

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

IN RE:	)	
	)	
VERIZON INTERNET SERVICES, INC.	)	
Subpoena Enforcement Matter	)	
	)	
_____	)	
	)	
RECORDING INDUSTRY	)	
ASSOCIATION OF AMERICA	)	
1330 Connecticut Avenue, N.W. Ste. 300	)	
Washington, DC 20036	)	Miscellaneous Action
	)	Case No. 1:03ms00040
v.	)	
	)	
VERIZON INTERNET SERVICES, INC.	)	
1880 Campus Commons Drive	)	
Reston, VA 20191	)	
	)	
_____	)	

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

United States Internet Industry Association (USIIA), Computer & Communications Industry Association (CCIA), Texas Internet Service Providers Association (TISPA), Washington Association of Internet Service Providers (WAISP), InKeeper Co., Progressive Internet Action (PIA), Southern Star, Mercury Network Corp., ZZAPP! Internet Services, Caprica Internet Services, LRBCG.COM, Inc., Stic.Net, LP, WiredSafety.org and Parry Aftab respectfully request permission to file a brief in the above-captioned matter as *amici curiae* in support of Verizon Internet Services, Inc. (Verizon), which seeks an order quashing an *ex parte* subpoena purportedly issued to Verizon pursuant to 17 U.S.C. § 512(h). The brief that *amici* seek to file is submitted with this motion.

USIIA, CCIA, TISPA, and WAISP (collectively, the Association *amici*) are trade associations dedicated to Internet issues. USIIA is the North American trade association for Internet commerce,

content, and connectivity. Founded in 1994, USIIA advocates effective public policy for the Internet and provides its members with essential business news, support, and services. USIIA is a member-owned-and-managed association. With members of every size, engaged in virtually every facet of the Internet, USIIA works to craft an environment in which Internet companies can thrive.

CCIA is a nonprofit membership organization for companies and senior executives from diverse sectors of the computer and communications industry. CCIA was established nearly three decades ago to represent its members' vital interests. Its member companies range from small start-ups to global leaders that operate in all areas of the high-tech economy. They include information technology, telecommunications, and networking equipment manufacturers, as well as software, Internet, telecommunications, and financial service providers, re-sellers, integrators, and others.

TISPA is a nonprofit organization committed to advocating and supporting a healthy Internet industry in the state of Texas. WAISP is a trade association representing the interests of independent Internet Service Providers in Washington state.

InKeeper Co. and PIA (collectively, the Website Services *amici*) provide a variety of services to users of the Internet. InKeeper is an Internet/Intranet design, hosting and consulting company dedicated to fair and equal access as it relates to internet technology. PIA offers businesses web services – including web and email hosting, website and e-commerce development, and socially responsible e-marketing services.

Southern Star, Mercury Network Corp., ZZAPP! Internet Services, Caprica Internet Services, LRBCG.COM, Inc., and Stic.Net, LP (the ISP *amici*) are companies that provide Internet connectivity to their customers. The ISP *amici* vary in size and mission. Southern Star is a small ISP providing Internet service in New Orleans, Louisiana, and LRBCG.COM serves residents and businesses of North Central Ohio. ZZAPP! is a non-profit 501(c)(3) community-supported Internet

Service Provider which, among other community services, provides free one-year Internet access accounts to selected individuals who are suffering terminal or chronic illness. Each company is concerned that, if RIAA is permitted to obtain evidence through this subpoena, it will receive similar subpoenas from copyright holders.

WiredSafety.org is the parent organization of WiredPatrol, WiredKids, and WiredCops, and provides many services aimed at enhancing Internet safety and privacy. Parry Aftab is its Executive Director. WiredSafety.org and Parry Aftab (collectively, WiredSafety) are concerned that many of the steps that Internet users take to protect themselves from cybercrime, harassment, and exploitation will be undermined if a user's identity can be obtained merely by serving a Section 512(h) subpoena.

The enforcement of this subpoena – and the very real risk that thousands of other subpoenas will follow in its wake – would infringe the constitutional rights of Verizon and its customers. Unless quashed, the subpoena would require Verizon, and other ISPs that serve merely as passive conduits to the Internet, to turn over the names of their customers – based on nothing more than a purported copyright holder's assertion, never tested by a court or other impartial arbiter, that the customer has engaged in infringing activity. To avoid the burdens associated with responding to these constitutionally impermissible subpoenas, and to protect the interests of their customers and their relationships with their customers, the ISP *amici* have a strong interest in ensuring that the subpoena is not enforced. To promote their mission of ensuring a fair and open business environment for those entities doing business on the Internet, the Association *amici* and the Website Services *amici* also have a substantial interest in seeing that this subpoena is quashed. And, to ensure that individuals' safety is not jeopardized through the use of subpoenas immunized from judicial review, WiredSafety has an interest in ensuring that this subpoena is quashed.

This is a case involving the construction of an important federal statute. The Association and Website Services *amici*, which promote the interests of companies doing business on the Internet, the ISP *amici*, who provide the same service to their customers that Verizon provides in this case, and WiredSafety, which represents the interests of individuals using the Internet, all are familiar with the questions involved and believe they can contribute to the Court's understanding of the issues presented. This Court regularly accepts *amicus* briefs under these circumstances (see, e.g., *United States v. Microsoft Corp.*, 2002 WL 649383, at \*1 n.4 (D.D.C. 2002), and has accepted a brief from many of the same *amici* in the proceeding involving RIAA's first subpoena issued under Section 512(h) to Verizon. See *In re Verizon Internet Services, Inc.*, Case No. 02MS00323, 10/1/02 Order. The Association *amici*, the Website Services *amici*, the ISP *amici*, and WiredSafety therefore respectfully request that the Court accept for filing and consideration the *amicus* brief filed herewith.

Pursuant to Local Civil Rule 7.1(m), undersigned counsel certify that they have conferred with counsel for the parties to this proceeding, RIAA and Verizon, and that Verizon has consented to the filing of the attached *amicus* brief but RIAA has not consented.

Respectfully Submitted.

