

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 16, 2003
Nos. 03-7015, 03-7053 (consolidated appeals)

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

IN RE: VERIZON INTERNET SERVICES, INC.
Subpoena Enforcement Matter

RECORDING INDUSTRY ASSOCIATION OF AMERICA,
Appellee,

v.

VERIZON INTERNET SERVICES INC.,
Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
GLOSSARY	vi
SUMMARY OF ARGUMENT	1
I. THE ISSUANCE AND ENFORCEMENT OF A JUDICIAL SUBPOENA MUST BE SUPPORTED BY AN ARTICLE III CASE OR CONTROVERSY INDEPENDENT OF A DISPUTE OVER THE VALIDITY OF THE SUBPOENA ITSELF	2
II. SECTION 512(h) CANNOT BEAR THE EXPANSIVE CONSTRUCTION ADVOCATED BY RIAA AND ITS AMICI.....	8
A. RIAA’s Reliance on the Statutory Definition of “Service Provider” Conflicts with the Organization of the Statute as a Whole and Leads to Absurd Results.....	10
B. By Statutory Cross-Reference and Context, the Scope of Section 512(h) Is Limited to the Functions Described in Section 512(c)	13
III. SECTION 512(h) VIOLATES THE FIRST AMENDMENT RIGHTS OF INTERNET USERS.....	17
A. RIAA Erroneously Dismisses the Significant First Amendment Interests at Stake.....	17
B. Section 512(h)’s Procedures Are Constitutionally Inadequate.....	18
C. Section 512(h) Will Restrict A Substantial Amount of Protected Speech.....	19
D. The Court Should Construe Section 512(h) Narrowly To Apply Only to Hosted Content Under Section 512(c)	20
CONCLUSION.....	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Application of the Pacific Railroad Commission</i> , 32 F. 241 (C.C.N.D. Cal. 1887)	7
<i>Arizona v. California</i> , 292 U.S. 341 (1934)	8
<i>Barwood, Inc. v. District of Columbia</i> , 202 F.3d 290 (D.C. Cir. 2000).....	5
* <i>Blount v. Rizzi</i> , 400 U.S. 410 (1971)	18
<i>Buckley v. American Constitutional Law Foundation</i> , 525 U.S. 182 (1999).....	18
<i>Chavez v. Martinez</i> , __ U.S. __, 123 S. Ct. 1994 (2003)	6
<i>Comsat Corp. v. NSF</i> , 190 F.3d 269 (4th Cir. 1999)	7
<i>Custiss v. Georgetown & Alexandria Turnpike Co.</i> , 10 U.S. (6 Cranch) 233 (1810)	5
<i>Doe v. DiGenova</i> , 779 F.2d 74 (D.C. Cir. 1985).....	4
<i>Estate of Joseph Leder v. Commissioner of Internal Revenue</i> , 893 F.2d 237 (10th Cir. 1989)	13
<i>Ex parte McCardle</i> , 74 U.S. (7 Wall.) 506 (1868)	4
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	19
<i>Green v. Compagnia General Italiana di Navigation</i> , 82 F. 490 (S.D.N.Y. 1897).....	8
* <i>Hayburn’s Case</i> , 2 U.S. (2 Dall.) 408 (1792).....	2

Authorities upon which Appellant chiefly relies are marked with asterisks.

<i>Hobson v. Hansen</i> , 265 F. Supp. 902 (D.D.C. 1967).....	5
<i>Hoffmann-La Roche Inc. v. Sperling</i> , 493 U.S. 165 (1989).....	2
* <i>Houston Business Journal, Inc. v. Office of Comptroller of Currency</i> , 86 F.3d 1208 (D.C. Cir. 1996).....	4, 6
<i>ICC v. Brimson</i> , 154 U.S. 447 (1894).....	3-4
<i>In re Lilly</i> , 76 F.3d 568 (4th Cir. 1996).....	13
<i>Lewis v. NLRB</i> , 357 U.S. 10 (1958).....	5
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983).....	7
<i>McCook Metals LLC v. Alcoa</i> , 249 F.3d 330 (4th Cir. 2001).....	5
<i>McIntyre v. Ohio Elections Commission</i> , 514 U.S. 334 (1995).....	18
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....	18
<i>Nat'l Cable Television Association v. Copyright Royalty Tribunal</i> , 689 F.2d 1077 (D.C. Cir. 1982).....	18
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986).....	19
* <i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997).....	12
<i>Robinson v. Shell Oil Co.</i> , 70 F.3d 325 (4th Cir. 1995) (<i>en banc</i>).....	12
<i>S & E Contractors, Inc. v. United States</i> , 406 U.S. 1 (1972).....	10

<i>Sheehan v. Doyle</i> , 513 F.2d 895 (1st Cir. 1975).....	6
* <i>Sony Corp. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	9
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998).....	4
<i>United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.</i> , 517 U.S. 544 (1996).....	5
* <i>United States Catholic Conference v. Abortion Rights Mobilization, Inc.</i> , 487 U.S. 72 (1988).....	3, 4, 6
<i>United States v. Wilson</i> , 290 F.3d 347 (D.C. Cir. 2002).....	12, 15
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995).....	7
<i>United States v. Hill</i> , 694 F.2d 258 (D.C. Cir. 1982).....	3, 4
* <i>United States v. Ferreira</i> , 54 U.S. (13 How.) 40 (1851).....	2
* <i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950).....	2, 3
<i>United States v. Staples</i> , 256 F.2d 290 (9th Cir. 1958).....	7
<u>Statutes</u>	
5 U.S.C. § 552	3
9 U.S.C. § 7	7
*17 U.S.C. § 512	<i>passim</i>
17 U.S.C. § 1205	16
28 U.S.C. § 332	7
28 U.S.C. § 1782	7

29 U.S.C. § 1132	3
35 U.S.C. § 23	6
35 U.S.C. § 24	6
45 U.S.C. § 157	6
Digital Millennium Copyright Act (Title II), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (Online Copyright Infringement Liability Limitation Act)	9

