No. ___

IN THE

Supreme Court of the United States

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
Petitioner,

v.

VERIZON INTERNET SERVICES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

STANLEY PIERRE-LOUIS
LINDA J. ZIRKELBACH
RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.
1330 Connecticut Avenue, NW
Suite 300
Washington, D.C. 20036
(202) 775-0101

DONALD B. VERRILLI, JR.
Counsel of Record
THOMAS J. PERRELLI
DEANNE E. MAYNARD
JARED O. FREEDMAN
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioner

May 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether, contrary to the views of both the United States and the Copyright Office, § 512(h) of the Digital Millennium Copyright Act precludes copyright holders from obtaining the identity of a copyright infringer through issuance of a subpoena to the infringer's Internet service provider, simply because the infringing material is stored on the infringer's computer rather than on the service provider's server.

PARTIES TO THE PROCEEDING

Petitioner Recording Industry Association of America, Inc. was the appellee below. Verizon Internet Services, Inc. was the appellant. The United States intervened to defend the constitutionality of the Digital Millennium Copyright Act.

RULE 29.6 DISCLOSURE

Petitioner is a not-for-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Recording Industry Association of America, Inc. ("RIAA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 351 F.3d 1229 (D.C. Cir. 2003), and is reprinted at Pet. App. 1a-17a. That court's order denying RIAA's petition for rehearing is reprinted at Pet. App. 112a, and its order denying RIAA's petition for rehearing en banc is reprinted at Pet. App. 113a. The opinions of the United States District Court for the District of Columbia are reported at 240 F. Supp. 2d 24 (D.D.C. 2003) and 257 F. Supp. 2d 244 (D.D.C. 2003), and are reprinted at Pet. App. 18a-54a and 55a-111a.

JURISDICTION

The D.C. Circuit issued its decision on December 19, 2003. It denied RIAA's timely petition for rehearing or rehearing en banc on February 24, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Title II of the Digital Millennium Copyright Act, 17 U.S.C. § 512, reprinted at Pet. App. 114a-132a.

STATEMENT OF THE CASE

This case involves a question of exceptional importance under the Digital Millennium Copyright Act ("DMCA"). Congress enacted the DMCA to combat the emerging reality of "massive piracy" of copyrighted works on the Internet. S. Rep. No. 105-190, at 8 (1998) ("S. Rep."). In Title II of the DMCA, codified at 17 U.S.C. § 512, Congress conferred upon Internet service providers ("ISPs") certain limitations on liability in exchange for requiring ISPs to cooperate with copyright owners to combat copyright piracy by users of their networks. *See* S. Rep. at 40-41. The core of the congressional bargain struck in § 512 is that copyright owners must generally seek redress in the first instance against infringing users, not ISPs, and that ISPs must assist copyright owners' efforts to do so.

As the Copyright Office has explained, "[a]mong those balancing obligations" Congress imposed on ISPs in exchange for limiting their copyright liability "was the requirement that ISPs 'expeditiously' respond to subpoenas to provide identifying information about subscribers accused of copyright infringement so that the controversy could be settled in court." *See* Statement by Marybeth Peters, The Register of Copyrights, *Before the Senate Comm. on the Judiciary*, 108th Cong. (Sept. 9, 2003), *available at* http://www.copyright.gov/docs/regstat090903.html, at Pet. App. 142a. That obligation is set forth in § 512(h) of the DMCA.

The decision below eviscerates the subpoena authority conferred by Congress in § 512(h), and thereby undoes the fundamental bargain at the heart of the DMCA. The D.C. Circuit held that a § 512(h) subpoena cannot issue unless the infringing material is stored on the ISP's own server, even though the text of § 512(h) contains no such limitation, and even though the vast majority of infringing material on the

Internet is stored on home computers or other computers not controlled by ISPs. Moreover, the D.C. Circuit's decision conflicts with the position of the United States and the Copyright Office. As the United States has explained, "the D.C. Circuit has impaired the Copyright Act's basic mechanisms for protecting intellectual property rights," and "fatally compromise[d]" private copyright enforcement against Internet infringers. Br. for the United States as Intervenor and *Amicus Curiae*, *RIAA v. Charter Communications, Inc.*, No. 03-3802, at 13, 16 (8th Cir. filed Feb. 24, 2004) ("US Charter Br."), *available at* http://www.ca8.uscourts.gov/briefs/04/03/intervenor/03 3802 _1br.pdf?A1=View+Brief. Immediate review is needed because the decision below is thwarting legitimate efforts across the nation to combat ongoing piracy that is causing irreparable harm to copyright owners on an unprecedented scale.

A. Factual Background

1. Copyright Piracy on the Internet

Congress enacted the DMCA in 1998. By that time, copyright piracy on the Internet had already reached epidemic proportions – approximately 3 million sound recordings were being downloaded from the Internet every day, the vast majority of which were pirated. *See The Music Industry*, The Economist, Oct. 31, 1998, at 67. Armed with a personal computer and a connection to the Internet, an individual could unlawfully disseminate copyrighted works (such as music, movies or software) to millions of people with just a few keystrokes. As the Copyright Office explained in 1997, "a disgruntled former employee, a dissatisfied customer, [or] an Internet user opposed to the fundamental concepts of copyright law" could inflict "tremendous damage to the market for a copyrighted work." *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. 9 (Sept. 11, 1997) (Marybeth Peters, Register of Copyrights).