---

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Attorneys for *Amici Curiae*

March 17, 2003

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

IN RE: )  
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VERIZON INTERNET SERVICES, INC. )  
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1880 Campus Commons Drive )  
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Miscellaneous Action  
Case No. 1:03ms00040

**[PROPOSED] ORDER**

Upon consideration of the Motion of United States Internet Industry Association, Computer & Communications Industry Association, Texas Internet Service Providers Association, Washington Association of Internet Service Providers, InKeeper Co., Progressive Internet Action, Southern Star, Mercury Network Corp., ZZAPP! Internet Services, Caprica Internet Services, LRBCG.COM, Inc., Stic.Net, LP, WiredSafety.org and Parry Aftab for leave to file brief as *amici curiae*, it is hereby

**ORDERED** that the motion is GRANTED and that the Brief of *Amici Curiae* United States Internet Industry Association, Computer & Communications Industry Association, Texas Internet Service Providers Association, Washington Association of Internet Service Providers, InKeeper Co., Progressive Internet Action, Southern Star, Mercury Network Corp., ZZAPP! Internet Services,

Caprica Internet Services, LRBCG.COM, Inc., Stic.Net, LP, WiredSafety.org and Parry Aftab In  
Support of Verizon's Motion to Quash Subpoena shall be deemed filed.

Dated: March \_\_, 2003

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United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
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Miscellaneous Action  
Case No. 1:03ms00040

**BRIEF OF *AMICI CURIAE***  
**UNITED STATES INTERNET INDUSTRY ASSOCIATION,**  
**COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,**  
**TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION, WASHINGTON**  
**ASSOCIATION OF INTERNET SERVICE PROVIDERS, INKEEPER CO.,**  
**PROGRESSIVE INTERNET ACTION, SOUTHERN STAR, MERCURY NETWORK**  
**CORP., ZZAPP! INTERNET SERVICES, CAPRICA INTERNET SERVICES,**  
**LRBCG.COM, INC., STIC.NET, LP, WIRESAFETY.ORG AND PARRY AFTAB**  
**IN SUPPORT OF VERIZON'S MOTION TO QUASH FEBRUARY 4, 2003 SUBPOENA**

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March 17, 2003

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## INTRODUCTION

*Amici Curiae* United States Internet Industry Association (USIIA), Computer & Communications Industry Association (CCIA), Texas Internet Service Providers Association (TISPA), Washington Association of Internet Service Providers (WAISP), InKeeper Co., Progressive Internet Action (PIA), Southern Star, Mercury Network Corp., ZZAPP! Internet Services, Caprica Internet Services, LRBCG.COM, Inc., Stic.Net, LP, WiredSafety.org, and Parry Aftab respectfully submit this memorandum in support of Verizon Internet Services, Inc.'s Motion to Quash February 4, 2003 Subpoena.

The subpoena served by the Recording Industry Association of America (RIAA) is invalid and should be quashed because the statutory provision assertedly authorizing its issuance – Section 512(h) of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512 – violates the Federal Constitution in at least three ways if that provision is interpreted as RIAA suggests. *First*, to the extent that Section 512(h) confers on the clerks of the federal district courts the extraordinary and unprecedented power to issue subpoenas to private parties *in the absence of any pending civil litigation*, the statute plainly exceeds the boundaries of Article III, which limits the “judicial Power of the United States” to “Cases” and “Controversies.” U.S. Const. art. III, §§ 1, 2. *Second*, as explained by Verizon in its submission, Section 512(h) contains inadequate procedural protections to safeguard the First Amendment rights of Internet users and violates the overbreadth doctrine. And *third*, under RIAA’s interpretation of Section 512(h), the statute violates the due process rights not only of Internet Service Providers (ISPs) that serve as no more than a passive conduit to the Internet but also of customers whose liberty and privacy interests are invaded (without any notice or opportunity to be heard) through a statutory procedure that is manifestly prone to error.

To avoid the Article III and other constitutional problems 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 – a limitation that, in any event, is apparent from a close analysis of the language and structure of Section 512. Properly understood as a supplementary subpoena provision applicable to service providers in copyright litigation, Section 512(h) simply does not authorize the pre-litigation subpoena issued in this case.

#### **INTEREST OF THE *AMICI CURIAE***

USIIA, CCIA, TISPA, and WAISP (the Association *amici*) are trade associations dedicated to Internet issues. USIIA is the North American trade association for Internet commerce, content, and connectivity. Founded in 1994, USIIA advocates effective public policy for the Internet and provides its members with essential business news, support, and services. USIIA is a member-owned and-managed association. With members of every size, engaged in virtually every facet of the Internet, USIIA works to craft an environment in which Internet companies can thrive.

CCIA is a nonprofit membership organization for companies and senior executives from diverse sectors of the computer and communications industry. Its member companies range from small start-ups to global leaders, and include information technology, telecommunications, and networking equipment manufacturers, as well as software, Internet, telecommunications, and financial service providers, re-sellers, integrators, and others.

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Southern Star, Mercury Network Corp., ZZAPP! Internet Services, Caprica Internet Services, LRBCG.COM, Inc., and Stic.Net, LP (the ISP *amici*) are companies that provide Internet connectivity to their customers. The ISP *amici* vary in size and mission. Southern Star is a small ISP providing Internet service in New Orleans, Louisiana, and LRBCG.COM serves residents and businesses of North Central Ohio. ZZAPP! is a non-profit 501(c)(3) community-supported Internet Service Provider which, among other community services, provides free one-year Internet access accounts to selected individuals who are suffering from terminal or chronic illness. These *amici* are concerned that, if RIAA is permitted to obtain evidence through this subpoena, they will receive similar subpoenas from other purported copyright holders.

WiredSafety.org provides many services aimed at enhancing Internet safety and privacy. Parry Aftab is its Executive Director. WiredSafety.org and Parry Aftab (collectively, WiredSafety) are concerned that many of the steps that Internet users take to protect themselves from cybercrime and harassment will be undermined if Section 512(h) subpoenas are widely used.

The enforcement of this subpoena – and the very real risk that thousands of other subpoenas like it will follow in its wake – would infringe the constitutional rights of Verizon and its customers. Unless quashed, the subpoena would require Verizon – and other ISPs that serve merely as passive conduits to the Internet – to turn over the names of their customers, based on nothing more than a purported copyright holder's assertion, never tested by a court or other impartial arbiter, that the

customer is suspected of engaging in infringing activity. To avoid the burdens associated with responding to these constitutionally impermissible subpoenas, to safeguard the interests of their customers, and to protect their relationships with their customers, the ISP *amici* have a strong interest in ensuring that RIAA's subpoena is quashed and the potential constitutional defects in Section 512(h) are recognized. Because this outcome would also promote their mission of ensuring a fair and open business environment for those entities doing business on the Internet, the Association and Website Services *amici* also have a substantial interest in seeing that this subpoena is quashed and Section 512(h) invalidated. And to ensure that individuals' safety is not jeopardized by the issuance of these kinds of subpoenas, WiredSafety has an interest in seeing that the subpoena is quashed.

