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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 PACIFIC BELL INTERNET SERVICES)
13)
14 Plaintiff,)
15 vs.)
16 RECORDING INDUSTRY ASSOCIATION)
17 OF AMERICA, INC., MEDIAENTRY, INC.,)
dba MEDIAFORCE, and IO GROUP, INC.,)
18 dba TITANMEDIA, TITANMEDIA.COM,)
and TITANMEN.COM,)
19 Defendants.)

Case No. C-03-3560 (SI)
**DEFENDANT RECORDING INDUSTRY
ASSOCIATION OF AMERICA'S
REPLY IN SUPPORT OF
MOTION TO DISMISS**

Date: November 21, 2003
Time: 9:00 a.m.
Dept.:10, 19th Floor

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1 rules on RIAA's motion to enforce, "the D.D.C. Court can decide what weight to give this Court's
2 opinion." *Id.* at 4 n.3. But the hardly disguised point of this action is to convince this Court to beat
3 the D.C. court the punch and then to argue collateral estoppel.²

4 PBIS contends that jurisdiction here is somehow salvaged because it has a reasonable
5 apprehension that RIAA will soon begin applying to the Northern District of California for issuance
6 of subpoenas. This allegation is not in its Complaint, but more importantly, even if the Court were
7 to allow this amendment, the argument would fail. The problem with PBIS's Complaint is that it
8 alleges a dispute that the DMCA and the federal rules expressly *bar* this Court from hearing. That
9 subpoenas might someday be issued in this or another jurisdiction does not alter the rule that
10 subpoenas are to be challenged in the issuing court, not in a declaratory action in another forum.³

11 Contrary to PBIS's contentions, *In re Certain Complaints*, 783 F.2d 1488 (11th Cir. 1986), is
12 precisely on point. In that case, an Investigating Committee of the Eleventh Circuit had subpoenas
13 issued to plaintiffs in the course of an investigation into the conduct of a federal judge. The
14 plaintiffs sought to enjoin enforcement of the subpoenas, but separately sought "a declaratory
15 judgment that the subpoena power conferred on the Committee is invalid and that *all subpoenas*
16 issued and served pursuant thereto are unenforceable." *Id.* at 1493 (emphasis added). Just as here,
17 the plaintiffs in *Certain Complaints* filed a declaratory judgment for the obvious purpose of avoiding
18 subpoenas issued by another court and sought a constitutional holding that could have applied to *any*
19 subpoena that might be issued in the future as well as the one already issued. The district court
20 dismissed for lack of subject matter jurisdiction, and the Eleventh Circuit affirmed.⁴

21 In the end, it does not matter whether PBIS seeks rules of general applicability or relief
22 targeted at the D.C. subpoenas. The Declaratory Judgment Act is not available where Congress has
23 created a special statutory mechanism to adjudicate a particular type of case. *See* Fed. R. Civ. P. 57
24 advisory comm. notes ("A declaration may not be rendered if a special statutory mechanism has

25 ² PBIS specifically reserved in its Complaint "the right to present additional claims
26 regarding these subpoenas upon further *factual* inquiry." Compl. ¶ 34 (emphases added).

27 ³ RIAA has served PBIS with subpoenas (issued out of the Western District of Texas) at the
28 office of the DMCA agent that PBIS has registered with the Copyright Office.

⁴ Given the Eleventh Circuit's statement that "we affirm the district court's dismissal of
appellants' complaint below for lack of subject matter jurisdiction," 783 F.2d at 1499, it is not clear
why PBIS characterizes this as a *sub silentio* holding of the Court of Appeals. *See* PBIS Opp. at 5.

1 been provided.”). PBIS responds that federal courts “regularly adjudicate declaratory judgment
2 actions” where there are enforcement mechanisms, PBIS Opp. at 4, but cites no case that says as
3 much.⁵ To be sure, declaratory actions may proceed where there is “another adequate remedy.”
4 PBIS Opp. at 5. But where Congress has specifically designed an adjudication mechanism to
5 address disputes – as it has in the streamlined procedure established in § 512(h)(6) – declaratory
6 relief is unavailable.

