

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 16, 2003
Nos. 03-7015, 03-7053 (consolidated appeals)

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

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

RECORDING INDUSTRY ASSOCIATION OF AMERICA,

Appellee,

v.

VERIZON INTERNET SERVICES,

Appellant.

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

**BRIEF OF *AMICI CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC., AFMA,
AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AMERICAN SOCIETY
OF MEDIA PHOTOGRAPHERS, INC., ASSOCIATION FOR INDEPENDENT MUSIC,
ASSOCIATION OF AMERICAN PUBLISHERS, BROADCAST MUSIC, INC., BUSINESS
SOFTWARE ALLIANCE, DIRECTORS GUILD OF AMERICA, INC., GRAPHIC ARTISTS
GUILD, INC., INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, NFL VENTURES, L.P.,
OFFICE OF THE COMMISSIONER OF BASEBALL, PRODUCERS GUILD OF AMERICA,
PROFESSIONAL PHOTOGRAPHERS OF AMERICA, RECORDING ARTISTS COALITION,
SCREEN ACTORS GUILD, INC., SOFTWARE & INFORMATION INDUSTRY
ASSOCIATION, AND WRITERS GUILD OF AMERICA, WEST, INC. IN SUPPORT OF THE
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

(A) Parties and *Amici*:

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellant: AFMA; American Federation of Musicians of the United States and Canada; American Federation of Television and Radio Artists; American Society of Media Photographers, Inc.; Association for Independent Music; Association of American Publishers; Broadcast Music, Inc.; Business Software Alliance; Directors Guild of America, Inc.; Graphic Artists Guild, Inc.; Interactive Digital Software Association; NFL Ventures, L.P.; Office of the Commissioner of Baseball; Producers Guild of America; Professional Photographers of America; Recording Artists Coalition; Screen Actors Guild, Inc.; Software & Information Industry Association; Writers Guild of America, west, Inc.

(B) Rulings Under Review:

References to the rulings at issue appear in the Brief for the Appellant.

(C) Related Cases:

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

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

In accordance with Circuit Rule 26.1, undersigned counsel certifies as follows:

Amicus Motion Picture Association of America, Inc. is a not-for-profit trade association that serves as the voice and advocate of the major American motion picture studios. The MPAA has no parent corporation. The MPAA has no stock and hence no shareholders.

Amicus AFMA (formerly known as the American Film Marketing Association) is a trade association representing more than 150 independent producers and distributors of motion pictures and television programming. AFMA has no parent corporation, and has no stock and hence no shareholders.

Amicus Screen Actors Guild, Inc. is the collective bargaining representative for over 96,000 professional actors and performing artists, including dancers, singers, and stunt performers, in the theatrical and television motion picture industry. SAG has no parent corporation, and has no stock and hence no shareholders.

Amicus Directors Guild of America, Inc. is a nonprofit corporation that serves as the duly recognized labor organization and exclusive representative for the purposes of collective bargaining of, among others, directors, assistant directors, and unit production managers of theatrical and television motion pictures. DGA has no parent corporation, and has no stock and hence no shareholders.

Amicus Producers Guild of America is a nonprofit, professional trade organization that represents the interests of nearly two thousand members of the producing team responsible for the production of motion pictures, television and new media. PGA has no parent corporation, and has no stock and hence no shareholders.

Amicus Writers Guild of America, west, Inc. is a labor organization representing approximately 8,500 professional authors of stories and scripts for theatrical and television motion pictures. WGA has no parent corporation, and has no stock and hence no shareholders.

Amicus Graphic Artists Guild, Inc. is a national union that serves illustrators, designers, web creators, production artists, surface designers, and other creatives who have come together to pursue a common goal of raising industry standards, and improve the ability of visual creators to achieve satisfying and rewarding careers. GAG has no parent corporation, and has no stock and hence no shareholders.

Amicus American Federation of Television and Radio Artists is a national labor union representing approximately 80,000 performers and newsmen who are employed in the news, entertainment, advertising, and sound recording industries. AFTRA has no parent corporation, and has no stock and hence no shareholders.

Amicus American Federation of Musicians of the United States and Canada is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law of the State of California. AFM has no parent corporation, and has no stock and hence no shareholders.

Amicus Broadcast Music, Inc. represents approximately 300,000 songwriters, composers, and music publishers. Broadcast Music, Inc. has no parent corporation, and has no stock and hence no shareholders.

Amicus Association for Independent Music is a national trade organization that represents independent record labels and is dedicated to the vitality of the independent music community. AFIM has no parent corporation, and has no stock and hence no shareholders.

Amicus Recording Artists Coalition is a nonprofit, non-partisan coalition formed to represent the interests of recording artists in public policy debates that affect the music industry. RAC has no parent corporation, and has no stock and hence no shareholders.

Amicus Business Software Alliance represents the world's commercial software industry. BSA has no parent corporation, and has no stock and hence no shareholders.

Amicus Interactive Digital Software Association is the U.S. trade association dedicated to serving the business and public affairs needs of companies that publish video games for game consoles, personal computers, handheld devices, and the Internet. IDSA has no parent corporation, and has no stock and hence no shareholders.

Amicus Software & Information Industry Association is a leading trade association committed to promoting and protecting the interests of the software and information industries. SIIA has no parent corporation, and has no stock and hence no shareholders.

