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## ACTA Fool or: How Rights Holders Learned to Stop Worrying and Love 512's Subpoena Provisions

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## **ACTA Fool or: How Rights Holders Learned to Stop Worrying and Love 512's Subpoena Provisions**

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### I. "2 FAST, 2 FURIOUS"<sup>1</sup> OR INTRODUCTION

In retrospect, 1998 was an age of innocence. On television, Dawson's Creek was one of the number one shows,<sup>2</sup> Shakespeare in Love upset Saving Private Ryan to win the Academy Award for Best Picture,<sup>3</sup> and the Britney Spears song 'Baby One More Time' rocketed up the Billboard Charts.<sup>4</sup> The internet was a relatively new feature in many homes and investors poured money into companies expecting that the internet represented a revolutionary new business model.<sup>5</sup> Conventional analog computer modems connected more than 90% of the world's internet users,<sup>6</sup> and new personal computers sold for less

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1. Christopher 'Ludacris' Bridges, Act A Fool (Def Jam 2003) [hereinafter Ludacris]. The lyrics of Ludacris' Grammy Nominated song are used in the headings of this comment.

2. Stuart Elliott, *The Media Business: Advertising; Networks Cheered by Sales of 1998-99 Commercial Time*, N.Y. TIMES, June 17, 1998, at D1.

3. See Amy Wallace, 'Shakespeare' Hit by Snipers; Miramax Comes Under Fire Among Some Inside Hollywood Over its Promotion of the Film That Went on to Upset 'Saving Private Ryan,' L.A. TIMES, Mar. 23, 1999, at F1.

4. BILLBOARD MAGAZINE HOT 100, Nov. 21, 1998, available at [http://www.billboard.com/bbcom/eseach/chart\\_display.jsp?cfi=379&cfgn=Singles&cfm=The+Billboard+Hot+100&ci=3032184&cdi=7374850&cid=11%2F21%2F1998](http://www.billboard.com/bbcom/eseach/chart_display.jsp?cfi=379&cfgn=Singles&cfm=The+Billboard+Hot+100&ci=3032184&cdi=7374850&cid=11%2F21%2F1998).

5. JOHN CASSIDEY, DOT.CON THE GREATEST STORY EVER SOLD 316 (2002).

6. Stephanie Miles, *Cable Modems Double in 1998*, CNET NEWS (Dec. 1, 1998, 4:00

than \$2,000 with 333 megahertz processors, and 4.3 billion-byte (4.3 giga-byte) hard-drives.<sup>7</sup>

The year was conspicuous as a harbinger of issues which continue to pervade and provoke debate. The first MP3 players appeared on store shelves.<sup>8</sup> A website scooped print journalists with news of the love affair between Monica Lewinski and President Bill Clinton.<sup>9</sup> Steve Jobs returned to Apple Computers and asked the world to 'think different' as he introduced the first i-product, the iMac.<sup>10</sup> The years waning months witnessed the dawn of Google<sup>11</sup> and the beginning of the googlization of everything.<sup>12</sup>

During this romantic period, Congress passed the Digital Millennium Copyright Act (DMCA).<sup>13</sup> Thrust into a world of rapidly changing technology, the DMCA sought to implement U.S. treaty obligations and address the problem of copyright infringement in a world of increasingly digital communications.<sup>14</sup> Congress intended the DMCA to serve two primary purposes: (1) to protect the interests of the content industries and (2) to limit the liability of service providers (ISPs) for acts of copyright infringement by customers using the providers' systems or networks.<sup>15</sup> However, by the time the law took effect, the legislation was already largely ineffective against new

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AM PST), [http://news.cnet.com/Cable-modems-double-in-1998/2100-1040\\_3-218523.html](http://news.cnet.com/Cable-modems-double-in-1998/2100-1040_3-218523.html).

7. Jim Davis, *Compaq's New Lines for the Fall*, CNET NEWS (Sept. 22, 1998, 2:40 PM PDT), [http://news.cnet.com/Compaqs-new-lines-for-the-fall/2100-1001\\_3-215822.html](http://news.cnet.com/Compaqs-new-lines-for-the-fall/2100-1001_3-215822.html); Jim Davis, *Gateway's Joins Pentium II Trend*, CNET NEWS (Feb. 27, 1998, 10:10 AM PST), [http://news.cnet.com/Gateways-low-cost-Pentium-II-PC/2100-1001\\_3-208556.htm](http://news.cnet.com/Gateways-low-cost-Pentium-II-PC/2100-1001_3-208556.htm).

8. Press Release, Diamond Multimedia Systems, *Portable MP3 Player Announced* (Sept. 15, 1998), available at <http://www.harmonycentral.com/blogs/News-Diamond/1998/09/15/portable-mp3-player-announced>. The Rio PMP300 retailed for \$199.95 and stored 32 mega-bytes of music. *Id.* Conversely, the current iPod Classic stores 160 giga-bytes of music, movies, and pictures and retails for \$249. APPLE, iPod Classic Technical Specifications, <http://www.apple.com/ipodclassic/specs.html> (last visited Feb. 9, 2011).

9. Howard Kurtz, *Clinton Schoop So Hot It Melted; Newsweek Editors Held Off on Scandal Story*, WASH. POST, Jan. 22, 1998, at C01; Francis X. Clines & Jeff Gerth, *The President Under Fire: The Overview; Subpoenas Sent as Clinton Denies Reports of an Affair with Aide at White House*, NY TIMES, Jan. 22, 1998, at A1.

10. OWEN W. LINZMAYER, APPLE CONFIDENTIAL 2.0: THE DEFINITIVE HISTORY OF THE WORLD'S MOST COLORFUL COMPANY 294 (2004).

11. DAVID A. VISE & MARK MALSEED, THE GOOGLE STORY 30 (2005).

12. See generally Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. DAVIS L. REV. 1207 (2007).

13. 17 U.S.C. § 512.

14. *Id.*

15. In re Verizon Internet Serv., 240 F. Supp. 2d 24, 36 (D.D.C. 2003) [hereinafter Verizon I].

technologies allowing the piracy<sup>16</sup> of copyrighted works.

