Appeal No. 03-3802

United States Court of Appeals
For the Eighth Circuit

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA

Appellee,

v.

CHARTER COMMUNICATIONS, INC.,

Appellant

Appeal from the United States District Court
for the Eastern District of Missouri
Hon. Carol E. Jackson, Chief United States District Judge

AMICUS CURIAE BRIEF OF CONSUMER AND PRIVACY GROUPS IN SUPPORT OF APPELLANT CHARTER COMMUNICATIONS, INC.

Cindy A. Cohn*
Cal. Bar No. 145997
Wendy M. Seltzer
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333
(415) 436-9993 (fax)
*8th Cir. App. Pending

Christopher A. Hansen
Aden J. Fine
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400
(212) 549-2500
(212) 549-2651 (fax)

CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, counsel for amici curiae submit these corporate disclosure statements regarding the entities and organizations they represent.

A. The undersigned, counsel of record for *amici curiae* states the following:

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

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

_____
Cindy A. Cohn

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Law Review Articles and Treatises

INTERESTS OF AMICI

Amici are 22 entities and organizations. The group includes a broad array of public interest organizations, consumer advocacy groups, library associations, think tanks, industry organizations and civil liberties organizations.[1] Almost all represent consumers whose constitutional rights, privacy and safety are at stake as a result of this action. *Amici* submit this brief urging reversal of the District Court's decision allowing the Recording Industry Association of America ("RIAA") to force Charter Communications, Inc. to reveal the names, home addresses and email addresses of 200 Charter subscribers prior to even a prima facie determination of wrongdoing.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on a misreading of Section 512(h) of the Digital Millennium Copyright Act ("Section 512(h)") and the opinions of a single district court, now reversed and vacated, the RIAA has issued a number of subpoenas to Charter that seek to uncover the identity of anonymous Charter subscribers using the Internet. RIAA asserts that Section 512(h) 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 of copyright infringement by the subpoenaing party. That lack of due process is inconsistent with the statute's plain meaning and with constitutional Due Process and First Amendment protections.

[1] A full list of the amici is included in the Motion for Leave to File Amicus Brief filed herewith.

Since the time that Charter's original Motion to Quash was denied by the District Court, the D.C. Circuit has reversed the primary case upon which RIAA relied, holding that the DMCA does not authorize Section 512(h) subpoenas to conduit ISPs – such as Charter – for users allegedly engaged in infringing peer-to-peer filesharing. *Recording Industry of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). Instead, the D.C. Circuit held in *Verizon*, "a subpoena may be issued only to an ISP engaged in material that is infringing or the subject of infringing activity." *Id.* The D.C. Circuit accordingly did not need to reach the constitutional challenges Verizon and its *amici* had raised. *Amici* urge this Court to follow the well-reasoned statutory analysis of the D.C. Circuit's *Verizon* decision. Should this Court disagree with the D.C. Circuit, however, *amici* describe some of the constitutional flaws[2] regarding the alternate reading RIAA proposes and urge that the statute be held unconstitutional.

As the RIAA reads Section 512(h), the provision is so devoid of procedural protections that it is an invitation to mistake and misuse. Although Section 512 is a relatively new provision, its improper use has already been reported numerous times, 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 software allegedly used and the improper issuance of subpoenas by companies such as Wal-Mart to suppress non-copyrightable facts 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.

RIAA's subpoenas sought the name, address, telephone number, and email

[2] Both Charter and the ISP amici discuss the Article III deficiencies. Amici join in those arguments.

address of 200 Charter subscribers who were using the Internet to communicate anonymously with other Internet users. Without analysis, the District Court allowed the RIAA to demand all but the telephone numbers of these 200 individuals. 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. The subpoenas were issued before any determination had been made that the speech actually constituted copyright infringement or that it is even reasonably likely to be held to be infringing. An implementation of Section 512(h) that lacks adequate safeguards to ensure that Internet users' fundamental rights are not unnecessarily or mistakenly curtailed violates the Due Process clause of the Fifth Amendment and the First Amendment.

