IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RECORDING INDUSTRY ASSOCIATION OF AMERICA'S OPPOSITION TO VERIZON INTERNET SERVICES, INC'S MOTION FOR A STAY PENDING APPEAL

The Recording Industry Association of America ("RIAA") respectfully submits this opposition to Verizon Internet Services, Inc.'s ("Verizon's") motion for a stay pending appeal. For six months, Verizon has refused to comply with a valid subpoena on the basis of legal arguments this Court has now rejected as insubstantial. There is no basis in law or equity to stay this Court's order, or Verizon's obligation to respond to DMCA subpoenas generally. Verizon's motion should be denied.

INTRODUCTION AND SUMMARY OF ARGUMENT

Verizon has not come close to satisfying the stringent requirements for a stay, as it has not shown any likelihood of success on the merits of the appeal and has utterly failed to establish any equitable justification for withholding enforcement of this Court's judgment. To the contrary, the relief Verizon seeks would do violence to the public policy Congress established in

the Digital Millennium Copyright Act ("DMCA"), and would inflict grievous harms on RIAA, its members, and thousands of other copyright holders.

On the merits, this Court's opinion makes quite clear that Verizon's procrustean reading of § 512(h) was not merely wrong, but completely without foundation. As the Court explained, "[t]here is *simply nothing* in the text of the statute that states, or even suggests, that the subpoena authority in subsection (h)" should be limited in the manner Verizon proposes. Memorandum Opinion & Order, *In re Verizon Internet Services, Inc. Subpoena Enforcement Matter*, CA 02-MS-0323, *slip op.* at 14 (D.D.C. Jan. 21, 2003) (hereinafter "Op.") (emphasis added). Verizon's stay request should be denied on that basis alone.

The equities, too, cut overwhelmingly against Verizon. Verizon has not shown any injury, much less the irreparable injury needed to justify a stay. Indeed, Verizon has conceded away its case by agreeing to disclose the name of the subscriber at issue in response to a third-party subpoena issued in a John Doe lawsuit. *See* Verizon Stay Motion at 14. Having made that concession, Verizon cannot plausibly contend it would be irreparably harmed by disclosing the same information in the more expeditious manner Congress established in the DMCA – especially since the DMCA "provide[s] greater threshold protection against issuance of an unsupported subpoena than is available in the context of a John Doe action." Op. at 28. Moreover, responding to the subpoena at issue here would burden Verizon minimally, and responding to DMCA subpoenas generally is – as this Court observed – merely part of the obligation Internet service providers must assume in exchange for the substantial "liability protection" the DMCA gives them. Op. at 16 n.6.

In sharp contrast, granting a stay would irreparably injure RIAA and its members. As this Court correctly observed,

> Verizon's position . . .would create a huge loophole in Congress's effort to prevent copyright infringement on the Internet. There is little doubt that the largest opportunity for copyright theft is through peer-to-peer ("P2P") software, as used by the alleged infringer here. . . . [U]nder Verizon's reading of the Act, a significant amount of potential copyright infringement would be shielded from the subpoena authority of the DMCA. That would, in effect, give Internet copyright infringers shelter from the long arm of the DMCA subpoena power, and allow infringement to flourish.

Op. at 18, 19 (footnote omitted). It is well established that copyright infringement constitutes irreparable injury to the copyright holder, and there is no doubt that the person whose identity RIAA seeks here is engaging in blatant and massive copyright theft. That risks massive harm. Each time the subscriber logs on to KaZaa, more than 600 copyrighted songs are made available to millions of other KaZaa users to copy illegally, and all of those illegal copies will in turn be made available on Kazaa for others to copy illegally.

But much more is at stake here than the viral propagation of this particular subscriber's infringement. Verizon has made quite clear that it will not comply with any DMCA subpoenas for subscribers using peer-to-peer software if a stay is granted, and other service providers already appear to be following suit. For all practical purposes, therefore, the stay Verizon seeks would function as an injunction against enforcing § 512(h) to obtain the identities of subscribers who steal copyrighted material using peer-to-peer software. A stay would thus create the "huge loophole" that this Court's opinion found so implausible, and would hobble the ability of all copyright owners to protect their rights in the manner Congress intended.