Well before enactment of the DMCA, much of the infringement occurring on the Internet involved individuals storing infringing material on their personal computers, and using ISP networks merely as a conduit to disseminate that material. As early as the 1980s, Internet users were "posting" copyrighted works on electronic bulletin boards ("BBSs").[1] By the thousands, users transformed their own computers into BBSs or file transfer protocol ("FTP") sites from which others could download copyrighted material.[2] By the mid-1990s, it was commonplace for Internet users to exchange copyrighted works by e-mail[3] or Internet Relay

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[1] A BBS allows users to post files for others to download. A BBS requires inexpensive software, a home computer, and a telephone line. *See* T.R. Reid, *Power Computing*, Wash. Post, Dec. 2, 1991, at F18 ("If you have a telephone, a personal computer and about $100 to cover start-up costs, you can broadcast to a national audience as early as tomorrow by going on-line with your own BBS.").

[2] FTP software turns any computer into a server that allows others to download files, including perfect digital copies of copyrighted sound recordings. *See* Andrew Leonard, *Mutiny on the Net*, Salon, March 1998, *at* http://archive. salon.com/ 21st/ feature /1998/03/cov_20feature.html (FTP software "allows anyone with a computer and a modem to make [pirated music] files on their home computer accessible to the [Internet]").

[3] *See* Kenneth D. Suzan, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 Alb. L. Rev. 789, 807 (1995) ("It is quite feasible for someone to download a song from a commercial site such as CompuServe and then e-mail or post the 'digitized audio file' on a bulletin board for others to copy. In essence, 'there is no way to ensure that a teen-ager who buys a new record will not send it to 1,000 of her closest friends.'") (internal citation omitted); Ian C. Ballon, *Pinning the Blame in Cyberspace: Towards a Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct*

Chat ("IRC").[4] Although these technologies involved the use of ISPs to transmit data, ISPs generally did not store the infringing material on their servers. And for infringers, these technologies offered the added advantage of anonymity.

In the early 1990s, copyright owners began suing to stop Internet infringement, targeting BBSs operated from personal computers connected to the Internet by ISPs. *E.g., Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 682-83 (N.D. Cal. 1994); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1555-56 (M.D. Fla. 1993). In some cases, copyright owners sued both the person running the BBS and the ISP that linked the BBS to the Internet. *E.g., Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). As early as 1993, the Department of Justice prosecuted infringers who offered pirated software from BBSs operated from home computers. *E.g., United States v. Stowe*, No. 96C2702, 1996 WL 467238, at *1 (N.D. Ill. Aug. 15, 1996).[5]

By 1998 when the DMCA was enacted, Congress had amassed an enormous legislative record relating to Internet piracy. That record documents infringement by ISP subscribers using their personal computers to disseminate

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Occurring over the Internet, 18 Hastings Comm. & Ent. L.J. 729, 737 (Summer 1996) ("[I]n a matter of seconds and at a cost of mere pennies," a copyrighted work can be transmitted "via E-mail to thousands of people.").

[4] IRC allows users to communicate and exchange copyrighted files directly with each other, without posting information on a server. *See* Andy Patrizio, *Cyberchatters Trade Electronic Booty*, CMP TechWeb, Dec. 30, 1998.

[5] *See also Third Largest BBS in US Hit in FBI Raid*, Newsbyte, Feb. 19, 1993 (describing raid of home BBS utilizing 125 computers and causing millions of dollars in copyright theft).

copyrighted material directly to others, using the ISP's network merely as a conduit. The Department of Justice testified about infringement committed from FTP and BBS sites run on personal computers. *See 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. 17-18 (Sept. 11, 1997) (Kevin DiGregory, Deputy Assistant Attorney General, Department of Justice) ("DiGregory Testimony"). ISP witnesses testified about the *Sega*, *Playboy* and *Netcom* cases – all of which involved infringing activity on personal computers linked by ISPs to the Internet – because these cases suggested that ISPs could be held liable for merely transmitting information from one infringing user to another.[6] Congress also heard testimony about the "growing use of 'blanket' e-mail messages" to commit copyright infringement and about infringers using e-mail (and attachments) to disseminate hundreds of copyrighted software programs.[7] One songwriter explained that e-mail distribution systems were difficult to police because ISPs

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[6] *See, e.g.,* S. Rep. at 19 n.20 (noting *Netcom* and *Playboy*); *The Copyright Infringement Liability of Online and Internet Service Providers*: *Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 101-03 (Sept. 4, 1997) (George Vradenburg, General Counsel, America Online, Inc.) (discussing *Netcom* and *Sega*).

[7] *Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 175 (Sept. 16-17, 1997) (Ronald Dunn, President, the Information Industry Association); *NII Copyright Protection Act of 1995 (Part 2): Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 88 (Feb. 7-8, 1996) (Garry L. McDaniels on behalf of the Software Publishers Association); *see* DiGregory Testimony, at 17-18 (describing use of e-mail to commit infringement of software programs).

had no obligation to reveal the identities of e-mail customers, absent a court order.[8]

As technology has advanced, digital piracy has continued to grow. In 1998, a new compressed digital format – mp3 – became the medium of choice for infringers. *See* Benny Evangelista, *Download That Tune*, S.F. Chron., Dec. 3, 1998, at A1. Very soon thereafter, peer-to-peer ("P2P") systems emerged. P2P systems – like their technological predecessors BBS, FTP and IRC software – allow users, under the cloak of anonymity, to disseminate files stored on their personal computers (and not on their ISP's server) to other Internet users.[9]

2. The DMCA

In Title II of the DMCA, 17 U.S.C. § 512, Congress sought to address the two principal (and interrelated) issues raised by copyright infringement on the Internet: ISPs' fear of liability for infringement committed by users of their networks,[10] and copyright owners' need for tools to combat

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[8] *See Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 160 (Sept. 16-17, 1997) (Allee Willis).