7 Finally, PBIS’s argument that this declaratory action will not delay final resolution of the
8 D.C. subpoenas is similarly without merit. Rather than filing a motion to quash in the D.C. court (as
9 it could have done), PBIS has put two courts on a collision course, filing suit here the day after it
10 raised objections to the subpoenas issued in D.C. PBIS seeks to substitute a drawn-out declaratory
11 action, with discovery and (apparently) serial summary judgment motions, for the expedited
12 subpoena enforcement mechanism that Congress created in the DMCA. Nothing could be more
13 inconsistent with Congress’ intent. *Verizon I*, 240 F. Supp. 2d at 34.⁶

14 **II. PBIS Has Not Stated a Cognizable Claim for Declaratory Relief.**

15 Even if subject matter jurisdiction were proper here, the Court should decline to hear this
16 action. First, this action is entirely unnecessary in order to protect PBIS’s rights, as PBIS is able to
17 assert (and has asserted) a full complement of objections to the subpoenas in the D.C. Court. RIAA
18 Mot. at 14. Second, this action will slow down the ultimate resolution of these issues in a judicial
19 forum. *Id.* at 14-15. Third, this action is plainly an attempt to shop for a more favorable forum than
20 the D.C. court, which has already ruled against many of the positions PBIS advances here. *Id.* at 16;
21 *see Verizon I; Verizon II*. Finally, because of the fact-specific nature of the allegations in PBIS’s
22 Complaint, this action will not fully resolve the legal dispute between the parties.

23 ⁵ The only weak support that PBIS offers for this line of argument is *Republican Party of*
24 *Minnesota v. White*, 536 U.S. 765 (2002), which does not discuss subject matter jurisdiction at all.
25 PBIS Opp. at 5. The case is irrelevant for two reasons. First, the “remedy” in *White* was not one
26 provided by Congress, and there was no express statement by Congress – as in the DMCA – as to
27 how disputes should be resolved. *See LoBue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996) (no
28 jurisdiction to hear a declaratory action where Congress had established a special statutory relief
mechanism). Second, at the time the plaintiff in *White* brought his declaratory action, the complaint
against him had already been *dismissed*, thus depriving him of any remedy.

⁶ PBIS cites and attaches two decisions in Massachusetts that quashed DMCA subpoenas
issued by another court, *see* PBIS Opp. at 6 n.5. But those single-sentence, unpublished orders give
no hint of reasoning. PBIS’s efforts to characterize the reasoning is simply its own speculation.

1 PBIS's opposition never squarely addresses these issues and never disputes that it is asking
2 this Court for rulings on issues identical to those before the D.C. court. Rather, PBIS contends that
3 the Northern District of California is the proper forum, while the District of Columbia is not. PBIS
4 Opp. at 8. But that claim – which depends wholly and completely on PBIS being victorious on the
5 merits⁷ – simply highlights why the exercise of jurisdiction is so improper. It is up to the *District of*
6 *Columbia* Court to decide its own jurisdiction, not this Court. *See Chiron Corp. v. Advanced*
7 *Chemtech, Inc.*, 869 F. Supp. 800, 801 (N.D. Cal. 1994) (“Each [federal] court has jurisdiction to
8 determine its own jurisdiction, but not the jurisdiction of others.”) (citing *United States v. United*
9 *Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947)). There is simply no reason why this
10 Court should expend one of the “remedial arrow[s] in [its] quiver,” *Wilton v. Seven Falls Co.*, 515
11 U.S. 277, 288 (1995), to decide such a question here.

12 PBIS's second argument is that its Complaint involves merely declarations of general
13 applicability as opposed to “subpoena-specific factual issues.” PBIS Opp. at 9. Here again PBIS
14 deserts its own Complaint. Count Four of PBIS's Complaint, after seven paragraphs of factual
15 allegations about the D.C. subpoenas, seeks a declaration that jurisdiction over PBIS is proper only
16 in the Northern District of California, Compl. ¶ 74; that subpoenas must be served on PBIS and no
17 other “corporate entity,” *id.*; and that the D.C. subpoenas do not give PBIS “adequate time” to notify
18 its subscribers, *id.* ¶ 76. Even PBIS cannot identify the principle of general applicability inherent in
19 these plainly fact-specific questions, saying only that this Count “seeks a declaration concerning
20 procedural aspects of 17 U.S.C. § 512.” PBIS Opp. at 9. Similarly, Count Five seeks compensation
21 for compliance with DMCA subpoenas, Compl. ¶ 82, even though the legal theory that PBIS
22 advances would require compensation only for “significant expense.” Compl. ¶ 80. PBIS cannot
23