Copyright piracy comes in two flavors: physical piracy and internet piracy. Physical or hard goods piracy entails the creation and distribution of unauthorized physical copies of copyrighted materials.<sup>17</sup> Conversely, internet piracy involves the use of the internet to circumvent technical protection measures or replicate intellectual property.<sup>18</sup> Typically motivated by a drive to impress others without financial gain, individuals share infringing files on peer-to-peer (p2p) networks that span the globe.<sup>19</sup> The simplicity and rampant use of p2p networks to swap infringing files has diminished the value of copyrighted works and an authors' ability to profit.<sup>20</sup>

User activities on p2p networks have not gone unnoticed by rights holders.<sup>21</sup> With each courtroom victory, the architecture of these p2p systems evolves, frustrating rights holders' ability to halt users from sharing content.<sup>22</sup> Falling outside the DMCA subpoena provisions, the

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16. The term 'piracy' is used throughout this Comment according to its definition in BLACK'S LAW DICTIONARY 1186 (8th ed. 2004). It defines piracy as "[t]he unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law." Both rights holders and users have criticized the use of the word 'piracy' to describe those who infringe on intellectual property rights. Nate Anderson, *"Piracy" Sounds Too Sexy, Say Rightsholders*, ARSTECHNICA (last updated Apr. 5, 2010), <http://arstechnica.com/tech-policy/news/2010/03/piracy-sounds-too-sexy-say-rightsholders.ars>; "[T]o say that X is a pirate is a metaphoric heuristic, intended to persuade a policy maker that the in-depth analysis can be skipped and the desired result immediately attained." WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 55 (2009). See generally ADRIAN JOHNS, PIRACY (2009) (discussing the origins and evolutions of the term 'piracy').

17. JANET WASKO, HOW HOLLYWOOD WORKS 217 (2003).

18. ORG. FOR ECON. CO-OPERATION & DEV., PIRACY OF DIGITAL CONTENT (2009), available at <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF>.

19. See Josh Levin, *"aXXo You are a God,"* SLATE (Nov. 12, 2008, 6:53 AM ET), <http://www.slate.com/id/2204367/> (discussing the Internet's most notable pirate, aXXo, and the popularity of his materials). On a randomly selected day, "33.5 % of all movies downloaded on BitTorrent were aXXo torrents." The next closest competitor, 'FXG', is responsible for less than ten percent of all movies downloaded on BitTorrent. *Id.*

20. U.S. DEPT. OF JUSTICE, PRO IP ACT REPORT FY2010, (Dec. 17, 2010), available at <http://www.justice.gov/criminal/cybercrime/proipreport2010.pdf>; Nate Anderson, *Rep "Hollywood" Berman Calls for New IP Law-Using Dodgy Data*, ARSTECHNICA (Apr. 8 2009, 12:23 AM), <http://arstechnica.com/tech-policy/news/2009/04/rep-howard-berman-calls-for-new-ip-law-using-dodgy-data.ars>.

21. See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *The Pirate Bay: Stockholm Tingsrätt* [Stockholm District Court] 2009-04-17 (Swed.), available at <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf>.

22. Bryan H. Choi, Note: *The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393, 396-97 (2006).

current p2p architecture, bittorrent,<sup>23</sup> requires rights holders file ‘John Doe’ lawsuits to identify infringers and enforce their rights.<sup>24</sup> While the networks are global, the DMCA and John Doe lawsuits are limited to the jurisdiction of the United States, a lesson rights holders have difficulty understanding.<sup>25</sup>

Rights holders eventually understood that the DMCA only applied in the United States and hatched a scheme to take U.S. law global. Instead of using existing mechanisms in the World Intellectual Property Organization or the World Trade Organization,<sup>26</sup> rights holders went to their representative, the U.S. Trade Representative.<sup>27</sup> Cloaked as an executive trade agreement, the United States began talks with other nations on a new agreement to address the popularity of p2p networks to share illegal files and the lack of international uniformity. Four years and eight meetings later, the proposed pluri-lateral Anti-Counterfeiting Trade Agreement (ACTA) aims to establish new international standards for enforcing intellectual property rights under the pretense of efficiently fighting the problems of counterfeiting and piracy.<sup>28</sup> The

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23. See generally IAN J. TAYLOR & ANDREW HARRISON, FROM P2P AND GRIDS TO SERVICES ON THE WEB: EVOLVING DISTRIBUTED COMMUNITIES, 218-24 (2nd. Ed. 2009); Seth Schiesel, *File Sharing's New Face*, N.Y. TIMES (Feb. 12, 2004), <http://www.nytimes.com/2004/02/12/technology/file-sharing-s-new-face.html>.

24. See, e.g., *Arista Records, LLC v. Does 1-12*, 2008 U.S. Dist. LEXIS 82548 (E.D. Cal. Sept. 4, 2008).

25. See generally Legal Threats Against The Pirate Bay, <http://thepiratebay.org/legal>; The Pirate Bay posts each takedown notice it receives. “As you may or may not be aware, Sweden is not a state in the United States of America. Sweden is a country in northern Europe. Unless you figured it out by now, US law does not apply here. For your information, no Swedish law is being violated.” Email from The Pirate Bay to Dreamworks S.K.G. (Aug. 21, 2004 18:21 GMT), available at [http://static.thepiratebay.org/dreamworks\\_response.txt](http://static.thepiratebay.org/dreamworks_response.txt) (in response to a takedown notice); See also Email from Microsoft Corp. to The Pirate Bay (Feb. 20, 2004, 10:15 AM), available at <http://static.thepiratebay.org/ms-loveletter.txt> (demanding immediate takedown of copyrighted materials).

26. U.S. Embassy Cables: Sweden’s Concerns About Anti-Counterfeit Trading Agreement Negotiations, THE GUARDIAN (Dec. 22, 2010, 12:37 GMT), available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/236363>; Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247, 248-49 (2009). Kaminski describes rights holders weariness to use the WTO and WIPO for intellectual property treaties after developing countries adopted the Zanzibar Declaration, highlighting several TRIPS-related problems.

27. Kaminski, *supra* note 26, at 250-51.

28. The Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion> (last visited Jan. 10, 2011) [hereinafter ACTA Summary]; Danny O’Brien, *Secret Agreement May Have Poisonous Effect on the Net*, IRISH TIMES, Nov. 13, 2009. O’Brien questions the goals of ACTA.

agreement's six chapters build upon existing international rules and seek to address a number of alleged shortcomings in the existing international legal framework.<sup>29</sup> Chapter two of the ACTA outlines a legal framework for enforcing intellectual property rights, addressing a variety of enforcement issues from boarder measures to criminal enforcement.<sup>30</sup> Chapter two also addresses digital enforcement of intellectual property rights.<sup>31</sup> Recognizing the special challenges new technologies pose for enforcement of intellectual property rights, the ACTA seeks to define the roles and responsibilities of internet service providers (ISPs) with specific emphasis on deterring internet piracy.<sup>32</sup>

This comment argues against the adoption of the proposed Anti-Counterfeiting Trade Agreement. Specifically, that the ACTA provision establishing “[p]rocedures enabling right holders who have given effective notification of a claimed infringement to expeditiously obtain information identifying the alleged infringer”<sup>33</sup> should not extend the current subpoena provisions of 17 USC § 512(h) to encompass p2p networks. Part II of this comment describes the current U.S. law, 17 USC § 512(h), and the Verizon cases discussing this provision. Part III discusses the reasons why rights holders want the ACTA agreement and highlights some of the recent history on the agreement. Part IV argues that the ACTA agreement should not be adopted, and finally, Part V concludes with a summary of reasons against the ACTA agreement.

