PETER D. KEISLER
Assistant Attorney General
THEODORE C. HIRT
Assistant Branch Director, Federal Programs Branch
JOHN H. ZACHARIA (D.C. Bar # 456867)
Trial Attorney, Federal Programs Branch
United States Department of Justice
20 Massachusetts Avenue, NW, Seventh Floor
Washington, DC 20530
Telephone: (202) 305-2310
Facsimile: (202) 616-8470

KEVIN V. RYAN
United States Attorney
JOANN SWANSON
Assistant United States Attorney, Chief, Civil Division
ALEX G. TSE (CA Bar #152348)
Assistant United States Attorney, Deputy Chief, Civil Division
450 Golden Gate Ave., Box 36055
San Francisco, CA 94102
Telephone: (415) 436-6730
Facsimile: (415) 436-6748

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

PACIFIC BELL INTERNET SERVICES, Plaintiff, v. RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., et al., Defendants.	**Case No. 03-CV-3560-SI** **INTERVENOR'S BRIEF IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DEFENDANT RECORDING INDUSTRY ASSOCIATION OF AMERICA'S MOTION TO DISMISS** Date: November 21, 2003 Time: 9:00 a.m. Courtroom: 10, 19th Floor Judge: The Honorable Susan Illston

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Pursuant to the Court's October 30, 2003 Order, Intervenor United States of America hereby respectfully submits this brief in defense of the constitutionality of the Digital Millennium Copyright Act ("DMCA"). Plaintiff Pacific Bell Internet Services is an Internet service provider ("ISP") that has received subpoenas served by Defendant Recording Industry Association of America, Inc. ("RIAA"),[1] pursuant to Section 512(h) of the DMCA, seeking the production of the name, address, telephone number, and e-mail address of subscribers using the conduit functions of Plaintiff's Internet service. Plaintiff has filed a complaint wherein Plaintiff alleges that the DMCA's subpoena provision, 17 U.S.C. § 512(h), violates Article III of the Constitution as well as the Constitution's First and Fifth Amendments. *E.g.*, Pl. Compl. ¶¶ 58-66; Pl. Notice of Claim of Unconstitutionality ("Pl. Notice"), at 1-2. RIAA filed its September 24, 2003 Motion to Dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that, *inter alia*, Plaintiff fails to state a claim that the DMCA is unconstitutional,[2] and Plaintiff reiterates its constitutional claims in its opposition to RIAA's motion. *See* Plaintiff's Oct. 21, 2003 "Opposition to Defendant Recording Industry Association of America's Motion to Dismiss" ("Plaintiff's Opposition" or "Pl. Opp.").

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[1] Although Defendant Titan Media ("Titan") also sent Plaintiff a subpoena pursuant to Section 512(h), it is undisputed that Titan later withdrew its subpoena before it was enforced and has not served any other subpoenas on Plaintiff. Plaintiff's Sept. 26, 2003 "Motion for Summary Judgment Re Claim Two (Declaratory Relief under Article III of the United States Constitution)," at 1, 5. It is also undisputed that Defendant MediaSentry, Inc. "has not yet served [Plaintiff] PBIS with any DMCA subpoenas." *Id.* at 5.

[2] Although the other Defendants in this action, MediaSentry and Titan, have also filed separate motions to dismiss, these motions either do not address or refer back to Defendant RIAA's motion to dismiss on the issue of whether Plaintiff has stated a claim that the DMCA is unconstitutional. *See* MediaSentry's Sept. 24, 2003 Motion to Dismiss; Titan's Sept. 24, 2003 Motion to Dismiss at 13.