Amicus Association of American Publishers is the national trade association of the U.S. book publishing industry. AAP has no parent corporation, and has no stock and hence no shareholders.

Amicus American Society of Media Photographers, Inc. is a trade association that was founded in 1944 to protect and promote the interests of professional photographers who earn their livings by making photographs for publication in the various media. ASMP has no parent corporation, and has no stock and hence no shareholders.

Amicus Professional Photographers of America, the world's largest photographic trade association, represents photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. PPA has no parent corporation, and has no stock and hence no shareholders.

Amicus NFL Ventures, L.P., a Delaware limited partnership with NFL Ventures, Inc., a Delaware corporation, as its general partner, is the for-profit arm of the National Football League and manages the commercial use and licensing of all of the NFL's valuable intellectual property rights. NFL Ventures, Inc. is not publicly traded. NFL Ventures, L.P. has no stock and hence no shareholders.

Amicus Office of the Commissioner of Baseball represents the thirty clubs engaged in the professional sport of Major League Baseball, who own copyrights in the broadcasts of more than 2000 Major League Baseball games played each year. The Office of the Commissioner of Baseball has no parent corporation, and has no stock and hence no shareholders.

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Underlying this appeal is the conduct of two customers of Verizon Internet Services (“Verizon”) who are (or appear quite clearly to be) engaged in aggravated copyright infringement. One made 600 copyrighted recordings, the other 800 copyrighted recordings, available for download over his or her Verizon Internet connection. Each was utilizing one of the popular “peer-to-peer” services that in the present state of the Internet provide “the largest opportunity for copyright theft.” *In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24, 35 (D.D.C. 2003) (“*First Subpoena Decision*”). These two individuals are inflicting damage on a very large scale, and their conduct is far from aberrant. As the District Court found, “[t]he extent of copyright infringement and piracy of intellectual property over the Internet . . . is well-recognized and ‘has reached epidemic proportions.’” *In re Verizon Internet Services, Inc.*, Civ. A. No. 03-MS-0040 (JDB), 2003 U.S. Dist. LEXIS 6778, at * 59-60 (D.D.C. Apr. 14, 2003) (“*Second Subpoena Decision*”) (quoting *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal 2002)).

Both of these individuals remained anonymous to the victims of their copyright infringement until this Court’s Order of June 4, 2003, which obligated Verizon to provide the Recording Industry Association of America (“RIAA”) with their identities. The issue in this appeal is whether and under what circumstances a copyright owner may utilize the procedural remedy Congress enacted to address this problem—the “Subpoena to identify infringer” provision enacted in 17 U.S.C. § 512(h). Verizon and its supporting *amici*, many of whom urged Congress to enact this statute, now urge the Court to invalidate or at least judicially narrow it. The *amici* who have joined this brief respectfully submit that this challenge be rejected and that the two decisions of the District Court be affirmed.

INTEREST OF AMICI

This brief of *amici curiae* is submitted on behalf of some of the principal victims of the piracy “epidemic” noted by the District Court and others.

Amicus Motion Picture Association of America, Inc. (“MPAA”) is a not-for-profit trade association that serves as the voice and advocate of the major American motion picture studios, all of which own famous intellectual property and rely heavily on state and federal laws for the protection of that property. The MPAA works to support and protect the copyright interests of its members in a variety of ways, including, among other things, through a comprehensive anti-piracy program on which tens of millions of dollars is spent annually. Internet piracy in particular presents a grave and growing threat to the motion picture industry, which spends billions of dollars annually making and distributing motion pictures and other copyrighted programming worldwide. Independent analysts estimate that between 400,000 and 600,000 times each day there is an unauthorized download of a copyrighted motion picture.

Amicus AFMA is a trade association representing more than 150 independent producers and distributors of motion pictures and television programming who produce more than 400 independent motion pictures and countless hours of diverse television programming annually.

Amici Screen Actors Guild, Inc., Directors Guild of America, Inc., Producers Guild of America, Writers Guild of America, west, Inc., Graphic Artists Guild, Inc., American Federation of Television and Radio Artists, and American Federation of Musicians of the United States and Canada are labor organizations that collectively represent hundreds of thousands of individuals who earn a living in entertainment and the arts and whose compensation is tied

inextricably to the protection of intellectual property rights and the prevention of unauthorized copying of the works that they create.

Amicus Broadcast Music, Inc. represents approximately 300,000 songwriters, composers, and music publishers. Because virtually all motion pictures, television programs, and other audio-visual works contain music, and because the public performance of that music, including by means of transmission over the Internet, is licensed, the piracy of copyrighted works deprives writers and publishers of their principal source of income.

Amicus Association for Independent Music is a national trade organization that represents independent record labels and is dedicated to the vitality of the independent music community.

Amicus Recording Artists Coalition is a nonprofit, non-partisan coalition formed to represent the interests of recording artists in public policy debates that affect the music industry. RAC's members comprise the most well-known recording artists in the world, including Tony Bennett, Clint Black, Jimmy Buffet, Eric Clapton, Sheryl Crow, Don Henley, Billy Joel, Madonna, Stevie Nicks, Bonnie Raitt, Bruce Springsteen and Trisha Yearwood, among others.

Amicus Business Software Alliance represents the world's commercial software industry before governments and in the international marketplace; pursues education and awareness campaigns and provides resources to software users with the aim of promoting voluntary compliance with copyright requirements; and takes action against reports of piracy of its members' products. On the Internet, BSA investigators identify over 100,000 instances of BSA member copyrighted programs being offered for unauthorized downloading each month.

