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, NW Suite 300 Washington, DC 20036 v. VERIZON INTERNET SERVICES, INC. 1880 Campus Commons Drive Reston, Virginia 20191	Miscellaneous Action No. 1:03MS00040 (JDB)

VERIZON INTERNET SERVICES INC.'S BRIEF IN SUPPORT OF ITS MOTION TO QUASH FEBRUARY 4, 2003 SUBPOENA AND ADDRESSING QUESTIONS PROPOUNDED BY THE COURT ON MARCH 7, 2003

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This proceeding involves the second subpoena that the Recording Industry Association of America, Inc. ("RIAA") has served upon Verizon Internet Services Inc. ("Verizon") under authority purportedly emanating from Section 512(h) of the Digital Millennium Copyright Act of 1998 ("DMCA"), 17 U.S.C. § 512(h), seeking production of the name, address, and telephone number of a subscriber using the conduit functions of Verizon's service. In the first such proceeding, this Court concluded that RIAA had the better of the statutory arguments and ordered that Verizon comply with the subpoena. *In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter*, No. 1:02MS00323 (D.D.C. Jan. 21, 2003) ("*First Subpoena Order*"). Although acknowledging that both Verizon and its supporting *amici* had raised First Amendment and Article III issues in their briefs, *id.* at 30-31, the Court declined to resolve those issues "[a]bsent a clear challenge by Verizon, and full briefing and development by the parties." *Id.* at 34-35. That clear challenge is now properly before this Court.[1]

Verizon's position in this second subpoena action is clear and unequivocal. First, Article III does not authorize federal courts to issue binding judicial process outside a pending case or controversy. The federal courts are neutral arbiters of claims brought to them by adversary

[1] RIAA concedes that Verizon may properly raise the Article III challenge in this second subpoena proceeding. *See* RIAA Opposition to Motion to Quash February 4, 2003 Subpoena at 10, No. 1:03MS00040 (D.D.C. filed March 4, 2003) ("RIAA Opp.") ("[H]istory does not preclude Verizon from making [its Article III] claims now."). Although it initially expressed uncertainty as to Verizon's ability to raise its First Amendment arguments in this second subpoena proceeding, RIAA Opp. at 12, RIAA has apparently waived that argument in subsequent pleadings. *See* RIAA's Response to Verizon's Motion to Consolidate at 2, No. 1:03MS00040 (D.D.C. filed March 7, 2003) ("Verizon has the right and has exercised that right to raise those issues [Article III and First Amendment] as the basis for its motion to quash in the second subpoena action."). In any event, the doctrine of issue preclusion is inapplicable where it is unclear whether the prior decision actually passed on the precise point of law at issue. *See United States v. Moser*, 266 U.S. 236 (1924); *Pelham Hall Co. v. Hassett*, 147 F.2d 63, 67 (1st Cir. 1945). Even as to the statutory issues, which were fully litigated and decided by this Court, it is far from clear that issue preclusion applies in this posture. *See* Restatement (Second) of Judgments § 13, cmt. f. ("The pendency of . . . an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. *It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded*." (emphasis added)).

parties—they cannot be assigned the role of private investigator for one side in a dispute that likely will never see the inside of a federal courtroom. From the early days of the Republic, the Supreme Court has consistently rejected attempts to foist non-judicial investigative or accusatory duties on Article III courts. Because the subpoena at issue in this proceeding was issued outside of any pending case or controversy, it must be quashed.

Second, Section 512(h) violates the First Amendment, because it does not provide adequate procedures for the protection of the expressive and associational interests of Internet users and because it is substantially overbroad in its potential applications. The Supreme Court has never countenanced a procedure whereby expressive and associational rights may be compromised based only upon an *ex parte* filing that does not even allege the existence of a civil cause of action. The First Amendment rights of every Internet user in the country are made to dangle by the thread of the "good faith" of anyone claiming to be the authorized representative of a copyright owner. Because both mistakes and abuse are inevitable, and because there are clearly alternative means to achieve the statute's purpose without invading First Amendment rights, the statute as interpreted by RIAA violates the First Amendment. In the alternative, the Court should adopt a narrowing construction of Section 512(h) that limits its application to material that is stored on the systems or network of the service provider as described in Section 512(c). In either case, the subpoena at issue in this proceeding is invalid.

Third, should this Court disagree with Verizon on these issues, it should enter a stay pending appeal in both these subpoena actions pending final disposition of these matters by the Court of Appeals. There can be no doubt that the Article III and First Amendment questions presented by RIAA's interpretation and use of this novel statutory provision are substantial. In addition, the balance of harms now tips decidedly in Verizon's favor—indeed RIAA cannot point to *any* cognizable harm from a stay in these two subpoena proceedings. Verizon has

notified both subscribers at issue of RIAA's allegations and concerns and has reminded them of Verizon's own use policies prohibiting copyright infringement. This is exactly the remedy RIAA claimed it sought in the first place in order to deter ongoing infringement. *See infra* p.15 and note 7, and pp. 34-35. In fact, as discussed below, RIAA itself can contact Internet users it suspects of engaging in infringing activities through an electronic mail function that is part of the KaZaA software, without involving Verizon at all. *See* Declaration of Keith Kidd ¶¶ 5-10 ("Kidd Decl."), attached hereto as Exhibit 1. If RIAA actually wishes to institute suit against these subscribers, there is no reason it cannot avail itself of a John Doe lawsuit and invoke the applicable provisions of Section 512(h) in that context.

On the other side of the coin, failure to enter a stay could moot Verizon's appeals in both cases, depriving the Court of Appeals of the ability to address the important constitutional and statutory issues presented in these matters of first impression. In addition, it is clear that after these two initial subpoenas are litigated, RIAA intends to issue large numbers of subpoenas to Verizon and argue that doctrines of issue preclusion prevent Verizon from resisting them. Other less scrupulous parties will also take advantage of this opportunity—doing grave harm to Verizon's interests, its subscribers' interests, and public confidence in the Internet in general. Verizon should not be required to take the irreversible step of disclosing the names, addresses, and telephone numbers of these (and countless other) subscribers while any doubt remains as to the legality of these subpoenas under both Article III and the First Amendment.[2]

[2] RIAA argues in a footnote that Verizon's motion to quash was untimely and therefore should be denied. RIAA Opp. at 6 n.2. This argument is meritless and has been waived by RIAA in any event. *See* note 1 *supra*. Verizon properly objected to the subpoena by the time specified, relieving it of the obligation of compliance and placing the burden on RIAA to move to compel. *See* Fed. R. Civ. P. 45(c)(2)(B) ("If objection is made, the party serving the subpoena shall *not* be entitled to inspect and copy the materials . . . except pursuant to an order of the court by which the subpoena was issued." (emphasis added)); *see also* David D. Siegel, Practice Commentary C45-21, 28 U.S.C.A., Fed. R. Civ. P. 45 ("The servee can shift the burden of making a court application to the party who issued the subpoena, merely by serving written objections on that party. . . ."). RIAA chose not to exercise its option to file a motion to compel, and Verizon filed a motion to quash within the time frame stated in its objection letter.

II. RIAA'S CONSTRUCTION AND USE OF SECTION 512(h) VIOLATES THE "CASE" OR "CONTROVERSY" REQUIREMENT OF ARTICLE III.

Section 512(h) is, as this Court has noted, "a novel provision." *First Subpoena Order* at 5. Therein lies the constitutional undoing of RIAA's sweeping interpretation of that provision. According to the RIAA, Section 512(h) authorizes the issuance of judicial process without any requirement that any elements of a legal cause of action even be *alleged*. Further, the statute supposedly foists upon the judiciary the distinctly non-judicial role of serving as private investigator for a non-litigant on an *ex parte* basis. In both respects RIAA's construction violates the limits on judicial authority established in Article III of the Constitution. The machinery of the federal courts simply cannot be used to investigate *possible civil wrongdoing* or to identify *possible* defendants, outside the context of an actual "case" or "controversy."