Plaintiff has failed to state a claim that the DMCA is unconstitutional on any of the grounds set forth in its complaint. As set forth more fully in Intervenor's October 31, 2003 Opposition to Plaintiff's Motion for Summary Judgment regarding Plaintiff's Article III claim, Congress clearly did not violate Article III when it enacted § 512(h), which, like Rule 27, authorizes the issuance of subpoenas related to a cognizable controversy (here, copyright infringement) between the party seeking the subpoena (the copyright owner) and the future litigant related to the information sought (the copyright infringer). With respect to Plaintiff's First Amendment claim that § 512(h) is facially overbroad, Plaintiff has failed to state a claim that § 512(h) proscribes spoken words or conduct commonly associated with expression. Moreover, § 512(h) is not facially overbroad because it neither compromises recognized First Amendment protections of parties not before the Court, nor is there a realistic danger that such a compromise would occur. Finally, Plaintiff's Fifth Amendment due process claim fares no better, as the requirements for obtaining a subpoena pursuant to § 512(h) are the same type of procedural requirements that other courts have imposed for subpoenas on service providers to identify anonymous posters of messages on the Internet.

Accordingly, to the extent that it seeks to dismiss Plaintiff's claims that § 512(h) is unconstitutional, the United States respectfully requests that the Court grant RIAA's motion.[3]

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[3] In submitting this brief, the United States does not take a position as to the other grounds set forth in Defendants' motions to dismiss for dismissing Plaintiff's complaint. In addition, the United States has intervened for the purpose of defending the constitutionality of Section 512(h) and expresses no views regarding the issue of whether, as a statutory matter, § 512(h) authorizes the issuance of the subpoenas at issue in this case.

ARGUMENT[4]

I. SECTION 512(h) OF THE DMCA DOES NOT VIOLATE THE FIRST AMENDMENT

Plaintiff has failed to state a claim that § 512(h) violates the First Amendment as facially overbroad. In its complaint, Plaintiff claims that the DMCA's subpoena provision is overbroad because Plaintiff alleges that § 512(h) reaches First Amendment protected anonymous speech of subscribers not before the court.[5] Compl. ¶¶ 62-66; Pl. Notice at 2. Plaintiff, however, has failed to state a claim that § 512(h) violates the First Amendment as overbroad for at least two reasons.[6]

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[4] Rather than repeat the Statutory Background section and the United States' position regarding Plaintiff's Article III claim set forth in the United States' Oct. 31, 2003 Brief in Opposition to Plaintiff's "Motion for Summary Judgment Re Claim Two (Article III of the United States Constitution)," the United States incorporates by reference pages 3-19 of that brief.

[5] Plaintiff also claims that Section 512(h) is overbroad because it allegedly "does not contain adequate procedural safeguards to protect the expressive and associational rights or the liberty interests of Internet subscribers." Compl. ¶ 63. In its Opposition, however, Plaintiff offers no authority for its position that the First Amendment imposes any procedural prerequisites on the disclosure of the identity of subscribers alleged to have committed copyright infringement pursuant to § 512(h) – a statute that "does not regulate expression, and . . . is not directed at the suppression of expression." *See Recording Industry Association of America v. Verizon Internet Services*, 257 F. Supp. 2d 244, 266 (D.D.C. 2003), *appeal pending*, No. 03-7053, (D.C. Cir. argued Sept. 16, 2003) ("*Verizon II*"); *id.* at 260-62 (rejecting the argument that the First Amendment imposes additional procedural safeguards on the application of § 512(h)). Even if additional procedural safeguards were required, however, and as set forth more fully in the United States' discussion of Plaintiff's Due Process claim, "the DMCA contains adequate safeguards to ensure that the First Amendment rights of Internet users will not be curtailed." *Id.* at 260-61.

[6] To the extent that Plaintiff's facial freedom of speech challenge includes non-overbreadth claims, such a facial challenge can only succeed if the Court finds that "*every* application of the statute create[s] an impermissible risk of suppression of ideas." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (emphasis added, internal citations omitted). Here, Plaintiff does not allege in its complaint any facts to establish that "in virtually every application[,] the DMCA offends the First Amendment by requiring the production of the identity of an anonymous user." *See In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter*, 240 F. Supp. 2d 24, 44 n.22 (D.D.C. 2003), *appeal pending*, No. 03-7015, (D.C. Cir. argued Sept. 16, 2003) ("*Verizon I*").

