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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PACIFIC BELL INTERNET SERVICES,

Plaintiff,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., MEDIASENTRY, INC., dba MEDIAFORCE, and IO GROUP, INC., dba TITANMEDIA, TITANMEDIA.COM, and TITANMEN.COM,

Defendants.

Case No. C 03-3560 SI

***AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF PBIS'S OPPOSITION TO RIAA'S MOTION TO DISMISS**

Date: November 21, 2003
Time: 9:00 a.m.
Courtroom: 10, 19th Floor
Judge: Hon. Susan Illston

Complaint Filed: July 30, 2003

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INTERESTS OF *AMICI*

Amici are 17 entities and organizations. The group includes a broad array of public interest organizations, consumer advocacy groups, library associations, and civil liberties organizations. Almost all represent consumers whose constitutional rights are implicated by the matters at issue in this action. *Amici* submit this brief urging this Court to deny the Recording Industry Association of America's motion to dismiss the declaratory relief complaint filed by Pacific Bell Internet Services ("PBIS") concerning the subpoena provisions of the Digital Milennium Copyright Act. Although *amici* limit this brief to a discussion of PBIS's claim that the subpoena provisions violate the First and Fifth Amendments (Claim 3), *amici* support PBIS's separate argument on its claim (Claim 2) that the DMCA violates Article III of the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on the novel provisions of Section 512(h) of the Digital Milennium Copyright Act ("Section 512(h)"), the Recording Industry Association of America ("RIAA") has issued a number of subpoenas to Pacific Bell Internet Services ("PBIS") that seek to uncover the identity of anonymous PBIS subscribers using the Internet. Section 512(h) purportedly authorizes the issuance of these subpoenas through a ministerial procedure that does not: (1) require that the subpoenas be in support of a case or controversy; (2) provide notice to the affected subscribers of the existence of the request; (3) require the subpoenaing party to detail the specifics of the claim; (4) afford the subscribers an opportunity to be heard; or (5) require a judge to review the legal and constitutional issues presented and make a judicial determination. Instead, all that is needed is a "good faith" assertion by the subpoenaing party.

This provision is so devoid of procedural protections that it is an invitation to mistake and misuse. Although Section 512(h) is a relatively new provision, numerous examples of erroneously and abusively issued Section 512(h) subpoenas have already been reported, including the erroneous filing of a lawsuit seeking hundreds of millions of dollars against a 65

year-old grandmother whose computer cannot even run the peer-to-peer technology allegedly used and the improper issuance of subpoenas by companies such as Wal-Mart to suppress legitimate and noninfringing speech about the price of their goods. It is for precisely this reason – to ensure that fundamental rights are not mistakenly or unnecessarily curtailed – that the Due Process Clause of the Fifth Amendment requires adequate procedural safeguards before individuals can be deprived of a protected liberty interest that fundamentally implicates the protection of freedom of expression.

RIAA's subpoenas seek the name, address and telephone number of certain PBIS subscribers who were using the Internet to communicate anonymously with other Internet users. Quite apart from the important privacy and personal security issues at stake, the right to engage in anonymous speech is guaranteed by the First Amendment. It is also a liberty interest protected by the Due Process Clause. The users' identities cannot, thus, be disclosed absent sufficient procedural protections. That the speech at issue here is alleged to constitute copyright infringement does not matter. Section 512(h) authorizes issuance of a subpoena before any determination has been made that the speech actually constitutes copyright infringement or that it is even reasonably likely to be held to be infringing. Because Section 512(h) lacks adequate safeguards to ensure that Internet users' fundamental rights are not unnecessarily or mistakenly curtailed, it violates the Due Process clause of the Fifth Amendment. RIAA's attempt to dismiss PBIS's complaint should be rejected.

FACTUAL BACKGROUND

A. The Procedure For Obtaining A Section 512(h) Subpoena.

Issuance of a Section 512(h) subpoena is a purely ministerial act by the clerk of the court and must be granted – without any questions – upon the mere submission of: (1) a proposed subpoena; (2) a sworn declaration that the purpose for the subpoena is to obtain the identity of an alleged infringer and to protect copyright rights; and (3) a copy of a Section 512(c)(3)(A) notice, identifying some of the copyrighted work(s) at issue and alleging that the copyright holder has a

"good faith belief" that such copyrighted material is being used without authorization. *See* 17 U.S.C. § 512(h).

