

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE:)

VERIZON INTERNET SERVICES, INC.)
Subpoena Enforcement Matter)

Miscellaneous Action)
Case No. 1:02MS00323 (JDB))

RECORDING INDUSTRY ASSOCIATION OF)
AMERICA)
1330 Connecticut Avenue, NW Suite 300)
Washington, DC 20036)

v.)

VERIZON INTERNET SERVICES, INC.)
1880 Campus Commons Drive)
Reston, Virginia 20191)

**MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF VERIZON INTERNET SERVICES, INC.'S
MOTION FOR A STAY PENDING APPEAL**

Pursuant to Federal Rule of Civil Procedure 62 and LCvR 7.1, Verizon Internet Services Inc. (“Verizon”) respectfully requests this Court to stay its January 21, 2003 order (the “Order”) enforcing the Recording Industry Association of America (“RIAA”) subpoena pending disposition of Verizon’s appeal in this matter.¹ This case presents a significant and close question of law regarding the interpretation of a federal statute—a question that all parties acknowledge is one of first impression. The case also presents important federal constitutional issues under Article III of the U.S. Constitution and the First Amendment. Failure to preserve the status quo by granting the stay will cause irreparable harm to both Verizon and its subscriber, and could have the effect of mooting Verizon’s appeal. On the other hand, if the Court grants the stay, RIAA will not suffer any substantial injury because the statute of limitations for filing an infringement action is three years. In fact, RIAA has alternative means to redress any alleged harms to its interests; it has made a conscious decision not to exercise pending resolution of this case. Because, as all parties concede, this is a “test case,” there is a strong public interest in allowing the Court of Appeals to address these important issues.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case relates to alleged copyright infringement that occurred six and a half months ago, on July 15, 2002. On July 24, 2002, RIAA served a subpoena invoking the authority of subsection 512(h) of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(h), directing Verizon to disclose to RIAA the identity of a user of Verizon’s Internet access service.

¹ Pursuant to Federal Rules of Civil Procedure 62(a) and 6(a), the Order is subject to an automatic stay until February 4, 2003. If the Court’s resolution of this motion will extend beyond that date, Verizon respectfully requests a stay of the Order pending this Court’s resolution of Verizon’s motion for a stay. Should this Court deny Verizon’s motion for a stay pending appeal, Verizon respectfully requests that the Court enter a temporary stay for 14 days from its denial to allow Verizon to seek further relief from the Court of Appeals pursuant to Fed. R. App. P. 8(a). Appropriate proposed orders have been filed with this motion.

The accompanying letter explained that RIAA believed the subscriber was “offering for download [by other Internet users] files containing copyright sound recordings through a peer to peer application” without authorization of the copyright owner. RIAA’s Motion To Enforce July 24, 2002 Subpoena, Attach. B, at 1 (Letter from Jonathan Whitehead, Vice President and Anti-Piracy Counsel of RIAA, to Lauren K. Crowder, Contracts Manager of Verizon Internet Services, Inc., of July 24, 2002). RIAA demanded that Verizon “remove or disable access” to the files “via your system,” but did not assert that the files resided *on* Verizon’s system. *Id.* RIAA’s subpoena asked Verizon to identify the Verizon subscriber who was online at the “IP Address: 141.158.104.94 on 7/15/02 at 5:26 p.m. (EDT).” *Id.*, Attach. A (July 24, 2002, Subpoena to Verizon Internet Service, Inc.).

More than a month after the alleged infringement, on August 20, 2002, RIAA filed its “Motion To Enforce” the July 24, 2002 subpoena. Verizon responded on August 30, 2002, opposing enforcement on the grounds that the subpoena exceeded the scope of the DMCA’s subpoena authority. Verizon also argued that the interpretation of Section 512(h) underlying the subpoena and ensuing motion to enforce presented serious First Amendment issues and required a federal court to undertake non-judicial duties in violation of the “case or controversy” requirement of Article III. Numerous *amici* filed briefs with this Court on both sides of the issue, and the case has attracted nationwide, and indeed worldwide attention.² This Court held a hearing on October 4, 2002, and issued its final order on January 21, 2003.

