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For Now, ISPs Must Stand and Deliver: An Analysis of *In re Recording Industry Association of America v. Verizon Internet Services*

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I.	Introduction.....	1
A.	Summary of Facts.....	2
B.	Statement of Case Significance	4
II.	Historical Overview	5
A.	General Concepts of Copyright Law	5
B.	Brief History of the Internet	6
C.	Basics of Peer-to-Peer Networks	7
D.	DMCA History and Explanation	10
E.	Pre-DMCA Caselaw on ISP Liability.....	11
III.	Court's Analysis	14
IV.	An Incomplete Answer	17
V.	Conclusion	18

I. Introduction

1. This note will analyze the decision of the District Court for the District of Columbia in *In re Recording Industry Association of America v. Verizon Internet Services*. In order to fully understand the ramifications of this decision and the reasoning behind it, the case law from prior to the Digital Millennium Copyright Act (“DMCA”) on Internet service provider (“ISP”) liability, § 512 of the DMCA, as well as a general understanding of copyright law, the technology of the Internet

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and peer-to-peer (“P2P”) networks and file sharing software must be understood. In *In re Verizon*, the court came to the correct conclusion about the statutory construction and meaning of the DMCA § 512 subpoena power. This power extends to all of the subsections of the section. However, even if the court properly construed § 512 of the DMCA, this does not necessarily mean that the DMCA is proper in its methods. The subpoena power is necessary to bring online copyright infringers to justice. However, the way in which § 512 subpoenas are issued with simply the request of the copyright owner and the stamp of the court clerk does not comport well with the ideals of fairness and the scope of Article III court powers under the Constitution and, thereby, infringes upon the rights of Internet users.

2. In Section I, this note will present the facts of *In re Verizon* and how the court’s decision in this case will affect subsequent litigation under the DMCA. Section II provides an overview of basic copyright law, the Internet, peer-to-peer networks, the DMCA, and pre-DMCA caselaw on the liability of ISPs. Section III will present the analysis of the court on the statutory construction of the DMCA and the subpoena powers of § 512(h). In Section IV, this note will discuss how the court’s analysis of the facts of the case, and the DMCA structure, was incomplete in scope. Section V will conclude the article with an overview of what is to come in the area of online infringement under the DMCA. This note is written so that the non-technical reader may grasp the importance of the *In re Verizon* decision in the technology-based litigation which will become more prevalent in our courts as technology continues to infiltrate our everyday lives.

A. Summary of Facts

3. The suit between the Recording Industry Association of America (“RIAA”) and Verizon Internet Services began when a Verizon Internet user downloaded over 600 copyrighted songs in one day using KaZaA P2P software.¹ The RIAA sued on behalf of copyright owners and wanted to pursue a claim against the Verizon user for copyright infringement.² Through the use of normal Internet tracking, investigators could access the Internet Protocol (“IP”) address of this user but not his/her identity.³ Verizon, the ISP, could identify this user through its records, but refused a court subpoena obtained by the RIAA from a federal district court, arguing that the DMCA does not require it to identify the user because the data merely traveled over Verizon’s network and was not stored on its service in any fixed form.⁴
4. Verizon claimed that only DCMA § 512(a) is applicable, because the user merely transmitted the infringing songs over Verizon’s network but did not store the songs

¹ *In re Verizon Internet Servs. Inc.*, Subpoena Enforcement Matter, Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Civil Action 02-MS-0323, 240 F. Supp. 2d 24, 28 (D.D.C. 2003).

² *Id.* at 26.

³ *Id.*

⁴ *Id.*

on any of Verizon's servers or equipment.⁵ The downloaded songs resided only on the user's personal computer.⁶ Verizon recognized the subpoena power of § 512(c) but argued that subsection (c) did not apply because it refers to ISPs who have infringing material stored on their network.⁷

5. The DMCA has requirements that must be fulfilled before ISP liability can be established.⁸ ISPs must provide an agent for receiving notice of copyright infringement on their network.⁹ If a copyright owner believes an infringement has occurred, the owner must send notice with the identity of material infringed, the identity of infringing material, a good faith statement that the owner believes authorization was not given to use, the signature of the copyright holder, contact information for the complainer, and a statement that the information in the notification is accurate.¹⁰ The notification process is not required for ISPs who fall under § 512(a) but is mentioned under subsections (b) and (d).¹¹ Section 512(h) permits a copyright owner to obtain and serve a subpoena on an ISP to obtain the identity of the infringer expeditiously using methods authorized by the Federal Rules of Civil Procedure so that the owner may quickly bring suit for the infringement.¹² This subpoena may be issued if the notification filed satisfies the requirements of § 512(c)(3)(A).¹³
6. The subpoena in question was served on Verizon on July 24, 2002, by the RIAA.¹⁴ This subpoena was issued without activity of a judge. When applying for the subpoena, RIAA provided information on more than 600 songs downloaded by the infringing individual.¹⁵ They also provided the IP address, date and times of downloads, as well as a good faith statement saying that they wanted the information to protect the rights of RIAA members.¹⁶ The subpoena also requested that Verizon disable access to the songs.¹⁷ The alleged infringing user was downloading songs using the software marketed by KaZaA, which allows users to share files over a peer-to-peer network.¹⁸ Verizon refused to comply with the subpoena and give the user information, stating that § 512(c) only applies if the infringing material was on its network and not the customer's computer, as was the case.¹⁹ Verizon also refused to block the user's access to the network, stating that

⁵ *Id.*

⁶ *Id.* at 28.

⁷ *Id.*

⁸ 17 U.S.C. § 512(c)(1) (2003).

⁹ *Id.* at § 512(c)(2).

¹⁰ *In re Verizon*, 240 F. Supp. 2d at 27-28 (construing 17 U.S.C. § 512(c)(3)(A)(i)-(vi)).