The recording industry can adequately pursue copyright infringers without the Section 512(h) subpoenas. The week of this filing, in fact, the RIAA announced lawsuits against 532 "John Does" the labels claimed infringed their copyrights. *See* "New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers," <http://www.riaa.com/news/newsletter/012104.asp>. In these cases judges will have to approve the issuance of subpoenas since they will occur prior to service on the defendant, granting such approval only if they find that the RIAA has made reasonable investigation and properly pled its prima facie case. That is some of the process that is due before rights of anonymity are breached.

II. FACTUAL BACKGROUND

A. The Procedure for Obtaining a Section 512(h) Subpoena.

Issuance of the Section 512(h) subpoenas RIAA obtained against Charter was a purely ministerial act by the clerk of the court, 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.[3]

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, one court has held that it imposes no due diligence requirement on the party seeking the subpoena to verify its "belief" in any manner.[4] Nor does the statute require the subpoenaing party to provide specific allegations supporting its claim or to present any evidence supporting its belief. Because the subpoenas to Charter identified material stored not on Charter's servers, but on the personal computers of Charter subscribers, Charter could not even access the material to ascertain whether on its face it was potentially copyright infringing. Most importantly, the subpoenas are issued without any judicial oversight or review, leaving the required recitations mere chimerical protection for Internet users.

---

[3] The *Verizon* court held that this procedure was improper for "conduit" ISPs because notices to them could not satisfy the requirements of § 512(c)(3)(A)(iii) to notify the ISP of material "that is to be removed or access to which is to be disabled." *Verizon*, 351 F.3d at 1233-35.

[4] At least one court has held that for 512(c) notices, no investigation to establish actual infringement is required. *See Rossi v. Motion Picture Ass'n of Am.*, 2003 U.S. Dist. LEXIS 1864, *8-9 (D. Haw. Apr. 29, 2003).

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

Given how easy it has been 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 coordinate provision to Section 512(h).[5] *See* McCullagh, *RIAA Apologizes For Erroneous Letters*, CNet News, May 13, 2003, <http://news.com.com/2100-1025-1001319.html>.

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 could have been prevented by procedural safeguards – 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

[5] 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, *see* § 512(h)(2)(A).

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.[6]

- 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. As it turned out, 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/2100-10253-1001095.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 also 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

[6] Amicus Electronic Frontier Foundation represents the defendant in this lawsuit, Fonovisa v. Plank.

same theory. *See* McCullagh, *Wal-Mart Backs Away from DMCA Claim*, CNet News, Dec. 5, 2002, <http://news.com.com/2100-1023-976296.html>.

- Retailers Best Buy, Kohl's Department Stores, and Target Corporation repeated Wal-Mart's abuse in 2003, with Best Buy serving a Section 512(h) subpoena in addition to its Section 512(c) removal demands for noncopyrightable pricing facts. This time, comparison shopping site FatWallet responded with a suit for declaratory judgment and damages, rather than wait for repeat performances each year. <http://www.fatwallet.com/forums/messageview.cfm?catid=18&threadid=245808>.

- 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 were successful in scaring ISPs into removing the material, thus effectively censoring the public debate. *Diebold Voting Case Tests DMCA*, <http://www.pcworld.com/news/article/0,aid,113273,00.asp>. Only after litigation was initiated did the company withdraw the notices.[7]

- 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 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>.

[7] *Amicus* Electronic Frontier Foundation also represents the plaintiffs in this lawsuit.

The instances of mistake and misuse can only be expected to increase. From mid-2003 through December, RIAA itself has used Section 512(h) to obtain approximately 2,400 subpoenas from the D.C. District Court. If this Court permits them to continue, St. Louis will become the next RIAA subpoena hotspot. No one knows how many Section 512(h) subpoenas have been issued at the request of claimants other than the RIAA. 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 in severity and probability 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 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 are 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.

The consequences of Section 512(h)'s lack of procedural protections are far from trivial. In addition to depriving Internet users of their constitutional rights to privacy and anonymity, the statute contains nothing to stop a vindictive business or individual from claiming copyright infringement in order to acquire the identity of an anonymous critic who has posted information on an Internet message board. For example, a company could easily use Section 512(h) to obtain the identity of an online critic who has posted excerpts from a (copyrightable) company press release

or SEC report on a message board to support critical comments. Eager to stifle the criticism or to retaliate against the speaker, who is often a company employee, the company could obtain the speaker's identity through a Section 512(h) subpoena, despite the First Amendment protections and fair use defense accorded to such speech.

