

**WILL INTERNET SERVICE PROVIDERS BE FORCED TO
TURN IN THEIR COPYRIGHT INFRINGING CUSTOMERS?
THE POWER OF THE DIGITAL MILLENNIUM COPYRIGHT
ACT'S SUBPOENA PROVISION AFTER *IN RE CHARTER
COMMUNICATIONS***

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I. INTRODUCTION

Downloading and sharing music files over the Internet has been in the public eye since the advent of file sharing software, which allows average

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² G.B. Trudeau, *Doonesbury*, March 25, 2002, http://www.musicunited.org/8_whatothers.html#doones.

music lovers to easily download a digital copy of virtually any song.³ If the song was copyrighted, then the download was theft; however, most music lovers did not equate the illegal download with shoplifting a compact disc featuring the same song.⁴ The Recording Industry Association of America (“RIAA”) reports an estimated industry wide loss of more than \$4.2 billion due to decreased sales as a result of piracy.⁵

To end illegal music downloading, the RIAA uses tracking software that attempts to download copyrighted songs from various individuals using online file sharing software.⁶ Once an infringer is found, however, the RIAA only has this individual’s internal protocol (“IP”) address.⁷ The infringer’s

³ See *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Since Napster was a centralized peer-to-peer file sharing program, the structure allowed it to be easily targeted as contributing to infringement; however, the newest batch of peer-to-peer programs are not centralized, which affords them a degree of safety from lawsuits. *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 773 (8th Cir. 2005). The court in *Charter* described the first peer-to-peer systems, including Napster:

In 1999, such activity reached new heights with the emergence of so-called peer-to-peer (P2P) systems. Like BBS sites, P2P systems allow users to disseminate files stored on their computers to other internet users. Napster was the first and most notorious P2P system, and the courts ultimately shut it down via an injunction.

Id.; see also *A & M Records*, 239 F.3d at 1011-13 (explaining the basics of file sharing software). File sharing software operates by allowing users access to the system by downloading client software from a particular website and logging in with a user name. *Id.* at 1011-12. Next, users may list available songs that they wish to make available for others to download, usually in MP3 format for music. *Id.* Users may then search other users’ lists for available files that they intend to download using common search engine and indexing techniques found in the software. *Id.* The final step involves the actual downloading of the file from the host user to the recipient user, which is facilitated by the software obtaining the IP address of the two users to establish a direct link between the two computers for transfer. *Id.*

⁴ Robert Moore, *Perceptions of Peer-to-Peer File Sharing Among University Students*, 11 J. CRIM. JUST. & POPULAR CULTURE, 1, 8 (2004), available at <http://www.albany.edu/scj/jcipc/vol11is1/moore.pdf>. This study of college aged music downloaders found that “a majority of respondents . . . did not equate the act of file sharing via peer-to-peer networks to the act of physically shoplifting movies, music, or software from a retail store.” *Id.*

⁵ Recording Industry Association of America, *Anti-Piracy: Old as the Barbary Coast, New as the Internet*, <http://www.riaa.com/issues/piracy/default.asp> (last visited Sept. 1, 2005). The RIAA goes on to explain that this loss is felt by consumers, retailers, record companies, and the creative artists. *Id.* According to the RIAA, record companies only turn a profit on fifteen percent of released sound recordings. *Id.* The remaining eighty-five percent of releases do not cover their costs; thus, the record companies need the profitability of the other fifteen percent to keep them in business. *Id.* Furthermore, online piracy deprives singers and songwriters of the money that is entitled to them, and ninety-five percent of these artists depend on these fees for their livelihood. *Id.*

⁶ *Charter*, 393 F.3d at 774; see also *infra* notes 65-66 and accompanying text (explaining how the tracking software works to “catch” online infringement and how that relates to the copyright owner identifying the infringer by his or her IP address).

⁷ See Jaha Design, *Web Glossary*, <http://www.jahadesign.com/glossary.htm> (last

physical address and contact information can only be ascertained through the Internet service provider (“ISP”) associated with that IP address.⁸

In an effort to curb the widespread copyright violations on the Internet, the RIAA began targeting downloaders who were using file sharing software and began filing copyright infringement cases against them.⁹ A number of these suits have resulted in notorious headlines including: *12-year-old Settles Music Swap Lawsuit*¹⁰ and *RIAA Drops Claim That Grandmother Stole Online Music*.¹¹ These headlines paint the RIAA as the villain in the struggle to end online piracy. In response to infringement lawsuits, groups have formed that want to end the lawsuits and focus attention away from the infringement by instead focusing on the business

visited Oct. 28, 2005). This website defines an IP address as

[a]n identifier for a computer or device on a TCP/IP network (the Internet). Networks using the TCP/IP protocol route messages based on the IP address of the destination. The format of an IP address is a 32-bit numeric address written as four numbers separated by periods. Each number can be zero to 255. For example, 1.160.10.240 could be an IP address.

Id.

⁸ *Charter*, 393 F.3d at 774.

⁹ Recording Industry Association of America, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, Sept. 8, 2003, <http://www.riaa.com/news/newsletter/090803.asp>. The press release read in pertinent part:

The Recording Industry Association of America (RIAA) announced today that its member companies have filed the first wave of what could ultimately be thousands of civil lawsuits against major offenders who have been illegally distributing substantial amounts (averaging more than 1,000 copyrighted music files each) of copyrighted music on peer-to-peer networks. The RIAA emphasized that these lawsuits have come only after a multi-year effort to educate the public about the illegality of unauthorized downloading and noted that major music companies have made vast catalogues of music available to dozens of new high-quality, low-cost, legitimate online services.

Id.

¹⁰ CNN.com, *12-year-old Settles Music Swap Lawsuit*, Feb. 18, 2004, <http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement/index.html>. The suit claimed that the girl offered more than 1,000 songs for downloading on the file sharing service known as Kazaa. *Id.* The settlement was for \$2,000, amounting to two dollars per copyrighted song. *Id.*

¹¹ Benny Evangelista, *Download Lawsuit Dismissed: RIAA Drops Claim that Grandmother Stole Online Music*, S.F. CHRON., Sept. 25, 2003, at B1, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/09/25/BUGJC1TO2D1.DTL> (explaining that The RIAA dropped its claim against a 65-year-old Massachusetts grandmother after she denied even knowing how to download a song off the Internet, and it was discovered that her computer was not even capable of running the software that she allegedly used to download songs such as *I'm a Thug* by Trick Daddy); see also John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES, Sept. 25, 2003, available at <http://www.nytimes.com/2003/09/25/business/media/25TUNE.html?ex=1126152000&en=22760bd567e51cf3&ei=5070&oref=login>.

practices of the music industry and the financial hardships that these lawsuits impose on families.¹² These lawsuits, coupled with the emergence of legal downloading services like Apple's iTunes, have shown that the public is willing to stop illegal downloading and start paying a fair price for quality digital music.¹³

In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA") to assist copyright owners, like those who are members of the RIAA, in stopping illegal downloading.¹⁴ When an owner of copyrighted material learns of specific illegal downloading, the Act allows the copyright owner to subpoena the ISP, compelling it to disclose the physical contact information of the infringer.¹⁵

In 2003, the RIAA requested such a subpoena in the United States District Court for the Eastern District of Missouri.¹⁶ The court ordered Charter Communications, Inc. ("Charter") to disclose the contact information for approximately 150 of its customers.¹⁷ After releasing the confidential information, Charter appealed. The United States Court of Appeals for the Eighth Circuit vacated the district court's decision and ordered that the subpoena could not be enforced.¹⁸ Furthermore, the Eighth Circuit ordered that all confidential customer information must be returned to Charter.¹⁹

This Note argues that the Eighth Circuit should have affirmed the decision of the district court in *In re Charter Communications, Inc.*²⁰ and should have allowed the RIAA to subpoena Charter for customer information

¹² See, e.g., Electronic Frontier Foundation, *Take a Stand Against the Madness: Stop the RIAA!*, <http://www.eff.org/share/petition/> (last visited Oct. 28, 2005). The Electronic Frontier Foundation is a nonprofit organization founded for the purpose of protecting individuals' digital rights. *Id.* This website contains an online petition to Congress to put an end to the lawsuits the RIAA is filing against individuals and families. *Id.*; see also Peer-to-Peer Legal Defense Fund, <http://www.downhillbattle.org/defense/> (last visited Oct. 28, 2005). The Peer-to-Peer Legal Defense Fund was created to help individuals who were sued for copyright infringement by the RIAA. *Id.* This website provides a means to donate money to the individuals and families facing lawsuits so that they may more easily afford a legal defense. *Id.*

¹³ Apple.com., *iTunes Music Store Downloads Top Half a Billion Songs*, July 18, 2005, <http://www.apple.com/pr/library/2005/jul/18itms.html>. On July 18th, Apple sold its 500 millionth song on its popular iTunes music store. *Id.* "Apple is also spearheading the digital music revolution with its iPod portable music players and iTunes online music store." *Id.* The Apple iTunes digital music service sells copies of songs for download for ninety-nine cents per song in a format that a purchaser can keep on a limited number of personal computers and portable devices. Apple.com, *All your Greatest Hits*, <http://www.apple.com/itunes/music>.

