

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

**BRIEF OF SBC INTERNET SERVICES, VERIZON INTERNET SERVICES INC.,
BELLSOUTH TELECOMMUNICATIONS, INC., UNITED STATES INTERNET
SERVICE PROVIDER ASSOCIATION, UNITED STATES INTERNET
INDUSTRY ASSOCIATION, PROGRESSIVE INTERNET ACTION, FRONTIER
COMMUNICATIONS OF AMERICA, INC., AND SOUTHERN STAR
AS *AMICI CURIAE* IN SUPPORT OF APPELLANT**

Alan Untereiner
Kathryn S. Zecca
Brian Willen
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
Tel.: (202) 775-4500

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

SBC Internet Services is the business name or d/b/a of four regional Internet service providers and one nationwide ISP: Southwestern Bell Internet Services Inc. (“SBIS”); Pacific Bell Internet Services Inc. (“PBIS”); Ameritech Interactive Media Services Inc. (“AIMS”); SNET Diversified Group, Inc. (“SNET”); and Prodigy Communications Corp. (“Prodigy”), respectively.

SBIS is 100%-owned by SBC Telecommunications Inc., which is 100%-owned by SBC Communications Inc. PBIS is 100%-owned by Pacific Telesis Inc., which is 100%-owned by SBC Communications Inc. AIMS is 100%-owned by Ameritech Corp., which is 100%-owned by SBC Communications Inc. SNET is 100%-owned by Southern New England Telecommunications Corp., which is 100%-owned by SBC Communications Inc. Prodigy is owned by SBIS (25%), PBIS (42%), AIMS (15%), and SNET (18%). SBC Communications Inc. is a publicly traded corporation with no parent company; no publicly traded corporation has a 10% or greater interest in SBC Communications Inc.

Verizon Internet Services Inc. is a wholly owned subsidiary of Bell Atlantic Entertainment and Information Services Group, and a wholly owned subsidiary of Verizon Communications Inc., which is a publicly traded corporation. Verizon Communications, Inc. does not have a parent company, and no publicly held

corporation has a 10% or greater interest in it.

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly traded corporation. BellSouth Corporation has no parent company and no publicly traded corporation holds a 10% or greater interest in it.

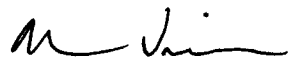
The United States Internet Service Provider Association is a national trade association. It has no parent corporation and no shares in the hands of the public.

The United States Internet Industry Association is a national trade association. It has no parent corporation and no shares in the hands of the public.

Progressive Internet Action is wholly owned by Richard R. Jones Communications, a sole proprietorship of Richard R. Jones. No publicly held company owns PIA's stock.

Southern Star has no parent company and no publicly traded corporation has a 10% or greater interest in it.

Frontier Communications of America, Inc. is wholly owned by Citizen Communications Company, which is publicly held; no publicly traded corporation owns more than 10% of Citizens Communications Company's stock.



Alan Untereiner

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**STATEMENT OF *AMICI CURIAE*'S IDENTITY, INTEREST IN THE
CASE, AND AUTHORITY TO FILE THIS BRIEF**

Amici SBC Internet Services (“SBC”), Verizon Internet Services Inc. (“Verizon”), BellSouth Telecommunications, Inc. (“BellSouth”), Frontier Communications of America, Inc., and Southern Star are companies that provide Internet access to subscribers across the United States, including to customers located within the Eighth Circuit. *Amicus* Progressive Internet Action (“PIA”) offers businesses web services – including web and email hosting, website and e-commerce development, and socially responsible e-marketing services. *Amicus* United States Internet Service Provider Association (“US ISPA”) is a trade association representing the interests of companies that operate Internet networks and provide Internet services.^{1/} *Amicus* United States Internet Industry Association (“USIIA”) is a national trade association for Internet commerce, content, and connectivity.

For the past several months, appellee, the Recording Industry Association of America (“RIAA”), has served *amici* SBC, Verizon, and BellSouth with hundreds of subpoenas issued under the purported authority of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(h). These subpoenas are substantively identical to those challenged by appellant Charter Communications, Inc. (“Charter”) in this case.

^{1/} Although it is a member of *amicus* US ISPA, AOL Time Warner does not join this brief.

Like Charter, *amici* have consistently objected to RIAA's subpoenas on the grounds that the subpoenas are not authorized by the DMCA, that their issuance violates several provisions of the Constitution, and that, in addition to other substantive and procedural defects, RIAA's attempt to include multiple requests on individual subpoenas is impermissible.

