

INTEREST OF AMICUS CURIAE

Public Citizen, a public interest organization based in Washington, has approximately 125,000 members and has appeared in several cases involving anonymous Internet speech. Its interest is set forth in detail in its motion for leave to file this brief.

ARGUMENT

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in London's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. As the Supreme Court explained in *Reno v. ACLU*, 521 US 844, 853, 870 (1997), "From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer." The Internet is a traditional public forum, and full First Amendment protection applies to free speech on the Internet. *Id.*

The First Amendment protects the right to speak anonymously. *Watchtower Bible Society v Stratton*, 122 SCt 2080, 2089-2090 (2002); *Buckley v. American Constitutional Law Found.*, 525 US 182, 199-200 (1999); *McIntyre v Ohio Elections*

Comm., 514 US 334 (1995); *Talley v. California*, 362 US 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings throughout history, from the literature of Shakespeare and Twain to the Federalist Papers. As the Supreme Court said in *McIntyre*,

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

* * *

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

514 US at 341-342, 356.

Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 FSupp2d 1029, 1033 (DNM 1998); *ACLU v. Miller*, 977 FSupp 1228, 1230 (NDGa 1997); *see also ApolloMEDIA Corp. v. Reno* 119 SCt 1450 (1999), *aff'g* 19 FSupp2d 1081 (CDCal 1998); *Global Telemedia v. Does*, 132 FSupp2d 1261 (CDCal 2001); *Doe v. 2TheMart.com*, 140 FSupp2d 1088, 1092-1093 (WDWash 2001); *Dendrite v. Doe*, 775 A2d 756 (NJApp 2001).

The Internet allows the public to communicate using pseudonyms, revealing their identities only to the company through which they gain access to the Internet.¹ Much Internet discourse is anonymous, for a variety of reasons. Internet speakers may be associated with an organization but want to express an opinion of their own, without running the risk that readers will assume that the group feels the same way. They may be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. They may wish to say things that might make other people angry and stir a desire for retaliation. They may fear having their views stereotyped according to their gender or racial, ethnic or class characteristics. Or, they may be engaged in wrongdoing and hope to evade detection to avoid being brought to justice. Whatever the reason for wanting to speak anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of potentially valuable contributions. On the other hand, a rule that makes it too easy to remain anonymous threatens to encourage illegal activity online.

¹RIAA's argument that Internet users are not really anonymous because their ISP knows their true identities is frivolous. The same could be said of anonymous leaflet authors (the printer has contact information), or anonymous petition circulators (the persons who were solicited saw them). That some persons know the name of the speaker has never meant that the speaker is not anonymous or that the government can compel disclosure of his or her identity.

Although the Internet enables individuals to speak anonymously, it also creates an unparalleled capacity to monitor every speaker and discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail, visits a website, or displays files for download leaves behind an electronic footprint that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original sender. Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom.

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 US 254, 265 (1964). And a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 US 449, 461 (1958); *Bates v. City of Little Rock*, 361 US 516, 524 (1960). The Court has acknowledged that abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 US at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* 462-463; *Bates*, 361 US at 524. The novelty of the procedural

requirements at issue cannot be used to thwart consideration of the constitutional issues involved. *NAACP v. Alabama*, 357 US at 457. Instead, due process requires the showing of a “subordinating interest which is compelling” where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 US at 524; *NAACP v. Alabama*, 357 US at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and any restrictions must be narrowly tailored to serve that interest. *McIntyre, supra*, 514 US at 347.

In a closely analogous area of law, courts have developed a standard for the compelled disclosure of the sources for libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. The courts apply a three-part test, under which the party seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the party’s case; (2) disclosure of the source is “necessary” because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *Carey v. Hume*, 492 F2d 631 (CA9 1974); *Cervantes v. Time*, 464 F2d 986 (CA8 1972); *Baker v. F&F Investment*, 470 F2d 778,

783 (CA2 1972). *See also UAW v. National Right to Work*, 590 F2d 1139, 1152 (CA2 1978); *Black Panther Party v. Smith*, 661 F2d 1243, 1266 (CA2 1981). If, for example, summary judgment can be granted without identifying the source because there is insufficient evidence of a tort, that is the preferable course. *Cervantes, supra*.

When a private party alleges that another person has violated its legal rights, and asserts that it needs to identify that person in order to initiate proceedings to stop or obtain compensation for the violation, a comparable problem is presented requiring the courts to balance the speaker's right to remain anonymous if he has done no wrong, against the plaintiff's right to identify a wrongdoer to serve process and, eventually, prove his entitlement to redress. Courts have therefore developed a multi-part balancing test to accommodate the interests of both sides. This test was most fully articulated in *Dendrite v. Doe*, 775 A2d 756 (NJApp 2001), which remains the only appellate opinion in the country to face the question squarely. *Dendrite* requires the would-be plaintiff to (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the statements allegedly actionable; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation, and (5) show the court that, on balance and in the particulars of the case, the right to identify the speaker

outweighs the First Amendment right of anonymity.

