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,
Appellant.

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

BRIEF OF ALLIANCE FOR PUBLIC TECHNOLOGY, AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION CAPITAL AREA, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, CAPRICA INTERNET SERVICES, CITIZENS FOR A SOUND ECONOMY FOUNDATION, COMPETITIVE ENTERPRISE INSTITUTE, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, DIGITALCONSUMER.ORG, DIGITAL FUTURE COALITION, ELECTRONIC FRONTIER FOUNDATION, ELECTRONIC PRIVACY INFORMATION CENTER, EUROPEAN INTERNET INDUSTRY ASSOCIATION, FRONTIER & CITIZENS COMMUNICATIONS COMPANIES, INKEEPER CO., MEDIA ACCESS PROJECT, MERCURY NETWORK CORP., NATIONAL ASSOCIATION OF CONSUMER AGENCY ADMINISTRATORS, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, NATIONAL CONSUMERS LEAGUE, NATIONAL GRANGE OF THE ORDER OF PATRONS OF HUSBANDRY, NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., PACIFIC RESEARCH INSTITUTE, PRIVACY RIGHTS CLEARINGHOUSE, PRIVACYACTIVISM, PROGRESSIVE INTERNET ACTION, PUBLIC KNOWLEDGE, SBC INTERNET SERVICES, SOUTHERN STAR, STIC.NET, LP, TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION, UNITED STATES INTERNET INDUSTRY ASSOCIATION, UNITED STATES INTERNET SERVICE PROVIDER ASSOCIATION, UNITED STATES TELECOM ASSOCIATION, UTILITY CONSUMERS ACTION NETWORK, WASHINGTON ASSOCIATION OF INTERNET SERVICE PROVIDERS, WIREDSAFETY.ORG, AND ZZAPP! INTERNET SERVICES AS *AMICI CURIAE* IN SUPPORT OF APPELLANT VERIZON INTERNET SERVICES AND URGING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES IN NOS. 03-7015 & 03-7053

In accordance with Circuit Rule 28(a)(1), counsel for *amici* hereby certifies as follows:

A. Parties and *Amici*

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

B. Rulings Under Review

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

C. Related Cases

Counsel is unaware of any related cases pending in any court.

_____
Alan Untereiner

CORPORATE DISCLOSURE STATEMENTS

In accordance with Circuit Rule 26.1, counsel for *amici curiae* submit these corporate disclosure statements regarding the entities and organizations they represent.

A. The undersigned, counsel of record for *amici curiae* Alliance for Public Technology, American Civil Liberties Union, American Civil Liberties Union Capital Area, American Association of Law Libraries, American Library Association, Association of Research Libraries, Citizens for a Sound Economy Foundation, Competitive Enterprise Institute, Computer Professionals for Social Responsibility, Consumer Action, Consumer Federation of America, Consumers Union, DigitalConsumer.org, Digital Future Coalition, Electronic Frontier Foundation, Electronic Privacy Information Center, Media Access Project, National Association of Consumer Agency Administrators, National Coalition Against Domestic Violence, National Consumers League, National Grange of the Order of Patrons of Husbandry, Pacific Research Institute, Privacy Rights Clearinghouse, Privacyactivism, Public Knowledge, Utility Consumers Action Network, and WiredSafety.org, states the following:

1. *Amici* are all nonprofit organizations; none of the *amici* has a parent corporation.

2. *Amici* have no stock and hence no shareholders.

_____
Megan E. Gray (D.C. Bar. No. 478479)
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B. The undersigned, counsel of record for *amici curiae* American Legislative Exchange Council, Caprica Internet Services, the Computer & Communications Industry Association, the European Internet Industry Association, Frontier and Citizens Communications Companies, InKeeper Co., Mercury Network Corp., New York State Telecommunications Association, Inc., Progressive Internet Action, SBC Internet Services, Southern Star, Stic.Net, LP, Texas Internet Service Providers Association, United States Internet Industry Association, United States Internet Service Provider Association, United States Telecom Association, Washington Association of Internet Service Providers, and ZZAPP! Internet Services, states the following:

1. The American Legislative Exchange Council is an organization of state legislators. It has no parent company and no stock.

2. Caprica Internet Services is a small, privately-held Internet Service provider based in Los Angeles and serving most of Southern California. It has no parent company and no shares in the hands of the public.

3. The Computer & Communications Industry Association is a trade association. It has no parent company and no stock.

4. The European Internet Industry Association is a trade association. It has no parent company and no stock.

5. Frontier and Citizens Communications is publicly traded. It has no corporate parent. FMR Corp. owns more than 10% of its stock.

6. InKeeper Co. has no parent corporation. No publicly held company owns 10% or more of Inkeeper's stock.

7. Mercury Network Corp. is an Internet Service Provider. It has no parent company, and no publicly held company owns 10% or more of its stock.

8. The New York State Telecommunications Association, Inc. is a nonprofit, membership-based association. It has no parent corporation, no stock and hence no shareholders.

9. Progressive Internet Action (PIA) is wholly owned by Richard R. Jones Communications, a sole proprietorship of Richard R. Jones. No publicly held company owns PIA's stock.

10. SBC Internet Services comprises four regional ISPs. Southwestern Bell Internet Services Inc. is 100%-owned by SBC Telecommunications Inc., which is 100%-owned by SBC Communications Inc., which is publicly traded. Pacific Bell Internet Services Inc. is 100%-owned by Pacific Telesis Inc., which is 100%-owned by SBC Communications Inc., which is publicly traded. Ameritech Interactive Media Services Inc. is 100%-owned by Ameritech Corp., which is 100%-owned by SBC Communications Inc., which is publicly traded. SNET Diversified Group, Inc. is 100%-owned by Southern New England Telecommunications Corp., which is 100%-owned by SBC Communications Inc., which is publicly traded.

