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# **RIAA V. VERIZON INTERNET SERVICES, INC.: PEER-TO-PEER NETWORKING RENDERS SECTION 512(H) SUBPOENAS UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT OBSOLETE**

*Thomas P. Owen, Jr.\* & A. Benjamin Katz\*\**

The advent of peer-to-peer technology, such as Napster, Kazaa, and Morpheus, has created considerable consternation among copyright owners, particularly within the music and motion picture industries. This technology, popularized in 1999, was used to illegally download music and movies online. Copyright owners attempted to curb this development by suing the services, such as Napster, that allowed file sharing to prosper.<sup>1</sup>

Despite the legal success copyright owners have enjoyed in stopping these services, the decentralized nature of peer-to-peer technology meant copyright owners were winning the battles, but losing the war. Because most instances of copyright infringement continued unabated, the music recording industry then took the next step—suing individual users.<sup>2</sup> After months of gathering information about alleged infringers of copyrighted music, the Recording Industry Association of America (“RIAA”) filed hundreds of suits against those who used peer-to-peer technology to illegally download music.<sup>3</sup>

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1. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); see also Ariana Eunjung Cha & Paul Fahri, *Media Titans Say Web Site Infringes on Copyrights*, WASH. POST, July 21, 2000, at E1 (discussing copyright infringement suit filed by the Motion Picture Association of America (“MPAA”) against Scour.com, a site described as “Napster with movies”).

2. See Mike Musgrove, *RIAA Plans to Sue Music Swappers; No More Warnings to Individuals*, WASH. POST, June 26, 2003, at E1.

3. See Jonathan Krim & Frank Ahrens, *Recording Industry Curbed on Music Suits*, WASH. POST, Dec. 20, 2003, at A1.

Unlike the RIAA's earlier attempts to curb online piracy, this effort appears to have been more successful. Many of those sued settled with the RIAA, agreeing to pay restitution and to stop downloading music.<sup>4</sup> Others signed up with the RIAA's "amnesty program," in which the RIAA agreed not to pursue litigation if the infringers erased their illegal music files and promised not to infringe in the future.<sup>5</sup> Even more important, some have linked the RIAA's lawsuits to the deletion of millions of music files on personal computers and a downturn in the use of file sharing technology.<sup>6</sup> So it appears that the RIAA's lawsuits against individual users positively affected its online piracy problem.

But there is concern that a recent federal appellate decision may undermine that success. In *RIAA v. Verizon Internet Services, Inc.*, the United States Court of Appeals for the District of Columbia ("D.C. Circuit") held that the subpoenas used by the RIAA to obtain the names and physical addresses of those accused of illegally downloading music could not be served upon Internet service providers ("ISPs") who merely acted as passive transmitters of the allegedly infringing materials.<sup>7</sup> This included situations involving file sharing through peer-to-peer technology. Thus, copyright owners have lost a mechanism for obtaining information necessary to pursue individual users for copyright infringement.

Part I of this Article will provide a brief overview of peer-to-peer technology and its emergence as a piracy tool. Part II will then look at the Digital Millennium Copyright Act,<sup>8</sup> specifically section 512(h),<sup>9</sup> which allows copyright owners to subpoena ISPs without filing suit. Part III will review and analyze the district and appellate court opinions in the *Verizon* case. Finally, Part IV will look at the effects and possible responses to the *Verizon* decision, concluding that an alternative procedure for obtaining the names and addresses of alleged infringers is sufficient to allow the RIAA to continue to pursue individual users.

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4. *Id.*

5. *Id.*

6. Mike Musgrove, *RIAA Warnings, Lawsuits Pressed 'Delete' Key*, WASH. POST, Nov. 9, 2003, at F7.

7. 351 F.3d 1229, 1233 (D.C. Cir. 2003) ("*Verizon III*"); see also *In re: Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 28–29 (D.D.C. 2003) ("*Verizon I*"); *In re: Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 247–48 (D.D.C. 2003) ("*Verizon II*"). For a description of an Internet "service provider," see *infra* text accompanying notes 60–61.

8. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

9. 17 U.S.C. § 512(h) (2000).

