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
1330 Connecticut Avenue, N.W. Ste. 300
Washington, D.C. 20036

v.

VERIZON INTERNET SERVICES, INC.
1880 Campus Commons Drive
Reston, VA 20191

Miscellaneous Action
Case No. 1:02MS00323

MOTION TO ENFORCE JULY 24, 2002 SUBPOENA ISSUED BY THIS COURT TO VERIZON INTERNET SERVICES, INC. AND MEMORANDUM IN SUPPORT THEREOF

The Recording Industry Association of America ("RIAA"), as authorized representative for its member companies, respectfully submits this motion to enforce the subpoena issued to Verizon Internet Services, Inc. ("Verizon") on July 24, 2002 by this Court under 17 U.S.C. § 512(h) of the Digital Millennium Copyright Act ("DMCA"). The subpoena seeks limited information relating to a computer connected to the Verizon network that is a hub for significant music piracy. Verizon is the only entity that can identify the infringer behind this computer.

The special subpoena authority of the DMCA, 17 U.S.C. § 512(h), imposes a mandatory, unconditional duty on Internet service providers such as Verizon to provide "expeditiously," upon

receipt of a subpoena, information sufficient to identify users of their networks who are pirating copyrighted works. RIAA complied with all of the requirements of the statute and obtained a validly issued subpoena from this Court. Verizon has refused to comply. Thus, RIAA requests that this Court enter an order compelling Verizon to comply. Given the urgent need of RIAA's copyright holders to stop the piracy of their intellectual property, RIAA further requests, by a separate Motion to Expedite, that the Court expedite briefing and decide the issue as soon as possible.

LEGAL FRAMEWORK

This is a straightforward subpoena enforcement action. The Digital Millennium Copyright Act of 1998 ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860, creates a special subpoena authority that requires "service providers," such as Verizon, to respond to subpoenas issued by United States District Courts at the request of copyright owners seeking information sufficient to identify those committing copyright infringement. *See* 17 U.S.C. § 512(h). The terms of the statute and its requirements are clear and require little further analysis. Because, however, Verizon seeks to graft conditions and limitations on the subpoena authority that do not appear in the text of Section 512(h) and are inconsistent with the purpose of the DMCA, additional background on the statutory scheme may be of assistance to the Court.

Congress enacted the DMCA because the Internet has revolutionized the way that copyrighted works are disseminated, both lawfully and unlawfully. Virtually any copyrighted work can now be put in a digital format, and thus can be copied and distributed worldwide instantaneously. This can be a great benefit, but also leaves copyrighted works susceptible to "massive piracy." S. Rep. No. 105-190, at 8 (1998). Congress was concerned that, unless copyright owners have the

ability to identify and pursue those who infringe their copyrights in the digital world, they would "hesitate to make their works readily available on the Internet." *Id.*

Title II of the DMCA seeks to ensure that copyright owners are able to protect their intellectual property and to give them enhanced ability to quickly and effectively deal with copyright infringement on the Internet. It does so in two ways:

Subpoena Authority under Section 512(h). The DMCA creates a special subpoena provision that allows copyright owners to obtain information quickly concerning the identity of those who are infringing their copyrights on the Internet. Pursuant to 17 U.S.C. § 512(h), District Courts are authorized, at the request of copyright owners, to issue subpoenas to Internet or on-line service providers ("service providers") where the copyright owner has a good faith belief that infringement is occurring and needs additional information to identify the alleged infringer. § 512(h). The logic behind this provision is obvious. On the Internet, identities can be hidden. Often the service provider through whom an individual engaging in infringement obtains network access is the only entity that can identify the individual. Without this critical information, the copyright owner cannot deal directly with the person trafficking in pirated works.

