

Appeal No. 03-3802

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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RECORDING INDUSTRY ASSOCIATION OF AMERICA,

*Appellee,*

v.

CHARTER COMMUNICATIONS, INC.,

*Appellant.*

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On Appeal from the United States District Court  
for the Eastern District of Missouri  
Hon. Carol E. Jackson, Chief United States District Judge

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**PETITION OF APPELLEE FOR  
REHEARING AND REHEARING EN BANC**

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Of Counsel:

~~Richard B. Verill, Jr.~~  
Thomas J. Perrelli     Tnd  
~~and O. Freedman~~     Jare  
NER & BLOCK LLP     JEN  
13th Street, NW     601  
Washington DC 20005     Wa  
2) 639-6000     (20:

Thomas C. Walsh  
K. Lee Marshall  
BRYAN CAVE LLP  
One Metropolitan Square  
211 North Broadway, Suite 3600  
St. Louis, MO 63102-2750  
(314) 259-2000  
(Counsel of Record)

Stanley Pierre-Louis  
Linda J. Zirkelbach  
RECORDING INDUSTRY ASSOCIATION  
OF AMERICA  
1330 Connecticut Avenue, NW  
Suite 300  
Washington, DC 20036

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The Recording Industry Association of America (“RIAA”) respectfully submits this petition for rehearing and rehearing en banc pursuant to Federal Rules of Appellate Procedure 35 and 40. RIAA seeks further review because this case “involves a question of exceptional importance” under the Digital Millennium Copyright Act (“DMCA”). *See* Fed. R. App. P. 35(a)(2). The panel majority reversed the District Court, sharply restricting the scope of the subpoena authority Congress conferred in 17 U.S.C. § 512(h) and defeating one of the essential objectives of the DMCA. As Judge Murphy pointed out in her dissent, the panel’s misreading of the statute produced a result that is irreconcilable with the DMCA’s text, structure and purposes. Its interpretation also flatly contradicts the position of the United States and the United States Copyright Office. If left undisturbed, the decision will deprive copyright owners of a critically important tool for stopping the massive infringement of copyrights over the Internet. Billions of dollars and **important federal policy are at stake**

### **BACKGROUND**

This appeal arises out of the RIAA’s request that the clerk of the district court issue § 512(h) subpoenas to obtain the identities of 93 individuals using **Charter Communications’ (“Charter”) network to disseminate over 100,000** copyrighted works without authorization. *See* RIAA Br. at 15. There is no dispute **that these individuals are committing copyright infringement on a massive scale and that Charter is the only entity able to identify the individuals. The district court held that the copyright owners (through the RIAA, acting as their agent)**

could obtain a subpoena under 17 U.S.C. § 512(h). The panel, in an opinion by Judge Bye joined by Judge Bright, reversed, holding that § 512(h) is unavailable to address the most common form of Internet piracy -- when copyright infringers store infringing material on their home computers and disseminate it over an Internet service provider's ("ISP") network, *i.e.*, when the ISP is acting as a mere "conduit." Slip. op. at 10-12.

## **ARGUMENT**

### **I. The Panel's Decision Involves a Question of Exceptional Importance.**

As will be shown below, the panel's interpretation rests on fundamental errors of statutory construction. The panel's decision is worthy of further review, however, not merely because it is wrong but also because it eviscerates § 512(h), rendering it useless where it is most needed and leaving the largest category of Internet infringement beyond the reach of the statute. In so doing, the panel majority has undone the fundamental bargain at the heart of the DMCA.