## I. COPYRIGHT OWNERS AND PEER-TO-PEER TECHNOLOGY

Peer-to-peer technology allows computer users to both provide and obtain material from others users without the need for an intermediary server.<sup>10</sup> Peer-to-peer technology did not become popular until Shawn Fanning created Napster in 1999.<sup>11</sup> Napster allowed users to share music files with one another using a centralized directory, although by using a centralized directory, it was not true peer-to-peer software.<sup>12</sup> But it did allow a user access to music files from other users without the need for that material to be stored on the Internet.<sup>13</sup> Napster immediately became one of the most popular online software programs ever, with over 70 million users at its peak.<sup>14</sup>

Unfortunately for the music recording industry, the most popular use for Napster was to illegally download music files. Therefore, in September 1999, the RIAA sued Napster for copyright infringement and sought to enjoin Napster from operating its site.<sup>15</sup> After years of litigation, the RIAA succeeded in obtaining an injunction that required Napster to prevent copyrighted material from being illegally swapped.<sup>16</sup> This proved to be Napster's death knell, and by September 2002, it was no longer operating.<sup>17</sup> Despite the RIAA's success in eliminating Napster, the music industry has failed to stop the widespread proliferation of illegal music downloads.<sup>18</sup> By its own estimate, the music industry lost \$5 billion in revenue in 2002 due

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10. Damien A. Riehl, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761, 1765 (2001).

11. Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 511–13 (2003); see also Riehl, *supra* note 10, at 1766–67. Peer-to-peer technology has technically been in existence since at least 1969. Lisa J. Beyer Sims, *Mutiny on the Net: Ridding P2P Pirates of Their Booty*, 52 EMORY L.J. 1907, 1910 (2003). However, this technology was not readily accessible to average users until Napster arrived in 1999. *Id.* To the extent it was available, there is no evidence that it was brought to the attention of Congress prior to the passage of the DMCA.

12. Beyer Sims, *supra* note 11, at 1911; Riehl, *supra* note 10, at 1766–68; Strahilevitz, *supra* note 11, at 511–12.

13. Riehl, *supra* note 10, at 1765.

14. Strahilevitz, *supra* note 11, at 507.

15. *Id.* at 513.

16. *Id.* at 515; A&M Records v. Napster, 2001 U.S. Dist. WL227083, at \*1–\*2 (N.D. Cal. Mar. 5, 2001).

17. Strahilevitz, *supra* note 11, at 515.

18. See Christopher Stern, *Verizon Identifies Download Suspects; Firm Says Fight Goes On to Guard Privacy*, WASH. POST, June 6, 2003, at E5. Although Napster was shut down, “peer-to-peer software spread across the Internet, making it easier for users to trade songs with each other directly.” *Id.*; see also A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

to illegal file sharing.<sup>19</sup>

The problem was that even while Napster was still functioning, peer-to-peer technology had evolved through new software programs, such as Gnutella, Kazaa, and Morpheus.<sup>20</sup> These programs were true peer-to-peer networks in that they did “not rely on a central server to store a directory of the files available on users’ systems.”<sup>21</sup> Instead, the computers that are on the network all “function as mini-servers.”<sup>22</sup> Because they are not centralized, these new programs were more difficult to take offline since there was no central repository that would eliminate the entire system if removed.<sup>23</sup>

These new decentralized networks caused the RIAA to re-evaluate its tactics in fighting online piracy. Instead of just prosecuting the creators of the file sharing programs, it decided to pursue legal remedies against individual copyright infringers, primarily focusing on those whom the RIAA suspected were illegally maintaining over 1000 songs on their computer hard drives.<sup>24</sup> The RIAA’s difficulty in pursuing these individual users was in physically locating them. Using “bot” technology, the RIAA could obtain the screen name of an individual user and the Internet Protocol (“IP”) address associated with that name on its own.<sup>25</sup> But it could not link the IP address to the individual using the software.<sup>26</sup> Consequently, after obtaining an IP address of a potential infringer, the RIAA needed the assistance of an ISP to determine the name and physical address associated with the IP address in its possession.<sup>27</sup>

## II. THE DMCA AND SECTION 512(H) SUBPOENAS

The DMCA, passed by Congress, was “designed to facilitate the robust development and world-wide expansion of electronic commerce,

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19. Jonathan Krim, *File Sharing Forfeits Right to Privacy; Judge Tells Verizon To Identify Customer*, WASH. POST, April 25, 2003, at E1 (stating that “[t]he recording industry estimates that it lost \$5 billion worldwide last year as a result of people sharing music files.”).

20. See Strahilevitz, *supra* note 11, at 515–22; Riehl, *supra* note 10, at 1773–79.

21. Strahilevitz, *supra* note 11, at 517.

22. *Id.*

23. *Id.*; Beyer Sims, *supra* note 11, at 1911.

24. See Musgrove, *RIAA Plans*, *supra* note 2, at E1; see also Frank Ahrens, *Music Industry Will Talk Before Suing: Trade Group Tells Senate It Wants to Be ‘Reasonable’ With Song Swappers*, WASH. POST, Oct. 1, 2003, at E1.

