

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

IN RE:)

VERIZON INTERNET SERVICES, INC.)
Subpoena Enforcement Matter)

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

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

v.)

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

**REPLY IN SUPPORT OF VERIZON INTERNET SERVICES INC.'S
MOTION FOR A STAY PENDING APPEAL**

PRELIMINARY STATEMENT

Verizon's opening submission established that: (1) this is a case of first impression; (2) substantial and difficult issues of statutory interpretation are presented by the appeal; (3) there are also important and unresolved constitutional questions presented by the appeal; (4) both Verizon and its subscriber will be irreparably injured absent a stay pending appeal; and (5) the public interest favors a stay pending appeal. Verizon supported its motion with declarations under oath regarding the irreparable injury to its interests, its subscriber's interests, and the harm to the public interest that would arise absent a stay pending appeal. Motion and Memorandum In Support of Verizon Internet Service Inc.'s Motion for a Stay Pending Appeal ("Verizon Stay Mot.") at Ex. A (Declaration of Douglas H. Place ("Place Decl.")); *id.* at Ex. B (Declaration of Peter P. Swire ("Swire Decl.")).

In its opposition, RIAA misses the significance of the privacy interests at stake, asking this Court to conclude that Internet users have no protected interest in privacy and anonymity of expression and association when they use their home computers to send e-mail, participate in chat rooms or instant messaging, or browse on the World Wide Web. RIAA also misapplies the standard for a stay pending appeal, asking this Court to accept the following erroneous propositions: (1) this Court's extension of the subpoena power in Section 512(h) to all conduit functions works no change in the status quo; (2) the requirements for issuance of a subpoena under Section 512(h) offer superior protection to Internet users and service providers than existing law; (3) RIAA is entitled to invoke a presumption of irreparable injury when in fact this applies only to infringement cases where a showing of copyright infringement has been made; and (4) there are no substantial issues presented by Verizon's appeal. RIAA offers no relevant

facts or expert opinion in opposition to Verizon's motion, and none of the four central assertions upon which the opposition rests can withstand scrutiny.

I. RIAA MISSES THE SIGNIFICANCE OF THE PRIVACY INTERESTS AT STAKE IN VERIZON'S APPEAL.

A. The First Amendment Protects Internet Users' Privacy and Anonymity of Expression and Association.

Most Americans would be astounded to learn that, according to RIAA, they have no legitimate expectation of privacy in their use of the Internet. See RIAA's Opposition to Verizon Internet Services Inc.'s Motion for a Stay Pending Appeal ("RIAA Stay Opp.") at 10. That proposition is simply wrong. The right to speak anonymously is a critical part of the free and robust expression and association that the Internet has fostered.¹ It has been consistently recognized and vindicated by federal courts throughout the country.²

Indeed, it is precisely this widely recognized and jealously guarded right to speak and associate freely and anonymously on the Internet that has caused a tide of editorial consternation

¹ See *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."); *id.* at 65 (citing numerous examples of the value of anonymous and pseudonymous speech and explaining that "[b]efore the Revolutionary War colonial patriots frequently had to conceal their authorship and distribution of literature," "[a]long about that time the Letters of Junius were written and the identity of their author is unknown to this day," and "[e]ven the Federalist Papers . . . were written under fictitious names").

² See, e.g., *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing "the legitimate and valuable right to participate in online forums anonymously and pseudonymously" because "[t]his ability to speak one's mind without the burden of parties knowing all the facts about one's identity can foster open communication and robust debate"); *Dendrite Int'l, Inc. v. Doe, No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (identifying the application of the "well-established First Amendment right to speak anonymously" to the Internet). As this Court recognized, "[l]ower federal courts have specifically recognized that the First Amendment may protect an individual's anonymity on the Internet." Order at 32-33 (citing *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) ("[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999) (upholding First Amendment right to communicate anonymously over the Internet); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997) (recognizing constitutional right to communicate anonymously and pseudonymously on the Internet)).