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29. ACTA Summary, *supra* note 26.. The six chapters of the ACTA agreement are as follows: ch. 1, Initial Provisions and Definitions; ch. 2, Legal Framework for Enforcement of Intellectual Property Rights; ch. 3, International Cooperation; ch. 4, Enforcement Practices; ch. 5, Institutional Arrangements; ch. 6, Final Provisions.

30. *Id.*

31. *Id.* Topics included in the Digital Enforcement section: Digital Rights Management Information, technological protection measures, third party liability and online service provider liability.

32. Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement, <http://wikileaks.org/leak/acta-proposal-2007.pdf> (last visited Nov. 23, 2009) [hereinafter Discussion Paper]; Current leaked drafts of the ACTA suggest ISP safe harbors contingent on ‘graduated response’ or ‘three strikes’ provisions. However, the USTR has specifically stated that such provisions are suggestions and the United States will not be bound to implement a graduated response provisions. See Letter from Ron Kirk, to Ambassador Ron Wyden, Senator (Jan. 28 2010), *available at* [http://keionline.org/sites/default/files/ustr\\_acta\\_response.pdf](http://keionline.org/sites/default/files/ustr_acta_response.pdf).

33. Discussion Paper, *supra* note 30, at 4.

II. "SOME FOOLS SLIPPED UP AND OVER STEPPED THEIR  
BOUNDARIES"<sup>34</sup> OR: CURRENT U.S. LAW

In 1998, Congress attempted to balance the competing interests of rights holders, users, and ISPs by creating safe harbors, immunizing ISPs from copyright liability. Subject to certain conditions, 17 U.S.C. § 512(a)-(d) provides safe harbors for ISPs against infringement claims, which stem from the transmitting, caching, storing or linking to infringing material.<sup>35</sup> In exchange for these safe harbors, ISPs agreed to expeditiously remove content and disclose identifying information about users allegedly infringing copyrights.<sup>36</sup>

Section 512(h) outlines the requirements a rights holder must follow to obtain information from an ISP to identify an alleged infringer. The rights holder must file a request with the clerk of any U.S. district court with a proposed subpoena, a sworn declaration, a written communication identifying the copyrighted work claimed to have been infringed and "[i]dentification 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 information reasonably sufficient to permit the service provider to locate the material."<sup>37</sup>

After the adoption of the DMCA, p2p networks burst on to the internet allowing users to swap files in violation of copyright law.<sup>38</sup> As p2p networks developed and flourished, courts had to address whether ISPs would have to comply with the DMCA subpoena provisions if it could not remove or disable access to the infringing material.<sup>39</sup>

On July 24, 2002, the Recording Industry Association of America (RIAA) sought to compel Verizon Internet Services to identify one of its subscribers who allegedly possessed and was actively trading over 600 copyrighted music files without permission of the copyright holders via the KaZaA p2p network.<sup>40</sup> The RIAA issued a subpoena pursuant to

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34. Ludacris, *supra* note 1.

35. 17 U.S.C. § 512(a)-(d).

36. 17 U.S.C. § 512(h).

37. 17 U.S.C. § 512(h) (citing § 512(c)(3)(A)(iii)).

38. JOHN LOGIE, PEERS, PIRATES AND PERSUASION: RHETORIC IN THE PEER-TO-PEER DEBATES, 4-6 (2006). Napster went live in Aug. 1999. At its peak it had more than 80 million users. In February 2001, the network transferred 2.8 billion files. *Id.* at 5.

39. Verizon I, *supra* note 15, at 28.

40. *Id.* Kazaa now offers legal digital downloads. *Kazaa Site Becomes Legal Service*, BBC NEWS (July 27, 2006, 11:51 GMT), <http://news.bbc.co.uk/2/hi/science/nature/5220406.stm> (last visited Mar. 22, 2010).

section 512(h) to compel Verizon to identify the alleged copyright infringer and requested that Verizon “remove or disable access to the infringing sound files.”<sup>41</sup> Verizon refused and the RIAA commenced litigation (*Verizon I*).<sup>42</sup>

Verizon based its refusal on a requirement that the infringing material “reside[s] on a system or network controlled or operated by or for [a service provider].”<sup>43</sup> Verizon argued that the subpoena power of section 512(h) applies only to section 512(c) and that, since its internet connection only service falls under section 512(a), the p2p activities of its users were not subject to section 512(h).<sup>44</sup> Initially, the court found in favor of the RIAA, holding that “the textual definition of ‘service provider’ in subsection [512](k) leaves no doubt, therefore, that the subpoena power in subsection (h) applies to all service providers, regardless of the functions a service provider may perform under the four categories set out in subsections (a) through (d).”<sup>45</sup> Further, the court found that Congress did not intend to limit the subpoena power of section 512(h) to section 512(c) alone.<sup>46</sup>

While *Verizon I* was on appeal, the RIAA served Verizon with a second subpoena based upon similar facts (*Verizon II*). Refusing to comply, Verizon made alternative arguments in addition to those that had failed in *Verizon I*.<sup>47</sup> Verizon claimed that section 512(h) violates the case and controversy requirement of Article III of the Constitution, and that section 512(h) violates the First Amendment rights of Internet users.<sup>48</sup> Acknowledging Verizon’s arguments as “intriguing, [but] ultimately not persuasive,” the court found against Verizon.<sup>49</sup>

Verizon appealed (*Verizon I & II Appeal*). In a combined proceeding, the D.C. Circuit Court of Appeals stated that it would not address either of the *Verizon II* constitutional arguments since “we agree with Verizon’s interpretation of the statute [in *Verizon I*].”<sup>50</sup>

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41. *Verizon I*, *supra* note 15, at 28.

42. *Id.*

43. *Id.* at 29 (quoting 17 U.S.C. § 512(c)(3)(A), the conformance requirement for notification).

44. *Id.*

45. *Id.* at 31.

46. *Id.* at 33.

47. *Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, 257 F. Supp. 2d 244 (D.D.C. 2003) [hereinafter *Verizon II*].

48. *Id.* at 246-47.

49. *Id.* at 249.

50. *Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003) [hereinafter *Verizon I & II Appeal*].