11. Southern Star has no parent company. No publicly held company owns 10% or more of Inkeeper's stock.

12. Stic.Net, LP has no parent company. No publicly held company owns 10% or more of Stic.Net, LP stock.

13. Texas Internet Service Providers Association is a trade association. It has no parent corporation and no shares in the hands of the public.

14. The United States Internet Industry Association is a national trade association. It has no parent corporation and no shares in the hands of the public.

15. The United States Internet Service Provider Association is a national trade association. It has no parent corporation and no shares in the hands of the public.

16. The United States Telecom Association is a national trade association. It has no parent corporation and no shares in the hands of the public.

17. The Washington Association of Internet Service Providers is a nonprofit trade association, incorporated under the Washington Non-Profit Business Act. It has not parent corporation and no shares in the hands of the public.

18. ZZAPP! Internet Services is a service of Community Educational Services Foundation (CESF), a local 501(c)(3) nonprofit communications and information resource based in Arlington, Virginia. ZZAPP! Internet Services and CESF have no parent corporation and no shareholders.

_____

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GLOSSARY

The Business *Amici*

This group of *amici* is comprised of the following businesses and business trade associations: Caprica Internet Services, the Computer & Communications Industry Association, the European Internet Industry Association, Frontier and Citizens Communications Companies, InKeeper Co., Mercury Network Corp., New York State Telecommunications Association, Inc., Progressive Internet Action, SBC Internet Services, Southern Star, Stic.Net, LP, Texas Internet Service Providers Association, United States Internet Industry Association, United States Internet Service Provider Association (US ISPA), United States Telecom Association, Washington Association of Internet Service Providers, and ZZAPP! Internet Services

The Consumer *Amici*

This group of *amici* is comprised of the following consumer groups, advocacy organizations, public interest groups, library associations, and civil liberties organizations: Alliance for Public Technology, American Civil Liberties Union, American Civil Liberties Union Capital Area, American Association of Law Libraries, American Library Association, Association of Research Libraries, Citizens for a Sound Economy Foundation, Competitive Enterprise Institute, Computer Professionals for Social Responsibility, Consumer Action, Consumer Federation of America, Consumers Union, DigitalConsumer.org, Digital Future Coalition, Electronic Frontier Foundation, Electronic Privacy Information Center, Media Access Project, National Association of Consumer Agency Administrators, National Coalition Against Domestic Violence, National Consumers League, National Grange of the Order of Patrons of Husbandry, Pacific Research Institute, Privacy Rights Clearinghouse, Privacyactivism, Public Knowledge, Utility Consumers Action Network, and WiredSafety.org.

DMCA

The Digital Millennium Copyright Act, 17 U.S.C. § 512.

First Subpoena Op.

The district court's decision in *In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003).

Second Subpoena Op.

The district court's decision in *In re Verizon Internet Services, Inc.*, No. 03-MS-0040-JDB, 2003 WL 1946489 (D.D.C. April 24, 2003).

INTEREST OF *AMICI*

Amici are 45 entities and organizations. Almost all represent either companies that expect to receive a flood of subpoenas under 17 U.S.C. § 512(h), or consumers whose constitutional rights may be jeopardized if the district court's decision is affirmed.[1] *Amici* received permission to file this brief in this Court's April 16, 2003 Order (amended by its April 29, 2003 Order).

INTRODUCTION AND SUMMARY OF ARGUMENT

Last week, a university department of astronomy nearly had its servers disconnected – and its ability to speak on the Internet cut off – after it received a threatening letter from Appellee Recording Industry Association of America (RIAA) accusing it of copyright infringement. The trigger? The department's website listed a professor with the same last name ("Usher") as a pop artist, and it allowed the download of a whimsical amateur song about gamma rays (performed *a capella* by some astronomers) that was closer to celestial charts than to anything on Billboard's Top 20.[2] Although the RIAA has apologized for its error, and several dozen more like it, if the lower court's decision is permitted to stand there is no telling how many future errors will result in clerk-stamped subpoenas forcing the improper disclosure of individual identities.

At stake in this litigation is whether fundamental First Amendment anonymity and privacy rights can be trampled with an unreviewed subpoena that is issued based on hastily generated paperwork and rests merely on a "good faith" allegation of copyright infringement. As interpreted

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[1] *Amici* are listed on the cover of this brief (and were described in detail in *amici*'s joint motion for leave to file separate briefs). By joining this brief, *amicus* Consumers Union (CU), the independent, not-for-profit publisher of *Consumer Reports*, in no way endorses any product or service made, sold, or distributed by any party or *amicus* in this action. CU's participation is based on its deep concern for the privacy and First Amendment interests posed by this case. *Amicus* American Legislative Exchange Council is an organization of state legislatures, and as such it has a strong interest in ensuring that the rights of Internet users are protected. Although it is a member of *amicus* US ISPA, AOL Time Warner did not join in this brief.

[2] See notes 8-9, *infra*, and accompanying text.

by the court below, 17 U.S.C. § 512(h) empowers anyone alleging "unauthorized" use of a copyrighted work to obtain from a district court clerk a judicial subpoena demanding the name, address, telephone number, and other identifying information of any Internet user. That subpoena issues with no judicial oversight, no ongoing or even anticipated litigation, and no required notice to the person whose identity is to be disclosed. No clerk, much less a judge, evaluates the substance or veracity of the assertions; if the paperwork is submitted in order, the clerk signs the subpoena for delivery to an Internet Service Provider (ISP). These minimal steps automatically shift the burden to the ISP who receives the subpoena (and, if the ISP gives notice to its customer, perhaps to the customer herself) to take steps to protect the customer's anonymity – all in a severely truncated time frame and generally in a jurisdiction other than the customer's home. Thus once paperwork is filed claiming that a speaker has "exceeded the authority" granted in a copyrighted work, that speaker's privacy and anonymity rights effectively vanish.

