

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE:)	Miscellaneous Action
VERIZON INTERNET SERVICES, INC.)	No. 1:03MS00040 (JDB)
Subpoena Enforcement Matter)	
)	
RECORDING INDUSTRY ASSOCIATION OF)	
AMERICA)	
1330 Connecticut Avenue, NW Suite 300)	
Washington, D.C. 20036)	
)	
v.)	
)	
VERIZON INTERNET SERVICES, INC.)	
1880 Campus Commons Drive)	
Reston, Virginia 20191)	

**BRIEF FOR INTERVENOR UNITED STATES OF AMERICA IN RESPONSE TO
DEFENDANT'S "BRIEF IN SUPPORT OF ITS MOTION TO QUASH
FEBRUARY 4, 2003 SUBPOENA AND ADDRESSING QUESTIONS
PROPOUNDED BY THE COURT ON MARCH 7, 2003"**

INTRODUCTION

Pursuant to the Court's April 1, 2003 Order,¹ Intervenor United States of America hereby respectfully submits this brief in defense of the constitutionality of the Digital Millennium Copyright Act ("DMCA"). Defendant Verizon Internet Services, Inc. ("Verizon") is an Internet service provider that has received at least two subpoenas served by Plaintiff Recording Industry Association of America, Inc. ("RIAA"), pursuant to Section 512(h) of the DMCA, seeking the production of the name, address, and telephone number of a subscriber using the conduit functions of Defendant's Internet service. *See* Defendant's March 17, 2003 "Brief in Support of Its Motion to Quash February 4, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003" ("Def. Op. Br.") at 1. The subpoena at issue in this case is the second such subpoena served on Defendant and was issued by the clerk for the United States District Court for the District of Columbia on February 4, 2003. *See* Defendant's February 19, 2003 "Motion to Quash February 4, 2003 Subpoena and Memorandum of Points and Authorities in Support Thereof" ("Def. Mot.") at 1.

Defendant has moved to quash this subpoena because Defendant alleges that the Constitution bars the subpoena's enforcement on at least two grounds. First, Defendant alleges that Article III does not authorize federal courts to issue binding judicial process outside a pending case or controversy. Def. Op. Br. at 1-2, 4-18. Second, Defendant alleges that § 512(h) of the DMCA 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

¹ The Court directed the United States, if it decided to intervene, to "file with the Court and serve on the parties a brief regarding the constitutionality of the DMCA by not later than April 18, 2003." April 1, 2003 Order at 1. The United States indicated its decision to intervene in its April 11, 2003 Motion to Intervene.

substantially overbroad in its potential applications. Def. Op. Br. at 2, 19-31. Plaintiff and Defendant have already briefed these constitutional issues in several pleadings, and the Court heard oral argument on these issues on April 1, 2003. Thus, rather than repeat every argument raised by the parties regarding the constitutionality of the DMCA's subpoena provision, the United States only seeks here to highlight certain arguments that the United States believes dispose of the constitutional issues raised by Defendant.

Defendant's Article III claim that a subpoena issued pursuant to 17 U.S.C. § 512(h) violates Article III because it is outside any *pending* case or controversy and is therefore "unenforceable under Article III" (Def. Op. Br. at 12) fails for at least three reasons. First, nothing in Article III of the Constitution precludes Congress from authorizing the clerk of a federal "Article III" court from issuing a subpoena unless a case is actually "pending" in an Article III court. In fact, Congress has repeatedly exercised its authority to direct federal district court clerks to issue subpoenas on behalf of private parties involved in controversies before non-Article III tribunals, such as private parties litigating a patent interference claim before the Patent and Trademark Office. Second, far from creating a novel mechanism for obtaining information, the notion of pre-litigation discovery to obtain and to preserve information for future litigation is not new, and Congress has authorized such discovery, for example, under Federal Rule of Civil Procedure 27 – a procedure that undisputedly does not violate Article III. As under Rule 27, subpoenas pursuant to § 512(h) are "tethered" (*cf.* Def. Op. Br. at 15) to a cognizable controversy (copyright infringement) between the party seeking the subpoena (the copyright holder) and the future litigant related to the information sought (the alleged copyright infringer). That a complaint has not yet been filed does not change the fact that such a cognizable controversy exists. Third, as a practical matter, § 512(h) is tethered to a controversy between the copyright

holder and a service provider because § 512 creates a statutory right to copyright holders to obtain certain information from Internet service providers.