Distinguishing *Verizon* from the *Napster* decision,<sup>51</sup> the court found that the notification component of the RIAA's subpoena "identifies absolutely no material Verizon could remove or access to which it could disable, which indicates to us that [section] 512(c)(3)(A) concerns means of infringement other than P2P file sharing."<sup>52</sup> The court reasoned that for Verizon to be liable for file sharing when it only provided communications services would be akin to holding a phone company liable because its services were unknowingly used to plan a crime by unknown parties.<sup>53</sup>

Ultimately, the court ruled that "512(h) applies to an ISP storing infringing material on its servers in any capacity," and that 512(h) does not apply when the ISP is "routing infringing materials to or from a personal computer owned and used by a subscriber"<sup>54</sup> reversing *Verizon I* and *Verizon II*. After losing its appeal, the RIAA sought similar subpoenas from ISPs in the 8th and 4th Circuits.<sup>55</sup> However, these courts upheld the reasoning of *Verizon* and rejected these subpoena requests.<sup>56</sup>

While the above holdings were a setback for rights holders, this precedence is grounded in strong logic. Courts should not require that ISPs reveal their customers information solely to limit their liability. Further, courts should not expand the protections afforded by copyright holders without explicit legislative guidance. Even the U.S. Supreme Court expressly recognized Congress' supremacy in copyright issues writing that "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."<sup>57</sup> Since *Verizon*, Congress has not passed any legislation to alter the subpoena provisions of the DMCA.<sup>58</sup>

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51. See *A&M Records*, 239 F.3d 1004 (finding that *Napster* directly infringed on the plaintiff's copyrights in violation of 17 U.S.C. § 106).

52. *Verizon I & II Appeal*, *supra* note 48, at 1236.

53. *Id.*

54. *Id.* at 1237.

55. See *In re Subpoena to Univ. of North Carolina at Chapel Hill*, 367 F. Supp. 2d 945 (M.D.N.C. 2005); *In re Charter Commc'n Inc.*, 393 F.3d 771 (8th Cir. 2005).

56. *Id.*

57. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

58. Other legislation has been proposed. See, e.g., Peer-to-Peer Piracy Prevention Act of 2002, H.R. 5211, 107th Cong. (2d Sess. 2002).

Rights holders are not without recourse; they can file John Doe lawsuits.<sup>59</sup> Using the internet protocol (IP) addresses of alleged infringers, rights holders file a John Doe lawsuit, identifying the parties by IP address, and the alleged infringing work available at that address.<sup>60</sup> Rights holders then seek subpoenas to compel the ISP associated<sup>61</sup> with each IP address to divulge the names and addresses associated with those IP addresses.<sup>62</sup> Although John Doe lawsuits are more costly for courts and rights holders, they are the only measure available to identify infringers.<sup>63</sup>

### III. "IT SEEMS THEY WANNA FINGER PRINT ME AND GIMME SOME YEARS" OR: THE ACTA AGREEMENT

In the last 13 years, Americans have upgraded their dial up modems

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59. Under Federal Rule of Civil Procedure 26(d)(1), a party may seek discovery prior to a Rule 26(f) conference pursuant to a court order. See also Joshua M. Dickman, *Anonymity and the Demands of Civil Procedure in Music Downloading Lawsuits*, 82 TUL. L. REV. 1049, 1053 (2008).

60. Dickman, *supra* note 57, at 1053.

61. ISPs are given blocks of IP addresses which they then assign to subscribers. An individual IP address only indicates which ISP it belongs to. See Katie Dean, *New Flurry of RIAA Lawsuits*, WIRED (Feb. 17, 2004), <http://www.wired.com/entertainment/music/news/2004/02/62318> (highlighting why infringement actions are often "bundled" by ISP).

62. In determining whether to grant a subpoena request, courts look at: "1) the allegations of copyright infringement in the Complaint, 2) the possibility that the ISP may destroy the information or delete information that could identify the Does identified in the Complaint, 3) the discovery request is narrowly tailored, 4) the request will substantially contribute to moving this case forward, and 5) Defendants will not be able to be identified without this information." *Artista Records, LLC v. Does 1-12*, 2008 U.S. Dist. LEXIS 82548, at \*5. However, subscribers' privacy rights, as well as any first amendment protection, require that an attempt be made to contact the subscribers prior to the release of their information. "If subscribers object to the release of information, they may file a motion to quash or modify the subpoena pursuant to *Fed. R. Civ. P. 45(c)(3)(A)*." *Id.* at 5-6.

63. Courts carefully consider each request, and not all are granted. In some cases, courts have found good cause exists to issue a Rule 45 subpoena: see *Arista Records LLC v. Does 1-43*, No. 07cv2357-LAB (POR), 2007 U.S. Dist. LEXIS 97774, 2007 WL 4538697 (S.D. Cal. Dec. 20, 2007); *Capitol Records, Inc., v. Doe*, No. 07-cv-1570 JM (POR), 2007 U.S. Dist. LEXIS 97702, 2007 WL 2429830 (S.D. Cal. Aug. 24, 2007); However, courts have denied similar requests. See, *Capitol Records, Inc., v. Does 1-16*, No. 07-485 WJ/LFG, 2007 U.S. Dist. LEXIS 97930, 2007 WL 1893603 (D.N.M. May 24, 2007); *Interscope Records v. Does 1-7*, 494 F. Supp. 2d 388 (E.D. Va. 2007) (denying expedited discovery request because subpoenas are not authorized under DMCA). Still, other courts have granted these types of requests subject to the notification of the subscriber prior to the release of any information by the ISP. *UMG Recordings, Inc. v. Doe*, No. C 08-1038 SBA, 2008 U.S. Dist. LEXIS 92788, 2008 WL 2949427 (N.D. Cal. 2008); *UMG Recordings, Inc., v. Does 1-4*, No. 06-0652 SBA (EMC), 2006 U.S. Dist. LEXIS 32821, 2006 WL 1343597 (N.D. Ca. 2006), at \*10, \*11, 2006 WL 1343597, at \*4 (noting privacy and limited first amendment protections).

to high-speed connections and altered how information is shared over the internet. Since the DMCA was enacted, p2p networks have been invented, evolved and become ubiquitous. Since their creation, connections through p2p networks have comprised an increasing portion of internet traffic and show no sign of decreasing. Rights holders have exercised their rights against each network.

The first and arguably most famous p2p network, Napster, was born in August 1999.<sup>64</sup> Enabling users to transmit MP3 files, Napster operated like a wheel; the spokes of the wheel were users.<sup>65</sup> Napster servers operated in the center of the wheel storing a list of every available file, facilitating searches of their database and downloads.<sup>66</sup> By storing information about the infringing files, Napster engaged in contributory and vicarious copyright infringement.<sup>67</sup> Thus, Napster was shut down under a traditional copyright claim and not under the newly enacted DMCA.<sup>68</sup>

From the ashes of Napster, rose the second generation of p2p networks. Learning from Napster's mistakes, decentralized file-sharing networks, such as KaZaA, Grokster, and Morpheus, allowed users to send requests for files directly to other computers on the network without the use of a centralized server.<sup>69</sup> Without a central point through which communications passed, these companies believed they could not be found guilty of contributory and vicarious copyright infringement.<sup>70</sup> Like their predecessor, Napster, the companies operating these networks were sued and shutdown under an inducement theory.<sup>71</sup> Also like Napster, these networks were shuttered under a traditional theory of copyright law and not the DMCA.<sup>72</sup>

Although the companies that created the second generation p2p networks have been sued out of business, their networks still remain.<sup>73</sup>

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64. LOGIE, *supra* note 36, at 4. Not only was Napster the first p2p service, it also comprised the largest music library in history.