Although it drew comfort from the fact that the Internet speakers whose identity is being sought in *these* proceedings appear to have engaged in large-scale infringement activities, the district court failed to grasp that this case is not merely about actual copyright infringement – unless one assumes that no one who invokes Section 512(h) will ever be wrong, malicious, or lazy. Procedural protections, whether in the criminal or civil context, serve not to protect the guilty, but to ensure that the innocent are not wrongfully ensnared in a net that was not intended for them. Where, as here, a law threatens to harm speech and associational rights protected by the First Amendment, the need for adequate procedural safeguards is greatly magnified.

As the district court recognized, the "Supreme Court has recognized a right of anonymity within the First Amendment." *Second Subpoena Op.*, 2003 WL 1946489, at *11. It is well

established that the First Amendment fully protects the rights of the anonymous publisher of a whistleblower report, an essay on a politically sensitive topic,[3] or a parody of a famous song – all of which are capable of being traded on peer-to-peer systems. The privacy interest of Internet users is equally obvious. At the same time, of course, neither the First Amendment nor privacy interests shield the identities of publishers of material that has been *shown* to be libelous, contain threats or obscenity, misappropriate trade secrets, or infringe copyrights. Nobody is arguing for such a shield.

At bottom, this case asks whether the constitutional and privacy safeguards that must be applied before any other legal claim is used to breach the anonymity of an online speaker must *also* be applied when the allegation involved is copyright infringement (and that allegation is made outside the context of actual or even anticipated litigation). *Amici* ask the Court to look beyond what has happened in this case, to what will happen *as a result of this case*. In this instance, which the district court acknowledged was "a test case" hand-picked by the recording industry (*First Subpoena Op.*, 240 F. Supp. 2d at 26), Verizon stood up for its subscribers and obtained both judicial oversight and extended time periods within which to challenge the subpoena authority, but that is not likely to recur.[4]

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[3] See, *e.g.*, *The Tiananmen Papers: The Chinese Leadership's Decision to Use Force Against Their Own People – In Their Own Words* (anonymous publication by an alleged Chinese General) <http://www.amazon.com/exec/obidos/tg/detail/-/158648012X/>.

[4] In the lower court, RIAA has now filed a motion seeking to extract more than $300,000 in attorneys' fees and costs from Verizon for defending its customers' rights in these cases of first impression. The message to other smaller ISPs – not to mention individual Internet users – who might wish to object to improper Section 512(h) subpoenas in the future is unmistakable.

This Court should hold that Section 512(h) is unconstitutional. Article III, First Amendment, and due process considerations give independent bases for such a holding.[5] Alternatively, to avoid the Article III problem raised by applying Section 512(h) in the absence of any actual case or controversy, this Court should interpret the provision as authorizing subpoenas *only* in the course of a pending copyright action.

ARGUMENT

I. THE DISTRICT COURT'S FIRST AMENDMENT ANALYSIS WAS FLAWED

As the district court acknowledged, 17 U.S.C. § 512(h) triggers First Amendment scrutiny because it implicates the right to anonymous speech. *Second Subpoena Op.*, 2003 WL 1946489, at *12 ("[a]n individual's anonymity may be important for encouraging the type of expression protected by the First Amendment"). Moreover, the district court agreed that the Internet "provide[s] an unprecedented electronic megaphone for the expression of ideas and an unparalleled opportunity for a national – even international – town square for expression." *First Subpoena Op.*, 240 F. Supp. 2d at 43. Despite those auspicious beginnings, the court ultimately concluded that Section 512(h) presents no serious First Amendment concerns.

Each step in the district court's logic was flawed. To begin with, there is no basis for the assumption animating its entire First Amendment analysis: That because "*alleged* copyright infringement" is the expression targeted by a Section 512(h) subpoena, the First Amendment offers "minimal" protection. *Second Subpoena Op.*, 2003 WL 1946489, at *12. *Proven* infringement of copyrights is not protected by the First Amendment, but *allegations* of copyright infringement are

[5] *Amici* agree with Verizon that Section 512(h), as applied in a case such as this where no copyright litigation is pending, violates Article III because there is no "case or controversy."

inherently no more reliable than allegations of obscenity, defamation, or other types of unprotected speech. More fundamentally, copyright law, by its nature, *necessarily* implicates core First Amendment issues because it imposes significant restrictions directly on public debate and the expression of ideas. For that reason, copyright law has "built-in First Amendment accommodations" including the fair use doctrine and the idea/expression distinction. *Eldred* v. *Ashcroft*, 123 S. Ct. 769, 788 (2003). These and other limitations on copyright protections require case-by-case determinations based on the require careful review of such complex and subtle factors as the amount of the work used and the effect on the market for a work. Yet, because a Section 512(h) subpoena issues without any judicial oversight, it is entirely possible that the "allegation" of copyright infringement will be made in a case where a court would find that the challenged expression involved a fair use, an uncopyrightable idea or fact, or materials in the public domain. Given that the First Amendment imposes *substantive* limitations on copyright law, it makes no sense to say that those limits may be disregarded merely because someone has "alleged" a copyright violation.

Moreover, history is full of attempts to burden, chill, or censor speech masquerading as claims that the speech itself is "unprotected." See, *e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) (claimed defamation). Faced with such claims, the courts have insisted on careful procedural safeguards and judicial oversight. The Supreme Court long ago counseled:

> As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools * * *.