Federal Regulations & Federal Rules of Civil Procedure

37 C.F.R. § 1.251	6
Fed. R. Civ. P. 27	7-8
Fed. R. Civ. P. 37	5
Fed. R. Civ. P. 45	5
Fed. R. Civ. P. 82	5

Congressional Material

H.R. Rep. No. 105-551 (1998)	15, 16
H.R. Rep. No. 105-190 (1998)	15
S. Rep. No. 105-190 (1998)	9, 15, 16, 17

<i>Copyright Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Sept. 11, 1997)</i>	10
--	----

<i>Privacy of Intellectual Property on Peer-to-Peer Networks: Hearing before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. (Sept. 26, 2002)</i>	9
---	---

<i>WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Sept. 16-17, 1997)</i>	10
--	----

Publications

Compact Oxford English Dictionary (2d ed. 1993)	14
---	----

Miscellaneous

David Burkai, *An Introduction to Peer-to-Peer Computing*, Intel Developer Update Magazine, Feb. 2000, at <http://www.intel.com/update/departments/initech/it02012.pdf>.....9

Order, *Rossi v. MPAA*, No. 02-00239BMK, (D. Haw. April 29, 2003) (unpublished).....19

GLOSSARY

BOTS

The term “bots” refers to automated computer programs that can run 24 hours a day seven days a week without human intervention. Bots can be used to perform key word or other searches of content available on the World Wide Web. *See generally* Newton’s Telecom Dictionary 99 (17 ed. 2001).

Conduit Functions

The term “conduit functions” refers to the provision of a transmission service, where the service provider transmits information of the user’s choosing, between or among points selected by the user, without any change in the content of the information as sent and received. *See* 17 U.S.C. § 512(a).

Counter Notification

The term “counter-notification” refers to the procedure specified in Section 512(g)(3) of the Copyright Act, 17 U.S.C. § 512(g)(3)(B), whereby the owner of an online site that has been the subject of a take-down notice under 17 U.S.C. § 512(c)(3)(A) may inform the service provider that the material designated is not infringing.

DMCA

The term “DMCA” refers to the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in various sections of 17 U.S.C.). The DMCA was enacted into law on October 28, 1998.

FIRST SUBPOENA OPINION

The phrase “*First Subpoena Opinion*” refers to the Memorandum Opinion and Order of the district court entered on January 21, 2003 in No. 1:02-MS-00323 (JDB) (D.D.C.), which granted RIAA’s motion to enforce a subpoena served on Verizon on July 24, 2002. This judgment is the subject of the appeal in No. 03-7015.

Internet

The term “Internet” means the international computer network of both federal and non-federal interoperable packet switched data networks. *See* 47 U.S.C. § 230(f)(1). The Internet is a network of computer networks joined by high-speed transmission facilities and the shared use of common protocols for the routing of information. Newton’s Telecom Dictionary 361 (17 ed. 2001).

Internet Service Provider (ISP)

The term “Internet Service Provider” or “ISP” means an entity that combines computer processing, information storage, protocol conversion, and routing with transmission to enable its subscribers to gain access to Internet content and services, such as the sending and receiving of electronic mail and the ability to browse web pages. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 F.C.C.R. 385, 401 ¶ 34 (1999). AmericaOnline, MSN, Earthlink and Verizon.net are all Internet service providers.

KaZaA

The term “KaZaA” refers to software distributed by Kazaa BV, which is based upon FastTrack networking technology. KaZaA users may exchange digital files from their personal computers, including documents, pictures, music files, and any other information that can be digitized. *See generally Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, No. CV01-08541, 2003 WL 1989129 (C.D. Cal. April 25).

MPAA

The term “MPAA” refers to “Motion Picture Association of America, Inc.,” a trade organization that represents the interests of its members, motion picture studios.

Peer-to-Peer Application (“P2P”)

The term “peer-to-peer” application or software (also known as “P2P”) refers to a set of functionalities that allows users to search and access digital files on other users’ computers. In a peer-to-peer system, each computer linked to the network has equivalent capabilities and responsibilities. *See Webopedia, Peer-to-Peer Architectures – Definition, available at <http://www.webopedia.com/TERM/P/Peer_to_Peer_architecture.html >* (visited May 10, 2003).

RIAA

The term “RIAA” refers to “Recording Industry Association of America, Inc.,” a trade organization that represents the interests of its members, various owners of copyrights in sound recordings.

SECOND SUBPOENA OPINION

The phrase “*Second Subpoena Opinion*” refers to the Memorandum Opinion and Order of the district court entered on April 24, 2003 in No. 1:03-MS-00040 (JDB) (D.D.C.), which denied Verizon’s motion to quash a subpoena served on Verizon by RIAA on February 4, 2003. This judgment is the subject of the appeal in No. 03-7053.

Take-Down Notice

The term “Take-Down Notice” refers to a notice sent by a copyright owner or the agent of a copyright owner to an Internet service provider as specified in Sections 512(c)(3)(A), 512(b)(2)(E), and 512(d)(3) of the Copyright Act, 17 U.S.C. §§ 512(c)(3)(A); 512(b)(2)(E) & 512(d)(3).

Verizon

The term “Verizon” refers to Verizon Internet Services Inc., d/b/a Verizon.net, an Internet service provider.

SUMMARY OF ARGUMENT

1. RIAA contends that Congress may use its Article I powers to require federal courts to lend their authority to the investigation of possible violations of law in the same manner as administrative agencies. For its part, the United States eschews this radical approach, and instead asks this Court to hold that the possibility of a dispute over the use of a discovery device can itself create jurisdiction to issue and enforce a judicial subpoena. Acceptance of either argument is foreclosed by Supreme Court and Circuit precedent.

2. Both RIAA and MPAA avoid any careful textual analysis of Section 512 in favor of the selective quotation of legislative testimony (much of which is completely unrelated to Title II of the DMCA). What they cannot deny is that Congress never considered peer-to-peer technology or its implications for either copyright holders or service providers *because that technology did not exist in 1998*. Both by express statutory cross-reference and by context, the operation of Section 512(h) is tied to the take-down duties contained in Section 512(c). Any other reading of the statute renders the cross-references to subsection (c) superfluous, conflicts with the purposes behind the notification requirements, and ascribes to Congress the intent to place an intrusive and controversial tool in the hands of copyright owners to combat a problem that Congress did not contemplate.