This Court's resolution of these issues will therefore have significant consequences for *amici*. The decision in this case will affect *amici*'s ability to resist such subpoenas, which *amici* consider vexatious, unlawful, and a threat to their customers' constitutional rights. If this Court affirms the District Court's decision enforcing RIAA's subpoenas, *amici* will incur significant costs and serious burdens from the flood of additional subpoenas that is sure to follow. Moreover, *amici* SBC and Verizon have extensive experience litigating these issues, experience that may help the Court to sort through the intricate statutory and constitutional questions presented by this appeal and discussed in this brief. *Amici* have submitted a motion for leave to file along with this brief, as required by FED. R. APP. P. 29(b).

SUMMARY OF ARGUMENT

The subpoenas challenged in this case are invalid for at least three independent reasons. *First*, as the D.C. Circuit has recently held, the DMCA simply does not authorize the issuance of a subpoena to an Internet service provider ("ISP") that acts

merely as a conduit for the transmission of material or information via peer-to-peer networks. See *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). In seeking subpoenas under these circumstances, RIAA is trying to obtain from the courts an invasive and expansive discovery tool that Congress has not seen fit to authorize. This Court should join the D.C. Circuit in firmly rejecting this unfounded effort to expand the statute beyond its terms. *Second*, the subpoenas are unconstitutional. Their very issuance represents a judicial act unconnected to any actual case or controversy, or any *expected* case or controversy, and thus require this Court to operate beyond the authority conferred on the judiciary by Article III of the Constitution. *Third*, even if the DMCA does allow the issuance of subpoenas in the first place, which it does not, RIAA's tactic of loading multiple requests onto a single subpoena is impermissible under the statute and under Rule 45 of the Federal Rules of Civil Procedure.^{2/}

^{2/} *Amici* agree with Charter, and with the consumer *amici*, that the subpoenas obtained by RIAA in this case also violate the First and Fifth Amendments of the Constitution. See *Amicus Curiae* Brief of Consumer and Privacy Groups in Support of Appellant Charter Communications.

ARGUMENT

I. THE DMCA DOES NOT ALLOW SUBPOENAS TO BE ISSUED WHERE, AS HERE, THE SERVICE PROVIDER HAS ACTED ONLY AS A CONDUIT FOR THE ALLEGEDLY INFRINGING MATERIAL

RIAA's central argument in this case – that the DMCA allows subpoenas to be served on ISPs to obtain the identities of subscribers who have allegedly engaged in peer-to-peer file sharing – has been roundly rejected by the only Court of Appeals to have considered the question. In a carefully reasoned, unanimous decision, which described one RIAA claim as “border[ing] on the silly,” *Verizon*, 351 F.3d at 1236, the D.C. Circuit held that subpoenas were not appropriate where – as in this case – the ISP has acted as a “mere conduit for the transmission of information sent by others.” *Id.* at 1237. This result is hardly surprising, as it flows readily from the text and structure of the statute.

The DMCA represents a calibrated compromise between the interests of copyright owners and the overriding goal of preserving the Internet as a medium of free expression and a place where privacy is respected. Title II of the statute thus codifies various immunities and responsibilities for ISPs based specifically on four different functions that they perform. See 17 U.S.C. § 512(a)-(d). In the present case, the critical distinction drawn by the statute is between an ISP acting, on the one hand, as a conduit for communication created and maintained by others and, on the other

hand, as the repository of infringing material on its own network. Immunities in the former situation are governed by Section 512(a) (“Transitory Digital Network Communications”), whereas in the latter they are governed by Section 512(c) (“Information Residing on Systems of Networks At Direction of Users”).^{3/}

ISPs act as conduits when they transmit material at the behest of their customers without selecting either the material or its recipients. See 17 U.S.C. § 512(a). This is exactly the role played by an ISP such as Charter whose subscribers use peer-to-peer software to share data files. In the peer-to-peer context, any copyrighted material shared by subscribers travels through the Internet connection offered by the ISP without the ISP’s knowledge or control. Such material is stored only on the individual computers used by subscribers, *not* on the system or network operated by, or for, the ISP itself. The ISP cannot view, access, or modify the material in question, and, because the files being shared reside on private computers belonging to subscribers, the service provider is unable to remove or block access to those files (see *infra*, note 5). Section 512(a) immunizes ISPs acting in this conduit

^{3/} Section 512(b) (entitled “System Caching”) addresses the intermediate situation, where a service provider temporarily stores information on its own system that is more permanently stored elsewhere. And Section 512(d) (“Information Location Tools”) applies where the service provider refers or links users to online locations that contain infringing information. Each of the subsections provides for its own limitations on liability; and Congress indicated that each is to be regarded as “separate and distinct.” 17 U.S.C. § 512(n); see also *infra*, pages 5-6.

capacity from liability for copyright infringement.