Congress enacted the DMCA in 1998 to combat the emerging reality of "massive piracy" of copyrighted works on the Internet. S. Rep. No. 105-190, at 8 (1998) ("S. Rep."). As the panel majority recognized, by 1998, more than three million copyrighted sound recordings were being downloaded each day from the Internet. Slip op. at 3-4. Much of this infringement was being committed by people storing infringing works on their home computers and disseminating those works unlawfully. *Id.* at 3. Moreover, this widespread infringement was only

increasing in scope as technology improved and bandwidth increased -- a fact that was repeated to Congress over and over in hearings

**In Title II of the DMCA, 17 U.S.C § 512, Congress sought to address two central problems, which it believed could hinder the development of the Internet:**

**ISPs would fail to invest in the Internet's infrastructure out of fear that they would be held liable for infringement being committed by their customers; and 2) copyright owners would hesitate to make works available online because of the ease with which those works could be pirated. See S. Rep. at 8** To combat these twin problems, Congress struck a bargain between ISPs and copyright owners Congress conferred upon ISPs certain limitations on liability in exchange for requiring ISPs to cooperate with copyright owners to combat copyright piracy by users of their networks. *Id.* 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

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<sup>1</sup> Congress conducted numerous hearings throughout the mid-1990s in which it heard testimony about the growth of digital piracy and the many ways in which the Internet was used to commit copyright infringement. *E.g., 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) (statement of Ronald Dunn, President, the Information Industry Association) (discussing dissemination of copyrighted software by e-mails from home computers); *Copyright Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing Before the House Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 17-18 (Sept. 11, 1997) (statement of Kevin DiGregory, Deputy Assistant Attorney General) (describing infringement by file transfer and bulletin board sites run on home computers).

Subsection (h) is central to this bargain because copyright owners cannot fully vindicate their rights under the Copyright Act if they do not know the identities of those infringing their copyrights. Section 512(h) allows a copyright owner to obtain a subpoena issued by the clerk of a district court to compel an ISP to identify an individual infringing copyrights using the ISP's facilities. Every day millions of infringers upload and download copyrighted works, shielded by the anonymity of an alias and an Internet Protocol ("IP") address, a unique number identifying a computer using the Internet at a particular date and time. Copyright owners can observe this infringement and can ascertain the IP addresses of infringers, but only ISPs can identify the ISP subscribers committing the direct infringement.<sup>2</sup> The purpose of § 512(h) -- imposed as part of the exchange for the limitations on liability -- was "to provide identifying information about subscribers accused of copyright infringement so that the controversy could be settled in court." Statement by Marybeth Peters, The Register of Copyrights, *Before the Senate Comm. on the Judiciary, 108th Cong. (Sept. 9, 2003)* (<http://www.copyright.gov/docs/regstat090903.html>).

The panel's interpretation blows a hole in the subpoena authority of § 512(h). The panel interpreted § 512(h) to authorize subpoenas only where the

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<sup>2</sup> As Judge Murphy recognized, the possibility that copyright owners can file "John Doe" suits against unknown infringers rather than use DMCA subpoenas is both "impractical and contrary to legislative intent. John Doe actions are costly and time consuming. Nowhere in the DMCA did Congress indicate that copyright holders should be relegated to such cumbersome and expensive measures against conduit ISPs." Slip op. at 20 (Murphy, J., dissenting).

infringing material is stored on computer servers controlled by an ISP, but not where infringing material is stored on a home or office computer and disseminated over an ISP's facilities. The panel majority reached this conclusion despite the absence of any indication that Congress intended such a limitation, without any suggestion as to why Congress would have wanted this irrational result, and in the face of the considered opinion of the United States and the United States Copyright Office that such a limitation is inconsistent with the statute's text and purpose. *See* Brief for the United States as Intervenor and *Amicus Curiae*, at 19-33 (Feb. 24, 2004) ("US Br.").

Thus, under the panel's interpretation, the subpoena authority is *not* available to address the vast majority of copyright infringement occurring over the Internet. Congress understood in 1998 that home and office computers were the source of widespread infringement; this infringement has increased with the growth of peer-to-peer ("p2p") networks,<sup>3</sup> which facilitate and exploit such infringement. Some estimate that more than 2.6 billion copyrighted sound recordings are downloaded each month over p2p networks. *See* Lev Grossman, *It's All Free, Time* (2003)

Moreover, the panel interpreted § 512(h) to authorize subpoenas in those circumstances where the DMCA already gives copyright owners another remedy -- seeking removal of the infringing material or links to the infringing material stored