3. The First Amendment question before the Court is whether this statute accords sufficient procedural protection to the expressive and associational rights of every citizen who uses the Internet and whether the lack of such protections will inevitably lead to an unacceptable level of mistakes and abuse. The minimal assertions necessary to obtain a subpoena and the lack of notice to the actual speaker fall far below what the First Amendment requires prior to authorizing interference with anonymous speech and association on the Internet.

I. The Issuance and Enforcement of a Judicial Subpoena Must be Supported by an Article III Case or Controversy Independent of a Dispute over the Validity of the Subpoena Itself.

The two subpoenas before this Court were issued and enforced in the absence of any pending case or controversy. They were issued and enforced at the behest of a trade association that, under the copyright laws, does not even have the right to bring a lawsuit to enforce a copyright. Their purpose is purely informational, gathering facts that may or may not be of use to a private party in its dealings with third parties not before the court. The facts gathered by these subpoenas are not placed before the district court or any other body in aid of adjudicating any issue of federal law.

Requiring a federal court to issue and enforce judicial process to advance the private interests of a non-litigant is “an innovation.” *Second Subpoena Opinion* 6 (JA ___). The Supreme Court has consistently condemned such “innovations” — under Article III the federal courts cannot act, or be required to act, as fact-finding bodies outside the strictures of a live controversy over which they have subject matter jurisdiction. *See, e.g., Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950); *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 174 (1989) (noting the distinction “in form and function” between judicial process employed in the management of existing claims and judicial process used for “the solicitation of claims”).

It is RIAA that has offered a “contrived pastiche,” RIAA Br. 19, of rationales to avoid application of these fundamental principles. RIAA’s arguments are threefold: 1) federal courts enforce process issued by administrative agencies and enforcement of the subpoenas at issue here constitutes an analogous use of judicial power, RIAA Br. 20-22; 2) Congress may authorize the issuance and enforcement of judicial process outside a case or controversy pursuant to any of

its powers under Article I, *id.* at 23-24; and, even if the first two rationales are wrong, 3) the exercise of Article III power pursuant to Section 512(h) is sufficiently analogous to Federal Rule of Civil Procedure 27 to pass constitutional muster. *Id.* at 28-30.¹ Each argument fails and each serves only to highlight the deviation from the constitutional principles at issue in these appeals.

First, the power of executive agencies to issue administrative subpoenas comes both from their Article II authority to “take Care that the Laws be faithfully executed” and their Article I authority delegated by Congress. As the Supreme Court made clear in *Morton Salt*, 338 U.S. at 641-42, courts may not be employed to conduct investigations into possible civil or criminal wrongdoing in the same manner as administrative agencies.² *ICC v. Brimson*, 154 U.S. 447 (1894), relied upon heavily by RIAA, RIAA Br. 21-23, involved the exercise of judicial power to enforce administrative subpoenas issued by the ICC after a refusal to comply. Because a live controversy over federal questions under the Interstate Commerce Act existed at the time judicial enforcement was sought, the Court held that the statute did not require the federal courts to act outside of Article III. 154 U.S. at 485. Nothing in *Brimson* or its progeny suggests that Congress could have authorized the *federal courts* to issue and enforce subpoenas to investigate possible violations of the Interstate Commerce Act. *See United States v. Hill*, 694 F.2d 258, 263

¹ RIAA’s fourth argument, *see also* U.S. Br. 16-18, that a request for a Section 512(h) subpoena is itself a lawsuit, analogous to a suit for information under ERISA or FOIA, RIAA Br. 30-32, is meritless and was properly rejected by the district court. *Second Subpoena Opinion* 19 n.12 (JA ___). Both 29 U.S.C. § 1132 and 5 U.S.C. § 552(a) authorize civil actions in federal court for disclosure of information after a live controversy has arisen under federal law over the disclosure.

² RIAA contends that *Morton Salt* stands only for the proposition that “federal courts lacked *inherent* authority to issue subpoenas to undertake investigations of their own.” RIAA Br. 23 (emphasis in original). *Morton Salt* spoke not of inherent authority but of “*limitations inherent in the body that issues ... [subpoenas] because of the provisions of the Judiciary Article of the Constitution,*” 338 U.S. at 642 (emphasis added), and both *Morton Salt* and *Catholic Conference* found the limitations of Article III analogous to those contained in the Bill of Rights, *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (quoting *Morton Salt*, 338 U.S. at 642).

(D.C. Cir. 1982) (“At least since *ICC v. Brimson* [citations omitted], federal courts have drawn a sharp distinction between agency power to *issue* subpoenas and judicial power to *enforce* them.”).

Second, Congress does not have constitutional authority to modify either the standing requirements of Article III or its prohibition on the exercise of judicial power for purely investigative purposes. Without a live controversy before it, a federal court may not undertake any judicial act. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998). RIAA acknowledges this principle, but argues that it applies only to the adjudication of claims and not to discovery tools employed for their adjudication. RIAA Br. 23. This argument is foreclosed by *Catholic Conference* where the Supreme Court flatly held that, “the subpoena power of a court cannot be more extensive than its jurisdiction.” 487 U.S. at 76; *accord Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996). RIAA’s position also makes no sense—it means that, while Congress could not authorize the adjudication of moot causes, it *could* authorize the issuance and enforcement of judicial process in moot proceedings.³

RIAA’s central contention is that the clerk of the district court is exercising Article I authority delegated from Congress in issuing the subpoena and that the court then exercises its Article III authority in enforcing it. RIAA Br. 23-24. But the law is clear that a possible Rule 45 challenge to a judicial subpoena does not itself constitute a “case or controversy” within the

³ RIAA contends that *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985), stands for the proposition that a subpoena “is not itself the order of an Article III court.” RIAA Br. 23-24. *Doe* drew a distinction between “legal process” and an “order of the court” in applying the Privacy Act. 779 F.2d at 80-85. It did not discuss Article III, and it certainly did not hold that a subpoena issued in the name of the court is not a judicial act. *Id.* at 81 (noting that a subpoena “is signed by the clerk of the court, issued in the name of the court, and carries with it the contempt power”). Moreover, both *Catholic Conference* and *Houston Business Journal* analyzed subpoenas issued at the behest of private parties as judicial acts, requiring the presence of Article III jurisdiction at the time of their issuance and enforcement.

meaning of Article III. *Barwood, Inc. v. D.C.*, 202 F.3d 290, 294-95 (D.C. Cir. 2000) (“To secure jurisdiction by this means would be a remarkable feat of bootstrapping.”); *McCook Metals LLC v. Alcoa*, 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”); *see* Fed. R. Civ. P. 82. Such a subsequent challenge might never occur and, in any event, is not itself a case “arising under” federal law. Because Congress cannot “excuse” the absence of a live controversy either at the issuance or enforcement stage, *see United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996), these subpoenas are invalid under Article III.

