

Appeal No. 03-3802

United States Court of Appeals
For the Eighth Circuit

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA,

Appellee,

v.

CHARTER COMMUNICATIONS, INC.,

Appellant,

Appeal from the United States District Court for the Eastern District of Missouri
Hon. Carol E. Jackson, Chief United States District Judge

APPELLEE RECORDING INDUSTRY ASSOCIATION OF AMERICA'S
BRIEF IN OPPOSITION TO CHARTER COMMUNICATIONS'
MOTION TO SUMMARILY REVERSE AND VACATE ORDER
ENFORCING SUBPOENAS AND FOR IMMEDIATE REMAND

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INTRODUCTION

Charter Communications, Inc.'s ("Charter") motion for summary reversal is frivolous. Charter seeks ultimate resolution of the issue on appeal – whether the district court properly enforced subpoenas issued to Charter pursuant to the Digital Millennium Copyright Act ("DMCA") – based solely on a recent decision by the United States Court of Appeals for the District of Columbia Circuit. But Charter ignores the critical fact that the D.C. Circuit's ruling is not binding on this Court. Charter cannot short-circuit the entire appellate briefing process in this case simply by citing a non-binding case from another court. Moreover, the D.C. Circuit's mandate has not issued and the time to seek rehearing and/or to petition for certiorari has not expired. If Charter believes that the D.C. Circuit's decision supports its argument that the subpoenas should have been quashed, it can make that argument in the normal course of briefing to this Court.

This Court should only dispose of a case summarily if the issues on appeal require no further consideration. Charter has utterly failed to meet that standard. Indeed, the opposite is true. This appeal involves issues of national concern – including online copyright protection and interpretation of a recent federal statute – that neither this Court nor any federal court of appeals other than the D.C. Circuit has considered. Important and unsettled issues of law are not the proper subject of summary disposition, and this Court should not be deprived of the benefit of full briefing and oral argument.

Summary disposition of the appeal is particularly unwarranted because Charter's position on the merits is wrong. Notwithstanding the D.C. Circuit's view to the contrary, the DMCA does allow for the issuance of subpoenas to ISPs acting as a conduit for the transmission of infringing materials by its subscribers. This Court should not adopt the D.C. Circuit's wooden

interpretation of the DMCA, which misconstrued the statutory language and structure and gave insufficient consideration to the statutory purpose and legislative history.

BACKGROUND

The Recording Industry Association of America ("RIAA") is a not-for-profit trade association whose member record companies create, manufacture and/or distribute most of the legitimate sound recordings produced and sold in the United States. A critical part of RIAA's mission is to assist its members in protecting their intellectual property online. Charter is an Internet Service Provider ("ISP") that provides its customers with access to the Internet.

This appeal arises out of subpoenas obtained by RIAA pursuant to the DMCA's subpoena provision, codified at 17 U.S.C. § 512(h). Under that provision, a copyright owner may obtain a subpoena issued by the clerk of a district court to an ISP in order to obtain information identifying a subscriber of that ISP who is alleged to be committing copyright infringement over the Internet. The subpoenas in this case seek the identities of approximately 200 individuals using Charter's network to disseminate illegally over 100,000 copyrighted works from July to October 2003. The individual infringers were disseminating copyrighted sound recordings over peer-to-peer ("P2P") networks. By downloading P2P software, and logging onto a P2P network, an individual makes music and video files on a home or office computer available to any Internet user worldwide. Until shut down by a federal court injunction, Napster was the most notorious P2P system. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

RIAA and its members (the copyright owners) observed massive and unlawful copying of their copyrighted works over the P2P networks, but were unable to identify the infringers. RIAA could determine, however, from each user's IP address that each was using Charter's cable

modem service to disseminate the copyrighted works. Beyond that, however, RIAA could not ascertain the identity or location of the infringer without seeking such information from Charter.

