

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE SUBPOENA TO BOSTON COLLEGE

RECORDING INDUSTRY ASSOCIATION
OF AMERICA,

Plaintiff,

v.

BOSTON COLLEGE,

Defendant,

and

JANE DOE

Intervenor.

Misc. A. No. 03-MC-10256-WGY

MOTION TO QUASH

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INTRODUCTION

The First Amendment protects the right to engage in anonymous speech. The right to anonymity is more than 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). This fundamental right to anonymity is especially critical for a new and powerful form of speech: the Internet. Based on little more than a “good faith” belief that Jane Doe, a student at Boston College, has used the Internet to infringe unspecified copyrights of an unspecified copyright holder, the Recording Industry Association of America (“RIAA”) has served a subpoena that seeks to strip Jane Doe of her fundamental right to anonymity. To make matters worse, RIAA asserts that it can obtain the subpoena from this Court through a “ministerial” procedure that does not: (1) require that the request be in support of a case or controversy; (2) provide notice to Jane Doe of the existence of the request, much less the specifics of the claim; (3) afford Jane Doe an opportunity to be heard; or (4) require a judge to review the legal and constitutional issues presented. Because the procedure used by RIAA is not authorized by statute, is procedurally deficient, and violates both Article III and the due process clause of the Constitution, the Court should quash the subpoena and protect Jane Doe’s right to anonymity.

FACTUAL BACKGROUND

On July 2, 2003, under the purported authority of the novel provisions of Section 512(h) of the Digital Millennium Copyright Act (“Section 512(h)”), RIAA obtained a subpoena from the clerk of the district court for the District of Columbia. The subpoena required Boston College (“BC”), in its capacity as an Internet Service Provider (“ISP”), to provide the identities of three of its students alleged to have committed copyright infringement while using BC’s computer system.¹ BC moved to quash the subpoena in the District of Massachusetts on venue

¹ BC, though not a typical ISP, provides its staff and students access to the Internet through a network it hosts. None of the content allegedly downloaded or allegedly made available for uploading by Jane Doe was stored on the BC system. A true copy of July 2nd subpoena, as well as all other references, excepting cases and statutes, cited in this Memorandum are attached to the Affidavit of David E. Plotkin, submitted herewith.

grounds. The District Court (Tauro, J.) granted the motion and quashed the subpoena. Boston College v. RIAA, Civ. A. No. 03-MC-10210 (JLT).

On August 25, 2003, RIAA obtained a new subpoena – this time from the clerk of this Court – directing BC to provide RIAA with information, “including name, address, telephone number, and e-mail address, sufficient to identify” the three BC students. The subpoena was accompanied by a “Declaration Pursuant to 17 U.S.C. § 512(h)” and an August 20, 2003 letter from RIAA to BC. The August 20 letter asserts that Jane Doe, one of the three students whose information was subpoenaed, was “offering for download over the internet files containing copyrighted sound recordings owned by RIAA member companies.” Neither the subpoena nor the letter identifies the actual owner(s) of the allegedly infringed copyrights or the specific files claimed to contain copyrighted songs that Jane Doe allegedly made available on the Internet.

In an attachment to its August 20 letter, RIAA asserted that the allegedly improper file sharing was occurring through iMesh, a popular peer-to-peer file-sharing system. Peer-to-peer technology enables users to create a network that allows them to search the contents of their peers’ computers and to share information, either as text, audio or video files. Although it is possible to exchange copyrighted material across the network, many users also share a broad range of material that is either in the public domain – such as the works of Shakespeare, Plato or the Bible – or whose copyright holders have consented to reproduction and distribution among network users – such as up-and-coming artists who are looking to create a “buzz” among music listeners. See Chris Nelson, Upstart Labels See File Sharing as Ally, Not Foe, N.Y. Times, Sept. 22, 2003, at C1.

Many peer-to-peer programs allow users to access the network without registering their name or IP address, 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 receive valuable news and cultural materials. See, e.g., New Technology May Foil PRC Attempts at Censorship Efforts, The China Post, March 12, 2003.