¹⁴ Digital Millennium Copyright Act, 17 U.S.C. § 512 (2000).

¹⁵ *Id.* at § 512(h).

¹⁶ *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 774 (8th Cir. 2005).

¹⁷ *Id.*

¹⁸ *Id.* at 778.

¹⁹ *Id.*

²⁰ *Id.* at 771.

attached to specific IP addresses.²¹ Part II of this Note discusses *Charter's* facts, the district court's ruling, and the majority and dissenting opinions of the Eighth Circuit Court of Appeals.²² Part III of this Note discusses the legislative history of the DMCA, the constitutional issues relating to this and other copyright infringement cases, and the canons of statutory interpretation as applied to the DMCA.²³ Additionally, Part III analyzes *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*²⁴ where the United States Court of Appeals for the District of Columbia Circuit interpreted the DMCA when dealing with copyright infringement and ISPs.²⁵ Lastly, Part IV of this Note provides an analysis of the Eighth Circuit's decision in *Charter* and argues that district court should have been affirmed for two reasons.²⁶ First, the subpoena clause of the DCMA applies to all ISPs, including those like Charter that act as conduit service providers.²⁷ Second, and perhaps more importantly, the goal of the DCMA is to help copyright holders protect their interests in light of new technology so that the further development of art and music may be fostered.²⁸

II. STATEMENT OF THE CASE

A. Facts

To curb the widespread illegal downloading of copyrighted songs, in 2003 the RIAA began using tracking programs to identify copyright infringers whom were using online peer-to-peer file sharing programs.²⁹ With the help of these tracking programs, the RIAA would be able to obtain the IP addresses of Internet users who were allowing others to download copyrighted songs from their computers.³⁰ In 2003, the RIAA obtained the IP addresses of ninety-three Charter Internet customers who had been

²¹ See *infra* notes 105-168 and accompanying text.

²² See *infra* notes 29-55 and accompanying text.

²³ See *infra* notes 67-74, 81-91, 92-95 and accompanying text.

²⁴ 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, No. 03-1579, 2004 U.S. LEXIS 6701 (U.S. Oct. 12, 2004).

²⁵ See *infra* notes 96-104 and accompanying text.

²⁶ See *infra* notes 105-168 and accompanying text.

²⁷ See *infra* notes 114-143 and accompanying text.

²⁸ See *infra* notes 144-150 and accompanying text.

²⁹ *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 774 (8th Cir. 2005). The *Charter* court described the RIAA as "a trade association representing record companies which create, manufacture and distribute most of the sound recordings produced and sold in the United States." *Id.*; see also *infra* notes 65-66 and accompanying text (explaining how the tracking programs used by the RIAA function).

³⁰ *Charter*, 393 F.3d at 774. The RIAA confirmed this illegal sharing by downloading a song file and verifying that it was indeed an unauthorized distribution of a copyrighted work. *Id.* According to the RIAA, more than 100,000 songs were made available illegally by the Charter customers the RIAA was seeking to identify. *Id.*; see also *supra* note 7 (explaining the technical description of an IP address and how it relates to an individual user's identity on the Internet).

engaging in illegal song swapping.³¹ However, the IP addresses could only be traced to actual subscribers by Charter, the ISP.³² To obtain the names of the subscriber-infringers from Charter, the RIAA acquired subpoenas under authority of section 512(h) of the DMCA.³³

B. The United States District Court for the Eastern District of Missouri

In response to the subpoenas issued by the clerk, Charter submitted a motion to quash on October 3, 2003.³⁴ At a hearing on November 17, 2003, the district court upheld the validity of the subpoenas and denied the motion to quash.³⁵ The court ordered Charter to release confidential identifying information of 150 Charter customers to the RIAA by November 21, 2003, and to release information for an additional 50 to 70 customers by December 1, 2003.³⁶ Charter disclosed the names and addresses to the RIAA after the district court and the Eighth Circuit denied motions to stay the order.³⁷

C. The United States Court of Appeals for the Eighth Circuit

1. Majority Opinion

The Court of Appeals for the Eighth Circuit vacated the order of the district court and remanded the case instructing the district court to order the RIAA to return all customer information obtained by the subpoenas, to delete

³¹ *Charter*, 393 F.3d at 774. Song swapping is offering songs for download from one's hard drive in exchange for allowing one to also download songs from the other's hard drive. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770 (U.S. 2005) (discussing song swapping software that allowed users to share files electronically).

³² *Charter*, 393 F.3d at 774.

³³ *Id.* at 774, 778; see *infra* notes 75-79 and accompanying text (outlining the details of the DMCA and the section (h) subpoena clause).

³⁴ *Charter*, 393 F.3d at 774. This motion cited five grounds for why the subpoena should be quashed including: (1) section 512(h) only applies to storage ISPs and not conduit ISPs; (2) the subpoena is not supported by a case or controversy; (3) compliance with the subpoena will require ISPs to violate the Cable Act; (4) the subpoena clause violates the First Amendment; and (5) the scope of the subpoena does not require disclosure of e-mail addresses. Brief for Appellant at 2, *In re Charter Commc'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005) (No. 03-3802), 2004 WL 2738704.

³⁵ *Charter*, 393 F.3d at 774.

³⁶ *Id.* Identifying information included the names, addresses, and e-mail addresses of the customers. *Id.*

³⁷ *Id.* at 774-75. After the district court order, Charter filed its notice of appeal on November 20, 2003, along with a motion to stay the order with the district court. *Id.* at 774. The court refused to consider the motion to stay prior to the deadline that Charter had to comply with the order. *Id.* In response, Charter filed an emergency motion to stay compliance with the order until its appeal could be decided with the Eighth Circuit on November 21, 2003, but was again denied. *Charter*, 393 F.3d at 774.

all records of such data, and to make no further use of the information.³⁸ The court based its decision on statutory interpretation of the DMCA and did not reach the constitutional issues raised by the case.³⁹ The court relied heavily on *Verizon*⁴⁰ in deciding how to interpret section 512(h) of the DMCA – the provision governing subpoena requests – as it relates to *conduit* ISPs.⁴¹ The Eighth Circuit adopted the reasoning of the *Verizon* court and held that section 512(h) of the DMCA could only be used by a copyright owner against an ISP where two preconditions were met: first, the ISP must receive proper notice under the statute, and, second, the ISP must have the ability to locate and remove the material that allegedly infringes a copyright.⁴²

The Eighth Circuit further agreed with the *Verizon* court's holding that conduit service providers cannot meet the requirements of being able to locate and remove infringing data because they do not have access to customers' computers, and though it may be an option, terminating the Internet accounts of these customers was not a proper means of removal.⁴³ Since Charter is an undisputed conduit ISP, the Eighth Circuit followed the precedent set by the *Verizon* court and held that the subpoenas were improper.⁴⁴

³⁸ *Id.* at 778.

³⁹ *Id.* at 777-78. The court stated in dicta:

We comment without deciding that this provision *may* unconstitutionally invade the power of the judiciary by creating a statutory framework pursuant to which Congress, via statute, compels a clerk of a court to issue a subpoena, thereby invoking the court's power. Further, we believe Charter has at least a colorable argument that a judicial subpoena is a court order that must be supported by a case or controversy at the time of its issuance.

Id.

⁴⁰ Recording Ind. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003); *see also infra* notes 96-104 and accompanying text (discussing the *Verizon* case holding).