For these reasons, many of the *amici curiae* submitted a brief to this Court in the prior proceeding (No. 1:02MS00323) involving RIAA's first Section 512(h) subpoena directed at Verizon. See *In re Verizon Internet Services, Inc.*, 2003 WL 141147 (D.D.C. Jan. 21, 2003). In its decision in that proceeding, this Court declined to "resolve the constitutional issues identified by Verizon and several *amici*" (*id.* at \*17); but it has since issued an order in this proceeding directing the parties, among other things, to discuss "issues relating to [the] First Amendment and Article III challenges" to Section 512(h). 3/7/03 Order, at 2. *Amici curiae* have a substantial interest in presenting this Court with a fuller and more extended analysis of the constitutional defects in Section 512(h), as set forth below. *Amici* also have a substantial interest in ensuring that this Court enforces the limitations implicit in Section 512(h) itself – including the critical limitation that requires a copyright action to be pending before Section 512(h) may be invoked.

## STATEMENT OF FACTS

On February 4, 2003, RIAA served on Verizon a second subpoena issued by the clerk of this Court pursuant to Section 512(h) of the DMCA, 17 U.S.C. § 512(h). See Exhibit 1 to Verizon's Motion to Quash. By its terms, the subpoena – which is on the standard form for a “subpoena in a civil case,” and which states that it was “issued” by the United States District Court for the District of Columbia – “command[s]” Verizon “to produce and permit inspection and copying of the following documents or objects”: “[i]nformation sufficient to identify the alleged infringer of the sound recordings described in the attached notification IP address: 162.83.196.170 on 2/03/03 at 5:23 p.m. (EST).” The subpoena further commands Verizon to make the specified disclosure at RIAA's offices in the District of Columbia on “2/12/03 at 5:00 p.m. (EST).” The subpoena is signed by, and issued by, the court clerk.

Section 512(h) provides that a “copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.” 17 U.S.C. § 512(h)(1). The request must include three things: “a copy of a notification described in subsection [512](c)(3)(A)”; “a proposed subpoena”; and “a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.” *Id.* § 512(h)(2). “If the notification filed” with the court clerk “satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed,” then “the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.” *Id.* § 512(h)(4). “Upon receipt of the issued subpoena,” the

Internet Service Provider “shall expeditiously disclose to the copyright owner or person authorized by 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.*” *Id.* § 512(h)(5) (emphasis added). According to RIAA, the italicized language compels immediate disclosure by the ISP even in situations where the ISP is challenging the subpoena by filing a motion to quash or other “response.” Finally, Section 512(h) provides that “[u]nless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.” *Id.* § 512(h)(6).

### **ARGUMENT**

In this proceeding, RIAA has invoked the authority of Section 512(h) even though there is no copyright infringement lawsuit currently pending – and none may ever be filed. Indeed, as Verizon demonstrates (at 15 & n.7), RIAA officials have repeatedly indicated in their public statements that RIAA does not wish to file a copyright infringement action against the Verizon customers RIAA suspects of copyright infringement. Under RIAA’s view, however, Congress has authorized the clerks of the federal courts to issue investigatory demands at the behest of private individuals who are not involved in any “case” or “controversy” that is cognizable under Article III – and to do so based on the minimal submission required by Section 512(h)(2). Worse yet, according to RIAA, an Internet Service Provider must disclose the information *immediately* – even if the ISP subsequently objects to the subpoena by filing a motion to quash. As Verizon has correctly pointed out in the stay proceedings relating to RIAA’s first subpoena (in No. 1:02MS00323),

however, the disclosure of such information has the effect of mooting any issue as to the legality of the subpoena. Thus, under RIAA's reading of the statute, Congress created a novel and unprecedented procedure that authorized federal court clerks to arm private litigants with investigatory powers untethered to any case or controversy, and further required the recipient of the subpoena to take a step (immediate disclosure) that would result in the lawfulness of the subpoena becoming nonjusticiable. That extra-legal scheme of private search warrants issued by administrative court personnel is utterly alien to our legal traditions.

As we explain in Point I below, when applied (as here) outside of the context of a pending lawsuit, Section 512(h) exceeds the bounds of Article III. Moreover, as we explain in Point II, Section 512(h), as interpreted by RIAA, also gives rise to insurmountable due process problems. According to RIAA, Section 512(h) entitles a purported copyright owner to demand, with virtually no showing and only the "ministerial" stroke of a court clerk's pen, that an ISP turn over proprietary business information. Such a deprivation of property ordinarily requires a pre-deprivation hearing. But Section 512(h), construed as RIAA would have it, affords none – and indeed requires an ISP to disclose the information before it challenges the subpoena in court (even though such disclosure has the effect of mooting any such challenge). As if that were not enough, the statutory scheme also seriously impinges on the liberty and property interests of Internet users, based on an *ex parte* submission to a court clerk without any notice or opportunity for the subscribers to be heard. Only by interpreting the statute as Verizon has urged can a court alleviate the severe due process burdens that Section 512(h) would otherwise entail. Finally, as we explain in Part III below, rather than accept RIAA's broad reading of Section 512(h) as authorizing subpoenas in situations where no litigation is pending, this Court should make clear what is apparent from a close analysis of Section

512 as a whole and subsection (h) in particular: the subpoena power is available *only* in the context of a pending copyright action. Enforcing this limit on Section 512(h), moreover, avoids the serious Article III problem that would otherwise arise as a consequence of RIAA’s interpretation.<sup>1</sup>

**I. IF SECTION 512(h) AUTHORIZES A SUBPOENA TO BE ISSUED TO A PRIVATE PARTY IN THE ABSENCE OF ANY PENDING CIVIL LITIGATION, IT EXCEEDS THE BOUNDS OF ARTICLE III**

The subpoena at issue in this proceeding does not relate to any lawsuit that is currently pending in federal court (or for that matter to any case that RIAA is about to file). In the absence of a pending lawsuit, there simply is no “case” or “controversy” within the meaning of Article III. Nor does Section 512(h), at least as interpreted by RIAA (as authorizing the issuance of subpoenas to private parties in this setting), represent the codification of any settled or traditional practice in the federal courts. On the contrary, federal courts traditionally have *not* employed their coercive powers to arm private investigators with the authority to demand information from others in settings completely unconnected to any pending litigation. This Court accordingly lacks the power to issue the subpoena involved in this case.