For these reasons, a stay would fly in the face of "Congress's express and repeated direction to make the [DMCA] subpoena process 'expeditious,'" Op. at 16, and would nullify the public interest as Congress has defined it in the DMCA. This Court recognized that requiring copyright owners to incur the "time and delay associated with filing complaints and pursuing third-party subpoenas in court would undermine the ability of copyright owners to act quickly to

prevent further infringement of their copyrights," and that such a result "is at odds with the design of Congress through the DMCA, which commands 'expeditious' issuance of and response to subpoenas under subsection (h)." Op. at 26-27. As the Supreme Court has held, a district court deciding whether to grant interim relief cannot "override Congress' policy choice, articulated in a statute." *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497-98 (2001). Rather, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." *Id.* (internal quotation marks omitted). Because, as this Court correctly held, Congress has decided that the public interest requires *all* Internet service providers to "expeditiously" disclose the identities of those subscribers who are the subject of a proper subpoena under § 512(h), "[e]veryday [the stay] remains in force the clearly expressed intent of Congress is being frustrated." *Heckler v. Turner*, 468 U.S. 1305, 1309 (1984) (Rehnquist, J., in chambers). That result is impermissible.

Since filing this action, RIAA has pressed for this matter to be resolved expeditiously, as Congress intended. In doing so, RIAA has tried to be respectful of the demands of this Court's docket and of Verizon's right to its day in court. But Verizon has had its say, and this Court rejected, in the strongest possible terms, Verizon's efforts to evade its responsibilities under § 512(h). The law should now be enforced as Congress wrote it. In exchange for the many benefits the DMCA confers on Internet service providers, Congress required them to cooperate with copyright owners to combat what this Court correctly acknowledged is an "epidemic" of copyright piracy. Op. at 19 n.19. It is high time for Verizon to do so, and to stop frustrating RIAA's legitimate efforts to halt the massive theft occurring over Verizon's network.

The stay should be denied.

ARGUMENT

A stay pending appeal is an "extraordinary remedy" that should be used sparingly, *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (*per curiam*), especially where, as here, a stay would have the effect of enjoining enforcement of an Act of Congress and allowing concededly unlawful copyright infringement to continue. *See generally Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1304 (1993) (Rehnquist, C.J., in chambers) ("Judicial power to stay an Act of Congress . . . is an awesome responsibility calling for the utmost in circumspection in its exercise . . . [especially where a court] is asked to delay the will of Congress to put its policies into effect at the time it desires.").

In all cases where a stay is sought, the Court must consider four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo*, 772 F.2d at 974 (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). As will be shown, each of the four factors cuts decisively against a stay here.

Although Verizon cannot prevail under any reading of this Circuit's stay law, at the outset it is important to correct Verizon's serious misstatement of the governing standards. Contrary to Verizon's claims, a stay is not warranted merely because a "serious legal question" is presented (a standard Verizon cannot meet in any event).[1] A movant gets the benefit of that

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[1] Verizon did not quote the entirety of the "test" articulated in *Holiday Tours*. In *Holiday Tours*, the court asked whether "plaintiff has raised questions going to the merits *so serious, substantial, difficult and doubtful*, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours*, 559 F.2d at 844 (emphasis added).

reduced standard only where the equities overwhelmingly favor a stay. *See Holiday* Tours, 559 F.2d at 844; *National Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980). Verizon is also wrong to suggest that proving irreparable harm alone would justify a stay. If the movant's case on the merits is weak, a "showing of irreparable harm is insufficient." *United States v. Judicial Watch*, No. Misc. A. 02-144, ___ F. Supp. 2d ___, 2003 WL 172125, at *2 (D.D.C. Jan. 23, 2003). Similarly, a stay is not warranted where "saving one claimant from irreparable injury, [is] at the expense of similar harm caused another," *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

I. VERIZON HAS NO LIKELIHOOD OF SUCCESS ON APPEAL.

Verizon has not shown any likelihood of success on appeal, or even that it can raise a sufficiently close and difficult question to support a stay. Verizon appears to believe that presenting a novel issue is enough to warrant a stay pending appeal. For good reason, that is not the law.[2] *See, e.g., FEC v. Committee to Elect Lyndon LaRouche*, 613 F.2d 849, 853 (D.C. Cir. 1980) (noting denial of stay pending appeal in subpoena enforcement action that presented an issue of first impression). A meritless statutory interpretation argument does not entitle a party to a stay, even if no one had ever thought to make the argument before.

[2] The cases cited by Verizon do not support its argument. One is a one-paragraph per curiam order that does not illuminate the court's analysis. *See Northwest Airlines, Inc. v. EEOC*, No. 80-2342, 1980 WL 4650, at *1 (D.C. Cir. Nov. 10, 1980). The other granted a stay where there were "serious and substantial issues," and where plaintiff *faced death* if deprived of the medical treatment to which the district court found her entitled. *See Wilson v. Group Hospitalization & Med. Servs., Inc.*, 791 F. Supp. 309, 313 (D.D.C. 1992).