Even worse, the Section provides no safeguards to stop batterers, cyberstalkers, or pedophiles from using Section 512(h) to obtain – without any questions – an intended victim's identifying information, including their name, physical address and e-mail address. All that is required is that they fill out the required paperwork and claim a "good faith" belief that copyright infringement has occurred. This danger is, unfortunately, not far-fetched. In connection with the *Verizon* proceeding, representatives of *amicus* WiredSafety.org, as well as the National Coalition Against Domestic Violence, submitted declarations explaining their very real concerns that 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 – with no questions or 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 or web-based message board 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 the requester is such a person, Section 512(h) does not 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. Nor is there any way for the clerk to verify this. So long as the proper words are put in the request, the statute purportedly 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 a variety of different forms of speech allegedly constituting copyright infringement. In this particular case, Section 512(h) subpoenas sought disclosure of the identity of anonymous Charter 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 either in the public domain – such as the works of Shakespeare, of the United States government, 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.[8] Peer-to-peer technology has also become

[8] Even established artists use peer-to-peer technology for commercial purposes. For example, some well-known musicians encourage their fans to share recordings

increasingly important to libraries and archivists, who are relying on the technology to assist them in their goals 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 following the student protests. *See* Jennifer 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 and the specific privacy protections it created for cable customers in the face of a bare claim of online copyright infringement? If so, was such a decision constitutional? Because Charter, the ISP *amici* and the *Verizon* decision of the D.C. Circuit amply address the first question, *amici* focus only on the second.[9]

---

of live shows to spur attendance at concerts, which are their main source of income (as opposed to royalties from recordings). *See* Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle,* N.Y. TIMES, Sept. 14, 2003, at A1.

[9] As noted above, *amici* also join in the Article III argument raised by both Charter and the ISP amici.

III. ARGUMENT

A. 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 ensures that fundamental rights are not unnecessarily curtailed by requiring adequate procedural protections before a person can be deprived of liberty or property. *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, 461 (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 in the First Amendment context 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, RIAA reads Section 512(h) to permit 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, 10 (1991). These factors demonstrate that Section 512(h) falls far short of the procedural protections required by the Due Process Clause.

B. Internet Users Have a Substantial and Constitutionally Protected Liberty Interest In Privacy and Anonymous Expression.[10]

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). Section 512(h) subpoenas directly impact the First Amendment right to anonymous speech by their failure to provide adequate procedural protections before stripping speakers of their anonymity and privacy.

It is well-established that the First Amendment protects the right to anonymity. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (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

[10] Charter 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).

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 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 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 . . . 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 (citation omitted).

This long-standing right to anonymity is especially critical to a 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, 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 Court noted that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id*.

In addition, for many online speakers, such as critics of a company who wish

to disclose potentially damaging or embarrassing facts, the protection of anonymity is essential to their willingness to speak. *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 (Feb. 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"). In *Columbia Insurance Company v. SeesCandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), a party's subpoena sought the identity of the defendant, an alleged trademark infringer. The court ruled that the party seeking disclosure 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.

Id., 185 F.R.D. at 578.

C. The Minimal Procedural Protections of Section 512(h) Create 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 privacy and 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. 5-8.

The substantial risk of mistake and misuse exists because Section 512(h) subpoenas issue on little more than an *ex parte* assertion of "good faith." In *Connecticut v. Doehr*, *supra*, 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.*, 501 U.S. 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 SeesCandy.com*, *supra*, at 579-80 (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 v. Doe*, 775 A.2d 756, 760-61 (N.J. App. 2001) (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 1093 (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 renders 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 438 ("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(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 760-61. 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 1093. Absent such a showing, there is no compelling reason to overcome the fundamental right to anonymity.