24 ⁷ PBIS's wholly fact-bound arguments concerning service of the D.C. subpoenas are ill-
25 suited to resolution in a declaratory action. As discussed at length in pleadings in D.C., RIAA
26 addressed and served the subpoenas on SBC Internet Communications, Inc. (“SBCIC”), the entity
27 which PBIS identified to the Copyright Office as the “Full Legal Name” of PBIS. PBIS now claims
28 that it made a mistake in filing its designation with the Copyright Office. RIAA served SBCIC
within 100 miles of the District of Columbia, consistent with the weight of authority interpreting
Rule 45. *See* 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1127,
260 n.1 (3d ed. 2002); *United States v. Diabetes Treatment Centers of Am., Inc.*, 238 F. Supp. 2d
270, 273 (D.D.C. 2002) (“Rule 45(c)(3) protects nonparties from inconvenience by limiting issuance
of a subpoena to a 100-mile radius of where the subpoenaed person resides or transacts business.”).

1 explain how an expense can be “significant” outside a specific factual context or how the declaration
2 sought could ever resolve a dispute between the parties. This is precisely the sort of fact-bound
3 question ill-suited to resolution in a declaratory action.

4 At bottom, PBIS can never explain why this Court should affirmatively take jurisdiction over
5 issues already submitted to another court. Exercise of discretionary jurisdiction here will
6 significantly slow resolution of disputes between the parties, threaten conflicting decisions, and
7 encourage forum-shopping. It is thus precisely the kind of declaratory judgment action over which
8 courts should and regularly do decline to exercise jurisdiction.

9 **III. PBIS’s Sweeping Statutory Construction and Constitutional Claims Are Meritless.**

10 **A. The DMCA Subpoena Provision Applies to All ISPs Including “Conduits.”**

11 Most notable about PBIS’s argument concerning the scope of § 512(h) is the fact that PBIS
12 spends almost no time discussing the text of that section of the DMCA. Rather, PBIS spends almost
13 all of its brief trying to explain how other provisions of the DMCA somehow implicitly limit the
14 plain language of § 512(h). This sleight-of-hand is exactly the argument Verizon attempted and
15 Judge Bates rejected. As Judge Bates found, nothing in the text, structure, legislative history or
16 purpose of the DMCA supports PBIS’s reading. *See Verizon I*, 240 F. Supp. 2d at 29-41.

17 **1. The Text of the DMCA Forecloses PBIS’s Argument.**

18 As discussed in RIAA’s motion and in Judge Bates’ decision in *Verizon I*, § 512(h), by its
19 terms, applies to all ISPs performing all functions, including so-called “conduit” ISPs. In enacting §
20 512(h), Congress did not differentiate between different kinds of ISPs because such distinctions
21 simply do not matter – all ISPs, regardless of what function they are performing, can identify
22 subscribers using their networks to infringe, once provided with the relevant information by a
23 copyright owner (as RIAA has done). Indeed, with respect to conduit providers, Congress went out
24 of its way to make clear that they must comply with § 512(h). Congress separately defined the term
25 “service provider,” as the term is used in § 512(h) and every subsection except § 512(a), to include a
26 broad array of service providers, including conduit providers. *See* § 512(k)(1)(B) (providing for all
27 of § 512, except subsection (a), the term “service provider” is defined broadly to encompass any
28 “provider of online services or network access, or operator of facilities therefore,” including

1 conduits); H.R. Rep. No. 105-551(II), at 64 (1998) (“H. Rep.”) (§ 512(k)(1)(B) definition “includes,
2 for example, services such as providing Internet access, e-mail, chat room and web page hosting
3 services”).

4 PBIS spends most of its brief explaining functions that ISPs perform and the limitations on
5 liability the DMCA provides for such ISPs. To be sure, Congress did, in § 512(a)-(d), separately
6 define limitations on liability for ISPs performing different functions. In crafting eligibility criteria
7 for each limitation on liability, Congress specified the functions that ISPs must be performing and
8 defined the obligations the ISPs must fulfill in assisting copyright owners. Thus, “conduit”
9 providers must terminate the accounts of repeat infringers, but need not disable access to infringing
10 material that has already passed through their systems. *See* § 512(a); § 512(i). ISPs that cache,
11 store, or link to infringing material must both terminate the accounts of repeat infringers and disable
12 access to infringing material available from their networks. § 512(b), (c), (d) & (i).