Speiser v. *Randall*, 357 U.S. 513, 525 (1958) (citations omitted). In *Speiser*, the Court struck down a California statute that required veterans seeking a tax exemption to sign a loyalty oath and prove that they had not advocated the overthrow of the government. "The vice of the present procedure,"

the Court explained, "is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding – inherent in all litigation – will create the danger that the legitimate utterance will be penalized." *Id.* at 526. Upon the same reasoning, the Second Circuit held in *United States* v. *Various Articles of Obscene Merchandise, Schedule No. 1769,* 600 F.2d 394, 398-400 (1979), that default judgments are improper in forfeiture cases involving allegedly obscene materials.

The mere *allegation* of unlawful behavior by a private party has *never* sufficed to abrogate the First Amendment rights of speakers and should not suffice to eliminate the privacy rights of ordinary Americans. The district court's contrary determination is unsupported by any authority and a dangerous departure from settled practice.

Equally incorrect was the district court's suggestion that the statute "does not directly impact" political speech and other speech entitled to First Amendment protection. *Second Subpoena Op.*, 2003 WL 1946489, at *12. Section 512(h)'s disclosure requirement will silence those whose identities are disclosed *and* chill the speech of others who fear disclosure even though they are engaging in wholly protected speech and association. See *Talley* v. *California*, 362 U.S. 60, 64 (1960) ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958) (compelled disclosure of affiliation with advocacy group may have same effect as direct ban).

The district court also erred in blessing the supposed procedural safeguards associated with Section 512(h) as adequate to protect the speech and associational rights of Internet users. *Second Subpoena Op.*, 2003 WL 1946489, at *13. As we explain below in discussing the due process issue,

those "safeguards" are illusory; errors *will* routinely occur and the subpoena authority *will* be misused. And the district court was wrong to say that the principles animating *Blount* v. *Rizzi*, 400 U.S. 410 (1971), have no application outside "the obscenity realm." *Second Subpoena Op.*, 2003 WL 1946489, at *13. That proposition is refuted by *Speiser*, which recognized the same fundamental need for procedural protections in the context of a tax exemption.

Finally, the district court was wrong to reject Verizon's overbreadth challenge. Although it acknowledged that the "scope of § 512(h) may impact some protected expression and association," the court brushed this concern aside on the ground that it was a "a policy argument" and there was no "evidence" that Section 512 was having such an effect or was being misused by cyberstalkers (or others acting without a legitimate concern for copyright infringement). *Second Subpoena Op.*, 2003 WL 1946489, at *15-16. The court seriously underestimated the dangers posed by the misuse (and erroneous use) of Section 512(h) subpoenas. As we explain below in discussing the due process issue, those dangers are very real.

II. SECTION 512(h) VIOLATES DUE PROCESS

The Due Process Clause of the Fifth Amendment requires adequate procedural safeguards before individuals may be deprived of their protected interests in liberty or property. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). To identify the minimum procedural protections required, courts examine (a) the private interest that will be affected by official action; (b) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and (c) the government's interest. *Ibid*. When a due process challenge targets a statute that "ordinarily appl[ies] to disputes between private parties," courts also examine

the interest of the private party who seeks to bring about the deprivation. *Connecticut* v. *Doehr*, 501 U.S. 1, 10 (1991).

Judged by those standards, Section 512(h) plainly violates the due process rights of Internet users. In *Connecticut* v. *Doehr*, the Court invalidated a Connecticut statute that authorized pre-judgment attachment of real estate based solely on the submission of an affidavit to a state court and without any showing of extraordinary circumstances. The Court ruled that the statute violated due process because it permitted attachment without affording the property owner prior notice and an opportunity for a hearing. The *ex parte* attachment proceeding at issue in *Doehr*, moreover, at least required the approval of a judicial officer based on a probable-cause determination. Section 512(h), by contrast, gives a private party the right to extinguish a liberty interest without any intervention of a federal judge, based solely on the submission to the *court clerk* of certain conclusory statements. The substantial due process concerns raised by this scheme should be obvious in light of *Doehr*. Whatever doubt exists on this score is dispelled by examination of the *Mathews* factors.

A. The Consumer's Interest in Privacy and Anonymous Expression is Substantial

The private interests that will be affected by this ruling are the First Amendment right to anonymous speech, the right to association, and the privacy rights of Internet users. The political and legal significance of anonymous speech is older than the Republic. See generally *Talley* v. *California*, 362 U.S. 60, 64-65 (1960). Anonymity protected the authors of *The Federalist* and of colonialist tracts critical of the British in 1643. *Ibid*.; Boston*, The Forgotten Founder*, CHURCH & STATE 1 (April 2003).

Anonymity is no less important today.[6] The Internet has expanded individual opportunities for public communication and multiplied the situations in which individuals, and society, will benefit from anonymity. The Internet opens up vast democratic fora, in which anyone can become "a pamphleteer" or "a town crier with a voice that resonates farther than it could from any soapbox." *Reno* v. *ACLU*, 521 U.S. 844, 867, 870 (1997). Unsurprisingly, a growing number of cases have recognized the importance of anonymity and pseudonymity in this setting. In *Columbia Ins. Co.* v. *SeesCandy*, 185 F.R.D. 573 (N.D. Cal. 1999), the court considered a pre-service subpoena seeking the identity of an alleged trademark infringer. Holding that a hearing was required at which certain standards of proof must be satisfied, the court explained:

> This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity. Thus some limiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted.