In marked contrast, in situations where ISPs do store, and thus have control over, infringing material, Section 512(c) imposes certain duties on them to assist copyright owners in protecting their intellectual property. In this regard, the central feature of subsection (c) is the so-called “take-down” notice described in Section 512(c)(3). When infringing material has been stored on an ISP’s network at the direction of a user, the copyright holder may provide “a notification of claimed infringement” to the ISP. 17 U.S.C. § 512(c)(3)(A). “To be effective,” that notice must provide, *inter alia*:

Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

Id. § 512(c)(3)(A)(iii). Once such notice is received, the service provider can limit its liability for infringement if it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” *Id.* § 512(c)(1)(C). Of utmost importance here, this take-down notice provision is “notably present” (that is, expressly mentioned) in Sections 512(b)-(d), but “notably absent” from Section 512(a). *Verizon*, 351 F.3d at 1234.

Under the DMCA, therefore, the obligations placed upon ISPs vary

substantially depending on the particular *function* that the ISP performs with respect to copyrighted material. These distinctions are not arbitrary; rather, service providers' responsibilities have been carefully tailored to these separate functions based, in large part, on the extent to which the service provider can actually access and remove allegedly infringing material. These carefully considered divisions are crucial to the operation of the statute, as Congress itself made explicit: "Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section." *Id.* § 512(n).

These functional distinctions also define and inform the scope of the DMCA's subpoena provision. This is so because the statute *requires*, as a condition precedent for the issuance of a subpoena, that the copyright holder serve a take-down notice upon the service provider (as well as a copy of that notice with the clerk of the court issuing the subpoena). See *id.* § 512(h)(2)(A). Indeed, subsection (h) includes no fewer than three separate cross-references to the notice provision set forth in Section 512(c) – to a provision applicable *only* where allegedly infringing material has actually been stored on the ISP's network. See *id.* § 512(h)(2)(A), (h)(4), (h)(5). This deliberate system of cross-references makes clear that DMCA subpoenas can be used only in situations where the ISP is actually in a position to take the steps contemplated by § 512(c)(3)(A)(iii): to locate the allegedly infringing material and

then either remove it or disable subscribers' access to it.

Indeed, a valid and effective Section 512(c) notification is not merely a suggested guideline for a party seeking a subpoena; rather, it is a mandatory prerequisite for every Section 512(h) subpoena. The statute says plainly that a subpoena may be issued only “[i]f the notification filed [with the clerk] *satisfies* the provisions of subsection (c)(3)(A). . . .” *Id.* § 512(h)(4) (emphasis added). Thus, the party seeking the subpoena must do more than recite meaningless words suggested by the statute; it must actually *satisfy* the substantive requirements of notification. This requires that, before a subpoena can be issued under Section 512(h), the copyright owner must present a notice to which the ISP can meaningfully respond.^{4/}

^{4/} That the architects of the DMCA meant for Section 512(c)(3)(A) notices to be used only where the service provider could actually take remedial action in response is confirmed by Section 512(d). That provision tells copyright owners how to notify service providers about the existence of infringing material to which the service provider is providing links or references. The notice must be the same as that described in Section 512(c)(3)(A), “except that . . . the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient *to permit the service provider to locate that reference or link.*” 17 U.S.C. § 512(d)(3) (emphasis added). Thus, because only the link – and not the material to which the link refers – is stored on the ISP’s network, the relevant notice provision directs the ISP to concern itself only with the former. This qualification reinforces that take-down notices under the DMCA are meaningful *only* when the service provider who receives the notice has something on its own system (whether copyrighted material or a link to such material) that it is actually in a position to remove or to prevent subscribers from accessing. It is therefore unsurprising that

This bedrock requirement is fatal to the subpoenas at issue here, because it is clear that a take-down notice simply cannot be effective in the peer-to-peer context. As described above, when its subscribers are engaged in peer-to-peer file sharing, an ISP serves the role of merely transmitting the allegedly infringing material; that material is neither stored on the provider's system nor under the provider's control. In *Verizon*, the D.C. Circuit quite properly recognized that the ISP's limited role ensured that any notice submitted by a copyright owner would be unable to "satisfy the provisions of subsection (c)(3)(A)":

No matter what information the copyright owner may provide, the ISP can neither "remove" nor "disable access to" the infringing material because that material is not stored on the ISP's servers. [The ISP] can not remove or disable one user's access to infringing material resident on another user's computer because [the ISP] does not control the content on its subscribers' computers.