¹¹ *Id.* at 28.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* On a peer-to-peer network, one would have to shut down the account to the computer to prevent the user from sharing and downloading songs.

¹⁸ *Id.* For an explanation of P2P networking over the Internet, see section III *infra*.

¹⁹ *Id.*

the case fell under subsection (a), whereas the user-blocking was part of the remedial measures under subsection (c).²⁰ Verizon argued that subpoena power is limited to the ISPs who fall under § 512(c) and does not apply to the ISPs who qualify under the other safe-harbor provisions.²¹ RIAA moved to enforce the subpoena, and such was the matter in front of the court. The court concluded that the subpoena power of the DMCA includes all ISPs, not simply those storing illegally-gained data.²²

B. Statement of Case Significance

7. *In re Verizon* was a test case to determine the scope of the DMCA § 512(h) subpoena power and was a case of first impression in the statutory construction of § 512.²³ RIAA contended that it was losing millions of dollars in music sales because potential customers were downloading digital copies from others in violation of copyright law.²⁴ RIAA's "battle with Verizon was part of an aggressive campaign by the record labels on Capitol Hill, at the Justice Department, and in the courts to crack down on the practice of online music-swapping."²⁵ The DMCA was drafted with the purpose of handling copyright infringement and protecting today's technological society as well as tomorrow's even more technologically-advanced world.²⁶ This case was a test to see how well the statute was formulated and how copyright owners may bring infringers to justice in a technological medium where user anonymity and copyright owner's rights hang in the balance. Copyright law is generally created to protect the rights of the owner, but not at every expense of the general public.²⁷ This and other cases²⁸ dealing with online infringement answer the question of whether the means of copying or distribution²⁹ determine whether a known infringer can be brought to court. Verizon and a coalition of Internet advocacy groups argued that if the recording industry prevailed in this case, the constitutional right to privacy of millions of Internet users would be compromised.³⁰

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 26.

²³ *Id.*

²⁴ Jonathan Krim, *A Story of Piracy and Privacy*, WASH. POST, Sept. 5, 2002, at E01.

²⁵ *Id.*

²⁶ *In re Verizon*, 240 F. Supp. 2d at 36.

²⁷ See L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991).

²⁸ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *United States v. Elcom, Ltd.*; Defendant's Motion to Dismiss, *Edelman v. N2H2, Inc.* (D. Mass. 2002) (No. 02-11503-RGS).

²⁹ The means of copying or distribution may involve the choice of infringers to use a cutting edge technological medium such as the Internet rather than more common methods such as videotaping or audio recording on tapes. For more discussion on this point, see Jane C. Ginsburg, *Copyright Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1616 (2001).

³⁰ *In re Verizon*, 240 F. Supp. 2d at 41-42.

II. Historical Overview

A. General Concepts of Copyright Law

8. The United States Constitution grants explicit power to Congress to create both patents and copyrights.³¹ Copyright law in the United States is intended to “[p]romote progress of Science and Useful Arts.”³² It is designed to enhance the public interest, and only secondarily, to confer a reward upon the author.³³ The ultimate aim is to stimulate artistic creativity for the public good.³⁴ Copyright law is codified in Title 17 of the U.S. Code. The general definition of copyrightable material is “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³⁵ The statute further breaks down copyrightable items into categories of literary works: musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.³⁶ The standard of originality does not include requirements of novelty, ingenuity, or aesthetic merit; rather, originality entails independent creation of a work featuring a modicum of creativity.³⁷ Independent creation requires only that the author not have copied the work from some other source.³⁸ Unlike patent law, an author has no right to prevent another from publishing a work identical to his if not copied from his.³⁹ The threshold of creativity is also rather low for copyrights compared to trademarks and patents. It requires only that the author have contributed something other than merely trivial variation, something recognizably the author’s own.⁴⁰ Courts are not to judge the artistic merit of the work, but whether or not the proper copyright procedure took place, and whether or not an infringement has occurred.⁴¹
9. Infringement occurs when non-copyright holders exercise a right that the federal government has given strictly to the holders of a copyright.⁴² Two sets of actors can cause infringement: those who directly infringe the rights through violation and those who encourage or assist a third-party to infringe.⁴³ Copyright owners are given exclusive rights to:

³¹ U.S. CONST. art. I, § 8, cl. 8.

³² *Id.*

³³ *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

³⁴ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

³⁵ 17 U.S.C. § 102 (2003).

³⁶ *Id.*

³⁷ *Feist Publ’n, Inc.*, 499 U.S. at 345 (1991); *see also* *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140 (2d Cir. 1998).

³⁸ *See* *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933).

³⁹ *See id.*

⁴⁰ *See generally* *Mazer*, 347 U.S. 201.

⁴¹ *Contemporary Arts, Inc. v. F.W. Woolworth Co.*, 93 F. Supp. 739 (D. Mass. 1950).

⁴² 17 U.S.C. § 106 et seq. (2003); *see also* *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 574 (1994).

⁴³ *See* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (9th Cir. 1984).

Reproduce the work in copies or phonorecords; to prepare derivative works based upon the work; to distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending; to perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works; to display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and in the case of sound recordings, to perform the work publicly by means of a digital audio transmission.”⁴⁴

10. These rights, however, are limited.⁴⁵ Copyrights are limited by time. Under the Sonny Bono Copyright Term Extension Act of 1998, any work created on or after January 1, 1978, is automatically protected from the moment of its creation and protection endures for the life of its author plus another 70 years after the author’s death.⁴⁶ In the case of joint works, which are those prepared by two or more authors who did not create the work as a work-for-hire, the protective term lasts for 70 years after the last surviving author’s death.⁴⁷ Made-for-hire works, and anonymous and pseudonymous works, carry a term of duration of 95 years from publication or 120 years from creation, whichever is shorter.⁴⁸ Copyrights are also subject to “fair use.” Historically, the fair use doctrine seems to have been based upon whether a reasonable author would consent to the use; the current statutory scheme uses four non-exclusive factors in an attempt to codify the old common law.⁴⁹

B. Brief History of the Internet

11. In the early 1970s, an experimental network was designed by the Department of Defense in conjunction with graduate researchers at some of the nation’s top science schools.⁵⁰ The researchers created a network over telephone lines to communicate between several research sites.⁵¹ The network was designed so that if a nuclear attack occurred, it could still operate because the information traveling

⁴⁴ U.S. COPYRIGHT OFFICE, COPYRIGHT INFORMATION CIRCULAR NO. 1, COPYRIGHT BASICS 1 (2002), available at <http://www.copyright.gov/circs/circ01.pdf> (last visited Feb. 1, 2003).