Nothing more is necessary. No notice need be provided to the individual whose identity is being sought. Nor must that individual be given an opportunity to challenge the subpoena. Although the statute requires a "good faith belief" that the conduct in question violates a copyright, the statute imposes no due diligence requirement on the party seeking the subpoena to verify its "belief" in any manner.[1] Nor does the statute require the subpoenaing party to provide specific allegations supporting its claim or to present any evidence supporting its belief. Most importantly, the subpoenas are issued without any judicial oversight or review, rendering the required recitations mere chimerical protection for consumers.

B. The Potential For Mistake and Misuse of The Section 512(h) Procedure.

Given how easy it is to obtain a Section 512(h) subpoena and how few procedural protections there are, there is a substantial risk that Section 512(h) subpoenas will be both mistakenly issued by legitimate copyright holders and abusively issued by those with improper purposes. This fear is not merely hypothetical. Numerous examples of mistake and misuse have already been reported. Indeed, RIAA has admitted that in one single week, it committed several dozen errors in sending out accusatory notices of copyright infringement under Section 512(c)(3)(A), a sister provision to Section 512(h).[2] *See* McCullagh, *RIAA Apologizes For Erroneous Letters*, CNET News, May 13, 2003, http://news.com.com/2100-1025-1001319.html.

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[1] *See Rossi v. Motion Picture Ass'n of Am.,* 2003 U.S. Dist. LEXIS 12864, *8-9 (D. Haw. Apr. 29, 2003) ("good faith" provision in Section 512(c) does not "require[] a copyright holder to conduct an investigation to establish actual infringement prior to sending a notice to an ISP").

[2] Errors and misuse of the 512(c)(3)(A) notice provisions are directly relevant to Section 512(h) subpoenas because those 512(c)(3)(A) notices are a prerequisite for obtaining a Section 512(h) subpoena.

Amici include groups that have substantial experience monitoring copyright claims on the Internet. The following examples of mistaken and erroneous uses of Section 512 – honest mistakes that would not have occurred if adequate safeguards were in place – are illustrative:

- RIAA issued a Section 512(h) subpoena, obtained the identity of an anonymous individual, and filed a federal copyright infringement action seeking damages of up to $150,000 per song, based on its sworn "good faith" belief that the defendant had illegally downloaded over 2,000 copyrighted songs, including the song, "I'm a Thug," by the rapper Trick Daddy. As it turned out, the defendant whose anonymity was breached is a 66 year-old grandmother who has never downloaded any songs and does not even own a computer capable of running the file-sharing software allegedly used. *See* Gaither, *Recording Industry Withdraws Suit*, Boston Globe, Sep. 24, 2003, C1.

- RIAA obtained the identity of a Los Angeles resident through a Section 512(h) subpoena and filed a lawsuit against him, seeking millions of dollars in damages for the defendant's alleged downloading of music. As it turns out, the IP address allegedly used for the downloading is not the defendant's, and the defendant did not have the file sharing software allegedly used. In addition, the allegedly infringed songs are primarily Spanish-language songs; the accused individual does not understand Spanish and does not listen to songs in Spanish. *See* Menn, *Group Contends Record Labels Have Wrong Guy*, Los Angeles Times, Oct. 14, 2003.[3]

[3] Electronic Frontier Foundation, one of the *amici,* is representing the defendant in that lawsuit.

- Warner Brothers sent a notice to an ISP that alleged that an illegal copy of the film "Harry Potter and the Sorcerer's Stone" was being made available on the Internet. The notice stated that the requesting party had the requisite "good faith belief" that copyright infringement had taken place over the ISP's connection at a specific date and time, and demanded that the ISP terminate the anonymous user's account. As it turned out, the material in question was a child's book report.

- RIAA sent a notice to Penn State's Department of Astronomy and Astrophysics, accusing the university of unlawfully distributing songs by the pop singer Usher. In fact, RIAA 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 copyright infringement. RIAA blamed a "temporary employee" for the error and admitted that it does not routinely require its "Internet copyright enforcers" to listen to the song that is allegedly infringing. *See* McCullagh, *RIAA Apologizes for Threatening Letter*, CNET News, May 12, 2003, http://news.com.com/2100-1025_3-1001095.html.

- A purported copyright owner sent a notice of copyright infringement to the Internet Archive, a well-known website containing numerous public domain films, in connection with two films, listed on the website as 19571.mpg and 20571a.mpg. As it turned out, the sender had mistaken the two public domain films for the popular copyrighted movie about a submarine, "U-571." *See* <http://www.chillingeffects.org/notice.cgi?NoticeID=595>.