13 Congress, however, did not draw functional distinctions when it drafted § 512(h).⁸ In
14 contrast to the limitations on liability, which each contain language that limit their application to
15 ISPs performing specific functions, *e.g.* § 512(a) (“transmitting”); § 512(b) (“caching”), subsection
16 (h) contains no such limiting language. By its plain terms, § 512(h) applies to all “service
17 providers,” and requires all ISPs to “expeditiously disclose to the copyright owner . . . the
18 information required by the subpoena.” § 512(h)(5). Nowhere does § 512(h) refer to what function
19 the service provider must be providing or to where the infringing material is stored. Rather, § 512(h)
20 “is written without limitation or restriction as to its application.” *Verizon I*, 240 F. Supp. 2d at 33.

21 Had Congress wanted to limit § 512(h) to exclude conduit providers, it could easily have
22 done so. Congress “could have stated such a limitation in subsection (h), or stated that subsection
23 (h) does not apply to subsections (a), (b), or (d), or even placed the subpoena authority itself within
24 subsection (c). But Congress did not do so.” *Verizon I*, 240 F. Supp. 2d at 33. Congress took care

25 ⁸ PBIS misleadingly suggests that RIAA contends there is a material factual dispute here.
26 That is not so. Under RIAA’s interpretation and Judge Bates’, the functions an ISP is performing
27 are irrelevant to § 512(h) because § 512(h) applies to all service providers performing all functions.
28 Only if PBIS’s interpretation were correct – and it is not – would there have to be discovery because
PBIS’s counter-textual interpretation requires a finding as to what functions an ISP was performing
in analyzing whether it must comply with a subpoena. *See Verizon I*, 240 F. Supp. 2d at 34-35, 41
(explaining that such evidentiary proceedings are inconsistent with Congress’s intent).

1 elsewhere in § 512 to prescribe with specificity which provisions of § 512 apply to which ISP
2 functions. Compare § 512(i) (requiring all ISPs to terminate repeat infringers), with § 512(a)-(d)
3 (extending liability limitations only to ISPs performing specific functions). Indeed, § 512(n) sets
4 forth a rule of construction for deciding whether an ISP qualifies for the limitations on liability set
5 forth in §§ 512(a)-(d), but makes the ISP's function relevant only for applying "those subsections."
6 S. Rep. No. 105-190 (1998) ("S. Rep.") at 55 ("Subsection [(n)] establishes a rule of construction
7 applicable to subsections (a) through (d)"). That decision not to so limit § 512(h) is "strong
8 evidence" that Congress intended no such limitation. *United States v. Naftalin*, 441 U.S. 768, 773
9 (1979).

10 Again ignoring the text of § 512(h), PBIS suggests that, because "conduit" providers are not
11 required to disable access to infringing material in response to notices of infringement, Congress
12 must have meant to exempt them from DMCA subpoenas. That is simply wrong. Congress made
13 absolutely clear that an ISP's obligation to respond to a subpoena and its obligation to respond to a
14 DMCA notice (by disabling access to infringing material) are entirely independent. Congress
15 required ISPs to respond expeditiously to a DMCA subpoena "notwithstanding any other provision
16 of law and regardless of whether the service provider responds to the notification." § 512(h)(5).
17 Thus, whether or not it must disable access to infringing material, an ISP must comply with a
18 DMCA subpoena. Just like any ISP performing any other function, a conduit provider can identify
19 subscribers using its network to commit copyright infringement.⁹

20 The sole textual hook for PBIS's claim that it is exempted from § 512(h) is the fact that a
21 copyright owner seeking a subpoena must provide to the ISP "a notification described in subsection
22 (c)(3)(A)." § 512(h)(2)(A). According to PBIS, reference to subsection (c)(3)(A) means that a
23 copyright owner must satisfy all of the requirements of subsection (c) of the statute, including the
24 requirement that the infringing material be stored on the ISP's network. PBIS Opp. at 14-15.

25 This argument, however, contorts the language of subsection (c)(3)(A) beyond imagination.
26 As an initial matter, nothing in subsection (c)(3)(A) – the only part of subsection (c) that is in any

27 ⁹ PBIS suggests that "conduit" providers are powerless to counteract infringement occurring
28 over their networks. Congress, however, did not agree. Congress required all ISPs, including
"conduit" providers, to terminate the accounts of any subscribers who are repeat infringers. § 512(i).