A. A "Case or Controversy" Is an Adversarial Proceeding Seeking a Judicial Determination of an Actual Legal Claim.

Article III of the Constitution mandates that the exercise of federal judicial power shall be limited to specifically enumerated "cases" and "controversies." U.S. Const. Article III, sec. 2. The Framers thus sought to limit the constitutional grant of jurisdiction "to cases of a Judiciary Nature." 2 Max Farrand, Records of the Federal Convention of 1787, at 430 (1911). From the earliest days of the Republic, this requirement has been understood to entail, at a minimum, an adversarial proceeding that involves at least two parties, a cause of action within the jurisdiction of the federal courts, and a prayer for judicial relief that is determinative of some set of rights or obligations as between those parties. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824); *United States v. Fierreira*, 54 U.S. (13 How.) 40 (1851); *Gordon v. United States*, 117 U.S. Appx. 697, 699-706 (1864); *Muskrat v. United States*, 219 U.S. 346, 353-63 (1911). It is equally well established that in the absence of such a case or controversy, a federal court is without authority to take *any* judicial action, except

dismissal of the proceeding. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); *Mansfield, C. & L. M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

The constitutional definition of a case or controversy is informed by the nature of the judicial role and the Framers' understanding of the concept of a "case" at common law. *See Steel Co.*, 523 U.S. at 101. A "case" in the constitutional sense has consistently been defined as "a suit instituted according to the regular course of judicial procedure." *Muskrat*, 219 U.S. at 356; *accord In re Application of the Pacific Ry. Comm'n*, 32 F. 241, 255 (N.D. Cal. 1887) (Field, Circuit Justice) ("[B]y such 'cases' and 'controversies' are meant the claims of litigants brought for determination by regular judicial proceedings established by law or custom."); II Joseph Story, Commentaries on the Constitution 452 (5th ed. 1994) ("a case is a suit in law or equity, instituted according to the regular course of judicial proceedings"); *see also* Samuel Freeman Miller, Lectures on the Constitution of the United States 314 (1893) ("Judicial power is . . . the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.").

The case or controversy requirement is a critical component of the Constitutional separation of powers. It ensures both that the judiciary does not take on non-adjudicatory tasks *and* that neither Congress nor the Executive attempts to foist non-judicial duties on the Article III courts. Duties that are inconsistent with the judicial function—such as the investigation of claims rather than their adjudication—undermine public confidence in the independence and impartiality of the judiciary and take the courts' resources away from their primary role. As Alexander Hamilton put it in The Federalist No. 78, the judiciary has "neither FORCE nor WILL, but merely judgment." *Id.* at 465 (Clinton Rossiter ed., 1961). The case or controversy requirement thus "limit[s] the business of federal courts to questions presented in an adversary

context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

The federal courts have repeatedly rejected legislative and executive attempts to assign duties to them that do not involve traditional cases or controversies as those terms were understood at the Framing. Thus, in *Hayburn's Case*, five of the six Justices of the Supreme Court, sitting as Circuit Justices, concluded that a law that assigned federal judges the role of taking pension applications and making recommendations to the Secretary of War, imposed duties "not of a judicial nature." 22 U.S. at 411. Similarly, in *Fierreira*, the Supreme Court struck down a law that assigned to district court judges in Florida the adjustment of claims by Spanish inhabitants under the Treaty of 1819. 54 U.S. 40. The Court found that the role assigned by statute was not judicial in nature:

> For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there . . . .

Id. at 46-47; *accord Muskrat*, 219 U.S. at 356 ("It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.").

These principles are directly relevant here. The identity of the subscriber sought by the RIAA subpoena is a fact that may or may not be relevant to a federal cause of action that may or may not be filed. No doubt the facts Congress required the courts to gather in *Hayburn's Case* and *Fierreira* were relevant to the administration of federal law and could have formed the

predicate for lawsuits within the jurisdiction of the federal courts. Nonetheless, their collection outside of a pending "case or controversy" was held to be beyond the judicial power.

The Supreme Court reaffirmed these principles in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). The Court had before it an administrative subpoena issued by the Federal Trade Commission ("FTC") pertaining to compliance with a previously entered judicial decree. The Court rejected the argument that inquiry into compliance with the decree could only be had through the courts—the FTC had independent statutory authority to "inform itself as to whether there is a probable violation of the law." *Id.* at 643. The Court drew a sharp distinction between these "investigative and accusatory duties," *id.*, properly lodged in an executive agency, and the role of the Article III courts. While the agency could engage in a "fishing expedition" for evidence of civil or criminal wrongs, "[c]ourts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends." *Id.* at 641-42. Even as to compliance with a previously entered decree, the judicial role was dependent upon private parties initiating adversarial proceedings. "Courts are not expected to start the wheels moving or to follow up judgments." *Id.* at 641.

Finally, the Supreme Court again acknowledged these limits on the judicial power in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). The case involved a form of class action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, whereby a plaintiff is authorized to sue for damages and injunctive relief for age discrimination "on behalf of himself or themselves and other employees similarly situated," provided that individual employees give their consent to the representational suit. *Id.* at 167-68 (citing 29 U.S.C. § 216(b)). The Supreme Court held that the district courts "have discretion, in appropriate cases," to facilitate notice to potential plaintiffs in such a representational action. *Id.*

at 169-70. Tellingly, the Court relied upon the existence of a pending Article III case or controversy: *"once an ADEA action is filed*, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71 (emphasis added).[3]

Notably, the dissenting opinion of Justice Scalia joined by the Chief Justice, 493 U.S. at 174, maintained that *even in the context of a pending lawsuit*, the district court did not possess authority to involve itself in the discovery of, or notice to, potential additional plaintiffs. Justice Scalia believed that the district court's actions in *Hoffmann-La Roche* were not properly directed "to the resolution of the dispute before it, but the generation and management of other disputes," and were therefore outside the Article III power. *Id.* at 176. This "unheard-of role of midwifing" lawsuits yet to be filed, *id.* at 176-77, while quite properly assignable to an executive agency, could not be granted to an Article III court. In Justice Scalia's view, the notice and the discovery order entered by the district court were "void because of lack of authority to act for a purpose unrelated to adjudication of the case before it," *id.* at 179.

Hoffmann-La Roche dooms the RIAA's attempt to save the "unheard-of" subpoena power at issue in this case. The majority was careful to limit its ruling to cases where a representational lawsuit had already been filed, and to make clear that outside of that context judges could not be involved in the investigation or solicitation of claims. 493 U.S. at 170-71, 174. The majority also refused to affirm the district court's discovery order on the grounds that disclosure of employee names was necessary to identify new plaintiffs. Rather, the Court

[3] Justice Kennedy's majority opinion carefully distinguished between actions taken in aid of existing jurisdiction and a judicial search for potential lawsuits. "Court intervention in the notice process for case management purposes is distinguishable *in form and function* from the solicitation of claims." *Id.* at 174 (emphasis added). The majority also affirmed the district court's discovery order requiring Hoffmann-La Roche to provide the names and addresses of other discharged employees—not on the ground that it would facilitate the notice—but rather because "the discovery was relevant to the subject matter of the action." *Id.* at 170.

reasoned that discovery of other discharged employees (as potential witnesses) was obviously relevant to the subject matter of the pending action. *Id.* at 170.

Section 512(h) surpasses the limits set down by the majority in *Hoffmann-La Roche* by allowing a party who could never be a plaintiff (here a mere trade association acting as agent of the copyright holders), *see infra* p. 11-12, to obtain discovery outside of any pending lawsuit in a manner utterly divorced from any issue that is even likely to come before the court. Section 512(h) is the equivalent of the judicial "solicitation of claims" condemned by the majority in *Hoffmann-La Roche* as destructive of "judicial neutrality" by making the court an instrument of *ex parte* investigative applications. *Id.* at 174. The logic of *both* the majority and the dissent in *Hoffmann-La Roche* compels the conclusion that subpoenas issued outside of pending lawsuits are beyond judicial competence and undermine judicial independence.

B. The Section 512(h) Subpoena Sent to Verizon Was Issued Outside of any Pending "Case or Controversy" in Violation of Article III.