A. This Court's Opinion Makes Clear That Verizon Lacks Any Legal Argument Sufficient To Justify A Stay.

Verizon portrays the legal issue here as a close question that this Court struggled to answer. But the powerful language this Court used in rejecting Verizon's argument leaves no doubt that Verizon's reading of § 512(h) is insubstantial. As the Court stated with crystalline clarity, "[n]othing in the language or structure of the statute suggests Congress intended the DMCA" to be read in the constricted manner Verizon proposes. Op. at 19. To the contrary, "[t]he statutory text of the DMCA provides clear guidance for construing the subpoena authority of subsection (h) to apply to all service providers under the Act." Op. at 8. Indeed, the statute is "unequivocal[]" on that decisive point. Op. at 9; *id.* at 12 ("the broad definition of 'service provider' . . . that is expressly applicable to subsection (h), together with the fact that Verizon indisputably provided network access to the alleged infringer, lead ineluctably to the conclusion that the subpoena authority of the DMCA applies to all service providers"). *See Wolverine Power Co. v. FERC*, 963 F.2d 446, 451 (D.C. Cir. 1992) (where statute "unambiguously uses a statutorily defined term, that definition controls"). This Court rejected "Verizon's *strained reading* of the Act, which disregards entirely the clear definitional language of subsection (k)," and stressed that "[t]here is *simply nothing* in the text of the statute that states, or even suggests, that the subpoena authority in subsection (h) applies only to those service providers described in subsection (c)," Op. at 13, 14 (emphasis added).

The Court was equally confident in its judgment that "[t]he clear purpose of the DMCA, evident in its legislative history, confirms that the scope of the subsection (h) subpoena power extends to service providers within subsection (a) as well as subsection (c)." Op. at 20. Moreover, Congress gave "express and repeated direction to make the subpoena process

'expeditious.'" *Id.* at 16 (citing 17 U.S.C. §§ 512(h)(3), (h)(4) & (h)(5)). Verizon's reading, in contrast, "makes little sense from a policy standpoint" because "Verizon has provided no sound reason why Congress would enable a copyright owner to obtain identifying information from a service provider storing the infringing material on its system, but would not enable a copyright owner to obtain identifying information from a service provider transmitting the material over its system." Op. at 17-18.

Ignoring the unambiguous conclusions in this Court's opinion, Verizon's stay motion largely recycles arguments this Court has already rejected.[3] Verizon does advance one new argument based on subsection (n) of § 512, claiming that it "provides an explicit rule of construction making clear that the section is to be construed in terms of service provider functions." Verizon Stay Motion at 5. But that argument cuts against Verizon, not for it. Section 512(n) states:

> Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this Section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability in any other such subsection.

17 U.S.C. § 512(n). As is obvious from its plain text, subsection (n) does not apply to subsection (h), and thus in no way limits that provision. The "rule of construction" in subsection (n) is expressly limited to the question "[w]hether a service provider qualifies for the limitation of

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[3] Verizon continues to argue that it cannot "take down" infringing material on a subscriber's computer. But, as this Court found, that is irrelevant to the question at hand because there is no dispute that *Verizon can identify who the infringer is* so that the copyright holder can take appropriate action directly. That is all that § 512(h) requires. Op. at 15 n.5. Only Verizon has that information and its continuing refusal to provide the information is both obstructionist and a violation of the statute. In any event, Verizon conceded that it can "disable access" to the infringing material by terminating the account. Transcript of Motions Hearing, Oct. 4, 2002, at 30 ("Hearing Tr.").

liability" in subsections (a)-(d). Subsection (n) does not purport to narrow the term "service provider," which Congress expressly defined in subsection (k). And subsection (n) makes no mention of subsection (h) – thus demonstrating, once again, that § 512(h) subpoenas apply to all service providers performing all functions.

Where "simply nothing in the text of the statute" or in its "language or structure" supports an argument, and where an argument "makes little sense from a policy standpoint," Op. at 14, 17, 19, that argument cannot possibly justify a stay. Verizon's stay request should be denied without any consideration of the equities.

B. Constitutional Considerations Do Not Remotely Support A Stay.

Verizon cannot revive its flagging fortunes by relying on constitutional claims that it pointedly declined to advance during the merits stage of this proceeding. Indeed, it is not entirely clear what Verizon intends by belatedly pressing the constitutional arguments so vigorously. As this Court noted, Verizon previously devoted "only two sentences and a footnote to [those] constitutional issues" and acknowledged that it may not have had standing to do even that. Op. at 30 n.17; *id.* at 31 n.18. If Verizon intends to raise the constitutional issues directly on appeal, its effort to justify a stay on that basis is totally inappropriate. Because Verizon did not raise these challenges directly in this Court, it cannot raise them on appeal. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (refusing to consider claim not raised by party), *aff'd* 123 S. Ct. 769 (2003); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444-45 (2d Cir. 2001) (refusing to consider constitutional challenge mentioned only briefly by party, though raised fully by amicus). And even if it had raised the issues directly, its perfunctory discussion would foreclose consideration on appeal. *See Building Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (where petitioners raised argument "in two brief

sentences, without supporting citation," court "decline[d] to address an issue that was presented in such a cursory fashion."). If instead Verizon merely contends, as it did in this Court, that constitutional considerations support reading subsection (h) narrowly, the argument is no more persuasive now than it was the last time Verizon made it. As this Court noted, Verizon's arguments do not provide a basis for preferring its reading of § 512(h) because the purported constitutional issues to which Verizon points would be equally present even if § 512(h) were read in the manner Verizon proposes. Op. at 31.