[9] Napster was the first and most notorious P2P system, until the courts shut it down. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The Napster P2P system simply merged FTP software (which can turn a personal computer into a server that allows Internet users to download files) and IRC software (which enables direct communication among Internet users). *See* Chris Sherman, *Napster: Copyright Killer or Distribution Hero?*, Online, Nov. 1, 2000. As discussed above, both of these technologies were used for copyright piracy on the Internet well before the enactment of the DMCA. Other P2P systems have arisen in Napster's wake including Kazaa, Grokster and Gnutella.

[10] *See, e.g., The Copyright Infringement Liability of Online and Internet Service Providers*: *Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 32 (Sept. 4, 1997) (Roy Neel, President, United States Telephone Association) (claiming that copyright owners should sue direct infringers transmitting

this "massive piracy." S. Rep. at 8.[11] Section 512 creates a balanced system of "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." *Id.* at 40. ISPs received new protections that limit their liability for their subscribers' infringement. In exchange, Congress imposed obligations on ISPs to assist copyright owners in combating such infringement.

The protections given to ISPs are set forth in subsections (a)-(d) of § 512, which establish four distinct limitations on liability for infringement. Each limitation applies to a particular ISP function. Subsection (a) limits the liability of ISPs that transmit infringing material – that is, when the ISP is a mere conduit. Subsections (b), (c), and (d) limit the liability of ISPs when they are caching, storing, or linking to infringing material. §§ 512(b) (caching), 512(c) (storing), 512(d) (linking).

Congress made these protections conditional. ISPs can claim them only if they take statutorily prescribed steps to assist copyright owners in policing against infringement. To qualify for any of the limitations on liability, an ISP must maintain and enforce a policy of terminating the accounts of subscribers who are "repeat infringers." § 512(i)(1)(A). To retain the limitations in subsections (b)-(d) (which cover storage functions), an ISP must also promptly remove or disable access to infringing material stored on its servers upon receiving a notification of infringement. The DMCA does not require an ISP to take any of these steps; rather,

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copyrighted materials, not the ISPs themselves); *id.* at 102 (Vradenburg) (claiming that such liability would "wreak havoc" on ISPs).

[11] *See The Copyright Infringement Liability of Online and Internet Service Providers*: *Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 15 (Sept. 4, 1997) (Cary Sherman, General Counsel, RIAA).

failure to do so results in the loss of the limitations on liability.

In addition, Congress imposed on ISPs the obligation that is at issue in this case – namely, the duty to disclose to copyright owners the identity of subscribers using their networks to infringe. That duty is not conditional. Under § 512(h), a copyright owner or its agent may request that "the clerk of any United States district court" issue a subpoena requiring an ISP to disclose the identity of such infringers when the copyright owner documents good faith claims of infringement. § 512(h)(1). The clerk is under a mandatory duty to issue the subpoena "expeditiously," and the ISP is likewise under a mandatory duty to respond to it "expeditiously." § 512(h)(4); § 512(h)(5).

Section 512(h) is essential to combat the Internet copyright piracy that Congress aimed to prevent. As the Copyright Office has explained, "[i]t is common sense that in order to be able to take action against the users of peer-to-peer networks, the copyright owner must know who those users are." Pet. App. 141a (internal endnote omitted). Only ISPs know the identities of subscribers using their networks to infringe. Copyright owners therefore need to obtain that information from the ISP. "Congress foresaw this need and addressed it by including in the DMCA a process by which copyright owners can learn basic identifying information about alleged infringers from their internet service providers . . . ." *Id.* (internal endnote omitted).

On its face, this subpoena provision applies to all ISPs. As the Copyright Office has explained, ISPs who are conduits of infringing material "received the benefits and burdens of the same bargain that service providers engaged in the other activity covered by 512 received. In exchange for a powerful limitation on liability, they undertook some obligations, including the obligation to identify alleged

infringers when served with a subsection 512(h) subpoena." Pet. App. 143a.

3. The Subpoenas in this Case

In the four years after enactment of the DMCA, RIAA served approximately 100 DMCA subpoenas, 60 of which involved infringing material that was not stored on an ISP's server. Second Declaration of Frank Creighton at 6-7 (Joint Appendix at JA424-JA425 (D.C. Cir. filed July 9, 2003)). At no point did any ISP object on the ground that § 512(h) did not apply to ISPs that are not storing infringing material on their own servers. *Id.*

In July 2002, RIAA discovered an individual illegally disseminating over 600 copyrighted sound recordings without authorization. RIAA discovered this infringer by logging onto a P2P network and observing the individual offering the copyrighted works. RIAA recorded the Internet Protocol ("IP") address and screen name of the copyright infringer, the date and time at which the infringer engaged in unlawful conduct, and the particular sound recordings the infringer was unlawfully disseminating.[12] From the IP address, RIAA could determine that the infringer was using Verizon's network to disseminate the copyrighted works. On July 24, 2002, RIAA sought and obtained a subpoena pursuant to § 512(h) requiring Verizon to disclose the identity of the infringer. On February 4, 2003, RIAA obtained a second subpoena seeking the identity of another Verizon subscriber who was disseminating more than 800 copyrighted works. Pet. App. 4a-5a, 23a, 58a.

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[12] An IP address is a number that specifically identifies a particular computer using the Internet.

B. The Proceedings Below

1. The District Court's Decisions

Verizon objected to the first subpoena on the ground that § 512(h) authorizes subpoenas only to ISPs storing infringing material on their own networks. The district court rejected "Verizon's strained reading of the Act," Pet. App. 31a, explaining that "nothing in the language or structure of the statute . . . suggests Congress intended the DMCA" to be restricted in that manner. *Id.* at 37a. The court held that the text of § 512(h) made clear that it applied to *all* ISPs, and emphasized that the definition of the term "service provider" used in § 512(h) encompassed all ISPs, including pure conduits. *Id.* at 27a-30a.