An *ex parte* request for a subpoena *duces tecum* is not itself a "case or controversy" within the meaning of Article III. Such a request does not present the elements of a civil action within the jurisdiction of the federal courts. It does not name an adverse party or seek any form of judicial relief or decree. It does not call upon the court to decide a legal issue. It does not even require action by an Article III judge, as the clerk of any district court issues such a subpoena on an *ex parte* basis without any judicial intervention or oversight.

An *ex parte* request for a subpoena *duces tecum* therefore cannot qualify as an independent "case" or "controversy" within the meaning of Article III. Rather, a subpoena is a form of *judicial process*—it is a tool to assist the court and the parties in the resolution of some other actual case or controversy. Thus, Fed. R. Civ. P. 45(a)(2) requires that "[e]very subpoena shall . . . state the title of the action, the name of the court in which it is pending, and its civil

action number . . . ." *See* 37 Cyclopedia of Law & Procedure 360 (1911) (defining subpoena *duces tecum* as "[a] process whereby a court, at the instance of a suitor, commands a person, who has in his possession or control, some document or paper that is pertinent to the issues of the pending controversy, to produce it for use at the trial"); Black's Law Dictionary 1426 (6th ed. 1990) (defining subpoena *duces tecum* as "[a] court process, initiated by a party in litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding . . . .").[4]

Nor does Section 512(h) itself create any cause of action cognizable in federal court. Rather, Section 512(h) speaks only in terms of a "request" for a "subpoena" that may be acted upon on an *ex parte* basis by the clerk of any district court. *Id.* § 512(h)(1) & (4). The statute does not enumerate any new intellectual property rights, provide for any monetary or equitable remedies, or establish any statute of limitations. *Compare* 17 U.S.C. § 512(h), *with, e.g.*, 17 U.S.C. § 501(a) ("exclusive rights"); *id.* § 501(b) ("action for any infringement"); *id.* §§ 502-04 (providing remedies for infringement); *id.* §505 (providing for costs and attorneys fees); *id.* § 507(b) (providing statute of limitations for "civil actions").

Both the *ex parte* nature of the proceedings and the fact that they are "resolved" by a non-Article III officer confirm that the issuance of the subpoena cannot itself constitute a "case or controversy" within the meaning of Article III. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 682 (1980); *see also* 28 U.S.C. §§ 951-957 (powers and duties of clerks of court). Indeed, the

[4] The Framers undoubtedly understood that a request for a subpoena was not itself a case or controversy. At the time of the Framing, a subpoena was a call to answer a bill in equity, serving essentially the same function that today is served by a summons. *See* 3 William Blackstone, Commentaries *443 ("But, upon common bills, as soon as they are filed, process of *subpoena* is taken out; which is a writ commanding the defendant to appear and answer the bill, on pain of 100 *l.*" (emphasis in original)). When a request for documentary evidence was added to the complaint, the process issued by the court was known as a subpoena *duces tecum. Id.* *382. In actions at law, a subpoena existed to compel witnesses to appear and testify at trial. *Id.* * 369. In fact, the Sixth Amendment itself confirms the distinction between a "case" and a "subpoena," providing that in "all criminal prosecutions" the accused shall enjoy the right to "compulsory process." U.S. Const. amend.VI.

RIAA itself describes the issuance of the subpoena as a "ministerial" act. RIAA Motion to Enforce July 24, 2002 Subpoena at 5, No. 1:02MS00323 (D.D.C. filed August 20, 2002) ("RIAA Mot. to Enforce") (quoting S. Rep. No. 105-190 at 51). The RIAA concedes that this "special subpoena authority," *id.* at 1, is not a right in itself, but rather is designed to facilitate the investigation of a possible violation of federal rights found outside Section 512(h). *Id.* at 4-5.[5]

Nor does Section 512(h) require the pleading of the elements of a cause of action for copyright infringement or even a certification that such a case will be brought once the information sought in the subpoena is received. An action for infringement of copyright can be brought only by the owner of the exclusive rights. 17 U.S.C. § 501(b); *see, e.g., Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) (affirming district court's dismissal of copyright infringement action because plaintiff licensee did not possess exclusive rights and therefore lacked standing). Registration of the copyright with the U.S. Copyright Office is also a *jurisdictional* prerequisite to the lawsuit. 17 U.S.C. § 411; 3 Nimmer & Nimmer, Nimmer on Copyright §12.09[A] ("an allegation of compliance with the statutory registration and deposit requirements is jurisdictionally required, so that a motion to dismiss will be granted absent such an allegation." (footnotes omitted)). A "case or controversy" arising under the copyright law must allege all the elements of infringement and contain a prayer for relief. More generally, any lawsuit in federal court also requires the naming of adversarial parties, *e.g.*, at least one party plaintiff and party defendant.

As interpreted by the RIAA, Section 512(h) meets none of these standards. In their view, the DMCA purports to empower an agent of the copyright holder to seek the subpoena, here the

[5] Section 512(h)(6)'s cross reference to the Federal Rules of Civil Procedure governing "the issuance, service, and enforcement of a subpoena *duces tecum*" provides further evidence that the statute purports to create a procedural device in the service of federal rights and federal jurisdiction that must be found elsewhere. *See, e.g.*, Fed. R. Civ. P. 82 (federal rules "shall not be construed to extend or limit the jurisdiction of the United States district courts"); *McCook Metals LLC v. Alcoa, Inc.*, 249 F.3d 330, 334 (4th Cir. 2001).

employee of a trade association, who does not even possess the right to sue for infringement. RIAA is not the actual owner of any of the copyrights that it asserts have been infringed. Copyright registration has not been alleged. No prayer for any of the judicial relief provided for in copyright law is made. *See* 17 U.S.C. §§ 502-505. The accompanying declaration need recite only that the requestor's "purpose" is to identify an alleged infringer and that any information obtained will be used for the "purpose of protecting rights" under the copyright laws. 17 U.S.C. § 512(h)(2)(C). The take-down notice that is to accompany the subpoena requires only "a good faith belief" that use of the material in question is not authorized. *Id.* § 512(c)(3)(A)(v). The distance between these paltry filings and a valid complaint for a violation of federal law, as well as the *ex parte* nature of the issuance of the subpoena itself, conclusively demonstrates that Section 512(h) does not establish any "case" or "controversy."

C. RIAA's Subpoena Is Unenforceable Under Article III.

"Much more than legal niceties are at stake here." *Steel Co.*, 523 U.S. at 101. Both the Supreme Court and this Circuit have made it abundantly clear that the power to issue subpoenas exists only in the context of a case that is properly pending before a federal court. In *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the Supreme Court affirmed the right of the recipient of a third-party subpoena to challenge the underlying jurisdiction of the court in whose name the subpoena issued—even in the posture of a civil contemnor. The Court reasoned that:

> Federal Rule Civil Procedure 45 grants a district court the power to issue subpoenas as to witnesses and documents, *but the subpoena power of a court cannot be more extensive than its jurisdiction.* It follows that if a district court *does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void* and an order of civil contempt based on refusal to honor it must be reversed.

Id. at 76 (emphases added). In *Catholic Conference*, the Supreme Court held that a subpoena would be void *ab initio* where an attempt had been made to plead the elements of a federal cause of action but that attempt was unsuccessful. *A fortiori* such process is void where there has never been any attempt to properly invoke the subject matter jurisdiction of any federal court.

In *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F. 3d 1208 (D.C. Cir. 1996), the D.C. Circuit applied these principles to a Rule 45 subpoena issued pursuant to an underlying state case that had been removed to federal district court. The court of appeals raised the jurisdictional issue *sua sponte* and held that where no federal cause of action was pending the district court is "without power to issue a subpoena." *Id.* at 1213. Echoing the admonitions of the Supreme Court in *Morton Salt* and *Catholic Conference*, the court stated: "The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others." *Id.; accord Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294-95 (D.C. Cir. 2000) ("a court without jurisdiction over an underlying case has no jurisdiction to issue a subpoena (unless it is in aid of determining jurisdiction)"); *McCook Metals LLC v. Alcoa, Inc.*, 249 F.3d 330, 334 (4th Cir. 2001) (noting that Fed. R. Civ. P. 37 & 45 "do not confer subject matter jurisdiction upon the [federal] courts," and thus "an ancillary court's power to issue and enforce subpoenas is entirely dependent upon the jurisdiction of the court in which the underlying action is pending").

