CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for the Appellant.

B. Rulings under Review

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

C. Related Cases

The cases on review have not previously been before this Court or any other court. Counsel for the United States is not aware of any other related cases currently pending in this court or in any other court.

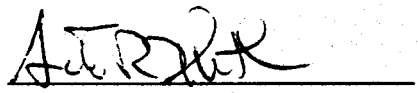

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

DMCA	Digital Millennium Copyright Act, Pub. L. No. 105-304, 12 Stat. 2860 (1998) (codified in various provisions of Title 17)
IP	Internet Protocol
RIAA	Recording Industry Association of America

STATEMENT OF THE CASE

I. Statutory Background

The past decade has witnessed the explosive growth of electronic commerce and the accompanying rise of digital networks that facilitate the reproduction and distribution, both authorized and unauthorized, of copyrighted works in electronic form. The Digital Millennium Copyright Act represents Congress's principal legislative response to these changes. The DMCA is designed to advance "two important priorities: promoting the continued growth and development of electronic commerce[] and protecting intellectual property rights." H. Rep. No. 105-551(II), at 23 (1998) ("House Report").

Among the issues addressed by the DMCA is the role of online service providers in the electronic dissemination of copyrighted works. Online service providers are instrumental in "provid[ing] new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment." House Report at 23. At the same time, however, the services provided by online service providers may also be misused by persons engaged in the unauthorized reproduction and distribution of copyrighted works. Because copyrighted works in digital form "can be copied and distributed worldwide virtually instantaneously" via the Internet, copyright owners require assurance that their works will be protected against piracy when they are made available on the Internet. S. Rep. No. 105-190, at 8 (1988) ("Senate Report"). But if online service providers face potential derivative liability for infringing uses of their services, they may be unwilling to develop new services and capabilities that will facilitate legitimate electronic commerce. *Id.*

Title II of the DMCA attempts to strike a balance between the interest of service providers in avoiding liability for infringing uses of their services and the interest of copyright owners in expanding digital commerce while minimizing online piracy. See Pub. L. No, 105-304, §§ 201-203, 112 Stat. 2877-2886, codified at 7 U.S.C. 512. Title II offers protection to service providers by creating statutory "safe harbor" provisions that limit potential liability for monetary and injunctive relief. See 17 U.S.C. 512(a)-(d). Among these provisions are 17 U.S.C. 512(a), which creates a safe harbor for data transmission, and 17 U.S.C. 512(c), which creates a safe harbor for data storage.

In exchange for the protection and certainty that these statutory safe harbors offer to service providers, Title II seeks to provide "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." Senate Report at 20. If a service provider wishes to avail itself of Title II's safe-harbor protections, when a copyright owner notifies the provider that one of its customers is engaged in infringing activities, the provider must take prescribed steps to disable access to the infringing material. See 17 U.S.C. 512(b)(2)(E), 512(c)(1)(A)(iii), 512(d)(1)(C). In addition, Title II obligates service providers to assist copyright owners by providing information about the identity of subscribers who are engaged in copyright infringement. Title II implements this obligation through 7 U.S.C. 512(h), the provision at issue in these appeals.

Section 512(h) authorizes a copyright owner or its representative to "request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer * * * ." 17 U.S.C. 512(h)(1). In order to obtain a subpoena, the requester must present the clerk with a "notification of claimed infringement." *Id.* § 512(h)(2)(A) (incorporating notification requirements of *id.* § 512(c)(3)(A)). The notification must identify the work claimed to have been

infringed and the material claimed to be infringing, and the requester must state that it "has a good faith belief that the use of the material in the manner complained of is not authorized" and that the information in the notification is accurate. *Id.* § 512(c)(3)(A)(ii)-(iii), (v)-(vi). The requester must also submit a sworn declaration that the subpoena is being sought "to obtain the identity of [the] alleged infringer and that such information will only be used for the purpose of protecting rights" under Title 17. *Id.* § 512(h)(2)(C). Finally, the requester must present the clerk with a proposed subpoena that "authorize[s] and order[s] the service provider * * * to expeditiously disclose * * * information sufficient to identify the alleged infringer * * * to the extent such information is available to the service provider." *Id.* § 512(h)(2)(B), 512(h)(3).