With respect to Defendant's claim that § 512(h) violates the First Amendment as facially overbroad, Defendant has failed to show that § 512 proscribes spoken words or conduct that is commonly associated with expression. Moreover, § 512(h) is not facially overbroad because it neither compromises a recognized First Amendment protection of parties not before the Court nor is there a realistic danger that such a compromise would occur. Accordingly, to the extent that Defendant's Motion to Quash challenges the constitutionality of 17 U.S.C. § 512(h), the United States respectfully requests that the Court deny Defendant's motion.

STATUTORY BACKGROUND

Congress passed the DMCA in 1998 in furtherance of the 1996 World Intellectual Property Organization ("WPO") Copyright and Performances and Phonograms Treaties. "Although the copyright infringement liability of on-line and Internet service providers (OSPs and ISPs) is not expressly addressed in the actual provisions of the WIPO treaties," Congress was "sympathetic" to the concerns of such service providers "from the standpoint of contributory and vicarious liability." S. Rep. No. 105-190, at 19. Accordingly, Congress amended chapter 5 of the Copyright Act, 17 U.S.C. § 501, *et seq.*, to create a new section 512 entitled "Limitations on liability relating to material online" in order to "preserve[] 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" as well as to "provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course

of their activities.” S. Rep. No. 105-190, at 20.² Indeed, this and other courts have confirmed that Congress had two purposes in mind when it enacted Section 512: (1) to limit the liability of Internet service providers for acts of copyright infringement by customers who are using the providers’ systems or networks and (2) to assist copyright owners to obtain information necessary to protect their copyrights. *See In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter*, 240 F. Supp. 2d 24, 36 (D.D.C. 2003) (“*First Subpoena Order*”); *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001); *cf. United States v. Elcom*, 203 F. Supp. 2d 111, 1124-25 (N.D. Cal. 2002).³

Most relevant here, the DMCA contains a provision in subsection (h) of Section 512 that states that “[a] copyright owner or a 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.” 17 U.S.C. 512(h)(1). The subpoena then authorizes and orders the recipient service provider “to expeditiously disclose” information sufficient to identify the alleged infringer. *Id.* § 512(h)(3). The clerk

² *See also* H.R. Rep. No. 105-551(II), at 49-50 (same), 21 (Congress sought to “balance[] the interests of content owners, on-line and other service providers, and information users in a way that will foster continued development of electronic commerce and the growth of the Internet”); H.R. Rep. No. 105-551(I), at 12 (Congress enacted safeguards in the DMCA “protecting service providers from lawsuits when they act to assist copyright owners in limiting or preventing infringement”).

³ Section 512 contains limitations on the liability of service providers for four general categories of activity set forth in subsections (a) through (d). The statute thereby creates a series of “safe harbors” that allow service providers to limit their liability for copyright infringement by users if certain conditions under the Act are satisfied. “The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory [copyright] infringement.” S. Rep. No. 105-190, at 20 (1998). Under the DMCA, an Internet service provider falls within one of these four subsections based on how the allegedly infringing material has interacted with the service provider's system or network. To qualify for a “safe harbor,” the service provider must fulfill the conditions under the applicable subsection and the conditions of 17 U.S.C. § 512(i).

“shall expeditiously issue” the subpoena only if it is in proper form, the declaration attached thereto is properly executed, and “the notification filed satisfies the provisions of subsection (c)(3)(A).”⁴ *Id.* § 512(h)(4). Any copyright holder who seeks a § 512(h) subpoena based on intentional misrepresentations “shall be liable for any damages, including costs and attorneys’ fees, incurred . . . by a service provider.” *Id.* § 512(f). The service provider, upon receipt of the subpoena, “shall expeditiously disclose” the information required by the subpoena to the copyright owner (or authorized person). *Id.* § 512(h)(5). The issuance, delivery and enforcement of subpoenas are to be governed by the provisions of the Federal Rules of Civil Procedure dealing with subpoenas duces tecum. *Id.* § 512(h)(6).