over the Court's ruling in this case. See, e.g., Editorial, *Pirating Privacy Online*, Boston Globe, Feb. 9, 2003, at D10 (The Court's "ruling would allow copyright holders using IP numbers to demand the identities of millions of people who have shared music files. This would be a major violation of personal privacy . . ."); Janis Ian, *Don't Sever a High-Tech Lifeline for Musicians*, Los Angeles Times, Feb. 2, 2003, at M5 ("If this ruling stands, many smaller musicians will be hurt financially, and many will be pushed out of the music business altogether."); Michelle Delio, *RIAA's Rosen Sets Sights on ISPs*, Wired, Jan. 22, 2003 (noting that monitoring of peer-to-peer could soon become "close to wiretapping"); *Judge orders ISP to reveal details of suspected pirate*, Internet Magazine, Jan. 22, 2003 ("Now we'll have to wait for an appeal court decision before the next round of the fight between copyright and privacy is decided."); *Ruling sparks privacy row*, Taipei Times, Jan. 23, 2003, at 10 (court's decision "spark[ed] a heated privacy row"); *Privacy vs piracy in US courtroom*, ABC [Australian Broadcasting Co.] Online, Jan. 24, 2003 (same); see also Verizon Stay Mot. at 2 n. 2, 17-18 (citing some of the numerous other editorials).

Contrary to RIAA's suggestion otherwise, see RIAA Stay Opp. at 10, this right to speak anonymously is not waived by the offering of content to others. Indeed, the very basis for protecting anonymity in the First Amendment context is to encourage those who might otherwise be reluctant to *offer their content to others* to do so under the veil of anonymity. See *Talley v. California*, 362 U.S. 60, 64-65 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995). The mere fact that there is a public aspect to the anonymous speech does not eviscerate that anonymity interest. See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. ___, 122 S. Ct. 2080, 2089-90 (2002) (recognizing that even where individuals engage in door-to-door canvassing they maintain their right to anonymity); *Buckley*

v. American Constitutional Law Found., Inc., 525 U.S. 182 (1999) (recognizing an anonymity interest where circulators were seeking signatures in face-to-face interactions).

RIAA's arguments based on several Fourth Amendment cases cannot support the intrusion at issue in this case: using the Court's clerk to issue subpoenas stripping anonymity from communications and association from the home. *Smith v. Maryland*, 442 U.S. 735 (1979), is not, as RIAA suggests, *see* RIAA Opp. at 10-11, to the contrary.³ In *Smith*, the individual's identity was already known and the government merely wished to match that identity to numbers dialed. By contrast, here the speaker is anonymous and RIAA wishes to match the speaker to particular content sent and received over the Internet. Both the Supreme Court and Congress have consistently required a heightened showing of necessity for an intrusion of this kind, even in the compelling case of investigation of criminal activity. *See Katz v. United States*, 389 U.S. 347 (1967); *see also* 18 U.S.C. § 2518(3)(a)-(d) (requiring, *inter alia*, a finding of probable cause that a particular individual is committing a crime and that alternative means of investigation are unavailable in order to intercept wire communications).

In addition to *Smith*, RIAA relies upon two out-of-circuit criminal cases that involved prosecutions for intentional receipt of child pornography and an attempt to lure a minor across interstate lines for the purposes of engaging in sexual activity. RIAA Stay Opp. at 11 (citing *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000), and *United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (W.D. Va. 1999), *aff'd*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision)). Obviously, the balance of interests involved in identifying and

³ In *Smith*, the police obtained Smith's identity by tracing his license plate number, *see* 442 U.S. at 737. The Supreme Court was very careful to observe that the pen register did not result in the disclosure of the content of any of Smith's communications. *Id.* at 743. In addition, after *Smith*, Congress recognized the privacy interests in pen register and trap and trace information by enacting 18 U.S.C. §§ 3121-3124, which generally limits the use of such devices to criminal investigations or national security matters. *See id.* § 3121(a).

incapacitating sexual predators is substantially different than the interests of a private party in investigating a possible violation of its intellectual property rights pending an expedited appeal. In fact, RIAA's interpretation of a Section 512(h) gives stalkers and pedophiles a new tool that can be abused to identify by name and address persons they correspond with on the Internet, including minors. (Swire Decl. ¶¶ 7-8; Place Decl. ¶ 9).

B. The First Amendment Interests at Stake Here Bear on Both the Proper Construction of Section 512(h) and the Court's Evaluation of the Public Interest.