If the constitutional merits were considered, they would not help Verizon in the slightest. The First Amendment right to speak anonymously is not at issue here. Verizon and its *amici* concede – as they must – that making available for download more than 600 songs from the Internet without authorization is not protected expression under the First Amendment. Op. at 33. *See Harper & Row, Publs., Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *Eldred v. Ashcroft*, 123 S. Ct. 769, 789 (2003). There is no First Amendment right to infringe copyrights, anonymously or otherwise.

The privacy, due process, and other interests that Verizon purports to advance are likewise without merit. First, Verizon has never identified the source of the supposed privacy or other interests at stake in this case. They do not derive from the Constitution or the DMCA. Indeed, it is preposterous to suggest that there is anything "private" about the activities of the person whose identity Verizon seeks to hide. To the contrary, that person has exposed the contents of his or her computer to over a hundred million KaZaa users, for the express purpose of offering to anyone who wants them illegal copies of more than 600 copyrighted works. Second, there is no legitimate expectation of privacy in one's phone or computer records, especially where a person has opened up his or her computer to the world to break the law. *See Smith v.*

Maryland, 442 U.S. 735 (1979) (no expectation of privacy in telephone call records); *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). Moreover, in this context, the individual is not anonymous. Verizon knows exactly who this person is. Op. at 33 n.19. Third, as the Court recognized, Congress created procedural protections in the DMCA that exceed those suggested by the courts cited in Verizon's motion, *see* Verizon Stay Motion at 10 n.9; Op. at 28 n.15, and that are more extensive than those that would apply if RIAA was forced to proceed using John Doe actions. Op. at 27. Thus, even if the Court applied the very legal test that Verizon and its *amici* advocate, it still would result in enforcement of the subpoena.

The Article III argument is also meritless. As an initial matter, Verizon disclaimed making an Article III challenge. Op. at 34 n.21; Hearing Tr. at 60-61 ("I want to make it clear that we are not raising a constitutional challenge when we raise the Article III issue."). Moreover, such a challenge would undoubtedly fail. The gist of Verizon's point is that the DMCA authorizes federal courts to issue and enforce subpoenas that are not connected to any pending case. But there is nothing unusual about that. Courts routinely enforce administrative subpoenas unrelated to any pending federal case, and they indisputably have jurisdiction to do so. *See United States v. Hill*, 694 F.2d 258, 267 (D.C. Cir. 1982) (explaining that Congress' general grants of jurisdiction under, *inter alia*, 28 U.S.C. § 1331 (federal question) and § 1337(a) (laws affecting commerce), give federal courts authority to enforce administrative subpoenas, even in the absence of a specific jurisdictional grant). Here the Court is acting pursuant to an express grant of authority from Congress. *See* 17 U.S.C. § 512(h)(6); Op. at 34 n.21. Moreover,

nothing in Article III limits who can issue a subpoena. And federal courts regularly enforce subpoenas issued by administrative agencies as well as those issued by private parties in litigation – all of which are issued without prior judicial approval. Not surprisingly, an Article III challenge to the subpoena provisions of the Federal Contested Elections Act, which involve only private parties, was rejected in *Dornan v. Sanchez*, 978 F. Supp. 1315 (C.D. Cal. 1997).

II. THE EQUITIES ARE OVERWHELMINGLY AGAINST A STAY.

A. Verizon Will Suffer No Harm Absent A Stay.

Verizon has failed to show that it will suffer any harm absent a stay. As Verizon conceded, complying with the subpoena at issue here will be a *de minimis* burden. Nor can Verizon claim that responding to § 512(h) subpoenas generally will be irreparable harm. As this Court noted, "in exchange for complying with subpoenas under subsection (h), service providers receive liability protection from any copyright infringement. . . . Hence, any additional burden is offset by that protection, which, of course, is exactly the contemplation reflected in the structure of the DMCA." Op. at 16 n.6.