The principle advocated by RIAA (like many attempted “innovations” in the separation of powers) has no logical stopping point. As long as Congress denominated the initial action of the clerk “ministerial,” it could require federal courts to undertake myriad investigative tasks otherwise forbidden to them by Article III.⁴ Under RIAA’s reasoning, Congress could authorize district court clerks to issue writs for the inspection of land, for depositions, or even for the investigation of legal entitlements such as those at issue in *Hayburn’s Case* and *Ferreira*. Federal judges then would be required to employ their Article III authority to gather facts unconnected to the adjudication of any independent federal claim. In essence, RIAA is arguing

⁴ None of the “ministerial” act cases cited by RIAA, RIAA Br. 25-26 & nn.20-21, involves the issuance of binding judicial process that carries with it the immediate threat of enforcement by an Article III judge. *See, e.g., Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233, 237 (1810) (recording of condemnation verdict where “[t]he law asks not the intervention of the court”); *Lewis v. NLRB*, 357 U.S. 10 (1958) (issuance of subpoenas by regional director of the NLRB); *Hobson v. Hansen*, 265 F. Supp. 902, 909-911 (D.D.C. 1967) (appointment of local officials by D.C. courts).

that Congress can overrule the results in *Catholic Conference* and *Houston Business Journal* by statute.⁵

RIAA concludes its Article I argument by citing a series of statutory provisions it claims are analogous to Section 512(h) and arguing that this Court therefore is required to conclude that these subpoenas are constitutional. RIAA Br. 27-28. The short answer is that none of these statutory provisions is before the Court, and their unvarnished citation without constitutional analysis is hardly persuasive evidence that Section 512(h) as employed here comports with Article III.

Moreover, by context and operation each of these statutory provisions is readily distinguishable from Section 512(h). For example, 35 U.S.C. § 24 allows the district courts to aid in discovery “for use in any contested case in the Patent Office.” The Patent Office sets the rules for such discovery, *see* 35 U.S.C. § 23, 37 C.F.R. §§ 1.251, *et seq.*, and thus “section 24 is simply a provision giving teeth, through the courts’ subpoena powers, to authority conferred on the Commissioner of Patents.” *Sheehan v. Doyle*, 513 F.2d 895, 898 (1st Cir. 1975). Similarly, 45 U.S.C. § 157(h) gives the National Mediation Board the right to require the attendance of witnesses and the production of documents it “deems material to a just determination of the matters submitted to its arbitration.” Again, the judicial role is limited to enforcement of an administrative demand for evidence in the context of a live controversy of federal law. The Federal Arbitration Act authorizes arbitration panels (not the litigants) to “summon in writing

⁵ If RIAA’s position were correct, Congress could employ its Article I powers to authorize the use of any judicial power where there exists some possible controversy of federal law. But *Catholic Conference* clearly holds that even a complaint alleging a live controversy of federal law cannot support the issuance and enforcement of a subpoena if, in fact, federal jurisdiction does not exist. The investigation of potential civil claims, to which the district court lent its authority here, is clearly not itself a “case” within the meaning of Article III. *See Chavez v. Martinez*, ___ U.S. ___, 123 S. Ct. 1994, 2001 (2003) (plurality opinion) (“[I]t is enough to say that police questioning does not constitute a ‘case’ any more than a private investigator’s precomplaint activities constitute a ‘civil case.’”).

any person to attend before them,” 9 U.S.C. § 7, and then petition the district court for an order enforcing their process. *See Comsat Corp. v. NSF*, 190 F.3d 269, 275-76 (4th Cir. 1999). The arbitrators’ role is akin to that of an administrative agency or an Article I court—a role Article III does not allow the federal courts to assume.

The issuance of subpoenas to investigate judicial misconduct, *see* 28 U.S.C. § 332(d)(1), obviously involves the inherent power of the federal judiciary to regulate the conduct of its own members and thus cannot be analogized to the private subpoena power at issue here. Similarly, provisions such as 28 U.S.C. § 1782 simply recognize the inherent judicial authority to offer comity to courts of other nations. *See Application of the Pacific R.R. Comm’n*, 32 F. 241, 256 (C.C.N.D. Cal. 1887) (Field, Circuit Justice) (power to offer comity to foreign tribunals is not an exception to the “case or controversy” requirement, but rather one of the “powers inherent in all courts”); *United States v. Staples*, 256 F.2d 290, 292-93 (9th Cir. 1958). An inherent power, based upon principles of international judicial comity, cannot be stretched to include the investigation of possible violations of domestic copyright laws.

Finally, Rule 27 and the principles behind it cannot justify the expansive subpoena power at issue here. To the extent that depositions *perpetuam rei memoriam* constitute a historical exception to the “case or controversy” requirement, that exception must be narrowly construed. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 791 (1983). The general rule at both common law and equity was that discovery was only allowed upon the filing of a valid complaint or bill, not before. *See United States v. Gaudin*, 515 U.S. 506, 581-19 (1995) (requiring demonstration of “a consistent historical tradition” to support an exception from established constitutional principles). An averment of inability to bring suit, that suit will in fact be brought, and that the evidence is subject to imminent loss, and adversarial proceedings to determine if these averments

justify the perpetuation of testimony, are the requisite elements of such a bill in equity— requirements that predate the Constitution and Rule 27. *See Arizona v. California*, 292 U.S. 341, 347-48 (1934); *Green v. Compagnia General Italiana di Navigation*, 82 F. 490, 494-495 (S.D.N.Y. 1897). Contrary to the suggestion of the United States, U.S. Br. 14, these were the “usages in chancery” referred to in the Judiciary Act of 1879, 1 Stat. 88, and Rule 27 merely codified them.