Id. at 578. Another court, in evaluating a subpoena seeking the identity of speakers accused of stock manipulation, observed: "If Internet users could be stripped of * * * anonymity by a civil subpoena enforced under liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights." *Doe* v. *2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

Similar care has been shown when defamation, breach of contract, trade secret violations, and discrimination have been alleged. *Dendrite Int'l, Inc*. v. *Doe No. 3*, 775 A.2d 756 (N.J. Super.

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[6] See, *e.g.*, *Watchtower Bible & Tract Society* v. *Village of Stratton,* 122 S. Ct. 2080, 2089 (2002); *McIntyre* v. *Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995).

A.D. 2001) (defamation and trade secret violations); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (2000) (defamation; breach of contract by revealing confidential business information), rev'd on other grounds, 261 Va. 350 (2001); *NLRB* v. *Midland Daily News*, 151 F.3d 472 (6th Cir. 1998) (discrimination). In each instance, the plaintiff had clearly *alleged* a violation of the law; yet in each the court recognized its duty to evaluate the claims before allowing the identity of the speaker to be revealed.[7]

The district court here acknowledged the importance of anonymity online but mistakenly asserted that this right applies chiefly to what it termed "core political speech." *Second Subpoena Op.*, 2003 WL 1946489, at *12. Nothing in the caselaw protecting anonymous speech limits the doctrine to "political speech." And such line-drawing within the broad category of noncommercial speech is inconsistent with modern First Amendment jurisprudence.

Additionally, the district court's assumption that no publication accused of infringing a copyright could ever include "political speech" is plainly wrong. Speech on *all* topics, including politics, is subject to copyright. See, *e.g.*, *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985) (involving excerpts from autobiography of former President Ford). Anonymity has also been used by authors of political novels such as *Primary Colors*, and of Chinese political tracts. See note 3, *supra*. The liberty interests of Internet users in free expression, free association, and privacy thus plainly qualify as substantial under the *Mathews* test.

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[7] Public Citizen explains this caselaw in greater detail. The Consumer *Amici* believe that the standards used to protect the anonymity of speakers in those contexts should apply here as well.

B. The Risk of Erroneous Deprivation and the Value of Additional Safeguards Are Both Substantial

1. Contrary to the district court's suggestion, there *is* evidence that Section 512(h) carries a substantial risk of being either misused or mistakenly applied to Internet users who are not infringing copyrights. In addition to the Harry Potter example noted in Verizon's brief (at 38-39), and others provided below, there is ample evidence in the use of the notice provisions under Section 512(c)(3)(A) that errors and misuse have occurred. This experience is directly relevant because Section 512(h) relies on allegations made under Section 512(c)(3)(A). If the Section 512(c)(3)(A) notification process is prone to error and misuse, then so too is the subpoena process that builds upon it.

Amici include groups that have substantial experience monitoring abusive copyright claims on the Internet. What follows is a small sampling of misuse, overreaching, and mistakes in the use of Section 512(h) subpoenas, Section 512(c)(3)(A) notices, or their equivalent:

> ● *Plain Errors*: RIAA sent a DMCA notice to Penn State's Department of Astronomy and Astrophysics, accusing the university of unlawfully distributing songs by the musician Usher. As it turned out, RIAA had mistakenly identified the combination of the word "Usher" (identifying faculty member Peter Usher) and an *a capella* song performed by astronomers about a gamma ray as an instance of infringement. In apologizing, RIAA noted that its "temporary employee" had made an error. RIAA admitted that, unlike the carefully selected situation in this case, it does not routinely require its "Internet copyright enforcers" to listen to the song that is allegedly infringing.[8]
>
> ● *More Plain Errors*: RIAA recently admitted to several dozen additional errors in sending accusatory DMCA notices – all made in a single week. But RIAA has refused to provide

[8] See McCullagh, *RIAA Apologizes for Threatening Letter*, CNET News, May 12, 2003, <http://news.com.com/2100-1025_3-1001095.html>.

additional details about these errors, professing concern that to do so would compromise the "privacy" of its employees and of the victims of its false accusations.[9]

● *Uncopyrightable Facts*: Wal-Mart sent a Section 512(h) subpoena, along with a 512(c) notice, to a comparison-shopping website that allows consumers to post prices of items sold in stores, claiming incorrectly that its prices were copyrighted. Wal-Mart sought the identity of the consumer who had anonymously posted information about an upcoming sale. Other retailers, including Kmart, Jo-Ann Stores, OfficeMax, Best Buy, and Staples, also served 512(c) notices on the website based on the same bogus theory.[10]

● *Public Domain Materials*: The Internet Archive is a well-known website containing numerous public domain films, including the historic Prelinger collection. Many of these films have numerical file names. A purported copyright owner sent a DMCA notice to the Internet Archive in connection with films 19571.mpg and 20571a.mpg. The sender mistook the Prelinger public domain films for the copyrighted submarine movie "U-571."[11]

● *Public Domain Materials*: An individual who simply wishes to erase the public record of his past, uncopyrighted messages has invoked 512(c) in an attempt to force ISPs to take down the material.[12]

● *Fair Use*: A DMCA claim was made against an individual who posted public court records that contained copyrighted material.[13]

● *Social Criticism*: The Church of Scientology has long been accused of using copyright law to harass and silence its critics. The Church has discovered the ease with which it can use the DMCA to take down the speech of its critics. It has made DMCA claims against a popular search engine, Google, to bully the engine to stop including in its index any information about certain websites critical of the Church.[14]

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[9] See McCullagh, *RIAA Admits It Sent Erroneous Letters*, CNET News, May 13, 2003, <http://www.msnbc.com/news/913204.asp?0dm=C16LT>.