Amicus Interactive Digital Software Association is the U.S. trade association dedicated to serving the business and public affairs needs of companies that publish video games for game consoles, personal computers, handheld devices, and the Internet. IDSA members collectively accounted for more than ninety percent of the \$6.9 billion in entertainment software sales in the United States in 2002, and billions more in export sales of American-made entertainment software.

Amicus Software & Information Industry Association is a leading trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 600 member companies, including prominent publishers of software and information products for reference, education, business, consumer, the Internet and entertainment uses.

Amicus Association of American Publishers is the national trade association of the U.S. book publishing industry, whose members vigorously support free speech and strong intellectual property rights protection.

Amici American Society of Media Photographers, Inc. and Professional Photographers of America are trade associations that work to protect and promote the interests of professional photographers who earn their livings by making photographs for publication in the various media. A core responsibility of both organizations is to protect their members' intellectual property rights against infringement.

Amici NFL Ventures L.P. and the Office of the Commissioner of Baseball manage the commercial use and licensing of their respective sports leagues' (and members teams') intellectual property rights, including the copyrights in the broadcasts of all NFL and Major League Baseball games.

ARGUMENT

I. VERIZON SEEKS TO ESCAPE ITS OBLIGATIONS UNDER THE COMPROMISE LEGISLATION IT URGED CONGRESS TO ENACT.

We are in the infancy of a networked, digital society. The early benefits of this transformation are obvious to anyone who has replaced his or her VCR with a DVD player, downloaded or updated software products over the Internet, or sampled and purchased music without visiting a record store. New and exciting online markets for distributing legitimate content are becoming a reality every day, and with advances in technology there will be benefits we have not yet imagined. But with these opportunities come real risks. The Internet and the inexpensive-yet-powerful computers that people use to access it are technological marvels, but copyright pirates have employed the technology and the Internet to cause millions of dollars in harm to copyright owners. At no cost, and with just a few clicks of a mouse, these individuals can copy and disseminate virtually perfect copies of digital works—*e.g.*, motion pictures, musical recordings, software—on a global scale. Left unchecked, these copyright thieves threaten to destroy the legitimate digital marketplace for works of art, music, film, software, literature, and other video programming, and will deter the development and distribution of new works in state-of-the-art digital media. The Digital Millennium Copyright Act of 1998 (“DMCA”) was Congress’s response to the threat and the reality of digital piracy. In this landmark law, Congress sought to make the risks of copyright infringement more manageable by giving those in the creative industries an incentive to produce and distribute works in digital formats by assuring them of reasonable and reliable procedural remedies.

One of those procedural remedies is contained in 17 U.S.C. § 512(h). It appears in Title II of the DMCA, which Congress separately titled the “Online Copyright Infringement

Liability Limitation Act,” Pub. L. No. 105-304, § 201, 112 Stat. 2877 (1998).¹ The legislative process that preceded the enactment of Title II was initiated by the Internet service provider (“ISP”) industry, which at that time—the mid-1990s—was increasingly concerned that traditional doctrines of copyright liability, including the theories of contributory and vicarious infringement, exposed ISPs to potential liability for the infringing conduct of their customers. *See* H.R. Rep. No. 105-551 (Amended), pt. 1, at 11 (1998). At the instigation of the ISP industry, proposed legislation was introduced in both houses of Congress in the summer of 1997.

Both bills proposed to grant to ISPs broad protection from claims arising from the infringing conduct of their users, and neither imposed any burden on ISPs to help copyright owners identify the ISP customers who were using their Internet connections to steal copyrighted material. *See The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the Senate Comm. on the Judiciary*, 105th Cong. 45-55 (1997) (“*Hearing on S. 1146*”) (proposed legislation); *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and 2280 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 22-25 (1997) (“*Hearing on H.R. 2281 and 2280*”) (proposed legislation). Not surprisingly, the ISP industry’s proposals met stiff resistance from the software, motion picture, and recording industries, among others, all of whom were suffering, and would continue to

¹ The DMCA is comprised of five separate titles. Title I of the DMCA implemented the World Intellectual Property Organization Copyright Treaty, which requires contracting parties to “provide adequate legal protection and effective legal remedies” against the circumvention of technological devices employed by copyright owners to protect their works. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001) (quotation omitted). Title III, the “Computer Maintenance Competition Assurance Act,” was enacted to “provide a clarifying exemption in the Copyright Act” to allow lawful owners or lessees of computers to authorize independent service technicians to activate their computers in order to service hardware components. S. Rep. No. 105-190, at 2. Title V is separately titled the “Vessel Hull Design Protection Act.” Title IV contains “Miscellaneous Provisions.”

suffer, the consequences of Internet copyright theft. *See Hearing on S. 1146; Hearing on H.R. 2281 and 2280.* They expressed resistance to any new laws affecting the liability of ISPs for their customers' infringements, and they also directed criticism to particular aspects of the ISPs' proposed legislation. *Id.* Among the concerns was the need for some provision under which copyright owners could obtain from ISPs the identity of customers suspected of copyright infringement. As explained by the head of the Business Software Alliance, an industry group representing the world's leading software firms:

A matter not now addressed by the bill is disclosure of the names and addresses of infringer by the service provider. Often in conducting internet anti-piracy cases, we can locate the source of the material as a particular site on a service provider's system, but because the Internet is essentially an environment replete with "aliases," we cannot determine the identity of a person. This makes it quite hard to proceed with prosecution, and it would be a valuable addition to the approach taken by the bill for it to also provide incentives for service providers to share information, under appropriate circumstances, about the infringer's identity.