ARGUMENT

I. SECTION 512(h) OF THE DMCA DOES NOT VIOLATE ARTICLE III’S “CASE OR CONTROVERSY” REQUIREMENT

A. Congress Acted Within Its Constitutional Authority When It Enacted Section 512(h)

Congress acted within its constitutional authority when Congress expressly authorized “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.” 17 U.S.C. § 512(h)(1); *see also id.* § 512(h)(6) (providing for enforcement of DMCA subpoenas in federal court).

⁴ Section 512(c)(3)(A)’s requirements for effective notification of copyright infringement include the requirement that the copyright holder provide to the designated agent of a service provider a written notification that includes: (1) a “signature of a person authorized to act on behalf of the [copyright] owner;” (2) identification of the copyrighted work (or a representative list where multiple works are involved) allegedly infringed; (3) identification of the allegedly infringing material and information to enable the provider to locate the material; (4) information to permit the provider to contact the complaining party; (5) a statement of good faith belief that the use complained of is unauthorized; and (6) a “statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.” 17 U.S.C. § 512(c)(3)(A)(i)-(vi).

Defendant principally challenges the constitutionality of § 512(h) because it permits the issuance and enforcement of a subpoena “outside a controversy *pending* in a judicial or administrative forum.” Defendant’s March 31, 2003 “Reply Brief in Support of Its Motion to Quash February 4, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003” (Def. Reply Br.) at 2 (emphasis added); *see also* Def. Op. Br. at 1 (“Article III does not authorize federal courts to issue binding judicial process outside a *pending* case or controversy”) (emphasis added). Defendant’s argument, however, argues too much. Nothing in Article III of the Constitution precludes Congress from authorizing the clerk of a federal “Article III” court from issuing a subpoena (and an “Article III” court from enforcing same) unless a case is actually “pending” in an Article III court.

In fact, Congress has enacted a number of statutes authorizing the clerk of the court to issue subpoenas outside a pending Article III controversy. As Plaintiff has noted, Congress has authorized such subpoenas pursuant to the enactment of certain patent laws, *e.g.*, 35 U.S.C. § 24 (authorizing issuance of subpoena by federal district court clerks and enforcement in federal court of subpoenas for evidence to be used in patent interference proceedings at the Patent and Trademark Office); 7 U.S.C. § 2354(a) (same procedure); the Railway Labor Act, 45 U.S.C. § 157(h) (authorizing clerks to issues subpoenas at request of private party arbitrators); the laws establishing Judicial Councils for investigating allegations of judicial misconduct, 28 U.S.C. § 332(d)(1) (authorizing issuance of subpoenas by clerk and enforcement through contempt); and where Congress seeks evidence relevant to challenges to elections for the House of Representatives. *See Dornan v. Sanchez*, 978 F. Supp. 1315, 1325-26 (C.D. Cal. 1997) (upholding constitutionality of the deposition subpoena provisions of the Federal Contested Elections Act, 2 U.S.C. § 381, *et seq.*). Like § 512(h), all of these statutes operate to authorize a

clerk of a United States court to issue a subpoena outside a case or controversy “pending” before an Article III court.