So long as the quantum of evidence that is demanded of the plaintiff to meet this test does not exceed information that a plaintiff can reasonably be expected to obtain before undertaking discovery in the case, this test fairly balances the interest in pursuing wrongdoing against the First Amendment right to speak anonymously. And, the final “balancing” part of the test enables courts to give extra protection where, for example, the danger of retaliation is greater, or the speech at issue is core political speech about public officials.

Several other courts have similarly set forth requirements of notice, articulation of basis, and presentation of argument and evidence before an ISP will be compelled to identify an Internet speaker. For example, in *Melvin v. Doe*, 49 PaD&C4th 449 (2000), *review granted*, 805 A.2d 525 (Pa. 2002), the court allowed the defendant to present evidence and seek summary judgment, ordering disclosure only after finding genuine issues of material fact requiring trial. In *Columbia Ins. Co. v. Seescandy.com*, 185 FRD 573 (NDCal 1999), the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity, and also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. And in *Re Subpoena to America Online*,

52 VaCir 26, 34 (Fairfax 2000), *rev'd on other grounds*, 542 SE2d 377 (Va 2001), the court required introduction of the allegedly actionable posting, and required that it be “satisfied by the pleadings or evidence supplied” that the subpoenaing party had a legitimate basis to contend that it was the victim of actionable conduct, “and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.”²

Although Verizon eventually gave notice in this case, it did so through the backdoor, while requesting a stay pending appeal. But notice is key, because it is unreasonable for Does to rely on their ISP’s to defend their legal right to continued anonymity. No ISP has the resources to litigate the anonymity rights of its users in response to the thousands of subpoenas for identifying information that they receive every year, or even to determine whether anonymity is defensible under the balancing test in any given case. Experience shows that, except in the rarest case, when an ISP receives a subpoena, the **most** that it will do is afford notice and then withhold disclosure if the user files a motion to quash.³

Even in this case, where Verizon objected to the subpoena and committed its

²The argument for a balancing test is more fully developed at <http://www.citizen.org/documents/Melvin%202.pdf>.

³ The Cyberslapp Coalition, whose website is hosted by Public Citizen, www.cyberslapp.org, urges ISP’s to create policies requiring notice to users whose identities are subpoenaed, and provides a resource for Does to defend their right to anonymity.

resources to defend the case, it argued primarily that it had a statutory exclusion from **all** such subpoenas, and used the threat of invoking the First Amendment rights of its users as a reason to adopt its proffered statutory construction. Only after its statutory argument was rejected did it put forward the First Amendment argument directly. Moreover, Verizon has no knowledge of the nature of the material contained in the allegedly infringing music files, and it conducted no investigation about the contents. To be sure, the egregious facts of these cases would have made arguments under the balancing test quite difficult, but requiring notice allows the ISP to resume its posture as a stakeholder while allowing users to defend their own rights.

RIAA gives two principal reasons why there is no need for “John Doe” procedures to protect the right of anonymity – first, there is no First Amendment protection for copyright infringement, and second, the requirement of filing affidavits to obtain subpoenas provides adequate protection because false swearers may be prosecuted for perjury. Neither argument is persuasive.

RIAA’s first argument begs the question. The First Amendment does not protect libel or revelation of trade secrets or any of the variety of other wrongs that are commonly alleged in the lawsuits for which the courts have developed John Doe proceedings, any more than it protects copyright infringement. However, at the initial stage of the lawsuit, no court has determined that anyone **has** committed any such

wrongs. The very point of the multi-part balancing test is to give the anonymous speaker an opportunity to contest the bona fides and merits of allegations of wrongdoing **before** the right of anonymity is permanently breached.

To be sure, RIAA has cherry-picked the two test cases before this Court where, from all appearances, anonymous Internet users offered several hundred contemporary, copyrighted songs for download. Moreover, although the affidavit filed with the subpoena application simply listed the filenames offered for download, in replying to Verizon's opposition, RIAA introduced further affidavits from its vice-president recounting that, before the subpoenas were sought, RIAA employees had not simply examined the filenames, but actually listened to a sample of the files and verified that they were copies of protected recordings. There is every reason to believe that, in these two cases, RIAA is pursuing a copyright infringer whose identity it is entitled to learn under the balancing test.

But the procedures that will be approved in this test case will be applied in other, less clear cases, and RIAA acknowledges that it plans "very substantial numbers" of subpoenas; Verizon warns about "millions" of subpoenas. April 1 Tr. 72, 80. The record below demonstrates that there are many ways whereby, once the availability of the DMCA to identify anonymous Internet users is widely publicized, predatory interests of various kinds could employ those procedures to less wholesome

ends. Indeed, even copyright holders can be less than careful in invoking the DMCA to protect their legitimate interests. For example, in the “Harry Potter” example discussed in the court below, a publisher’s agent filed a sworn notice alleging infringement by the posting of a file that was quite obviously a **book report** about Harry Potter. Docket Entry No. 47, Exhibit A. There may also be close cases – for example, if an individual posted a single file containing copyrighted material, a fair use defense might be available.