65. Ulric M. Lewen, *Internet File-Sharing: Swedish Pirates Challenge the U.S.*, 16 CARDOZO J. INT'L & COMP. L. 173, 177 (2008).

66. A&M Records, 239 F.3d at 1012.

67. *Id.* at 1011.

68. *Id.* at 1025.

69. Choi, *supra* note 20, at 396.

70. *Id.* at 396-97.

71. MGM Studios, 545 U.S. 913.

72. Grokster was found liable for contributory and vicarious copyright infringement. *Id.* at 930-32.

73. See, e.g., Matthew Humphries, *LimeWire is Back as LimeWire Pirate Edition (Updated)*, GEEK.COM (Nov. 9, 2010, 6:00 AM), <http://www.geek.com/articles/news/limewire->

Like a condemned railroad, users with the requisite software may still use these p2p networks to exchange infringing files, but do so at their own risk.<sup>74</sup> Unable to identify users, rights holders monitor these networks and file John Doe lawsuits to compel ISPs to turn over information linking IP addresses to individual users.

The modern p2p software, bittorrent, builds upon the decentralized structure of previous p2p systems and changes how files are downloaded. Before bittorrent, files were downloaded linearly; a user had to download part 1 before part 2. However, bittorrent cuts one file into many smaller files that are exchanged through a “swarm” of users, enabling faster downloads and more anonymity. Although bittorrent is decentralized, it is not anonymous; users and IP addresses are discoverable. Like previous p2p networks, 512(h) does not allow rights holders to subpoena ISPs to identify users downloading files using bittorrent networks. Again, rights holders monitor these networks, file “John Doe” lawsuits and compel ISPs to turn over information linking IP addresses to individual users.

Several unique elements distinguish bittorrent from the p2p systems that preceded it. Bittorrent is a protocol, like ‘http,’ ‘ftp,’ and ‘dns,’<sup>75</sup> and is not tied to a particular piece of software or company.<sup>76</sup> The architecture of bittorrent creates a self-reinforcing cycle; the more popular a file is, the more users are in the swarm and the faster the file downloads.<sup>77</sup> This design allows users to become lost in the swarm, limiting rights holders’ ability to identify individual users and prove infringement.<sup>78</sup> However, bittorrent also has uses beyond facilitating

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is-back-as-limewire-pirate-edition-2010119/; see also Enigma, *LimeWire Resurrected By Secret Dev Team*, TORRENTFREAK (Nov. 9, 2010), <http://torrentfreak.com/limewire-resurrected-by-secret-dev-team-101108/>.

74. Risks include downloading fake files. Anthony Brauno, *Shifting Gears* BILLBOARD MAGAZINE, June 14, 2008 at 10

75. “The basic idea is that protocols are similar to human languages in that each protocol is a language all its own. Imagine sitting on a street corner in New York City and listening to passers-by speaking dozens of foreign languages, and you get the idea of what it’s like to listen to a network with dozens of protocols going by.” LINDA VOLONINO AND REYNALDO ANZALDUA, *COMPUTER FORENSICS FOR DUMMIES* 258 (2008). Examples of common computer protocols include Bit Torrent, Domain Name System (DNS), Dynamic host configuration protocol (DHCP), File transfer protocol (FTP), HyperText Transfer Protocol (HTTP). *Id.* at 258-59.

76. MATTHEW RIMMER, *DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION*, 113 (2007). “In 2002, software programmer Bram Cohen released BitTorrent as a free, open source project, a peer-to-peer file distribution tool. It has since been adopted by consumers of music, television and films.” *Id.*

77. Choi, *supra* note 20, at 402-03.

78. Lewen, *supra* note 63, at 177. Scholars argue that the next generation of p2p

copyright infringement; the protocol allows NASA to share satellite pictures,<sup>79</sup> enables players to update World of Warcraft,<sup>80</sup> and permits Subpop Records to release entire albums for free.<sup>81</sup>

The impact of p2p systems on rights holders will never be fully known. Connections through p2p networks comprise a substantial portion of web traffic each year and remain outside the DMCA's subpoena provisions.<sup>82</sup> Rights holders can only enforce their rights by filing costly lawsuits in an overburdened court system.<sup>83</sup> Unhappy with this arrangement, rights holders appealed to their representative in the government, the U.S. Trade Representative.<sup>84</sup>

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systems have begun to replace the traditional model of the Internet user as a consumer of server resources, with a 'prosumer' model whereby users create content and contribute resources, eliminating the need for central servers. Under this model of the Internet, ISPs further shift their functions from hosting content, such as websites, to only providing bandwidth placing them outside the DMCA subpoena provisions. See J.A. POUWELSE ET AL., *Pirates and Samaritans: A Decade of Measurements on Peer Production and Their Implications for Net Neutrality and Copyright*, TELECOMMUNICATIONS POLICY, VOL. 32 NO. 11, Dec. 2008, pp. 701-12, available at [www.tribler.org/trac/raw-attachment/wiki/PiratesSamaritans/pirates\\_and\\_samaritans.pdf](http://www.tribler.org/trac/raw-attachment/wiki/PiratesSamaritans/pirates_and_samaritans.pdf).

79. Press Release, Free Press, A Public Hearing on the Future of the Internet (Feb. 25, 2008), available at <http://www.freepress.net/release/340>.

80. Blizzard Downloader, WoWWiki—Your Guide to the World of Warcraft (2011), [http://www.wowwiki.com/Blizzard\\_Downloader](http://www.wowwiki.com/Blizzard_Downloader).

81. Ernesto, *Indie Bands on BitTorrent.com*, TORRENT FREAK (Sept. 21, 2006), <http://torrentfreak.com/indie-bands-on-bittorrentcom/>. Sub Pop records is an important participant in the music industry, representing artists such as Nirvana, Death Cab for Cutie, and the Shins. See Rick Marin, *Grunge: A Success Story*, N.Y. TIMES, Nov. 15 1992; Kelefa Sanneh, *Rock Celebrities by Stealth; Without Trying Too Hard, the Shins Have Become an Indie Phenomenon*, N.Y. TIMES (Oct. 22, 2003).

82. ORG. FOR ECON. CO-OPERATION & DEV., PIRACY OF DIGITAL CONTENT (2009), available at <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF>. In 2007, p2p networks generated between forty-nine percent and eighty-three percent of internet traffic. *Id.* at 29.

83. See CHAD M. OLDFATHER, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 768 (2006). (highlighting the increase in the number of cases in federal court. "The federal courts of appeals in 2003 faced more than fifteen times as many cases as in 1960. While the number of judges has increased over this same period, expansion has not kept pace with the dockets. Appeals per judge have grown by some 450% over this same period."); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 59 (1996). (From 1960 to 1983, "the number of cases filed in the district courts more than tripled, compared with a less an 30 percent increase in the preceding quarter-century. The compound annual rate of increase, 5.6 percent was six times what it had been in the preceding period.").