⁴¹ *Charter*, 393 F.3d at 777. A conduit ISP is one that merely acts as a transmitter of data between its customers and the information available on other computers via the Internet. *Id.* In this case, it is undisputed that Charter is a conduit service provider. *Id.* The court stated its finding of fact that “Charter's role in disseminating the allegedly copyright protected material is confined to acting as a conduit in the transfer of files through its network.” *Id.* at 773.

⁴² *Id.* at 777; *see also Verizon*, 351 F.3d at 1233-36.

⁴³ *Charter*, 393 F.3d at 777; *see also Verizon*, 351 F.3d at 1235.

⁴⁴ *Charter*, 393 F.3d at 777. The court states that Charter is classified as a conduit service provider for purposes of the DMCA because it only acts as a re-transmitter of data between its customers and outside data sources on the Internet and does not store any copies of the data on its own servers. *Id.*

2. *Dissenting Opinion*

The dissent disagreed with the majority opinion and argued instead that the validity of the subpoenas served on Charter should have been affirmed.⁴⁵ It reasoned that section 512(h) of the DMCA should be interpreted by a plain reading of the section's language within the context of the statute as a whole.⁴⁶ It argued that "[t]he statutory right to request a subpoena is not limited by the type of ISP."⁴⁷ Therefore, it concluded that the subpoena power of section 512(h) may be lawfully exercised against conduit ISPs.⁴⁸

The dissent also addressed the four additional arguments raised by Charter that the majority did not discuss.⁴⁹ First, the dissent argued that section 512(h) of the DMCA did not violate the case or controversy clause of Article III because the subpoena process in the statute creates a ministerial task performed by a clerk that does not rise to the level of judicial action,

⁴⁵ *Id.* at 778 (Murphy, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.* at 780. The dissent stated that, "[a]lthough Charter contends that the subpoena power in the DMCA is limited by the function of the ISP, such a limitation is not to be found in a plain reading of the DMCA." *Id.* The dissent further argued that conduit service providers are included in the subpoena power under the plain reading of the DMCA. *Charter*, 393 F.3d at 778 (Murphy, J., dissenting). It characterized the statute as "defin[ing] 'service providers' in § 512(k) as all 'providers of online services or network access,' including conduit providers who offer the 'transmission . . . of material of the user's choosing, without modification.'" *Id.* (quoting Digital Millennium Copyright Act, 17 U.S.C. § 512(k)(1) (2000)). This definition includes Charter. *Id.* at 782. The dissent also supported its position by pointing out the specific language of section (h) requirements for notification and its use of the disjunctive word "or." *Id.* at 781. The dissent agreed with the majority that a conduit service provider cannot meet the locate and remove requirement of this section. *Id.* However, it pointed out that the locate and remove requirement was not necessary in cases like Charter's since it was only included in the latter half of an "or" phrase. *Id.* The statute reads:

(3) Elements of notification.

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following: . . .

(iii) Identification of the material that is claimed to be infringing *or* to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and the information reasonably sufficient to permit the service provider to locate the material.

Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3)(A)(iii) (2000) (emphasis added).

The dissent read this statute to mean that a choice must first be made between whether the case deals with material that is: (1) "claimed to be infringing" *or* (2) "to be the subject of infringing activity and that is to be removed or access to which is to be disabled." *Charter*, 393 F.3d at 774 (Murphy, J., dissenting). The dissent saw *Charter* as falling under the first choice – claimed to be infringing – and, thus, did not carry along the locate and remove requirement. *Id.*

⁴⁸ *Charter*, 393 F.3d at 782-83.

⁴⁹ *Id.* at 783-86.

which requires a case or controversy.⁵⁰ The dissent also addressed Charter's argument that compliance with the disclosures requested in the DMCA section 512(h) subpoena clause would require that it also violate its nondisclosure duties articulated in the Cable Act.⁵¹ The dissent argued that the language of the DMCA superseded the Cable Act provisions due to its use of the specific word "notwithstanding" in contemplation of other conflicting laws.⁵²

Next, in regard to Charter's First Amendment argument claiming a violation of the anonymity of Internet speech, the dissent reasoned that the DMCA does not inhibit free speech or violate Internet users' anonymity because any alleged suppression of free speech is not based on its expressive content.⁵³ Furthermore, the dissent noted that the DMCA has adequate procedural safeguards in place to ensure First Amendment compliance.⁵⁴

⁵⁰ *Id.* at 784. Congress intended to make the subpoena process a ministerial task where the data needed by the copyright owners could be obtained in a way that did not require civil action; thereby striking a balance between the copyright owners' interest and the ISPs' interest. *Id.* at 783-84 (discussing S. Rep. No. 105-190, at 51 (1998)). The report went on to state that "[t]he issuing of the order should be a ministerial function performed quickly for this provision to have its intended effect." *Id.*

⁵¹ *Id.* at 784-85. The privacy requirements of the Cable Act read in pertinent part:
 § 551. Protection of subscriber privacy
 (c) Disclosure of personally identifiable information.
 (1) . . . cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.
 (2) A cable operator may disclose such information if the disclosure is--
 (B) . . . made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed

Wire or Radio Communications (Cable) Act, 47 U.S.C. § 551 (2000).

⁵² *Charter*, 393 F.3d at 784. The dissent pointed out that the language of section 512(h) stated that the disclosure include "the information required by the subpoena, notwithstanding any other provision of law." *Id.* (quoting Digital Millennium Copyright Act, 17 U.S.C. § 512(h)(5) (2000)). The use of the term "notwithstanding" means that the given provision was intended to supersede any other law that would prevent its compliance. *See* *Campbell v. Minneapolis Pub. Hous. Auth. ex rel. City of Minneapolis*, 168 F.3d 1069, 1075 (8th Cir. 1999); *see also Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

⁵³ *Charter*, 393 F.3d at 785; *see also Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (overturning a federal statute authorizing the Postmaster to refuse delivery of obscene materials because the statute lacked the "sensitive tools" required to separate protected speech from regulated speech and permitted suppression of expressive material without any judicial decision on its obscenity).

⁵⁴ *Charter*, 393 F.3d at 785 (Murphy, J., dissenting). These adequate safeguards include: (1) a requirement that the requestor identify the copyrighted material and the material that is infringing it; (2) a statement by the requestor that he or she has a good faith belief infringement occurred; (3) a verification statement and a declaration that ensures that the requestor will only use the information gathered via the subpoena to enforce his or her

Finally, the dissent rebutted Charter's argument that customers' e-mail addresses should not be included in the subpoenas' disclosures. The dissent contended that e-mail addresses are not specifically excluded in "identifying information," and they are likely the most expeditious way to contact copyright infringers.⁵⁵

III. BACKGROUND

A. The Economic and Technological Background of Peer-to-Peer File Sharing in Light of Its Use as a Copyright Infringement Tool

File sharing has economic and technological impacts on the music industry. Thus, the analysis must start with the economic and technological underpinnings behind the problem in order to understand how the legal issues relate to an emerging technology and to the music industry's need to make a profit.⁵⁶

copyright. *Id.*

The statute reads in pertinent part:

(3) Elements of notification.

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

...

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3)(A) (2000).

⁵⁵ *Charter*, 393 F.3d at 786 (Murphy, J., dissenting). The dissent stated:

Since electronic mail provides the fastest and surest means of contacting individuals alleged to have engaged in digital piracy over the internet, email addresses are a most appropriate form of identification. Nothing in § 512(h) precludes the disclosure of email addresses, and the statute in fact includes electronic mail addresses as part of that 'information reasonably sufficient to permit the service provider to contact the complaining party.' Finally, as noted by the district court, email is a less intrusive form of notification than the telephone. The district court did not err by requiring the disclosure of email addresses by Charter.

Id. (citation omitted); see also Brief for Appellant at 44, *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771 (8th Cir. 2005) (No. 03-3802), 2004 WL 2738704 (laying out Charter's argument why e-mail addresses are not required for identification in the subpoenas).