Under Section 512(h), "[a] copyright owner or person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection." § 512 (h)(1). To obtain a subpoena under Section 512(h), the copyright owner or its agent must supply a "sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title." § 512(h)(2)(C). The copyright owner must also file "a copy of the notification described in

subsection [512] (c)(3)(A)." § 512(h)(1)(H). Subsection (c)(3)(A) is a freestanding provision of the DMCA that is referenced in several different subsections of the statute. It provides the elements of an effective notification to a service provider that its network is being used by others for copyright infringement and triggers the service provider's obligations under the various subsections of the statute. The notice provisions require, among other things, that the copyright owner, or its agent, identify the material being infringed, attest to its ownership of the material, state its good faith belief that the complained-of use is unauthorized, and provide information sufficient to allow the service provider to locate the material and, if appropriate, remove or disable access to the material. § 512(c)(3)(A). By substantially complying with the elements of subsection (c)(3)(A), the copyright owner or its agent has established the bona fides of its ownership and claim of infringement. *See* § 512(c)(2)(B)(i).

Upon receipt of the appropriate documentation, the DMCA requires that the clerk issue the subpoena "expeditiously." § 512(h)(4) ("If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider."). Once issued, the subpoena compels the service provider to disclose "information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider." § 512(h)(3).

To achieve its purpose, Section 512(h) subpoenas must bear fruit quickly. A copyright holder has no recourse against a copyright pirate if it cannot identify and locate the individual. A pirate who is able to avoid identification can continue infringing, thus impairing the value of the copyright

holder's intellectual property. Given the nature of the Internet, an individual user can cause literally tens of thousands of infringing copies to be distributed in a single day. Thus, Congress emphasized the need for expedition. Section 512(h) makes clear that the District Court clerk shall "expeditiously issue" the requested subpoena if all of the requirements are met and that, upon receipt, the service provider "shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification." § 512(h)(5). The legislative history of Section 512(h) describes issuance of the subpoena as a "ministerial" act, and emphasizes that it must be "performed quickly for this provision to have its intended effect." S. Rep. 105-190 at 51.

The Safe Harbor Provisions. In addition to the subpoena provisions under Section 512(h), Title II of the DMCA "preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. 105-190 at 40. To that end, Congress established a variety of safe harbors for service providers to limit their own liability for copyright infringement "for 'passive,' automatic actions in which the service provider's system engages through a technological process initiated by another without the knowledge of the service provider." *ALS Scan, Inc. v. Remarq Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001).[1]

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[1]Each safe harbor applies narrowly to situations where service providers are engaging in specific functions, such as routing or transmitting digital network communications (subsection (a)); system caching (subsection (b)); information storing (subsection (c)); and providing search tools for information on the Internet (subsection (d)). S. Rep. 105-190 at 19-20. When engaging in one of those specific functions and complying with the precise requirements of the relevant subsection, the service provider cannot be held liable (as a result of engaging in the specified

The safe harbor provisions do not alter the substantive rules of copyright infringement or protect infringers who would use service providers' networks to traffic in pirated material. To the contrary, the safe harbor provisions are designed to induce service providers to work together with copyright owners to identify infringers by providing some measure of certainty to innocent service providers that they will not be held financially responsible for infringement that occurs over their networks, so long as they comply with the specific conditions of the safe harbors. In order to fall within several of the safe harbors, service providers must assist copyright owners by, for example, removing or disabling access to infringing material once they are notified of copyright infringement.[2] *See, e.g.* § 512(b)(2)(E); § 512(c)(1)(C); § 512(d)(3). To qualify for any of the safe harbors, a service provider must also have in place a policy "for the termination in appropriate circumstances of subscribers and account holders of the service providers' system or network who are repeat infringers." 17 U.S.C. § 512(i)(1)(A). But the "DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe." *ALS Scan*, 239 F.3d at 625.

The scope of the various DMCA safe harbors is not at issue in this case – only the subpoena authority in Section 512(h) is relevant. The safe harbor provisions, however, work together with the subpoena authority in Section 512(h) and all of the provisions of the DMCA to promote the development of the Internet and to ensure effective protection for intellectual property in the digital

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function) for monetary relief for copyright infringement and can be subjected to injunctive relief only as specified in Section 512(j).