Mistaken use of Section 512 is bad enough. Even worse is that many companies and individuals will try to take advantage of the powerful and easily invoked provisions of Section

512(h) for improper purposes. Several instances of the deliberate misuse of Section 512 have been reported:

- Wal-Mart sent a Section 512(h) subpoena, along with a Section 512(c) notice, to a comparison-shopping website that allows consumers to post prices of items sold in stores. The subpoena sought the identity of the consumer who had anonymously posted price information about an upcoming sale. Wal-Mart claimed that its prices were copyrighted; in fact, prices are not copyrightable facts as a matter of law. Other retailers, including K-Mart, Jo-Ann Stores, OfficeMax, Best Buy and Staples have also improperly served Section 512(c) notices on the same theory. *See* McCullagh, *Wal-Mart Backs Away from DMCA Claim*, CNET News, Dec. 5, 2002, <http://news.com.com/2100-1023-976296.html>.

- An electronic voting machine company has flooded ISPs with Section 512 notices claiming copyright infringement in an effort to remove thousands of embarrassing internal e-mails from websites critical of the company. The documents are covered by the fair use doctrine, yet the notices have been successful in scaring ISPs into removing the material, thus effectively censoring the public debate. Roberts, *Diebold Voting Case Tests DMCA,* PC World News, Nov. 4, 2003, http://www.pcworld.com/news/article/0,aid,113273,00.asp.[4]

- The Church of Scientology has long been accused of using copyright law to harass and silence its critics. It has apparently begun to use the provisions of Section 512, making DMCA claims against the search engine Google in an

[4] A lawsuit has been brought against this alleged copyright holder arising out of its use of Section 512. Plaintiffs in that case are represented by one of the *amici*, Electronic Frontier Foundation.

attempt to cause it to stop including in its index any information about certain websites critical of the Church. *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, <http://news.com.com/2100-1023-865936.html>.

- Several owners of trademarks – who have no rights under Section 512 – have asserted DMCA violations in an improper attempt to take advantage of the powerful weapons of Section 512. *See* http://www.chillingeffects.org/notice.cgi?NoticeID=310.

- A DMCA claim was made – despite the clear existence of a right to fair use – against an individual who posted public court records that contained copyrighted material. *See* http://www.chillingeffects.org/notice.cgi?NoticeID=348.

- An individual who apparently wanted to erase the public record of his past, uncopyrighted messages, invoked Section 512(c) in an attempt to force several ISPs to take down the material. *See* http://www.chillingeffects.org/notice.cgi?NoticeID=312.

The instances of mistake and misuse can only be expected to increase. RIAA itself has apparently used Section 512(h) to obtain over 2,200 subpoenas in the past few months alone. Many more are promised, and expected. No one knows how many other Section 512(h) subpoenas have been issued. Even if the vast majority of these subpoenas are correctly issued, it is highly likely that a significant number of them will be erroneously or abusively served –

requiring the disclosure of the identity of anonymous individuals engaging in legitimate and protected online speech.

The risk of mistake and misuse is magnified – and made even more probable – by the widespread use by companies of automated software robots ("bots") to monitor Internet activity. *See* Ahrens, *Ranger vs. the Movie Pirates, Software is Studios' Latest Weapon in a Growing Battle,* Wash. Post, June 19, 2002, at H01 (discussing the "Ranger" bot used by the Motion Picture Association of America, which operates twenty-four hours per day, in 60 countries, and prepared over 54,000 cease-and-desist letters in 2001). When these bots find a possibly suspicious file, they note its location, the date and time, and automatically generate lists – sometimes, even boilerplate Section 512(c) notices – that get sent to the relevant ISPs. These bot-generated notices seem to get little, or no, human review, let alone a meaningful analysis of whether a valid infringement claim or fair use defense exists. That the companies controlling the bots are apparently compensated based on the number of potential infringers identified only exacerbates the problem.

The consequences from Section 512(h)'s lack of procedural protections are far from trivial. In addition to depriving Internet users of their constitutional right to privacy and anonymity, there is nothing to stop a vindictive business or individual from claiming copyright to acquire the identity of an anonymous critic who has posted information on an Internet message board. Even worse, there are no safeguards to stop individuals like batterers, cyberstalkers or pedophiles from using Section 512(h) to obtain – without any questions – an intended victim's identifying information, including their name, address and telephone number. All that is required is to fill out the required paperwork and to claim a "good faith" belief that copyright infringement has occurred. This danger is, unfortunately, not far-fetched. In connection with another proceeding, representatives of two of the *amici*, WiredSafety.org and the National Coalition Against Domestic Violence, submitted declarations explaining their very real concerns about how the lack of procedural protections in Section 512(h) will enable pedophiles and

abusive husbands to obtain the identity and physical location of their targets through Section 512(h) subpoenas – without any questions and without any discretion by the clerk to reject the request. *See* Declaration of Parry Aftab, Executive Director of WiredSafety.org, available at http://www.eff.org/Cases/RIAA_v_Verizon/20030318_aftab_declaration.pdf; Declaration of Juley Fulcher, Director of Public Policy for the National Coalition Against Domestic Violence, available at http://www.eff.org/Cases/RIAA_v_Verizon/20030318_fulcher_declaration.pdf. For example, a pedophile who has been talking with another Internet user in an Internet chat room could easily claim copyright in his or her online postings to obtain – once again, without questions – the identity, telephone number and address of the other participant through a Section 512(h) subpoena.