Hearing on H.R. 2281 and 2280, at 77 (statement of Robert W. Holleyman II, President, Business Software Alliance). Likewise, the Information Industry Association urged Congress to "condition reduced liability for infringement on the access or service provider's willingness to reveal the names of users that violate copyright and to preclude repeat offenders from accessing their services." *Id.* at 177.

Congressional deliberations over the legislation continued for months thereafter. The ISP industry acknowledged that the task of combating Internet copyright piracy would have to be one of "joint responsibility between copyright owners and ISPs." *Hearing on S. 1146*, at 32 (prepared statement of Roy Neel, President, United States Telephone Association); *Hearing on H.R. 2281 and 2280*, at 89 (same). As this ISP industry representative stated, "When ISPs acquire actual knowledge that their services are being misused for infringing purposes, they

should be obligated to take reasonable steps to halt further abuse.” *Hearing on S. 1146*, at 32; *Hearing on H.R. 2281 and 2280*, at 88.

We 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 (unlike the ISPs, who cannot be certain who may have recently purchased which copyrighted material.) *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.*

Hearing on S. 1146, at 32; *Hearing on H.R. 2281 and 2280*, at 89 (emphasis added). (Verizon was and is a member of the industry group Mr. Neel was representing, and the group is an *amicus* in this appeal.)

What it would mean for ISPs to “sensibly act” in response to evidence that their customers were engaged in copyright infringement was the subject of legislative negotiations “in which representatives of copyright owners and Internet and online service providers sought to resolve the contentious issue of the scope of liability of service providers for the infringing acts of their users.” S. Rep. No. 105-190, at 4. Congress initiated this negotiation process, and encouraged and admonished the parties to work out a deal to resolve these issues. The fruits of this negotiation were embodied in Title II of S. 2037, which the Senate passed in May 1998. Section 202 of S. 2037, which is virtually the same as § 512 as ultimately enacted, includes a provision entitled “Identification of Direct Infringer” that served the same function as the provision, § 512(h), at issue in this litigation.² As Senator Hatch, a co-sponsor of the bill, explained: “Title II . . . reflects 3 months of negotiations between the major copyright owners and the major OSPs, and ISPs, which I encouraged and in which I participated, and which took

² Indeed, although significant amendments were made to nearly every other provision of the Senate-passed bill before the DMCA was finally enacted, Title II of the DMCA embodies the compromise contained in Section 202 of the Senate bill, with only minor changes.

place with the assistance of Senator Ashcroft.” 144 Cong. Rec. S4885 (daily ed. May 14, 1998) (remarks of Sen. Hatch).

After the Senate adopted the compromise, the House took it up. At House committee hearings, the witness testifying “on behalf of the Ad Hoc Copyright Coalition, which represents thousands of phone companies and other builders of the Internet,” applauded the “compromise . . . embodied in Title II of S. 2037,” explaining that “the arguments which had previously divided the parties” were resolved after “the content and service provider industries began face-to-face negotiations and were able to approach the remaining key issues with increased knowledge, creativity, and insight.” *WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 50-52 (1998) (“*Hearing on H.R. 2281*”) (remarks and prepared statement of George Vradenburg III, Ad Hoc Copyright Coalition). Although others objected that there was “a significant privacy problem” with the “Identification of Direct Infringer” provision, *id.* at 16 (statement of Marc Rotenberg, Electronic Privacy Information Center) (asserting, among other things, that the provision “grants too much latitude to those who might pursue fishing expeditions”), the ISP industry came out “very much in support” of the legislation. *Id.* at 50-52. The House Committee thereafter accepted the compromise endorsed by the ISP industry, which was virtually identical to Section 202 of the Senate bill, and which was perceived as “preserv[ing] 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.” *See* H. Rep. No. 105-551, pt. 2, at 49; *see also* S. Rep. No. 105-190, at 20 (intended purpose of Title II was to get ISPs and copyright owners “to cooperate

to detect and deal with copyright infringements that take place in the digital networked environment”).

As noted by the District Court, the final compromise reached by the parties was that “in exchange for the liability protections afforded to service providers in subsections (a) through (d) of [17 U.S.C. § 512], Congress sought through subsection (h) to require service providers to assist copyright owners in identifying infringers using the service providers’ systems.” *First Subpoena Decision*, 240 F. Supp. 2d at 38. The bill passed by the House in August 1998 included the provision titled “Subpoena to Identify Infringer,” 144 Cong. Rec. H7074–7103 (daily ed. Aug. 4, 1998), a provision ultimately included in the statute as enacted and signed by the President.

While commonplace in 1998 when the DMCA was enacted, Internet copyright piracy had not yet reached the “epidemic proportions” that exist now. Nevertheless, that prospect was plainly on the mind of Congress as it was considering the legislation. The motion picture industry, for one, warned that rampant piracy of its product, while not then occurring, was inevitable as technology advanced:

Movies and videos are not much in evidence yet. That is because the audio-visual content is so rich in information that it cannot yet move easily through the digital network. The volume of flow is simply too great for some of the pipes. But we also know that our present reprieve is only temporary. The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates.