² See, e.g., Will Knight, *US Internet provider told to unmask file-sharer*, THE NEW SCIENTIST [LONDON], Jan. 22, 2003; *RIAA ruling ups the ante for ISPs*, THE GLOBE AND MAIL [CANADA], Jan. 22, 2003; Tim Richardson, *Verizon to appeal in music download ID case*, THE REGISTER [LONDON], Jan. 22, 2003; Dinah Greek, *RIAA Can’t Touch UK ISPs, Says Lawyer*, VNUNET [United Kingdom], Jan. 23, 2003 (“Stuart Nuttall, of solicitors Fladgate Fielder, . . . suggested that . . . a move like this in the UK could fall foul of a number of laws designed to

Simultaneous with this motion, Verizon is filing its Notice of Appeal. To Verizon's knowledge, this is the first-ever judicial examination of the scope of the subpoena power contained in Section 512(h), and the United States Court of Appeals for the D.C. Circuit will be the first federal appeals court in the nation to consider the important statutory and constitutional issues raised by Verizon's appeal.

II. VERIZON IS ENTITLED TO A STAY PENDING APPEAL.

A. Standard for a Stay Pending Appeal

To obtain a stay pending appeal, the movant need only establish that: (1) "a serious legal question" is presented, *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980); (2) "without such relief, it will be irreparably injured"; (3) "the issuance of a stay [would not] substantially harm other parties interested in the proceedings"; and (4) the public interest favors relief, *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Verizon need not prove that it has "a chance of prevailing that is" greater than "fifty percent," or that "success on appeal is 'probable.'" *Washington Met. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Where, as here, there is little risk of

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protect consumers. "In the UK I would seriously question the validity of any claim and think it would be unenforceable," he said. "Monitoring customers' internet activities could fall foul of UK data protection laws."); Isabelle Repitone, *Les fournisseurs d'accès dans le collimateur de l'industrie du disque [Internet Service Providers in the Music Industry's Firing Line]*, LA TRIBUNE [FRANCE], Jan. 23, 2003, at 11; Anna Wilde Mathews, *Verizon Is Ordered To Disclose Name Of Song-Swapper – U.S. Judge's Ruling May Expose Users of Music-Sharing Services To Increased Legal Hazards*, THE ASIAN WALL STREET JOURNAL, Jan. 23, 2003, at A9; Jon Healey, *Verizon Told to Identify Music File Swapper Ruling in a Piracy Case is Boon to the Entertainment Industry but Worries Privacy Advocates*, LOS ANGELES TIMES, Jan. 22, 2003, at C-1; Amy Harmon, *Verizon Ordered To Give Identity Of Net Subscriber*, THE NEW YORK TIMES, Jan. 22, 2003 at C-1.

“substantial harm to another party or person,” a court may grant a stay as long as there is “fair ground for litigation and thus for more deliberative investigation.” *Id.* at 844.

B. Verizon’s Appeal Raises Serious Questions of First Impression.

As the Court itself acknowledged at the October 4, 2002 hearing, this case presents a complex and difficult issue of statutory interpretation, for which, in the Court’s view, neither the text nor the legislative history provided a clear answer. *See* Hearing Transcript at 37, *In re Verizon Internet Servs., Inc.*, No. 1:02MS00323 (D.D.C. Oct. 4, 2002) (“Hearing Tr.”) (“There’s nothing in the legislative history . . . that really is very helpful for either side of this question of the application of a 512 subpoena to the various subsections of 512.”); *id.* at 41 (“[T]he problem here perhaps for either side is that the statute is not organized exactly consistent with the interpretation that is being advocated either by RIAA or by Verizon.”). In its order of January 21, 2003, the Court also emphasized that “[t]he parties, and several *amici curiae*, agree that this is an issue of *first impression of great importance* to the application of copyright law to the Internet. Indeed, they concede that this case is presented as a *test case* on the DMCA subpoena power.” Order, at 2 (emphases added).