This First Amendment right to speak and associate without having one's identity revealed bears on two important issues relevant to the motion for a stay. First, it lends further support to Verizon's argument that Congress did not extend the Section 512(h) subpoena power to conduit activities. There is obviously a greater First Amendment interest in privacy and anonymity respecting the subsection (a) functions (e-mail, web browsing, chat room activity, and instant messaging), where the allegedly infringing information is stored only on a home computer,⁴ than respecting the subsection (c) functions where the information is placed outside the home and a third party system or network is enlisted to assist its storage and distribution. (Swire Decl. ¶¶ 3-5; Place Decl. ¶¶ 9-10). The heightened First Amendment interests at issue in these subsection (a) contexts counsel a reading of the statute that limits the subpoena power to non-conduit functions. Since such a reading is clearly one permissible interpretation of the statute, the doctrine of constitutional avoidance counsels that it should be chosen over a more

⁴ The Supreme Court has consistently held that activities conducted in the home are subject to especially high privacy protection, *see, e.g., Kyllo v. United States*, 533 U.S. 27, 34 (2001); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) (holding that a search was unreasonable where "the Government surreptitiously employ[ed] an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house.").

constitutionally problematic interpretation. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-77 (1988).

Second, the First Amendment privacy and anonymity interests are critical to this Court's assessment of the public interest in the context of a stay. As the Swire Declaration makes clear, both Congress and the Executive Branch have taken substantial steps to protect the privacy and First Amendment rights of consumers in the Internet context and beyond. (Swire Decl. ¶12). Even in the DMCA itself, Congress recognized that the protection of Internet users' privacy was critical to the continued growth of the Internet as a medium of expression and commerce. *See* 17 U.S.C. § 512(m) (entitled "Protection of Privacy" and ensuring that "[n]othing in this section shall be construed to condition the applicability of" service provider immunity on the provider's invading consumers' privacy); *see also* S. Rep. No. 105-190, at 9 (May 11, 1998) (explaining that the DMCA contains "important procedural protections for individual Internet users to ensure that they will not be mistakenly denied access to the World Wide Web"); *id.* at 17-18 (discussing the importance of "protecting personal privacy interests" in the context of Title I of the DMCA); *id.* at 18 (adding a "savings clause" to Title I of the DMCA, 17 U.S.C. § 1205, "to clarify that nothing in the new [provision] will abrogate, diminish or weaken the provisions of any Federal or State law that prevents the violation of an individual's privacy in connection with the individual's use of the Internet"). Verizon simply asks that the Court of Appeals have an opportunity to address the issues presented by its appeal *before* these important interests are irrevocably compromised.

II. RIAA HAS MISSTATED AND MISAPPLIED THE STANDARD FOR A STAY PENDING APPEAL.

A. A Stay Pending Appeal Would Protect, Not Alter, the Status Quo.

RIAA asserts that Verizon has acquiesced in requests that it disclose its subscribers' identities to RIAA and thus "[i]t is Verizon, not RIAA, that seeks to change the status quo." RIAA Stay Opp. at 17. This statement is factually erroneous. The record is clear that Verizon has never disclosed a subscribers' identity to RIAA pursuant to a Section 512(h) subpoena in a "conduit" case and that this is the first such subpoena ever served on Verizon by RIAA. (Supplemental Declaration of Myles E. Mendelsohn ¶ 10); see Editorial, *Pirating Privacy Online*, Boston Globe, Feb. 9, 2003, at D10 ("A spokesman for the industry association says it has used the power fewer than 100 times in the past, and not against Verizon customers."). To date, Verizon has consistently protected the identity of its subscribers when performing conduit functions.

Nor is there any doubt that revelation of this subscriber's name would change the status quo as it now exists. RIAA concedes that "once Verizon discloses its subscriber's name, the act cannot be undone." RIAA Stay Opp. at 15. The traditional office of a stay pending appeal is to preserve the status quo pending the ability of the court of appeals to resolve an important legal issue. That is exactly the posture of this case.