1 way referenced in subsection (h) – mentions where infringing material is stored or what function the
2 ISP must be performing.¹⁰ Those requirements are in entirely different portions of subsection (c)
3 that are not referenced in subsection (h). Indeed, subsection (c)(3)(A) merely specifies six items of
4 information that copyright owners must provide to notify an ISP that copyright infringement is
5 occurring and to allow the ISP to identify the infringer. The sole requirement of subsection
6 (c)(3)(A) that PBIS claims RIAA has not met is that a copyright owner provide “information
7 reasonably sufficient to permit the service provider to locate the material.” § 512(c)(3)(A)(iii); PBIS
8 Opp. at 16. RIAA clearly has provided this information – it has provided the IP address from which,
9 and the date and time when, the infringement was occurring.

10 PBIS does not dispute that this information specifically identifies a particular subscriber’s
11 computer, at the end of a telephone line provided by PBIS, as the source of the infringement.
12 Rather, PBIS claims that it should have to catch the user committing copyright infringement red-
13 handed before it has to comply with the subpoena. But that theory simply flies in the face of the
14 statute and the legislative history. The statute requires expeditious compliance and does not
15 contemplate ISPs doing their own investigation of allegations of infringement. That is because ISPs
16 are ill-positioned to do this – they are not the copyright owner and do not know what would
17 constitute infringement. Indeed, ISPs begged Congress *not* to require them to review material to
18 determine whether it constituted copyright infringement. *See, e.g., Online Copyright Liability*
19 *Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House*
20 *Comm. on the Judiciary, 105th Cong. 88-89 (Sept. 16-17, 1997) (statement of Roy Neel, President*
21 *of the United States Telephone Association) (proposing “that copyright owners and ISPs should*
22 *share responsibility for protecting intellectual property on the Internet” and that copyright owners*
23 *should “ferret” out infringement because ISPs were not in a position to determine whether particular*
24 *materials are infringing). Under the DMCA, copyright owners track down infringers, and ISPs are*
25 *required to provide information when presented with a good faith claim of infringement meeting the*
26 *requirements of the statute. PBIS’s suggestion that an ISP should check for itself to see whether*

27 ¹⁰ Judge Bates’ interpretation thus gives full effect to the cross-references in § 512(h), none
28 of which refer to text that limits the application of the DMCA subpoena provision in the way PBIS
claims. *See Verizon II*, 257 F. Supp. 2d at 268-69.

1 infringement is occurring makes it the arbiter of the copyright owner's dispute – which cannot
2 possibly be squared with the statute.

3 There is simply no evidence that Congress intended subsection (c)(3)(A) to be a massive
4 implied exception to § 512(h). Section 512(c)(3)(A) is a mechanism for specifying the copyright
5 infringement occurring over the ISP's network and for providing sufficient information to allow the
6 ISP to identify the infringer. It is referenced in numerous subsections within § 512 because it
7 provides a baseline of information that copyright owners must provide so that ISPs can perform their
8 obligations under the DMCA. But in none of those subsections does it create an implicit limitation.
9 Indeed, Congress explained that subsection (c)(3)(A) establishes “procedures,” not substantive
10 limitations, H. Rep. at 55, and that substantial compliance is all that is required. *See* § 512(c)(3)(A);
11 *ALS Scan, Inc v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001).

12 2. **PBIS's Interpretation Cannot Be Squared with the Legislative History.**

13 PBIS's attempt to rewrite § 512(h) should be rejected for the additional reason that it would
14 defeat the core objectives of the DMCA. “[A]bsent unambiguous directions from Congress,” a court
15 should not limit the scope of a provision that unearths the identities of law-breakers because to do so
16 would “frustrate[]” Congress's purpose. *United States v. Bisceglia*, 420 U.S. 141, 150 (1975).

17 PBIS's interpretation would turn the DMCA on its head. PBIS claims that the DMCA
18 intended self-help to be a copyright owner's primary means of defending its copyrights, but then
19 proposes an interpretation which would make self-help impossible. PBIS does not deny – because it
20 cannot – that its subscribers are committing copyright infringement and that it knows exactly who
21 they are. PBIS's reading of § 512(h) would allow an ISP to foster illegal conduct – by providing
22 facilities for the dissemination of infringing material – and to shield infringers from any realistic
23 threat of being called to account, thus thwarting “Congress's efforts to prevent copyright
24 infringement on the Internet,” and “undermin[ing] the balance Congress established.” *Verizon I*, 240
25 F. Supp. 2d at 35, 38. There is “no sound reason why Congress would enable a copyright owner to
26 obtain identifying information from a service provider storing the infringing material on its system,
27 but would not enable a copyright owner to obtain identifying information from a service provider
28 transmitting the material over its system.” *Id.* at 35.