First, as a threshold matter, Plaintiff's First Amendment facial overbreadth challenge must fail because, on its face, § 512 does not proscribe spoken words or conduct that is patently expressive or communicative or integral to or commonly associated with expression. "[T]he Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, 'by their terms,' sought to regulate 'spoken words,' or patently 'expressive or communicative conduct.'" *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973)).[7] "[A] facial freedom of speech attack must fail unless, at a minimum, the challenged statute is directed narrowly and specifically at expression or conduct commonly associated with expression." *Roulette*, 97 F.3d at 305 (internal citations, quotations omitted); *see also Virginia v. Hicks*, 123 S. Ct. 2191, 2199 (2003) ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech").

Here, it is manifest that "[t]he DMCA does not regulate expression, and § 512(h) is not directed at the suppression of expression." *Verizon II*, 257 F. Supp. at 266. Instead, the DMCA authorizes the issuance of subpoenas to identify those who allegedly have violated copyright law by, for example, illegally offering hundreds of songs for downloading over the Internet. When a subscriber commits copyright infringement, that person is not engaging in First Amendment protected expression. *See Harper & Row, Publs., Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (rejecting First Amendment challenge to copyright infringement action); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 574-78 (1977). Thus, § 512(h) is

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[7] *Cf. City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

directed toward the conduct of copyright infringement; and the conduct at issue here is the distribution of stolen recordings – something that does not involve expression at all, much less First Amendment protected expression.[8] Accordingly, Plaintiff's overbreadth claim does not even come into play and "must fail" because the DMCA is not at all "directed narrowly and specifically at expression or conduct commonly associated with expression" protected by the First Amendment. *Roulette*, 97 F.3d at 305; *Hicks*, 123 S. Ct. at 2199.

Second, even if the Court construed § 512(h) as a provision directed at spoken words or conduct commonly associated with expression, to present an overbreadth challenge, Plaintiff's challenge still must fail because Plaintiff has not alleged facts showing that the DMCA is so broadly written that it infringes unacceptably on the First Amendment rights of third parties. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984). Before applying the "'strong medicine' of overbreadth invalidation," the Supreme Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 123 S. Ct. at 2197 (quoting *Broadrick*, 413 U.S. at 613, 615 (The overbreadth doctrine "is, manifestly, strong medicine," to be employed "sparingly and only as a last resort.")). For this reason, a statute will be declared facially unconstitutional for overbreadth *only if* the court finds a realistic danger that the statute itself will significantly compromise *recognized* First Amendment protections of parties not before the Court. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988); *see also Hicks*, 123 S. Ct. at 2198

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[8] *Cf.* Compl. ¶ 18 ("The provision [§ 512(h)] is designed to require an ISP to identify the owner of allegedly infringing content that is stored on the provider's network."); *Verizon II*, 257 F. Supp. 2d at 262 ("The DMCA places no limits on protected activity; it governs unprotected copyright piracy, and § 512(h) reaches only the identity of the subscriber (already known to the service provider), not any underlying expression.").

(overbreadth must be shown "from the text of [the law] and from actual fact") (quoting *New York State Club Ass'n*, 487 U.S. at 14).

Here, § 512(h) is not facially invalid because it neither compromises a recognized First Amendment protection of parties not before the Court, nor is there a realistic danger that such a compromise would occur. Section 512(h)'s "plainly legitimate sweep" is identifying copyright infringers, not those engaged in protected expression. In fact, the requirements for obtaining a § 512(h) subpoena clearly show that § 512(h) "deals strictly" with conduct unprotected by the First Amendment – copyright infringement. *Verizon II*, 257 F. Supp. 2d at 260, 265. For a § 512(h) subpoena to issue, the requesting party must, *inter alia*, (1) identify the work claimed to have been infringed and the material claimed to be infringing; (2) have a good faith belief that the complained of infringing use of the material is unauthorized; and (3) make a sworn declaration that the requestor only seeks the subpoena to identify an alleged infringer for the purpose of protecting rights under the Copyright Act. 17 U.S.C. §§ 512(c)(3)(A); 512(h)(2); *Verizon II*, 257 F. Supp. 2d at 265.