This change in the status quo would also carry with it the possibility of depriving Verizon of its statutory right to appeal, a well-recognized ground for a stay pending appeal. See, e.g., Verizon Stay Mot. at 11-12; *Alexander v. Chesapeake, Potomac, and Tidewater Books, Inc.*, 190 F.R.D. 190, 194 (E.D. Va. 1999) (in case of alleged copyright infringement, granting stay pending appeal to relieve alleged infringer from being forced to take the irreversible step of destroying allegedly infringing material); *Ashcroft v. North Jersey Media Group*, __ U.S. __, 122

S. Ct. 2655 (2002) (*Mem.*) (granting stay pending appeal where potential interim disclosure of national security information during an open immigration proceeding, including identities of special interest aliens, could not later be remedied); *cf. Population Institute v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (holding that the mere possibility that the appeal could be mooted if the government were not stopped from distributing funds to groups other than appellant satisfied the irreparable injury requirement, and granting an injunction pending appeal). RIAA hints that this appeal *might* fit into an exception to the mootness doctrine, RIAA Stay Opp. at 14-15, but it is by no means certain that the Court of Appeals will adopt this analysis. *See, e.g., U.S. Dep't of Veterans Affairs v. Fed. Labor Relations Auth.*, 1993 WL 190995, at *1 (D.C. Cir.) (*per curiam*) (dismissing, on its own motion, a petition for review as moot and noting that “[t]he fact that a similar controversy may recur in the future is not, by itself, sufficient to preserve our jurisdiction”). The possibility that disclosure will moot Verizon’s appeal in this case, standing alone, satisfies the requirement of irreparable injury.⁵

B. The Section 512(h) Process Offers Little Protection for Internet Users’ Privacy and Will Result in Inevitable Mistakes and Abuse.

In its opposition RIAA asserts that “Congress created procedural protections in the DMCA that exceed those suggested by the courts cited in Verizon’s motion,” RIAA Stay Opp. at 11. The cases cited by Verizon required: (1) the filing of a complaint subject to the investigative duties and potential sanctions of Federal Rule of Civil Procedure 11; (2) the demonstration that

⁵ Ignoring the slew of recent case law making clear that courts should grant a stay pending appeal where such relief is necessary in order to preserve the statutory right to appeal, *see Verizon Stay Mot.* at 11-12, RIAA prominently cites a 1980 district court opinion in which the court stated that “[p]otential mootness is not a ground for an injunction.” RIAA Stay Opp. at 14 (citing *Fleming v. FTC*, No. 80-2328, 1980 WL 1945, at *7 (D.D.C. Nov. 10, 1980), *aff’d*, 670 F.2d 311 (D.C. Cir. 1982)). But the decision the district court relied upon for that proposition, *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (Harlan, J., in chambers), stated only that potential mootness was not *independently* dispositive of a stay pending appeal.

the complaint could withstand a motion to dismiss; and (3) a balancing of the need for the information against the presumptive First Amendment and privacy interests of an otherwise anonymous Internet user. *See* Verizon Stay Mot. at 10 n.9. Nothing in Section 512 allows for such protection.⁶

In fact, the record before this Court establishes that a copyright owner can meet the standard for a Section 512(h) subpoena in a situation where there is no plausible legal argument that copyright infringement has occurred. MediaForce, a copyright infringement agent-for-hire acting on behalf of RIAA-member Warner Brothers, sent a notice to an Internet service provider that contained the following elements: (a) it identifies the copyrighted work allegedly infringed (*Harry Potter and the Sorcerer's Stone*);⁷ (b) it identifies a 1-kilobyte file entitled HarryPotterBookReport.rtf as the allegedly infringing material⁸; (c) it asserts that MediaForce, the agent of Warner Brothers, had a “good faith belief” that offering the book report for download was “not authorized by the copyright owner, its agent, or the law”;⁹ (d) it alleges “that the information in this notification is accurate”; and (e) it states, under penalty of perjury, that MediaForce is authorized to act on Warner Brothers’ behalf.¹⁰ On this basis, MediaForce demanded that the Internet service provider “[d]isable access to the individual who has engaged in the conduct described above; and [t]erminate any and all accounts that this individual has

⁶ Indeed, RIAA’s argument in this regard is directly contrary to its position that the judicial role in the DMCA subpoena process is ministerial and intended to circumvent the “time and delay associated with filing complaints and pursuing third-party subpoenas in court.” RIAA Stay Opp. at 3-4 (internal quotation marks and citation omitted).