BC notified Jane Doe via a letter dated August 28, 2003, which was sent to her mother's address in Washington, D.C., that her identity was being sought and that the college intended to turn over that information on September 8, 2003 unless she filed an objection in this Court. On September 8, Jane Doe filed an Emergency Motion to Stay Subpoena. This Court (Young, C.J.) stayed the subpoena until oral argument could be heard on the motion to stay. Before oral argument was held, Jane Doe and RIAA stipulated to a briefing schedule for this motion.

ARGUMENT

I. THE SUBPOENA IS UNAUTHORIZED BECAUSE THE NOVEL SUBPOENA POWERS OF SECTION 512(h) AUTHORIZE A SUBPOENA ONLY WHEN THE INFORMATION AT ISSUE IS STORED ON THE ISP'S SYSTEM.

Section 512 recognizes that ISPs may encounter copyrighted content on their systems in various ways. The statute thus imposes different liability limitations, procedures and obligations on ISPs based on their differing levels of involvement with the content. On one end of the spectrum is the situation in this case. Here, the alleged infringing files are not stored on BC's system. This case is thus controlled by subsection (a), which addresses circumstances in which the ISP performs a pure transmission or "conduit" function, simply providing the system through which information is transmitted. 17 U.S.C. § 512(a). On the opposite end of the spectrum is the situation contemplated by subsection (c), which addresses material actually stored on an ISP's servers at a user's request. 17 U.S.C. § 512(c). In that context, the ISP has access to the allegedly infringing material, and the DMCA therefore places certain obligations on such ISPs in exchange for immunity, including the duty to "remove" or "disable access to" infringing material upon receipt of a "take down notice" sent by a copyright owner (detailed in § 512(c) (3)(A)).

Subsection (h), the subpoena provision at issue here, expressly conditions the issuance of a subpoena on certain statutory requirements. Specifically, subsection (h) requires that the subpoena request be filed with a "copy of a notification described in subsection (c)(3)(A) (i.e., the takedown notice). 17 U.S.C. § 512(h)(2)(A). Subsection (h)(4), entitled, "Basis for granting subpoena," states that if the notification filed pursuant to subsection (h) "satisfies the provisions of subsection (c)(3)(A)," among other requirements, "the clerk shall expeditiously issue and sign

the proposed subpoena.” Id. at § 512 (h)(4). Finally, subsection (h)(5) provides that the ISP must comply with the subpoena only if it is accompanied by, or served subsequent to, a (c)(3)(A) takedown notice. Id. at § 512(h) (5).

The repeated cross-references to subsection (c)(3)(A) in subsection (h) demonstrate that the issuance of a Section 512(h) subpoena is dependent upon a proper 512(c) (3)(A) takedown notice. Subsection (a), by contrast, contains no such takedown provision. As a result, a subpoena sought under subsection (h), which is conditioned on a proper (c)(3)(A) notice, cannot logically apply in the subsection (a) context.²

The language of subsection (c)(3)(A) also establishes that it only applies when allegedly infringing content is stored on an ISP’s system. For instance, “To be effective under this subsection [(c)],” a takedown notice must contain “identification of the material that is claimed to be infringing . . . and that is to be removed or access to which is to be disabled.” 17 U.S.C. § 512(c) (3)(A)(iii). This requirement necessarily presumes the ability of the ISP to remove or disable access to the allegedly infringing content. In other words, it presumes that the ISP can control the content at issue. Here, BC has *no* control over the music Jane Doe allegedly copied onto her personal computer.³

This issue has been addressed by the district court for the District of Columbia. See In re Verizon Internet Services, Inc., 240 F. Supp. 2d 24 (D.D.C. 2003) (“Verizon I”). That court’s determination is now on appeal to the D.C. Circuit. The Verizon I court found, in part, that limiting the DMCA’s subpoena power to just the subsection (c) context would “create a huge loophole in Congress’s effort to prevent copyright infringement on the internet.” Verizon I, 240

² The cross-references in subsection (h) cannot be ignored or written out of the statute. See Estate of Leder v. Comm’r of Internal Revenue, 893 F.2d 237, 241 (10th Cir. 1989) (“express cross reference” in statute revealed Congress’s intention that the linked subsections be interpreted “*in para materia*”); Overseas Educ. Ass’n v. FLRA, 824 F.2d 61, 65 (D.C. Cir. 1987) (“highly specific cross reference” must be read to limit scope of more general statutory provision).