Hence, § 512(h)'s focus on copyright infringement cannot compromise a First Amendment right to infringe copyrights because the First Amendment clearly does not protect copyright infringement. *Verizon II*, 257 F. Supp. 2d at 260; *Verizon I*, 240 F. Supp. 2d at 42 (citing *Harper & Row*, 471 U.S. at 555-60; *Zacchini*, 433 U.S. at 574-78). "Nor is this an instance where the anonymity of an Internet user merits free speech or privacy protections." *Verizon I*, 240 F. Supp. 2d at 43. In fact, it is undisputed that RIAA has served its subpoenas only to identify those who it believes have committed copyright infringement.

Compl. ¶¶ 26-27, 34, 36, 40, 50.[9] In any event, and most significantly, although the First Amendment does protect a speaker's anonymity under certain circumstances, it is undisputed that anonymously offering for downloading songs over the Internet without the copyright owner's authority does not constitute First Amendment protected expression. *Verizon I*, 240 F. Supp. 2d at 43.

By the same token, Plaintiff has failed to allege facts supporting a claim that there is a realistic danger that § 512(h) compromises First Amendment protections of parties not before this Court. Although Plaintiff is correct that its complaint does not have to "*prove* that the DMCA's subpoena provision is overbroad" to survive a motion to dismiss (Pl. Opp. at 23) (emphasis in original), Plaintiff must at least *allege* well-pleaded facts in its complaint that, if true, state an overbreadth claim. Here, however, Plaintiff makes only conclusory allegations of overbreadth in its complaint that do not follow from *any* facts alleged therein. *See* Compl. ¶¶ 63-66. For example, Plaintiff does not contend that *any* of the subpoenas it has received from RIAA so far seek to identify subscribers for engaging in First Amendment protected activity. On the contrary, it is undisputed that these subpoenas have only been issued to identify those subscribers who RIAA believes have committed copyright infringement. Compl., ¶¶ 26-27, 34, 36, 40, 50. Thus, Plaintiff essentially alleges that Section 512(h) is overbroad and thereby cannot be applied even where its application would unmistakably be constitutional – to identify subscribers committing copyright infringement. Clearly, Plaintiff's complaint falls far short of alleging facts sufficient to state a claim that the

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[9] Further, the alleged infringers' identities in this case are not even anonymous; Plaintiff knows their identities. *Cf. Verizon I*, 240 F. Supp. 2d at 43 n.19; *Verizon II*, 257 F. Supp. 2d at 262.

DMCA's overbreadth is not only "real, but substantial as well."[10] *See Verizon II*, 257 F. Supp. at 264 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002)); *id.* (holding that "[t]he § 512(h) subpoena authority hardly amounts to a real or substantial threat to protected expression"). Accordingly, Plaintiff's conclusory allegations are insufficient to state an overbreadth claim.[11]

II. THE DMCA DOES NOT VIOLATE THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

Plaintiff has failed to state a claim that § 512 of the DMCA violates the Fifth Amendment's Due Process Clause. Plaintiff claims that the DMCA "does not contain adequate procedural safeguards to protect the expressive and associational rights or the liberty interests of Internet subscribers." Compl., ¶ 63. Even assuming *arguendo* that Plaintiff has standing to assert the Fifth Amendment rights of its subscribers,[12] however,

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[10] Rather than make well-pleaded allegations in its complaint to support its overbreadth claim, Plaintiff instead speculates how overbreadth may occur, and offers one alleged example of an erroneous § 512(h) subpoena, in its opposition to RIAA's motion to dismiss. *See* Pl. Opp. at 21-22, 22 n.22. As a threshold matter, "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984); *Schneider v. Cal. Dep't. of Corr.*, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998) ("[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss") (emphasis in original). In any event, Plaintiff's single example (even if true) and unsupported speculation fails to state a claim "'from the text of [the law] and from actual fact,' that *substantial* overbreadth exists." *Hicks*, 123 S. Ct. at 2198 (emphasis added).