25. Jonathan Krim, *A Story of Piracy and Privacy*, WASH. POST, Sept. 5, 2002, at E1. “Bots,” short for “robots,” are automated software agents that identify computers with music that can be downloaded through peer-to-peer file sharing. *Id.*

26. *Id.*; *Verizon III*, 351 F.3d 1229, 1232 (D.C. Cir. 2003).

27. *Verizon III*, 351 F.3d at 1232.

communications, research, development, and education in the digital age.”<sup>28</sup> It was an attempt to adapt the law to account for changes in technology and “to make digital networks safe places to disseminate and exploit copyrighted materials,” particularly “the movies, music, software, and literary works that are the fruit of American creative genius.”<sup>29</sup>

One of the main concerns in formulating the DMCA was to balance the competing interests of copyright owners and ISPs. Copyright owners wanted assurances that copyrighted material placed online would not be subject to mass piracy.<sup>30</sup> In contrast, ISPs were concerned about their potential liability from lawsuits by copyright holders based on online infringement by third parties.<sup>31</sup> Congress reached a compromise between these two interests that was incorporated into 17 U.S.C. § 512.<sup>32</sup>

Under section 512, ISPs have a number of safe harbors that protect them from monetary liability as long as the ISP did not have actual knowledge that they were facilitating the spread of infringing material.<sup>33</sup> This includes situations where the ISP was transmitting, caching, or storing material as well as situations where an ISP’s information location tools were used to locate infringing material.<sup>34</sup> In exchange for these safe harbors, ISPs were required to assist copyright holders in finding infringers. For instance, if a copyright owner properly notifies an ISP that its network contains infringing material, the ISP must expeditiously act to take down the infringing material.<sup>35</sup> Another example of this required assistance is the subpoena power provided to copyright owners by section 512(h).<sup>36</sup>

Under Section 512(h), a copyright owner may request that the clerk of any federal district court issue a subpoena to a service provider in order to identify an alleged infringer.<sup>37</sup> To validly request a subpoena, the

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28. SEN. REP. NO. 105–190, at 1–2 (1998).

29. *Id.* at 2.

30. *Id.* at 8 (claiming that “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”).

31. *Id.* (suggesting that “[a]t the same time, without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”).

32. *See id.* at 9; 17 U.S.C. § 512 (2000).

33. 17 U.S.C. § 512(a)–(d) (detailing limitations on liability relating to online material).

34. *Id.*

35. *Id.* §§ 512(b)(2)(E), (c)(1)(A)(iii), (d)(3).

36. *Id.* § 512(h).

37. *Id.* § 512(h)(1) (stating that “[a] copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a

copyright owner must file three documents with the clerk of court: (1) a copy of a notification described in 17 U.S.C. § 512(c)(3)(A); (2) a proposed subpoena; and (3) a sworn declaration that the purpose of the subpoena is to obtain the identity of an alleged infringer and that the information will only be used for the purpose of copyright protection.<sup>38</sup> Under section 512(c)(3)(A), a notification of claimed infringement must be a written communication provided to the designated agent of a service provider, which substantially includes the following: (1) the copyright owner's signature; (2) identification of the copyrighted work that has allegedly been infringed; (3) "[i]dentification of the material that is claiming 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"; (4) information reasonably sufficient to allow the service provider to contact the complaining party; (5) a statement of good faith belief that the material complained of is not authorized by copyright law; and (6) a statement under penalty of perjury that notification is accurate and that the complaining party is authorized to act on behalf of the copyright owner.<sup>39</sup> The proposed subpoena shall order the service provider to disclose to the copyright owner information sufficient to identify the alleged infringer to the extent such information is available.<sup>40</sup>

If the three documents described above are in proper form, then the clerk shall issue and sign the proposed subpoena and return it to the copyright owner for delivery.<sup>41</sup> After the service provider receives the subpoena and the section 512(c)(3)(A) notification, it shall disclose the information required by the subpoena.<sup>42</sup> To the extent that section 512(h) fails to provide an answer, the general subpoena duces tecum rules of the Federal Rules of Civil Procedure will govern the issuance of these

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service provider for identification of an alleged infringer in accordance with this subsection.").

38. *Id.* § 512(h)(2).

39. 17 U.S.C. § 512(c)(3)(A).

40. *Id.* § 512(h)(3) (stating that "[t]he subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner . . . information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.").

41. *See id.* § 512(h)(4) (stating that "[i]f the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.").