Because the subpoenas in these cases were issued and enforced as a pure fact-gathering exercise with no connection to any pending case or controversy, this Court should hold that they are void and unenforceable. Because Section 512(h)’s expedited procedures and other provisions can be applied constitutionally in the context of an actual infringement lawsuit, this Court should construe the statute to apply only where a Section 512(h) subpoena is issued in aid of such a pending lawsuit.

II. Section 512(h) Cannot Bear the Expansive Construction Advocated by RIAA and its Amici.⁶

Throughout its brief, RIAA presumes that Congress intended to extend Section 512(h) to conduit functions and places the burden on Verizon to identify a statutory exception. RIAA Br. 11-12; *see* MPAA Br. 10-12. RIAA accomplishes this statutory sleight of hand by ascribing to Congress the intent to address technologies *that did not exist when the DMCA was enacted*. RIAA cannot deny what the district court expressly found: peer-to-peer (“P2P”) file sharing was “not even a glimmer in anyone’s eye when the DMCA was enacted’ by Congress in 1998.” *First Subpoena Opinion* 23-24 (citation omitted) (JA __-__). The *only* conduit functions discussed by *Congress* in the reports accompanying Section 512 were electronic mail and web

⁶ While the United States defends the constitutionality of the statute, it pointedly takes no position on RIAA’s expansive view of the subpoena power in Section 512(h). U.S. Br. 8 n.2. If this Court concludes, as Verizon submits that it must, that these subpoenas were not authorized by statute, the Court need not address the constitutional issues in these cases. *Id.*

browsing. Verizon Br. 30. Because P2P technology could not have been considered by Congress in 1998, deference to congressional constitutional authority and expertise in the area of copyright counsels *against* an expansive construction of Section 512(h). *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (“The Judiciary’s reluctance to expand the protections afforded by the copyright *without explicit legislative guidance* is a recurring theme.” (emphasis added) (citations omitted)).⁷

RIAA employs its chronologically distorted analysis of congressional intent to conceal the real purpose behind Section 512 and to ride roughshod over the express limitations contained in the text. Title II of the DMCA is entitled “Online Copyright Infringement Liability Limitation Act,” Pub. L. No. 105-304, § 201, 112 Stat. 2860 (1998), and Section 512 bears the title “Limitations on liability relating to material online.” These provisions were created not primarily to expand copyright owners’ enforcement tools, as was Title I of the DMCA, but rather to limit ISP’s liability and thus ensure that “the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” S. Rep. No. 105-190, at 8 (1998).

Similarly, the attempt to use legislative testimony to portray the subpoena power as central to the “share[d] responsibility” and “strong incentives ... to cooperate” embodied in the legislative compromise that became Section 512 is pure fiction. RIAA Br. 5 & n.3; MPAA Br.

⁷ Not one of the snippets of legislative testimony offered by RIAA and MPAA contains any discussion of P2P applications or their relevance to the scope of Section 512(h). *See, e.g.,* David Burkai, *An Introduction to Peer-to-Peer Computing*, Intel Developer Update Magazine, Feb. 2000, at 3, <http://www.intel.com/update/departments/initech/it02012.pdf> (describing P2P as “a revolution underway that represents a new computing model for the Internet,” and contrasting it to “the traditional client/server architecture” in which “the client makes requests of the server with which it is networked”). Indeed, RIAA’s president told Congress in 2002 that it was conducting “the first hearing Congress ha[d] held to specifically examine the effects of copyright theft over peer-to-peer networks on the Internet.” *Privacy of Intellectual Property on Peer-to-Peer Networks: Hearing before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 21 (Sept. 26, 2002) (Statement of Hilary Rosen).

3-6. Examination of the cited testimony reveals that, in each case, the ISP cooperation being discussed was the take-down of infringing material. *See, e.g., WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 88-89 (Sept. 16-17, 1997) (Statement of Roy Neel, cited at RIAA Br. 5 n.3) (explaining that in “shar[ing] responsibility,” ISPs should “screen[]-off or take[] down” material in exchange for copyright immunity and immunity “from liability to those who may be adversely affected by” such action). Indeed, the only arguably pertinent statement unearthed by MPAA supports Verizon’s position by directly linking disclosure of user identity to material on “a particular site on the service provider’s system.” MPAA Br. at 3 (citation omitted).⁸

Any fair reading of the text and structure of Section 512 compels the conclusion that the subpoena power is limited to material hosted on the systems or network of a service provider. This Court should so hold and require RIAA and MPAA to take their “Brandeis Briefs” on today’s technologies and copyright concerns to Congress.

A. RIAA’s Reliance on the Statutory Definition of “Service Provider” Conflicts with the Organization of the Statute as a Whole and Leads to Absurd Results.

RIAA places primary reliance upon the definition of “service provider” in Section 512(k)(1)(B). RIAA Br. 10-11. It argues that because the words “service provider” as used in Section 512(h) are not themselves limited to a particular function specified in subsections (a)

⁸ Not only are the self-serving statements of copyright owners, upon which RIAA and MPAA rely heavily, *see* RIAA Br. 17-19 & nn.8-11, 15; MPAA Br. 3-6, a poor guide to statutory interpretation, *see, e.g., S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972) (“[i]n construing laws we have been extremely wary of testimony before committee hearings”), they are used in a distorted fashion. For example, what RIAA misleadingly labels “First 1997 House Hearings” in its brief, RIAA Br. 17 n. 9, were in fact hearings regarding an amendment to the criminal provisions of the Copyright Act that had nothing to do with ISP duties under Title II of the DMCA. *Copyright Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Sept. 11, 1997).

through (d), this “conclusively establishes” that the entire subsection extends to *all* service provider functions. *Id.* at 11. This is like arguing that a generic definition of “taxpayer” in the Internal Revenue Code means that all taxpayers must pay the Alternative Minimum Tax. It conflicts with the organizational structure of the statute, cannot be applied neutrally throughout the statute without leading to absurd results, and requires the Court to ignore the *other* provisions of Section 512(h) that clearly establish a more limited office for that subsection.