⁴⁵ *Id.* at 2.

⁴⁶ 17 U.S.C. § 302(a) (2000).

⁴⁷ *Id.* at § 302(b).

⁴⁸ *Id.* at § 302(c).

⁴⁹ *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985); see also John T. Soma and Natalie A. Norman, *International Take Down Policy: A Proposal for the WTO and WIPO to Establish International Copyright Procedural Guidelines for Internet Service Providers*, 22 HASTINGS COMM. & ENT. L.J. 391 (2001).

⁵⁰ Barbara Folensbee, *Introduction to the Internet*, in VIRGINIA LAW FOUNDATION, LAWYERS ON-LINE: A GUIDE TO USING THE INTERNET 1A-1 (1995).

⁵¹ *Id.*

between the computers at each site could be directed over numerous paths.⁵² This early Internet was called ARPANET. Even though ARPANET was slow by today's standards and limited to those who knew computer language code, it formed the starting point for the development of the Internet Protocols that are still in use today.⁵³ The network was designed so that any computer on the network could talk to any other computer on the network.⁵⁴ Eventually, the network expanded from connecting the large supercomputers at research facilities to connecting other networks made up of smaller computers to each other.⁵⁵

12. "In the late 1970s and early 1980s, . . . the National Science Foundation ("NSF") [set up NSFNet among] five supercomputer networks, which were then made available for scholarly research."⁵⁶ "The NSF also created its own network of regional networks."⁵⁷ "The NSF networks promoted universal educational access by funding campus connections only if the school would allow all members of the institution to access the Internet," and network technologies continued to grow as Usenet and other bulletin boards were created.⁵⁸ In the late 1980s Senator Al Gore introduced the High Performance Computing Act to Congress.⁵⁹ The purpose of the Act was "to expand national funding and access to a national information infrastructure."⁶⁰ By 1993, many regional and mid-level networks began to accept commercial users rather than limiting access to the "just research" restrictive access offered before.⁶¹ During this commercial expansion, thousands of ISPs popped up, offering access to the commercial Internet through modem-based connections.⁶² The Internet grew widely in popularity as a graphic user interface based on hypertext markup developed, which allowed a normal user to view information without having to know computer languages;⁶³ today, the Internet is a world-wide entity consisting of thousands of local, regional, or global computer networks interconnected in real-time.⁶⁴ Information on any subject and topic is available, but as the *In re Verizon* case has shown, all available files may not be legal.

C. Basics of Peer-to-Peer Networks

13. The online infringers in *In re Verizon* and other online copyright infringement suits have used what is known as peer-to-peer (P2P) networks over the Internet to obtain

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at IA-2. The High Performance Computing Act is codified at 15 U.S.C. § 5501 (2002).

⁶⁰ Folensbee, *supra* note 50, at IA-2.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* For a more complete history of the Internet, see generally Barry Leiner et al., *A Brief History of the Internet* (Aug. 4, 2000), at <http://www.isoc.org/internet/history/brief.shtml> (last visited Apr. 4, 2003); see also *Reno v. ACLU*, 521 U.S. 844, 849-53 (1997) (summarizing findings of fact about the Internet).

their illegal goods.⁶⁵ The use of P2P networks has caused the courts to take another look at how they define the liability of ISPs.⁶⁶ Previously, the copyrighted file had usually been made available on a server belonging to a commercial party, the ISP.⁶⁷ In these early infringement cases, the illegally copied material sat in a physical form of storage space on the server, making the ISP the obvious party to allege as contributing to copyright infringement, in some cases being found directly liable.⁶⁸ P2P networks do not use this form of distribution; there are few commercial servers involved because a P2P network stores files on the computer of the user. The theory of vicarious liability used in previous online infringement cases may not apply to ISPs when they do not themselves house the infringing materials. As the ISP's ability to control infringing content becomes more limited, courts are apt to treat the ISP as a common carrier and foreclose vicarious liability.⁶⁹

14. The definition of a P2P network is quite simple. A P2P network is one in which “two or more computers share [files and access to devices such as printers] without requiring a separate server computer [or server software]”⁷⁰ “A P2P network can be an ad hoc connection — a couple of computers connected via a Universal Serial Bus [“USB”] to transfer files ... [or] a permanent infrastructure linking a half-dozen computers in a small office over copper wires.”⁷¹ “Or a P2P network can also be a network on a much grander scale in which special protocols and applications set up direct relationships among users over the Internet.”⁷² This final example is how programs like Napster, Gnutella, and KaZaA work. The end-users download and run software which allows files to be shared and searched for over the Internet by other end-users who have the same software.
15. San Mateo, Calif.-based Napster, Inc., was the first P2P to make major headlines in its legal battles against recording artists.⁷³ But Napster was not a true P2P network.⁷⁴ “Users of the service had to log on to a server, owned and operated by Napster, to search for a [file.]”⁷⁵ “[T]he server then pointed to the PC of another user somewhere on the Internet containing the desired file,” and “once the file was

⁶⁵ See, e.g., *In re Verizon*, 240 F. Supp. 2d at 28; *A&M Records, Inc. v. Napster, Inc.* 284 F.3d 1091, 1095 (9th Cir. 2002).