42. *Id.* § 512(h)(5) (stating that "[u]pon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner . . . the information required by the subpoena").

subpoenas.<sup>43</sup>

Section 512(h) was convenient because it allowed the RIAA to subpoena the required information prior to filing suit and then decide later whether to initiate litigation. To request a subpoena, a copyright owner only had to pay \$35 and make sure the paperwork was properly filed.<sup>44</sup> The RIAA took full advantage of this power when it decided to pursue individual users for copyright infringement. Although the RIAA has not confirmed how many subpoenas it has requested, some estimate that the RIAA made between 1500 and 4000 requests.<sup>45</sup>

### III. THE VERIZON SUBPOENAS

Many ISPs complied with the subpoena requests, providing the names and addresses requested.<sup>46</sup> With this information, the RIAA filed suit against 382 individuals and sent warnings to 398 others.<sup>47</sup> As a result of these suits, the RIAA settled with 220 defendants and has been able to prompt over 1000 people to sign “amnesty letters” in which the RIAA agreed not to pursue litigation if the infringers erased their music files and promised not to illegally download copyrighted music in the future.<sup>48</sup> Additionally, the lawsuits reportedly caused many computer users to delete music files from their computers and refrain from using peer-to-peer services.<sup>49</sup>

But not all the ISPs complied with the subpoena requests. Verizon Internet Services, Inc. refused to comply with two section 512(h) subpoenas filed by the RIAA.<sup>50</sup> Verizon maintained that because it merely

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43. *Id.* § 512(h)(6); see also FED. R. CIV. P. 34, 37, 45.

44. See 17 U.S.C. § 512(h)(4); Frank Ahrens, *A Reprise of Lawsuits Over Piracy: Music Industry Lacks Defendants' Names*, WASH. POST, Jan 22, 2004, at E1.

45. See Frank Ahrens, *Use of Subpoenas to Name File Sharers Criticized*, WASH. POST, Sept. 30, 2003, at E5; Krim & Ahrens, *supra* note 3, at A1.

46. Krim, *A Story of Piracy and Privacy*, *supra* note 25, at E1 (“[T]he RIAA said that until Verizon’s refusal to honor the subpoena, many Internet service providers had given the identities of individuals accused of copyright violations.”).

47. See Krim & Ahrens, *supra* note 3, at A1.

48. *Id.*

49. Musgrove, *supra* note 6, at F7 (discussing a report by research firm NPD Group Inc., which found that in August 2003, 1.4 million households deleted the digital music files on their computer hard drives and that the number of households acquiring music from peer-to-peer technology declined 11% in that month).

50. 351 F.3d 1229, 1233 (D.C. Cir. 2003) (“*Verizon III*”). The first RIAA subpoena was served on Verizon on July 24, 2002, and is the subpoena at issue in *In re: Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) (“*Verizon I*”). Verizon only challenged this subpoena on statutory grounds, which the district court rejected. *Verizon I* at 41–42. The second RIAA subpoena was served on Verizon on February 4, 2003, after the district court’s decision in



acted as a conduit for those allegedly infringing upon copyrighted materials, section 512(h) did not require it to provide the RIAA with the names and addresses of its customers.<sup>51</sup> Rather, it contended that it was only required to comply with that provision if it was storing material that infringed on copyrights.<sup>52</sup> Accordingly, it refused to provide the names and addresses behind the IP addresses that were the basis of the RIAA's subpoena.<sup>53</sup>

*A. In Re: Verizon Internet Services, Inc.*

In response, the RIAA filed a motion to enforce the first subpoena issued to Verizon in the United States District Court for the District of Columbia where it had originally filed the subpoena request.<sup>54</sup> It asserted that section 512(h) applied to all ISPs, regardless of the services the ISPs provided the alleged infringers.<sup>55</sup> The RIAA maintained that this was part of the balance struck between copyright owners and ISPs when formulating the DMCA.<sup>56</sup> In addition to the RIAA, the Motion Picture Association of America ("MPAA"), a number of Internet industry associations, and Internet privacy advocates, such as the Electronic Frontier Foundation ("EFF"), filed amicus briefs, with the MPAA supporting the enforcement of the subpoena and the others challenging it.<sup>57</sup> After a one-day hearing, the district court held in favor of the RIAA, finding that the statutory language, the statutory structure, and the purpose and legislative history of the DMCA compelled enforcement of the subpoena.<sup>58</sup>

With regard to its statutory interpretation of section 512(h), the district court initially focused on the definition of "service provider" in section 512(k).<sup>59</sup> In section 512 (with the exception of 512(a)), the term

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*Verizon I. In re: Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 248 (D.D.C. 2003) ("*Verizon I*"). Verizon challenged this subpoena on constitutional grounds, contending that all of section 512(h) was unconstitutional because it violated both Article III of the United States Constitution and the First Amendment. *Id.* at 246-47. The district court also rejected these arguments. *Id.* at 247. The D.C. Circuit consolidated both challenges on appeal, but only addressed the statutory basis for Verizon's refusal to comply. *Verizon III*, 351 F.3d at 1231-33. Whether section 512(h) is constitutional is beyond the scope of this Article.