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<sup>3</sup> Peer-to-peer software merged two pre-existing types of software that were used to infringe copyrights -- file transfer protocol ("FTP") software and internet relay chat ("IRC"). *See* Chris Sherman, *Napster: Copyright Killer or Distribution Hero?*, *Online*, Nov. 1, 2000.

on the ISP's network, *see* § 512(b), (c), (d) -- but to prohibit subpoenas where they are needed most, *i.e.*, where the copyright owner's *only* option for stopping the infringement is a direct suit against the infringer.<sup>4</sup> **The United States has explained** that this interpretation “fundamentally alter[s] the *quid pro quo* embodied in Title II of the DMCA,” and “has the perverse effect of denying recourse to Section 512(h) precisely where the need for it is greatest.” US Br. at **7-18**.

The panel's misreading of § 512(h) subverts the balanced objectives of the DMCA. Copyright owners will be prevented from using the expedited means Congress provided to assert their rights directly against the vast majority of infringing users. At the same time, ISPs such as Charter will benefit in two ways they will profit handsomely from illegal downloading over high-end broadband services, and they will receive limitations on liability without the corresponding obligation to do the most important thing they can to stop infringement over their **networks -- identify the infringers. With respect to the most common form of** infringement, if the panel majority's interpretation is correct, “the *quid pro quo* exacted by Congress in return for immunity thus turns out to be . . . nothing.” US

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<sup>4</sup> As early as 1996, in testimony before Congress, a major ISP recognized this problem and proposed that, in exchange for limitations on liability, ISPs providing conduit functions 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) (testimony of Stephen Heaton, General Counsel, Compuserve).*

Br. at 18 (ellipsis in original). Congress could not possibly have intended this result. *See* Slip op. at 20 (Murphy, J., dissenting).

The damage caused by this infringement cannot be overstated. Massive copyright infringement on the Internet not only directly harms all of the American industries that rely on intellectual property for their livelihood, *see* Slip op. at 14, but also poses a direct threat to freedom of expression. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). Indeed, “it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work.” *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) (internal quotation and citation omitted). The panel’s decision threatens to allow literally billions of copyright violations to continue. That is plainly a massive harm to the public interest, and it presents an issue worthy of en banc review

## **II. The Panel Misinterpreted § 512(h).**

The panel majority provided little analysis to support its result, other than to cite a prior D.C. Circuit opinion in a similar case and to claim that the perverse result was compelled by the text of § 512(h) and related provisions. *See Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert denied*, 125 S. Ct. 309 (2004). But that is not so. As the United States and Judge Murphy have 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 Br. at 18-19; Slip op. at 20 (Murphy, J., dissenting) (“A coherent reading of the text and **structure of the statute reinforces the message that the subpoena power created by § 512(h) was intended for use against all types of service providers.**”).

In holding that § 512(h) applies only to ISPs that store infringing material, the panel majority confused two separate remedies given to copyright owners in **§ 512**. Sections 512(a)-(d) establish four distinct limitations on liability for ISPs, each of which applies only when the ISP is engaging in particular functions. Each of the four subsections contains prefatory language specifying the ISP function covered, and each has distinct requirements that must be met in order for the ISP to earn a safe harbor. To qualify for any of the limitations on liability (including the limitation for ISPs who do no more than transmit infringing material -- so-called “conduits” -- as defined in § 512(a)), an ISP must terminate the accounts of repeat infringers. *See* 17 U.S.C. § 512(i). To qualify for the limitations on liability involving storage functions in § 512(b)-(d) -- including storing, caching, or linking to infringing material -- an ISP must disable access to infringing material upon a proper demand by a copyright owner.

Section 512(h) applies to ISPs whether or not they seek the protection of the limitations on liability and is separate and distinct from the copyright owner’s right to demand that the ISP disable access to infringing material. **In contrast to the**

detailed provisions restricting the limitations on liability in § 512(a)-(d) for ISPs performing particular functions, § 512(h) contains no language limiting the ISPs to which it applies. By its terms, § 512(h) makes no distinction between ISPs that store infringing material and those that do not. Rather, it applies to all ISPs, regardless of the function an ISP performs. As Judge Murphy correctly pointed out, “[h]ad Congress wanted to limit the reach of the subpoena power to ISPs engaged in storage functions, it could have easily stated that. It did not, however.” Slip op. at 20 (Murphy, J., dissenting).