The Court also recognized that the DMCA “contains a *novel provision* in subsection (h),” *id.* at 5 (emphasis added), and that the statutory question is “[c]omplicat[ed]” by “the fact that two new technology developments underlying the issues in this case—peer-to-peer (P2P) software and ‘bots,’ a software tool used by copyright owners to monitor users of the Internet and detect unauthorized distribution of copyrighted material—were ‘not even a glimmer in anyone’s eye when the DMCA was enacted’ by Congress in 1998.” (citation omitted), *id.* at 23-24. The Court’s recognition of the difficult “questions of first impression” *alone* is sufficient for Verizon to meet the first requirement for a stay. *See Northwest Airlines, Inc. v. EEOC*, 1980 WL

4650, *1 (D.C. Cir. Nov. 10, 1980) (*per curiam*); *Wilson v. Group Hospitalization & Med. Servs., Inc.*, 791 F. Supp. 309, 313 (D.D.C. 1992).³

While Verizon will not reargue the merits in the context of a stay application, there is no doubt that RIAA's proffered interpretation of the statute is subject to serious dispute when examined in light of established canons of statutory construction. This Court acknowledged that fact at the hearing in this matter. Hearing Tr. at 41. There is certainly "fair ground for litigation and thus for more deliberative investigation" before the Court of Appeals, *Holiday Tours*, 559 F.2d at 844, on several issues:

First, Verizon respectfully submits that the Court's central reliance on the definition of the term "service provider" is misplaced. The structure of Section 512 is based on *what* service providers do (i.e., the functions they perform in particular transactions), not *who* they are. Subsection (n) provides an explicit rule of construction making clear that the section is to be construed in terms of service provider *functions*: "Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section." Similarly, the Senate Report explains that "in the beginning, the Committee identified the following *activities*" of service providers, and tailored sections to address those functions. S. Rep. No. 105-190 at 19 (emphasis added). Viewed in context, it is clear that the statute uses a broad term to define

³ See also *United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) ("The issue on appeal in this case is one of first impression in this circuit," and "[t]his factor weighs in favor of granting a stay"); *Sweeny v. Bond*, 519 F. Supp. 124, 132-33 (E.D. Mo. 1981) (finding a stay pending appeal appropriate where "matters of first impression" or "substantial and novel questions" were presented), *aff'd*, 669 F.2d 542 (8th Cir. 1982); *Moutevelis v. United States*, 564 F. Supp. 1554, 1556 (M.D. Penn. 1983) (granting stay pending appeal where opinion "may well [have] involve[d] issues of first impression in th[e] Circuit").

service provider, but carefully identifies the functions performed by the service provider (and concomitant duties) in each particular subsection.⁴

Second, Verizon respectfully submits that the Court's reading of Section 512 renders a core requirement of subsection (h) meaningless when applied to the circumstances of pure conduit activity covered by subsection (a). The "take down" notification that must be filed with the application for a subpoena and served on a service provider is completely inapplicable to the conduit function and is not referenced in any way in subsection (a). Further, the notification must include "[i]dentification of the *material* that . . . is to be removed or access to which is to be disabled." 17 U.S.C. § 512(c)(3)(A)(iii) & (h)(4) (emphasis added). Because by definition a service provider serving the conduit function does not store the allegedly offending material on its own system, it could not remove or disable any *material*. Rather, as the Court acknowledged, *see* Order at 15 n.5, the service provider acting as a conduit could only terminate the *subscriber's* account. Where Congress intended that a service provider terminate a subscriber's account, however, it plainly knew how to say so directly. *See, e.g.*, 17 U.S.C. § 512(j)(1)(A)(ii) (differentiating between "providing access to infringing material" residing on the provider's system or network and "terminating the accounts of the subscriber"). Thus, it is clear from the inapplicability of the notification to subsection (a) and from the notice requirement's reference to the removal or disabling of material, and not the termination of a subscriber's account, that Congress did not intend for the take-down notice to apply to service providers serving a conduit

⁴ The fact that the term "service provider" as used in subsection (h) includes the performance of conduit functions, *see* Order at 8-12, does not provide the answer. For example, subsections (b), (c) and (d) use the same term as subsection (h), but clearly do not apply to service providers when they are performing the conduit function. Subsections (e) and (j) similarly use the same defined term, yet have provisions that do not apply to the conduit function.

function. This statutory anomaly—the requirement that a subpoena addressed to conduit activity be served with a meaningless and unenforceable take-down notice—suggests, at a minimum, that alternative readings of the statute should be explored.