D. RIAA's Arguments for Enforcing the Subpoena Are Flawed.

RIAA makes three arguments in support of its interpretation of Section 512(h). Each one actually *highlights* the constitutional infirmity of its novel construction.[6]

[6] Verizon notes that RIAA does not invoke the presumption of constitutionality in its discussion of Article III, *see* RIAA Opp. at 11-12, and quite properly so. Because the proper allocation of power among the three branches of government is at issue, this Court must decide the separation of power issue without deference to Congress. It cannot presume the role assigned to it here is a proper one. *Morisson v. Olson*, 487 U.S. 654, 704-05 (1988); *see also Freytag v. Comm'er of Internal Revenue*, 501 U.S. 868, 880 (1991).

1. RIAA asserts that "there is nothing in Article III to prevent Congress from passing a law giving a private party the right to obtain information from another party." RIAA Opp. at 11. That assertion is both irrelevant and wrong. It is irrelevant because, whatever Congress' constitutional authority to create a stand-alone statutory cause of action of the kind hypothesized by RIAA is, Congress has not exercised such authority here. Section 512(h) does not itself establish any cause of action cognizable in federal court.

RIAA's assertion is also wrong because the existence of "statutory authorization," RIAA Opp. at 12, is not, as RIAA would have it, the beginning and end of the constitutional inquiry. The "case or controversy" requirement is dictated by both the text of Article III and the overall separation of powers established by the first three Articles of the Constitution. It is therefore "absolute" and not "malleable by Congress." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, 577 (1992). An Article III court cannot be assigned the duty of collection of information, whatever label is appended to that duty, outside of a pending case or controversy.

2. RIAA makes a brief feint at Federal Rule Civil Procedure 27. RIAA Opp. at 11. The analysis is advisedly terse, for the strictures of Rule 27 provide a clear contrast to Section 512(h). Rule 27 requires the filing of a verified petition with the court, which must contain very specific showings to result in a court order. The petition must first demonstrate that, "the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought." Fed. R. Civ. P. 27(a)(1). A Rule 27 petitioner must demonstrate an unequivocal intent to file an action within the jurisdiction of the federal court, which intent is frustrated by some circumstance beyond the potential litigant's control. *In re Skylight Shipping Corp.*, 1999 WL 1293472, *2 (E.D. La.) ("[T]he rule is clear by its terms that the petitioner must demonstrate that it expects to be a party to such an action and that it is

presently unable to bring it or cause it to be brought. 'The allegation that the petitioner expects to be a party to an action must be *unequivocal* ....'" (quoting 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2072 (3d ed. 1998))).

This requirement alone starkly separates Rule 27 from Section 512(h). A Section 512(h) subpoena application does not even require that the subpoena request come from the real party-in-interest, the only party with standing to bring a copyright infringement suit in federal court. No evidence is required that the rights alleged to be infringed are the subject of a valid federal copyright registration—a prerequisite to filing a copyright infringement claim. Nor does Section 512(h) require averment under oath of intent to file suit. In fact, RIAA has suggested that it merely wishes to contact and admonish individual subscribers it suspects of copyright infringement and would prefer not to file suit against them, *see* RIAA Reply Brief in Support of Motion to Enforce at 12-14, No. 1:02MS00323 (D.D.C. filed September 4, 2002); *see also* February 13, 2003 Hearing Tr. at 53, and has noted publicly that such contact would be efficacious in avoiding suit, *see Verizon, Recording Industry Argue Over Internet Privacy Rules*, Bloomberg Bus. Rev. (Oct. 4, 2002) ("*Verizon, Recording Industry Argue*") (Cary Sherman, President of the RIAA, stating that "If I were a kid or even an adult uploading 500 files and I got a letter from RIAA saying that we know you're doing this and you need to stop immediately, I would probably stop doing it.").[7] While Rule 27 is at least tethered to an anticipated action in federal court, Section 512(h) is not.

[7] RIAA's President repeatedly has stated that RIAA is interested only in contacting the Verizon subscribers at issue. *See e.g.*, *Verizon, Recording Industry Argue* ("It is a procedural burden to have to file litigation against people just to find out who they are, especially when you might have been able to achieve the same result with just a warning notice"); Jonathan Krim, *A Story of Piracy and Privacy*, The Washington Post, Sept. 5, 2002 at E1 ("RIAA simply wants to warn the subscriber that he or she is violating the law"); *High Tech Security Keeps Watch Over Super Bowl; Police Use DNA Dragnets to Catch Criminals; Verizon Ordered to Rat on User*, CNN (Jan. 25, 2003), *available at* http://matrix.textore.net/TEXTore/Pages/1043687088-134-145-994/Article/extoreLTextoreLDataLHLSL0127L1.htm=A=165.html (visited Mar. 17, 2003) ("Verizon's position would actually have us sue their subscribers rather than be able to find out how to warn them. . . . We just want to get the information so we can get in touch with them.").

Moreover, it is quite clear from the text of Rule 27, its history, and its historical antecedents, that it is not a discovery device at all. It is a procedure for the preservation of evidence, the substance of which is already known to the petitioner, and which may be lost before the petitioner can file suit. Thus, the petitioner must put forward "the facts which petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it." Fed. R. Civ. P. 27(a)(1), 27(a)(3) (the court must be "satisfied that the perpetuation of the testimony may prevent a failure or delay of justice"). The limited nature of Rule 27 was made clear by a colloquy between Advisory Committee members shortly after its adoption:

> *Mr. Mitchell*: I think the language of the rule shows the conditions under which the court may order it, and all the conditions specified are those which apply in ordinary cases of perpetuation of evidence, and the court has to make an order saying that there shall be no examination unless necessary to prevent a failure or delay of justice, and in reaching that conclusion he considered all of these facts stated in the petition, that you cannot bring your suit, that your witness is likely to die, and all that sort of thing.
>
> *Mr. Sunderland*: It is certainly clear that the whole scheme of Rule 27 is inappropriate for obtaining information in an ordinary suit to enable one to draw a complaint.

Federal Rules of Civil Procedure and Proceedings of the American Bar Institute 292-93 (W. Dawson ed. 1938).

Rule 27 thus authorizes an *adversarial* proceeding to determine whether the preservation of existing evidence is essential to a federal cause of action that currently cannot be brought in federal court. The proceedings cannot be *ex parte*—the petitioner must notify each "expected adverse party" and if notice is impossible, the court must appoint a lawyer to represent their interests. Fed. R. Civ. P. 27(a)(2).[8] It is equally clear that the rule applies only to the

[8] This was the rule regarding the equity antecedents to Rule 27 as well. *See, e.g.*, *Green v. Compagnia Generale Italiana di Navigation*, 82 F. 490, 494 (1897) ("Counsel have not referred me to any authority, however, nor have I been able to find any, for proceeding in equity under any circumstances by mere *ex parte* petition to take

preservation of evidence *known* to the petitioner for future suit, it is not a tool to discover new evidence or to assist a potential plaintiff in drafting the complaint. *See, e.g., Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) ("A Rule 27(a) deposition 'may not be used as a substitute for discovery.'"); *Ash v. Cort*, 512 F.2d 909, 911(3d Cir. 1975) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost."); *see also In Re Petition of Dean A. Gurnsey*, 223 F. Supp. 359, 360 (D.D.C. 1963) ("[Rule 27] is not a method . . . to determine whether a cause of action exists; and, if so, against whom action should be instituted."). In sum, the verified assertions of: (1) a firm intention to bring a federal cause of action; (2) a present inability to do so beyond the control of the petitioner; (3) the immediate need to preserve evidence; as well as the (4) notification of adverse parties; and (5) entry of an order only after adversary proceedings, all distinguish the Rule 27 procedure from Section 512(h).