1 PBIS is simply wrong to suggest that the DMCA cannot apply here because P2P networks
2 did not exist in 1998. As a matter of statutory construction, that argument deserves no weight. As
3 the Supreme Court has repeatedly stressed, the circumstances that serve as a catalyst for legislative
4 action “do[] not define the outer limits of [a] statute’s coverage.” *New York v. FERC*, 535 U.S. 1, 21
5 (2002). To the contrary, “the fact that a statute can be applied in situations not expressly anticipated
6 by Congress does not demonstrate ambiguity. It demonstrates breadth.” *PGA Tour, Inc. v. Martin*,
7 532 U.S. 661, 689 (2001) (internal quotation omitted); *see also Cook County v. United States ex rel.*
8 *Chandler*, 123 S. Ct. 1239, 1245-46 (2003). That principle applies with particular force here.
9 Congress recognized that § 512 would have to apply to the dynamic technology of the Internet,
10 which was making “massive piracy” easier by the day, S. Rep. at 8; thus Congress made the DMCA
11 technology-neutral. *See* H. Rep. at 24.

12 Moreover, Congress was concerned about infringement committed by people using ISPs as
13 conduits. Indeed, why else would Congress have enacted subsection (a) of the DMCA, behind
14 which PBIS hides, if not for that concern? Congress was presented with testimony concerning
15 infringement through the use of FTP sites and bulletin boards on home computers (the precursors to
16 P2P services), and testimony concerning the use of e-mail services to disseminate copyrighted
17 material without authorization.¹¹ FTP sites (precursors to P2P networks), which allow anyone to
18 download files from them, were already a significant problem in 1998, and the recording industry
19 had already sued FTP operators by then.¹² *See, e.g., Complaint, Geffen Records, Inc. v. Arizona*
20 *Business Network*, No. C98-0794 (D. Ariz. filed May 5, 1998), *available at*

21
22 ¹¹ *Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and*
23 *Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 88-89 at 175 (Sept. 16-17
24 1997) (statement of Ronald Dunn, President of the Information Industry Association); *Copyright*
25 *Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing Before the Subcomm. on Courts*
26 *and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 12 at 17-18 (Sept. 11,
27 1997) (statement of Kevin DiGregory, Deputy Attorney General, Department of Justice).

28 ¹² A File Transfer Protocol (FTP) site offers files for download using a particular computer
protocol; the FTP site is referred to as the server and the computer downloading the files is the
client. In a P2P system, all computers in the network serve as both clients and servers, and thus any
one of them can download from any other. An FTP site often is a home computer not maintained by
the ISP, but disseminating files over the ISP’s network. *See* Andrew Leonard, *Mutiny on the Net*,
Salon, March 1998, *available at* http://archive.salon.com/21st/feature/1998/03/cov_20feature.html
(FTP software “allows anyone with a computer and a modem to make [pirated music] files on their
home computer accessible to the rest of the Net”).

1 <http://www.riaa.com/news/newsletter/pdf/geffencomplaint.pdf>. Congress was thus well aware home
2 computers and “conduit” facilities provided by ISPs were being used to engage in digital piracy.

3 Finally, PBIS’s arguments should be seen for what they are – a recently developed ploy to
4 obtain the benefits of the DMCA without its correlative obligations. PBIS’s positions before this
5 Court are directly contrary to its past conduct in complying with DMCA subpoenas and its
6 contemporaneous statements to subscribers. Indeed, PBIS tells its internet access subscribers (as it
7 has for years) that it “may be required to disclose information to individuals asserting rights under
8 the Digital Millennium Copyright Act,” and PBIS requires its customers to “expressly authorize
9 [PBIS] to comply with any and all lawful notices, subpoenas, court orders or warrants without prior
10 notice to you.” *See* RJN, Ex. 3, Att. A (SBC Terms of Service). Such a requirement in its contracts
11 with internet access customers makes little sense if, as PBIS now contends, the DMCA subpoena
12 provision does not apply at all when it is providing such services.