Third, Verizon respectfully submits that the Court erred in concluding that Congress had “no discernible reason” to exclude subsection (a) from Section 512(h)’s reach, Order at 16. To the contrary, Congress had very strong reasons to treat subsection (a) differently. Congress was not concerned only with maximizing enforcement of copyright monopolies; it was also concerned with interests of Internet users in their freedom of expression and privacy, and of Internet service providers in efficiently administering their services without excessive compliance burdens. When viewed with the interests of subscribers in mind, the inapplicability of Section 512(h) to conduit activity is perfectly reasonable: a subscriber’s reasonable expectation of privacy and anonymity is greater for material stored on the subscriber’s own personal computer in his or her home than it is for material that the subscriber places on an external service provider’s system. *See* Declaration of Peter P. Swire, ¶¶ 3-5 (“Swire Decl.”), attached hereto as Exhibit A. In addition, as the Court recognized, “the total burden on service providers may [arguably] be heavier from subpoenas relating to subsection (a),” Order at 16 n.6. Congress had a rational basis for drawing a line between information kept at home and information placed out on a network. *See* Swire Decl., ¶¶ 1, 10.

Fourth, Verizon respectfully submits that the Court’s application of Section 512(h) presents serious constitutional questions under Article III of the Constitution, questions that the Court of Appeals has a constitutional obligation to examine *sua sponte*. *See, e.g., Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967); *Steffan v. Perry*, 41 F.3d 677, 697 n.20 (D.C. Cir. 1994) (*en banc*). On its face, the issuance of judicial process at the behest of a private

party absent a pending judicial proceeding of any kind raises the specter of the exercise of judicial power outside the constitutional confines of a “case or controversy.” *See United States v. Morton Salt Co.*, 338 U.S. 632, 641-43 (1950); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77 (1988).

As Verizon argued previously, “the filing of an Article III lawsuit . . . is more than a formality or technicality.” Opposition of Verizon Internet Services to Motion To Enforce Ex Parte Subpoena Issued July 24, 2002 (“Verizon Opp.”) at 5; *see id.* at 24-25. The filing of a complaint ensures that the plaintiff “ha[s] evidentiary support,” or “[is] likely to have evidentiary support after a reasonable opportunity for further investigation,” Fed. R. Civ. P. 11(b)(3), that the court has subject matter jurisdiction over the controversy, *id.* at 12(b)(1), and that the plaintiff can “state a claim upon which relief can be granted,” *id.* at 12(b)(6). If the attorney or unrepresented party filing the complaint does not meet the Rule 11 evidentiary standards, he or she is subject to sanctions. *Id.* at 11(c). There are simply no comparable evidentiary standards, or sanctions for when those standards are not met, under Section 512(h).⁵ Indeed, the only statement that must be made “under penalty of perjury” is that “the complaining party is authorized to act” on behalf of the alleged copyright owner. 17 U.S.C. § 512(c)(3)(A)(vi). Allowing a private party to issue a private search warrant without pleading the elements of a civil action under the statutory jurisdiction of the federal district courts presents unique (and unresolved) Article III issues.⁶

⁵ The potential applicability of Federal Rule of Civil Procedure 45, *see* Order at 34 n.21, does not answer the question whether a “case or controversy” is present when the subpoena is issued.

⁶ The examples given by the RIAA, such as grand jury subpoenas and search warrants, *see* Reply Brief in Support of Motion To Enforce (“RIAA Reply”) at 21, are all expressly authorized by other provisions of the Constitution, *see* U.S. Const. amends. IV & V, involve the

Finally, Verizon and the supporting *amici* also have raised serious questions regarding the RIAA's construction of Section 512(h) with regard to the First Amendment rights of Internet users. Verizon's subscribers have the First Amendment right to speak anonymously.⁷ As this Court recognized in its order, *see* Order at 32-33, the Supreme Court has repeatedly recognized the value of anonymity in the context of the right to speak freely under the First Amendment, and its value in the context of the Internet is undeniable. *See Talley v. California*, 362 U.S. 60, 64 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995); *see also Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001).