Most importantly, Verizon has totally undercut its claim of irreparable harm by conceding that it will comply with a subpoena in the context of a John Doe lawsuit. *See* Verizon Stay Motion at 14. Verizon would suffer precisely the same purported injury if it disclosed a subscriber's name in response to a John Doe subpoena as it would by obeying this Court's order to comply with the § 512(h) subpoena at issue here. Thus, the purported injury Verizon posits is no injury at all – much less an irreparable injury. To the contrary, the interests of Verizon and its subscribers receive far *more* protection under the DMCA than they would in a John Doe lawsuit. To obtain a DMCA subpoena, a copyright owner must have a good faith belief that the subscriber of the Internet service provider is infringing a copyright, § 512(c)(3)(A)(v) – a

protection equal to that provided by Rule 11 in the John Doe context. But, as this Court noted, the DMCA provides even greater protections. Op. at 27. A person seeking a subpoena must provide a sworn declaration that he or she will use the subpoena solely to obtain the identity of an alleged infringer and that such information will be used only for the purpose of protecting the owner's copyrights. 17 U.S.C. § 512(h)(2)(a). Thus, if an unscrupulous person were to abuse subsection (h) in one of the ways darkly hypothesized by Verizon, that person would be subject to criminal sanction. Moreover, because such abuse would almost certainly entail misrepresentations, both the subscriber and the service provider could sue the abuser for damages. 17 U.S.C. § 512(f); *see* Op. at 28 n.14.

Verizon's stay papers devote one desultory paragraph to asserting a purported loss of consumer goodwill if Verizon must comply with the subpoena at issue here. That argument has no merit. Verizon's subscribers are on clear notice that they cannot use Verizon's network to infringe copyrights and that their names will be disclosed if there is a good reason to conclude they have done so. Verizon's terms of service inform every subscriber that Verizon 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 (Attachment B); *see also* Verizon Online Terms of Service, http://www.verizon.net/policies/popups/internetaa_popup.asp (Attachment C) (explaining that subscribers are forbidden to violate copyrights and can have their accounts terminated for doing so). Moreover, shielding the identity of subscribers who act illegally is hardly the sort of goodwill-generating activity the law protects. *See Cadence Design Systems, Inc. v. Avant! Corp.*, 125 F.3d 824, 829-30 (9th Cir. 1997) (explaining that a party whose only hardship is lost profits from an activity that is likely shown to be infringing deserves little

equitable consideration) (citing *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995)); *see also Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 620-21 (7th Cir. 1982).[4]

Lacking any real irreparable harm argument, Verizon instead devotes most of its energy to arguing that compliance with this Court's order might moot Verizon's appeal. But "potential mootness" does not justify a stay pending appeal. *Fleming v. FTC*, No. 80-2328 1980 WL 1945, at *7 (D.D.C. Nov. 10, 1980), *aff'd* 670 F.2d 311 (D.C. Cir. 1982); *see also Rubin v. United States,* 524 U.S. 1301, 1301-02 (1998) (Rehnquist, C.J., in chambers) ("the applicant has not demonstrated that denying a stay and enforcing the subpoenas pending a decision on certiorari would cause irreparable harm"). *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (Harlan, C.J., in chambers). The *Fleming* court relied on the D.C. Circuit "twice refus[ing] to enjoin disclosure to state attorneys general pending appeal, despite appellants' predictions of mootness." *Id.* (citing *Interco, Inc.*, No. 79-1423 (D.C. Cir. Mar. 6, 1980) and *Martin Marietta Corp. v. FTC*, No. 79-1781, 1979 Trade Cases ¶ 62,970 (D.C. Cir. Sept. 10, 1979)).

Moreover, there is no reason to believe that denial of a stay will moot Verizon's appeal. Verizon does not concede that it will, and RIAA does not believe that it will. In an analogous context, the Supreme Court found that compliance with an administrative subpoena did not moot the underlying issues. *See Church of Scientology of Calif. v. United States*, 506 U.S. 9, 11-13 (1992) (finding disclosure of confidential tax information located on tapes to the IRS did not moot issue on appeal following denial of stay); *see also United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 422 n.6 (1983). Moreover, the present controversy is one that would qualify as

[4] Verizon cannot claim that it will suffer any competitive disadvantage if it must comply with the law. Section 512(h) does not single out Verizon. It applies equally to all internet service providers.

"capable of repetition yet evading review." *See, e.g., Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688-89 (D.C. Cir. 1996); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 173 F.3d 757, 760-61 (10th Cir. 1999).[5]

To be sure, once Verizon discloses its subscriber's name, that act cannot be undone. But that does not justify a stay. Interim relief is warranted only where disclosure would result in injury to an interest the law specifically protects – such as the interest served by the attorney-client privilege or by laws forbidding disclosure of classified information. *See* Verizon Privacy Principles (Attachment B) (explaining to Verizon subscribers that there names will be disclosed in response to valid process). No such interest is at stake here. There is no constitutional harm because, for all the reasons stated in this Court's opinion, there is no First Amendment right to engage in copyright infringement. Nor is there a statutory or common law right to avoid disclosure in this context.[6] Congress has not seen fit to make the identity of a subscriber protected or privileged in any way. Indeed, Congress directed that it be disclosed in precisely this situation, "notwithstanding any other provision of law." 17 U.S.C. § 512(h)(5). Thus, disclosing the infringer's identity is not a cognizable harm, but rather is precisely the end that Congress found to be in the public interest.

