Response to Questions from Senate Judiciary Committee

Questions from Senator Chambliss

Q1. Mr. Barr, what is the impact on service providers in terms of responding to the hundreds of subpoenas you have received?

A1. The hundreds of subpoenas discussed in my testimony had been issued under 17 U.S.C. § 512(h), which creates a procedure for the issuance of subpoenas addressed to online service providers without judicial supervision in certain circumstances. Copyright owners had been using section 512(h) to issue subpoenas against peer-to-peer file sharing, which Verizon did not believe was an authorized, or appropriate, use of the special section 512(h) subpoena process. On December 19, 2003, the US Court of Appeals for the District of Columbia Circuit agreed with Verizon and held unanimously that Section 512(h) does not apply to online service providers when they are acting as a conduit for online traffic. Rather, the Court held that section 512(h) only applied where content was stored on a service provider's servers. *RIAA v. Verizon Internet Services, Inc.,* 351 F.3d. 1229 (D.C. Cir. 2003), *cert. denied,* 125 S. Ct. 309 (2004). The Eighth Circuit agreed, shortly thereafter. *In re Charter Communications, Inc., Subpoena Enforcement Matter,* 393 F.3d 771 (8th Cir. 2004). To a large extent, the impact on service providers is now moot. Since the Court of Appeals' decision, RIAA has been obtaining court-ordered subpoenas on a regular basis and sending them to Verizon pursuant to a process both parties have found acceptable. Verizon has promptly responded to the subpoenas and as distributor of content, believes strongly in copyright protections and compliance with copyright enforcement in partnership with the content community.

Q2. Mr. Barr, you have stated that the subpoena process under the Digital Millennium Copyright Act is less protective of parties' interests than is true of the traditional subpoena process. How is this so? Can you compare the process law enforcement must go through with the process the Recording Industry Association of America is using to get identifying information?

A2. After the Court of Appeals' decision, content owners, including the RIAA, began filing John Doe lawsuits and obtaining traditional subpoenas issued with the appropriate judicial oversight The traditional subpoena requires that the copyright owner file a valid complaint in federal court, investigate the facts and inquire into defenses and prove ownership of a federal copyright registration. Under the traditional subpoena process, defendants also enjoy fundamental due process protections, including notice, the opportunity to be heard and to raise defenses. Judicial oversight deters potential abuses as does the availability of FRCP Rule 11 sanctions. None of these protections were part of the old RIAA form subpoena process. Similarly, government entities under a variety of criminal statutes, including the Video Privacy Protection Act and Cable Communications Policy Act, can only obtain subscriber information subject to extensive limitations and pursuant to court order or judicial supervision. This issue, however, is now largely moot. In the preceding five years, the filing of John Doe lawsuits has not interfered with copyright owners' enforcement activities. As RIAA President Cary Sherman stated in a press release shortly after the D.C. Circuit's 2003 decision, "[o]ur campaign against illegal file sharers is not missing a beat." He confirmed that "[t]he 'John Doe' legal process is a well-established mechanism for aggrieved parties to enforce their rights. The process by which we obtain the identity of defendants has changed, but the enforcement program has not." *See* http://www.riaa.com/newsitem.php?news_month_filter=1&news_year_filter=2004&resultpage=&id=7A2318DB-1A51-7911-AB93-54D8337A9B90.

Question from Senator Cornyn

Q. The "fair use" doctrine of copyright law gives consumers a certain amount of flexibility to use copyrighted materials they legitimately possess, without risk of liability for copyright infringement. Does that doctrine apply, however, to materials that have yet to even be released to the public? Under what conditions, if any, would it even be possible for ordinary consumers to lawfully possess such "pre-release" materials? Should the NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) be amended, so that <u>any</u> reproduction or distribution of "pre-release" material shall constitute per se infringement under 17 U.S.C. § 506(a)(2)?

A. The thrust of the question appears to focus on whether a consumer's infringing conduct should be subject to enhanced criminal liability with respect to pre-release materials. It is our understanding that Congress addressed this issue in Title I of the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9 (enhancing criminal penalties for infringement of works "being prepared for commercial distribution" including by "making it available on a computer network").

