LEGAL UPDATE

IN RE CHARTER COMMUNICATIONS: THE NEWEST CHAPTER IN P2P FILE SHARING

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INTRODUCTION

"Peer to Peer" (P2P) programs permit parties to share and transfer files on their computer with other users of the program.[1] P2P programs can be used to transfer unauthorized digital music files, often in the form of .mp3 files.[2] While the recording industry was successful at stopping the use of some of P2P programs, such as Napster, the recording industry has not been as successful against other "decentralized" forms of P2P programs that continue to exist, permitting the sharing and transfer of .mp3 files.[3] In response to the continuing infringement, the music industry attempted to identify the users of the P2P programs by subpoenaing the Internet service providers (ISP) using section 512(h) of the Digital Millennium Copyright Act (DMCA).[4]

Earlier this year the Eighth Circuit rejected the recording industry's attempt to subpoena user identities through § 512(h).[5] The court adopted the analysis

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[1] *See, e.g.*, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231-32 (D.C. Cir. 2003).

[2] *See, e.g., id.*

[3] *E.g., id.* The Supreme Court has granted certiorari on Grokster cases, which may change the copyright holder's ability to sue for contributory infringement and vicarious liability on P2P software. Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2005).

[4] 17 U.S.C. 512(h) (2000). *See In Re* Charter Communications, Inc., 393 F.3d 771, 774 (8th Cir. 2005); Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs. Inc., 351 F.3d 1229 (D.C. Cir. 2003); Garrett v. Comcast Communications, Inc., 2004 WL 1660391, at *2 n.1 (N.D. Tex. July 23, 2004). Subpoenas have been used to identify "Doe defendants". *See generally* Elektra Entm't Group, Inc. v. Does 1-9, 2004 WL 2095581 (S.D.N.Y. Sept. 8, 2004); Sony Music Entm't, Inc., v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

[5] *In Re* Charter Communications, Inc., 393 F.3d 771, 777 (8th Cir. 2005).

in *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*[6] Both decisions were narrow and limited to statutory grounds applicable to certain classes of ISP's.[7] Some courts have already held that subpoenaing an ISP for the identities of individual subscribers does not violate the First Amendment.[8] The § 512(h) subpoena provision has been the subject of controversy and debate as to the constitutionality of the provision, the possibility for abuse, and the fear of chilling use of the Internet.[9]

Part I of this update will discuss recent litigation over the validity of subpoenas served to ISP's. Part II will discuss the practical implications of the recent litigation and what legal options remain for copyright holders to enforce their rights against P2P file sharing. Part III will describe the recent academic discussion of § 512(h). Part IV will look at legislation that has been proposed in response to the recording industry's fight against copyright infringement.

I. RECENT LITIGATION

A. Statutory Interpretation of § 512(h)

Most recently, the Recording Industry Association of America (RIAA) attempted to enforce a § 512(h) subpoena in 2005 against Charter Communications, Inc. (Charter) to obtain the identities of subscribers.[10] Charter actually complied, but later appealed the subpoena.[11] Charter not only argued that it qualified as a "conduit" but also raised other arguments, such as the inability to enforce a subpoena in the absence of a "case or controversy," privacy violations under the Communications Act, and First Amendment concerns.[12] In spite of Charter's arguments, the court limited its analysis to a statutory interpretation of § 512(h).[13]

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[6] *Id.* (citing Recording Indus. Ass'n of Am., Inc., 351 F.3d 1229 (D.C. Cir. 2003)).

[7] *See In Re* Charter Communications, Inc., 393 F.3d 771 (8th Cir. 2005); Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

[8] Elektra Entm't Group, Inc. v. Does 1-9, 2004 WL 2095581 (S.D.N.Y. 2004); Sony Music Entm't, Inc., v. Does 1-40, 326 F.Supp.2d 556 (S.D.N.Y. Sept. 8, 2004).

[9] *See generally* Matthew Amedeo, *Shifting the Burden: The Unconstitutionality of Section 512(h) of the Digital Millennium Copyright Act and its Impact on Internet Service Providers*, 11 CommLaw Conspectus 311 (2003); David Gorski, *The Future of the Digital Millennium Copyright Act (DMCA) Subpoena Power on the Internet in Light of the Verizon Cases*, 24 Rev. Litig. 149 (2005); Alice Kao, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405 (2004).

[10] *In Re* Charter Communications, Inc., 393 F.3d 771, 774 (8th Cir. 2005).