51. See *Verizon I*, 240 F. Supp. 2d at 28-29.

52. *Id.*

53. *Id.*

54. *Id.* at 26.

55. *Id.*

56. *Id.* at 36-38.

57. *Verizon I*, 240 F. Supp. 2d at 25-26.

58. *Id.*

59. *Id.* at 30-32.

“service provider” is defined as “a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).”<sup>60</sup> Subparagraph (A) of section 512(k)(1) provides that “the term ‘service provider’ means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”<sup>61</sup> The district court noted that the definition in subparagraph (A) describes Verizon’s role as a service provider.<sup>62</sup> Further, the district court noted that the term “service provider” is used throughout section 512(h).<sup>63</sup> Therefore, the district court concluded that section 512(h) contemplated requiring all ISPs, including those that merely transmit material, to comply with its subpoena provisions.<sup>64</sup>

Next, the district court considered whether a copyright owner could satisfy the notification requirements of section 512(c)(3)(A) if the ISP only passively transmitted information.<sup>65</sup> Verizon had argued that subpoena authority only extended to claims under section 512(c), which covers situations where infringing material is stored by an ISP, because only section 512(c) is referenced in section 512(h).<sup>66</sup> It also claimed that a copyright owner could not properly file a subpoena request involving passive transmissions of material because it could not comply with the notification requirements of section 512(c)(3)(A).<sup>67</sup> Section 512(c)(3)(A)(iii) required the copyright owner to identify the infringing material “that is to be removed or access to which is to be disabled,” when notifying an ISP of infringing activity.<sup>68</sup> Verizon maintained that this was impossible because in order to remove the material, the material must be stored on the system.<sup>69</sup>

The court rejected both of Verizon’s arguments.<sup>70</sup> It first reiterated its earlier observation that all ISPs, including passive transmitters, were

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60. 17 U.S.C. § 512(k)(1)(B) (2000).

61. *Id.* § 512(k)(1)(A).

62. *Verizon I*, 240 F. Supp. 2d at 31.

63. *Id.* at 30 (noting four circumstances within section 512(h) where the term “service provider” is used); *see also* 17 U.S.C. § 512(h)(1), (3)–(5).

64. *Verizon I*, 240 F. Supp. 2d at 32.

65. *Id.* at 32–34.

66. *Id.* at 32–33; *see* 17 U.S.C. § 512(h)(2)(A), (4), (5) (referencing § 512(c)(3)(A)).

67. *Verizon I*, 240 F. Supp. 2d at 33 n.5.

68. 17 U.S.C. § 512(c)(3)(A)(iii).

69. *Verizon I*, 240 F. Supp. 2d at 33 n.5.

70. *Id.* at 32–34.

covered by section 512(h).<sup>71</sup> It then noted that sections 512(b) and (d) also had notification requirements that referenced section 512(c)(3)(A).<sup>72</sup> Therefore, the subpoena provision had to cover more than just section 512(c) situations.<sup>73</sup> Further, the court found that neither the title to section 512(h) nor the language in the provision provided any indication that Congress intended to prevent copyright owners from using these subpoenas when the ISP did not store any information on its network.<sup>74</sup>

Next, the court rejected Verizon's argument that a copyright owner could not comply with the section 512(c)(3)(A) notification requirements.<sup>75</sup> The court stated that section 512(c)(3)(A)(iii) only requires the copyright owner to identify the infringing material to be removed, not that the material actually be removed.<sup>76</sup> The district court also noted that even if the infringing material had to be removed or disabled, an ISP can do so by terminating the alleged violator's Internet account.<sup>77</sup> In fact, the district court noted that section 512 contemplates that ISPs implement policies that in appropriate circumstances provide for termination of the accounts of repeat infringers.<sup>78</sup> Therefore, the district court concluded, the statutory language and structure of section 512 compels finding that all ISPs are subject to section 512(h).

After making this determination, the court confirmed this result by looking at the purpose and history of the DMCA.<sup>79</sup> It noted that in passing the DMCA, "Congress not only sought to limit the liability of service providers . . . but also intended to assist copyright owners in protecting their copyrights."<sup>80</sup> Thus, the DMCA was the result of tradeoffs, in which "service providers would receive liability protections in exchange for assisting copyright owners in identifying and dealing with infringers who

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71. *Id.* at 32.

72. *Id.* at 32–33; 17 U.S.C. § 512(b)(2)(E); *id.* § 512(d)(3).

73. *Verizon I*, 240 F. Supp. 2d at 32–33.

74. *Id.* at 33–34.

75. *Id.* at 33 n.5.