Hearing on S. 1146, at 8–9 (testimony of Fritz Attaway, MPAA Senior Vice President). The head of the Business Software Alliance likewise warned that “[p]iracy of software is a major and growing problem,” and warned of the prospect that the Internet could “become a haven for thieves.” *Hearing on H.R. 2281*, at 37–40 (testimony of BSA President Holleyman).

This anticipated wave of digital theft has now crashed over the creative industries, facilitated by the provision of faster and faster Internet connections that, while providing enormous benefits for society, have also made it more practical for copyright pirates to copy and distribute large files, such as full-length motion pictures. (According to one recent study, the number of Americans who access the Internet from home via a broadband Internet connection grew 50 percent from March 2002 through March 2003 and has doubled since year-end 2001; an estimated 30 million Americans now have home broadband connections.)³ Many broadband users undoubtedly restrict their activities to lawful pursuits. Unfortunately, others do not. Driving this unlawful conduct are exactly the sort of Internet users whose identities were subpoenaed in this case. Under the cloak of anonymity, they sign on to peer-to-peer file-copying services and offer for downloading numerous copies of the latest and most popular movies, recordings, and software. This conduct has continued to flourish notwithstanding a number of successful efforts by the recording and motion picture industries to shut down file-copying services that are not willing or capable of operating lawfully. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013–19 (9th Cir. 2001); *In re: Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002). In the latter case, Chief Judge Aspen pointed out that “Defendants manage to do everything but actually steal the music off the store shelf and hand it to Aimster’s users,” whose conduct he described as “ongoing, massive, and unauthorized distribution and copying of Plaintiff’s copyrighted works.” *Id.* at 649, 652. New-and-improved file-copying services

³ See John B. Horrigan, *Broadband Adoption at Home: A Pew Internet Data Memo*, May 18, 2003, at 1, available at http://www.pewinternet.org/reports/pdfs/PIP_Broadband_adoption.pdf.

proliferate, and in some instances incorporate innovations that “have been designed specifically to increase the efficiency and speed of transfer for large files such as movie files.”⁴

While the success in litigating against peer-to-peer *services* has not been uniform,⁵ in every instance the courts have concluded without the slightest equivocation that *persons who use* these file-copying services to download copyrighted works and make them available to others—the very sort of individuals whose identity the RIAA seeks to learn in these proceedings—are engaged in direct copyright infringement.⁶ And there is no sign that this infringing conduct is abating. The company that provides the KaZaa file-copying service recently announced that 230 million copies of its software had been downloaded, making it (according to the company) the most popular free program on the Internet.⁷

Regrettably, Verizon has revised its view of what it means to “act sensibly” in the face of this massive Internet piracy among its customers. To Verizon, “acting sensibly” apparently means finding a way to capitalize on and profit from the problem. An extraordinary piece of evidence submitted by Verizon itself to the District Court is promotional material for its broadband services. While the boilerplate in its customer service agreement states that use of its

⁴ John Borland, *File swapping shifts up a gear*, at <http://news.com.com/2100-1026-1009742.html> (May 27, 2003) (file-copying innovation reaching “critical mass”).

⁵ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, ___ F. Supp. 2d ___, CV 01-08541-SVW (PJMx), CV 01-09923-SVW (PJMx), 2003 U.S. Dist. LEXIS 6994, at * 50 (C.D. Cal. Apr. 25, 2003) (granting summary judgment to two file-copying services on claims of contributory and vicarious infringement). This action brought by the member companies of the MPAA and the RIAA is on appeal to the United States Court of Appeals for the Ninth Circuit.

⁶ See, e.g., *Napster*, 239 F.3d at 1114 (“[A] majority of Napster users use the service to download and upload copyrighted music . . . [which] constitute[s] direct infringement. . . .” (quotation omitted)); *Grokster*, 2003 U.S. Dist. LEXIS 6994, at * 14–15 (“[I]t is undisputed that at least some of the individuals who use Defendants’ software are engaged in direct copyright infringement of Plaintiff’s copyrighted works”); *Aimster*, 252 F.Supp.2d at 652.

⁷ See *Most downloaded program on the Web?*, at <http://www.cnn.com/2003/TECH/internet/05/23/media.kazaa.reut/index.html> (May 23, 2003).

network for copyright infringement is strictly forbidden, Verizon in these marketing materials urges its customers to do just that. Verizon goes so far as to suggest that its broadband customers might want to bypass the licensed “official sites” that offer music downloads legally, and instead patronize the “free sites.”

[T]he official sites typically don’t offer all music that is still selling exceedingly well in stores. *By contrast, the free sites are likely to have pretty much everything*, but you may well be pelted with some unwanted ads.

Attachment B to Second Decl. of Keith Kidd (3/31/03), JA at __. These promotional materials—in an “Essential Site List”—actually direct customers who are music lovers and “file-sharing fiends” to a peer-to-peer service named “Morpheus.” *Id.*⁸ Verizon now complements this piracy marketing strategy with a legal strategy designed to impede the anti-piracy efforts it once vowed to aid.

II. COPYRIGHT INFRINGERS WHO UTILIZE PEER-TO-PEER SYSTEMS ARE SUBJECT TO § 512(H) SUBPOENAS.

Verizon and its *amici* propose a construction of § 512(h) that disowns the statutory compromise described above and that renders the “subpoena to identify infringer” virtually useless for its intended purpose.