Verizon, 351 F.3d at 1235; see also *id.* at 1237 ("An ISP performing a function described in § 512(a), such as transmitting e-mails, instant messages, or files sent by an internet user from his computer to that of another internet user, *cannot be sent an effective § 512(c)(3)(A) notification.*") (emphasis added). It is therefore an exercise in futility to provide a take-down notice to an ISP engaged, like Charter has been

no such notification provision is provided in Section 512(a), for ISPs simply cannot take those steps when performing conduit functions.

here, merely in conduit functions.^{5/}

From this, it follows inexorably that Section 512(h) does not allow RIAA to obtain subpoenas against an ISP that has merely provided Internet access to subscribers engaged in peer-to-peer file sharing, and has not stored any of the allegedly infringing material on its own system. It would be contrary to the letter and the purpose of the DMCA to allow a subpoena to be obtained where the central

^{5/} When a service provider is engaged in subsection (a) functions, the only action that the service provider could take in response to a take-down notice would be to terminate the subscriber's account altogether. It is clear, however, that termination is not the response contemplated by Section 512(c)(3)(A)(iii). See *Verizon*, 351 F.3d at 1235 (holding that any argument to the contrary "is undone by the terms of the Act"). Indeed, Title II of the DMCA uses very different – and very specific – language to describe the separate termination remedy. See 17 U.S.C. § 512(i)(1)(A) (requiring service providers to maintain a "policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers"); *id.* § 512(j)(1)(ii) (allowing court to enter injunctions "restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network . . . by terminating the accounts of the subscriber or account holder that are specified in the order"). Under the statute, therefore, blocking access to certain material and blocking access to the Internet altogether are "different remedies for the protection of copyright owners," and must not be conflated. *Verizon*, 351 F.3d at 1235; accord *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one Section of a statute but omits it in another Section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Springdale Mem. Hosp. Ass'n v. Bowen*, 818 F.2d 1377, 1383 n.6 (8th Cir. 1987) (noting that "because Congress used different language, 'we must presume that Congress intended the terms to have different meanings'" (quoting *Washington Hosp. Ctr. v. Bowen*, 795 F.2d 139, 146 (D.C. Cir. 1986))).

prerequisite for that subpoena cannot meaningfully be satisfied. Indeed, if subpoenas could issue even where the notice supporting them is necessarily ineffective, as RIAA contends, the express incorporation of Section 512(c)(3)(A)'s requirements in Section 512(h) would be read right out of the statute. This, in turn, would expand the subpoena provision far beyond what Congress envisioned or intended.

Accordingly, RIAA's tortured interpretation of Section 512(h) runs afoul of basic principles of statutory construction and must be rejected. See *United States ex rel. Harlan v. Bacon*, 21 F.3d 209, 212 (8th Cir. 1994) (“[I]t is a cardinal and long-revered canon of statutory construction that Congress is not to be presumed to have done a vain thing, namely, using superfluous language.”); *Continental Cable Vision of St. Paul, Inc. v. U.S. Postal Serv.*, 945 F.2d 1434, 1436 (8th Cir. 1991); (rejecting an interpretation that would have rendered a statutory provision “nothing more than a superfluous cross-reference”); cf. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (observing that the interpretation of a provision that seems ambiguous in isolation is often aided by looking at the remainder of the statutory scheme, which may reveal that “only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law”).

RIAA may believe that it should be allowed to sidestep the explicit requirements of Section 512(h) because no special subpoena provision exists to deal

with infringement through peer-to-peer activities. But it is hardly surprising that Congress neglected to authorize subpoenas in this circumstance: the DMCA, after all, was enacted before peer-to-peer technology was available to the public. See *Verizon*, 351 F.3d at 1238 (“[T]he legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; [peer-to-peer] software was not even a glimmer in anyone’s eye when the DMCA was enacted.”) (quotation marks omitted). *Amici* respectfully suggest that it is not the courts’ role to expand the DMCA to cover a technology entirely unknown to Congress when it carefully considered how best to balance the rights of copyright owners, service providers, and millions of Internet users.^{6/}

^{6/} Not only does extending Section 512(h) to permit the issuance of subpoenas to ISPs performing a conduit function far exceed the authority created by Congress, it also creates real world problems for individual subscribers that would *not* exist if the subpoenas could be issued only to ISPs who are storing material on their networks. Take, for example, the case of Sarah Seabury Ward, who was identified by her service provider, Comcast, in response to a DMCA subpoena obtained by RIAA, and in turn named as a defendant in a copyright lawsuit. See *No, this grandma didn’t download I’m a Thug*, HOUSTON CHRONICLE, Sep. 25, 2003, at B3, available at 2003 WL 57445437. Ms. Ward, however, did not use KaZaA (the service through which copyrighted material allegedly had been downloaded); indeed, her Macintosh computer could not even run KaZaA. Because Comcast provided Ms. Ward only with a connection to the Internet, RIAA could not have given Comcast information sufficient to locate the allegedly infringing material – as required by Section 512(c)(3)(A). This left Comcast with no way to verify the existence or location of that material. In contrast, had Comcast stored the

For all of these reasons, this Court should join the D.C. Circuit in enforcing the statute as written and holding that Section 512(h) does not authorize the issuance of subpoenas to an ISP who acts only as a conduit for peer-to-peer file sharing. See *Verizon*, 351 F.3d at 1237 (“[Section] 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others.”).