[11] *Id.* at 775.

[12] *Id.*

[13] *Id.* at 777.

The Eighth Circuit began its analysis by looking to the text of the statute.[14] The court looked at the notice requirement in § 512(h) and the various "safe harbor" provisions.[15] Finding that Charter fell within § 512(a), the court adopted the analysis in *Verizon*[16] and held that RIAA would return all of the identities and information and refrain from using the information obtained through the subpoenas.[17] The Eighth Circuit suggested that there may be constitutional issues with § 512(h) but did not fully address those arguments.[18] To fully appreciate the decision in *Charter*, it is necessary to look at *Recording Industry Association of America, Inc. v. Verizon, Inc.*, because the Eighth Circuit essentially adopted the analysis of the *Verizon* court.[19]

In 2003, the Court of Appeals in the District of Columbia rejected an attempt by RIAA to enforce a § 512(h) subpoena against Verizon.[20] RIAA attempted to enforce two subpoenas against Verizon, who refused to comply and appealed the district court's decision to order Verizon to comply with the subpoena.[21] The court of appeal's decision to vacate the district court's decision and quash the subpoena[22] hinged upon the first notification requirement, focusing on the fact that Verizon qualified as a "conduit" under § 512(a).[23] The court based its holding solely on statutory analysis of the DMCA and did not address the constitutional issues raised by the subpoenas.[24]

The court began the analysis by introducing the basic relevant provisions of the DMCA.[25] To obtain a subpoena for the identity of ISP users, the DMCA has three main requirements.[26] The first is a notification requirement that refers to § 512(c)(3)(A), the second is the "proposed subpoena directed to the ISP" and the third is a "declaration that the purpose . . . is to obtain the identity of the alleged infringer . . ." for enforcing the copyright and will not be used for any other purposes.[27] Crucial to the enforceability of the subpoena was

[14] *Id.* at 775-77.

[15] *In Re* Charter Communications, Inc., 393 F.3d 771, 775 (8th Cir. 2005).

[16] *Id. at* 777.

[17] *Id.* at 778.

[18] *Id.* at 777-78.

[19] *Id.* at 777.

[20] Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1239 (D.C. Cir. 2003).

[21] *Id.* at 1233.

[22] *Id.* at 1239.

[23] *Id.* at 1234-35.

[24] *Id.* at 1233.

[25] Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1232 (D.C. Cir. 2003) (citing 17 U.S.C. §512(h)(2)(A)-(C) (2005)).

[26] *Id.*

[27] *Id.*

classifying the ISP under one of the four "safe harbor" provisions.[28]

Section 512(a) gives a "safe harbor for infringement of copyright by reason of the [ISP's] transmitting, routing or providing connections for infringing material . . . [as long as] the transmission is initiated and directed by an Internet user."[29] Section 512(b) is a "safe harbor" for "system caching" that protects an ISP from infringement if "certain conditions regarding the transmission and retrieval of the material created by the ISP are met."[30] Section 512(c) immunizes ISP's from liability from "information residing on systems or networks at the direction of users. . .[and if] the ISP meets certain conditions regarding lack of knowledge . . . financial benefit . . . [and makes] expeditious efforts to remove or deny access . . . ."[31] The fourth safe harbor in § 512(d) is for "information location tools,"[32] protecting ISP's that provide links to infringing content. Section 512(d) "cross references" the same knowledge and financial benefit requirements from § 512(c).[33]

The *Verizon* court focused on the notice requirement in § 512(h) referring to § 512(c)(3)(A), requiring that proper notice constitutes "identifying" the infringing material so that the ISP can "remove or disable access to [the material] . . . ."[34] The .mp3 files transferred in P2P software were on the user's personal computer, therefore Verizon could not respond to the notice by "remov[ing] or disabl[ing] one user's access to infringing material . . . because Verizon does not control the content on its subscriber's computers."[35] The court also rejected RIAA's proposal that Verizon terminate user accounts and also noted their refusal to enforce the subpoena regardless of how "broadly" the definition of ISP was construed.[36] Even though RIAA attempted to argue that its notification was sufficiently specific, the court rejected the argument, stating that "RIAA's notification identifies absolutely no material Verizon could remove or access to which it could disable, which indicates to us that § 512(c)(3)(A) concerns means of infringement other than P2P file sharing."[37]

After analyzing the text of § 512, the court looked at the general "structure" and concluded that § 512(h) applies to the "safe harbor" provisions of §

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[28] *See id.* at 1234.