On the broader question related to the fair use doctrine, the Copyright Act expressly recognizes that "the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of [the four fair use factors]." 17 U.S.C. § 107. In *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), the Supreme Court recognized that, although the unpublished status of a work was important, it was "not necessarily determinative" in considering a claim of fair use. *Id.* at 554. While a claim of fair use is not likely to prevail where a consumer widely distributes a full copy of a pre-release entertainment work, there may be other circumstances in which a claim of fair use could be appropriate. It is therefore be important to target illegal activity while maintaining the flexibility of the fair use doctrine.

Questions from Senator Leahy

Q1. I have deep respect for privacy rights, and if there is an abuse of law, I believe that should be dealt with. Is there some use of the § 512(h) subpoena with which Verizon would be comfortable?

A1. Verizon has no objection to the use of the traditional Fed. R. Civ. P. 45 subpoena process in the context of a pending John Doe lawsuit, where a pre-service subpoena is subject to judicial supervision and subject to the Federal Rules of Civil Procedure. Further, Verizon does not believe that section 512(h) creates substantial privacy problems if the provision is limited to its original intended scope, where content is stored on a service provider's system or network. In that situation, the service provider has access to the content and may examine it, as contemplated by the take-down notice, which forms an essential part of the subpoena application.

Q2. Did Verizon raise any privacy concerns on behalf of its customers when it decided to support § 512(h) in 1998?

A2. Verizon was a leading participant in the 1998 negotiations, and specifically understood that section 512(h) was intended to apply solely as an adjunct to the take-down process available for material residing on the service provider's system or network in the context of subsection (c). That was the reason for the repeated cross references to subsection (c) and for the references in the required take-down notice to "material . . . to be removed or access to which is to be disabled." In that context, Verizon did not believe that section 512(h) raised substantial privacy concerns, because the material was publicly hosted on a provider's servers and it was expected that the service provider would have access to, and the ability to examine, the allegedly infringing material, and to judge the copyright owner's claim. The service provider would also have the ability to disable access to infringing material, providing more time for deliberative judicial review. Further, Verizon understood that, in the subsection (c) take-down context, the sanctions for misrepresentation provided in subsection (f), and the counter-notification described in that subsection, would be available to further protect user interests.

Q3. To the extent that Verizon raised these concerns before, why did Verizon support the subpoena provision regardless of its concerns, and why do those privacy concerns now weigh more heavily?

A3. As discussed above, Verizon did not believe that, properly confined to the subsection (c) context, subsection (h) created substantial privacy concerns. Our concern with privacy arose out of the misconstruction of subsection (h) by the U.S. District Court for the District of Columbia, which enabled the sending of subpoenas in a context where the service provider often was unable to review the copyright owner's claim of infringement or remove specific material. Moreover, the District Court's construction could not logically be limited to peer-to-peer activity; it necessarily swept all conduit functions within the scope of subsection (h). Verizon believes that the conduit functions expressly considered by Congress in 1998 — anonymous web browsing and private email — were Internet functions where privacy and anonymity interests were at their zenith. The District Court decisions placed the privacy and anonymity of users of these Internet functions at risk. Fortunately, the D.C. Circuit corrected the District Court's error and the parties have been working amicably on enforcement activities ever since.

Q4. Is there any way the parties can come together, as they did in 1998, to work out terms for the issuance and response to 512(h) subpoenas, which would satisfy everyone, and respect the privacy rights of individual customers? Could the parties agree to give notice to subscribers that their information is being requested, so that the subscriber could fight the subpoena if they wished?

A4. The parties did come together after the Court's unanimous decision and worked out a mutually agreeable process whereby RIAA could serve Verizon with judicially reviewed subpoenas and RIAA would take that information and contact the users directly. RIAA uses the information to send "pre-litigation" settlement notices to users and concludes that "[W]hat we've found is that more students tend to settle in the prelitigation stage, saving them from increasing costs that would otherwise occur if the legal process dragged on." RIAA Sees a 99.6% Capitulation Rate from Students at UT, http://arstechnica.com/news.ars/post/20080129-less-than-1-of-u-of-tennessee-students-hold-out-against-riaa.html, January 29, 2008. Those who do not settle are sued. RIAA has stated that its enforcement program continues to be a success, noting that the large number of lawsuits filed has "arrested the growth of a runaway solution that would have grown worse and worse." *See* RIAA's next moves in Washington, ZD Net, May 26, 2006, http://news.zdnet.co.uk/itmanagement/0,1000000308,39271312,00.htm.