A. It is black-letter law that “Article III of the Constitution limits the power of federal courts to deciding ‘cases’ and ‘controversies.’” *Diamond v. Charles*, 476 U.S. 54, 61 (1986); see also *id.* at 62 (“The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”). Here, however, rather than commence a case against the person assertedly responsible for the infringement of a copyright – even as a “John Doe” lawsuit –

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<sup>1</sup> As Verizon correctly explains in its submission (at 19-28), the statute, as applied in the pre-litigation setting, also suffers from a lack of procedural protections required by the First Amendment and from a serious overbreadth problem (because it substantially chills the First Amendment rights of Internet users). *Amici* join in Verizon’s First Amendment arguments.

RIAA has assumed the mantle of Inspector Javert and seeks this Court’s assistance in ferreting out evidence it may or may not ever use in court.

*United States v. Morton Salt Co.*, 338 U.S. 632 (1950), makes clear that Article III courts may not serve such a purely investigatory function. As the Supreme Court explained, Article III courts are not like Executive Branch agencies; there is a fundamental “difference,” the Court stated, “between the judicial function and the function [an executive branch agency might] attempt[] to perform.” *Id.* at 641. Whereas the Executive Branch is free to engage “in a mere ‘fishing expedition’ to see if it can turn up evidence of guilt” (*ibid.*),

Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power \* \* \* is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

*Id.* at 641-42. As the Supreme Court summarized the matter: “[the] judicial power is reluctant if not unable to summon evidence until it is shown to be *relevant to issues in litigation.*” *Id.* at 642 (emphasis added); see also *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 175-76, 178 (1989) (Scalia, J., joined by Rehnquist, C.J., dissenting) (questioning federal court’s exercise of certain managerial functions in a pending case for a “purpose that neither achieves nor assists the resolution of claims” already before the court).<sup>2</sup>

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<sup>2</sup> As Verizon correctly points out (at 7-9), the majority in *Hoffman La-Roche* relied on the pendency of a representational lawsuit and on an express statutory authorization for other plaintiffs to “opt-in” to support judicial involvement in the notice process in that case. Indeed, the majority opinion itself strongly suggests that judicial involvement in the identification of plaintiffs *outside* of a pending lawsuit that is alleged to be representational in nature would be beyond the judicial role. The majority did not address any Article III issues – perhaps because the question presented in *Hoffman La-Roche*’s petition for certiorari made no mention whatsoever of Article III. See 57 U.S.L.W. 3607 (Mar. 14, 1989); Sup. Ct. R. 14.1(a); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97-98 (1994) (*sub silentio* assumption of jurisdiction is not binding precedent on a jurisdictional

Thus, “the subpoena power of a court cannot be more extensive than its jurisdiction.” *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). “It follows,” for example, “that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void.” *Ibid.* Nor, for example, may a party to a state-court action obtain a federal subpoena to get documents that it could not obtain through the state subpoena power. “[T]he district court is \* \* \* without power to issue a subpoena when the underlying action is not even asserted to be within federal-court jurisdiction.” *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996); see also *Washington Consulting Group. v. Monroe*, No. 00MS141 HHK/JMF, 2000 WL 1195290, \*3 (D.D.C. July 24, 2000) (recognizing that federal court does not have power to issue subpoena for evidence relevant to state-court proceeding).

Here, there is no pending controversy. On the contrary, as Verizon demonstrates (at 15 & n.7), RIAA has repeatedly suggested that it has *no* desire to initiate a lawsuit against the Verizon customers whom RIAA suspects of copyright infringement.<sup>3</sup> Without a pending lawsuit, this Court cannot issue a subpoena. “The federal courts” simply “are not free-standing investigative bodies whose *coercive power* may be brought to bear at will in demanding documents from others.”

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issue when that issue is later actually presented to the Court).

<sup>3</sup> See also *Music Firms, ISPs Battle Over Identity of Sharers*, L.A. Times, Oct. 5, 2002, at C1 (“We have to get the information from [Verizon] to know who to notify.”) (quoting RIAA President Cary Sherman); *Judge Orders Internet Providers To Help Trace Online Pirates*, Associated Press Newswires, Jan. 21, 2003 (same). Indeed, RIAA President Cary Sherman has indicated that, in his view, notification by letter will in most cases result in a halt in any infringement activity. *Music Cos. Go To Court Vs. Verizon*, Associated Press Online, Oct. 3, 2002.

*Houston Bus. Journal*, 86 F.3d at 1213 (emphasis added).<sup>4</sup> See also *ibid.* (“[T]he discovery devices in federal court stand available to facilitate the resolution of actions cognizable in federal court.”).

Nor does it matter that the subpoena authority in Section 512(h) was granted by Congress. The requirement that courts hear only cases and controversies is dictated by Article III of the Constitution. It is therefore “absolute” and not “malleable by Congress.” See, e.g., *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996) (distinguishing between constitutional rules, which are absolute, and prudential rules, which may be altered or superseded by act of Congress); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998) (assuming without deciding that Congress had authorized lawsuit but nevertheless resolving case against the plaintiffs on the ground that they lacked Article III standing). Congress has no more power to implicate federal courts in matters that stray beyond the bounds of Article III than it does to pass laws that abridge the freedom of speech.