[11] *See, e.g.*, *Nicosia v. Rooy*, 72 F. Supp. 2d 1093, 1100 (N.D. Cal. 1999) ("Conclusory allegations, unsupported by the facts alleged, need not be accepted as true.") (citing *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (holding that conclusory allegations, unsupported by facts, will be rejected as insufficient to state a claim)); *cf. Hicks*, 123 S. Ct. at 2198 (to make an overbreadth claim, the claimant must "demonstrate 'from the text of [the law] and from actual fact,' that substantial overbreadth exists"); *New York State Club Ass'n*, 487 U.S. at 11, 14.

[12] "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others, in other situations not before the Court." *Broadrick*, 413 U.S. at 610. Plaintiff itself

Plaintiff has failed to establish that § 512 of the DMCA violates the Fifth Amendment's Due Process Clause for at least two reasons.

First, Plaintiff has failed to allege, as it must, that the government has deprived Plaintiff or its subscribers of "life, liberty or property." U.S. Const. amend. V. Plaintiff baldly asserts that § 512 deprives its subscribers of their "liberty interests" in their First Amendment right to anonymous expression on the Internet (Compl., ¶¶ 63-64), even though it is undisputed that the RIAA has served its subpoenas on Plaintiff only to identify those who RIAA believes have committed copyright infringement. *Id.* ¶¶ 26-27, 34, 36, 40, 50. As already noted above in Section I., however, § 512 cannot deprive subscribers of a First Amendment right to infringe copyrights (and, in turn, cannot deprive subscribers of a liberty interest therein) because the First Amendment clearly does not protect copyright infringement. *Verizon II*, 257 F. Supp. 2d at 260; *Verizon I*, 240 F. Supp. 2d at 42. Accordingly, Plaintiff has failed to state a claim that § 512 violates the Fifth Amendment's Due Process Clause because § 512 does not deprive Plaintiff or its subscribers of a "liberty interest." *See Board of Regents v. Roth*, 408 U.S. 564, 575 (1972) (holding that failure to show the deprivation of a constitutionally protected liberty interest in free speech activities was fatal to procedural due process claim).

Second, even if Plaintiff could allege a deprivation of a constitutionally protected liberty interest, the requirements for obtaining a § 512 subpoena provide sufficient

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does not claim that its procedural due process rights have been denied. Rather, Plaintiff advances its Due Process claim on behalf of its subscribers on the premise that its "subscribers are unable to properly raise their own rights." Compl., ¶ 63; *cf. Broadrick*, 413 U.S. at 611. Plaintiff's claim that its subscribers are unable to properly raise their own rights is suspect, at best, as at least one ISP subscriber has already shown the ability to raise her own Fifth Amendment Due Process claim in an attempt to quash a DMCA subpoena issued by the Clerk of the United States District Court for District of Massachusetts, and another currently seeks to do the same in the United States District Court for the District of Columbia.

procedural protections to ensure that subscribers' due process rights in First Amendment expression are adequately safeguarded. *See Verizon II*, 257 F. Supp. 2d at 262 ("the DMCA includes sufficient procedures to prevent any substantial encroachment on the First Amendment rights of Internet users"). Plaintiff's contention that the DMCA's subpoena provision fails to contain adequate procedural safeguards and that § 512 "fails to require any factual showing that there is, in fact, a basis for filing a lawsuit for copyright infringement" before a subpoena will issue (Pl. Opp. at 22) ignores the safeguards in copyright law and in the DMCA itself.