Although RIAA may argue that its subpoenas do not pose these problems, Section 512(h) is available to anyone claiming to be a copyright holder or the agent of a copyright holder. Other than a self-serving assertion that it is such a person, Section 512(h) does not even require the requesting party to show any proof that it is actually the owner of a valid copyright or the true agent of a valid copyright holder. The request for the subpoena need not be signed by a member of the bar. Nor is there any way for the clerk to verify the assertions in the request. So long as the proper words are recited, the statute requires the clerk to issue the subpoena – without questions. Given these circumstances, and the growing list of examples of mistakes and misuse, it is not hard to understand why *amici* are concerned about Section 512(h).

C. The Subject Matter Of These Section 512(h) Subpoenas.

Section 512(h) can be used in a variety of different contexts, to affect any form of speech allegedly constituting copyright infringement. In this particular case, Section 512(h) subpoenas seek disclosure of the identity of anonymous PBIS subscribers using "peer-to-peer technology" on the Internet. Peer-to-peer file-sharing technology enables users to create networks to connect directly to peers, rather than through third-party servers, to search for and share information in text, audio or video files. Although it is possible to use these networks to exchange copyrighted

material without authorization, many users also share a broad range of material that is either in the public domain – such as the works of Shakespeare, Mozart or the Bible – or whose copyright holders have consented to reproduction and distribution among network users – such as up-and-coming musicians looking to create a "buzz" among music listeners. *See* Nelson, *Upstart Labels See File Sharing as Ally, Not Foe,* N.Y. Times, Sept. 22, 2003, at C1.[5] Peer-to-peer technology has also become increasingly important to libraries and archivists, who are relying on the technology to assist them in their goal of providing access to vast amounts of public domain and non-infringing materials.

Many peer-to-peer programs allow users to access the network without registering their names, thus preserving anonymity. This feature is critical in countries where, due to government monitoring and censorship of the Internet, anonymous peer-to-peer file sharing is the only safe way to exchange or to receive valuable (and noninfringing) news and cultural materials. *See*, *e.g.*, *New Technology May Foil PRC Attempts at Censorship Efforts,* The China Post, March 12, 2003, available at 2003 WL 4136640. Indeed, among the documents that have been shared on peer-to-peer networks in China are the Tiananmen Papers, a compilation of the transcripts from 1989 meetings among Chinese leaders in the aftermath of the student protests. *See* Lee, *Grass-Roots War Heats Up Against Government Web Blocks,* Chicago Tribune, Oct. 14, 2002, at 4.

Thus, the questions before this Court are straightforward: given the obvious speech-enhancing and legitimate uses of online technology, including peer-to-peer technology, did Congress intend to sweep away all of the procedural protections that have long existed for anonymous speech in the face of a bare claim of online copyright infringement? If so, was such a decision constitutional? Because PBIS properly addresses the first question, *amici* focus only on the second.

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[5] Even established artists use peer-to-peer technology for commercial purposes. For example, some well-known musicians encourage their fans to share recordings of live shows to spur attendance at concerts, which are their main source of income (as opposed to royalties). *See* Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. Times, Sept. 14, 2003, at A1.

ARGUMENT

I. SECTION 512(H) VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT DOES NOT CONTAIN ADEQUATE PROCEDURAL PROTECTIONS AGAINST THE CURTAILMENT OF CONSTITUTIONALLY PROTECTED EXPRESSION.

The Fifth Amendment requires adequate procedural protections before a person can be deprived of liberty or property to ensure that fundamental rights are not unnecessarily curtailed. *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). Sufficient safeguards are especially critical where, as here, the liberty interest at stake is the freedom of speech guaranteed by the First Amendment. *See*, *e.g*., *Blount v. Rizzi,* 400 U.S. 410, 416 (1971) ("[T]hose procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government 'is not free to adopt whatever procedures it pleases for dealing with [illicit content] without regard to the possible consequences for constitutionally protected speech.'") (citation omitted); *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958) (a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny"). Heightened protections are necessary because "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).