First, the term “service provider” is used in numerous subsections in which it is clear that the term is limited operationally. The most obvious example is its use in subsections (b), (c), and (d), where the term “service provider” indisputably is limited by the particular functions described in each of those provisions. *Verizon Br. 23-26*. Beyond those provisions, subsection (f), entitled simply “Misrepresentations,” uses the defined term “service provider,” but read in context it clearly does not apply to subsection (a) because there can be neither a take-down notice nor counter-notification under subsection (a). Similarly, subsection (g) uses the term “service provider” but by context and cross-reference it clearly applies only to subsections (b), (c), and (d). Indeed, subsections (f), (g), and (h) are all provisions that by cross-reference and context apply only to settings where take-down notices are authorized and specify additional rights or duties surrounding such take-down provisions.

Second, the only provision of the statute that imposes duties in each of the four situations described in subsections (a) through (d) explicitly says so. Subsection (i) imposes duties that apply to all the functionalities and corresponding limitations on liability “established by this section.” Thus, in subsection (i) as well, it is not the term “service provider” but the express reference to all limitations of liability that defines the scope of that provision. No such express specification of universal application is contained in subsection (h).

Third, RIAA makes the same mistake that the district court did by dismissing the first sentence of subsection (n), which states plainly that “[s]ubsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this *section*.” This rule of construction thus applies to all of Section 512, including subsection (h). Verizon Br. 25 & n.6. This intrinsic canon of construction confirms that Congress intended the carefully defined functionalities, not the definition of “service provider,” to drive the application of the rights and duties contained throughout Section 512.

Finally, the Supreme Court’s decision in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), exposes the inadequacy of the mechanistic approach advocated by RIAA and adopted by the court below. In *Robinson*, the Court reversed an *en banc* Fourth Circuit decision that had relied upon the definition of the word “employee” in Title VII to hold that the substantive protections of the statute could not extend to former employees. *See Robinson v. Shell Oil Co.*, 70 F.3d 325, 329-30 (4th Cir. 1995) (citing 42 U.S.C. § 2000e(f)). A unanimous Supreme Court rejected the idea that a statutory definition could have controlling effect where the operative provisions of the statute pointed to a different result. The Court noted numerous examples where, in context, use of the word “employee” in the operative provisions of Title VII could not be read to mean only “current employees.” 519 U.S. at 342-43 & n.3. From these examples, the Court reasoned: “Once it is established that the term ‘employees’ includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and *each section must be analyzed* to determine whether the context gives the term a further meaning that would resolve the issue in dispute.” *Id.* at 343-44 (emphasis added) (footnote omitted); *accord United States v. Wilson*, 290 F.3d 347, 351-53 (D.C. Cir. 2002). As in *Robinson*, the significance RIAA ascribes to the defined term “service provider” is inconsistent with numerous

substantive provisions of Section 512, and therefore the proper interpretive course is to analyze each particular provision in order to determine its intended scope.⁹

B. By Statutory Cross-Reference and Context, the Scope of Section 512(h) Is Limited to the Functions Described in Section 512(c).

RIAA begins its textual analysis by boldly pronouncing that: “On its face, nothing in § 512(h) limits the obligation to service providers performing ‘storing’ functions or excludes service providers performing ‘transmission’ functions.” RIAA Br. 10-11; *see* MPAA Br. 12. Apparently for RIAA and MPAA, the *three* explicit cross-references to procedures that are only applicable in the subsection (c) context are not on the “face” of the statute. It is a well-established principle of statutory construction, however, that a statutory cross-reference must be given effect, and where it places substantive or procedural limitations on the referring provision, those limitations are incorporated into the referring provision. *Verizon Br. 27; Estate of Joseph Leder v. Comm’r of Internal Revenue*, 893 F.2d 237, 241 (10th Cir. 1989) (noting the “only inference” that can be drawn from an “express cross reference” is that Congress meant for the two linked subsections to be interpreted “*in para materia*”).

RIAA addresses only one of the three cross-references to subsection (c)—the one in Section 512(h)(2)(A), which “requires a copyright owner seeking a subpoena to provide the ISP ‘a notification *described* in subsection (c)(3)(A).’” RIAA Br. 13 (emphasis by RIAA). Relying upon its analysis of this provision alone, RIAA argues that Section 512(h)’s repeated cross-references to subsection (c)(3)(A) should not be read to require compliance with the requirements of the notice provision. RIAA Br. 13-14.

⁹ The Fourth Circuit precedent upon which RIAA relies for its contention that the statutory definition is conclusive, RIAA Br. 11 (quoting *In re Lilly*, 76 F.3d 568 (4th Cir. 1996)), itself relied upon the Fourth Circuit’s *Robinson* decision, which was overruled by the Supreme Court as described above. *Lilly*, 76 F.3d at 571.