13 **B. The DMCA Subpoena Provision Does Not Violate Article III.**

14 PBIS’s brief largely restates the mistaken arguments advanced in its Motion for Summary
15 Judgment. Because PBIS essentially incorporates by reference the arguments in that motion, RIAA
16 will simply incorporate by reference the arguments in its opposition brief on that same motion.¹³

17 **C. Section 512(h) Does Not Violate the First or Fifth Amendments.**

18 PBIS has failed to show why its First and Fifth Amendment claims should not be dismissed
19 as a matter of law.

20 As an initial matter, PBIS’s claim that there is a First Amendment interest at stake here does
21 not pass even minimal scrutiny. Section 512(h) is directed at copyright infringement, which receives
22 no First Amendment protection. *See Verizon II*, 257 F. Supp. 2d at 260 (citing *Harper & Row*
23 *Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985); *Zacchini v. Scripps-Howard Broad.*
24 *Co.*, 433 U.S. 562, 574-78 (1977)). *See* RIAA Mot. at 22. With respect to subpoenas already issued

25 ¹³ The only thing new in PBIS’s brief is its contention that *Certain Complaints* advances its
26 Article III claim. In that case, the Eleventh Circuit found constitutional a statute authorizing not
27 merely the issuance and enforcement of subpoenas at the direction of federal judges but their
28 wholesale involvement on a committee to investigate allegations against a fellow Judge. The court
found “little merit in [the] bald proposition” that such a statute intermingled Judicial and Executive
Power. 783 F.2d at 1503. The DMCA is an even easier case than the statute at issue in *Certain*
Complaints, since it involves only the ministerial issuance of subpoenas by the clerk of the court.

1 in D.C., RIAA has presented good faith claims of copyright infringement, to which PBIS has no
2 response. With respect to future subpoenas that might be issued, PBIS cannot even guess whether
3 there would be a First Amendment issue at stake.

4 This simply reveals the first of many flaws in PBIS's argument. The right that PBIS claims
5 to advance is a right to have business records expunged, not a right to free expression. Section
6 512(h) does not regulate expression. It neither restricts speech by users of the Internet, nor penalizes
7 them after speaking. Its sole effect and function is to allow copyright owners to obtain information
8 essential to the vindication of their rights under federal law. It is thus no different from Rule 45,
9 grand jury subpoenas, or administrative subpoenas that require disclosure of information without
10 intervention by a judge prior to their issuance. As the Supreme Court has repeatedly made clear,
11 whatever right a person may have not to be compelled to identify oneself before speaking, there is no
12 right to be forever concealed, no what matter a person does. *See Buckley v. American Constitutional*
13 *Law Found., Inc.*, 525 U.S. 182, 197-200 (1999) (contrasting invalid requirement that petitioners
14 wear identification badges with valid requirement that petitioners sign an affidavit attesting to
15 signatures obtained while petitioning).

16 Thus, even if First Amendment interests were at stake, 512(h), like any provision allowing
17 discovery of information without prohibiting or penalizing speech, passes constitutional muster.
18 Indeed, the courts have regularly rejected the argument that some heightened level of procedure (or
19 judicial scrutiny) is required prior to issuance of a subpoena. *See Oklahoma Press Publ'g Co. v.*
20 *Walling*, 327 U.S. 186, 209-17 (1946). Just as users of the telephone forfeit the expectation that the
21 telephone company will conceal records of their calls, *see Smith v. Maryland*, 442 U.S. 735, 742
22 (1979); *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1050 n.67 (D.C.
23 Cir. 1978), ISP subscribers have no legitimate expectation that ISPs will conceal their identities in
24 response to legal process. *See United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (D. W. Va.
25 1999), *aff'd*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision); *United States v. Kennedy*, 81
26 F. Supp. 2d 1103, 1110 (D. Kan. 2000).