If the proposed subpoena, the notification, and the sworn declaration are in proper order, Section 512(h) provides for the clerk to issue and sign the subpoena and give it to the requester for delivery to the service provider. *Id.* § 512(h)(4). Upon receipt of the subpoena, the service provider is obligated to 'expeditiously disclose * * * the information required by the subpoena, notwithstanding any other provision of law." *Id.* § 512(h)(5).

Except as otherwise provided by Section 512 itself, the procedure for issuance and delivery of the subpoena and the remedies for noncompliance are governed "to the greatest extent practicable" by the provisions of the Federal Rules of Civil Procedure governing issuance, service, and enforcement of subpoenas duces tecum. *Id.* § 512(h)(6). Those provisions are found primarily in Rule 45. Rule 45 provides for subpoenas to be issued in the name of the court, and the failure 'without adequate excuse" to obey a subpoena may be deemed a contempt of court. *Id.* Rule 45(a)(1)(A), 45(e). A person subject to a subpoena may move to quash or modify the it, and if he serves timely written objection to disclosure of the materials designated by the subpoena, the serving

party is not entitled to inspect the materials "except pursuant to an order of the court by which the subpoena was issued." *Id.* Rule 45(c)(2)(B), 45(c).

II. The Present Controversy

In July 2002, RIAA obtained and served a subpoena on Verizon pursuant to Section 512(h). The subpoena sought identifying information about an anonymous individual who was alleged to be using Verizon's network to engage in the unauthorized, and hence unlawful, distribution of copyrighted songs. RIAA provided a list of more than 600 sound files allegedly made available for downloading by the user in a single day, the time and date of the downloads, and a sworn declaration that the information was sought in good faith and would be used only in connection with protecting the legal rights of RIAA's members. Opinion of January 21, 2003 ("First Op.") at 5 [JA __].

Verizon declined to comply with the subpoena. Verizon contended that Section 512(h) applies solely where the alleged infringement involves data storage under Section 512(c) and does not apply where, as here, the service is engaged in data transmission under Section 512(a). RIAA then moved to enforce the subpoena pursuant to Section 512(h)(6) and Rule 45(c)(2)(B). On January 23, 2003, the district court issued an opinion and order granting RIAA's motion, holding that the subpoena mechanism created by Section 512(h) applies equally to providers engaged in data transmission and providers engaged in data storage.

In February 2003, RIAA served Verizon with a second subpoena under Section 512(h). The second subpoena, like the first, sought the identity of a subscriber who used Verizon's services to make hundreds of copyrighted sound recordings available for illegal downloading over the Internet. Opinion of April 24, 2003 ("Second Op.") at 1 [JA __]. Verizon moved to quash the second subpoena, arguing that RIAA's invocation of Section 512(h) violated Article III and the First Amend-

ment. In response, the United States intervened to defend the constitutionality of Section 512(h) pursuant to 28 U.S.C. 2403(a). On April 24, 2003, the district court issued an opinion and order rejecting Verizon's constitutional claims and denying Verizon's motion to quash the second subpoena.[1]

SUMMARY OF ARGUMENT

Verizon argues that while 17 U.S.C. 512(h) may be freely used to obtain the identity of an alleged infringer after the copyright owner has filed a complaint against the infringer, Article III of the Constitution precludes the use of Section 512(h) in situations where no infringement action is pending. In so arguing, Verizon confuses the existence of an Article III controversy with the pendency of a complaint. The exercise of judicial power under Article III is dependent only on the former, not on the latter. As long as an Article III controversy is present, Congress is free to authorize federal courts to issue discovery orders relating to the controversy without insisting on the filing of a complaint. That is precisely what Congress has done here. When a subpoena is sought under Section 512(h), the requirements of the statute itself ensure that the subpoena is tied to an actual controversy under the copyright laws between a copyright owner and an alleged infringer. In addition, the subpoenas in this case are supported by the existence of an additional controversy – the controversy between the copyright owner and the service provider over access to the alleged

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[1] It is the understanding of the United States that Verizon has now complied with both subpoenas. Verizon's compliance raises a question of mootness. Resolution of that question turns on whether Verizon is seeking the return of any documents turned over pursuant to the subpoenas and, if not, whether the controversy between RIAA and Verizon is capable of repetition yet will evade review. See generally *Church of Scientology* v. *United States*, 506 U.S. 9 (1992); *Office of Thrift Supervision* v. Dobbs, 931 F.2d 956, 957-59 (D.C. Cir. 1991).

infringers' identities. Either of these controversies is sufficient to bring Section 512(h) within the ambit of Article III.