⁶⁶ See Randolph J. Buchanan, *The New-Millennium Dilemma: Does Reliance on the Use of Computer Servers and Websites in a Global Electronic Commerce Environment Necessitate a Revision to the Current Definition of a Permanent Establishment?*, 54 SMU L.R. 2109, 2133-34 (2001).

⁶⁷ See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

⁶⁸ *Id.*

⁶⁹ Soma & Norman, *supra* note 49, at 400.

⁷⁰ James Cope, *Peer-to-Peer Network* (Apr. 8, 2002), at

<http://www.computerworld.com/networkingtopics/networking/story/0,10801,69883,00.html> (last visited Jan. 30, 2003).

⁷¹ *Id.*

⁷² *Id.*

⁷³ James Cope, *P2P Over the Internet* (Apr. 8, 2002), at

<http://www.computerworld.com/networkingtopics/networking/story/0,10801,69939,00.html> (last visited Jan. 30, 2003).

⁷⁴ *Id.*

⁷⁵ *Id.*

found, the download took place peer-to-peer, from one PC to another.”⁷⁶ Napster’s servers actively contributed to the violation of copyright law by directing users to the server from where the infringing file could be copied. Because of the centralized nature of the service, Napster had the ability to control and police its peer-to-peer network given notice of infringement; this function of the Napster service was a key factor in its eventual shutdown.⁷⁷

16. Gnutella is an example of a true P2P file-sharing system that uses the Internet.⁷⁸ Gnutella was originally developed by San Francisco-based Nullsoft, Inc., “but [was] subsequently jettisoned into the public domain” when Nullsoft was purchased in 1999 by America Online, which did not want to develop the software.⁷⁹ “Gnutella-compatible end-user applications create what is called a Gnutella ‘servent’ when installed on an end user’s computer.”⁸⁰ “When users log on to the Internet, servents announce themselves to other servents, [who announce to more servents,] and also propagate search requests for files housed on user hard drives.”⁸¹ “The query results are presented to the user via the servent application; the user selects the file they want and then download it directly from the [computer] housing the file.”⁸²
17. The P2P that was used by the infringer in *In re Verizon* was KaZaA. Like Gnutella, KaZaA is a true P2P network.⁸³ The philosophy of Sharman Networks, the creators of KaZaA, is “I share, therefore we are.”⁸⁴ They actively promote the sharing of files over the Internet by use of their software. “P2P is a perfect way for musicians, producers, poets, photographers and artists to make their work available to others, while enhancing the peer-to-peer experience for everyone.”⁸⁵ At the top of the Sharman Networks philosophy page, above the main title, almost completely avoidable by the viewer, is their warning against sharing too much. “It is important to ensure that you choose carefully which files you want to share. Don’t share files which are personal, such as financial information, or which you do not have the right to distribute.”⁸⁶ KaZaA users search each other through a list of files available on supernodes.⁸⁷ Any computer using KaZaA can be a supernode if they have a modern computer and are accessing the Internet with a broadband connection.⁸⁸ Computers functioning as supernodes receive a list of files shared by other KaZaA

⁷⁶ *Id.*

⁷⁷ *See* Napster, 284 F.3d at 1098.

⁷⁸ Cope, *P2P Over the Internet*, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See In re Verizon*, 240 F. Supp. 2d at 28-29.

⁸⁴ Sharman Networks, *Sharing and the P2P Philosophy*, at

http://www.kazaa.com/us/help/glossary/p2p_philosophy.htm (last viewed Jan. 30, 2003).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Sharman Networks, *Supernodes*, at <http://www.kazaa.com/us/help/faq/supernodes.htm> (last viewed Jan. 30, 2003).

⁸⁸ *Id.*

users in their neighborhood, and whenever possible, use the same ISP.⁸⁹ When they search, they send the search request to a supernode. The actual download will be directly from the computer sharing the file, not from the supernode.⁹⁰ This use of users' computers as the server function relieves KaZaA of the liability Napster faced with its servers because nothing is ever housed or copied onto any machine owned and operated by Sharman Networks.

D. DMCA History and Explanation

18. President Clinton signed the Digital Millennium Copyright Act into law on October 28, 1998.⁹¹ The DMCA is divided into five titles: Title I, the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998; Title II, the Online Copyright Infringement Liability Limitation Act; Title III, the Computer Maintenance Competition Assurance Act; Title IV (which does not carry its own title); and Title V, the Vessel Hull Design Protection Act. Title I implements two 1996 World Intellectual Property Organization treaties.⁹² Title II creates four new limitations on the liability of online service providers for copyright infringement by adding a new section to the Copyright Act.⁹³ Title III expands the exemption for copying computer programs under the Copyright Act by creating an exemption for making a copy of a computer program for the purposes of maintenance or repair of that computer.⁹⁴ Title IV contains six miscellaneous provisions "relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, 'webcasting' of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures."⁹⁵ Title V creates a new form of protection for the design of vessel hulls with regard to the appearance of useful articles in the hull's design.⁹⁶ The case at hand deals with Title II, the Online Copyright Infringement Liability Limitation Act.⁹⁷
19. Title II added a new section to the Copyright Act, § 512, which creates four new limitations on liability for copyright infringement by online service providers, also known as ISPs.⁹⁸ The four categories are based on the way the alleged infringer of the copyright interacts with the network or system of the ISP.⁹⁹ The categories, as outlined in the first four subsections of § 512, are (a) transitory communications, (b) system caching, (c) storage of information on system or networks at direction of

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ United States Copyright Office, Library of Congress, *The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary 1* (Dec. 1998), at <http://www.loc.gov/copyright/legislation/dmca.pdf> (last viewed Jan. 30, 2003) [hereinafter *U.S. Copyright Office Summary*].