Accordingly, RIAA obtained subpoenas issued by the district court clerk pursuant to § 512(h) and served them on Charter from August through October of 2003. Charter refused to comply with the subpoenas, and moved to quash the subpoenas and for a protective order. On November 17, 2003, following full briefing by the parties and a hearing, the United States District Court for the Eastern District of Missouri denied Charter's motions and ordered Charter to comply with the subpoenas by providing RIAA with the subscribers' names, addresses and e-mail addresses by November 21.¹ On November 20 – the day before the deadline for Charter to produce the information – Charter moved in the district court for a stay pending appeal. The next day, before the district court ruled on that motion, Charter filed an emergency motion in this Court to stay the district court's order enforcing the subpoenas. This Court denied the motion, and Charter complied with the district court's order. Charter also filed this appeal. Charter's opening brief in this Court is due nine days from now, on January 15, 2004, and RIAA's brief is due on February 17, 2004.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION IN THE *VERIZON* CASE DOES NOT JUSTIFY SUMMARY DISPOSITION OF THIS APPEAL.

Charter offers no legitimate basis for summary reversal of the district court's order. "Neither the Federal Rules of Appellate Procedure nor the Local Rules of this Court expressly recognize" a motion for summary disposition of an appeal, though this Court may summarily dispose of an appeal on its own motion. *Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc.*, 952 F.2d 980, 981 (8th Cir. 1991). As a general rule, this Court will not invoke that authority unless

¹ The court gave Charter additional time to comply with a subset of the subpoenas.

the questions presented “do not require further consideration.” *Id.* That is patently not the case here, as this Court has never once had the opportunity to consider the legal issues presented by this appeal.²

The sole basis for Charter’s motion is that the D.C. Circuit recently issued an opinion holding that the DMCA does not authorize the issuance of a subpoena to an ISP acting solely as a conduit for its subscribers’ communications. *See Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, Nos. 03-7015 & 03-7053, 2003 WL 22970995 (D.C. Cir. Dec. 19, 2003). As an initial matter, Charter raised this issue only in passing below, if even at that. Charter’s sole mention of this argument was a bare reference in its motion to quash – unsupported by any argument or points of authority whatsoever – that purported to “reserve” the arguments that Verizon made in the D.C. Circuit case on which Charter now relies. Charter Mot. to Quash, at 3 (Oct. 3, 2003). Charter can hardly seek summary reversal from this Court on the basis of an argument it did not even deem worthy of full briefing to the court below.

In any event, the fundamental premise underlying Charter’s motion – that this Court must summarily reverse the district court’s order based on the D.C. Circuit’s decision – is simply

² Although Charter styles its motion as one for summary reversal and remand, Charter actually seeks a much broader order from this Court. It asks this Court to direct “the clerk of the district court not to issue further subpoenas,” and to instruct “the district court to require RIAA to return all subpoenaed subscriber data to Charter and to make no further use of such subscriber data.” Mot. at 14. This request for relief, which exceeds the scope of the District Court’s order, is in effect a petition for mandamus. “[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). It is “an extraordinary remedy reserved for extraordinary situations.” *In re MidAmerican Energy Co.*, 286 F.3d 483, 486 (8th Cir. 2002) (per curiam). Charter has not begun to meet the standard for such a petition. The only case it cites, *Church of Scientology of California v. United States*, 506 U.S. 9 (1992), is entirely inapposite. In that case, the Court found that federal courts have authority under the Fourth Amendment to compel the return of privileged attorney-client communications unlawfully obtained by the Government. By contrast, this case does not involve privileged communications; the materials were not obtained by the Government; and the Fourth Amendment is not applicable.

wrong. *See, e.g., Ackerman v. Northwest Airlines, Inc.*, 54 F.3d 1389, 1393 n.3 (8th Cir. 1995) (noting that this Court denied motion for summary reversal that was based on decision of another court). The D.C. Circuit's decision is not binding on this Court, and this Court has repeatedly demonstrated its willingness not to follow the other circuits when it disagrees with their legal analysis. *See, e.g., United States v. Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir. 1991) (declining to follow 4th Circuit); *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 154 n.2 (8th Cir. 1990) (declining to follow 9th Circuit); *Adams v. Fuqua Indus., Inc.*, 820 F.2d 271, 277-78 (8th Cir. 1987) (declining to follow 7th Circuit); *Jaben v. United States*, 333 F.2d 535, 537-38 (8th Cir. 1964) (declining to follow 9th Circuit).

Indeed, it is precisely because the federal circuit courts issue conflicting decisions on questions of law that the Supreme Court recognizes circuit splits as one of the principal bases for granting petitions for certiorari. *See* S. Ct. R. 10. If Charter were correct that one circuit's ruling is binding on all of the circuit courts of appeal, then circuit splits would never develop. Of course, Charter's view is not the law.