³ Subsection (c)(3)(A) similarly requires that a takedown notice contain “information reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. § 512 (c)(3)(A)(iii). “The goal of this provision is to provide the service provider with adequate information to find and examine the allegedly infringing material expeditiously.” H. Rep. No. 105-551, at 55. In the subsection (a) conduit context, however, this is impossible. BC cannot find, let alone examine, information stored on a student’s personal computer.

F. Supp. 2d at 31. If so, the “loophole” was created by Congress, and should be honored by this Court. See Sony Corp. v. Universal City Studios, 464 U.S. 417, 431 (1984) (“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.”).⁴

This Court should heed both the Supreme Court’s words in Sony, as well as the history, structure and language of the DMCA, and determine that Section 512(h) subpoenas are limited solely to copyright infringement in the context of subsection (c).

II. THE SUBPOENA IS INVALID BECAUSE IT IS PROCEDURALLY DEFICIENT.

Even if Section 512(h) does authorize this subpoena, it should still be quashed because it is procedurally deficient. First, Section 512(h) does not permit RIAA to issue – as it did here – a single subpoena for the identity of multiple persons allegedly engaged in unrelated acts. See 17 U.S.C. § 512(h)(1) (allowing for subpoena that identifies “*an* alleged infringer”) (emphasis added); id. at § 512(h)(2)(C) (the purpose of the subpoena is “to obtain the identity of *an* alleged infringer”) (emphasis added); id. at § 512(h)(3) (“information sufficient to identify *the* alleged infringer”) (emphasis added).

Second, the subpoena is overbroad because it improperly requests Jane Doe’s email address. Section 512(h)(3) provides that a subpoena may require production of “information sufficient to identify the alleged infringer.” Clearly, a name and address are sufficient to satisfy this requirement. As email addresses are specifically mentioned elsewhere in § 512, see 17 U.S.C. § 512(c) (3)(A)(iv), Congress’s failure to mention them in § 512(h) should be dispositive.

Third, the subpoena fails to identify the copyright owner on whose behalf the subpoena is sought. Section 512(h) states that only a “copyright owner or a person authorized to act on the owner’s behalf” may obtain a subpoena. See 17 U.S.C. § 512(h)(1); see also id. at § 512(h)(5). The RIAA subpoena served on BC is accompanied by a letter from a Los Angeles law firm

⁴ Peer-to-peer networks did not, as the Verizon I court itself admitted, id. at 38, exist at the time the DMCA was negotiated and enacted. Because peer-to-peer networks were not yet in use, Congress could not have been seeking, in enacting subsection (a), to legislate with regard to peer-to-peer technology.

stating that it is “authorized to act on behalf of the RIAA and its member companies.” However, neither the members of RIAA, nor the owners of the specific copyrights at issue, are identified.

III. THE SUBPOENA IS INVALID BECAUSE IT VIOLATES ARTICLE III’S MANDATE THAT COURTS MAY ACT, AND JUDICIAL PROCESS MAY BE OBTAINED, ONLY IN PENDING CASES OR CONTROVERSIES.

Article III of the Constitution limits the exercise of judicial power to “cases” or “controversies.” U.S. Const. Article III, § 2. From the earliest days of this country, the case or controversy requirement of Article III has been zealously guarded. See, e.g., Hayburn’s Case, 2 U.S. (2 Dall.) 408 (1792); Muskraat v. United States, 219 U.S. 346, 353-63 (1911); United States v. Morton Salt, 338 U.S. 632, 641-42 (1950). Where, as here, there is no case or controversy, a federal court cannot take any judicial action, except dismissal of the proceeding. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94 (1998); Ex parte McCordle, 74 U.S. (7 Wall.) 506, 514 (1868). Section 512(h), which purports to authorize issuance of a judicial subpoena absent a pending case and with no requirement that a future case even be contemplated, is in clear violation of Article III.