In fact, Congress did the opposite. Section 512 contains two separate definitions of “service provider.” One of those definitions is narrow and defines “service provider” to include only ISPs performing the “conduit” function of transmitting information. *See* 7 U.S.C. § 512(k)(1)(A). Significantly, Congress expressly applied that definition *only to § 512(a)*. *Id.* For all other provisions of § 512 – including § 512(h) – Congress defined service provider broadly to encompass *all* “provider[s] of online services or network access.” 7 U.S.C. § 512(k)(1)(B). This broad definition of “service provider” expressly makes § 512(h) applicable to situations where an ISP is serving only as a conduit. *See* Slip op. at 20 (Murphy, J., dissenting); 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.” As the United States explained, “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 Br. at 20 (citation omitted).

The panel ignored this statutory definition and limited § 512(h) only to those situations where an ISP must also take down infringing material. Not only is this inconsistent with the statutory text, but it makes no sense as a matter of policy. Although there may be a rationale for Congress’s decision to give conduit ISPs a broader limitation on liability than ISPs storing infringing material, there is no such rationale for treating ISPs differently when it comes to identifying infringers. Regardless of whether an ISP transmits or stores infringing material, the damage to the copyright owner from the infringement is the same (irreparable), the subscriber’s conduct is the same (unlawful), and the burden on the ISP to identify the infringer is the same (minimal).<sup>5</sup>

The panel majority derived its drastic limitation on the scope of the subpoena authority from subsection (h)’s cross-reference to § 512(c)(3)(A). *See Slip op.* at 7-12. The latter provision prescribes the contents of a notification that 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 attempt to obtain the subscriber’s identity. As Judge

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<sup>5</sup> Indeed, copyright owners who discover infringement over the Internet generally cannot determine where the infringing material is stored -- they can only determine the ISP to which the infringer’s IP address is assigned and whose facilities are being used to disseminate the infringing material.

Murphy correctly recognized, Congress cross-referenced this provision in subsection (h) to “avoid[] the necessity of repeating . . . notice details,” not to limit the scope of the subpoena authority. Slip op. at 19 (Murphy, J., dissenting).

The panel majority nevertheless read the reference to § 512(c)(3)(A) as an implied limitation because one of the required items in a subsection (c)(3)(A) **notification is identification of material “claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled.”** § 512(c)(3)(A)(iii). *See* Slip op. at 8-12. The panel majority read this language as restricting the subpoena power to situations where an ISP can disable **access to the infringing material.**

**That reading of the statute is not only convoluted -- it is palpably wrong.**

First, as Judge Murphy pointed out in dissent, the panel majority’s reading is not a “plain language” interpretation -- rather, the panel majority had to read words into the statute to strain to its result. *Id.* at 19 (explaining that panel majority’s reading depends “entirely on its reading extra words into § 512(c)(3)(A)(iii)”). Subsection (c)(3)(A) does not specify that the infringing material must be stored on an ISP’s network, nor does it require ISPs to disable access to anything in order for a notification to be sufficient. *See* 17 U.S.C. § 512(c)(3)(A).

Second, the panel majority’s belief that an ISP can only be required to respond to a DMCA subpoena in those situations where it can disable access to **infringing material following a DMCA notification is flatly contradicted by** § 512(h) itself. Section 512(h)(5) -- which the panel majority ignored -- provides

that an ISP served with a subpoena “shall expeditiously disclose to the copyright owner . . . the information required by the subpoena, notwithstanding any other provision of law and *regardless of whether the service provider responds to the notification.*” (emphasis added). Congress thus imposed a mandatory duty on ISPs to respond to § 512(h) subpoenas even if the ISPs are under no duty to remove or disable access to infringing material because it is not stored on their networks. This makes perfect sense -- whether or not the ISP can disable access to infringing material, a copyright owner needs the identifying information to pursue the direct infringer, and the ISP can (as Charter did in this case) locate such information once it has the IP address, date and time of the infringement.