Summary disposition would be particularly inappropriate in this case because this Court has never considered the validity of subpoenas issued pursuant to the DMCA. As Charter itself previously argued to this Court, this appeal raises "legal issues of first impression." *See* Charter Emergency Mot. to Stay at 1 (Nov. 21, 2003). It is therefore fanciful to imply, as Charter does, that summary disposition is justified on the ground that the questions presented by this appeal do not require further consideration.

Nor have the issues in this appeal been considered by other appellate courts. The D.C. Circuit is the only federal appeals court to have addressed any issue related to the validity of DMCA subpoenas. Moreover, as a review of the D.C. District Court's and D.C. Circuit's

opinions makes plain, the question of statutory interpretation at issue in that case was complex. Because no other federal court of appeals has considered the important and potentially complex questions of law at issue in this appeal, Charter cannot show that the issues in this appeal require no further consideration. To the contrary, this is precisely the kind of case that merits plenary consideration by this Court. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting in a case involving a circuit split that “[t]his litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals”); *American Med. Int’l, Inc. v. Secretary of Health, Educ. & Welfare*, 677 F.2d 118, 122-23 (D.C. Cir. 1981) (concluding that “independent reconsideration of legal issues by the circuits can facilitate Supreme Court review by highlighting their complications and controversial aspects, and thus make for better informed decisions”) (footnote omitted).³

For all of these reasons, this Court should deny Charter’s motion for summary reversal and reserve all judgment until the parties have fully briefed and argued the issues.

II. CHARTER’S INTERPRETATION OF SECTION 512 IS WRONG.

Because the issues in this appeal are properly decided in the normal course of appellate review and not on a motion for summary disposition, there is no need to reach the merits of Charter’s argument at this point. Nonetheless, out of an abundance of caution, RIAA offers the following response to the merits of Charter’s argument, while expressly reserving the right to raise any and all issues in this appeal in RIAA’s response brief to this Court (including that Charter has waived the argument it now makes). In doing so, however, RIAA notes that the

³ Charter’s attempt to frame the question in this case as whether the courts have subject matter jurisdiction is immaterial to the legal analysis and wrong. Mot. at 6-7. Charter’s newly discovered argument is that the DMCA subpoenas in this case are not authorized by statute. *Id.* But Charter does not suggest that the courts lack jurisdiction to decide that issue. Indeed, it was *Charter* that brought its motion to quash in the District Court, expressly invoking § 512 and other federal statutes.

inappropriateness of summary disposition is highlighted by the rules governing this response brief. Charter filed and served its motion on December 23, just before the Christmas holiday. RIAA's ability to respond to the substantive issue raised by Charter's motion for summary reversal was thus severely compromised, because the rules provided RIAA with only eight days to respond to Charter's motion, and the response cannot exceed twenty pages. *See* Fed. R. App. P. 27(a)(3), (d)(2). That is a poor substitute for a full briefing of the issues on the merits and oral argument as provided by the standard appellate procedures.

Charter's argument that the DMCA does not authorize subpoenas issued to an ISP that is serving solely as a conduit for its subscribers' materials relies exclusively on the D.C. Circuit's decision in the *Verizon* case. *See* Mot. at 7-12. That panel's analysis, however, is fundamentally flawed. The panel engaged in a wooden approach to statutory construction that misconstrued the language of the DMCA and gave insufficient consideration to its purpose and critical elements of its legislative history. By contrast, the district court in *Verizon* provided a careful and thorough analysis of the issues, and concluded that nothing in the text, structure, legislative history or purpose of the DMCA supports the interpretation advocated here by Charter. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 29-41 (D.D.C. 2003). This Court should adopt the district court's analysis.

A. Background of the DMCA and Subpoenas Since Its Enactment

Congress enacted the DMCA in 1998 against a backdrop of massive piracy of copyrighted works on the Internet. S. Rep. No. 105-190, at 8 (1998) ("S. Rep."). Congress was concerned that this piracy would stunt the growth of the Internet for two reasons: (1) ISPs that provide access to the Internet would be subject to massive liability, thus discouraging them from investing in the Internet, and (2) copyright owners and creators would fear making works

available over the Internet because of the ease with which digital works can be copied and pirated. The DMCA was the product of extensive negotiations between ISPs and copyright owners.