3. RIAA argues that Congress has provided for the enforcement of subpoenas issued by administrative agencies in the federal courts "even though no complaint has previously been filed in federal court." RIAA Opp. at 12 (citing *United States v. Hill*, 694 F.2d 258, 267 (D.C. Cir. 1982)). This argument runs headlong into *Morton Salt*, *Catholic Conference*, and *Houston Business Journal*, all of which are controlling authority on this point. Executive agencies quite properly exercise investigative powers under both delegated authority from Congress under Article I and the Executive's own Article II authority to "take care that the laws be faithfully executed." This authority is just as clearly denied to the federal courts, which must operate within the confines of a "case or controversy." A petition to enforce an administrative subpoena

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depositions in *perpetuam rei memoriam*, without any bill filed, or process issued or served on the defendants in interest.").

is an adversarial proceeding that requires the courts to pass upon the legal issue of a federal agency's statutory authority to act. That such suits are cognizable in federal court says nothing about the ability of a private party to use the offices of the court itself to gather facts outside of any pending federal action.[9]

Under RIAA's view, there would be no limit to the possibilities for congressional use of this new power to assign the judiciary investigative tasks. May Congress provide for depositions of corporate officers by private parties in the absence of a lawsuit in order to promote adherence to the securities laws? *See* Fed. R. Civ. P. 30. May it authorize the inspection of land by private parties prior to the filing of an environmental lawsuit on the theory that this promotes civil enforcement of the environmental laws? *See* Fed. R. Civ. P. 34(a)(2). The answer to these questions must be "no," and if it is, so too Congress may not place a judicial discovery device in the hands of a private party as an investigative and accusatory tool. For these reasons, this Court should hold that Section 512(h) cannot operate outside the context of a pending lawsuit and should quash this subpoena as issued in violation of Article III and the separation of powers.[10]

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[9] Nor is the district court's decision in *Dornan v. Sanchez*, 978 F. Supp. 1315 (C.D. Cal. 1997), of help to RIAA here. RIAA Opp. at 11. That court held that because of the nature of the dispute at issue (a contested election to the House of Representatives), Congress was free to reserve to itself the decisional process or delegate it in whole or in part to another branch. *Id.* at 1325 (citing *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932)). Based upon this reasoning, the *Dornan* court expressly found that the power being exercised in that case was *not* the judicial power, but rather delegated authority from the House of Representatives under U.S. Const. art. I, § 5, cl. 1. *Id.* at 1325-27. *Dornan* obviously says nothing about the use of the Article III power to gather facts relevant to private disputes, because it found that Article III power was not even being exercised. Moreover, to the extent there is any tension between the result in *Dornan* and the teachings of *Catholic Conference* and *Houston Business Journal*, the latter must quite obviously prevail in this Court.

[10] Because the validity of a single subpoena is before the Court in this proceeding, and Section 512(h) would have constitutional applications in the context of a pending lawsuit, Verizon does not believe that the Court is called upon to conduct a severability analysis here. Even if such an analysis were necessary, Verizon believes that the presumption in favor of severablity, *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987), and the fact that the self-help, immunity, and take-down provisions of the statute can operate coherently without the Section 512(h) subpoena power, compel a finding that Section 512(h) should be severed from the rest of the DMCA. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932).

III. THE SUPOENA POWER IN THIS PROCEEDING VIOLATES THE FIRST AMENDMENT RIGHTS OF INTERNET USERS.

As discussed above, in RIAA's view, Section 512(h) creates a novel and unprecedented legal device that purports to delegate the court's coercive power to a private party upon a minimal *ex parte* declaration of a "good faith" belief that someone else's intellectual property rights are being violated. The statute does not even require that the subscriber be notified of this subpoena proceeding, in which the subscriber stands to have his or her identity revealed and to be associated with presumptively protected expressive and associational activity. Nor is there any guarantee that the subscriber will ever be able to obtain any legal redress—an infringement action may never be filed and there are no remedies in Section 512 for improper Section 512(h) subpoenas. Because the statute provides insufficient procedural protection for expressive and associational rights and because it is vastly overbroad as interpreted by the RIAA, it violates the First Amendment. Because there is a permissible reading of the statute that confines the scope of Section 512(h) to the activities described in Section 512(c)—indeed Verizon submits that this is the better reading of the statute—the Court should find the subpoena at issue in this case invalid.

A. Internet Users Have a First Amendment Right To Speak, Listen, and Associate Anonymously.

As the Supreme Court repeatedly has recognized, individuals have a right to speak, listen, and associate anonymously. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, __ U.S. __, 122 S. Ct. 2080, 2089 (2002); *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 200, 204 (1999). In numerous contexts, the Supreme Court has held that, "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Thus, a local ordinance requiring that handbills identify the names and addresses of the persons who prepared them violates the First Amendment because, "such an identification

requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Talley v. California*, 362 U.S. 60, 64 (1960).

The First Amendment guarantees both the rights of authors to create and distribute presumptively protected content and the rights of willing listeners to receive those authors' ideas. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Nor is the right to speak and associate anonymously limited to cases of fear of official retaliation or social opprobrium. "'The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern over social ostracism, or merely be a desire to preserve as much of one's privacy as possible.'" *Watchtower Bible*, 122 S. Ct. at 2089 (quoting *McIntyre*, 514 U.S. at 341-42).

The right to speak and associate anonymously takes on particular importance in the Internet context, which Congress has recognized "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). Indeed, "the ability of individual users to log onto the Internet anonymously, undeterred by traditional social and legal restraints, tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society." *Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001). Recognizing that "'the content on the Internet is as diverse as human thought,'" *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (citation omitted), and "[a]ny person or organization with a computer connected to the Internet can 'publish' information," *id.* at 853, the Supreme Court has held without qualification that expression and association over the Internet enjoy full First Amendment protection. *Id.* at 870; *see First Subpoena Order* at 32-33 (cases recognizing First Amendment right to speak and associate anonymously over the Internet).

RIAA continues to profess ignorance as to the source of the privacy interest at stake in this case and posits that, "there is no legitimate expectation of privacy in phone records or in the business records of an ISP." RIAA Opp. at 14 (citing criminal cases under the Fourth Amendment). What RIAA ignores is that the First Amendment right to speak and associate freely, by definition, must be exercised with others. The Supreme Court has never applied Fourth Amendment principles in its anonymous speech cases—to the contrary, the Court has held that exercising speech rights even in a public manner does not waive the First Amendment right to privacy and anonymity. *See Watchtower*, 122 S. Ct. at 2089-90 (recognizing that even where individuals engage in door-to-door canvassing they maintain their right to anonymity); *Buckley*, 525 U.S. 182 (recognizing an anonymity interest even in face-to-face interactions).

Cases such as *Smith v. Maryland*, 442 U.S. 735 (1979), which address Fourth Amendment rights in the context of a criminal investigation, are simply not relevant to the issues before this Court. In *Smith*, the individual's identity was already known and the government merely wished to match that identity to certain telephone numbers that the individual had dialed.[11] By contrast, here the speaker is anonymous and RIAA wishes to match the speaker to particular content sent and received over the Internet. This is exactly the kind of *First Amendment harm* that the Supreme Court's anonymous speech cases protect against.

[11] In *Smith*, the police obtained Smith's identity by tracing his license plate number, *see* 442 U.S. at 737. The Supreme Court was very careful to observe that the pen register did not result in the disclosure of the content of any of Smith's communications. *Id.* at 743. In addition, after *Smith*, Congress recognized the privacy interests in pen register and trap and trace information by enacting Sections 3121 to 3124 of Title 18, which generally limit the use of such devices to criminal investigations or national security matters. *See id.* § 3121(a). Thus, even within a Fourth Amendment context, *Smith* does not suggest that one disclaims all privacy interest in one's name, address, and telephone number simply by using the Internet. Indeed, common sense and the public reaction to the Court's decision in the *First Subpoena Order* strongly suggest the opposite.

B. Verizon Has Standing To Defend the First Amendment Rights of its Subscribers and All Internet Users.

Without analysis or citation, RIAA asserts that, "there is considerable doubt as to whether Verizon can assert the rights of its customers in this case." RIAA Opp. at 12. Supreme Court precedent says otherwise.