2. Verizon also claims that Section 512(h) is subject to facial invalidation under the First Amendment overbreadth doctrine. To invalidate Section 512(h) on the basis of overbreadth, Verizon has the burden of demonstrating that the law impermissibly burdens a substantial amount of protected speech, both in absolute terms and in relation to the legitimate scope of the statute. Verizon has wholly failed to carry that burden. The online copyright infringers who are the target of Section 512(h) are not engaged in protected speech – and, indeed, are not engaged in speech at all. Verizon has identified nothing about the statute itself, and has introduced no evidence, to suggest that Section 512(h) is likely to be applied impermissibly in a significant number of cases. Verizon's procedural objections to Section 512(h) add nothing to the force of its First Amendment claim, for two reasons: first, because Section 512(h) does not impose the kind of restriction on speech that has been held to require procedural safeguards, and second, because it contains procedural requirements that minimize the risk that anonymous speakers will have their identities improperly disclosed.

ARGUMENT[2]

I. 17 U.S.C. 512(h) Does Not Exceed the Limits of the Judicial Power Under Article III

A. Section 512(h)'s Requirements Ensure That an Article III Controversy Exists Between the Copyright Owner and the Alleged Infringer

The Copyright Act vests copyright owners with, *inter alia*, the exclusive rights to reproduce their copyrighted works and to distribute copies of those works to the public. 17 U.S.C. § 106(1), (3). The advent of the Internet has placed these rights in jeopardy, not only by facilitating the wholesale copying and distribution of copyrighted works without authorization of the copyright owner, but also by permitting infringers to conceal their identities behind the anonymity of an IP address. If copyright owners are to be able to enforce their legal rights against infringers in the digital age, they must be able to identify them – and they cannot do so without the assistance of service providers, like Verizon, who provide infringers with Internet access. Section 512(h) is the mechanism chosen by Congress to enable copyright owners "to obtain the identity of an alleged infringer * * * for the purpose of protecting [the owners'] rights" under the Copyright Act. 17 U.S.C. 512(h)(2)(C).

The district court held alternatively that the issuance of a subpoena under Section 512(h) does not involve an exercise of judicial power under Article III and that Article III does not confine the exercise of judicial power to instances in which a suit is pending in federal court. It is unnecessary

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[2] The threshold issue in these appeals is whether, as a statutory matter, Section 512(h) authorizes the issuance of the subpoenas at issue in these cases. The United States has intervened for the purpose of defending the constitutionality of Section 512(h) and expresses no views regarding this statutory question. For purposes of addressing the constitutional questions in these appeals, the United States assumes that Section 512(h) provides sufficient statutory authority for the subpoenas at issue here.

for this Court to resolve the dispute between Verizon and RIAA over the first of these two holdings, for the district court's second holding is demonstrably correct, and that holding suffices to dispose of Verizon's Article III claim even if the issuance of a subpoena under Section 512(h) involves an exercise of judicial power that must comport with Article III.

1. It is a commonplace that the "judicial Power of the United States" is confined to cases and controversies within the ambit of Article III. The heart of Verizon's argument is that Section 512(h) authorizes district courts to issue subpoenas "in the absence of a pending case or controversy" and, in so doing, necessarily crosses the boundaries of Article III. Verizon Br. 12. Verizon concedes that when Section 512(h) is employed after a copyright owner has filed a complaint against an alleged infringer, the controversy between the copyright owner and the infringer suffices to meet the demands of Article III. See Verizon Br. 22 n.5. But Verizon insists that Section 512(h) is categorically unconstitutional under Article III whenever it is employed before the filing of a complaint against the infringer.

The central fallacy of this argument is that it confuses the *existence of an Article III controversy* with the *pendency of a complaint*. It can be assumed for present purposes that the judicial power may be exercised only in the context of an actual controversy under Article III. But it is a *non sequitur* that the judicial power is confined to situations in which a lawsuit is pending. The filing of a complaint does not create a controversy under Article III; it is simply a procedural mechanism for bringing an existing controversy before the court. As long as an actual controversy in the Article III sense exists, a federal court is free to exercise judicial power within the limits imposed by Congress, and Congress in turn is free to prescribe whatever procedural mechanisms

it thinks most appropriate for the invocation and exercise of judicial power. As the Supreme Court explained in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 264 (1933):

> [T]he Constitution does not require that [a] case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.