The issuance and enforcement of a subpoena is not outside the strictures of Article III. A subpoena is a form of judicial process. See Black’s Law Dictionary 1426 (6th ed. 1990) (“subpoena duces tecum” is a “court process, initiated by a party in litigation, compelling production of certain specific documents . . . material and relevant to facts in issue in a pending judicial proceeding”); 9 Charles A. Wright, et al., Federal Practice and Procedure § 2451 ((3d ed. 1971). As a result, “[t]he judicial subpoena power not only is subject to specific constitutional limitations . . . 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.” Morton Salt, 338 U.S. at 642. A court can, thus, only issue a subpoena when it has jurisdiction over an existing, not hypothetical, matter. See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) (“if a district court does not have subject matter jurisdiction over the underlying action, and the process was not issued in aid of determining that

jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed.”) (citation omitted).

This issue was considered by the same D.C. district court in In re Verizon Internet Services, Inc., 257 F. Supp. 2d 244 (D.D.C. 2003) (“Verizon II”). The Verizon II court asserted that Article III is not triggered because the clerk issuing a Section 512(h) subpoena performs a “quintessentially ministerial act” that is not an “act of ‘the court.’” Verizon II, 257 F. Supp. 2d at 249. Issuance of a judicial subpoena, however, is an exercise of judicial power. See, e.g., 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.”); see also 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.”). Were it otherwise, a court clerk could perform a function when a judge (without jurisdiction) could not. See, e.g., Lloyd v. Lawrence, 60 F.R.D. 116, 118 (S.D. Tex. 1973) (“Obviously, the Clerk may not take action which the Court itself may not take.”). In addition, the subpoena is issued in the name of the district court and carries with it the enforcement authority of the court.

The Supreme Court has repeatedly rejected attempts by the legislative and executive branches to relax or modify Article III’s “case or controversy” requirement. See, e.g., United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551 (1996) (the requirement of Article III standing is “absolute” and not “malleable by Congress”); Morton Salt, 338 U.S. at 641-42 (“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.”); ICC v. Brimson, 154 U.S. 447, 485 (1894) (reiterating the “salutary doctrine that congress . . . may not impose upon the courts of the United States any duties not strictly judicial”). Any legislative attempt to require court clerks to perform judicial duties in the absence of a case or controversy should likewise be rejected. See Lloyd, 60 F.R.D. at 118.

The Verizon II court also attempted to avoid the strictures of Article III by relying on Federal Rule of Civil Procedure 27, which authorizes the taking of depositions before litigation

is commenced in order to preserve testimony necessary to an imminent lawsuit. Rule 27 is far different from Section 512(h). First, a party requesting discovery under Rule 27 must state, under oath, a definite intention to bring a lawsuit in federal court relating to the issues for which discovery is sought. Fed. R. Civ. Proc. 27(a)(1); see also 8 Charles A. Wright, et al., Federal Practice and Procedure § 2072 (3d ed. 1998). Section 512(h) does not even require a subpoenaing party to assert that it is *contemplating* the filing of a lawsuit, let alone to *confirm* that it will file such a lawsuit. Indeed, RIAA, which does not own the copyrights at issue, could not even bring such a lawsuit as a matter of law because it does not have standing to do so.

Second, unlike Section 512(h), Rule 27 can be used only in limited circumstances: when it is necessary to perpetuate testimony that will otherwise imminently be lost forever. See, e.g., Ash v. Cort, 512 F.2d 909, 911 (3d Cir. 1975).

Third, Rule 27, in contrast to Section 512(h), requires notice to be provided, an evidentiary showing to be made, and a pre-discovery hearing before a judge to determine if the requested discovery should be permitted. A Rule 27 request is, in other words, a “suit” for the perpetuation of testimony, with all the elements of the promised claim plead in the petition. See Arizona v. California, 292 U.S. 341, 347 (1934) (“The sole purpose of such a [Rule 27] suit is to perpetuate the testimony.”). As discussed below, Section 512(h) subpoenas, by contrast, are issued on an ex parte basis, with no requirement of notice, no requirement that any evidentiary showing or specification of claim be made, and no judicial involvement or review. The existence of Rule 27, in sum, does not suggest that Section 512(h) is constitutionally firm.⁵

⁵ The Verizon II court also erroneously suggested that Section 512(h) subpoenas are similar to subpoenas authorized by a few other federal statutes. Verizon II, 257 F. Supp. 2d at 251-52. None of those statutes, like Section 512(h), authorizes the issuance and enforcement of judicial subpoenas to private parties seeking to gather facts unrelated to a pending or promised federal lawsuit. Nor do those statutes authorize issuance of subpoenas without judicial review and a judicial determination.