Defendant counters that none of these examples “involves the use of the coercive power of the federal courts to gather facts merely deemed useful by a private party outside a controversy pending in a judicial or administrative forum” as Defendant contends Plaintiff’s use of the § 512(h) subpoena does. Def. Reply Br. at 2. Not only does this position stray from Defendant’s earlier assertion that Article III requires the presence of “a cause of action within the jurisdiction of the federal courts” (Def. Op. Br. at 4), but Defendant provides no authority explaining why Article III’s controversy requirement – which Defendant alleges invalidates the DMCA’s subpoena provision here – extends to controversies before an “administrative forum” (or any forum) that is not created pursuant to Article III. Further, Defendant does not contest the constitutionality of the aforementioned examples even though these controversies are not “Article III” controversies and are not otherwise pending in an Article III forum. For instance, a controversy pending before the Patent and Trademark Office or a Railway Labor Act arbitration panel is not a controversy pending before a tribunal created pursuant to Article III. Further, Defendant does not contend that Article III forbids “private parties” from asking a federal district court clerk to issue subpoenas in connection with controversies before non-Article III tribunals such as the PTO, *see* 35 U.S.C. § 24 (authorizing private party subpoenas), or the House of Representatives under the Federal Contested Elections Act (“FCEA”). *See Dornan* (upholding the constitutionality of FCEA’s private party subpoena provision).

Indeed, Congress has even authorized district courts to “order [a person] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.” 28 U.S.C. § 1782(a). Significantly, 28 U.S.C. § 1782

authorizes a court to issue compulsory process even when no proceeding is yet pending in a foreign tribunal. *In re Letter Rogatory*, 42 F.3d 308, 310 (5th Cir. 1995) (“Congress abrogated the requirement that the foreign litigation actually be pending before relief could be had under § 1782”); *In re Application of Aldunate*, 3 F.3d 54, 57 (2d Cir.) (Congress “deleted the requirement that the foreign litigation actually be pending”), *cert. denied*, 510 U.S. 965 (1993). Considering 28 U.S.C. § 1782(a) in the context of Defendant’s Article III theory, Congress makes compulsory process available in situations where there is not, and never will be, an underlying “cause of action within the jurisdiction of the federal courts” (Def. Op. Br. at 4) because “a proceeding in a foreign or international tribunal” will virtually always arise under foreign rather than American law and therefore will not itself be within the jurisdiction of the federal courts. Thus, if Defendant’s constitutional theory (requiring the presence of an Article III controversy before an Article III court’s clerk may issue a subpoena) were correct, then 28 U.S.C. § 1782, which is the latest in a line of statutes in effect for nearly 150 years, *see In re Letter Rogatory*, 523 F.2d 562 (6th Cir. 1975), arguably would be unconstitutional as well.

Accordingly, if Congress has the authority (without violating Article III) to direct federal district court clerks to issue subpoenas requested by private parties in connection with controversies before non-Article III administrative and international fora, then Congress certainly has the authority to direct federal district court clerks to issue similar subpoenas related to cognizable controversies before Article III courts – like a potential copyright infringement action.

B. The DMCA’s Subpoena Provision Does Not Violate Article III Because It Is “Tethered” to an Article III Controversy Between a Copyright Holder and an Alleged Copyright Infringer

In any event, § 512(h) does not violate Article III because it expressly relates to a cognizable Article III controversy (a potential copyright infringement action), over which federal courts have exclusive jurisdiction. *See NBC, Inc. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1295 (D.C. Cir. 1988). To the extent that Defendant’s position rests on the notion that a case or controversy must be “pending” before an Article III court in a temporal sense, this argument must also fail because the existence of an Article III controversy is not dependent on the filing of a complaint. Although the Supreme Court has long held that a case or controversy must already exist when a complaint is filed,⁵ the filing of a complaint does not in itself create the Article III case or controversy; the circumstances leading to the complaint do. Accordingly, Article III does not forbid the issuance of a § 512(h) subpoena simply because it is issued before a complaint is filed.