In this case, Congress has chosen to allow a copyright owner to seek a subpoena without first filing a complaint against the alleged infringer. Once it is recognized that the existence of an Article III controversy does not turn on the pendency of a complaint, the only question is whether the provisions of Section 512(h) are sufficient to confine the operation of this subpoena mechanism to settings in which an actual Article III controversy is present. As the district court recognized, the answer to that question is affirmative. The statutory prerequisites for the issuance of a subpoena under Section 512(h) ensure that there is a genuine controversy arising under federal law between the copyright owner and the alleged infringer, and the existence of that controversy empowers the district court to issue a subpoena in aid of the copyright owner's efforts to vindicate his federal rights.

As explained above, a requester who seeks a subpoena under Section 512(h) must first submit a notification of claimed infringement. 7 U.S.C. 512(h)(2)(A) (incorporating notification requirements of *id.* § 512(c)(3)(A)). The notification must identify the work claimed to have been infringed and the material claimed to be infringing, and the requester must state that it "has a good faith belief that the use of the material in the manner complained of is not authorized" and that the information in the notification is accurate. *Id.* § 512(c)(3)(A)(ii)-(iii), (v)-(vi). Section 512(h) thus requires the requester to set forth the substantial equivalent of a *prima facie* claim of copyright

infringement. Second Op. at 30-31 [JA__]; see *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991); *Stenograph L.L.C.* v. *Bossard Associates, Inc.*, 144 F.3d 96, 99 (D.C. Cir. 1998) Whether the requester is correct that the alleged infringer has committed copyright infringement is, of course, a separate question. But the existence of an Article III controversy does not depend on whether the complaining party is ultimately entitled to prevail. *Cf. Bell* v. *Hood*, 327 U.S. 678, 682 (1946) (jurisdiction over claims arising under federal law "is not defeated * * * by the possibility that the averments might fail to state a [valid] cause of action")

Contrary to Verizon's suggestion, there is no tension between the district court's holding that Section 512(h) may be invoked outside the confines of pending lawsuits and this Court's decision in *Houston Business Journal* v. *Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996) In *Houston Business Journal*, this Court held that a federal court lacks power to issue a subpoena in connection with an underlying legal controversy that "is not even asserted to be within federal-court jurisdiction." 86 F.3d at 1213. In so holding, the Court did not suggest that Article III confines the subpoena power to pending federal suits To the contrary, the Court recognized that "the discovery devices in federal court stand available to facilitate the resolution of actions cognizable in federal court," and that Article III permits a federal court to exercise the subpoena power not only when it "has subject-matter jurisdiction over the underlying action," but also "in certain circumstances where an action is cognizable in federal court." *Id.* The touchstone of constitutionality under *Houston Business Journal* is thus whether a subpoena is being sought in connection with a controversy that is *cognizable* in federal court That is manifestly true of Section 512(h), both as a general matter and in the specific circumstances of this case

2. As the district court recognized, the subpoena mechanism employed by Section 512(h) is hardly a radical innovation in federal judicial practice. See Second Op. at 10-1 [JA __]. A variety of statutes and rules permit federal courts to issue discovery orders in connection with controversies that are not the subject of pending litigation in federal court. See Fed. R. Civ. P. 27; 2 U.S.C. 388 (subpoena for election contests before House of Representatives); 7 U.S.C. 2354(a) (subpoena for administrative claims under Plant Variety Protection Act); 9 U.S.C. 7 (subpoena for arbitration proceedings under Federal Arbitration Act); 28 U.S.C. 782 (order compelling testimony and document production "for use in a proceeding in a foreign or international tribunal"); 35 U.S.C. 24 (subpoena for administrative claims before Patent and Trademark Office); 45 U.S.C. 157(h) (subpoena for arbitration proceedings under Railway Labor Act).