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[5] RIAA has served another Section 512(h) subpoena on Verizon and is awaiting a response. *See* Decl. of Jonathan Whitehead, Attachment A hereto.

[6] For that reason, the cases cited by Verizon are inapposite. In each, the information at issue was protected from disclosure by statutory or common law. *See* Verizon Stay Motion at 11-12 (citing *Whalen v. Roe*, 423 U.S. 1313, 1315 (1975) (doctor-patient privilege); *Irons v. FBI*, 811 F.2d 681, 683-84 (1st Cir. 1987) (FBI informant's identity); *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (alleged September 11 terrorists and their lawyers's identities); *Ashcroft v. North Jersey Media Group, Inc.*, ___ U.S. ___, 122 S. Ct. 2655 (2002) (Mem.) (national security information)). Here there is no such statutory or common law protection of the information, nor is there any basis on which to suggest that disclosure will, for example, harm national security or breach a well-established privilege.

B. A Stay Will Irreparably Harm RIAA's Members.

Whereas enforcement of this Court's order would impose no harm, a stay of that order would perpetuate the irreparable injury RIAA and its member companies are presently suffering. That is especially true because, as discussed below, Verizon and other ISPs intend to use a stay in this case as a basis for refusing to comply with *any* DMCA subpoenas where the infringing material is not stored on the ISP's servers. A stay would thus irreparably harm not only the RIAA and major record companies, but all copyright owners – including all music companies, movie studios, book publishers and photographers – whose work can be pirated over the Internet.

It is hornbook law that copyright infringement, such as that occurring here, is irreparable injury. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06[A], at 14-107 (2002); *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)); *see also Taylor Corp. v. Four Seasons Greetings*, LLC, 315 F.3d 1034, 2003 WL 118641, at *2 (8th Cir. Jan. 15, 2003); *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996).[7] Verizon has never disputed that the individual or entity it is concealing is breaking the law by engaging in blatant copyright infringement. Absent compliance by Verizon, the infringer will be able to continue making available over 600 songs to the entire world, without the authority of the copyright holders, and those copies will be propagated over and over, each time illegally. That is irreparable harm.

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[7] The availability of money damages does not rebut the presumption of irreparable harm created by plaintiff's showing of copyright infringement. *Cadence Design Systems, Inc.*, 125 F.3d at 827-28; 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06[A], at 14-107 (2002).

Verizon's suggestion that RIAA should have brought a John Doe action ignores that Congress created the DMCA subpoena mechanism for precisely this purpose – to give copyright holders the information they need to enforce their rights "expeditiously."[8] There is a vast difference between obtaining a subscriber's identity in a matter of days under the DMCA, and waiting months to obtain it in a John Doe lawsuit, as this Court specifically noted. Op. at 26-27. RIAA had every reason to believe that Verizon would comply with the subpoena, given the history of compliance with such subpoenas by other ISPs. Decl. of Frank Creighton ¶ 10 (Brief in Support of Motion to Enforce, Sept. 4, 2002) (Since enactment of the DMCA, RIAA has utilized the subpoena provision of this statute approximately 94 times to obtain the identities of alleged infringers, including in cases where the infringing material did not reside on an ISP's servers). It is Verizon, not RIAA, that seeks to change the status quo.[9]

But the harm to RIAA will be even greater because Verizon will use a stay in this case as a basis for refusing to comply with *any* DMCA subpoenas where no infringing material is stored

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[8] Contrary to Verizon's suggestion, RIAA has sought, at every turn, an expeditious resolution of this case. After RIAA served the subpoena on Verizon, it waited to enforce solely because Verizon indicated it was considering complying with the subpoena. Within four hours of learning that Verizon would not comply, RIAA filed its Motion to Enforce. RIAA simultaneously filed a Motion to Expedite Briefing, and subsequently opposed amici's request for a delayed briefing schedule. Response Brief to Amici Motion, August 26, 2002. Although RIAA was also "prepared to argue the case as soon as possible," it requested the Court decide the issue on the papers without awaiting argument in order to conclude the matter as "expeditiously as possible." RIAA's Response to Verizon's Request For Oral Argument on RIAA's Motion To Enforce the July 24, 2002 Subpoena, filed Sept. 13, 2002. In view of this procedural history, there is no basis for Verizon's suggestion that RIAA has sat on its rights.