27 PBIS's due process claim that the DMCA "provides insufficient procedural protection" is
28 equally futile. PBIS Opp. at 20. PBIS ignores the fact that the "subpoena provision contains a

1 number of substantial procedural requirements aimed at preventing abuse, fraud, and mistakes,
2 without chilling expressive or associational rights.” *Verizon II*, 257 F. Supp. 2d at 270. A copyright
3 owner or its agent must possess a “good faith belief” that the use of copyrighted material is
4 unauthorized, § 512(c)(3)(a)(v); must swear under penalty of perjury that it owns the copyrighted
5 works or is authorized by the copyright owner to seek the subpoena, § 512(c)(3)(a)(vi); and must
6 swear that the information sought “will only be used for the purpose of protecting rights under this
7 title.” § 512(h)(2)(C). These measures minimize the risk of mistake and misuse, and the statute
8 expressly provides for judicial review, if desired, before compliance. *See* § 512(h)(6). The
9 Constitution requires nothing more. *See Oklahoma Press*, 327 U.S. at 209-17; *Reisman v. Caplin*,
10 375 U.S. 440, 445-50 (1964). Indeed, Rule 45 provides less, not more, protections than § 512(h).¹⁴

11 In any event, this case is not at all about privacy. Where, as here, an ISP subscriber “opens
12 his computer to permit others, through peer-to-peer filesharing, to download materials from that
13 computer, it is hard to understand just what privacy expectation he or she has after essentially
14 opening the computer to the world.” *Verizon II*, 257 F. Supp. 2d at 267; *see also Kennedy*, 81 F.
15 Supp. 2d at 1110 (concluding that a computer user’s activation of file sharing mechanism shows no
16 expectation of privacy). The First Amendment does not confer an unqualified right to engage in
17 expression anonymously or to have all business records of one’s activities effectively erased. *See*
18 *Oklahoma Press*, 327 U.S. 186 (rejecting argument under First and Fourth Amendments that
19 documents of newspaper could not be disclosed absent a warrant); *United States v. Miller*, 425 U.S.
20 435, 444-45 (1976) (same). And PBIS can hardly be heard to complain about a lack of notice to
21 subscribers. PBIS *requires* its subscribers to agree that their names can be disclosed, without notice,
22 pursuant to a DMCA subpoena. *See* RJN, Ex. 3, Att. A (SBC Terms of Service). For its part, RIAA
23 has never objected to notice to subscribers, so long as it does not slow the subpoena process, in
24 contravention of Congress’s command that it proceed expeditiously.

25 Finally, PBIS suggests that this Court cannot dismiss its First Amendment claim without
26 taking evidence. That is simply not true. PBIS’s Complaint does not come close to sufficiently

27 ¹⁴ As Judge Bates notes, the DMCA provides protections similar to those suggested by Judge
28 Jenson in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). *Verizon II*, 257 F.
Supp. 2d at 263 n.22.

1 alleging an overbreadth claim. See RIAA Mot. at 23. As the Supreme Court has recognized,
2 invalidation based on overbreadth is “strong medicine” and is “employed . . . with hesitation, and
3 then only as a last resort.” *New York v. Ferber*, 458 U.S. 747, 769 (1982) (internal quotation and
4 citation omitted). PBIS does not even allege that a substantial number of people who wish to engage
5 in fully protected speech on the Internet are ceasing to do so out of fear that they may accidentally be
6 identified through a mistake in the issuance of DMCA subpoenas. See *Broadrick v. Oklahoma*, 413
7 U.S. 601, 615 (1973) (holding that overbreadth must be “real” and “substantial”). Nor would such
8 allegations even be sufficient because they are far too attenuated. See *University of Pa. v. EEOC*,
9 493 U.S. 182, 199-200 (1990) (rejecting First Amendment challenge to subpoena for academic peer
10 review materials because “chilling effect” was “extremely attenuated” and “speculative”); *Members*
11 *of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789; 800 (1984). Moreover,
12 overbreadth claims fail in the context of statutes offering case-by-case adjudication, as the DMCA
13 does. See *University of Pa.*, 493 U.S. at 199-200. Any possible threat to First Amendment interests
14 – and there is none – can be remedied through such proceedings.¹⁵

15 CONCLUSION

16 For all of these reasons, and the reasons stated in RIAA’s motion to dismiss, the Court should
17 dismiss all of PBIS’s claims against RIAA.

18 Respectfully submitted,

19
20 Dated: November 7, 2003

_____/s/Howard A. Slavitt_____

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25

26 ¹⁵ PBIS suggests that RIAA concedes that Counts 4 and 5 of the Complaint state claims upon
27 which relief can be granted. That is not true. As noted above, RIAA believes that such fact-specific
28 claims cannot be resolved in a declaratory judgment action. To the extent that PBIS purports now to
want rules of general applicability, the rules PBIS advocates are inconsistent with the DMCA
streamlined process.