IV. SECTION 512(H) AND THIS SUBPOENA PURPORTEDLY ISSUED PURSUANT TO IT VIOLATE THE DUE PROCESS CLAUSE.

A. Jane Doe Has A Liberty Interest In Anonymity On The Internet.

The Supreme Court has recognized 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 part of “our national heritage and tradition.” Watchtower Bible, 536 U.S. at 166.

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).

The longstanding right to anonymity is especially critical to a thoroughly modern medium of expression: the Internet. The rise of the Internet has created an opportunity for dialogue and expression on a scale and in a manner previously unimaginable. 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).

Recognizing the speech-enhancing and equalizing features of the Internet, the Supreme Court has accorded it the highest degree of constitutional protection. Id. (“no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”). This rigorous protection extends to speech conducted anonymously on the Internet. See, e.g., Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“the constitutional rights of Internet users, including the right to speak anonymously, must be carefully safeguarded”); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (confirming the

importance of the “legitimate and valuable right to participate in online forums anonymously or pseudonymously”); ACLU v. Johnson, 4 F. Supp. 2d 1029, 1033 (D. N.M. 1998), *aff’d* 194 F.3d 1149 (10th Cir. 1999) (striking down law “that prevents people from communicating and accessing information anonymously”); ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down law prohibiting anonymous Internet speech).

B. Section 512(h) Does Not Contain Adequate Procedural Protections Against The Curtailment of Constitutionally Protected Expression.

The subpoena issued here seeks the identity of Jane Doe. Because Section 512(h) and this subpoena seek to strip Jane Doe and other Internet speakers of their constitutionally protected liberty interest in anonymity, the due process clause of the Fifth Amendment requires sufficient procedural protections to be put in place. Matthews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* 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 [unprotected speech] 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”).

Section 512(h) fails to provide adequate procedural protections. Issuance of a 512(h) subpoena is a purely ministerial act by the clerk of the court and must be granted – without 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.

Nothing more is necessary. No notice need be provided to the individual whose identity is being sought. Nor must that individual be given an opportunity to challenge the subpoena.

Although the statute requires a “good faith belief” that the conduct in question violates a copyright, the statute imposes no due diligence requirement on the party seeking the subpoena to verify its “belief” in any manner. Nor does the statute require the subpoenaing party to present any evidence supporting its belief or to provide specific allegations supporting its claim. Finally, to make matters worse, the subpoenas are issued without any judicial oversight or involvement.

To determine if these procedural protections are sufficient to pass constitutional scrutiny, the following factors should be examined: (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. Matthews, 424 U.S. at 335; see also Connecticut v. Doe, 501 U.S. 1, 10-11 (1991). These factors demonstrate that Section 512(h) falls far short of the procedural protections required by the First Amendment and Due Process.

1. Jane Doe and Other Internet Users Have A Substantial And Constitutionally Protected Interest In Anonymous Expression.

As detailed earlier, Internet users’ interest in engaging in online communications with anonymity is a substantial and constitutionally protected right. The right to online anonymity is especially critical because unlike traditional media speakers, Internet speakers typically do not have professional training to judge the credibility of the information they post, editors to peruse their posts for problems or lawyers to advise them of the complexities of the laws possibly implicated by their statements. Faced with the threat of having to defend against costly litigation arising out of an erroneously or maliciously issued – but easily obtained – subpoena, many legitimate users may simply decide that using the Internet as a forum for their communications is not worth the risk. In addition, for many online speakers, such as critics of a company who wish to disclose potentially damaging facts, the protection of anonymity is essential to their willingness to speak. See, e.g., 2theMart.com, 140 F. Supp. 2d at 1093 (“The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously.”).