[2]Service providers must comply with their obligations under several of the safe harbors any time they have actual knowledge that infringement is occurring, regardless of whether they have received a formal notification from the copyright owner. *See, e.g.*, § 512(d)(1)(A).

world. Nothing in the DMCA creates a shield for those directly involved in disseminating pirated works or other violations of the copyright laws. That was not who Congress sought to protect; indeed, the entirety of the DMCA is designed to ensure that such infringers can be identified and forced to face appropriate penalties.

THE VERIZON SUBPOENA

On July 24, 2002, RIAA obtained a subpoena, issued by this Court pursuant to 17 U.S.C. § 512(h), ordering Verizon to disclose information sufficient to permit identification of an alleged copyright infringer operating from a specified IP (Internet Protocol) address. *See* July 24, 2002, Subpoena to Verizon Internet Service, Inc. ("Subpoena") (Attachment A). The Subpoena requests only information sufficient to identify the individual subscriber who is trafficking in pirated material – that is, the subscriber's name, address, and telephone number. RIAA delivered the Subpoena to Verizon in conjunction with the documentation required by § 512(h)(2)(C), including a letter notifying Verizon that RIAA believed a computer on Verizon's internet service was distributing to the public for download unauthorized copies of hundreds of copyrighted sound recordings owned by RIAA member companies. *See* Letter from Jonathan Whitehead, Vice President and Anti-Piracy Counsel of RIAA, to Lauren K. Crowder, Contracts Manager of Verizon Internet Services, Inc., of July 24, 2002, at 1 ("Notification Letter") (Attachment B). The letter specified the computer's IP address and attached documentation including a list of the recordings available for download from that computer. RIAA also provided a declaration indicating the basis for the issuance of the Subpoena and a statement, under penalty of perjury, that the information obtained from Verizon would only be used for "protecting the [intellectual property] rights" of RIAA's members. *See*

Declaration of Jonathan Whitehead at 1 ("Whitehead Declaration") (Attachment C). RIAA requested Verizon's "immediate assistance in stopping this unauthorized activity." *Id.*

Verizon refused to comply with the Subpoena. *See* Letter sent by Thomas M. Dailey, General Counsel of Verizon Internet Services Inc., to Jonathan Whitehead of Aug. 6, 2002 ("Verizon Letter") (Attachment D). Verizon asserted that because "[n]o files of the Customer are hosted, stored or cached by [Verizon]," it need not respond to the Subpoena. *Id.* at 2. RIAA responded by letter, explaining that Verizon's arguments provided no basis for ignoring a subpoena issued under Section 512(h). *See* Letter from Cary Sherman, General Counsel of RIAA, to Thomas M. Dailey of Aug. 9, 2002 (Attachment E). Subsequent conversations between officials at RIAA and Verizon have failed to resolve this matter, and RIAA has informed Verizon that it would be filing this motion.

Accordingly, RIAA invokes this Court's jurisdiction pursuant to 17 U.S.C. § 512(h)(6) and Fed. R. Civ. P. 45(c)(2)(B) to obtain an order to compel the production of the subpoenaed information within 24 hours of the issuance of an order from this Court.

ARGUMENT

Section 512(h) of the Digital Millennium Copyright Act is crystal clear. Where a service provider receives a subpoena validly issued under Section 512(h), "the service provider *shall* expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law." § 512(h)(5) (emphasis added). The Subpoena at issue in this case was validly issued by this Court, and RIAA complied with all of the requirements of the statute.

Verizon has not raised any issue with respect to the form or validity of the Subpoena or alleged that compliance with the Subpoena is burdensome. Rather, Verizon has argued that it can *never* be required to provide information in a case such as this because, in its view, the DMCA does not allow a subpoena to be issued unless the Verizon subscriber committing copyright infringement *using* Verizon's network is actually storing illegal material *on* servers owned or operated by Verizon.