[29] *Id.*

[30] *Id.*

[31] Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1234 (D.C. Cir. 2003).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1235.

[35] *Id.*

[36] Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1235-36 (D.C. Cir. 2003).

[37] *Id.* at 1236.

512(b)-(d) because those sections had notice requirements.[38] The court refused to link § 512(h) structurally with § 512(a) ultimately holding that ISP's that are "conduits" cannot be subpoenaed to obtain user identities.[39]

The court concluded by looking at the legislative history and the purpose of the DMCA.[40] The legislative history indicated that P2P programs were not considered when Congress passed the DMCA and held that the legislative history did not necessarily mandate enforcing subpoenas against "an ISP acting as a conduit for P2P file sharing."[41] Even though the court acknowledged that the purpose of the DMCA was to prohibit such "widespread" copyright infringement, the legislature had to be the one to make changes to include P2P software.[42]

B. Litigation over the First Amendment Rights

While *Verizon* and *In Re Charter* focused on the statutory interpretations of § 512(h), there has been litigation tackling the issue as to whether or not the act of subpoenaing an ISP to obtain user identities violates the First Amendment.[43] In 2004, Sony Music Entertainment first brought lawsuits against "unidentified Doe defendants" and then subpoenaed the ISP for the identities of the defendants.[44] Sony claimed that the defendants had used P2P software to obtain infringing music files.[45] The defendants were chosen based on their Internet Protocol address (IP), a number that the ISP could use to identify the user.[46] The defendants attacked the subpoena on several grounds but the main issue centered on the defendant's First Amendment rights.[47] The district court ultimately held that the subpoena did not violate the First Amendment rights of the defendants.[48]

The court acknowledged the importance of "anonymous speech" and also stated that "[i]t is well-settled that the First Amendment's protection extends to the Internet."[49] While noting that subpoenas could present issues with the First

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[38] Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1236-37 (D.C. Cir. 2003).

[39] *Id.* at 1237.

[40] *Id.*

[41] *Id.* at 1238.

[42] *Id.*

[43] *See, e.g.*, Elektra Entm't Group, Inc. v. Does 1-9, 2004 WL 2095581 (S.D.N.Y. 2004); Sony Music Entm't, Inc., v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. Sept. 8, 2004).

[44] Sony Music Entm't Inc., v. Does 1-40, 326 F. Supp. 2d 556, 558 (S.D.N.Y. 2004).

[45] *Id.*

[46] *Id.* at 558-59.

[47] *Id.* at 558.

[48] *Id.* at 564.

[49] *Id.* at 562.

Amendment, the court noted that the First Amendment right is not absolute.[50] The court held that the defendants were entitled to only limited protection by the First Amendment.[51] Sharing and transferring music files over P2P programs was a limited form of expression but could not be "true expression" entitling the user to the highest constitutional protection because "the individual's real purpose is to obtain music for free."[52] The court created a five factor test to determine whether or not a subpoena violated the First Amendment:

> 1) a concrete showing of a prima facie claim of actionable harm . . . 2) specificity of the discovery request . . . 3) the absence of alternative means to obtain the subpoenaed information . . . 4) a central need for the subpoenaed information to advance the claim . . . and 5) the party's expectation of privacy.[53]

The court held that the factors favored the plaintiff and refused to quash the subpoena.[54] Most notably the court stated "defendants have little expectation of privacy in downloading and distributing copyrighted songs without permission."[55] Shortly after *Sony*, the same court reaffirmed *Sony* and rejected another John Doe defendant's attempt at quashing the subpoena.[56] The court used the same five factors and held that "the need for disclosure outweighs the defendant's first amendment interests."[57]

II. PRACTICAL IMPLICATIONS OF THE RECENT P2P LITIGATION

After *Verizon* and *Charter* it is apparent that a copyright holder who wants to obtain user identity using a § 512(h) subpoena should try to classify the ISP's function under § 512(b)-(d).[58] In the event that the ISP falls under § 512(a) and is classified as a conduit, the copyright holder still has the option of filing a "John Doe" lawsuit, seen in *Sony Music Entertainment, Inc., v. Does 1-40*.[59] The "John Doe Lawsuit" is one where parties can "file lawsuits which identify the defendants only by their numerical IP addresses . . . after filing . . .

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[50] Sony Music Entm't Inc., v. Does 1-40, 326 F. Supp. 2d 556, 562-63 (S.D.N.Y. 2004).