The RIAA's reading of Section 512(h) would invoke the power of the Court to strip Internet users of their anonymity only upon a "good faith" allegation by anyone claiming to be a copyright owner, or authorized to act on behalf of a copyright owner, that copyright infringement *might* be occurring. 17 U.S.C. § 512(c)(3)(A)(v). The Supreme Court has never countenanced governmental interference with presumptively protected content based upon such a cursory showing.⁸ *See, e.g., Blount v. Rizzi*, 400 U.S. 410, 418 (1971) ("The teaching of our cases is

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participation of Executive Branch officers exercising Article II authority, and are subject to substantial judicial oversight. By contrast, here a private party can obtain binding process through simple interaction with the clerk of the court, without alleging a cause of action or even representing that one will be filed in the future. *See* 17 U.S.C. § 512(h).

⁷ Verizon clearly raised the First Amendment issue in the context of asking the Court to avoid an interpretation of the statute that presented serious constitutional questions, *see* Verizon Opp. at 4-5 & nn. 2-4, 23, and this Court clearly passed upon that issue, *see* Order at 35. Because the First Amendment interest in anonymity is clearly greatest in the context of conduit activities (such as e-mail or participation in chat rooms) Verizon continues to believe that First Amendment considerations militate for choosing a reading of the statute that does not extend the Section 512(h) subpoena power to those activities unless Congress has made its intent to test those constitutional waters exceedingly clear. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Loveday v. FCC*, 707 F.2d 1443, 1459 n.24 (D.C. Cir. 1983).

⁸ Because "bots" cannot distinguish between infringing content and content that merely contains words that suggest *it might be infringing*, a vast amount of perfectly licit content, both

that, because only a judicial determination in an *adversary proceeding* ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial *determination* suffices to impose a valid final restraint.” (citation omitted) (emphasis added); *id.* at 420 (rejecting a censorship scheme that permitted the Postmaster General to curtail speech “upon a showing [to a court] merely of ‘probable cause’ to believe [the statute was] being violated”).⁹

Although the Court has now disposed of these issues adversely to Verizon, they certainly provide a “fair ground for litigation and thus for more deliberative investigation,” *Holiday Tours*, 559 F.2d at 84, in the Court of Appeals. These important statutory and constitutional questions merit further consideration by the Court of Appeals *before* the RIAA’s reading of the statute is given irreversible consequences.

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created by and accessible to subscribers, could be covered by the Section 512(h) subpoena process. As the record before the Court shows, content providers have invoked Section 512(c)(3) alleging, for example, that a book report with the words “Harry Potter” in its title was, in fact, infringing material. *See* Motion for Leave To File and Brief Amicus Curiae of United States Internet Service Provider Association in Support of Respondent (filed Sept. 12, 2002) at 10. This presents a classic First Amendment overbreadth problem. *See Broadrick v. Okla.*, 413 U.S. 601, 612 (1973); *Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 122 S. Ct. 1389, 1404 (2002).

⁹ Numerous state and federal courts have recognized this First Amendment interest in anonymity by requiring the satisfaction of a *heightened* standard for enforcement of subpoenas that seek to strip such anonymity away. *See, e.g., Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (because of the “legitimate and valuable right to participate in online forums anonymously or pseudonymously,” party seeking discovery to uncover the identity of an online speaker must satisfy a heightened burden, including establishing that suit could withstand motion to dismiss); *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d 274, 281 (Cal. App. 1999) (“The need for discovery [of the identity of anonymous speakers] is balanced against the magnitude of the privacy invasion, and the party seeking discovery must make a higher showing of relevance and materiality than would otherwise be required for less sensitive material.”) (citation omitted).