Several courts that have considered similar discovery requests designed to uncover the identity of anonymous Internet speakers have recognized the substantial interest in maintaining online anonymity. In Seescandy.com, a pre-service subpoena sought the identity of an alleged trademark infringer. The court ruled that the party seeking the subpoena needed to satisfy certain standards of proof at a pre-disclosure hearing, explaining that:

This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity. Thus some limiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted.

185 F.R.D. at 578. The court in Doe v. 2theMart.com, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), similarly recognized the need to protect the right to anonymous online speech: "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." Id. at 1093. See also Dendrite Int'l Co. v. Doe No. 3, 775 A.2d 756, 771 (NJ Super. A.D. 2001) (strict procedural safeguards must be imposed "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet").

In spite of these cases, the Verizon II court concluded that the anonymous online speakers in that case had only a minimal right to anonymity because the allegedly infringing speech was not political speech, but "alleged copyright infringement." Id. at 260. The fundamental flaw in the Verizon II court's analysis is that when a Section 512(h) subpoena is issued – *i.e.*, when the right to anonymity will be lost – no determination has yet been made as to whether the anonymous speech at issue is protected or not. The First Amendment does not

protect speech constituting proven copyright infringement. The First Amendment does, however, provide full protection to speech allegedly constituting copyright infringement.⁶

That is why, as discussed below, procedural safeguards must be put in place to ensure that legitimate expression is not suppressed merely because of the possibility that it may be unprotected.

2. The Minimal Procedural Protections of Section 512(h) Give Rise To A Substantial Risk of Erroneous Deprivation Of Constitutional Rights That Adequate Procedural Safeguards Would Diminish.

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 provision is so totally lacking in procedural protections, however, that it is an invitation to mistake and misuse. This fear is not merely hypothetical. Numerous examples of both mistake and misuse have already been reported. It is a near certainty that they are not the only such instances, nor the last such instances that will occur. 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).⁷ See McCullagh, RIAA Apologizes For Erroneous Letters, CNET News, May 13, 2003, <http://news.com.com/2100-1025-1001319.html>.

The following examples of the mistakes that have been made are illustrative:

- RIAA issued a Section 512(h) subpoena, obtained the identity of an anonymous individual, and filed a federal copyright infringement action in Boston 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 Newbury, Massachusetts woman who has apparently never downloaded any songs and does not even own a computer capable of running the file-sharing software allegedly

⁶ That the expression at issue is alleged to constitute copyright infringement, instead of trademark infringement, defamation, obscenity, or any other illegitimate expression, does not limit the need for First Amendment protection. If anything, it increases it. Copyrights, by their nature, necessarily implicate First Amendment rights because they impose restrictions on the use of certain materials. For that very reason, copyright law has “built-in First Amendment accommodations,” including the fair use doctrine and the idea/expression distinction. Eldred v. Ashcroft, 123 S. Ct. 769, 788 (2003).

⁷ 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 basis for the Section 512(h) provisions.

used. RIAA withdrew its lawsuit earlier this week. See Gaither, *Recording Industry Withdraws Suit*, Boston Globe, Sep. 24, 2003, at C1.

- 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. See Arrison, *When the Music Stops*, Tech Station, February 7, 2003, <http://www.techcentralstation.be/020703C.html>
- 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. In its apology, RIAA blamed a “temporary employee” for the error and admitted that it does not routinely require its “Internet copyright enforcers” to listen to the song that is allegedly infringing. See McCullagh, *RIAA Apologizes for Threatening Letter*, CNET News, May 12, 2003, http://news.com.com/2100-1025_3-1001095.html.
- The Internet Archive is a well-known website containing numerous public domain films. A purported copyright owner sent a notice of copyright infringement to the Internet Archive in connection with two films, listed 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>.