[51] *Id.* at 564.

[52] *Id.*

[53] *Id.* at 564-65.

[54] *Id.* at 565-66.

[55] *Id.* at 566.

[56] Elektra Entm't Group, Inc. v. Does 1-9, 2004 WL 2095581, at *3-*4 (S.D.N.Y. Sept. 8, 2004).

[57] *Id.* at *3.

[58] A Texas court rejected an attack against a subpoena holding that there was not enough evidence to show that the ISP was acting as a "conduit" between two P2P users. Garrett v. Comcast Communications, Inc., 2004 WL 1660391, at *2 n.1 (N.D. Tex. July 23, 2004)

[59] Kao, *supra* note 9, at 418.

[parties can] subpoena the information necessary to identify the defendants by name."[60] The validity of subpoenaing ISP's through a John Doe lawsuit was analyzed in *Dendrite Int'l, Inc.* where the court weighed the First Amendment rights and fear of harassment against the necessity of obtaining the user's identity.[61] The court identified four relevant factors:

> *First*, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court . . . *Second*, plaintiff must . . . demonstrate that plaintiffs have made a good-faith effort to [locate the defendant] . . . [*Third*] the plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. *Fourth*, the moving plaintiff [must show] reasonable likelihood that the discovery process will lead to identifying information about defendant. . . . [62]

The John Doe lawsuit gives copyright holders the power to enforce their copyright while trying to maintain protection for the rights of Internet users.[63] After *Sony*, it appears that it is not a violation of First Amendment rights for a copyright owner to subpoena an ISP by using the John Doe procedure.[64]

III. RECENT ACADEMIC DISCUSSION OF § 512(H)

A. Academic Discussion About the Constitutionality of § 512(h)

Section 512(h) has received some attention from academic journals.[65] By permitting a party to subpoena an ISP without an underlying court judgment or claim, § 512(h) has made itself vulnerable to constitutional attacks based on right of privacy, due process, and undue burden.[66] While *Sony* and *Elektra* addressed the issue of First Amendment rights, many have attacked the constitutionality of § 512(h) arguing that the provision presents problems with

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[60] *Id.*

[61] Dendrite Int'l, Inc. v. John Doe, No. 3, 775 A.2d 756, 767-68 (N.J. Super. Ct. App. Div. 2001).

[62] *Id.* at 767-68 (emphasis added) (suggesting that the factors are relevant to cases in the "Internet Forum"); Gorski, *supra* note 9, at 161-62 n.101 (noting the broad use of the factors).

[63] *See id.* at 766-67; Amedeo, *supra* note 9, at 325 (advocating John Doe lawsuits); Gorski, *supra* note 9, at 167 (advocating John Doe lawsuits).

[64] Elektra Entm't Group, Inc. v. Does 1-9, 2004 WL 2095581, at *3-*4 (S.D.N.Y. Sept. 8, 2004); Sony Music Entm't Inc., v. Does 1-40, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004).

[65] *See supra* note 9.

[66] *See* Amedeo, *supra* note 9, at 320-21; Gorski, *supra* note 9, at 158; Kao, *supra* note 9, at 419-22.

the constitutional right to privacy,[67] the judicial powers under Article III,[68] and the Fifth Amendment's right to Due Process.[69]

Section 512(h) has attracted debate and controversy as to whether the provision violates the user's rights to privacy. Some have criticized § 512(h) because it allows the copyright owner to obtain user identities without "sufficient particularity" and only requires that the owner have a "good faith" belief that there is infringement.[70] By allowing parties to subpoena ISP's without a greater foundation for the allegations, many have argued that § 512(h) violates user privacy and violates the Fourth Amendment.[71] Others have suggested that the problem may extend further to the "penumbral" right to privacy, implicating the "First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments."[72]

In the case of *In Re Charter*, the subpoenaed ISP argued that § 512(h) was vulnerable to an attack on Article III grounds, an argument that has been raised in academic discussion.[73] Charter argued that a "judicial subpoena is a court order that must be supported by a case or controversy at the time of its issuance" and § 512(h) permits parties to subpoena ISP's even though there is no "case and controversy."[74] Copyright owners such as the RIAA may avoid this problem by using "John Doe Lawsuits."[75] The use of John Doe lawsuits adds a procedural aspect that responds to the Article III concerns and protects users while permitting copyright holders to enforce their rights.[76]

Some have argued that § 512(h) raises Fifth Amendment Due Process concerns because "it does not allow a subpoenaed party to object; it sanctions a pre-judgment seizure of property, and it places undue burden upon the subpoenaed party without due process of law."[77] There is a concern that ISPs will have to spend unreasonable amounts of time and resources to obtain thousands of subscriber identities.[78] Some have argued that the identities of the subscribers are data that constitutes "property" to the ISP and that forcing the ISP to give up "property" without court order or judgment would conflict

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[67] *See* Amedeo, *supra* note 9, at 320-22; Kao, *supra* note 9, at 407. *But see* Gorski, *supra* note 9, at 162 (discussing the "limits of privacy").