⁷ *See* 17 U.S.C. § 512(c)(3)(A)(ii). A copy of the Harry Potter book report notice is in the record before this Court as an attachment to Motion for leave to File and Brief *Amicus Curiae* of United States Internet Service Provider Association in Support of Respondent at Attach. 3, *In re Verizon Internet Services, Inc.* (D.D.C.) (No. 1:02MS00323) (filed Sept. 12, 2002). An additional copy of the notice is attached to this brief as Exhibit A.

⁸ *Id.* at § 512(c)(3)(A)(iii).

⁹ *Id.* at § 512(c)(3)(A)(v).

¹⁰ *Id.* at § 512(c)(3)(A)(vi).

through you”—that is, terminate the Internet access of the family whose child wrote the book report on Harry Potter.

By contrast, if a copyright owner were required to meet the prerequisites of a John Doe lawsuit, the owner (not a bounty hunter acting as an agent) would have had to allege ownership (including providing a registration certificate) and made a prima facie case of actual copying, in compliance with federal pleading rules. The investigation required to meet this stricter threshold surely would have resulted in the copyright owner realizing that the 1-kilobyte text file entitled “book report” could not possibly infringe the movie. Even if the copyright owner did pursue a John Doe subpoena, it would likely face dismissal of its lawsuit prior to revelation of the private data, and the attorney who brought the suit would likely face Rule 11 sanctions. No such sanction is available under Section 512(h).¹¹

C. RIAA Cannot Claim Irreparable Injury Based on its Unsupported Assertions that its Ability to Combat Possible Copyright Infringement Will Be Frustrated by a Stay.

RIAA says it does not have to show a stay pending an expedited appeal will cause it irreparable injury because such injury is *presumed*. RIAA Stay Opp. at 16-19 (citing the Nimmer hornbook). That is not the law. The presumption of irreparable injury invoked by the RIAA is inapplicable outside the limited context of a copyright infringement action. Thus, in *ASCAP v. Pataki*, 930 F. Supp. 873 (S.D.N.Y. 1996), performing rights societies, acting as agents for copyright owners to detect infringement, challenged as preempted a state law that they alleged hindered their ability to investigate infringement. Explaining that “[t]he issue here is the

¹¹ Contrary to RIAA’s contention, *see* RIAA Stay Opp. at 13, Section 512(f) provides no relief even for misrepresentation, as the only damages that may be recovered are those “as a result of the service provider relying upon such misrepresentation in removing or disabling access to the material,” *see* 17 U.S.C. § 512(f), which is not at issue here as the service provider cannot remove the material that resides on a home computer. Nor is injury from disclosure of identity covered by Section 512(f).

hindrance of plaintiff's ability to detect the copyright infringement," the court declined "to extend the presumption to cases such as this in which infringement has not yet been proved." *Id.* at 880.

Absent the presumption, RIAA cannot show irreparable injury here. First, RIAA's members are in the business of selling sound recordings, and their alleged injury is nothing more than lost revenue from lost sales. Such injury is quintessentially reparable by money damages. Even in an infringement case where the presumption applies, "plaintiff [copyright owner] must demonstrate that equitable relief [in the form of a preliminary injunction] is warranted. If a legal remedy will adequately compensate for any infringement, then injury, if any, is not irreparable." *Belushi v. Woodward*, 598 F.Supp. 36, 37 (D.D.C. 1984).¹²

Second, nothing in the record indicates that the Internet user at issue here acted unlawfully in obtaining the sound recording files on his computer, that any files have, in fact, been downloaded from this source, or that any files from this source would not have been readily available from other sources. At most, RIAA has presented speculation that third parties are downloading files from this one user that they could not obtain from the millions of other KaZaA users.

Third, if there really were a substantial emergency here that could not await an expedited appeal, RIAA would not have brought only this test case, but would have proceeded in parallel with a John Doe suit. The availability of alternatives to achieve the same result means that a temporary delay in learning the user's identity is not irreparable. Despite RIAA's "sky-is-falling" predictions made in the context of this lawsuit, its President recognizes that combating

¹² The Copyright Act offers RIAA's members the opportunity to seek not only actual damages, but also statutory damages of up to \$150,000 per infringed work (if its sound recordings were timely registered), from the infringer. 17 U.S.C. § 504.

copyright infringement is a “a long-term issue with long-term approaches.” Michael Totty, *Taming the Frontier*, *The Wall St. J.*, Jan. 27, 2003, at R10 (quoting Cary Sherman).