[10] See <http://www.fatwallet.com/forums/messageview.cfm?catid=18&threadid=129657>; McCullagh, *Wal-mart Backs Away from DMCA Claim*, CNET News, Dec. 5, 2002, <http://news.com.com/2100-1023-976296.html>.

[11] See <http://www.chillingeffects.org/notice.cgi?NoticeID=595>.

[12] See <http://www.chillingeffects.org/notice.cgi?NoticeID=312>.

[13] See <http://www.chillingeffects.org/notice.cgi?NoticeID=348>.

[14] See <http://www.chillingeffects.org/notice.cgi?NoticeID=232>; see also Loney and Hansen, *Google pulls Anti-Scientology Links*, News.com, Cnet, March 21, 2002,

● *Misuse and Overreaching*: Trademark owners are not protected under the DMCA. Nevertheless, some trademark owners, eager to take advantage of the easy silencing of others under the 512(c) process, have claimed DMCA violations.[15]

Notwithstanding this experience, in the district court RIAA ridiculed as "virtually inconceivable" the possibility that the DMCA could be used "to reveal * * * the identity of individuals engaged in protected anonymous speech, as opposed to unprotected copyright infringement." RIAA Br. in Opp. to Verizon's Motion to Quash Feb. 4, 2003 Subpoena, at 22. As just noted, however, more recently RIAA has apologized for falsely accusing Penn State of engaging in "unprotected copyright infringement" and has admitted to having made several dozen other mistakes of this kind with the period of a single week.

In addition to these actual examples, misuses are easily foreseen based on the experience of some of the *amici* in representing clients in John Doe lawsuits.[16] Imagine a small investor who cuts and pastes several paragraphs from the annual SEC report (which is protected by copyright) of a publicly owned company onto an online message board, and then gives his opinion that the company's business is failing. Eager to stifle this criticism, and to fire him if he is an employee, the company could simply issue a Section 512(h) subpoena based on the copied section of the report, despite the First Amendment protections and fair use defense accorded this kind of speech.

The risks of error and misuse demonstrated by the foregoing examples are magnified by the widespread use on the Internet of automated software robots (or "bots"), which are capable of

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<http://news.com.com/2100-1023-865936.html>.

[15] See <http://www.chillingeffects.org/notice.cgi?NoticeID=310>.

[16] See, *e.g.*, Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 896 (2000).

reviewing an enormous range of data. When these bots find a suspicious file, they note its location and automatically generate lists, or even form notices, to the relevant ISPs. From their output, it appears that some of these bot-generated notices get no human review for plausibility, much less a true analysis of copyright infringement. Bots are simply not able to determine whether writings or other files satisfy the "substantial similarity" test under copyright-infringement law, represent a fair use (such as parody or critical commentary), or are in the public domain.[17]

The specter of millions of bot-generated subpoenas is no exaggeration in light of the large amount of material potentially subject to copyright claims. Any content captured in tangible form, however fleeting, is arguably protected by copyright. 17 U.S.C. § 102. This has broad implications – a copyright owner can be almost anyone, and a person can assert copyright over almost anything. A batterer can claim copyright in his threatening e-mails. A company may claim copyright in an internal memo documenting improprieties. A pedophile may claim copyright in his luring chatroom conversation. Yet, should any of this content be found on a user's computer, it could give rise to a *prima facie* copyright claim and the right, pursuant to Section 512(h), for the copyright owner or its agent to learn the identity of that user.

2. The risk of misuse of Section 512(h) subpoenas – and of erroneous deprivations of the anonymity of online speakers – is a direct result of the woefully inadequate procedural protections built into Section 512(h). Most glaringly, there is no requirement that the Internet user be given

[17] Assessing a bot used by the Motion Picture Association of America, one report noted: the "Ranger [bot] is scouring the globe – Web sites, chatrooms, newsgroups and P2P – spanning 60 countries, searching in English, Chinese, and Korean. * * * . Ranger is 24-7. Ranger is relentless. Ranger * * * acts like an Internet search engine. * * * Ranger Online provides the data to the MPAA and prepares cease-and-desist letters. * * * Last year, [MPAA] sent 54,000 letters; this year, it is on pace to send 80,000 to 100,000." Ahrens, *Ranger vs. the Movie Pirates, Software is Studios' Latest Weapon in a Growing Battle*, Wash. Post, June 19, 2002, at H01.

notice of the subpoena (and ISPs may be reluctant to do so). Nor is there any meaningful opportunity for the user to object. Nor does a judge oversee the process of subpoena issuance; instead, the clerk is required, no matter how obviously far-fetched the claim may be, to issue a subpoena if everything on the checklist of materials has been submitted. In addition, the highly expedited nature of the Section 512(h) subpoena process makes it virtually certain that ordinary Internet users – even if they happen to learn about the subpoena – will not have adequate time to mount an expensive legal challenge, often in a distant forum. See pages 2-3, *supra*.

Moreover, as Verizon has persuasively demonstrated (at 33-39), Section 512(h)'s modest prerequisites offer very little protection to Internet users. For example, the requester of a subpoena need only state a "good-faith belief" of infringement in the underlying 512(c) notice, and is not expressly required to undertake any due diligence, such as actual review of the suspicious files. (As noted above, RIAA, in apologizing for its recent false accusation of copyright infringement leveled at Penn State, admitted that it does not require its temporary employees who prepare DMCA notices to listen to the assertedly infringing files.) Although RIAA makes much of the fact that a Section 512(h) subpoena is signed under penalty of perjury, this provision applies not to the allegations of infringement but rather only to the identification of the "purpose" of the requester and the uses to which the information will be put. 17 U.S.C. § 512(h)(2)(C). In addition, the actual copyright owner need not even be identified, as it was not in this case, with the ironic consequence that the copyright enforcer may remain anonymous while the individual engaging in presumptively protected speech is compelled to relinquish anonymity. Nor does Section 512(h) require the subpoenaing party to demonstrate that the copyrights allegedly at issue are enforceable.