[68] *See* Kao, *supra* note 9, at 419-21, 424.

[69] Amedeo, *supra* note 9, at 311, 317-20.

[70] *Id.* at 320-21.

[71] *Id.* at 320.

[72] Kao, *supra* note 9, at 420.

[73] *Id.* at 421-22.

[74] *In Re* Charter, 393 F.3d 771, 775 (8th Cir. 2005).

[75] Kao, *supra* note 9, at 421-22.

[76] *See* Gorski, *supra* note 9, at 167; Kao, *supra* note 9, at 419.

[77] Amedeo, *supra* note 9, at 317.

[78] *Id.* at 319-20.

with the Fifth Amendment.[79] The John Doe lawsuit forces the copyright owner to bring a claim in court, undermining the Fifth Amendment concerns.[80]

B. Academic Discussion of the Public Policy Concerns of ISP Subpoenas

In addition to the constitutional issues raised by the use of subpoenas, many have questioned the general ability to subpoena ISP's for user identities, even with the use of John Doe lawsuits.[81] The main arguments that have been raised concern fear of harassment or abuse of John Doe lawsuits and a fear that the subpoenas will chill Internet use.[82]

One concern about the ability to subpoena ISP's is the fear that subpoenas will result in harassment and abuse.[83] Some fear that individuals who have not been engaging in infringing activity will be mistakenly exposed.[84] For example, the copyright owners such as the RIAA may use "software bots that search the Internet reviewing filenames and other information" to discern who may be engaging in infringing activity.[85] There have been instances where the process was flawed and the identity of the "innocent user" was obtained.[86] Mistakenly subpoenaing the identities of users is problematic because it strips the user of anonymity with minimal evidence or suspicion.[87] Some have suggested that § 512(h) is problematic because it allows parties to obtain user identities with "mere suspicion," making the process vulnerable to being used as a tool for "invasion of privacy . . . harassment . . . [and] intimidation."[88] The fear of exposing users innocent of infringement is a valid concern. However, it is crucial that the interests of the copyright holders are not abandoned.[89] John Doe lawsuits, while not immune from error, may strike an adequate balance between bringing procedural safety measures to protect user privacy and user rights and giving copyright holders the power to enforce their copyright.[90]

Some have argued that § 512(h) may end up "chilling" Internet use, "if users

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[79] *Id.* at 318-19.

[80] *Id.* at 318.

[81] Kao, *supra* note 9, at 421-22. *But see* Amedeo, *supra* note 9, at 325; Gorski, *supra* note 9, at 167.

[82] Kao, *supra* note 9, at 421-24.

[83] *Id.* at 418, 422-24.

[84] *Id.* at 422-23.

[85] Amedeo, *supra* note 9, at 321 (applying this to the Fourth Amendment analysis).

[86] *See id.*; Kao, *supra* note 9, 422-23.

[87] Kao, *supra* note 9, at 423-24; *see* Amedeo, *supra* note 9, at 322-23.

[88] Kao, *supra* note 9, at 424.

[89] *See* Gorski, *supra* note 9, at 160-61.

[90] *See id.* at 167. *But see* Kao, *supra* note 9, 421-22 (questioning whether John Doe lawsuits can provide sufficient protection).

know that their ISP's will turn over their identifying information immediately, without even investigating whether any copyright infringement has actually taken place, they will be reluctant to exercise legitimate use of their Internet services . . . ."[91] The recent *Charter* and *Verizon* cases somewhat diminish the concerns about chilling Internet use.[92] The use of John Doe lawsuits permits the owners to protect their copyright while adding procedural safety precautions and reducing the fear that § 512(h) will be used to arbitrarily strip users of their anonymity.[93]