In rejecting Verizon's interpretation, the district court concluded that there is "no sound reason why Congress would enable a copyright owner to obtain identifying information from a service provider storing infringing material on its system, but would not enable a copyright owner to obtain identifying information from a service provider transmitting the material over its system." *Id.* at 36a. Indeed, Verizon's position "would create a huge loophole in Congress's effort to prevent copyright infringement on the Internet," because "the largest opportunity for copyright theft is through [P2P] software." *Id.*

Thereafter, Verizon moved to quash the second subpoena on the grounds that the subpoenas violated Article III and the First Amendment to the Constitution. The district court rejected those arguments as well. *Id.* at 59a-96a.

2. The D.C. Circuit's Decision

The D.C. Circuit reversed. The Circuit held that § 512(h) does not authorize subpoenas to an ISP that serves as a conduit for infringing material, but does not store the material on its servers. *Id.* at 6a.

In reaching that result, the D.C. Circuit gave no weight to the fact that the term "service provider," as used in § 512(h), is expressly defined to include all ISPs performing all functions, including conduit functions. The court concluded that the defined term should not be given its full scope, but was instead subject to a categorical limitation. That limitation, the court believed, arose from the cross-reference in § 512(h) to another DMCA provision, § 512(c)(3)(A). Section 512(c)(3)(A) requires copyright owners seeking a subpoena to serve upon ISPs a notification that documents the good faith basis for their claim of infringement by, *inter alia*, describing "the infringing material to be removed or access to which is to be disabled." 17 U.S.C. § 512(c)(3)(A)(iii). The court read that provision not as a notification requirement, but instead as a categorical limitation on the substantive scope of the statutory subpoena power. The court was of the view that "Verizon can not remove or disable one user's access to infringing material resident on another user's computer because Verizon does not control the content on its subscribers' computers." Pet. App. 9a-10a. The court then drew from that observation the conclusion that a copyright holder could never "satisf[y]" the requirements of subsection (c)(3)(A)(iii) sufficient to obtain a subpoena when infringing material is stored on a subscriber's computer rather than an ISP's server. *Id.* at 12a. Thus, the court concluded, Congress intended to impose on ISPs a duty to respond to § 512(h) subpoenas only when the ISP actually stored infringing material on its network.

Although the appeals court acknowledged the district court's common-sense holding that an ISP can "disable access" to infringing material on a subscriber's home computer by terminating the subscriber's Internet access (*see* Pet. App. 33a & n.5), it nevertheless held that termination of an account did not constitute "disabl[ing] access" in satisfaction of § 512(c). *Id.* at 10a. To support that counterintuitive view, the court looked to yet another provision of § 512: subsection (j). That subsection prescribes the types of injunctive relief that can be entered against ISPs that qualify for the safe harbors of § 512(a)-(d). Because Congress purportedly used the terms "disabl[ing] access" and "terminating" accounts to mean different things in subsection (j), the D.C. Circuit presumed that the statutory terms must have mutually exclusive meanings – without considering whether the two terms could have overlapping meanings. *Id.*

Moreover, in addition to its purported reliance on the plain language of the statute, the D.C. Circuit invoked "the legislative history of the DMCA" which, the court asserted, "betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works." *Id.* at 14a. Apparently unaware of the legislative history documenting Congress' concern with Internet piracy involving material stored on home computers, the court believed that Congress did not "draft the DMCA broadly enough to reach [P2P] technology when it came along." *Id.* at 15a. The court acknowledged that the effect of this ruling was to deprive copyright owners of the primary tool § 512 gave them to combat Internet piracy, but believed that the purported gap in the statute's protective scheme could only be filled by Congress. *Id.* at 16a.

RIAA filed a timely petition for rehearing or rehearing en banc, which the D.C. Circuit denied on February 24, 2004. Pet. App. 112a-113a.

C. Other DMCA Subpoena Proceedings

In addition to the subpoenas at issue in this case, subpoena enforcement proceedings raising identical issues are pending in at least two other courts. *See RIAA v. Charter Communications, Inc.*, No. 03-3802 (8th Cir.); *In re Subpoena to Univ. of North Carolina*, No. 1:03MC138 (M.D.N.C.); *In re Subpoena to North Carolina State Univ.*, No. 1:03MC139 (M.D.N.C.). After the D.C. Circuit issued its decision, the United States joined the proceedings in the Eighth Circuit and in the North Carolina district court to support enforcement of the subpoenas. In those proceedings, the United States has taken the position that the D.C. Circuit's interpretation of § 512(h) is in error, and that the provision authorizes subpoenas to obtain the identities of ISP subscribers who store infringing material on their personal computers rather than on their ISPs' servers. *See* US Charter Br. at 16-33. The Copyright Office of the United States also interprets § 512(h) as requiring ISPs to disclose the identity of subscribers who store infringing material on their personal computers, in direct conflict with the D.C. Circuit's reading of § 512(h). Pet. App. 141a-144a.[13]

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[13] The United States briefed only the constitutional issues before the D.C. Circuit and did not address the statutory question. In response to a question at oral argument, counsel for the United States informed the D.C. Circuit that the Copyright Office interprets the statute as RIAA does, and subsequently confirmed that position by letter. Pet. App. 133a-134a. After the D.C. Circuit ruled, the Department of Justice filed *amicus* briefs in the proceedings discussed above. Those briefs set forth the position of the United States with respect to the meaning of § 512(h), which is in accord with that of the Copyright Office.