Contrary to Plaintiff's claim, the DMCA's contains several procedural protections to "ensure that a service provider will not be forced to disclose its customer's identifying information without a reasonable showing that there has been copyright infringement." *Verizon I*, 240 F. Supp. 2d at 40-41, 43. Specifically, before a DMCA subpoena will issue, the DMCA mandates a copyright owner (1) have "a good faith belief that use of the material in the matter complained of is not authorized by the copyright owner, its agent, or the law" (17 U.S.C. § 512(c)(3)(A)(v), (h)(4)); (2) identify the work claimed to have been infringed and the material claimed to be infringing (*Id.* § 512(c)(3)(A)(ii), (iii), (h)(4)); and (3) provide a "statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed." *Id.* § 512(c)(3)(A)(vi), (h)(4). In addition, a copyright holder must submit a sworn declaration that the subpoena's purpose is to obtain an alleged infringer's identity for the exclusive purpose of protecting the holder's copyright. *Id.* § 512(h)(2)(C); *accord Verizon II*, 257 F. Supp. 2d at 262; *Verizon I*, 240 F. Supp. 2d at 40.

These protections provide substantial protection for Internet users against baseless or abusive subpoenas. *Verizon II*, 257 F. Supp. 2d at 262-63; *Verizon I*, 240 F. Supp. 2d at 40-

41. Moreover, any copyright holder who seeks a § 512(h) subpoena based on intentional misrepresentations "shall be liable for any damages, including costs and attorneys' fees, incurred . . . by a service provider." 17 U.S.C. § 512(f); *accord Verizon II*, 257 F. Supp. 2d at 263 (same); *Verizon I*, 240 F. Supp. 2d at 41 n.14 (same).

Thus, in effect, § 512 requires a copyright owner to attest to all of the elements of an infringement action *before a § 512(h) subpoena will issue. Verizon II*, 257 F. Supp. 2d at 263 ("to obtain a [§ 512(h)] subpoena, the copyright owner must, in effect, plead a prima facie case of copyright infringement") (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). As District Judge Bates observed in *Verizon II*, "[u]nder § 512, one must assert ownership of an exclusive copyright, § 512(c)(3)(A)(i), and a good faith belief that the use of copyrighted material is not authorized, § 512(c)(3)(A)(v). In other words, the subpoena notification must establish ownership and unauthorized use – a prima facie case of copyright infringement." *Verizon II*, 257 F. Supp. 2d at 263.

Plaintiff criticizes § 512's "good faith belief" standard because it does not require "an *objective* basis for believing that actual infringement has occurred." Pl. Opp. at 22-23 (emphasis in original). Plaintiff's criticism, however, rings hollow for at least two reasons. *First*, § 512's "good faith belief" standard is precisely the same standard that courts have used when permitting the issuance of Rule 45 subpoenas to identify anonymous Internet users in the John Doe context. *See, e.g., Doe v. 2TheMart.Com Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (permitting subpoena where, *inter alia*, "the subpoena seeking the information was issued in good faith and not for any improper purpose"); *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 52 Va. Cir. 26, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000) (permitting subpoena where, *inter alia*, "the party requesting the

subpoena has a legitimate, good faith basis to contend that it may be the victim of [actionable] conduct"), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001).

Second, even if a § 512 subpoena must, as Plaintiff suggests, be congruent with Rule 11's "objective basis" standard for complaints, the discussion above demonstrates that § 512, like Rule 11, adequately protects against meritless claims. *Accord Verizon II*, 257 F. Supp. 2d at 263 n.21 ("Both procedures allow for sanctions for any baseless or meritless claims."). In fact, on the issue of whether § 512 adequately protects against unsupported subpoenas, the DMCA's requirements "provide greater threshold protection against the issuance of an unsupported subpoena than is available in the context of a John Doe action." *Verizon I*, 240 F. Supp. 2d at 41.