Several instances of the 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 incorrectly claimed that its prices were copyrighted; in fact, prices are not copyrightable facts. Other retailers, including K-Mart, Jo-Ann Stores, OfficeMax, Best Buy and Staples have also improperly served Section 512(c) notices on the same theory. See McCullagh, *Wal-Mart Backs Away from DMCA Claim*, CNET News, Dec. 5, 2002, <http://news.com.com/2100-1023-976296.html>.
- 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.

The instances of mistake and misuse can only be expected to increase. Indeed, RIAA has apparently used Section 512(h) to obtain over 1500 subpoenas in the past two months alone. Many more are promised, and expected. Even if the vast majority of such subpoenas are correctly issued, it is highly likely that a significant number of such subpoenas will be erroneously served – requiring the disclosure of the identity of anonymous individuals engaging in legitimate and protected online speech.⁸

The consequences from this lack of procedural protections are far from trivial. In addition to being deprived of one's constitutional rights, there is nothing to stop a vindictive business or individual from claiming copyright to acquire the identity of critics. Even worse, there are no safeguards to stop a batterer or a cyberstalker or a pedophile from using Section 512(h) to obtain – without any questions – an intended victim's identifying information, including their name and address. All that is required is to fill out the required paperwork and claim a "good faith" belief that copyright infringement has occurred. This danger is, unfortunately, not far-fetched. Indeed, in connection with the Verizon II motion to quash, representatives of organizations protecting children from online predators and battered women filed declarations voicing their very real concerns about the potentially devastating consequences created by Section 512(h)'s lack of procedural protections. See Declaration of Parry Aftab, Executive Director of WiredSafety.org, an online safety group, 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.

⁸ The risk of mistake and misuse is magnified – and made even more probable – by the widespread use by companies, including RIAA, of automated software robots ("bots") to monitor Internet activity. When these bots find a possibly suspicious file, they note its location, the date and time, and automatically generate lists – sometimes, even Section 512(c) notices – that get sent to the relevant ISPs. These bot-generated notices seem to get little, or no, human review, let alone a meaningful analysis of whether an infringement claim or fair use defense exists.

The substantial risk of mistake and misuse exists because, as detailed earlier, Section 512(h) requires little more than an ex parte assertion of “good faith.” In Connecticut v. Doe, 501 U.S. 1 (1991), the Supreme Court invalidated a Connecticut statute authorizing pre-judgment attachment of real estate based, as here, solely on the submission of a “good faith” affidavit and without any showing of extraordinary circumstances. The Court held that the statute violated due process because it permitted an attachment without affording the property owner prior notice or an opportunity to be heard. Id. at 13-14. Similarly, in Fuentes v. Shevin, 407 U.S. 67 (1972), the Court also found that an individual’s self-interested statement of “belief in his [own] rights” was insufficient to satisfy the requirements of due process. Id. at 83.

Section 512(h)’s “good faith” requirement is likewise not sufficient. Instead, the Court should follow the holdings of several courts that have been faced with similar discovery requests seeking to uncover the identity of anonymous online speakers and require that (1) notice be given to the user that the subpoenaing party is seeking its identity, and (2) a complaint or other pleading 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. Then, the Court must (1) afford the user an opportunity to be heard, and (2) determine, on its own, regardless of whether the user objects, whether the pleading and evidence presented makes out a *prima facie* claim for infringement. See Seescandy.com, 185 F.R.D. at 578-80 (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., 52 Va. Cir. 26, 2000 WL 1210372, *8 (Va. Cir. Ct. 2000), rev’d on other grounds, 542 S.E.2d 377 (Va. 2001) (“before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of action may exist, must be made”); Dendrite, 775 A.2d at 760-61 (requiring notice, identification of the precise statements alleged to be

infringing, and production of evidence to the Court sufficient to demonstrate each element of the cause of action); 2theMart.com, 140 F. Supp. 2d at 1093 (judicial determination must be made, based on evidence produced by subpoenaing party, that, among other things, information sought is materially relevant to claim).