REASONS FOR GRANTING THE PETITION

The decision below gutted a federal statute essential to protecting intellectual property rights from piracy on the Internet. Section 512(h) imposes on all "service providers" the duty to respond to subpoenas seeking the identity of subscribers who use the ISP's network to commit copyright infringement. Yet the D.C. Circuit read § 512(h) as not reaching infringement by ISP subscribers who store the infringing material on their own systems – by far the largest category of Internet infringement. Despite conceding that its interpretation left copyright holders without "the legal tools" needed to combat "widespread infringement," Pet. App. 16a, the D.C. Circuit purported to find in the statutory text a clear instruction from Congress to limit § 512(h) in a manner that defeats the very purpose for which it was enacted. By failing to give effect to the plain language of § 512(h) itself, and instead divining from a statutory cross-reference an implied limitation on the expressly defined scope of that provision, the D.C. Circuit has eliminated the primary tool Congress provided to facilitate vigorous private copyright enforcement against Internet infringers.

There is a pressing need for immediate review of the D.C. Circuit's decision. As that court itself recognized, "[t]he stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation." Pet. App. 16a. The district court similarly observed that "copyright infringement and piracy of music recordings over the Internet has skyrocketed, resulting in enormous losses for the industry," and the value of copyrighted works "could plummet" if "universal downloading could continue unabated." *Id.* at 106a. The D.C. Circuit's decision is having the effect of depriving copyright owners of the ability to expeditiously obtain subpoenas not only in the District of Columbia but

throughout the nation. That is crippling the private copyright enforcement that Congress envisioned as a bulwark against Internet lawlessness, and allowing Internet piracy to metastasize.

Moreover, the harms are not confined to copyright owners. The epidemic of Internet piracy threatens important public interests as well. Our copyright system is, as this Court has repeatedly recognized, an "engine of free expression" and that system is under assault by the conduct that Congress enacted § 512(h) to help combat. Even more fundamentally, allowing massive, anonymous Internet piracy to continue unchecked has a corrosive effect on bedrock commitments to the rule of law and protection of private property on the Internet.

Indeed, in recognition of the public importance of the issue this case presents, the United States has taken the unusual step of participating in multiple proceedings involving private litigants to explain that "the D.C. Circuit's statutory ruling in [this case] is inconsistent with the text of Section 512(h) and the legislative policies that underlie it." US Charter Br. at 12. As the United States has explained in these cases, the D.C. Circuit's decision conflicts with the interpretation of the Copyright Office, which reads "the plain language of subsection 512(h)" as applying to "'all service providers, regardless of the functions a service provider may perform . . . .'" Pet. App. 142a-143a (quoting Pet. App. 28a).[14]

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[14] That view is entitled to deference. *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998); *Satellite Broad. & Communications Ass'n of Am. v. Oman*, 17 F.3d 344, 347-48 (11th Cir. 1994). Deference is particularly warranted in this case because the Copyright Office "played a formative role" in drafting and implementing the

No offsetting consideration favors delaying review. The issue this case raises will recur; indeed it is already recurring. Further adjudication is not likely to shed additional light on the question presented, which involves a straightforward issue of statutory construction. Nor are the factual circumstances of this case anomalous or unusual. To the contrary, the facts here are typical of any case that will present these important issues.

A. Internet Piracy Of Copyrighted Works Is A Huge And Growing Social Problem.

Copyright piracy on peer-to-peer networks is the greatest current threat to the integrity of copyright in the digital age. Use of peer-to-peer networks is growing by leaps and bounds: there are now more than five million people on peer-to-peer networks at any given moment. *See Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Comm. on Governmental Affairs*, 108th Cong. (Sept. 30, 2003) (statement by Mitch Bainwol, CEO, RIAA), *available at* http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&HearingID=120&WitnessID=414 ("Bainwol Statement"). Approximately 90% of the content on P2P systems is copyrighted movies, software, images, and music disseminated without authorization. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). More than *2.6 billion* infringing music files are downloaded each month. Lev Grossman, *It's All Free*, Time, May 5, 2003. Internet piracy has become big business, as companies have sprung up to cater to the illicit trade in copyrighted

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DMCA. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 772 (E.D. Pa. 2001), *aff'd*, 347 F.3d 485 (3d Cir. 2003).

material.[15] ISPs also profit handsomely. P2P users drive the demand for broadband services, such as Verizon's DSL, which offer faster speeds for Internet access and downloading.

This piracy is inflicting massive and irreparable harm. The link between P2P piracy and lost sales is well documented. Among the heaviest downloaders, purchases of compact discs declined by 61% from 2002 to 2003. *See* Edison Media Research Study (June 2003). Not surprisingly, retail sales of music have plummeted, falling 7% in 2000, 10% in 2001, 11% in 2002, and 7% in 2003. *See* http://www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf. Of particular note is the precipitous drop in sales of the CDs that are most popular and most commonly disseminated on peer-to-peer networks: from 2000 to 2002, sales of the top 10 selling albums dropped almost 50%. *See* Bainwol Statement, *supra*.

The issue presented here thus arises in a context of great national significance. Massive copyright infringement on the Internet not only directly harms all of the American industries that rely on intellectual property for their livelihood, but also poses a direct threat to the freedom of expression, *see Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985), and indeed to the very notion of respect for private property and for the rule of law on the Internet.