B. The novel subpoena in this case cannot be defended by resort to the analogies previously advanced by RIAA. Thus, it is no answer to say that the federal courts are often called upon to review the issuance of process – such as grand jury subpoenas or search warrants – before the commencement of *criminal* litigation by the government. See *Mistretta v. United States*, 488 U.S. 361, 389 n.16 (1989). In such cases, the Executive Branch initiates the investigation, pursuant to its Article II duties to enforce the law, and the court is then called upon to examine whether the Executive Branch has exercised its powers appropriately. That, of course, is a far cry from

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<sup>4</sup> The essential characteristic of a subpoena as a demand for information backed by the coercive power of a court is confirmed by etymology. The word “subpoena” is derived from the Middle Latin words “sub” (meaning “under”) and “poena” (meaning “penalty”). See Online Etymology Dictionary (available at [www.etymonline.com/s13etym.htm](http://www.etymonline.com/s13etym.htm)) (visited March 16, 2003).

requisitioning an Article III court into assisting a *private party* in fishing for evidence.<sup>5</sup> What is more, each of the executive functions previously cited by RIAA has a specific constitutional grounding – search warrants in the Fourth Amendment, and grand jury subpoenas in the Fifth Amendment. By contrast, nothing in the Copyright Clause of Article I purports to authorize courts to assist alleged owners of copyrights in a search for evidence of violations, outside the ambit of ordinary litigation. And, of course, there is no equivalent in the context of civil litigation between private parties to the “supervisory authority over the administration of criminal justice in the federal courts” (*McNabb v. United States*, 318 U.S. 332, 341 (1943)) that has long been recognized by the Supreme Court. See generally Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1444-48 (1984); see also *id.* at 1494 (identifying “federal courts’ authority to fashion nonstatutory remedies for violations of federal law as a second source of authority for supervisory power rulings”); *United States v. Hasting*, 461 U.S. 499, 505 (1983) (purposes underlying exercise of supervisory powers include implementation of a remedy “for violation of recognized rights” or “to deter illegal conduct”). Because “[t]he judicial subpoena power \* \* \* is subject to those limitations inherent in the body that issues them” (*Morton Salt*, 338 U.S. at 642), the Section 512(h) subpoena must be quashed.

Nor can RIAA draw any support from Federal Rule of Civil Procedure 27, which permits the taking of a deposition before the filing of a lawsuit in certain very limited circumstances. Before

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<sup>5</sup> The grand jury’s investigatory powers (including its power to issue subpoenas) are limited to the context of a *criminal* investigation. See *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958) (use of grand jury’s subpoena power for the purpose of adducing evidence to be used in civil litigation would “flout[] the policy of the law”).

taking the deposition, the party seeking the evidence not only must establish to a court's satisfaction an unequivocal intent to file a lawsuit, but also must demonstrate that the party is unable to file a lawsuit at the current time. See 8 C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2072 (3d ed. 1998). Moreover, Rule 27 is not a discovery device, but instead is designed to preserve testimony of whose substance the petitioner already is aware. See *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) (“a Rule 27(a) deposition ‘may not be used as a substitute for discovery’”) (quoting rule); see also Fed. R. Civ. P. 27(a) (requiring Rule 27 petitioner to describe testimony sought to be perpetuated).

What is more, Rule 27 represents the continuation (and codification) of an ancient procedural mechanism originating in the courts of equity. “Bills to perpetuate testimony had been known as an independent branch of equity jurisdiction before the adoption of the Constitution.” *Arizona v. California*, 292 U.S. 341, 347 (1934); see also *Green v. Compagnia Generale Italiana di Navigazione*, 82 F. 490, 494 (S.D.N.Y. 1897), *aff’d*, 102 F. 650 (2d Cir. 1900).<sup>6</sup> Moreover, early in our Nation's history Congress specifically authorized the bringing of independent actions for the purpose of perpetuating testimony. See *Arizona v. California*, 292 U.S. at 347 & n.3 (citing “Revised Statutes, § 866 (28 USCA § 644)"); *Ex parte Fisk*, 113 U.S. 713, 722-24 (1885) (quoting and discussing same); *Green*, 82 F. at 494-95 (discussing origins of Rev. Stat. 866 in the Judiciary Act of 1789); see also Fed. R. Civ. P. 27(c) adv. committee notes (1937) (describing Rule 27 as an “alternative

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<sup>6</sup> Notably, a “bill” in equity was the name for the complaint that initiated an equitable action. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 3.4, at 135 (3d ed. 1985). In contrast to complaints at law, bills in equity traditionally included “three parts: the narrative, the charging, and the interrogative parts.” *Ibid.* In other words, the bill in equity ordinarily included a discovery component designed to gain admissions from one's adversary. *Id.* § 5.1, at 224 (“Every bill in equity was said to be a bill of discovery; in addition to the complainant's statements of fact and charges of evidence, it propounded interrogatories to the defendant which had to be answered under oath.”).

method” for perpetuating testimony, which mirrors “the right to employ a separate action to perpetuate testimony under U.S.C., Title 28 [former] § 644 (Depositions under *dedimus protestatem* and *in perpetuam*)”). A Rule 27 proceeding is thus the modern-day, functional equivalent of certain kinds of equitable suits that have long been a part of American law. See *Arizona*, 292 U.S. at 347 (“The sole purpose of such a *suit* is to perpetuate the testimony.”) (emphasis added).<sup>7</sup>

Unlike a Rule 27 petition to perpetuate testimony, the extraordinary subpoena that is challenged in this proceeding is *not* contingent upon any showing that litigation is clearly intended; it does *not* require service upon the expected adverse parties in any future proceeding; and it has *no* roots (much less deep ones) in our legal traditions. In fact, the subpoena here is unprecedented in its extraordinary delegation of discovery powers to a low-level functionary (the court clerk) in the absence of any existing case or controversy. As such, its compatibility with Article III cannot be defended on the basis of historical practice. Compare *Marsh v. Chambers*, 463 U.S. 783, 790-92 (1983) (in rejecting Establishment Clause challenge to practice of opening legislative sessions with prayer, relying on longstanding historical practices, including acts of early Congresses).<sup>8</sup>

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<sup>7</sup> Consistent with these origins, the request under Rule 27 is called a “petition,” includes a description of facts (like a bill in equity), and is required to be served under Rule 4 (just like a complaint) on the expected adversary in the future lawsuit. See Fed. R. Civ. P. 27(a); accord *Green*, 82 F. Supp. at 494 (“Counsel have not referred me to any authority, however, nor have I been able to find any, for proceeding in equity under any circumstances by mere ex parte petition to take depositions in perpetuam rei memoriam, without any bill filed, or process issued or served on the defendants in interest.”). Under Rule 27, the adversary is provided an opportunity to object, and the Court must issue an order allowing the requested examination. Fed. R. Civ. P. 27(a). If service cannot be accomplished, the Court is required under Rule 27 to appoint counsel for those not served to ensure an adversary presentation (including cross-examination of the deponent). Rule 27, in short, contemplates a full-blown judicial proceeding.