That claim ignores the plain language of the statute, as well as its legislative history and purpose, and would gut an important tool that Congress gave to copyright owners to protect their intellectual property. Indeed, Verizon's response to the Subpoena confuses two totally different things: its duty as a service provider to remove or disable access to infringing material upon notice (which is required in order to maintain limitations on its own liability under the safe harbor provisions) and its obligation to respond to a validly issued subpoena (under subsection (h)) to provide the information that copyright owners need to address infringement being committed by others. The latter obligation is the only one at issue here. It is straightforward, and entirely independent of whether Verizon is eligible for a safe harbor for itself. Upon receipt of a subpoena under Section 512(h), the service provider must provide the identifying information. This Court should compel Verizon to do exactly that.

I. THE DMCA REQUIRES THAT INTERNET SERVICE PROVIDERS SUCH AS VERIZON EXPEDITIOUSLY PRODUCE THE INFORMATION REQUESTED BY A SUBPOENA ISSUED UNDER SECTION 512(h).

Statutory analysis begins with the text. *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) (citations omitted); *United States v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002). "Where the language is clear, that is the end of judicial inquiry in all but the most

extraordinary circumstances." *Braxtonbrown-Smith*, 278 F.3d at 1352 (quotation marks and citation omitted). The plain language of the DMCA (reinforced by its legislative history and purpose) compels Verizon to produce the information requested in this Court's Subpoena.

A. Section 512(h) of the DMCA Applies to Service Providers, Like Verizon.

Section 512(h) of the DMCA provides that a copyright owner may ask any district court "to issue a subpoena *to a service provider* for identification of an alleged infringer in accordance with this subsection." § 512(h)(1) (emphasis added). A "service provider," for purposes of § 512(h), is broadly defined as "a provider of online services or network access, or the operator of facilities therefor." § 512(k)(1)(B); *see also ALS Scan*, 239 F.3d at 623 ("The Act defines a service provider broadly."); H. Rep. No. 105-551(II) at 54 (1998) (definition of "service provider" includes those who "provide Internet access, e-mail," etc.). Section 512(h) applies to all "service providers" regardless of what functions the service provider may be performing. Here, Verizon concedes that it is a "service provider." Verizon Letter at 2.[3] Verizon is unquestionably providing "network access" to the subscriber referenced in the Subpoena. It thus is subject to the subpoena provisions of Section 512(h).

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[3]The term "service provider" is defined in 17 U.S.C. § 512(k). Section 512(k) defines "service provider" in two ways: one definition which is applicable only to Section 512(a)'s safe harbor, *see* 17 U.S.C. § 512(k)(1)(A), and a broader definition which is applicable to the remainder of Section 512, including Section 512(h), *see* 17 U.S.C. § 512(k)(1)(B). The latter definition expressly encompasses all entities that fall within the former. *See* 17 U.S.C. § 512(k)(1)(B); H. Rep. No. 105-551(II) at 54. In seeking to claim it falls within the safe harbor defined in § 512(a), Verizon necessarily must admit it is a "service provider." Verizon Letter at 2. That concession means that it is a "service provider" for purposes of the rest of Section 512, including the subpoena provisions of Section 512(h).

B. The DMCA's Procedures For Issuing A Subpoena To Verizon Were Met In This Case.

Under the DMCA, a copyright owner, or its agent, must provide three things in order for a subpoena to issue: a notification described in subsection (c)(3)(A), a proposed subpoena in the proper form, and "a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title." § 512(h)(2)(c). RIAA met all three requirements.