II. THE SUBPOENAS VIOLATE ARTICLE III BY REQUIRING FEDERAL COURTS TO ENGAGE IN JUDICIAL ACTS UNCONNECTED TO AN ACTUAL CASE OR CONTROVERSY

Amici believe that this case can be resolved solely based on the text and structure of the DMCA, which simply does not authorize the subpoenas at issue. But if the Court disagrees with that submission, it should still reverse because the subpoenas violate the Constitution. The reason is straightforward: they represent judicial acts unconnected to any case or controversy. Clearly, these subpoenas have not been issued in connection with any pending lawsuit. Indeed, not only has RIAA obtained them without having initiated a lawsuit, it has done so without averring that it expects to, or even that it *could*, initiate a lawsuit. Such a result, however, is

information on its system, and had RIAA satisfied the provisions of Section 512(c)(3)(A), Comcast would have been able to evaluate RIAA’s allegations, and recognize them as unfounded, before turning over Ms. Ward’s name and exposing her to a baseless and vexatious RIAA lawsuit.

forbidden by Article III, which, since the founding of the Republic, has carefully restricted the power of the federal courts to the resolution of tangible cases and controversies.

As the Supreme Court has consistently observed, “by the express terms of the Constitution, the exercise of the judicial power is limited to ‘cases’ and ‘controversies.’ Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.” *Muskrat v. United States*, 219 U.S. 346, 356 (1911); see also *McConnell v. FEC*, 124 S. Ct. 619, 707 (2003) (Rehnquist, C.J.) (“Article III of the Constitution limits the ‘judicial power’ to the resolution of ‘cases’ and ‘controversies.’”). Accordingly, where no case or controversy exists, a federal court lacks authority to take any judicial action, except dismissal of the proceeding. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

For Article III purposes, the Supreme Court has defined “case” as “a suit instituted according to the regular course of judicial procedure,” *Muskrat*, 219 U.S. at 356, and Justice Field has suggested that the term “implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.” *In re Application of the Pacific Ry. Comm’n*, 32 F. 241, 255 (N.D. Cal.

1887) (Field, Circuit Justice).²⁷ Preserving these limitations on judicial power is vital to the Framers’ vision of separation of powers, as it prevents the legislative and executive branches from foisting functions onto the judiciary— such as the investigation of claims that have not been submitted for formal adjudication – that may compromise the impartiality of the courts or cause them to lose public confidence. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (the case and controversy requirement goes “to the very heart of our constitutional form of government,” by limiting “the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process”).

The Supreme Court applied this foundational principle in addressing the propriety of administrative subpoenas in *United States v. Morton Salt Co.*, 338 U.S.

²⁷ Whatever the precise meaning of the murkier term “controversy,” it is “less comprehensive” than “case” because it “includes only suits of a civil nature.” *Pacific Ry. Comm’n*, 32 F. at 255. It should also be noted that when Article III refers to federal question jurisdiction, it speaks only of “cases . . . arising under . . . the [l]aws of the United States.” U.S. Const. Art. III, sec. 2. The word “controversy” is used to refer to other sorts of federal jurisdiction, including diversity jurisdiction and instances in which the United States or a State is a party. Accordingly, because the only basis for RIAA’s invocation of this Court’s power to issue the subpoenas in question derives from their possible connection to copyright infringement actions arising under federal law, Article III allows the Court to act *only* insofar as those subpoenas are connected to an actual *case*, rather than to some broader concept linked to the colloquial meaning of the word *controversy*.