<sup>8</sup> In contrast to a subpoena duces tecum issued outside the confines of any action at law or suit in equity, the so-called “John Doe” lawsuit has a long history at English common law. One of the earliest mentions of a “John Doo” action dates to 1630, and the third edition of *The Attorney’s*

Finally, RIAA can draw no support from the district court’s decision in *Dornan v. Sanchez*, 978 F. Supp. 1315 (C.D. Cal. 1997), which involved a subpoena issued under the Federal Contested Elections Act, 2 U.S.C. §§ 381-396. *Dornan* is an out-of-circuit district court decision that turned on the special constitutional status of election contests. Even assuming that *Dornan* is correctly decided (which we dispute), the case is far afield. In any event, *Dornan* is easily distinguishable because, among other things, it involved a practice – the issuance of subpoenas by the federal courts in aid of election contests – that (like Rule 27 petitions to perpetuate testimony) has a long historical pedigree in the legal traditions of this country. See 978 F. Supp. at 1319-22 & n.5 (relying on these factors). RIAA has identified no historical antecedent for the novel and extraordinary subpoena power created (according to RIAA’s reading) in Section 512(h), and there is none.<sup>9</sup>

## **II. RIAA’S INTERPRETATION OF 512(h) RESULTS IN A MANIFEST VIOLATION OF THE RIGHTS OF VERIZON AND ITS CUSTOMERS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT**

According to RIAA, Section 512(h) imposes on Verizon a “mandatory, unconditional duty” to disclose the name of its subscriber upon receipt of the subpoena. See RIAA Motion to Enforce

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Academy by Thomas Powell. See Grinnel, *John Doe and Richard Roe – Their Portraits, Their History, Their Services in the Advancement of Justice Through the Rulemaking Power of the Courts*, MASS. L.Q., Aug 1935, at 26, 27. At and before the time of the Framing, “John Doe” was most often used as the fictitious lessee in an action for ejectment. See, e.g., *Doe v. Myhil*, 2 Va. Colonial Dec. B 161, 1735 WL 1 (Va. Gen. Ct., Oct. 1735). “John Doe” also has a long pedigree as a mechanism for the identification of unknown defendants. See, e.g., *Stearns v. Doe*, 78 Mass. 482 (1859).

<sup>9</sup> As we explain in Part III below, the Article III problem can be avoided if (as Verizon and we suggest) Section 512(h) is understood to authorize subpoenas only after a copyright action is commenced. In addition, Verizon’s proposed alternative construction of Section 512(h) as inapplicable to ISPs that serve only as conduits to the Internet goes some distance toward alleviating the Article III difficulties. Where an ISP stores the allegedly offending material on its server – and, after appropriate notice, fails to take it down – there is at least a sharper, riper controversy between the purported copyright owner and the ISP.

July 24, 2002 Subpoena, at 1; see also *id.* at 12. This deprives Verizon of many of the protections that would be available to it if RIAA had filed a “John Doe” lawsuit and served Verizon with a third-party subpoena pursuant to Fed. R. Civ. P. 45. If Verizon had received such a subpoena, it would have had the right under Rule 45(c) to assert objections, which would relieve it of any obligation to comply with the subpoena. It would also have had a right to file a motion to quash on the ground that the subpoena requires disclosure of confidential commercial information. Fed. R. Civ. P. 45(c)(3)(B)(i). In other words, Rule 45 provides for a real adversarial process between the proponent and the recipient of a subpoena. Section 512(h), as RIAA reads it, does not. Moreover, in filing a “John Doe” lawsuit, RIAA would be representing to the court that its allegations have or will have “evidentiary support.” Fed. R. Civ. P. 11(b).

RIAA’s construction of the statute gives rise to serious procedural due process concerns. The Due Process Clause of the Fifth Amendment requires federal courts to ensure that a litigant is accorded adequate procedural safeguards before being deprived of a property or liberty interest. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-49 (1993); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The identity of an Internet Service Provider’s customer is confidential business information in which the ISP has a property interest. As the Supreme Court has explained, “[c]onfidential business information has long been recognized as property.” *Carpenter v. United States*, 484 U.S. 19, 26 (1987); see also *ibid.* (“[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit”) (quoting 3 W. FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 857.1, at 260 (rev. ed. 1986)). Indeed, the Court has made clear that information owned by a business – particularly information that the owner

maintains as confidential and from which the owner excludes others – can also constitute property within the meaning of the Takings Clause. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1001 (1984); see also *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (takings analysis has been, and properly can be, applied to intangible intellectual property); *id.* at 554 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting) (same); *United States v. Zolin*, 491 U.S. 554, 571 (1989) (attorney-client privilege is a property or liberty interest subject to the protection of the Due Process Clause).<sup>10</sup>

Requiring an Internet Service Provider to turn over confidential business information – the identity of a customer – to a third party immediately upon receipt of a subpoena under Section 512(h) results in a serious impairment or deprivation of the ISP’s property interest in that information. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“one of the most essential sticks in the bundle of rights that are commonly characterized as property” is “the right to exclude others”).<sup>11</sup> Once the information is turned over to a third party, its confidentiality is irretrievably lost. As Verizon has explained in the stay proceedings involving this Court’s ruling on RIAA’s first Section 512(h) subpoena, the fact that there is no way to restore the confidential nature of this information means that disclosure effectively moots any post-deprivation challenge that might be mounted to the

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<sup>10</sup> Even beyond contractual obligations assumed by a service provider (see note 13, *infra*), the “common law may impose confidentiality and security obligations on the service provider” to safeguard information concerning a customer’s identity or activities. B. WRIGHT & J. WINN, *THE LAW OF ELECTRONIC COMMERCE* § 19.07[B], at 19-17 (3d ed. 2000).

<sup>11</sup> In addition, the compelled disclosure in this situation also threatens to have more substantial ripple effects on the service provider’s business and customer base. For example, it would prevent the service provider from making contractual commitments to its subscribers to maintain their anonymity in the face of requests for disclosure by private individuals and entities made before a court or other neutral arbiter has determined that such disclosure is appropriate.

compelled disclosure of the customer's identity. What is more, the deprivation of the service provider's property interest occasioned by Section 512(h) occurs – again, under RIAA's reading of the statute – without any prior opportunity for the service provider to be heard. Thus, according to RIAA, service providers such as Verizon must immediately hand over the information requested – thereby destroying its confidentiality – regardless of whether Verizon may later object to this deprivation of its property interests.