In Title II of the DMCA, codified at 17 U.S.C. § 512, Congress addressed both concerns by carving out certain limitations on the liability of ISPs, while at the same time requiring ISPs to act swiftly when they are notified of copyright infringement. *See* S. Rep. at 40 (Congress wanted there to be “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”). The four different limitations on liability established by the DMCA are available to an ISP solely when it is performing functions specific to each of the limitations and solely if the ISP takes action to stop copyright infringement as detailed in the specific requirements of each subsection. *See* §§ 512(b)-(d) (requiring ISPs to disable access to infringing material available from their networks when notified to qualify for three of the limitations on liability); § 512(i)(1)(A) (requiring ISPs to terminate the accounts of repeat copyright infringers to qualify for *any* of the limitations on liability).

The DMCA operates on the principle that copyright infringers – customers of ISPs who use their facilities to copy and disseminate copyrighted works – should be liable in the first instance for copyright infringement, and that copyright owners should sue them and not ISPs. Because, however, copyright infringement can be committed on the Internet anonymously or through an alias (such as `copyrightpirate@charter.net`), only ISPs can identify the infringers. Thus, to achieve its goal, the DMCA ensured that copyright owners can subpoena from ISPs the identities of infringers in order to assert their rights and bring suit for infringement. That is the purpose of § 512(h).

Section 512(h) obligates ISPs to provide the identity of subscribers who use their networks to infringe. Under § 512(h)(1), a copyright owner may request that “the clerk of any United States district court” issue a subpoena requiring an ISP to disclose the identity of one of its subscribers when the copyright owner comes forward with good faith claims of infringement against the subscriber. Pursuant to a DMCA subpoena, a copyright owner may obtain only information sufficient to identify the infringer, § 512(h)(3), and such information may only be used by the copyright owner to protect rights under the federal copyright laws, § 512(h)(2)(C).

Since enactment of the DMCA, § 512(h) has been used thousands of times to identify copyright infringers using the Internet to unlawfully disseminate copyrighted works. In many instances, RIAA has subpoenaed the identity of infringers who were using their home computers to commit copyright infringement or using computers that were not owned or controlled by ISPs. At no time from the enactment of the DMCA to July 2002 did any ISP claim that it was not required to respond to a DMCA subpoena merely because it did not store the infringing material being disseminated by its subscriber. It was thus understood by ISPs and copyright owners alike that § 512(h) applied to all ISPs, regardless whether they were storing the infringing material.

In July 2002, for the first time, Verizon made the argument that § 512(h) does not authorize the issuance of subpoenas to ISPs that merely transmit infringing material for their subscribers. That argument was thoroughly rejected in an extensive opinion by the District Court for the District of Columbia. See *Verizon*, 240 F. Supp. 2d at 29-41. Since that decision, ISPs (with a very small number of exceptions) have regularly complied with subpoenas identical to the ones served on Charter. Although Charter initially refused to comply in this case, it thought so little of Verizon’s statutory construction argument that it barely mentioned it in its briefs below.

B. The D.C. Circuit's Opinion Is Wrong.

The D.C. Circuit's opinion was a bolt out of the blue. Rather than construing the text of § 512(h) in light of its purpose, the panel fabricated limitations on § 512(h) that do not appear in the statute itself and cannot be squared with its purpose or legislative history. The D.C. Circuit's opinion is wrong for at least the following reasons:

There is no language in § 512(h) limiting the provision to a subset of ISPs or to ISPs storing infringing material on their networks. The D.C. Circuit held that “§ 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others.” 2003 WL 22970995, at *7. That limitation, however, appears nowhere in § 512(h). Rather, by its terms, § 512(h) applies to all ISPs regardless of where the infringing material is stored, regardless of the function the ISP is performing, and regardless of whether the ISP is eligible for any particular limitation on liability. This, of course, makes complete sense. Regardless of whether the ISP is serving as a conduit for infringing material or is storing infringing material, the damage to the copyright owner from the infringement is the same (irreparable), the conduct of the subscriber is the same (unlawful), and the burden on the ISP to identify the infringer is the same (minimal).