Nowhere does RIAA acknowledge or discuss Section 512(h)(4), entitled “Basis for Granting Subpoena,” which provides:

If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

There can be no doubt that this provision sets up a series of separate statutory *conditions precedent* to the issuance of any subpoena under Section 512(h). See Compact Oxford English Dictionary 812 (2d ed. 1993) (“if” means “[o]n condition that”). But a take-down notice drafted and issued in the subsection (a) context cannot, as a matter of law, “satisf[y] the provisions of subsection (c)(3)(A).” The provisions of subsection (c)(3)(A) apply only in the context of subsection (c). 17 U.S.C. § 512(c)(3)(A) (providing criteria that must be satisfied for the notification “[t]o be effective under this *subsection*,” *i.e.*, subsection (c)).¹⁰

RIAA now concedes that the take-down notices that accompanied these two subpoenas have no legal effect and do not require Verizon to *do anything*. RIAA Br. 13-14 & n.6. It recognizes that take-down notices apply only to subsections (b) through (d), *id.* at 4, and it further concedes that Section 512 differentiates between disabling “access to material” and “terminating the accounts of a subscriber.” *Id.* at 13 n. 6. RIAA is thus forced to argue that when a subpoena is issued in the subsection (a) context, the take-down notice is not a take-down notice at all; it is a form letter, serving a purely informational role. *Id.* at 14. But an invalid take-down notice that creates no legal obligations can hardly be said to “satisfy” the provisions of subsection (c)(3)(A) or even constitute the notice “described” in subsection (c)(3)(A). As this Court has stated: “It is the ‘classic judicial task’ of construing related statutory provisions ‘to

¹⁰ Subsection (a) does not provide for any take-down notices at all, and both subsections (b) and (d) provide for their own unique take-down notices that differ from the one specified in subsection (c)(3)(A). 17 U.S.C. § 512(b)(2)(E) (unique requirements of take-down notice under subsection (b)); *id.* § 512(d)(3) (same for subsection (d)).

make sense in combination.” *Wilson*, 290 F.3d at 355 (citation omitted). In this case, the only way to do so is to require that the (c)(3)(A) notice filed with the court and served upon the service provider be valid and effective.

RIAA also ignores the import of the other express cross-reference to the (c)(3)(A) notice procedure contained in Section 512(h)(5). That provision conditions an ISP’s duty to *respond* to the subpoena upon service of “a notification described in subsection (c)(3)(A).” Section 512(h)(5) further requires that the take-down notice either accompany the subpoena or be served upon the service provider *before* service of the subpoena. These provisions make no sense in the subsection (a) context. They require the service of a document that has no legal significance, in what is, in essence, a meaningless act. Moreover, in the subsection (a) context, a requester would *never* serve a take-down notice prior to a subpoena, because under RIAA’s reading of the statute the *only* purpose of the take-down notice is to obtain the subpoena. RIAA Br. 14.¹¹

Reading the cross-references to require compliance with each provision of subsection (c)(3)(A) is not a mere technicality. Each requirement serves an important statutory function that is lost or inapposite in the subsection (a) context. Subsection (c)(3)(A)(iii) contains two such substantive requirements, neither of which can be satisfied in the subsection (a) context.¹² This provision requires: “Identification of the material that is claimed to be infringing ... and that is to

¹¹ RIAA argues that “substantial compliance” with notification requirements is sufficient. RIAA Br. 14. That is beside the point. A take-down notice that requires nothing and does not satisfy key provisions of the statute cannot be considered “substantially compliant.” In fact, the legislative history of subsection (c)(3)(A)(iii) establishes that “substantial compliance” means only that “technical errors ... such as misspelling a name” or “supplying an outdated area code” may be ignored. S. Rep. No. 105-190, at 47 (1998); *see also* H. Rep. No. 105-551, at 56 (1998).

¹² Similarly, subsection (c)(3)(A)(ii)’s requirement that the infringing material be identified with a particular “online site” cannot be met in the subsection (a) context. The term “online site” is used throughout the legislative history as synonymous with a hosted website as described in subsection (c) of the statute. *See, e.g.*, H. Rep. No. 105-551, at 53 (referring to “wrongful activity that is occurring at the site on the provider’s system or network at which the material resides” as an example of infringing activity at an “online site”); H. Rep. No. 105-190, at 44.

be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. § 512(c)(3)(A)(iii). The first portion of this requirement necessarily presumes the ability of the ISP to remove or disable access to material and thus requires *control* over the particular material at issue. Verizon does not have such control over material stored on the personal computers of its over 1.7 million Internet access subscribers.¹³

The second clause of subsection (c)(3)(A)(iii) requires that notice contain information sufficient to allow the ISP to locate the material. “The goal of this provision is to provide the service provider with adequate information to *find and examine* the allegedly infringing material expeditiously.” H. Rep. No. 105-551, at 55 (emphasis added). It is simply impossible for the notice to accomplish this statutory “goal” in the subsection (a) context. Verizon can neither find nor examine material residing on personal computers, private networks, or other third-party storage devices to verify or rebut a claim of infringement. The fact that neither the complaining party nor the ISP can comply with subsection (c)(3)(A)(iii)’s notification and take-down requirements is powerful evidence that Section 512(h) was not intended to apply to the subsection (a) context.

Finally, RIAA has no response to Verizon’s statutory point about reconciling Titles I and II. Congress expressed a special solicitude for the privacy and expressive rights of individual Internet users throughout both Titles of the DMCA. Verizon Br. 3, 30-31 & n.8. In particular, Congress included a “privacy savings clause” in Title I of the DMCA, 17 U.S.C. § 1205, to ensure that individual Internet users could protect themselves from technological devices that

¹³ The statutory formulation “disabling access to” or “removing” material is used throughout the statute to refer *only* to situations where take-down duties are applicable, and never in the subsection (a) context. See 17 U.S.C. §§ 512(b)(2)(E), 512(c), 512(d)(3), 512(f), 512(g)(1). The Senate Report expressly ties this linguistic formulation to the take-down duties imposed by subsection (c)(1). S. Rep. 105-190, at 50.

copyright owners might use to gather personal information about them through their Internet use. *See* S. Rep. No. 105-190, at 18 (“[T]he committee concluded that it was prudent to rule out any scenario in which section 1201 might be relied upon to make it harder, rather than easier, to protect personal privacy on the Internet.”). Thus, when confronted with a choice between authorizing broader use of copyright protection devices and the personal privacy of Internet users in Title I, Congress chose the latter. It is simply implausible that Congress struck a radically different balance in Section 512(h).

III. SECTION 512(h) VIOLATES THE FIRST AMENDMENT RIGHTS OF INTERNET USERS.

A. RIAA Erroneously Dismisses the Significant First Amendment Interests at Stake.

RIAA repeats what is uncontested, *see* U.S. Br. 18, that copyright infringement is not protected speech under the First Amendment. RIAA Br. 32. Contrary to RIAA’s misleading assertions, RIAA Br. 3, Verizon does not condone copyright infringement and, in fact, promotes and profits from agreements it has reached with RIAA members to feature authorized music-sharing entities on Verizon’s own website. Second Kidd Decl. ¶¶ 4-6 (JA __-__). The issue before this Court is whether a statute that requires nothing more than the statement of an interested party that its rights to limit the expression of others *may* have been violated satisfies the First Amendment.