In addition, the DMCA provides "yet another layer of protection for Internet users" by prescribing that the Federal Rules of Civil Procedure govern the issuance and enforcement of DMCA subpoenas. *Verizon II*, 257 F. Supp. 2d at 263; *see* 17 U.S.C. § 512(h)(6). "Service providers or their subscribers, for example, can employ Fed. R. Civ. P. 45(c)(1) to object to, modify or move to quash a subpoena, or even to seek sanctions." *Verizon II*, 257 F. Supp. 2d at 263. In this way, the DMCA makes available the very access to the courts and judicial supervision that Plaintiff claims is needed to protect its subscribers.[13] *See id.*; *cf.*

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[13] Plaintiff claims that the DMCA violates the Fifth Amendment's Due Process Clause because it does not require notice to alleged infringers of the issuance of a § 512(h) subpoena (Pl. Opp. at 22), even though Plaintiff has already conceded that the target of a Rule 45 subpoena would *not* receive such notice pursuant to a subpoena issued in the "John Doe" lawsuit context that it prefers. *See* Plaintiff's Sept. 26, 2003 "Motion for Summary Judgment Re Claim Two (Article III of the United States Constitution)," at 13 (citing *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573 (N.D. Cal. 1999)); *accord 2TheMart.Com Inc.*; *In re Subpoena Duces Tecum to America Online, Inc.*; *Seescandy.Com*. In fact, the Due Process Clause does not require notice in either situation. *Cf. Securities and Exchange Comm'n v. O'Brien*, 467 U.S. 735, 742 (1984) (holding that the Due Process Clause "is not offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him" such as "an inquiry by the SEC into

Verizon I, 240 F. Supp. 2d at 41 (§ 512's procedures "provide greater threshold protection against the issuance of an unsupported subpoena than is available in the context of a John Doe action."). Most significantly, § 512's procedural protections are precisely the type of procedural requirements other courts have imposed to compel an ISP to disclose the identity of anonymous Internet users. *Verizon II*, 257 F. Supp. 2d at 263 n.22 (citing *2TheMart.Com Inc.*, 140 F. Supp. 2d at 1095; *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 52 Va. Cir. 26, 2000 WL 1210372, at *8; *Seescandy.Com*, 185 F.R.D. at 578-80); *Verizon I*, 240 F. Supp. 2d at 41 n.15 (citing *2TheMart.Com.* and *Seescandy.Com*).

Accordingly, Section 512 has more than adequate procedural protections. Plaintiff has failed to state a claim that § 512 violates the Fifth Amendment's Due Process Clause.

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possible violations of the securities laws"). This result makes sense; DMCA subpoenas impose no liability on the subscribers themselves – only a separate suit for copyright infringement does that.

Further, "nothing in the DMCA precludes a service provider from raising non-compliance or other objections to a subsection (h) subpoena." *Verizon I*, 240 F. Supp. 2d at 41. As in the "John Doe" context, nothing in the DMCA precludes ISPs from giving notice to their subscribers before complying with a § 512(h) subpoena. Indeed, as the *2TheMart.Com Inc.* court observed, when ISPs comply with civil subpoenas seeking the identifying information of Internet users *without* notifying their subscribers, "[t]his is because some Internet service providers do not notify their users when such a civil subpoena is received." 140 F. Supp. 2d at 1095 n.5.

CONCLUSION

For the foregoing reasons, Intervenor respectfully submits that this Court should dismiss Plaintiff's constitutional claims for failure to state a claim.

Dated: November 7, 2003.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
KEVIN V. RYAN
United States Attorney
JOANN SWANSON
Assistant United States Attorney,
Chief, Civil Division
ALEX G. TSE
Assistant United States Attorney
Deputy Chief, Civil Division

/s/ John H. Zacharia
THEODORE C. HIRT
JOHN H. ZACHARIA
Attorneys, Department of Justice
20 Massachusetts Ave., N.W., 7th Floor
Washington, D.C. 20530
Tel.: (202) 305-2310; Fax: (202) 616-8470
E-mail:john.zacharia@usdoj.gov
Attorneys for the United States of America