Copyright owners cannot fight back unless they know who the infringers are. Congress understood this. That is

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[15] Peer-to-peer companies themselves (often headquartered abroad in small island nations) receive millions of dollars annually for advertising to P2P users and for installing spyware on users' computers, which gathers personal information for marketing and other purposes. *See, e.g.*, www.kazaa.com; www.grokster.com.

why § 512(h) is in the DMCA. The provision creates a streamlined mechanism for obtaining the identities of infringers, thus allowing copyright owners to move swiftly against those unlawfully disseminating copyrighted works. As both Congress and the district court recognized, expedition is critical because the information that copyright owners need – the identity of the Internet user infringing works from a particular IP address at a given date and time – is maintained by ISPs for only a short period of time; once it is destroyed, the copyright owner can never enforce its rights. Pet. App. 69a.

The D.C. Circuit's opinion blows a hole in § 512(h), rendering it useless where it is most needed and leaving the largest category of Internet infringement beyond the reach of the statute. As the United States has explained, the D.C. Circuit's opinion strikes at the heart of the congressional bargain and "fundamentally alter[s]" the *quid pro quo* embodied in the DMCA. US Charter Br. at 17. With respect to the most common form of infringement, if the D.C. Circuit's interpretation is correct, "the *quid pro quo* exacted by Congress in return for immunity thus turns out to be . . . nothing." *Id.* at 18 (ellipsis in original).

B. The Decision Below Is Inconsistent With The Text, Structure, And Purposes Of Section 512(h).

The D.C. Circuit believed that its perverse result was compelled by the text of § 512(h) and related provisions. But that is not so. As the United States has explained, "[p]roperly read, Section 512(h) applies to ISPs engaged in data transmission as well as to ISPs engaged in data storage and other activities. And only that reading vindicates the policies underlying Title II of the DMCA and the underlying policies of federal copyright law." US Charter Br. at 18-19.

The statute broadly defines the term ISP to include *all* "provider[s] of online services or network access." 17 U.S.C. § 512(k)(1)(B). Nowhere in § 512(h) did Congress draw any distinction between ISPs who store infringing material and those who do not – even though "it would have been a trivial matter to say so." US Charter Br. at 19. As the district court in this case observed, Congress could have stated "such a limitation in subsection (h), or stated that subsection (h) does not apply to subsections (a), (b), or (d), or even have placed the subpoena authority itself within subsection (c). But Congress did not do so." Pet. App. 32a.

In fact, Congress did the opposite. Section 512 contains two separate definitions of "service provider." One of those definitions is the precise limitation adopted by the D.C. Circuit – that is, it narrowly defines service provider to include only ISPs performing the "conduit" function of transmitting information. *See* 17 U.S.C. § 512(k)(1)(A). Congress expressly applied that definition *only to § 512(a)*. *Id.* For all other provisions of § 512 – including § 512(h) – Congress defined service provider to include the broadest possible array of ISPs, including those who are conduits. *See* § 512(k)(1)(B); *see also* H.R. Rep. No. 105-551(II), at 64 (1998) (§ 512(k)(1)(B) definition "includes, for example, services such as providing Internet access, e-mail, chat room and web page hosting services"). Thus, "when Congress identified the entities that are subject to subpoenas under Section 512(h), it used unqualified language that encompasses all ISPs and embraces, rather than excludes, ISPs engaged in data transmission." US Charter Br. at 20 (citation omitted).

Despite the fact that Congress took great care in § 512 generally, and in § 512(h) in particular, to define the scope of an ISP's duties, the D.C. Circuit brushed this statutory definition aside. Calling reliance on the definition "silly," Pet. App. 11a, the D.C. Circuit instead divined a drastic

implied limitation in the scope of the statutory subpoena power based on subsection (h)'s cross-reference to § 512(c)(3)(A). The latter provision prescribes the contents of a notification a copyright owner must provide under § 512 to establish its bona fides as a prelude to enforcing its rights. It is cross-referenced by numerous other subsections of § 512. Its obvious purpose in the § 512(h) context is to establish a basis for the copyright owner's claim that an ISP subscriber has infringed the owner's rights, and thereby to justify the effort to obtain the subscriber's identity.

The D.C. Circuit nevertheless read the provision as an effort on the part of Congress to restrict the subpoena power to situations where the ISP actually stores infringing material. The court did so because one of the required items in a subsection (c)(3)(A) notification is identification of material "that is to be removed or access to which is to be disabled." § 512(c)(3)(A)(iii). That requirement is in the provision because the notification also serves the different function of triggering the ISP's duty to remove or disable material in order to preserve its limitations on liability in subsections (b), (c) and (d) – *see supra* pp. 8-9 – in situations where a copyright owner has invoked those provisions. Ignoring this obvious explanation for the requirements of § 512(c)(3)(A), the court of appeals instead read the provision as an implicit restriction on the substantive scope of the subpoena power. In essence, the court concluded that copyright owners had the right to enforce § 512(h) subpoenas only in situations where they also had the right to demand that ISPs remove or disable access to infringing material stored on an ISP's network.

That reading of the statute is not only convoluted – it is palpably wrong. Indeed, it is contradicted by another provision in § 512(h) itself – § 512(h)(5) – which the D.C. Circuit ignored. As the United States has explained, "[b]y its

terms Section 512(h) provides that an ISP served with a subpoena 'shall expeditiously disclose * * * the information required by the subpoena, notwithstanding any other provision of law *and regardless of whether the service provider responds to the notification*.'" US Charter Br. at 23-24 (quoting 17 U.S.C. § 512(h)(5)) (emphasis and ellipses by United States). Congress thus stated quite plainly that an ISP must respond to a § 512(h) subpoena even if it believes it is under no duty to remove or disable access to infringing material pursuant to § 512(c) because the infringing material is not stored on its network. Moreover, the substantive limitation the D.C. Circuit derived from (c)(3)(A) appears nowhere in the text of that provision: subsection (c)(3)(A) does not specify that the infringing material must be on an ISP's network nor does it require the ISP to disable access to anything. *See* 17 U.S.C. § 512(c)(3)(A).