In *Connecticut v. Doe*, 501 U.S. 1 (1991), the Supreme Court invalidated a Connecticut statute that authorized prejudgment 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 *Doe*, moreover, required the approval of a judicial officer based on a determination that the attachment was supported by probable cause. In Section 512(h), in contrast, at least under RIAA's view, Congress has authorized a private party to demand the extinguishment of a property interest without any intervention of a federal judge, based solely on the submission to the *court clerk* of certain materials. Under RIAA's view, once the clerk carries out the "ministerial act" of issuing the subpoena, and the subpoena is delivered to the service provider, the provider is required immediately to turn over its confidential business information to the requester. The substantial due process concerns raised by this scheme should be obvious in light of *Doe*.

Moreover, in *Doe* the Court explained that the due process inquiry there was substantially informed by a review of "[h]istorical and contemporary practices" concerning prejudgment attachment, including a "survey of state attachment provisions." 501 U.S. at 16-17. The fact that pre-

judgment attachment “is a remedy unknown at common law” and that “nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place,” this Court explained, “confirm[s] our view that the Connecticut provision \* \* \* clearly falls short of the demands of due process.” *Id.* at 16-18; see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (“abrogation of a well-established common-law protection \* \* \* raises a presumption that its procedures violate the Due Process Clause”); *Burnham v. Superior Court*, 495 U.S. 604, 621-22 (1990) (opinion of Scalia, J.).

As explained above, the extraordinary subpoena power created by Section 512(h) – under RIAA’s reading – represents a substantial departure from “historical and contemporary practices” in the area of subpoena authority conferred on civil litigants. See, e.g., Fed. R. Civ. P. 45(c) (describing “Protection of Persons Subject to Subpoenas”).<sup>12</sup> Section 512(h)’s substantial departure from the traditional safeguards accorded to third parties subjected to demands for information in civil litigation underscores the serious due process issues raised by Section 512(h).

Finally, these due process concerns are heightened if, as RIAA suggests, the subpoena power created by Section 512(h) is *not* limited to pending copyright lawsuits or to situations in which the allegedly offending material is actually stored on a service provider’s system. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court explained that

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

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<sup>12</sup> RIAA never explains why, if Section 512(h) requires immediate disclosure by a service provider upon receipt of the subpoena, RIAA employed a form for *this* subpoena that reprints the protections for subpoena recipients mandated by Rule 45 (including a portion of Fed. R. Civ. P. 45(d)(2) that sets forth the duties of recipients when “information subject to a subpoena is withheld” on grounds of privilege).

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335. But when, as in *Doehr* or in this case, the due process challenge is to a statute that “ordinarily appl[ies] to disputes between private parties rather than between an individual and the government,” the third *Mathews* factor must be adjusted somewhat. *Doehr*, 501 U.S. at 10-11. In that setting “any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other’s property”; therefore the “relevant inquiry requires \* \* \* principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have” in forgoing additional procedures. *Id.* at 11.

Consideration of these factors strongly suggests that Section 512(h) violates due process as applied to a service provider such as Verizon. First, the private interest of Verizon in maintaining the confidential nature of its customer’s identity is substantial. As noted above, that property interest will be destroyed as soon as the disclosure is required. Moreover, Verizon’s customers also have substantial interests in maintaining their anonymity. Those interests would also be adversely affected by the compelled disclosure sought by RIAA. Second, the risk of error inherent in the procedure set forth by Section 512(h) is substantial. Under RIAA’s view, no judicial officer is required to review the application for a subpoena – or ensure the accuracy of the information underlying the application – before the subpoena is issued. The only review that takes place, as RIAA admits, is purely ministerial in nature, involving only a cursory review by the court clerk. In these circumstances, the risk of erroneous disclosure is high and the value of a predeprivation hearing substantial. Finally, the applicant’s interest in immediate disclosure is not weighty, and the burden of imposing additional

safeguards is no more than would be required for an ordinary subpoena obtained under Fed. R. Civ. P. 45. Thus, due process requires that a service provider such as Verizon be given an opportunity to be heard in a judicial forum before being required to disclose the confidential business information sought by RIAA's subpoena.

The due process problems created by Section 512(h) under RIAA's reading are exacerbated, moreover, if the *customer's* rights are considered.<sup>13</sup> The customer, after all, may never receive any notice of the demand for confidential information concerning his or her identity. Since the customer has no idea that a demand has been made to disclose his private identity, the customer ordinarily will have no opportunity to be heard. Once the disclosure is made, a challenge to the subpoena will be mooted. And, of course, under RIAA's reading, all of this can occur without any lawsuit ever being filed. A more egregious example of a due process violation is difficult to imagine.<sup>14</sup>

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<sup>13</sup> Verizon safeguards the privacy of its customers in various ways. See About Verizon – Privacy/Other Policies (available at <http://www22.verizon.com/About/Privacy/genpriv>) (visited Mar. 17, 2003). For example, Privacy Principle No. 1 states that “Verizon obtains and uses individual customer information for business purposes only.” Under Privacy Principle No. 4, “Verizon enables customers to control how and if Verizon discloses individual information about them to other persons or entities – except as required by law or to protect the safety of customers, employees or property.” According to the commentary on Privacy Principle No. 4, “[a]n example of when Verizon would disclosure individual customer information to an outside entity is when Verizon is served with *valid legal process* for customer information” (emphasis added). Thus, both Verizon and its customers have an expectation that such data will remain confidential absent a subpoena served in the traditional context, *e.g.*, a lawsuit, grand jury, or valid administrative investigation.

<sup>14</sup> The due process concerns from the perspective of the customer are less significant if – as Verizon correctly contends – the subpoena power created in Section 512(h) is limited to situations in which the allegedly offending material is stored on a service provider's system. For one thing, the privacy interests of the customer are much less weighty in that circumstance, because the customer has already elected to expose the material to the service provider and its employees by placing the materials on the service provider's network. See *United States v. Miller*, 425 U.S. 435, 442 (1976) (bank customers have no legitimate expectation of privacy in bank records involving checks, deposit slips, and other documents that “contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business”). Second, the risk of

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

As it turns out, there is no need for this Court to resolve the serious Article III problems (described in Part I above) that arise if Section 512(h) is interpreted to authorize the issuance of subpoenas, such as the one at issue in this proceeding, that are completely untethered to any pending case or controversy. Nor is there any need to grapple with the serious chilling and overbreadth problems that arise if (as RIAA contends) Section 512(h) authorizes any copyright owner – or his purported agent – to obtain a subpoena commanding the immediate disclosure of private customer information from an ISP, without regard to whether the copyright owner has asserted a claim in a pending lawsuit. These serious constitutional defects can be avoided if the Court simply reads Section 512(h) as creating a supplemental, and specialized, subpoena procedure that applies only *in pending proceedings* involving Internet Service Providers.<sup>15</sup> As we explain below, even apart from questions of constitutional avoidance, this is by far the better reading of Section 512(h).