These shortcomings are not alleviated by the existence of remedies for misuse of the statute, as the district court believed. For one thing, such remedies are unlikely to deter certain types of misusers, such as stalkers and abusive spouses. In addition, because the Internet user is not required to be notified of the Section 512(h) subpoena, there is no guarantee that she will be aware that her private information has been disclosed to a third party. And the loss of anonymity is exactly the sort of irreparable damage that mere monetary damages cannot remedy.

Beyond that, the remedial provision (Section 512(f)) does not even attach to wrongfully issued identification information. It applies only when misrepresentation results in the ISP "removing or disabling access to the material or activity claimed to be infringing." 17 U.S.C. § 512(f). Even if the statute were interpreted to include improper disclosure of identity, it applies only when the subpoenaing party has made a "knowingly material[] misrepresent[ation]." *Ibid.* These limitations, and the threshold standard of "good faith," deny recovery based on a subpoena requestor's failure to conduct "due diligence" or consider whether the speech is protected under the fair-use doctrine or in the public domain. See *Arista Records, Inc.* v. *MP3Board, Inc.*, No. 00CIV-4660 (SHS), 2002 WL 1997918, at *15 (S.D.N.Y. Aug. 29, 2002) ("liability cannot be incurred by the RIAA pursuant to Section 512(f) for merely sending a letter that constitutes insufficient notification"). Section 512(f) is cold comfort indeed.

C. The Legitimate Interests of the Government and Copyright Owners Are Not Offended by Additional Safeguards

As a general matter, the government has a strong interest both in ensuring that copyright owners are protected against infringement of their works and in safeguarding the speech, associational, and privacy rights of Internet users. The government also has a substantial interest in ensuring that the discovery processes of the courts are properly used. Because in the discovery

process "[t]here is an opportunity for litigants to obtain * * * information that * * * could be damaging to reputation and privacy," the government "clearly has a substantial interest in preventing this sort of abuse of its processes." *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 35 (1984). Of course, the potential for abuse is even greater when discovery occurs in the *absence* of actual litigation.

The relevant question, however, is what interest the government and copyright owners have in *not* affording Internet users notice and an opportunity to be heard before their anonymity is destroyed pursuant to a Section 512(h) subpoena. The copyright owner would obviously prefer not to wait, since notice and an opportunity to be heard entail delay, expense, and the potential denial of its request for information, but mere convenience of the copyright owner is not by itself a legitimate interest. Nor should any weight be accorded to RIAA's claimed interest in using the subpoena process to warn purported infringers to stop, since alternative means to do so plainly exist (such as the instant messaging campaign RIAA has recently initiated). See Verizon Br. 40. Although additional procedural safeguards might impose some burden on the judiciary, they would also lessen the burden on clerks' offices by curtailing copyright owners' profligate requests for hundreds or even thousands of bot-generated subpoenas without the accountability of such procedures. The burden on the judicial branch in applying these additional due process protections, moreover, would be minimal because they are no more onerous than the same rules applicable to all other civil litigation.[18]

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[18] Notably, Fed. R. Civ. P. 27 requires notice to the subpoenaed party, an opportunity to be heard, and a judicial order, before a pre-litigation subpoena may issue. Similarly, once a case is filed, discovery ordinarily *may not issue* before service on the defendant unless authorized by a judge. See Fed. R. Civ. P. 26(f); see also *SeesCandy,* 185 F.R.D. 573.

D. Because it Fails to Require Notice to Internet Users, an Opportunity for Users to Be Heard, and a Prior Judicial Determination Before a Subpoena May Be Issued, Section 512(h) Violates Due Process[19]

Under the *Mathews* factors, due process plainly requires that Internet speakers receive not only notice but also a reasonable opportunity to object before their private information is disclosed to persons claiming copyright infringement. Without this basic protection, a speaker may not even realize that her privacy has been violated until she is fired or suffers other negative consequences. For persons at risk from domestic violence or stalkers, the consequences of the statute's failure to require notice can be much more severe.[20] Even if the speaker's ISP gives notice voluntarily, the expedited nature of the Section 512(h) process (RIAA has served Section 512(h) subpoenas demanding a response in as few as eight days) fails to provide a meaningful opportunity for accused speakers to object. The difficulty is compounded by the fact that Section 512(h) will effectively require all subpoena targets to defend their anonymity in Washington, D.C., even though the vast majority of them live elsewhere and have no ready access to counsel to represent them in a faraway jurisdiction on shortened time.[21]

In addition, due process requires that the subpoena be substantively examined, and not by a "ministerial" clerk but by a judge.[22] Such scrutiny is important because, as observed in *Fuentes*

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[19] The Business *Amici* do not join in this section.

[20] This is the chief concern of *amici* WiredSafety and National Coalition Against Domestic Violence, based upon their long experience protecting children and survivors of domestic violence.

[21] Section 512(h) lacks any venue limitations. If this Court affirms, the D.C. Circuit will likely become the jurisdiction of choice for Section 512(h) subpoenas.

[22] If this Court holds that Article III requires the filing of a lawsuit, this due process concern is effectively met. See note 18, *supra*.

v. *Shevin*, 407 U.S. 67, 83 (1972), the applicant's self-interested statement of "belief in his [own] rights" is insufficient to permit a deprivation of property or liberty.