As detailed earlier, Section 512(h) permits an alleged copyright holder to obtain an Internet speaker's identity without providing anything more than the barest of procedural protections – a unilateral, self-serving assertion of "good faith" by the subpoenaing party. The following factors should be examined to determine if these procedural "protections" of Section 512(h) are sufficient to pass constitutional scrutiny: (1) the private interest affected by enforcement of the law; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; (3) the government's

interest; and (4) the interest of the private party seeking to bring about the deprivation. *Mathews,* 424 U.S. at 335; *see also Connecticut v. Doehr,* 501 U.S. 1, 11 (1991). These factors demonstrate that Section 512(h) falls far short of the procedural protections required by the Due Process Clause.

A. Internet Users Have A Substantial And Constitutionally Protected Liberty Interest In Privacy And Anonymous Expression.[6]

Freedom of speech is one of the liberty interests protected by the Due Process Clause. *See*, *e.g., Procunier v. Martinez,* 416 U.S. 396, 418 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Green v. Harnden*, 1994 WL 412434, *2 (N.D. Cal. 1994).

It is well-established that the First Amendment protects the right to anonymity. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent"). This right to anonymity is more than just one form of protected speech; it is part of "our national heritage and tradition." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of* Stratton, 536 U.S. 150, 166 (2002).

The Supreme Court first documented the historical value and importance of anonymity in *Talley v. California,* 362 U.S. 60 (1960):

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Even the Federalist Papers, written in

[6] RIAA does not dispute that PBIS has standing to raise the First Amendment rights of its subscribers. *See*, *e.g., In re Verizon Internet Services, Inc.,* 257 F. Supp. 2d 244, 257-58 (D.D.C. 2003) (rejecting RIAA's argument that Verizon did not have standing to raise its subscribers' rights); *see also Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 64 n. 6 (1963).

> favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Id. at 64-65.

The Supreme Court has subsequently explained that the right to anonymity is necessary to encourage a diversity of voices and to shield unpopular speakers:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357 (citations omitted).

This long-standing right to anonymity is especially critical to a thoroughly modern medium of expression: the Internet. The rise of the Internet has created an opportunity for dialogue and expression on a scale and in a manner previously unimaginable. Now, alongside the traditional print and broadcasting media – largely controlled by corporations – individuals can utilize the Internet to convey their opinions, thoughts or ideas whenever they want, and to anyone who cares to read them. As the Supreme Court has recognized, the Internet is a new and powerful democratic forum 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, 870 (1997).

The unique nature of the Internet makes the right to speak on the Internet anonymously especially important. The Internet enables anyone – with or without an education, expertise or

money – to express themselves. Unlike traditional media speakers, Internet speakers typically do not have professional training to evaluate the nuances of copyright law as it might affect the information they post, editors to peruse their posts for problems, lawyers to advise them of the complexities of the multitude of laws possibly implicated by their statements, or insurance to protect themselves from potential lawsuits. Faced with the threat of having to defend against costly litigation arising out of an erroneously or maliciously issued – but easily obtained – Section 512(h) subpoena, many legitimate users may simply decide that using the Internet as a forum for their communications is not worth the risk. In addition, for many online speakers, such as critics of a company who wish to make negative comments, the protection of anonymity is essential to their willingness to speak. The threat of the loss of anonymity would, thus, have a substantial chilling effect on the free exchange of ideas that otherwise takes place in this vast democratic forum. *See*, *e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously."); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 896 (2000) (online anonymity increases the ability to be heard because it permits speakers to "disguise[] status indicators such as race, class, gender, ethnicity, and age, which allow elite speakers to dominate real-world discourse").

Recognizing the speech-enhancing and equalizing features of the Internet, the Supreme Court has accorded it the highest degree of constitutional protection. *Reno*, 521 U.S. at 870 (concluding that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). This rigorous protection extends to speech conducted anonymously on the Internet. *See*, *e.g., Doe v. 2theMart.com,* 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded"); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing the "legitimate and valuable right to participate in online forums anonymously or pseudonymously"); *ACLU v. Johnson,* 4 F. Supp. 2d 1029, 1033

(D. N.M. 1998), aff'd 194 F.3d 1149 (10th Cir. 1999) (striking down law "that prevents people from communicating and accessing information anonymously"); *ACLU v. Miller,* 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down law prohibiting anonymous Internet speech).