⁵⁶ See *Charter*, 393 F.3d at 773-74 (showing that the court started its opinion with

1. *Economic Considerations*

The sheer scope of new downloading technologies and their likely role in the future of music distribution necessitates an analysis of the economic impact felt by the illegal and legal downloading of music files.⁵⁷ Partly attributable to the threat of a lawsuit from the RIAA, the climate of downloading music from the Internet, both legally and illegally, has changed in recent years.⁵⁸ In March 2005, 26 million songs were purchased and downloaded legally from online stores while a total of 243 million songs in the same month were downloaded, mainly illegally, using peer-to-peer software.⁵⁹ The public conception of illegal downloading may be viewed “by some as an innocuous form of entertainment”; however, the economic truth behind the activity is that it results in substantial revenue losses for recording companies and for artists.⁶⁰ The dissent in *Charter* pointed out that “[i]t is not just faceless corporations who pay the cost. Local music retailers are also vulnerable to the allure of free music, and artists can lose the economic incentive to create and distribute works.”⁶¹

2. *Technological Background*

When Congress first passed the DMCA, mainstream peer-to-peer software was “not even a glimmer in anyone's eye”⁶² There were two

an analysis of the economic and technological background of the case).

⁵⁷ *Id.* at 778-79 (Murphy, J., dissenting) (discussing the court’s view on the economic repercussions resulting from online infringement and how they are often not given proper consideration).

⁵⁸ NPD Group, Inc., *Progress Report: Digital Music Landscape Shifting, but Slowly*, June 23, 2005, http://www.npd.com/dynamic/releases/press_050623.html. This study determined that the threat of lawsuits was the number one reason why illegal downloaders stopped using peer-to-peer software. *Id.* Other reasons for not using peer-to-peer software included: large amounts of spyware, adware, and viruses, and not obtaining the song in an acceptable quality due to corrupted files and decoy song files. *Id.*

⁵⁹ *Id.* The study further reports that two years ago illegal music downloads outnumbered legally purchased music downloads nearly twenty to one, based on household activity as a whole. *Id.* That disparity has been narrowed to almost two to one in March 2005. *Id.* The rise in legally purchased downloaded music may be attributed to many factors including faster broadband connections and technological advancements in personal computers and electronic devices. NPD Group, Inc., *supra* note 58.

⁶⁰ *Charter*, 393 F.3d at 778 (Murphy, J., dissenting); *see also* Jeff Leeds, *Music Industry Turns to Napster Creator for Help*, N.Y. TIMES, Dec. 3, 2004, at C1 (arguing that illegal file sharing via peer-to-peer software has grown to the point that users may obtain nearly any song they want with the click of a mouse, and this has attacked the very foundation of the music industry since sales of CDs has significantly diminished).

⁶¹ *Charter*, 394 F.3d at 779 (Murphy, J., dissenting); *see also* David Segal, *Requiem for the Record Store; Downloaders and Discounters Are Driving Out Music Retailers*, WASH. POST, Feb. 7, 2004, at A1 (reporting that music retail sales are currently in “serious trouble” because they have been “hammered by Internet piracy”).

⁶² *In re Verizon Internet Servs.*, 240 F. Supp. 2d 24, 38 (D.D.C. 2003) (quoting Brief for Alliance for Public Technology et al. as Amici Curiae Supporting Appellant at 6, *In*

primary problems put in front of Congress in 1998. The first concerned computer hackers who were creating unauthorized sites on the ISPs' own servers to facilitate bulletin board systems and file transfer protocols ("FTP") sites that housed infringing material.⁶³ The second problem involved ISPs that hosted bulletin boards and FTP sites on their own servers, making digital versions of copyrighted songs freely available for download to anyone with FTP access or a subscription to the ISP's bulletin boards.⁶⁴

Today, the RIAA's tracking software locates the IP addresses of those who have copyrighted songs on their computers by analyzing the incoming information to identify the source IP addresses.⁶⁵ This software identifies the users who illegally shared the copyrighted material by tracking them through their ISP, which collects the users' information.⁶⁶

B. The Digital Millennium Copyright Act's Legislative Background

1. Legislative Intent and Congressional Reports

Congress enacted the DMCA as the main legislative means of combating the use of the Internet to digitally infringe copyrights; however, the emergence of mainstream peer-to-peer programs occurred after its

re Verizon Internet Servs., 240 F. Supp. 2d 24, 38 (D.D.C. 2003)). The court also noted that the means for the RIAA to identify copyright infringers on the Internet using automatic tracking software known as "bots" was also not contemplated by Congress at the time of the DMCA enactment. *Id.*

⁶³ Recording Ind. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1238 (D.C. Cir. 2003) (discussing the hearing before the House Subcommittee on Courts and Intellectual Property regarding the balance of responsibilities on the Internet and the Online Copyright Liability Limitation Act).

⁶⁴ *Id.*; see Complaint at 1, Geffen Records, Inc. v. Arizona Bizness Network, No. CIV. 98-0794, (D. Ariz. May 5, 1998) available at <http://www.riaa.com/news/newsletter/pdf/geffencomplaint.pdf> (claiming that the defendant ISP hosted a site that allowed users to download a "Song of the Day" via FTP while the defendant did not have the permission of the copyright owners to offer their works for free download).

⁶⁵ See Kristyn Maslog-Levis, *Key Witness Takes Stand in Kazaa Trial*, Dec. 1, 2004, <http://news.zdnet.com/2100-9588-5472814.html>. Nigel Carson testified as an expert witness in a trial involving a peer-to-peer software provider on the capabilities and limitations of what IP tracking can do in the fight against Internet piracy. *Id.* An example of the software that may be used to track the IP address of online activity is PacketMon developed by AnalogX. AnalogX, <http://www.analogx.com/contents/download/network/pmon.htm> (last visited Sept. 19, 2005). This software is free to download and allows users to monitor all incoming and outgoing packets of information traveling along their networks and to capture information including the time of transmission; the size of transmission; and the sending and receiving IP addresses. *Id.*

⁶⁶ Maslog-Levis, *supra* note 65. Even if the user's IP address has changed since he or she was caught infringing online, the ISP can still provide the user's contact information based on its records. *Id.*

passage in 1998.⁶⁷ When Congress passed the DMCA, its intent was to deal with the “massive piracy” of copyrighted material over the Internet while refraining from smothering the growth of the technology by placing the burden of liability for illegal customer use on ISPs.⁶⁸ In doing so, the Act had to accommodate and balance the competing interests of copyright holders and the ISPs. The copyright owners wanted to ensure that their intellectual property would be protected by minimizing the threat that Internet piracy posed.⁶⁹ On the other hand, the ISPs wanted limitations on liability for illegal customer use of their Internet services.⁷⁰ Congress sought to foster cooperation between ISPs and copyright owners by creating incentives for ISPs to detect and stop infringing activity and by eliminating uncertainty for ISPs regarding exposure to third party liability for contributing to their customers' copyright infringement.⁷¹

Specifically, the history of the DMCA also indicates that the subpoena power of section 512(h) was intended to gather information from ISPs in a timely manner to end illegal activity.⁷² The subpoena power also has a requirement that the ISP be notified of infringing activity because Congress intended to give the ISP an opportunity to “find and address” the issue on its own.⁷³ Legislative history is important because only Congress is empowered with the authority and the procedural tools necessary to

⁶⁷ *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 773-74 (8th Cir. 2005).

⁶⁸ S. REP. NO. 105-190, at 8 (1998). According to House reports, the DMCA was created with two central priorities in mind: “promoting the continued growth and development of electronic commerce and protecting intellectual property rights.” H.R. REP. NO. 105-551, pt. 2, at 23 (1998). The House report reads in pertinent part:

The debate on [the DMCA] highlighted two important priorities: promoting the continued growth and development of electronic commerce; and protecting intellectual property rights. These goals are mutually supportive. A thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property – whether in the form of software, music, movies, literature, or other works – drives the demand for a more flexible and efficient electronic marketplace.

Id.

⁶⁹ *Charter*, 393 F.3d at 774.

⁷⁰ *Id.* *Charter* was also concerned that since conduit ISPs do not store the infringing material available for download on their servers, they would not be able to protect themselves from liability. *Id.* at 778.

⁷¹ S. REP. NO. 105-190, at 40.

⁷² *See id.* at 51. The Senate report stated that “[t]he issuing of the [subpoena] should be a ministerial function performed quickly for this provision to have its intended effect.” *Id.*

⁷³ *See id.* at 46 (contrasting the statutory language of “locate and remove” with “find and address”). The report states that “[t]he goal of [the notification] provision is to provide the service provider with adequate information to *find and address* the allegedly infringing material expeditiously.” *Id.* (emphasis added).

completely serve all those with a stake in the legal implications of a new technology.⁷⁴

2. *The Basics of Copyright Law in the Digital Millennium Copyright Act*

Copyright laws were envisioned by the Constitutional Framers as "the engine of free expression."⁷⁵ In order to realize this ideal, copyright laws have been adapted as American society has changed.⁷⁶ In response to the rapid development of Internet technology, the DMCA creates safe harbors for ISPs by limiting liability for those providers who fall within certain statutory classifications.⁷⁷ In exchange for this limited liability, the

⁷⁴ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 420, 431 (1984) (balancing the interests of copyright holders of television broadcasts with the interests of the emerging technology of home video tape recorders).