RIAA provided a proposed subpoena in the proper form, which was issued by the District Court clerk, as well as a declaration addressing the issues discussed in the statute. *See* Attachments A & C. RIAA also provided a notification including all of the elements of § 512(c)(3)(A). *See* Attachment B. RIAA's notification included, among other things, a list of literally hundreds of infringing works that were being offered for download by Verizon's subscriber and the identification of the specific location from which the alleged infringer was operating – an IP address of a Verizon subscriber. From that IP address, the alleged infringer is using access obtained through Verizon's network to send and receive unauthorized copies of copyrighted material. The information RIAA provided tells Verizon exactly where to find this computer and identifies precisely where the infringing material is located.[4] Verizon needs no additional information to identify this subscriber.

The Subpoena seeks only a minimum amount of information. It merely requires that Verizon provide identifying information, such as a name, address, and telephone number. Verizon can comply with the subpoena in a matter of seconds. But unless it does so, RIAA members will have

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[4]RIAA also provided the date and time of its evidence of infringing activity so that there can be no mistake as to who the infringer actually is (such as, if a different user subsequently obtained the IP address that had been used for infringement).

no ability to seek redress for the infringing activity that Verizon does not – and cannot – deny is occurring over its network.

C. The DMCA Requires Verizon Expeditiously To Produce The Information Requested In The Subpoena.

Upon receipt of a subpoena and the notification under subsection (c)(3)(A), disclosure of the requested information is not optional. Under the DMCA, the service provider "*shall expeditiously disclose* to the copyright owner or person authorized by the copyright owner the information required by the subpoena, *notwithstanding any other provision of law* and *regardless of whether the service provider responds to the notification.*" § 512(h)(5) (emphasis added). The words of the statute could not be more explicit. Thus, regardless of whether Verizon could itself be liable for copyright infringement or regardless of whether Verizon must take *other* steps in order to maintain the limitations on liability in the safe harbor provisions of the DMCA, Verizon must nonetheless comply with the Subpoena. Moreover, pursuant to Rule 45(c)(2)(B) and Section 512(h)(6), this Court has the authority to enforce the terms of the Subpoena and compel Verizon to produce the requested information. Compliance with the subpoena will require only a simple and ministerial act by Verizon, putting virtually no burden on them. The Court should order Verizon to comply immediately in order to allow the rightful copyright owners the opportunity to bring a halt to the unlawful dissemination of their copyrighted works.

II. NONE OF THE ARGUMENTS RAISED BY VERIZON JUSTIFIES REFUSING TO COMPLY WITH A SUBPOENA VALIDLY ISSUED BY THIS COURT.

In its letter to RIAA, Verizon raises a number of issues that it claims justify ignoring a validly issued subpoena. *See* Attachment D. All of Verizon's arguments stem from its interpretation of the various safe harbor provisions in the DMCA, but those provisions – all of which relate to Verizon's own liability for copyright infringement – have nothing to do with Verizon's obligation to respond to a subpoena issued pursuant to Section 512(h). Moreover, all of Verizon's arguments lack merit.

Limitation of Liability under Section 512(a). Verizon argues that, because it believes that it qualifies for a safe harbor under Section 512(a),[5] it is entitled to ignore a subpoena issued under Section 512(h). Verizon Letter at 2. That claim finds no support in the text of the statute and makes no sense. A service provider is plainly obligated to comply with a subpoena even if it can validly claim the protection of a DMCA safe harbor.

Whether a service provider qualifies for the safe harbor in Section 512(a) has nothing to do with whether a provider must comply with a subpoena issued by a court under Section 512(h). Those provisions are completely unrelated. Section 512(a), in conjunction with §§ 512(b) – (d), defines the *activities* or *functions of* service providers which may qualify such service providers for potential safe harbors from being held "liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, *for infringement of copyright*." § 512(a); S Rep. 105-190 at 55. Section 512(a) thus only protects a service provider from liability for its own

[5]RIAA takes issue with Verizon's claim that it falls within the terms of the safe harbor defined in Section 512(a). That issue, however, is for another day because it is wholly irrelevant to Verizon's obligation to respond to a subpoena issued under Section 512(h).