Several courts that have considered similar discovery requests designed to uncover the identity of anonymous Internet speakers have recognized the substantial interest in maintaining online anonymity. In *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), a subpoena sought the identity of the defendant, an alleged trademark infringer. The court ruled that the party seeking the subpoena needed to satisfy certain standards of proof at a pre-disclosure hearing, explaining that:

> 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. The court in *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), similarly recognized the need to protect the right to engage in anonymous online speech before a subpoena could be issued: "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights." *Id.* at 1093. *See also Dendrite, Int'l, Inc. v. Doe No. 3,* 775 A.2d 756, 771 (N.J. Super. A.D. 2001) (strict procedural safeguards must be imposed "as a means of ensuring that plaintiffs do not use

discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet").

In spite of these cases, the court in the case heavily relied on by RIAA, *In re Verizon Internet Services, Inc.,* 257 F. Supp. 2d 244 (D.D.C. 2003), *appeal pending*, Nos. 03-7015, 03-7053 (D.C. Cir. argued Sep. 16, 2003), concluded that the anonymous online speakers in that case had only a minimal right to anonymity because the speech at issue was "alleged copyright infringement." *Id*. at 260. The fundamental flaw in the *Verizon* court's analysis – and in RIAA's similar argument – is that at the time a Section 512(h) subpoena is issued – *i.e.*, when the right to anonymity will be lost – no determination has yet been made as to whether the anonymous speech at issue is protected or not. The First Amendment does not protect speech constituting proven copyright infringement, just as it does not shelter defamatory or obscene speech. The First Amendment does, however, provide full protection to speech allegedly constituting copyright infringement, just as it protects allegedly defamatory or obscene speech. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 268-69 (1964) ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963) (attempted regulation of allegedly obscene speech requires "the most rigorous procedural safeguards" to "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line").[7] That is why, as discussed below, procedural safeguards must be put in place to ensure that legitimate expression is not

[7] That the expression at issue is alleged to constitute copyright infringement, instead of defamation, obscenity, or any other unlawful expression, does not limit the need for First Amendment protection. If anything, it increases it. Copyrights, by their nature, implicate First Amendment rights because they impose restrictions on the use of certain materials. For that very 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, 788-89 (2003).

suppressed merely because of the possibility that it may not be protected speech. *See, e.g.*, *Speiser*, 357 U.S. at 526 (invalidating a statute without adequate procedural protections on the ground that, "The vice of the present procedure 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.").

B. The Minimal Procedural Protections of Section 512(h) Give Rise To A Substantial Risk of Erroneous Deprivation Of Constitutional Rights That Could Be Diminished By the Use of Adequate Procedural Safeguards.

Section 512(h) was designed to provide an expeditious way for copyright holders to protect their works in the digital age. That goal is legitimate, and understandable. The failure of the statute to provide even the most minimal procedural safeguards, however, creates an invitation to mistake and misuse – and to the erroneous deprivation of the anonymity of online speakers. As detailed earlier, numerous examples of both erroneous and abusive use of Section 512(h) have already been reported. *See supra*, pp. 3-7.

The substantial risk of mistake and misuse exists because Section 512(h) requires little more than an *ex parte* assertion of "good faith." In *Connecticut v. Doehr*, 501 U.S. 1 (1991), the Supreme Court invalidated a Connecticut statute authorizing pre-judgment attachment of real estate based, as here, solely on the submission of a "good faith" affidavit and without any showing of extraordinary circumstances. The Court held that the statute violated due process because it permitted an *ex parte* attachment without affording the property owner prior notice or an opportunity to be heard and thus created "too great a risk of erroneous deprivation." *Id.* at 13-14. Similarly, in *Fuentes v. Shevin,* 407 U.S. 67 (1972), the Court also found that an individual's self-interested statement of "belief in his [own] rights" was insufficient to satisfy the requirements of due process. *Id*. at 83. Section 512(h)'s "good faith" requirement is likewise not sufficient.

Recognizing the need to protect the right to anonymity, several courts that have been faced with discovery requests seeking to uncover the identity of online speakers have imposed strict procedural safeguards before permitting the right to anonymity to be overridden. *See Columbia Insurance Company v. Seescandy.com,* 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (procedural safeguards, including an attempt to notify the anonymous speaker and a showing to "establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss," must be imposed to "prevent use of [civil discovery mechanisms] to harass or intimidate" anonymous Internet speakers); *In re Subpoena Duces Tecum to America Online, Inc.,* 2000 WL 1210372, *8 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom. American Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) ("before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made"); *Dendrite*, 775 A.2d at 760-61 (requiring notice, identification of the precise statements alleged to be infringing, production of evidence to the Court sufficient to demonstrate each element of the cause of action and a judicial determination as to whether the need for the identity outweighs the right to anonymity); *2themart.com,* 140 F. Supp. 2d at 1095 (judicial determination must be made, based on evidence produced by subpoenaing party, that, *inter alia*, information sought is materially relevant to claim). Those cases all involved subpoenas issued in the context of a pending lawsuit. In the context of a Section 512(h) subpoena, where no lawsuit has been filed and no lawsuit need even be contemplated by the subpoenaing party, the necessity of procedural safeguards is even more paramount.