Both Charter and the D.C. Circuit panel confuse the DMCA's limitations on liability (§ 512(a)-(d)) with the DMCA subpoena provision (§ 512(h)) and have improperly imported limitations from the former into the latter. In crafting eligibility criteria for each limitation on liability, Congress specified the functions that ISPs must be performing and defined the obligations the ISPs must fulfill in assisting copyright owners. Thus, “conduit” providers must terminate the accounts of repeat infringers, but need not disable access to infringing material that has already passed through their systems. *See* § 512(a); § 512(i). ISPs that cache, store, or link

to infringing material must both terminate the accounts of repeat infringers and disable access to infringing material available from their networks. §§ 512(b), (c), (d) & (i). But Congress did not draw functional distinctions when it drafted § 512(h). In contrast to the limitations on liability, which each contain language that limit their application to ISPs performing specific functions, e.g. § 512(a) (“transmitting”); § 512(b) (“caching”), subsection (h) contains no such limiting language. By its plain terms, § 512(h) applies to all “service providers,” and requires all ISPs to “expeditiously disclose to the copyright owner . . . the information required by the subpoena.” § 512(h)(5). Nowhere does § 512(h) refer to what function the service provider must be providing or to where the infringing material is stored. Rather, § 512(h) “is written without limitation or restriction as to its application.” *Verizon*, 240 F. Supp. 2d at 33.

Had Congress wanted to limit § 512(h) to exclude conduit providers, it could easily have done so. Congress “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 placed the subpoena authority itself within subsection (c). But Congress did not do so.” *Verizon*, 240 F. Supp. 2d at 33. Congress took care elsewhere in § 512 to prescribe with specificity which provisions of § 512 apply to which ISP functions. Compare § 512(i) (requiring all ISPs to terminate repeat infringers), with § 512(a)-(d) (extending liability limitations only to ISPs performing specific functions). Indeed, § 512(n) sets forth a rule of construction for deciding whether an ISP qualifies for the limitations on liability set forth in §§ 512(a)-(d), but makes the ISP’s function relevant only for applying “those subsections.” S. Rep. at 55 (“Subsection [(n)] establishes a rule of construction applicable to subsections (a) through (d)”). That decision not to so limit § 512(h) is “strong evidence” that Congress intended no such limitation. *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

The cross-reference on which the D.C. Circuit's entire analysis rests does not limit § 512(h) as the panel believed. To reach the conclusion that Charter now advocates, the panel rests entirely on a cross-reference in § 512(h), which obliges a copyright owner seeking a § 512(h) subpoena to provide to the ISP "a notification described in subsection (c)(3)(A)." § 512(h)(2)(A). Because subsection (c)(3)(A) includes, as one of the elements in the required notification, "[i]dentification of the material that is claimed to be infringing . . . and that is to be removed or access to which is to be disabled, and information reasonably sufficient to locate the material," § 512(c)(3)(A)(iii), the panel held that Congress intended to limit § 512(h) to ISPs who store infringing material.

Once again, the panel found a limitation that simply does not exist. Nothing in subsection (c)(3)(A) – the only part of subsection (c) that is in any way referenced in subsection (h) – mentions where infringing material is stored. *That* requirement is in an entirely different portion of subsection (c) that is not referenced in subsection (h). Indeed, there is simply no evidence that Congress intended subsection (c)(3)(A) to be a massive implied exception to § 512(h). Section 512(c)(3)(A) is a mechanism for specifying the copyright infringement occurring over the ISP's network and for providing sufficient information to allow the ISP to identify the infringer. It is referenced in numerous subsections within § 512 because it provides a baseline of information that copyright owners must provide so that ISPs can perform their obligations under the DMCA. But in none of those subsections does it create an implicit limitation. Indeed, Congress explained that subsection (c)(3)(A) establishes "procedures," not substantive limitations, H. Rep. No. 105-55(II) at 55 (1998), and that substantial compliance is all that is required. *See* § 512(c)(3)(A); *ALS Scan, Inc v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001).

The panel's interpretation of "disable access" makes no logical sense. The panel's contorted reading of subsection (c)(3)(A) in turn rests entirely on its assertion that an "ISP can neither 'remove' nor 'disable access to' the infringing material because that material is not stored on the ISP's servers." 2003 WL 22970995, at *5. That is legally irrelevant and factually wrong. ISPs can disable access to infringing material stored on a subscriber's computer by terminating that subscriber's account under § 512(i).