C. Verizon and Its Subscriber Will Suffer Irreparable Injury in the Absence of a Stay Pending Appeal.

“A showing of probable irreparable harm is the principal prerequisite for the issuance of a stay.” *Rothenberg v. Ralph D. Kaiser Co., Inc.*, 200 B.R. 461, 463 (D.D.C. 1996) (citation omitted). Where, as here, a court’s order requires revelation of otherwise confidential information, the party privy to that information must be permitted to appeal the order before revealing the information. “To hold otherwise would be to force [the party] to let the cat out of the bag, without any effective way of recapturing it if the district court’s directive was ultimately found to be erroneous.” *Irons v. Fed. Bureau of Investigation*, 811 F.2d 681, 683-84 (1st Cir. 1987) (“irreparable harm would plainly result . . . from an inability to obtain *precompliance* review” (emphasis added)); *see, e.g., United States v. Microsoft Corp.*, No. 98-5339, 1998 WL 543920 (D.C. Cir. Aug. 19, 1998) (finding that the balance of harms favored applicant seeking to stay order allowing the public to attend depositions because “if appellant prevails, the disclosure could not be undisclosed, whereas if appellees prevail, the text and videotape of a private deposition can then be disclosed”); *Whalen v. Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J.).

In cases such as this one, a stay is particularly critical: the revelation of the information could well moot Verizon’s appeal, and thus deprive Verizon of its statutory right to further review in this matter. *See* 28 U.S.C. § 1291. As this Court has recognized in the Freedom of Information Act context, the revelation of confidential information pending appeal will cause irreparable harm by effectively removing the grounds for appeal. *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (granting stay because “disclosure of the names of the detainees and their lawyers would effectively moot any appeal”); *Ashcroft v. North Jersey Media Group*, ___ U.S. ___, 122 S. Ct. 2655 (2002) (*Mem.*) (granting stay pending appeal where potential interim disclosure of national security information, including

identities of special-interest aliens, could not later be remedied). More generally, whenever the actions mandated by a decision subject to further review are irreversible, a stay is required. *See, e.g., Alexander v. Chesapeake, Potomac, and Tidewater Books, Inc.*, 190 F.R.D. 190, 194 (E.D. Va. 1999) (in case of alleged copyright infringement, granting stay pending appeal to relieve alleged infringer from being forced to take the irreversible step of destroying alleged infringing books); *United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) (“[W]here the failure to enter a stay will result in a meaningless victory in the event of appellate success, the district court should enter a stay of its order.”); *cf. Nat’l Assoc. of Farmworkers Orgs.*, 628 F.2d at 613 (injunctive relief may be “necessary to assure that rights sought are not so eviscerated during trial that final relief would be to no avail”).

Once the user’s name is revealed, RIAA will undoubtedly argue that revelation has mooted this case, *see Irons*, 811 F.2d at 683 (noting argument that “once the identities of the sources are revealed, the ballgame will be over” and the order will be “unreviewable on appeal”), or the Court of Appeals might decide on its own that “events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.” *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (citation omitted); *see Calderon v. Moore*, 518 U.S. 149, 150 (1996). Thus, if Verizon is forced to reveal the user’s name, it might well be deprived of its statutory right of appeal in this case.

Moreover, regardless of whether Verizon’s appeal would become moot in the absence of a stay, there is no question that its subscriber’s anonymity and privacy will be irretrievably lost. Although the subscriber’s interest in his or her anonymity need not be of a constitutional dimension in order to be irreparably injured, the harm here is particularly severe because it implicates the subscriber’s presumptive First Amendment right to communicate anonymously.

The possibility that the subscriber's constitutional rights could be violated creates a presumption of irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) ("The Court presumes that irreparable harm will flow to plaintiffs from a continuing constitutional violation."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997); 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995) ("When an alleged violation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Finally, Verizon's disclosure of its subscriber's name to RIAA will damage Verizon's goodwill with its customers. Verizon's service relationship with its customers is built in part upon protection of their privacy from unwarranted or unreasonable invasion. *See, e.g.*, General Privacy Principles, available at <http://www22.verizon.com/About/Privacy/genpriv/> ("assuring strong and meaningful customer privacy protection in an era of rapidly changing communications technology and applications"). Even the revelation of a single customer's identity (and the attendant publicity that revelation will undoubtedly unleash) could cause a loss of consumer confidence and goodwill that constitutes irreparable injury. Declaration of Douglas H. Place in Support of Motion for Stay ("Place Decl."), ¶¶ 6-7, attached hereto as Exhibit B; *see Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (a "threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