None of these provisions involves proceedings pending in federal courts. Indeed, two of them involve controversies that are beyond the cognizance of the federal courts altogether. 2 U.S.C. 388 authorizes district courts to issue subpoenas in connection with election contests before the House of Representatives even though the Constitution makes each House the exclusive "Judge of the Elections, Returns and Qualifications of its own Members" (Art. I, § 5, cl. 1), and 28 U.S.C. 782 authorizes district courts to compel testimony for use in "foreign and international tribunals" even though the controversies heard by such tribunals will characteristically arise under foreign rather than federal law and will ordinarily be outside the scope of Article III. Moreover, 28 U.S.C. 1782 authorizes a district court to compel the production of evidence even when no proceeding is pending in the foreign tribunal itself. See, *e.g.*, *In re Letter Rogatory*, 42 F.3d 308, 310 (5th Cir. 1995).

Verizon offers no convincing explanation for how Section 512(h) can run afoul of Article III while these provisions concededly pass constitutional muster. Verizon asserts that none of these

provisions "places the clerk and the court in the role of the initial investigator of facts that may or may not be useful" in private civil claims. Verizon Br. 19. But it is difficult to see how a clerk who issues a subpoena under Section 512(h) is any more an "initial investigator of facts" than a clerk who issues a deposition subpoena relating to a patent proceeding or a labor arbitration. The only obvious difference is that the subject matter of a subpoena under Section 512(h) is far narrower than the open-ended scope of subpoenas issued under the provisions cited above – a distinction that makes the clerk's role under Section 512(h) *less*, not more, "investigative."

For present purposes, perhaps the most significant of the provisions cited by the district court is Rule 27, which authorizes district courts to issue orders compelling depositions "to perpetuate testimony regarding any matter that may be cognizable in any court of the United States " Like Section 512(h), Rule 27 permits a federal court to compel the giving of testimony with respect to controversies that "may be cognizable" in federal court but that are not the subject of pending federal litigation Verizon concedes that Rule 27 does not offend Article III, but insists that there are four "fundamental distinctions * * * of constitutional dimension" between Rule 27 and Section 512(h). Verizon Br. 20 In fact, however, the distinctions offered by Verizon are neither fundamental nor constitutional in dimension

Verizon first notes that Rule 27 requires the person seeking to conduct the deposition to aver that he "expects to be a party to an action cognizable in a court of the United States" in the future. But as the district court pointed out, a bare averment under Rule 27(a) that the party expects to engage in future litigation offers no assurance that a cognizable suit will actually be commenced. And even if litigation *does* subsequently occur, there is no assurance that the court will ever adjudicate the merits of the controversy. It is routine for suits to be terminated prior to judgment,

whether through settlement or otherwise. As a result, a federal court that is called on to order a deposition under Rule 27 may well never adjudicate the underlying controversy even if a complaint is filed. Yet the real and substantial possibility that the controversy will be resolved without any judicial determination of the parties' rights and liabilities in no way divests the court of the constitutional power to issue compulsory process under Rule 27. For the same reason, the possibility that the genuine controversy between the copyright owner and the alleged infringer may be resolved without further litigation does not affect the constitutional power of the court to issue a subpoena under Section 512(h).

It is also noteworthy that the federal predecessors to Rule 27, which go back to the founding of the Republic, required no averment regarding the likelihood of future litigation. Rule 27 has its origins in the Judiciary Act of 1789, which provided that a federal circuit court "may, according to the usages in chancery[,] direct" the taking of depositions *in perpetuam rei memoriam* "if they relate to matters that may be cognizable in any court of the United States." 1 Stat. 88, 90; Rev. Stat. § 866 (same). In contrast to Rule 27, the Judiciary Act of 1789 did not require the party seeking the testimony to aver that he expected to be party to a future suit cognizable in federal court. The First Congress thus does not appear to have understood Article III to condition the issuance of compulsory process on the probability of future litigation – and the First Congress's understanding has special weight in resolving constitutional questions. See *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983).

Verizon's second suggested distinction is that Rule 27 is designed to preserve known testimony from loss, while there is no risk of loss in this case because Verizon preserves relevant information regarding its customers' identities. Verizon Br. 20. That is indeed a distinction – but Verizon offers no explanation of why it is significant for Article III purposes, and we are aware of

none. In practice, moreover, Section 512(h) often will perform precisely the same preservation function as does Rule 27. See Second Op. at 14 [JA __].