First, Verizon is undoubtedly entitled to invoke the interests—First Amendment or otherwise—of the anonymous subscriber whose identity is at issue in this proceeding. Although the posture of this proceeding is novel, as it involves a subpoena where there is no underlying suit, it represents a classic situation "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." *Broadrick v. Okla.*, 413 U.S. 601, 611 (1973); *see Eisenstadt v. Baird*, 405 U.S. 438, 444-46 (1972); *NAACP v. Alabama*, 357 U.S. 449 (1958). Where as here there is no "suit" at all, but instead merely an *ex parte* request and the near automatic issuance of a subpoena, the anonymous subscriber has no ability to protect his or her rights before the Court.

After the subpoena has issued, the subscriber's ability to intervene fares no better because Section 512(h) does not provide for notice to be sent to the subscriber regarding the existence of a subpoena. This lack of notice combined with the requirement of "expeditious" compliance in a matter of days, leaves no avenue for the subscriber to defend his or her rights in a judicial forum. Indeed, if other copyright owners adopt RIAA's practice of combining requests for the identities of multiple subscribers in a single subpoena and insisting on a schedule for disclosures of identities shorter than the standard 14 days, *see* Subpoena Directed to Verizon Internet Services Inc., No. 1:03MS00079 (D.D.C. Mar. 4, 2003), the compressed schedule will assure that subscribers have no opportunity to effectively defend their own interests. Where the right at issue is anonymity, which "once lost, cannot be regained," *Rancho Publications v. Superior*

Court, 81 Cal. Rptr. 2d 274, 275 (Cal. Ct. App. 1999), third party standing is essential to the protection and vindication of that right. *See NAACP*, 357 U.S. at 459.

Second, in the special context of the First Amendment, the Supreme Court has consistently held that parties are permitted to "attack[] . . .overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick*, 413 U.S. at 611-12 (internal citation and quotation marks omitted); *see, e.g.*, *Eisenstadt*, 405 U.S. at 445 n.5 ("[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibiting effect on freedom of speech."). Because Section 512(h) is substantially overbroad and will chill protected anonymous speech and association, *see infra* pp. 25-28, Verizon is entitled to raise the rights of those whose protected communications and associations would be chilled. *See Broadrick*, 413 U.S. at 612; *accord Watchtower Bible*, 122 S. Ct. at 2090 n.14.

Third, "[o]verbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." *Broadrick*, 413 U.S. at 612; *see Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Sec. of State*, 378 U.S. 500 (1964). Thus Verizon may raise not only the rights of the particular subscriber at issue in this case, but also the rights of all subscribers and other Internet users whose expressive and associational rights will be chilled by RIAA's sweeping interpretation of Section 512(h).

Fourth, because Verizon's business interest as an Internet service provider depends on its having subscribers who are willing to use its conduit for their communications, Verizon itself is directly injured by loss of business due to Section 512(h)'s chilling effect. Verizon is no

different in this respect from a bookseller whose business depends on the speech rights of book-buyers, and it is beyond question that booksellers may raise the First Amendment rights of their buyers. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *see also Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1051 & n.9 (Colo. 2002) (en banc).

Finally, as a matter of statutory interpretation, independent of the standing issue, this Court must consider the presence of First Amendment issues in deciding between alternative readings of a federal statute. *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Loveday v. FCC*, 707 F.2d 1443, 1459 n.24 (D.C. Cir. 1983).

C. Section 512(h) Violates the First Amendment.

Verizon does not dispute that there is no First Amendment right to engage in copyright infringement, and RIAA's wasted effort on that straw man is a thinly veiled attempt to divert attention from the real question presented by the Section 512(h) process, *see* RIAA Opp. at 12-13. By design, at the time Section 512(h) is invoked, there has been no judicial determination of copyright infringement. As discussed in detail in the Article III portion of this brief, the filings required by Section 512(h) fall far short of meeting even the notice pleading requirements for *alleging* a case of copyright infringement. *See supra* pp. 11-12.

Such minimal allegations, made in an *ex parte* context, are simply not sufficient to strip Internet users of presumptively protected speech and associational rights. The copyright law places limits on expressive activity, and thus by its very nature implicates the First Amendment. That is why, as the Supreme Court noted only two months ago, "copyright law contains built-in First Amendment accommodations." *See Eldred v. Ashcroft*, __ U.S. __, 123 S. Ct. 769, 773-74 (2003) (noting that the "idea/expression dichotomy" and "fair use defense" both provide First Amendment protection against copyright infringement claims). Section 512(h) provides no such built-in protection for expression that may very well be, following adjudication of the merits,

found to be fully protected speech that is not (or cannot be) restricted by the copyright laws. That is the First Amendment issue at the heart of this action and the one upon which RIAA has consistently remained silent.

Because Section 512(h) is a procedure designed to strip Internet speakers of their presumptively protected anonymity, "those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government 'is not free to adopt whatever procedures it pleases for dealing with [illicit content] without regard to the possible consequences for constitutionally protected speech.'" *Blount v. Rizzi*, 400 U.S. 410, 416 (1971) (citation omitted); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 220 (1990) (plurality opinion) (noting need for First Amendment "procedural safeguards"); *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir. 1981). Because the Supreme Court has "recognized that 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn,'" "'[t]he separation of legitimate from illegitimate speech calls for sensitive tools.'" *Blount*, 400 U.S. at 417 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Section 512(h) is not a sensitive tool but a blunt instrument, that may be wielded by mere trade associations or bounty hunters who use automatic "infringement detection" robot software and who are compensated in proportion to the number of potential infringers identified, leading to the irreparable loss of anonymity without even the allegation of a valid cause of action that might justify a restriction on free expression. *See Blount*, 400 U.S. 410.

First, on its face, Section 512(h) permits the employment of a federal court's power to strip Internet users of their anonymity upon no more than an *ex parte* "good faith" allegation by anyone willing to allege he or she is a copyright owner, or authorized to act on behalf of a copyright owner, that copyright infringement *might* be occurring. 17 U.S.C. § 512(c)(3)(A)(v).

Such a cursory showing is not constitutionally sufficient to destroy presumptively protected First Amendment rights. *See, e.g., Blount*, 400 U.S. at 418 ("'The teaching of our cases is that, because only a judicial determination in an *adversary proceeding* ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial *determination* suffices to impose a valid final restraint.'" (emphases added)); *id.* at 420 (rejecting a censorship scheme that permitted the Postmaster General to curtail speech "upon a showing [to a court] merely of 'probable cause' to believe [the statute was] being violated"). Accordingly, for this reason alone, Section 512(h) violates the First Amendment.[12]

Because of this lack of adversarial process (and the accuracy that such process ensures), Section 512(h) as construed by the RIAA threatens to sweep within its ambit a substantial amount of protected speech. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). The lack of any adversarial safeguards, normally available in any federal litigation, will inevitably lead to both honest mistakes and deliberate abuse—thereby stripping Internet users of anonymity even where the underlying speech and association is fully protected.

[12] Indeed, the very idea of an *ex parte* proceeding that would strip away an individual's anonymity without that individual having the opportunity to defend him or herself raises serious First Amendment concerns. *See, e.g., Carroll v. President and Comm'ners of Princess Anne*, 393 U.S. 175, 180 (1968) (use of *ex parte* temporary restraining orders is severely limited in First Amendment context). Even apart from the heightened protection required in the First Amendment context, rudimentary principles of due process require more than Section 512(h) accords here. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 13-14 (1991) ("good faith" *ex parte* attachment statute creates "too great a risk of erroneous deprivation"); *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) (applicant's self interested statement of "belief in his [own] rights" insufficient to work a deprivation of property or liberty). Not only are Internet users' rights to free expression and association threatened by this inadequate process, but Verizon's property interest in its subscriber lists is also placed in jeopardy. *See* General Privacy Principles at Principles 1 & 4, *available at* http://www22.verizon.com/About/Privacy/genpriv/, attached hereto as Exhibit 2; Verizon Online's Terms of Service, *available at* http://www.verizon.net/policies/popups/internetaa_popup.asp, attached hereto as Exhibit 3; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). For these reasons, RIAA's reading of Section 512(h) violates the Due Process Clause. *See* Brief of *Amici Curiae* USIIA at Part II, *et al.*, No. 1:03MS00040 (D.D.C. filed March 17, 2003).