In all events, even if an ISP must be able to "disable access" to infringing material in order to come within the scope of § 512(h), the provision can be satisfied when an ISP subscriber stores infringing material on a home computer. As the United States has explained, "an ISP *can* deny access to infringing material that resides on a subscriber's computer, and hence a copyright owner *can* present a notification that conforms to the requirements of subsection (c)(3)(A)." US Charter Br. at 22 (emphasis in original). The D.C. Circuit believed that "Verizon can not remove or disable one user's access to infringing material resident on another user's computer because Verizon does not control the content on its subscribers' computers." Pet. App. 9a-10a. As a matter of plain English and common sense, however, an ISP can "disable access to [infringing material] simply by terminating or suspending the subscriber's Internet account, thereby preventing other peer-to-peer users from reaching

the infringing files." US Charter Br. at 23 (citing Pet. App. 33a n.5).[16]

Given that Congress took such care to define "service provider" in § 512, it strains credulity that Congress would have limited the scope of § 512(h) by the circuitous route of an oblique cross-reference to a notification provision in § 512(c)(3)(A), which in turn would have to be interpreted by reference to yet another provision, § 512(j).

Indeed, the D.C. Circuit's reading of § 512(h) is self-evidently antithetical to Congress' purpose, and thus conflicts with this Court's repeated admonition that an interpretation of a statutory text must be consistent with the statute's purpose. *See, e.g.*, *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1245 (2004) (interpreting statutory provision "in light of the statute's manifest purpose"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274, 278 (1995) (rejecting interpretation that, "when viewed in terms of the statute's basic purpose, seems anomalous"); *Holloway v.*

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[16] To reject this straightforward argument, the D.C. Circuit resorted to yet another part of § 512, subsection 512(j), in which Congress purportedly used the term "disable access" to mean something different from "terminating a subscriber's account." *See* Pet. App. 10a. The D.C. Circuit assumed that these terms must therefore be mutually exclusive. *Id.* But courts have routinely recognized that distinct statutory terms can have an overlapping or common meaning – a possibility that the D.C. Circuit did not even consider. *See, e.g., Natural Res. Def. Council, Inc. v. U.S. EPA*, 907 F.2d 1146, 1163 (D.C. Cir. 1990) (rejecting argument that terms cannot have overlapping meaning where Congress "d[id] not explicitly indicate that they are to be mutually exclusive"); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 882 (9th Cir. 2001) (concluding that "there is at least substantial overlap between" two terms and "reject[ing] the interpretation that the difference in the definitions requires us to . . . make the terms mutually exclusive"); *United States v. Hill*, 79 F.3d 1477, 1482-83 (6th Cir. 1996) (noting that two terms in the same provision "must have different meanings," but concluding nonetheless "that there is considerable overlap between the two terms").

United States, 526 U.S. 1, 9 (1999) (adopting interpretation of statutory language that served the purpose reflected by the statute as a whole, and rejecting interpretation that would contravene Congress' intent); *United States v. Morton*, 467 U.S. 822, 833 (1984) (stressing significance of "underlying purpose" in ascertaining plain meaning of statutory term); *FBI v. Abramson*, 456 U.S. 615, 625 (1982) (adopting interpretation of statutory language that "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute"); *United States v. Bisceglia*, 420 U.S. 141, 150 (1975) (holding that courts should not interpret a statute to "frustrate" Congress' purpose "absent unambiguous directions from Congress").

Congress crafted § 512(h) broadly to serve a primary aim of the statute – to enable copyright owners to bring suit against direct infringers, rather than bringing derivative claims against ISPs. Applying § 512(h) to all ISP functions vindicates the purposes of § 512. As the district court held, there is "no sound reason" to deny copyright owners the ability to sue infringers directly when infringing material is stored on computers or servers that do not belong to an ISP.[17] Regardless of where the copyrighted material is stored, the harm to the copyright owner is the same (irreparable), the burden on the ISP to determine the identity of the infringer is the same (minimal), and the conduct of the subscriber is the same (unlawful).

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[17] Indeed, copyright owners seeking a DMCA subpoena generally do not know where infringing material is stored – they can determine only the IP address of the infringer and, through that information, the ISP to which that address is assigned. *See* Pet. App. 35a.

C. The DMCA Expressly Addressed Piracy Over Conduit Facilities And The D.C. Circuit Effectively Repealed Congress' Solution.

The D.C. Circuit justified its result in part by claiming that Congress had "no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works," Pet. App. 14a, and thus had not drafted the DMCA to address the problem of Internet piracy over conduit facilities. That belief is wrong, as is the conclusion the Circuit drew from it – namely, that the issues in this case "must be addressed in the first instance by the Congress." Pet. App. 16a. The reality is that Congress already addressed this issue, as the DMCA's text and legislative history make perfectly clear.

The whole point of the DMCA was, as the United States has explained, "to deal with [the problem of Internet piracy] *in its entirety*." US Charter Br. at 14 (emphasis added). It was not, as the D.C. Circuit suggests, a statute designed to address, in narrow terms, those types of software then being used to infringe copyrights on the Internet. Rather, the DMCA was enacted to establish broad, enduring rules for the future, and thus to avoid the necessity of ongoing legislative revision. As one sponsor (Senator Leahy) explained, the DMCA "address[es] the needs of creators, consumers, and commerce in the digital age and well into the next century." Pet. App. 41a.