84. In 2004, the United States established the STOP! initiative to "fight global piracy by systematically dismantling piracy networks, blocking counterfeits at [U.S.] borders, helping American businesses secure and enforce their rights around the world, and collaborating with our trading partners to ensure the fight against fakes is global." Press Release, Office of the U.S. Trade Rep., Ambassador Schwab Announces U.S. Will Seek New

In October 2007, the U.S., the European Union, Switzerland, and Japan announced the negotiation of the ACTA treaty.<sup>85</sup> Although the negotiations have been kept secret,<sup>86</sup> numerous documents have been leaked to the public detailing general and specific principles of the proposed agreement.<sup>87</sup> Most relevant is the provision establishing “[p]rocedures enabling rights holders who have given effective notification of a claimed infringement to expeditiously obtain information identifying the alleged infringer.”<sup>88</sup> Most commentators and academics believe that this provision of the agreement will take the DMCA’s ISP safe harbor provisions global and create new requirements to compel ISPs to provide information to quickly identify and stop copyright infringers.<sup>89</sup> Proponents of the agreement intend to bring every p2p network under the subpoena provision of the DMCA. Each leaked draft of the agreement includes language conditioning ISP safe harbors on the disclosure of subscriber information upon the identification of material stored on an ISPs servers or activity by the ISPs users.<sup>90</sup> The ACTA seeks to help rights holders reduce these costs and efficiently fight intellectual property infringement on the internet.

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Trade Agreement to Fight Fakes (Oct. 23, 2007), *available at*

<http://www.ustr.gov/ambassador-schwab-announces-us-will-look-for-new-trade-agreement-to-fight-fakes>.

85. 73 FED. REG. 8910 (Feb. 15, 2008). Since October 2007, the countries of “Australia, the Republic of Korea, New Zealand, Mexico, Jordan, Morocco, Singapore, the United Arab Emirates and Canada have joined the negotiations.” *Anti-Counterfeiting Trade Agreement: What is ACTA?*, ELECTRONIC FRONTIER FOUND. (EFF), <http://www.eff.org/issues/acta> (last visited Mar. 22, 2009); *Copyright Deal Could Toughen Rules Governing Info on iPods, Computers*, VANCOUVER SUN., May 26, 2008, *available at* <http://www.canada.com/vancouver/sun/story.html?id=ae997868-220b-4dae-bf4f-47f6fc96ce5e>.

86. Knowledge Ecology International, a non-profit, non-governmental organization focusing on the management of knowledge resources submitted a Freedom of Information Act request for a copy of the proposed treaty. This request was denied because “the documents you seek are being withheld in full pursuant to 5 U.S.C. § 552(b)(1), which pertains to information that is properly classified in the interest of national security pursuant to Executive Order 12958.” Knowledge Ecology International, USTR FOIA Denial, *available at* [http://www.keionline.org/misc-docs/3/ustr\\_foia\\_denial.pdf](http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf) (last visited, Mar. 22, 2009).

87. Nate Anderson, *ACTA Draft Leaks: Nonprofit P2P Faces Criminal Penalties*, ARSTECHNICA (Feb. 4 2009, 10:03), <http://arstechnica.com/tech-policy/news/2009/02/actual-acta-draft-leaks-noncommercial-p2p-could-get-criminal-penalties.ars>.

88. Discussion Paper, *supra* note 30, at 3.

89. Nate Anderson, *The Real ACTA Threat (It's Not iPod Scanning Border Guards)*, ARSTECHNICA (June 2, 2008, 7:05 AM), <http://arstechnica.com/old/content/2008/06/the-real-acta-threat-its-not-ipod-scanning-border-guards.ars>.

90. See ACTA Internet Chapter Leak (Mar. 1 2010), *available at* [https://sites.google.com/site/iipenforcement/acta/acta-internet-chapter-march-1-2020/acta\\_digital\\_chapter.pdf?attredirects=0&d=1](https://sites.google.com/site/iipenforcement/acta/acta-internet-chapter-march-1-2020/acta_digital_chapter.pdf?attredirects=0&d=1)

However, the ACTA seeks to alter these subpoena provisions without Congress' input or express approval.<sup>91</sup>

IV. "YOU'LL BE LIKE LIL. JOHN Q. PUBLIC AND GET A CHANGE OF HEART"<sup>92</sup> OR: WHY NO ACTA NEEDED

Any extension of existing rights must be supported by sound public policy. Unfortunately, extending the subpoena provisions of § 512(h) is unsupported by recent history and current law. The First Amendment<sup>93</sup> rights of users and the repeated examples of misuse of the current powers granted under the DMCA, illustrate that any extension of rights holders powers is unwarranted and would result in a more precipitous decline in respect for intellectual property rights.<sup>94</sup>

The First Amendment is at once a grant of rights to individuals and a restraint against certain government actions. While First Amendment protection for free speech is not absolute;<sup>95</sup> it does protect anonymous speech.<sup>96</sup> The First Amendment fully protects the rights of the

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91. See Eddan Katz, *Stopping the ACTA Juggernaut*, ELECTRONIC FRONTIER FOUND. (EFF) (Nov. 19, 2009), <http://www.eff.org/deeplinks/2009/11/stopping-acta-juggernaut>. Because Trade Promotion Authority expired in 2007, the U.S. Trade Representative (USTR) chose to negotiate ACTA as an executive agreement which will not require congressional advice or approval. *Id.* "USTR denies that ACTA will any require substantive changes in U.S. law. For this reason, no need to get Congress involved or to have public hearings; no need, in other words to worry. RIAA has just submitted its suggestions to USTR for what should be in the agreement." William Patry, *RIAA Ups the ACTA Ante*, THE PATRY COPYRIGHT BLOG (July 2, 2008), <http://williampatry.blogspot.com/2008/07/riaa-ups-acta-ante.html>.

92. Ludacris, *supra* note 32.

93. U.S. CONST. Amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

94. These arguments are discussed in *Verizon II* and, *overruled by Verizon I & II Appeal*, on other grounds. *Verizon II*, *supra* note 45 at 247; *Verizon I & II Appeal*, *supra* note 48. On appeal, the court agreed with Verizon's interpretation of 17 U.S.C. § 512, and therefore did not address the arguments that the district court lacked jurisdiction "to issue a subpoena with no underlying 'case or controversy' pending before the court; and that § 512(h) violates the First Amendment because it lacks sufficient safeguards to protect an internet user's ability to speak and associate anonymously." *Verizon I & II Appeal*, *supra* note 48, at 1231.

95. Certain categories of speech are not protected. The First Amendment does not shield the identities of publishers of material that is libelous, threatening, or infringes copyrights. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (libel).