Additional procedural protections would greatly minimize the possibility of mistake and misuse of Section 512(h); their absence makes Section 512(h) in violation of the Due Process Clause. First, notice must be given to the anonymous user that the subpoenaing party is seeking its identity. Section 512(h)'s failure to require this notice is a violation of a basic, yet critical, due process protection. *See*, *e.g., Mathews*, 424 U.S. at 348 ("The essence of due process is the

requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'") (citation omitted); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); Seescandy, 185 F.R.D. at 579-80.

Second, the anonymous Internet user must be given an opportunity to challenge the request to disclose his or her identity – before the disclosure takes place. *See Mathews*, 424 U.S. at 333 (citation omitted) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *see also* Fed. R. Civ. Proc. 26(d), 26(f) (discovery not permitted absent court order until after service of the complaint). This safeguard would ensure that individuals engaging in legitimate, noninfringing speech on the Internet are able to refute erroneously or abusively issued subpoenas before their anonymity is irreparably lost.

Third, a complaint or other pleading must be filed that identifies with specificity and with factual support the nature of the infringement, the identity of the copyright holder, and each item alleged to be infringing. *See Seescandy*, 185 F.R.D. at 579-80; *Dendrite*, 775 A.2d at 760. Without these basic details, an Internet user has no real notice of the claims and no real opportunity to challenge the subpoena or defend his or her rights.

Finally, the Court must make a determination, regardless of whether the Internet user objects, as to whether the pleading and evidence presented makes out a *prima facie* claim for infringement that would justify stripping the speaker's anonymity. *Seescandy*, 185 F.R.D. at 579-80; *In re Subpoena to America Online,* 2000 WL 1210372, *8; *Dendrite*, 775 A.2d at 760-61; *2themart.com,* 140 F. Supp. 2d at 1095. Absent such a showing, there is no compelling reason to overcome the fundamental right to anonymity.

The *Verizon* court declined to require any such procedural safeguards.[8] Instead, the *Verizon* court concluded that procedural safeguards were not necessary in connection with a Section 512(h) subpoena because (1) the subpoenaing party has to assert that it has a "good faith belief" that an unauthorized use has occurred, (2) the declaration accompanying the subpoena must be submitted under penalty of perjury, (3) Section 512(f) provides a remedy against issuance of erroneous subpoenas, and (4) the Federal Rules of Civil Procedure can be used to object to a subpoena. *In re Verizon,* 257 F. Supp. 2d at 262-63. These "safeguards" hardly provide sufficient constitutional protection.

First, as just discussed, a subpoenaing party's assertion that it has a "good faith" claim is not sufficient to satisfy due process standards. *Fuentes*, 407 U.S. at 83.

Second, a subpoenaing party need only state under oath that its purpose is to use the information to protect copyrighted material; it need not swear that copyright infringement has occurred. *See* 17 U.S.C. § 512(h)(2)(C). Indeed, there is not even a requirement that the subpoenaing party conduct any due diligence or investigation, such as actual review of the suspicious files, to determine if the files are truly improper or if their use is protected by the fair use doctrine. Moreover, given the very rare prosecution of perjury cases by the government, this requirement is of questionable value – especially with respect to subpoenas issued by those abusing the procedure, such as stalkers or pedophiles, who may not even use a real name.

Third, the loss of anonymity created by an improperly obtained subpoena is exactly the type of irreparable damage that a subsequent recovery of monetary damages under Section 512(f) cannot cure. *See Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 1541 (1999) ("anonymity, once lost, cannot be regained"); *see also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time,

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[8] The *Verizon* court addressed the adequacy of procedural safeguards in considering whether Section 512(h) violates the First Amendment. That court did not address or render a decision on the issue presented in this motion: whether Section 512(h)'s procedural safeguards satisfy the Fifth Amendment requirements of due process.

unquestionably constitutes irreparable harm"). In addition, Section 512(f) only applies when the subpoenaing party "knowingly materially misrepresents" that infringement has occurred. 17 U.S.C. § 512(f). Where, as in the mistaken lawsuits or the Harry Potter examples discussed earlier, the subpoenaing party simply fails to conduct any due diligence or to consider whether the speech is protected by the fair use doctrine, Section 512(f) provides no remedy.[9]