The procedural prerequisites required by all courts – notice, an opportunity to be heard, a full statement of the specific speech at issue, the 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, 254 (2002) (judicial process cannot be used to "suppress lawful speech as the means to suppress unlawful speech"); *McIntyre*, 514 U.S. at 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.

D. 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 proposed 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 for litigants to obtain . . . information that . . . could be damaging to reputation and privacy," the government "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 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 mail or 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.

E. Section 512(h) Violates the First Amendment When it Strips Speakers of Their Anonymity Without Procedural Protections.

As noted above, the Fifth Amendment Due Process analysis rests, in part, on

[11] Even Federal Rule of Civil Procedure 27, which allows pre-litigation subpoenas in some narrow circumstances, requires prior judicial approval. *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(f).

the liberty interest that exists for anonymous speech. Additionally, as *Verizon* demonstrates, the First Amendment by itself provides a direct basis for invalidating Section 512 for its lack of procedural protection, as several courts have found. The court in *Doe v. 2theMart.com*, for example, recognized the need to protect the right to engage in anonymous online speech before an ordinary discovery subpoena could be issued: "If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights." 140 F.Supp.2d at 1093. *See also Dendrite*, 775 A.2d at 771. In spite of these cases, the RIAA argues that the anonymous online speakers whose identities it seeks to uncover had only a minimal right to anonymity because the speech was "alleged copyright infringement." The fundamental flaw in that argument is that when a Section 512(h) subpoena is issued – *i.e.*, when the right to anonymity will be lost – there has been no judicial determination of infringement, or even a likelihood of infringement. Instead, there has been only the barest allegation. 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.*, *Bantam Books*, 372 U.S. at 66 (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").[12] Procedural

[12] 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

safeguards are necessary to ensure that legitimate expression is not suppressed merely because of the possibility it may not be protected speech. *See, e.g.*, *Speiser*, 357 U.S. at 525-26 (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.").

IV. CONCLUSION

Whether viewed through the lens of the Due Process Clause or the First Amendment, Section 512 without additional procedural protections fails to pass constitutional muster.

For the foregoing reasons, *amici* urge the Court to reverse and vacate the District Court ruling.

DATED: January 23, 2004 ELECTRONIC FRONTIER FOUNDATION

By _____

Cindy A. Cohn
Wendy M. Seltzer
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

First Amendment accommodations," including the fair use doctrine and the idea/expression distinction. *Eldred v. Ashcroft*, 123 S. Ct. 769, 788 (2003).

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

Counsel for Amici Curiae certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 version 9 in Times New Roman, 14-point font.

DATED: January 23, 2004 ELECTRONIC FRONTIER FOUNDATION

By _____

Cindy A. Cohn
Wendy M. Seltzer
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that two (2) copies of the foregoing Amicus Curiae Brief of Consumer and Privacy Groups in Support of Appellant Charter Communications, Inc. was served upon the following by Federal Express overnight delivery on January 23, 2004:

James W. Erwin
Mark S. Sableman
Stephen B. Higgins
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101-1693

Thomas C. Walsh
David A. Roodman
K. Lee Marshall
Bryan & Cave
211 N. Broadway, Suite 3600
St. Louis, MO 63102-2186

Jeffrey R. Bragalone
Matthew P. Harper
McKool Smith P.C.
300 Crescent Court,
Suite 1500
Dallas, TX 75201

Donald B. Verrilli, Jr.
Thomas J. Perrelli
Jenner & Block
601 13th Street, N.W.,
Suite 1200
Washington, DC 20005

Paul Glist
John D. Seiver
K.C. Halm
Cole & Raywid & Braverman LLP
1919 Pennsylvania Ave., N.W.,
Suite 200
Washington, DC 20006

Matthew J. Oppenheim
Stanley Pierre-Louis
Recording Industry Association of America
1330 Connecticut Ave., N.W.,
Suite 300
Washington, DC 20036

Lawrence S. Robbins
Alan Untereiner
Alison C. Barnes
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, NW, Suite 411
Washington, DC 20006

Yvette Molinaro
Patricia H. Benson
Mitchell Silberberg & Knupp LLP
Trident Center
11977 West Olympic Boulevard
Los Angeles, CA 90064

_____

Cindy A. Cohn