RIAA also attacks the district court’s holding that Internet users have a First Amendment right to speak anonymously. *Second Subpoena Opinion* 23-26 (JA __-__). It tries to sever the interest in anonymity from the free expression that anonymity is designed to protect and encourage, and it goes so far as to claim that Section 512(h) is not directed at speech at all. *See* RIAA Br. 33-34; U.S. Br. 19-20. But the exchange of content over the Internet is undoubtedly protected First Amendment expression, *see* Verizon Br. 32-33; Alliance for Public Technology

Br. 6; copyright just as assuredly is about limitations on free expression, *Nat'l Cable Television Assoc. v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1078 n.6 (D.C. Cir. 1982), and anonymous expression is just as assuredly protected by the First Amendment. Verizon Br. 36 n.11; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Because the right to speak anonymously encompasses a corresponding right to remain anonymous both during and after speech, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 201-204 (1999), a requirement that ISPs disclose the identities of subscribers based upon otherwise anonymous email, web browsing, and file-sharing activities both prevents and deters anonymous expression and association, *see, e.g., McIntyre*, 514 U.S. at 342; *NAACP v. Ala.*, 357 U.S. 449, 462 (1958).

B. Section 512(h)'s Procedures Are Constitutionally Inadequate.

RIAA wisely abandons the district court's reasoning that *Blount* is limited to the obscenity context and makes no attempt to defend the lower court's "core political speech" limitation on First Amendment procedural protections. Verizon Br. 32-33, 35-36. Instead, RIAA clings to its theory that "the logic of *Blount*" is limited to prior restraints on expression and ignores altogether the fact that Section 512(h) does "directly suppress speech," RIAA Br. 34. *See supra* 17-18. Contrary to RIAA's claim, RIAA Br. 35 n. 25, Verizon did not argue that *NAACP* had expanded *Blount*, but rather that anonymity can be an integral component of *both* protected expression and association. Verizon Br. 36 n.11. The revelation of identity impinges directly on the form of expression itself and prevents a particular mode of speech and association critical to the Internet medium. *Id.*

RIAA also reprises the district court's contention that Section 512(h) provides sufficient procedural safeguards. RIAA Br. 35-36; U.S. Br. 22. But Section 512(h) does not even require the due diligence required to file a complaint in federal court. In fact, one federal district court recently found that DMCA's "good faith" provision does not even "require[] a copyright holder

to conduct an investigation to establish actual infringement prior to sending a notice to an ISP.” Order, *Rossi v. MPAA*, No. 02-00239BMK, *7 (D. Haw. Apr. 29, 2003) (unpublished) (citing subsection (c)(3)(A)(v)). The right to challenge a subpoena under Rule 45 is meaningless where the service provider cannot access the material and the individual subscriber has no right to notice of the subpoena or an opportunity to challenge the elements of an infringement complaint or raise defenses such as “fair use.” This statute operates to shift the burden to a third party to defend presumptively protected speech of others. But Supreme Court has repeatedly held that the would-be censor must bear the burden of establishing the unprotected nature of the speech. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965) (government must bear burden of proving speech is unprotected); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-78 (1986) (libel plaintiff must bear burden of proving speech is false). The minimal showing required for issuance of the subpoena, the lack of notice to the individual user, the requirement of expeditious compliance, and the resultant inability to contest a self-interested assertion that expression is unprotected, fall far short of the procedural protections required by both the First Amendment and the Due Process Clause.

C. Section 512(h) Will Restrict A Substantial Amount of Protected Speech.

RIAA claims that “Verizon does not actually assert that § 512(h), properly applied, threatens protected speech.” RIAA Br. 37. But that is precisely Verizon’s point—the procedural requirements of the statute are so minimal that its “proper application” will lead to a significant number of good faith errors and intentional abuses. Both Verizon and *amici* have produced numerous examples where a notice was properly issued and it is *known* that the subscriber was obviously not committing copyright infringement. Verizon Br. 38-39; Alliance for Public Technology Br. 11-13; *see also* Public Citizen Br. 10-11. These examples do not include situations in which the ISP itself could not know that there was no actual infringement. Neither

do they represent the full range of errors that occur when copyright owners, or their bounty hunters, troll the Internet using “bots” to identify word groups that *might* suggest the presence of copyrighted material. Verizon Br. 39.

D. The Court Should Construe Section 512(h) Narrowly To Apply Only to Hosted Content Under Section 512(c).

Contrary to RIAA’s argument, there is a difference of constitutional dimension between hosted content and the billions of private communications that ISPs carry when performing the conduit functions described in subsection (a). It is analogous to the difference between regulating the content of billboards and policing the content of private telephone communications from the home. Verizon Br. 40-42. Moreover, only in the subsection (c) context do the protections of subsections (c), (f) & (g) apply, giving both the service provider and the web site owner an opportunity to analyze and respond to the copyright owner’s claims. For these reasons, this Court should construe Section 512(h) narrowly to apply only where the material itself resides outside the home and the statute ensures some procedural protections for the actual speaker.

CONCLUSION

For the foregoing reasons, the judgments of the district court in both proceedings should be reversed.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C)**

Counsel for Verizon Internet Services Inc. certifies the following:

In accordance with Fed. R. App. P. 32(a)(7)(B) and (C) and Circuit Rule 32(a), the attached brief for Reply Brief for Appellant is printed using a proportionally spaced, 12-point Times New Roman typeface and contains 6,986 words.



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CERTIFICATE OF SERVICE

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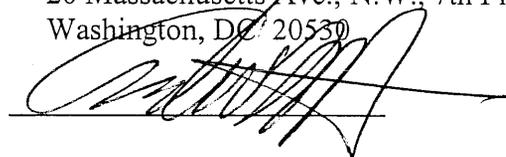
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