76. *Id.*

77. *Id.*

78. *Id.* (citing 17 U.S.C. § 512(i)(1)(A)). Section 512(i)(1)(A) states:

(1)The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A)has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, 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.

17 U.S.C. § 512(i)(1)(A).

79. *Verizon I*, 240 F. Supp. 2d at 36–39.

80. *Id.* at 36.

misuse the service providers' systems."<sup>81</sup> From a policy standpoint, the court concluded, there was no basis for making a distinction between ISPs who passively transmit material and ISPs who store it because the harm to copyright owners was the same.<sup>82</sup> The widespread use of peer-to-peer technology, which only requires that ISPs transmit, rather than store, material, requires the inclusion of all ISPs; any other interpretation of section 512(h) would fail to effectuate the purposes behind the Act.<sup>83</sup>

The court's only hesitation in reaching this result was that the technologies at issue, peer-to-peer software and "bots," were not used online at the time of the DMCA's enactment.<sup>84</sup> But the district court decided that this new technology should not upset the careful balance struck between ISPs and copyright owners with regard to the exchange of assistance and protection from liability.<sup>85</sup> Considering the foregoing, the district court concluded that based on the language and structure of the statute, and the purpose and legislative history of the DMCA, section 512(h) necessarily requires all ISPs to comply with its subpoena provisions.<sup>86</sup> Accordingly, it granted the RIAA's motion to enforce.<sup>87</sup>

#### B. RIAA v. Verizon Internet Services, Inc.

Verizon appealed the district court's decision, and the D.C. Circuit consolidated this case with Verizon's appeal of the second RIAA subpoena, which concerned the constitutionality of section 512(h).<sup>88</sup> Judge Douglas Ginsburg, writing for a unanimous panel, agreed with the district court's analysis of the purpose of the DMCA, but concluded that the district court incorrectly interpreted section 512 with respect to its subpoena provisions.<sup>89</sup> Specifically, the panel disagreed with the district court on three points: (1) whether the definition of "service provider" was dispositive; (2) whether a copyright owner could comply with the notification requirements of section 512(c)(3)(A) if the ISP was only

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81. *Id.* at 37.

82. *Id.* at 35–36.

83. *Id.* at 38.

84. *Id.*

85. *Verizon I*, 240 F. Supp. 2d at 38–39.

86. *Id.* at 44.

87. *Id.* at 45. After the district court granted the motion to enforce, Verizon asked for a stay pending appeal from both the district and appellate courts. *Verizon II*, 257 F. Supp. 2d 244, 268 (D.D.C. 2003); Stern, *supra* note 18, at E5. The stay was denied, and on June 5, 2003, Verizon provided the name and physical addresses of the customers that were the basis of the contested subpoena. Stern, *supra* note 18, at E5.

88. *Verizon III*, 351 F.3d 1229, 1233 (D.C. Cir. 2003).

89. *See id.* at 1238–39.

passively transmitting material; and (3) whether terminating Internet accounts was an available enforcement mechanism to remove or disable access to infringing material.<sup>90</sup> Additionally, the panel reviewed the legislative history and purpose behind the DMCA.<sup>91</sup> After its review, the panel concluded that ISPs are only required to comply with section 512(h) subpoenas if they are caching materials, storing materials, or providing information tools to link to infringing materials.<sup>92</sup> Consequently, the panel vacated the district court's decision enforcing the subpoena because Verizon was not performing any of these tasks.<sup>93</sup>

In its analysis, the panel vehemently disagreed with the district court's emphasis on the definition of "service provider" under section 512.<sup>94</sup> The panel concluded that regardless of how broadly the term was defined, it is irrelevant with respect to whether a copyright owner can comply with the requirements of section 512(h).<sup>95</sup> Therefore, although an ISP that only transmits material could possibly be covered by section 512(h), the ISP will not be required to comply with that section unless the copyright owner can satisfy that section's requirements.<sup>96</sup>

The panel then challenged the district court's conclusion that a copyright owner could satisfy the notification requirements of section 512(c)(3)(A).<sup>97</sup> Whereas the district court found that the requirement the copyright owner identify the infringing material "that is to be removed or access to which is disabled" was not problematic, the panel disagreed.<sup>98</sup> Instead, it held that because there is no material for an ISP to remove or to which to disable access, a copyright owner cannot possibly identify such material.<sup>99</sup> And even though section 512(c)(3)(A) only requires substantial compliance with the notification requirements, the failure to identify material to be removed was substantial.<sup>100</sup> Therefore, when an ISP was

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90. *See id.* at 1234–37.

91. *Id.* at 1238–39.

92. *See id.* at 1234–35, 1237.

93. *Id.* at 1239.