D. Substantial Questions of Law Are Presented by Verizon’s Appeal.

RIAA asserts that the issue in this case did not present a “close question” and that Verizon’s legal position on appeal is “insubstantial.” RIAA Stay Opp. at 7. This position does not comport with this Court’s own characterization of the issues at the hearing in this matter, the time this Court devoted to the case, or even the length of the Court’s opinion. A stay pending appeal would never be issued if the relevant question were whether the district court (or the prevailing party) believed that the initial resolution was the correct one. *See Thomas v. City of Evanston*, 636 F. Supp. 587, 590 (N.D. Ill. 1986) (“[A] party seeking a stay need not show that it is more than 50% likely to succeed on appeal; otherwise, no district court would ever grant a stay. It is enough that the [appellant] have a substantial case on the merits.” (citing *Washington Metro. Area Trans. Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977))).

RIAA does not respond to Verizon’s challenges to the Court’s statutory interpretation. RIAA does respond to the Article III concerns raised by the Section 512(h) subpoena mechanism, but these responses highlight the constitutional novelty of the device. First, RIAA asserts that “[c]ourts routinely enforce administrative subpoenas unrelated to any pending federal case.” RIAA Stay Opp. at 11 (emphasis added) (citing *United States v. Hill*, 694 F.2d 258, 267 (D.C. Cir. 1982)). But administrative agencies issue subpoenas and other investigatory processes in their own names. In so doing, they are exercising Article I authority delegated by Congress, as well as Article II authority to “take Care that the Laws be faithfully executed.” U.S. Const. Arts. I & II, sec. 3. They are not bound by the “case or controversy” requirement of Article III and can, in fact, issue process merely to investigate wrongdoing or to study an issue in their

legislative capacity. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 641 (1950) (administrative agency may engage in “mere ‘fishing expedition[s]’ to see if [it] can turn up evidence of guilt”). Just as obviously, when a company refuses to comply with an administrative subpoena, a controversy is then created that may fall within general or specific grants of federal jurisdiction. *See id.* at 642 (“[J]udicial power . . . is subject to those limitations inherent in the body that issues them because of the Judiciary Article of the Constitution.”). In other words, courts do *enforce* administrative subpoenas, but only after they have been *issued* by entities pursuant to power under Articles I and II.

The cases holding that the federal courts are available for the enforcement of subpoenas issued by administrative agencies say nothing about the power of the courts—here, the Court’s clerk’s office—to issue such purely investigatory subpoenas at the behest of private parties. Unlike administrative agencies, federal courts have no commission to study issues or gather facts outside an existing controversy within their original jurisdiction. *See, e.g., Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1203, 1213 (D.C. Cir. 1996) (“The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others.”). Just as federal courts cannot issue advisory opinions, so too they cannot issue process that is simply aimed at collecting facts deemed useful by a private party outside the context of a pending case or controversy.¹³

¹³ The D.C. Circuit’s decision in *Hill*, which is relied upon by RIAA, makes clear that district courts must always indulge the presumption “that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.” 694 F.2d at 260. The case also makes clear that courts may only hear cases that are *both* within the “judicial power” and “that have been entrusted to them by a jurisdictional grant by the Congress.” *Id.* RIAA simply repeats the presence of the latter requirement, while ignoring the former.

The *Dornan* case, on which RIAA relies, actually highlights the constitutional problems posed by Section 512(h) subpoenas. See RIAA Stay Opp. at 12 (citing *Dornan v. Sanchez*, 978 F. Supp. 1315 (C.D. Cal. 1997)). The district court in *Dornan* upheld a subpoena power granted by the Federal Contested Elections Act to contestants in elections for the House of Representatives. Congress had provided for such a power since 1798 and the present power was limited to actual contestants in the election. The district court found that the entire process was an exercise of the *congressional authority* to be the exclusive judge of the elections and returns of its own members. U.S. Const., Art. I, sec. 5. Thus, the court found that: “[I]n the context of the FCEA, the Court is not called on to exercise its own judicial power.” 978 F. Supp. at 1326. Rather, the court was exercising delegated power from the House of Representatives pursuant to Article I, sec. 5. Here, RIAA can point to no power outside of the Article III judicial power that is being exercised in this case. Moreover, a “novel provision” adopted in 1998 in the DMCA obviously does not have the historical and constitutional pedigree of a process dating from 1798. Thus, the Article III question posed by this case is, at the very least, an open one, which the Court of Appeals must address *de novo*.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2003, I caused copies of the foregoing Reply in Support of Verizon Internet Services Inc.'s Motion for Stay Pending Appeal to be served by via hand delivery, to the following:

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Dineen P. Wasylik

Exhibit A

From: Mediaforce DMCA Enforcement Center
mailto:copyright@mediaforce.com
Sent: Monday, December 03, 2001 2:39 PM
To: Clint N. Smith
Subject: Case ID 15996 - Notice of Claimed Infringement

Monday, December 03, 2001

UUNET Technologies, Inc.
3060 Williams Drive, Suite 601
Fairfax, VA 22031 USA

RE: Unauthorized Distribution of the Copyrighted Motion Picture Entitled
Harry Potter

Dear Clint N. Smith:

We are writing this letter on behalf of Warner Bros., a division of Time Warner Entertainment Company, L.P. ("Warner Bros.").

As you may know, Warner Bros. is the owner of copyright and exclusive distribution rights in and to the motion picture entitled Harry Potter and the Sorcerer's Stone (titled, Harry Potter and the Philosopher's Stone in some regions).

No one is authorized to perform, exhibit, reproduce, transmit, or otherwise distribute the above-mentioned work without the express written permission of Warner Bros., which permission Warner Bros. has not granted to 67.201.159.19.

We have received information that an individual has utilized the above-referenced IP address at the noted date and time to offer downloads of the above-mentioned work through a "peer-to-peer" service.

The attached documentation specifies the location on your network where the infringement occurred, the number of repeat violations recorded at this specific location, as well as any available identifying information.

The distribution of unauthorized copies of copyrighted motion pictures constitutes copyright infringement under the Copyright Act, Title 17 United States Code Section 106(3). This conduct may also violate the laws of other countries, international law, and/or treaty obligations.

Since you own this IP address, we request that you immediately do the following:

- 1) Disable access to the individual who has engaged in the conduct described above; and
- 2) Terminate any and all accounts that this individual has through you.

On behalf of Warner Bros., owner of the exclusive rights to the copyrighted material at issue in this notice, we hereby state, pursuant to the Digital Millennium Copyright Act, Title 17 United States Code Section 512, that we have a good faith belief that use of the material in the manner complained of is not authorized by Warner Bros., its respective agents, or the law.

Also pursuant to the Digital Millennium Copyright Act, we hereby state that we believe the information in this notification is accurate, and, under penalty of perjury, that MediaForce is authorized to act on behalf of the owner of the exclusive rights being infringed as set forth in this notification.

Please contact us at the above listed address or by replying to this email should you have any questions.

We appreciate your assistance and thank you for your cooperation in this matter. In your future correspondence with us, please refer to Case ID 15996.

Your prompt response is requested.

Respectfully,

Mark Weaver,
Director of Enforcement
MediaForce, Inc.
(212) 925-9997

Infringement Detail:
Infringing Work: Harry Potter
Filename: harry potter book report.rtf
First Found: 12/3/01 12:43:30 PM EST
Last Found: 12/3/01 12:43:30 PM EST
Filesize: 1k
IP Address: 67.201.159.19
Network: Bearshare
Protocol: Gnutella

From: MediaForce DMCA Enforcement Center
mailto:copyright@mediaforce.com
Sent: Monday, December 03, 2001 2:51 PM
To: Clint N. Smith
Subject: Case ID 16035 - Notice of Claimed Infringement

Monday, December 03, 2001

UUNET Technologies, Inc.
3060 Williams Drive, Suite 601
Fairfax, VA 22031 USA

RE: Unauthorized Distribution of the Copyrighted Motion Picture Entitled
Harry Potter

Dear Clint N. Smith:

We are writing this letter on behalf of Warner Bros., a Division of Time Warner Entertainment Company, L.P. ("Warner Bros.").

As you may know, Warner Bros. is the owner of copyright and exclusive distribution rights in and to the motion picture entitled Harry Potter and the Sorcerer's Stone (titled, Harry Potter and the Philosopher's Stone in some regions).

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Your prompt response is requested.

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