⁷⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); see U.S. CONST. art. I, § 8, cl. 8 (granting power to Congress to "promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .").

⁷⁶ See, e.g., 17 U.S.C. §§ 901-914 (2000) (creating copyright protection for semiconductor chips in 1984 in the wake of the expanding microcomputer industry); 17 U.S.C. §§ 1001-1010 (2000) (providing copyright laws that deal specifically with digital audio recordings and their relation to copy controls and royalty payments after advances in the technology of digital recording devices).

⁷⁷ 17 U.S.C. § 512(a)-(e) (2000). The statute reads in pertinent part:
 § 512. Limitations on liability relating to material online
 (a) Transitory digital network communications. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections
 (b) System caching.
 . . . by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider
 (c) Information residing on systems or networks at direction of users.
 . . . by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider
 (d) Information location tools.
 . . . by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link
 (e) Limitation on liability of nonprofit educational institutions.
 (1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of

DMCA expects ISPs to help copyright holders enforce their rights against Internet subscribers who engage in infringing activity by submitting to the subpoena power of section 512(h).⁷⁸ Additionally, the Act contains a

subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution

Id.

⁷⁸ 17 U.S.C. § 512(h) (2000). The subpoena provision of the statute reads in pertinent part:

(h) Subpoena to identify infringer.

(1) Request. A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request. The request may be made by filing with the clerk--

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena. The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) Basis for granting subpoena. If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) Actions of service provider receiving subpoena. Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) Rules applicable to subpoena. Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

safeguard that provides a cause of action if the subpoena power is used for improper or fraudulent purposes.⁷⁹

C. Constitutional Challenges to The Digital Millennium Copyright Act

Federal laws, such as the DMCA, that grant statutory based subpoenas to further the discovery process must survive constitutional scrutiny. Constitutional challenges commonly allege that the subpoena would violate a person's First Amendment free speech rights or that no "case or controversy" exists that would allow judicial action as required by Article III of the Constitution.⁸⁰

1. First Amendment Violations

First, copyright infringement is not protected by the First Amendment.⁸¹ Furthermore, the Supreme Court has said that the close proximity of the creation of the First Amendment and the Copyright Clause shows that "the Framers' view [regarding] copyright's limited monopolies are compatible with free speech principles," and the First Amendment's goal of promoting free expression is further promoted by the copyright laws.⁸² In some situations, the Supreme Court has recognized anonymity as an element of free speech.⁸³ New technologies create new venues for the exercise of

Id.

⁷⁹ 17 U.S.C. § 512(f) (2000). The provision reads in pertinent part: (f) Misrepresentations. Any person who knowingly materially misrepresents under this section-- (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

Id.

⁸⁰ See, e.g., *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 783 (8th Cir. 2005) (listing Charter's constitutional arguments for invalidating the subpoenas); see also *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 558 (S.D.N.Y. 2004) (rejecting the ISP's argument that subpoenas violated Internet users' free speech by finding that the users' identities were not protected when the users distributed copyrighted songs on the Internet without permission).

⁸¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

⁸² *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (citing *Harper & Row*, 471 U.S. at 560).

⁸³ See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002) (deciding that a city ordinance mandating pamphleteers to disclose

speech. Most recently the Internet has provided an “unprecedented electronic megaphone” where people may express ideas to extremely wide national and international audiences with the option of remaining anonymous.⁸⁴ The Supreme Court has stated that anonymous expression is protected to safeguard individuals who anonymously support causes or who fear retaliation by economic or official means; by social ostracism; or by an intrusion into their personal privacy.⁸⁵ Although copyright infringement through file sharing is anonymous, it does not meet the intent of these policies. Therefore, it is not protected expression.

2. Case or Controversy Requirement of Article III

The DMCA may also be challenged on the grounds of violating Article III of the Constitution that restricts judicial power by requiring that it only be used to resolve “a case or controversy.”⁸⁶ For constitutional jurisdiction to exist, there must be “an adversary proceeding, involving a real, not a hypothetical, controversy.”⁸⁷ Courts have discussed whether a case or controversy exists in subpoena actions if judicial power is invoked. The D.C. Circuit noted in *Verizon* that if a subpoena application is challenged by the party it will be served upon, a sufficient case or controversy exists to allow constitutional subject matter jurisdiction.⁸⁸ The D.C. Circuit has also held that in order for a court to have the power to issue a subpoena there must be at least a claim that the case in question falls within the jurisdiction of the federal courts.⁸⁹ However, this restriction on judicial power is not invoked when the activity is considered a ministerial act.⁹⁰ The issuance of a subpoena may be considered a ministerial act when a clerk is

names implicates “anonymity interests” implicit in the First Amendment); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (holding that a state regulation requiring identification badges for petitioners violated the First Amendment because it violated those individuals' anonymity).

⁸⁴ *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997) (with the advent of chat rooms and bulletin board systems all Internet users may become “town criers” with their words reaching farther than they could have ever reached pre-Internet).

⁸⁵ *Watchtower*, 536 U.S. at 165-66.

⁸⁶ U.S. CONST. art. III, § 2.

⁸⁷ *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (citing *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 724 (1929)) (finding that a case or controversy did exist in a railroad company’s declaratory relief action in regards to a state tax on gasoline stored for interstate shipment).

⁸⁸ *Recording Ind. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003). The court stated that “[t]he district court’s jurisdiction to issue the orders . . . is not drawn into question by [an] Article III argument.” *Id.* at 1231 n.*.

⁸⁹ *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996); *accord Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294-95 (D.C. Cir. 2000).

⁹⁰ *Dorman v. Sanchez*, 978 F. Supp. 1315, 1326 (C.D. Cal. 1997) (holding that the Federal Contested Elections Act’s discovery subpoena clause is not in violation of Article III since it is a ministerial task).

charged with issuing a subpoena specified in a statute, and all the requirements to give the subpoena authority have been satisfied.⁹¹

D. Courts Have Had Few Opportunities to Interpret the Digital Millennium Copyright Act; However, When Doing So, They Must Look to Precedent to Guide the Process

When courts are asked to interpret the meaning and scope of a statute they look to various legal precedents to guide them. When interpreting a statute, most courts start with the specific language of that statute.⁹² If this language is ambiguous, then courts likely will consider the congressional intent behind the statute's enactment.⁹³ Courts also view statutory construction “[a]s a holistic endeavor” that should at least take into account the statute's text in its entirety, along with structure, punctuation, and subject matter.⁹⁴ Furthermore, interpretations by the courts that leave portions of a statute “superfluous” should be avoided.⁹⁵

⁹¹ See *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866). The court stated “[a] ministerial duty . . . is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.” *Id.*

⁹² U.S. Sec. & Exch. Comm'n v. *Zahareas*, 272 F.3d 1102, 1106 (8th Cir. 2001). See also *United States v. Missouri Pac. Ry. Co.*, 213 F. 169, 173 (8th Cir. 1914) (stating that if the legislature does not provide an exception to a broad and definite declaration, it is assumed that the legislature did not intend to make such an exception, and it is not the court's job to create one).

⁹³ See *Haley v. Retsinas*, 138 F.3d 1245, 1249 (8th Cir. 1998) (interpreting a federal whistle-blower protection statute to apply to the plaintiff in this employment termination case). The use of legislative history in clearing up ambiguity is premised on the caveat that it should not be utilized by the court to directly contradict the words in the statute. See *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (stating that legislative history should not be analyzed if the statute's text is clear).

⁹⁴ *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (stating that a major “canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))).

⁹⁵ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The Supreme Court went on to further explain:

Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Id. at 253-54 (citing *United States v. Ron Pair Enters.*, 489 U.S. 235, 241-42 (1989)).