actions that may constitute copyright infringement, *not from responding to a valid subpoena seeking information about another party's alleged copyright infringement.*

In contrast, Section 512(h) applies to all service providers, whether or not they fall within the safe harbor provisions of subsection (a)-(d), and regardless of what functions the service provider is performing. The safe harbor provisions of subsections (a)-(d) and the subpoena authority of subsection (h) each create tools to combat piracy – the former by encouraging service providers to cooperate with copyright owners by disabling access to infringing material in exchange for receiving liability protection and the latter by giving copyright owners the ability to uncover information from service providers that will allow them to pursue appropriate action against direct infringers. To read the safe harbors as restricting the scope of the subpoena provision would make hash of the statutory design.

Subsection 512(c)(3)(A) Notice Provision. Verizon also contends that it need not comply with Section 512(h) because that provision is limited to situations in which a service provider is storing infringing material on its network. In Verizon's view, where – as is believed to be the case here – the alleged infringer maintains files on his or her own computer, rather than on servers owned and controlled by the service provider, and uses the service provider's network to distribute the infringing material, a subpoena under Section 512(h) can *never* issue. Verizon Letter at 2. That argument – which seeks to transform the notice provisions of subsection (c)(3)(A) into a substantive limitation that would eviscerate the subpoena authority created under Section 512(h) – has no basis in the statutory text and is antithetical to the policies Congress sought to advance in the DMCA.

As an initial matter, Verizon erroneously assumes that a copyright owner can determine whether the infringing material that is being offered for download resides on a computer or server owned and operated by Verizon. *See* Verizon Letter at 2-3. But only Verizon knows what computer and what subscriber is at the IP address that is offering unauthorized material for download; indeed, only Verizon knows whether Verizon itself owns or controls that computer. RIAA knows only the unique IP address of the computer; it provided that information in its Notification Letter to Verizon. Verizon's suggestion that RIAA should provide more specific information ignores the fact that only Verizon is in possession of the information that is sought by the Subpoena and that it unilaterally claims it should not have to provide.

More importantly, however, the text of the DMCA refutes Verizon's statutory arguments. Section 512(h) does not limit subpoenas only to situations where the allegedly infringing material physically resides on the service providers' network. Section 512(h) authorizes subpoenas "for identification of an alleged infringer" and says nothing about where the alleged infringing material resides. § 512(h)(1). Indeed, disclosure is mandatory "notwithstanding any other provision of law." § 512(h)(5). This broad reading is confirmed by the legislative history, which makes clear that Section 512(h) was designed to permit "identification of alleged infringers who are users of a service providers' system or network." H. Rep. No. 105-551 (II) at 60. That is exactly what RIAA seeks here.

Further, nothing in subsection 512(c)(3)(A) suggests that the notification provisions create substantive limitations on the scope of any other section. Congress explained that subsection (c)(3)(A) establishes "procedures," not substantive limitations. H. Rep. No. 105-551 (II) at 55. The contours of the safe harbors and any limitations on the subpoena authority are to be found in those

subsections, not in the notification provisions to which they all refer. Moreover, Congress made clear that strict compliance with the notification provisions was not required; substantial compliance was sufficient to trigger all of the service providers' obligations under the DMCA. *See* § 512(c)(3)(A). Congress expected service providers and copyright owners "will comply with the functional requirements of the notification provisions." H. Rep. No. 105-551 (II) at 56. So long as copyright owners furnish information that would assist service providers "in understanding the nature and scope of the infringement" and in taking appropriate action, such as identifying the infringing user or disabling access to infringing material, the copyright owner has fulfilled its obligations. *Id.*

Finally, the two snippets of statutory language that Verizon cites for its claim do not remotely support its argument. Verizon suggests that subsection 512(c)(3)(A) applies only to situations where the alleged infringement involves "material that resides on a system or network *controlled or operated by or for [a] service provider.*" Verizon Letter at 2 (emphasis and bracket in original). That language, quoted and emphasized in Verizon's letter, does *not* appear in subsection 512(c)(3)(A) or in Section 512(h). Rather, that language appears in subsection 512(c)(1) and defines the terms of one of the safe harbor provisions. Thus unmasked, Verizon's argument is truly bizarre – in essence, Verizon argues that because both Section 512(h) and subsection 512(c)(1) reference the notification provisions of (c)(3)(A), the limitations of subsection 512(c)(1) should be read into Section 512(h). That makes no sense.