Verizon's third purported distinction is that Rule 27 provides for adversarial proceedings before any judicial process issues, while subpoenas are issued under Section 512(h) on an *ex parte* basis. But nothing in Article III confines the exercise of judicial power to proceedings conducted on an adversarial rather than *ex parte* basis. For example, federal courts have the unquestioned authority to issue temporary restraining orders – a vastly more serious and invasive exercise of judicial power than the issuance of a subpoena – on an *ex parte* basis. See Fed. R. Civ. P. 65(b). The *ex parte* character of a proceeding may (or may not) implicate the demands of the Due Process Clause, but it has no bearing on the operation of Article III.

Finally, petitioner argues that Rule 27's roots "predate the Constitution," while there is no comparable historical precedent for the issuance of a third-party subpoena that is "unconnected to any case or controversy." Verizon Br. 21. But as we have shown above, the requirements of Section 512(h) ensure that subpoenas issued to service providers *are* "connected" to a case or controversy. Thus, in the end, there are no constitutionally significant differences between Section 512(h) and Rule 27. If the latter provision is constitutional, as Verizon concedes, the former provision is constitutional as well.

3. In addition to arguing that Section 512(h) authorizes the issuance of subpoenas in the absence of any Article III controversy, Verizon argues that Section 512(h) violates Article III by converting the federal courts into "free floating investigative bodies." Verizon Br. 12. According to Verizon, Section 512(h) assigns court clerks "purely investigatory" duties that are "non-judicial" or "extra-judicial" in nature. *Id.* at 17, 18. Verizon seeks to convey the image of federal clerks

roaming the countryside at will, issuing writs hither and yon to "investigate" potential malfeasance under the copyright laws.

That image is a striking one, but it has nothing to do with the actual function performed by clerks under Section 512(h). When a clerk issues a subpoena under Section 512(h), he is performing precisely the kind of routine function that he performs whenever he is called on to issue a garden-variety subpoena *duces tecum* under Rule 45. There is simply nothing "extra-judicial" about that function. Nor does Section 512(h) somehow transform the clerk, and through him the court, into a "free floating investigative body." The initiative for the issuance of a subpoena under Section 512(h) rests exclusively with the copyright owner, not the clerk, and the copyright owner must be able to identify specific past acts of copyright infringement before Section 512(h) can be invoked. Moreover, when the copyright owner properly invokes Section 512(h), the clerk has no power to conduct an open-ended inquiry into potential copyright infringement. Instead, the subject matter of a subpoena under Section 512(h) is limited to a single, narrowly defined subject: the identity of the alleged infringer. When a clerk issues such a subpoena, his function does not differ in any material respect from the functions routinely – and constitutionally – performed by him under provisions like Rule 45.

B. An Article III Controversy Exists Between the Copyright Owner and the Online Service Provider

As the foregoing discussion demonstrates, the subpoena mechanism created by Section 512(h) satisfies the requirements of Article III because it is tied to the existence of an actual controversy between the copyright owner and the alleged infringer. In addition, Section 512(h) is tethered to another Article III controversy – the controversy between the copyright owner and the

online service provider over disclosure of the identity of the infringing subscriber. Section 512(h) subjects online subscribers to an obligation under federal law to disclose specified information to copyright owners and establishes a mechanism for copyright owners to enforce that disclosure obligation in federal court. The adversity between the copyright owner and the online subscriber regarding disclosure of the subscriber's identity constitutes an independent Article III controversy sufficient to sustain resort to the subpoena power under Section 512(h).

There is nothing either novel or constitutionally doubtful about an Act of Congress that requires a private party to disclose specified information and permits the beneficiary of the disclosure obligation to compel disclosure in federal court. For example, the Employee Retirement Income Security Act (ERISA) obligates pension plan administrators to make specified information available to plan beneficiaries, and an administrator who fails to disclose requested information is subject to suit by the beneficiary in federal court. 29 U.S.C. 1132(a)(1)(A), (c)(1). The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 *et seq.*, requires owners and operators of industrial facilities to disclose specified information about hazardous chemicals used in those facilities, and any person may bring a civil suit in federal court against an owner or operator who fails to make the required disclosures. 42 U.S.C. 11021(a), 11046(a)(1), (b). Similarly, Title X of the Toxic Substances Control Act obligates sellers of residential property to disclose the presence of lead-based paint to purchasers, and the failure to comply with that disclosure obligation subjects the seller to, *inter alia*, a private suit to enforce the disclosure obligation. *Id.* § 4582d(a)(1)(B) (disclosure); *id.* §§ 2619, 2689, 4582d(d)(5) (enforcement).