Third, even if, as the panel majority believed, § 512(c)(3)(A) could be read to limit the subpoena authority to situations where the ISP can disable access to the infringing material, the panel’s assumption that the ISP “has no ability to . . . disable access to the infringing material” is incorrect. Slip op. at 10. As the United States and Judge Murphy both recognized, it is a matter of plain English and common sense that 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 Br. at 23; Slip op. at 18 (Murphy, J., dissenting) (ISP can “disable access to material by terminating the accounts of an infringing subscriber”).<sup>6</sup>

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<sup>6</sup> Indeed, the DMCA *requires* a conduit ISP to take such action to stop the infringement when the individual in question is a repeat infringer. This fact highlights the absurdity of the panel majority’s interpretation. The DMCA

Fourth, as Judge Murphy concluded, the panel majority's reading is antithetical to Congress's intent and the purposes behind the DMCA. *See* Slip op. at 19-20 (Murphy, J., dissenting). It thus conflicts with the Supreme 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"); *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, 50 (1975) (holding that courts should not interpret a statute to "frustrate" Congress' purpose "absent unambiguous directions from Congress").

Finally, the panel majority erred in adopting the D.C. Circuit's view that the courts should not interpret the DMCA to apply to "a new and unforeseen internet architecture." Slip op. at 11. The notion that Congress was unaware that "internet users might be able directly to exchange files containing copyrighted works," and thus did not draft the DMCA to address the problem of Internet piracy over conduit facilities, *see* 351 F.3d at 1238, is demonstrably wrong, as even the panel majority

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requires all ISPs -- including conduits -- to terminate the accounts of repeat infringers. 17 U.S.C. § 512(i). It would make no sense to impose such an obligation on conduit ISPs if they were never required to *identify* subscribers committing infringement in the first place.

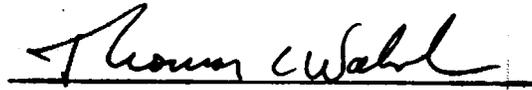
makes clear in its opinion. *See Slip op.* at 3 (explaining how infringers were posting files on their home computers for others to download prior to 1998). The legislative history conclusively establishes that Congress knew in 1998 that ISP subscribers were using their home computers to disseminate copyrighted material to others, using the ISP's network merely as a conduit. *See RIAA Br.* at 8-10, 37-40. "Although 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 Br.* at 13-14. Indeed, Congress legislated against the very risk that the panel majority claims was unforeseen: § 512(a), which provides a limitation on liability for mere transmission, would have had no purpose if Congress did not understand that ISPs often served as conduits for infringing material transmitted from one home computer to another.

Rather than limiting the application of the DMCA so it would not apply to a new situation, the panel majority has stripped away a critically important tool to combat Internet piracy that Congress knew about and was certain would only increase. In so doing, the panel majority upsets the delicate balance between the interests of ISPs and copyright owners that Congress implemented in the DMCA and leaves copyright owners without an efficient and effective remedy to stop the massive infringement of their copyrights on the Internet.

## CONCLUSION

For the foregoing reasons, the RIAA respectfully requests that the Court grant this Petition.

Respectfully submitted,



Of Counsel:

Donald B. Verrilli, Jr.  
Thomas J. Perrelli  
Jared O. Freedman  
JENNER & BLOCK LLP  
601 13th Street, NW  
Washington DC 20005  
(202) 639-6000

Thomas C. Walsh  
K. Lee Marshall  
BRYAN CAVE LLP  
One Metropolitan Square  
211 North Broadway, Suite 3600  
St. Louis, MO 63102-2750  
(314) 259-2000  
(Counsel of Record)

Stanley Pierre-Louis  
Linda J. Zirkelbach  
RECORDING INDUSTRY ASSOCIATION  
OF AMERICA  
1330 Connecticut Avenue, NW  
Suite 300  
Washington, DC 20036

Dated: February 18, 2005