Under this proposed construction, a copyright owner may not obtain a “subpoena to identify infringer” except where that individual stores his pirated catalogue on his ISP’s computer, rather than his own computer. This construction would provide a safe haven for the

⁸ Verizon is not alone in marketing its broadband services for use in piracy. The ISP RCN Corporation, for example, boasts that its broadband customers can access the Internet “6 times faster than [sic] the competition,” in order to, among other things, “Share files, and download MP3’s on KaZaa and Morpheus.” *See What’s Hot*, <http://www.rcn.com/internet/highspeed/whatshot.php> (last visited June 16, 2003). KaZaa and Morpheus are two of the unlicensed peer-to-peer services over which the aforementioned piracy epidemic is occurring.

vast majority of anonymous Internet pirates who increasingly utilize peer-to-peer services—services that, as the District Court noted (and Verizon does not dispute) provide “the largest opportunity for copyright theft.” *First Subpoena Decision*, 240 F. Supp. 2d at 35.⁹ And this construction of Section 512(h) would for all practical purposes relieve ISPs of their obligation to assist anti-piracy efforts through the identification of customers suspected of infringement.

The District Court’s thorough analysis rejecting this construction of the statute should be affirmed. Interpreting § 512(h) as inapplicable to peer-to-peer infringers like those at issue in this case “would create a huge loophole in Congress’s effort to prevent copyright infringement on the Internet” and would “allow infringement to flourish.” *Id.* at 35-36.

Verizon’s alternative construction would violate the principle that “‘absurd results’ are strongly disfavored.” *United States v. Wilson*, 290 F.3d 347, 361 (D.C. Cir. 2002) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)), *cert. denied*, 123 S. Ct. 581 (2002); *see also FTC v. Ken Roberts Co.*, 276 F.3d 583, 590 (D.C. Cir. 2001), *cert. denied*, 123 S. Ct. 99 (2002). There is no dispute that the two individuals whose identities Verizon seeks to protect are engaged in “large-scale infringement activities.” *Amici Br.* at 2. Nor is there any dispute that the only reliable way for one of the aggrieved copyright owners to secure their identities is through Verizon, their ISP. Verizon in turn has not claimed that its burden in identifying a particular peer-to-peer subscriber is any different or greater than identifying customers suspected of infringement by other means, such as those hosting materials on the ISP’s server. As Verizon acknowledged below, the process of identifying the customer associated with that IP address takes only a few minutes. And, of course, the injury for which Congress was providing a

⁹ During the proceedings below, *amici* in support of Verizon acknowledged, with laudable candor, that “many P2P users swap infringing materials.” JA _____. The amount of infringement on P2P systems is, in fact, “massive.” *Aimster*, 252 F. Supp. 2d at 649.

remedy—Internet copyright piracy—is the same regardless of whether the infringer utilizes a peer-to-peer service or distributes unauthorized digital copies over the Internet some other way.

It is almost certainly true that, on an overall basis, Verizon and other ISPs will be subjected to more subpoenas if peer-to-peer infringers are subject to § 512(h). That fact, however, cannot justify the invention of some otherwise non-existent legislative intent to carve out peer-to-peer infringers from the scope of the statute. It simply reflects the magnitude of the growing problem to which the statutory provision is addressed. Moreover, the burden on ISPs of complying with such subpoenas is still greatly outweighed by the benefit of being sheltered from monetary liability by the DMCA safe harbors.

There is nothing whatsoever in the statutory text or legislative record of the DMCA that might justify the embrace of Verizon’s implausible interpretation of § 512(h). Congress nowhere drew a distinction between peer-to-peer systems on the one hand, and on the other hand those circumstances where the ISP is providing (intentionally or unwittingly) a home for the infringer’s pirated works. Nor was Congress acting out of ignorance of the potential problem, as Verizon suggests. To the contrary, the legislative materials reflect a discussion and awareness of the copyright piracy occurring outside of ISP servers, specifically among users of certain FTP (or “file transfer protocol”) sites, which functioned as a sort of early-stage peer-to-peer system.¹⁰ Had Congress wanted to limit these subpoenas to infringement hosted on ISP servers, as Verizon suggests, it could have done so simply and sensibly, by locating the subpoena provision within § 512(c), which provides other remedies for that particular problem. It did not

¹⁰ See, e.g., *FTP New User Guide*, at <http://www.FTPplanet.com/ftpresources/basics.htm> (last visited June 11, 2003) (describing FTP operation and noting “FTP is the backbone of the MP3 music craze”); cf. *Hearing on H.R. 2281 and H.R. 2280* at 120, 145 (testimony of Ken Wasch, Software Publishers Association) (noting piracy problems associated with FTP).

do so, but rather made it a stand-alone provision that on its face applies to *all* “service providers.” It may be that Congress in 1998 never anticipated the scope and extent of the copyright piracy that exists today, but there is no reason at all to believe that it preemptively circumscribed the application of one of the key tools it provided copyright owners to protect themselves.

III. CONGRESS WAS ENTITLED TO BALANCE, AND PROPERLY BALANCED, THE COMPETING INTERESTS OF INTERNET USERS AND COPYRIGHT OWNERS.

Among their constitutional arguments,¹¹ Verizon and its supporting *amici* contend that § 512(h) violates the First Amendment. In fact, the DMCA generally, and § 512(h) in particular, were intended by Congress to *promote* First Amendment interests.