The only distinction between Title II of the DMCA and these statutes is that Section 512(h) provides for the copyright owner to invoke the court's assistance by applying for a subpoena rather

than filing a complaint. But that is a distinction without a difference for Article III purposes, for Congress has the authority to "provid[e] remedies and defin[e] procedure in relation to cases and controversies in the constitutional sense," and in "[e]xercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies." *Aetna Life Ins. Co. of Hartford* v. *Haworth*, 300 U.S. 227, 240 (1937) (internal quotation marks omitted).

Although the district court found it unnecessary to decide whether the controversy between RIAA and Verizon provided an alternative basis for meeting the requirements of Article III, it suggested that an actual controversy might not be present in some cases because "the copyright owner need not assert that a disagreement over whether to provide the alleged infringer's name has emerged or will emerge." Second Op. at 19 n.12 [JA __]. In this case, however, as the district court itself acknowledged, "RIAA did make a pre-subpoena request for the name and Verizon did object." *Id.* Thus, assuming *arguendo* that a refusal to disclose the information must occur before Section 512(h) may be invoked, that requirement is met here.

II. Section 512(h) Does Not Violate The First Amendment

A. Section 512(h) Is Not Unconstitutionally Overbroad

The subpoenas at issue in this case involve individuals who are alleged to have engaged in wholesale violations of federal copyright law by illegally offering hundreds of copyrighted sound recordings for downloading over the Internet. It is undisputed that the First Amendment offers no protection for copyright infringement. *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 568 (1985); *Zacchini* v. *Scripps-Howard*, 433 U.S. 562, 574-78 (1977); see Verizon Br. 33. Moreover, the subpoenas impose no legal disability whatsoever on the subscribers themselves; only a separate suit for copyright infringement can do that. Accordingly, Verizon does not contend

that these subpoenas violate the First Amendment rights of the subscribers whose identities are at issue here, much less Verizon's own First Amendment rights. Instead, Verizon asserts that Section 512(h) is unconstitutionally overbroad and therefore may not be applied even where, as here, its application would indisputably be constitutional.

The overbreadth doctrine "is, manifestly, strong medicine," to be employed "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech * * * ." *Virginia* v. *Hicks*, No. 02-371 (U.S. June 16, 2003), slip op. 10; *Broadrick*, 413 U.S. at 612-13. Even when a statute *is* "specifically addressed to speech" or expressive conduct, the party seeking to invalidate the law on overbreadth grounds must "show[] that [the] law punishes a 'substantial' amount of protected free speech," "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications * * * ." *Hicks*, slip op. 5, 6 (quoting *Broadrick*, 413 U.S. at 615). Moreover, mere speculation about potentially unconstitutional applications will not suffice. Instead, "[t]he overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Id.* at 8 (internal quotation marks omitted; bracketed text added by Court).

Section 512(h) is manifestly constitutional under these standards. As a threshold matter, Section 512(h) "is not specifically addressed to speech or to conduct necessarily associated with speech * * * ." *Hicks*, slip op. 10. The conduct at which Section 512(h) is directed is the unlawful reproduction and distribution of copyrighted works over the Internet. When a subscriber illegally distributes computer files containing someone else's performance of copyrighted music, he himself

is not engaging in expression of any sort. Because the conduct at which Section 512(h) is directed does not involve expression at all, the overbreadth doctrine simply does not come into play.

Moreover, even if the transmission of illegally copied sound recordings could somehow be regarded as expressive conduct, Verizon has utterly failed to carry its "burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Hicks*, slip op. 8. Section 512(h) is, on its face, directed exclusively at copyright infringement – an activity that is wholly unprotected by the First Amendment. The statute cannot lawfully be invoked unless the requester identifies the work claimed to have been infringed and the material claimed to be infringing, has a good faith belief that the use of the material in the manner complained of is not authorized, and makes a sworn declaration that the subpoena is being sought to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under the Copyright Act. 17 U.S.C. 512(c)(3)(A), 512(h)(2)(C).