D. A Stay Will Not Cause Any Substantial Harm to RIAA.

By contrast, RIAA will suffer little or no injury if the stay is granted. As this Court recognized in its Order, RIAA brought this enforcement action as a "test case" to determine the limits of the DMCA subpoena power. *See* Order at 2. Thus, it is RIAA that seeks to change the

status quo through this litigation. The stay sought by Verizon thus does nothing more than maintain the status quo pending appellate review of what are conceded to be difficult legal issues of first impression. *Holiday Tours*, 559 F.2d at 844-45 (“tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained”); *United States Telecom Ass’n v. FCC*, No. 00-1012, 2002 WL 31039663 (D.C. Cir. Sept. 4) (granting stay pending remand to the FCC to preserve the status quo).

Moreover, if RIAA considers it absolutely essential to obtain the identity of Verizon’s subscriber quickly—a proposition belied by the RIAA’s failure to seek emergency relief at any point from this Court during the five months that this action has been pending—it has alternative means other than this suit to obtain such information. RIAA does not deny that it can obtain the exact information it seeks through the mechanism of a “John Doe” lawsuit, *see* RIAA Reply at 12-13, and Verizon has already indicated that it would cooperate with a subpoena served under this mechanism, *see* Verizon Opp. at 24-25. RIAA’s conscious decision not to commence any such suit, in order that it may test its interpretation of Section 512(h) in the courts, constitutes powerful evidence that RIAA is not currently suffering any irreparable injury.

RIAA is also armed with alternative means to combat infringement on the Internet, means that could have a much more substantial effect on shutting down infringing activities than would ferreting out alleged infringers on a case-by-case basis: RIAA is presently pursuing judicial remedies against the creators and distributors of peer-to-peer software such as KaZaA and Aimster in numerous judicial fora. *See, e.g.*, Preliminary Injunction Order, In Re: Aimster Copyright Litigation, Master File No. 01 c 8933 (N.D.Ill. Oct. 29, 2002).

Finally, RIAA has stated that it does not necessarily wish to bring an infringement action against this particular user, RIAA Reply at 12-14. Even if it did wish to bring such an action, it will fully retain that ability following the completion of Verizon's appeal.¹⁰ The identity of Verizon's subscriber can always be revealed to RIAA in the future if the Court of Appeals upholds this Court's decision. *See, e.g., Microsoft Corp.*, No. 98-5339, 1998 WL 543920 (D.C. Cir., Aug. 19, 1998); *see also Whalen v. Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J.) (denying application for stay by party seeking to obtain information because, "[i]f applicant's position is sustained on appeal, all the data it is precluded from processing by the District Court's order will be readily available" to it). The statute of limitations for an infringement action is three years, 17 U.S.C. § 507(b); six months have past since the alleged infringement occurred, and thus there is no danger that any action that the underlying copyright owner might wish to bring will be barred. Further, any infringement is subject to monetary recompense, including damages, costs, and attorney's fees, *id.* §§ 504-505, and thus "a legal remedy will adequately compensate for any infringement," *Belushi v. Woodward*, 598 F. Supp. 36, 37 (D.D.C. 1984). In short, RIAA will suffer no irreparable injury if the disclosure of the identity of the alleged infringer sought in this case is delayed pending Verizon's appeal.

E. The Public Interest Favors a Stay.

The public interest will be served by granting the requested stay. "The public interest is a uniquely important consideration in evaluating a request for [interim relief]." *Nat'l Assoc. of Farmworkers Orgs.*, 628 F.2d at 616. Because this is a test case – and one that will likely affect

¹⁰ Verizon intends to immediately seek expedited treatment of its appeal from the Court of Appeals. *See* D.C. Cir. Handbook of Practice and Procedures, VIII.B.

all future DMCA subpoenas – the public interest will be served by ensuring that the Court of Appeals is given the opportunity to review the important issues outlined above.