As a case in point, MediaForce, a copyright bounty hunter of sorts, sent a notice to an Internet service provider that contained the elements sufficient to meet the minimal requirements of Section 512(h), alleging possible copyright infringement of the film *Harry Potter and the Sorcerer's Stone*. *See* Notice attached hereto as Exhibit 4. The notice demanded that the service provider terminate the account of the person who had posted the alleged infringing material. The title of the allegedly infringing work—"Harry_Potter_Book_Report.rtf"—revealed the material was in fact a child's book report, yet the robotic program designed to identify infringement on the web could not tell the difference and the notice was issued.

A clerk faced with such a notice, that on its face complied with the requirements of Section 512(h), would have had no choice but to issue the subpoena, which would have demanded compliance of Verizon and shifted the burden of asserting the subscriber's First Amendment rights to Verizon. As the use of robotic software or "bots" increases, such automatic and erroneous demands to strip an innocent Internet user of his or her First Amendment rights will undoubtedly increase and chill perfectly licit Internet communications and association. To be sure, the Section 512(h) mechanism would capture the identities of some number of copyright infringers, but judicial process cannot be used to "suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 254. "Protected speech does not become unprotected merely because it resembles the latter." *Id.* at 255.

In addition to honest mistakes, the lack of any judicial supervision or oversight will encourage abuse. An individual with sinister intentions could carry cyberstalking one step further by alleging that someone he or she "met" in a chat room is a possible copyright infringer, thereby "expeditiously" obtaining that person's name, address, and telephone number. *See, e.g.*, Federal Trade Commission, *Privacy Online: A Report to Congress* at 4-5 (June 1998) ("[The collection of "detailed personal information . . . online from and about children"] present[s]

unique privacy and safety concerns because of the particular vulnerability of children . . . ."); Declaration of Juley Fulcher ¶¶ 4-8 ("Fulcher Decl."), attached hereto as Exhibit 5; Declaration of Parry Aftab ¶¶ 5-24 ("Aftab Decl."), attached as Exhibit 6. This threat to privacy, and even personal safety, will substantially chill speech and association on the Internet. *See Talley*, 362 U.S. at 64; *McIntyre*, 514 U.S. at 342; *Cmty.-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1118 (D.C. Cir. 1978) ("[I]t is the task of the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute." (citing *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *Talley*, 362 U.S. 60)).

The Supreme Court has repeatedly recognized that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Broadrick*, 413 U.S. at 612; *Free Speech Coalition*, 122 S. Ct. at 1404. Thus, even if copyright owners were unable to locate all Internet copyright infringers and some unprotected speech were to go unpunished, Section 512(h) would not survive constitutional scrutiny given the muting of protected Internet speech and association. But, in the context of Section 512(h), there is an obvious and less burdensome alternative that would ensure identification and punishment of most, if not all, of the unprotected speech RIAA wishes to reach: the John Doe lawsuit. Or, as described below at p. 34, if what RIAA wants to do is simply "send a warning," *see supra* p. 15 and note 7, it has the ability to communicate directly with the supposed infringer without invoking the Court's process. Accordingly, the RIAA's interpretation of Section 512(h) cannot satisfy the narrow tailoring requirement of the First Amendment. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

D. Section 512(h), If Not Struck Down Entirely, Should Be Construed Narrowly In Order To Avoid Serious First Amendment Issues.

At the very least, the serious constitutional concerns raised by a broad application of Section 512(h) require this Court to construe subsection (h) narrowly. *See Catholic Bishop*, 440 U.S. at 500 ("[A]n Act of Congress ought not be construed to violate the Constitution if *any other possible construction* remains available." (emphasis added)); *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). That is, this Court must endeavor to "adopt[] the reading that will avoid rather than implicate constitutional questions." *Loveday*, 707 F.2d at 1459 n.24; *see also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Reading Section 512(h) to apply only where the subscriber stores his or her allegedly infringing material on the service provider's system or network is an alternative construction that avoids the serious First Amendment questions raised by application of Section 512(h) to private email, web browsing, and chat room activity.

As explained above, the constitutional question raised by Section 512(h) is whether its cursory process too easily strips away Internet users' First Amendment right to speak and associate anonymously. Although Verizon respectfully submits that this problem is fatal to Section 512(h), there is a possible reading of the statute—limiting the application of Section 512(h) only to the subsection (c) context—that would minimize the unconstitutional encroachment on Internet users' First Amendment rights. Under this reading, those activities where the subscriber's privacy and anonymity interests are at their zenith, in connection with material stored on the subscriber's own personal computer in his or her home, would not be subject to Section 512(h)'s truncated process. *See, e.g.*, *Stanley*, 394 U.S. at 564 (expressive activity that may be proscribed outside the home is constitutionally protected inside the home).

While Verizon continues to believe that the better reading of Section 512(h) is that it applies only in the context of subsection (c) of the statute, it recognizes that this Court has previously disagreed with that analysis. *First Subpoena Order*, at 8-25. However, the Court has also recognized that RIAA's reading of the statute is not perfect and that there are statutory anomalies under that reading that remain unresolved. *See* October 4, 2002 Hearing Tr. at 41; *see also* February 13, 2003 Hearing Tr. at 63. Three fundamental statutory defects inhere in RIAA's reading of the statute. First, the entire statute is organized around *what* service providers do, *e.g.*, the particular functions they are performing. *See* 17 U.S.C. § 512(n); *see also* S. Rep. No. 105-190, at 19 (1998) (explaining that, "[i]n the beginning, the Committee identified the following *activities*" of service providers, tailored separate subsections to address those activities (emphasis added)). Thus, giving talismanic significance to the definition of "service provider," and finding that one provision of the statute is *not* tied to the particular function performed by the service provider, is contrary to the structure and purpose of the statute as a whole. *See First Subpoena Order* at 7 (citing canon of holistic construction).

Second, RIAA's reading of the statute renders three separate cross-references to subsection (c)(3)(A) contained in Section 512(h) complete surplusage. The issuance of any Section 512(h) subpoena is expressly conditioned on the requester's filing and service of a so-called "take-down" notice as described in Section 512(c)(3)(A) of the Act. The required take-down notice, the statute says, can only be "effective under this subsection," if it allows the service provider to "locate" and "remove" or "disable" "access to" "the *material* that is claimed to be infringing." 17 U.S.C. § 512(c)(3)(A) & (c)(3)(A)(iii) (emphasis added). But this provision cannot have any force or effect in the subsection (a) context where Verizon has neither the ability to locate the material at issue nor remove or disable access to it. The requirement that no provision of a statute be rendered without effect is not just *a* canon of statutory construction;

the Supreme Court has described it as *the cardinal canon* of statutory construction. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997). Thus, the most logical reading is that the cross-references in Section 512(h) do have meaning, because that provision only applies to the subsection (c) context.

Third, RIAA's reading of the statute requires the Court to give the words "remove" or "disable access to" information the same meaning as termination of a subscriber's Internet account. *See First Subpoena Order* at 15 n. 5. But the statute separately describes the process of terminating a subscriber's Internet account in *different* language. *See* 17 U.S.C. § 512(j)(1)(A)(ii) (referring to injunctive relief that requires "terminating the accounts of he subscriber"). RIAA's reading of the statute thus requires the Court to give the same meaning to the different language chosen by Congress for two distinct factual situations—violating another well recognized canon of statutory construction. *See Nat'l Ass'n of Recycling Industs., Inc. v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981).[13]

The statutory problems with RIAA's reading conclusively establish that it is a *permissible* reading of the statute to confine the subsection (h) subpoena power to the subsection (c) setting. Because that reading takes the most private and sensitive Internet communications, such as email, web browsing, and chat room activity, out of the ambit of Section 512(h), the Court should adopt it. At least in the subsection (c) context, the service provider can identify the material at issue and contact its customer to assess the copyright owner's claim. As important, the largely commercial and public nature of online sites hosted by third-party providers means the most sensitive and private communications will not be affected by Section 512(h).