Given these statutory prerequisites, there is nothing on the face of the statute to suggest that persons who are engaged in protected expression, rather than copyright infringement, will routinely have their identities disclosed pursuant to subpoenas issued under Section 512(h). Nor has Verizon has offered any evidence that Section 512(h) is in fact being used or abused in a significant number of cases to obtain information that falls outside the intended scope of the provision. Instead, it offers a single factual example that does not involve the use of Section 512(h) at all (Verizon Br. 38) and speculates that Section 512(h) *could* be misused by "cyberstalkers" (*id.* at 39). Irrelevant anecdotes and unsupported speculation fall far short of "demonstrating, from the text of [the law] and from

actual fact, that substantial overbreadth exists." *Hicks*, slip op. 8. Verizon's overbreadth claim may therefore be rejected out of hand.[3]

B. Verizon's Objections to Section 512(h)'s Procedural Requirements Add Nothing To Its Overbreadth Claim

Verizon argues that persons who engage in expression over the Internet have a qualified First Amendment interest in anonymity and that Section 512(h) lacks the procedural safeguards required to protect that interest. Verizon's procedural objection to Section 512(h) is without merit for two basic reasons: the First Amendment does not impose any procedural preconditions on the disclosure of subscriber identities under Section 512(h), and even if it did, Section 512(h)'s own procedures would be sufficient to pass constitutional muster.

With respect to the first of these points, Verizon's procedural claim is predicated on Supreme Court decisions involving statutes that are specifically intended to suppress speech. For example, in *Blount* v. *Rizzi*, 400 U.S. 410 (1971), the case on which Verizon places principal reliance, the Supreme Court was presented with statutes that permitted the Postmaster General to exclude allegedly obscene materials from the public mail. The Supreme Court held that the statutes, as an "administrative censorship scheme,' were unconstitutional because they lacked procedural safeguards to minimize the risk that non-obscene materials would be improperly suppressed. U.S. at 417. In contrast to the statutes at issue in *Hicks* and other cases relied on by Verizon, Section 512(h) imposes *no* restraint on speech and is not intended to prohibit expression in any way.

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[3] Verizon suggests that it is "not required to provide documentary proof of mistakes or abuse." Verizon Br. 38. The Supreme Court's decision in *Hicks*, which requires the complainant to demonstrate overbreadth "from the text of the [law] *and from actual fact*," disposes of that suggestion. *Hicks*, slip op. 8.

Second Op. at 28 [JA __] Nothing in *Blount* suggests that such a law must have particular procedural safeguards in order to pass muster under the First Amendment.

In any event, as the district court pointed out, Section 512(h) possesses ample procedural safeguards to minimize the risk that persons who are engaged in protected speech over the Internet will have their identities improperly disclosed. As explained above, a party requesting a subpoena under Section 512(h) must identify the infringing material, assert a good faith belief that the use of the material unauthorized, and swear under oath that the information will only be used to protect rights under the Copyright Act. Any person who knowingly misrepresents that the material or activity underlying a subpoena is infringing is liable for damages, costs, and attorney's fees. 17 U.S.C. 512(f). And an online service provider that believes a subpoena is unfounded may make a timely objection to compliance and, by so doing, shift to the requester the burden of obtaining a judicial order compelling disclosure of the information. As the district court pointed out, these safeguards "are precisely the type of procedural requirements other courts have imposed" in non-copyright cases "to compel a service provider to reveal the identity of anonymous Internet users." Second Op. at 31 n.23. The First Amendment demands nothing more here.[4]

[4] Verizon appears to conceive of its procedural argument as an alternative to its overbreadth claim. In fact, however, the procedural objections raised by Verizon are – at most – simply another basis for asserting that Section 512(h) is impermissibly overbroad. To invalidate Section 512(h) on its face, Verizon would have to show not only that there are individual cases in which the claimed lack of procedural safeguards will trench on protected First Amendment interests, but that the volume of such cases is substantial in an absolute sense and "relative to the scope of the law's plainly legitimate applications." *Hicks*, slip op. 6. Verizon has made no effort to make such a showing.

CONCLUSION

For the foregoing reasons, the orders of the district court should be affirmed insofar as they sustain the constitutionality of 17 U.S.C. 512(h).

Respectfully submitted,

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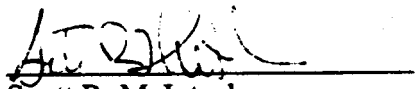
CERTIFICATE OF COMPLIANCE

1 This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's order of April 29, 2003. It contains 6994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using WordPerfect version 9.0 in 12-point Times New Roman type.



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