96. See, e.g., *Talley v. California*, 362 U.S. 60 (1960) (recognizing the First Amendment right to communicate anonymously); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357

anonymous publisher of a whistleblower report, a ‘photoshopped’ image or a parody of a famous video. This protection applies regardless of where this speech occurs.<sup>97</sup> Speech in the public square receives the same protection as speech on the internet because both are public forums where ideas are exchanged.<sup>98</sup> Allowing rights holders to pierce users anonymity based solely on an allegation of infringement necessarily curtails the first amendment rights of users.

The First Amendment also imposes limits on copyright law.<sup>99</sup> These limits may not be disregarded merely because a rights holder alleges a violation of copyright law. History is full of attempts to burden, chill, or censor speech masquerading as claims that the speech is unprotected.<sup>100</sup> Whenever courts have examined such claims, they insisted on careful procedural safeguards and judicial oversight.<sup>101</sup>

Extending § 512 to encompass p2p connections would chill speech because internet users would be unaware of whether their anonymity on the internet was intact. Unlike traditional anonymous speech where a speaker takes affirmative steps to disguise their identity, internet users presume their speech is anonymous. Extending § 512 would allow rights holders to obtain a subpoena without any form of notice to the individual that their anonymity has been destroyed. Further, once identified, actions taken prior to the loss of anonymity can easily be discovered.<sup>102</sup> Therefore, individuals must be afforded some due process before their identities are revealed.

Increasing the subpoena powers of § 512(h) to include p2p networks would remove judicial oversight. Under § 512(h) the subpoena need

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(1995) (“Anonymity is a shield from the tyranny of the majority.”); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (recognizing the First Amendment right to receive ideas in privacy).

97. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to” the Internet); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

98. *Id.* *Dendrite Int’l., Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. App. Ct. 2001).

99. Built-in First Amendment accommodations include the fair use doctrine and the idea/expression distinction. *Eldred v. Ashcroft*, 537 U.S. 186 (2003); 17 U.S.C. § 107.

100. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (alleged defamation).

101. “The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding-inherent in all litigation-will create the danger that the legitimate utterance will be penalized.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

102. See, e.g., Nate Anderson, *Why Google Keeps Your Data Forever, Tracks You with Ads*, ARSTECHNICA (Mar. 8, 2010), <http://arstechnica.com/tech-policy/news/2010/03/google-keeps-your-data-to-learn-from-good-guys-fight-off-bad-guys.ars>.



only state merely a “good faith” allegation of copyright infringement. Extending § 512(h) would empower anyone alleging unauthorized use of a copyrighted work to obtain from a district court clerk a subpoena demanding the name, address, telephone number, and other identifying information of any internet user. The subpoena issues without any judicial oversight and there is no requirement that such a subpoena be issued in ongoing or even anticipated litigation and there is no notice to the person whose identity is to be disclosed.

According rights holders additional powers will only serve to protect the declining business models of the content industry. Rights holders cannot use their lack of progress toward online content distribution to justify increased rights to police the internet. In the ten years since the Napster decision closed the largest music archive ever,<sup>103</sup> many notable artist’s catalogues are only recently available online.<sup>104</sup> This failure is highlighted by the fact that music was first released online in 1982.<sup>105</sup> Rights holders failure to adapt to new technologies cannot be used to justify new rights.

Additionally, rights holders have failed to use the rights already granted under the DMCA responsibly. For example, a university department of astronomy nearly had its servers disconnected and its ability to speak on the Internet cut off after it received a threatening letter from the RIAA accusing it of copyright infringement.<sup>106</sup> The letter was sent because the department’s website listed a professor with the last name Usher, which is the stage name of a pop artist.<sup>107</sup> The department allowed visitors the opportunity to download an amateur song about gamma rays performed by some astronomers. Though the RIAA eventually apologized, this incident and others like it<sup>108</sup> illustrate how errors can impact individuals and force improper disclosure of their identities.

Further, a large percentage of infringing copyrighted content available on the internet has been uploaded by members of content

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103. LOGIE, *supra* note 36, at 4.

104. Ethan Smith, *Apple Finally Snares Beatles*, WALL ST. J., Nov. 16, 2010.

105. See Andrew A. Adams & Ian Brown, *Keep Looking: The Answer to the Machine is Elsewhere*, COMPUTERS AND LAW MAGAZINE, Vol. 19, No. 6, at 32-35 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1329703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329703) (discussing the first digitally delivered album, Billy Joel’s CD 52<sup>nd</sup> Street in Japan, 1982).

106. In re Verizon Internet Serv., 2003 U.S. D.C. Cir. Briefs 7015, 1 (D.C. Cir. May 19, 2003).

107. *Id.*

108. *Id.* at 11. (Chronicling mistaken use of § 512(h) subpoenas to takedown uncopyrightable facts, public domain materials, social criticism and general errors).

industries themselves. In 2009, U2's yet to be released album *No Line on the Horizon*, slated for a March release, was uploaded onto bittorrent networks in February.<sup>109</sup> Because the album had not been released, U2 fans faced a choice: wait a month to listen to the album or listen to the album now by illegally downloading it.<sup>110</sup> An investigation quickly determined that the album was posted online, not by hackers or pirates, but was uploaded by Universal Music Group's Australian branch.<sup>111</sup> Mistakes like this are not the exclusive province of the music industry.

Technologist and blogger Andy Baio has documented one unique aspect of p2p networks. For the past seven years Baio has tracked the time between Academy of Motion Pictures (the Academy) members receipt of screener copies of Oscar nominated films and the presence of those films on bittorrent networks. His ongoing series, "Pirating the Oscars," provides insight on how some members of the Academy regard copyright and the internet.<sup>112</sup> In 2010, thirty-four films were nominated in the major categories. An incredible fourteen films were already available on p2p networks at DVD quality on nomination day with thirty films available by Oscar night.<sup>113</sup> Other statistics are less troubling but still illuminating. This year, the median number of days between release and online availability has gone up; the average time from receipt by Academy members to its leak online is only 11 days<sup>114</sup> Members of the Academy who post movies online have the most to lose; not only are they decreasing the profits for their industry, but they also open themselves up to increased penalties. Posters can be found liable for copyright infringement and find themselves out of work.

Overall, rights holders have not used existing powers effectively. Instead of using the DMCA's power like a scalpel, it has been wielded

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109. "What's the worst thing that could happen to a band that is adamantly pro-DRM and anti-filesharing? Having an unreleased album leaked all over the Internet, of course, and by one of the Big Four labels to boot." Jacqui Cheng, *Upcoming U2 Album All Over P2P After Band's Label Screws Up*, ARSTECHNICA (Feb. 20, 2009, 2:44 PM), <http://arstechnica.com/media/news/2009/02/upcoming-u2-album-all-over-p2p-after-bands-label-screws-up.ars>.