The Congress that enacted the DMCA was well aware that Internet piracy involving material stored on home computers and merely transmitted over ISP networks was an everyday occurrence. As the United States has explained, "[a]lthough Congress may not have foreseen the specific problem of illegal peer-to-peer file transfers, it manifestly did anticipate the general problem of which peer-to-peer transfers are simply one instance – the problem of online

copyright infringement in which an ISP serves only as a conduit." US Charter Br. at 13-14. Indeed, the DMCA provides for a limitation on liability for so-called conduit ISPs in § 512(a) – a limitation that would have had no purpose if Congress did not understand that ISPs often served as mere conduits for infringing material transmitted from one home computer to another. Moreover, as discussed above, *see supra* pp. 3-7, the legislative history conclusively establishes that Congress knew in 1998 that FTP sites and BBS services on home computers and electronic mail were engines of copyright piracy. The D.C. Circuit's blindness to this legislative record is inexplicable.

Ironically, the solution Congress enacted in the DMCA was *exactly* what the ISP community recommended to Congress as early as 1996 – when the problem of piracy involving material stored on home computers was already a well-recognized phenomenon. At a legislative hearing, the general counsel of one of the largest ISPs specifically proposed that ISPs should be required, "[i]n those cases where the allegedly infringing content is not on facilities controlled by the [ISP], . . . [to] take[] reasonable steps to assist the copyright owner in identifying the party that does control the hosting facility (upon receipt of a subpoena if necessary)." *NII Copyright Protection Act of 1995 (Part 2): Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 261 (Feb. 7-8, 1996) (Stephen Heaton, General Counsel, Compuserve). That, of course, is precisely the obligation Congress imposed when it enacted § 512(h).

In sum, the notion, advanced by the D.C. Circuit, that Congress has primary authority in the area of copyright and thus that copyright owners must seek a remedy from Congress has no application here – Congress already legislated to address this problem. Rather than defer to

Congress' expertise in the area of copyright, the D.C. Circuit has overridden it.

D. Review Is Urgently Needed.

This Court should review this issue now, as the D.C. Circuit's decision is causing ongoing, irreparable harm to copyright holders. Infringement of the kind that prompted RIAA to serve the subpoenas at issue in this case occurs millions of times a day.

In the District of Columbia, the decision below has stripped copyright holders of a critical tool provided by Congress to enforce their intellectual property rights. The effect of the decision below is akin to declaring a statute unconstitutional because it has so constricted the subpoena provision as to make it practically meaningless and to completely thwart Congress' intent. Delay in the resolution of this issue may forever deprive those copyright holders of the ability to identify infringers, as ISPs have made clear that they do not retain the identifying information for very long.[18]

The D.C. Circuit's decision is reverberating far beyond the District of Columbia. The decision below has effectively stopped the issuance of DMCA subpoenas in the context of peer-to-peer copyright infringement. A critical aspect of § 512(h) is Congress' express and repeated direction that

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[18] Prior to the D.C. Circuit's opinion, the music industry's efforts to enforce their rights against anonymous infringers by means of the DMCA subpoena provision were bearing fruit. According to one study, the number of Americans unlawfully downloading music files dropped by half in the six months after the industry began filing suits and before the D.C. Circuit's opinion. *See* Pew Internet & American Life Project, *The Impact of Recording Industry Suits Against Music File Swappers* (Jan. 2004), *available at* http://www.pewinternet.org/reports/pdfs/PIP_File_Swapping_Memo_0104.pdf.

clerks issue subpoenas expeditiously and ISPs respond expeditiously so that copyright owners can protect their rights. In the wake of the D.C. Circuit's opinion, however, court clerks are unsure whether they can issue such subpoenas, and ISPs have made clear that they will not comply with them.

Moreover, this important issue is likely to recur. Indeed, the issue already is recurring in other jurisdictions, including in courts in the Fourth and Eighth Circuits. This Court should not wait for those courts to rule. This case presents a straightforward question of statutory construction, applied to a narrow set of material facts that are essentially the same in every case. The Court already has the benefit of thorough discussions (reaching opposite conclusions) by the district court and the D.C. Circuit, and it can obtain the considered views of the United States and the Copyright Office.

Finally, resolution of this issue is of enormous importance to the administration of the federal courts. Stripped of the expeditious process Congress created in § 512(h), copyright owners are relegated to a much more cumbersome procedure – filing John Doe suits against unknown infringers. Pursuing such suits significantly delays copyright owners' ability to stop the irreparable harm they face. Copyright owners must obtain court permission before seeking prompt discovery, and face the risk that ISPs will purge the information needed to match IP addresses to subscriber identities. Such lawsuits also impose enormous burdens and costs on the federal courts that far exceed the DMCA subpoena process.

Even where DMCA subpoenas might be issued, the D.C. Circuit's ruling will prompt collateral litigation in every case seeking enforcement of a § 512(h) subpoena to determine where the infringing material at issue is stored. Copyright owners typically will not know whether infringing material

resides on a subscriber's home computer or an ISP server, and serious questions exist as to whether computers linked to ISPs via DSL or cable modem should be considered part of the ISP's network. With its emphasis on expedition and simplicity, Congress cannot possibly have intended that such collateral litigation be a prerequisite to enforcement of § 512(h) subpoenas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY PIERRE-LOUIS
LINDA J. ZIRKELBACH
RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.
1330 Connecticut Avenue, NW
Suite 300
Washington, D.C. 20036
(202) 775-0101

DONALD B. VERRILLI, JR.
Counsel of Record
THOMAS J. PERRELLI
DEANNE E. MAYNARD
JARED O. FREEDMAN
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioner

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