A. There is ample evidence in the text and structure of Section 512 demonstrating that Section 512(h) presupposes the existence of (and was intended by Congress to apply only in the context of) a pending copyright lawsuit. First, the rest of Section 512 (which is aptly entitled

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error is much less because, if the material is actually stored on the provider’s system, the provider may at least be able to confirm the accuracy of the statements submitted in support of the subpoena request. In light of those considerations, the due process balance may well *not* require a pre-deprivation hearing before a service provider is required to disclose information pursuant to Section 512(h) when the allegedly offending information is stored on the provider’s system.

<sup>15</sup>Although this construction does not completely resolve the due process problems discussed in Part 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 (who, in turn, can take additional steps to address due process concerns).

“Limitations on liability relating to material online”) deals primarily with certain safe harbors or defenses to liability that may be asserted by defendants in copyright litigation. See 17 U.S.C. §§ 512(a)-(g), (i). Other provisions similarly deal with rules, definitions, and principles of construction relating to liability and the safe harbors (*id.* §§ 512(f), (g), (i), (k)-(m)), and with the scope of injunctive relief against Internet Service Providers (*id.* § 512(j)). Plainly, 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 strongly suggests that Congress presupposed the pendency of a copyright lawsuit. To begin with, a request for a subpoena under Section 512(h) must identify “an alleged infringer.” 17 U.S.C. § 512(h)(1). That reference is sensibly understood as a reference to someone who has been “alleged” – either in a *John Doe* complaint or in a complaint brought against an ISP – to have engaged in copyright infringement. See also 17 U.S.C. § 512(f) (creating remedy, including reimbursement of “costs and attorneys’ fees,” in favor of an “alleged infringer” who has been the victim of certain material misrepresentations). In addition, Section 512(h) expressly states that “[u]nless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service and enforcement of a subpoena duces tecum.” 17 U.S.C. § 512(h)(6) (emphasis added). Under Rule 45, every subpoena must, among other things, “state the title of the action, the name of the court *in which it is pending*, and its civil action number.” Fed. R. Civ. P. 45(a)(1)(B) (emphasis added); see also Fed. R. Civ. P. 1 (stating that rules govern “the procedure in the United States district courts in *all suits of a civil nature whether cognizable as cases*

*at law or in equity or in admiralty,*” except as specified in Rule 81) (emphasis added); Fed. R. Civ. P. 26(b)(1) (the “scope of discovery” is limited to “any matter, not privileged, that is relevant to *the claim or defense of any party*”) (emphasis added). Because Section 512(h) does not “otherwise provide,” these limitations are presumptively applicable to the specialized subpoenas authorized under Section 512(h). Taken together, these provisions strongly suggest – if they do not conclusively demonstrate – that Congress intended Section 512(h) subpoenas to be available only once a copyright lawsuit is initiated. This is further confirmed, moreover, by the language of Section 512(h)(2)(C), which 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.<sup>16</sup>

B. Any ambiguity about the meaning of Section 512(h) should be resolved in light of the traditional limitations long observed in the federal courts on the use of subpoena powers by private parties seeking to vindicate private rights in civil litigation. As explained in Part I above, the coercive power of the federal courts to order the disclosure of information exists only in connection

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<sup>16</sup> Needless to say, there is nothing whatsoever in Section 512(h) that would suggest that a subpoena authorized under that provision is *unavailable* to parties to an actual copyright lawsuit. For that reason, acceptance of the Article III challenge to *this* subpoena will not result in the facial invalidation of Section 512(h). Nor can RIAA plausibly be heard to suggest that, as applied to litigants in a pending copyright lawsuit, Section 512(h) is superfluous because of the availability of subpoenas under Rule 45. Under RIAA’s own reading of Section 512(h), that provision creates an expedited procedure for compelling the disclosure of an ISP customer’s identity (and, according to RIAA, requires such disclosure to be made before the ISP may object to the subpoena). In addition, Section 512(h) authorizes the issuance of a subpoena in a pending copyright case before the Rule 26(f) conference and outside of the strictures of Rule 26(d), which ordinarily preclude such discovery. See Fed. R. Civ. P. 26(d), (f). Equally meritless is any suggestion that Section 512(h) renders Rule 45 superfluous. The latter, unlike the former, is not limited to information concerning the “identity of an alleged infringer.” 17 U.S.C. § 512(h)(1)(C).

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 Congress intended to make such a radical departure from our legal and constitutional traditions. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 110 (1948). Plainly, Section 512(h) does not include any such clear statement that Congress intended it to apply in situations where no case or controversy is actually pending.

C. Finally, even if Section 512(h) is ambiguous, and even that ambiguity is not resolved by reference to the longstanding practices of the federal courts (which do not include the issuance of private civil subpoenas unconnected to pending litigation), this Court should read Section 512(h) in the manner we suggest because doing so will avoid the Article III problems described in Part I above. *See New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (statute should be construed “to avoid constitutional problems, if the statute is subject to such a limiting construction”); see also *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (same). Interpreting Section 512(h) as authorizing a subpoena only if a copyright lawsuit is actually pending would also go far toward addressing the serious First Amendment overbreadth problems and chilling effects that arise from RIAA’s interpretation of the statute as authorizing subpoenas such as the one at issue here. See also note 15, *supra*.

## CONCLUSION

For the foregoing reasons, the Court should grant Verizon's Motion to Quash the February 4, 2003 Subpoena.

Respectfully Submitted.

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## CERTIFICATE OF SERVICE

I certify that on Monday, March 17, 2003, I caused the Motion for Leave to File Brief as *Amici Curiae*, the Brief of *Amici Curiae* United States Internet Industry Association, Computer & Communications Industry Association, Texas Internet Service Providers Association, Washington Association of Internet Service Providers, InKeeper Co., Progressive Internet Action, Southern Star, Mercury Network Corp., ZZAPP! Internet Services, Caprica Internet Services, LRBCG.COM, Inc., Stic.Net, LP, WiredSafety.org and Parry Aftab to be delivered to the following recipients by first-class mail:

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