[9] Verizon itself repeatedly told RIAA in the year 2000 that it would provide RIAA with information identifying infringers in response to subpoenas issued under § 512(h) where the infringing material did not reside on its system or network. *See* Creighton Decl. ¶ 13 and Attachment A.

on the ISP's network.[10] Copyright infringement on peer-to-peer networks is a huge and growing problem. RIAA, like other copyright owners, is trying to stem the tide of massive copyright piracy over the Internet. The vast majority of those involve infringement over peer-to-peer systems, such as KaZaa. Op. at 18. If, however, Verizon is able to use a stay as a basis for refusing to comply with any subpoenas seeking to redress such illegal conduct, it will – for the remainder of this case – have shut down the expeditious process that Congress created.

Verizon's conduct also affects whether other ISPs will respond to such subpoenas. At the time this case was argued, Earthlink had agreed to comply with an RIAA subpoena issued on July 25, 2002. Declaration of Jonathan Whitehead ¶ 4 (Attachment A). After Verizon refused to comply with its subpoena, Earthlink told RIAA that it would not comply, citing Verizon's refusal as a reason. *Id.* ¶ 7. Earthlink subsequently agreed that it would comply as soon as this Court had issued its ruling. *Id.* ¶ 9. Now Earthlink appears to have reneged and to be refusing to comply, pending a decision on Verizon's stay motion. *Id.* ¶ 10.

That experience vividly illustrates the intolerable situation that a stay will bring about. Section 512(h) is a critically important tool in the war against digital piracy. Without it, RIAA cannot expeditiously discover the identity of those stealing the copyrighted works of its member companies. If a stay is in place, RIAA will have effectively lost the expedited DMCA process

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[10] Verizon's papers amply demonstrate Verizon's intent to refuse to comply with future subpoenas if a stay is entered. Verizon's argument about the public interest and the potential burden it will face from additional subpoenas if a stay is not entered would have no purpose unless Verizon did not intend to comply with future subpoenas if a stay is entered. *See, e.g.*, Verizon Stay Motion at 16-17 (arguing for stay to avert costs of compliance with future subpoenas); Decl. of Douglas Place at 5-6 (attached to Verizon Stay Motion) (arguing that a stay will protect Verizon from having to face voluminous future subpoenas).

created by Congress to stop the massive piracy of music on the Internet.[11] Thus, the harm to RIAA from a stay – especially one that Verizon interprets as permission to ignore all DMCA subpoenas similar to the subpoena at issue in this case – far outweighs any conceivable harm to Verizon.

C. A Stay Would Violate The Public Interest As Congress Defined It In The DMCA.

The balance of harms tips so decisively against Verizon that a stay is insupportable even without considering the public interest. Adding the public interest to the balance utterly defeats Verizon's claim. The public interest indisputably favors the enforcement of congressional enactments and the cessation of blatant copyright infringement. Indeed, as the Supreme Court explained, the public interest *always* favors enforcing an Act of Congress:

> the mere fact that the District Court had discretion [to apply equitable relief] does not suggest that the District Court . . . could consider any and all factors that might relate to the public interest or the conveniences of the parties, ... On the contrary, a court sitting in equity cannot "ignore the judgment of Congress, deliberately expressed in legislation." *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937). A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." [*Tennessee Valley Authority v.*]*Hill*, 437 U.S. [153], 194 [(1978)]. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. *Id.*, at 194-195.

United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 497-98 (2001); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) ("The presumption of

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[11] As the Court noted in its opinion, copyright owners such as RIAA cannot know where information resides and thus cannot know, when it goes to the expense and burden of obtaining a subpoena, whether the subpoena involves material on an ISP's system or not. Thus, if Verizon and other ISPs do as they have indicated, they will, in each subpoena case, make a unilateral decision about whether to comply with any particular subpoena. That will mean that each subpoena will then spawn a mini-litigation about where the material resides – something wholly at odds with Congress' intent in enacting Section 512(h). Op. at 17.

constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating [the] success on the merits, but an equity to be considered . . . in balancing hardships."); *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 & n.6 (D.C. Cir. 1998) (holding that "the public's interest in the 'faithful application of the laws' outweighed its interest" in rapid movement of generic drugs, noting that "[o]ur polity would be very different indeed if the courts could decline to enforce clear laws merely because they thought them contrary to the public interest").