⁹² *Id.* at 2.

⁹³ *Id.* at 8.

⁹⁴ *Id.* at 13.

⁹⁵ *Id.* at 1.

⁹⁶ *Id.* at 17.

⁹⁷ *In re Verizon*, 240 F. Supp. 2d at 27.

⁹⁸ *U.S. Copyright Office Summary*, *supra* note 91, at 8.

⁹⁹ *In re Verizon*, 240 F. Supp. 2d at 27.

users, and (d) information location tools.¹⁰⁰ The limitations set out in subsection (j) completely bar monetary damages for ISPs who qualify under the first four subsections.¹⁰¹ Whether or not a service provider qualifies for one of the four limitations does not affect whether a provider may also qualify under one of the other three limitations because each limitation relates to a separate function of the ISP.¹⁰²

20. The limitations under subsections (a)-(d) are not the only ways an ISP can be relieved of liability for copyright infringement. If an ISP does not fit into one of the categories, it is not automatically liable.¹⁰³ The copyright owner still must demonstrate that the ISP has infringed the copyright.¹⁰⁴ The provider may still use any defenses, such as fair use, that are generally available for defendants to copyright infringement claims.¹⁰⁵ Section 512(h) also establishes a procedure by which copyright owners may subpoena information from ISPs.¹⁰⁶ These subpoenas are obtained through the federal courts, and may be used to order an ISP to provide the identity of a service subscriber who is allegedly engaging in copyright infringement online.¹⁰⁷ In addition to the provisions empowering copyright owners, Title II also contains a provision ensuring that ISPs are not placed in the position of having to choose between limiting liability and preserving the privacy of their subscribers.¹⁰⁸ Subsection (m) states that ISPs are not required to monitor their services or access material in any way which would violate the law in order to be eligible for any of the liability limitations in the first four subsections.¹⁰⁹

E. Pre-DMCA Caselaw on ISP Liability

21. Prior to the passing of the DMCA, the courts laid down the law against ISPs whose users infringed federal copyrights, but in varying circumstances, and with varying opinion. In order to follow some recognizable tenets of law, the courts often looked at ISPs as part of a distribution chain, akin to those found in defamation law.¹¹⁰ Under this philosophy, the ISPs were merely common carriers who could be directly liable for the content that they carried, regardless of whether they were aware of its substance.¹¹¹ This line of thinking arose from the tangible qualities of Internet technology. When information flows across the Internet, it is in reality packets of energy which are copied over and over again by servers, routers, and relays, including the server of the user's ISP until the information packets reach

¹⁰⁰ 17 U.S.C. § 512(a)-(d) (2002).

¹⁰¹ *Id.* § 512(j).

¹⁰² *Id.* § 512(n).

¹⁰³ *U.S. Copyright Office Summary, supra* note 91, at 9.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 17 U.S.C. § 512(h); *In re Verizon*, 240 F. Supp. 2d at 26.

¹⁰⁷ 17 U.S.C. § 512(h).

¹⁰⁸ *Id.* § 512(m).

¹⁰⁹ *Id.*

¹¹⁰ Soma & Norman, *supra* note 49, at 400.

¹¹¹ *Id.*

their destination on the user's screen. Even if an ISP claimed to have only been used to transmit infringing material, as Verizon has done in this case, the ISP has at some point made a copy of that information on its server and network, even if only for a second. Historically, these "cache" copies were sufficient to establish copyright infringement because they provided a fixed means of expression.¹¹²

22. With no specific statutory language to follow, courts fashioned other ideas of how to tackle the ISP liability dilemma. In *Playboy Enterprises, Inc. v. Frena*, a subscription computer bulletin board service ("BBS") was held to have infringed Playboy magazine's copyrights by distributing copyrighted photographs on its service.¹¹³ Defendant George Frena operated a subscription computer BBS, Techs Warehouse BBS ("Techs").¹¹⁴ Techs was accessible via telephone modem to customers.¹¹⁵ Paying subscribers, those who purchased certain products from Frena, or anyone with an appropriately equipped computer could log onto Techs.¹¹⁶ Once logged on, the subscribers could browse through different BBS directories to view the pictures and text and were also able to download or save the high-quality digital photos onto their personal computers.¹¹⁷ The court found that 170 of the images available on Frena's BBS were copies of photographs taken from Playboy's copyrighted materials.¹¹⁸ The pictures were placed on the BBS not by Frena, the owner of the board, but by the users of the BBS.¹¹⁹ Frena objected to the claims that he had violated copyright law by allowing the images to be uploaded onto his BBS.¹²⁰ However, the court disagreed and held that even if the bulletin board operator did not know that the photographs had been uploaded by subscribers onto the BBS, the bulletin board operator was still directly liable to the owners of the copyright.¹²¹ It should be noted that the court did not find Frena liable for unauthorized reproduction, only for violation of display and public distribution rights.¹²²
23. *MAI Systems Corp. v. Peak Computer, Inc.*, did not deal directly with an ISP suit, but laid much of the court's reasoning behind the common carrier idea for ISP liability. MAI Systems Corp ("MAI") manufactured computers and designed operating system software. Peak Computer, Inc. ("Peak"), maintained computers manufactured by MAI.¹²³ Defendant individuals left their employment with MAI to work for Peak and when they did so they copied MAI software onto their

¹¹² See 17 U.S.C. 101; see also *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993); Soma & Norman, *supra* note 49, at 402-03.

¹¹³ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1554-1559 (M.D. Fla. 1993).

¹¹⁴ *Id.* at 1554.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *id.* at 1556-57.

¹²² Soma & Norman, *supra* note 49, at 408.