The Court’s ruling extends the reach of Section 512(h) subpoenas to all conduit functions, including electronic mail between customers and personal web browsing. These are activities where an individual’s interests in privacy and anonymity are at their zenith. Swire Decl., ¶¶ 3-5. These are also activities where the potential for abuse of the subpoena process is greatest. Swire Decl., ¶¶ 6-8; Place Decl., ¶¶ 9-10. Thus, the chilling effect of the Court’s ruling on expressive activity over the Internet in general weighs heavily in favor of a stay here. *See Talley*, 362 U.S. at 65 (“[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified” because “fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”). Quite simply, “the ability of individual users to log onto the Internet, anonymously, undeterred by traditional social and legal restraints, tends to promote the kind of unrestrained, robust communication that many people view as the Internet’s most important contribution to society,” *Patentwizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069, 1072 (D.S.D. 2001).

If, as we suspect it will, RIAA argues against a stay based upon its desire to serve Verizon and other ISPs with hundreds or even thousands of Section 512(h) subpoenas outside the immediate purview of this litigation, the attendant costs, both in terms of compliance with a wave of such subpoenas by Verizon and other ISPs and in terms of the chilling effect on Internet communications and commerce would be substantial. *See also* S.Rep. No. 105-190, at 8 (“[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”); *id.* (“[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue

to improve and that the variety and quality of services on the Internet will continue to expand.”). Because these harms will be spread over millions of Internet users, and are impossible to measure and not subject to economic recompense, the public interest favors maintaining the status quo pending the final ruling of the Court of Appeals in this matter.

Expansion of the section 512(h) subpoena power to the conduit function would work a radical change in the law, a change inconsistent with the prevailing approach to privacy. Swire Decl., ¶ 12. The import of this change, even in the peer-to-peer context, is underscored by numerous national press accounts of this Court’s opinion. *See, e.g.*, Editorial, *Ruling is blow to privacy*, USA TODAY, Jan. 29, 2003 (“Allowed to stand, the decision would mark an unprecedented assault on Americans’ privacy rights.”); Hiawatha Bray, *Recording Industry Shows Some Cunning*, BOSTON GLOBE, Jan. 27, 2003 (“Unless a higher court overturns the ruling, music companies need only present the most minimal evidence of a violation to a court, which will automatically issue a subpoena. An Internet provider must then hand over the customer’s name and address, tearing away his shield of privacy and exposing him to the tender mercies of an enraged multinational corporation.”); Dennis K. Berman & Anna Wilde Matthews, *Is the Record Industry About to Bust Your Teenager? – Forget Napster: In Shift, Music Labels Go After People Who Download Songs*, THE WALL STREET JOURNAL, Jan. 28, 2003 at D1 (“[T]he Verizon ruling is a sure sign that media companies are getting closer to taking some of the most egregious offenders to court.”); Jonathan Krim, *Recording Firms Win Copyright Ruling; Judge Orders Verizon to Identify Internet Customer Who Used Music-File-Sharing Service*, THE WASHINGTON POST, Jan. 22, 2003 at E1 (“Because file sharing is popular with teenagers, their parents also could be in the cross hairs if they are the official subscribers of online services that connect their homes to the Internet.”); William Glanz, *Verizon Must Reveal*

File-sharing Customer, WASH. TIMES, Jan. 22, 2003 (“Privacy experts were aghast at the recording industry’s legal victory.”).

II. CONCLUSION

For the foregoing reasons, this Court should grant a stay pending the issuance of the Court of Appeals’ mandate in this matter. In the alternative, the Court should grant a temporary stay until the Court of Appeals can rule on a motion for similar relief under Fed. R. App. P. 8(a).


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LCvR 7.1(m) CERTIFICATION

The undersigned hereby certifies that John Thorne, counsel for Verizon, conferred with counsel for RIAA in person on January 23, 2003, in a good faith attempt to resolve or narrow the issue addressed in this motion. RIAA declined to assent to the motion.



Bruce G. Joseph

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2003, I caused copies of the foregoing Motion and Memorandum of Points and Authorities in Support of Verizon Internet Services Inc.'s Motion for Stay Pending Appeal and two alternative Proposed Orders to be served by via U.S. mail, with a courtesy copy via electronic transmission, to the following:

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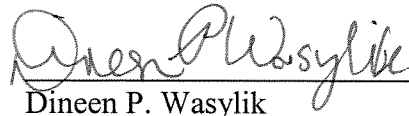
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