By the same token, § 512(h) satisfies Article III because a subpoena issued under this DMCA provision is related to a cognizable controversy. Specifically, § 512(h) is expressly related to a potential copyright infringement action between a copyright holder and an alleged infringer. 17 U.S.C. § 512(h)(1) (“[a] *copyright owner* or a 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”) (emphasis added). In fact, before a § 512(h) subpoena will issue, § 512 requires a copyright

⁵ *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In fact, a “live” Article III case or controversy may later become unripe without a complaint having ever been filed. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000) (no controversy where the dispute became moot by the time the complaint was filed); *Steel Co.*, 523 U.S. at 109 (same); *Renne v. Geary*, 501 U.S. 312, 320 (1991) (holding that respondents’ allegation that petitioners unconstitutionally applied a challenged statute in the past was unripe and “does not demonstrate a live controversy . . . [where] those disputes had become moot by the time respondents filed suit”).

holder to attest to all of the elements of an infringement action, such as entitlement to a particular and valid copyright and that such copyrighted work has been unlawfully used or copied. 17 U.S.C. § 512(c)(3)(A)(i)-(vi); *see also*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (copyright infringement established upon proof of (1) the existence and ownership of a valid copyright and (2) “copying of constituent elements of the work that are original” without the copyright holder’s authorization). “These protections ensure that a service provider will not be forced to disclose its customer’s identifying information without a reasonable showing that there has been copyright infringement.” *First Subpoena Order*, 240 F. Supp. 2d at 40.⁶

Defendant contends that asking a federal district court clerk to issue a subpoena before a case is actually pending in a judicial or administrative forum is tantamount to asking the clerk to perform “an investigative function analogous to that undertaken by an administrative agency or a grand jury.” Def. Reply Br. at 1. However, the fact that a private individual requests discovery related to an Article III controversy that is not yet pending in a judicial court does not categorically transform such requests into a non-judicial investigation. If true, Defendant’s categorical position would invalidate the operation of Federal Rule of Civil Procedure 27, a rule that is undisputedly constitutional.⁷

⁶ In fact, the requirements for obtaining a § 512(h) subpoena are the same type of procedural requirements that other courts have imposed for subpoenas on service providers to identify anonymous posters of messages on the Internet. *Id.* at 41 n.15 (citing *Doe v. 2TheMart.Com. Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001)).

⁷ It is worth noting that Rule 27’s origins trace back to the Judiciary Act of 1789, passed by the First Congress, authorizing federal courts to direct the taking of depositions in “rei memoriam . . . if they relate to matters that may be cognizable in any court of the United States.” Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 90. *Cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“An act passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning”) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888)).

Like § 512(h)'s operation, Rule 27 authorizes discovery in advance of federal litigation, before a case is "pending" in an Article III court. *See* Def. Op. Br. at 15 (Defendant concedes that "Rule 27 is at least tethered to an *anticipated* action in federal court") (emphasis added). Indeed, both forms of subpoenas are a prelude to a potential federal court action. In fact, the Court of Appeals for this circuit upheld a federal district court's jurisdiction to grant a Rule 27 petition where the district court had found "a sufficient likelihood that the expected litigation will eventuate," even though the underlying controversy was not yet pending before any court. *De Wagenknecht v. Stinnes*, 250 F.2d 414, 417 (D.C. Cir. 1957); *accord Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (recognizing that Article III authorizes the issuance of subpoenas before a federal court has exercised subject-matter jurisdiction over the underlying action "in certain circumstances where an action is cognizable in federal court, *cf.* Fed. R. Civ. P. 27(a)"). Further, neither Rule 27 nor § 512(h) require the filing of a complaint.

Defendant raises no meaningful distinction between Rule 27 and § 512(h) that justifies a finding that § 512(h) violates Article III when Rule 27 undisputedly does not. In fact, the differences between these provisions only further demonstrate that § 512(h) does not violate Article III. For instance, Rule 27 does not require that a party have a present *ability* to file a complaint, and a Rule 27 petition may even be filed before a case is ripe. *De Wagenknecht*, 250 F.2d at 416-17. It is axiomatic that a complaint setting forth unripe claims will be dismissed for lack of an Article III case or controversy. *E.g. Texas v. United States*, 523 U.S. 296, 300 (1998). Section 512(h) subpoenas, in contrast, must relate to a ripe copyright infringement action because the copyright holder must attest that infringement has already occurred before the subpoena will issue. *See* 17 U.S.C. § 512(c)(3)(A), (h)(2), (h)(4). Indeed, Plaintiff could not file