¹²³ *MAI Sys. Corp.*, 991 F.2d at 513.

computers' random access memory ("RAM").¹²⁴ The court held that copying occurs when a computer program is transferred from a permanent storage device to a computer's RAM,¹²⁵ and that Peak was engaged in copying in violation of copyright law.¹²⁶

24. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, organizations affiliated with the Church of Scientology brought action against an ex-member who allegedly posted the Church's copyrighted works on Netcom, the ISP he used to access the Internet. The Religious Technology Center alleged copyright infringement and trade secret misappropriation of certain writings of L. Ron Hubbard, the founding leader of the Church, which the Church said included published literary works as well as unpublished confidential materials.¹²⁷ The former church member, upon leaving the church, was a vocal critic of the organization and posted numerous messages and writings on the Internet on a Usenet newsgroup called "alt.religion.scientology."¹²⁸ The ex-member argued that it was common practice on the Internet "to repeat large portions of a previous posting verbatim, [because it was] necessary to add context for those who are late in joining a discussion."¹²⁹ Nevertheless, the court noted that "[w]hile this would perhaps justify copying of works that were previously posted by their authors on the basis of an implied license or fair use argument, these defenses would not apply where the first posting made an unauthorized copy of a copyrighted work."¹³⁰
25. In subsequent litigation, the Religious Technology Center argued that, "although Netcom was not itself the source of any of the infringing materials on its system, it nonetheless should be liable for infringement, either directly, contributorily, or vicariously."¹³¹ The court held that, "unlike MAI, the mere fact that Netcom's system incidentally makes temporary copies of plaintiffs' works does not mean Netcom has caused the copying."¹³² The court stated "that Netcom's act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike the situation of an owner of a copying machine who lets the public make copies with it."¹³³ "Although some of the people using the machine may directly infringe copyrights, courts analyze the machine owner's liability under the rubric of contributory infringement, not

¹²⁴ *Id.* at 513, 517.

¹²⁵ *Id.* at 519.

¹²⁶ *Id.* at 518.

¹²⁷ *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 923 F. Supp.1231, 1239. (N.D. Cal. 1995).

¹²⁸ *Id.* A Usenet newsgroup "allows users of systems 'subscribing' to the groups to participate by reading and 'posting' messages on a particular topic." *Id.* at 1239 n.5. Users post articles by sending the written text to the newsgroup's subscribers. *Id.* "When a message is posted to a group, it is distributed to the computers of all those systems that subscribe to that group so that the users of that system can access the message." *Id.*

¹²⁹ *Id.* at 1247 n.18. (citation omitted)

¹³⁰ *Id.*

¹³¹ *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs. Inc.*, 907 F. Supp. 1361, 1367. (N.D. Cal. 1995).

¹³² *Id.* at 1368-69.

¹³³ *Id.* at 1369.

direct infringement.”¹³⁴ In its conclusion, the court stated that “[w]here the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet.”¹³⁵

26. *Marobie-FL., Inc. v. National Ass'n of Fire and Equipment Distributors* also addressed ISPs directly. This case stemmed from an argument that an ISP infringed the copyrights of clip art software files by transmitting them in electronic form to Internet users from a Web site hosted on the provider’s server.¹³⁶ Northwest provided a host computer for the National Association of Fire and Equipment Distributors (“NAFED”) Web page.¹³⁷ The administrator of NAFED’s Web page placed files on the Northwest server for the Web page. Once placed there, the files were available to be downloaded by Web users who viewed the page.¹³⁸ Marobie claimed that these files contained its copyrighted clip art and therefore infringed upon its copyright.¹³⁹ Marobie also claimed that, because Northwest provided illegal copies to Web users, Northwest was directly liable.¹⁴⁰ The court held that Northwest was not liable because it:

only provided the means to copy, distribute or display plaintiff’s works, much like the owner of a public copying machine used by a third party to copy protected material. Like a copying machine owner, Northwest did not actually engage in any of these activities itself. Accordingly, Northwest may not be held liable for direct infringement.¹⁴¹

The decision depended on whether Northwest had the license to use the copyrighted images, which it had, and not whether it could monitor Internet users who illegally downloaded them.

III. Court’s Analysis

27. The court’s analysis in *In re Verizon* turned on the meaning and scope of the provisions of the DMCA.¹⁴² “Here, the statutory language and structure lead to a single result – the § 512(h) subpoena authority [to ISPs] applies ... not only [within] subsection (c) but also [within] subsections (a), (b), and (d). [T]he purpose and history of the DMCA are consistent with that conclusion.”¹⁴³ First, the court

¹³⁴ *Id.*

¹³⁵ *Id.* at 1372.

¹³⁶ *Marobie-FL., Inc. v. Nat’l Ass’n of Fire and Equip. Distrib.*, 983 F. Supp. 1167, 1171 (N.D. Ill. 1997).

¹³⁷ *Id.* at 1171

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1172.

¹⁴¹ *Id.* at 1178.

¹⁴² 17 U.S.C. § 512(h); *In re Verizon*, 240 F. Supp. 2d at 29.

¹⁴³ *In re Verizon*, 240 F. Supp. 2d at 30.

analyzed the meaning of a “service provider” under the DMCA.¹⁴⁴ “The ... text of the DMCA provides clear guidance for construing the subpoena [power] of subsection (h) to apply to all service providers under the Act.”¹⁴⁵ Subsection (h) uses the term “service provider” throughout the section. “Service provider” is defined in two separate places in the Act: first narrowly in subsection (a) and second in subsection (k).¹⁴⁶ Subsection (k), which holds a broader definition, was found to govern all sections, even subsection (a)’s narrower definition.¹⁴⁷ “The textual definition ... in subsection (k) leaves no doubt ... that the [subsection (h)] subpoena power ... applies to all service providers,” no matter what services they render under subsections (a)-(d).¹⁴⁸