1. Recording Industry Ass'n of America v. Verizon Internet Services, Inc.

This case was the first to interpret the DMCA subpoena clause.⁹⁶ In *Verizon*, the RIAA sought subpoenas under section 512(h) of the DMCA to obtain the contact information for two of Verizon's Internet customers suspected of copyright infringement through peer-to-peer programs.⁹⁷ Verizon contended that the subpoena power was not applicable to conduit ISPs.⁹⁸ The district court was not convinced and ordered Verizon to disclose the information requested in the subpoenas basing its analysis on "the language and structure of the statute, as confirmed by the purpose and history of the legislation."⁹⁹

On appeal, the RIAA argued that the statute supported a broad definition of ISP for subpoena issuance.¹⁰⁰ The D.C. Circuit rejected this argument finding that the statute's subpoena clause did not apply to conduit ISPs – those that only engage in transferring data and do not store any data on their servers.¹⁰¹ The court did not reach the constitutional challenges.¹⁰²

⁹⁶ *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, No. 03-1579, 2004 U.S. LEXIS 6701 (Oct. 12, 2004).

⁹⁷ *Id.* at 1231. The RIAA then in turn filed a district court motion to compel disclosure of the requested information. *Id.*

⁹⁸ *Id.* at 1233.

⁹⁹ *Id.* (quoting *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 45 (D.D.C. 2003)). RIAA also acquired a second subpoena, and Verizon filed a motion to quash based on the two constitutional arguments also raised in the *Charter* case – unconstitutional under the Article III case or controversy requirement and unconstitutional for violation of the First Amendment. *Id.*; see *supra* notes 34, 39, 50, 53-54 and accompanying text. The district court also ruled against Verizon on these issues and both appeals were consolidated at the appellate level. *Verizon*, 351 F.3d at 1233.

¹⁰⁰ *Verizon*, 351 F.3d at 1233, 1236. The RIAA argued that since section 512(h)(1) allows "the clerk of any United States district court to issue a subpoena to a service provider" the Act's definition of service provider should be analyzed to see if Charter falls within its definition. *Id.* at 1236 (citing 17 U.S.C. § 512 (h)(1) (2000)). A service provider is defined:

(A) As used in subsection (a), . . . an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), . . . a provider of online services or network access, or the operator of facilities therefor [sic] . . .

17 U.S.C. § 512(k)(1)(2000). The RIAA contends that a conduit ISP like Charter falls under the definition in section 512(k)(1)(B) and that such definition applies to service providers articulated in section 512(h). *Verizon*, 351 F.3d at 1236. The courts go so far as to classify this argument as "border[ing] upon the silly." *Id.* The court states this opinion based on its contention that whatever definition of service provider one uses is irrelevant if the notice provisions of section 512(c)(3)(A) are not met. *Id.*

¹⁰¹ *Verizon*, 351 F.3d at 1233.

¹⁰² *Id.* at 1231. The *Verizon* court did not comment on the merits of the constitutional challenges raised as the court in the *Charter* case did in dicta. See *id.* at 1231-

Although the D.C. Circuit expressed sympathy for the plight of copyright holders facing massive infringement,¹⁰³ it remanded the case to the district court with instructions to vacate the orders enforcing the subpoenas.¹⁰⁴

IV. ANALYSIS

Online piracy is a tremendous threat to the interests of copyright holders. The plain language of the DMCA, the congressional intent behind the Act, its constitutionality in light of the First Amendment and Article III, along with the economic and the policy reasons for preventing infringement, indicate that copyright holders are entitled to use the DMCA to eliminate the “massive piracy” occurring on the Internet.¹⁰⁵ Clearly, the subpoena power of section 512(h), which allows copyright owners to identify copyright infringers, must extend to conduit Internet service providers.¹⁰⁶

The concluding section of this Note will argue that the Eighth Circuit should have declined to follow *Verizon*. Instead, it should have affirmed the decision of the lower court; thus, enforcing the subpoenas issued to Charter.¹⁰⁷ This Note will first contend that the Eighth Circuit’s interpretation of the DMCA subpoena clause as inapplicable to conduit service providers does not follow accepted statutory interpretation methods.¹⁰⁸ Next, this Note will argue that public policy and economic reasons justify copyright holders use of the DMCA’s subpoena power against conduit service providers to stop peer-to-peer file sharing – the most common form of online piracy.¹⁰⁹

Finally, this Note will show that the DMCA does not violate the constitutional rights of ISPs or their Internet service subscribers.¹¹⁰ First, procedural safeguards exist in the DMCA to prevent unconstitutional limitations on the free speech of Internet users.¹¹¹ Also, the clerk-issued subpoenas are not in violation of the case or controversy requirement since a

39; *supra* note 39 (noting that the court recognized the possibility of an Article III case or controversy requirement violation). The *Verizon* court stated that “[t]he district court’s jurisdiction to issue the orders here under review is not drawn into question by Verizon’s Article III argument.” *Verizon*, 351 F.3d at 1231 n.*; *see also* Interstate Commerce Comm’n v. Brimson, 154 U.S. 447, 478 (1894) (finding that the case or controversy requirement was met in a subpoena enforcement matter initiated by the Interstate Commerce Commission for investigative purposes).

¹⁰³ *Verizon*, 351 F.3d at 1238. “We are not unsympathetic either to the RIAA’s concern regarding the widespread infringement of its members’ copyrights, or to the need for legal tools to protect those rights.” *Id.*

¹⁰⁴ *Id.* at 1239.

¹⁰⁵ *See supra* note 68 (quoting S. REP. NO. 105-190, at 8 (1998)).

¹⁰⁶ *See supra* note 78 (providing the language of the DMCA and its subpoena power clause as it relates to the notification requirements and the different types of ISPs).

¹⁰⁷ *See infra* notes 114-168 and accompanying text.

¹⁰⁸ *See infra* notes 114-143 and accompanying text.

¹⁰⁹ *See infra* notes 144-150 and accompanying text.

¹¹⁰ *See infra* notes 151-168 and accompanying text.

¹¹¹ *See infra* notes 151-160 and accompanying text.

controversy exists at the time of the request.¹¹² Even if no controversy exists, the clerk's action is a ministerial task; therefore it does not invoke judicial power.¹¹³

A. The Subpoena Clause of the Digital Millennium Copyright Act Must Be Interpreted to Include Conduit Service Providers

In *Charter*, the Eighth Circuit interpreted the DMCA and its subpoena clause as inapplicable to ISPs who merely act as transmitters of data for their customers.¹¹⁴ The plain language of the statute suggests that this interpretation is wrong because the statute contains no such limitation.¹¹⁵ The subpoena provision is clearly meant to apply to all four of the enumerated types of ISPs in the statute: conduit service providers, storage providers, search tool providers, and caching providers.¹¹⁶ The subpoena provision specifically states that someone like the RIAA can request a federal court clerk to issue the subpoena "to a service provider."¹¹⁷ In no way does the subpoena provision mention excluding any of the ISPs enumerated in the statute.¹¹⁸

Furthermore, when viewing the text of the statute as a whole, courts recognize the need to review the entire statute for definitions of terms and for other uses of those terms.¹¹⁹ A service provider is clearly defined in section (k) as "a provider of online services or network access."¹²⁰ This definition precisely describes Charter because, as a conduit ISP, it provides the service of routing data from the Internet at large to its customers' personal

¹¹² See *infra* notes 162-168 and accompanying text (noting that the dilemma of complying with the disclosure requirements of a subpoena while at the same time being bound by the nondisclosure requirements of the Cable Act, is remedied in the case where a controversy exists).

¹¹³ See *infra* notes 165-168 and accompanying text.

¹¹⁴ See *supra* notes 41-44 and accompanying text (explaining the court's reasoning for excluding subpoenas issued to conduit service providers).

¹¹⁵ See *supra* notes 77-78 and accompanying text (providing the language of the statute in pertinent part); see also *supra* note 92 (explaining that statutory interpretation necessarily starts with an analysis of the words of the statute).

¹¹⁶ See *supra* note 77 and accompanying text (providing the language of the statute in pertinent part); see also *supra* note 93 and accompanying text (noting that in the face of statutory ambiguity, the court looks to legislative intent when interpreting the statute).

¹¹⁷ See *supra* note 78 and accompanying text (providing the language of the subpoena clause of the statute).

¹¹⁸ See *supra* note 78 and accompanying text (providing the language of the subpoena clause of the statute); see also *supra* note 92 (explaining that courts cannot create an exception to a general provision if Congress did not provide an exception in the text of the statute).