The D.C. Circuit made the reasonable determination that because the DMCA uses "disable access" and "terminate" a subscriber's account distinctly, those two terms must mean different things. But the panel then made the wholly unsupported leap that, because the two phrases have different meanings, one could not encompass the other. In contrast, the district court recognized that terminating a subscriber's account is one way (though not necessarily a required method) for an ISP to disable access to infringing material. By terminating a subscriber's account, an ISP disables access by other users of the Internet to the infringing content that the user is making available. It is no different than if the ISP were to disable access to a website which was hosted on one of its computers.

There is no dispute that Charter, like other ISPs, can terminate the accounts of infringing subscribers, and therefore block access to the infringing material. Indeed, it is uncontested that conduit ISPs *must* terminate a repeat infringer's account pursuant to § 512(i) in order to qualify for the limitation on liability in subsection (a). There is thus no sound basis for the conclusion that termination of an account does not constitute disabling access to infringing material. Indeed, the common usage of the terms contradicts the court's reasoning. *See Webster's Third New International Dictionary* 642 (1993) (to "disable" includes "to make incapable or ineffective").

Charter takes the panel's opinion one step further and claims that it cannot comply with a DMCA subpoena because it cannot "locate" the infringing material. That argument cannot be taken with a straight face. Charter has already located the infringing material by complying with these subpoenas and identifying the infringing subscribers. Thus, there can be no dispute that Charter knows exactly where the infringement was occurring – from the computer at the end of the cable line going into a particular home or office.

The D.C. Circuit panel wholly ignored § 512(h)(5), which expressly distinguishes between the obligation to disable access and the obligation to identify infringers. The panel's decision confuses an ISP's obligation to disable access to infringing material in some circumstances and its distinct obligation to identify infringers. Remarkably, the panel's opinion does not even mention the language of § 512(h)(5), which addresses this issue directly. Pursuant to § 512(h)(5), Congress made clear that an ISP's obligation to identify infringers is wholly distinct from the obligation imposed on ISPs in some situations to disable access to infringing material upon receipt of a DMCA notification. Thus, an ISP must respond to a DMCA subpoena "notwithstanding any other provision of law and *regardless of whether the service provider responds to the notification.*" (emphasis added).

The panel's opinion is directly contrary to the interpretation of the United States Copyright Office. The Registrar of Copyrights has made clear that the Copyright Office believes that the interpretation of § 512(h) advanced by RIAA is the correct one and that espoused by Charter, Verizon, and the D.C. Circuit panel is wrong. See Statement by Marybeth Peters, *The Register of Copyrights, Before the Senate Comm. on the Judiciary*, 108th Cong. (Sept. 9, 2003) (available at <http://www.copyright.gov/docs/regstat090903.html>) ("[S]ubsection 512(h) is written without limitation or restriction as to its application. . . . Had Congress wished to limit

the application of the subpoena power, it would have simply said so in the law. It did not.”)
(internal citations omitted).

The D.C. Circuit's Discussion of Legislative History Is Wrong. The panel suggests that “the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works.” 2003 WL 22970995, at *7. That single statement manifests a blindness to the text of the DMCA as well as the extensive legislative record on which it was based that is almost unfathomable.

First, the fact that P2P networks did not exist in 1998 when the DMCA was enacted is irrelevant as a matter of statutory construction. As the Supreme Court has repeatedly stressed, the circumstances that serve as a catalyst for legislative action “do[] not define the outer limits of [a] statute’s coverage.” *New York v. FERC*, 535 U.S. 1, 21 (2002). To the contrary, “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (internal quotation omitted); *see also Cook County v. United States ex rel. Chandler*, 123 S. Ct. 1239, 1245-46 (2003). That principle applies with particular force here. Congress recognized that § 512 would have to apply to the dynamic technology of the Internet, which was making “massive piracy” easier by the day, S. Rep. at 8; thus Congress made the DMCA technology-neutral on purpose so that it would not have to amend it every time that technology advanced. *See H. Rep. at 24.*

Moreover, Congress was concerned about infringement committed by people using ISPs as conduits and exchanging copyrighted works from their home or office computers. Indeed, why else would Congress have enacted subsection (a) of the DMCA, behind which Charter hides, if not for that concern? Congress was presented with testimony concerning infringement

through the use of FTP sites⁴ and bulletin boards *on home computers* (the precursors to P2P services), and testimony concerning the use of e-mail services to disseminate copyrighted material without authorization.⁵ Congress was thus well aware that home computers and “conduit” facilities provided by ISPs were being used to engage in digital piracy.