After canvassing the area, the Consumer *Amici* cannot find a single state or federal statute or rule that permits a court subpoena to impinge upon First Amendment rights without either a lawsuit being filed (also required by Article III) or prior court approval.[23] In fact, every state's rules of civil procedures (and the federal rules) adhere to this bedrock principle. In *Connecticut* v. *Doehr*, *supra*, the Supreme Court relied on a survey of state attachment provisions in invalidating a Connecticut provision, explaining that "nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place." 501 U.S. at 16. Here, just as in *Doehr*, the dearth of historical antecedents to Section 512(h) shows that it "clearly falls short of the demands of due process." *Id.* at 18.

III. TO AVOID THE ARTICLE III PROBLEM, THIS COURT SHOULD INTERPRET SECTION 512(h) AS AUTHORIZING A SUBPOENA ONLY IN CONNECTION WITH A PENDING COPYRIGHT LAWSUIT

This Court need not resolve the serious Article III problems (detailed in Verizon's brief) that arise if Section 512(h) is interpreted to authorize the issuance of subpoenas completely untethered to any pending case or controversy. Rather, the Article III defect can be avoided if the Court simply reads Section 512(h) as creating a supplemental subpoena procedure that applies only in pending

[23] If unable to serve a summons because he does not know the defendant's identity, a plaintiff can simply request court permission to issue a subpoena to learn that identity. Contrary to RIAA's arguments below, filing a John Doe lawsuit and obtaining a subpoena is simple and relatively quick for the copyright owner – the lawsuit and subpoena can be filed and obtained on the very same day. Similarly, Rule 27 of the Federal Rules of Civil Procedure, relied upon heavily by the district court, requires judicial approval before discovery can issue to preserve evidence for a future lawsuit.

litigation under Title 17.[24] Even apart from questions of constitutional avoidance, this is the better reading of Section 512(h).[25]

The text and structure of Section 512 demonstrate that Congress intended Section 512(h) to apply only in the context of a pending copyright lawsuit. First, Section 512 (aptly entitled "Limitations on liability relating to material online") deals primarily with safe harbors or defenses that may be asserted by ISP defendants in copyright litigation, and with related rules, definitions, principles of construction, and limits on remedies available in such litigation. See 17 U.S.C. §§ 512(a)-(g), (i)-(m). The focus of Section 512 as a whole is on rules affecting liability and remedies *in copyright litigation* involving ISPs.

Second, Section 512(h) itself suggests that Congress presupposed the pendency of a copyright lawsuit. Section 512(h)(2)(C) requires an applicant for a subpoena under Section 512(h) to declare that the information obtained "will only be used for the purpose of protecting rights under this title." The purpose of that limitation is to ensure that information obtained in a pending copyright lawsuit will not be used for purposes unrelated to the protection of Title 17 rights.

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[24] Although this construction may not completely resolve the First Amendment and due process problems discussed in Parts I and II above, it does ensure that the Section 512(h) subpoena process takes place in the context of actual litigation superintended by an Article III judge under the basic rules of civil procedure, which have built-in protections and may be supplemented where needed by the judge. See notes 18 and 22, *supra*.

[25] Some of the *amici* sought to present this argument below in the second subpoena proceeding, but were denied leave to file their proposed *amicus* brief. The lower court apparently accepted RIAA's objection that all issues concerning Section 512(h)'s meaning – as opposed to its constitutionality – had been resolved in the first proceeding. But in the first proceeding, the district court declined to consider constitutional issues and thus could not have meaningfully considered principles of constitutional avoidance. In any event, the judicial obligation to construe statutes to avoid the adjudication of constitutional questions is not one controlled by the parties or subject to waiver.

Any ambiguity about the meaning of Section 512(h) should be resolved in light of the traditional limitations on the federal judicial power. As Verizon explains, the coercive power of the federal courts to order the disclosure of information exists only in connection with a "case" or "controversy" within the meaning of Article III. In light of that bedrock limitation on the judicial power, this Court should require the clearest possible statement by Congress before concluding that a radical departure from our legal and constitutional traditions was intended. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Section 512(h) includes no such clear statement.

Finally, even if Section 512(h) is ambiguous, this Court should read Section 512(h) in the manner suggested because doing so will avoid the Article III problems. See *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). Interpreting Section 512(h) as authorizing a subpoena only if a copyright lawsuit is actually pending would also go far toward addressing the serious constitutional problems that arise from the district court's interpretation.

* * * * *

Amici understand RIAA's desire for fast-track access to information without the procedural requirements of judicial review and their attendant delays. *All* litigants and potential litigants share that desire, however. Such "delays" are the necessary price we must pay for safeguarding the rights of all citizens. In this connection, Justice Murphy's cautionary words (in discussing Article II subpoenas enforced by *government* officials and administrative agencies) have much to say about the specter of *private* investigators copiously armed with Section 512(h) subpoenas:

> Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. * * *

> Many persons have yielded solely because of the air of authority with which the demand is made * * *. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Oklahoma Press Pub. Co. v. *Walling*, 327 US 186, 218-19 (1946) (dissenting opinion). This Court should be mindful of the need to protect the constitutional rights of Internet users against abuse by private individuals.

CONCLUSION

The judgments of the district court should be reversed.

May 16, 2003

Respectfully submitted.

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

Counsel for *Amici Curiae* certifies the following:

In accordance with Fed. R. App. P. 32(a)(7)(B) and (C) and Circuit Rule 32(a), the attached Brief of *Amici Curiae* is printed using a proportionally spaced, 12-point Times New Roman typeface and contains 6970 words.

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Alan Untereiner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 2003, I caused copies of the foregoing Brief of Alliance for Public Technology *et al.* as *Amici Curiae* in Support of Appellant and in Support of Reversal to be served via First Class U.S. mail, to the following:

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