¹¹⁹ See *supra* note 94 and accompanying text (explaining that statutes must be interpreted as an entirety, taking into account the structure and holistic nature of the statute).

¹²⁰ See *supra* note 100 and accompanying text (providing the language of the definition section of the statute).

computers.¹²¹ Applying this definition to section (h), it is evident that conduit service providers are also subject to the subpoena power of this clause.¹²²

Certain courts have characterized this definitional analysis as approaching “silly” since they view the notice requirement, which is one of the six subpoena requirements, as the bottleneck.¹²³ This characterization is flawed if one follows the definitional approach when interpreting the subpoena provision. The term “service provider” is consistently used in every single section of 512.¹²⁴ Also, its use in other provisions, such as the provision providing remedies for misrepresentations that cause harm to “service providers,” certainly does not leave classes of “service providers,” such as conduit ISPs, without reprieve when faced with this misconduct.¹²⁵

The content requirements in subsection (h)(2)(A) refer back to the notice specification residing in subsection (c)(3)(A), which applies to ISPs engaging in data storage.¹²⁶ In subsection (c)(3)(A), the elements for effective notice include “[1] [i]dentification of the material that is claimed to be infringing or [2] to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information . . . to locate the material.”¹²⁷ The specifics of subsection (c)(3)(A) could have just been reproduced in section (h), but to avoid repetition and unduly long provisions a simple reference to subsection (c)(3)(A) was included instead.¹²⁸ Some courts, however, have read too much into this reference back to subsection (c)(3)(A) and have concluded that the subpoena provision only applies to service providers that engage in storing data for their customers.¹²⁹

The notion that the text of subsection (c)(3)(A) implicitly excludes conduit service providers since they are unable to remove or locate the infringing material is flawed for two reasons. First, the structure of this

¹²¹ See *supra* note 44 and accompanying text (describing Charter as an ISP that provides Internet service to its customers and is primarily a conduit service provider).

¹²² See *supra* note 100 and accompanying text (citing the RIAA’s argument in the *Verizon* case that the statute supported a broader definition of service provider than the D.C. Circuit was willing to apply).

¹²³ See *supra* notes 101, 103 and accompanying text (citing *Verizon* decision and its dismissal of the RIAA’s definitional argument).

¹²⁴ See *supra* notes 77-78, 100 and accompanying text (providing the text of the various sections of the statute); see also *supra* note 94 and accompanying text (explaining that statutes must be interpreted as an entirety, taking into account the structure and holistic nature of the statute).

¹²⁵ See *supra* note 79 and accompanying text (providing the language of the misrepresentations section); see also *supra* note 95 (noting that interpretations that render provisions of a statute superfluous are to be avoided).

¹²⁶ See *supra* note 78 and accompanying text (providing the language of the subpoena clause of the statute).

¹²⁷ See *supra* note 47 and accompanying text (quoting the text of the statute).

¹²⁸ See *supra* notes 47, 78 and accompanying text (providing the text of the relevant sections of the statute to note the inclusion of the subsection (c)(3)(A) reference).

¹²⁹ See *supra* notes 41, 42-44, 102 and accompanying text (discussing the majority decisions in the *Charter* and *Verizon* cases).

provision is such that the “locate and remove” requirement is not needed if the notice includes identification of the material that is actually “claimed to be infringing,” such as a list of known copyright infringing songs on an Internet user’s computer.¹³⁰ The “locate and remove” requirement only applies if the second part of subsection (c)(3)(A)(iii) has to be used, and this portion is only used for material that will “be the subject of infringing activity,” like an FTP service that allows users to engage in infringing activity such as downloading copyrighted albums in digital format.¹³¹

Second, even if the “locate and remove” requirements for notice are applicable to the situation in the *Charter* case, they have been fulfilled.¹³² Charter has the ability to locate the infringing material by identifying the customer and disabling access to that infringing material by terminating that user’s account.¹³³ Also, the congressional reports indicate that the goal of the “locate and remove” provision was to allow the ISPs to “find and address” the infringing activity.¹³⁴ Congress seems to consider “addressing” and “removing” as equivalents; thus, allowing notice to be effective when the infringing material cannot be deleted but can still be dealt with in other ways.¹³⁵ Furthermore, if the technology is available, Charter has the ability to remove access to infringing material by limiting the user’s bandwidth so that transfer of large files, like songs, is prevented while other Internet functions, such as e-mail and web surfing, are still allowed.¹³⁶

In addition to a detailed dissection of the statute, to interpret ambiguities the legislative intent behind the DMCA also must be considered.¹³⁷ Congress saw this statute as a “bargained for exchange,” quasi-contract, between copyright owners and ISPs.¹³⁸ The ISPs were receiving the benefit of limited liability for their customers’ infringing activity in exchange for helping copyright owners defend their works against customers legitimately suspected of infringement.¹³⁹ Congressional reports

¹³⁰ See *supra* note 47 and accompanying text (providing the text of the subsection that contains the “locate and remove” language); see also *supra* note 94 (noting the canon of statutory interpretation that the structure of the statute as a whole should be considered by the court).

¹³¹ See *supra* note 47 and accompanying text (providing the language of the statute and detailing the *Charter* dissent’s reasoning used in the statutory disjunction argument); see also *supra* note 64 (discussing the early roots of online piracy using FTP services).

¹³² See *supra* notes 29-60 and accompanying text (discussing *Charter*).

¹³³ See *supra* note 43 and accompanying text (noting that the majority decision in *Charter* disregarded this action by the ISP as qualifying as “removing” infringing material).

¹³⁴ See *supra* note 73 and accompanying text.

¹³⁵ See *supra* note 73 and accompanying text (providing the legislative intent behind the notification requirement).

¹³⁶ See *supra* note 43 and accompanying text.

¹³⁷ See *supra* note 93 and accompanying text (noting the statutory interpretation procedure followed by courts when faced with ambiguities).

¹³⁸ See *supra* notes 67-71 and accompanying text (outlining the congressional debates regarding the passage of the DMCA).

¹³⁹ See *supra* notes 68-70 and accompanying text (discussing the desired benefit that ISPs and copyright holders each respectively sought); see also *supra* note 77 (citing the

reveal the thought process of Congress at the time of enacting the DMCA and show that the Act was meant as the primary tool to launch an offensive against online piracy, with the subpoena provision being a fundamental element.¹⁴⁰ If one side of the bargain is removed, namely the requirement that ISPs help enforce copyrights, this statute stands as a one-sided shield for the vast majority of ISPs today.¹⁴¹ Congress could not have intended such an absurd interpretation because to do so would render portions of the DMCA “superfluous.”¹⁴²

Furthermore, the specific location of the subpoena provision is important. If the subpoena clause was meant to apply only to those ISPs who actually had infringing material stored on their servers, then Congress could have just made it a subdivision of subsection (c), rather than privileging the subpoena provision with its very own section as it stands today.¹⁴³

B. Public Interest Dictates that ISPs Should Aid in the Enforcement of Copyrights so That Artists Have the Protection to Continue to Produce Their Works

Since the first sound recording, the music industry has been dealing with illegal copying and piracy problems, but it has never dealt with infringing activity that has created such a detrimental and far reaching impact like that of illegal downloading through peer-to-peer systems.¹⁴⁴ Society benefits from the creation of all art, including music. Music enhances the quality of life for many people who enjoy it for its relaxant or escapist qualities.¹⁴⁵ Much of what drives the music industry is the promise of revenue to pay not only the songwriters, artists, and producers, but many average, middle-class citizens such as small retailers and distribution shippers.¹⁴⁶ The economic impact of online piracy not only threatens significant harm to many associated with the music industry, but also

statute sections that grant limited liability to ISPs); *supra* note 78 (citing the statute section that details what ISPs have to do for copyright holders to receive the limited liability benefit).

¹⁴⁰ See *supra* notes 68-74 and accompanying text (providing the Congressional Reports that indicate Congress’s appreciation for the problem of online piracy and how the DMCA would respond to that problem); see also *supra* notes 59-61 (discussing the economic impact of online piracy and of piracy in general on the music industry).

¹⁴¹ See *supra* note 95 and accompanying text (noting that courts cannot formulate interpretations that render portions of a statute superfluous or absurd).

¹⁴² See *supra* note 95 and accompanying text.