The D.C. Circuit’s opinion defeats the core objectives of the DMCA. The D.C. Circuit essentially concedes that its interpretation defeats an essential purpose of the DMCA, 2003 WL 22970995, at *8, but gives that factor no weight because it believes that its interpretation of the text is unassailable. But, “absent unambiguous directions from Congress,” a court should not limit the scope of a provision that unearths the identities of law-breakers because to do so would “frustrate[]” Congress’s purpose. *United States v. Bisceglia*, 420 U.S. 141, 150 (1975). The panel’s reading of § 512(h) would allow an ISP to foster illegal conduct – by providing facilities for the dissemination of infringing material – and to shield infringers from the threat of being called to account, thus thwarting “Congress’s efforts to prevent copyright infringement on the

⁴A File Transfer Protocol (FTP) site offers files for download using a particular computer protocol; the FTP site is referred to as the server and the computer downloading the files is the client. In a P2P system, all computers in the network serve as both clients and servers, and thus any one of them can download from any other. An FTP site often is a home computer not maintained by the ISP, but disseminating files over the ISP’s network. See Andrew Leonard, *Mutiny on the Net*, Salon, March 1998, available at http://archive.salon.com/21st/feature/1998/03/cov_20feature.html (FTP software “allows anyone with a computer and a modem to make [pirated music] files on their home computer accessible to the rest of the Net”).

⁵*Online Copyright Liability Limitation Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 88-89 at 175 (Sept. 16-17 1997) (statement of Ronald Dunn, President of the Information Industry Association); *Copyright Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 12 at 17-18 (Sept. 11, 1997) (statement of Kevin DiGregory, Deputy Attorney General, Department of Justice).

Internet,” and “undermin[ing] the balance Congress established.” *Verizon*, 240 F. Supp. 2d at 35, 38.

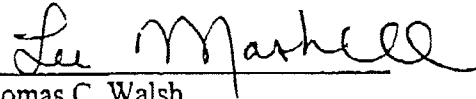
Indeed, the Supreme Court has made clear that statutes should be interpreted to avoid such absurd results, *see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), yet that is exactly what the panel’s opinion would engender. The panel’s interpretation effectively destroys the usefulness of § 512(h) because it means that in many (if not most) cases copyright owners will be allowed to subpoena only ISPs that do not know who the infringers are. In many cases, those who store infringing material, such as those who operate websites or bulletin boards, have no idea who posted infringing material on their sites; those ISPs simply store information sent by others. Only the ISP who provides Internet access knows who the infringer (the sender) is. Under the panel’s interpretation, the copyright owner can only subpoena the former. Thus, infringers can post infringing material on bulletin boards under aliases such as `copyrightpirate@charter.net`, but Charter is under no obligation to identify them. That nonsensical conclusion is not compelled by the text of § 512(h) or any strand of logic.

For all of these reasons, even if this Court reaches the merits of the issue raised by Charter’s motion for summary reversal (which it should not), Charter’s motion must be rejected. Instead, this Court should allow the briefing schedule previously established by this Court to move forward, and to resolve this appeal in the ordinary course.

CONCLUSION

For the foregoing reasons, Charter’s motion for summary reversal should be denied in its entirety.

Respectfully submitted,



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Dated: January 6, 2004

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, appellee The Recording Industry Association of America states that it is a non-profit, trade association acting in this case (pursuant to 17 U.S.C. § 512(h)) as the agent of its members, Universal Music Group, EMI Music North America, Sony Music Entertainment Inc., BMG Music, and Univision Music, Inc.

Universal Music Group is a subsidiary of Vivendi Universal, S.A., which is publicly traded in the United States.

EMI Music North America is a division of EMI Group, PLC, which is publicly traded in the United Kingdom.

Sony Music Entertainment Inc. is a subsidiary of Sony Corporation of America, which is publicly traded in the United States.

BMG Music is a unit of Bertelsmann, Inc. and Bertelsmann AG, neither of which is publicly traded.

Univision Music, Inc. is a subsidiary of Univision Communications, Inc., which is publicly traded in the United States.

PROOF OF SERVICE

The undersigned hereby certifies that on January 6, 2004, a true and correct copy of the foregoing was served by hand delivery on the following:

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