Moreover, it is well established that "the public interest is the interest in upholding copyright protections." *Autoskill Inc. v. Nat'l Educ. Support Sys. Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) ("[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work."). In the DMCA, Congress created an expedited mechanism to allow copyright holders to obtain the information that they need to enforce their rights. As this Court recognized, Congress repeatedly made clear that it wanted this mechanism to operate swiftly in order to stop ongoing infringement. Op. at 16 (noting "Congress's express and repeated direction to make the subpoena process "expeditious'"). Verizon's motion for a stay, as well as its intransigence in responding to this subpoena, totally undermines Congress's goals. Moreover, Verizon seeks to have the benefits of the DMCA without the burdens. Congress carefully balanced those burdens and benefits when it enacted the DMCA, and, as this Court noted, it is not for the judiciary to alter that balance. *Id.* at 35.

Verizon's responses are insubstantial. Verizon's argument about the public interest is wholly dependent on its assertion that the Court's decision somehow has changed the status quo by "extending" or "expanding" the reach of § 512(h). But, as this Court's opinion demonstrates, it is Verizon that wants to change the status quo by refusing to comply with subpoenas that ISPs have regularly complied with since the DMCA was passed. Indeed, the fact that ISPs have regularly complied with DMCA subpoenas since passage of the Act in 1998, including subpoenas such as this, simply demonstrates that Verizon's hypothetical, "impossible to measure" injury to the Internet, Verizon Stay Motion at 17, is non-existent. Moreover, as with its other arguments, Verizon's promotion of John Doe lawsuits puts the lie to its public interest argument. A John Doe action would result in the disclosure of the name of an individual. Having agreed to such disclosure, Verizon can hardly argue that enforcement of the subpoena here violates the public interest. Indeed, Verizon's argument on this score is based almost exclusively on the wholly improper declaration of Peter Swire and some newspaper editorials – sources that should have no weight in this Court.[12]

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[12] The Swire declaration, which contains self-serving conclusions of law, speculation as to Congress' intent, and unsupported conclusory factual allegations, is wholly improper and is the subject of the separate Motion to Strike filed by RIAA. *See A&M Records, Inc. v. Napster, Inc.*, 2000 U.S. Dist. Lexis 20688 (N.D. Ca. Aug. 10, 2000) (striking declaration of law professor that "merely offers a combination of legal opinion and editorial comment on Internet policy.") Even if the Court does not strike it, it should be disregarded. *See, e.g., BellSouth Telecomms. Inc. v. W.R. Grace & Co. - Connecticut*, 77 F.3d 603, 615 (2d Cir. 1996); *Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998); *Topps Chewing Gum, Inc. v. Imperial Toy Corp.*, 686 F. Supp. 402, 409 (E.D.N.Y. 1988), *aff'd*, 895 F.2d 1410 (2d Cir. 1989) (unpublished table decision). Moreover, Mr. Swire's speculation as to Congress' intent flies in the face of this Court's conclusions, as well as a recent statement by an influential member of Congress who, in contrast to Mr. Swire, actually was involved in considering the DMCA. *See* Transcript of *Oversight Hearing on Piracy and Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, House Committee on the Judiciary*, 107th Cong. at 127 (Sept. 26, 2002) (Statement of Congressman Goodlatte) (Attachment D) (referring to this lawsuit, "when Congress passed the DMCA, we intended that provision to

Finally, Verizon's intention to transform a stay by this Court into the equivalent of an injunction against a federal statute would wholly vitiate the will of Congress. Courts often allow even statutes that have been struck down as unconstitutional to continue in force pending appeal. *See, e.g.*, *Schweiker v. McClure*, 452 U.S. 1301 (1981) (Rehnquist, J., in chambers) (staying injunction invalidating congressional statute); *Walters*, 468 U.S. at 1324 (same). To effectively suspend the application of an Act of Congress absent a judicial decree of unconstitutionality is, quite simply, unprecedented.

For this reason, as well as the others discussed above, Verizon has not and cannot meet its burden. Thus, Verizon's motion should be denied.

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provide quick access to this information, so they can go after the infringers directly and take the ISP out of the middle of the process.").

CONCLUSION

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

Respectfully submitted,

By: _____

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Dated: February 7, 2003

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. VERIZON INTERNET SERVICES, INC.	Miscellaneous Action Case No. 1:02MS00323 Honorable John D. Bates

PROPOSED ORDER DENYING VERIZON'S MOTION FOR STAY PENDING APPEAL

IT IS HEREBY ORDERED, that Verizon Internet Servies, Inc's Motion For a Stay Pending Appeal is hereby DENIED.

Dated Feb. _____, 2003

The Honorable Judge John Bates

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

Pursuant to Local Civil Rule of Procedure 7.1(k), listed below are the names and addresses of all attorneys entitled to be notified of the proposed order's entry.

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CERTIFICATE OF SERVICE

I certify that on Friday, February 7, 2003, I caused RIAA's Opposition to Verizon Internet Services, Inc.'s Motion For a Stay Pending Appeal and Proposed Order to be delivered via U.S. Mail, along with courtesy copies via electronic transmission, to the following recipients:

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