct mail feature enabled have received such messages or heeded them. See *id.* Moreover, without being able to specifically identify a

⁹ Even by Verizon's measure, RIAA will have to suffer this irreparable harm for an additional six months. See Verizon Brief at 35. And that calculation includes only the time from the present date to the earliest possible D.C. Circuit argument date, without adding the additional time it will take for the D.C. Circuit to issue its opinion.

particular subscriber, RIAA is powerless to monitor such an individual for repeat infringement. *See id.* Finally, KaZaA is only one of many P2P programs, and there is no evidence that other programs have a direct mail feature, or, for that matter, no guarantee that KaZaA will continue to include this feature in its software. *See id.* It may be true that, from time to time, a message of the type Verizon describes will get through to a user of a P2P network, but overall, the direct mail feature is an inadequate substitute for the § 512(h) subpoena tool guaranteed to copyright holders by the DMCA. Verizon's direct mail "solution" cannot possibly tip the balance of equities in Verizon's direction.

Finally, the unsigned declaration of an unknown individual, which purports to be a declaration from one of the two infringers in these cases, takes away nothing from RIAA's clear case of harm. As an initial matter, RIAA notes that Verizon procured this declaration some eight months after this litigation began. Thus, Verizon apparently neither informed this subscriber about the present action, nor took any step to stop the irreparable harm to RIAA, until Verizon wanted to get a stay in the present cases. Moreover, assuming that such an unsigned, anonymous declaration is admissible and should be given any weight, the declaration is most noteworthy for what it does not say. It does not say that the infringer is going to stop infringing; it only says that he or she is going to stop using KaZaA – only one of many P2P networks that could be used to violate RIAA's members' copyrights – and will only do so during the pendency of the suit before this Court. It does not say that Verizon or anyone else will monitor this individual to ensure that no more infringement will occur. It does not establish any harm to the individual that could be caused by disclosure, other than the individual's bare desire to have his or her illegal behavior remain anonymous. Finally, it neither takes issue with RIAA's claim of infringement, nor suggests that the individual will make recompense for the harm that has been done to RIAA's members.

In contrast to RIAA's showing of a significant and ever-increasing harm, Verizon has identified no real harm it will suffer absent a stay and adds nothing new to meet its burden to demonstrate irreparable harm. RIAA has previously responded to Verizon's claims in detail. *See* RIAA's Opposition to Motion for Stay Pending Appeal at 12-15. Nothing has changed with respect to any harm alleged by Verizon since that time. Verizon's belief that mootness is a more significant issue now than it was a month ago makes no sense; the legal issue – now as before – is exactly the same, and both parties have told the Court they do not believe these cases will be mooted if the Court denies a stay.¹⁰ Indeed, RIAA conceded at the stay hearing concerning the first subpoena that it will not argue mootness on appeal. And Verizon's continued advocacy of John Doe suits as a means for RIAA to obtain the identity of Verizon's subscribers, as well as Verizon's recent compliance with other § 512(h) subpoenas, *see* Lombardo Decl. ¶ 7, demonstrates that neither Verizon nor its subscribers will suffer irreparable harm due to the disclosure of subscriber information here.

Verizon's likelihood of success on the merits has not improved by fully briefing its constitutional claims, which are unsupported by the Constitution or case law, and thus fail to present the sort of "serious, substantial, difficult, and doubtful" questions characteristic of cases stayed pending appeal. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).¹¹ Verizon's belated raising of meritless constitutional arguments should be viewed for what it is: a smoke screen thrown up in a desperate attempt to secure a stay.

¹⁰ Verizon also makes the bizarre suggestion that it should receive a stay pending appeal because this Court's judgment against Verizon will issue preclude Verizon in future § 512(h) litigation. *See* Verizon Brief 33-34. If this argument were correct and losing a claim provided automatic grounds for a stay pending appeal, a stay would be granted in every case.

¹¹ Moreover, the merits of Verizon's constitutional claims are only relevant with respect to any request for a stay of this Court's decision concerning the February 4, 2003 subpoena, because Verizon waived a constitutional challenge to the July 24, 2002 subpoena. *See Verizon*, 240 F. Supp. 2d at 41-42.

There is simply nothing here to warrant the extraordinary relief of a stay. As Verizon has conceded, complying with the subpoena imposes on Verizon a *de minimis* burden, at most. In contrast, the irreparable harm that a stay would cause RIAA has only increased since this Court's hearing on the stay issues. It is more clear than ever that Verizon seeks to prevent the enforcement of all § 512(h) subpoenas, pending resolution of its appeals in both these cases, by seeking stays in all § 512(h) proceedings. If Verizon gets its way, it will have achieved a truly astonishing result – a stay of a federal statute that was intended to protect copyright holders against irreparable harm, even though every argument Verizon has ever raised will have been soundly rejected by this Court.

CONCLUSION

The motion to quash the subpoena should be denied. The Court should deny the requests for a stay pending appeal in both the first and second subpoena actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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