28. Verizon contended that the subpoena power did not apply to it because it was an ISP under the narrow definition of subsection (a).¹⁴⁹ However, since the definition of “service provider” in subsection (k) applies to the subpoena authority under subsection (h), the subpoena power extends to the subsection (a) ISPs; Verizon must now answer to the subpoena issued on behalf of the RIAA.¹⁵⁰ The court must read the provisions of subsection (k)(1)(B) and (h) together, “under well-established statutory construction tools.”¹⁵¹ “Subsection (h) ... is written without limitations or restriction as to its application.”¹⁵² “If Congress intended to restrict or limit subsection (h) ... based on where the ... material resides, one would expect to see that limitation spelled out in subsection (h).”¹⁵³ Additionally, if Congress wished to limit subsection (h) to ISPs under subsection (c), it would have done so explicitly.¹⁵⁴ There is nothing in the text suggesting that subsection (h) should be limited to ISPs in subsection (c), and subsection (h) “does not require, as Verizon contends, [that the] copyright owner[s] comply fully with subsection (c)(3)(A).”¹⁵⁵
29. Section 512(h)(2)(A) simply requires that the copyright holder present to the clerk of the court the same type of notification as required under subsection (c)(3)(A).¹⁵⁶ “[I]f Congress had intended subsection (h) subpoenas to apply solely to subsection (c) service providers, it could have stated such a limitation in subsection (h), or stated that subsection (h) does not apply to subsections (a), (b), or(d), or even have placed the subpoena authority itself within subsection (c)” and not in subsection (h)

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 31 (quoting 17 U.S.C. § 512(k) (2002) and *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) (the DMCA “defines a service provider broadly”).

¹⁴⁸ *In re Verizon*, 240 F. Supp. 2d at 31

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; *see also* *United States v. Fausto*, 484 U.S. 439, 453 (1988) (“[S]o that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two” (citing *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (citing *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 456-57 (1945))).

¹⁵² *In re Verizon*, 240 F. Supp. 2d at 33.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

at all. But Congress did not do so.¹⁵⁷ Construing “the four-part structure of the liability limitations ... under subsections (a) through (d) ... with the subpoena authority [of] subsection (h) ... ‘make[s] sense in combination’ if construed so that the subpoena authority extends to service providers in all four categories.”¹⁵⁸ “Otherwise, the statute would fail significantly to address many contexts in which a copyright owner needs to utilize the subpoena process in order to discern the identity of an apparent copyright infringer.”¹⁵⁹ “Moreover, whatever rationale warrants distinguishing among subsections (a) through (d) for purposes of the safe harbor liability protections, there is no corresponding rationale for such distinctions regarding a subpoena power that entails merely identifying infringers.”¹⁶⁰

30. In addition, the court found that Verizon’s construction did not fit with Congress’ intent to make the process expeditious such that a subpoena quickly identifies infringers and authorities can then be notified by the copyright owner that infringement has indeed taken place.¹⁶¹ “Verizon has provided no sound reason why Congress would enable a copyright owner to obtain identifying information from [an ISP] storing the infringing material on its system” but would not enable a copyright owner to get that same information from an ISP whose user merely utilized the ISP to transmit or gain the infringed information.¹⁶² “After all, the information obtained simply permits the copyright owner to take steps directly with the infringer,” not with the ISP, to remedy the situation.¹⁶³ “It is unlikely ... that Congress would seek to protect copyright owners in only some of the settings ... [and] ... not in others.”¹⁶⁴
31. On the subject of P2P software, the court made several comments as to its potential threat to copyrights. It concluded that “[t]here is little doubt that the largest opportunity for copyright theft is through [P2P] software, as used by the alleged infringer” in this case.¹⁶⁵ One of the Verizon amicus briefs identifies P2P as “the biggest revolution to happen on the Internet since the advent of email or the World Wide Web.”¹⁶⁶ Millions of users use P2P, and the number is growing.¹⁶⁷ The court held that Verizon’s arguments “would create a huge loophole in Congress’ effort to prevent copyright infringement on the Internet.”¹⁶⁸ In addition, the court held that if it found for Verizon, the users of P2P software would not be able to be identified

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 34.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 35.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (quoting Br. of Amici in Support of Verizon’s Opposition at 6, available at http://www.eff.org/Legal/Cases/RIAA_v_Verizon/20020830_eff_amicus.rtf (last visited Feb. 4, 2003)).

¹⁶⁷ *In re Verizon*, 240 F. Supp. 2d at 35 (citing Br. of Amici in Support of Verizon’s Opposition, *supra* note 166, at 6).

¹⁶⁸ *In re Verizon*, 240 F. Supp. 2d at 35.

under the DMCA.¹⁶⁹ The court did not believe that Congress would intend to protect only a very limited portion of copyrights on the Internet and not others solely because of the way the user interacted with the Internet service provider.¹⁷⁰

IV. An Incomplete Answer

32. The subpoena power is necessary to bring online copyright infringers to justice. The court's analysis of how the DMCA is written, and of the intent and power of each subsection of § 512, fits with the precedent of how our system of courts and legislatures construe the written texts of our laws and statutes. However, the way in which the subpoenas are brought – with just a request by the copyright owner and the stamp of the clerk – does not comport well with the ideals of fairness and due process of law, and therefore, it infringes upon the rights of Internet users. The court has only answered one aspect of this case, the meaning of the statute, and it has not considered the constitutional correctness of the law it seeks to uphold.
33. The District Court of the District of Columbia is a court created by Congress out of the powers of Article III of the United States Constitution.¹⁷¹ Cases involving federal copyrights fall under the scope of this court.¹⁷² As stated in an amicus brief filed by the United States Internet Industry Association and eleven other Internet-related companies in favor of Verizon's refusal to comply with the subpoena, the requested subpoena is "untethered from any pending or imminently impending litigation," and therefore, "an Article III court lacks the authority to issue it."¹⁷³ When copyright owners attempt to obtain a subpoena under § 512(h), they need not have already begun a legal action against the infringing user. Under the court's ruling, the information on the identity of the user is released before any evidence is presented to a judge, jury, or even a law enforcement officer. The court has ordered ISPs to release private information before there is a case or controversy. In the absence of a closely connected lawsuit, there simply is no case or controversy within the meaning of Article III.¹⁷⁴
34. When a § 512 subpoena is carried out, the court has made a decision about the evidence presented before it by the request of the copyright owner without due process of law. There are no evidentiary hearings, no grand juries, and no

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 28 U.S.C. § 88 (2002); U.S. CONST. art. III, § 1.