94. *Verizon III*, 351 F.3d at 1236; 17 U.S.C. § 512(k)(1)(B); *see also supra* text accompanying notes 59–64.

95. *Verizon III*, 351 F.3d at 1236. The court stated "however broadly '[internet] service provider' is defined in § 512(k)(1)(B), a subpoena may issue to an ISP only under the prescribed conditions regarding notification. Define all the world as an ISP if you like, the validity of a § 512(h) subpoena still depends upon the copyright holder having given the ISP, however defined, a notification effective under § 512(c)(3)(A)." *Id.*

96. *Id.*

97. *Id.* at 1234–36.

98. *Verizon III*, 351 F.3d at 1234–36; *see also supra* text accompanying notes 75–78.

99. *Verizon III*, 351 F.3d at 1235.

100. *Id.* at 1235–36.

merely transmitting material, a copyright owner could not satisfy the requirements of section 512(c)(3)(A), and thus section 512(h).<sup>101</sup>

The panel also rejected the argument that an ISP could disable access to the material by terminating the alleged infringer's Internet account.<sup>102</sup> The appellate court stated that disabling access to material and terminating an account were two distinct remedies under the DMCA.<sup>103</sup> Because the requirements of section 512(c)(3)(A) only discussed disabling access to material, this provision could not imply that the notification requirements could be satisfied by terminating accounts.<sup>104</sup>

After concluding that the statutory language required excluding ISPs that merely transmitted material, the panel reviewed the legislative history and the purpose of the DMCA.<sup>105</sup> In reviewing this material, the panel agreed with the district court that the purpose of the DMCA was to balance copyright protection for copyright owners with the need to shield ISPs from liability for the copyright infringement of others.<sup>106</sup> But it noted that because peer-to-peer technology had not been available when the DMCA legislation was passed, Congress could not have contemplated that the infringing material would be stored on personal computers, rather than the Internet.<sup>107</sup> At the time of passage, Congress was concerned with bulletin board services ("BBSs") and file transfer protocol ("FTP") sites, both of which involved storing material on the Internet, rather than accessing material stored on an individual's hard drive.<sup>108</sup> The fact that Congress did not contemplate the advent of peer-to-peer technology and did not draft the statute broad enough to encompass subpoena power for these situations meant that the language of section 512(h) must control, even if that is not

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101. *Id.* at 1236 (stating that "[i]n sum, we agree with Verizon that § 512(h) does not by its terms authorize the subpoenas issued here. A § 512(h) subpoena simply cannot meet the notice requirement of § 512(c)(3)(A)(iii).").

102. *Id.* at 1235.

103. *Id.* Section 512(j)(1) provides the scope of injunctive relief that a copyright owner may employ against an ISP. 17 U.S.C. § 512(j)(1). One remedy is to restrain an ISP "from providing access to infringing material or activity residing at a particular online site on the provider's system or network." *Id.* § 512(j)(1)(A)(i). Another is to restrain an ISP "from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity . . . by terminating the accounts of the subscriber or account holder[.]" *Id.* § 512(j)(1)(A)(ii).

104. *Verizon III*, 351 F.3d at 1235 (citing *Transbrasil S.A. Linhas Aereas v. Dep't of Trans.*, 791 F.2d 202, 205 (D.C. Cir. 1986)).

105. *Id.* at 1237-39.

106. *Id.* at 1238-39.

107. *Id.* at 1238. Although not technically correct, it is true that peer-to-peer technology was not widely available until after Congress passed the DMCA. See Beyer Sims, *supra* note 11, at 1910.

108. *Id.* at 1237.

what Congress intended.<sup>109</sup> Therefore, the panel concluded that Verizon was not required to comply with the RIAA's subpoenas because it merely transmitted infringing material, and passive transmitters of infringing material are not covered by section 512(h).<sup>110</sup>

The D.C. Circuit decision was correct. Congress did not intend for ISPs to assist copyright owners when the ISP was merely transmitting material. That is why section 512(a), unlike sections 512(b)–(d), does not contain a provision that requires an ISP to act upon notice of infringement.<sup>111</sup> If Congress did so intend, it could have easily required ISPs to disable the Internet accounts of illegal downloaders, which, although a separate remedy, is not necessarily harsher than removing stored information. Further, it is clear that the reason Congress chose not to require ISP action in these situations was because the threat of peer-to-peer technology had not yet crystallized in 1998 when the DMCA was passed. Therefore, the statute Congress passed treated transmitted material differently from stored material, and the D.C. Circuit correctly concluded that this distinction prevented copyright owners from enforcing section 512(h) in passive transmittal situations.