RIAA’s argument that because an affidavit supporting the subpoena is subject to prosecution for perjury, the statute provides all the protection that anonymous Internet users need, is similarly flawed. The affidavit need not attest to infringement, but only a good faith belief. Moreover, the possibility of post-proceeding punishment for false affidavits is cold comfort to persons whose identity is sought by predators of the sort discussed in Verizon’s papers below. Indeed, such persons may already be violating keepaway orders by pursuing minors or former spouses. And the experience in representing Doe defendants is that the authorities simply do not regularly pursue those who initiate DMCA proceedings even if in bad faith. The “Harry Potter” example establishes the lack of protection provided by the theoretical possibility of prosecution. This was as clear a case as one can imagine of an affidavit sworn by the agent of a respected publisher but without the slightest regard for accuracy – yet

although the notice was withdrawn, there was not a hint that the filer might be prosecuted for a perjurious statement of good faith belief in infringement.

The district court offered an additional protection that is allegedly afforded by DMCA §512 – an award of damages and attorney fees in favor of any alleged infringer against any person who “knowingly materially represents . . . that material is infringing.” §512(f). However, this subsection only protects an alleged infringer who suffers damages “as a result of the service provider relying upon such misrepresentation in removing or disabling access to the material.” DMCA provides no redress for wrongful disclosure of identity.

Verizon and its amici, for their part, argued below that the entire statute was constitutionally flawed because RIAA could have brought a copyright action against the alleged infringers, permitting the courts to invoke the standard John Doe procedure that the constitution requires in such cases before ISP’s can be ordered to identify the anonymous defendant. But precisely the same discovery procedures apply under §512, because §512(h)(6) incorporates the FRCP procedures for the issuance and enforcement of subpoenas. Moreover, to the extent that Verizon is seen as the “party” in this case and the alleged infringers as third parties, Rule 45 is, if anything, **more** solicitous of the interests of third parties than of the interests of defendants. Just as the First Amendment and Due Process Clause require notice and an opportunity to

defend before a Doe defendant can be identified through process, so too do they require such protection when the Doe is a third party.

Here, the district court upheld §512(h) against constitutional attack, in part, because although the subpoena was originally issued by the Clerk's Office as a ministerial act, with no consideration of the validity of the contentions in the subpoena request, either the ISP or the alleged infringer could obtain the judgment of an Article III judge on any statutory or constitutional issues raised by the subpoena. In this case, notice occurred only when the district judge insisted that Verizon provide it as a condition of its motion for a stay pending this appeal. And, indeed, the failure of the two alleged infringers to offer any defense of their anonymity speaks volumes about the slight burden that a notice requirement imposes when the copyright owner has a legitimate claim.

For future cases, this Court should instruct the district courts to require such notice at the outset, under the general equitable principles underlying Rule 45, just as notice is provided before subpoenas are enforced in a case brought against a Doe defendant. Public Citizen thus urges the Court to rule that, when a subpoena is obtained under §512(h), the subpoenaing party must allow enough time to respond to enable the ISP to provide notice and to enable the user to obtain counsel to defend his anonymity. Pursuant to the cost-sharing principles of Rule 45, the copyright owner

must, of course, compensate the ISP for the costs of notice.

But the need for notice does not justify a reversal of the orders on appeal. Surely the **form** of the proceeding does not affect the constitutionality of the requirement that identifying information be produced, so long as the substantive and procedural protections conform to the constitution. In order to obtain information in this case, RIAA presented a paper setting forth the essential elements of a claim of infringement (ownership of the copyright and unauthorized copying or display). RIAA paid the standard filing fee for a miscellaneous proceeding, and although \$35 is less than the \$150 fee for a civil proceeding, the difference is hardly constitutionally significant. Notice was eventually given to the alleged infringers who had an opportunity to defend themselves (one user presented an affidavit, but did not deny liability). And, after its application was challenged, RIAA submitted an affidavit attesting that a member of its staff had listened to many of the files at issue and determined that they contained copyrighted matter. Coupled with the filenames that suggest that they are contemporary copyrighted songs, and absent any contrary evidence from the Does, RIAA's showing is sufficient to warrant the conclusion that the Does have infringed RIAA's copyrights and that RIAA is entitled to remove their anonymity. The John Doe procedure would not provide any more protection.

CONCLUSION

Unless the Court accepts Verizon's Article III or statutory construction arguments, the orders under appeal should be affirmed because the First Amendment and Due Process rights of the Does were protected on the facts of this case.

Respectfully submitted,

Paul Alan Levy
Alan B. Morrison
Allison M. Zieve

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Public Citizen

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