the “John Doe” action suggested by Defendant if the infringement controversy were not ripe. *See* Def. Reply Br. at 3 n.4. Moreover, unlike Rule 27’s allowance for discovery orders encompassing a broad range of discovery devices from document production to land inspection, § 512(h) permits copyright holders to use only one discovery device, the subpoena. The information discovered through a § 512(h) subpoena in turn can only be used for the limited purpose of protecting the rights subject to the underlying cognizable Article III controversy – protection against copyright infringement. *E.g.* 17 U.S.C. § 512(h)(2)(C) (request for § 512(h) subpoena must include a “sworn declaration” that the identity of an alleged infringer “will only be used for the purpose of protecting rights under this [copyright] title”). Rule 27 has no such limit.

Accordingly, the DMCA’s subpoena provision, perhaps more clearly than Rule 27, does not violate Article III because a § 512(h) subpoena is “tethered” to a cognizable infringement controversy between a copyright holder and an alleged infringer. *Compare* Def. Op. Br. at 15 (asserting that “Rule 27 is at least tethered to an anticipated action in federal court”).⁸

C. The DMCA’s Subpoena Provision Does Not Violate Article III Because It Is “Tethered” to an Article III Controversy Between a Copyright Holder and an Internet Service Provider

⁸ Defendant makes much of the fact that Rule 27 provides for an initial adversarial proceeding, whereas a § 512(h) subpoena is issued *ex parte*. *See* Def. Op. Br. at 16, Def. Reply Br. at 4. This distinction is interesting but not relevant to Defendant’s Article III claim because those who have a basis to object to the subpoena (like Defendant here) have the opportunity to initiate an adversarial proceeding before the subpoena will be enforced, as does an “expected adverse party” in the Rule 27 context. *First Subpoena Order*, 240 F. Supp. 2d at 41 (“of course, nothing in the DMCA precludes a service provider from raising non-compliance or other objections to a subsection (h) subpoena. *See, e.g., ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001) (action addressing service provider’s resistance to subpoena for non-compliance with the DMCA)”). In addition, § 512(h)(6) ensures that ISPs served with subpoenas can resort to the Federal Rules of Civil Procedure, including Rule 45, which specifically authorizes motion to quash subpoenas like the one before this Court. *Id.* at 44 n.21.

Similarly, § 512(h) does not violate Article III because it relates to the Article III controversy between a copyright holder and an Internet service provider (“ISP”) over the copyright holder’s statutory right to certain information.⁹ Defendant contends that this merely amounts to jurisdictional “bootstrapping” and that the “jurisdiction to issue the subpoena cannot be created by an after-the-fact dispute.” Def. Reply Br. at 4. As already noted, however, when Congress enacted 17 U.S.C. § 512, Congress created a right to obtain certain information from ISPs, including a right to ask federal district courts to enforce such requests. *See First Subpoena Order*, 240 F. Supp. 2d at 44 n.21 (citing 17 U.S.C. § 512(h)(6)). It is the dispute over this statutory right to information that forms one basis for this Court’s jurisdiction.

Here, there is a justiciable Article III controversy between one party (Plaintiff RIAA), seeking to obtain identifying information pursuant to § 512 from another party (Defendant Verizon) that refuses to provide such information. Plaintiff attempted to exercise its right to obtain the identity of the alleged infringer at issue here pursuant to § 512, and Defendant has refused to provide such information, pursuant to a motion to quash. This controversy is thus justiciable and ripe. Plaintiff has constitutional standing (and has a ripe claim) because Defendant currently causes Plaintiff’s injury by refusing to provide the information to which Plaintiff is entitled under the DMCA, and the Court can redress this injury by ruling on Defendant’s motion to quash. *See Renne*, 501 U.S. at 320 (“Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial

⁹ In many cases, § 512 could also be “tethered” to a separate potential controversy between a copyright holder and an Internet service provider: a contributory or vicarious liability action filed by the copyright holder against the ISP. Indeed, it is not a foregone conclusion that the ISP qualifies for one the Section 512’s safe harbors; ISPs must still satisfy § 512(i)’s requirements. If an ISP fails to satisfy § 512(i), then the limited liability disappears, and a subpoena used to identify an alleged infringer and confirm an alleged copyright infringement claim could relate to a contributory infringement claim against the applicable ISP as well.

intervention.”). Indeed, Congress has similarly created an enforceable right to obtain information in other contexts. *See, e.g.*, 29 U.S.C. § 1132(c)(1) (granting an ERISA beneficiary the right to obtain information from his or her plan administrator, regardless of whether a federal lawsuit is pending). As with § 512 of the DMCA, if an ERISA administrator fails to comply with a request of information pursuant to 29 U.S.C. § 1132(c)(1), then the beneficiary may ask the court to compel disclosure. *See id.*

Defendant’s contention that a dispute over Plaintiff’s request for information cannot form the basis for this Court’s jurisdiction fails because it focuses on the form of Plaintiff’s request (a subpoena), not its statutory basis. Defendant relies principally on the unremarkable proposition that “[a] federal court’s jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction.” Def. Reply Br. at 4 (quoting *Matter of Marc Rich & Co.*, 707 F.2d 663, 669 (2d Cir. 1983)). Not surprisingly, none of the cases upon which Defendant relies involved a free-standing statutory right to obtain information, as this one does. Def. Reply Br. at 4. Furthermore, the fact that the controversy in this case comes in the form of a motion to quash (or, alternatively, a motion to enforce) following the issuance of a subpoena does not change the question of whether a justiciable Article III controversy exists. As the Supreme Court long ago observed:

In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. Exercising this control of practice and procedure the *Congress is not confined to traditional forms or traditional remedies.*

See Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227, 240 (1937) (emphasis added, internal citation omitted).

It would run counter to the very essence of Article III if the Court could not hear the controversy between Plaintiff and Defendant over Plaintiff's statutory entitlement to the information it seeks here. After all, controversies between private citizens are "controversies of the sort traditionally amenable to, and resolved by, the judicial process." *See Steel Co.*, 523 U.S. at 102.

II. SECTION 512(h) OF THE DMCA DOES NOT VIOLATE THE FIRST AMENDMENT

Defendant has failed to establish that § 512 of the DMCA violates the First Amendment as facially overbroad for at least two reasons.¹⁰ *First*, as a threshold matter, Defendant's First Amendment facial overbreadth challenge must fail because, on its face, § 512 does not proscribe spoken words or conduct that is patently expressive or communicative or integral to or commonly associated with expression. The Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, "by their terms," sought to regulate "spoken words," or patently "expressive or communicative conduct." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973).¹¹ Here, it is manifest that the DMCA's subpoena provision targets the identity of alleged copyright infringers, not spoken words or conduct commonly associated with expression.

¹⁰ Aside from its overbreadth challenge, Defendant's facial freedom of speech challenge can only succeed if the Court finds that "every application of the statute create[s] an impermissible risk of suppression of ideas." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (emphasis added, internal citations omitted). Here, Defendant has made no showing that "in virtually every application the DMCA offends the First Amendment by requiring the production of the identity of an anonymous user." *See First Subpoena Order*, 240 F. Supp. 2d at 44 n.22.

¹¹ *Cf. City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

Second, even if the Court construed § 512(h) as a provision directed at spoken words or conduct commonly associated with expression, to present an overbreadth challenge, Defendant still must show that the DMCA is invalid because it is so broadly written that it infringes unacceptably on the First Amendment rights of third parties. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984). A statute will be declared facially unconstitutional for overbreadth *only if* the court finds a realistic danger that the statute itself will significantly compromise *recognized* First Amendment protections of parties not before the Court. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988).