[13] There are also numerous other flaws in RIAA's reading of Section 512(h). For example, subsection (c)(3)(A)(ii) refers to copyrighted works "at a single online site." An "online site" is hardly an apt description of an internet user's personal computer.

IV. SHOULD THIS COURT DISAGREE WITH VERIZON ON THE MERITS, IT SHOULD STAY ENFORCEMENT OF BOTH SUBPOENAS PENDING DISPOSITION OF VERIZON'S APPEAL.

It is now clear that RIAA intends to parlay this Court's *First Subpoena Order* into a license to obtain an unlimited number of subscriber identities pending the Court of Appeals' decision in these related cases. For the reasons given below, as well as the reasons articulated in the Motion and Memorandum of Points and Authorities In Support of Verizon Internet Services, Inc.'s Motion for a Stay Pending Appeal, No. 1:02MS00323 (D.D.C. filed Jan. 30, 2003) ("Verizon First Subpoena Stay Mot."), incorporated by reference herein, this Court should stay the *First Subpoena Order*, as well as any decision regarding the Second Subpoena that would require Verizon to disclose its subscriber's identity, pending appeal of both related cases.

First, the merits of the Article III issue are now clearly before this Court and that issue, standing alone, presents a "serious legal question," *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980), that should be addressed by the Court of Appeals before an irreversible disclosure is mandated. *See Machinists Non-Partisan Political League*, 655 F.2d at 390 (holding that "where the [FEC] seeks judicial enforcement of a sweeping subpoena" that implicates First Amendment rights, "it is essential for a court to assure itself affirmatively that the investigation is within the subject matter of jurisdiction of the [FEC] before lending its authority to enforcement of a subpoena"). Indeed, if Verizon is correct that the RIAA's interpretation of Section 512(h) violates Article III, then the subpoena is void *ab initio* and its enforcement in the interim will cause irreparable injury to both Verizon and its subscriber. *See* Verizon First Subpoena Stay Mot. at 11-13.

Second, to the extent the Court believes that the First Amendment challenge was not fully raised before, the First Amendment arguments are now fully presented and also provide Verizon a high likelihood of success on the merits of its appeal of both related cases. *See Washington*

Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Once stripped of his or her identity, each Verizon subscriber will have lost his or her anonymity altogether. And, the chilling of Internet speech as a whole will result in irreparable injury. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976).

Third, the bundling of the related cases regarding the First and Second Subpoenas for appellate review makes the mootness issue all the more important. If this Court were to require disclosure of either subscriber's identity to RIAA, such disclosure would threaten to moot those issues raised in the corresponding proceeding and eviscerate Verizon's right of appeal. *See* Verizon First Subpoena Stay Mot. at 11-12; Reply in Support of Verizon Internet Services Inc.'s Motion for a Stay Pending Appeal at 7-9, No. 1:02MS00323 (D.D.C. filed Feb. 11, 2003). The possibility of mooting Verizon's appeal unquestionably constitutes irreparable harm. *See, e.g.*, *Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (holding that the mere possibility that the appeal could be mooted if the government were not stopped from distributing funds to groups other than appellant satisfied the irreparable injury requirement, and granting an injunction pending appeal).

Fourth, the balance of harms weighs decidedly in Verizon's favor. It is now clear that RIAA will argue that Verizon will be bound to comply with any future subpoenas without the benefit of further litigation of any kind. In fact, RIAA has compressed the time for compliance in the Second and Third Subpoenas, *compare* First Subpoena (incorporating by default Rule 45(c)(2)(B)'s 14-day deadline for compliance), *with* Second Subpoena (compliance in 8 days), *and* Third Subpoena (compliance in 7 days), and has now apparently adopted the practice of including a request for multiple identities in a single subpoena, *see* Third Subpoena (listing two

IP addresses).[14] As there is no logical limit to adding multiple names to single subpoena requests, or for that matter shrinking the time for compliance to a matter of a few days, Verizon could very well be faced with requests for hundreds, if not thousands, of subscribers in a matter of days without any ability to contact the subscribers involved or to raise proper legal objections.

Balanced against this probability that Verizon will be flooded with subpoenas is the fact that RIAA has two avenues of self-help to prevent it from suffering any irreparable injury. On the one hand, if RIAA's members wish to sue those subscribers they believe have engaged in copyright infringement, they may file a John Doe lawsuit wherein the court, and a not a clerk, can balance the subscriber's First Amendment interests against the strength of the copyright owner's case. *See* Verizon First Subpoena Stay Mot. at 14-15. On the other hand, if, as RIAA has continually asserted, it seeks only to make alleged infringers aware of copyright law and to request that they seek and desist any further alleged infringing activity, it may contact the alleged infringers itself through the very KaZaA application it uses to search for alleged infringers. *See* Kidd Decl. ¶¶ 5-10.

More importantly, for the purposes of these related cases, Verizon has already notified the subscribers at issue, pursuant to this Court's Mar. 7, 2003 Order, of the status of the pending proceedings, of RIAA's assertions that the subscribers are engaging in copyright infringement, of RIAA's request that the subscribers cease and desist any infringing activity, and of the existence of Verizon's own terms of service that prohibit copyright infringing activity over its service. *See* Letters of March 11, 2003 from Verizon Internet Services Inc. to Anonymous Subscribers (Redacted), attached hereto as Exhibit 8. Indeed, one of the anonymous subscribers has provided

[14] *See also* Letter of March 11, 2003 from Thomas M. Dailey to Johnathan Whitehead Re: March 4, 2003 Subpoena Directed to Verizon Internet Services Inc. (No. 1:03MS00079) (final version), attached hereto as Exhibit 7.

a declaration stating that he or she received the notice required by the Court, "understand[s] the basic nature of the allegations made by RIAA," and "certif[ies] to the Court that no use of the KaZaA application will occur in [his or her] household or on [his or her] computer pending resolution of the litigation in" this action. Declaration of Anonymous Subscriber ¶¶ 3-4, attached hereto as Exhibit 9.[15]

Finally, the matter of the Second Subpoena will not be resolved until at least mid-April, and the Court of Appeals has issued an order granting Verizon's motion for an expedited briefing schedule that is consistent with the appeal in the matter of the First Subpoena being heard in September. *See* Order, No. 03-7015 (D.C. Cir. Mar. 17, 2003), attached hereto as Exhibit 10. Accordingly, any harm to RIAA resulting from an inability to enforce these two Section 512(h) subpoenas, assuming that they are ultimately upheld, would be limited to approximately six months. As RIAA waited almost four years after the enactment of the DMCA before making its first request to Verizon for a subscriber identity in the subsection (a) context, and both of these subscribers have been notified of RIAA's contentions, any injury to RIAA's interests pending appeal of these matters is truly ephemeral.

CONCLUSION

For the forgoing reasons, Verizon respectfully requests that the Court grant Verizon's motion to quash the subpoena at issue in this proceeding. Should this Court deny Verizon's motion, it should stay its decision in both this proceeding and the *First Subpoena Order* pending resolution of both proceedings by the Court of Appeals.

[15] The aforementioned anonymous declaration is offered only for the limited purpose of this Court's consideration of the balance of harms in the stay pending appeal decision. By offering this declaration, neither Verizon nor its subscriber waives any right to confidentiality. *See FEC v. Hall-Tyner Election Campaign Comm.*, 524 F. Supp. 955, 959-60 (S.D.N.Y. 1981); *United States v. Ferek*, 1985 WL 857, *3 (N.D. Ill. April 16).

Respectfully submitted,

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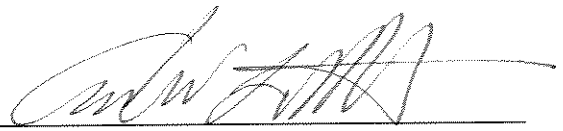
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2003, I caused copies of the foregoing Verizon Internet Services Inc.'s Brief In Support of Its Motion to Quash February 3, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003, with Exhibits 1-10, to be served via Express U.S. mail, to the following:

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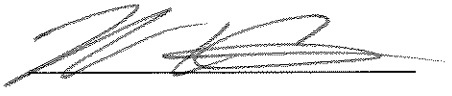

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