¹⁷² U.S. CONST. art. III, § 2, cl. 1.

¹⁷³ Br. of Amicus Curiae U.S. Internet Service Provider Assoc. at 6, *available at* http://www.eff.org/Legal/Cases/RIAA_v_Verizon/20020913_ccia_amicus_brief.pdf (last visited Feb. 4, 2003) (arguing that without a lawsuit that is "closely connected" to the subpoena, there is no "case or controversy" within the meaning of Article III of the Constitution).

¹⁷⁴ U.S. CONST. art. III, § 2, cl. 1; *see also* North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.'"); O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("Abstract injury is not ... [enough to warrant assumption of jurisdiction by a federal court]"; to establish a case or controversy "[i]t must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury'"; "[t]he injury or threat of injury must be both 'real and immediate,' [and] not 'conjectural or hypothetical.'").

consultation with a district attorney. Article III courts may not serve a purely investigatory function,¹⁷⁵ and yet, the court is acting in this capacity. It is neither the purpose nor the precedent of American courts to serve as inquisitors,¹⁷⁶ and the courts do not have the power to issue such a subpoena even if the text of the DMCA says they are able to do so. Congress may neither add to nor subtract from the powers of Article III courts without an amendment to the Constitution.¹⁷⁷ Furthermore, if federal courts are faithful to the Constitution, they cannot entertain unconstitutional statutes.¹⁷⁸ The court failed in its analysis of the situation when it did not address these issues. The court should have declared the subpoena process null and outside the scope of its powers as an Article III court.

35. The necessity of the § 512(h) subpoena is not in question. According to Nua Internet Surveys as of September 2002, 182.67 million people in Canada and the United States used the Internet.¹⁷⁹ Its estimate of world wide users is 605.60 million.¹⁸⁰ In addition, a recent study has shown that "nearly 30 million American adults . . . have downloaded music files," and that "[o]n any given day, 6 million adult [Web] surfers are downloading music, twice the number making any retail purchase[s] online."¹⁸¹ The information which the subpoenas demand is necessary when in the context of an investigation. Since the matters at hand usually deal with copyright infringement, a federal charge, the information should be requested not by the copyright owner, but by the U.S. district attorney in the proper jurisdiction. The amount of specific information needed to obtain the subpoena certainly suggests that the case against the infringer would be sustainable enough to warrant criminal charges and prosecution by the federal government. If there was enough evidence, all of which RIAA claims it can garner except for the identity of the user, then there should be enough evidence to bring charges in a "John Doe" case. The evidence should be heard by a judge or possibly a grand jury, who then can decide if there is reason to issue the subpoena. If permission to issue the subpoena is granted, then the government can continue with its suit, or the copyright owner can file a civil suit against the infringer.

V. Conclusion

36. The growth of P2P networks and users in the United States and around the world will continue to strain the laws of copyrights and trademarks. The sheer number of

¹⁷⁵ "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).

¹⁷⁶ *Morton Salt Co.*, 338 U.S. at 642.

¹⁷⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁷⁸ *Id.*

¹⁷⁹ See Nua Internet Surveys, *How Many Online* (Sept. 2002), at http://www.nua.ie/surveys/how_many_online/index.html (last viewed Jan. 30, 2003).

¹⁸⁰ *Id.*

¹⁸¹ Jefferson Graham, *Net Profit: Real Music, The Next Spin is Paying for Online Tunes*, USA TODAY, Apr. 26, 2001, at D1; see also Aric Jacover, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207 (2002).

users will make it difficult for any governing body to catch every illegally downloaded song or file. However, with the § 512(h) subpoena power, if used in a constitutional manner, copyright owners will at least be able to catch and litigate against the most egregious offenders. Copyright law must strike a balance between the rights of the copyright owners and the rights and enjoyment of the general public. Online technologies tend to tip the balance in the favor of the public and not the owner of the copyright. Legislatures must continue to pass laws that deal with emerging technologies, but they must attempt to make the laws broad enough to continue to be useful when future technologies appear, and narrow enough to continue to afford protection to those whom the Copyright Act intends to protect.

37. Along the same lines, Verizon and other ISPs need to be more rigorous in their application of their user agreements. Copyright protection associations like the RIAA have already employed “Bots” who roam the Internet following copyrighted music to its infringers.¹⁸² ISPs can certainly employ similar technology and cut down on infringement on their own. One would think that Verizon and other large companies would want to create an Internet in which their own trademarks and protected materials were honored and not exploited by infringers. KaZaA and several other online sharing companies filed a countersuit against the RIAA and other members of the entertainment industry in January 2003.¹⁸³ The legal and political battle between the P2Ps and the Bots will be interesting to follow because the courts, like the one in *In re Verizon*, flush out the statutory meaning of the DMCA, and then apply it to these emerging technologies as well as the constitutional rights of individual Internet users.

8 Va. J.L. & Tech. 9 (2003), at <http://www.vjolt.net>
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¹⁸² *In re Verizon*, 240 F. Supp.2 d at 38.

¹⁸³ John Borland, *Kazaa Strikes Back at Hollywood, Labels* (Jan. 27, 2003), available at <http://rss.com.com/2100-1023-982344.html> (last viewed Apr. 14, 2003). See also *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (C.D. Cal. 2003).