632 (1950). Upholding the validity of a subpoena issued by the Federal Trade Commission, the Court drew a sharp distinction between the power of agencies to investigate through the issuance of compulsory process and the investigatory power of federal courts:

This case illustrates the difference between the judicial function and the function the Commission is attempting to perform. The respondents argue that since the Commission made no charge of violation either of the decree or the statute, it is engaged in a mere 'fishing expedition' to see if it can turn up evidence of guilt. We will assume for the argument that this is so. *Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends.* The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, *but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.*

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because *judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation*, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, *which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated*, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute *to an administrative body*, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Id. at 642-43 (emphases added). In other words, judicial subpoenas must be connected to the actual business of courts: the adjudication of concrete cases. The federal courts are not permitted, whether authorized by Congress or not, to participate in the investigation of *possible* violations of law that merely *may* help generate *future* cases to be pursued by private litigants. They lack the free-ranging investigative power that the Constitution allows administrative agencies, and indeed Congress itself, to exercise. *Morton Salt* thus stands for the proposition that Article III does not allow the courts to issue compulsory process on behalf of private parties, unless the information sought is reasonably connected to the adjudication of an actual case or controversy.

Similarly, in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), the Court carefully distinguished between notices sent by a court to potential plaintiffs in the context of a pending class action suit and the mere “solicitation of claims” to be brought before some court in the future. *Id.* at 174. Unlike the latter, the former were permissible, but *only* because they were “intertwined” with discovery in the live case and thus constituted an unobjectionable form of “case management.” *Id.* at 172, 174. Like *Morton Salt*, then, *Sperling* compels the conclusion that Article III precludes judicial involvement in *ex parte* procedures designed merely to uncover possible lawbreaking or drum up potential litigation by private parties.

The subpoenas that RIAA has obtained here represent a sharp break from these constitutional limitations on the judiciary’s use of compulsory process to assist private parties. Indeed, by obtaining and serving the DMCA subpoenas at issue here, RIAA is seeking to eviscerate the critical line drawn in *Morton Salt* and reaffirmed in *Sperling*. These subpoenas, which carry the name and authority of a federal court, including the penalty of contempt if disobeyed, are an exercise of judicial power unconnected to any case pending before this Court. A subpoena application under Section 512(h) need not (and the subpoenas at issue here do not) contain any averment that the applicant intends to, or is even empowered to, file suit for copyright infringement. And the mere fact that issuing the subpoenas may someday lead to litigation is insufficient to supply the missing case or controversy. To hold otherwise would be to allow the federal courts to participate in the very sort of ‘fishing expeditions’ and ‘claim solicitations’ disapproved in *Morton Salt* and *Sperling*. It would be to confuse the subpoena power of the courts – a power carefully and crucially limited by Article III – with the investigative power of a grand jury or administrative agency.^{8/}

^{8/} This disconnect between the issuance of compulsory process and the pendency of an actual lawsuit distinguishes Section 512(h) from deposition orders issued pursuant to Rule 27 of the Federal Rules of Civil Procedure. Rule 27 allows courts to order that depositions be taken before a civil action is actually filed, but *only* when the “person who desires to perpetuate testimony” files a verified

Nor does RIAA's request for a subpoena *itself* create the requisite case or controversy. It is well-established that a subpoena is merely a form of judicial process, a tool to assist the court and the parties in the resolution of actual, preexisting cases and controversies. See BLACK'S LAW DICTIONARY 1426 (6th ed. 1990) (defining "subpoena duces tecum" as a "court process, initiated by a party *in*

petition averring that "the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought." FED. R. CIV. P. 27(a)(1). The Rule is distinctly *not* a discovery device, but is instead designed to preserve evidence that otherwise might be lost. See *Penn. Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) (Rule 27 "may not be used as a substitute for discovery").

To satisfy Rule 27, the "allegation that the petitioner expects to be a party to an action must be *unequivocal*." *In re Skylight Shipping Co.*, No. 99-1290, 1999 WL 1293472, at *2 (E.D. La. July 9, 1999) (quoting 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2072 (3d ed. 1998)). Moreover, Rule 27 does not authorize an *ex parte* proceeding, but instead requires that the petitioner provide notice to "each person named in the petition as an *expected adverse party*." FED. R. CIV. P. 27(a)(2) (emphasis added). And resolving the issues raised by the petition itself requires adjudication. See FED. R. CIV. P. 27(a)(3). Accordingly, it is clear that a Rule 27 petition requires a court to take action meaningfully connected to a case or controversy, between adverse parties, which the court is expected to resolve through the exercise of judgment.