#### IV. EFFECTS OF THE *VERIZON* DECISION

Assuming other federal appellate courts agree with the D.C. Circuit's decision, where does this leave copyright owners in the battle against individual users in the war on online piracy? Copyright owners appear to have two options: they can seek to have section 512(h) amended to include ISPs serving as passive transmitters, or they can file "John Doe" lawsuits and send a third-party subpoena to an ISP for the same information. Although the helpfulness of the legislative option is uncertain, the "John Doe" subpoenas give copyright owners rights similar to section 512(h) subpoenas.

Through legislative change, copyright owners could try to amend section 512(h) to expressly include section 512(a) situations where an ISP is passively transmitting infringing material between two users. To do this, Congress could pursue two different paths. First, it could change section 512(h) to note that section 512(a) situations do not have to meet the section 512(c)(3)(A) requirements. This, however, would necessitate a further revision of section 512(h) for transmittal situations to require a copyright owner to identify the IP address, the material that is being infringed, and

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109. *Id.* at 1238.

110. *Verizon III*, 351 F.3d at 1239.

111. *Compare* 17 U.S.C. § 512(a), *with* § 512(b)–(d).

the material that is infringing. The section 512(c)(3)(A) notification requirements currently provide this information, which is necessary for ISPs to determine the customer the copyright owner seeks and to make a cursory assessment as to whether the subpoena was submitted in good faith.<sup>112</sup> Second, Congress could state in section 512(h) that section 512(a) situations have to meet the notification requirements of section 512(c)(3)(A), with the exception of section (c)(3)(A)(iii). But in that case, section 512(a) would have to be revised to require a copyright owner to provide notification, as it is currently not required to do so.<sup>113</sup>

Regardless of the method for revising section 512(h), it is not a foregone conclusion that change is imminent. Senator Orrin Hatch has said that he would seek to streamline the subpoena process after learning of the D.C. Circuit's decision.<sup>114</sup> But there has been some concern about the mass use of these subpoenas against individual users. In fact, on September 30, 2003, the Senate Permanent Subcommittee on Investigations, chaired by Senator Norm Coleman, held a hearing to discuss these concerns.<sup>115</sup> Senator Coleman is on record as saying that "there has got to be a better way" than mass suing computer users in order to protect copyrights.<sup>116</sup> Thus, there are political hurdles that copyright owners must overcome before Congress can pass such legislation.

In the meantime, the RIAA has decided to use "John Doe" lawsuits to obtain the names and addresses of individual users accused of illegally downloading music. On January 21, 2004, the RIAA filed a number of "John Doe" lawsuits in order to obtain the names and addresses of 532 computer users.<sup>117</sup> With these suits, a copyright owner can subpoena an ISP for the names and addresses of those IP addresses that are the nominal basis for the suit.<sup>118</sup> The ISP can then either comply with the subpoena or contact its customer to see if the customer wants to challenge the validity of the subpoena. Unless there is a successful challenge, the copyright owner will receive the names and addresses and proceed with litigation substituting the customer's name for that of the IP address.

In practicality, the "John Doe" lawsuit will not be much more

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112. See 17 U.S.C. § 512(c)(3)(A).

113. See *id.* § 512(a).

114. Krim & Ahrens, *supra* note 3, at A1.

115. Ahrens, *Use of Subpoenas*, *supra* note 45, at E5; *Privacy And Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Perm. Subcomm. on Investigations of the Senate Comm. on Gov. Affairs*, 108th Cong. 4-6 (2003) (opening statement of Sen. Coleman).

116. Ahrens, *Use of Subpoenas*, *supra* note 45, at E5.

117. Ahrens, *A Reprise of Lawsuits*, *supra* note 44, at E1.

118. *Id.*



expensive or time consuming than section 512(h) subpoenas. The costliness of these lawsuits has been somewhat ameliorated by the bundling of suits for each different service provider, which the RIAA has already begun to do.<sup>119</sup> With bundling, all of the IP addresses associated with one ISP are sued in one suit. In addition, filing suit will not be time-consuming unless the customer challenges the subpoena. However, the customer will not have many valid arguments against the subpoena, as the broad rules of discovery allow the disclosure of almost all relevant information, and the name and the location of a defendant is certainly relevant.<sup>120</sup>

In conclusion, even without legislative change, the D.C. Circuit decision should not have a drastic long-term effect on the RIAA's crusade against online piracy. However, to the extent that online piracy is committed primarily through peer-to-peer technology, the subpoena power granted to copyright owners under section 512(h) of the DMCA has now been rendered obsolete.

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119. *Id.* The RIAA filed only four "John Doe" suits in suing 532 individuals. *Id.*

120. Fed. R. Civ. P. 26. ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including . . . the identity and location of persons having knowledge of discoverable matter.").