Verizon's attempt to graft one of the limitations of the safe harbor provisions onto the subpoena authority ignores that the DMCA creates separate and distinct obligations on service providers – they must respond to valid subpoenas and, if they wish to remain within the safe harbor

provisions, they must comply with the specific requirements of those subsections. The freestanding notification provisions in subsection (c)(3)(A) are referenced by all of the relevant subsections. That notification pursuant to subsection (c)(3)(A) may *also* require the service provider to take some action in order to stay within a safe harbor (such as by disabling access to infringing material) does not affect the provider's obligation to respond to a subpoena. If there was any doubt, Section 512(h) makes clear that a service provider's obligation to comply with a subpoena is unrelated to any obligations it might or might not have when it receives a notification under subsection 512(c)(3)(A). *See* § 512(h)(5) (service provider shall disclose "regardless of whether the service provider responds to the notification").

Verizon also seeks to dress up the same point in different clothing by claiming that, because the infringing material does not reside on its network, it cannot "locate" the material; because subsection (c)(3)(A) requires copyright owners to provide sufficient information to allow the infringing material to be located so that it can be removed, Verizon claims the notice is "defective." Verizon Letter at 3.

As an initial matter, Verizon's claim that it cannot locate the material rings hollow. Subsection (c)(3)(A)(iii) makes clear that service providers only need to receive sufficient information to allow them to disable access to the material. *See* § 512(c)(3)(A)(iii) (requiring notice of "the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or *access to which is to be disabled*, and information reasonably sufficient to permit the service provider to locate the material") (emphasis added). That Verizon unquestionably can do, once a copyright owner provides – as RIAA has – the IP address of the infringer.

Moreover, the DMCA expressly provides that subsection 512(c)(3)(A)'s notification provisions apply in myriad situations, including those in which the infringing material does *not* reside on the service provider's network. Subsection 512(c)(3)(A) provides the general elements of notice that are required for three of the safe harbors – subsections (b), (c), and (d), as well as the safe harbor for educational institutions (subsection (g)) – and for the subpoena provision of Section 512(h). Under subsection (d), a copyright owner may give notice pursuant to subsection (c)(3)(A) where infringing material is *not* on the provider's network but is accessible through use of an information location tool or search engine. *See* § 512(d)(3). Similarly, subsection (c)(3)(A) notice is applicable where the copyright owner is notifying a service provider that it has or is caching infringing material, whether or not that material is still being stored by the provider. *See* § 512(b)(2)(E). The drafters of the DMCA would not have referenced the notification provisions of subsection (c)(3) in each of these subsections (as well as the subpoena provision found at Section 512(h)) if they were not a freestanding provision defining the elements of effective notice, applying with equal force to situations where the service provider was *not* storing infringing files (as alleged necessary by Verizon).[6]

[6]Verizon's letter raises one additional argument that is not an objection to the subpoena. *See* Verizon Letter at 3, ¶¶ 4-5. Verizon argues that it is not required to terminate the subscriber's access to the Internet under Section 512(i). *Id.* at 3. Once again, whether or not that obligation exists is irrelevant to whether Verizon is obliged to reveal to the copyright owner the name of a person pursuant to a valid subpoena.

CONCLUSION

For the foregoing reasons, RIAA respectfully requests that the Court enter an order requiring Verizon to comply with the subpoena issued by this Court on July 24, 2002, and grant such other relief as is just and appropriate.

Respectfully submitted,

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