The Verizon II court declined to require these procedural safeguards.⁹ In spite of the holdings of these other courts, the Verizon II court concluded that procedural safeguards were not necessary in connection with a Section 512(h) subpoena because (1) the subpoenaing party has to assert that it has a “good faith belief” that an unauthorized use has occurred, (2) the declaration accompanying the subpoena must be submitted under penalty of perjury, (3) Section 512(f) provides a remedy against issuance of erroneous subpoenas, and (4) the Federal Rules of Civil Procedure can be used to object to a subpoena. Verizon II, 257 F. Supp. at 262-63. These “safeguards” hardly provide sufficient constitutional protection.

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

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

Third, the loss of anonymity created by an improperly obtained subpoena is exactly the type of irreparable damage that a subsequent recovery of monetary damages under Section 512(f) cannot cure. In addition, Section 512(f) only applies when the subpoenaing party

⁹ The Verizon II court addressed the adequacy of procedural safeguards in considering whether Section 512(h) violates the First Amendment. That court did not address or render a decision on the issue presented in this motion: whether Section 512(h)’s procedural safeguards satisfy the requirements of due process.

“knowingly materially misrepresents” that infringement has occurred. 17 U.S.C. § 512(f).

Where, as in the Harry Potter example discussed earlier, the subpoenaing party simply fails to conduct any due diligence or consider whether the speech is protected by the fair use doctrine, Section 512(f) provides no remedy.

Finally, the Federal Rules are of little value to an anonymous speaker where, as under Section 512(h), there is no requirement that the speaker receive any notice or an opportunity to challenge the subpoena. That Boston College – the ISP here – chose to provide such notice to Jane Doe in this case does not mean that other ISPs, or even Boston College, will do so in the future. Without a notice requirement, the theoretical ability to challenge a Section 512(h) subpoena is meaningless.¹⁰

The procedural prerequisites required by other courts – notice, an opportunity to be heard, identification 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 kicked aside 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. Their absence renders Section 512(h) and this subpoena constitutionally infirm.

C. The Legitimate Interests Of the Government and Copyright Holders Will Not Be Detrimentially 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

¹⁰ Although the ISP, which receives the subpoena, will always have such notice, an ISP will not always challenge the subpoena on behalf of its subscribers or raise all of the arguments that would be brought by the anonymous subscriber. Indeed, Boston College has chosen not to bring any challenge to this subpoena.

interest in preserving the speech and privacy rights of Jane Doe and other anonymous Internet users. The procedural protections required by the Seescandy.com, Dendrite and other courts 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 properly used. 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 procedural safeguards imposed by the other courts would greatly decrease the potential for mistakes and misuse of the judicial discovery process, thereby furthering, not harming the governmental interest.

These procedural requirements – providing notice and an opportunity to be heard, identifying the precise speech at issue, presenting evidence sufficient to support the claimed action, and judicial review – 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 90 n.22 (“these rather ordinary costs [in time, effort and expense] cannot outweigh the constitutional right”). Notice to the anonymous speaker can readily be provided via e-mail or “instant messaging” 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 safeguards 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.

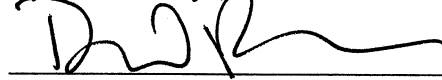
CONCLUSION

For the foregoing reasons, the subpoena served by RIAA should be quashed.

Respectfully submitted,

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¹¹ As discussed earlier, even Federal Rule of Civil Procedure 27 requires judicial approval before a subpoena can be served. *See* Fed. R. Civ. Proc. 27(a)(3). Similarly, once a case is filed, discovery ordinarily may not issue before service on the defendant unless authorized by a judge. *See* Fed. R. Civ. Proc. 26(f).

CERTIFICATE OF SERVICE

I, David E. Plotkin, hereby certify that on this the 26th day of September, 2003, I caused a copy of the foregoing document to be delivered by First Class Mail to John C. Ottenberg, Ottenberg & Dunkless, LLP, 101 Arch Street, Boston, Ma. 02110, Thomas J. Perrelli, Jenner & Block, 601 13th Street, N.W., Suit 1200 South, Washington, DC, 20005, and to Joseph M. Herlihy, General Counsel, Boston College, 140 Commonwealth Avenue, Chestnut Hill, MA 02467.

A handwritten signature in black ink, appearing to read 'D. Plotkin', written over a horizontal line.

David E. Plotkin, Esq.