Finally, the Federal Rules are of little value to an anonymous speaker where, as under Section 512(h), there is no requirement that the speaker receive any notice or an opportunity to challenge the subpoena. Although ISPs have the ability to provide such notice to their subscribers, there is no guarantee (or requirement) that they will do so – especially given the multitude of subpoenas RIAA has been serving and the incredibly short time frame for compliance. Without a notice requirement, the theoretical ability to challenge a Section 512(h) subpoena is meaningless.[10]

The procedural prerequisites required by all of the courts other than the *Verizon* court – notice, an opportunity to be heard, a specific statement of the claim and presentation of evidence sufficient to support each element of the claim, and judicial review – are necessary to ensure that the fundamental right to anonymity is not lost in the rush to stifle alleged copyright infringement. *See Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002) (judicial process cannot be used to "suppress lawful speech as the means to suppress unlawful speech"); *McIntyre*, 514 U.S. at

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[9] RIAA attempts to downplay the fact that mistakes will be made by arguing that the anonymous subscriber whose identity has been revealed "would still be able to present whatever defense he or she wanted (such as fair use) in the infringement action that will eventually be brought by the copyright owner." Motion, 24:10-12. RIAA misses the point: under RIAA's scenario, the subscriber's constitutional right to anonymity will already have been breached. Even if the subscriber establishes (at trial) a valid fair use defense, the harm will already have occurred. In addition, the ability to assert the fair use defense at trial is small comfort to the many subscribers who will not have the resources to engage in a lengthy, expensive action.

[10] Although the ISP, which receives the subpoena, will always have such notice, an ISP will not always challenge the subpoena on behalf of its subscribers or raise all of the arguments that would be brought by the anonymous subscriber, particularly because the ISP may not have access to all of the relevant facts.

357 ("The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."). Section 512(h) does not provide for any of these procedural protections. It is, accordingly, unconstitutional.

C. The Legitimate Interests Of the Government and Copyright Holders Will Not Be Substantially Affected By Requiring The Use of Adequate And Normal Procedural Protections.

The government – like copyright holders – has a strong interest in ensuring that copyright owners can protect against infringement of their works. The government also has a substantial interest in ensuring that its laws are not used to suppress the speech and privacy rights of anonymous Internet users. The additional procedural protections strike an appropriate balance between these two interests, ensuring that each will be furthered. If a proper showing is made, a copyright holder will be entitled – and should be entitled – to learn the identity of the anonymous speaker. Absent such a showing, in order to guard against the potentially erroneous disclosure of identity and to preserve a vital constitutional right, the subpoena should be rejected.

The government also has a substantial interest in ensuring that the discovery processes of the courts are not abused. Because the discovery process provides "an opportunity, therefore, 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). Once again, the proposed procedural safeguards would greatly decrease the potential for mistake and misuse of the judicial discovery process, thereby furthering, not harming, the governmental interest.

These additional procedural requirements would not harm either the government's or the copyright holders' interests in any significant manner. Although copyright owners would obviously prefer to obtain an immediate subpoena, without having to satisfy any procedural requirements, that is not a legitimate interest – especially not when copyright holders should

easily and promptly be able to meet the discussed minimal standards if there is a legitimate claim of copyright infringement. *See Fuentes*, 407 U.S. at 91 n.22 ("these rather ordinary costs [in time, effort and expense] cannot outweigh the constitutional right"). Notice to the anonymous speaker can readily be provided via e-mail by either the copyright holder or the relevant ISP. The copyright holder should also immediately be able to identify, verbatim, the specific allegedly infringing speech. Providing specific evidence sufficient to support each element of copyright infringement should also not be difficult for a subpoenaing party – so long as a legitimate infringement claim exists and it has conducted even a minimal amount of due diligence. Finally, having judicial review over this process would simply impose the same process that is common to all other requests for discovery made by a private party.[11] Although these procedures might impose an additional burden on the judiciary, requiring these procedural protections – protections required in all other civil contexts where anonymity is at stake – would be no more onerous than the rules applicable to all other legal claims. Claims of copyright infringement should be treated no differently – especially in view of the constitutional rights at stake.

[11] As discussed earlier, even Federal Rule of Civil Procedure 27 requires judicial approval before a pre-litigation subpoena can be served. *See* Fed. R. Civ. Proc. 27(a)(3). 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. Proc. 26(d), 26(f).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to deny RIAA's motion to dismiss in its entirety.

Respectfully submitted,

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