110. *Id.*

111. *Id.*

112. Andy Baio, *Pirating the 2010 Oscars*, WAXY.ORG (Feb. 15 2010), *available at* [http://waxy.org/2010/02/pirating\\_the\\_2010\\_oscars/](http://waxy.org/2010/02/pirating_the_2010_oscars/) and <http://spreadsheets.google.com/pub?key=pVNrsh7EqwD7a7NghoFZRAg&output=xls>.

113. The number of films available on Oscar night is down from the previous year. *See id.*

114. *Id.*

like a club removing obviously non-infringing works<sup>115</sup> and even works that describe abusive practices.<sup>116</sup> One result of misuse is a declining respect for intellectual property laws.

This general disenchantment crops up in unusual places.<sup>117</sup> Journalists become smugglers because a loved one's life saving drug costs \$47,000<sup>118</sup> and the sick are forced to ask survivors of the recently deceased if they would be willing to pass along the remains of no longer needed prescriptions.<sup>119</sup> Artists and curators are suppressed from their endeavors because licenses for decades old footage cost hundreds of thousands of dollars.<sup>120</sup> While these examples are extreme, they illustrate the actual costs of our current intellectual property regime and unhappiness with the broad scope of rights already afforded rights holders. Before any discussion of additional rights, there should be some discussion of improving the present regime.

The general unhappiness of our current intellectual property rights

115. See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (holding that before a takedown notice can be sent, copyright holders must consider fair use).

116. See Larry Lessig, *New Conservatism*, TEDx, Mar. 6, 2010, available at <http://blip.tv/file/3309463> (last visited Mar. 22, 2010) (describing how he uploaded a presentation on the fair use doctrine to YouTube only to receive a takedown notice).

117. See generally Randall Munroe, *Steal This Comics*, XKCD, available at <http://xkcd.com/488/> (humorously highlighting some flaws of Digital Rights Management systems). See also Rob Pegoraro, *Copyright Overreach Goes on World Tour*, WASH.POST, Nov. 15, 2009.

118. Julia Whitty, *Smuggling Hope*, MOTHER JONES MAGAZINE, Mar./Apr. 2004, at 52. Julia chronicles her own struggles to obtain a life-saving medication to treat her father's cancer. All the research and development on the drug had been done 40 years before. One year's prescription cost \$47,000 with the potential to triple, based on his clinical response, to \$141,000. Because her family could not afford the cost and the drug was available outside the U.S. for \$1,200, Julia became a smuggler, buying medication abroad and smuggling it into the U.S.

119. "I turned to the Internet, hoping to find some way of acquiring what my father needed . . . . There were those looking, and those giving—including the survivors of the deceased, who were willing to pass along the remnants of no-longer-needed prescriptions. Like addicts, we identified ourselves by first name only, and our missives were sad and apologetic." *Id.*

120. See Lawrence Lessig, *For the Love of Culture*, NEW REPUBLIC (Jan. 26, 2010, 12:00 AM), <http://www.tnr.com/article/the-love-culture>. Lessig describes the efforts of Charles Gugenheim's daughter, to remaster her father's groundbreaking documentary *Eyes on the Prize*. Hailed as a historical document, the film focused on the African American Civil Rights Movement from 1954-85. The required licenses for the footage used in the film cost \$500,000. See also Nate Anderson, *Sputnik Mania! Documentaries, Old Footage, and Copyright*, ARSTECHNICA (Mar. 15, 2010, 1:35 PM), <http://arstechnica.com/tech-policy/news/2010/03/documentaries-old-footage-and-copyright.ars> (detailing filmmaker David Hoffman's acquisition of old footage about the Sputnik Space launch from collectors on eBay and uploaders on YouTube only to pay \$320,00 to clear the rights for the footage he gathered).

regime is highlighted by the mere existence of the ACTA. Instead of seeking the opinions of rights holders, users and ISPs, the ACTA has been negotiated in secret without public input or comment.<sup>121</sup> The Obama administration has classified the agreement as top secret.<sup>122</sup> Public interest groups have sued to see it and members of the European Parliament were forced to introduce a resolution to allow themselves to see the agreement.<sup>123</sup> Authors and rights holders should be rewarded for their creative endeavors. However, those rewards should not come at the costs of individual rights and freedoms. Reducing the difficulty and costs of intellectual property enforcement is an important goal. At present, however, the cost to individual rights through quick subpoenas is too high.

#### V. “2 FAST . . . ACT A FOOL”<sup>124</sup> OR: CONCLUSION

Since 1998, Britney Spears has gone from pop superstar to divorced mother of two,<sup>125</sup> Dawson’s Creek has dried up<sup>126</sup> and Google has moved from a Palo Alto garage to larger facilities.<sup>127</sup> Computer speeds are no longer clocked in megahertz and internet connections to the no long require a phone line. Copyright holders’ rights have not advanced with changes in technology and they should not. While the amount of internet traffic subject to the DMCA subpoena procedures shrinks,

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121. James Love, *Who Are the Cleared Advisors That Have Access to Secret ACTA Documents*, KNOWLEDGE ECOLOGY INT’L (Mar. 13, 2009, 14:44), <http://keionline.org/blogs/2009/03/13/who-are-cleared-advisors> (last visited Mar. 22, 2010); see also, U.S. Embassy Cables: Sweden’s Concerns About Anti-Counterfeit Trading Agreement Negotiations, THE GUARDIAN (Dec. 22, 2010, 12:37 GMT), available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/236363>.

122. James Love, *Obama Administration Rules Texts of New IPR Agreement are State Secrets*, HUFFINGTON POST (Mar. 12, 2009, 5:05 PM EST), [http://www.huffingtonpost.com/james-love/obama-administration-rule\\_b\\_174450.html](http://www.huffingtonpost.com/james-love/obama-administration-rule_b_174450.html).

123. Nate Anderson, *Europe Trashes ACTA as Obama Praises It*, ARSTECHNICA (Mar. 14, 2010, 7:00 PM), <http://arstechnica.com/tech-policy/news/2010/03/europe-trashes-acta-as-obama-praises-it.ars>; The resolution passed 633 to 13. *Id.* see also Press Release, White House, Remarks by the President at the Export-Import Bank’s Annual Conference (Mar. 11, 2010, 11:30 AM EST), <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>.

124. Ludacris, *supra* note 32.

125. Biography for Britney Spears, IMDB.COM, <http://www.imdb.com/name/nm0005453/bio> (last visited Feb. 7, 2011).

126. MAXINE SHIN, *If Dawson and Buffy Are Gone, Can I Still Be Young?*, N.Y. POST, May 20, 2003.

127. DAVID A. VISE & MARK MALSEED, THE GOOGLE STORY 30 (2005).GOOGLE.COM, Corporate Information-Google Offices, <http://www.google.com/intl/en/corporate/address.html> (last accessed May 1, 2009).

rights holders can still prosecute infringement actions against p2p users. The DMCA should not be extended to encompass p2p traffic simply because the current regime is difficult. Rights should only be extended after thorough and transparent discussions balancing competing interests and not through secret meetings and backroom deals.

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