¹⁴³ See *supra* notes 77-78 and accompanying text (providing the text and structure of the statute and noting that the drafter chose to make the subpoena provisions a separate subsection, rather than place them within the non-conduit service provider provisions or exclude them from the conduit service provider provision).

¹⁴⁴ See *supra* notes 58-61 and accompanying text (detailing various studies and analyzing online piracy’s economic impact on the music industry).

¹⁴⁵ See *supra* note 75 and accompanying text (discussing the constitutional purpose behind copyright laws).

¹⁴⁶ See *supra* note 61 and accompanying text (quoting the *Charter* dissent’s view of piracy’s real impact on the smaller players in the music industry).

threatens the quantity and quality of art available for public enjoyment.¹⁴⁷ Technology changes so fast in the modern world that often Congress cannot keep up with updating the laws.¹⁴⁸ For these reasons, courts must interpret laws in a manner that keeps them continually effective if and when new technology poses a novel threat.

The threat of lawsuits by copyright owners, with the help of laws such as the subpoena provision of the DMCA, have had the desired impact on the public.¹⁴⁹ More people are becoming informed about the legal music downloading services, and, as a result, illegal peer-to-peer downloading has decreased while legal downloading services are gaining popularity.¹⁵⁰ Thus, the climate of music downloading is morphing into a viable future for the music industry, and the continued copyright enforcement by groups like the RIAA will sustain this change.

C. Divulging Customer Information By ISPs In Response To Subpoenas Does Not Violate The Constitution

1. Requiring ISPs to Provide Contact Information About Customers Who Violate Copyrights Does Not Violate the First Amendment

When determining if a class of individuals' First Amendment rights to free speech is at risk of being infringed, the courts look to see what type of speech would allegedly be suppressed.¹⁵¹ The alleged First Amendment violation in regards to ISPs and their customers is that the disclosure of the information requested by the subpoena destroys the Internet users' online anonymity.¹⁵² Aside from conspiracy theories and paranoia that the RIAA will use the subpoena power to discover the identity of an anonymous Internet author of anti-RIAA statements, the user's anonymity will remain intact.¹⁵³ The copyright owner will only use the "IP address to real name

¹⁴⁷ See *supra* notes 58-61 and accompanying text (discussing studies on the effects of online piracy).

¹⁴⁸ See *supra* note 62 and accompanying text (noting that Congress did not foresee the vast technological changes that were to come in the form of file sharing when it passed the DMCA, rather Congress passed the Act to deal specifically with the technological issues that existed at that time).

¹⁴⁹ See *supra* notes 9-11 and accompanying text (discussing the RIAA announcement to begin targeting individuals found to be infringing online along with highly publicized cases of specific suits that attracted media attention).

¹⁵⁰ See *supra* note 13 and accompanying text (discussing the emergence and success of legitimate, paid-for music downloading services).

¹⁵¹ See *supra* note 81 and accompanying text (noting that copyright infringement is not speech protected under the First Amendment).

¹⁵² See *supra* notes 83-85 and accompanying text (discussing the anonymity element of the First Amendment and how the use of the Internet as the means of expression corresponds).

¹⁵³ See *supra* note 12 and accompanying text (describing an example of a group who suspects the RIAA of having other motives in filing suits against individuals).

correlation” to settle its infringement suit and not for personal reasons in violation of that person's online anonymous identity.¹⁵⁴

In fact, chapter 512 of the DMCA provides adequate procedural safeguards to protect against improper uses that would violate an Internet subscriber's First Amendment rights.¹⁵⁵ These safeguards include the requirement that statements be made with a good faith belief of unauthorized use and that the information is accurate under penalty of perjury.¹⁵⁶ The protections also include penalties for misrepresentations regarding infringing material, including liability for damages and attorney's fees.¹⁵⁷ Another protection requires a sworn declaration that the subpoenas are only sought to obtain the identity of an infringer and “will only be used for the purpose of protecting rights” under the DMCA.¹⁵⁸

In addition to the safeguards built into the DMCA, courts also have held that copyright laws supersede free speech rights since infringement is not a protected form of speech.¹⁵⁹ Therefore, if the ISP chooses to terminate users' account after receiving notice under the subpoena provision, the users' First Amendment rights are not violated because they have been caught infringing by tracking software.¹⁶⁰ To regain their Internet free speech rights, the users simply would have to refrain from engaging in illegal copyright infringement.¹⁶¹

2. Federal Court Action Meets the Case or Controversy Requirement When the Dispute is over Subpoenas to Identify Unknown Copyright Infringers

The other constitutional challenge the DMCA must survive is the “case or controversy” requirement of Article III.¹⁶² The DMCA does not violate this Article because there is a controversy when the subpoena is granted, either between the requestor and the ISP challenging it or between

¹⁵⁴ See *supra* note 78 and accompanying text (providing the text of the statute that mandates the only purpose for which the subpoena may be used); see also *supra* note 9 (citing the RIAA press release stating that the purpose of seeking subpoenas and filing suits against individual infringers).

¹⁵⁵ See *supra* notes 78-79 and accompanying text.

¹⁵⁶ See *supra* note 54 and accompanying text (providing the statutory requirements to obtain a subpoena).

¹⁵⁷ See *supra* notes 77-78 and accompanying text (discussing statutory procedural safeguards).

¹⁵⁸ See *supra* notes 78-79 and accompanying text (providing the language of the statute relating to the procedural safeguards).

¹⁵⁹ See *supra* notes 81-82 and accompanying text (discussing the case law on the relationship between copyright protection and free speech protection).

¹⁶⁰ See *supra* notes 65-66 and accompanying text (explaining the technological underpinnings of the tracking software the RIAA uses to catch infringers); see also *supra* note 85 (identifying situations, like fearing social ostracism, where violating anonymity would violate the First Amendment).

¹⁶¹ See *supra* notes 81-82 and accompanying text.

¹⁶² See *supra* note 86 and accompanying text (providing the constitutional basis).

the requestor and the unknown infringer whose identity is being sought.¹⁶³ Furthermore, the court in *Verizon* even conceded in a footnote that a controversy sufficient for constitutional purposes exists if one party requests a subpoena and the other party disputes it.¹⁶⁴

Alternatively, even if no case or controversy is in existence at the time of the subpoena, the act of a clerk issuing a subpoena is a ministerial task that does not rise to the level of a judicial act.¹⁶⁵ The task of a clerk issuing a section (h) subpoena is classified as ministerial because the statute lists in plain language the specific requirements that the requestor must meet.¹⁶⁶ Due to this lack of discretion on the part of the clerk, no judicial power is invoked by issuing the subpoenas.¹⁶⁷ Furthermore, the legislative history indicates that this process was designed to “be a ministerial function performed quickly.”¹⁶⁸

V. CONCLUSION

The Eighth Circuit should have affirmed the lower court's ruling, and should have enforced the subpoenas issued to Charter in order to further the societal and congressional goal of putting an end to the online piracy of music. The DMCA must not be interpreted to undermine this overall goal and to destroy the apparent balance of benefits to ISPs and copyright holders on which the statute is based. Failure to correct the problem of online piracy will lead to grave economic impacts on individuals involved with the music industry and on the overall public utility gained from the enjoyment of music.

The DMCA will withstand constitutional scrutiny due to the unlikely chance of abuse under the safeguard provisions of the statute. Furthermore, the DMCA will pass constitutional muster because it does not grant judicial power to a federal clerk in the absence of a pending controversy between the parties. People must realize that the days of openly downloading their favorite songs off of the Internet for free without the fear of being caught are over. However, the days of peer-to-peer systems did not leave society with nothing gained. It left a new digital medium through which artists will bring music to the ears of listeners for years to come.

¹⁶³ See *supra* notes 87, 88 and accompanying text (discussing what activity constitutes a controversy at law).

¹⁶⁴ See *supra* note 102 and accompanying text (discussing caselaw regarding the case and controversy requirement).

¹⁶⁵ See *supra* note 91 and accompanying text (discussing the actions of clerks as ministerial tasks when issuing statutory subpoenas).

¹⁶⁶ See *supra* note 78 and accompanying text (providing the text of the statute that lays out the requirements for subpoena issuance).

¹⁶⁷ See *supra* note 90 and accompanying text (explaining when judicial power is not invoked to require a case or controversy).

¹⁶⁸ See *supra* note 72 and accompanying text (quoting a Senate report determination of the function of the subpoena provision).