Here, § 512(h) is not facially invalid because it neither compromises a recognized First Amendment protection of parties not before the Court nor is there a realistic danger that such a compromise would occur. As this Court has already observed, § 512 cannot compromise a First Amendment right to infringe copyrights because the First Amendment clearly does not protect copyright infringement. *First Subpoena Order*, 240 F. Supp. 2d at 42 (citing *Harper & Row, Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 574-78 (1977)). “Nor is this an instance where the anonymity of an Internet user merits free speech or privacy protections.” *First Subpoena Order*, 240 F. Supp. 2d at 43. In fact, it is undisputed that Plaintiff has served its subpoena to identify someone who Plaintiff believes was committing copyright infringement. *See* Plaintiff’s “Brief in Opposition to Verizon’s Motion to Quash February 4, 2003 Subpoena” at 21. Further, the alleged infringer’s identity in this case is not even anonymous; Defendant knows his or her identity. *Cf. First Subpoena Order*, 240 F. Supp. 2d at 44 n.20. In any event, and most significantly, although the First Amendment does protect a speaker’s anonymity under certain circumstances, it is undisputed that anonymously offering for downloading songs over the Internet without the copyright

holder's authority does not constitute First Amendment protected expression. *Cf. First Subpoena Order*, 240 F. Supp. 2d at 43.

In the same vein, there is no realistic danger that § 512 compromises First Amendment protections of parties not before this Court. Defendant contends that the DMCA's subpoena provision is an unconstitutional law regulating speech because it fails to contain adequate procedural safeguards to prevent arbitrary application to anonymous protected speech. Def. Reply Br. at 4. Defendant's contention however, ignores the safeguards in copyright law and in the DMCA itself demonstrating that the DMCA does not "significantly compromise" First Amendment protections. The Framers of the Constitution understood that copyright's limited monopolies, and the availability of the fair use doctrine, promote First Amendment ideals. *See First Subpoena Order*, 240 F. Supp. 2d at 42-43 (citing *Eldred v. Ashcroft*, 123 S. Ct. 769, 788 (2003)).

Most significantly, in addition to the safeguards inherent in copyright law, § 512(h) itself has several protections that further guard against First Amendment concerns and ensure that an ISP will not be forced to disclose its customer's identifying information without a reasonable showing that there has been copyright infringement. *First Subpoena Order*, 240 F. Supp. 2d at 40-41, 43. For instance, before a DMCA subpoena will issue, the DMCA mandates a copyright holder (1) have a "good faith belief that the use of the material in the matter complained of is not authorized by the copyright owner, its agent, or the law" (§ 512(c)(3)(A)(v), (h)(4)) and (2) provide a "statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed." 17 U.S.C. § 512(c)(3)(A)(vi), (h)(4); *accord First Subpoena Order*, 240 F. Supp. 2d at 40. In addition, a copyright holder must submit a sworn declaration

that the subpoena's purpose is to obtain an alleged infringer's identity for the exclusive purpose of protecting the holder's copyright. 17 U.S.C. § 512(h)(2)(C). Further, "nothing in the DMCA precludes a service provider from raising non-compliance or other objections to a subsection (h) subpoena." *First Subpoena Order*, 240 F. Supp. at 41. Accordingly, not only do these requirements "provide substantial protection to service providers and their customers against overly aggressive copyright owners and unwarranted subpoenas," but they also "provide greater threshold protection against the issuance of an unsupported subpoena than is available in the context of a John Doe action." *First Subpoena Order*, 240 F. Supp. 2d at 40-41; *see also* 17 U.S.C. § 512(f) (making any person who makes intentional misrepresentation in seeking a subpoena liable for damages, costs, and attorneys' fees incurred by the alleged infringer or by a service provider).

Accordingly, § 512 does not significantly compromise or impair the First Amendment rights of third parties so as to render this provision overbroad.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that, to the extent that Defendant's Motion to Quash challenges the constitutionality of 17 U.S.C. § 512(h), the Court deny Defendant's motion.

Dated: April 18, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2003, a copy of the United States of America's Brief in Response to Defendant's "Brief in Support of Its Motion to Quash February 4, 2003 Subpoena and Addressing Questions Propounded by the Court on March 7, 2003" was sent by electronic mail, facsimile and first class mail to:

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