Congress and the courts have long recognized that free expression cannot thrive without effective protection for copyrighted works. Copyright law provides an incentive to authors, composers, and artists to invest their time and efforts in the development of new works, secure in the knowledge that they will maintain control over and reap the rewards of their creative labors for a reasonable period. These rewards, in turn, benefit the public by encouraging the continued creation and dissemination of original expression. “[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas. . . . “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public

¹¹ *Amici* are in full agreement with the District Court holding on the Article III issue, as presented in the context of a § 512(h) subpoena.

welfare through the talents of authors and inventors in ‘Science and useful Arts.’”

Id. (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)). The impact this principle had on Congress is evidenced in abundance throughout the legislative history.¹² Congress recognized that without some assurances to the creative community that their own anti-piracy efforts would be given some legal teeth, society will be deprived the myriad benefits that accompany the distribution of copyrighted works in digital form.

By comparison, it is a stretch to assert that the “anonymous speech” rights of Internet users even attach in the context of a § 512(h) subpoena. As the Supreme Court’s recent decision in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) makes clear, the purpose of the “anonymous speech” doctrine is to protect those “who support causes anonymously” from “fear of economic or official retaliation,” “social ostracism,” or an unwanted intrusion into “privacy.” *Id.* at 166 (quotations omitted). No case is cited suggesting that the “anonymous speech” doctrine creates presumptions and protections in the face of a substantial allegation of infringement. Infringers, after all, do not create speech, they copy it. Verizon does not argue that the two anonymous Internet users in this case are engaged in anything remotely resembling expressive conduct. Nor could the argument be advanced with regard to the millions of ISP customers whose only conduct is allowing others access to their computer hard drives to copy valuable intellectual property owned by someone else.

¹² See, e.g., H.R. Rep. No. 105-551, pt. 2, at 23 (1998); see also 144 Cong. Rec. S4884 (daily ed. May 14, 1998) (remarks of Sen. Hatch); S. Rep. No. 105-190, at 8 (1998); 144 Cong. Rec. H7092 (daily ed. Aug. 4, 1998) (remarks of Rep. Frank).

Even so, Congress hardly gave short shrift to the interests of Internet users. Congress did not establish a regime whereby copyright owners are entitled to obtain an Internet user's identity just by demanding it. As the District Court noted, Section 512(h) contains "provisions [that] provide substantial protection for Internet users against baseless or abusive subpoenas." *Second Subpoena Decision*, 2003 U.S. Dist. LEXIS 6778, at * 51. The subpoena applicant must submit a notification that is the substantial equivalent of a copyright infringement complaint, and must also submit a declaration sworn under penalty of perjury that the sole purpose for requesting the subpoena is to identify a suspected infringer, and the information "will only be used for the purpose of protecting rights under this title [*i.e.*, Title 17]." 17 U.S.C. § 512(h)(2)(c) (2000).¹³ Furthermore, the protections of Fed. R. Civ. P. 45, apply. *Id.* § 512(h)(6). Thus, unless court clerks start accepting "sworn declarations" executed by computers rather than humans, the "specter of millions of bot-generated subpoenas," *Amici Br.* at 14, will never occur. As for the misuses Verizon predicts, the absence of any substantial evidence that this has occurred in the five years since the statute was enacted strongly suggests that the hypothesized scenarios—*e.g.*, utilizing § 512(h) to learn the identity of the quintessential "anonymous pamphleteer"—are highly unlikely. *Second Subpoena Decision*, 2003 U.S. Dist. LEXIS 6778, at * 56.

Finally, Verizon and its supporting *amici* supply a recitation of past erroneous complaints by copyright owners, but these anecdotes—small in number to begin with relative to the magnitude of the Internet piracy problem—are inapposite in the present appeal. Like the "Harry Potter" incident noted by the District Court, 2003 U.S. Dist. LEXIS 6778, at * 56 n.23,

¹³ Verizon's suggestion that these requirements "fall[] far short of meeting even the notice pleading requirements for *alleging* a case of copyright infringement," *Verizon Br.* at 33, is entirely mistaken.

these examples involve notices that were served pursuant to § 512(c)(3) requesting that an ISP remove material located on its servers. Unlike § 512(h), no user's identity is called for when this "notice-and-takedown" procedure is invoked. Verizon states that some copyright owners have served ISPs with a large number of computer-generated notices of websites engaged in infringement. But that is *precisely* what the ISPs expected when the DMCA was drafted and exactly the compromise Congress contemplated in the *quid pro quo* scheme that Congress adopted in Section 512. In urging Congress to impose on copyright owners "the task of ferreting out copyright infringement on the Internet," the ISP representative noted the availability of software (then called "spiders," now called "bots") to perform this task. *Hearing on S. 1146*, at 32; *Hearing on H.R. 2281 and 2280*, at 89 (statement of Mr. Neel of the United States Telephone Association). The large number of notices served, *see Amici Br.* at 14, n.17, is a testament to the extent of the piracy epidemic that requires the persistence and scope of the creative industries' anti-piracy efforts.