IV. RECENT UPDATES IN P2P LEGISLATION

There has been activity in the legislature on the issue of Internet technology and copyright infringement, much of it aimed at enforcing copyrights aggressively against infringement. The House passed the Piracy Deterrence and Education Act of 2004, which proposed to educate the public about "the security and privacy risks associated with being connected to certain peer-to-peer networks."[94] In addition to its educational purpose, the bill proposed to "enhance criminal enforcement of the copyright laws" as a result of the infringing P2P activity.[95]

In 2004, Sen. Orrin Hatch (R-Utah) introduced the Inducing Infringement of Copyright Act of 2004 that would allow parties to sue creators of technology that "induces" copyright infringement.[96] The legislation was met with strong disapproval, because it would allow those that make products such as iPod to be subject to lawsuits.[97] Many expressed concerns with the fact that the bill would "increase the risk that colleges and universities would face claims of infringement when developing new computer networks and applications for faculty and staff."[98] While Hatch's legislation is an attempt to curb the infringing activity associated with P2P file sharing, such legislation is not the solution to the problem.[99] Some have suggested that the negative response to

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[91] Kao, *supra* note 9, at 421.

[92] *See* Gorski, *supra* note 9, at 166-67 (noting that copyright owners have to resort to John Doe lawsuits to enforce their copyright).

[93] *See* Amedeo, *supra* note 9, at 318.

[94] Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2d Sess. 2004).

[95] *Id.*

[96] American Council on Education, *Senate Judiciary Committee Hears Testimony on Legislation Involving Copyright, Peer to Peer Technology*, http://www.acenet.edu/hena/readArticle.cfm?articleID=903, July 23, 2004.

[97] *Id.*

[98] *Id.*

[99] There was strong disapproval of Hatch's legislation. *See id.*; PcWorld.com, *New Copyright Protection Bills Likely in 2005*, Jan. 19, 2005, http://www.pcworld.com/news/

Hatch's proposal makes it unlikely that similar types of legislation will be enacted in 2005.[100] While it is important to ensure that copyright holders can enforce their rights, an effective solution is one that would not curb and inhibit technology.[101]

Legislation aimed at technology and copyright infringement has also surfaced on the state level. Most recently, California State Senator Kevin Murray has introduced into the California legislature a bill aimed against P2P software.[102] The bill would expose companies that distribute P2P software capable of infringement to fines up to $25,000.[103] The bill also proposes a year long jail sentence if "reasonable care" is not used to prevent infringement.[104] It is possible that "reasonable care" may constitute incorporating some kind of technology to guard against trading infringing music files, although "[s]ome file-swapping companies say these tools would be impractical to use on a widespread basis."[105]

V. CONCLUSION

Earlier this year, the Eighth Circuit in *In Re Charter* adopted *Verizon's* statutory reading of § 512(h) of the DMCA, holding that ISP's that act as "conduits" under § 512(a) for direct infringers using P2P software could not be subpoenaed under § 512(h) to provide the identities of the infringers. Copyright owners are not without recourse because they can obtain the identities of the direct infringers through John Doe lawsuits. Recent litigation would suggest that copyright owners who take advantage of the John Doe process can subpoena ISP's without being concerned about conflicts with the First Amendment. The constitutionality of § 512(h) and its effect on public policy has been debated in academic journals but it appears that John Doe lawsuits are best way to protect the rights of both the copyright owners and the rights of individual users. Recent legislation at the federal and state level suggests that copyright owners will lobby to adopt measures allowing copyright holders to enforce their rights.

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article/0,aid,119352,pg,1,RSS,RSS,00.asp, Jan. 19, 2005.

[100] PcWorld.com, *New Copyright Protection Bills Likely in 2005*, http://www.pcworld.com/news/article/0,aid,119352,pg,1,RSS,RSS,00.asp, Jan. 19, 2005.

[101] American Council on Education, *Senate Judiciary Committee Hears Testimony on Legislation Involving Copyright, Peer to Peer Technology*, http://www.acenet.edu/hena/readArticle.cfm?articleID=903, July 23, 2004; PcWorld.com, *New Copyright Protection Bills Likely in 2005*, http://www.pcworld.com/news/article/0,aid,119352,pg,1,RSS,RSS,00.asp, Jan. 19, 2005.

[102] Cnet News, *State bill could cripple P2P*, http://news.com.com/State+bill+could+cripple+P2P/2100-1028_3-5540937.html?tag=sas.email, Jan. 18, 2005.

[103] *Id.*

[104] *Id.*

[105] *Id.*