None of these factors is present with respect to DMCA subpoenas, which require the court to automatically issue a subpoena without any notice to – let alone adjudication of the rights of – the recipient of the subpoena or the individual subscriber, without the necessary involvement of an Article III judge. As used by RIAA, the subpoenas are an unprecedented device for obtaining discovery outside of any tangible case or controversy, or even the expectation of such a case or controversy. This is demonstrated by the numbers: in the District of Columbia alone, RIAA issued approximately 2,400 subpoenas in the final months of 2003, but filed fewer than 400 lawsuits. See <http://www.eff.org/IP/P2P/riaasubpoenas>.

litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue *in a pending judicial proceeding*") (emphases added). This general understanding is reinforced by the particular features of the subpoena application described by the DMCA. Not only is it an *ex parte* action, but it also neither calls upon the court to resolve any legal issue nor seeks any form of judicial relief. In acting on a subpoena application, the Court's role is limited to the largely ministerial task of determining that the paper work is submitted "in proper form." 17 U.S.C. § 512(h)(4); H.R. REP. 105-551 at 61 (July 22, 1998) (describing the issuance of a DMCA subpoena as a "ministerial function"). The participation or oversight of an actual Article III judge is not required.^{2/} These features illustrate that Section 512(h) was not intended to authorize a new cause of action, or to give rise to an independent case or controversy.

Nor is the possibility of *subsequent* litigation over the propriety of the

^{2/} That said, the issuance of a DMCA subpoena is clearly an exercise of the "judicial power," in that it carries the name and authority of the Court, including the penalty of contempt if it is not obeyed. See, e.g., *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975) ("A subpoena is a lawfully issued mandate of the court issued by the clerk thereof."); *In re Simon*, 297 F. 942, 944 (2d Cir. 1924) ("The fact that a writ of subpoena is actually signed in writing by the clerk of the court . . . makes it none the less the court's order."). The ministerial nature of the subpoenas' issuance thus does not excuse that act from the limitations imposed by Article III's case-or-controversy requirement. That ministerial nature does, however, reinforce that the issuance of such subpoenas does not, on its own, satisfy those requirements.

subpoena sufficient to give rise to the necessary case or controversy. The jurisdiction to issue a subpoena obviously cannot be bootstrapped into place by an after-the-fact dispute about whether that jurisdiction exists. See *In re Marc Rich & Co.* 707 F.2d 663, 669 (2d Cir. 1983) (“A federal court’s jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction.”); cf. *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294 (D.C. Cir. 2000) (rejecting the argument that federal jurisdiction to issue a temporary restraining order arose from a civil contempt claim based on a violation of that order as “a remarkable feat of bootstrapping”).^{10/}

Therefore, because the subpoenas at issue here are unrelated to any actual case or controversy, they plainly exceed the constitutional jurisdiction of this Court. And

^{10/} Nothing in the D.C. Circuit’s *Verizon* opinion is to the contrary. The Court there did suggest that the “district court’s jurisdiction to issue the orders here under review is not drawn into question by Verizon’s Article III argument.” 351 F.3d at 1231 n.* (citing *ICC v. Brimson*, 154 U.S. 447 (1894)). But this observation is nothing more than a recognition of the familiar maxim that a federal court always has jurisdiction to hear a challenge to its jurisdiction, and that an appellate court has jurisdiction to review the lower court’s resolution of that challenge. See *United States v. Ruiz*, 536 U.S. 622, 628 (2002). The fact that a court may adjudicate a motion to *enforce* (or, as here, to quash) a subpoena certainly does not imply that the court therefore has the power under Article III to *issue* a subpoena outside the context of a pending or impending case or controversy. Cf. *Silverman v. Berkson*, 661 A.2d 1266, 1271 (N.J. 1995) (observing that “the power to issue a subpoena and the power to enforce a subpoena are different incidents of sovereignty, and such powers are not necessarily identical”).

obviously, “the subpoena power of a court cannot be more extensive than its jurisdiction.” *United States Catholic Conf. v. Abortion Rights Mobilization League, Inc.*, 487 U.S. 72, 76 (1988). “The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others. Rather, the discovery devices in federal court stand available to facilitate the resolution of *actions* cognizable in federal court.” *Houston Bus. Journal, Inc. v. Office of the Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (emphasis added). No such action is currently pending here.

Congress may not expand these powers merely because it considers doing so desirable as a matter of public policy. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (holding that Congress may not create cases or controversies by statutory decree). Similar attempts to alter the fundamental “judicial nature” of the federal courts have been consistently rejected in the past. *Hayburn’s Case*, 2 U.S. (2 Dallas) 408 (1792) (five Supreme Court justices, sitting as Circuit Judges, invalidated a law that assigned federal judges the role of making recommendations on pension applications to the Secretary of War); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851) (striking down a law assigning judges the task of adjusting claims presented by Spanish inhabitants of Florida under a treaty).

In sum, then, because the subpoenas at issue in this case have been issued on

behalf of a private party in the absence of any underlying legal action, and because they are not reasonably calculated to assist in the resolution of a cognizable action, the subpoenas simply exceed the boundaries set by Article III. This result is not some “nicety of legal metaphysics,” but “rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from . . . the excessive use of judicial power.” *Catholic Conf.*, 487 U.S. at 77.