As the District Court properly recognized, the remoteness of this perceived threat and absence of evidence of the abuses Verizon foretells alone defeat this constitutional challenge. "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984); *see also Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002) ("[T]he overbreadth of a statute must not only be real, but substantial as well." (quotation omitted)). And even if anecdotal evidence could be presented, that would not be grounds for invalidating a remedial statute directed towards the millions of copyright infringements that occur each day on peer-to-peer systems; "[j]udged in relation to the statute's plainly legitimate sweep, and in light

of the extent of copyright piracy over the Internet, any impact on expressive and associational rights on the Internet is negligible.” *Second Subpoena Decision*, 2003 U.S. Dist. LEXIS 6778, at * 61–62 (internal quotation omitted). “So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, . . . the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

As an alternative to invalidating the statute altogether, the Court is urged to graft additional procedures onto Section 512(h)—specifically, a requirement that an Internet user receive advance notice of a subpoena seeking his or her identity, and an opportunity to oppose it anonymously. “The relevant question . . . is what interest the government and copyright owners have in not affording Internet users notice and an opportunity to be heard before their anonymity is destroyed pursuant to a § 512(h) subpoena.” *Amici Br.* at 17.

Of course, nothing in Section 512(h) precludes an ISP from notifying its customer that a subpoena has been served seeking his or her identity. And nothing in the statute precludes a timely, pre-compliance objection to the subpoena. On the other hand, a court-imposed series of additional procedures would inevitably result in delay, and that in turn would result in substantial damage to the copyright owners whom Congress intended this provision to aid. In three separate places Congress directed that § 512(h) subpoenas be issued and responded to “expeditiously.” 17 U.S.C. § 512(h)(3), (4), (5). As the District Court observed, the plain purpose of this requirement is to ensure that copyright owners can respond to Internet piracy before the horse leaves the barn or as quickly thereafter as possible. *First Subpoena Decision*, 240 F. Supp. 2d at

34.¹⁴ As the District Court recognized, delay in obtaining a § 512(h) subpoena could be catastrophic for a motion picture studio that discovered pirated copies on the Internet of a new release—without the ability to identify the suspected infringers immediately, “the movie could be distributed all over the world in the meantime, dramatically diminishing the value of the copyright.” *Id.* at 35 n.7. This threat was hardly unknown to Congress when it passed the statute, as it was warned repeatedly of the “viral” nature of Internet piracy. Indeed, the plain purpose of the subpoena was to allow victimized copyright owners to obtain the identifying information more quickly than would be possible through bringing a lawsuit.

Thus, whatever presumption of constitutionality attaches to the conduct of these Internet users to whom § 512(h) subpoenas are directed, no less weighty a presumption attaches to the interests of the copyright owners utilizing that statute in their anti-piracy efforts. *Amici* submit that Congress in crafting § 512(h) gave proper consideration to these respective interests, but at the end of the day, it is not a judicial function to supplant that balancing with the Court’s own. As the Supreme Court has repeatedly held, courts “are not at liberty to second-guess congressional determinations and policy judgments” regarding copyright policy, as “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, ___, 123 S. Ct. 769, 782–83, 785 (2003).¹⁵

¹⁴ In this respect, § 512(h) is similar to, although far milder in affect than, provisions in copyright law that permit the *ex parte* seizure and impoundment of infringing products and instrumentalities. See 17 U.S.C. § 503(a); Fed. R. Civ. P. 65(f); see also *Columbia Pictures Indus., Inc. v. Jasso*, 927 F. Supp. 1075, 1077 (N.D. Ill. 1996).

¹⁵ *Amici* also agree with the RIAA on the impact of a ruling on the entirety of Section 512. The structure, language, and legislative history of the “Online Copyright Infringement Liability Limitation Act” mark Title II of the DMCA as a classic example of compromise legislation, see, e.g., *First Subpoena Decision*, 240 F. Supp. 2d at 36–38. Accordingly, all of Section 512—*i.e.*, the liability limitation on ISPs as well as the subpoena provision—should properly be viewed as one provision. See, e.g., *Am. Fed. of Gov’t Employees v. Pierce*, 697 F.2d 303, 306–07 (D.C. Cir. 1982) (finding against severability in compromise legislation). The limited burden of

CONCLUSION

In the DMCA, Congress, after years of considering the competing issues involved, took on the latest threat to copyright—balancing the tremendous benefits of the Internet and digital technology against the very significant risks they pose to the intellectual property of present and future copyright owners. One cannot find in Title II the purported right to anonymity that Verizon invokes on behalf of the serial infringers at issue in this proceeding, and the others who are similarly inflicting massive injury on copyright owners. For the reasons set forth above, the Court should decline the invitation to create such a right. *Amici* respectfully submit that the Court should affirm the District Court’s Orders.

Respectfully submitted,

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Continued ...

helping copyright owners identify anonymous infringers was the “consideration” the ISP industry offered in return for the liability limitations the ISPs requested. Congress declined to act on the more one-sided bills originally proposed by the ISPs, and instead enacted the compromise statute that both provided benefits and imposed corresponding burdens on the ISPs. This compromise provision was maintained intact throughout the remainder of the legislative process, even while different provisions that became other titles of the DMCA were undergoing significant alteration. This history strongly suggests that a liability limitation statute for ISPs that lacked any corresponding obligation to assist in identifying infringers is “legislation that Congress would not have enacted” and that thus the “traditional” test for severability is not satisfied here. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987); *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

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

Undersigned counsel certifies that the attached Brief of *Amici Curiae* is printed using proportionally spaced, 12-point Times New Roman typeface and contains 6,980 words.

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I HEREBY CERTIFY that I caused true and correct copies of the foregoing
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