III. IT IS IMPERMISSIBLE FOR RIAA TO INCLUDE REQUESTS TO MULTIPLE, UNRELATED SUBSCRIBERS IN A SINGLE SUBPOENA

Finally, the Court should reject RIAA’s tactic of including multiple requests for subscribers’ identities in a single subpoena. This approach is not authorized by the DMCA and, if accepted, could create unnecessary and inappropriate burdens for ISPs and even greater risks to Internet users.

The language of the statute is straightforward. Whenever it makes reference to a user sought to be identified by subpoena, Section 512(h) uses the singular, making clear that each subpoena is to be seek the identity of only one alleged infringer: “A copyright owner . . . may request the clerk of any United States district court to issue a subpoena to a service provider for identification of *an alleged infringer* in accordance with this subsection.” 17 U.S.C. § 512(h)(1) (emphasis

added); see also *id.* § 512(h)(2)(C), (3). Nothing in the statute so much as hints that copyright owners (or their agents) are permitted to load as many requests as they please onto a single subpoena. To adopt a rule leaving the size and scope of subpoenas up to RIAA is to adopt no rule at all.

Furthermore, allowing RIAA to do so poses potentially serious problems for service providers such as *amici*. For example, RIAA could demand subscriber records pertaining to thousands of different and unrelated IP addresses in a single subpoena, under a single case number, and demand expeditious compliance on the grounds that the service provider need respond only to one subpoena. This is not idle speculation. RIAA has clearly mechanized its battle against Internet users and music fans. It has shown the capability to generate hundreds, if not thousands, of copyright-related complaints. Without limits, RIAA will undoubtedly push the line beyond reason by loading a single subpoena with dozens, if not hundreds, of requests.

This tactic also poses a greater risk of inaccuracy and abuse. Requiring RIAA to obey the statute and use separate subpoenas for every alleged infringer at least imposes an administrative and financial check on possibly dubious requests. In contrast, under RIAA's new approach, the marginal cost of demanding another name is essentially nil. The absence of any external check makes mistakes more likely and further shifts the burdens (both monetary and administrative) associated with these

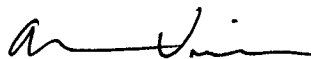
subpoenas from RIAA to the service providers. In light of these problems, and given that the use of multiple-request subpoenas finds no support in the text of the DMCA, any subpoenas that seek the identity of more than one subscriber must be quashed.

CONCLUSION

For all of the foregoing reasons, the order of the District Court denying appellant Charter's Motion to Quash should be reversed.

DATED: January 26, 2004

Respectfully submitted,



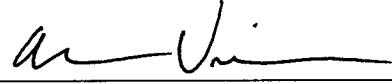
Alan Untereiner
Kathryn S. Zecca
Brian Willen
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
Tel.: (202) 775-4500
Fax: (202) 775-4510

Attorneys for Amici Curiae

CERTIFICATION OF COMPLIANCE

Counsel for *amici curiae* hereby certifies that this brief complies with Federal Rules of Appellate Procedure 29(c) and 32. It contains 6,625 words, excluding the portions of the brief exempted. The brief is printed using 14-point Times New Roman font and was prepared using WordPerfect 10. *Amici* have also submitted to the Court a virus free 3.5" floppy disk containing a copy of this brief in PDF form as required by Eighth Circuit Rule 28A(d).

DATED: January 26, 2004

By 
Alan Untereiner
Kathryn S. Zecca
Brian Willen
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
(202) 775-4515 (phone)
(202) 775-4510 (fax)

CERTIFICATION OF SERVICE

I hereby certify that on this 26th day of January, 2004, I caused copies of the foregoing Brief of SBC Internet Services, Verizon Internet Communications Inc., BellSouth Telecommunications, Inc., United States Internet Service Provider Association, United States Internet Industry Association, Progressive Internet Action, Frontier Communications of America, Inc., and Southern Star as *Amici Curiae* in Support of Appellant to be served via Federal Express upon the following:

K. Lee Marshall, Esq.
Bryan Cave, LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102

John D. Seiver
Cole & Raywid & Braverman LLP
1919 Pennsylvania Ave. NW
Suite 200
Washington, D.C. 20006

Yvette Molinaro, Esq.
Mitchell Silberberg & Knupp LLP
Trident Center
11977 West Olympic Blvd.
Los Angeles, CA 90064

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

Thomas J. Perrelli, Esq.
Jenner & Block, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005

James W. Erwin
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101-1693

Cindy A. Cohen
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110